

Written Submission on Asian Development Bank's (ADB) September 2023 Draft Environmental and Social Framework (ESF)

Submission from Outright International
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Submission of Paul Jansen, Senior Director of Global Programs and Grantmaking
on behalf of Outright International
to the Asian Development Bank to provide feedback on
the September 2023 Consultation Draft Environmental and Social Framework.

We are thankful for this opportunity to provide feedback and recommendations regarding the September 2023 Consultation Draft Environmental and Social Framework (ESF). We offer our feedback in a spirit of constructive engagement towards the goal of sustainable and inclusive development for all Asian countries. Below, please find our recommendations and a detailed rationale for each.

Definition of “disadvantaged or vulnerable.”

Recommendations:

- On page 134, we strongly support the inclusion of “sexual orientation” and “gender identity” in the list of factors to be considered when determining whether individuals or groups face risks of harm or exclusion.
- We recommend the addition of the terms “gender expression” and “sex characteristics.”

Rationale:

On page 134, we strongly support the inclusion of sexual orientation and gender identity in the list of factors to be considered when determining whether individuals or groups face risks of harm or exclusion. Every day, millions of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people in Asia face stigma and discrimination because of their sexual orientation or gender identity. LGBTIQ people are bullied and excluded in school, denied access to health care, and excluded from remunerative livelihood opportunities. While each individual instance of discrimination is a personal tragedy, the toll on national economies can be as much as one percent of GDP.¹ Based on these concerns, the African Development Bank, the Inter-American Development Bank, and the World Bank have each recognized that discrimination based on sexual orientation and gender identity is a barrier to achieving development goals. We support the ADB in its efforts to do the same.

We recommend that the list of factors be amended to include gender expression as a factor to be considered when determining whether individuals or groups face risks of harm or exclusion. The term gender identity has often been used to describe the broad range of ways that gender is manifested in each person, as both an internal awareness of identity and a set of external acts and characteristics. Recently, the term “gender identity and expression” has become a common way to avoid disputes about whether clothing, mannerisms, and expressive behavior are components of gender. Thus, referring to gender identity and expression, instead of just gender identity, would ease the implementation of the environmental and social standards and avoid conflicts regarding their meaning.

¹ M. V. Lee Badgett, *The Economic Case for LGBT Equality* (Boston: Beacon Press, 2020)

We also recommend that the term “sex characteristics” be added to the definition’s list of factors to be considered when determining whether individuals or groups face risks of harm or exclusion. Intersex individuals are those born with certain sex characteristics (biological traits such as hormones, chromosomes, genitals, and reproductive systems) that do not fit typical binary notions of male or female. Though intersex individuals may or may not be lesbian, gay, bisexual, transgender or queer, intersex people often face similar patterns of stigma and discrimination based on their perceived deviation from sex and gender norms. We expect intersex people and LGBTQ people will face similar risks of exclusion and negative project-related impacts. Because the forms of remedy and redress sought by intersex people overlap with those sought by LGBTQ people, it has become common for institutions to include intersex people in the same policies relied on to provide remedy and redress for LGBTQ people. Thus, it would be appropriate to include sex characteristics in the definition along with sexual orientation, gender identity, and gender expression.

ESS 1: Assessment and Management of Environmental and Social Risks

Recommendation:

- On page 26, paragraph 24 provides the central list of environmental and social risks and impacts to be taken into account as part of the E&S assessment. We recommend that the list of risks to be assessed include the risk that disadvantaged or vulnerable groups might face discrimination or exclusion from the project, limitations in their ability to take advantage of a project’s benefits, or exclusion from consultation processes and benefit sharing.

Rationale:

On page 26, paragraph 24 provides the central list of environmental and social risks and impacts to be taken into account as part of the E&S assessment. The draft standard requires the borrower/client to assess the risk that “project impacts fall disproportionately” on disadvantaged and vulnerable groups, and to the risk that disadvantaged and vulnerable groups will be “adversely impacted” by project activities. Examples of impacts listed in paragraph 24 include risks from land acquisition, labor conditions, abuse, and harassment. Each of these risks involves individuals experiencing some type of impact from a project.

The risk of discrimination and exclusion from a project, leading to disadvantaged and vulnerable groups experiencing no project impact at all, is not a risk factor listed in the standard. We recommend that paragraph 24 include the risk of discrimination or exclusion among those risks that must be assessed. Furthermore, consistent with the definition of disadvantaged or vulnerable persons, we recommend that this paragraph include an explicit reference to the risk that disadvantaged or vulnerable groups might face limitations in their ability to take advantage of a project’s benefits, or might face exclusion from the project, consultation processes, and benefit sharing.

ESS 2: Labor and Working Conditions

Recommendations:

- We support the standard established on page 47, paragraph 12, prohibiting the borrower/client from making “employment decisions on the basis of personal characteristics unrelated to inherent job requirements, particularly for those project workers who are disadvantaged or vulnerable.”
- We recommend that on page 47, paragraph 13, “remedial” be inserted in the first phrase so that it reads as follows: “The following *remedial* measures will not be considered discrimination.”

Rationale:

We support the language on page 47, paragraph 12, which applies to decisions made by the borrower/clients when it employs project workers. It establishes a standard prohibiting “decisions on the basis of personal characteristics unrelated to inherent job requirements.” This standard protects LGBTIQ people as an individual's sexual orientation, gender identity or expression, and sex characteristics are rarely, if ever, relevant to job requirements.

The language used in the following paragraphs raises concern. Paragraphs 13 and 14 appear to address whether it is legal for an employer to take measures to remedy past discrimination or to assist disadvantaged and vulnerable people to take advantage of employment opportunities. The ESS seems to anticipate the problem that some of these measures might be legal in some countries but not in others. For example, affirmative action, job set-asides, and special recruitment activities may be legal in some countries, whereas in other countries they may be considered impermissible discrimination. The ESS resolves the inconsistencies in national laws by providing that the local laws will be used to determine which measures are legal and which are not.

Each sentence of paragraph 14 makes it clear that it focuses on measures to protect and assist disadvantaged or vulnerable workers in the employment process. The last sentence states that “[s]uch measures of protection and assistance will not be deemed as discrimination provided they are consistent with the host country’s applicable law.” Thus, local law determines the legality of employer actions insofar as they are meant to protect and assist disadvantaged and vulnerable workers.

In comparison, paragraph 13 lacks similar clarity. Though the text of the paragraph focuses on remedial measures, the paragraph begins with the broad statement that “[t]he following measures will not be considered discrimination,” seemingly referring to all measures, not just ones that are remedial. Among the things that would not be considered discrimination, according to paragraph 13’s last clause, is a “selection for a particular job based on the inherent requirements of the job that are in accordance with the host country’s applicable laws.” Consequently, paragraph 13 could be interpreted to apply to ANY employment selections, not just those made as part of remedial measures.

We are concerned that the lack of clarity in paragraph 13 could support an interpretation that paragraph 13 carves out an exception to paragraph 12. According to this interpretation, an

employment selection that violated the standard set out in paragraph 12 would nevertheless be considered permissible if it were in accordance with the host country's applicable laws.

Such an interpretation would defeat the entire point of the standard, which is to safeguard groups against harms they might face because of the operation of local norms. Throughout Asia, some employers have made employment selections excluding LGBTIQ people from the workplace based on a view that being LGBTIQ disqualifies an applicant from fulfilling job requirements. In many countries, such a selection is not a violation of local law. We are concerned that borrowers/clients could try to justify discriminatory employment selections on the basis that acting in accordance with local legal standards exempts them from the requirements of paragraph 12.

The proper interpretation of these paragraphs is that the standard in paragraph 12 should apply to employment selections, the standard in paragraph 13 should apply to remedial measures, and paragraph 14 should apply to measures to protect and assist disadvantaged and vulnerable people. To accomplish this, we recommend that "remedial" be inserted in the first phrase in paragraph 13 so that it reads as follows: "The following **remedial** measures will not be considered discrimination."

ESS 1: Assessment and Management of Environmental and Social Risks & ESS 10: Stakeholder Engagement and Information Disclosure

Recommendations:

- The policy should specify that the Bank has a general authority to review any of the borrowers/client's efforts related to the E&S assessment, mitigation measures, and stakeholder engagement, and in the event those efforts are inadequate, to take action to ensure that the assessment, mitigation measures, and stakeholder engagements are adequate. Possible actions should include the ADB leading the assessment and stakeholder engagement, either jointly with the borrower/client or through its own staff, consultants, or contractors.

Rationale:

According to multiple provisions throughout the draft, the responsibility and authority to assess E&S risks, engage with stakeholders, and develop mitigation measures is held by the borrower/client. ADB staff will likely encounter instances of possible noncompliance with the ESF by borrowers/clients. This is particularly evident in cases where individuals are disadvantaged or vulnerable because of discrimination perpetrated by the borrower/client itself. In these cases, it is naive to expect that the borrower/client will objectively assess and mitigate against risks that arise from its own policies and practices.

If this occurs, ADB staff are in the best position to determine whether the efforts of borrowers/clients are sufficient and, if they are not, to identify specific activities that would ensure that E&S risks are addressed. However, the draft provides minimal responsibility and authority to the ADB to step in and engage in assessments, stakeholder engagement, and

implementation of mitigation measures. The ESF should provide greater authority and discretion to the ADB to ensure that E&S risks are addressed.