

*DRAFT comments: further change will occur as consultations proceed*

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## **I. Indigenous Peoples**

These are preliminary comments on the consultation draft of the ADB's Safeguard Policy Statement, focusing on the policy principles and safeguard requirements relevant to indigenous peoples. They are intended to inform further debate on the provisions contained in the document. Our overall conclusion from careful reading of the SPS is that although the current draft uses careful language, and provides some improved protections in specific areas, it fails to uphold existing human rights requirements for international finance institutions generally, and specifically in the case of indigenous peoples. In particular, the protections afforded to the right to give or withhold consent, to obtain and retain recognized rights to customary and traditional lands and resources, and the overall lack of clear guidance on requirements for 'consultation' and 'good faith negotiation' mean that the policy statement and operational requirements fail to provide the minimum protections required under international law.

It is also worth noting at the outset that this revision of the indigenous peoples' safeguards of the Asian Development Bank is taking place in a changed international context regarding the legally recognized rights of indigenous peoples. In September 2007 the United Nations General Assembly passed the Declaration on the Rights of Indigenous Peoples, and **not one** Asian government voted against passing the Declaration. The passage of the Declaration must be taken as a resounding and powerful statement of the aspirations and intentions of Asian governments and peoples for the futures of the indigenous peoples of the region. The Supreme Court of Belize recently upheld the importance of the Declaration for governments in a historic decision, stating that:

"...this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of

such force that the defendants, representing the Government of Belize, will not disregard it. ... In **Article 42** of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and **states**, are enjoined to promote respect for and full application of the Declaration's provision and to follow up its effectiveness..."<sup>1</sup>

The updating and improvement of the Asian Development Bank's safeguards for indigenous peoples therefore represent an opportunity for Asian governments, for the Bank, and for other governments sitting on the Board of the Bank, to operationalize the Declaration and set a historical precedent for all other multi-lateral financing agencies to follow. These comments are intended to highlight areas of the draft in which the current draft falls short of international standards, and to provide concrete recommendations on possible approaches to strengthen the draft.

## **Section A: Overview of the policy provisions**

The draft policy statement currently fails to meet existing standards on safeguard measures for indigenous peoples on a number of key, significant points. Further consideration of the detail of these areas in which revision and improvement is required will be provided below, in summary the draft policy:

- fails to apply or reference relevant international agreements, legal norms and laws as relevant to the requirements of the policy, in particular the Declaration on the Rights of Indigenous Peoples
- fails to apply a human rights based approach to development
- fails to ensure that the policy provisions are universally applied across all Bank-supported activities (in particular 'Section E' or 'special requirements')
- fails to protect or recognize the right to free, prior and informed consent in ANY activity impacting on indigenous peoples
- fails to provide protection for customary and traditional tenure in projects involving physical relocation or direct impacts on indigenous peoples' lands, if such tenure is not formally recognized by the state
- fails to ensure that the imposition of Protected Areas can only proceed with the free, prior and informed consent of the affected peoples, in direct contravention of agreements made under the World Parks Congress (Durban 2004)
- fails to prohibit the relocation of indigenous peoples from their traditional lands, territories and resources without their free, prior and informed consent, nor does it prohibit the restriction of access or commercial development of natural resources found on the lands of indigenous peoples
- fails to provide disclosure requirements sufficient to ensure informed decisions can be made, in particular SIA and EIA documents

## **Section B: Consideration of Specific Issues**

Here we seek to look in detail at particular issues that exist with the current draft of the SPS, with specific reference to indigenous peoples. In particular, we will address issues with both intent or approach, and issues with specific language employed. Alternative language is provided in the attached table, illustrative of existing legal and practical norms.

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<sup>1</sup> For full details and argument please see:

[http://www.law.arizona.edu/depts/iplp/advocacy/maya\\_belize/documents/ClaimsNos171and172of2007.pdf](http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf)

## 1. General concerns

### Human rights framework

A central reason for instituting a safeguard is, in our view, to protect and promote human rights, both the rights of peoples and the rights of individuals. Safeguards form a minimum set of requirements by which certain internationally agreed principles – including also environmental protection – are to be protected and promoted in the development process. For the specific case of indigenous peoples, safeguards intended to benefit and protect them directly should, and in the past have, been designed with reference to the need to protect human rights, and the rights of indigenous peoples as internationally recognized. The World Bank, the International Finance Corporation and the Inter-American Development Bank (to cite commensurate institutions) all recognize this in the objectives of their respective indigenous peoples safeguard standards. The IFC seeks to "foster full respect for the dignity, human rights, cultural and natural resource-based livelihoods of indigenous peoples"; the World Bank seeks to ensure "that the development process fully respects the dignity, human rights, economies and cultures of indigenous peoples"; and the IDB seeks to "safeguard indigenous peoples and their rights". The Asian Development Bank draft currently under discussion does not.

An advance copy of the draft was circulated (unofficially) and contained the following objective: "This set of policy requirements aims to safeguard indigenous peoples rights to maintain sustain and preserve their cultural identities, practices and habitats, and ensure that projects affecting them will take into consideration necessary measures to protect these rights". The current draft has removed this sentence, and thus removed the rights-based understanding of the overall purpose of safeguard policies.

~~infringe into areas which they traditionally own, occupy or use or consider as ancestral assets. This set of policy requirements aims to safeguard Indigenous Peoples rights to maintain, sustain and preserve their cultural identities, practices and habitats, and ensure that projects affecting them will take into consideration necessary measures to protect these rights..~~

Original draft text, SPS July 2007

The removal of 'human rights' from the objectives of the policy statement is symptomatic of a wider fault within the SPS – the lack of reference to or application of a human rights based approach to development. The results of such a lack of framework can be seen in the lack of reference to any form of 'consent', or to any applicable international legal norms, or to the specific provisions for indigenous peoples' rights enshrined in the UN Declaration on the Rights of Indigenous Peoples. All of these areas will be dealt with in greater detail below.

### Unbalanced application of policy provisions

A second key general observation is the non-application of policy provisions for a wide range of economic activities. Protections afforded to indigenous peoples should not vary according to the financing modality under which a particular activity happens to be arranged. However the ADB draft currently contains (in Attachment C, 'Safeguard Requirements for Indigenous Peoples, herein 'SR') two sets of requirements, Section C dealing with General Requirements for all projects and all funding modalities, and Section E, Special Requirements which are triggered by the possibility of particularly sensitive impacts being felt by affected indigenous peoples. The cases in which such 'Special Requirements' are triggered are when the cultural knowledge of indigenous peoples may be commercially developed, where activities will take place on, or affect, the lands of indigenous peoples and where commercial development of natural resources on indigenous peoples' lands is planned. Clearly 'Special

Requirements' are applied in the most sensitive cases – yet Section E is not applied to activities funded under Program Loans, Multitranchise Financing Facility, Emergency Assistance, Sector Finance or Financial Intermediaries. (SR 32, 34, 35, 37, 38, 39(ii)).

### **Weakened language**

Attachment C 'Safeguard Requirements for Indigenous Peoples' contains the most important detailed information for protections for indigenous peoples in the SPS. As its name suggests, the purpose of the attachment is to provide detailed guidance to borrowers and clients as to what is **required** under the policy. Its provisions are mandatory and must be understood as such. However one stark change between the unofficial earlier draft of July 2007 and the current version is the periodic replacement of the term 'will' to the weaker term 'should'. This is an illustrative example of other changes that have appeared in the draft also, many of which point to a weakening of the language and provisions.

## **2. Policy triggers**

Experience with other multi-lateral financial institutions has shown that one of the most important aspects of a safeguard system is **when it is applied**. No matter how good the protections offered by a safeguard system, if they are rendered useless by non-application then they are worse than useless. Therefore it is important to look carefully at when and how the provisions of this safeguard statement are applied – before looking at the content and quality of those provisions.

The ADB states that its safeguards for indigenous peoples will apply "if a project impacts directly or indirectly on the dignity, **human rights**, livelihood systems, or culture of Indigenous Peoples, or affects the territories, natural or cultural resources that Indigenous Peoples own, use, occupy, or claim as their ancestral domain or asset." (SR 7, emphasis added). This is the only time in the draft that human rights are mentioned in relation to indigenous peoples.

With regards to application, the formulation provided appears strong – requiring the full 'general requirements' for any project that is assessed to fit the above definition. This means that the safeguard provisions apply to any project that has any impact, positive or negative, on any aspect, direct or indirect, on indigenous peoples' land, territories or lives. As a trigger for application this is consistent with international standards.

However on closer inspection there are areas of concern with this application. Firstly, the extent to which provisions are followed depends upon the assessed 'significance' of the potential impacts – an assessment in which indigenous peoples are not required to be involved. One of the first steps of the safeguard is the carrying out of a social impact assessment to determine potential impacts, where:

16. The level of detail and comprehensiveness of the social assessment will be proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether adverse or positive. (SR 16)

The allowance for the social assessment to be 'commensurate' with the nature and scale of potential impacts is an added section of text inserted into the original draft, and its inclusion weakens the text without providing any additional clarity or guidance.

The Safeguard Policy Statement also contains a paragraph that implies 'significance' of impact is relevant to determining the extent to which safeguard provisions apply:

"projects are screened according to the significance of their impacts on Indigenous Peoples. 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" (SPS 44)

This paragraph serves no useful function, as it is not necessary under the terms of the policy trigger, as described in the Safeguard Requirements, for there to be an assessment of significance of impact. The safeguard requirements are applied in full whenever the conditions of the trigger are met, i.e., whenever: **a project impacts directly or indirectly on the dignity, human rights, livelihood systems, or culture of Indigenous Peoples, or affects the territories, natural or cultural resources that Indigenous Peoples own, use, occupy, or claim as their ancestral domain or asset.**

### 3. Identification of 'indigenous peoples'

ADB's approach to identifying indigenous peoples is provided in the attachment dealing with safeguard requirements (SR 5). The ADB rightly acknowledges that the ADB can not define who indigenous peoples are, due to the right to self-determination. Instead the ADB uses an approach common among multi-lateral development banks, the provision of a list of identifying elements which need to be present to varying degrees. This approach to identifying indigenous peoples is consistent with international best practice, and rests on the first element provided – that of self-identification.

This approach to identifying indigenous peoples can be effective if a few basic conditions are met, all of which can be addressed in either the policy principles or the operational requirements. The first condition that should be met is that self-identification should be clearly recognized as the fundamental or foundational criteria for recognizing an indigenous identity, on which the other criteria depend. This is in line with international law on the identification of indigenous peoples, specifically the advice of the Committee of the Convention on the Elimination of Racial Discrimination, General Recommendation 8 which states that "such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned."

The second condition that must be met is that screening must be carried out by independent experts, as provided for in the operational requirements. The third condition is that the identification of indigenous peoples must clearly be separated from national legislation or national legal recognition. In many countries in Asia there is reluctance to use the term 'indigenous peoples' for a variety of historical and political reasons. However for the purposes of international law, and the purposes of development finance institutions, peoples who self-identify as indigenous and who have, to varying degrees, the other identifying criteria should be recognized as such **even though national legislation does not use the term**. This is in line with the practice of other multilateral development banks

The Consultation Draft of June 2007 recognizes this difficulty: "a country's national legislation and definitions of indigenous peoples, if any, seldom correspond fully to ADB's policy"<sup>2</sup>. As a recommended solution we draw attention to the formulation of the Inter-

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<sup>2</sup> ADB Consultation Draft June 2007, p. 5

American Development Bank where the target populations are identified "irrespective of their legal status"<sup>3</sup>.

### 3. Free, prior and informed consent

The centrality of free, prior and informed consent to the wellbeing of indigenous peoples can not be overestimated. It is directly referenced and protected in Articles 10, 11, 19, 28, 29 and 32 of the Declaration on the Rights of Indigenous Peoples. It is a fundamental right stemming from their right to self-determination. It is not provided for at any stage, nor is it mentioned, in the current draft of the SPS. Further, there were protections provided for indigenous peoples' rights to give or withhold their 'informed consent' that appeared in an earlier iteration of this Safeguard Policy Statement that have since been removed, and at no point in the draft is consent mentioned. The key paragraph (now removed) stated, in part:

#### 5. Informed Consent and Good Faith Negotiation

17. In deciding whether to proceed with the project, the borrower/client will obtain from the affected Indigenous Peoples' communities their informed consent to the project. To obtain the informed consent of the indigenous peoples to the maximum extent possible, the borrower/client will use free, prior and informed consultations to ensure that the needs, priorities, and preferences of indigenous peoples are adequately addressed. Where there is such consent, the borrower/client will provide the detailed documentation of the formal agreements reached with Indigenous Peoples and Indigenous Peoples Organizations in the IPP.

It is worth highlighting that even in projects where the commercial development of indigenous peoples' traditional, customary and cultural knowledge is involved the principle of Free, Prior and Informed Consent – or indeed 'consent' – remains absent (SR 49). Instead the ADB has used the formulation of 'conditional upon prior agreement' without providing any guidance as to what these terms mean. Again, the language of 'consent' was present in earlier iterations, and therefore its removal appears to represent a conscious effort to weaken protective provisions. Current international legal norms and emerging agreements provide strong protections for the intellectual property rights of indigenous peoples over their cultural and customary knowledge, norms that should be reflected also in the ADB's emerging standards.<sup>4</sup>

Further instances in which 'informed consent' have been removed are for projects requiring the physical relocation of indigenous peoples from their lands, and for projects involving limitations on access and use to traditional resources (for instance, in the creation of National Parks). What is provided instead is the requirement for 'broad community support'. Before discussing what is meant by 'broad community support' in the ADB documents, international norms and agreements on FPIC are worth listing:

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<sup>3</sup> See the Inter-American Development Bank, Operational Policy 765, Definition 1.1 which states in full: **Indigenous peoples**, for the purposes of this policy, is a term that refers to peoples who meet the following three criteria: (i) they are descendants from populations inhabiting Latin America and the Caribbean at the time of the conquest or colonization; (ii) irrespective of their legal status or current residence, they retain some or all of their own social, economic, political, linguistic and cultural institutions and practices; and (iii) they recognize themselves as belonging to indigenous or precolonial cultures or peoples.

<sup>4</sup> See, for instance, the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, World Intellectual Property Organization currently drafting provisions to strengthen legal protections for such knowledge [http://www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html)

- The Declaration on the Rights of Indigenous Peoples explicitly references and protects the right to give or withhold free, prior and informed consent in Articles 10, 11, 19, 28, 29 and 32.
- Free, prior and informed consent is recognized by a range of intergovernmental organizations and national governments. For instance, the CBD, in its 5<sup>th</sup> Conference of the Parties, confirmed that: "access to traditional knowledge, innovation and practices of indigenous and local communities should be subject *to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.*"<sup>5</sup>
- UNDP in preparation of the third session of the PFII surveyed a questionnaire among UN bodies, funds, programmes and specialized agencies in order to gather information about 'how the principle of FPIC is understood and applied by the United Nations Programmes, Funds and agencies' (E/C 19/2004/11). The report states that 10 out of 19 UN agencies implemented FPIC in their policies and practices and FPIC is embedded in the human rights framework. UNDP applies the principle in three areas: in the context of developmental planning and programming; on issues of resettlement; and on issues of indigenous knowledge.
- The draft American Declaration on the Rights of Indigenous Peoples (passed 1997 by the Inter-American Human Rights Commission) provides for free, prior and informed consent, or some form similar, for any activities impinging on indigenous peoples' lands and territories.

However, as stated, currently the ADB consultation draft does not mention, reference, protect or allow for free, prior and informed consent. The terminology used instead is 'free, prior and informed consultation leading to broad community support' (SR 8). Here we will look at what these terms mean for the Bank.

#### 'Broad community support'

This is a protection that applies to all projects with potential impacts on indigenous peoples, and must be documented by the borrower, and verified by the ADB. The ADB states in this draft that it will not fund any project without having verified BCS:

ADB will review the borrower/client's documentation of the engagement process, and in addition, through its own investigation, assure itself that there is broad community support for the project within the affected Indigenous Peoples communities. ADB will not finance the project if it is unable to ascertain that such support exists. (SPS 47)

Further to this, the ADB specifies that "when the borrower/client and the affected Indigenous Peoples have serious differences and disagreements on the project, its components, or IPP, the borrower/ client should adopt good faith negotiations for them to resolve such differences and disagreements." (SR 11). It is notable that these negotiations are not required to be successful (as they are explicitly required to be in commensurate standards, the IFC's PS7).

Strongly interpreted, these provisions for 'broad community support' and 'good faith negotiation' may provide some limited protections for indigenous peoples, **but remain far below the standard of international law**. However lack of clarity and specificity in the requirements mean that interpretation is more open than it should be. Further attention to this issue can be found in section 7 below).

## **5. Lands, territories and resources**

<sup>5</sup> Decision V/16, Annex: Programme of Work, 1 General Principles 5, 139–42

The draft of the SPS provides some recognition and description of the importance of land and resources to indigenous peoples. It requires that borrowers and clients of the Bank 'pay particular attention to' issues such as "the customary rights of indigenous peoples, both individual and collective, pertaining to ancestral domains, lands or territories that they traditionally owned, or customarily occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihood systems". (SR 44 (i)). Language elsewhere in the draft also underscores the importance of land and resources to the identities, cultures and survival of indigenous peoples.

Actual enforceable requirements within the document, however, do not uphold the rights of indigenous peoples to their lands. Article 26 of the UN Declaration on the Rights of Indigenous Peoples states, in relation to land, 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.

In the SPS draft of the ADB, these rights are indirectly referenced, but not enforced. The ADB acknowledges that "Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply if the project affects such ties. (SR 44). However no special protections stem from these 'special considerations'. Initially, in assessing impact on indigenous peoples' ties with their lands and resources, the ADB does not require independent experts to be involved in such a review, nor do they require a review of customary tenure regimes. Without such knowledge, gained in an independent survey, the borrower can not possibly be expected to ascertain how their project will affect the ties that indigenous peoples have to their lands.

### Physical Relocation

Clearly for projects requiring the physical relocation of indigenous peoples from their ancestral territories, and for projects involving the institution of Protected Areas over indigenous peoples' lands, such 'special ties' will be directly and irreparably damaged. So what are the protections issued for these instances?

In exceptional circumstances, when avoidance is proven to be impossible, the borrower/client will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process. (SR 50)

The weak protection of 'broad community support' is required for ALL ADB projects impacting on indigenous peoples and therefore provides no additional or particular protections for projects involving physical relocation. It does not require 'successful outcomes' or any other such formulation that would imply agreement or consent. Thus the 'special requirements' – seemingly intended to provide additional protections in sensitive cases – appear to fail to provide anything more than the minimum BCS required elsewhere in

the draft. Yet the Declaration on the Rights of Indigenous Peoples specifically protects indigenous peoples from physical relocation in Article 10:

*Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place **without the free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Further, in outlining the requirements for a Bank client in a project where physical displacement of indigenous peoples is planned, the safeguard requirements do not provide for the recognition of customary tenure or non-official tenure, only that the client pay 'consideration to' such ties. This means that there is no protection for peoples living with customary and traditional tenure if the state has not recognized such tenure.

### Protected Areas

The draft safeguard provisions provide that:

for all projects affecting Indigenous Peoples' ownership and access to land and natural resources, the borrower/client will prepare an IPP that could be combined with a resettlement plan. Such a combined plan will be compatible with the Indigenous Peoples' cultural preferences, and will include culturally appropriate livelihood restoration measures. The borrower/client will document **the results** of the free, prior and informed consultation process for that particular Indigenous Peoples community. (SR 47)

Given international norms and agreements on the creation of Protected Areas, this formulation is particularly surprising. In the Durban Action, created by governments at the World Parks Congress in South Africa in 2004, the issue of protected areas and the rights of indigenous peoples was directly addressed in Outcome 5 states that "The rights of indigenous peoples, mobile peoples and local communities [should be] recognized and guaranteed in relation to natural resources and biodiversity conservation" (IUCN, 2003 23). It is followed by three "Key Targets." Amplifying Recommendation 5.24, Key Target 10 specifies the implementation of "participatory mechanisms for the restitution of indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free and informed consent ...by 2010" (IUCN, 2003: 24). Given that the world's governments have agreed to work towards restitution for lands and territories incorporated into protected areas without their consent, it is particularly strange that the ADB should allow the continued financing of the same. (See IUCN, Durban Action Plan, Vth IUCN World Parks Congress, Durban, South Africa, 8-17 September 2003 for full details).

Further the Declaration on the Rights of Indigenous Peoples specifically states:

*Article 28*

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged **without their free, prior and informed consent**.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

With these observations in place, the only possible conclusion is that the inalienable rights over traditional lands and resources claimed by indigenous peoples are not respected or

even directly acknowledged in the draft. Alternative proposed text is provided in the table below to address the issues of protected areas, physical relocation, and commercial development of cultural knowledge and / or natural resources.

## **7. Lack of clear guidance on 'consultation', 'broad community support' and 'good faith negotiation'**

The Consultation Draft correctly recognizes that one of the key challenges to implementing the 1998 policy on indigenous peoples in the past has been realizing "meaningful and culturally appropriate consultation with indigenous peoples' communities" (SPS 18). It is clear that one of the main roles of this new Safeguard Policy Statement and its attachments is to provide increased clarity and precision to assist borrowers/clients and affected communities and peoples understand and engage with the safeguards and use them fully to improve project conception, design and implementation.

The first point that must be made is that the operational requirements for 'free, prior and informed consultation' and for 'good faith negotiation' must be extensively discussed, and consulted with indigenous peoples prior to being finalized within the draft. The importance of the up-coming consultations on this draft can not be stressed enough, as the process of 'consultation' and 'negotiation' towards 'broad community support' will embody the true strength (or weakness) of this new policy.

Here, therefore, we do not seek to provide any solution to what 'consultation' or 'good faith negotiation' could be defined as in the SPS. Rather we seek to draw out a few points that we see should be considered within the context of full and free consultations with indigenous peoples.

### 'Consultation'

The guidance provided on what 'consultation' means for borrowers and clients of the Bank fails currently to address the following principles of consultation:

- involvement of representative local indigenous peoples' institutions in all stages of the project, including impact assessments and planning (see IFC PS 7)
- involvement of regional or national indigenous peoples' organizations in free, prior and informed consultations
- respect for and use of customary and traditional decision making processes, including the provision of sufficient time for community decision making processes to take place (see IFC PS 7 GN)

Comprehensive guidance is required for consultation processes, as they need to be adopted and suited to each locale. As an illustration, the following guidance is provided by the International Finance Corporation:

- avoiding conflict "through an iterative process of listening to and incorporating concerns, sharing certain decisions, and adapting the project as necessary and feasible" (IFC GN7, para 20)
- "Consultation with *and within* affected communities of Indigenous Peoples may require lengthy periods of time. Ensuring that all members of the indigenous community are adequately informed about likely project impacts and possible mitigation measures may involve an iterative process over time with various segments of the community. Thus, (i) consultation should start as early as possible in the assessment stage; (ii) project information should be made available in

understandable format, using the indigenous languages where appropriate; (iii) the communities should have sufficient time for consensus building and developing responses to project issues and options that benefit their community; and (iv) clients should reserve sufficient time to fully consider and address concerns and suggestions about the project into the project design and implementation. (IFC GN7 para 17)

- "During the process of information disclosure, consultation and informed participation, care must be taken to ensure that engagement with the affected communities of Indigenous Peoples occurs freely and voluntarily, without any interference or intimidation" (IFC GN7 para 15)
- "Clients should adopt consultation approaches that rely on existing customary institutions, collective decision making processes utilized by many Indigenous Peoples, and the role of community elders or leaders" (IFC GN7 para 16)

These quotations from existing guidance on the issue of consultation and of FPIC – what these terms means in practical terms for clients of the Bank and how they are enshrined by other institutions – are merely illustrative. We seek to demonstrate that the existing guidance is flawed and superficial. More effective, detailed and practical guidance is required in the operational requirements for the SPS, established in consultation with indigenous peoples and their representative organizations.

#### 'Good faith negotiation'

If negotiation is to take place, as allowed for in the operational requirements, (SR 11), then guidance on what the acceptable processes of negotiation are must be provided also. Given that the standard of good faith negotiation is upheld by the International Finance Corporation, the guidance provided by this institution should be referenced. For instance, IFC Guidance Notes to PS 7 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.”

However the trigger for requiring such negotiation is unclear, as it is provided for only: "when the borrower/client and the affected Indigenous Peoples have serious differences and disagreements on the project, its components, or IPP" (SR 11). How this is judged, who verifies it and how oversight is ensured is not described.

## **8. Presence of measurable timelines and stages of implementation**

Experience in the past with other multi-lateral finance institutions has shown that measurable, concrete indicators of compliance with safeguards are required to ensure that people are able to access and use their rights under safeguard systems. Such timelines and concrete indicators give organizations and communities the ability to track and monitor the responsibilities of the ADB and its borrowers/clients. When the timeline and level of detail for safeguard requirements are left to the judgment of the borrower or client then standards are often 'read down' or interpreted weakly. It was therefore with great concern that we noted the removal of the following from the July draft:

7. All operations, mentioned under paragraph 2 and which potentially trigger the IP Principles, will require the following:

**All Stages of Project Cycle**

(1) Free, Prior and Informed Consultation

**Project Preparation**

(2) screening, if screening proves that no Indigenous Peoples are present in or no potential impacts are anticipated, no further action beside of constant crosschecking is required.

(3) social impact assessment;

(4) Indigenous Peoples Planning (IPP);

(5) process of obtaining informed consent through good faith negotiation;

(6) disclosure of safeguard documents.

**Project Implementation**

(7) finalization and updating of IPP

(8) IPP monitoring

**Project Completion/Termination**

(9) IPP completion and evaluation

8. The level of detail necessary to meet the requirements specified in paragraph 7, (3) and (4), will be proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether adverse or positive.

This above formulation provides a clear overall guide to borrowers / clients on the requirements of the policy, and also provides a guide to indigenous peoples and their organizations on what they can expect and have the right to expect from the ADB and its clients. Both this framework of time-bound indicators and the disclosure requirements listed (see section 11 below) weaken the overall safeguard by making it more difficult for indigenous people to access relevant information and understand for themselves the overall process of safeguards that the ADB and its clients are bound by.

In a further example, also difficult to interpret, the new draft of the SPS has changed references to the Indigenous Peoples Plan to 'Indigenous Peoples Plan, or equivalent document' (SR 17). This could weaken requirements by not defining or interpreting what an 'equivalent document' is, or who is able to make such a judgment of equivalency, and such information is not provided. It also potentially weakens the ability of affected communities to provide substantive input on what this 'document' may be of may contain as guidance is only provided as to what an IPP requires in terms of consultation.

## **9. Lack of established grievance mechanisms for project level redress**

The further away from a project site the mechanisms for redress or complaint are situated, the harder they are for indigenous peoples and affected communities to access. Although independent mechanisms for review and accountability at an institutional level are essential, and are provided for in ADB's compliance review procedure and accountability mechanism, it is also essential for local means for complaint and grievance to be provided.

The operational requirements provide for consultations which are 'on-going' (SR 10), and for the establishment of grievance mechanisms (SR 22) and there is a small passage in annex 1 to attachment C (paragraph H) which provides further detail as follows:

Accessible procedures appropriate to the project to address grievances by the affected Indigenous Peoples' communities arising from project implementation.

When designing the grievance procedures, the borrower/client takes into account the availability of judicial recourse and customary dispute settlement mechanisms among the Indigenous Peoples." (annex 1 to attachment c, para h)

On the positive side, such a provision ensures that grievance mechanisms are set up for all projects with impact on indigenous peoples. However the provision is weakened by not being referenced in the policy principles (as per the involuntary resettlement and environment principles) and by the fact that the language used requires such mechanisms to be accessed by affected communities – but does not include a timeline on the establishment of such mechanisms (before appraisal? to be detailed in the IPP?). The language also allows the mechanism to be dispensed with if it is judged that no impacts will be felt, even if the potential for impacts has been identified, and for it to be scaled to the severity of potential impacts.

These issues could be addressed by moving the text directly into policy principles and correcting the language to avoid ambiguities in application (see table below for suggested text). This would be commensurate with the references to grievance mechanisms for environmental safeguards (SPS page 14; Attachment A 15).

## **10. Guidance provided does not include reference to relevant international law**

There are two closely related issues in relation to applicable international law, one is the need to reference international law and legal norms as relevant to the project activity, and the second is a concurrent commitment not to finance projects or investments which fail to comply with applicable legal norms (including norms protecting indigenous rights under international treaties ratified by the Borrower **and** international jurisprudence on indigenous rights).<sup>6</sup> The Inter-American Development Bank is illustrative of a peer institution of the Bank that has codified this commitment in the IDB Operational Policy on Indigenous Peoples, OP-765 and could provide some guidance for the Bank in instituting this no-go criteria. See also FPP comments on the OED Review, June 2007. One simple way to address the issue is to prohibit investment in any project not applying relevant and applicable international legal norms under the Prohibited Activities List.

The SPS draft does recognize that the policy requirements are triggered when a project may impact on the human rights of indigenous peoples (SR 7), and the provision of guidance as to what this entails would assist borrowers and clients to understand the context of indigenous peoples' rights in international law, including the Declaration on the Rights of Indigenous Peoples. The instruments that should be referenced can be researched and compiled separately, but as an illustration the Inter-American Development Bank currently states (in footnote 4):

International legislation includes, as in force for each country, the United Nations Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the American Convention on Human Rights (1969), the International Covenant on Economic, Social, and Cultural Rights (1976), the International Convention on the Elimination of all Forms of Racial Discrimination (1966), the Convention on the Rights of the Child (1990), the International Labor Organization (ILO) Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957), ILO Convention 169 concerning Indigenous and Tribal Populations in Independent Countries (1989), Agenda 21 adopted by the United Nations Conference on Environment and Development (UNCED) (1992),

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<sup>6</sup> Inter-American Development Bank Operational Policy on Indigenous Peoples, OP-765 1.2

and the International Convention on Biological Diversity (1992), as well as the corresponding international jurisprudence of the Inter-American Court of Human Rights or similar bodies whose jurisdiction has been accepted by the relevant country.

Other international instruments currently in preparation, such as the draft United Nations Declaration on the Rights of Indigenous Peoples and the draft American Declaration on the Rights of Indigenous Peoples, establish aspirational principles that may be taken into account to the extent that these instruments are finalized and subscribed by the relevant country.

The original 1998 Policy on Indigenous Peoples of the ADB did provide discussion and details of the national and international legal framework relevant for interpretation and application of the indigenous peoples' policy. The new policy statement and requirements must include a commensurate section.

In the interests of clarity, the new policy should also underline the requirement to meet applicable international law by referencing it whenever the relevant national law is referenced, for instance in the specific guidance provided regarding the activities of Financial Intermediaries (SR 39):

39. ADB's requirements for social safeguard and environmental assessment and management for the FIs will be proportional to the level of potential impacts. All FIs will apply the Prohibited Investment Activities List (PIL) (Attachment D). FIs with business activities that have minimal or no adverse impacts on Indigenous Peoples will be considered as Category C projects and need not apply any other specific requirements. In addition to the PIL, FIs providing long-term corporate finance or project finance will require the recipient of such finance to:

- (i) follow national laws, and applicable international laws and norms, where the activity financed presents limited impacts on Indigenous Peoples;
- (ii) follow national laws, and applicable international law and norms, and apply ADB's general requirements specified in Section C and specific requirements provided in Section E where the activity financed presents significant impacts on Indigenous Peoples.

## 11. Disclosure requirements

The definition of free, prior and informed consultation would seem to pre-suppose the sharing of all relevant documents with affected communities as and when they are prepared, including draft versions. However the disclosure requirements for projects impacting on indigenous peoples do not reflect this. They state, in whole:

"20. The borrower/client will submit to ADB the following documents and disclose them to key stakeholders:

- (i) draft IPP/Indigenous Peoples Planning Framework (IPPF) endorsed by the borrower/client, before appraisal;
- (ii) revised and final IPP/IPPF upon completion of such plan;
- (iii) new or updated IPPs or addendums to IPPs, prepared during implementation;
- (iv) due diligence reports and corrective action plans, if any; and
- (v) monitoring reports.

21. The borrower/client will provide relevant key information on the projects and the IPPs in a form, manner and language(s) accessible to key stakeholders, especially the affected Indigenous Peoples. In case of non-literate Indigenous Peoples, other appropriate communication methods will be utilized." (SR 20-21)

Attachment C, where this passage is written, is intended to provide guidance to the borrowers and clients of the Bank as to how to what responsibilities the clients have, and how they should implement the indigenous peoples' safeguards. However during a process of free, prior and informed consultation, all relevant documents should be provided to the affected communities in formats and languages that are appropriate to the peoples concerned. This should specifically include documents that impact significantly on the project – at every stage. For instance, the social impact assessment will necessarily involve indigenous peoples in the research and writing of that assessment – and the conclusions reached in that assessment regarding the type and severity of potential impacts must be shared with affected indigenous peoples. Likewise any environmental impact assessment will contain information of great interest to communities, and information to which they should be a party at the earliest possible stage. There is indirect reference to additional disclosure requirements in the guidance on free, prior and informed consultation where it is stated that the client will:

provide the affected Indigenous Peoples, prior to actual consultation, all relevant information (draft documents and plans, including an assessment of potential impacts that may arise during and after project implementation). (SR 9(iii))

However this is insufficient if not specifically and directly reiterated in the disclosure requirements of the safeguard requirements. As the disclosure requirements stand they fail to provide for appropriate or sufficient access to centrally important project documents, and do not require that affected peoples remain informed about the range of potential impacts that a project may or may not have for them. Although access to such reports does not replace the requirement to iteratively discuss and consult over the form and design of the project, such documents are an essential part of communities and their representative organizations remaining fully informed.

### A matrix/table to summarize the narrative portion

All recommended text and proposed changes are illustrative only. Actual text changes must be determined in close, full and free consultation with indigenous peoples and their representative organizations.

Policy Principle	Current language in SPS Consultation Draft	Recommended language
Policy trigger	"if a project impacts directly or indirectly on the dignity, <b>human rights</b> , livelihood systems, or culture of Indigenous Peoples, or affects the territories, natural or cultural resources that Indigenous Peoples own, use, occupy, or claim as their ancestral domain or asset." (SPS 44)	
Identification of 'indigenous peoples'	For operational purposes, the term "Indigenous Peoples" is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees: (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (ii) collective attachment to geographically distinct habitats or ancestral territories and to the natural resources in these habitats and territories; (iii) distinct customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (iv) an indigenous language, often different from the official language of the country or region.	For operational purposes, the term "Indigenous Peoples" is used in a generic sense to refer to a distinct, vulnerable, social and cultural group, <u>irrespective of national legal status</u> , possessing the following characteristics in varying degrees: (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (ii) collective attachment to geographically distinct habitats or ancestral territories and to the natural resources in these habitats and territories; (iii) distinct customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (iv) an indigenous language, often different from the official language of the country or region. <i>In screening for impacts on indigenous peoples, the borrower/client will consult with regional and national indigenous peoples' organizations if available.</i>
Lands, territories and	borrowers and clients of the Bank will 'pay particular	<i>Any project impacting on the customary lands and territories</i>

resources	attention to' issues such as "the customary rights of indigenous peoples, both individual and collective, pertaining to ancestral domains, lands or territories that they traditionally owned, or customarily occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihood systems". (SR 44 (i))	<p>of indigenous peoples, whether under cyclical or permanent use, will not proceed unless their free, prior and informed consent has been obtained.</p> <p>In determining or assessment potential impacts, the borrower/client should be required to make use of independent experts to assess the presence of customary tenure regimes in the project area, or project area of influence.</p>
Relocation	In exceptional circumstances, when avoidance is proven to be impossible, the borrower/client will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process.	The borrower / client will not require the physical relocation of indigenous peoples from their customary lands and territories unless their free, prior and informed consent has been obtained. Full consideration will be provided to project alternatives, and compensation, where required and agreed to, will take the form of land of equivalent size and quality.
Protected Areas	for all projects affecting Indigenous Peoples' ownership and access to land and natural resources, the borrower/client will prepare an IPP that could be combined with a resettlement plan. Such a combined plan will be compatible with the Indigenous Peoples' cultural preferences, and will include culturally appropriate livelihood restoration measures. The borrower/client will document <b>the results</b> of the free, prior and informed consultation process for that particular Indigenous Peoples community. (SR 47)	The borrower / client will not curtail or limit the access of indigenous peoples to their customary lands and territories under use unless their free, prior and informed consent has been obtained. In the establishment of Protected Areas that incorporate in part or in whole the lands and territories of indigenous peoples, the Durban Action Plan and Durban Accord of the World Parks Congress will be applied and followed as relevant.
Free, prior and informed consent	<p>There is no mention of free, prior and informed consent in the draft.</p> <p>Earlier iterations of the draft required 'informed consent through good faith negotiations with affected indigenous peoples' (Safeguard Requirements for Indigenous Peoples, July Draft, para: 7)</p>	<p>See formulations above for sensitive project areas, including protected area creation, land rights and relocation.</p> <p>For general requirements, potential language:</p> <p>if a project impacts directly or indirectly on the dignity, <b>human rights</b>, livelihood systems, or culture of Indigenous Peoples, or affects the territories, natural or cultural</p>

	Current draft requires 'free, prior and informed consultation leading to broad community support' without which funding will not be provided.	resources that Indigenous Peoples own, use, occupy, or claim as their ancestral domain or asset, the ADB will not approve funding prior to verifying the existence of free, prior and informed consent from the affected indigenous peoples
Lack of clear guidance on 'consultation', 'consent' and 'good faith negotiation'	'prior agreement' successful outcome broad community support	
Lack of established grievance mechanisms for project level redress	<p>22. If ongoing risks to or adverse impacts on affected communities are anticipated, the borrower/client will establish a grievance mechanism to receive and facilitate resolution of the affected communities' concerns and grievances about displacements in an impartial manner. The grievance mechanism will be scaled to the impacts of the project. It should address concerns promptly, using an understandable and transparent process that is culturally appropriate and accessible to the affected communities, and at no cost and without retribution. The mechanism should not impede access to the country's judicial or administrative remedies. The affected communities will be appropriately informed about the mechanism.(SR 22)</p> <p>"Accessible procedures appropriate to the project to address grievances by the affected Indigenous Peoples' communities arising from project implementation. When designing the grievance procedures, the borrower/client takes into account the availability of judicial recourse and customary dispute settlement mechanisms among the Indigenous Peoples." (annex 1 to attachment c, para h)</p>	<p>Insert reference to the mandatory establishment of a grievance mechanism into policy principles and Attachment C to underscore that it is a mandatory requirement.</p> <p><b>Potential text:</b>  For policy principles: Establish a grievance mechanism to receive and facilitate resolution of the affected indigenous peoples' concerns and grievances about the project.  For Attachment C:  22. If <del>ongoing</del> risks to or adverse impacts on affected communities are anticipated, the borrower/client will establish a grievance mechanism to receive and facilitate resolution of the affected communities' concerns and grievances about displacements in an impartial manner. The grievance mechanism will be described in full, and form part of, the indigenous peoples plan to be submitted prior to project appraisal. <del>scaled to the impacts of the project.</del> It should address concerns promptly, using an understandable and transparent process that is culturally appropriate and accessible to the affected communities, and at no cost and without retribution. The mechanism should not impede access to the country's judicial or administrative remedies. The affected communities will be appropriately informed about the mechanism.(SR 22)</p>
Guidance provided does not	No mention of international laws.	<b>Illustrative from peer institutions:</b>

include reference to relevant international law		<p>“...the rights of indigenous peoples and individuals, in national indigenous legislation, in other relevant national legislation, in <u>applicable international norms in force for each country</u>, or in the indigenous juridical collectively referred to as the “applicable legal norms”. [IDB OP 765]</p> <p><b>Potential text:</b></p>
Prohibited Activities List	<p>"production or activities that impinge on the lands owned, or claimed under adjudication, by Indigenous Peoples, without full documented consent of such peoples."</p>	<p>Keep existing prohibitions relevant to indigenous peoples.</p> <p><b>Add:</b> any project or activity which is not explicitly compliant with relevant and applicable international legal norms, including laws and agreements on environmental protection, resettlement and indigenous peoples' rights</p>
Financial intermediaries, multi-tranche finance facility	<p><b>As illustrative example:</b></p> <p>39. ADB’s requirements for social safeguard and environmental assessment and management for the FIs will be proportional to the level of potential impacts. All FIs will apply the Prohibited Investment Activities List (PIL) (Attachment D). FIs with business activities that have minimal or no adverse impacts on Indigenous Peoples will be considered as Category C projects and need not apply any other specific requirements. In addition to the PIL, FIs providing long-term corporate finance or project finance will require the recipient of such finance to:</p> <ul style="list-style-type: none"> <li>(i) follow national laws where the activity financed presents limited impacts on Indigenous Peoples;</li> <li>(ii) follow national laws and apply ADB’s general requirements specified in Section C where the activity financed presents significant impacts on Indigenous Peoples.</li> </ul> <p>(SR 39)</p>	<p><b>As illustrative example:</b></p> <p>39. ADB’s requirements for social safeguard and environmental assessment and management for the FIs will be proportional to the level of potential impacts. All FIs will apply the Prohibited Investment Activities List (PIL) (Attachment D). FIs with business activities that have minimal or no adverse impacts on Indigenous Peoples will be considered as Category C projects and need not apply any other specific requirements. In addition to the PIL, FIs providing long-term corporate finance or project finance will require the recipient of such finance to:</p> <ul style="list-style-type: none"> <li>(i) <u>follow national laws, and applicable international laws and norms</u>, where the activity financed presents limited impacts on Indigenous Peoples;</li> <li>(ii) follow national laws, <u>and applicable international law and norms</u>, and apply ADB’s general requirements specified in Section C <u>and specific requirements provided in Section E</u> where the activity financed presents <del>significant</del> impacts on Indigenous Peoples.</li> </ul> <p>(SR 39)</p>

<p>Disclosure</p>	<p>20. The borrower/client will submit to ADB the following documents and disclose them to key stakeholders:</p> <ul style="list-style-type: none"> <li>(i) draft IPP/Indigenous Peoples Planning Framework (IPPF) endorsed by the borrower/client, before appraisal;</li> <li>(ii) revised and final IPP/IPPF upon completion of such plan;</li> <li>(iii) new or updated IPPs or addendums to IPPs, prepared during implementation;</li> <li>(iv) due diligence reports and corrective action plans, if any; and</li> <li>(v) monitoring reports.</li> </ul> <p>21. The borrower/client will provide relevant key information on the projects and the IPPs in a form, manner and language(s) accessible to key stakeholders, especially the affected Indigenous Peoples. In case of non-literate Indigenous Peoples, other appropriate communication methods will be utilized. (SR 20-21)</p>	<p>20. The borrower/client will submit to ADB the following documents and disclose them to key stakeholders:</p> <ul style="list-style-type: none"> <li>(i) draft IPP/Indigenous Peoples Planning Framework (IPPF) endorsed by the borrower/client, before appraisal;</li> <li><u>(ii) draft environmental impact and social impact assessments, before appraisal;</u></li> <li><u>(iii) revised and final IPP/IPPF before appraisal;</u></li> <li><u>(iv) final environmental and social impact assessment reports before appraisal</u></li> <li>(v) new or updated IPPs or addendums to IPPs, prepared during implementation;</li> <li>(iv) due diligence reports and corrective action plans, if any; and</li> <li>(v) monitoring reports.</li> </ul> <p>21. The borrower/client will provide relevant key information on the projects and the IPPs in a form, manner and language(s) accessible to key stakeholders, especially the affected Indigenous Peoples. In case of non-literate Indigenous Peoples, other appropriate communication methods will be utilized. <u>The borrower/client will provide such information early in the project design cycle, in support of the process of obtaining free, prior and informed consent, where necessary</u> (SR 20-21)</p>