

Written Submission on Asian Development Bank's (ADB) September 2023 Draft Environmental and Social Framework (ESF)

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ADB's Draft Environmental and Social Framework

We, the undersigned organisations, recognise ADB's new draft ESF is an improvement on its 2009 Safeguard Policy Statement.

We welcome the acknowledgement of indigenous peoples' right to Free, Prior, and Informed Consent (FPIC) as a significant step forward to upholding indigenous peoples' internationally recognised rights,¹ and applaud ADB on continuing to retain a stand-alone policy on indigenous peoples - ESS7 - within the draft ESF.

We commend the creation of an indigenous peoples' advisory panel to engage with the risks and impacts on indigenous peoples during the preparation and implementation phases of a project cycle.²

We note the definition of "indigenous peoples" in ESS7 could be improved.³ Indigenous peoples do not require their identity as indigenous peoples to be recognised by others in order to be considered indigenous peoples.⁴ The current definition is dangerous because many States do not recognise indigenous peoples even if they have international obligations to do so.⁵

We are, however, concerned that the draft ESF references FPIC as a "special requirement"⁶ and provisional on a set of three circumstances.⁷ This represents a serious misinterpretation of the right to FPIC.

The right to FPIC is derived from other rights - such as the right to self-determination, to non-discrimination and to effective participation – rather than an 'expansion' of "the process of meaningful consultation" as the current draft suggests.⁸ It is a right that always applies whenever projects may have impacts on indigenous peoples' rights and its application is not contingent upon the existence of any other particular conditions.

The right to FPIC applies to any activity that affects indigenous peoples', or in appropriate circumstances other collective rightsholders', lands or resources.⁹ This means whenever any activity is proposed that affects customary lands, it should be the subject of an FPIC process, involving genuine good faith negotiations with a view to reaching a mutually satisfactory outcome.¹⁰

¹ "FPIC is required to be ascertained by the time of project appraisal. When the FPIC of potentially project-affected Indigenous Peoples cannot be ascertained, the aspects of a project relevant to those affected Indigenous Peoples for which the FPIC cannot be ascertained will not be processed further." Paragraph 55, Draft ESF

² See Paragraph (Para) 24 of ESS7

³ See Para 6 and 7 of ESS7

⁴ See <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> p.14

⁵ See for example F. Lenzerini, Implementation of the UNDRIP around the world: achievements and future perspectives, The International Journal of Human Rights, Volume 23, 2019. Available at: <https://www.tandfonline.com/doi/abs/10.1080/13642987.2019.1568993> which notes "in many countries the effective degree of practical implementation and effective realisation of the rights of indigenous peoples is still rather unsatisfactory"; and E/C.19/2012/3. Available at: <https://www.un.org/esa/socdev/unpfii/documents/2012/session-11-e-c19-2012-3.pdf> which notes "problems arise, however, over the implementation of these standards [including UNDRIP], and the alignment of incentives within the national domain".

⁶ See Para 31 of ESS7

⁷ Namely when the project will: (1) have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation ; (2) cause relocation of Indigenous Peoples' communities from land and natural resources subject to traditional ownership or under customary use or occupation ; (3) have significant impacts on Indigenous Peoples' cultural heritage that is material to their identity and culture, and/or to ceremonial and/or spiritual aspects of their lives.

⁸ See Paragraph 32 of ESS7

⁹ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

¹⁰ Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, James Anaya (2009), Promotion and protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, A/HRC/12/34, para 48, "In all cases in which indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations."

It is important not to limit in advance the activities to which an FPIC process should apply, for example, only to activities with “adverse” impacts - as the draft currently states - precisely because those with customary rights to the land have a right to determine for themselves how significant an impact an activity would have, from their own economic, social and cultural standpoint.¹¹

Framing the right to FPIC as conditional on “significant impacts on indigenous peoples’ cultural heritage”,¹² when those determining the impacts are external parties rather than indigenous peoples themselves, is again an acute misreading of indigenous peoples right to FPIC.¹³

The requirements of the FPIC process itself, depends on the circumstances, and how significant the impact will be on the indigenous peoples, as determined by the indigenous peoples themselves.¹⁴

Under the current draft ESF, the right to FPIC is substantially constrained in preference of “meaningful consultation”. Meaningful consultation should not be used as a replacement for internationally recognised indigenous peoples’ rights.

“Meaningful consultation” does not constitute consent - although it is a necessary prerequisite - and consultation itself does not ensure sustainable and equitable development.¹⁵ The draft ESF must recognise the need to improve current consultation processes and move beyond consultation into greater levels of participation, including the right to FPIC by affected indigenous peoples.¹⁶

Civil society provided comment to the Safeguard Policy Review and Update Secretariat in November 2021 on the inadequacy of “Broad Community Support” (BCS) as a standard to guarantee the rights of indigenous peoples.¹⁷ We emphasise that “meaningful consultation” on its own is also an insufficient tool to address deeply entrenched power imbalances and unrecognised indigenous peoples’ rights.¹⁸

¹¹ Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), 2018, note 3, para 34: “*The perspective of the indigenous peoples concerned on the potential broader impact of a decision is the starting point for assessing whether a legislative or administrative measure or any project affecting their lands or territories and other resources affects them. Indigenous peoples should have a major role in establishing whether the measure or project affects them at all and, if it does, the extent of the impact. Indigenous peoples may highlight possible harms that may not be clear to the State or project proponent and may suggest mitigation measures to address those harms.*”

¹² The draft refers to “cultural heritage” as “the location and characteristics of sites and materials discovered or identified during the concept design, preparation, and implementation phases of a project cycle in consultation with international, national, or sub-national cultural heritage authorities”. There is no reference to indigenous peoples in this definition.

¹³ It is important to acknowledge that the traditional categorization of heritage as “tangible”, “intangible”, and “natural” demonstrates its limitations: tangible heritage carries out meanings, while intangible heritage is often embodied in specific objects. This categorization is particularly inappropriate in the case of indigenous peoples. It is important to adopt a holistic approach to cultural heritage and acknowledge that the rigid legal regime of protection for cultural heritage could be problematic for indigenous peoples. See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/185/41/PDF/G1518541.pdf?OpenElement>

¹⁴ The Special Rapporteur on Indigenous Peoples expressed it as follows: “Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.” See Report of the Special Rapporteur (2009), note 8, para 47.

¹⁵ Many international conventions go beyond consultation and strongly identify the rights of indigenous peoples to participate fully in decisions that affect or may affect their livelihoods and lands, these rights are protected under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

¹⁶ For example, p.17, para. 54 of draft ESF states: “Where Indigenous Peoples are present in, or have a collective attachment to, a proposed project-affected area, ADB will require a borrower/client to undertake a process of meaningful consultation tailored to Indigenous Peoples in accordance with ESS7 and to document the outcome.” It would be more appropriate for this to read “...ADB will require a borrower/client to undertake a process of **Free, Prior and Informed Consent**...”.

¹⁷ See for example “FPP Recommendations on ADB Policy Review Indigenous Peoples (SP3), 2021”.

¹⁸ The application of meaningful consultation in the context of ESS5 (Land Acquisition and Land Use), for example, denies the right of prior informed consent to indigenous peoples facing involuntary resettlement (see p.82, para.48, draft ESF). Furthermore, indigenous peoples have repeatedly raised concerns over ad-hoc consultations without proper representation. See

Indigenous peoples must have the right to withhold their consent to projects (and/or aspects of a project) impacting their lands and access to natural and cultural resources. If no FPIC is obtained, any aspects of a project for which FPIC is not obtained should not affect indigenous peoples.

We express concern that Section E of the Special Requirements on “Private Sector Responsibilities Where Government is Responsible for Managing Indigenous Peoples Issues” is potentially limiting.

This section suggests, if the government is the borrower or client, they do not have to comply with ESS7 as “the responsible government agency” only has to comply with ESS7 “to the extent feasible and permitted by the agency”, potentially limiting the application of FPIC to national laws and interpretation.

If the borrower is a government agency, they should be obliged to comply with ESS7. If the borrower is a non-government agency, but they are partnering with the government, they should commit to comply with ESS7.

Recommendations:

- Remove the clause "and recognition..." from paragraph 6 of ESS7 or change it along the lines of "self-identification at the individual level as a member of a distinct social and cultural group or as indigenous and acceptance by their community as a member".
- Add a clarification that the identification of indigenous peoples for the purposes of the ESS7 does not depend upon a host country's legal recognition of the existence of indigenous peoples or a particular indigenous people in paragraph 7 of the ESS7 or phrase it along the lines of "the lack of legal recognition by the host country of indigenous peoples or a particular indigenous people does not preclude their identification as indigenous peoples for the purposes of the ESS7."
- Provide a comprehensive definition of indigenous peoples' right to FPIC¹⁹ and good faith negotiations.²⁰
- The draft ESF makes explicit reference the rights of indigenous peoples affirmed by UNDRIP. We recommend that ADB directly reference how these same rights are protected under ICCPR, ICESCR, ICERD and CEDAW.
- Replace "meaningful consultation" with the right to FPIC – especially in reference to indigenous peoples in ESS5, ESS7 and ESS8 – a legal standard which guarantees indigenous peoples a right to be consulted and that such consultations should lead to consent or lack of it.²¹
- The grievance mechanism is not time-bound, instead complaints should be dealt with "promptly".²² We recommend this language is revised and time-bound requirements are stated and defined. Similar provisions should be accommodated in the finding of any noncompliance in the IPP/IPPF.²³
- Provide further information on the role, scope, and mandate of the indigenous peoples' advisory panel and how it will guide ADB's decision-making and engagement with indigenous peoples.²⁴
- Strengthen language surrounding impact assessments with indigenous peoples to ensure that the assessment is done with the participation and consent of affected communities and identifies marginalized groups and the differentiated risks and impacts they may face.
- Impact assessments and additional steps in the FPIC process²⁵ carried out by the borrower/client should be independently verified by a third-party (e.g., the indigenous peoples' advisory panel).²⁶

¹⁹ The draft ESF only provides a definition of "meaningful consultation" which does not register indigenous peoples' right to give or withhold their consent to activities affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources as enshrined in UNDRIP (which is referred to in paragraph 3 of draft ESS7) and protected under ICCPR, ICESCR, ICERD and CEDAW. The draft ESS7 does not provide a comprehensive definition of FPIC and instead states the following: "consent refers to the collective support of project-affected Indigenous Peoples' communities for project activities that affect them, reached through a culturally appropriate process." We recommend that the recently published FPIC guide by Cultural Survival is used as a reference to provide a more complete definition which can inform the ESF Definitions (p.132-142). See https://static1.squarespace.com/static/62cd7860272be4335685de88/t/650b105c830dca28a4ee35ff/1695223916300/FPIC+guide+sm_compressed.pdf, see also: <https://fpic360.org/document-library/resources/>

²⁰ See for example: p.5 https://www.forestpeoples.org/sites/default/files/documents/ifi-ps7-english-web_0.pdf

²¹ See p.86, para. 63, Draft ESF

²² See p.103, para. 28, Draft ESF

²³ p.107, para. 45, draft ESF

²⁴ As a reference, ADB may consider Global Environment Facility's Indigenous Peoples' Advisory Group see https://www.thegef.org/sites/default/files/council-meeting-documents/EN_GEF.ME_C.53_Inf.07_GEF_Eng_Indigenous_People_Nov_2017_1.pdf

²⁵ See p.105, para. 38, Draft ESF

²⁶ Impact assessments should also consider assessment of enabling environment for public participation, discrimination, conflict, capacity and human rights record of client. Such assessments should be cross-referenced with information from human rights bodies and civil society groups and, for assessments at the project level, local communities within the project area.

- Provide further information on the defining characteristics of “qualified and experienced experts” in the context of (1) indigenous peoples and (2) cultural heritage, and how such persons will be accountable.²⁷
- Any partners in a project, including the government, must commit to comply with ESS7.
- ESS5: (1) paragraph 42 should make explicit reference to indigenous peoples²⁸: “When the host country’s applicable laws and tenure systems do not recognise the rights of...[indigenous peoples]..., provisions will be made to ensure, to the extent possible, that [indigenous peoples] can gain security of tenure”.²⁹ (2) paragraph 63, the Land Acquisition Plan (LAP) agreement should reflect “voluntary, informed consent [*not consensus*] through a transparent and fair decision-making process”.
- ESS7: (1) The application of a standalone indigenous peoples assessment should not be dependent “on the nature and scale of the potential risks and impacts”³⁰ or solely “*High Risk or Substantial Risk* projects”³¹, but be applied whenever indigenous peoples are present in a proposed project-affected area.³² Such assessments should be publicly available and be subject to scrutiny by the indigenous peoples advisory panel. (2) paragraph 25, “the borrower/client will provide relevant information and documents to demonstrate that *it has sought and acted upon the opinions of project-affected Indigenous Peoples*” should be rephrased to “...*it has complied with project-affected indigenous peoples right to FPIC and acted accordingly*”.³³ (3) Any “significant changes to a project that result in additional risks to and impacts on indigenous peoples” should require the borrower/client to seek project-affected indigenous peoples FPIC, rather than solely relying on meaningful consultation³⁴ - reflecting similar provisions accommodated in the section “anticipated impacts” and “relocation of indigenous peoples’ communities”.³⁵ (4) paragraph 44 (v) should accommodate participatory mapping of indigenous peoples lands. (5) Annex 1: IPP, C.(v) and D.(i) – (iv) should be based on FPIC not solely meaningful consultation.³⁶ (6) Annex 2: IPPF, D. (iii) should read “delineates the potential positive and adverse effects of the project or subproject on indigenous peoples *as determined by indigenous peoples themselves*”. (7) Provide clarification on criteria 6(i) of ESS7, are we to assume this refers to individuals who identify as indigenous peoples are recognised as such by others within their respective community?
- Paragraph 33 of ESS7 states that FPIC does not require unanimity, but it should also state “FPIC must be a consent that comes from IPs through their chosen representative institutions after decision-making via their customary decision-making process.”
- Rephrase paragraph 35 of ESS7 to state: “the client will ensure that it does not implement any parts of the project that may affect those IPs or is only implementing the other aspects of the project do not affect indigenous peoples.”
- Indigenous Peoples Planning (IPP) should be revised to accommodate indigenous peoples right to withhold their consent to the aspects of the project which they deem cannot be minimized, mitigated, or compensated for³⁷ - indigenous peoples should actively have a

²⁷ See p.99-104, para. 10/15/24/29 ; p.108, para.45 ; p.115-120, para.7/9/16/17/21/22/40, Draft ESF

²⁸ The definition of “disadvantaged or vulnerable” persons makes specific reference to “indigenous status” see p.135, draft ESF.

²⁹ See p.80, para.42, draft ESF

³⁰ See p.99, para. 11, draft ESF

³¹ See p.102, para. 25, draft ESF

³² One of the principal critiques of ABD’s 2009 SPS was that overall approach to risk assessment and management in the safeguard processes allowed for project-risk classification to be calibrated in such a way as reduce the application of higher safeguards to indigenous peoples. See 2020 Independent Evaluation Department (IED) review of SPS, 2020.

³³ See p.102, para. 25, draft ESF

³⁴ See p.102, para. 27, draft ESF

³⁵ See p.102, para. 30 ; p.105, para. 40, draft ESF

³⁶ p.108 (v) ; p.109, draft ESF

³⁷ P.100, para. 15, draft ESF states where avoidance of “potential adverse impacts on indigenous peoples...is not possible, based on meaningful consultation with project-affected indigenous peoples, the borrower/client will outline measures to minimize, mitigate and/or compensate for the adverse impacts”. P.110 (F.) should be revised to be consistent with new accommodations.

say on project implementation, including the right to reject “unavoidable” aspects whose impacts are deemed too severe. Aspects of a project where FPIC cannot be ascertained should not be processed further.

- Expand the definition of cultural heritage to include both tangible and intangible cultural heritage.³⁸
- ESS8: (1) Any assessment of cultural heritage should be conducted in participation with the project-affected indigenous peoples themselves and not dependent solely on third-party experts. (2) Any standalone cultural heritage management plan should have the FPIC of the project-affected indigenous peoples.
- The definition of “mitigation hierarchy”³⁹ should include language which acknowledges project-affected indigenous peoples’ right to withhold their consent to project activities which they deem have unacceptable adverse impacts that cannot be minimized, mitigated and/or compensated for.
- Parts of the environmental and social commitment plan (ESCP) and the environmental and social action plan (ESAP) impacting indigenous peoples should require their FPIC before ADB and a borrower/client enter a legal agreement to implement the ESCP/ESAP.⁴⁰

³⁸ See A/HRC/21/53, para. 52 “Indigenous peoples’ cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, and are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous culture is a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering.” See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/185/41/PDF/G1518541.pdf?OpenElement> para 7, p.4

³⁹ See p.139, draft ESF

⁴⁰ See p.14, para 36-40, draft ESF.

Co-signatories

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