

Excessive trust on the borrower: The ADB Way

An analysis of the ADB's draft safeguards
policy on indigenous peoples



ASIAN INDIGENOUS & TRIBAL PEOPLES NETWORK

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I. Introduction

On 27th November 2007, the Asian Development Bank (ADB) held “Indigenous Peoples’ Consultation” on its draft safeguards policy on indigenous peoples. Asian Indigenous and Tribal Peoples Network (AITPN) studied the “Consultation Draft of Safeguard Policy Statement” (October 2007 version as available in ADB’s website) and provided specific comments.

A cursory reading of the “safeguard requirements for borrowers/clients on indigenous peoples” (hereinafter referred as “Indigenous Peoples Safeguards”) shows that the ADB places excessive trust on the borrowers to the point of rendering its revised safeguards meaningless. In addition, the term “safeguards” involves neither rights nor duties.

Asian Development Bank plays a pivotal role for financing projects that negatively impact upon indigenous peoples across the region. Therefore, the policy assumes significance.

AITPN expressed concerns with the current text of the policy and provided specific recommendations as provided in this report.

II. General concerns

I. No reference to borrower's obligations under international law

When the Asian Development Bank adopted its policy on indigenous peoples in 1998, there were very few legal standards on the rights of indigenous peoples. Since 1998, the United Nations established specific mechanisms relating to indigenous peoples such as the Permanent Forum on Indigenous Issues (2002), United Nations Special Rapporteur on the situation of human rights and fundamental freedom of indigenous peoples. These mechanisms have since made specific recommendations on a range of issues covered in the ADB safeguards requirements for the borrowers on indigenous peoples. The United Nations Treaty Bodies too provided a number of comments in their Concluding Observations. Most importantly, the United Nations General Assembly has adopted the Declaration on the Rights of Indigenous Peoples.

One of the requirements for the borrowers must be ensuring obligations under international law. The ADB's safeguard requirements on indigenous peoples fall far short of the obligations undertaken by the borrower/States voluntarily and as directed by the UN Treaty Bodies.

2. No responsibility for the ADB

On the current roles and responsibilities, ADB states, "A basic principle of the three safeguard policies is that implementation of the provisions of each policy is the responsibility of the borrower or project sponsor". In principle, the ADB as the sponsors should have the equal responsibility as the borrower/client.

The current draft policy states "61. If a borrower/client fails to comply with legal agreements on safeguard requirements, including those described in the safeguard plans and frameworks, ADB will seek corrective measures and work with the borrower/client to bring it back into compliance. If the borrower/client fails to reestablish compliance then ADB may exercise legal remedies including suspension, cancellation, or acceleration of maturity, which are available under the legal agreements. Resorting to legal remedies in the event of noncompliance is not automatic or mandatory. Before resorting to such measures, ADB uses available means to rectify the situation satisfactory to all parties to the legal agreements, including initiating dialogue with the parties concerned to achieve compliance with legal agreements".

While this appears to be an improvement, it will have little effect unless indigenous peoples are made “full or at least proforma party” in the legal agreements between the Bank and the borrower/client. It is necessary that they be involved in all the processes including access to all the information indispensable for free, prior and informed consent and participates fully in the implementation of the safeguards.

Recommendations: Indigenous peoples should be made full or at least proforma parties to the legal agreements.

3. No clarity about “trigger timing” for applicability of the policy

The ADB's Indigenous Peoples Safeguards fail to indicate the trigger timing for applying the policy. There is no clarity as to whether the applicability of the “safeguard requirements” shall start prior to or after the signing of the agreement with the borrower/client remain unclear.

In the past, the ADB has been applying the policies and safeguards only after the agreement has been signed. The ADB on its current dilemmas states there is a frequent debate “as to whether the IR policy is triggered only by land acquisition. There is a need to clarify that the policy is triggered by involuntary acquisition of land and land-based assets, changes in land-use patterns, and restricting access to common land and legally designated protected areas.”

In its current draft, it fails to clarify the trigger timing.

Recommendations: Safeguard requirements shall apply from the moment dialogue with the borrower is held i.e. prior to the screening of a project and the responsibility to ensure compliance shall form part of the MOU or Contract.

4. Reject ADB's “Country Safeguard System”

The ADB lays strong emphasis, rather over-emphasis, on the country safeguard systems (CSS) which is defined as a “mean a country's legal and institutional framework, consisting of its national, sub-national, or sectoral implementing institutions and relevant laws, regulations, rules, and procedures, which pertain to the policy areas of environmental and social safeguards”.

Across Asia, the legal and institutional frameworks of most of the countries can be described as “anti-indigenous peoples”. In a few countries like India and the Philippines the rights of indigenous peoples recognized under the law have been systematically undermined by the judiciary especially with

regard to “land for land compensation” in case of forced evictions and the right to free, prior and informed consent. The yardsticks provided by the ADB for determination for “equivalence and acceptability” of the CSS by the ADB does not meet international obligations of the borrowers/clients.

Moreover, the statement of the ADB, “If, however, the CSS is changed, and such change adversely affects the achievement of the agreed objectives, ADB discusses with the borrower/client, as part of ADB country dialogue, the implementation of additional measures (beyond the project level) to meet those objectives” (para 18) is not serious. How can a borrower (State) violate court orders unless it is run by dictatorial regimes!

Recommendations: The Country Safeguard System should be done away with and ADB should develop its own system based on international obligations of the borrowers/ the State parties.

III. Specific concerns with the “safeguard requirements on indigenous peoples”

AITPN has a number of concerns with regard to the “safeguard requirements on indigenous peoples” which is peppered with “where possible”.

I. Consultation is not consent

In its General Requirements, ADB refers to Free, Prior and Informed Consultation and Broad Community Support”. “Consultation” is not “consent” and this is an attempt to undermine established international law. Article 10 of the UN Declaration on the Rights of indigenous peoples recognizes the “the right to free, prior and informed consent”. The same has been reiterated by the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) on its General Comment on Indigenous Peoples¹.

The CERD Committee has asserted the same in its Concluding Observations on a number of countries including Indonesia, India, Laos etc.

On the Laos’ policy of resettling members of ethnic groups from the mountains and highland plateaux to the plains, the CERD Committee on 18 April 2005 recommend that the government of Laos “study all possible alternatives with a view to avoiding displacement; that it ensure that the persons concerned are made fully aware of the reasons for and modalities of their displacement and of the measures taken for compensation and resettlement; that it endeavour to obtain the free and informed consent of the persons and groups concerned; and that it make remedies available to them”.²

On the construction of dams in the North East India, some of which are reportedly financed by the ADB, the CERD Committee recommended to the government of India on 5 May 2007 to “seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects, and provide adequate compensation and alternative land and housing to those communities.”³

With regard to the oil palm plantations in Kalimantan as part of the Kalimantan Border Oil Palm Mega-project, the CERD Committee, among others, recommended that Indonesia “review its laws, in particular Law No. 18 of 2004 on Plantations, as well as the way they are interpreted and implemented in practice, to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands.

ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan.⁴

The non-recognition of the right to “consent” denies the right to say “no” to any project which adversely affects indigenous peoples. Therefore, the draft safeguard requirements do not provide any provision for abandonment/cancellation of any project before its commencement. Under section 11, the ADB states, “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”. Therefore, the intention is clear: by hook or crook, continue with the project.

This is indeed contrary to the ADB's proposed accountability mechanism which states “ADB may exercise legal remedies including suspension, cancellation, or acceleration of maturity” for failure of compliance. If the project is opposed from the beginning by indigenous peoples why would the ADB wait till it has to resort to extreme measures? Or is it a case the ADB believes that accountability shall be an exception.

Recommendations: The right to free, prior and informed “consent” of the indigenous peoples must be recognized.

2. Screening of project cannot be the “trigger timing”

The screening is the proposed trigger timing of the applicability of the safeguard requirements. As stated above, the ADB must make the safeguard requirements on indigenous peoples clear to the borrower from the time dialogue on a possible project starts.

Moreover, screening will be conducted by the borrower with the help of qualified experts. However, if the borrower does not recognize existence of indigenous peoples what will be the implications?

Recommendations: The ADB should conduct the screening with the help of indigenous experts.

3. No representation of indigenous peoples for Social Assessment

The present draft provides that “When screening confirms likely impacts on Indigenous Peoples, the borrower/client will retain qualified and experienced expert(s) to carry out a full social impact assessment, and if adverse impacts on Indigenous Peoples are identified, prepare an IPP in conjunction with the feasibility study”.

The Social Impact Assessment (SIA) is too crucial to be left alone to the borrower/client.

In fact, the ADB takes no responsibility for adverse impacts.

Nor the stakeholders, i.e. indigenous peoples, are provided the opportunity to be included in the social assessment. This is almost racist considering that there are many indigenous experts who can conduct the Social Impact Assessment.

There is also no reference for making the findings of the SIA public.

Recommendations: The ADB must be equally responsible for the Social Assessment and indigenous peoples must be mandatorily included in the social assessment team. The SIA study must be made public.

4. Indigenous peoples planning

Similar to the Social Impact Assessment, the preparation of Indigenous Peoples Plan (IPP) is too crucial to be left to the borrower alone.

In addition, the draft refers to the “measures to minimize, mitigate and compensate” where the avoidance of adverse impact is unfeasible. The draft requirements do not provide threshold under what circumstances a project can be rejected at the initial stage of the project. The requirements time and again assert unequivocally that a project must continue whatever be the adverse impact. This is quite frightening considering that the ADB does not include projects which “promotes racism” in its prohibited investment activities.

Moreover, there is no mechanism for inclusion of indigenous peoples' representatives in the preparation of the IPP.

Recommendations: The ADB and indigenous peoples must have equal involvement in the preparation of Indigenous Peoples Plan. In addition, the planning document must be made public.

5. Information disclosure

This provision also provides excessive control to the borrower relating to indigenous peoples. In fact, it provides that “(i) draft IPP/Indigenous Peoples Planning Framework (IPPF) endorsed by the borrower/client, before appraisal.”

Since the borrower under the current text is mandated to conduct the SIA and prepare Indigenous Peoples Plan, the suggestion that the draft IPP too will be endorsed by the borrower is ridiculous and self-serving.

In an age of the right to information, the procedure for information disclosure is quite outdated.

Recommendations: The ADB should take the responsibility to disclose all the information to the public and disclosing all information in all stages must form a part of the agreement signed with the borrower.

6. Grievance mechanism

The present draft on Indigenous Peoples Safeguards provide for the creation of a grievance mechanism by the borrower against itself. In a way, the borrower is being asked to act as judge and jury on itself!

It is a case of too much "good faith on the borrower/client". It violates internationally accepted principles on independence and impartiality on any grievance mechanism.

Recommendation: The ADB should establish its own grievance mechanism consistent with internationally accepted principles on independence and impartiality on any grievance mechanism.

7. Monitoring and reporting

In another case of assigning the borrower to be the judge and jury, the Draft Indigenous Peoples Safeguards provide that monitoring and reporting on the implementation of the IPP is to be done by the borrower. It also suggests that borrower hire external experts.

It is clear that borrowers are not interested in developing safeguard policies on indigenous peoples. It is the initiative of the ADB.

Recommendations: The ADB should develop independent monitoring mechanism for implementation of the IPP with the full participation of indigenous peoples' experts.

8. Unanticipated impact

Once again, the draft Indigenous Peoples Safeguards authorizes the borrower to undertake SIA in case of unanticipated impacts.

Recommendations: The ADB should be fully involved while conducting such studies.

9. Project completion

It is strange that borrower is also given the responsibility to conduct assessment of implementation of the IPP and the degree of compliance with

indigenous peoples related loan covenants.

In fact, it is the ADB which must conduct the study itself, among others, for the lessons learnt for future operations involving indigenous peoples.

At least, in this process, the ADB, borrower and the stakeholders must be involved to learn from the best practices and to avoid the adverse impacts.

10. Special considerations: No land rights for indigenous peoples

The Asian Development Bank uses the ancestral domains, land and related natural resources to mislead. The critical issue is not ADB's promises to take measures to recognize land rights as provided under para 45 and para 46 under Special Considerations. These provisions assume that indigenous peoples do not have any land rights.

The critical issue is where indigenous peoples have their land rights recognized under normal laws or specific laws such as the 5th and 6th Schedules of the Constitution of India which guarantee land for land as compensation. Even in these cases, the ADB under para 47 proposes "resettlement" of the indigenous peoples without making any reference as to how indigenous peoples' lands will be acquired. Obviously, the land acquisition laws shall be applied, and the ADB support acquisition of the lands of indigenous peoples irrespective of the legal and constitutional guarantees through the creation of so-called "culturally appropriate livelihood restoration measures" which are just jargons, never used by any borrower or Bank. The United Nations Committee on Economic, Social and Cultural Rights under its General Comments No. 7 relating to "the right to adequate housing: forced evictions" concluded that forced evictions are prima facie incompatible with the requirements of the Covenant (ICESCR) and laid the legal guidelines that must be respected by the borrower and the ADB.

The ADB also does not use rights based approaches with regard to commercial development of natural and cultural resources (para 48 and 49) as provided under International Covenant on Civil and Political Rights, UN Convention on Biological Diversity etc.

In fact, under Para 50 relating to physical relocation of indigenous peoples, the ADB gives the discretion to the borrower either to explore alternate project designs or carry out physical relocation of indigenous peoples without recognizing the rights of the indigenous peoples under national law or obligation of the borrowers under international law. The use of the terms "where possible" is nothing but providing the license to "relocate". Moreover, the word "relocate" denotes the necessity to resort to such a

measure which in reality is forced and therefore involves “arbitrariness and of illegality”.

It is not the borrower but the lender i.e. the ADB which must ensure that there is no force involved.

Even under para 51 relating to restriction of access to protected areas and natural resources, there is no reference to the safeguards relating to indigenous peoples as provided under the declaration of the World Parks Congress (Durban 2004) and article 28 of the United Nations Declaration on the Rights of Indigenous Peoples.

Most surprisingly, the prohibited investment activity of Asian Development Bank does not include project or investment activities, which are prima facie racist or involve violations of the right to life. In fact, any violation of the right to life in the conflicts involving the ADB supported projects must be the threshold for the “suspension and cancellation” of the projects.

IV. ADB's Safeguard Requirements for Borrowers/Clients Indigenous Peoples

A. Introduction and Rationale

1. Nearly three-quarters of the world's Indigenous Peoples live in the Asia and Pacific region. ADB recognizes the rights of Indigenous Peoples to development. In practice, however, indigenous Peoples do not automatically benefit from development, which often planned and implemented by those in the mainstream or dominant population in the respective countries they reside. Special efforts are needed to engage Indigenous Peoples in the planning of development programs which affect them, in particular those development programs which are supposedly designed to meet their specific needs and aspirations. Indigenous Peoples are more and more threatened as development programs infringe into areas which they traditionally own, occupy or use or consider as ancestral assets.
2. This document outlines the requirements for borrowers/clients in applying Indigenous Peoples policy principles outlined in the Safeguard Policy Statement (SPS) to ADB-financed projects. It discusses the scope of application, outlines delivery mechanisms, and highlights special Indigenous Peoples safeguard procedural requirements of some project financing modalities. 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.

B. Scope of Application

3. These requirements for Indigenous Peoples safeguards apply to all projects including ADB-funded and/or ADB-administered sovereign and non-sovereign investment projects funded by a loan, and/or a grant, and/or other means (such as equity and/or guarantee). They also cover actions conducted in anticipation of ADB projects.
4. There are varied and changing contexts in which Indigenous Peoples live and there is no universally accepted definition of "Indigenous Peoples." Indigenous Peoples may be referred to in different countries by such terms as "indigenous communities," "ethnic minorities," "indigenous cultural communities," "aboriginals," "hill tribes," "minority nationalities," "scheduled tribes," or "tribal groups".

5. 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.
6. A group that has lost "collective attachment to geographically distinct habitats or ancestral territories in the project area" (paragraph 5 [ii]) because of forced severance remains eligible for coverage under the Policy.
7. The Policy on Indigenous Peoples is triggered, 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.

C. General Requirements

1. Free, Prior and Informed Consultation and Broad Community Support
8. The borrower/client will undertake free, prior and informed consultation with affected Indigenous Peoples to obtain their broad community support of the project, and their informed participation in (a) designing, implementing, and monitoring measures to avoid adverse impact on them, or when avoidance is not feasible, to minimize, mitigate, and compensate for such effects; and in (b) tailoring project benefits that accrue to them in a culturally appropriate manner. Free, prior and informed consultation is an ongoing process and will be started as early as possible in the project cycle so that views of affected Indigenous Peoples can be taken into account in the project design.
9. To carry out free, prior and informed consultation, the borrower/client will:

- (i) establish a strategy for inclusive consultation to take place on a level playing field on which all participants (affected Indigenous Peoples' communities and Indigenous Peoples organizations if any, and other local civil society organizations) have the same say (this includes special measures for marginalized groups) and are able to voice their concerns without facing any pressure or guidance;
 - (ii) use consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples' communities, giving special attention to the concerns of indigenous women, and the youth;
 - (iii) 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).
10. In deciding whether to proceed with the project, the borrower/client will ascertain whether the affected Indigenous Peoples communities provide their broad support to the project, and where there is such support, the borrower/client will provide documentation that details the process and outcomes of consultations with Indigenous Peoples and Indigenous Peoples organizations, including (i) the findings of the social assessment; (ii) the process of free, prior and informed consultation with the affected Indigenous Peoples' communities; (iii) additional measures including project design modification, that may be required to address adverse impacts on the Indigenous Peoples and to provide them with culturally appropriate project benefits; (iv) recommendations for free, prior, and informed consultations with and participation by Indigenous Peoples' communities during project implementation, monitoring and evaluation; and (v) any formal agreements reached with Indigenous Peoples communities and/or the Indigenous Peoples organization.
11. 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.
2. Screening
12. Screening will be conducted as early as possible in the project cycle. Screening will determine (i) whether Indigenous Peoples are present in, or have collective attachment to, the project area, and (ii) whether there are likely project impacts on Indigenous Peoples. In conducting

the screening, the borrower/client will seek the technical judgment of qualified and experienced expert(s).

13. Screening of impact can continue throughout the project cycle. The results of the screening of whether the projects will trigger the Policy or not will be validated and such results could change in later stages as further information becomes available.

3. Social Assessment

14. When screening confirms likely impacts on Indigenous Peoples, the borrower/client will retain qualified and experienced expert(s) to carry out a full social impact assessment, and if adverse impacts on Indigenous Peoples are identified, prepare an IPP in conjunction with the feasibility study.

15. Based on the screening, a field-based social impact assessment (SIA) will be conducted either as part of the feasibility study or as a stand-alone activity. The SIA will identify the project affected Indigenous Peoples and the potential impacts of the proposed project on them. The SIA will provide the baseline socioeconomic profile of the Indigenous groups in the project area and project impact zone, assess their access to and opportunities to avail of basic social and economic services, assess the short and long-term, direct and indirect as well as positive and negative impacts of the project on each ethnic group's social, cultural and economic status, assess and validate which Indigenous groups will trigger the Indigenous Peoples policy principles, and assess the subsequent approaches and resource requirements to address the various concerns and issues of projects that affect them.

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.

4. Indigenous Peoples Planning

17. If the screening and SIA indicate that the proposed project will have impacts on Indigenous Peoples, the borrower/client will prepare an Indigenous Peoples Plan (IPP), or an equivalent document, in the context of the SIA and in free, prior informed consultations with the affected Indigenous Peoples' communities. The IPP, or an equivalent document, will set out the measures through which the borrower/client will ensure that (a) affected Indigenous Peoples

receive culturally appropriate social and economic benefits; and (b) when potential adverse impacts on Indigenous Peoples are identified, these will be avoided to the maximum extent possible. Where this avoidance is proven to be unfeasible, the IPP will prepare based on free, prior and informed consultations with Indigenous communities, and with measures to minimize, mitigate, and compensate for the adverse impacts. The level of detail and comprehensiveness of IPPs (Annex A) will vary depending on the specific project and the nature of impacts to be addressed. The borrower/client will integrate the elements of the IPP into the project design.

18. If Indigenous Peoples are the sole or the overwhelming majority of direct project beneficiaries and when only positive impacts are identified, the elements of an IPP will be included in the overall project design, and a separate IPP will not be required. In such cases, the project document will include a summary of how the project complies with the Policy on Indigenous Peoples Safeguards, in particular, will explain how the requirements for free, prior and informed consultations are fulfilled and how accrual of benefits has been integrated into the project. The project design and legal covenants will also explicitly specify how benefits accrue to Indigenous Peoples in the project area and how free, prior and informed consultations will be done during implementation.
19. The borrower/client will finalize draft IPPs after the completion of detailed engineering design, and detailed measurement surveys. Addendums to the draft IPPs will be prepared closely following the award of contract packages, and the implementation time schedules of each project component or subproject for implementing IPPs. The mitigating measures to avoid adverse impact on IPs will be enhanced but the agreed outcomes of the draft IPP will not be lowered or minimized. If new groups of Indigenous Peoples are identified prior to submission of the final IPP to ADB, free, prior and informed consultation, aimed at obtaining broad community support, will also be undertaken.
5. Information Disclosure
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 nonliterate Indigenous Peoples, other appropriate communication methods will be utilized.

6. Grievance Redress Mechanism

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.

7. Monitoring and Reporting

23. The borrower/client will monitor and measure the progress of implementation of IPP. In addition to recording information to track performance, the borrower/client should use dynamic mechanisms, such as inspections and audits, where relevant, to verify the compliance with the requirements and the progress toward achieving the desired outcomes. For projects with significant adverse impacts on Indigenous Peoples, the borrower/client will retain qualified and experienced external experts to conduct semi-annual monitoring and/or verify monitoring information of borrower/client. The external experts engaged by the borrower/client will advise on compliance issues, and if any significant Indigenous Peoples issues are found, an

additional IPP or an addendum to the approved IPP will be prepared.

24. The borrower/client will prepare periodic progress reports on progress of IPP implementation highlighting compliance issues and corrective actions, if any. The borrower/client will submit semiannual progress reports. The costs of monitoring requirements will be reflected in project budgets.
8. Unanticipated Impacts
25. If unanticipated impacts on Indigenous Peoples become apparent during project implementation, such as change in alignment and footprint, the borrower/client will carry out a social impact assessment, and as relevant, prepare an IPP or an addendum to the IPP focusing on measures and required resources to mitigate adverse impacts, if any, and to provide for culturally-appropriate benefits for affected Indigenous Peoples.
9. Project Completion
26. As necessary, the borrower/client will prepare and submit a project accomplishment/completion report that will include an assessment of the implementation of IPPs and the degree of compliance with Indigenous Peoples-related loan covenants. The report will include assessment of the following: (i) degree of Indigenous Peoples' participation in the project; (ii) impacts, both positive and adverse, on Indigenous Peoples; (iii) achievement of the objectives of the relevant safeguard instrument(s); and (iv) lessons learned for future operations involving Indigenous Peoples.

D. Specific Requirements on Different ADB Financing Modalities

27. Preparation of an Indigenous Peoples Planning Framework. Framework approach is applied to projects delivered through sector lending modality, multitranches financing facility (MFF) or other lending modalities where subprojects are prepared after Board approval. For such projects that may trigger the Indigenous Peoples Policy, an IPPF will be prepared, instead of an IPP, before Board approval. An IPPF sets out the Indigenous Peoples Policy principles together with the screening and planning procedures, which apply to all subprojects, components, or tranches that are to be determined and approved during loan implementation by the borrower/client and ADB.
28. An IPPF will put into detail participatory screening procedures for

components/subprojects/tranches to determine whether indigenous peoples are affected or not; spell out strategies for ensuring the free, prior and informed consultations and participation of affected Indigenous Peoples at each stage of project preparation and implementation; and strategies to ensure that project benefits will accrue to Indigenous Peoples and mitigate any adverse impacts on them. Annex B provides the details of the content of an IPPF.

29. Preparation of Subproject or Component IPPs. If the screening of a subproject or a project component identified in the IPPF indicates that Indigenous Peoples are present in, or have collective attachment to, the area of the subproject or component, the borrower/client will ensure that, before the individual subproject or component is implemented, a social assessment is carried out and an IPP is prepared in accordance with the requirements specified in Section

C. The borrower/client will submit each IPP to ADB for review before the respective program or subproject or component is considered eligible for financing.

30. Other projects with subprojects or components where impacts on Indigenous Peoples may not be known in advance and where all or part of the impact area cannot be determined before appraisal, due to the preliminary status of technical design, and/or the need for a clearly defined community process for site selection, will require the preparation of an IPPF prior to appraisal.
31. In stand-alone projects, for specific project component activities that may not be defined or have adequate design detail prior to appraisal, the borrower/client will justify any departure from standard procedures, with reference to the specific circumstances of the individual project and the component processing schedule.
 1. Program Loans
 32. Policy-based loans and grants—because of their size and systemic impact on the country—require a deeper analysis of potential social impacts, including impacts on Indigenous Peoples. For programs that are likely to affect Indigenous Peoples through the development of relevant national, subnational policies, approaches, and legal frameworks, the borrower/client will incorporate proposed actions and remedies in the project design. Investment components of the program loan or grant will comply with the general requirements specified in Section C.

2. Sector Finance
 33. For sector loans or grant that are likely to involve impact on Indigenous Peoples, the borrower/client will agree with ADB, before appraisal, on an IPPF for the project and an IPP for each core subproject having impacts on Indigenous Peoples. The IPPs prepared for the first subproject will serve as the model for subsequent Indigenous Peoples planning for other subprojects under the sector loan or grant. The borrower/client will ensure that contract schedules and packages consistently match each subproject requiring an IPP. The borrower/client will also ensure that sufficient IPP technical and management capacity are provided during project implementation.
 34. The general requirements specified in Section C apply to subprojects and components identified during project implementation.
3. Multitranche Financing Facility
 35. ADB's safeguard requirements apply to all components, projects, subprojects financed under an MFF. Components, subprojects, and projects identified during preparation and implementation of an MFF will follow the general requirements specified in Section C.
 36. In addition, an IPPF as described in paragraph 27 and 28 will be required. The IPPF will explain the anticipated general impacts of the investments (which are likely to be financed under the MFF) on Indigenous Peoples; outline safeguard criteria that are to be used in selecting components, projects, or subprojects; specify the requirements that will be followed for the screening and categorization, impact assessments, development of management plans, public consultation and information disclosure, and monitoring and reporting; describe the institutional arrangements (including budget and capacity requirements), and the counterparties' and ADB's responsibilities and authorities for the preparation, review, and clearance of safeguard documents.
4. Wider Application of IPPF
 37. An IPPF will be prepared for a project loan or grant where subprojects or project components are identified after Board approval. The borrower/client will agree with ADB on an IPPF as specified in paragraph 27 and 28. The general requirements specified in Section C will apply to subprojects and project components identified during project implementation.

5. Emergency Assistance Loans

38. For emergency assistance loans, the completion of standard surveys and free, prior and informed consultation requirements based on a feasibility study may not be possible before Board approval. In such cases, an IPPF will be prepared prior to Board circulation of the project design and included as a core appendix. Components and subprojects identified during the project implementation will follow the general requirements specified in Section C.

6. Financial Intermediaries

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 where the activity financed presents limited impacts on Indigenous Peoples;
- (ii) follow national laws and apply ADB's general requirements specified in Section C where the activity financed presents significant impacts on Indigenous Peoples.

40. The FI will establish and maintain an Environmental and Social Management System (ESMS) to ensure that its investments meet the requirements specified in paragraph 39 (i) or

- (ii). The ESMS should incorporate the following elements: (i) environmental and social policies;
- (ii) screening and review procedure; (iii) organizational structure and staffing including skills and competencies in environmental and social areas; (iv) training requirements; and (v) monitoring and reporting.

41. Where the business activities financed by the FI present impacts on IP, the FI will prepare and submit an annual report on the implementation status of its ESMS. If the reports suggest that ESMS is not functioning, then a corrective action plan will be developed and submitted by the FI in addition to the annual report.

7. Corporate Investments

42. The borrower/client will establish and maintain an ESMS. The ESMS will include a screening mechanism that would identify if the work that it would be supporting is likely to be in noncompliance with ADB's Indigenous Peoples safeguard requirements. The borrower/client will not provide contracting services for projects that are likely to have unmitigated noncompliance with ADB's Indigenous Peoples safeguard requirements. The ESMS will also include the following elements: (i) organizational structure and staffing including skills and competencies in environmental and social management; (ii) training requirements; and (iii) monitoring and reporting.
43. The borrower/client will submit annual reports on the implementation status of ESMS with specific reference to impacts on IP. If reports suggest that ESMS is not functioning, then a corrective action plan will be developed and submitted by the borrower/client in addition to the annual reports.

E. Special Considerations

1. Ancestral Domains, Lands and Related Natural Resources
44. 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. In this situation, when carrying out the social assessment and preparing the IPP, the borrower/client will pay particular attention to
 - (i) the customary rights of the Indigenous Peoples, both individual and collective, pertaining to ancestral domains, lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihood systems;
 - (ii) the need to protect such ancestral domains, lands and resources against illegal intrusion or encroachment;
 - (iii) the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources;
 - (iv) Indigenous Peoples' natural resources management practices and the long-term sustainability of such practices, and
 - (v) the need to rehabilitate the livelihood systems of Indigenous Peoples who have been evicted from their lands before proper safeguards were put in place.

45. If the project involves (a) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied (such as land titling projects), or (b) the acquisition of such lands, the borrower/client will integrate in the IPP an action plan for the legal recognition of customary rights to such lands, territories, and ancestral domain. Normally, the action plan is carried out before project implementation but in some cases, the action plan may need to be formulated concurrently with the project itself. Such legal recognition may take the following forms:
- (i) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or
 - (ii) conversion of customary usage rights to communal and/or individual ownership rights.
46. If neither option is possible under national law, the IPP will include measures for legal recognition of perpetual or long-term renewable custodial or user rights.
47. 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. Where possible, the plan will allow the affected Indigenous Peoples to obtain full ownership of the resources they traditionally owned, or customarily used or occupied, if the restrictions cease to exist.
2. Commercial Development of Natural and Cultural Resources
48. Commercial Development of Natural Resources. If the project involves the commercial development of natural resources (such as minerals, hydrocarbon resources, forests, water, or hunting/fishing grounds) on lands or territories used or claimed by Indigenous Peoples, the borrower/client will ensure that as part of the free, prior, and informed consultation process the affected communities are informed of (a) their rights to such resources under statutory and customary law; (b) the scope and nature of the proposed commercial development and the parties interested or involved in such development; and (c) the

potential effects of such development on the Indigenous Peoples' livelihoods, environments, and use of such resources.

The borrower/client will include in the IPP, arrangements to enable the Indigenous Peoples to receive in a culturally-appropriate manner an equitable share of the benefits to be derived from such commercial development which is at least equal or higher than any other affected landowner.

49. Commercial Development of Cultural Resources. If the project involves the commercial development of Indigenous Peoples' cultural resources and knowledge, the borrower/client will ensure that as part of the free, prior, and informed consultation process, the affected communities are informed of (a) their rights to such resources under statutory and customary law; (b) the scope and nature of the proposed commercial development and the parties interested or involved in such development; and (c) the potential effects of such development on Indigenous Peoples' livelihoods, environments, and use of such resources.

Commercial development of the cultural resources and knowledge of these Indigenous Peoples is conditional upon their prior agreement to such development. The IPP will reflect the nature and content of such agreements and will include arrangements to ensure that Indigenous Peoples receive in a culturally appropriate way an equitable share of the benefits to be derived from such commercial development.

3. Physical Relocation of Indigenous Peoples
50. The borrower/client will explore to the maximum extent possible alternative project designs to avoid physical relocation of Indigenous Peoples which will result in adverse impacts on their identity, culture, and customary livelihoods. 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. In such cases, the borrower/client will prepare an IPP that could be combined with a resettlement plan. Such combined plan need to be compatible with the Indigenous Peoples' cultural preferences, and will include a land-based resettlement strategy. The borrower/client will document the results of the free, prior and informed consultation process for that particular Indigenous Peoples community. Where possible, the plan will allow the affected Indigenous Peoples to return to the lands and territories

they traditionally owned, or customarily used or occupied, if the reasons for their relocation cease to exist.

4. Restriction of Access to Protected Areas and Natural Resources
51. In many countries, the lands and natural resources set aside as legally designated parks, protected areas, and/or exclusive zones, may overlap with lands and territories that Indigenous Peoples customarily used or claim as ancestral territory. ADB will recognize these rights, of ownership, occupation, or usage, as well as the need for long-term sustainable management of critical ecosystems. Therefore, involuntary restrictions on Indigenous Peoples' access to legally designated parks, protected areas, exclusion zones, and other natural resources, in particular access to their sacred sites, will be avoided to the maximum extent possible, and management arrangements of such sites will give priority to collaborative approaches that enable Indigenous Peoples, as the custodians of the resources, to continue to use them in an ecologically sustainable manner. Under exceptional circumstances, where avoidance is proven to be impossible, the borrower/client will prepare, with the free, prior, and informed consultation of the affected Indigenous Peoples' communities, necessary steps and guidelines for preparation, during project implementation, of an individual parks', protected areas' and natural resources' and/or exclusion zones' management arrangements, that will ensure that the Indigenous Peoples participate in the design, implementation, monitoring, and evaluation of the arrangements, and receive equitable share of the benefits. The compensation and livelihood restoration measures will be developed by the borrower/client for all such operations in an IPP that could be combined with a resettlement plan. Such combined plan will need to 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. Where possible, the plan will allow the affected Indigenous Peoples to obtain full ownership of the territory they traditionally owned, or customarily used or occupied, if the protected area or natural resource management system ceases to exist.
5. Indigenous Peoples and Development
52. In furtherance of the objectives to benefit Indigenous Peoples, DMCs could request ADB to support the country in its development planning

and poverty reduction strategies by providing financial assistance for a variety of initiatives designed to

- (i) strengthen local legislation to establish legal recognition of the customary or traditional land tenure systems of Indigenous Peoples;
- (ii) enhance the participation of Indigenous Peoples in the development process by incorporating their perspectives in the design of development programs and poverty reduction strategies, and providing them with opportunities to benefit more fully from development programs through policy and legal reforms, capacity building, and free, prior, and informed consultations, participation, and empowerment;
- (iii) support the development priorities of Indigenous Peoples through programs developed by governments in cooperation with Indigenous Peoples;
- (iv) address the gender and intergenerational issues that exist among many Indigenous Peoples, including the special needs of indigenous women, youth, and children;
- (v) prepare participatory profiles of Indigenous Peoples to document their culture, demographic structure, gender and intergenerational relations and social organization, institutions, production systems, religious beliefs, and resource use patterns;
- (vi) strengthen the capacity of Indigenous Peoples' communities and Indigenous Peoples organizations to prepare, implement, monitor, and evaluate development programs;
- (vii) strengthen the capacity of government agencies responsible for providing development services to Indigenous Peoples;
- (viii) protect indigenous knowledge, including the strengthening of intellectual property rights; and
- (ix) facilitate partnerships among the government, Indigenous Peoples' organizations, civil society organizations, and the private sector to promote Indigenous Peoples' development programs.

ANNEX 1

Outline of Indigenous Peoples Plan

A. Executive Summary of the IPP

B. Social Assessment

- (i) A review of the legal and institutional framework applicable to Indigenous Peoples.
 - (ii) Baseline information on the demographic, social, cultural, and political characteristics of the affected Indigenous Peoples' communities, the land and territories that they have traditionally owned or customarily used or occupied, and the natural resources on which they depend.
 - (iii) Taking the review and baseline information into account, the identification of key project stakeholders and the elaboration of a culturally appropriate process for free prior and informed consultation with the Indigenous Peoples at each stage of project preparation and implementation.
 - (iv) An assessment, based on free, prior, and informed consultation, with the affected Indigenous Peoples' communities, of the potential adverse and positive effects of the project. Critical to the determination of potential adverse impacts is an analysis of the relative vulnerability of, and risks to, the affected Indigenous Peoples' communities given their distinct circumstances and close ties to land and natural resources, as well as their lack of access to opportunities relative to other social groups in the communities, regions, or national societies in which they live.
 - (v) An assessment of the affected IPs' perception about the project and its impact on their social, economic and cultural status.
 - (vi) The identification and evaluation, based on free, prior, and informed consultation with the affected Indigenous Peoples' communities and , of measures necessary to avoid adverse effects, or if such measures are not feasible, the identification of measures to minimize, mitigate, or compensate for such effects, and to ensure that the Indigenous Peoples receive culturally appropriate benefits under the project.
- C. The documentation of the free, prior, and informed consultation with the affected Indigenous Peoples' communities that was carried out during project preparation, and that led to their broad community

support for the project and safeguard measures.

- D. A plan for ensuring free, prior, and informed consultation with the affected Indigenous Peoples' communities during project implementation.
- E. Measures to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate.
- F. When potential adverse effects on Indigenous Peoples are identified, measures to avoid, minimize, mitigate, or compensate for these adverse effects.
- G. Measures to strengthen social, legal, and technical capabilities of (a) government institutions to address Indigenous Peoples issues and (b) of Indigenous Peoples' organizations to represent Indigenous Peoples more efficiently.
- H. 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.
- I. Mechanisms and benchmarks appropriate to the project for monitoring, evaluating, and reporting on the implementation of the IPP. The monitoring and evaluation mechanisms should include arrangements for the free, prior, and informed consultation with the affected Indigenous Peoples' communities, and mechanism for disclosure of information.
- J. Process of involving local organizations and nongovernment organizations with proven expertise in Indigenous Peoples development.
- K. The institutional arrangement and mechanism for implementing the IPP.
- L. The cost estimates and financing plan for the IPP.

ANNEX 2

Outline of Indigenous Peoples Planning Framework

The Indigenous Peoples Planning Framework (IPPF) sets out:

- A. The types of programs and subprojects likely to be proposed for financing under the project.
- B. The information on Indigenous Peoples most likely to be affected by the project or subprojects, and the potential positive and adverse effects of such project or subprojects on Indigenous Peoples.
- C. A set of activities for carrying out the social assessment (see Annex 1.B) for such programs or subprojects.
- D. A strategy for ensuring free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of project preparation and implementation.
- E. Institutional arrangements (including capacity building where necessary) for screening project activities, evaluating their effects on Indigenous Peoples, preparing IPPs, and addressing any grievances.
- F. Monitoring and reporting arrangements, including mechanisms and benchmarks appropriate to the project.
- G. Disclosure arrangements for IPPs to be prepared under the IPPF.
- H. Budget arrangements for IPP to be prepared for such projects or subprojects.

Prohibited Investment Activities⁵

The following are not qualified for ADB financing:

- (i) production or activities involving harmful or exploitative forms of forced labor⁶/child labor;⁷
- (ii) production of or trade in any product or activity deemed illegal under host country laws or regulations;
- (iii) production of or trade in any product or activity that contravenes any international conventions and agreements to which the host country is a party, and which have the force of law in the host country;

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- (iv) production of or trade in weapons and munitions, including paramilitary materials;
- (v) production of or trade in alcoholic beverages (excluding beer and wine);⁸
- (vi) production of or trade in tobacco;⁸
- (vii) gambling, casinos, and equivalent enterprises;⁸
- (viii) trade in wildlife or wildlife products regulated under the Convention on International Trade in Endangered Species (CITES) of Wild Fauna and Flora;⁹
- (ix) production of or trade in radioactive materials, including nuclear reactors and components thereof;¹⁰
- (x) production of or trade in or use of unbonded asbestos fibers;¹¹
- (xi) commercial logging operations or the purchase of logging equipment for use in primary tropical moist forest;
- (xii) production, commercial-scale use, trade, storage, or transport of products containing polychlorinated biphenyls,¹² and hazardous chemicals;¹³
- (xiii) production of or trade in pharmaceuticals,¹⁴ pesticides/herbicides,¹⁵ or ozone-depleting substances¹⁶ subject to international phase outs or bans;
- (xiv) transboundary trade in waste or waste products,¹⁷ except for non-hazardous waste destined for recycling;
- (xv) marine and coastal fishing practices, such as large scale pelagic drift net fishing and fine mesh net fishing, harmful to unwanted vulnerable and protected species in large numbers and damaging to the marine biodiversity and habitats; and
- (xvi) production or activities that impinge on the lands owned, or claimed under adjudication, by Indigenous Peoples, without full documented consent of such peoples.

Endnotes:

1. General Recommendation No. 23: Indigenous Peoples of 18 August 1997
2. CERD/C/LAO/CO/15 of 18 April 2005
3. CERD/C/IND/CO/19 of 5 May 2007
4. CERD/C/IDN/CO/3 of 15 August 2007.
5. A reasonableness test will be applied when the activities to be financed would have a significant development impacts but circumstances of the country require adjustments to this Prohibited Investment Activities list.
6. Forced labor means all work or service not voluntarily performed, that is extracted from an individual under threat of force or penalty.
7. Child labor means the employment of children whose age is below the host country's statutory minimum age of employment or employment of children in contravention of International Labor Organization Convention No. 138 "Minimum Age Convention" (www.ilo.org).
8. This does not apply if the activity concerned is ancillary to a sponsor's/project's (or subproject's) primary operations.
9. A list of CITES is available from www.cites.org.
10. This does not apply to the purchase of medical equipment, quality control (measurement) equipment, and any equipment where ADB considers the radioactive source to be trivial and/or adequately shielded.
11. This does not apply to the purchase and use of bonded asbestos cement sheeting where the asbestos content is less than 20%.
12. A group of highly toxic chemicals, polychlorinated biphenyls, are likely to be found in oil-filled electrical transformers, capacitors, and switchgear dating from 1950 to 1985.
13. A list of hazardous chemicals is available from www.pic.int.
14. A list of pharmaceutical products subject to phase-outs or bans is available from www.who.int.
15. A list of pesticides and herbicides subject to phase-outs or bans is available from www.pic.int.

16. A list of the chemical compounds that react with and deplete stratospheric ozone, resulting in the widely publicized ozone holes is listed in the Montreal Protocol, together with target reduction and phase out dates. <http://www.unep.org/ozone/montreal.shtml>.
17. As defined by the Basel Convention. See www.basel.int.

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The Asian Indigenous and Tribal Peoples Network (AITPN) is an alliance of indigenous and tribal peoples' organisations and individual activists across the Asian region. It seeks to promote and protect the rights of indigenous and tribal peoples in Asia:

- by providing accurate and timely information to national human rights institutions, the United Nations and its specialised mechanisms, as appropriate;
- by conducting research, campaigning and lobbying on country situations or individual cases;
- by increasing the capacity of indigenous peoples through relevant training programmes for indigenous peoples' rights activists and community leaders;
- by providing legal, political and practical advice to indigenous peoples organisations;
- by providing input into international standard-setting processes on the rights of indigenous peoples; and
- by securing the economic, social and cultural rights of indigenous peoples through rights-based approaches to development.

AITPN has Special Consultative Status with the United Nations Economic and Social Council (ECOSOC).

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