



February 22, 2009

To

Board Members of the Asian Development Bank

Re: Concerns with the SPS W-Paper

Dear Board Members, Alternates, and Advisors,

Enclosed please find the comments of the NGO Forum on the ADB on the SPS W-paper. The Forum is an Asia-led network, based in Manila, of 250 NGOs throughout the Asia-Pacific region and donor countries.

The Paris Declaration on aid effectiveness calls on signatories to commit to "*enhanced accountability and transparency*", to "*promote a harmonized approach*" to safeguards and consultation processes and to "strengthen the application of environmental impact assessments, including consultations with stakeholders." The W-paper fails to do this.

While the W-paper makes some improvements over the previous SPS consultation drafts, it still represents a significant dilution of existing policies (including operations manuals) and contains major shortcomings in terms of providing the policy foundation for effective and efficient safeguards.

Enclosed please find:

- 1) 1 -page summary of the views of the NGO Forum on the ADB
- 2) 2-page outline of main concerns
- 3) 1 -page conclusion
- 4) detailed appendices

We believe that the Board is faced with two viable choices:

- 1) continue to insist on no dilution of existing policy which will require significant changes throughout the text in order to meet this goal, as per previously submitted Forum comments; in addition, provide for public comment on the next draft text, the OM and glossary, or

- 2) revert to current policy and recommend full implementation and appropriate resourcing of existing environmental and social protections described in current policies, operations manuals and handbooks. (See enclosed document for details.)

The W-paper, with its existing core inadequacies, represents a direct threat to the lives and livelihoods of affected communities and the environment and deeply undermines the Bank's credibility. There are additional important concerns which will be submitted by CSOs in their individual submissions based on their areas of expertise. Together these submissions represent the changes necessary to ensure no policy dilution and robust and efficient safeguards that strengthen the Bank's comparative advantage and advance its overall development effectiveness.

With Best Regards,

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Concerns with the SPS W-Paper

A. Introduction

The Paris Declaration on aid effectiveness calls on signatories to commit to “enhanced accountability and transparency”, to “promote a harmonized approach” to safeguards and consultation processes and to “strengthen the application of environmental impact assessments, including consultations with stakeholders.” The February 2009 G7 Rome communiqué emphasizes the effective use of multilateral bank resources as well as “integrity and transparency” of international financial activity.

While the W-paper makes some improvements over the previous SPS consultation drafts, it still represents a significant dilution of existing policies (including operations manuals) and contains major shortcomings in terms of providing the policy foundation for effective and efficient safeguards. It fails to meet the goals of the Paris Declaration. After this summary page, enclosed is a 2 page outline of our main concerns, followed by a concluding paragraph and Appendices providing greater detail regarding concrete next steps.

Approval of the W Paper, as currently drafted, will:

- dramatically increase the complexity and expense of safeguard implementation while substantially decreasing efficiency and effectiveness;
- unacceptably weaken due diligence requirements for risky investments in the midst of the global financial crisis;
- result in the impoverishment of displaced people;
- fuel climate change and other forms of environmental damage;
- threaten the violation of international human rights law pertaining to the rights of Indigenous Peoples.

We believe that the Board is faced with two viable choices:

- 1) continue to insist on no dilution of existing policy which will require significant changes throughout the text in order to meet this goal, as per previously submitted Forum comments; in addition, provide for public comment on the next draft text, the OM and glossary, or
- 2) revert to current policy and recommend full implementation and appropriate resourcing of existing environmental and social protections described in current policies, operations manuals and handbooks. (See below for details.)

In terms of the process of the safeguard policy update; we appreciate the Bank’s response to CSO calls for a second consultation draft and the SPU consultation in November 2008. To ensure that the consultation process remains transparent, we call on the Board to ensure that the R-paper is made public together with the OM and glossary, with sufficient time for comment. This additional step is essential, as the quality of the W-paper cannot be accurately assessed without access to the OM and definitions provided in the glossary.

B. Concerns and Recommendations: W-Paper Represents Policy Dilution and Decreases Efficiency and Effectiveness

We share the interest of the Board in increasing safeguard efficiency and effectiveness and reducing overall costs. The W-paper does not do this. For instance, the elimination of categorization requirements for IP and IR and the insertion of vague language will lead to greater inefficiencies, recurrent disputes, conflicts, delays, slowdowns, cost increases and, potentially, project cancellation. Projects that proceed without proper consultation with affected communities - likely to occur as a result of weakened safeguards language in the W-paper – often generate significant unanticipated impacts. (Please refer to Appendix A, “Increased Efficiency” for more details.)

Additional concerns and recommendations, detailed in the enclosed Appendices, include:

1. Elimination of 120 Day Disclosure Requirement

It is of the utmost importance – especially from the viewpoint of ensuring efficiency of project implementation - that the minimum 120 day disclosure period be maintained for all ADB project and subproject activities requiring Category A or B assessments, in both public and private sectors. Disclosure should occur prior to project appraisal and a minimum of 120 days prior to Board vote. See Appendix B.

2. Material Weakening of Project Categorization Requirements

In addition to diluting current policy, the W-paper in no sense represents harmonization with World Bank categorization policy, which remains stronger than that of the ADB. It weakens the existing ADB definitions and requirements for project categories A and C. The abolition of categorization for Involuntary Resettlement and Indigenous Peoples not only removes the categories, but also eliminates the trigger for when a full resettlement plan is required. Recommendation: Upward harmonization with World Bank categorization policy or, at a minimum, adherence to existing ADB policy. See Appendix C.

3. Inaccurate and inappropriate definition of Free, Prior and Informed Consent

The ADB has used the term 'free, prior and informed consent', or FPIC, in its W-paper, a move that is to be congratulated and that brings the Bank into line with the only other multilateral finance institution to have reviewed its safeguard policies in light of the passage of the UN Declaration on the Rights of Indigenous Peoples, the EBRD. However, the ADB has defined the term FPIC inaccurately and inappropriately. It has conflated the term FPIC with a separate, vague and weaker term developed by the World Bank: 'Broad Community Support', which has been firmly rejected by indigenous peoples' representatives and raises implementation difficulties for the Bank. The primary recommendation of indigenous peoples has always been that FPIC should be applied in full for any activities impacting on indigenous peoples' lands, livelihoods and resources. Recommendations: 1) Update the definition of FPIC in line with the recommended text provided by indigenous peoples, namely: *For the purposes of policy application, consent refers to a collective agreement by the affected Indigenous Peoples' communities, through an independent and self-determined decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices.*

2) Expand the application of the principle of free, prior and informed consent to include *"(iv) all projects aimed at improving or altering the educational or health systems in indigenous peoples' lands, communities and areas"*. See Appendix D.

4. Reduction of the scope of IR policy

The W-paper excludes thousands of displaced people from coverage by reducing the scope of the IR policy to only those persons displaced by land acquisition and places undue reliance on cash compensation as a means to mitigate the adverse affects of displacement. Recommendations: Land acquisition must be eliminated as a policy trigger within the IR policy, and the W-paper should retain the same scope as is currently operational under the 2006 Operations Manual. Borrowers/clients must be prohibited from relying

upon cash compensation for lost assets unless exceptional circumstances are publicly demonstrated and documented to the satisfaction of the Bank and affected community. See Appendix E.

5. Substantial Weakening of Environmental Policy

The Safeguard Policy Statement W-paper represents an unacceptable weakening of existing environmental policy, the significant narrowing of the scope of existing safeguards and the removal of due diligence requirements in the midst of the global financial crisis. It eliminates current language requiring environmental assessment for *all* project components, whether financed by the ADB, cofinanciers or the borrower and removes language specifying a detailed chain of responsibility and authority for each step of the safeguard assessment process. It does not appear to require disclosure of the full *draft* environmental assessments. It fails to harmonize with MDB best practices, including those for hydropower and reservoir projects, and will exacerbate ADB's role in fuelling climate change and other forms of environmental damage. It not only fails to require compliance with ADB safeguards, but introduces language which prevents the immediate application of standard legal remedies in the event of non-compliance. It fails to require independent experts for due diligence, weakens consultation requirements, appears to dilute or repeal the requirements of the Bank's Forestry Policy and reduces (compared to the 2nd Draft SPS) the proposed application of a "prohibited investments list" to a small subset of projects. It introduces loopholes in the W-paper language pertaining to natural habitats, critical habitats, and protected areas. It fails to require, as principles, mitigation to the level of "no significant harm to third parties" and "polluter pays" and to require that these principles are made legally binding in contract language.

Recommendation: Correct each of the above dilutions and shortcomings. See Appendix F.

6. Selective Application of Safeguard Requirements, Due Diligence for Risky Investments, Gender Issues

The W-paper fails to apply the full suite of the proposed safeguard requirements, including the Prohibited Investment List to "all project components whether financed by ADB, cofinanciers, or the borrower" as per current policy. The definition of a project as "a borrower's planned undertaking" has been eliminated. There have been improvements in language related to gender but in general the W-paper still lack of protection to women in the whole project cycle; moreover, the overall weakening of safeguards threatens women. See Appendix H.

Different Finance Modalities: In addition, in the "different finance modalities" section, the current mandatory requirement for ADB screening and assessment of category A and B sub-projects has been eliminated, and the definition of a category C project has been weakened. The introductory paragraph introduces non-binding aspirational language which refers to the aim of different finance modalities meeting "ADB safeguard objectives, principles and requirements". The binding portion of the text, however, contains only a very narrow list of applicable safeguards, i.e. Appendices 1 – 3 or about half of SPS text, not including categorization requirements.

Prohibited Investment List: The W-paper drastically reduces the scope of the putative "prohibited investment list" found in the 2nd draft SPS, which applied to all ADB activities. The reduced PIL now applies only to a small subset of ADB operations within the "different finance modalities" section (financial intermediaries) and then only to those directly financed by the ADB. In addition, the PIL contains footnotes which reverse important prohibitions in the PIL and in existing ADB policy such as the ban on the finance of nuclear reactors.

Recommendations: Ensure no policy dilution. See Appendices G and H. Reinstate language requiring ADB clearance of EIA and IEE for Category A and B subprojects prior to subproject approval. Reinstate 120 day requirement for sensitive subprojects. Ensure protection of women's rights. Retain definition of project as

"borrower's planned undertaking." All requirements, including PIL, (not simply SR 1 -3) must apply to all ADB activities, including those undertaken by "different finance modalities", and including all components, subprojects (whether previously identified or not), of activities "whether financed by ADB, cofinanciers, or the borrower." Footnotes to the PIL should not be used to reverse prohibitions. Remove language, including the word "or" in footnote pertaining to nuclear reactors, which reverses a prohibition. Safeguard compliance must be mandatory; remove language hindering direct application of legal remedies; text requiring a "report" on non-compliance or an "action plan" must require immediate implementation of the action plan, designed and implemented in consultation with affected communities with compliance by a specified time. Require mitigation to level of "no significant harm to third parties," polluter pays as mandatory principles included in legally binding contract language; Require use of "independent" experts.

7. Unclear approach to Country Systems

The W-paper introduces a phased approach to country systems. However, the nature of this phased approach is not defined. Without the development of a clear pilot system with benchmarks, country systems may be prematurely applied and may result in weakening of safeguards as well as increased inefficiency. (Appendix I).

Recommendation: Develop a limited pilot system for specific projects (not entire countries or sectors) through a consultative process. The pilot system should test the application in a small number of countries, avoiding those with repressive governments and governance concerns; it should contain contingency plans for restoring livelihoods to affected people if the project fails to protect communities and the environment. During the pilot phase, the application of CSS for specific projects must go to the Board for approval for each individual project.

8. Derogation: The paragraph on derogation found in the 2nd Draft SPS has been removed in the W-paper; which is good. However, there is no language that states that derogation is not an option for the Safeguards policies.

Recommendation: Given the concerns about the ad hoc removal of safeguards, add provision prohibiting derogation of safeguard requirements.

9. Conclusion

The W-paper, with its existing core inadequacies, represents a direct threat to the lives and livelihoods of affected communities and the environment and deeply undermines the Bank's credibility. We have presented a general outline of important concerns above. More detail is provided in the appendices. There are additional important concerns which will be submitted by CSOs in their individual submissions based on their areas of expertise. Together these submissions represent the changes necessary to ensure no policy dilution and robust and efficient safeguards that strengthen the Bank's comparative advantage and advance its overall development effectiveness.

We urge the Board to ensure, at a minimum, full implementation of the key changes outlined above. The other alternative is to revert to existing environmental and social policies, operational manuals and handbooks (including safeguard policies, Gender and Development Policy, Forestry Policy, consent requirements for indigenous peoples, etc.) and ensure their full implementation, including the provision of necessary resources.

If this is the case we urge the Board to also:

1. ensure that language pertaining to GHG accounting mechanisms by which the carbon footprint of ADB-funded projects can be tracked and reduced is transferred into the draft Energy Policy ;
2. approve a corrected Prohibited Investment List (i.e. where footnotes are not used to negate investment prohibitions) to be applied to all project and subproject components;

It would likewise be important that any halt to the SPS not be viewed as a temporary device, to remove pressure for reform related to the General Capital Increase, only to be re-instated after the GCI vote.

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Appendix A: Decreased Efficiency and Effectiveness

We share the interest of the Board in increasing efficiency in terms of project sustainability and the provision of clear guidelines for processing of safeguard requirements during project preparation, approval and implementation. We support the call for full resourcing of safeguard specialists to ensure thorough and proper safeguard implementation and monitoring. We find that there are many aspects of the current W-paper which will lead to greater inefficiencies, conflicts, slowdowns and increased costs. This is because the W-paper still contains vague language and unclear requirements that are open to interpretation and are likely to be the subject of recurrent disputes and time delays in project processing and implementation.

Insufficient consultations with affected communities during project preparation and implementation can generate significant unanticipated resistance to or backlash against a project. These could lead to significant cost increases, inefficiency, delays, shutdowns and potentially, project cancellation or funding withdrawal. Such a situation can be avoided if affected communities are provided thorough information on likely project impacts and given sufficient time to understand, discuss and reflect on the impacts. Moreover, a clear methodology for gaining consent and utilizing input from affected communities to shape project design should be put in place for the maximum benefit of all stakeholders.

Civil society groups have, from the beginning of the SPS process, emphasized the fact that clear, explicit safeguard policies are crucial for efficiency in implementation. Safeguard specialists at the ADB and several of ADB's peer institutions have underscored the following principle: When a policy is vague, this vagueness means that every point in the process requires deliberation, debate and could potentially cause conflict. Numerous reports, including those by the OED and the December 2008 Mercer report have highlighted the fact that, as the ADB proposes a massive increase in private sector and infrastructure lending, safeguard specialists are overworked and under-resourced to the point where they cannot properly implement existing safeguards.

If the relatively clear language of existing safeguards is to be replaced with vague/loose terminology proposed in the W-paper, which introduces new ambiguity and opens up for interpretation many previously clear requirements, the ensuing confusion and conflict is likely to create significant inefficiencies, expenses and time loss in terms of project evaluation, processing and implementation. Indeed the W-paper calls into question the possibility of sustainable project outcomes.

Increased costs, inefficiencies and risks

Examples of increased costs, inefficiencies and risks arising from the failure to require and implement clearly worded social and environmental safeguard requirements are widespread. Heightened financial risk, construction risk, operational risk, reputational risk, and credit risk are often linked to a substantial increase in conflicts, project delays, cost increases and failure. There are many examples of substantial problems associated with the de facto safeguards dilution which has occurred through lack of implementation of existing safeguard policies. For example, as a result of poor consultation practices and safeguards violations in the Southern Transport Development Project, the ADB was required to provide substantial additional financing for compensation and resettlement beyond the committed project cost. . The same is true of the Chashma Right Bank Irrigation Project (Stage III) where the ADB had to undertake remedial measures to bring the project into compliance after its Inspection Panel found non-compliance with ADB policies. To remedy the situation, a post-project TA #4718 was approved to "independently monitor" the situation on ground so to ensure the Board approved changes were actually being implemented¹. All of these actions required time and money being spent on a situation which could have been avoidable if it had been done right in the first instance.

The case of the Lafarge PT Semen Andalas Indonesia cement factory in Aceh, Indonesia provides another example of inefficiency avoidable through proper safeguards implementation. In April 2007, the Board approved a \$45 million private sector loan for the Lafarge factory. The Board had not been informed by staff that the Bank's safeguards had not been properly implemented, that the environmental assessment was inadequate and there were multiple violations of existing ADB safeguards including those pertaining to

¹Independent Monitoring of Remedial Actions for Chashma Right Bank Irrigation Project (Stage III), <http://www.adb.org/Projects/project.asp?id=39589>

information disclosure and consultation. Because of the lack of proper consultation with local communities, after the funds were approved by the Board, the project was beset with demonstrations, including a blockade of the factory which resulted in a shutdown and a substantial paramilitary occupation of the site. A little over a year later, the ADB loan was cancelled without ever having been disbursed – a truly inefficient use of Bank resources.

There are many other examples, and these cases occurred as a result of the de facto dilution of existing safeguard policies arising from the lack of proper safeguard implementation, including safeguard staffing. The ADB must ensure that provisions are in place to avoid similar risks, to provide appropriate safeguard resources and to ensure clear monitoring of the safeguards requirements during implementation. Doing so will allow for a long-term sustainability of operations which is, indeed, the ultimate measurement for efficiency. The Forum has provided detailed edits, including in December 2008, to the SPS which would ensure no policy dilution and clear wording for the SPS. Most of these edits still apply to the text in the W-paper. If the W-paper is to be re-written, we urge us of the previously submitted comments.

Appendix B: Debunking the myths about the 120 day public comment requirement for private sector projects

Below are some responses to arguments put forth by ADB Management for the elimination of the 120 day rule:

- 1) The 120 day rule presents an unacceptable and costly inefficiency for project implementation. The 120 day rule would only be triggered for projects likely to have significant environmental impacts. Category C projects – without significant negative impacts – would not be subject to this requirement. As noted above, dramatic cost increases and inefficiencies are associated with the failure to carry out appropriate consultation processes for projects with significant impacts.² Complex and controversial projects are often repeatedly postponed or cancelled - with financial consequences for project proponents, investors and ADB shareholders - as a result of improper consultation and information provision practices. Shortening the consultation time for complex and potentially environmentally and socially sensitive private sector projects will only serve to increase costs and inefficiencies.
- 2) The 120 day rule stems from an era before email. In this day and age, this length of time is no longer necessary to ensure public consultation with affected people. Many examples can be used to illustrate the inaccuracy of this perception. For example, communities likely to be severely impacted by the planned West Seti Hydropower Project, for the most part, do not have electricity, let alone internet or computers. Despite over a decade of written requests, they have still not received a copy of the proposed project's massive Environmental Impact Assessment in Nepali language. Villagers affected by the Lafarge cement plant in Aceh, Indonesia did not have computers or email and had not been presented with the full EIA in Indonesian language by the ADB or the company. Many of the communities likely to be further impoverished by infrastructure and other projects do not have access to email, electricity or computers. EIA documentation can often reach well over 1,000 pages. It is important not only to commit to 120 day comment prior prior to project appraisal but to insist on full implementation of this requirement.

² See also WRI, Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects, February 2009, <http://www.wri.org/publication/breaking-ground-engaging-communities>. Also, Development without Conflict, the Business Case for Community Consent, WRI 2007.

- 3) The reduction of public comment requirements is a result of harmonization with World Bank standards. There are several problems with this statement. The World Bank Group has vastly more safeguard specialists and resources for safeguard specialists than the ADB. The ADB has proven so significantly under-resourced that it is, according to the OED and other reports, unable to implement even the existing clearly worded safeguards. Further shortening the consultation period for private sector operations would represent a material dilution of safeguard policy, leading to greater time and cost inefficiencies and an increased likelihood of project failure.

ADB Staff comments re ADB's proposed elimination of 120 day public comment requirement for private sector projects

From ADB SPS Staff Comments Matrix, October 2008. We note that these comments come from Division/Department involved in large hydropower development and coal projects.

South Asia Department, South Asia Energy Division

The same timeframe for the disclosure of environment safeguard documents for category A projects shall be applied for both public and private sector loans. If the 120 day rule is effective for public sector loans, the compliance with this rule should be consistent across the Bank regardless of the lending modality

The reasons for keeping a unified 120 day rule are as follows:

1. the ADB Environment. Policy shall not make special concessions to the private sector when it comes to observing the safeguard policy requirements -- compromising on environment information disclosure, safety, and/or impact mitigation shall not be the way to attract/stimulate private investments. On the contrary, ADB should demonstrate leadership when it comes to compliance with information disclosure and environmental mitigation (according to the principles of the Aarhus Convention);
2. the private sector has sufficient financial resources to access qualified environment expertise and engage/hire specialists to prepare environmental compliance documentation, as required by ADB, within a given timeframe. The argument presented in the Change Matrix (Key Differences and Rational) has the exact opposite implications -- yes, "public and private sector clients have different abilities and constraints", but the private sector has more resources to i) enhance its abilities; and ii) overcome the existing constraints. Public sector clients are often more disadvantaged due to lack of institutional capacity and knowledge base;
3. differentiated disclosure procedures applied to public and private sector projects create a real problem when lending is provided on a mixed basis (public-private). We have already experienced such difficulties when one loan has both public and private sector funding components. If the modified 120 day rule differentiating the public and private sector disclosure requirement is enacted, the clients will obviously question the rational for executing stricter environment compliance requirements for a public portion of the loan vs. a private sector one. Moreover, a public sector portion of the loan can be much smaller than the private sector one -- but a smaller sovereign portion of the entire loan will be subject to the 120 day rule, and a bigger, non-sovereign part of the loan will be subject to the 60 day rule? The general public and especially local people have the right to access to and comment on environment compliance documents for the entire project at the same time -- wouldn't this constitute fair play?

South Asia Department

SARD finds that the request from external stakeholders to have different disclosure rules for public and private sector projects is not a sufficient reason to have differential disclosure policies for private and public sector projects. If the 120-day disclosure rule is reinstated, it should be applicable to all projects that are financed by ADB.

Appendix C: Material Weakening of Project Categorization Requirements

The language of the W-paper materially weakens project categorization requirements relative to existing ADB policy as well as World Bank policy. It weakens the existing ADB definitions and requirements for project categories A and C and fails to require use of independent experts not affiliated with the project for Category A projects, as per World Bank requirements.

The abolition of categories for Involuntary Resettlement and Indigenous Peoples presents an additional dilution by eliminating the policy trigger for when a full resettlement plan is required.³ The W-paper disingenuously points to other MFIs to explain the proposed changes to its existing categorization system. It states that such other institutions do not employ a categorization system specifically for IR and IP categories. This is not factually correct because the World Bank identifies as a Category A project, any project which triggers policies pertaining to IR, IP, natural habitats, or management of cultural property.

Because the W-paper eliminates categories and the policy triggers, all resettlement plans are *procedurally* equal under the W-paper. But, not all resettlement plans will be *substantively* equal because the W-paper fails to provide a list of minimum items that must be included in any resettlement plan. Instead it offers a non-binding outline, and a vague set of objectives to be realized and specific components spread across 11 paragraphs.⁴ The introduction of such vague language is likely to lead to significant conflicts, delays and inefficiency as a result of decreased clarity of requirements.

Both the World Bank and current ADB policy, however, extensively list the elements that must be in both the full (category A) and the abbreviated (category B) resettlement plans.⁵ Any failure to include a list equal to the one currently employed by the ADB, or to weaken existing definitions of project categories must be considered a dilution of the current policy as should the elimination of the policy trigger for full resettlement plans. The new language in no sense represents harmonization with World Bank categorization policy, which remains stronger than that of the ADB.

Recommendations:

³ See International Accountability Project submission for more detail. Asian Development Bank, Safeguard Policy Statement: Working Paper, January 29, 2009, ¶ 32 (“ADB is the only MFI that uses a classification system for involuntary resettlement and Indigenous Peoples and that subdivides environmental category B. ... It is therefore proposed that environmental category B-sensitive be eliminated and that project classifications for involuntary resettlement and Indigenous Peoples be eliminated in line with other MFIs’ practices.”).

⁴ Asian Development Bank, Safeguard Policy Statement: Working Paper, January 29, 2009, ¶¶ 13-24 & Annex to Appendix 2.

⁵ ADB, Operations Manual, OM Section F2/OP, 25 September 2005, ¶¶ 26 & 27; World Bank, Operational Manual, OP 4.12, December 2001, Annex A available at <http://bit.ly/cPOjs>.

Make categorization language fully consistent and upwardly harmonized with World Bank categorization language (definitions of categories, use of independent experts for category A projects, application of category A to projects involving IR, IP, natural habitats, cultural property).

Appendix D: Inaccurate and inappropriate definition of Free, Prior and Informed Consent

The ADB has used the term 'free, prior and informed consent', or FPIC, in its W-paper, a move that is to be congratulated and that brings the Bank into line with the only other multilateral finance institution to have reviewed its safeguard policies in light of the passage of the UN Declaration on the Rights of Indigenous Peoples, the EBRD.⁶ However the ADB has defined the term FPIC inaccurately and inappropriately. It has conflated the term FPIC with a separate, vague and weaker term developed by the World Bank in their own safeguard policies, the term 'Broad Community Support (BCS)'. This conflation has been firmly rejected by indigenous peoples' representatives and raises implementation difficulties for the Bank. Indigenous peoples have repeatedly offered to work with the ADB to determine operational guidelines for the implementation of FPIC, however the attempted implementation of BCS by the World Bank over the past 2 years has seen numerous difficulties and vagaries emerge from the lack of content and meaning in the term and the lack of understanding of the requirements of BCS by Bank staff.⁷

Free, prior and informed consent is also limited in application in the W-Paper to three instances, namely; (i) commercial development of cultural resources; (ii) physical relocation; and (iii) commercial development of natural resources. The primary Recommendation: of indigenous peoples has always been that FPIC should be applied in full for any activities impacting on indigenous peoples' lands, livelihoods and resources. In the November consultation held by the ADB, indigenous peoples' representatives also provided a compromise position that the policy would be acceptable if the list of instances requiring FPIC was lengthened to include (iv) all projects aimed at improving or altering the educational or health systems in indigenous peoples' lands, communities and areas.

Recommendations:

- 1) Update the definition of FPIC in line with the recommended text provided by indigenous peoples, namely:
For the purposes of policy application, consent refers to a collective agreement by the affected Indigenous Peoples' communities, through an independent and self-determined decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices.
- 2) Expand the application of the principle of free, prior and informed consent to include "*(iv) all projects aimed at improving or altering the educational or health systems in indigenous peoples' lands, communities and areas*".

⁶ For the EBRD policy, which cites the UN Declaration on the Rights of Indigenous Peoples as relevant international law and which requires adherence to the principle of FPIC, please see: <http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf>

⁷ The review of the International Finance Corporation's Performance Standards, including Performance Standard 7 which requires Broad Community Support from indigenous peoples' communities, is on-going currently. Preliminary findings are available from non-governmental sources, (see http://www.forestpeoples.org/documents/ifi_igo/ifc_india_lanco_report_sept08_eng.pdf) and formal results are expected to be available from the IFC in late 2009.

Appendix E: Reduction of the scope IR policy

The W-paper reduces the scope of the IR policy by reducing the current policy's scope to only those persons displaced by land acquisition. The W-paper first lists a set of disruptions that amount to economic displacement: loss of land, assets, access to assets, income sources, or means of livelihoods.⁸ The W-paper then exclusively recognizes two causes of the aforementioned disruptions as legitimate, the most important being land acquisition.⁹ All other causes of economic displacement are not covered by the IR components of the W-paper, but rather delegated to the Environmental components.¹⁰ This is affirmed in the W-paper's definition of involuntary resettlement.¹¹ This means that the W-paper takes a bifurcated approach towards managing economic resettlement whereby those persons economically displaced by land acquisition are covered by the IR policy and everyone else receives the minimal protections in the Environmental Policy.

Additionally, the reliance on cash-compensation as the primary means for compensating losses must be revised to bring the W-paper in line with the past decade of scientific research. Specifically, empirical research has repeatedly affirmed that relying upon cash compensation for lost assets *creates new poverty*.¹² Similarly, it has confirmed that projects that invest in the community through benefit-sharing models best *avoid impoverishment*.¹³ Thus, the W-paper need to place strict limits on when cash compensation may be the primary means of mitigating the adverse affects of displacement instead of the weak and non-binding "preference" it currently states.¹⁴

Recommendations:

- 1) Land acquisition must be eliminated as a policy trigger within the IR policy, and the W-paper should retain the same scope as is currently operational under the 2006 Operations Manual.
- 2) Borrowers/clients must be prohibited from relying upon cash compensation for lost assets unless exceptional circumstances are publicly demonstrated and documented to the satisfaction of the Bank and affected community.

⁸ Asian Development Bank, Safeguard Policy Statement: Working Paper, January 29, 2009, Appendix 2 ¶ 4.

⁹ *Id.* ("(i) involuntary acquisition of land, or (ii) involuntary restrictions on land use or on access to legally designated parks and protected areas.").

¹⁰ *Id.* at Appendix 2 ¶ 10 & Appendix 1 ¶ 4.

¹¹ *Id.* at Appendix 2 ¶ 4 ("Resettlement is considered involuntary when affected individuals or communities do not have the right to refuse land acquisition that results in displacement. This occurs in cases of (i) lawful expropriation or restrictions on land use based on eminent domain, and (ii) negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.") (emphasis added).

¹² Michael M. Cernea & Hari Mohan Mathur (eds.), *CAN COMPENSATION PREVENT IMPOVERISHMENT?: REFORMING RESETTLEMENT THROUGH INVESTMENTS AND BENEFIT SHARING*, Oxford 2008.

¹³ *Id.*

¹⁴ Asian Development Bank, Safeguard Policy Statement: Working Paper, January 29, 2009, at Appendix 2 ¶ 6.

Appendix F: Substantial Weakening of Environmental Policy

The Safeguard Policy Statement W-paper represents an unacceptable weakening of existing policy¹⁵, the significant narrowing of the scope of existing environmental safeguards and the removal of due diligence requirements in the midst of the global financial crisis. The Paris Declaration on aid effectiveness calls on signatories to “strengthen the application of EIAs and deepen common procedures for projects, including consultations with stakeholders,” to “promote a harmonised approach to environmental assessments” and to commit to “enhanced accountability and transparency.”

The policy proposed in the SPS W-Paper, however, represents a failure to harmonize with best practices of multilateral and bilateral financial institutions, fails to harmonize with best practices for hydropower and reservoir projects, and will exacerbate ADB’s role in fueling climate change and other forms of environmental damage. It not only fails to require compliance with ADB safeguards, but introduces language which prevents the immediate application of standard legal remedies in the event of non-compliance. It eliminates the requirement for a robust 120 day consultation period for all projects, fails to require independent experts for due diligence, weakens consultation requirements, project categorization requirements, fails to meet the requirements of the Bank’s Forestry Policy and reduces the proposed application of a “prohibited investments list” to a small subset of projects. It eliminates current language requiring environmental assessment for *all* project components, whether financed by the ADB, cofinanciers or the borrower and removes language specifying a detailed chain of responsibility and authority for each step of the safeguard assessment process. In addition, the unacceptable lack of an updated draft Operations Manual and a Glossary of important definitions makes it impossible to assess the full extent of the material weakening of safeguards proposed in the W-paper

All ADB safeguard requirements must apply to all components of all projects and subprojects.

The W-paper:

1. Eliminates the **120 day requirement** for public comment; applies a “prior to appraisal” standard for IR, IP and category B projects; and a 60 – 120 day “prior to Board approval” standard for Category A projects. Environmental assessments for all sensitive projects must be made public for comment prior to appraisal and a minimum of 120 days prior to Board vote..
2. Weakens current **consultation requirements** and introduces consultation practices which are inconsistent amongst the three policies. Consultation requirements should be, at a minimum, as strong as existing policy and consistent – with the strongest language prevailing - amongst IR, IP and environment.

¹⁵ Existing policy includes policy documents, operations manuals and handbooks.

3. Eliminates the requirement to assess “**all project components whether financed by ADB, cofinanciers, or the borrower**” as per current policy; fails to require “**independent experts**” throughout the W-paper.
4. Eliminates clear and specific language describing the internal **chain of command and responsibility** for safeguard assessment.
5. Materially weakens **project categorization requirements** relative to existing ADB policy as well as World Bank policy; weakens the existing ADB definitions and requirements for project categories A and C; falsely harmonizes with the World Bank by failing to require use of independent experts not affiliated with the project for Category A projects, as per World Bank requirements; eliminating the requirement for categorization of Involuntary Resettlement (IR) and Indigenous Peoples (IP) impacts without having IR / IP impacts trigger a Category A status under the Environment Policy (as per World Bank). This removes an important flagging mechanism to alert staff, management, Board, public, project affected peoples to projects which have significant IR and IP impacts.
6. **Dilutes / Repeals ADB Forestry Policy prohibitions.** ADB Forestry Policy recognizes the “irreplaceable” “intrinsic value” of old growth forests and prohibits ADB finance of **any rural infrastructure or other public investment project that contributes significantly, directly or indirectly, to deforestation or to the degradation and depletion of forests.** Current policy states unambiguously that “**The Bank will not support construction of roads in old-growth forests.**” The W-Paper introduces vague language which allows the significant conversion or degradation of natural habitats, which appear to include forests, as long as certain conditions are met. Non-conservation projects would be allowed in legally protected areas. **There are also substantial loopholes in the W-paper language pertaining to natural habitats, critical habitats, legally protected areas, etc (pg 36 – 37, Appendix 1, SR1).** (Please see comments made by NGO Forum on ADB in December 2008 for recommended language changes.)
7. **Fails to require application of all safeguard requirements to all projects, project components, and subprojects whether financed by the ADB, cofinanciers or the borrower.**
8. Is substantially weaker than both World Bank policy and World Commission on Dam requirements for **hydropower and reservoir projects.** . The World Bank requires special measures for dam and reservoir projects, including the use of **independent**, recognized experts and consideration of an independent advisory panel. WB has a separate section focused entirely on dams and reservoirs: WB BP 4.01, Annex B – Application of EA to Dam and Reservoir Projects. The World Commission on Dams makes specific recommendations regarding hydropower projects. The W-paper makes no such requirements
9. Fails to require mitigation to the level of “**no significant harm to third parties**” and “**polluter pays**” to be considered **core principles and to require that they are legally binding contract language;**
10. While some improvements have been made to language found in the October 2008 draft SPS, the W-paper also represents a substantial weakening of the 2nd Draft SPS in that it eliminates the

proposed application of a "**Prohibited Investments List**" for all ADB projects and, instead, only applies prohibitions to a small sub-category of ADB finance, a significant step backwards from the October 2008 draft.

General Concerns

- 11. Fails to require compliance, hinders direct application of legal remedies.** States that "if a borrower/client fails to comply with legal agreements on safeguard requirements... ADB will ..work with the borrower/client.. . Before resorting to such [legal remedies, including suspension, cancellation, acceleration of maturity], ADB uses other available means to rectify the situation satisfactory to all parties to the legal agreements..." pg 27, Para 76 States that "ADB will not finance projects that do not comply with its safeguard requirements **or** with host country's social and environmental laws and regulations." (pg 22, para 60). This means that ADB safeguards are not mandatory and that it is only necessary to satisfy "parties to the legal agreements" which does not include project-affected communities impacted by violations of safeguards.

- 12. Derogation:** The disturbing paragraph on derogation (i.e. suggesting that Board members could vote to allow the violation of safeguard requirements) found in the 2nd Draft SPS has been removed and is not found in the W-paper; which is good. However, there is no language that explicitly states that derogation is NOT an option for the Safeguards policies. There is a general concern that the Board should not be able, on an adhoc basis, to decide to allow the violation of safeguard policies. Recommendation: Add provision stating that there cannot be derogation of safeguard requirements.¹⁶

- 13.** In addition, the unacceptable lack of an updated draft Operations **Manual and a Glossary of important definitions** makes it impossible to competently assess the impact of the requirements proposed in the W-paper. The draft O.M. presented in November 2008 was so deficient and weak that it revealed a new significant level of dilution of existing safeguards, in addition to the dilutions proposed in the draft SPS text. The last version of the draft Glossary, likewise, introduced significant additional dilutions. The only way it will be possible to meaningfully analyze the full extent of policy dilution is to examine the OM and the glossary together the W-paper.

For more detailed comparisons of language in existing ADB policy, World Bank policy and the W-Paper, as well as recommendations, please see "Dilutions of ADB Policy in the draft Safeguards Policy W-Paper With a focus on Environment and "Different Finance Modalities" by Stephanie Fried.

Appendix G: Selective Application of Safeguard Requirements, "Different Finance Modalities"¹⁷

In the context of the international focus on the "re-regulation" of financial architecture and an increase in transparency measures, the W-paper language pertaining to "Different Finance Modalities" represents an unacceptable weakening of existing policy, including the removal of due diligence requirements. This draft introduces non-binding aspirational language in the introductory paragraph which refers to the aim that "different finance modalities" meet "ADB safeguard objectives,

¹⁶ As suggested by Jessica Rosien, Oxfam Australia.

¹⁷ For more details contact Stephanie Fried, Environmental Defense Fund, sfried@edf.org

principles and requirements". The binding portion of the text, however, contains only an extremely narrowed list of applicable safeguards and, among other things, applies a putative "prohibited investment list" only to financial intermediaries and to no other finance modality. A reversal of the Bank's prohibition on investments in nuclear reactors has been made by way of a footnote to the Prohibited Investments List.

The new language pertaining to Program Loans, Sector Finance, Multitranches Finance Facilities, Emergency Assistance Loans, Existing Facilities, General Corporate Finance and Financial Intermediaries fails to apply the full suite of the proposed safeguard requirements to these "different finance modalities." Instead, the W-paper requires the application of less than half of the text of the SPS (SR1 – SR3) to "different finance modalities" and eliminates the requirement that the ADB must approve category A subprojects, which are currently subject to a 120 day public comment period. The W-paper has eliminated assessment of "all project components whether financed by ADB, cofinanciers, or the borrower" as per current policy. For program loans, the reduced portion of the SPS (SR 1 – SR 3) appears to apply only where subprojects have been identified. The W-paper does not require compliance with SPS requirements. Instead, in the case of non-compliance (demonstrated after the submission of annual reports – which appears to mean at least two years after initiation), the offending company must simply submit a compliance plan. The requirements are further weakened by vague language, i.e. "appropriate mitigation measures", "reasonable time frame" and the failure to require the use of independent experts with no connection to the project.

Recommendations:

1. There should be **no dilution of existing ADB safeguard requirements**, including the **120 day** public comment requirement for "different finance modalities";
2. **All safeguard requirements, including the Prohibited Investment List, must apply to all ADB activities, including all components of projects and subprojects "whether financed by ADB, cofinanciers, or the borrower";**
3. **Compliance** with ADB safeguards must be **mandatory and with no barrier to enforcement using legal remedies.**
4. Mitigation to level of **"no significant harm to third parties," polluter pays** principles must be mandatory principles included in legally binding contract language;
5. **Footnotes** to the Prohibited Investment List, including footnote 11 pertaining to **nuclear reactors, must not be used to reverse ADB prohibitions.** (Eliminate the word "or" in footnote 11.)
6. **Independent experts**, not linked to the project should be used for environmental, social and financial due diligence purposes.

Details:

The **non-binding aspirational introductory language** of SR 4 states that the "aim" is to "ensure that ADB safeguard objectives, principles and requirements are met in the context of various finance modalities." Pg 66 Appendix 4, para 1. Yet, the only actual requirements specified in paragraphs 4,5,9,11,13, 14, 17 and in footnote 1 on pg 69 of SR 4 are "the requirements specified in Safeguard Requirements 1 – 3" which make up approximately half of the Safeguard Policy Statement. These paragraphs, which stipulate that only the requirements in SR 1 – 3 apply, pertain to Program Loans, Sector Finance, Multitranches Finance Facilities, Emergency Assistance Loans, Existing Facilities, General Corporate Finance and Financial Intermediaries.

Interestingly, the section on General Corporate Finance discusses “compliance with the **objectives, principles, and requirements of ADB’s safeguard policy statement.**” This is a stronger formulation than found elsewhere.

Safeguard objectives, principles, classification requirements and other requirements are elaborated elsewhere – from pages 15 – 27 in the main body of the report, and not in SR 1 – 3. Their implementation is thus not required. **The Prohibited Investment List** has been eliminated from the General Requirements section (where it was in the 2nd Draft SPS) as well as in the Appendices. It is now solely placed in Appendix 5, which lies outside of SR 1 – 3 and is thus not mandatory.

In the W-paper, only Financial Intermediaries are specifically required to follow the Prohibited Investment List and only for subprojects “using ADB funds”. This appears to **eliminate the current requirement that all components of a project must be assessed, whether financed by the ADB, co-financers, or the borrower.**

FIs are required to ensure that their subprojects meet “**screening, classification and disclosure requirements**”, but only as specified in SRs 1 – 3. Classification screening requirements are only described in detail in the Policy Delivery Process (pg 20, para 54) which is not part of SRs 1 – 3 and are, therefore, not required for the borrower to implement.

The **mandatory requirement for ADB screening and assessment of category A projects** and “environmentally sensitive” B projects has been eliminated.

As is true elsewhere in the SPS, the definition of a category C project has been weakened so by removing the requirement that “their environmental implications will nevertheless need to be reviewed.” “

Identified Subprojects: Program Loans: Safeguard requirements (in the W-paper, only SR 1-3) are only required for investment components where “specific projects are identified.” This appears to provide a perverse incentive to ensure that projects are not identified. Language should be simplified to state that “all safeguard principles, objectives and requirements shall apply to all projects and subprojects.”

External Experts: The use of *independent* experts with no connection to the project should be required instead of “external experts”. (See Environment comments.)

No requirement to comply with safeguards – if no compliance “submit a plan”, only annual reports

W-paper: SR 14, para 18. Except for FIs whose subprojects have minimal or no adverse environmental and social impacts or risks, the FI will prepare and submit periodic reports at least annually on the implementation status of its ESMS. If the reports suggest that the ESMS is not functioning, the FI will prepare and submit a corrective action plan agreed to with ADB.”

Lack of requirement for “corrective action” to ensure compliance in existing facilities to be taken prior to ADB finance. Corrective action plans only have to be agreed upon with the ADB and not with affected communities. (para 18, pg 68)

Vague language in stead of legally binding terms: “reasonable”, “appropriate”

There is no requirement in SR4 for mitigation measures to ensure “no significant harm to third parties” or to operate under the polluter pays principle or to ensure that these requirements are made part of legally

binding contract language. Instead for example under Program Loans, paragraph 3, pg 66) the requirement is to "identify *appropriate* mitigation measures, and incorporate them into the program's *design*."

"A corrective action plan will... achieve and maintain compliance with the objectives, principles, and requirements of ADB's safeguard policy statement within a reasonable time frame" para 21, pg 69

Elimination of ADB oversight requirement for Category A / B subprojects.

Existing Policy: For category-A and environmentally sensitive category-B subprojects above the "free limit", the EIA or IEE must be cleared by ADB before subproject approval. The SEIA or SIEE must be disclosed to the public at least 120 days before the subproject is approved (para. 10). For these subprojects, ADB reviews compliance with its environmental assessment. OM Section F1/OP, 25 September 2006, Page 7 of 12

W-Paper: 17. Where the FI's subprojects to be funded by ADB have potential for significant environmental or social impacts, the FI will be required to ensure that such subprojects meet ADB's requirements specified in Safeguard Requirements 1–3, including screening, classification and disclosure. ADB may also set additional requirements for the FI's activities more generally depending on the FI's portfolio and the host country's safeguard systems. In such cases, the FI will refer these subprojects to ADB early in its due diligence process. ADB will assist the FI with the appraisal of these subprojects. ADB will review the due diligence information collected by the FI, determine any additional information needed, assist with determining appropriate mitigation measures, and specify conditions under which the subprojects may proceed. ADB will monitor the FI's performance on the basis of its environment and social management system.

Definition of project: "In the context of describing the environmental assessment of projects, the term **"project" is defined here as a borrower's planned undertaking.**" Environmental assessment "covers all project components whether financed by ADB, cofinanciers, or the borrower." OM/OP 9/25/06 pg 2. This definition does not appear in the W-paper.

Recommended language changes for SR 4: Different Finance Modalities: Ensure no Dilution

- 1) replace "requirements specified in SR 1 – 3" with "all ADB Safeguard Requirements in the Safeguard Policy Statement, including SR 1 – 4 and the Prohibited Investments List apply to all project components, subprojects, and projects whether financed by the ADB, co-financiers, or the borrower
- 2) Maintain mandatory ADB screening, assessment and approval of all category A / B subprojects
- 3) Require use of *independent* experts
- 4) Make safeguard compliance mandatory, with corrective action plans agreed upon with affected communities; mandatory compliance for existing operations prior to Board approval
- 5) Maintain definition of "project" as "borrower's planned undertaking"
- 6) Ensure mitigation to level of "no significant harm to third parties", polluter pays are mandatory principles included in legally binding contract language;
- 7) Eliminate vague terms "reasonable" , "appropriate"

Appendix H: Gender Issues

Women are influenced by their society and living environment. Therefore, it is also important to see not only language that addresses women, but also terms that not only specifically address gender considerations but also facilitate conditions that affect women. Since the W-paper, overall, represents a material weakening of environmental and social protections, this will also markedly affect women. In this context, the increased use of the word “gender” in the text will not be sufficient to protect women.

- There is no requirement for borrower/clients to respect human and women’s rights, women’s safety and reproductive rights.
- The W-paper doesn’t consistently differentiate “women” from “people”, gender impacts and risks from social impacts and risks, female headed households from other households;
- Though the W-paper accommodates the gender language particularly in the project preparation stage (environmental impacts assessment), there are still concerns regarding the lack of protection to women from project impacts and risks at the implementation stage.
- Borrowers/clients are not required to have capacity on gender issues.
- The safeguard due diligence to assess potential environmental and social impacts doesn’t include gender impacts.
- Availability of gender specialists is not required in ADB resource provisions for safeguard implementation.

Recommendation

The language of W-paper illustrating the lack of gender considerations and protections must to be improved by adding language that protect women from project impacts and risks throughout the whole project cycle with respect to human and women’s rights as basic principles.

There should be no dilution of safeguard requirements. The dilution of safeguard requirements pertaining to environment, resettlement, consultation, participation, indigenous peoples, the 120 day requirement all have a negative impact on women.

Appendix I: Country Safeguard System

In theory, use of country systems can be beneficial, if it: (1) prioritizes the environmental and social well-being of communities affected by ADB-financed projects; (2) strengthens countries’ environmental and social safeguards and capacities to implement those safeguards over the long term; and (3) harmonizes strong environmental and social safeguard policies across the development banks. In practice, however, the ADB’s approach to country systems not only fails to incorporate measures that will secure these changes, but will also result in weaker environmental and social protections for affected persons. In particular, ADB’s approach will reduce opportunities for affected communities to participate in project design and resolve grievances. Although the ADB references the goals of the Paris Declaration and Accra Agenda in its pursuit of the country systems approach, the current ADB approach will not achieve these goals; it does not ensure effective and efficient use of country systems.

Upon careful examination of the changes that ADB has proposed, we believe that the W-Paper continues to attempt to commit ADB to a full-fledged country safeguards system approach without first demonstrating a track record of effective system assessment and implementation. The ultimate measure of success of a CSS process should be improvement for, rather than greater harm to, the communities affected by ADB-financed projects.

We continue to believe that a pragmatic approach to adopting a CSS policy is necessary. As the W-paper itself proclaims: "ADB needs to develop rigorous and transparent methodologies for assessing CSS and to adopt a strategic approach for strengthening and using CSS more systematically." Page 77, Para. 8. Without such methodologies and approaches in place, it seems premature to commit at this time to a policy that will fundamentally alter the ADB's safeguard system.

Rather, than commit to this approach now, we recommend the following process:

- Test the application of CSS in a discrete number of ADB pilot projects (e.g. three specific projects in three different countries) during the first three years. These projects should not take place in countries with military governments, human rights violations, or corruption.
- Develop a contingency plan for restoring the livelihoods of communities affected by the pilot projects, in the event that CSS fails to protect their environmental and social well-being.
- Require an independent review, subject to a public comment period, after three years.
- Specify the key terms of reference for this independent review, examining in particular: (1) whether standards have been reduced; (2) the long-term sustainability of CSS and gap-filling measures; and (3) efforts to harmonize CSS and safeguard policies with the World Bank Group.
- Allow expansion of CSS only if the ADB approach does not reduce standards, ensures long-term sustainability of gap-filling measures, and ensures harmonization of CSS and safeguard policies with those of the World Bank Group.