

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

Submission from the Indian Law Resource Center
Received on January 31, 2024

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Feedback Form: ADB Draft Environmental and Social Framework

This form is provided for you to send feedback on draft ADB Environmental and Social Framework and 10 Environmental and Social Standards.

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Overview/General Comments

1. The Indian Law Resource Center (Center) welcomes the opportunity to provide input on the Asian Development Bank's (Bank) Environmental and Social Framework (Framework) and the ten Environmental and Social Standards (Standards). This policy update process is a critical opportunity for the Bank to harmonize the proposed Framework and Standards with those of other multilateral development banks to both reflect the industry's good international practice and address the particularities of indigenous issues in the Asian context.

2. The Center acknowledges the comprehensive and thorough updates made by the Bank of the Framework and Standards, especially the guidance provided towards helping borrowers fulfill their international human rights law obligations. Our comments and recommendations focus only on the draft Environmental and Social Standard 7 Indigenous Peoples (Standard 7). Based on an analysis comparing the Bank's Standard 7 with a similar standard adopted by other multilateral development banks, we have divided these comments into three sections: (1) the use of indigenous peoples' consultation protocols; (2) the creation of buffer zones to prevent forced contact with indigenous peoples in voluntary isolation; and (3) the prohibition of individual land titling. In doing so, as a matter of recommendation, we have decided to provide examples of peer institutions' safeguard measures relating to each of these three issues of concern to help the Bank meet its upward harmonization goals.

3. The Center is a U.S.-based non-profit law and advocacy organization established and directed by American Indians. We provide free legal assistance to indigenous peoples in the Americas who are working to protect their lands, resources, human rights, environment, and cultural heritage. The Center has been advocating for better international law standards and policies on indigenous peoples within international organizations, including the United Nations and the World Bank Group, since 1980. For further information about our policy advocacy work, see <https://indianlaw.org/projects/mdb>.

Draft Environmental and Social Policy

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Draft ESS 1: Assessment and Management of Environmental and Social Risks and Impacts
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Draft ESS 2: Labor and Working Conditions
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Draft ESS 3: Pollution Prevention and Resource Efficiency
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Draft ESS 4: Health, Safety, and Security
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Draft ESS 5: Land Acquisition and Land Use Restriction
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Draft ESS 6: Biodiversity and Sustainable Natural Resource Management
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Draft ESS 7: Indigenous Peoples
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4. As stated earlier, our comments are divided into the following three sections: (1) the use of indigenous peoples' consultation protocols; (2) the establishment of buffer zones to prevent forced contact with indigenous peoples in voluntary isolation; and (3) the prohibition of individual land titling.

I - The Use of Indigenous Peoples' Consultation Protocols

5. The proposed Standard 7 devotes serious attention to the borrower/client's obligation to undertake a meaningful consultation with project-affected indigenous peoples to ensure their participation in relevant project cycle phases and discuss project benefits. However, it fails to ensure indigenous peoples' own consultation protocols are considered when carrying out such consultations (see, paragraphs 13, 14). Indigenous peoples have started to develop their own

consultation protocols to provide clear directions to government and private sector entities on how they would like to be consulted and/or the conditions under which they would accept to participate in a consultation process. In response to such development, the 2020 Inter-American Development Bank's policy on indigenous peoples requires the borrower to "include indigenous peoples' consultation protocols when they exist" (see, Inter-American Development Bank, Environmental and Social Standard 7 Indigenous Peoples (2020), paragraph 13, <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-2131049523-16>). We recommend the Bank endorses this requirement.

II - The Establishment of Buffer Zones to Prevent Forced Contact with Indigenous Peoples in Voluntary Isolation

6. The proposed Standard 7 forbids financial support for project activities that would force contact with indigenous peoples living in voluntary isolation. However, it fails to require the establishment of buffer zones to prevent such contact (see, paragraph 17). The Inter-American Development Bank's policy on indigenous peoples does incorporate this requirement, stating "To this end, the borrower will collaborate with responsible government agencies to regulate the territories of uncontacted peoples and establish buffer zones..." (see, Inter-American Development Bank, Environmental and Social Standard 7 Indigenous Peoples (2020), paragraph 12, <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-2131049523-16>). We recommend the Bank adopt this language from the Inter-American Development Bank policy to adequately protect the rights of indigenous peoples living in voluntary isolation.

III - The Prohibition of Individual Land Titling

7. The proposed Standard 7 provides for comprehensive safeguards aimed at preventing harm to indigenous peoples' lands. But it fails to prohibit financial support for projects aimed at individual titling of collectively held indigenous lands. Surprisingly, the proposed Standard 7 allows the "conversion of customary use to communal and/or individual ownership rights" (see, paragraph 37). The practice of allotting indigenous lands or dividing up collectively held indigenous lands is one of the most destructive development practices. Projects that seek to allot collectively held land to individuals are a very grave threat to indigenous peoples' collective land tenure systems, special attachment to their lands, and cohesive social and political structures.

8. The Inter-American Development Bank's policy on indigenous peoples prohibit support to individual land titling, stating, "The borrower will not pursue projects that entail individual titling in indigenous territories" (see, Inter-American Development Bank, Environmental and Social Standard 7 Indigenous Peoples (2020), paragraph 17, <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-2131049523-16>). The Bank should reverse its policy approach to align its standards with those of the Inter-American Development Bank and prohibit any funding for projects that would allot indigenous peoples' collective lands to individuals.

Without further ado, we take this opportunity to express our highest consideration and esteem.

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Draft ESS 9: Climate Change

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Draft ESS 10: Stakeholder Engagement and Information Disclosure

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Draft Prohibited Investment Activities List

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Draft Requirements for Financing Modalities and Products

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