

## **Annex: Comparative analysis of the ADB Policy on Indigenous Peoples**

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### **Objectives:**

The purpose of this analysis is to compare the existing ADB safeguard policy on Indigenous Peoples with other IFI policies on Indigenous Peoples and with related international standards and best practice on indigenous peoples and development.<sup>i</sup> Comparative comments focus on useful elements that need to be strengthened and on gaps and weaknesses that must be addressed in an updated and improved version of this important safeguard policy at the ADB.<sup>ii</sup>

The analysis examines the existing ADB policy with other IFI and related international standards in twelve critical areas relating to: (1) policy coverage, (2) identification of indigenous peoples, (3) free, prior and informed consent (FPIC), (4) social assessment and baseline studies, (5) key safeguards, (6) land and territorial rights, (7) customary and collective rights, (8) human rights and rights-based approaches, (9) participation and information disclosure, (10) benefit sharing, (11) accountability and (12) monitoring and compliance.

### **ADB documents consulted:**

*Indigenous Peoples*, ADB Policy (1998) [http://www.adb.org/Documents/Policies/Indigenous\\_Peoples/ADB-1998-Policy-on-IP.pdf](http://www.adb.org/Documents/Policies/Indigenous_Peoples/ADB-1998-Policy-on-IP.pdf)

*Indigenous Peoples*, Operations Manual, Bank Policies (BP), OM Section F3/BP, September 2006  
[http://www.adb.org/Documents/Manuals/Operations/OMF03\\_25sep06.pdf](http://www.adb.org/Documents/Manuals/Operations/OMF03_25sep06.pdf)

*Safeguard Policy Update: a discussion note*, ADB, October 2005 <http://www.adb.org/Documents/Policies/Safeguards/discussion-note.pdf>

The ADB safeguard policy on indigenous peoples is compared with:

- UN Declaration on the Rights of Indigenous Peoples (as adopted by the UN Human Rights Council, June 2006)
- General principles of international law on the human rights of indigenous peoples
- IFI, UN agency and other multilateral policies on Indigenous Peoples (World Bank (IBRD/IDA), World Bank (IFC), IADB, UNDP, EU)
- Other IFI safeguard policies and international development agency policies of relevance to Indigenous Peoples<sup>iii</sup>
- Report of the World Commission on Dams (2000)
- Report of the Extractive Industries Review (EIR) (2003)
- Relevant recommendations of the United Nations Permanent Forum on Indigenous Issues (UNPFII)

ADB Policy on Indigenous Peoples (1998) and OM Section F3/BP issued on 25 September 2006 (mandatory provisions are marked with an asterisk)*	Comments and comparative analysis
<p><b>1. Coverage, principal objectives and policy trigger</b></p> <p>Applies to projects in the both the public and private sector, including financial intermediaries, and "...applies to all project components, regardless of whether the source of financing is ADB, its co financiers, or the government" [V.A.32/OM.BP/OP.A.1 and OM.OP.B.4.20 and OM.OP.B.4.21]</p> <p><u>Objectives and scope:</u></p> <ul style="list-style-type: none"> <li>• To recognize the potential vulnerability of indigenous peoples in the development process</li> <li>• To ensure that indigenous peoples have opportunities to participate in and benefit equally from development</li> <li>• To aim to achieve the greatest possible poverty reduction impacts possible</li> <li>• To promote the participation of indigenous peoples in project preparation and implementation</li> <li>• To avoid negatively affecting indigenous peoples</li> <li>• To provide effective safeguards to mitigate against and minimise negative impacts that are unavoidable</li> <li>• To provide adequate and appropriate compensation when a negative impact is unavoidable</li> <li>• To ensure that development initiatives affecting indigenous peoples are compatible with the affected peoples' culture and social and economic institutions, and commensurate with the needs, aspirations and demands of affected peoples [V.A.31/OM.BP.C.6, BP.C.8, BP.D.9 and D.10]</li> </ul> <p><u>BP is triggered under the Initial Poverty and Social Assessment (IPSA) process</u>, which should address definition and identification of indigenous peoples (OM.OP.B.1.8). The policy <i>requires</i> that each stage of a project <i>should</i> be screened in order to ascertain its impact on indigenous peoples, including (i) the project identification stage, (ii) an initial poverty and social assessment (IPSA) during the fact-finding prior to the project preparatory technical assistance (PPTA) (OM.OP.B.1.6)* <b>[Note here the contradictory use of "require" and "should"]</b></p> <p>"When project sponsors and project-affected indigenous peoples have serious differences over project design and implementation, adequate time <i>must</i> be allowed for the government or the project sponsor to resolve these differences, before ADB commits its support for the project" [OM.OP.C.23]*</p> <p>Notwithstanding this precondition for ADB project approval, the overall thrust of the policy and its trigger mechanisms still appear to depend to a large extent on national criteria and policies and on borrower government priorities. The 1998 policy stipulates, for example:</p> <p>"In its operations, the Bank <i>must</i> recognize and respect the sovereignty of its member countries, including national legislation and policy relating to indigenous peoples and at the same time, recognize a responsibility for ensuring equality of opportunity for indigenous peoples and that its operations and assistance to developing member countries (DMCs) do not negatively affect the welfare and interests of indigenous peoples" (emphasis added)" (I.4)*</p> <p>"At the national level, in some cases, new laws, policies, and other measures may be necessary to reconcile competing demands and conflicting interests, especially if interests of indigenous peoples are to be protected. In any case, however, the Bank <i>must</i> respect the will of governments, including legislation and policy that exists and the power of eminent domain that governments possess. Country programs and project selection will be developed in cooperation with governments. When difficulties are encountered, the Bank may be able to provide guidance or assistance through mechanisms such as policy dialogue and technical assistance" [IV.A.21]*</p>	<p><b><u>Consistency with international standards</u></b></p> <ul style="list-style-type: none"> <li>• Objective to ensure equitable and culturally appropriate benefit sharing among indigenous peoples affected by or involved in development operations.</li> <li>• Objective to <i>avoid</i> negative impacts</li> <li>• Application of the safeguard to <u>all</u> ADB loan and other financial and technical operations</li> </ul> <p><b><u>Gaps and weaknesses:</u></b></p> <ul style="list-style-type: none"> <li>• The policy does <u>not</u> aim explicitly to uphold and safeguard the rights of indigenous peoples as do other IFI and development agency policies (IBRD-IDA; IFC, IADB, UNDP).</li> <li>• Though the objective of the policy is to avoid negative impacts, there are no corresponding <i>requirements</i> for such avoidance elsewhere, just requirements to mitigate and compensate negative impacts</li> <li>• The policy in effect applies an outdated narrow mitigation and compensation approach</li> <li>• The policy trigger is not well-defined and leaves a high degree of discretion based on the general requirement for project screening under the IPSA process. Other IFIs have more precise and objective triggers (e.g., IBRD/IDA OP 4.10).</li> <li>• Application of policy safeguard requirements and even the policy trigger appears to depend partly on the subjective or arbitrary discretion of borrower governments (see #2 below)</li> </ul> <p><b><u>Recommendations:</u></b></p> <ul style="list-style-type: none"> <li>• Adopt a rights-based framework for ADB safeguard objectives and its policy requirements</li> <li>• Use objective criteria to define the policy trigger. Trigger criteria must address not only project-based operations, but also other ADB operations.</li> <li>• Make clear distinctions between mandatory and optional policy provisions.</li> <li>• Remove loopholes that give discretion to borrowers or clients as to where safeguard standards may or may not apply.</li> <li>• Ensure standards conform with international standards, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)</li> <li>• Establish regional consultations with indigenous peoples' organisations in Asia to identify where necessary and progressive revisions to the ADB policy should be made</li> <li>• Ensure revised policy provisions are acceptable to indigenous peoples and they consider them to adequately safeguard their rights and interests (see # 6 below)</li> </ul>

<p><b>2. Identification of Indigenous Peoples</b></p> <p>ADB defines "indigenous peoples" as: "...groups with social or cultural identities distinct from that of the dominant or mainstream society." The ADB states: " 'Indigenous peoples' is a generic concept that includes cultural minorities, ethnic minorities, indigenous cultural communities, tribal people, natives, and aboriginals." [OM.BP.B.2]. The introduction to the 1998 policy and 2006 OM guidelines do note a wide range of elements that define indigenous peoples, including self-identification and close attachment to land and territory (Section II: paras 7 through 10.)</p> <p>In the end, however, <u>the 1998 policy leaves the definition of indigenous peoples up to a borrower's national legislation and national development policies</u> [ II.11].</p> <p>The serious problems with the criteria and procedures for identification of indigenous peoples the 1998 policy remain in the 2006 Operations Manual, which affirms that national legislation "usually" provides a basis for defining indigenous peoples.</p> <p>On the more positive side, the OM clarifies that: "The government, regional <i>and national indigenous organizations</i>, NGOs, and relevant experts <i>must</i> be consulted to ensure appropriate identification of indigenous peoples who are, or are likely, to be affected by a development intervention in a developing member country (DMC)." (OM.BP.B.4)*</p> <p>The OM advises that: "National legislation includes constitutional, statutory, and customary law, and international conventions to which the country is a party" [OM.BP.B.4]</p>	<p><b>Consistency with international standards</b></p> <ul style="list-style-type: none"> <li>• The (apparent) mandatory requirement in the 2006 OM on the need to consult with national indigenous organizations in the screening and identification processes is important and should be strengthened.</li> <li>• The recognition that national laws encompass ratified international conventions is important</li> </ul> <p><b>Gaps and weaknesses:</b></p> <ul style="list-style-type: none"> <li>• Continued ADB reliance on borrower legislation as the principal identifier of indigenous peoples and as the trigger for the policy is problematic and does not meet international standards</li> </ul> <p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>• Eliminate policy provisions which enable governments and their national economic and development and other national policies to determine who are or are not indigenous peoples</li> <li>• Use self-identification as one principle criterion for defining indigenous peoples</li> <li>• Use objective criteria to aid identification of indigenous peoples</li> <li>• Keep the mandatory requirement to consult with national indigenous organisations and expand this to include "local indigenous organisations" as well.</li> <li>• A revised definitions section should define "applicable legal norms" and recognise these include international norms and jurisprudence as well as intergovernmental declarations on the rights of indigenous peoples.</li> </ul>
<p><b>3. Free, prior and informed consent (FPIC)</b></p> <p>There is <u>no</u> requirement for FPIC or prior agreement in the existing ADB policy.</p> <p>The 1998 policy does note, however, that "Initiatives <i>should</i> be conceived, planned, and implemented, <i>to the maximum extent possible</i>, with <b>the informed consent</b> of affected communities, and include respect for indigenous peoples' dignity, human rights, and cultural uniqueness" (V.A.31)</p> <p>Even the aspirational principle of prior consent included in the 1998 policy is <u>lost</u> in the Operational Manual.</p>	<p><b>International standards and best practice:</b></p> <p>Indigenous peoples' right to prior consent flows in international law from their right to self-determination and their collective property rights to lands and natural resources. The UNDRIP establishes that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their <i>free, prior and informed consent</i> before adopting and implementing legislative or administrative measures that may affect them" (Article 19). International law prohibits any relocation of indigenous peoples without their prior consent (UNDRIP, Article 10). Where these guarantees are absent, such measures would be arbitrary and therefore unlawful. Special protection should be afforded to indigenous peoples given their special dependency on and attachment to their lands.</p> <p>The accepted FPIC standard for indigenous peoples has been incorporated in the policies of the UNDP and the EU. It is also adopted by the IADB in its policy on Involuntary Resettlement. FPIC is now accepted as a fundamental safeguard for indigenous peoples in development under best practice standards in the private sector (e.g., FSC, Roundtable on Sustainable Palm Oil etc etc). The standard is likewise recommended in recent sector reviews, including the World Commission on Dams and EIR.</p>

**3. Free, prior and informed consent (FPIC) [Continued]**

Both the WCD and EIR reviews underline that FPIC does not apply to just one point in the project cycle, but rather applies at different stages throughout project preparation. The WCD criteria, for example, establish that FPIC for indigenous peoples should be obtained at each of the five critical decision points during the project cycle.

The World Bank and IFC have accepted the need for special protections for indigenous peoples, including requirements for “broad community support” (BCS) for all World Bank projects (except policy development loans) and good faith negotiation in all high-risk IFC operations. The World Bank, affirms that “...the Bank provides project financing *only* where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples” (OP 4.10). The IFC requires its client to: “enter into good faith negotiation with the affected communities of IPs, and document their informed participation and the successful outcome of the negotiation” (PS7:13). This process of good faith negotiation includes “**mutually acceptable procedures for the negotiation**” (PS7 – GN7: G25).

This IFC standard applies to all high risk projects affecting customary and traditional lands and for all projects involving physical location, and economic displacement caused by land acquisitions. It also applies to the commercial use of indigenous knowledge and cultural resources. Both IBRD and IFC policies require that informed consultation a good faith negotiation must be *culturally appropriate, involve indigenous peoples’ representative bodies, be inclusive by age and gender and provide sufficient time for indigenous peoples’ collective and customary decision-making processes.* (See also # 9 below).

**Gaps and weaknesses:**

- The ADB policy fails to uphold the accepted international standard of free, prior and informed consent (FPIC) and falls below the standards of other international agencies and IFIs.

**Recommendations:**

- Incorporate the accepted international standard of FPIC in an updated policy and use this precise term as accepted in international law
- Apply the FPIC safeguard to all the resettlement activities that may affect indigenous peoples. This must apply to both physical relocation and economic or cultural displacement
- Establish that the ADB will only support projects that have the prior consent of affected indigenous peoples
- Apply the FPIC safeguard at each stage of the project cycle
- Expressly prohibit forced relocation
- Define the components of prior consent and good faith negotiation
- Ensure respect for collective and customary decision-making processes and involve marginalised groups within indigenous societies
- **Require independent third-party verification mechanisms to document the existence or absence of prior consent.**

#### 4. Social Assessment and baseline studies

Initial poverty and social assessment (IPSA) is required for every development project (which) ...*should* be undertaken as early as possible in the project cycle...”.... “This will provide the basis for including an appropriate social design in the project” [B.1.34]

“Clear mechanisms for accurate and objective analysis” of the circumstances of affected indigenous peoples *should* be prepared in both projects with potential adverse impacts and projects of potential benefit to indigenous peoples [OM.BP.D.10.iii]

An ISA and its component social analysis *must* provide information on existing land and resource rights and analyze “the problems with” and “likely positive and negative impacts on...rights to land and natural resources” [Appendix I] [This review has not been able to determine the status of these 1998 appendices in the ADB safeguard framework, nor whether they are binding or optional for ADB staff and consultants]

An indigenous peoples development plan (IPDP) “should include” a legal framework study [Appendix]

An “appropriately prepared IPDP *will* include...consideration in the project design, of local patterns of social organization, cultural beliefs, ancestral territory, and resource use” [Appendix] [again, it is not clear if this is mandatory or not]

Projects are categorised into A, B or C as follows: (i) **Category A**. Such projects are expected to have significant impacts (ii) **Category B**. Such projects are expected to have limited impacts. (iii) **Category C**. Such projects are not expected to have impacts on indigenous peoples, and therefore do not require special provisions. [OM.OP.B.1.4]

The 2006 OM clarifies that the impacts on indigenous peoples will be considered “significant” if they positively or negatively (i) affect their customary rights of use and access to land and natural resources; (ii) change their socioeconomic status; (iii) affect their cultural and communal integrity; (iv) affect their health, education, livelihood, and social security status; or (v) alter or undermine the recognition of indigenous knowledge.” [OM.BP.12 and OM.OP.B.1.4]

If indigenous peoples are affected, the policy requires that “**in depth poverty and social assessment**” is carried out during the project preparation or when “due-diligence” is performed” [OM.OP.B.1.6] [Again, here there is some lack of clarity as to whether the full social assessment is required in all cases where impacts on indigenous peoples are anticipated, or just certain cases. This is implied by the OM language, but not entirely clear]

#### International standards and best practice

The Convention of Biological Diversity (CBD) has developed best practice *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.*

IFIs like the African Development Bank (2001) and the private sector arm of the World Bank, the IFC, have already adopted standards for integrated project-level **Social** and Environmental Assessment (SEA) as part of their safeguard procedures. These policies contain specific mandatory requirements for information disclosure, public consultation and the informed and *culturally appropriate* participation of affected indigenous communities in the assessment process. They also require, *inter alia*, the use of independent experts to assist in social assessment for high-risk projects, expert reviews to ensure project categorisation is accurate, analysis of direct and indirect risks and impacts for each stage of the project cycle, and safeguards to ensure selection of the “**NO project alternative**” where assessment finds total social and cultural costs are high and cannot be adequately ameliorated or compensated.

IFC social assessment includes a **study of the customary land and resource tenure system** of affected communities of IPs “within the project area of influence” (PS7 – G7:G23). IFC policies advise that the social assessments for their projects should draw on international best practice like the *Akwé: kon Guidelines*. The IFC is also developing guidelines on Human Rights Impact Assessment (HRIA) for use in Social and Environmental Assessment (SEA).

The WCD recommends that social assessment should apply a *rights and risks framework*, including poverty-risk assessment and Comprehensive Options Assessment.

The EIR has recommended that IFIs adopt “Integrated Environmental and Social Impact Assessments” applying “a holistic, multidimensional approach to assessments, identifying cumulative impacts of projects and socioeconomic linkages to environmental issues. Social impacts should be fully identified, including health impacts and project effects on vulnerable groups.”

#### Consistency with best practice:

- Mandatory requirements for a social assessment or social evaluation process as part of project screening and safeguard planning (like IBRD/IDA and IADB policies)
- The definition of significant adverse impacts is helpful in the 2006 OM, but could be further refined with objective criteria (in other IFI policies such definitions are absent or vague)
- Apparent (?) requirement for a full poverty and social assessment in all cases where significant positive and negative impacts are anticipated

<p><b>4. Social Assessment and baseline studies [Continued]</b></p>	<p><b><u>Gaps and weaknesses:</u></b></p> <ul style="list-style-type: none"> <li>• Although IPSAs are mandatory for all ADB operations, the ADB does not possess a specific stand-alone mandatory operational policy on poverty and social assessment. This review has not identified detailed minimum standards for ADB social assessment, though presumably internal staff guidelines must exist. Existing guidance in the public domain is superficial and fragmented. In the case of indigenous peoples' issues, guidance on key issues for assessment is apparently confined to appendices accompanying the 1998 policy.</li> <li>• ADB assessments do not apply a rights and risks-based framework</li> <li>• The existing policy is not clear when a full PSA is required (i.e. when such a full assessment is mandatory)</li> <li>• The existing policy does not spell out minimum standards for a full PSA with regard to procedures to identify of potential impacts on indigenous peoples.</li> </ul> <p><b><u>Recommendations:</u></b></p> <ul style="list-style-type: none"> <li>• Adopt a bank-wide mandatory and operational policy on social assessment or integrated Social and Environmental Assessment</li> <li>• Ensure that the revised Indigenous Peoples Policy and the new Social Assessment policy have binding rules that require the informed and culturally appropriate participation of affected indigenous peoples in the assessment process</li> <li>• Incorporate rights and risk analysis in the assessment process, including human rights impacts assessment</li> <li>• Ensure the policy is fully consistent with international standards and best practice, such as the <i>Akwe:kon</i> Guidelines.</li> </ul>
<p><b>5. Key safeguards</b></p> <p>Initial <i>screening</i> for project impacts on indigenous peoples <i>is</i> to be conducted as early as possible in the project cycle, (i.e., at the project concept stage), to categorize the impacts and identify subsequent approaches and resource requirements to address indigenous peoples issues. [OM.OP.B.1.7]* A thorough and systematic screening <i>is</i> to be conducted during the IPSA [OM.OP.B.1.8]*</p> <p>If indigenous peoples are likely to be affected <i>significantly</i> by ADB's intervention, the borrower and project sponsors <i>must</i> be informed of the ADB's indigenous peoples policy [OM.BP.D.11]*</p> <ul style="list-style-type: none"> <li>• Concern for indigenous peoples <i>should</i> be reflected in and integrated into each step of the policy development cycle, country programming, project design, project processing, project implementation, and project monitoring and evaluation processes, <i>as appropriate</i> [OM.BP.C.7]</li> <li>• All projects <i>should</i> involve an initial poverty and social impact assessment (see below) and <i>in-depth poverty and social assessment during the PPTA or when "due diligence" is performed</i> (OM.OP.B.1.6)* [Note incorrect usage of "should" for a mandatory requirement]</li> <li>• The policy <i>requires</i> the preparation and implementation of an indigenous peoples plan for projects with impacts on indigenous peoples [OM.OP.B.3]* (see below)</li> <li>• The 1998 policy stipulates that it (the policy) <i>must</i> ensure that the Bank's operations and assistance to developing member countries (DMCs) do not negatively affect the welfare and interests of indigenous peoples.*(?) If a Bank intervention does affect indigenous peoples negatively, adequate measures <i>must</i> be taken to <i>mitigate</i> the negative impact (I.4).* [Here the 1998 policy seems to be logically flawed as it</li> </ul>	<p><b><u>International standards and best practice</u></b></p> <p>International law requires states to uphold the human rights of indigenous peoples and protect them from the adverse impacts of national development, including protection from the harmful actions of third parties (like companies and corporations) within the State's jurisdiction. International human rights bodies have ruled that state policy and practice relating to economic development and natural resource exploitation must uphold the State's obligations under international human rights law.</p> <p>IFIs like the IADB now make clear in their safeguard policies that there are certain preconditions for their financing of operations that may affect indigenous peoples, including circumstances where the Bank will <u>not</u> proceed with project processing. The IADB prohibits Bank financing for any projects or investments that: (i) fail to apply with "applicable legal norms" (including norms protecting indigenous rights under international treaties ratified by the Borrower <u>and</u> international jurisprudence on indigenous rights), (ii) involve involuntary resettlement of indigenous peoples, (iii) may violate the rights of uncontacted indigenous peoples or (iv) exclude indigenous peoples on the basis of their ethnic identity.</p>

places mandatory requirements on the “policy” itself and not on ADB staff (though such defective language is not taken over into the 2006 OM provisions)]

- ADB’s interventions affecting indigenous peoples *should*...not impose the negative effects of development on indigenous peoples (OM.BP.C.8.v.)
- If negative impacts are unavoidable, appropriate and acceptable compensation *must* be ensured (OM.BP.C.8.v.)\*
- Unavoidable negative impacts *should* be minimized as much as possible and measures taken to mitigate adverse impacts (OM.BP.D.10.I.ii.) [this OM provision contradicts the earlier 1998 provisions that contained mandatory language on mitigation]
- The policy *requires* the preparation and implementation of an **indigenous peoples plan** for projects with impact on indigenous peoples. (OM.OP.B.3)\*
- Category A projects *require* and IPDP or IPDF to address significant impacts (OM.OP.4.i)\*
- Category B projects *require* “Specific action for indigenous peoples” specified by the recommendation of the president (RRP) to address limited impacts (OM.OP.4.ii)\*
- If IPSA detects possible negative impacts, a Borrower *must* prepare an IPDP “acceptable to the ADB”.\*
- All major change in the scope of a project need to be screened by operations departments for their impacts on indigenous peoples and IPPs need to be revised accordingly [OM.OP.D.5.36]
- “Where unanticipated impacts on indigenous peoples become apparent during project implementation, ADB assists EAs and other relevant government authorities to assess the significance of the impacts and identify measures to mitigate...” them [OM.OP.D.6.37]

**Consistency with international standards**

- A requirement for pre-project screening to identify social and environmental issues and potential impacts on indigenous peoples
- A requirement for a specific instrument (IPP) to address indigenous issues in project design and implementation

As noted above, the IBRD-IDA and IFC IP policies both stipulate that they will not finance projects affecting indigenous peoples unless the IFI can ensure there is prior acceptance among the affected communities and their representative bodies. Both the IBRD-IDA and IFC now effectively prohibit the forced relocation of indigenous peoples under their safeguard policies (OP 4.10: 20; PS7: 13,14,15) as does the IADB.

The WCD recommends that effective safeguards for indigenous peoples must be based “An...analysis based on recognising rights and assessing risks...The analysis will [i]dentify those at risk through vulnerability or risk analysis... including those who face risk to their livelihoods, human rights, and property and resource rights. *Special attention should be given to indigenous and tribal peoples, women and other vulnerable groups*” (WCD, 2000 at 279). The EIR advises that IFI safeguard policies on Indigenous peoples must be formulated or revised through “high-level discussions with indigenous peoples” and measures must be taken to ensure the safeguard policy is “consistent with internationally guaranteed human rights” and “with indigenous rights in international law”. Crucially, the EIR established that an effective safeguard policy on indigenous peoples must be based on “consensus among indigenous peoples about the contents of the policy” and “beneficiaries must consider that it provides adequate safeguards” for their rights and interests. (EIR, 2003 at page 60).

**Gaps and weaknesses:**

- The policy contains no prohibitions on ADB lending (‘no-go’ criteria)
- The existing ADB policy is at odds with international law because it does not prohibit the forced relocation of indigenous peoples
- There are no requirements for FPIC, no protections from forced relocation and no clear protections for land and resource rights
- The policy (and presumably its requirements) must be only raised with the Borrower or client where “significant” impacts are anticipated
- Bottom-line safeguard requirements appear to be confined to the identification of potential harmful impacts, their mitigation and payment of “acceptable” compensation to affected communities
- The policy is NOT entirely clear on whether an IPP is required for all projects with some degree of impacts on indigenous peoples, or just those with significant adverse impacts (compare OM.OP.B.3 with OM.OP.B.2.9) [although the former appears to be the case, the 2005 Safeguard Update discussion note states that an IPDP is only required where “significant adverse impacts are anticipated”]

**Recommendations:**

- Develop a strengthened safeguard policy in full consultation with indigenous peoples
- Ensure the policy is consistent with indigenous peoples’ right in international law, including the UNDRIP, and that the contents of the revised policy are acceptable to indigenous peoples
- Make sure the revised safeguard policies at the ADB are backed up by strengthened compliance and oversight mechanisms.

## 6. Land and territorial rights

Although the 1998 policy mentions in several places the importance of land rights and threats to indigenous lands in its introductory and descriptive sections, there are no clear requirements to take action to respect indigenous peoples' land and resource rights under the policy.

The 1998 documents only notes that: "legal recognition of ancestral domain and the traditional rights of indigenous peoples over land and resources" *should* be considered as one key issue by the Bank in addressing indigenous peoples matters in its operations (V.C.41)

The policy and OM also advises that an "acceptable" IPDP "addresses" ancestral territory and resource use patterns [OM.OP.2.12]. [This seems to be a mandatory standard, though it is not clear]

The OM no longer gives specific guidance on how poverty and social impact assessment should address land tenure and resource rights issues for indigenous peoples, though this was briefly specified in earlier appendices issued with the 1998 policy. These guidelines stipulated that social assessment must provide information on existing land and resource rights and analyse "the problems with" and "likely positive and negative impacts on...rights to land and natural resources" [1998 Policy: Appendix I (ii)(iii) + Appendix II 2i.a.b.c.;2ii.d; 2iii.b.c.). [This review has not identified updated guidance nor binding rules on these critical issues in the 2006 OM]

The 1998 policy advises that IPDPs *should* be developed to ensure that project design gives *consideration* to land and resource issues (Appendix.1.v).

The legal framework study for an IPDP *should* give: "...Particular attention...to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forest, wildlife, and water) vital to their subsistence" [1998 Policy: Appendix III.2.ii]

An IPDP "...may, as appropriate, include" elements relating to the (i) legal framework, (ii) baseline data, and (iii) *land tenure*" [1998 Policy: Appendix III.1]

[Once again, it is not clear how these guidelines have or have not been incorporated into the ADB's 2006 Operational Manual]

However, despite *recommendations* that social assessment and IPDP processes deal with land rights and land tenure issues, there are no substantive requirements to protect indigenous peoples' land rights.

### **International standards and best practice:**

Under international law, States must legally recognise, respect and guarantee indigenous peoples' ownership rights and other rights to lands, territories and natural resources traditionally owned or otherwise occupied and used. International instruments and jurisprudence affirm that indigenous peoples have the associated rights to use or conserve their resources, the right to manage and control these resources and the right to enjoy and freely dispose of their natural assets. Indigenous peoples also have the right to restitution of lands and resources taken previously without their prior consent. These land and resource rights guaranteed under international law stem from the right to be free from racial discrimination, the right to self-determination, the right to cultural integrity, the right to equal treatment under the law and from property rights. International norms clearly establish that the arbitrary expropriation of indigenous peoples' lands and territories by States is contrary to international law. Unilateral extinguishment of indigenous peoples' land and natural resource rights thus held to be unlawful.

International law establishes that indigenous peoples' land and resource rights are *inherent* rights that flow from their traditional occupation and use of the land. In other words, such original rights or 'aboriginal title' do not depend on grants or privileges given by the State, but emerge from customary laws and practices and customary land tenure regimes.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) establishes that: "(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.(2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. (Article 26)

The 2001 UNDP policy on Indigenous Peoples affirms that: "UNDP promotes the recognition of indigenous rights to lands, territories and resources; laws protecting indigenous lands..."

The 2006 IADB safeguard policy requires that "operations that directly or indirectly affect the legal status, possession, or management of territories, lands, or natural resources traditionally occupied or used by indigenous peoples" must "respect...indigenous rights recognized in accordance with "the applicable legal norms" (*including international law and jurisprudence*). The IBRD-IDA 2005 policy (OP 4.10) requires that the Borrower include an **Action Plan** for the legal recognition of indigenous peoples' lands in the IPP or IPPF – where projects involve or depend on the legal recognition of indigenous peoples' lands. An Action Plan is required for all projects that propose any "*acquisition*" of such lands (OP 4.10: 17, BP 4.10: 8).

<p><b>6. Land and territorial rights</b> [Continued]</p>	<p><b>Gaps and weaknesses:</b></p> <ul style="list-style-type: none"> <li>• The 1998 policy suffers from vague or absent safeguards for land and resource rights</li> <li>• Existing weak provisions seem to be confined to 1998 guideline documents</li> <li>• Inconsistent with international standards on the land, resource and territorial rights of indigenous peoples under international law</li> <li>• Few objective requirements to respect and safeguard land rights in marked contrast to the World Bank’s IBRD and IDA policy that requires the Borrower to include an <b>Action Plan</b> for the legal recognition of indigenous lands.</li> </ul> <p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>• Ensure revision of the ADB policy includes objective safeguards to recognise and protect indigenous peoples’ rights to their traditional lands and resources</li> <li>• Requirements should safeguard against the unilateral extinguishment of indigenous people’ land and resource rights and ensure recognition of their property and ownership rights</li> <li>• Social analysis must, with the full and effective participation of affected communities, <i>inter alia</i>: (i) identify the specific modalities of control, ownership, use and enjoyment of lands, territories and natural resources as part of an effective assessment, (ii) document customary systems of tenure, including identification of lands and resources under cyclical or periodic seasonal use and lands of religious, spiritual or other cultural importance (iii) assess the status of land tenure security and pinpoint risks to such security and (iv) recommend measures to secure land and resource rights where these are not secure.</li> </ul>
<p><b>7. Customary and collective rights</b></p> <p>Customary law is only mentioned once in passing in the 1998 policy. The 1998 policy does not mention collective rights at all.</p> <p>The 2006 Operational Manual states: “Significant impacts” (requiring a full poverty and social assessment and IPDP) include those that “...positively or negatively (i) affect their customary rights of use and access to land and natural resources” [OM.BP.12 and OM.OP.B.1.4]</p> <p>The OM also accepts that: “National legislation includes constitutional, statutory, and <i>customary law</i>, and international conventions to which the country is a party” [OM.BP.B.4] (emphasis added) [This ADB definition may, however, only include customary law that is recognised under national legislation]</p> <p><u>However, there a no substantive or actionable requirements to ensure safeguard actions to protect indigenous peoples’ customary or collective rights.</u></p>	<p><b>International Standards:</b></p> <p>International law and jurisprudence establishes that indigenous peoples’ rights to land and surface and sub-soil resources flow partly from their customs and customary law (see above). UN human rights bodies, like the Committee on the Elimination of Racial Discrimination (CERD), have ruled that State measures to recognise and protect indigenous peoples’ rights to own, control and manage lands they have traditionally occupied, must take due account of relevant indigenous customary laws. International norms establish that special measures are required to ensure recognition of the collective rights of indigenous peoples, including the particular and collective interest they have in the occupation and use of their traditional lands and resources. Indigenous peoples’ rights are distinct in international law because these rights have a strong collective dimension. Article 27 of the UNDRIP establishes that: “States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ <i>laws</i>, traditions, <i>customs</i> and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process” (emphasis added)</p>

**7. Customary and collective rights** [Continued]

**Gaps and weaknesses:**

- No requirement to take action to safeguard customary and collective rights
- The emphasis of the 1998 ADB policy is on national legislation and development policies that may be prejudicial to the customary rights and interests of indigenous peoples.

UNDRIP establishes that: “Indigenous peoples have the right to the full enjoyment, as a *collective* or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law” (Article 1). (emphasis added)

Article 40 of UNDRIP states: “Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and *collective rights*. Such a decision shall give due consideration to the *customs*, traditions, rules and *legal systems* of the indigenous peoples concerned and international human rights.” (emphasis added)

The IADB policy clarifies that indigenous rights are taken to be: “the rights of indigenous peoples and individuals, in national indigenous legislation, in other relevant national legislation, in applicable international norms in force for each country, or in the indigenous juridical systems of each people, hereinafter collectively referred to as the “applicable legal norms” (emphasis added).

The IADB policy also stipulates that it aims to “*Prevent* or mitigate direct or indirect adverse impacts on indigenous peoples, rights or patrimony, individual or *collective*” (emphasis added).

The IFC’s Performance Standards 7 on Indigenous Peoples is triggered when social assessment identified potential impacts on indigenous peoples’ “traditional or *customary* lands...in the “project area of influence” (emphasis added). The IFC policy notes that while indigenous peoples traditional or customary lands may not be under legal ownership under national laws, customary occupation and use (including seasonal and cyclical use) and ties that define indigenous identity and community can be “substantiated and documented” (PS7:12).

The IBRD-IDA policy at the World Bank recognises the importance of collective rights in its policy trigger (see #1 above.) It also stipulates that the mandatory social assessment required under the policy *must* “...pay special attention to the *customary rights* of indigenous peoples regarding lands or territories they have traditionally owned, customarily used or occupied and where access to natural resources is vital to the sustainability of their cultures and livelihoods” (OP 4.10: para 16).

As noted elsewhere in this matrix, both the IBRD-IDA and IFC policies recognize and require respect for indigenous customary decision-making processes (see # 9 below).

**Recommendations:**

- Adopt explicit standards to recognise and protect indigenous peoples’ collective and customary rights
- Ensure safeguards for collective and customary rights are incorporated into relevant social assessment and informed participation procedures

## 8. Human rights and rights-based approach

There are no objective safeguard standards on human rights in the 1998 policy, but it does specify that:

“ .. initiatives *should* be compatible in substance and structure with the affected peoples’ culture and social and economic institutions, and commensurate with the needs, aspirations, and demands of affected peoples. Initiatives *should* be conceived, planned and implemented, to the maximum extent possible, with the informed consent of affected communities, and include respect for indigenous peoples’ dignity, human rights and cultural uniqueness”. (emphasis added) [V.A.31]

The legal framework study for an IPDP *should* give : “...Particular attention...to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forest, wildlife, and water) vital to their subsistence” [1998 Policy: Appendix III2.ii]

The 1998 document does contain about one page of text on “international conventions and declarations”, including a passing mention of ILO Conventions 107 and 169, among others. However, this section of the 1998 policy (IV.B) is descriptive, of poor substantive quality, and is not linked in any way to the operational requirements of the ADB safeguard policy. It is also now out of date.

### International standards and best practice:

It is increasingly accepted that public international financial institutions are required under international law to ensure that their decisions, actions and operations do not undermine the ability of other subjects of international law, including their member states, to fulfil their obligations under international human rights instruments, environmental treaties and under international customary law.

In carrying out their oversight and executive functions in the governing bodies of IFIs, States have obligations to ensure that their decisions do not infringe national and international human rights laws.

Many UN agencies like the UNDP as well as the EU and several bilateral development agencies have adopted rights-based approaches to development. According to the UN: “a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development”. The norms and standards are those contained in international treaties and declarations.

A rights-based approach to development includes the following elements (i) express linkage to rights (ii) accountability (iii) empowerment (iii) participation (iii) non-discrimination and attention to vulnerable groups.

In 2003, the EIR recommended: “...that the World Bank Group adopt a system-wide policy that integrates and mainstreams human rights into all areas of Bank policy and practice and that Bank policies and operations must be, at a minimum, consistent with its obligations, as a subject of international law, in relation to international human rights law”.

In 2005, the United Nations Permanent Forum on Indigenous Issues (UNPFII) affirmed:

“The human rights-based approach to development should be operationalized by States, the United Nations system and other intergovernmental organizations, including the **international financial institutions**, and should be the framework underpinning the Millennium Development Goals and poverty reduction strategies, programmes and activities” (Recommendation of Fourth Session) [emphasis added]

So far IFIs have not adopted HR policies, though the IFC is now developing guidelines on Human Rights Impact Assessment to complement its policy on Social and Environmental Assessment. It is also noteworthy that the World Bank’s legal department has affirmed that “...taking in account, where appropriate, human rights issues and members’ international human rights obligations does not contravene the Articles’ prohibition on political interference...”, and that: “There are some activities that the Bank cannot properly undertake without considering human rights.”

	<p><b>Gaps and weaknesses:</b></p> <ul style="list-style-type: none"> <li>• The 1998 policy preamble gives inadequate treatment of international agreements and instruments on the human rights of indigenous peoples and is now out of date</li> <li>• Lacks a rights-based framework;</li> <li>• The failure to prohibit forced relocation is contrary to human rights law</li> </ul> <p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>• Show leadership among IFIs by adopting objective standards on human rights, including the application of rights-based approach to new standards in a revised Indigenous Peoples safeguard policy, which must be fully consistent with international human rights law and standards</li> </ul>
<p><b>9. Participation and information disclosure</b></p> <p>The 1998 policy stipulates that the policy (?) <i>must</i> ensure that ADB interventions affecting IPs are:</p> <ul style="list-style-type: none"> <li>• ...consistent with the needs and aspirations of affected indigenous peoples</li> <li>• compatible in substance and structure with affected indigenous peoples’ cultures and social and economic institutions</li> <li>• be conceived, planned, and implemented with the <i>informed participation</i> of affected communities [VII.B.58., OM C.8]*</li> </ul> <p>Participation requirements are affirmed in the 2006 Operational Manual that states: “The policy <i>requires</i> consultation with and participation by project-affected indigenous peoples in formulating development interventions to ensure that these adequately deal with their needs, priorities, and preferences” (OM.OP.C.22)*</p> <ul style="list-style-type: none"> <li>• The IPDP and IPDF <i>should</i> be prepared in consultation with and participation of key stakeholders in the proposed project [OM.OP.D.1.28]</li> <li>• Bank appraisal also examines whether the indigenous peoples have participated in the formulation of the IPDP [OM.OP.D.2.31]</li> <li>• The borrower or private sector sponsor <i>shall</i> make available the following documents to the project-affected indigenous peoples: (i) a draft IPDP, before appraisal; (ii) a final IPDP, after completion of such an IPDP; and (iii) the revised IPDP, following the detailed technical design or change in scope in the project [OM.OP.C.24]*</li> <li>• The policy notes that “the information from the documents specified in para. 24 can be made available ...in local languages.” and “For nonliterate people, other communication methods will be appropriate” [OM.OP.C.25]</li> </ul> <p>ADB <i>shall</i> post on its website: (i) a draft IPDP or draft IPDF (or both) before appraisal; (ii) a final IPDP no later than 14 calendar days after receipt; and (iii) the revised IPDP no later than 14 calendar days after receipt.(OM. C.26)*</p> <p><b>Gaps and weaknesses:</b></p> <ul style="list-style-type: none"> <li>• Weak provisions on participation e.g., the policy only advises that affected communities should be involved in preparation of an IPDP, but does not require this.</li> <li>• No requirement for <i>culturally appropriate</i> participation nor <i>good faith negotiation</i>, which places the ADB policy below existing IFI participation standards like those of IFC and IADB</li> </ul>	<p><b>International standards and best practice:</b></p> <p>International law establishes that indigenous peoples have the right to participate in decisions and activities which may affect them. In the case of indigenous peoples, special measures to ensure meaningful and informed participation are often required to overcome historical and contemporary discrimination and to account for their special circumstances, including special mechanisms to enable indigenous <i>collective</i> participation through their freely chosen representatives. The UNDRIP affirms: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” (Article 18)</p> <p>The World Bank IBRD-IDA policy requires the Borrower to engage in a process of free, prior informed consultation for <u>all</u> projects that are “proposed for Bank financing and affect Indigenous Peoples” (OP 4.10: 1). Under the same policy the borrower must provide all affected indigenous peoples with all relevant information about the project (including information about possible negative impacts) in <i>a culturally appropriate manner at each stage of project preparation and implementation</i> (OP 4.10: 10.c.). Bank staff are required ensure that affected indigenous peoples participate in the social assessment process (BP 4.10: 6(a))</p> <p>The World Bank policy stipulates that “Free prior informed consultations” must be “...conducted in <i>good faith</i>, constitute a process which is <i>culturally appropriate</i> to <i>collective decision-making</i> and include mechanisms for informed participation in the preparation and implementation of the project” (OP 4.10: footnote, 4).</p> <p>At the IFC, PS7 requires private sector clients to establish an ongoing relationship with affected communities from “as early as possible” in project planning and “throughout the life of the project”. (PS7:9). Such community engagement must be “...culturally appropriate, involve indigenous peoples’ representative bodies, be inclusive by age and gender and “provide sufficient time for IPs’ collective decision-making processes”. As noted above, if a project may have adverse impacts and affects the customary and traditional lands of indigenous peoples, the client must establish mechanisms to establish good faith negotiation based on free prior informed consultation with affected communities (PS7: 13).</p>

<ul style="list-style-type: none"> <li>No requirement for information to be provided to affected communities in their local languages (this is left optional for the Bank and borrower)</li> <li>No explicit requirements to respect for customary decision-making</li> </ul> <p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>Strengthen binding provisions to require informed and culturally appropriate participation, including participation in social assessments</li> <li>Retain and <i>expand</i> objective standards on information disclosure under the policy (including draft social assessments etc)</li> <li>Require provision of relevant information to affected communities and their representative organisations in local languages or languages tailored to local preferences</li> <li>Require informed participation by indigenous peoples in upstream country programming and in technical assistance operations and other non-project and policy-based interventions</li> </ul>	<p>The IFC does not specify in detail what constitutes good faith negotiation in its Performance Standard, but its related Guidance Notes do advise that as a minimum such negotiation: "...generally involves: (i) willingness to engage in a process and availability to meet at reasonable times and frequency; (ii) provision of information necessary for informed negotiation; (iii) exploration of key issues of importance; (iv) mutual[ly] acceptable procedures for the negotiation; (v) willingness to change initial position and modify offers where possible; and (vi) provision for sufficient time for decision making." (<i>Guidance Notes to Performance Standard 7</i>, Guidance Note 25).</p>
<p><b>10. Indigenous peoples plans, indigenous components and benefit sharing</b></p>	
<p>The application of the policy requires the preparation and implementation of an indigenous peoples plan for projects with impacts on indigenous peoples. An <b>indigenous peoples plan</b> (IPP) may take the form of <b>indigenous peoples development plan</b> (IPDP), <b>indigenous peoples development framework</b> (IPDF), or <b>indigenous peoples specific action</b> [OM.OP.B.3]</p> <p>The responsibility for preparing an indigenous peoples plan (IPP) acceptable to ADB and for its implementation rests with the borrower or project sponsors.[OM.BP.D.11]</p> <p>The IPP <i>will</i> be prepared at the project <u>feasibility study</u> stage of the project cycle [OM.OP.B.2.8]*</p> <p>"An acceptable IPP <i>must</i> be completed before project appraisal" and prior to Management review meeting (MRM) [OM.BP.D.11 and OM.OP.B.3.15]*</p> <ul style="list-style-type: none"> <li>The IPDP is <i>required</i> for category A projects [OM.OP.B.2.9]*</li> <li>IPDP and IPPF are <i>required</i> where the IPs are the "main beneficiary of a development project", where a project component may "significantly benefit" affected communities or "the project or project component may have significant adverse impacts on indigenous peoples" [OM.OP.B.2.10]*</li> <li>The IPDF is <i>required</i> for financial intermediation projects and sector loans and is a: "a policy and procedural framework for IPDPs that are developed for subprojects, components, or investments, and that are to be approved during loan implementation" [OM.OP.B.2.9 and OM.OP.B.4.17]*</li> <li>Under an IPDF... "during implementation, the executing agency (EA) or project sponsor <i>will</i> prepare an IPDP for each subproject in accordance with the policy and procedures spelled out in the IPDF, and will submit it to ADB for review and approval" [OM.OP.B.4.17]*</li> <li>Any IPDP <i>must</i> be included in the project costs and <i>must</i> be reflected in the logical framework of the project [OM.OP.D.29]*</li> <li>The draft IPDP/DF <i>are</i> to be reviewed to by the government or project sponsor prior to submission to the MRM [[OM.OP.D.29]*</li> </ul> <p>An appropriately prepared draft IPDP <i>must</i> have provisions for time-bound plan, monitoring, and evaluation...(and)...appropriate budgetary resources for its implementation" [B.1.35 and OM.OP.B.2.11] The IPP <i>will</i> also include...an executive summary, details of salient issues recommendations of the president (RRP), measures to ensure benefit sharing with affected indigenous peoples, and measures to mitigate adverse impacts [OM.BP.D.11 and OM.OP.B.3.15]*</p>	<p><b>International standards and best practice:</b></p> <p>UNDRIP affirms: "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." (Article 20). And: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions." (Article 23)</p> <p>As noted in # 7 above, international law recognises that indigenous peoples' rights are enjoyed by individuals and <i>groups</i>. Indigenous peoples thus have right to collective participation and decision-making in the development process and have the right to be represented collectively through their own representative bodies.</p> <p>Various international treaties, including the Convention on Biological Diversity (CBD, Article 8j) establish that indigenous peoples have the right to share in equitable benefits arising from the use of their traditional knowledge.</p> <p>The IBRD-IDA policy on Indigenous Peoples obliges Bank staff to "take measures to ensure that affected indigenous peoples receive social and economic benefits that are <i>culturally appropriate</i> and <i>equitably shared</i> between generations and between men and women (OP 4.10, para 1.). The borrower must detail in the IPP the contents of any prior agreements with affected indigenous peoples regarding the commercial use of their cultural resources or knowledge.</p> <p>The IADB policy likewise stipulates that in projects involving the commercial development of indigenous cultural and knowledge resources, the Bank will <i>require</i> provisions for indigenous peoples' equitable participation in the benefits derived from such commercial development. In projects with adverse impacts, the IFC policy requires that the client take mitigation measures "contained in a time-bound plan, such as an IPDP, or a broader community development plan with separate components for Indigenous Peoples" (PS7:8)</p>

**10. Indigenous peoples plans and benefit sharing [Continued]**

In addition, an acceptable IPDP addresses the aspirations, needs, and preferred options of the affected indigenous peoples; local social organization, cultural beliefs, *ancestral territory*, and *resource use patterns*; potential positive and negative impacts..., measures to strengthen social, legal, and technical capabilities of government... options for involving local organizations and NGOs with expertise in indigenous peoples issues [OM.OP.2.12]

The IPDF includes mainly outline objectives and strategies for indigenous peoples’ participation and benefit sharing in possible future project components that may arise once implementation has started (OM.OP.B.2.13). A specific action may include plans to involve indigenous peoples as beneficiaries or a community action plan to address indigenous issues within mixed indigenous and non-indigenous communities, though 2006 guidelines advise: “Projects should avoid any unnecessary distinctions or inequalities between indigenous peoples and other poor and marginal groups who live in the same locality” (OM.OP.B.2.14)

*Checklist compliance and weak safeguards?*

Scrutiny of the ADB’s IPDPs and IPDF on the ADB web site (<http://www.adb.org/IndigenousPeoples/plans-ipdf.asp> ) indicates that the quality and detail of these plans are highly variable and some are perfunctory and consist of only a few pages (from 4 to 11 pages). It is not always clear from these plans what safeguards have been put in place and will be implemented to safeguard and respect indigenous peoples’ rights and interests. Furthermore, it seems overall plans are only available in English, though some plans do contain provision for translation of local documents. It is not clear if these plans have been provided to local communities in draft form in their own language or to what extent affected communities were in agreement with or even aware of these plans. Examination of these documents shows that treatment of critical issues like resettlement and land rights is superficial in some cases.

**Consistency with best practice:**

- The ADB policy conforms with other IFI policies in requiring a specific instrument such as an Indigenous Peoples’ Plan (IPP) or Indigenous Peoples’ Components with adequate time-scales and budgets to ensure equitable and culturally appropriate benefit sharing, and provide development opportunities to affected communities.
- The requirement to disclose the draft IPDP to affected communities is consistent with best practice, though the policy does not require disclosure in local languages.
- It seems that current ADB standards on a benefit-sharing instrument may to some extent exceed World Bank and IFC standards as in the latter policies IPPs are only required where negative impacts are anticipated

**Gaps and weaknesses:**

- There are no explicit mandatory requirements of indigenous participation in the design and preparation of the IPDP, should they agree to a project
- There are no requirements to recognise and protect indigenous peoples land and resource rights as a part of the IPP
- There are no requirements that a draft IPDP and its budget be approved by the beneficiary communities and their representative organisations prior to its finalisation (only that must be provided with a draft copy – see # 10 above)

**Recommendations:**

- Require that IPDP and IPPF contain measures to recognise and protect indigenous peoples’ customary and collective rights, including rights to lands and natural resources, where these may be affected
- Include a requirement for approval of draft IPDPs by affected communities and their freely chosen representatives and that the terms of agreement for IPDP design and implementation be documented as part of the final plan.

**11. Accountability mechanisms and appeals, complaints and grievances procedures**

- “Development processes *must* incorporate transparency and accountability” (1998 policy: V.A.32)
- “The mechanisms for any intervention must be transparent and *should* ensure accountability” [OM.BP.D.10.iv] [Again, here the OM seems to have lost mandatory language found in the original policy]
- “The operations departments and the Private Sector Strategy Department, supported by RSDD, are responsible for implementing the Indigenous peoples policy.” [OM.OP.E.38]
- The operations departments are responsible for categorizing all loans in consultation with the government/project sponsors and RSES.
- The project teams are responsible for the planning and supervising IPDPs/IPDFs, and
- Social development specialists in operations departments review the performance of IPDPs/IPDFs [OM.OP.E.38]
- “The operations departments are responsible for complying with the policy.” [OM.OP.E.39]
- The CCO, assisted by RSES, is responsible for monitoring compliance with ADB safeguard policies, and advising and assisting operations departments.

**International standards and best practice:**

It is increasingly accepted that IFIs and international development agencies must be accountable to affected communities and the public. At present, eleven multilateral and bilateral agencies now have official appeals or complaints processes, including the ADB, which since 2003 has established an Accountability Mechanism, which is semi-independent (that replaced a flawed ADB Inspection Function). This ADB mechanism has only become active in recent years and the efficacy of the complaints process is still not clear. More recent IFI policies, like those of the IFC, require the establishment of local grievance mechanisms at the project level to complement centralised IFI complaints and appeals offices. Under IBRD-IDA policy, for example, the borrower is required during implementation to **establish accessible procedures to address any grievances** by affected indigenous peoples arising from project implementation, taking into account the availability of their own judicial and customary dispute settlement mechanisms (OP 4.10: Annex B).

**11. Accountability mechanisms and appeals and grievances procedures [Continued]**

IFC Performance Standard 1 stipulates that: “The client will respond to communities’ concerns related to the project. If the client anticipates ongoing risks to or adverse impacts on affected communities, the client will establish a grievance mechanism to receive and facilitate resolution of the affected communities’ concerns and grievances about the client’s environmental and social performance. The grievance mechanism should be scaled to the risks and adverse impacts of the project (PS1: 23).

PS7 further requires that any grievance mechanism established under PS1 must be culturally appropriate and accessible to indigenous peoples (PS7:9)

While these new requirements for project-level grievance mechanism have yet to be properly tested in IBRD-IDA and IFC loan operations, critics point out that these standards are flawed because the mechanisms are to be established by the Bank or IFC client and thus will not be truly independent or impartial bodies. The usefulness of such mechanisms for affected communities is thus remains to be seen.

Indigenous peoples and civil society are calling on IFIs to be truly accountable through *external* non-judicial mechanisms as well as through judicial mechanisms. At this stage, however, IFIs including the ADB are largely immune from litigation. One exception is the European Investment Bank which may be brought before the European Court of Justice for violations of certain aspects of European law, such as information disclosure standards relating to environmental matters.

**Consistency with best practice:**

- Publication of staff positions and departments responsible for overseeing policy compliance is consistent with other IFIs (Bank Procedures at the World Bank, IFC’s Environmental and Social Review Procedures etc)

**Gaps and weaknesses:**

- The ADB is apparently immune from any litigation by aggrieved communities affected by its operations
- The policy does not contain specific provisions on accountability or grievance mechanisms (nor cross-references to other relevant ADB policies)
- There is no provision for project-level/local accountability mechanisms

**Recommendations:**

- Include provisions on accountability and redress in a revised policy
- Involve Indigenous Peoples’ chosen representatives in a future ADB review of its Accountability Mechanism to help identify where this mechanism can be strengthened
- In the longer term, work with governments, indigenous peoples and civil society to explore options for establishing additional accountability mechanisms outside the Bank

<p><b>12. Monitoring, supervision, compliance and evaluation</b></p> <p>“A loan agreement may require that certain social monitoring reports be prepared during the course of a project. Such social monitoring reports shall be posted on ADB’s web site upon submission to ADB. ADB shall require private sector sponsors to make social monitoring reports available to affected people and to submit these to ADB for web posting” [OM.OP.C.27]</p> <p>“The status of IPDP components <i>must</i> be reviewed throughout the project implementation. As appropriate, ADB’s review missions include periodic review of IPDP implementation as well.” [OM.OP.D.3.32]</p> <ul style="list-style-type: none"> <li>• The progress of implementing the IPDP/IPDF must be monitored regularly and the executing agencies must report semi-annually to ADB on the progress [OM.OP.D.4.33]</li> <li>• Independent monitoring agencies or individuals are assigned to submit project periodic monitoring reports to the executing agencies and ADB [OM.OP.D.4.33]</li> <li>• The project team provides guidance in preparing the terms of reference for independent monitoring.</li> <li>• Upon completion of the project, the operations department concerned prepares a project completion report [OM.OP.D.4.33]</li> <li>• Project completion review missions should review any unanticipated impacts on indigenous peoples [OM.OP.D.6.37]</li> <li>• The Operations Evaluation Department prepares the performance audit and evaluation report as independent evaluations of the effectiveness of the IPDP/IPDF in achieving its intended objectives [OM.OP.D.4.34]</li> <li>• Overall performance with regard to ADB’s safeguard policies and procedures is measured through the compliance monitoring system, which is implemented by Environment and Social Safeguard Division (RSES) of Regional Sustainable Development Department (RSDD) [OM.OP.D.4.35]</li> </ul>	<p><b><u>Current international practice:</u></b></p> <p>Most IFIs have in recent years upgraded their oversight and compliance systems for safeguard policies. However, these systems are primarily geared towards procedural compliance in project documentation during project preparation, which has developed a check-list approach to compliance leaving a “paper trail” of due diligence. However, independent evaluations of IFI projects affecting indigenous peoples find many safeguard and development measures are not implemented, implemented late or in a shoddy manner with little or no informed participation by beneficiary communities.</p> <p>More effective implementation has occurred where safeguard and development components have been monitored by affected communities or their chosen technical advisers or by their representative organisations (e.g., World Bank-assisted land titling projects in South America).</p> <p>Indigenous peoples demand transparency in project accounting, timely disbursements and implementation by their own organisations and support agencies.</p> <p><b><u>Consistency with international practice:</u></b></p> <ul style="list-style-type: none"> <li>• Requirements for ADB staff oversight of project implementation and mid-term and implementation completion reports are comparable with similar standards of other IFIs</li> <li>• Provision for independent monitoring compares with policies of other IFIs, mainly in projects involving resettlement or high-risk activities. In many cases, such independent monitoring is optional and not mandatory</li> </ul> <p><b><u>Recommendations:</u></b></p> <ul style="list-style-type: none"> <li>• Include provisions on options for participatory monitoring</li> <li>• Provide <i>positive incentives</i> for ADB staff and implementing agencies to implement safeguard standards</li> <li>• Enable independent third-party monitoring and social audit of ADB portfolios by indigenous peoples’ organisations at the national and regional levels</li> <li>• Require culturally appropriate and accessible provision of draft monitoring reports, including independent reports, to affected communities and ensure their views on implementation are accurately documented (if they choose to make comments)</li> <li>• Ensure monitoring information is channelled to corrective and grievance mechanisms in a strengthened ADB compliance and accountability framework.</li> </ul>
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<sup>i</sup> International norms on indigenous peoples' rights are drawn from: Thornberry, P (2002) *Indigenous Peoples and Human Rights* Juris publishing and Manchester University Press, Manchester; Mackay (2006) *Indigenous Peoples and United Nations Human Rights Treaty Bodies: a Compilation of Treaty Body Jurisprudence, 1993 – 2006* FPP, Moreton-in-Marsh; and Gilbert, J (2006) *Indigenous Peoples' Land Rights Under International Law: from victims to actors* University of Ulster and Transitional Justice Institute

<sup>ii</sup> Documents consulted include: MacKay, F (2004) *Indigenous Peoples Right to Free, Prior Informed Consent and the World Bank's Extractive Industries Review* Forest Peoples Programme, Moreton-in-Marsh; MacKay, F (2005) "The Draft World Bank OP 4.10 on Indigenous Peoples: progress or more of the same?" *Arizona Journal of International and Comparative Law* 22(1):65-98 Griffiths, T (2003) *A Failure of accountability: indigenous peoples, human rights and international development agency standards – a comparative review* FPP, Moreton-in-Marsh; Griffiths, T (2006) *Making the Grade: a survey of IFI social policies, international development standards and the policies of the European Investment Bank* CEE Bankwatch; Halifax Initiative (2006) *One Step Forward and One Step Back: an analysis of the IFC's Sustainability Policy, Performance Standards and Disclosure Policy* Halifax Initiative Coalition, Ottawa; Roy, D (n.d.) *The Asian Development Bank's Indigenous Peoples' Policy and its Impact on Indigenous Peoples of Asia* manuscript;