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To the SPS Update Team,

Submission of comments to the 2nd (2008) Safeguard Policy Statement Review

Thank you for the opportunity to join the consultations held in Manila on the 2008 draft of the new proposed Safeguard Policy Statement. The consultations provided a forum for a frank exchange of views and opinions. It also enabled different stakeholders to gain a better understanding of the constraints and needs of other stakeholder groups, as well as indigenous peoples as rights-holders.

We are pleased to submit here a summary of our key analysis points regarding the new draft and look forward to seeing the W-Paper and the incorporation of the many comments provided during the consultations. We are appending to this letter a full set of 'tracked changes' comments that incorporate all the proposed text changes that we would like to see reflected in the W-Paper. We are of course happy to discuss any particular aspect of these proposed changes with you should you wish.

In particular we would like to draw attention to two key areas of the policy which we believe emerged as areas of general agreement during the course of the consultation. We are providing here also suggested language changes to the text of the policy.

Free, prior and informed consent

Free, prior and informed consent ("FPIC") is an international legal term of art that refers to the right of indigenous peoples, stemming from their right to self-determination, to control the course of their own development including as it relates to the use of their traditionally owned lands, territories and resources.[1] The 2007 UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") affirms that FPIC applies to any activity that may affect

[1] The concept of free, prior and informed consent, or FPIC, has been developed and elaborated in a number of international fora. Of particular relevance to the ADB in developing their approach to recognizing the right is the workshop report from the UN Permanent Forum on Indigenous Issues in which the Forum elaborates methodologies for realizing FPIC, please see: http://daccessdds.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement. The application of the right of FPIC has been confirmed by the Committee on the Elimination of Racial Discrimination in General Comment 23 and elsewhere, reiterating this right in respect to the ownership, development and use of indigenous peoples' traditional lands, territories and resources and to decisions involving development projects. http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument.

indigenous peoples' traditional territories, to resettlement, and to the adoption of legislative, administrative and other measures that may affect them.[2] It further declares that FPIC constitutes one of "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[3]

This right is not unique to the UNDRIP, which simply restates existing international law on this point. Accordingly, indigenous peoples' right to FPIC has also been upheld by, *inter alia*, the UN Committee on the Elimination of Racial Discrimination ("CERD"), the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights. CERD, for instance, has affirmed that all decisions directly relating to indigenous peoples' rights shall be taken only with "their informed consent."[4] It also emphasizes indigenous peoples' right to FPIC, through representatives chosen by themselves, in connection with a range of specific activities including: mining, oil and gas operations; logging; the establishment of protected areas; dams; agro-industrial plantations; resettlement; and compulsory takings.[5] CERD further holds that states should use the UNDRIP "as a guide to interpret [their] obligations under the Convention relating to indigenous peoples."[6] CERD oversees compliance with the Convention on the Elimination of All Forms of Racial Discrimination, an instrument ratified by all but one of the ADB's member states.

Most recently, citing a range of international instruments and jurisprudence, including the UNDRIP, the Inter-American Court of Human Rights held that FPIC was the applicable standard for any investment or project "that could affect the integrity" of indigenous and tribal peoples' territories.[7] The Court explicitly applied this right when assessing the legality of state-authorised measures to restrict indigenous and tribal property rights for development projects.[8]

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[2] See Articles 3,10, 19, and 32, UN Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/en/drip.html.

[3] Article 43, UN Declaration on the Rights of Indigenous Peoples

[4] *General Recommendation XXIII on Indigenous Peoples*, adopted by the Committee on the Elimination of Racial Discrimination at its 51st session, 18 August 1997, at para. 4, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument.

[5] *See inter alia* Cambodia, 31/03/98, CERD/C/304/Add.54, at para. 13 and 19 (observing that the "rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations" and recommending that Cambodia "ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent"); India, 05/05/2007, CERD/C/IND/CO/19, at para. 20 (stating that the "State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation…"); Indonesia, 15/08/2007, CERD/C/IDN/CO/3, at para. 17 (recommending that Indonesia "ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan"); Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 19 (recommending that Guyana "seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities"); India, 05/05/2007, CERD/C/IND/CO/19, at para. 19 (stating that the India "should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities"); and Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 11 (recommending "that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land").

[6] United States, 02/2008, CERD/C/USA/CO/6, at para. 29.

[7] See *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185 , at para. 17, http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf.

[8] *Id*., and; *Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 28 November 2007. Series C No. 172, para. 129-40.

While the 2nd draft of the SPS has taken some steps towards acknowledging FPIC, it is extremely disappointing to observe that the proposed definition of FPIC employed therein is fundamentally incompatible with current understandings of the term, including as used by other IFIs (the EBRD and Inter-American Development Bank ("IADB"), for example). This definition, if permitted to stand, also would greatly undermine the rights of indigenous peoples as guaranteed in international human rights norms accepted by the vast majority of ADB members and even in international environmental law. This is difficult understand in light of the international community's affirmation in the UNDRIP that FPIC is one of the "minimum standards for the survival, dignity and well-being of the indigenous peoples." Additionally, and as discussed below, this misappropriation and contortion of the definition of FPIC is inappropriate as guidance for borrowers/clients, exposes them and the ADB to a series of legal, commercial and reputational risks, and ultimately undermines development effectiveness.

The current proposed language in the SPS defines FPIC as follows:

> For the purposes of policy application, consent 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. Such broad community support may exist even if some individuals or groups were to object to the project activities.

This conflates two separate terms, FPIC on the one hand, and 'broad community support' as used by the World Bank and the International Finance Corporation on the other. 'Broad community support' has no accepted definition or meaning and is unacceptable to indigenous peoples, as clearly demonstrated during the recent consultations. World Bank management has also recommended that the policy on indigenous peoples be amended to replace broad community support with FPIC, as publically stated by the World Bank representatives at the recent consultation and it was explicitly rejected by the EBRD in its 2008 policy on indigenous peoples, which unambiguously requires FPIC for projects that may affect indigenous territories.[9]

By redefining FPIC as 'broad community support' the ADB is adopting a retrograde standard that undermines its members international legal obligations pertaining to indigenous peoples and could also be accused of failing to even seek to attain the internationally accepted minimum standards. The 'broad community support' standard is even contrary to Article 8(j) of the Convention on Biological Diversity, which protects indigenous peoples' traditional knowledge and requires their "approval" before it can be used. The World Bank's OP 4.10 acknowledges this legal obligation by also requiring indigenous peoples' 'agreement' in this respect, as does the IFC's policy on indigenous peoples. The ADB however is proposing to adopt a lower standard.

We strongly recommend amending the proposed definition of FPIC and replacing it with an internationally acceptable and accurate description of what the term entails. Leaving the definition as is risks exposing the ADB to accusations of contorting and misapplying existing concepts and standards, and, as discussed below, of adopting standards that fall below those employed by other IFIs. We propose the following alternative definition:

> For the purposes of policy application, consent refers to a collective agreement by the affected Indigenous Peoples' communities, through an independent and self-determined decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices.

[9] The European Bank on Reconstruction and Development defines consent as: 'Consent refers to the process whereby the affected community of Indigenous Peoples, arrive at a decision, in accordance with their cultural traditions, customs and practices, as to whether to become involved in the proposed project.' http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf

The 2nd draft of the SPS also unjustifiably limits the application of FPIC, again inappropriately defined as 'broad community support', to a specific set of project activities, as follows:

> Apply the principle of free, prior, informed consent of affected Indigenous Peoples to the following project activities: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples, (ii) physical relocation from traditional or customary lands, and (iii) commercial development of natural resources on lands used with impacts on the livelihood, or cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples.

The World Bank and the IFC, the original architects of the 'broad community support' concept, apply it across the board to ALL project activities that may adversely impact on indigenous peoples, rather than just to these three above listed circumstances as the ADB is now proposing.[10] Moreover, the IFC, IADB and EBRD apply a significantly higher standard to these three activities (successfully concluded negotiations, agreement and FPIC, respectively), and all apply these higher standards to economic displacement in addition to physical displacement. The ADB, however, only applies 'broad community support' rather than a higher, more appropriate standard (FPIC or agreement), and does not include non-physical displacement at all in this category.

The 2nd draft of the SPS is thus adopting a retrograde standard when compared with the standards adopted by other international financial institutions and multilateral development agencies. As one of the stated aims of the SPS update is to harmonize with other financial institutions, it is difficult to see how such a regression is justified. This deficiency could of course be addressed by ensuring that FPIC is not defined as 'broad community support' and we reiterate our prior recommendation above that the proposed definition be amended.

We further recommend that economic displacement be added to physical displacement as one of the activities for which FPIC is required in the policy. As it currently stands, 2nd draft of the SPS allows for the acquisition of indigenous peoples' lands and territories - and the economic displacement of indigenous peoples - without FPIC as long as such acquisition does not result in physical displacement. Therefore, potentially large areas of indigenous territories may be taken without FPIC as that term is understood internationally and also without even applying opaque the 'broad community support' standard.[11] The acquisition of indigenous peoples' traditional lands, territories and resources without their consent is impermissible under international law, and under existing voluntary and mandatory standards governing development finance activities. The IFC, EBRD and IADB all require some for of agreement in this context and even the World Bank requires 'broad community support'. Failure to address this issues seriously undermines the ability of the ADB to provide appropriate safeguards for the rights of indigenous peoples in Asia.

There are two further key problems with the specified list of project activities, even if the principle of FPIC is defined to meet international standards. The first issue is the use of the language 'apply the principle of free, prior and informed consent' rather than 'obtain the free, prior and informed consent'. This is an unnecessary confusion and could be easily addressed by clarifying for borrowers/clients that the requirement from the ADB is to obtain the free, prior and informed consent of the affected indigenous peoples – not to apply a principle in the abstract.

The second issue with the cited paragraph is the restriction of application of FPIC. Even if the Bank alters the current proposed definition to bring it inline with international law and international good practice, the proposed restrictions in application remain problematic. As an internationally recognized right, the right to give or withhold consent to a proposed

[10] IFC Performance Standard 7: Indigenous Peoples
[11] ADB SPS consultation draft 2008, SR3 paragraph 25

development initiative is not restricted, it encompasses every activity that may directly or indirectly impact on the lands and resources of indigenous peoples. We strongly recommend removing the restrictions on application of FPIC and ensuring that it is required and obtained for all activities impacting on indigenous peoples.

If, for the purposes of policy application, the restriction is retained we would like to draw your attention to one of the points of consensus that arose during the recent consultation, namely the inclusion of projects aimed at affecting, altering, supporting or subsidizing the health and education systems of indigenous peoples. We would also recommend the reformulation of the restrictions to more fully reflect the required protections for indigenous peoples. Our proposed alternative text, with alterations highlighted, is:

> **Obtain** the free, prior, informed consent of affected Indigenous Peoples to the following project activities: (i) **impacts on** cultural resources and knowledge of Indigenous Peoples, (ii) physical **and/or economic displacement** of indigenous peoples, (iii) **impacts on** natural resources on lands used with impacts on the livelihood, or cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples, **and (iv) projects involving health and education activities for Indigenous Peoples.**

Country Safeguard Systems

The current draft of the SPS formalizes in the ADB's policies the introduction of a country safeguard system approach. The ADB is not the first Bank to work with the idea of using national systems to safeguard the environment, human rights and social impacts from large-scale projects and the trend of using such an approach is likely to gain momentum with the Paris Declaration on Aid Effectiveness and the Accra Declaration.

The concept of strengthening country systems of safeguards, raising them progressively to meet international standards and improving capacity to implement and monitor such safeguards, is an aim that we fully support. In line with the Paris Declaration, we feel that country ownership is fundamental to ensuring a sustained and effective system of protection for the environment, social impacts and human rights. However we also recognize that often both the words and the deeds of country safeguard systems fail to match up to the minimum standard of the ADB's safeguards and fall far short of international standards, laws and agreements.

The 'bottom line' for the ADB is that ADB financing should not ever be used in projects that lead to wide-spread environmental and social damage or exacerbate and increase abuses of human rights in Asian countries and against Asian peoples. This bottom line is non-negotiable for the Bank and for its lender countries. The difficulty for the Bank is to balance the desire to improve country safeguards against the prohibition to do harm.

The current proposal to introduce country safeguard systems (CSS) fails to appropriately address these two countervailing needs of the Bank. The proposed approach provides no detail on the basis for the proposed 'equivalence assessment', what aspects of a national system would be taken into account, how actual practice would be considered along side the words of the relevant laws and regulations and no requirement for disclosure of such assessments.

The lack of any requirement for involvement of indigenous peoples in the assessment of the laws and regulations impacting on them contravenes the spirit and words of the ADB safeguard standards and contravenes the internationally recognized and protected right of indigenous peoples to be in control of the course of their own development. We strongly call for the Bank to develop a detailed paper, in consultation with civil society and indigenous peoples, on the mechanisms for the assessments proposed in the CSS as presented in the

current SPS. Only on successful conclusion of such discussions should the proposal to implement such a system be initiated.

In regards to the text proposed for the CSS currently included in the SPS, significant revisions are required if the system is going to be able to cope with the challenges of implementing a diverse range of safeguard systems without violating the intent of safeguards. In particular, the text needs to include (i) reference to international laws and standards as part of the definition of a country system; (ii) provisions for the disclosure of draft and final equivalence and acceptability assessments to the public with opportunity for public comment and (iii) provisions for full and effective involvement of concerned sections of society in the conduct and finalization of such assessments and public validation of the results.

In concrete terms, we propose the following text changes:

Specific reference within the CSS sections of the SPS to the need to develop a separate paper, through open consultations and involvement of relevant stakeholders and rights holders, to further elaborate the mechanisms and procedures for the assessments proposed within the CSS.

Inclusion of international standards

The CSS approach proposed is based primarily on assessing a county's safeguard system based on the following definition:

> **Definition.** "Country safeguard systems" is used to mean a country's legal and institutional framework, consisting of its national, sub-national, or sectoral implementing institutions and relevant laws, regulations, standards, and procedures, which pertain to the safeguard policy areas.

This definition fails to incorporate any reference to international standards, commitments and agreements which are an integral part of any nation's legal framework. Alternative proposed text is:

> **Definition.** "Country safeguard systems" is used to mean a country's legal and institutional framework, consisting of its **international commitments,** national, sub-national, or sectoral implementing institutions and relevant **international and national** laws, regulations, standards, and procedures, which pertain to the safeguard policy areas.

Provisions for disclosure of draft and final assessments

The proposed adoption of the CSS relies heavily on the outcome of the two proposed assessments, the equivalence and acceptability assessments. However there is no provision for public involvement with or validation of the results of such assessments. The SPS must ensure that the draft and final assessments are provided for public comment prior to any acceptance of the findings of the assessments by the Bank. We strongly recommend public disclosure of the draft assessments *as early as possible* in the conduct of the assessments, and disclosure of the final assessments no later than 120 days prior to consideration of the findings of the assessments by the Board, with opportunity provided for public comment.

Without such disclosure the ADB risks conducting its assessments and reaching decisions with potentially wide-ranging impacts on the peoples of the Asia-Pacific without sufficient information and lacking external and practical perspectives from potentially affected peoples. Proposed text changes are provided here in bold:

(vi) Disclosure and Consultation. Draft equivalence assessments at country / sector / agency level will be documented and disclosed on ADB's website **as early as possible, with at least 120 days provided** for public comments **prior to any Board consideration of the assessment results** ~~upon completion~~. ADB ~~may~~ **shall** organize in-country consultation workshops to solicit comments and feedback from stakeholders including governments and NGOs. **Equivalence assessments involving possible use of country safeguards for indigenous peoples shall provide for the full and effective involvement of indigenous peoples in the conduct of the equivalence assessment.** Final equivalence assessment reports will be disclosed on ADB's website upon completion. Issues related to the acceptability assessments at project level will be an element of the normal safeguard consultation process undertaken for project preparation.

Provisions for full and effective involvement and consultation with concerned sections of society

In addition to providing no requirement for public disclosure, the equivalence assessment as currently proposed fails to balance the need to assess both the words and the deeds of country safeguard systems through the involvement of non-governmental sections of society. Although many countries may have laws or standards that seem – on paper – to be functionally equivalent to the ADB safeguards and to international standards, any true equivalence assessment must look also at the actual capacity and *political will* within a country to achieve the implementation of such safeguards. Without the formal involvement of civil society and indigenous peoples such an assessment would necessarily fail to incorporate all necessary perspectives and experiences of an existing safeguard system. We propose the following text to address this serious gap (additions in bold):

> Phase I: Country/Sector/Agency Level Assessment—Determining Equivalence. ADB will be responsible for assessing and determining the equivalence through CSS assessment at national, sub-national, sector, or agency level. **Such assessments will be undertaken with the involvement of a wide variety of stakeholders to ascertain equivalence assessment in both the policies and laws and in the actual practice within the country. In particular non-government organizations with expertise in the given policy area will be involved in the assessments, and in the case of the indigenous peoples' safeguards national and sub-national indigenous peoples' organizations and representative authorities will be involved.** If the assessments reveal that gaps can be addressed reasonably, ADB and the borrower will agree on specific gap-filling measures to be included in an action plan. **Such agreed gap-filling measures will be implemented and completed prior to the adoption of a successful equivalency assessment.** The assessments will need to be updated as required to reflect changes in CSS. Recent analytical work and assessments of other MFIs, updated as required, can be used. Joint assessments with other MFIs will be encouraged. At this phase, ADB will not consider application of CSS to any specific project and ADB's safeguard policies and requirements will apply. If the equivalence assessments conclude that gaps at country/sector/agency level cannot be addressed within a reasonable timeframe, ADB will not move into the second phase of acceptability assessment

In addition to the two areas of specific concern which we have highlighted in this submission, we are also providing you herein with a full document of suggested text changes to address the weaknesses in the current draft. You will note that the suggestions we make within the appended document reflect and support the recommendations provided to you also by the indigenous peoples' representatives at the recent consultation. In particular we fully endorse the following recommendations already provided to you:

1. The policy should confirm to and reaffirm the international understanding of development provided by the UN Common Understanding of the Human Rights Based Approach to Development.
2. The policy, for indigenous peoples, should refer to and implement the UN Declaration on the Rights of Indigenous Peoples as the primary international instrument on the human rights of indigenous peoples
3. The linkages between the implementation and the principles of the three policy areas, resettlement, environment and indigenous peoples, should be made explicit. Additional provisions should be included within the resettlement and environment policies in areas relevant to indigenous peoples to ensure that specific protections are consistent.
4. Terminology used in the policy should be active and strong in order to avoid misinterpretation, *inter alia*, feasible should be replaced with possible, 'normally acceptable' should be removed, 'applicable' should be removed in reference to laws and standards, 'where relevant' should be removed.
5. References to the use of external experts should be consistent throughout the document, and should use the term "independent, qualified and experienced experts". In the case of projects impacting on indigenous peoples references to the use of experts should additionally specify the use of indigenous peoples' experts.
6. The conduct of all assessments related to indigenous peoples including both environmental and social impact assessments must be conducted by independent, qualified and experienced experts and must include a process of validation by the affected indigenous peoples

We stand ready to provide further information should it be required or provide additional details and background on any of the suggestions and recommendations provided herein,

Best regards,

Helen Leake
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