

## Comparative Analysis of DMC Legal Framework and ADB Safeguard Policy Statement: Indigenous Peoples

### Malaysia

(A) ADB Safeguard Policy Statement	(B) Corresponding DMC Legal Provisions	(C) Extent of Equivalence <sup>1</sup>	(D) Recommended Gap-filling Measures
Policy Principle 1: Screen early on to determine (i) whether Indigenous Peoples are present in, or have collective attachment to, the project area; and (ii) whether project impacts on Indigenous Peoples are likely.			
Key element (1): Early screening to determine whether Indigenous Peoples are present in, or have collective attachment to, the project area.	No specific requirement for early screening to determine whether Indigenous Peoples are present in, or have collective attachment to, the project area.	No equivalence.	Prior agreement on a project-specific basis to require early screening to determine whether Indigenous Peoples are present in, or have collective attachment to, the project area.
Key element (2): Early screening to determine whether project impacts on Indigenous Peoples are likely.	No specific requirement for early screening to determine whether project impacts on Indigenous Peoples are likely.	No equivalence.	Prior agreement on a project-specific basis to require early screening to determine whether project impacts on Indigenous Peoples are likely.
Policy Principle 2: Undertake a culturally appropriate and gender-sensitive social impact assessment or use similar methods to assess potential project impacts, both positive and adverse, on Indigenous Peoples. Give full consideration to options the affected Indigenous Peoples prefer in relation to the provision of project benefits and the design of mitigation measures. Identify social and economic benefits for affected Indigenous Peoples that are culturally appropriate and gender and intergenerationally inclusive and develop measures to avoid, minimize, and/or mitigate adverse impacts on Indigenous Peoples.			

<sup>1</sup> “Full Equivalence” denotes that DMC legal requirement(s) are in complete harmony with the corresponding ADB Safeguard Objective, Scope and Trigger, Policy Principle or Key Element thereof. “Partial Equivalence” denotes that the DMC legal requirement is in partial harmony with the corresponding ADB Safeguard Objective, Scope and Trigger, Policy Principle or Key Element; and “No Equivalence” denotes that no DMC legal requirement can be found that corresponds to the particular ADB Safeguard Objective, Scope and Trigger, Policy Principle or Key Element.

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Key element (1): Undertake a culturally appropriate and gender-sensitive social impact assessment or use similar methods to assess potential project impacts, both positive and adverse, on Indigenous Peoples.	With regard to Peninsular Malaysia, some form of social impact assessment is required by the Town and Country Planning Act (1976, as amended 2001), but these provisions do not necessarily cover all possible sectors of investment and are not binding on the states of Sabah and Sarawak. While the Malaysian constitution establishes specific protections for indigenous groups (including Malays), no specific provisions have been established with regard to cultural appropriateness or gender sensitivity in social impact assessment.	Partial equivalence.	Prior agreement to scope and methods in TOR for social impact assessment.
Key element (2): Assessment process gives full consideration to options the affected Indigenous Peoples prefer in relation to the provision of project benefits and the design of mitigation measures.	Under the Town and Country Planning Act (1976, as amended 2001), the assessment of social impacts is to be included in a site- or project-specific Development Proposal Report, but the Act includes no specific requirements for consideration of Indigenous Peoples preferences regarding project benefits or design of mitigation measures. No known requirements exist for states of Sabah and Sarawak.	No equivalence.	Prior agreement to scope and methods in TOR for social impact assessment.
Key element (3): Assessment process identifies social and economic benefits for affected Indigenous Peoples that are culturally appropriate and gender and intergenerationally	No specific requirements exist for explicit identification of social and economic benefits for affected Indigenous Peoples, or for ensuring that such benefits are culturally appropriate and gender and intergenerationally inclusive.	No equivalence.	Prior agreement to scope and methods in TOR for social impact assessment.

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inclusive.			
Key element (4): Project preparation process develops measures to avoid, minimize, and/or mitigate adverse impacts on Indigenous Peoples.	Constitution and state laws variably incorporate measures to protect lands and resources of groups deemed indigenous. But no requirements to systematically prepare project-specific planning measures to avoid, minimize, mitigate or compensate for adverse impacts exist.	No equivalence.	Prior agreement on a project-specific basis on necessity for incorporation of SPS principles in an Indigenous Peoples Plan (IPP).
Policy Principle 3: Undertake meaningful consultations with affected Indigenous Peoples communities and concerned Indigenous Peoples organizations to solicit their participation (i) in designing, implementing, and monitoring measures to avoid adverse impacts or, when avoidance is not possible, to minimize, mitigate, or compensate for such effects; and (ii) in tailoring project benefits for affected Indigenous Peoples communities in a culturally appropriate manner. To enhance Indigenous Peoples' active participation, projects affecting them will provide for culturally appropriate and gender inclusive capacity development. Establish a culturally appropriate and gender inclusive grievance mechanism to receive and facilitate resolution of the Indigenous Peoples' concerns.			
Key element (1): Affected Indigenous Peoples communities and organizations are consulted in a meaningful manner.	As part of the National Policy for the Development and Implementation of Regulations (2013), the federal government has proposed "Guidelines for Standardization of Public Consultation Procedures" (2014), which appear to be non-binding in general and not applicable to state processes in Sabah and Sarawak. No specific requirements appear to exist for establishing meaningful consultations with affected Indigenous Peoples communities.	No equivalence.	Prior agreement on a project-specific basis on consultation arrangements for affected Indigenous Peoples communities.
Key element (2): The scope of consultations includes design, implementation and monitoring of measures to avoid or otherwise minimize, mitigate or compensate for adverse impacts.	No specific requirements.	No equivalence.	Prior agreement on a project-specific basis on consultation arrangements for affected Indigenous Peoples communities.
Key element (3): The	No specific requirements.	No equivalence.	Prior agreement on a project-

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scope of consultations includes tailoring project benefits for affected Indigenous Peoples communities in a culturally appropriate manner.			specific basis on consultation arrangements for affected Indigenous Peoples communities.
Key element (4): To enhance Indigenous Peoples' active participation, projects affecting them will provide for culturally appropriate and gender inclusive capacity development.	There are no requirements for projects to include culturally appropriate and gender inclusive capacity development measures to enhance Indigenous Peoples' active participation.	No equivalence.	Prior agreement on a project-specific basis that the need for, and feasibility of, capacity-building measures to enhance Indigenous Peoples' active participation will be assessed through the social impact assessment (or other means)..
Key element (5): Establish a culturally appropriate and gender inclusive grievance mechanism to receive and facilitate resolution of the Indigenous Peoples' concerns.	The Town and Country Planning Act (1976, as amended 2001, Section 25) establishes local appeals boards to whom affected persons can address grievances. There is no requirement to ensure that grievances of Indigenous Peoples can be raised and addressed in a culturally appropriate manner through a project-specific grievance mechanism. As the Act applies only to Peninsular Malaysia, requirements may vary in Sabah and Sarawak.	Partial equivalence.	Prior agreement on a project-specific basis regarding grievance redress mechanisms and procedures, to be reflected in the IPP.
Policy Principle 4: Ascertain the consent of affected Indigenous Peoples communities to the following project activities: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples. For the purposes of policy application, the consent of affected Indigenous Peoples communities refers to a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized representatives, of broad community support for such project activities. Broad community support may exist even if some individuals or groups object to the project activities.			
Key element (1): Consent of affected Indigenous Peoples communities is required for project activities that would include commercial development of cultural resources and knowledge	No specific requirements to obtain consent of affected Indigenous Peoples communities for project activities that would include commercial development of cultural resources and indigenous knowledge.	No equivalence.	Prior agreement on a project-specific basis that affected Indigenous Peoples communities' consent must be obtained for commercial development of cultural resources or indigenous knowledge.

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of Indigenous Peoples.			
Key element (2): Consent of affected Indigenous Peoples communities is required for project activities that would include physical displacement of Indigenous Peoples from traditional or customary lands.	No specific requirements to obtain consent of affected Indigenous Peoples communities for project activities that would include physical displacement of Indigenous Peoples from traditional or customary lands. Though states variably make provisions, or can make provisions for establishment of areas reserved for Indigenous Peoples, the federal government agencies interpret Section 83 of the Constitution as allowing expropriation of state land, including reserves or other areas inhabited by Indigenous Peoples.	No equivalence.	Prior agreement on a project-specific basis that affected Indigenous Peoples communities' consent must be obtained for activities that would physically displace them..
Key element (3): Consent of affected Indigenous Peoples communities is required for project activities that would include commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples.	No specific requirements to obtain consent of affected Indigenous Peoples communities for project activities that would include commercial development of natural resources within customary or traditional lands.	No equivalence.	Prior agreement on a project-specific basis that affected Indigenous Peoples communities' consent must be obtained for commercial development of natural resources within customary or traditional lands.
Policy Principle 5: Avoid, to the maximum extent possible, any restricted access to and physical displacement from protected areas and natural resources. Where avoidance is not possible, ensure that the affected Indigenous Peoples communities participate in the design, implementation, and monitoring and evaluation of management arrangements for such areas and natural resources and that their benefits are equitably shared.			
Key element (1): Project design avoids, to the maximum extent possible, any restrictions on Indigenous Peoples' access to, and physical	While various states have regulations intending to protect access of native residents to established reserves or other resources, both state and federal agencies can impose restrictions or displacement. No specific regulation requires avoidance, to the maximum extent possible, such impacts on Indigenous Peoples communities.	No equivalence.	Prior agreement on a project-specific basis that such impacts will be avoided to the maximum extent possible; review of project design.

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displacement of Indigenous Peoples from, protected areas and natural resources.			
Key element (2): Where avoidance is not possible, project designs ensure that the affected Indigenous Peoples communities can participate in the design, implementation, and monitoring and evaluation of management arrangements for such protected areas and natural resources.	There are no specific requirements that project designs allow affected Indigenous Peoples communities to participate in the design, implementation, and monitoring and evaluation of management arrangements for protected areas and natural resources.	No equivalence.	Prior agreement on a project-specific basis that project design, as reflected in the IPP, allows affected Indigenous Peoples communities to participate in the design, implementation, and monitoring and evaluation of management arrangements for protected areas and natural resources.
Key element (3): Where avoidance is not possible, project designs ensure that affected Indigenous Peoples communities share equitably in project benefits.	No specific requirement that affected Indigenous Peoples communities share equitably in project benefits.	No equivalence.	Assessment of equitability and cultural appropriateness of project benefits is included in TOR for social impact assessment and results are incorporated into IPP.
Policy Principle 6: Prepare an Indigenous Peoples plan (IPP) that is based on the social impact assessment with the assistance of qualified and experienced experts and that draw on indigenous knowledge and participation by the affected Indigenous Peoples communities. The IPP includes a framework for continued consultation with the affected Indigenous Peoples communities during project implementation; specifies measures to ensure that Indigenous Peoples receive culturally appropriate benefits; identifies measures to avoid, minimize, mitigate, or compensate for any adverse project impacts; and includes culturally appropriate grievance procedures, monitoring and evaluation arrangements, and a budget and time-bound actions for implementing the planned measures.			
Key element (1): When Indigenous Peoples communities are present in the project area, or are likely to be affected by	Preparation of an Indigenous Peoples Plan is not required under any circumstances.	No equivalence.	Prior agreement on a project-specific basis on necessity of, and scope of coverage of, IPP.

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project activities, an Indigenous Peoples Plan (IPP) is prepared.			
Key element (2): The IPP is based on social impact assessment and is prepared by qualified experts.	No IPP is required. The Town and Country Planning Act (1976, as amended 2001) requires some form of social impact assessment, and specifically requires that development planning be conducted by qualified experts. The Act is not binding on the states of Sabah and Sarawak.	Partial equivalence.	Same as above.
Key element (3): The IPP draws on indigenous knowledge and participation by the affected Indigenous Peoples communities.	There are no requirements for preparation of an IPP, or to otherwise ensure that development plans draw on indigenous knowledge and participation by affected Indigenous Peoples communities.	No equivalence.	Same as above.
Key element (4): The IPP includes a framework for continued consultation with the affected Indigenous Peoples communities during project implementation.	The Town and Country Planning Act (1976, as amended in 2001) provides for consultation in the general development planning context. The Act does not specifically require project-specific consultations with Indigenous Peoples, or that consultations continue through the implementation process. The Act does not apply to Sabah and Sarawak.	Partial equivalence.	Same as above.
Key element (5): The IPP includes specific measures to ensure that Indigenous Peoples communities receive culturally appropriate benefits.	No IPP is required and other planning requirements do not appear to include measures to ensure that Indigenous Peoples communities will receive culturally appropriate benefits as a result of the project.	No equivalence.	Same as above.
Key element (6): The IPP identifies measures to avoid, minimize, mitigate, or compensate for any adverse project impacts.	No IPP is required and other planning requirements do not appear to include measures to avoid, minimize, mitigate or compensate for any adverse project impacts on Indigenous Peoples communities.	No equivalence.	Same as above.
Key element (7): The IPP	The Town and Country Planning Act (1976, as amended 2001, Section 25) establishes local appeals	Partial equivalence.	Same as above.

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includes a culturally appropriate grievance redress mechanism.	boards to whom affected persons can address grievances. There is no requirement for an IPP or for ensuring that grievances of Indigenous Peoples can be raised and addressed in a culturally appropriate manner through a project-specific grievance mechanism. As the Act applies only to Peninsular Malaysia, requirements may vary in Sabah and Sarawak.		
Key element (8): The IPP includes arrangements for monitoring during project implementation and for evaluation of results.	No specific requirements for monitoring and evaluation have been identified.	No equivalence.	Same as above.
Key element (9): The IPP includes a budget and timebound plan for implementing all required actions.	No specific requirements for inclusion of budgets or timebound action plans have been identified.	No equivalence.	Same as above.
Policy Principle 7: Disclose a draft IPP, including documentation of the consultation process and the results of the social impact assessment in a timely manner, before project appraisal, in an accessible place and in a form and language(s) understandable to affected Indigenous Peoples communities and other stakeholders. The final IPP and its updates will also be disclosed to the affected Indigenous Peoples communities and other stakeholders.			
Key element (1): A draft IPP (including documentation of consultations with Indigenous Peoples communities and social impact assessment results is publicly disclosed in a timely manner before project appraisal.	The Town and Country Planning Act (1976, as amended 2001) requires public disclosure of planned interventions prior to preparation of a project-specific Development Proposal Report, as well as higher-order planning documents, and prior to decision-making. As an IPP is not specifically required, there is no specific requirement for its disclosure. State regulations in Sabah and Sarawak may vary.	Partial equivalence.	Project-specific agreement on method and timing of IPP disclosure.
Key element (2): The disclosed draft IPP is accessible to, and in a form and language(s) understandable to, affected Indigenous Peoples communities and other stakeholders.	The Town and Country Planning Act (1976, as amended 2001) requires public disclosure through multiple media sources and specifies that at least must be in the national language (Malay). As an IPP is not specifically required, there is no specific requirement for its disclosure, and no specific requirements regarding accessibility or language of disclosure. State regulations in Sabah and Sarawak may vary.	Partial equivalence.	Project-specific agreement on method and timing of IPP disclosure.



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Key element (3): The final IPP (and any subsequent updates) also are disclosed to affected Indigenous Peoples communities and other stakeholders.	The Town and Country Planning Act (1976, as amended 2001) requires disclosure of the draft Development Proposal Report, but does not specifically require re-disclosure of final versions or subsequent revisions. As an IPP is not specifically required, there is no specific requirement for its disclosure, and no specific requirements regarding accessibility or language of disclosure. State regulations in Sabah and Sarawak may vary.	No equivalence.	Project-specific agreement on method and timing of IPP disclosure.
Policy Principle 8: Prepare an action plan for legal recognition of customary rights to lands and territories or ancestral domains when the 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) involuntary acquisition of such lands.			
Key element (1): Prepare an action plan for legal recognition of customary rights to lands and territories or ancestral domains when the project involves activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied.	No similar requirement at state or federal level.	No equivalence.	Prior agreement on a project-specific basis for preparation of an action plan when necessary..
Key element (2): Prepare an action plan for legal recognition of customary rights to lands and territories or ancestral domains when the project involves involuntary acquisition of such areas.	No similar requirement at state or federal level.	No equivalence.	Same as above.
Policy Principle 9: Monitor implementation of the IPP using qualified and experienced experts; adopt a participatory monitoring approach, wherever possible; and assess whether the IPP's objective and desired outcome have been achieved, taking into account the baseline conditions and the results of IPP monitoring. Disclose monitoring reports.			
Key element (1): Monitor	No requirement for preparation of IPP or for monitoring of same.	No equivalence.	Monitoring arrangements

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implementation of the IPP using qualified and experienced experts.			included in the project IPP.
Key element (2): Include arrangements for participatory monitoring whenever possible.	No requirement for IPP or for consideration of participatory monitoring of same.	No equivalence.	Prior agreement that feasibility of participatory monitoring will be considered in social impact assessment.
Key element (3): Assess whether IPP objectives and desired outcomes are achieved, taking into account baseline conditions and monitoring results.	No requirement for IPP or for evaluation of results of same.	No equivalence.	Prior agreement on evaluation methods and timing, with arrangements incorporated in IPP.
Key element (4): Monitoring reports are disclosed.	No requirements for IPP or for disclosure of monitoring reports based on its implementation.	No equivalence.	Prior agreement on disclosure arrangements, incorporated in IPP.