

INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURIDICOS PARA LOS PUEBLOS INDIGENAS

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10 CRITICAL POINTS

Comments on the Inter-American Development Bank's *Profile* of its Operational Policy on Indigenous Peoples

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In June of this year, the Inter-American Development Bank began on-site consultations with indigenous peoples regarding the *Profile* of its proposed Operational Policy on Indigenous Peoples. The Bank hopes to adopt this policy by February of 2005. According to the Bank's *Profile*, the final policy "should set out key general principles that form the basis for its more specific directives." In light of this objective, during the initial consultations about the *Profile* it seems appropriate to emphasize these general principles as they will form the basis for the language that will appear in the actual policy.¹

With this understanding, this document outlines a list of "10 Critical Points" that the Indian Law Resource Center believes the Bank must address in its consultations and in its final policy. The following is not meant to be an exhaustive discussion of all the matters that must be dealt with during the development of the policy. Nevertheless, we believe that these 10 critical points provide a good starting place for the commencement of consultations between indigenous peoples and the Bank. Once mutual understandings can be reached on these fundamental issues, it will be easier to reach agreement regarding the precise language that must appear in the policy in order to ensure full respect and protection for the rights and interests of indigenous peoples.

1. Rights to Lands, Territories, and Natural Resources

- 1.1 The policy must require that Bank staff and borrower countries recognize and respect indigenous peoples' rights to own, control, and manage the land, territories, and natural resources they have traditionally owned or otherwise occupied and used, as well

¹ According to the Bank, a draft of the actual *policy* will eventually be made available for comment, but the date of this release is uncertain. The hope is that the draft policy will be made public and open for comment by the end of October. For a complete explanation of the Bank's Consultation Plan as well as its Guide to Consultations see http://www.iadb.org/sds/ind/index_ind_e.htm.

as those they have otherwise acquired. The policy must require that Bank staff and borrowers take special measures to protect and respect these rights.

- 1.2 The policy must require that Bank staff and borrowers recognize and respect that indigenous lands, territories and resources include those of spiritual and cultural significance and that indigenous peoples' rights to their lands, territories and natural resources include rights over the total environment of the lands, air, waters, coastal seas, sea ice, flora, fauna, and all other surface and subsurface resources.
- 1.3 The policy must require that Bank staff and borrowers recognize and respect that under international law, indigenous peoples' customary rights to ownership of their lands, territories and natural resources arise from their own laws, values, customs and mores, and not the domestic laws of the States in which they live. These rights exist independent of national laws and regardless of whether the State has issued formal land title. Language in the final policy that permits Bank staff or the borrower to recognize these rights only to the extent that they are consistent with the legal framework of the country or its national legislation would be contrary to international law.
- 1.4 The policy must recognize the right of indigenous peoples to have their lands and territories delimited, demarcated, and titled by the borrower country in accordance with the customary laws, values, customs, and mores of the peoples concerned. The policy must require that the Bank refrain from supporting any project, operation or activity which may affect such indigenous lands, territories and natural resources until such delimitation, demarcation, and titling has taken place. The Bank should encourage and support borrower efforts aimed at delimiting, demarcating, and titling indigenous lands and territories with the free prior informed consent and full and effective participation of the affected indigenous peoples.
- 1.5 The policy must require that Bank staff and borrowers recognize and respect that indigenous peoples have: the right to receive benefits (economic and otherwise) derived from the exploitation of natural resources pertaining to their lands and territories; the right to measures that will avoid and mitigate adverse impacts to their lands, territories and natural resources; and the right to compensation for any damages or adverse impacts. The Bank and the borrower must recognize and respect the right of indigenous peoples to legal standing (juridical personality) and to fair and effective access to legal redress for grievances about these matters.

2. Right of Free Prior Informed Consent

- 2.1 The policy must require that free prior informed consent of indigenous peoples be obtained by Bank staff and the borrower prior to the approval and initiation of any IDB-assisted project, operation or activity that i) takes place on their lands and territories or involves their resources, or ii) does not take place on their lands, but which may significantly affect their lands, territories and resources or may affect their human rights.

- 2.2 The right of free prior informed consent refers to the right of indigenous peoples to forbid, control or authorize such activities. It is the right to say yes, yes with conditions, or no to the activities. It is not a substitute for the full recognition and protection by the Bank staff and borrower of indigenous peoples' rights to property, self-determination and other human rights.
- 2.3 The policy must provide that consent shall be obtained according to the customary laws, values and norms of the indigenous peoples concerned. The right of free prior informed consent is a collective right of indigenous peoples exercised through their indigenous governments and representatives in accordance with their own laws and customs. Indigenous individuals do not have a right, when acting as individuals, to authorize or veto any activity that may affect the collective rights of indigenous peoples.
- 2.4 The policy must articulate mechanisms to ensure that indigenous consent is "free", i.e. given without coercion, duress, fraud, bribery, or any threat or external manipulation; that it is given "prior" to any significant planning for the proposed activity has been completed, and before each decision-making stage of the planning and implementation; and that the consent is "informed", i.e. given only after the affected indigenous people has been provided with all relevant information related to proposed activities in appropriate languages and formats, including information regarding indigenous rights under domestic and international law, the likely and possible consequences of the proposed activities, and alternatives to the proposed activities.

3. Full and Effective Participation

- The policy must require that Bank staff and borrowers secure the full and effective participation of the respective indigenous community, its members, and its representative institutions and organizations throughout the full project, operation or activity cycle, including the initial planning and development through to the implementation, monitoring, and evaluation phases.

4. Self- Identification

- The Policy must include self-identification as the fundamental criterion for identifying indigenous peoples and determining when the policy applies. Indigenous peoples who have been displaced or otherwise pressured to leave their ancestral lands and territories must not be excluded from this policy.

5. Involuntary Resettlement

- In the final policy, involuntary resettlement of indigenous peoples must be strictly prohibited.

6. Uncontacted Peoples or Peoples in Voluntary Isolation

- The policy must require that Bank staff and borrowers recognize and respect that uncontacted peoples or indigenous peoples in voluntary isolation have the right to remain in that condition and to live freely and in accordance with their ancestral traditions. The policy must prohibit Bank staff and borrowers from engaging in IDB supported projects, operations, or activities that will result in forced contact with such peoples or otherwise violate their rights.

7. Parks and Protected Areas

- 7.1 The policy must require that the IDB refrain from supporting any project, operation or activity aimed at establishing a park or protected area located within indigenous lands and territories absent the recognition of the indigenous peoples' rights to own, control, and manage their land, territories, and natural resources and the right of free prior informed consent of the peoples concerned.
- 7.2 The policy must require that free prior informed consent and the full and effective participation of indigenous peoples be secured by Bank staff and borrowers in the development, implementation and evaluation of projects, operations and activities that are conducted within the bounds of existing parks or protected areas located within indigenous lands and territories (including efforts aimed at modifying the status of these existing parks and protected areas). The fact that parks or protected areas might overlap with indigenous lands and territories does not justify the derogation or limitation of indigenous peoples' rights to their lands, territories, and natural resources.

8. Baseline Studies

- 8.1 The policy must require that Bank staff, prior to approval of all IDB-assisted projects, operations, and activities affecting indigenous peoples, carry out mandatory baseline studies, in full consultation with the indigenous peoples concerned, in order to determine the indigenous peoples' priorities and concerns. These baseline studies should include environmental and social assessments that properly consider the cultural, social and economic value of indigenous peoples' resources and territories and include an assessment of the national and international legal frameworks that protect indigenous peoples' rights, especially those rights relating to land ownership, land tenure, and natural resources.

9. Broad Policy Application; Structural Adjustment

- The policy must apply to all Bank projects, operations and activities, and in particular, the policy's safeguard provisions must apply to structural adjustment lending.

10. Verifiable Operational Procedures

- 10.1 The policy must require the establishment of clear and binding conditions for the initial approval and continued support of projects, operations or activities. These conditions must stipulate that the IDB will not fund or support projects, operations, and activities that may affect indigenous peoples if they: a) undermine the borrower's obligations to uphold international environmental and human rights standards; b) fail to guarantee the full and effective participation of the indigenous peoples concerned; c) fail to secure the free prior informed consent of indigenous peoples; or d) violate other rights of indigenous peoples. The policy must further require that the Bank establish mechanisms for monitoring the borrower's continued compliance with these conditions and clear mechanisms to suspend or withdraw IDB funding and support should the borrower cease, at any time, to be in compliance.
- 10.2 The policy must include mandatory requirements for participatory monitoring and evaluation of all IDB projects, operations, and activities that may affect indigenous peoples. Funding for such monitoring must be provided.
- 10.3 The policy must require both the Bank and the borrower to define and apply effective and verifiable procedures and mechanisms to ensure that the participation and consent requirements of the policy are adhered to.
- 10.4 The policy must require that the borrower establish effective and verifiable mechanisms to review and specify not only how indigenous peoples will receive the benefits derived from exploitation of natural resources pertaining to their lands and territories, but also how affected indigenous peoples will secure mitigation, restoration, and/or compensation for adverse environmental, economic, social, cultural or spiritual impacts.
- 10.5 The policy should encourage fair and equal access for indigenous peoples to accountability mechanisms within the IDB. This includes access to complaint mechanisms that already exist (such as the Independent Investigation Mechanism) as well as access to new mechanisms which may need to be established to ensure that indigenous peoples can obtain prompt recourse when IDB-assisted projects, operations or activities result in the violation of their rights.