

Comments from Developing Countries

on

The Draft Summary of Procedures (the Procedures) to Submit Objections Concerning  
JBIC Guidelines for Confirmation of Environmental and Social Considerations

and

The Draft of the Establishment of the Office of the Examiner for Environmental  
Guidelines

	Comment	Response of JBIC
Overall	Developing country governments make decisions on undertaking projects after taking into account their benefits and costs. Under the Procedures, a request for investigation (the Request) based on objections concerning the JBIC Guidelines for Confirmation of Environmental and Social Considerations (the Guidelines) can be made without difficulty. However, frequent submission of unwarranted Requests could lead to the canceling or delaying of project implementation, to the detriment of a number of intended beneficiaries of the project. Therefore, in implementing the Procedures, adequate care should be taken to prevent their abuse by taking into account what the project does to the public good in the host country.	We will take into account the point raised by the comment and take adequate care to prevent abuse in our practice.

	<p>As it is a government of developing country that owns and has responsibility for the project, the government has to play the central role in dealing with problems concerning the project. The government is not in a position to receive instructions from JBIC in regard of the project and how to resolve its problems. It is also out of the question to take action in violation of domestic law and regulations. In implementing the Procedures, there should not be adverse effect on the domestic dispute resolution process or the plan agreed among the parties concerned. Adequate considerations should be accorded to the sovereignty of the developing country through communications with the host government.</p>	<p>We will take into account the point raised by the comment and accord adequate considerations to the sovereignty of the developing country in implementing the Procedures.</p>
<p>Requirements to Commence the Procedures</p>	<p>The requirement that “the cases in which ... substantial damage ... is likely to be incurred in the future” is ambiguous. More specific description is called for.</p>	<p>It is difficult to provide more a specific description of “substantial damage likely to be incurred in the future” in the Procedures. An Examiner for Environmental Guidelines (the “Examiner”) will thus determine what constitutes this phrase for individual cases, while taking care to prevent abuse.</p>
	<p>The clause, “the cases in which ... substantial damage ... is likely to be incurred in the future ” might encourage abuse, and this should be dropped from the requirements.</p>	
	<p>An explicit definition is required for the content, type, and the extent of the “damage.”</p>	
	<p>The Request should not be accepted if a litigation concerning the project is underway or under preparation based on the domestic law.</p>	<p>Under the Procedures, after the Request is accepted, the Examiner may suspend the Procedures in the case where litigation is underway. In addition, the Examiner may stop the ongoing Procedures if a legal action is taken against the project. Thus the Procedures are in line with the comment.</p>

	<p>Objections voiced in public hearings held in the process of preparing the environment impact assessment (EIA) report have already been discussed and therefore are not amenable to this mechanism.</p>	<p>One of the purposes of the Procedures is to investigate facts as to whether or not JBIC complies with the Guidelines. Even when the Project Proponent has made appropriate environmental and social considerations, a Request is accepted if a question is raised on the JBIC's compliance with the Guidelines.</p>
	<p>"Two or more residents who have suffered actual and direct damage" is too loose as a requirement. One half of the population suffering from damage is appropriate.</p>	<p>In focusing a usefulness of the Procedures, the qualifications of the Requester have been relaxed to the greatest extent possible in reference to the World Bank model. The Procedures lay down, however, that a Request may be submitted with respect to the cases in which material damage has actually been incurred or is likely to be incurred in the future. A Request based on personal, subjective sense of suffering or interests of an individual that are not shared by the community will be excluded in an appropriate manner in the process of investigation.</p>
	<p>We are against "Two or more residents who have suffered actual and direct damage." Considering the cost of investigation, we need increased caution.</p>	
	<p>"Two or more residents who have suffered actual and direct damage" is too small.</p>	
	<p>"Two or more residents who have suffered actual and direct damage" is too small from the point of view of preventing abuse. The number should be at minimum 10 percent of those affected by the project.</p>	
	<p>When an agent makes the Request on behalf of the affected people, he should submit the reason and evidence that the directly affected people are unable to submit the Request.</p>	
	<p>To avoid abuse, JBIC should identify the fact that the agent is genuinely acting on behalf of the Requester.</p>	<p>Under the Procedures, when an agent makes the Request on behalf of the affected people, he must bring forth the reason and evidence that he is genuinely acting on behalf of the Requester. Thus the Procedures are in line with the comment. To ensure that our intention is clarified, however, a phrase will be added to this effect under "4. Contents of Request" and "Sample Request".</p>

	<p>As agents tend to ignore the intentions of the local residents and try to continue the Procedures to the maximum extent, agents should not be permitted to submit the Request.</p>	<p>Given the difficulty some Requesters face in submitting the Request in person due to circumstances where the Requester lives or other reasons, simply ruling out an agent without exception seems inappropriate. The Procedures thus accept a Request submitted by an agent under compelling circumstances. We will ascertain fully that there is a need for an agent.</p>
	<p>If the Requester is allowed to remain anonymous, the project and the project proponent should also be allowed to remain anonymous.</p>	<p>Depending on the circumstances of the areas where the Requester live and other reasons, anonymity may be called for to protect the human rights of the Requester.</p>
	<p>Anonymity of the Requester may foment the abuse of the procedures.</p>	
	<p>Anonymity of the Requester may lead to the abuse of the Procedures and is inconsistent with promoting dialogue with the Project Proponent.</p>	
	<p>Since it is not possible to have a dialogue with the anonymous Requester, the anonymous Request should not be accepted.</p>	
	<p>Qualifications of the Requester are important. The soundness of the Requester should be a requirement.</p>	<p>Regardless of the Requester's intent, we would like to assess whether or not the individual Request meets the requirements.</p>
	<p>Under the Procedures , there is a risk that those who intend to thwart the project might repeatedly submit a Request every year by slightly changing its content. This would result in suspension of the project and beneficiaries could suffer over many years. Therefore, JBIC must set a specified period during which the Request may be submitted.</p>	<p>One of the purposes of the Procedures is to investigate whether or not JBIC complies with Guidelines. We will not take any steps detrimental to the Borrower simply on the ground that a Request was submitted. Repeated submission of a Request therefore will not result in suspension of the project. We will take adequate care to prevent abuse, however, as mentioned above.</p>

	<p>Under the Procedures, objections to all acts of non-compliance with the Guidelines may be filed until loan closure. For example, a debate on the validity of the resettlement and compensation plan agreed on with the residents may be brought up again. As the loan term is long for ODA loans, a limited period during which the Request may be submitted should be specified.</p>	<p>If the resettlement and compensation plan has been agreed on through the due process of the Guidelines, there will be no controversy over the plan itself. The World Bank, in the meantime, accepts the Request up until the practical closure of loan disbursements (or 95% completed). Accepting the Request through the completion of disbursement does not seem inappropriate.</p>
	<p>There is a serious concern over the provision that the Request may be submitted before the signing of a loan agreement for ODA loans. Since the Operational Department of JBIC may be able to confirm environmental and social considerations and take necessary measures before the signing of a loan agreement, JBIC should not allow submission of the Request during this period.</p>	<p>In the case of ODA loan, prior to the signing of a loan agreement, there is a certain point in time when JBIC makes substantial confirmation on environmental and social considerations. This is why the Request may be submitted from that point in time in the case of ODA loan.</p>
	<p>As a requirement for commencing the Procedures, the Requester should “endeavor to have dialogues with the Project Proponent” prior to the submission of the Request. In this respect, JBIC should ascertain that the Requester has exhausted dialogues with the Project Proponent.</p>	<p>Under certain circumstances, the Requester may be unable to have dialogues with the Proponent. The Requester is thus required to at least “endeavor to have dialogues” under the Procedures.</p>
	<p>As local residents do not understand JBIC Guidelines, it is unrealistic to ask the Requester to point out the relevant provisions of the Guidelines that are violated in the Requester’s opinion.</p>	<p>The Procedures stipulates that the Examiner, in face of inadequacy in the Request document, may demand additional information, instead of rejecting the Request outright. Through such process, efforts will be made to ensure that the Request is eligible.</p>
<p>The Process of Submitting A Request</p>	<p>Suspending project implementation and disbursement is unacceptable. The period of 4 months for completing the Procedures should not be extended easily.</p>	<p>One of the purposes of the Procedures is to investigate facts as to whether or not JBIC complies with the Guidelines. We will not take any steps</p>

	A period of 4 months from the receipt of the Request to the submission of an opinion by the Operational Department is too long. 3 months are considered sufficient. Extension of this period should be averted.	detrimental to the Borrower, including suspension of disbursement simply on the ground that the Request is submitted. With regard to extension of the period, we will ascertain that there is such a need.
	Adequate communications with the host government is called for in going through the steps of the Procedures such as arranging the schedule for a project site visit.	We will take into account the point raised by the comment and take care to ensure adequate communications with the host government.
Information Disclosure	It is crucial to attach an opinion of the host country when the report of the Examiner and the Operational Department will be made public after 4 months.	When the Examiner conducts interviews with the host government, their description will be included in the report. Comments of the host country may also be attached to the statement of the Operational Department, if necessary.
	When an objection to the project is made public on the website, international NGOs may step in and create a big controversy out of it. Therefore, prior consent from the host government is essential for disclosure.	To ensure transparency of the Procedures, certain information including the submission of the Request will be made public. Disclosure of information other than specified in the Procedures will naturally require consent of the parties concerned.
	JBIC should obtain consent from the host government at the time of disclosure.	
	It is unacceptable to disclose the Request in the original form as it could damage the reputation of the Project Proponent or the host country. If the opinion of the Requester in response to the Examiner's report is made public, the debate will not stop there but go on and on and could encourage even more Requests. Information disclosure beyond the provisions of the Procedures should require consent from the host country.	JBIC will not disclose documents prepared by entities or people other than JBIC, including the Request and the Requester's opinions, since they do not belong to JBIC.
	The opinion of the Requester against the report submitted by the Examiner should not be made public.	
	Further information disclosure should obtain consent from the host country in each case.	Obviously disclosure of more information than was stipulated in the Draft Summary is conditional on consent from the parties concerned.

Review of the Summary and Interim Provisions	Since ongoing projects do not follow the new Guidelines, retroactive application of the Procedures is unacceptable.	The Procedures are applicable to only those projects for which loan requests will be submitted on and after October 1, 2003. They are not applicable to the projects financed by JBIC under the old guidelines.
	We cannot approve retroactive application of the Procedures to ongoing projects.	
	The projects for which a loan agreement has been signed should proceed as planned, and the Procedures should not be applied retroactively.	
	Applying the new mechanism retroactively to ongoing projects should not be allowed because no consensus existed on the Procedures at the time.	
	We do not agree with retroactive application.	
	Retroactive application goes against the rule of the game and categorically opposed to it.	
	We are against retroactive application.	
	Retroactive application violates the rule of the game and is unacceptable.	
Others	In the case where non-compliance on the part of JBIC led to increased compensation, it should be shouldered by an ODA loan as its responsibility rests with JBIC.	The Procedures are intended to find whether confirmation by JBIC of environmental and social considerations is appropriate or not. They are in no way linked to compensation, which will be determined among the parties concerned.
	When the Project Proponent incurs a liability for compensation as result of the revelation of non-compliance on the part of JBIC, the obligation of JBIC should be explicitly stated.	
	There must a description on what is going to happen after a conclusion indicating non-compliance with the Guidelines has been reached.	In the event that the Procedures determined non-compliance by JBIC, the Governor will issue necessary instructions on a case-by-case basis. Thus it is difficult to describe specific actions to be taken in the Procedures.
	The project is the government's project, and while we are open to advice, we are not obligated to follow an order. Further, it should be noted that we cannot act in violation of domestic rules and regulations.	The point is well taken. We will implement the Procedures in full respect of the sovereignty of the host country.

	<p>It may have a serious adverse effect on third parties concerning the project if JBIC suspends disbursement and/or makes outstanding loan immediately due and payable for the reason of non-compliance with the Guidelines on the part of JBIC. Thus such course of action is unacceptable.</p>	<p>One objective of the Procedures is to investigate the compliance of the Guidelines. JBIC would not resort to actions detrimental to the borrower such as the suspension of disbursement and/or making outstanding loan immediately due and payable upon submission of the Request alone.</p>
	<p>It is unacceptable to cancel or suspend the signing of a loan agreement or disbursement on the basis of the submission of the Request. Please consider huge losses to be incurred by the Request submitted simply by two persons.</p>	
	<p>Divergent systems concerning environmental and social guidelines and varying mechanisms to deal with objections among multilateral institutions, JBIC and governments pose a problem. As developing countries have inadequate human resources and cannot bear huge administrative costs, and as developing country governments have primary responsibility for their projects, the Procedures should converge toward the comparable process in developing countries.</p>	<p>We recognize it important to harmonize and ensure consistency of the Guidelines with those of multilateral and other donor agencies and continue to study ways to proceed to that end.</p>

Governments and agencies with which JBIC conducted interviews: China, Vietnam, Philippines, Thailand, Malaysia, India, Bangladesh, Sri Lanka, Brazil, Tunisia and Morocco