



**Asian Development Bank Accountability Mechanism
Compliance Review Panel**

REPORT ON ELIGIBILITY

**To the Board of Directors
on
Compliance Review Panel Request No. 2015/1
on the
Greater Mekong Subregion: Rehabilitation of the Railway
in Cambodia Project
(Asian Development Bank Loan 2288 and
Asian Development Bank Loan 2602/Grant 0187 [Supplementary])**

16 November 2015

This document is being disclosed to the public in accordance with ADB's Public Communications Policy 2011.

ABBREVIATIONS

ADB	– Asian Development Bank
AH	– affected household
AP	– affected person
CARM	– ADB Cambodia Resident Mission
COI	– corridor of impact
CRP	– Compliance Review Panel
EIRP	– expanded income restoration program
IRC	– Inter-Ministerial Resettlement Committee
IRP	– income restoration program
km	– kilometer
NGO	– nongovernment organization
RP	– resettlement plan
SERD	– Southeast Asia Department
SETC	– Transport and Communications Division, SERD

NOTE

In this report, “\$” refers to US dollars.

In preparing any country program or strategy, financing any project, or by making any designation of or reference to a particular territory or geographic area in this document, the Asian Development Bank does not intend to make any judgments as to the legal or other status of any territory or area.

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I. BACKGROUND

1. A second request for compliance review of the Greater Mekong Subregion: Rehabilitation of the Railway Project in the Kingdom of Cambodia¹ (Appendix 1) was forwarded by the complaints receiving officer to the Compliance Review Panel (CRP) on 7 September 2015. In accordance with the Accountability Mechanism Policy (2012) and its operational procedures,² the CRP initially assessed the complaint and determined that it fell within the mandate of the compliance review function.

2. Subsequently, on 11 September 2015, the CRP forwarded the complaint to ADB Management (Southeast Asia Department [SERD]) with a copy to the Board Compliance Review Committee (BCRC), and requested that a response to the complaint be submitted to the CRP by 12 October 2015. The CRP also informed the Government through the Board member representing Cambodia about the receipt of the complaint. The CRP undertook a mission to Cambodia from 30-31 October 2015 and met with officials of the Government, staff from the Cambodia Resident Mission (CARM), 19 of the 23 complainants and representatives of non-governmental organizations including Equitable Cambodia (EC) and Inclusive Development International (IDI).

3. This report summarizes the CRP's findings on its determination of the eligibility of the complaint for compliance review.

II. DESCRIPTION OF THE PROJECT

4. The project was proposed because the railway in Cambodia had fallen into disuse and disrepair during the past civil war and conflict. The government decided to seek the assistance of ADB in rebuilding the 642-kilometer railway line connecting the port city of Sihanoukville in the south, via the capital of Phnom Penh, to the city of Poipet in the north at the Thai border.

5. On 13 December 2006 the ADB Board approved a \$42 million loan (Loan 2288) for a 2-year (2007–2009) project. The railway's operations were to be improved through (ongoing) restructuring, which was to be completed in 2007 with an award to a private railway operator of a concession to operate the railway commercially for a period of 33 years under a public–private partnership arrangement.

6. The project was prepared and implemented from ADB headquarters through the Transport and Communications Division of SERD and with the Cambodia Resident Mission (CARM) when required.

7. This was a category A project where involuntary resettlement was concerned. According to the October 2006 resettlement plan (RP), the railway rehabilitation would affect a total of 2,629 households (comprising 11,288 persons), of which 822 households (3,535 persons) would have to be relocated to resettlement sites. Innovative features of the RP were the provision of plots with land title to affected households (AHs) relocating to resettlement sites, a guaranteed 5-year right of residence for AHs shifting from the railway corridor of impact but still

¹ Information on the first request for compliance review for the Greater Mekong Subregion: Rehabilitation of the Railway Project in the Kingdom of Cambodia are at <http://compliance.adb.org/dir0035p.nsf/alldocs/RDIA-8XT5DA?OpenDocument>.

² ADB. 2012. *Accountability Mechanism Policy*. Manila; and ADB. 2012. *Operations Manual Section on Accountability Mechanism* (OM Section L1: Bank Policies and Operational Procedures), issued on 24 May 2012. Manila.

within the right-of-way of the railway line, an income restoration program for AHs, and grievance redress arrangements.

**Figure 1: Affected Households in the Right-of-Way in Phnom Penh
(Source: CRP and OCRP)**



8. However, because of delays in fulfilling the condition for loan effectiveness involving the signing of a concession agreement, the project took effect only on 30 January 2008. Compared with the 2006 RP, the updated RPs, which were based on the final technical designs, increased the aggregate number of AHs by about 30%, but kept the allocated aggregate budget unchanged. By the end of June 2013, compensation payments for the railway sections covered by the four updated RPs were reported to be fully or nearly completed, while relocation to resettlement sites was 54% completed.

9. Moreover, following complaints from AHs in the Phnom Penh section of the railway line, it was recognized that an additional 242 AHs had houses that would be fully affected. Of these, 105 AHs chose to move to the resettlement site. This impact was to be addressed through an addendum RP for Phnom Penh (as of October 2015 this plan had not yet been submitted). The addendum RP has not been prepared or submitted even as at the date of the present complaint or this eligibility report.

10. A supplementary project (Loan 2602, \$42 million) to establish a new freight and rolling-stock maintenance facility at Samrong Estate, about 10 kilometers west of Phnom Penh was approved on 15 December 2009. Additionally, a grant of \$21.5 million from the Australian Agency for International Development (AusAID) took effect on 5 January 2011.

11. Following a request from the Government, ADB decided to extend the closing date for loan fund disbursements for both the original and supplementary loans to 31 December 2014. This date was further extended to 31 December 2015.

III. THE COMPLAINT

12. The complaint was filed by 23 affected persons (22 from Phnom Penh and 1 from Poipet) all of whom claim to have lost parts or the entirety of their homes to the project and some of whom have been offered resettlement and compensation but have declined to accept that offer. The complaint itemized the harm allegedly done by the project to the affected persons' homes and livelihood, and attributed it to ADB's failure to adhere to its operational policies and procedures on involuntary resettlement.

13. The complainants did not ask the CRP to keep their identities confidential.
14. According to the complainants they fall into two categories:
 - (a) Project AHs living in their homes, in the railway right-of-way in either Phnom Penh or Poipet, that now comprise less than 30 square meters because they were ordered by the Inter-Ministerial Committee (IRC) of the Government to remove part of their homes and other structures from the corridor of impact (COI). They allege that according to the revised resettlement plan, these AHs should have been categorized as fully affected and offered resettlement assistance. Instead, they allege, they were treated as partially affected, and compensated only for the part of the structure that was removed. They state that their homes are too small for their families to live in with dignity and that they lack security of tenure.
 - (b) Project AHs still living in the COI in Phnom Penh that were categorized as fully affected, but who have refused to relocate to the Phnom Penh resettlement site because they allege they were not consulted on resettlement options, and did not agree to move to the Trapeang Anhchanh resettlement site. They claim that this particular resettlement site does not comply with ADB safeguard policies and is unsuitable because it is 20-30 km away from Phnom Penh and does not have satisfactory drainage, road access and other facilities. They also claim that those who moved there previously have been impoverished, and as such, claim that they should be offered a suitable and satisfactory alternative site with the necessary facilities and closer to Phnom Penh. In support of their complaint, they cite the findings from the CRP in its compliance review report on this project dated 14 January 2014.³

**Figure 2: Reduced Size of the Houses in the Corridor of Impact in Phnom Penh
(Source: CRP and OCRP)**



³ Complaint, Appendix 1.

15. The complainants alleged that, owing to ADB's noncompliance with its operational policies and procedures on involuntary resettlement, the project has caused them the following direct and material harm:

- (i) Lack of tenure to the current plots they have within the right-of-way rendering their occupation precarious and liable to eviction at any time without compensation or resettlement;
- (ii) Their current homes (or what is left of them after the project demolished parts) are unviable and fall below the project's acceptable housing square area;
- (iii) The promised addendum RP for the Phnom Penh area (referred to in para. 9 above) has not materialized, leaving the complainants without the benefits of the ADB's involuntary resettlement policy; and
- (iv) The current Trapeang Anchanh site has been found by the CRP, in its compliance review report for this project dated 14 January 2014, to be inadequate and has led to impoverishment of other AHs who moved to the said site. As such, asking the complainants to move to this same resettlement site, allegedly, will be a clear violation of the ADB's involuntary resettlement policy.

16. The complainants acknowledge that these complaints would be excluded under the Accountability Mechanism Policy⁴ if they were "about matters already considered by the CRP, unless the complainants have new evidence previously not available to them and unless the subsequent complaint can be readily consolidated with the earlier complaint."⁵ They also acknowledge that the previous compliance review of the project by the CRP included the subject of this present complaint. However, they contend that "not all issues and grievances were addressed"⁶ and that the "CRP did not address or make findings and recommendations relating to the specific situation described in this complaint."⁷ The complainants state that they believe their "situation was not addressed because at the time the CRP was conducting its investigation," the Government and ADB "had committed to developing an addendum RP for the remaining AHs in Phnom Penh still need to be resettled."⁸ They further contend that "in its final report, the CRP referred to the addendum RP as "pending" and that some "18 months after the CRP final report was published, the addendum RP has not been produced" and that "the complainants have never been consulted on its preparation."⁹ They also assert that "it is unclear why an addendum was never promised for the families in Poipet that face the same situation, and why this was not addressed by the CRP."¹⁰ They state that "because the matters raised in this complaint were not considered by the CRP, they were also not addressed in the Board's final recommendations or the Management's remedial action plan and to date remain outstanding." The complainants assert that "in addition, new evidence of non-compliance, in the form of an omission to produce addendum RPs in a timely manner for AHs still to be resettled,

⁴ Footnote 2, para. 148(v).

⁵ The Complaint which is Appendix 1 of this report.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

or to communicate a schedule to prepare the same, has led to the harm and anticipated harms,” described in the complaint.¹¹

IV. MANAGEMENT’S RESPONSE

17. In its response to the complaint dated 12 October 2015 (Appendix 2), ADB Management (Management) sought to address the issues raised by the complainants. The thrust of the Management response (see Appendix 2) was that:

- (a) the CRP had already considered the first grievance of mis-categorization in its previous compliance review report dated 14 January 2014 and that Management concedes that under the Resettlement Plans (RPs), a household whose affected house has less than 30 square meters remaining was to be categorized as fully affected and entitled to resettlement assistance and compensation for the entire structure.
- (b) during implementation of the RP, the IRC had applied a modified criterion whereby houses with 25% or more of loss of structure were treated as fully affected, resulting in a number of households whose remaining households fell below the 30 square meters of area being incorrectly treated as partially affected and compensated as such; CRP had considered such mis-categorization as one of the causes of under compensation and had included rectification as part of recommendation 1 of the 14 January 2014 compliance review report for the establishment of a compensation deficit payment scheme which was endorsed by the ADB Board subsequently;
- (c) as part of remediation efforts, the ADB and Government had developed a compensation deficit scheme which included paying compensation deficits for the 30 meter square issue and the Management has continued to be in dialogue with the IRC to implement the recommendation with regard to this issue;
- (d) the addendum RP is one way for the Government to remediate the deficit compensation resulting from this issue and that as recently as 18 September 2015, the ADB management had requested IRC to address this issue and the IRC had agreed to consider the same and respond to it.
- (e) with regard to the second grievance, the CRP’s findings in the previous compliance review report on this project that the resettlement site facilities required to be improved was endorsed by the Board and included as part of the remediation in the Management’s action plan; and
- (f) since then steps have been taken by the Government to improve facilities (including access roads, internal roads and drainage) as well as livelihood restoration efforts through the expanded income restoration program (EIRP) at the resettlement sites and these actions have been supervised by the ADB addressing the concerns of the complainants about the sites.

¹¹ Ibid.

18. Accordingly, the Management contends that “the matters referred to in the complaint have already been considered by the CRP and there is no new evidence that has not been previously considered by the CRP” and that “the Board-approved recommendations include measures to address the same” and that “pursuant to the Board-approved recommendations, ADB is making efforts with the Government to implement the remedial actions in full.”¹²

19. The CRP considered the details provided in the Management response in assessing the evidence of noncompliance and related harm presented in section V below.

V. ELIGIBILITY

20. The complaint gave adequate information for determining whether the complaint is within the mandate of the compliance review function of the Accountability Mechanism Policy. The CRP reviewed the complaint, the Management’s response to the complaint, and relevant documents; interviewed the complainants, ADB staff of SERD and CARM, as well as relevant government officials and visited some affected areas in Phnom Penh during the eligibility mission to Cambodia.

21. According to the Accountability Mechanism Policy, para. 138(i), any two or more people in a borrowing country where the ADB-assisted project is located, can file a complaint, who are directly, materially and adversely affected. In this case there are 23 complainants. For a complaint to be considered eligible for compliance review, para. 179 of the policy states that “the CRP must be satisfied that the complainant meets all the eligibility criteria, satisfies the scope, and does not fall within the exclusions (para. 142 and paras. 145-149).” Para. 179 of the policy further states that “[the] CRP must be satisfied that (i) there is evidence of noncompliance; (ii) there is evidence that the noncompliance has caused, or is likely to cause, direct and material harm to project-affected people; and (iii) the noncompliance is serious enough to warrant a compliance review.” Additionally, the CRP also needs to consider whether the complaint is excluded under the exclusions listed in paras. 142 and 148 of the Accountability Mechanism Policy. Each of these four considerations are addressed in order below.

22. Under the Accountability Mechanism Policy, a compliance review has two stages. Eligibility is determined in the first stage. A request that is determined to be eligible proceeds to the second stage, involving a full investigation. In both stages, the CRP is required to address much the same issues enumerated in para. 21 above. The policy does not provide guidance on the weight of evidence required for an eligibility determination. But consideration of the scheme of the Accountability Mechanism Policy makes it clear to the CRP that what is required at the eligibility stage is adequate (*prima facie*) evidence to establish elements set out in para. 21 above to warrant further investigation. It is important to note that the CRP’s determination of eligibility is based on *prima facie* evidence, as full evidence would require more extensive work during the post-eligibility investigation phase.

A. Evidence of Noncompliance

23. With regard to this complaint, there is no dispute between the complainants and the Management that the 30 square meter criterion was not followed in categorizing some partially affected houses for the purpose of compensation under the RP. It is agreed by the complainants and Management that this was a noncompliance with ADB’s operational policies and procedures and the agreed RP. With regard to the second grievance set out above, the

¹² See ADB Management response in Appendix 2 of this report.

complainants and Management also agree that the Phnom Penh resettlement site and other sites were deficient in facilities. It is also not in dispute that the CRP made a finding in its 14 January 2014 compliance review report that affected persons who moved to the resettlement sites were impoverished due to a number of reasons, including inadequate compensation, the lack of adequate facilities at resettlement sites and the insufficiency of livelihood support systems (i.e., the IRP and EIRP).

24. The only disagreement on this issue is with regard to the appropriate remedy for the second category of noncompliance. Some of the complainants assert that they should be provided with an alternative site closer to Phnom Penh and/or adequate compensation in lieu of moving to the resettlement site at Trapeang Anchanh. The Management contends that in keeping with the ADB Board's decision based on the recommendation of the CRP in its 14 January 2014 compliance review report, facilities at the sites have been improved and the EIRP strengthened. Presumably, the Management's position, though not explicit, is that the sites now comply with the ADB's involuntary resettlement policy and therefore are suitable for the complainants to move to. As such no further remedy is needed. The CRP addresses this specific question later in this report.

B. Has Noncompliance Caused Material Harm or Is It Likely to Cause Such Harm?

25. There is no disagreement between the complainants or the Management that the noncompliance referred to above has caused material harm. Mis-categorization of the partially affected houses and the lack of proper compensation under ADB policies had caused harm to the complainants in that category. With regard to complainants in the second category of grievances, they too have not received compensation yet and as such, have suffered material harm, albeit as a result of choices they have made to refuse to move to the offered resettlement site and to take the offered compensation (which the CRP has already found in its 14 January 2014 compliance review report to be insufficient).

C. Were the Complainants Directly, Materially, and Adversely Affected by the Project?

26. Once again, there is no dispute between the complainants and the Management that the complainants were directly, materially and adversely affected by the project. All the complainants lost their houses either fully or partially as a direct result of this project. The alleged harm suffered by the complainants is set out para. 15 above.

D. Exclusions

27. The CRP has examined the exclusions under paras. 142 and 148. The complainants have made several good faith efforts to address the complaints with CARM. The loan closing date for this project is 31 December 2015 and as such the 2-year exclusion period has not yet lapsed. The only provision that may apply is that set out in para 148(v) of the Accountability Mechanism Policy which excludes from compliance review:

“...complaints about matters already considered by the CRP, unless the complainants have new evidence previously not available to them and unless the subsequent complaint can be readily consolidated with the earlier complaint.”

28. The complainants contend that the addendum RP for Phnom Penh (and by analogy for Poipet) has not been issued even after 18 months from the issuance of the CRP compliance review report. There is no dispute that this is the case. They argue that this constitutes new

evidence previously not available to them. But the facts do not support this contention. The CRP is of the view that the term new evidence in para 148(v) of the Accountability Mechanism Policy means information or data that is material to the findings or recommendations made by the CRP in its previous review and is of such a nature that the complainants could not have discovered or known about it before the CRP's previous compliance review report.

29. The addendum RP had not been issued even as at the date of the CRP report and this was stated to be so in the report itself. The addendum RP had not been issued then and was not available then to the CRP as well as the complainants. The CRP, Management and the complainants were fully aware of these facts at the time. That position has not changed. This cannot constitute new evidence. There is no discovery of new information or data that was unavailable to the CRP or complainants at the time of the previous compliance review. The Management agrees that the addendum RP is one way to deal with the complainants grievances. But they also contend that pursuant to the Board decision, based on the CRP's compliance review report, remediation of the complainant's first grievance is covered and will be remediated in bringing the project into compliance. The CRP agrees with this submission of the Management.

30. However, in the CRP's view, the second grievance is also covered by the said Board decision. If, even after the improvement of the facilities of the resettlement site, an affected person still does not wish to move to the offered resettlement site because it is too distant and would be disruptive to their livelihood, that person ought to be offered an equitable and commensurate compensation package or alternate site that will place the person in the same position as before the project impacts were felt. In the CRP's view, other affected persons who accepted to move to the resettlement site were given compensation and a plot of land with good title. An affected person who prefers not to go to that site should receive an alternative equitable package of compensation.

31. In these circumstances, the CRP concludes that both categories of grievances set out in this complaint have been covered and dealt with in the 14 January 2014 CRP report and also in the ADB Board's decision on the same (in particular under Recommendation 1). The CRP also concludes that there is no new evidence revealed in this complaint that is different to the situation as it was on 14 January 2014. The CRP is also satisfied that these grievances – which are real and persistent – need to be – and can be – adequately and urgently addressed under the existing Board decision referred to above. In the CRP's view, the Management (in collaboration with the Government) should take urgent steps to address the grievances by establishing specific time-bound actions. In this sense the current complaint can be “readily consolidated with the earlier complaint” in terms of para. 148(v) of the Accountability Mechanism Policy. Most of the complainants who were interviewed by the CRP during its eligibility mission to Cambodia, agreed with this course of action.

VI. CONCLUSION

32. The CRP finds *prima facie* evidence of noncompliance with ADB's operational policies and procedures and *prima facie* evidence that this noncompliance with ADB policies has led to harm or is likely to lead to future harm. However, the CRP also finds that this complaint is excluded under para. 148(v) of the Accountability Mechanism Policy as it does not present new evidence that was unavailable at the time of the previous CRP report. Since the current complaint can be readily consolidated with the earlier complaint, the CRP recommendations and Board decision, Management should work with the Government to establish specific time-bound actions to remedy these two categories of grievances.

33. The CRP finds that the current complaint is excluded from compliance review under para 148(v) of the Accountability Mechanism Policy and accordingly, finds it ineligible.

34. It is to the credit of the complainants that they filed this complaint. It has allowed both the CRP and the Management to clarify these issues and address grievances that might otherwise have taken longer. The CRP believes that the quickest remedy for these grievances lie in them being addressed via the existing Board decision and remedial action plan.

VII. COMPLIANCE REVIEW PANEL DETERMINATION

35. The CRP determines pursuant to paragraph 179 of the Accountability Mechanism Policy that the complaint is ineligible.

36. The CRP notes, however, that the Management and the CRP interpret Recommendation 1 approved by the Board on 31 January 2014 to encompass remedial actions to bring the two categories of issues raised by the complaint into compliance with ADB's safeguards policy and applicable ADB procedures. Accordingly, the CRP will construe the Recommendation 1 including the remediation of the two categories of issues in the complaint. Management should work with the Government to establish specific time-bound actions for such remediation, and the CRP will closely monitor and report to the Board on progress and compliance thereon accordingly.

/S/Dingding Tang

Chair, Compliance Review Panel

/S/Lalanath de Silva

Part-time Member, Compliance Review Panel

/S/Artraud Hartmann

Part-time Member, Compliance Review Panel

THE COMPLAINT

Complaints Receiving Officer
 Accountability Mechanism
 Asian Development Bank
 6 ADB Avenue
 Mandaluyong City 1550
 Philippines
 Email: cro@adb.org

August 30, 2015

Dear Complaints Receiving Officer,

We, the undersigned complainants, are representatives of families affected by the Greater Mekong Subregion: Rehabilitation of the Railway Project in the Kingdom of Cambodia.¹ Our families are project affected households (AHs), living along the railway in Phnom Penh and Poipet, who are entitled to be resettled but have not been offered a resettlement assistance package in accordance with ADB's Involuntary Resettlement Policy.

As explained below, we have all suffered harm and anticipate further harm as a direct result of the Project, because of acts and omissions of ADB that violate ADB policies. We therefore request compliance review by the CRP.

The matters we are raising in this complaint have not previously been considered by the CRP. In addition, we are presenting new evidence of acts and omissions that was not yet available at the time the CRP was conducting its investigation or when it released its Final Report on the same Project in January 2014.

We fall into two groups of complainants:

- a) Project AHs living in our homes, in the railway right of way (ROW) in either Phnom Penh or Poipet, that now comprise less than 30 square meters because we were ordered by the IRC to remove part of our homes and other structures from the Corridor of Impact (COI). According to the Resettlement Plan, we should have been categorized as "fully affected" and offered resettlement assistance. Instead, we were treated as partially affected, and compensated only for the part of the structure that was removed. Our homes are too small for our families to live in with dignity and we lack security of tenure.
- b) Project AHs still living in the COI in Phnom Penh that were categorized as fully affected, but have refused to relocate to the Phnom Penh resettlement site because we were not consulted on resettlement options, and did not agree to move to the Trapeang Anhchanh resettlement site.

We all wish to resettle and we have the right to resettlement assistance. Those of us from Phnom Penh do not want to move to the Trapeang Anhchanh resettlement site, which is 20-30 kilometers away from our homes and places of work and business. We have strong

¹ Asian Development Bank Loan 2288 and 2602/Grant 0197 [Supplementary].

reason to believe that we will be impoverished and face other negative impacts on our lives if we have to move to this site, particularly given the lack of livelihood opportunities available and the meager assistance provided by the Project. Those of us from Poipet want to be provided with resettlement assistance so that we can move to the Poipet resettlement site.

Direct and Material Harms and Anticipated Harms

We are all living in an extremely precarious tenure situation because of the Project. We have no security of tenure and live under the persistent threat of eviction. Those of us who shifted back into the residual ROW have never been provided with any certificates guaranteeing our security of tenure for five years, as provided in the 2006 Resettlement Plan. Even if we had been given such certificates, this would be an inadequate guarantee that we will not be evicted without adequate resettlement assistance in the future due to the rehabilitation of the railway made possible by the ADB-financed Project. In addition, many of our families now live in homes that are too small by the Project's own standards to be considered viable, and that do not allow us to live in dignity, privacy and security.

We fear that that will be left in these precarious and untenable circumstances indefinitely, or eventually be forcibly evicted without the protections of the ADB Involuntary Resettlement Policy.

For those of us in Phnom Penh, we were promised an addendum to the Resettlement Plan to cover AHs that still need to be resettled for more than two years, but the addendum has not been prepared, despite our repeated requests. We have repeatedly requested information about our status and demanded to be consulted on the addendum to the Resettlement Plan, including on options for resettlement sites, but our requests have consistently been denied.

Previously, we were informed that our only resettlement option was to move to Trapeang Anhchhan, which we continue to believe will cause us grave and irreparable harm, as we have seen happen to our former neighbors who were forced to relocate there. We fear we will face the same risks of indebtedness and impoverishment because we will not be able to continue our jobs or find new ones.

The CRP documented the problems at the Trapeang Anhchhan resettlement site in its Final Report on the compliance review of the Project and subsequent Monitoring Report. In its Final Report, the CRP found people who had been resettled there to be impoverished and in distress.² It found that the drop in income was particularly significant at the Phnom Penh site, because of the distance from the AH's former homes.³ It found facilities, including the access road, waste disposal, health post and the primary school to be inadequate. When the CRP recently visited the site to monitor implementation of the action plan, it found a broken access road subject to flooding and the medical center locked with no staff and no schedule of operations.⁴

² CRP, Final Report on Compliance Review Panel Request No. 2012/2 on the Project, 14 January, 2014, para. 14.

³ Ibid, page vii.

⁴ CRP, First Annual Monitoring Report to the Board of Directors on the Implementation of Remedial Actions for the Project, 6 April, 2015, para 24 and figure 7.

We are convinced that the Enhanced Income Restoration Program, which is based on “Self Help Groups” rather than the provision of alternative employment as recommended by CRP, will not prevent us from falling into poverty. Moreover, IRC intends to end the program by Q4 2015, which is too early for us to receive benefits – even if the program was more effective. Even if the program is extended to Q4 2016, as suggested by the ADB in its TA approved on 15 December 2014, CRP has warned that this is “unrealistically early” to restore the incomes of those who have been participating in the program since 2012, much less those who have yet to be resettled.⁵

We are also concerned that we will face other problems if we are forced to move to Trapeang Anhchhan, including lack of access to basic services and facilities. We hear from our former neighbours now residing at the resettlement site that they cannot afford to pay for connections to basic services, including electricity and piped water, and these issues are not addressed by ADB in its Management Action Plan.

Matters Not Yet Considered by the CRP and New Evidence Presented

The Accountability Mechanism Policy states that the CRP excludes complaints that are “about matters already considered by the CRP, unless the complainants have new evidence previously not available to them and unless the subsequent complaint can be readily consolidated with the earlier complaint.”⁶

The CRP conducted an extremely thorough review of most harms and areas of policy non-compliance relating to the Project after receiving a Request for Compliance Review in August 2012, and set out its findings in its Final Report, dated January 14, 2014. However, not all issues and grievances were addressed. The CRP did not address or make findings and recommendations relating to the specific situation described in this letter. We believe our situation was not addressed because at the time the CRP was conducting its investigation, RGC and ADB had committed to developing an addendum RP for the remaining AHs in Phnom Penh still to be resettled. In its final report, the CRP referred to the addendum RP as “pending”.⁷ However, to date, some 18 months after the CRP Final Report was published, the addendum RP has not been produced and we have never been consulted on its preparation. It is unclear why an addendum was never promised for the families in Poipet that face the same situation, and why this was not addressed by the CRP.

Because the matters raised in this complaint were not considered by the CRP, they were also not addressed in the Board’s final recommendations or the Management Action Plan and remain outstanding.

⁵ CRP, First Annual Monitoring Report to the Board of Directors on the Implementation of Remedial Actions for the Project, 6 April, 2015, para 46.

⁶ Accountability Mechanism Policy 2012, para 148(v).

⁷ Para 105.

In addition, new evidence of non-compliance, in the form of an omission to produce addendum RPs in a timely manner for AHs still to be resettled, or to communicate a schedule to prepare the same, has led to the harm and anticipated harms, described above.

Policy Non-Compliance

We submit the omission to ensure the preparation of an addendum RP based on meaningful consultations with AHs, and other circumstances described above, amounts to non-compliance by the ADB with the Operations Manual F2/BP and F2/OP on Involuntary Resettlement, September 2006.

In particular, the ADB has failed to ensure that “specific opportunities [were] provided for [AHs] to participate in choosing planning and implementation options”⁸ and that “the views of the affected people are taken into account in formulating the compensation and rehabilitation measures.”⁹ ADB has failed to ensure that: “In preparing the resettlement planning documents,...the borrower... take into account the views of affected groups and civil society groups where relevant, including nongovernment organizations.”¹⁰

The ADB has failed to ensure “a revised resettlement plan resulting from a detailed technical design or change in scope of the project” has been made available to AHs¹¹ and/or it has failed to assist in the preparation of resettlement plan to address “unanticipated resettlement impacts” that have “become apparent during project implementation.”¹²

Furthermore, the omission to prepare and implement an addendum RP compliant with ADB policy is inconsistent with the involuntary resettlement policy objectives,¹³ and the requirement to ensure: “If individuals or a community must lose all or part of their land, means of livelihood, or social support systems, so that a project might proceed, they will be compensated and assisted through replacement of land, housing, infrastructure, resources, income sources, and services, in cash or kind, so that their economic and social circumstances will be at least restored to the preproject level.”¹⁴

The ADB did not properly execute its role of assisting and monitoring compliance with ADB’s policies as required by, inter alia, OM F2/OP, paras. 51, 53, 55, 56 and 57.

There may be other policies and procedures with which the ADB has failed to comply. We request that the CRP review all possible areas of non-compliance.

Efforts to Address the Problems with CARM

⁸ OM F2/BP, para. 4(v)

⁹ OM F2/OP, para. 44

¹⁰ Ibid, para. 58(iii).

¹¹ Ibid, para. 44(iii).

¹² Ibid, para 53.

¹³ OM F2/BP, para. 3.

¹⁴ Ibid., para 4(iii)).

We have raised these concerns with CARM in every meeting we have joined since ADB began meeting with us quarterly since the CRP investigation report was adopted by the Board, yet all we have ever been told for the past 18 months is that ADB will discuss our issue with the government.

Most recently, some of us attended a meeting with CARM on June 12, 2015 regarding the Fourth Quarterly Progress Report on the Implementation of the Management Action Plan. During the meeting, we raised our grievances with CARM. A representative from Phnom Penh requested information about the addendum RP and specifically asked the ADB to facilitate a meeting with the IRC to discuss their resettlement entitlements and timeline.

The Country Director acknowledged that our issue has not been resolved, but was not able to say when it would be. In response to queries from a Phnom Penh representative, he said that he is seeking confirmation from the government that they understand that it is their responsibility to resolve the issue, but he does not think that the IRC would agree to a meeting with the AHs with the ADB as facilitator. In response to a representative from Poipet he said that the Grievance Redress Mechanism needs to work. We were not satisfied with these responses.

In addition, representatives of the Phnom Penh families wrote to CARM on 27 April, 2015 requesting that we be consulted on a solution. In its response on 6 May, ADB stated “We will be in touch shortly”. No one has been in touch with us. (See letters attached.)

Finally, in a letter to the Country Director of CARM, dated April 6, 2015 (also attached), IDI and EC enquired on behalf of Requesters about, inter alia, the status of the addendum to the Phnom Penh RP and whether the families still to be resettled in Phnom Penh will be presented with meaningful resettlement options “that will not make them worse off.”

IDI and EC received a letter from CARM on June 11, 2015. In the letter, CARM responded to the above query as follows: “Eligibility and entitlements of AHs ...eligible for assisted relocation in relevant sections of the project are indicated in the resettlement plan. ADB is in discussion with IRC on these matters.”

We have heard similar responses from the ADB for years, and firmly believe that our issue will not be resolved unless Management is required by the Board to enforce the contractual requirement to comply with ADB’s safeguard policies, as stipulated in the Project Loan Covenants, with respect to our situation.

Outcomes sought

All of us want to be promptly and meaningfully consulted on addendums to the RP (for Phnom Penh and Poipet, respectively), which should meet the standards of the ADB’s Involuntary Resettlement Policy. We have never been consulted on resettlement options in the past.

Those of us in Poipet want to be offered a plot at the Poipet resettlement site and other resettlement assistance, as long as the conditions at the site are improved as required by the Board’s earlier recommendations.

Those of us in Phnom Penh do not want to be impoverished, so we will not move 20-30 kilometers away from our current homes and livelihoods to the Trapeang Anhchhan resettlement site. However, we cannot remain in our current precarious and untenable situation either. The Project has left our families living in inadequate housing conditions and extremely vulnerable to displacement without application of safeguards that “ensure [we] will be at least as well off as [we] would have been in the absence of the project.”¹⁵ We have a right to be resettled to a location with ample economic opportunities, with security of tenure and with appropriate assistance so that we are not impoverished.

We have told the IRC and the ADB many times that we want to be resettled to Stung Meanchey, which is not so far away and where we can earn a living for our families. A site in Stung Meanchey was included in the original 2006 Resettlement Plan but was apparently dropped in the 2010 updated RP because it was too expensive to purchase. The result is that our families are being made to bear those costs by being forced out of the city and cut off from its economic opportunities. It is our expectation that rather than having to bear these costs, resettlement should be used as a development opportunity, as required by ADB’s Involuntary Resettlement Policy.

We urge the CRP to recommend that addendums to the RP for Phnom Penh and Poipet be prepared for all AHs still living along the railway, and that the addendums be prepared in full consultation with AHs and meet the standards of the ADB’s Involuntary Resettlement Policy, including the requirement to ensure that AHs’ “economic and social circumstances will be at least restored to the pre-project level.”¹⁶ We also urge the CRP to recommend a timeline for preparation, consultation, approval and implementation of the addendum RPs.

Correspondence and Contact Information

We are representing ourselves in this matter and do not seek anonymity. However, we have prepared this complaint with support from Equitable Cambodia (EC) and Inclusive Development International (IDI) and have asked them to continue to provide us with assistance and advice throughout the complaints process. We request that you address all correspondence on this matter to Mr. Eang Vuthy (vuthy@equitablecambodia.org), Mr. David Pred (david@inclusivedevelopment.net) and Dr. Natalie Bugalski (natalie@inclusivedevelopment.net), who will transmit the correspondence to us. We also request that you provide us with Khmer and English versions of written correspondence, where possible.

Sincerely,

[Requesters’ names and thumbprints attached herewith]

¹⁵ The Involuntary Resettlement Policy Objectives. OM F2/BP, para. 3

¹⁶ OM F2/BP, para. 4(iii)

ADB MANAGEMENT'S RESPONSE



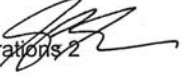
Asian Development Bank

Memorandum

Office of the Vice-President
(Operations 2)

12 October 2015

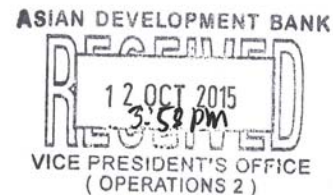
To: Dingding Tang
Chair, Compliance Review Panel and Concurrently Head, OCRP

From: Stephen P. Groff 
Vice President, Operations 2

Subject: **Complaint on GMS: Rehabilitation of the Railway in Cambodia Project**
(Loans 2288/2602/8228-CAM, and Grant 0187-CAM)
-Management's Response

With reference to your letter dated 11 September 2015 forwarding the complaint related to the **GMS: Rehabilitation of the Railway in Cambodia Project**, please find enclosed ADB Management's response.

cc: Mario Sander, Chair, Board Compliance Review Committee
Anthony Baker, Executive Director for Cambodia
Director General, SERD
Senior Advisor to the President



**Management Response to the Complaint Requesting Compliance Review on GMS:
Rehabilitation of the Railway in Cambodia Project (Loans 2288/2602/8228-CAM, and Grant
0187-CAM)**

A. INTRODUCTION

1. The Compliance Review Panel (CRP) requested on 11 September 2015 ADB Management's Response to the referenced Complaint dated 30 August 2015 (the Complaint). Management's Response is provided herewith indicating that ADB is taking necessary actions related to the matter referred to in the Complaint to bring the Project into compliance with ADB's relevant policies and procedures. These actions are pursuant to the ADB Board of Directors' decision on the recommendations (the Board Recommendations)¹ set out in Section X of the Compliance Review Panel Final Report for the subject Project (the CRP Final Report).²

B. THE COMPLAINT

2. The Complaint presents two grievances. The first is related to the mis-categorization of some houses as being partially affected rather than fully affected. The second is regarding certain households in Phnom Penh who are stated to be fully affected but consider that relocation to the provided resettlement site in Trapeang AnhChanh is unsuitable and that other resettlement site options should be provided.

(i) First Grievance – Mis-Categorization

3. The first grievance, of mis-categorization of some households as being partially affected, has already been considered by the Compliance Review Panel (CRP). The Project's Resettlement Plans (RPs) provides that households whose affected houses have less than 30m² remaining are to be categorized as fully affected and entitled to resettlement assistance and compensation for the entire structure. However, during RP implementation, Government's Inter-ministerial Resettlement Committee (IRC) applied a modified criterion whereby houses affected by 25% or more loss of structure were treated as fully affected. This resulted in a number of households whose remaining affected houses were less than 30m² being incorrectly categorized as partially affected and compensated as such.

4. The CRP considered the mis-categorization as one of the causes of under-compensation. CRP Final Report's "Conclusions concerning Compensation, Livelihood and Income Restoration, and Indebtedness" refers to this matter under "adequacy of compensation for property losses" and the Board "Recommendation 1: Establish a compensation deficit payment scheme" specifically references this type of mis-categorization.³

5. ADB, in consultation with the Government, developed a set of remedial actions to implement the Board Recommendations,⁴ which include the review of the compensation that had been paid to each of the Project's affected households (AHs). The scope of the review included AHs impacted by the mis-categorization and under-compensation (described in para 3 above, which will hereinafter be referred to as "30m² issue"). ADB remains in dialogue with IRC

¹ ADB. 2014. Decision of the Board of Directors of the Asian Development Bank. 31 January. Manila.

² ADB. 2014. *Final Report on Compliance Review Panel Request No.2012/2 on the Greater Mekong Subregion: Rehabilitation of the Railway Project in the Kingdom of Cambodia*. 14 January. Manila.

³ *Supra* 2, at paras. 132, 154-157, 161 et seq, section 6 of p.71 and 266.

⁴ ADB. 2014. Joint Memorandum of VPO2 and DG SERD to the Board of Directors, Attachment 2. 11 April. Manila.

on the 30m² issue, and continues to emphasize the need to address this issue at several informal discussions with IRC.

6. Most recently, on 18 September 2015, ADB sent a letter to IRC advising that addressing this issue is a requirement of the approved RP and an outstanding matter requiring their attention to bring the Project into compliance (Appendix 1). ADB reiterated that this falls under the Board Recommendation 1: Establish a compensation deficit payment scheme. IRC agreed that they would review the matter presented in ADB's letter, and inform ADB of its position.

7. The Complaint makes mention of an Addendum RP to provide resettlement assistance to AHs in Phnom Penh who had been mis-categorized as partially affected. The Addendum RP was to correct the mis-categorization that was identified during RP implementation. This was one possible way for the Government to address this shortcoming in implementation. The Board Recommendation 1: Establish a compensation deficit payment scheme requires review of all types of mis-categorization, including the 30m² issue. Accordingly ADB is addressing this issue within the remedial actions.

(ii) Second Grievance – Resettlement Site Options

8. Regarding the second grievance of resettlement site options in Phnom Penh, the Trapaeng AnhChanh resettlement site was selected by IRC over other potential sites based on presence of services nearby (school, market, health center, pagoda), and the availability of land. Shortcomings of the resettlement sites, including Trapaeng AnhChanh, were set out in the CRP Final Report. The Board "Recommendation 2: Improve facilities at resettlement sites" and "Recommendation 6: Implement the expanded income restoration program (EIRP) in a sustained and sustainable manner" recommend measures to address the shortcomings, covering facilities and livelihood restoration, which formed part of the remedial actions. ADB has actively engaged with the Government and provided consulting resources to assist in the improvement of the resettlement sites. The Government has improved access roads, internal roads and drainage at the resettlement sites. ADB monitored the improvement of resettlement site facilities. ADB is continuing assistance to improve operations and maintenance of the improved resettlement site facilities and to support the sustained implementation of the EIRP.⁵

C. CONCLUSION

9. As described above, in ADB management's assessment, the matter referred to in the Complaint has already been considered by the CRP and there is no new evidence that has not been previously considered by the CRP⁶. The Board-approved recommendations include measures to address the same. Pursuant to the Board Recommendations, ADB is making efforts with the Government to implement the remedial actions in full.

Attachment: ADB's letter to IRC dated 18 September 2015

⁵ As elaborated in the Fifth Quarterly Progress Report on the status of the remedial actions as of 31 July 2015.

⁶ ADB. 2012. *Accountability Mechanism Policy*. at para.148(v). Manila.

ATTACHMENT



18 September 2015

H.E. Nhean Leng
Under Secretary of State
Chairman of the Inter-Ministerial Resettlement Committee
Ministry of Economy and Finance
Royal Government of Cambodia

Dear Excellency:

CAMBODIA: Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project (L2288/L2602) – Implementation of the Remedial Actions to implement the Board-approved compliance review Panel's (CRP) recommendations – Issue related to the implementation of the Resettlement Plan in a section in Phnom Penh (30 m2 rule).

During implementation of the ADB-approved Resettlement Plan for a Phnom Penh section in 2011, ADB found non-compliance related to the application of the 30m2 rule for AHs in the right-of-way (ROW).

This was also raised in the CRP Final Report (para 266) and footnote 384.

We would like to inform IRC that ADB's position is that main house structures that were affected and had less than 30m2 remaining floor area should be treated as fully affected. Accordingly those affected households are entitled to the option of assisted resettlement as described in the approved resettlement plan. There have been differing views regarding the extent to which the 30m2 issue is addressed in the ADB Board approved CRP's Recommendation 1 (Establish a compensation deficit payment scheme). However, irrespective of such considerations, the Loan Agreement requires that full implementation of compensation and resettlement entitlements as set out in the approved resettlement plan for such households is required.

More details on this aspect are provided in the Attachment. We would request IRC's consideration to implement the required corrective actions. We would be happy to discuss how ADB could support IRC to implement the corrective actions. Please do not hesitate to reach us for any such support.

Sincerely,


Hideaki Iwasaki
Director
Transport and Communications Division
Southeast Asia Department

cc: Mr. Im Sethyra, Director of Resettlement Department, MEF

ASIAN DEVELOPMENT BANK
6 ADB Avenue, Mandaluyong City
1550 Metro Manila, Philippines
Tel +63 2 632 4444
Fax +63 2 636 2444

Attachment

Brief on the 30 m2 issue

During implementation of the ADB-approved Resettlement Plan for a Phnom Penh section in 2011, ADB found non-compliance related to the application of the 30m2 rule for AHs in the right-of-way (ROW).

IRC, without ADB's concurrence, used its own formula whereby AHs whose main structure/house are affected 25% or more were entitled to the option to resettle out of the ROW to resettlement sites.

The approved Resettlement Plan entitlement matrix states that for AHs with affected houses "the minimum viable size to reorganize is 30m2", meaning that those with affected houses with less than 30m2 remaining are considered fully affected.

As such, in follow up letter to HE Nhean Leang on 15 August 2011, ADB informed its interpretation on the 30m2 rule, stating that:

- a) For houses and shops that are more than 30 sq.m. before the project:
 - An affected structure (house and shop) is deemed viable for continued use when the remaining unaffected area of the main structure is at least 30 m2 and is still basically intact.
- b) For houses and shops that are less than 30 m2 before the project:
 - When the affected portion of said structure is only the extended eaves or staircase/steps protruding from the main structure, it is considered partially affected because the loss of said extended eaves, etc, will not compromise the integrity of the main structure, and the same is basically intact.
 - When any part of the main structure is affected (walls, posts, main roof), then the entire structure has to be acquired.

In September 2011, IRC advised ADB mission that it identified 248 eligible AHs under the 30m2 rule and agreed to prepare an Addendum RP covering these cases which was expected to take 10-12 months to prepare.

On 30 November 2011, the IRC, along with the Deputy Governor of the Municipality of Phnom Penh met with AHs affected by the 30 m2 minimum viable space for houses in Daum Penh District; Sen Sok District; Russey Keo District; and Taul Kork District. In this meeting, IRC explained to the AHs the 30 m2 minimum viable space rule and relocation options available to the AHs; First option is that AH could opt to remain in their present location outside the COI, having already received compensation for structures inside the 3.5 meter COI, and will be entitled to no further compensation or assistance. Second option is that AHs will relocate to the Project relocation site and receive 105 m2 plot of land and compensation based on the actual remaining structure at replacement cost.