

Comments on the Second Draft of the Safeguard Policy Statement

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Japan Center for a Sustainable Environment and Society (JACSES)

Compliance Issues

1. **Compliance Check at Due Diligence:** In terms of due diligence, Para. 65 states that “ADB will confirm that borrowers/client understand the ADB’s safeguard principles and requirements in SRs 1-4,” and only the confirmation of the borrowers/clients’ understanding is required. In due diligence, it must be required to confirm whether the project complies with ADB’s safeguard principles and requirements in SRs 1-4, which should also be stated in this section.

2. **Definition of “Requirement”:** The “requirements” described in the following paragraphs are vague on which section is applied. Thus, it is necessary to alter the following phrases to “all safeguard principles and requirements in SRs 1-4.”
 - Due Diligence (Para. 65): ADB will not finance projects that do not comply with ADB safeguard requirements, or the host country social and environmental laws and regulations.
 - Financial Intermediaries (FI) (Para. 18 in SR4): Subprojects will be required to meet ADB’s safeguard requirements when the FI provides finance under ADB’s authority.
 - Cofinancing (Para. 79): ADB’s safeguard policy requirements will apply to all ADB financed components.

3. **Policy Scope:** There are the words “relevant” and “applicable” used in the document. Though the requirements to be complied are clearly defined in the scopes of Policy Principles and SRs, the ambiguity of its expression may lead the misinterpretation of its meaning by ADB staff and borrowers/clients, which may cause the situation where the critical requirements are ignored. Thus, the words “relevant” and “applicable” should be eliminated in the following paragraphs.
 - Safeguard Framework (Para. 72): Safeguard frameworks will fully reflect the policy objectives, and relevant policy principles and SRs.
 - Use of the CSS (Para. 77): The CSS is equivalent to ADB’s, i.e. the CSS is designed to achieve the objectives and adhere to the applicable policy principles set out in ADB’s SPS.
 - Roles and Obligations of Borrowers/Clients (Para. 82): “The borrower/client is responsible for....., following all applicable policy principles and SRs.”

4. **Exclusion to Safeguard Framework and CSS:** Para. 71 states, “The application of safeguard framework is not appropriate for sector loans which are highly complex and

sensitive, including sector loan tranches of MFFs or components of sector loans which are highly complex and sensitive.” Similarly, para. 77 states, “CSS will not be applied to highly complex and sensitive projects financed by ADB.” However, it is very difficult to define “highly complex and sensitive” projects, and most of Category A projects can be excluded from the requirement. In addition, use of CSS is still in a pilot stage in the World Bank. Therefore, it is necessary to alter “highly complex and sensitive” to “Category A.”

5. **Criteria of ADB approval for FI:** Para.76 states that “the ESMS will incorporate relevant provisions to ensure that such subprojects will be required to meet ADB’s safeguard requirements in addition to national laws and standards.” This paragraph does not state clearly on which criteria are applied in “relevant provisions”. Thus, it is crucial to specify the criteria at ADB’s approval for FI finance.
6. **Derogation:** Para. 68 states, “the Board will balance the proposed approach against the overall environmental and/or social costs and benefits of the project in deciding whether to approve any derogation to this policy statement.” There may be some projects with high social and environmental cost to make it easier to apply the derogation, and ADB staff and borrowers/clients may misunderstand that the derogation can be easily applied to such high risk projects. Thus, this statement should be eliminated in order to prevent those cases.

Consistency between Policy Principles, Policy Delivery Process (Section B), and Safeguard Requirements (SRs)

7. **Policy Principles:** Several principal requirements are stated in SRs, not in Policy Principles or Policy Delivery Process (Section B). ADB proposed that Policy Principles are applied as the requirements for framework approach and CSS. Thus, the following requirements should be included in Policy Principles as well as SRs.
 - The retainment of qualified and experienced external experts. (Para. 15 and 29 in SR1, Para. 22 and 23 in SR2, Para. 17 in SR3)
 - The disclosure of the information during consultation process in a form, manner, and language(s) accessible to the affected people. (Para. 17 in SR1 and Para. 26 in SR2)
 - The continuous consultation from the early stage of the project cycle. (Para. 26 in SR2 and Para. 8 in SR3)
 - The disclosure of completed and updated versions of EIA. (Para. 19 in SR1)
 - The retainment of qualified and experienced external experts for the verification of monitoring information (Para. 21 in SR1)
 - The disclosure of the involuntary resettlement monitoring reports (Para. 24 in SR2) and the monitoring reports on the Indigenous Peoples (Para. 18 in SR3)

8. **Policy Delivery Process:** The following major procedural requirements in SR4 should be incorporated into Policy Delivery Process (Section B).
- ADB's review process on the subprojects with potential significant social or environmental impacts and risks, which finance is provided by FI under ADB (Para. 18 in SR4)
 - The requirements in emergency assistance loans, loan for existing facilities and general corporate finance (Paras. 11-14 and 21-24 in SR4)
9. **Safeguard Requirements (SRs):** Some requirements are included in Policy Principles, but not specified in SRs. It is most likely that the borrower/client will follow the SRs while projects are in process. Therefore, the following requirements should be specified in SRs as well as Policy Principles.
- The identification of the project's past involuntary resettlement impacts (Para. 1 in Policy Principles on the Involuntary Resettlement Safeguards)
 - The improvement of the livelihood through land-based resettlement strategies (Para. 3 in Policy Principles on the Involuntary Resettlement Safeguards)
 - The improvement of the standards of living of the affected poor and other vulnerable groups at least to the national minimum standards (Para. 5 in Policy Principles on the Involuntary Resettlement Safeguards)

Comparison with Existing Policies

10. The following requirements are stated in existing Operations Manual (OM), not in the draft SPS or Safeguard Review Procedures. They should be included in the SPS.
- The public consultations before loan appraisal by ADB, which must be carried out for category-A projects during the early stages of EIA fieldwork and when the draft EIA report is available. (Para. 9 in OM F1/OP)
 - The disclosure of subproject's EIA/IEE provided by borrower/client under sector finance, FI and etc.. (Paras. 17 and 21 in OM F1/OP)
 - The specification of the target for the sample survey on the economic and social condition of the affected people by including a poverty assessment and a survey of least 10% of affected people and 20% of seriously affected people. (Para. 34 in OM F2/OP)

Comments on New Concepts

11. **Degree of "Offset":** Para.4 of Policy Principles on Environment Safeguards (P17) states, "Avoid and, where avoidance is not feasible, minimize, mitigate and/or offset for adverse impacts and enhance positive impacts through environmental planning and

management.” And the word “offset” is put down with the words “minimize” and “mitigate.” However, the “offset” should be used as an additional countermeasure after the minimization and mitigation of the impacts. Therefore, “offset” should be separated from the words “minimize” and “mitigate.”

12. **Negotiated Land Acquisition:** Para. 23 of SR2 states, “a negotiated settlement will offer adequate and fair cost of land and/or other assets to the seller, who is an AP (affected people). “ However, there is no requirement that the buying price exceed the replacement cost. Thus, it is highly possible that it may not turn out to be profitable for affected people even if both sides agree to the land sales contract through the negotiation. The reasons are;

- It is less likely that the affected people can calculate and estimate their replacement cost of land and other assets affected properly and that they present the price and negotiate with substantial reasons, and
- It seems to be difficult for the affected people to negotiate with the borrower/client as equals since the borrower/client may sustain final authority to exercise the process of land acquisition and it is much easier for the borrower/client to resort legal procedures.

Therefore, replacement cost should be offered through the negotiation, or the new concept of “negotiated land acquisition option” should be eliminated.

13. **Disclosure of ESMS:** In case of FI and corporate investment, ADB confirms documented ESMS of the borrower’s before financing. Draft SPS does not clarify whether ADB disclose the document. However, it is crucial for external stakeholders to confirm the project sponsor’s capacity. Therefore, ADB should disclose the ESMS document, and this information should be also included in the disclosure version of RRP.

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