

ADB Safeguards Policy Review and Update
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via electronic mail

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Re: Written submission on “lessons from the accountability mechanism”

To whom it may concern:

Thank you for the opportunity to participate in consultations regarding lessons the ADB should learn from its Accountability Mechanism (AM) as it reviews and improves its Safeguards policy. To supplement our remarks during the consultation session, Accountability Counsel submits the below recommendations in writing. It is critical for ADB to take lessons from complaints to its mechanism, not only because they shed light on gaps in ADB Safeguards and their implementation, but also because it is a way for ADB to respond to and learn from project-affected people. For this reason, ADB should ensure that the Safeguards are drafted to work in tandem with the AM policy, empowering the mechanism to be an effective tool for improving ADB’s impact on the communities it seeks to serve.

Accountability Counsel is an international legal nonprofit organization that employs community-driven and policy-level strategies to access justice through the independent accountability mechanisms of development finance institutions.

1. ADB’s Safeguards must be informed by the experiences of project-affected people.

Complaints submitted to the ADB’s AM provide valuable insights into the kinds of projects that cause environmental and social harms to project-affected people. We highlight some data on the ADB’s AM from the [Accountability Console](#), which tracks all complaints ever filed at every independent accountability mechanism:

Combined, the CRP and OSPF have received 208 complaints total.

- The vast majority of these complaints (71%) came from **infrastructure** projects, with **energy** projects being the next highest (15%).
- However, all types of projects can cause harm - the regulatory development, community capacity and development, agribusiness, conservation, and education sectors have generated complaints as well.
- The top issues raised in complaints are:

- **Displacement** (56 complaints)
- **Consultation and Disclosure** (47 complaints)
- **Livelihoods** (36 complaints)

We can look specifically at adverse impacts from complaints about [projects where non-compliance was found](#):¹

- Most were **infrastructure** projects (5 cases), but there were also 2 **energy** projects and 1 **conservation and environmental protection** project.
- The issues raised in these complaints were:
 - **Community Health and Safety** (4 complaints)
 - **Displacement** (4)
 - **Consultation and Disclosure** (4)
 - **Livelihoods** (4)
 - **Environmental** (3)
 - **Due Diligence** (3)
 - **Pollution** (3)
- This data tells us that at minimum, Safeguards policies around these issues should be strengthened and enforced. This is particularly important in light of the mechanism's report during the consultation call that ADB is increasingly funding infrastructure projects, which generate more complaints than any other kind of project.

As a starting point, ADB should ensure that human rights standards are incorporated throughout its Safeguards policy. Moreover, the ADB should commit to not financing activities that would cause, contribute to, or exacerbate human rights violations. Therefore, we echo the NGO Forum on ADB's recommendations for ensuring a [robust, rights-based, and just safeguards policy](#).

2. To bolster the AM's accessibility, the Safeguards should include a requirement for clients and sub-clients to disclose the availability of the CRP and OSPF to people potentially affected by a project.

If project-affected people are unaware that the AM exists, then they are unable to access it, which limits ADB's ability to learn lessons through it. Requiring ADB clients to disclose that the AM is available is a simple way to increase its accessibility, particularly since clients are already required to disclose the existence of project-level grievance redress mechanisms.

¹ Only 7 compliance reviews have ever been completed, and all found non-compliance.

This disclosure requirement should apply equally to ABD sub-clients implementing projects funded through financial intermediaries (FIs). Lack of transparency around FI projects often leaves affected communities unaware that a DFI with an independent accountability mechanism is involved in the project, which limits their access to recourse for harm. Requiring sub-clients to disclose the availability of the ADB's AM would help the Bank to avoid a potential blind spot and ensure that it gleans lessons from cases involving FIs.

We were encouraged to hear that ADB is finalizing a client disclosure provision to be included in loan covenants. However, given that such loan covenants are often confidential - and at any rate, are rarely shared with project-affected communities - it is critical that the client disclosure requirement be [included explicitly in the Safeguards](#) as well. There should be a public commitment from clients and sub-clients to disclose, in the interest of transparency and accountability.²

Using the 2009 Policy Statement, we would recommend adding the following language:

“The borrower/client will establish a mechanism to receive and facilitate resolution of affected peoples’ concerns, complaints, and grievances about the project’s environmental performance. The grievance mechanism should be scaled to the risks and adverse impacts of the projects. It should address affected people’s concerns and complaints promptly, using an understandable and transparent process that is gender responsive, culturally appropriate, and readily accessible to all segments of the affected people at no costs and without retribution. The mechanism should not impede access to the country’s judicial or administrative remedies. The affected people will be appropriately informed about the mechanism. **In addition, the borrower/client will notify affected peoples of the existence and application of the ADB’s Accountability Mechanism.**”

3. The Safeguards should enable remedy, in a manner consistent with the UN Guiding Principles.

² Several peer financial institutions have recently updated their environmental and social safeguards to require clients to disclose the availability of accountability mechanisms. These include the **Inter-American Development Bank**, the **Asian Infrastructure Investment Bank**, the **Green Climate Fund**, and the **European Investment Bank**. Other institutions have included a client disclosure requirement in other public policies, including the **U.S. International Development Finance Corporation** (in its Board resolution establishing the Office of Accountability), and the **African Development Bank** (in the Operating Rules and Procedures of its Independent Recourse Mechanism).

Ensuring that communities are made whole if they are harmed by ADB-financed projects is a key part of improving ADB's development effectiveness. In recent months, peer development finance institutions have taken steps toward enabling remedy for harms that occur despite preventative efforts.³ If ADB fails to incorporate provisions for enabling remedy throughout the Safeguards, the new policy risks lagging behind best practice at peer institutions.

- (1) The ADB should establish **reserve funds** for the remediation of adverse impacts, should any arise.
 - Other mechanisms for financing remedy include (1) Escrow, (2) Trust fund, (3) Contingency funds, (4) Insurance, and (5) Guarantees and letters of credit.
- (2) We echo the Office of the UN High Commissioner on Human Rights' [recommendations for integrating remedy into Safeguards](#) from its recent report on remedy in development finance:
 - The Safeguards should “[r]equire contingency planning for **remedy and that environmental and social action plans include provisions on remedy**, including and beyond the resettlement context.”
 - **Mitigation hierarchies should be amended** in order to:
 - “Incorporate a clear requirement that adverse impacts, including adverse human rights impacts, should be remedied.
 - Ensure that human rights impacts are not subject to offsetting.
 - Provide a broader range of reparations (i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), rather than compensation and offsetting alone.
 - Ensure that the ‘technical or financial feasibility’ criterion does not trump human rights considerations.”
 - **ADB should “[e]nsure that safeguards specify that IAMs should seek to address and remedy harms**, in addition to (and related to)... environmental and social performance.”

³ For example:

- **IFC** is working on a public “remedy issues and options” paper to set out a potential framework for how to contribute to remedy where it has contributed to harm. Relatedly, the mandate of IFC's CAO requires the mechanism to facilitate access to remedy. (IFC's CAO Policy paras. 4-5,7)
- **AfDB's** updated IRM policy requires management action plans to include clear, time-bound actions to achieve remedy for affected populations in addition to returning the Bank to compliance. (AfDB's IRM Operating Rules and Procedures VII.h.69(b))

- This in turn requires the AM to be more accessible to complainants so that it can better serve as a channel for remedy.
 - Of the 208 complaints received, only 33 have ever been found eligible (16%).
 - 79% of all complaints received are closed without outputs, meaning no compliance review report or problem-solving agreement is generated.
 - The AM's presentation during the consultation revealed that a large number of these complaints are found ineligible because of the "good faith engagement" prerequisite. However, neither the AM nor ADB more broadly has a centralized system for tracking the outcomes of complaints found ineligible for not meeting the "good faith engagement" requirement.
 - Therefore, even though the AM exists, very few project-affected communities are obtaining remedy through it, and it is not clear that remedy is provided through other channels.
 - **ADB should "[i]ntegrate the Guiding Principles on Business and Human Rights within [its] safeguard policies** in order to harmonize upwards, and strengthen: (a) social risk assessment and prioritization; (b) human rights due diligence; (c) approaches to remedy; and (d) GRMs."
- (3) The current AM policy emphasizes that ADB clients must agree to any remedial measures proposed in Management Action Plans. The Safeguards should also include this requirement (given that the Safeguards policy is the primary public document that sets out client obligations) and should assert that **ADB management can and should use its leverage over the client to encourage the implementation of remedial measures.**

4. The Safeguards should require ADB and clients to engage in good faith with the accountability mechanism.

The ADBs lacks public procedures for how Bank management engages with the institution's AM. The ADB Safeguards, or other policies, should contain procedures for management's timely and cooperative engagement with AM processes, including but not limited to:

- Cooperating with CRP investigations;
- Participating in dispute resolution processes when consented to by complainants;

- Establishing a designated focal point within the environmental and social compliance department between management and the AM;
- Ensuring that management action plans include specific, time-bound remedial measures that are able to be monitored, include a budget, and include financing for remedy; and
- Requiring management to indicate how it is making use of lessons generated by the AM, whether in new policies, procedures, or guidance to staff.

The Safeguards should also require clients to cooperate in good faith with all AM investigations and processes. This includes providing the AM access to all relevant project documents, data, and staff.

5. The Safeguard policy review should anticipate and lay a strong foundation for the upcoming AM policy review.

As the AM is the primary mechanism by which communities can hold the Bank and clients accountable to its Safeguards policy, the Safeguards and AM procedures must work in tandem to ensure that the AM is as effective as possible. With an eye to the upcoming AM policy review, the new Safeguards must take into account potential AM policy revisions. At minimum, the new Safeguards policy should not limit the opportunity for the AM to adapt its procedures to become consistent with existing good practice.

Above all else, the Safeguards update must not dilute good provisions from the current policy. As just one example, the Safeguards should retain their application to associated facilities, as these facilities have the same potential to cause environmental and social harm as projects themselves. In turn, the updated AM policy should clarify that communities experiencing harm from associated facilities may bring a complaint to the AM.

One fundamental impediment to the AM's effectiveness was discussed during the consultation: the AM's eligibility requirements - particularly the good faith engagement prerequisite - exclude the vast majority of complaints. During the forthcoming review of the AM procedures, the ADB should **eliminate the good faith engagement requirement** for several reasons:

- (1) From the perspective of communities, the AM's independence from the project implementer and ADB management is often a key advantage over other mechanisms. Communities frequently have good reasons for not wanting to engage with a project-level grievance mechanism or Bank management, particularly if they fear, or are experiencing, retaliation. The high rate of complaints to the AM found ineligible

because of no good faith engagement illustrates this issue. Instead of requiring communities to go through other channels, some of which they do not trust or are ineffective, the ADB should allow them to access the mechanism of their choice so that issues can be unearthed and addressed.

- (2) IAMs at peer institutions allow complaints without first engaging with a client or project-level grievance mechanism or management. These policies, such as that of the International Finance Corporation's Compliance Advisor and Ombudsman, allow complainants to describe any previous efforts they have made but do not require such efforts for eligibility.⁴
- (3) Concerns raised during the consultation call about the AM being less responsive and slower-acting than a project-level GRM do not justify the AM's position as a mechanism of last resort. Rather, such concerns indicate that the AM needs to be better resourced. The AM must be given an adequate budget and staff to address the volume of complaints it receives in a timely manner.

Allowing the AM to address more of the complaints it receives benefits ADB by enabling it to draw lessons from more cases, which should in turn lead to better implementation of Safeguards and a more positive impact on communities.

The Accountability Mechanism's procedures should be updated through a robust consultations process so that it can better comport with existing good practice,⁵ not only on the issue of eligibility, but others as well.

Thank you again for the opportunity to share these recommendations for strengthening the updated ADB Safeguards. Please reach out if you have any questions or if we can be of any further assistance.

Sincerely,



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⁴ CAO policy paras. 33-34. See also the Green Climate Fund's Independent Redress Mechanism policy paras. 25-26.

⁵ See [Accountability Counsel, Bank Information Center, Center for International Environmental Law, et al., Good Policy Paper: Guiding Practice from the Policies of Independent Accountability Mechanisms \(Dec. 2021\)](#).

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