



## ASIA INDIGENOUS PEOPLES PACT FOUNDATION

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15 March 2016

Mr. Jim Yong Kim  
President  
World Bank Group

### **Re: Comments on Draft Environmental and Social Framework of the World Bank**

Dear Mr. Kim:

The Asia Indigenous Peoples Pact (AIPP) wishes to convey our views regarding the second draft of the World Bank's Environmental and Social Framework (ESF), with particular focus on Environmental and Social Standard 7 (ESS7): Indigenous Peoples.

We welcome the deletion of Paragraph 9 under ESS7 in the second draft, which contained the alternative approach, in which risks and impacts of a World Bank financed project on Indigenous Peoples would be addressed through the application of the ESSs other than ESS7. Such provision of alternative approach was one of the main concerns of Indigenous Peoples. Nonetheless, the second draft of the ESF still contains number of provisions, which provide room for non-application of the ESSs, including the ESS7, in projects financed by the Bank and do not guarantee the rights of Indigenous Peoples to the highest possible standards. We reiterate our recommendation to remove all such provisions.

We are encouraged to see the continued inclusion of Free, Prior and Informed Consent (FPIC) in the ESS7 in the second draft currently under consideration but we are also aware that the discussions about FPIC are contentious. We thus strongly recommend keeping the requirement of FPIC in order to bring the Bank in line with other international development and financial institutions. At the same time, we continue to request some amendments to the proposed requirements on FPIC to ensure Indigenous Peoples can exercise their right to self-determination and are full partners in the development process.

We hope you will give serious consideration to the comments on the draft ESF of the Bank provided below. The comments are based on the submission of participants of Southeast Asia Regional Indigenous Peoples' Consultation for the review and update of the Bank's Safeguard Policies held in and built on our earlier comments on the draft ESF of the Bank<sup>1</sup>.

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<sup>1</sup> <http://www.forestpeoples.org/topics/safeguard-accountability-issues/news/2015/02/joint-aipp-and-fpp-submission-world-bank>



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We look forward to your response to this letter.

Sincerely,

A handwritten signature in black ink, which appears to read 'Joan Carling', is positioned below the word 'Sincerely,'.

Joan Carling  
Secretary General  
Asia Indigenous Peoples Pact



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### **Comments on the Second Draft Environmental and Social Framework (ESF) of the World Bank**

These comments highlight some key concerns on the second draft of the Environmental and Social Framework (ESF) of the World Bank dated July 1, 2015, with a particular focus on Environmental and Social Standard 7 (ESS 7): Indigenous Peoples.

#### **A) Introduction**

A.1) Indigenous peoples account for only about 5% of the global population, they comprise 15% of the poorest. Asia is home to two-thirds of the estimated 370 million of the world's Indigenous Peoples. Such disproportionate rate of extreme poverty among Indigenous Peoples is the result largely of the continuing violations of their collective rights to their lands, territories and resources in the name of national development; the lack of access to basic social services including livelihood opportunities; and social, economic and political discrimination.

A.2) For Indigenous Peoples, poverty alleviation which is the mandate of the World Bank, needs to be aligned to the respect and protection of human rights, including their collective rights as Indigenous Peoples, as well as the protection of the environment. The historical record of multilateral development banks has been marked with serious violations of the rights of indigenous peoples to their lands, territories and resources, to their sustainable livelihoods and meaningful participation in decision-making including in the governance of their territories and for sustainable development. In particular, the requirement for the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples is not simply a procedural matter, but in fact a substantive process in the exercise of their right to their lands, territories and resources, to self-determination and cultural integrity. The UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 as an act of achieving social justice, non-discrimination, equality and development for all. Thus, States that comprise the Bank have a clear obligation to respect and implement the rights of indigenous peoples as embodied in the UNDRIP. The Bank cannot thereby exempt itself from this obligation, and should in fact be a leading institution in abiding by the minimum standards for the respect and protection of human rights as a fundamental foundation for its interventions in sustainable development. This should be embedded in its safeguard policies with clear provisions for its operationalization not only at the project level but also in the strategic programmes of the Bank.

A.3) In the context of the above, the following comments on the draft ESF, particularly focusing on ESS 7, are submitted for serious consideration by the Bank.

#### **B) General comments**



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B.1) Before looking in detail at the requirements of the ESF, it is worth noting that the ESSs apply only to one of the Bank's three loan instruments – investment loans. This is indicated in Paragraph 1 and paragraph 6 (footnote 5) of ESS1. The ESSs do not apply to operations supported by Development Policy lending or Program for Results (P4R) Financing, which make up a significant proportion of Bank financing. This restriction is problematic, as it ensures that any advances secured in the protections provided to indigenous peoples in ESS7 are NOT applied to projects impacting on indigenous peoples if a different loan instrument is used. This is an opaque and confusing method of standard development, and makes it difficult for affected peoples to be sure of what standards are applied to them. As has been stated repeatedly during the review of these safeguard policies, it is crucial for indigenous peoples that the same policies and protections apply **regardless of loan instrument used**.

B.2) The new system of ESP and ESSs separate out the responsibilities of the Bank (contained in the ESP) and the borrowers (contained in the ESSs). In doing so, responsibility to actually implement and meet the standards is largely turned over to the borrowers (to the governments). The Bank's role is to conduct due diligence (almost exclusively reduced to review of information provided by the borrowers) and a monitoring and follow-up role for most types of projects.

This is a riskier approach to lending, and it assumes an ability to monitor actual practice that Bank staffs have not shown in the past. It also assumes a willingness to speak up quickly when things are going wrong. The current structure of investment in staff training, and allocated budget for safeguard staff, is not high enough for the staff to take on significantly more responsibility to review and monitor projects at a more detailed level, but there has been no information provided about how staff will be funded and supported to undertake these additional tasks.

### C) ESS 7: Indigenous Peoples

At the outset, it is important to note that ESS7 should be the main reference of the Bank and Borrower for projects affecting indigenous peoples, and that non-discrimination, full and effective participation, and self-determination be the main principles that guide all project activities. Independent participatory monitoring mechanisms, provided with adequate budget, using clear monitoring guidelines and indicators, and equitable participation of independent indigenous peoples' experts be put in place. Should there be findings of violations of indigenous peoples' rights, clear and proportionate sanctions shall be imposed.

**RECOMMENDATION: ESS7 should be the main reference of the Bank and the Borrower for projects affecting indigenous peoples. All other ESSs should give reference to ESS7 when it is identified that indigenous peoples will be affected. Further, there is a need to ensure that the**



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provisions in the ESS7 are aligned with the UNDRIP and other international human rights norms and standards as well as multilateral environmental agreements<sup>2</sup> particularly on the recognition of the rights of indigenous peoples to their land, territories and resources, development, FPIC and cultural heritage, among others. Clear sanctions should be provided for violations against the rights of indigenous peoples.

C.1) *Paragraph 4.* This ESS applies whenever Indigenous Peoples are present in, or have collective attachment to a proposed project area, as determined during the environmental and social assessment...

COMMENT: This paragraph, which determines when ESS7 is triggered, along with paragraphs 8 and 9 of ESS7, paragraph 33 of the ESP, and ESS1, are confusing. It is unclear whether it is the Borrower of the Bank that has primary responsibility for determining the presence or collective attachment of indigenous peoples in the project area, hence triggering the application of ESS7. It is unacceptable for indigenous peoples to leave the determination solely to the Borrower, with the Bank merely reviewing environment and social assessment documents submitted by the Borrower.

**RECOMMENDATION: The determination whether indigenous peoples are present in or have collective attachment to a proposed project area and the conduct of the environmental and social assessments shall be conducted with the participation of indigenous peoples including indigenous experts. Environmental and social assessments must not undermine the self-identification of indigenous peoples.**

COMMENT: The impact of many projects funded by the Bank, such as mining, large dams and other energy projects, is not just in the project areas but also in adjacent and downstream areas. Use of “project area” in this paragraph would exclude indigenous peoples directly or indirectly affected by such projects.

**RECOMMENDATION: A more inclusive term, such as “affected area” or “project affected area”, should be used in order to adequately cover indigenous peoples who may be directly or indirectly impacted by proposed projects.**

C.2) *Paragraph 8.* Following a determination by the World Bank that indigenous peoples are present in, or have collective attachment to the project area, the Borrower may be required to

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<sup>2</sup> International human rights norms and standards found in the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCT), International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), Convention on the Rights of the Child (CRC), ILO Convention No. 169 on Indigenous and Tribal Peoples. Multilateral environmental agreements such as the Convention of Biological Diversity (CBD) and its Nagoya Protocol and the UN Framework Convention on Climate Change (UNFCCC) require FPIC of Indigenous Peoples.



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*seek inputs from appropriate specialists to meet the consultation, planning, or other requirements of this ESS.*

COMMENT: The principles embodied in the rights of indigenous peoples to self-determination and FPIC should be reflected in all the paragraphs of ESS7 and other relevant ESSs. In this case, those principles require that indigenous peoples are able to participate fully and effectively in all stages of a project or activity, from planning, to implementation and monitoring. This includes full and effective participation of indigenous peoples representatives and experts in the determination of the presence of indigenous peoples in a project-affected area.

**RECOMMENDATION: The determination of whether Indigenous Peoples are present in, or have collective attachment to the project area and the conduct of environmental and social assessments should not rely solely with Bank. It should involve indigenous experts and indigenous representatives from the proposed project affected area<sup>3</sup>.**

*C.3) Paragraph 9. A key purpose of this ESS is to ensure that Indigenous Peoples present in, or with collective attachment to, the project area are fully consulted about, and have opportunities to actively participate in, project design and the determination of project implementation arrangements. The scope and scale of consultation, as well as subsequent project planning and documentation processes, will be proportionate to the scope and scale of potential project risks and impacts as they may affect Indigenous Peoples.*

**RECOMMENDATION: The paragraph should be revised to read – A key purpose of this ESS is to ensure that Indigenous Peoples present in, or with collective attachment to, the project-affected area<sup>4</sup> are fully consulted about, and have opportunities to actively participate in, project design and the determination of project implementation arrangements. The scope and scale of consultation, as well as subsequent project planning and documentation processes, will be commensurate with the scope and scale of potential project risks and impacts in the short and long term as they may affect Indigenous Peoples.**

*C.4) Paragraph 10. The Borrower will assess the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on Indigenous Peoples who are present in, or have collective attachment to, the project area...*

**RECOMMENDATION: The participation of the affected Indigenous Peoples including indigenous experts should start in the determination of short term and long-term impacts (environmental and social impact assessments) and not just during the project design and implementation.**

<sup>3</sup> See comments under A. Paragraph 4 in the immediately preceding page.

<sup>4</sup> Affected area refers to areas that are directly and indirectly affected by the proposed project. See also comments under paragraphs 4 and 8.



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*C.5) Paragraph 11. For projects designed specifically to provide benefits directly to Indigenous Peoples, the Borrower will proactively engage with the relevant Indigenous Peoples to ensure their ownership and participation in project design, implementation, monitoring and evaluation. The Borrower will also consult with them as to the cultural appropriateness of proposed services or facilities, and will seek to identify and address any economic or social constraints (including those relating to gender) that may limit opportunities to benefit from, or participate in, the project.*

COMMENT: There have been many instances in the past where governments unilaterally design and implement projects that they believe are specifically designed to provide benefits to Indigenous Peoples, but end up displacing or destroying their cultures instead. Examples include roads that traverse the territories of Indigenous Peoples in voluntary isolation, schools and education programs that are not attuned to indigenous culture, large dams, and other services that are not consistent with or run counter to indigenous peoples' vision for development. In the past, governments have claimed that a project is meant to benefit Indigenous Peoples as a loophole or an excuse to exempt them from the requirement of an FPIC process.

**RECOMMENDATION: The paragraph should be revised to read - For projects designed specifically to provide benefits directly to Indigenous Peoples, the Borrower will proactively engage with the relevant Indigenous Peoples subject to their FPIC to ensure their ownership and participation in project design, implementation, monitoring and evaluation.**

*C.6) Paragraph 12. When Indigenous Peoples are the sole, or the overwhelming majority of, direct project beneficiaries, the elements of an action plan may be included in the overall project design and preparation of a stand-alone plan is not necessary.*

**RECOMMENDATION: Even when Indigenous Peoples are the overwhelming majority of direct project beneficiaries, a stand-alone plan should be necessary. For the action plan referred to here, and any other form of Indigenous Peoples' Plan or related planning document, the plan must be developed in close partnership with the affected Indigenous Peoples in coordination with indigenous experts. The plan must reflect the self-determined development priorities of Indigenous Peoples through the conduct of FPIC, contain specific budget allocated against planned activities or objectives, have an associated clear time line agreed in advance, include associated monitoring indicators for assessment of results gained, and be subject to regular participatory assessment with the affected peoples. A draft framework plan should be developed and provided as an annex to ESS7 to provide consistency and clarity for borrowers and certainty for affected peoples.**



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C.7) *Paragraph 13.* When Indigenous Peoples are not the sole project beneficiaries, planning requirements will vary with circumstances. The Borrower will design and implement the project in a manner that provides affected Indigenous Peoples with equitable access to project benefits. The concerns or preferences of Indigenous Peoples will be addressed through meaningful consultation and project design, and documentation will summarize the consultation results and describe how Indigenous Peoples' issues have been addressed in project design. Arrangements for ongoing consultations during implementation and monitoring will also be described.

**RECOMMENDATION:** The paragraph should be revised to read – ... The Borrower along with the affected indigenous peoples and indigenous experts will design and implement the project in a manner that provides affected Indigenous Peoples with equitable access to project benefits<sup>5</sup>. The concerns or preferences of Indigenous Peoples will be addressed through the conduct of FPIC. Agreements and plans arising from this process should have a clear monitoring tool with budget.

That means deleting “... meaningful consultation and project design, and documentation will summarize the consultation results and describe how Indigenous Peoples' issues have been addressed in project design. Arrangements for ongoing consultations during implementation and monitoring will also be described.”

C.8) *Paragraph 14.* If specific actions relating to providing equitable access to project benefits will occur during the implementation phase, the Borrower will prepare a time-bound action plan, such as an Indigenous Peoples plan. Alternatively, a broader integrated community development plan incorporating necessary information relating to the affected Indigenous Peoples may be prepared where appropriate.

**RECOMMENDATION:** The formulation of the Indigenous Peoples Plan or the broader integrated community development shall involve the meaningful participation of the affected Indigenous Peoples and indigenous experts. Such plan shall have specific indicators and measures for Indigenous Peoples to be able to have equitable access to project benefits.<sup>6</sup>

This must include, at a minimum, the following characteristics: written agreement on project benefits; the establishment of a project-level grievance mechanism to address non-compliance; and clear sanctions and enforcement mechanisms to resolve conflicts at the project level and ensure compliance with agreed plans. The terms of the project benefits included in the plan must be established as part of the process of obtaining and maintaining FPIC of the affected Indigenous Peoples.

<sup>5</sup> Also ensure the equitable benefits for women, children, persons with disabilities and the poorest of the poor.

<sup>6</sup> See footnote 5



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The plan must also reflect the self-determined development priorities of indigenous peoples, contain clear budget allocated against planned activities or objectives, have an associated clear time line agreed in advance, include associated monitoring indicators for assessment of results gained, and be subject to regular participatory assessment with the affected peoples. Any reallocation or revision of the budget and change of project beneficiaries among others will be subject to the FPIC of the affected communities. A draft framework plan should be developed and provided as an annex to ESS7 to provide consistency and clarity for borrowers and certainty for affected peoples. A clear monitoring tool should be developed for the implementation of the any plans and agreements with indigenous peoples. Any diversion from the plan/agreement should have clear sanctions.

C.9) *Paragraph 15.* Adverse impacts on Indigenous Peoples will be avoided where possible. Where alternatives have been explored and adverse impacts are unavoidable, the Borrower will minimize and/or compensate for these impacts in a culturally appropriate manner proportionate to the nature and scale of such impacts and the form and degree of vulnerability of the affected Indigenous Peoples. The Borrower's proposed actions will be developed in consultation with the affected Indigenous Peoples and contained in a time-bound plan, such as an Indigenous Peoples plan. Where appropriate, an integrated community development plan incorporating necessary information relating to the affected Indigenous Peoples may be prepared.

**RECOMMENDATION:** The paragraph should be revised to read - Adverse impacts on Indigenous Peoples will be avoided where possible. Where alternatives have been explored and adverse impacts are unavoidable, the Borrower, affected Indigenous Peoples and indigenous experts will determine the impacts through the conduct of environmental and social impact assessment. The determination of impacts – short term and long term – shall include specific impacts to children, women and persons with disabilities and other vulnerable groups within the community. The assessment shall also include possibilities of potential conflicts (within/intra- and inter-community) resulting from the project. The affected indigenous peoples will determine the compensation. Any proposed action to minimize and/or compensate for these impacts shall be subject to FPIC of the affected Indigenous Peoples.

C.10) *Paragraph 16.* There may be situations involving the exceptional vulnerability of remote groups with limited external contact, also known as peoples "in voluntary isolation" or "in initial contact." Projects that may have potential impacts on these peoples require appropriate measures to recognize, respect and protect their land and territories, environment, health and culture, as well as measures to avoid all undesired contact with them as a consequence of the project.



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**RECOMMENDATION:** The paragraph should be revised to read - There may be situations involving the exceptional vulnerability of remote groups with limited external contact, also known as peoples “in voluntary isolation” or “in initial contact”. Projects that may have potential impacts on these peoples require appropriate measures to recognize, respect and protect their rights to their land and territories and environment, health and culture, as well as measures to strictly avoid all undesired contact with them as a consequence of the project.

*C.11) Meaningful Consultation Tailored to Indigenous Peoples*

COMMENT: Meaningful consultations, as determined by indigenous peoples and tailored by them to meet their needs and comply with requirements of their indigenous customary laws, are a consequence and integral part of the FPIC process. Thus, it is more appropriate to place a paragraph on “meaningful consultation” under the section of FPIC, to reflect the fact that it is part of the FPIC process.

**RECOMMENDATION:** The paragraph 18 should be deleted altogether.

*Meaningful Consultation Tailored to Indigenous Peoples, Footnote 9: Internal decision making processes are generally but not always collective in nature. There may be internal dissent, and decisions and may be challenged by some in the community...*

**RECOMMENDATION:** The footnote should be revised taking into account that the customary decision-making processes of Indigenous Peoples respect and recognize collective decision of the community resulting to an independent decision free from coercion or manipulation. Conflicting views shall be resolved by community members and the Bank and Borrower shall adhere to the final outcome of the decision making process taking into account the legitimate views and issues raised by community members as bases for their decision.

*C.12) Paragraph 18. Indigenous Peoples may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In recognition of this vulnerability, in addition to the General Requirements of this ESS (Section A) and those set forth in ESSs 1 and 10, the Borrower will obtain the FPIC of the affected Indigenous Peoples when the project will: (a) have impacts on land and natural resources subject to traditional ownership or under customary use or occupation; (b) cause relocation of Indigenous Peoples from land and natural resources subject to traditional ownership or under customary occupation or use; or (c) have significant impacts on Indigenous Peoples’ cultural heritage. In these circumstances, the Borrower will engage independent specialists to assist in the identification of the project risks and impacts...*

COMMENT: The inclusion of a requirement for obtaining the free, prior and informed consent is of fundamental importance in that the requirement achieves the objective of ensuring



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indigenous peoples can exercise their right to self-determination and are full partners in the development process. It should be within the framework and context of respecting and recognizing the rights of indigenous peoples over their lands, territories and resources, and not merely on their “vulnerability”. The ESS7 objectives clearly states “To ensure that the development process fosters full respect for the human rights, dignity, aspirations, identity, culture, and natural resource-based livelihoods of Indigenous Peoples. In this context, it is critical that the Bank policy and standards are fully aligned with the UNDRIP in order to ensure that indigenous peoples rights are not violated, and that they become genuine partners for sustainable development.

### RECOMMENDATION:

1. The Paragraph should be revised to read – Indigenous Peoples remain vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In addition to the General Requirements of this ESS (Section A), the Borrower will obtain the FPIC of the affected Indigenous Peoples in the framework of respecting and recognizing their rights to their lands, territories and resources. In line with achieving the objectives of ESS7, the FPIC applies to all projects and programmes affecting indigenous peoples (negative or positive) in general, and in particular when the project will: (a) have impacts on land and natural resources subject to traditional ownership or under customary use or occupation; (b) cause relocation of Indigenous Peoples from land and natural resources subject to traditional ownership or under customary occupation or use; or (c) have significant impacts on Indigenous Peoples’ cultural heritage. In these circumstances, the Borrower will engage independent experts and community recognized indigenous leaders and representatives to assist in the identification of short-term and long-term project risks and impacts.<sup>7</sup>
2. The conduct of the FPIC process should be in line with the recognition and respect of the collective rights of Indigenous Peoples to self-determination and to their lands, territories and resources. The current formulation proposed in paragraphs 18-21, which focuses on vulnerability rather than rights, fails to achieve this. The following important amendments, are at a minimum, required:
  - a) The process of decision making and agreements reached with communities must be described and verified by the Bank together with independent experts, including time-bound actions necessary to ensure that agreements are met and clear budget allocations made to agreed actions.
  - b) The consultation process shall involve not just Indigenous Peoples’ representative bodies and organizations but also other community members. The process shall likewise ensure transparency and the meaningful participation of women, youth and

<sup>7</sup> This will include determination of specific impacts to children, women and persons with disabilities among others.



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- persons with disabilities and where needed to conduct separate consultations with them to ensure that their views are taken into account.
- c) Disclosure of information must be required to be in a language and in appropriate forms including those specifically for persons with disabilities to be fully understood by the affected communities.
  - d) The involvement of Indigenous Peoples' representative bodies and organizations must specifically include women, youth and other community members in addition to councils of elders, village councils or chieftains.
  - e) Respect for decision-making processes of indigenous peoples should be mandatory (not where applicable) and must ensure respect for the independent and collective decision-making processes free from intimidation, manipulation and any form of undue pressure.
3. Further, the paragraph should state that, for the purposes of this ESS, the FPIC process will:
- a) include stakeholder analysis and engagement planning and disclosure of information ;
  - b) be in a culturally appropriate manner;
  - c) include, but not be limited to, among others, women, elders, youth, socio-economically disadvantaged sections and persons with disability;
  - d) involve Indigenous Peoples' community-recognized traditional or other institutions, councils, organizations and other representative bodies, along with other members of the community;
  - e) take place at national, sub-national or local levels, as demanded by the context; and
  - f) The Borrower will document: (i) the decision making process as defined and agreed by the affected communities (ii) the outcome of the FPIC process; and (iii) evidence of agreement between the parties on the outcome of the negotiations, in accordance with the process outlined in sub paragraphs (a), (b), (c), (d) and (e) above.

*C.13) Paragraph 19. When the FPIC of the affected Indigenous Peoples cannot be ascertained by the Bank, the aspects of the project relevant to those Indigenous Peoples will not be processed further. Where the Bank has made the decision to continue processing the project other than the aspects for which the FPIC of the affected Indigenous Peoples cannot be ascertained, the Borrower will ensure that no adverse impacts result on such Indigenous Peoples during the implementation of the project.*

**RECOMMENDATION:** The paragraph should be rephrased as - When the FPIC of the affected Indigenous Peoples cannot be ascertained by indigenous experts based on clear indicators, the aspects of the project relevant to those Indigenous Peoples will not be processed further.



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**In such cases, the Borrower will ensure that the project will not cause adverse impacts on those Indigenous Peoples.**

*C.14) Paragraph 20.* Agreements reached between the Borrower and affected Indigenous Peoples will be described, and actions necessary to accomplish agreements will be included, in the ESCP. During implementation, the Borrower will ensure that necessary actions are taken, and agreed benefits or improvements to services are delivered, so as to maintain Indigenous Peoples' support for the project.

**RECOMMENDATION: The Borrower will document the decision making process agreed on by the affected communities. Agreements reached between the Borrower and affected Indigenous Peoples will be described, and actions necessary to accomplish agreements will be included, in the ESCP. Agreements shall be written in a language and form understood and affirmed and be made public and affirmed by the affected indigenous peoples. Agreements shall have clear indicators and monitoring system. During implementation, the Borrower will ensure that necessary actions are taken through the effective and meaningful participation of the affected indigenous peoples, and agreed benefits or improvements to services are delivered on time, so as to maintain Indigenous Peoples' support for the project. The benefits shall fully take into account the specific needs and priorities of women, children, persons with disabilities, elderly and the poorest of the poor and to avoid elite capture. An independent monitoring mechanism with the affected indigenous peoples should be established and provided with the necessary resources. The Bank shall ensure the monitoring of the implementation of agreements.**

The agreement resulting from the process shall contain the following:

- a. Detailed benefit-sharing provisions, indicating the type of benefits to be derived by the affected Indigenous Peoples, specific target beneficiaries as to sector and number, the period covered, and other pertinent information;
- b. Development projects must be based on the development priorities of the community;
- c. Monitoring of the implementation agreement which shall be paid for by the Bank/Borrower;
- d. Mitigation and resettlement plans for potential risks, if any;
- e. Effective, accessible and gender-sensitive redress mechanisms at the project level with explicit option to use other redress mechanisms;
- f. Clause on the non-transferability and or concrete conditions for transfer (such as, death of the local leader who was the signatory) of the agreement;
- g. Clause for renegotiation of the economic provisions;
- h. List of responsibilities of the Borrower and the affected community
- i. Inclusive dates/duration of agreement;
- j. Transparency mechanism on transfer and disbursement of funds (from the Bank to the Borrower);



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- k. Detailed measures to protect Indigenous Peoples' rights and value systems;
  - l. Detailed measures to conserve/protect any affected portion of the indigenous territories critical for watersheds, mangroves, wildlife sanctuaries, forest cover, and the like;
  - m. Remedies and/or penalties for non-compliance or violation of the terms and conditions, which includes applicability of customary laws and imposition of sanction(s);
  - n. Provision by the Bank or the Borrower to render assistance in the event of calamities/disasters in the community;
- (Lifted from the 2012 FPIC Guideline of the National Commission on Indigenous Peoples in the Philippines with some modifications)*

In case of violation or non-compliance with agreements reached with communities or cases of violation of the policy requirements in ESS7 there must be a clear and accessible grievance mechanism that affected communities and peoples can access for redress, including but not limited to direct access to the Inspection Panel. Technical and financial support for use of grievance mechanisms and/or Inspection Panel must be available upon request.

*C.15) Paragraph 23: ... Where projects involve (a) activities that are likely contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have significant impacts on land that is traditionally owned or under customary use customarily used or occupation by Indigenous Peoples, occupied, or (b) the acquisition of such lands, the Borrower will prepare a plan for the legal recognition of their such ownership, occupation, or usage, with due respect to the customs, traditions and land tenure systems of the Indigenous Peoples concerned. The objective of such plans will be the following: (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or (b) conversion of customary usage rights to communal and/or individual ownership rights. If neither option is possible under national law, the plan includes measures for the legal recognition of Indigenous Peoples' perpetual or long-term renewable custodial or use rights.*

**RECOMMENDATION:** The land rights of Indigenous Peoples have been recognized again and again under international and regional human rights law as fundamental to the very survival of the peoples themselves. Given the importance of this set of rights, it is critical that requirements intended to ensure that such rights are protected are clearly formulated. As such, the required "the plan (which) includes measures for the legal recognition of Indigenous Peoples' perpetual or long-term renewable custodial or use rights" must be developed in partnership with the Indigenous Peoples themselves, time-bound, designed against clear indicators and with sufficient budget allowance.

The paragraph should be revised as - Indigenous Peoples are entitled to their rights to their land and related natural resources. 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



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acquired. While Indigenous Peoples may not possess legal title to land as defined by national law, their use of the land, including seasonal or cyclical use, for their livelihoods, or for cultural, ceremonial, and spiritual purposes that define their identity and community, can often be substantiated and documented. Where projects are likely to have significant impacts on 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, the Borrower will prepare a plan for legal recognition of their perpetual or long-term renewable custodial or use rights. This shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

*C.16) Paragraph 24: If the borrower proposes to locate a project, or commercially develop natural resources, on land traditionally owned by or under customary use of occupation of, Indigenous Peoples, and adverse impacts can be expected, the Borrower will take the following steps and obtain their FPIC:*

- (a) Document efforts to avoid and otherwise minimize the area of land proposed for the project;*
- (b) Document efforts to avoid and otherwise minimize impacts on natural resources subject to traditional ownership or customary use or occupation;*
- (c) Identify and review all property interests, tenurial arrangements and traditional resource usage prior to purchasing, leasing or, as a last resort, undertaking land acquisition;*
- (d) Assess and document Indigenous Peoples' resource use without prejudicing any Indigenous Peoples' land claim. The assessment of land and natural resource use will be gender inclusive and specifically consider women's role in the management and use of these resources;*
- (e) Ensure that affected Indigenous Peoples are informed of: (i) their land rights under the national law, including any national law recognizing customary use rights; (ii) the scope and nature of the project; and (iii) the potential impacts of the project; and*
- (f) Where a project promotes commercial development of their land or natural resources, afford due process, and offer compensation together with culturally appropriate sustainable development opportunities to Indigenous Peoples, at least equivalent to that which any landowner with full legal title to the land would be entitled, including...*

### **RECOMMENDATIONS:**

**The paragraph should be revised to read – If the borrower proposes to locate a project, or commercially develop natural resources, that Indigenous Peoples possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired of Indigenous Peoples, and adverse impacts can be expected, the Borrower shall implement the FPIC as stipulated in paragraphs 18-21.**



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**All clauses on land acquisition should be removed. Further, the Bank should verify the veracity of the steps undertaken and ensure the equitable benefits for women, children, persons with disabilities and other vulnerable sectors within the community.**

*C.17) Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership of Under Customary Use or Occupation, Footnote 15: ...Where Indigenous peoples individually hold legal title, or where the relevant national law recognizes customary rights for individuals, the requirements of ESS5 will apply, rather than the requirements under paragraph 23 of this ESS.*

**RECOMMENDATION: FPIC should be applied in all processes/aspects of any project affecting Indigenous Peoples or affecting any member of indigenous peoples' communities. The FPIC process to be undertaken shall be verified by the affected indigenous peoples. Where individual titles exist within indigenous territories, such legal ownership must of course be recognized, but the requirements of paragraph 25 of ESS7 must be retained. Traditional and customary collective tenure is often unrecognized, leading to individual titles being secured in the absence of any available collective tenure. However this does not mean collective tenure is absent, and certainly does not mean that a project affecting an entire community need only gain approval from individual landholders. FPIC must be obtained from the whole project affected community irrespective of tenure arrangements. Thus, the reference to ESS5 should be deleted.**

*C.18) Cultural Heritage, Paragraph 25: Where a project proposes to use the cultural heritage including knowledge, innovations, or practices of Indigenous Peoples for commercial purposes, the Borrower will inform the affected Indigenous Peoples of: (a) their rights under national law; (b) the scope and nature of the proposed commercial development; and (c) the potential consequences of such development; and obtain their FPIC. The Borrower will also enable Indigenous Peoples to share equitably in the benefits to be derived from commercial development of such knowledge, innovation, or practice, consistent with the customs and traditions of the Indigenous Peoples.*

**RECOMMENDATION: With regards to this, the Borrower should not just enable but ensure the fair and equitable benefit sharing<sup>8</sup>, including the intellectual property rights of Indigenous Peoples (i.e. patenting should be determined by Indigenous Peoples).**

*C.19) Mitigation and Development Benefits*

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<sup>8</sup> Fair and equitable benefit sharing should account for the needs and priorities of women, children, elderly, persons with disabilities and the poorest of the poor.



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**RECOMMENDATIONS:** Agreements of mitigation and development benefits, referred to in paragraph 26, should be included in the overall content of the agreement with affected indigenous peoples as stipulated in paragraph 20 with reference to recommendations above.

The activities contained in paragraphs 29 and 30 should be subject to FPIC.

### C.20) *Grievance Mechanism*

**RECOMMENDATIONS:** The grievance mechanism to be established should be effective and accessible for affected indigenous peoples.

The paragraph should include that clear sanctions shall be identified for any violations committed i.e., grave violations<sup>9</sup> committed against indigenous peoples shall result in the discontinuity of the project. There should also be compensation/indemnification to the victims including rehabilitation of victims and areas affected as identified by the affected indigenous peoples themselves.

Further, when intra- or inter-conflict arises as a result of the project, all activities of the project should be suspended until such time that the conflict is resolved. Negotiation and mediation can take place with mutually agreed terms with the participation of third parties.

### D) ESS1: Assessment and Management of Environmental and Social Risks and Impacts

*Use of Borrower's Environmental and Social Framework, Paragraph 18: When a project is proposed for Bank support, the Borrower may request the Bank to consider the use of all, or part, of the Borrower's existing environmental and social framework (the Borrower's ES Framework) in the assessment, development and implementation of projects supported through investment Project Financing, provided that it is likely to be able to address the risks and impacts of the project, and enable the project to achieve objectives materially consistent with the ESSs. For such a request, the Borrower will provide information to the Bank in connection with the Bank's review of the Borrower's Framework. (See also paragraphs 19 and 20)*

COMMENT: These paragraphs outline the process through which a Borrower would apply to use national laws and policies in place of the ESS of the World Bank. It includes the process through which a Government could apply to use its national laws in place of ESS7 on Indigenous Peoples. The critical judgment from the Bank is "to what extent the ES Framework can be used to enable the project to achieve objectives materially consistent with the ESSs" (footnote 24). The proposal to use country systems, or national laws and policies, as written relies entirely on

<sup>9</sup> Grave violations includes forced displacement of communities, grave human rights violations, violations to civil and political rights such as arbitrary arrests, enforced disappearance, killings among others



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information provided to the Bank by the Borrower, and requires the Bank only to assess the laws and policies in place in a given country, with no attention required on the *actual practice* of the given Government against the policies and laws in place. There is also no requirement to consult with peoples or communities affected by the project about their views on the use of the country laws in place of the Bank Standards.

**RECOMMENDATION:** The use of a country's own laws and policies in place of the Bank Standards must be allowed only after a higher threshold is met. This includes assessment of the actual practice of that country in meeting the Standards incorporated into its national laws and policies, and must include open consultation with the affected peoples or communities for whom the Bank Standards would be set aside.

*D.1) Environmental and Social Assessment, Paragraph 29: If the project involves the preparation of subprojects, the Borrower will carry out appropriate environmental and social assessment of each subproject:*

*(a) High Risk subprojects, in accordance with the ESSs;*

*(b) Substantial Risk, Moderate Risk and Low Risk subprojects, in accordance with national law any requirements of the ESSs that the Bank deems relevant to the subproject.*

COMMENT: The effect of the paragraph above is to remove the requirements of the Bank Standards, including ESS7, for sub-projects implemented with Bank financing for all but the highest risk rating. These risk classifications are not defined clearly, but it is clear that in addition to 'high risk' classifications there are "substantial risk", "moderate risk" and "low risk". All three of these risk categories would be exempt from applying the standards of the ESSs if they were implemented as sub-projects.

**RECOMMENDATION:** All projects funded by the Bank financing and impacting on Indigenous Peoples must be subject to the same standards. To do otherwise is to establish an incentive for more complex projects to be bundled under sub-project classification where a requirement for Free, Prior and Informed Consent (for example) will not apply. While the very highest risk projects are not in danger of this, the Bank could finance sub-projects with 'substantial risk' to the lives and livelihoods of indigenous peoples without reference to the requirements of ESS7.

*D.2) Conduct of environment and social risk assessments*

**RECOMMENDATION:** The Bank should ensure participation of indigenous experts and Indigenous Peoples in environment and social risk assessments and any impact to indigenous peoples should trigger the implementation of ESS7.



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### E) The Inspection Panel

The proposed ESF does not change the mandate of the Inspection Panel, which is set out under the relevant resolutions. However, it materially and directly impacts on the Panel's ability to meet its mandated responsibilities and on the level of utility that the Panel will have for affected peoples and communities in the future.

The inclusion of phrases in the ESF such as projects being expected to meet the standards 'where appropriate', 'in a reasonable timeframe', among many others is very problematic. Who is assessing what is reasonable, acceptable and feasible? The Inspection Panel will no longer be asked the simpler question of whether a requirement was met or not (a clear yes or no), but rather whether it was met, and if it was not met, whether that was necessary or feasible. For indigenous Peoples, all the specific protections provided under ESS7 can therefore be delayed or adjusted according to staff judgment, and the Panel can only assess whether a staff member judged compliance to be required only under a longer timeframe, or in a manner different from that expected by the affected peoples. This has the direct effect of making the Inspection Panel a less effective tool for Indigenous Peoples and thereby reducing avenues for redress in cases of violations of Bank requirements.

**RECOMMENDATION: The Bank should ensure that requirements are clear and mandatory, that all projects shall meet the requirements of the ESSs. Instead of the Bank Standards being presented as flexible expectations to be met over time, they should be required to be fully met throughout the life of the project.**