

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

Submission from Indigenous Peoples Rights International, Right Energy Partnership with Indigenous Peoples and Asia Indigenous Peoples Network on Extractive Industries and Energy
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Commentary for the Asian Development Bank's Safeguard Policy Review on the draft Environmental and Social Framework, particularly the draft Environmental and Social Standard 7 on Indigenous Peoples

Indigenous Peoples Rights International (IPRI), Right Energy Partnership with Indigenous Peoples (REP), Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE) including 35 Indigenous Peoples organizations and support groups jointly submit this commentary on the proposed Environmental and Social Framework (ESF) of the Asian Development Bank (ADB), particularly the draft Environmental and Social Standard 7 on Indigenous Peoples ("ESS7") dated 7 September 2023. While the commentary below is specifically focused on the ESS7, Annex 1 provides our feedback and revisions on the overall text of the ESF, including the ESS7. A list of organizations and groups that have endorsed this commentary is listed in Annex 2.

Compliance, Process and Accessibility:

We stress that, while the wording of the ESS7 is important and provides a basis for engagement with member States, Indigenous Peoples and the ADB itself, adherence to its requirements, its effective implementation, and its monitoring and enforcement more generally are also significant concerns. In this regard, it is crucial that ESS7 – both as proposed for consultation and in its final form – is accessible to Indigenous Peoples in languages and forms understandable to them – more so as English is not the first language of most Indigenous Peoples in the region. As it stands now, the ESS7 is dense and not easily understandable, even more as it must be cross-referenced with other ESSs (e.g., ESS1 on Assessment and Management of Environmental and Social Risks and Impacts, which itself may have serious ramifications for how a project may be classified for the purposes of ESS application). The same may also be said about the procedures for accessing the Accountability Mechanism (AM), the designated overall grievance mechanism.

Regarding adherence and implementation, or compliance more generically, we note with concern that Independent Evaluation Department's (IED) 2020 report on the effectiveness of the prior safeguard policy regime concluded that the results for Indigenous Peoples were "less than satisfactory and limited."¹ It explained that "the application of the IP safeguard requirement (SR3) has been minimal. The evaluation team found numerous examples of risk avoidance, which is counter to good international practices."² Among other things, there were serious issues with the triggering of the Indigenous Peoples' safeguards, meaning that the policy was sometimes not applied at all (some of these concerns are also raised in the ESS7, paras. 6 and 7, particularly in the definition of 'forced severance' as discussed below). The IED review also concluded that "[s]ome projects only recognized impacts on IPs if any of them were affected by land acquisition and resettlement. If indigenous people

¹ IED Review 2020, <https://www.adb.org/documents/effectiveness-2009-safeguard-policy-statement>.

² Id. p. 40.

were living within the project area but no land acquisition and resettlement was needed, then no further mitigation measures were required.”³

If these issues and other issues are not addressed and resolved, the wording of ESS7 would be either be moot in some cases or of limited value (and perhaps even a secondary concern in terms of the consultation now underway). We suggest that these concerns are best discussed collectively with Indigenous Peoples in addition to member states.

Text of the ESS7:

International Standards

Turning to the text itself, we welcome the explicit recognition of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) in para. 3 and the acknowledgement that it “is the most comprehensive international instrument on the rights of Indigenous Peoples” and that most “countries in Asia and the Pacific voted in favor of this declaration.” The UNDRIP is coherent with the standards in most of the major binding human rights treaties, including interpretations thereof by international authorities.⁴ We note that recognition of UNDRIP is in the preambular language in the introduction and that is important that it is made effective as a key reference point in comprehending the rights and impacts thereon in the operational sections of ESS7, including the objectives set out in Section II and the assessment requirements in paras. 10-12.

Paragraph 10, for instance, provides that a “project’s potential social, cultural, and economic risks and impacts will be assessed against the requirements set out in this ESS7 and the host country’s applicable laws that pertain to Indigenous Peoples matters, including those laws implementing host country obligations under international laws.” Social, cultural and economic risks and impacts” must be understood in light of the rights vested in Indigenous Peoples, including the key referents in the UNDRIP. We note in this respect that where impacts are to be assessed against ESS7 and national laws, “including those laws implementing host country obligations under international laws” that the last phrase is a meaningless tautology insofar as it refers only to national laws in either case, not the international obligations as such (the same consideration applies to para. 7).⁵

It is also common knowledge that the various legal regimes across the region vary considerably in terms of compliance with international obligations – both on their face and, especially, in practice. The required ‘gap analysis’ and obligation to correct those gaps, therefore, solely concerns determined disparities between ESS7 and national laws, not necessarily whether Indigenous Peoples’ internationally guaranteed rights will be respected in ADB-financed projects. This again refers to the need to ensure that ESS7 itself is consistent with the rights of Indigenous Peoples and that it is effectively implemented, monitored, and enforced. This is all the more important given that the IED review found that no one single project reviewed “indicated a possibility that IPs’ dignity and/or human rights would be affected” – a startling conclusion amplified by the various rights violations identified in the review itself.⁶

Identification

³ *Id.* p. 137.

⁴ See e.g., *Ailsa Roy & Wunna Nyiyaparli Indigenous People v. Australia*, CCPR/C/137/D/3585/2019 (2023).

⁵ The term is defined thus: “Host country’s applicable laws. This refers collectively to laws, regulations, procedures, rules, standards, codes, and/or other legal and regulatory requirements of a host country, including those that implement the host country’s obligations under international laws, that regulate, govern, or are otherwise relevant to the environmental and social system of a host country.”

⁶ IED Review 2020, p. 131.

Returning to provisions for identification of Indigenous Peoples in para. 6-7, and recalling also the conclusions of the IED review noted above, we highlight that the term ‘forced severance’ in para. 8 – as in loss of ‘collective attachment’ (which, by virtue of para. 9, also modifies para. 6) is circumscribed to the “concerned group members’ lifetime.”⁷ Presumably, this covers three to four generations and would potentially exclude those who have been forcibly, legally, and otherwise denied full access to their ancestral lands or parts thereof over such time frames. This is incompatible with human rights law, which recognizes ongoing rights and remedies, including restitution, to the extent that Indigenous Peoples continue to maintain a variety of relationships to the same areas, despite their physical dislocation or exclusion. This needs to be corrected and reformulated to comply with international standards as they pertain to ongoing cultural, spiritual, traditional or other relations to those lands. This would also be more in line with the requirement in para. 11 that impact assessments “shall include physical and tangible and intangible cultural impacts” and para. 36 pertaining to cultural and spiritual attachments to lands and resources.

Also, the IED review was clear that there was a marked tendency in the projects it reviewed to label Indigenous Peoples as ‘mainstreamed,’ “although this was rarely supported by a rigorous assessment,” and thus fail to trigger the safeguard policy beyond (often) involuntary resettlement considerations.⁸ While the concept of ‘mainstreamed’ is repugnant to the notion that Indigenous Peoples are equal to all other peoples and have rights as such, we observe that para. 8 does require that provided indicators in para. 6 are present, and that the “borrower/client will also apply the provisions of this ESS7 to a group that has been assimilated, mainstreamed, or lost collective attachment to distinct areas or ancestral territories in a project-affected area....” The key consideration again would appear to be challenges related to implementation and enforcement, more so as the IED observed confusion in safeguard “application by ADB, as well as a reluctance by some [developing member countries] to recognize the special status of IPs.”⁹

Impact Assessment

We acknowledge the requirement in para. 11 that impact assessments take place with some degree of involvement (“meaningful consultation”) of Indigenous Peoples. Among other things, this should aid in identifying cultural, spiritual and other relations to lands, territories and resources. Such requirements also featured in prior iterations of ADB Safeguards. However, there are substantial cross-references to other ESS that complicate the process. The IED review, for instance, concluded that “[r]esults from the safeguard requirement on indigenous peoples, driven by the lack of robust SIAs, were less than satisfactory and limited.” This is a clear acknowledgement of the deficiencies in impact assessment and that these deficiencies then caused additional downstream problems (e.g., “community support cannot be established by the client without a SIA to assess the likely impacts on IPs”).¹⁰

Therefore, **firstly, the ESS7 should mandatorily require conduct of a robust and separate assessment of social, cultural and economic risks and impacts on Indigenous Peoples – or a Social Impact Assessment (SIA) – in absence of which ADB-financed projects in an area, where Indigenous Peoples are present, should not proceed.** Secondly, it is critically important that the identified flaws in compliance and results in the case of Indigenous Peoples are fully understood and addressed if they

⁷ The term ‘Forced severance’ means “A loss of collective attachment to geographically distinct habitats or ancestral territories occurring within the concerned group members’ lifetime because of conflict, government resettlement programs, dispossession from their lands, natural calamities, or incorporation of such territories into an urban area.”

⁸ IED Review 2020, p. 45.

⁹ *Id.* para. 21.

¹⁰ *Id.* p. 40 (and p. 41: “In the absence of a thorough SIA, it is not possible to establish whether there was broad community support for the projects”).

are to be avoided in the future. Again, we consider that such reviews are best undertaken in collaboration with Indigenous Peoples and that the flaws identified above amplify the need to require and ensure Indigenous Peoples' effective participation in the design, conduct and review of environmental and social impact assessments. These assessments also need to include specific consideration and review of the rights of Indigenous Peoples as guaranteed by international laws, and not only as they may be reflected in national law.

Meaningful Consultation

'Meaningful consultation' is a bedrock principle of any project that may impact on Indigenous Peoples (para. 13 and 14 and ESS10), albeit often not one that is normally effective in ensuring that impacts are adequately understood, and the rights of Indigenous Peoples are respected. In this regard, we highlight that international standards require that consultation processes adhere to the customs and traditions of Indigenous Peoples, including as they concern designating representatives and modalities. Where Indigenous Peoples have adopted laws and/or written rules or protocols expressing their requirements and/or expectations for how they shall be consulted and/or their free, prior and informed consent (FPIC) obtained, these should be considered authoritative, adhered to, and take precedence over consultation plans developed by others.¹¹ Likewise, for consultation to be meaningful, Indigenous Peoples' views must be accommodated, meaning that they must have a demonstrable impact on the proposed project or measure or, where this does not occur, formal and written justification must be provided and included in the record. Indigenous Peoples also have the right to decline to take part in consultation processes and to state the significance of such a decision (e.g., an objection to the project itself). ESS7 should be amended to reflect these key considerations.¹²

More importantly, it is imperative that the ESS7 requires that meaningful consultation is carried out with Indigenous Peoples present in the proposed project-affected area to obtain their free, prior and informed consent (FPIC) for the proposed ADB-financed project, including for any significant changes to the project, and the outcome of the process clearly documented (*more about FPIC in the section below*). If the ADB cannot ascertain that such consent has been obtained from the project-affected Indigenous Peoples, it should not proceed with the project or its aspects relevant to those Indigenous Peoples. This is in line with the rights of Indigenous Peoples, including to self-determination, over their lands, territories and resources, and to development, as guaranteed in the UNDRIP. Among other provisions on FPIC, the UNDRIP requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (art. 19).

Additionally, we note that (para. 15) Indigenous Peoples are not consulted where "the borrower/client, in consultation and in agreement with ADB, may propose an alternative title to IPP [Indigenous Peoples Plan] based on the national context." While this may be acceptable following discussion with the project affected Indigenous Peoples, who have the right to decide such questions in general or ad hoc, we question why a borrower/client should be allowed to refer to Indigenous Peoples by other term based on no more than some vague and unexplained reference to 'national context'. Moreover, we consider such questionable considerations and arbitrary discretions to be at least one of the factors underlying the defects identified by the IED and noted above. The ADB should not perpetuate and

¹¹ E.g., E/C.12/GC/26, para. 16; E/C.12/ARG/CO/4, para. 21; and E/C.12/MEX/CO/5-6, para. 12-3. *See also Free, prior and informed consent: a human rights-based approach*, A/HRC/39/62.

¹² E.g., ESS7, para. 16 should be amended to state that "[Where indigenous peoples have not specified the modalities for consultation and FPIC via a written instrument or specification of relevant customary law norms], [t]he IPPF will clearly outline the procedures for conduct of FPIC...." Other paragraphs and ESS should be so amended, and such amendments should not be restricted to the IPPF instruments only.

endorse this line of thought, even more given that the IED found a series of safeguard-related problems connected to the “reluctance by some [developing member countries] to recognize the special status of IPs.”¹³

Similarly, there does not appear to be any required engagement with Indigenous Peoples in relation to project modifications as envisaged in para. 23. This should be corrected as the indicated modifications could be substantial and, at any rate, where they represent a change in circumstances from those originally discussed.

Further, the IED concluded that even where consultations with Indigenous Peoples took place, “only two category A projects, and four category B projects made provisions for consultations to be conducted in an atmosphere free from coercion.”¹⁴ The UN Committee on the Elimination of Racial Discrimination opines in this respect that where consultations are “held against a backdrop of threats, criminalization and harassment ... any consent obtained is not freely given.”¹⁵ While it may be implicit in some of the requirements, we recommend that issues pertaining to Indigenous rights defenders are treated specifically and explicitly in ESS7 and in line with international standards. In the case of Indigenous Peoples, defenders are often community leaders, speaking and acting on behalf of their community or people. As the former Special Rapporteur on the Rights of Indigenous Peoples observes, Indigenous “[l]eaders are targeted as a strategy to suppress and silence the entire community.”¹⁶ ESS7 should also denounce the practice of criminalization of Indigenous Peoples where they are exercising their rights, including protests against coercion or unwanted activities within their territories. This should be followed up with specific guidance for project managers and specific corrective measures to be applied in project processing and appraisal to ensure that these practices are not taking place in ADB-supported activities.

Indigenous Peoples Plan (IPP)

Para. 15 explains that the IPP will set out measures to avoid potential adverse impacts as possible, to ensure culturally appropriate social and economic benefits, to provide for meaning participation of Indigenous Peoples in project preparation and implementation processes. Also, “where avoidance is not possible,” consultation with Indigenous Peoples would “outline measures to minimize, mitigate, and/or compensate for the adverse impacts.” **Noting that avoidance is always possible (e.g., by not doing the project at all or doing it elsewhere), we recommend that the IPP and its elements should be agreed to by all parties via a written agreement and made enforceable via a specific and enforceable tripartite loan covenant in the project agreement between the borrower/client and the ADB to explicitly include provision for adequate finance and resources for its implementation and for effective grievance mechanism at the project level. The lack of budget for the implementation of IPP has been used as an excuse by government bodies, and the ADB is taking no responsibility for this. Affected Indigenous Peoples’ communities are not also provided with any recourse for the non-implementation or only partial implementation of the IPP especially in relation to livelihood support.**

This is notwithstanding and in addition to the enumerated FPIC requirements in Section V, Special Requirements, which should also be addressed in the same agreement. It is also in line with the spirit of various other provisions of ESS7 (e.g., para. 18 and 34), and would provide greater assurance to Indigenous Peoples that agreements made on the basis of ESS7 would be adhered to and enforced

¹³ IED Review 2020, p. 21 and 42.

¹⁴ *Id.* p. 41.

¹⁵ CERD/C/MEX/CO/18-21, para. 20.

¹⁶ A/HRC/39/17 (10 Aug. 2018), para. 45.

in fact.¹⁷ This would also be consistent with the spirit of international standards concerning Indigenous Peoples' right to self-determined development – a principle endorsed also in the preambular paragraphs of ESS7.

Voluntary Isolation

Para. 17 refers to “remote groups of Indigenous Peoples with limited external contact, also known as peoples ‘in voluntary isolation,’ ‘isolated peoples’, or peoples ‘in initial contact’”. It states that measures shall be taken to, inter alia, avoid all project-related “undesired contact with them,” and that the “borrower/client will not process further the aspects of a project that would result in such undesired contact.” Assuming that there is no outside contact, on what basis would a borrower/client determine what is desired or not? Moreover, how would this be monitored and enforced given the often-overriding self-interest of borrower/clients in proceeding with “their” projects, even more given the vague and highly subjective term ‘undesired’? International standards, such those adopted by the UNOHCHR and the Inter-American Commission on Human Rights, provide that ‘voluntary isolation’ is a self-determined decision that any contact is ‘undesirable’ and that the people themselves are not consenting to contact for any reason.

Special Requirements

Free, Prior and Informed Consent (FPIC)

We commend the ADB for stating that it will not proceed without FPIC (para. 35) and for dispensing with the incongruous equation of FPIC with the amorphous notion of ‘broad community support’. However, as noted above, we reiterate that the ADB should require obtaining FPIC for the proposed ADB-financed project of the Indigenous Peoples in the project-affected area whenever they are present therein – not only when the project causes certain impacts.

Additionally, it is unclear whether this is more a stylistic than substantive change in ESS7. Specifically, para. 33 explains that ‘consent’ in FPIC refers to “the collective support of project-affected Indigenous Peoples’ communities for project activities that affect them, reached through a culturally appropriate process.” Noting that ‘communities’, if this means a village or villages, may not always be the locus of decision making (e.g., it may be at the clan level), this could be one way of understanding ‘consent’ (its plain meaning is ‘agreement’ or ‘permission’). The ‘culturally appropriate process’ qualification implies deference to Indigenous Peoples’ views on the same as the authoritative interpreters of their cultures.

Also, para. 32 states that FPIC “will be established through good faith negotiation between the borrower/client and project-affected Indigenous Peoples’ communities.” Negotiation may be a part of obtaining consent, albeit it is unlikely to be the sole means of doing so if the process is not culturally appropriate. In either case, we stress again that where Indigenous Peoples have adopted laws and/or written rules or protocols expressing their requirements and/or expectations for how FPIC shall be obtained, these should be considered authoritative, adhered to, and take precedence. ESS7 needs to reflect this aspect in relation to FPIC as well as meaningful consultation.

The same paragraph also provides that external expert, including Indigenous Peoples’ organizations, will be engaged by the borrower/client to assist in assessment and FPIC processes. ESS7 needs to be amended to make clear that project-affected Indigenous Peoples shall be consulted about the involvement on external experts and organizations, and that they have a right to identify their own

¹⁷ Para. 18 provides in pertinent part that the “borrower/client and project-affected Indigenous Peoples will jointly identify mitigation measures ... as well as opportunities for culturally appropriate and sustainable development benefits from a project. ... The borrower/client will ensure the timely delivery of agreed measures to project-affected Indigenous Peoples.”

experts and technical support, which shall be funded via project preparation funds controlled by Indigenous Peoples.

Most importantly, and assuming that an appropriate and acceptable process was followed, the way the “collective support” is verified and documented is key to ascertaining the veracity and durability of FPIC. In this respect, para. 34 could be rendered simpler and more transparent and effective by requiring that a formal written agreement between the parties be submitted as part of the documentation for project appraisal (in addition to a description of process, etc.). This would ensure that Indigenous Peoples themselves are party to, and directly verify, any agreements reached, upholding their agency and standing, and providing written confirmation. It also would not make the entire process solely dependent on the ADB’s review of and decisions about the borrower/client’s views alone, as it is now.¹⁸ As noted above, these agreements and those determined via the IPP process can be one project-related agreement between the parties (as above). This would render the “collective support” tangible and directly verifiable and reduce the subjectiveness that has characterized and tarnished determinations of ‘broad community support’ in the past and very likely, ‘collective support’ in the future.

The modifications to ESS7 proposed above should also be seen in the light of the IED review, which concluded that “aspects of meaningful consultation were not often reported in the project documents” and that the indigenous peoples’ views recorded in consultations were not “in many cases ... clearly linked to changes in project design.”¹⁹ Meaningful consultation and FPIC processes that fail to account for inputs by Indigenous Peoples are not only incompatible with internationally protected rights, they also lead to cynicism and opposition, and reduce the likelihood that a project will provide sustainable results. They would not be ‘meaningful’ in any sense of the word. This is also applicable in relation to the comments on meaningful consultation above.

Thus, it is imperative that culturally appropriate process should include explicitly “as independently defined and determined by affected Indigenous Peoples’ communities through their own mechanisms” to obtain the free, prior and informed consent of the project-affected Indigenous Peoples.

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

We note at the outset that the effectiveness of the FPIC requirements above is very much dependent on accurate and agreed identification of Indigenous Peoples’ lands, territories, and resources traditionally owned (those lands encompassed by their customary tenure system), and adequate assessment of related rights (noting again the deeply problematic nature of ‘forced severance’, as above). The IED review concludes that this was often not done, both as a trigger for policy application and as part of impact assessment, and that Indigenous Peoples’ issues were frequently subsumed with treatment of involuntary relocation only.²⁰ While it is welcome that ESS7 continues to highlight the importance of various relations to lands, territories and resources traditionally owned, its predecessor contained very similar provisions and the IED review makes clear that implementation was seriously deficient. How will this be corrected in relation to ESS7?

¹⁸ E.g., IED Review 2020, p. 40 (explaining that “the SPS requires consent to be ascertained through broad community support which needs to be clearly documented by the borrower or client in the IPP. ADB is expected to review the documentation and undertake its own investigation to assure itself that broad community support for project activities has been demonstrated by the affected IP”).

¹⁹ *Id.* p. 133.

²⁰ Also concluding, p. 108, that “When work on IP and IR was combined, IP provisions were effectively subsumed under the involuntary resettlement requirement and the particular risks and concerns of indigenous people fell by the wayside.”

ESS7 contains two special considerations: 1) requiring some form of legal recognition of rights to lands where a project is contingent on such recognition or where land acquisition of parts thereof will take place in the project. This is to occur according to a plan made by the borrower/client, with due respect to the customs, traditions, and land tenure systems of the Indigenous Peoples;” and 2) where the proposal is to locate “a project or commercially develop natural resources on land traditionally owned....” With respect to the former, any change to the legal status of indigenous lands – or takings thereof – is subject to FPIC and this principle has been upheld by various international human rights bodies.²¹ Also, one of the possible options listed is the conversion of “customary usage rights to individual ownership rights,” which, ESS7 says, “will only be an objective following consultation with the Indigenous Peoples concerned and assessment of the impacts of such conversion on the communities and their livelihood.” Again, the correct standard in such instances is FPIC, not mere consultation, as it is in connection with commercial development of natural resources (para. 38) and commercial use of cultural heritage (para. 42) in ESS7. Compensation and culturally appropriate sustainable development opportunities, per para. 39, should be agreed in writing as part of the FPIC process and submitted as part of the documentation reviewed at appraisal.

²¹ E.g. the United Nations Declaration of Indigenous Peoples Rights (UNDRIP), the minimum standard for Indigenous Peoples’ rights around the world includes provisions recognizing the duty of States to secure FPIC from Indigenous Peoples in the circumstances of population relocations; the dispossession of “cultural, intellectual, religious and spiritual property”; “confiscated, taken, occupied, used or damaged” lands, territories and resources; before “adopting and implementing legislative or administrative measures”; and “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

ANNEX 1: FEEDBACK ON THE DRAFT ENVIRONMENTAL AND SOCIAL aFRAMEWORK OF THE ADB

Draft Environmental and Social Policy

C. Common Approach

19. Where ADB is **cofinancing** a project with other multilateral or bilateral agencies or organizations, and where appropriate, ADB will cooperate with such cofinancier(s) and a borrower/client to agree on a common approach in the assessment, development, and implementation of a project. A common approach will be acceptable to ADB, provided that such an approach will enable a project to achieve objectives **(Delete “materially”)** consistent with the ESSs.

F. Environmental and Social Assessment Review

34. Where ADB is financing a project for which certain E&S assessment and management have already been undertaken in compliance with the requirements of other multilateral or bilateral funding agencies, ADB may agree to rely on such assessment and management of the **E&S risks and impacts** for the project, provided that the requirements will enable the project to achieve objectives **(Delete “materially”)** consistent with the applicable ESSs.

H. Strengthening and Use of Borrower’s Environmental and Social System

41. In a sovereign operation, ADB may support the use of a borrower’s E&S system in the assessment, development, and implementation of a project, provided this is likely to address the **E&S risks and impacts** of the project, and enable the project to achieve objectives **(Delete “materially”)** consistent with the ESSs. The use of all, or part, of a borrower’s E&S system will be agreed between ADB and a borrower, following completion of the assessment consistent with para 43. Any decision to use all, or parts, of a borrower’s E&S system will not relieve ADB of its responsibilities set out in this E&S Policy, and ADB’s Accountability Mechanism Policy (2012) will continue to apply.

45. If the assessment identifies gaps in a borrower’s E&S system, ADB will work with the borrower to agree on measures and actions to address such gaps and strengthen the borrower’s E&S system, to the extent that such measures and actions are necessary to meet the requirements of para 41. ADB must agree that such measures and actions must be implemented before project preparation or project implementation. **(Make revisions to the sentence as shown in tracked changes)**

54. ADB recognizes that **Indigenous Peoples** may be particularly vulnerable in certain project circumstances. Therefore, to determine the applicability of ESS7, ADB will undertake a screening in accordance with the criteria in paras 6-8 of ESS7, to determine whether Indigenous Peoples are present in, or have **collective attachment** to, a proposed project-affected area. In conducting this screening, ADB may seek the technical advice of specialists with expertise on the social and cultural groups in a project-affected area. ADB will also consult the Indigenous Peoples concerned and a borrower/client. 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** to obtain the free, prior and informed consent (FPIC) of the Indigenous Peoples in accordance with ESS7 and to document the outcome. ADB will undertake the necessary review and monitoring and ascertain the outcome of the meaningful consultation to obtain the free, prior and informed consent (FPIC), and this will contribute to ADB’s decision making as

to whether to proceed with a proposed project or not. When ADB is unable to ascertain that such consent has been obtained from the project-affected Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7. **(Make revisions to the paragraph as shown in tracked changes)**

L. Grievance Mechanism and Accountability

61. **Project-affected persons** may submit complaints related to a project to the project-level grievance mechanism, appropriate local judicial or administrative bodies, or mediation, or ADB's Accountability Mechanism. Project-affected persons may **(Replace “will” by “may”)** first make good faith efforts to resolve the problems with ADB's relevant operations departments before approaching the Accountability Mechanism...**(The requirement for project-affected persons to first make good faith efforts to resolve problems with ADB's relevant operations department may not apply in all cases especially on cases of harassment, coercion, threats, and reprisals among others where the borrower/client or project level personnel. Further, ADB must require putting in place an accessible and effective grievance mechanism that provides security and confidentiality for affected persons or communities and ensures that concerns are timely and effectively addressed and fully documented. Resources and accessibility (interpretation, translation, etc.) should be ensured for affected persons and communities. An operational level grievance mechanisms should meet the effectiveness criteria as provided in the United Nations Guiding Principles on Business and Human Rights).**

Draft ESS 1: Assessment and Management of Environmental and Social Risks and Impacts

12. Where the borrower/client proposes less stringent standards or measures than those provided in the **EHSGs** or in applicable **GIP**, the borrower/client will provide detailed assessment and justification for the proposed alternatives. In this justification, the borrower/client will demonstrate, to the satisfaction of ADB, that the choice of any alternative performance level is consistent with the ESSs and the applicable EHSGs or GIP and is unlikely to result in significant environmental or social harm. **(Delete “the objectives of”. The choice of any alternative performance level should be consistent with the entire ESSs – not only their objectives but also their scope and requirements)**

27. The borrower/client will ensure that the E&S assessment is based on current information, including an accurate description of the scope of a project, its components and **associated facilities**, and E&S baseline data at an appropriate level of detail sufficient to inform characterization and identification of **E&S risks and impacts** and mitigation, management, and monitoring measures. The borrower/client will ensure that the E&S assessment process for a project examines project alternatives and identifies ways of improving project selection, siting, planning, design, and implementation. The borrower/client will seek opportunities to enhance the positive impacts of a project, subject to the requirements of the ESSs. The borrower/client will undertake **stakeholder** engagement as an integral part of the E&S assessment process in accordance with ESS10. The borrower/client will ensure that stakeholder engagement is inclusive and without discrimination against **project-affected persons**, including those deemed **disadvantaged or vulnerable**. **(Add: If Indigenous Peoples are present in the proposed project-affected area, ADB will require the borrower/client to ensure that the E&S assessment and the involved stakeholder engagement includes conduct of meaningful consultation to obtain the free, prior and informed consent (FPIC) of the Indigenous Peoples for the project as described in ESS7.)**

34. Where ADB is financing a project for which certain E&S assessment and management have already been undertaken in compliance with the requirements of other multilateral or bilateral funding agencies, ADB may agree to rely on such assessment and management of the **E&S risks and impacts** for the project, provided that the requirements will enable the project to achieve objectives (**Delete “materially”**) consistent with the applicable ESSs.

Para 40, ESS1: If there are changes to a project that result in additional **E&S risks and impacts**, particularly where these will impact **project-affected persons**, the borrower/client will provide information on such risks and impacts and meaningfully consult with **project-affected persons** on how to mitigate these risks and impacts. (**Add: If additional E&S risks and impacts are significant and Indigenous Peoples are present in the proposed project-affected, ADB will require the borrower/client to undertake a process of meaningful consultation to obtain the free, prior and informed consent (FPIC) of the Indigenous Peoples on the changes to the project as described in ESS7.**)

G. Environmental and Social Assessments in Fragile and Conflict Situations

45. For projects in fragile and conflict-affected situations where there are constraints to the availability of information and data required to prepare **assessment tools** and **management tools** proportionate to the nature and scale of E&S risks and impacts, the borrower/client will address key risks and impacts and propose management measures, to the extent possible. **Projects should be a no-go in identified fragile and conflict affected situations unless E&S risks and impacts are fully accounted and analyzed and a risk management plan is in place. Projects should not be approved where identified that the project will further increase fragility and conflict in the proposed project area.**

J. Use of Borrower’s Environmental and Social System

56. In a sovereign operation, ADB may support the use of the borrower’s E&S system in the assessment, development, and implementation of a project, provided this is likely to address the **E&S risks and impacts** of the project, and enable the project to achieve objectives (**Delete “materially”**) consistent with the ESSs.....

57. Where the borrower and ADB propose to use all, or part, of the borrower’s E&S system, ADB will undertake an assessment to determine whether and to what extent the borrower’s E&S system can be used to address the **E&S risks and impacts** of the project, and achieve objectives (**Delete “materially”**) consistent with the ESSs. The borrower/client will provide information reasonably requested by ADB in connection with this assessment. A final decision on the use of all, or part, of a borrower’s E&S system for a project will be made by ADB’s Board of Directors.

K. Environmental and Social Approach to Financing Modalities and Products

63. Where ADB provides financing to a borrower based on the completion of specified policy actions, the borrower will identify and assess the potential direct and indirect E&S risks and impacts associated with the policy actions, and will integrate mitigation measures into the design of the final policy actions to achieve objectives (**Delete “materially”**) consistent with the relevant ESSs.

Draft ESS3: Resource Conservation and Pollution Prevention

25. For **hazardous** and **non-hazardous waste** disposal in a project, the borrower/client will use licensed disposal sites, preferentially ones that are designed, constructed, and demonstrated as being operated to applicable **GIP**. Disposal of hazardous and non-hazardous wastes in Indigenous Peoples' territories will require the free, prior and informed consent (FPIC) of the affected Indigenous Peoples as described in ESS7. **(Reference: UNDRIP Article 29)** Where licensed disposal sites do not meet such standards or do not exist, the borrower/client will assess alternative disposal options that comply with these standards of the applicable **GIP**, including the possibility of developing its own recovery or disposal facilities at a project site or elsewhere.

Draft ESS4: Health, Safety and Security

31. ...Where a project involves a new or existing **dam**, the borrower/client will provide sufficient resources to apply the requirements for safety of dams, as set out in Annex 1. For new or existing dam under an ADB-financed project in area where Indigenous Peoples are present or the inundation of which may affect Indigenous Peoples, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the Indigenous Peoples in accordance with ESS7. **If FPIC was previously obtained, a review and validation process with the affected Indigenous Peoples shall be conducted under the ADB-financed project.** When ADB is unable to ascertain that such consent has been obtained from the project-affected Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7.

Draft ESS5: Land Acquisition and Land Use Restriction

14. Where the E&S assessment has identified that a project may entail **LA/LUR** risks and impacts, the borrower/client demonstrate that the proposed LA/LUR is limited to direct project requirements for clearly specified project purposes within a clearly specified period. The borrower/client will consider feasible alternative project designs and sites to avoid LA/LUR, while balancing environmental, social, and financial costs and benefits, paying particular attention to gender impacts, and avoiding adverse impacts on **disadvantaged or vulnerable** persons. Where avoidance is not possible, the borrower/client will minimize displacement and develop appropriate measures to mitigate adverse impacts on **affected persons**. In balancing costs and benefits, the borrower/client may consider situations where avoidance may not be an appropriate approach for public health, safety, or similar reasons, and where displacement can bring direct positive development outcomes to affected persons and communities, including improved housing and strengthened **security of tenure** or other improvements to standards of living of affected persons. If a project may entail LA/LUR in an area where Indigenous Peoples are present, and particularly for their lands under customary or traditional use to which ESS7 applies, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the Indigenous Peoples in accordance with ESS7. When ADB is unable to ascertain that such consent has been obtained from the project-affected Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7.

43. To mitigate the risks and impacts caused by involuntary **LA/LUR**, the borrower/client will offer **affected persons** compensation at **replacement cost**, and other assistance as may be necessary to help affected persons improve or at least restore their standards of living and **livelihoods**. The borrower/client will offer affected persons an informed choice of either compensation in kind (land-for-land; house-for-house; shop-for-shop) or monetary compensation at

full replacement cost. The borrower/client will respect the choice of the affected persons.

(Reference: EIB Standard 6, Para 25) Compensation standards for affected land and assets will be disclosed and applied consistently. In all cases, a clear basis for calculation of compensation will be documented, and compensation distributed in accordance with transparent procedures.

45. The borrower/client will provide affected persons with compensation for their lost land and other assets at replacement cost or above. Payment of cash compensation for lost land or assets at replacement cost may be appropriate where: (i) livelihoods are not land-based; (ii) livelihoods are land-based but the land taken for a project is a small fraction of the affected asset and the residual land is economically viable; or (iii) active markets for land, housing, and labor exist, affected persons use such markets, and there is sufficient supply of land and housing available through such markets. The borrower/client will give preference to land-for-land compensation and other land-based compensation strategies for affected persons whose livelihoods are land-based, or the land is collectively owned. The term “land-based” includes livelihood activities such as subsistence agriculture and related value addition activities, rotational cropping, and grazing of livestock as well as harvesting of natural resources. Replacement land and assets offered to affected persons will be at least equivalent in their material characteristics and use value in terms of their quality, productive potential, quantity, and purpose and will be provided with security of tenure and similar locational advantages. Where there is insufficient suitable replacement land available, the borrower/client will demonstrate and document this in a LAP. If this option is not available, the promoter shall provide sufficient justification to the ADB as to why this option is not feasible, including justification that livelihoods are not affected by not replacing land. (Reference: EIB Standard 6, Para 26)

63. Community-based natural resource management projects may entail voluntary collective agreement by a community to restrict access to resources that are being managed or conserved. In such cases, the borrower/client will ensure that a project engages the participating community, and especially all of the economically displaced community members with landownership or use rights, in a participatory and consensus-based process, to design and establish land use restrictions and alternative land use practices which simultaneously protect natural resource bases and affected persons’ livelihoods. If the project is in an area where Indigenous Peoples are present, ADB will require the borrower/client to undertake a process of meaningful consultation to obtain the free, prior and informed consent (FPIC) of the Indigenous Peoples in accordance with ESS7. When ADB is unable to ascertain that such consent has been obtained from the project-affected Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7. The borrower/client will document the commitment of a community, with special attention to those most affected, to the agreed land use restrictions and modified land use practices and clarify how the livelihoods of the community members will be protected, restored, and improved. The borrower/client applies the criteria in paragraph 59 and confirms in a LAP that the agreement reached reflects voluntary, informed consensus through a transparent and fair decision-making process. Because conservation measures may have livelihood implications, particularly for disadvantaged or vulnerable households, a LAP will assess the nature and extent of such adverse impacts and appropriate mitigation measures will be agreed with the community and supported by the borrower/client. General Requirements in Section IV.A apply to such transactions, modified as appropriate to reflect the nature of the transaction and proportionate to the LUR risks and impacts involved.

Draft ESS6: Biodiversity Conservation and Sustainable Natural Resource Management

13. If there are significant changes to a project that result in additional risks to, or impacts on, biodiversity, particularly where these will impact project-affected persons, including Indigenous

Peoples, the borrower/client will **meaningfully consult** with project-affected persons on how to mitigate these risks and impacts and will update relevant plans accordingly, setting out any additional mitigation measures. If the project is in an area where Indigenous Peoples are present, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the Indigenous Peoples in accordance with ESS7. When ADB is unable to ascertain that such consent has been obtained from the project-affected Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7. The borrower/client will disclose the updated plans.

20. The borrower/client will not implement any project activities which may cause significant adverse impacts to **natural habitats** or their **priority biodiversity features**, unless:

... (iii) **stakeholders** are consulted in accordance with ESS10, and if the project in an area where Indigenous Peoples are present, FPIC of the affected Indigenous Peoples are obtained in accordance with ESS7; and...

22. The borrower/client will not implement any project activities which may cause adverse impacts to **critical habitat** or its **priority biodiversity features**, unless:

... (iv) relevant **stakeholders** are consulted in accordance with ESS10, and if the project in an area where Indigenous Peoples are present, FPIC of the affected Indigenous Peoples are obtained in accordance with ESS7; ...

Draft ESS7: Indigenous Peoples

I. Introduction

3. The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly in September 2007. The Declaration is the most comprehensive international instrument on the rights of **Indigenous Peoples**. Most countries in Asia and the Pacific voted in favor of this declaration....

II. Objectives

e. Ensure free, prior, and informed consent (FPIC) for projects affecting them and specifically in the three circumstances described in this ESS7;

III. SCOPE OF APPLICATION

7. In considering these characteristics, a borrower/client will take into account the **host country's applicable laws**, including the **host country's** obligations under international laws, and customary laws. Self-identification as member of an Indigenous Peoples community will nonetheless be regarded as a fundamental criterion for determining the groups to which the provisions of this ESS7 apply. **(Reference: ILO Convention 169)**

IV. GENERAL REQUIREMENTS

A. Impact Assessment for Indigenous Peoples

10. The borrower/client will retain qualified and experienced experts to carry out a comprehensive, field-based assessment of potential risks to and impacts on **Indigenous Peoples**. A project's potential social, cultural, and economic risks and impacts will be assessed against the requirements set out in this ESS7 and/or the **host country's** applicable laws that pertain

to Indigenous Peoples matters, including the host country obligations under international laws. The borrower/client will undertake a policy gap analysis comparing the host **country's applicable laws** relevant for Indigenous Peoples with the requirements of this ESS7 and any gaps identified will be addressed by the borrower/client.

11. A borrower/client will conduct the impact assessment as part of the E&S assessment process described in ESS1 or as a standalone **Indigenous Peoples** assessment depending on the nature and scale of the potential risks and impacts. A borrower/client, in a gender-sensitive manner and in **meaningful consultation** with the Indigenous Peoples' communities, will identify project-affected Indigenous Peoples and the potential risks and impacts of a proposed project on them. The assessment shall include physical and tangible and intangible cultural impacts, as set out in ESS8, as well as risks to and impacts on **biodiversity** and the **ecosystem services** upon which the identified Indigenous Peoples depend, as set out in ESS6. The borrower/client will use the impact assessment to document and create a baseline socio-economic profile of the Indigenous Peoples' communities in a project-affected area. The assessment will assess the existing economic, political, social, and historical vulnerabilities amongst the project-affected Indigenous Peoples' communities and with reference to the wider society. The borrower/client will, at minimum, assess: the Indigenous Peoples' access to and opportunities to avail themselves of basic social and economic services; the short- and long-term, **direct** and **indirect**, and positive and adverse impacts of a project on each community's social, cultural, and economic status; and subsequent approaches and resource requirements for addressing their concerns regarding a project that affects them. When ADB is unable to ascertain that such a robust and separate/dedicated Indigenous Peoples assessment has been conducted, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples.

B. Meaningful Consultation

13. The borrower/client will undertake **meaningful consultation**, as described in ESS10, with project-affected **Indigenous Peoples** to ensure their informed participation in (i) designing, implementing, and monitoring measures to avoid adverse impacts on them or, where avoidance is not possible, to minimize, mitigate, and/or compensate for such impacts; (ii) tailoring project benefits that accrue to them in a **culturally appropriate** manner; and (iii) to obtain their free, prior and informed consent (FPIC) for the design, implementation, monitoring and benefits sharing of the project. This includes meaningful consultation with affected Indigenous Peoples on climate risk assessment. The borrower/client will also undertake meaningful consultation where a project is intended to have only positive impacts to ensure that the impacts are indeed seen as positive by the project-affected Indigenous Peoples' communities. The borrower/client will establish a context-specific strategy for inclusive and participatory consultation, including approaches for identifying appropriate Indigenous Peoples' representatives, and consultation methods appropriate to the social and cultural values of the project-affected Indigenous Peoples' communities. The borrower's/client's consultation process will provide sufficient time for Indigenous Peoples' collective decision-making processes and will pay special attention to the concerns of indigenous women, youth, people with disabilities, and people with other disadvantages or vulnerabilities. The borrower/client will assess the willingness and capacity of the Indigenous Peoples' communities to participate in consultation activities and where required, build such capacities prior to the commencement of meaningful consultation. When ADB is unable to ascertain that such consent has been obtained from the project-affected Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained.

14. The borrower/client will carry out **meaningful consultation** in a manner proportionate to a project's risks to and impacts on project-affected **Indigenous Peoples** communities. The

borrower/client will document the consultation process and the outcome of the process, including all agreements reached as well as dissenting views, and reflect its results in the Indigenous Peoples plan (IPP) or other form of documentation, as appropriate. For purposes of this ESS7, other forms of documentation will include an Indigenous Peoples planning framework (IPPF), Environmental and Social Management System, or other **management tools** described in ESS1.

C. Indigenous Peoples Planning

15. The borrower/client will engage qualified and experienced experts to prepare an IPP or other form of documentation, as appropriate based on an impact assessment as described in paras 10-12. The borrower/client, in consultation and in agreement with ADB and the affected Indigenous Peoples, may propose an alternative title to IPP based on the national context. The borrower/client will also ensure that the IPP reflects the results of the **meaningful consultation** with project-affected **Indigenous Peoples'** communities. The level of detail and comprehensiveness of an IPP will vary depending on the specific project and the nature of risks and impacts to be addressed. In the IPP, the borrower/client will set out measures to ensure that (i) potential adverse impacts on Indigenous Peoples are avoided to the maximum extent possible and (ii) project-affected Indigenous Peoples receive **culturally appropriate** social and economic benefits and meaningfully participate in project preparation and implementation processes. Where avoidance is not possible, based on meaningful consultation with project-affected Indigenous Peoples' communities, the borrower/client will, in the IPP, outline measures to minimize, mitigate, and/or compensate for the adverse impacts. The borrower/client will integrate the elements of the IPP into a project's design. An indicative outline of an IPP is provided in Annex 1 of this ESS7. The IPP and its elements should be agreed to by all parties via a written agreement and made enforceable via a specific and enforceable tripartite loan covenant in the project agreement between the borrower/client, ADB and Indigenous Peoples **to explicitly include provision for adequate finance and resources for its implementation and for effective grievance mechanism for its implementation at the project level.**

21. When **Indigenous Peoples** are the sole or the overwhelming majority of direct project beneficiaries, and when only positive impacts are identified, the borrower/client may include the elements of an IPP in the overall project design in lieu of preparing a separate IPP. In such cases, the borrower/client will proactively engage with the project-affected Indigenous Peoples to ensure their participation in the project design, implementation, and monitoring and evaluation. The borrower/client will also meaningfully consult with them as to the cultural appropriateness of proposed services or activities and will seek to identify and address any economic or social constraint that may limit opportunities to benefit from or participate in a project. The borrower/client will include in project documents a summary of how a project complies with this ESS7. In particular, project documents will explain how the borrower/client has complied with requirements for **meaningful consultation** and obtaining FPIC from the affected Indigenous Peoples and how the borrower/client has integrated accrual of benefits in a **culturally appropriate** way into a project's design.

22. When **Indigenous Peoples** are not the sole or overwhelming beneficiaries of a project, planning requirements will vary according to the nature and scale of a project's potential risks and adverse or positive impacts. In such a project, the borrower/client will pay particular attention to the Indigenous Peoples and design and implement a project in a manner that provides project-affected Indigenous Peoples' communities with equitable access to project benefits. The concerns or preferences of project-affected Indigenous Peoples will be addressed through **meaningful consultation** to obtain their FPIC and project design accordingly. The borrower/client will prepare a time-bound IPP setting out measures or actions proposed. An IPP will summarize the consultation outcomes and describe how Indigenous Peoples' issues have been addressed in the project design. The borrower/client will also describe in a project's **stakeholder** engagement plan the arrangements for ongoing **meaningful consultation** with and continued participation of project-affected

Indigenous Peoples to obtain their FPIC during project implementation. In some circumstances and with due justification, the borrower/client will prepare a broader community development plan addressing all beneficiaries of a project and incorporating necessary information on how the plan meets the requirements of this ESS7 relating to project-affected Indigenous Peoples' communities.

23. The borrower/client will update the IPP following the completion of any detailed engineering design and detailed measurement surveys, as necessary. As part of the update, the borrower/client may adjust mitigation measures to avoid adverse impacts on **Indigenous Peoples** and any measures to enhance **culturally appropriate** development benefits, but the agreed outcomes as specified in the draft IPP will not be lessened or minimized. If new or additional groups of Indigenous Peoples are identified prior to submission of the final IPP to ADB and are determined to be project-affected, the borrower/client will undertake **meaningful consultation** with them and obtain their FPIC and update the IPP.

27. If there are significant changes to a project that result in additional risks to and impacts on **Indigenous Peoples**, the borrower/client will meaningfully consult with the project-affected Indigenous Peoples' communities to obtain their FPIC on how to mitigate these risks and impacts and will update the IPP, and the environmental and social commitment plan (ESCP)/ environmental and social action plan (ESAP) accordingly, setting out any additional mitigation measures described in ESS1.

32. FPIC applies from a project's concept design phase to the end of the implementation phase of a **project cycle**. FPIC builds on and expands the process of **meaningful consultation** described in ESS10 and paras 13-14 and will be established through good faith negotiation between the borrower/client and project-affected **Indigenous Peoples'** communities in a culturally appropriate manner. The borrower/client will engage external experts, including Indigenous Peoples' organizations where possible, to assist in identification of a project's risks and impacts and in conducting and documenting the FPIC process. Where Indigenous Peoples have adopted laws and/or written rules or protocols expressing their requirements and/or expectations for how FPIC shall be obtained, these should be considered authoritative, adhered to, and take precedence. Indigenous Peoples shall be consulted about the involvement on external experts and organizations, and that they have a right to identify their own experts and technical support, which shall be funded via project preparation funds controlled by Indigenous Peoples.

34. The borrower/client will document: (i) the mutually accepted process to carry out good faith negotiations that has been agreed in writing by the borrower/client and the **Indigenous Peoples** who are potentially project-affected; and (ii) the outcome of the good faith negotiations between the borrower/client and Indigenous Peoples, including all agreements in writing reached as well as dissenting views. The borrower/client will submit the documentation of the FPIC process, as part of the IPP, to ADB for review. The borrower/client will ensure that the IPP describes agreements reached between the borrower/client and potentially project-affected Indigenous Peoples and includes the actions necessary to implement those agreements. During implementation, the borrower/client will ensure that necessary actions are taken and agreed benefits or improvements to services are delivered in a timely manner.

37. **Indigenous Peoples'** land is often traditionally owned or under their customary use or occupation. While some Indigenous Peoples may not possess legal title to land as defined by the **host country's applicable laws**, 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 a project involves (i) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied, or (ii) the acquisition of such lands, the borrower/client will prepare a plan for the legal recognition of such

ownership, occupation, or usage, with due respect to the customs, traditions, and land tenure systems of the Indigenous Peoples. The objective of such a plan will be (i) full legal recognition of Indigenous Peoples' existing customary land tenure systems; or (ii) conversion of customary use to communal and/or individual ownership rights after obtaining their FPIC.¹ If neither option is possible under the host country's applicable laws, the borrower/client will ensure that the plan includes measures for the legal recognition of Indigenous Peoples' perpetual or long-term renewable custodial or use rights.

39. Where a project promotes commercial development of **Indigenous Peoples'** land or natural resources, the borrower/client will afford due process, and offer compensation together with **culturally appropriate** sustainable development opportunities to project-affected Indigenous Peoples through meaningful consultations to obtain their FPIC, at least equivalent to that to which any landowner with full legal title to the land would be entitled, including: ...

Draft ESS8: Cultural Heritage

15. As a part of the E&S assessment process, the borrower/client will carry out **meaningful consultation** with **stakeholders**, in accordance with ESS10, to: (i) identify **cultural heritage** that may be affected by a project; (ii) consider the level of significance of the cultural heritage affected by a project; (iii) assess the potential risks and impacts to that cultural heritage; and (iv) explore avoidance, mitigation, and monitoring and reporting options. The borrower/client will provide information to stakeholders using transparent and appropriate language on the scope, location, and duration of project activities that could cause risks to and impacts on cultural heritage. If the project is in an area where Indigenous Peoples are present, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the project-affected Indigenous Peoples for the project in accordance with ESS7. When ADB is unable to ascertain that such consent has been obtained from the Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7.

17. If there are significant changes to a project, or discoveries that indicate additional risks to and impacts on **cultural heritage**, particularly where these will impact **project-affected persons**, the borrower/client will meaningfully consult with relevant **stakeholders** and appropriate cultural heritage experts on how to mitigate these risks and impacts and determine if any additional mitigation measures would be required. If the project is in an area where Indigenous Peoples are present, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the project-affected Indigenous Peoples for the changes to the project in accordance with ESS7. When ADB is unable to ascertain that such consent has been obtained from the Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7.

34. In cases where it is deemed necessary to identify, remove, and relocate human remains or related monuments from their original **setting**, the borrower/client will consult **project-affected persons**, including the descendant communities and individuals as well as, where specific conditions require, experts such as forensic archaeologists and remote sensing practitioners to establish locally appropriate identification and preservation measures. If the human remains or related monuments are in an area where Indigenous Peoples are present, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the project-affected Indigenous Peoples their removal or relocation in accordance with ESS7. **ADB will ensure that adequate resources are allocated for the conduct of required rituals for the relocation of human remains or related monuments.** When ADB is unable

to ascertain that such consent has been obtained from the Indigenous Peoples, ADB will not proceed further with those activities that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7.

41. Where a project proposes to use **cultural heritage** including traditional knowledge and techniques, or where a project proposes to enhance or develop a cultural heritage site that has long-standing association with a traditional or indigenous community, the borrower/client will:

- (i) Inform **project-affected persons**, including the traditional or indigenous users of a site or the holders of intangible cultural heritage, of their rights under the **host country's applicable laws as well as international human rights standards**, the scope and nature of the proposed commercial or non-commercial use or development, and the potential consequences of such use or development, and if the heritage are of Indigenous Peoples, ensure obtaining their FPIC for the usage of the heritage; and
- (ii) Enter into a documented good-faith negotiation process with **project-affected persons**, including the traditional or indigenous users of a site or the holders of intangible cultural heritage, to reach agreement on an arrangement that provides for fair and equitable sharing of benefits from the proposed use or development of such cultural heritage, consistent with their customs and tradition.

Draft ESS9: Climate Change

7. The borrower/client will undertake **meaningful consultation** with **project-affected persons**, including **disadvantaged or vulnerable** groups and communities, on project-related **GHG** reduction measures, if any, and climate risk assessment including **climate change adaptation** and **resilience** measures, and any subsequent changes or updates to such measures and assessments. If the project is in an area where Indigenous Peoples are present, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the project-affected Indigenous Peoples for the changes to the project in accordance with ESS7. When ADB is unable to ascertain that such consent has been obtained from the Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7.

14. If there are significant changes to a project or climate risk context that result in additional climate risk to the project and/or **project-affected persons**, the borrower/client will update the climate risk assessment and ESCP/ESAP accordingly, setting out additional risk management measures, as necessary. If the project is in an area where Indigenous Peoples are present, ADB will require the borrower/client to undertake a process of **meaningful consultation** to obtain the free, prior and informed consent (FPIC) of the project-affected Indigenous Peoples for the changes to the project in accordance with ESS7. When ADB is unable to ascertain that such consent has been obtained from the Indigenous Peoples, ADB will not proceed further with the project or with the aspects of the project that are relevant to those Indigenous Peoples whose FPIC cannot be ascertained in accordance with ESS7.

Involvement of Affected Indigenous Peoples in the Conduct of Risk and Impact Assessments and Mitigation and Biodiversity Management Plans among others

ADD Affected Indigenous Peoples shall be involved in the:

- conduct of the environmental and social assessment of the project to assess specific environmental and social risks and impacts to them and their community (Para 22, ESS1)
- conduct of the environmental and social assessment with regards to pollution prevention and resources conservation (Para 6, ESS3)

- identification and assessment of project-related risks and adverse impacts on the health and safety of potential **project-affected persons** throughout the concept design, preparation, and implementation phases of a **project cycle (Para 17, ESS4)**
- conduct of **Land Acquisition/Land Use Restriction** assessment of risks and impacts (Paras 12 and 18, ESS5), census to enumerate all affected persons (Para 20, ESS5), inventory of affected assets and **livelihood** resources, as well as a detailed measurement survey (Para 22, ESS5), valuation to determine the replacement cost of lost and **livelihood** resources (Para 23, ESS5), development of livelihood restoration program (Para 53, ESS5)
- conduct of biodiversity assessments (Para 6, ESS6) and development of biodiversity management plans and biodiversity action plans (Para 11, ESS6)
- assessment of cultural heritage (Para 9, ESS8)
- conduct of climate risk assessment (Para 12, ESS9)

Para 24, ESS6: Where appropriate, the borrower/client will ensure that **biodiversity** conservation measures incorporate local and traditional knowledge and practices. When **Indigenous Peoples** are affected by a project, the borrower/client **(ADD: in consultation with affected Indigenous Peoples)** will integrate measures, that incorporate their traditional culture, knowledge, and practices **(DELETE: of affected Indigenous Peoples)** in accordance with ESS7.

ANNEX 2: List of endorsing organizations and groups

- 1. Philippine ICCA Consortium**
- 2. Community Empowerment and Social Justice Network (CEMSOJ)**
- 3. Timuay Justice Governance**
- 4. Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP)**
- 5. Kabugao Youth**
- 6. Panaghiusa Philippine Network to Uphold Indigenous Peoples' Rights**
- 7. Kapaeeng Foundation**
- 8. Indigenous Women League (IWL Nepal)**
- 9. Torang Trust**
- 10. Indigenous Russia**
- 11. Indigenous Women's Forum North East India**
- 12. Center for Research and Advocacy, Manipur**
- 13. Asia Indigenous Peoples Pact (AIPP)**
- 14. Cordillera Peoples Alliance (CPA)**
- 15. Maryada Foundation**
- 16. Adivasi Samanway Manch Bharat (Tribal Coordination Front)**
- 17. The William Gomes Podcast**
- 18. Center for Development Programs in the Cordillera (CDPC)**
- 19. Western Youth Empire**
- 20. Tebtebba**
- 21. Center for Orang Asli Concerns (COAC)**
- 22. Indigenous Rights Advocacy Centre (IRAC)**
- 23. Legal Rights and Resources Center (LRC)**
- 24. Asian Indigenous Women's Network (AIWN)**
- 25. Yayasan Anak Dusun Papua (YADUPA)**
- 26. Dewan Adat Papua (DAP)**
- 27. Cambodia Indigenous Peoples Organization (CIPO)**

- 28. Katribu Kalipunan ng mga Katutubong Mamamayan ng Pilipinas**
- 29. Alliance for the Future Generations**
- 30. Perhimpunam Pembela Masyarakat Adat Nusantara (PPMAN)**
- 31. National Indigenous Women's Forum (NIWF)**
- 32. Zomi Human Rights Foundation**
- 33. Papora Indigenous Development Association (PIDA)**
- 34. Center for Renewable Energy and Sustainable Technology (CREST)**
- 35. CCKLOS**