

Phase 2 - Southeast Asia Regional Indigenous Peoples Consultation
February 5-6, 2015
Manila Philippines

SUBMISSION OF INDIGENOUS PEOPLES PARTICIPANTS

Comments and recommendations to the World Bank proposed safeguards for indigenous peoples (ESS7: Indigenous Peoples)

GENERAL COMMENTS

The purpose of this submission is to highlight key issues for indigenous peoples in the new Environmental and Social safeguard system proposed by the World Bank. The policies referred to herein are the Environmental and Social Policy (ESP) and the Environmental and Social Standards (ESS), 1 through 10, with particular focus on ESS7 on indigenous peoples.

Before looking in detail at the requirements of the system, 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 3) of ESS1. The ESSs are not applied to Development Policy Loans or Program for Results (P4R), 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.**

The new system of ESP and ESSs separate 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 staff 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.

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.

ESS 7. INDIGENOUS PEOPLES

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 provisions in the ESS7 are aligned with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international human rights norms and standards as well as multilateral environmental agreements¹ particularly on the recognition of the rights of indigenous peoples to their land, territories and resources, development, Free Prior and Informed Consent (FPIC) and cultural heritage, among others. Clear sanctions should be provided for violations against the rights of indigenous peoples.

A. Para 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.

B. Paragraph 9. Where the Borrower is concerned that the process of identifying groups for purposes of applying this ESS would create a serious risk of exacerbating ethnic tension or civil strife, or where the identification of culturally-distinct groups as envisioned in this ESS is inconsistent with the provisions of

¹ 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.

the national constitution, the Borrower may request the Bank to agree on an alternative approach, in which risks and impacts of the project on Indigenous Peoples will be addressed through the application of the ESSs other than ESS7

COMMENT: This section directly and seriously undermines the specific and fundamental rights that indigenous peoples have over their distinct identities, their lands and resources and the course of their own development, as already enshrined in international human rights law. To enable governments to opt-out of applying protections for indigenous peoples indicates that the protections due to indigenous peoples, as a matter of national law or of policy, are dependent on the governments under which they live. This fundamentally violates international law on the rights of indigenous peoples as progressively developed over the past thirty years and will result to further discrimination and violations against the rights of indigenous peoples.

Encroachment on the lands, resources and territories of indigenous peoples is often undertaken with the implicit or explicit consent of governments whose decisions often adversely impact indigenous peoples. If the decision on whether international human rights are to be respected or not rests solely with national governments, then the Bank is acting to further undermine agreed international human rights standards, protected by UN and regional human rights instruments.

The Bank is also undermining significant progress achieved in the development of national level laws and policies recognizing and protecting the unique rights of indigenous peoples. This danger was highlighted by the African Commission on Human and Peoples Rights (ACHPR) in its communication with the World Bank, through the Working Group on Indigenous Populations. In its communications with the Bank the WGIP stated:

...any 'alternative approach' to indigenous peoples in Africa would undermine the work of the Commission, which has started to bear fruit by gradually inspiring and guiding national laws and policies. Such an 'alternative approach' would also undermine the Commission's on-going work to sensitize stakeholders about what the concept means in Africa.

The 'alternative approach' being proposed by the World Bank could also lead to a parallel and conflicting framework that would discourage more African States from developing policies and legal frameworks for indigenous peoples. The 'alternative approach' would as well be in stark contradiction with the various policies, decisions and rulings of the Commission and that of the African Union.²

RECOMMENDATION: DELETE Section 9 in ESS7 and Section 33 in the ESP where governments can simply “opt out” of applying the policy requirements intended to protect indigenous peoples.

“...risks and impacts of the project on Indigenous Peoples will be addressed through the application of the ESSs other than ESS7”

COMMENT: The principles contained in ESS7 are based on the collective rights of indigenous peoples; the other standards (ESSs) are not. For instance, ESS7 provides protections for:

² Communication to Dr. Jim Kim from Commissioner Soyata Maiga, Chairperson of the African Commission's Working Group on Indigenous Populations/Communities in Africa, 4 July 2014

- Self-governance and autonomous decision making processes
- Protection from marginalization by dominant ethnic groups and peoples
- Specific and additional requirements for consultation and effective participation
- Continued cultural integrity and survival through a requirement to obtain FPIC
- Prohibition on resettlement without FPIC
- Land and resource rights

In contrast, for instance, ESS5 seeks only to “avoid involuntary resettlement” and “avoid forced eviction”. Unlike ESS7, which reflects customary international law that disallows resettlement without FPIC, ESS5 does not contain a strict prohibition on forced resettlement of indigenous peoples. Further, ESS5 only refers to affected persons, not collectivities, and provides only for resettlement assistance, and not compensation for land, contrary to the UNDRIP.

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

COMMENT: The principles embodied in the right 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 area³.

D. Para 10: 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 commensurate with the scope and scale of potential project risks and impacts as they may affect Indigenous Peoples.

RECOMMENDATION: A key purpose of this ESS is to ensure that Indigenous Peoples present in, or with collective attachment to, the project-affected area⁴ 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.

³ See comments under A. Paragraph 4 in the immediately preceding page.

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

E. Paragraph 11. 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.

F. Para 12: 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 territory 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 use as a loophole or an excuse the claim that a project is meant to benefit indigenous peoples in order to exempt themselves from the requirement of an FPIC process.

RECOMMENDATION: 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.

G. Paragraph 13. 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: Delete Para 13.

H. Para 14: 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.

RECOMMENDATIONS:

- **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 benefits⁵. 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.

- **DELETE:** 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.

I. Para 15

RECOMMENDATIONS:

- 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 benefits⁶.

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 Free, Prior and Informed Consent.

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.

- **DELETE** Footnote 6.

I. Para 16 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 commensurate with 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

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

⁶ See footnote 5

development plan incorporating necessary information relating to the affected Indigenous Peoples may be prepared.

RECOMMENDATION:

- 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 compensation will be determined by the affected indigenous peoples.

Any proposed actions by the Borrower shall be subject to FPIC.

- **DELETE footnote 7.**

J. Para 17 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.

RECOMMENDATION: 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.

K. Meaningful Consultation Tailored to Indigenous Peoples

COMMENT: Meaningful consultations, 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: DELETE Para 18

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: Customary decision making processes of indigenous peoples respects and recognizes 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.

L. Circumstances Requiring Free Prior and Informed Consent

19. *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.*

RECOMMENDATIONS:

- **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 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 WB Policy is 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.**

Below are the proposed revisions:

- **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 specialists to assist in the identification of the project risks and impacts.**
- **The current formulation proposed in paragraphs 19-22, which focuses on vulnerability rather than rights, fails to achieve this. The following important amendments, are at a minimum, required:**
 1. **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.**

2. 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 persons with disabilities and where needed to conduct separate consultations with them to ensure that their views are taken into account.
3. 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.
4. 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.
5. 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.

- Para 19: The conduct of the FPIC process is 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 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, such as projects for basic services and education. In these circumstances, the Borrower will engage independent experts and community recognized indigenous leaders and representatives to assist in the identification of the short term and long term project risks and impacts⁷.

- Para 20:

a. DELETE B and D.

b. Paragraph 20 be rephrased as follows: Customary decision making processes of indigenous peoples respects and recognizes 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. For the purposes of this ESS, the FPIC engagement process:

(a) Will include stakeholder analysis and engagement planning and disclosure of information;

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

- (b) It will be in a culturally appropriate manner;
- (c) It will include, but not be limited to, among others, women, elders, youth, socio-economically disadvantaged sections and persons with disability;
- (d) It will involve Indigenous Peoples' community-recognized traditional or other institutions, councils, organizations and other representative bodies, along with other members of the community;
- (e) It will 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.

- Para 21: 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. In such cases, the Borrower will ensure that the project will not cause adverse impacts on those Indigenous Peoples.

- Para 22: 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, the benefits to be derived by the affected community indicating the type of benefits, specific target beneficiaries as to sector and number, the period covered, and other pertinent, information;
- b. Development projects based on the development priorities of the community;
- c. Monitoring of the implementation agreement. This undertaking shall be paid for by the Bank/Borrower;
- d. Mitigation and resettlement plans for potential risks;
- e. Redress mechanisms;
- f. Clause on the non-transferability of the agreement;
- g. Clause for renegotiation of the economic provisions;
- h. List of responsibilities of the Bank/Borrower and the affected community

- i. Inclusive dates/duration of agreement;
- j. Transparency mechanism on transfer and disbursement of funds;
- 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 to render assistance in the event of calamities/disasters in the community;

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.

Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use or Occupation

M. Paragraph 23:Where projects are likely to have significant impacts on land that is traditionally owned or under customary use or occupation by Indigenous Peoples, the Borrower will prepare a plan for legal recognition of their 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 “plan for recognition of their 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.

Para 23: 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 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.

N. 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 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:

- **REPHRASE: 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 19-22.**
- **REMOVE all clauses on land acquisition.**
- **INCLUDE: The Bank should verify the veracity of the steps undertaken.**
- **Ensure the equitable benefits for women, children, persons with disabilities and other vulnerable sectors within the community.**

O. Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership of Under Customary Use or Occupation, Footnote 14: 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 25 of this ESS.

RECOMMENDATIONS:

- **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 land holders. FPIC must be obtained from the whole project affected community irrespective of tenure arrangements.**
- **DELETE the mention of ESS5.**

P. Cultural Heritage

RECOMMENDATIONS:

- **Para 26: Include sacred mountains and forests including livelihoods and no go zones/negative list (ie sacred mountains, burial grounds and sites).**
- **Para 27: In this, the Borrower should not just ensure the fair and equitable benefit sharing⁸ but also the intellectual property rights of Indigenous Peoples (ie patenting should be determined by Indigenous Peoples).**
- **(a) Their rights under national and international human rights and environmental laws**

Q. Mitigation and Development Benefits

RECOMMENDATIONS:

- **Para 28: Agreements of mitigation and development benefits shall be included in the overall content of the agreement with affected indigenous peoples as stipulated in para 22.**
- **Para 29 and 30: Activities contained in these paragraphs shall be subject to FPIC.**

Q. Grievance Mechanism

RECOMMENDATIONS:

- **The grievance mechanism to be established should be effective and accessible for affected indigenous peoples.**
- **INCLUDE – Clear sanctions shall be identified for any violations committed. Ie. Grave violations⁹ 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.**
- **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.**

⁸ 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.

⁹ 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