

Summary of the Indigenous Peoples' Consultation with the Asian Development Bank, November 27th 2007

This document is an overview of the discussions of the indigenous peoples' consultation held in Manila on the 27th of November 2007. It is not a comprehensive record of all discussions held, as there are separate official minutes available. Instead it seeks to pull out and highlight the key areas of discussion, and the key recommendations made by indigenous representatives at the consultation. The document also incorporates written submissions provided to the ADB and summary recommendations. In addition to the discussions held during the formal discussions on the 27th, there was a half-day spent in discussion of experiences gained in five different projects impacting on indigenous peoples. These discussions are in Annex One (pg. 9-11).

At the end of the consultation, and during the course of the consultation, both verbal and written submissions and comments were provided to ADB staff on the current draft of the Safeguard Policy Statement. For ease of reference, the central recommendations are reproduced here:

Recommendation One: Free, Prior and Informed Consent MUST be enshrined in the safeguards for all lending modalities affecting indigenous peoples

1. Free, prior and informed consent is essential for the indigenous peoples' sections of the SPS, both in the policy principles and in the safeguard requirements. Text on this was submitted, reproduced below (pg. 6-7). The point was made and reiterated that free, prior and informed consent is the standard to which Asian governments have held themselves with their support of the UN Declaration on the Rights of Indigenous Peoples, and that the ADB has held itself to the standard of consent in the past (1998 policy) and proposed it in the July draft of the new SPS. Part of the process of obtaining consent should reference consultation with national and local indigenous peoples' organizations, and involvement of representative indigenous institutions.

Recommendation Two: Inclusion of guidance and reference to international law, including the UN Declaration on the Rights of Indigenous Peoples

2. Specific reference within the SPS must be made of international law, recognizing that international law is both binding and/or advisory on all borrower governments and clients, and that the ADB should provide assistance to its borrowers in understanding what legal guidance is available to them. Specific legal instruments referred to in the consultation included the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169 and 'consistent with international and national laws and legal norms'.

Recommendation Three: The safeguards must detail the establishment of accessible, effective and responsive grievance mechanisms

3. There must be a requirement to include a grievance mechanism at the project level as an essential part of the IPP, with representation from indigenous peoples on the grievance committee and/or panel. For some projects a national level committee may additionally be appropriate, and flexibility should be retained to enable the most suitable grievance mechanism for any particular project to be designed and included in the IPP. In addition to project, and possible national level mechanisms, there should be an ADB-wide panel for addressing indigenous peoples' grievances, when not addressed at a project or national level. This body could have regular sessions throughout the year, and review specific complaints and reporting directly to the Board. This panel could address, among other things, redress for past unresolved

complaints, and focus on mediation of agreed and viable solutions to on-going impacts. All levels of grievance mechanisms (project / national / ADB) must have the required authority and mandate to enable them to effectively address the complaints raised (the independence and 'teeth' or authority).

Recommendation Four: Specific requirements for information disclosure should reference 'all relevant project documents' including environmental and social impact assessments

4. Information disclosure requirements are essential as a tool to enable indigenous peoples' organizations to monitor borrower/client compliance with the policy requirements. The text on information disclosure must include reference to all relevant project documents, including social and environmental assessments, indigenous peoples' plans and any other relevant management plans. Information dissemination should be done in a manner conducive to access by indigenous peoples, using suitable languages and formats.

Recommendation Five: An Indigenous Peoples' Plan should all be should be a mandatory requirement for all projects, programmes or other funding modalities impacting on indigenous peoples, should be developed primarily by indigenous peoples and should include reference to the applicable grievance mechanisms (see Recommendation 3 also).

5. An Indigenous Peoples' Plan should be a mandatory requirement for all projects and other activities triggering the indigenous peoples' safeguards. When other safeguard requirements are triggered also (ie. involuntary resettlement) then additional components may be added to the IPP to ensure compliance with other requirements. Where indigenous peoples are a minority section of the affected peoples, an IPP could form a component of a wider social safeguard plan. Indigenous peoples should guide and lead the formation of the IPP, facilitated by consultants as required. The IPP must reflect the agreed conditions for project implementation, and must be finally approved by the affected indigenous peoples through their representative institutions.

Recommendation Six: The use of country safeguard systems or the development of a framework approach to safeguard application under MFF, sector loans or other funding mechanisms is rejected as weakening and confusing the intent and effectiveness of the proposed safeguards.

6. Fundamental principles of safeguards – including but not restricted to the principles of free, prior and informed consent, respect for customary land rights, information disclosure and consultation – are universal. A safeguard system which establishes 'two tiers' of application weakens, confuses and ultimately loses its ability to protect the values it has been created to protect. We refuse the 'equivalency judgement' that the ADB proposes for use of country systems without full involvement of potentially affected peoples, both indigenous peoples and any other project-affected peoples, and see no practical way to implement such a collaborative judgement.

Formal presentations by the Asian Development Bank staff and officials

Xianbin Yao (acting head of RSDD)
Indira Simbolon (Sr. Social Safeguards Specialist)
Xiaoying Ma
[Presentations available separately]

Discussions and clarifications:

Clarification requested by Devasish Roy on the replacement of 'consent' with 'consultation' – specifically with reference to the 'increased clarity' provided by use of the terms chosen.

ADB would like further information on the terms consent and consultation and BCS.

Clarification sought by Vicky on screening and scoping – how will affected people be involved in the classification of the project?

ADB: the full process of screening and impact assessment should be based on the real impacts and therefore should be carried out by competent experts, with some guidelines in place. This must involve consultants talking to people in the local areas and in the affected areas.

Clarification sought by Joan regarding the establishment of grievance mechanisms at the local level – if a project level grievance mechanism is not working, what redress may be available? The intention is good but further information required.

ADB: a local level mechanism allows a rapid response to people's concerns, if such a local level is not available then the Accountability Mechanism exists on an international level.

Clarification by Ram regarding the use of CSS – expressed concern that there is no role for indigenous peoples in having input as to what safeguard policy is used, both for CSS adoption and for projects with multiple funders, and multiple possible policies.

ADB: a two fold test exists, equivalence and capacity. In doing these assessments and then taking the decision to the board the process itself is consultative. All major stakeholders would be consulted at this point and within this process.

Clarification on monitoring processes – there is no allowance for or recommendation for involvement of affected persons and individuals.

ADB requires that the borrower / client will disclose all monitoring reports to affected persons

Clarification on the trigger for application of the policy sought – whether just project funding or whether all funding modalities.

ADB agrees this requires further discussion

Clarification requested regarding the framework approach for funding

ADB clarified that this refers to funding processes in which funding is agreed before the sub-projects are known. In this situation a safeguard framework is developed for each of the safeguard policies.

The issue of cultural displacement was raised, loss of access to spiritual places was raised as an issue for further discussion.

Further queries were also raised regarding the issue of grievance mechanism and who would be represented.

ADB reiterated that redress for grievances should be at the most local level possible, from the company (for private finance) or the government agency.

Secondary explanation was also provided regarding BCS and the process of determining what it is and how to document it.

Disclosure of monitoring reports from private sector only, is the requirement. Why this does not also apply to public institutions is unclear.

*Further clarification was provided that **the identification of indigenous peoples is not dependent on government agreement** and remains in force regardless of whether the use of the term is rejected by the government or not. ADB inputs here also reflected inconsistency of understanding of the safeguards, with some staff stating that for some projects impacting on indigenous peoples 'the impacts are the same as they would be for any other people so no special safeguards are needed'.*

ADB also stated that the current (old) policy was triggered by vulnerability and the new proposed language covers a more 'rights-based' identification – the trigger occurs regardless of the level of vulnerability.

A further input from Vicky emphasized the need for explicit discussion and reference of rights in the policy.

Joan Carling – presentation of the key recommendations from the 26th of November

- violation of the collective rights of indigenous peoples over their lands, territories and resources – an explicit reference to rights is required to ensure that this issue is appropriately addressed, this also includes free, prior and informed consent in the context of the UNDRIP
- disclosure requirements must be provided in language and form as appropriate – covering environmental and social impact assessments and all other relevant project documents
- conduct of social impact assessments must be with the full and effective involvement of indigenous peoples
- grievance mechanisms with reference to customary decision making processes
- representation and participation of indigenous peoples in various aspects of project management and project implementation
- benefit sharing in the services and benefits provided together with non-indigenous persons affected by the project or activity

Group break out sessions

Group break out sessions involved dividing ADB staff and all other participants into three groups under the three headings of (i) Free, Prior and Informed Consent; (ii) Participation requirements and Information Disclosure; and (iii) Grievance Mechanisms. All groups could address any other areas of the policy statement and safeguard requirements that they wished in addition to the group topic.

Group 1: Participation requirements and Information Disclosure

1. Suggested additions into the 'objectives' of the indigenous peoples' principles statement (p16): "recognize collective rights to land and the right to self-determination" explicitly and also to emphasize that indigenous peoples must be able to participate on an equal footing with other groups in projects that affect them "active participation on an equal footing with others"
2. In principle 5 it was recommended that language specifically on land be inserted to (i) ensure recognition of indigenous peoples lands and resources (or land under customary use) regardless of title; and (ii) that activities affecting land can only proceed with the free, prior and informed consent of indigenous peoples
3. In the preparation of the IPP (principle 7), it was recommended to remove 'or equivalent document' and replace with 'and all other relevant project documents'
4. Also in principle 7, the principle should explicitly state that the IPP should be 'done together with' indigenous peoples and that the final IPP must be agreed to by affected indigenous peoples.
5. In principle 9, the language used should emphasize use of 'independent qualified experts with proven knowledge on indigenous issues' and the term 'wherever possible' should be removed. [The recommendation in regards to 'wherever possible' applies equally to the rest of the SPS document]
6. In the requirements on information disclosure (Attachment C, para 20 – 21) the description of requirements should include the phrase 'and all relevant project documents' (as implied in the terms free, prior and informed) and paragraph 21 on the process of information disclosure should include reference to timeliness and time-bound milestones for information disclosure.

Other recommendations:

7. Indigenous peoples should be involved in the equivalency consideration of the country systems, and no country system of indigenous rights protection should be applied to any activity without the free, prior and informed consent of affected indigenous peoples.
8. Co-financing arrangements. Projects with more than one financier involved should apply the strongest safeguards to all components and associated facilities
9. Indigenous peoples should participate in the assessment of selection of which policy should be used

Discussion

ADB provided an explanation of the use of the term 'or equivalent document', in some countries governments will not accept the use of the term 'indigenous peoples' and therefore an IPP is sometimes titled differently.

There was also a query raised by indigenous participants regarding the use of the term 'project' in the scope of application of the policy – it was reaffirmed and emphasized that safeguards must apply equally to all lending modalities, including technical assistance, as policy change (in areas such as extractive industries) often impacts on indigenous peoples.

Group 2: Free, Prior and Informed Consent

10. The borrower will obtain the free, prior and informed consent of indigenous peoples for any activities impacting indigenous peoples, directly or indirectly – text changes suggested included changing 'using FPIC on to establish BCS' to 'the borrower/client will obtain the FPIC of indigenous peoples'
11. Text changes required must begin with the policy principles and continue throughout the safeguard requirements attachment.

12. In the safeguard requirements paragraph 8 a suggested explanatory note could read: 'free, prior and informed consent is a collective expression of indigenous peoples through their selected representatives after they have been provided with sufficient, easily accessible, relevant, timely, adequate and sufficient information provided in an atmosphere free from coercion or intimidation'. Detailed text can be provided on request.
13. The mandatory SPS (including the attachments and requirements detailed within) need to be supplemented with a strategy document including aspirational statements. As such a strategy is planned, it was requested that indigenous peoples are consulted on the development of this strategy paper as soon as possible, and that the timeframe for its development is widely disseminated.
14. The recommendation regarding the classification of a project (A, B, C, FI) was that a single categorization is used where the most serious consideration (IR, Env. or indigenous peoples) is used for the whole project. Specifically for indigenous peoples, the triggering of the policy occurs when indigenous peoples are present in the project area or project area of influence and all safeguard requirements are mandatory from that point onwards.
15. It was reiterated by the group that small technical assistance loans are not excluded from the policy requirements as they can potentially have a large influence on indigenous peoples through policy change
16. Explanation of the nature of information disclosure requirement in sub-paragraphs, then followed by requirements for certification of the presence of FPIC should be provided in paragraph 10

Discussion:

ADB stated that the Bank is listening on the recommendations regarding FPIC. They additionally stated that as a Bank owned by governments they need to listen to those governments also. The practice of FPICon and BCS and the requirements for obtaining of FPIC are, in their eyes, not that different. The level of common ground that they can see may mean that the terms employed may not be as important as the manner in which the provisions are implemented.

Response from indigenous participants is that the similarities exist but FPIC is not equivalent to FPICon and BCS. The weaker terms do not accurately reflect either the current state of international agreements regarding indigenous peoples nor do they reflect the conditions that indigenous peoples have been fighting for in development initiatives on indigenous peoples' lands.

The point was also made that commensurate institutions such as the World Bank may have used FPICon leading to BCS but this was done prior to the passing of the UN Declaration on the Rights of Indigenous Peoples. The ADB must recall that no Asian government voted against the Declaration, and only two abstained. The Declaration therefore represents an agreed consensus within Asian governments of the measures necessary to secure the rights of indigenous peoples.

It was also recommended by indigenous participants that all three policy frameworks (IR, environment and indigenous peoples) apply equally and the overlapping relationship between the three sections should be emphasized in a clear paragraph within the SPS.

A further clarification was also provided on the presentation of Group 1 – that the development of indigenous peoples' plans should include BOTH indigenous peoples and qualified professionals.

Group 3: Grievance mechanism

17. There should be a mandatory grievance mechanism established at project / local level with full and effective participation of indigenous peoples (this may serve the requirements of both the IR provisions and the indigenous peoples' requirements)
18. The grievance mechanism should have participation of indigenous people (who are identified by, and accountable to, the indigenous peoples' community)
19. The SPS should explicitly mention the higher level mechanisms available for use if the project level mechanism is found to be deficient
20. In the operations manual, there should also be specific mention of the monitoring role of the Resident Mission (to whom affected peoples can direct unresolved grievances)
21. There should be a mechanism to address non-project based concerns, ie. where affects are felt across borders, and where effects are felt after project is completed (on-going impacts from previous projects)
22. Funding mechanisms for the grievance mechanism needs to be further detailed
23. A further level of grievance mechanism should be established under this policy, or under the coming strategy document, at a regional or ADB level. This second level should be an independent panel, meeting regularly throughout the year, mandated to address any grievance arising from projects impacting on indigenous peoples and reporting directly to the Board.

[Discussion:

- Additional points made include the importance of accessibility, and the need for a secondary level of redress for more complex issues and complaints.
- Strong endorsement received from Robert May
- Further clarification sought by participants about the relationship between local grievance mechanisms and the Review Panel
- *ADB responded that where an indigenous mechanism of complaint or mediation exists then a grievance mechanism should rely on this, or work with it in some way*
- *Also, there is now a two step process for ADB, initially a problem-solving step and then a compliance step*

ADB requested a clarification – what is the position for projects in which there are a grievance mechanism already required because of the involuntary resettlement requirements, will there be two grievance mechanisms? This could lead to a confusing complexity of systems.

Clarification provided that almost all projects impacting indigenous peoples will trigger one of the other sets of requirements (either environment or involuntary resettlement) – and the IPP will contain the description of an agreed single mechanism. There should be no duplication.

Ram queried the cut-off point for use of the Special Project Facilitator, and the accountability mechanism of the ADB. ADB agreed that this was a concern but that it was the nature of the CRP and the Office of the Special Projects Facilitator.

Additional points were raised regarding the effectiveness of the grievance mechanism – that any established grievance mechanism, whether that the project level of the regional level, must have the necessary 'teeth', must have the required mandate and authority to enforce or effectively ensure the implementation of any ruling or judgement.

Immunity of the Bank was also discussed, and not fully clarified. ADB holds the view that the Bank (as an institution) is immune to all judicial processes. This view is not shared by indigenous participants.

Closing by Nessim Ahmed

- thank you for productive discussions
- provided ideas and suggestions, with constructive conversations
- particularly useful is to hear of the UN Declaration
- reviewed objectives, delivery processes, monitoring processes and other details of the policies
- key issues noted: definition and identification of indigenous peoples, FPIC about which they are listening and which needs to evolve, need to recognize collective rights, grievance mechanisms – one size does not fit all, flexibility is needed in the requirements for them, that redress does occur, and that such GM are accessible for indigenous peoples, the IPP and its preparation and formulation needs to include and allow for the ownership of indigenous peoples – these details are suggested for inclusion in further documents, disclosure and the need for timeliness and formats / languages that are accessible
- there is a strong need for balances to be struck and to be found – one such balance is between governments and indigenous peoples, another is procedural requirements and flexibility to accommodate different circumstances, the need to have universal policies that apply to all countries and to public and private, and the need to accommodate the reality of a diverse region such as this, the balance between the rights and responsibilities of ADB, the borrowers/clients and indigenous peoples and other affected peoples
- all comments received will be presented in matrices that will accompany the W-paper for a 30 day comment period in 2008
- formal comments are still requested via written input

Indigenous Peoples' Consultation with the Asian Development Bank

Day One, informal project-oriented discussions

Bangladesh case study from the Chittagong Hill Tracts

1. Free, Prior and Informed Consent (FPIC) must be obtained for any activity impacting on indigenous peoples is an essential aspect both of any safeguard framework intending to protect indigenous peoples' rights and of international law
2. This particular project indicates that the ADB can and has required that borrowers obtain the consent of indigenous peoples to activities impacting on them, and that such consent can and does improve the quality and outcomes of activities. Indeed, the only aspect of the project to cause difficulties was the single component that was not designed in partnership with indigenous peoples
3. Information disclosure requirements must include 'all relevant project documents' for projects impacting on indigenous peoples, as implied by 'free, prior and informed'
4. Further detail regarding the process of developing the IPP is required, ensuring that indigenous peoples lead the process of this planning, and that the IPP is mandatory across all funding mechanisms and funding forms used by the ADB
5. A grievance mechanism established to serve and protect the interests of indigenous peoples must be respectful of customary law, traditional decision making processes and mediation processes
6. Further, it should be provided that grievance mechanisms can be established on all such levels as deemed necessary by indigenous peoples, including project level and national level
7. Further, grievance mechanisms at all levels must be endowed with the appropriate mandate and authority to ensure that they are able to effectively address the grievances placed before them.
8. The full application of the policy should be triggered solely by the presence of indigenous peoples NOT by the severity of impact expected

NE India case study from Meghalaya

9. Free, Prior and Informed Consent (FPIC) must be obtained for any activity impacting on indigenous peoples is an essential aspect both of any safeguard framework intending to protect indigenous peoples' rights and of international law
10. The timing of the policy trigger requires clarity – at what point in ADB processes does screening occur?
11. For situations in which funding is provided from a variety of funding sources, both other public multilateral banks and private financing sources, the strongest policy applicable should be universally applied to all project components, with reference to the UNDRIP as the key framework for indigenous peoples' rights
12. A grievance mechanism established at the ADB level should specifically address restitution for past damages and for on-going affects from currently implemented projects.
13. Information disclosure requirements must include 'all relevant project documents' for projects impacting on indigenous peoples, as implied by 'free, prior and informed' and should include specific protections for any project in which customary or formal land tenure is affected.
14. The issue of ADB investment in non-democratic situations of internal colonialism should be addressed

Nepal

15. Free, Prior and Informed Consent (FPIC) must be obtained for any activity impacting on indigenous peoples is an essential aspect both of any safeguard framework intending to protect indigenous peoples' rights and of international law
16. The identity of indigenous peoples must be recognized according to both national and international law – principal criteria of self-determination

17. The SPS should include specific reference to international law, UNDRIP and ILO 169
18. Recognition of indigenous peoples' rights over lands and resources which may not be legally recognized must be specifically stated
19. The impact assessments (environmental and social) should be undertaken as independent studies and must be carried out with full involvement of indigenous peoples
20. Policy principles should also require equal access to service and benefit sharing resulting from project activities
21. Information disclosure requirements must include 'all relevant project documents' for projects impacting on indigenous peoples, as implied by 'free, prior and informed' and should be carried out with appropriate languages and in appropriate formats to ensure indigenous peoples can access the information
22. There should be established an independent and competent grievance mechanism with representation of indigenous peoples
23. Indigenous peoples' organizations should be represented on key project decision making bodies
24. Indigenous peoples' empowerment sub-projects should be essential elements within the indigenous peoples' development plan

Philippines

25. Free, Prior and Informed Consent (FPIC) must be obtained for any activity impacting on indigenous peoples is an essential aspect both of any safeguard framework intending to protect indigenous peoples' rights and of international law
26. Empowerment of political representation and capacity for meaningful participation in development initiatives for indigenous peoples should provide part of project design in the IPP
27. Protection of land rights must include recognition and protection of customary and traditional tenure **even if** government does not recognize
28. Past practice and work of the ADB, or work funded by the ADB, should be reviewed to correct past wrongs and provide restitution and redress for past damage (Article 28, UNDRIP)
29. The formulation of IPP's must occur with the active involvement of indigenous peoples
30. International legal instruments and laws must be referenced and applied where relevant, for instance the CBD voluntary guidelines for impact assessment
31. Self-determined development should be central to the policy framework

Indonesia

32. Free, Prior and Informed Consent (FPIC) must be obtained for any activity impacting on indigenous peoples is an essential aspect both of any safeguard framework intending to protect indigenous peoples' rights and of international law
33. Implementation difficulties at the project level require assistance and training for implementing agencies on what the requirements are for projects impacting on indigenous peoples
34. Measures should be taken to ensure the effective participation of women at all stages of a project cycle
35. Information disclosure should be more comprehensive in its requirements and provide detail also on the process of how such information disclosure is undertaken (ie. language, form, timing)

Additional

36. A grievance mechanism established to serve and protect the interests of indigenous peoples must be respectful of customary law, traditional decision making processes and mediation processes

37. Further, it is proposed that a grievance mechanism for indigenous peoples is established to assist the ADB's work in the region, an independent, accessible and effective mechanism for redress
38. Evaluation of projects should involve indigenous experts, and in particular planned future monitoring and review of the implementation of the new Safeguard Policy Statement (SPS) must include indigenous peoples