



Analysis of the Inter-American Development Bank's First-Ever Operational Policy on Indigenous Policy

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Introduction

The Inter-American Development Bank (IDB) approved its first ever Operational Policy on Indigenous Peoples on February 22, 2006. The policy contains some relatively important provisions. Most notably, the policy recognizes that indigenous peoples have collective rights, and that territorial and cultural integrity should be prioritized when the IDB finances development projects designed to benefit indigenous peoples.¹ Further, when the IDB finances projects designed to ‘benefit’ indigenous peoples, such as education or tourism projects etc., the policy stipulates that—depending on the circumstances—consultation should be carried out ‘with a view to reaching agreement or obtaining consent.’² The policy also specifies that the commercial development of indigenous peoples’ cultural resources and knowledge should be conditioned upon their prior agreement to such development, and on an equitable sharing of benefits.³ Finally, the new policy recognizes the precarious situation of uncontacted peoples and establishes that the Bank will only finance projects that respect the right of uncontacted peoples to ‘remain in said isolated condition and to live freely according to their culture.’⁴

These relatively positive provisions, however, are far outweighed by the deficiencies in the policy. The IDB claims that the intent of this new operational policy is to help safeguard the rights and interests of indigenous peoples from the adverse impacts of IDB-financed projects. The policy, however, contains several operational loopholes and exceptions that will likely allow the Bank and its borrowers to avoid complying with even a minimum set of restrictions. Further, the weak standards contained in the policy are inconsistent with protections guaranteed to indigenous people under international human rights law. As a whole, the policy is not likely to provide any meaningful safeguard protections that will help restrict the IDB and its borrowers from infringing on the rights and interests of indigenous peoples.

The IDB’s Operational Policy on Indigenous Peoples is divided into two sections. The first section discusses the proactive measures that the IDB should take when a project is designed to benefit indigenous peoples. The second section of the policy sets out the safeguards, or protective measures that the IDB should take to help protect indigenous peoples from adverse impacts. This latter section is arguably the most important section because the very purpose of an operational policy is to establish a minimum set of standards and restrictions that will help prevent and mitigate social and environmental harm. This analysis thus focuses exclusively on the safeguard section of the operational policy. The analysis first outlines the rights that indigenous peoples are afforded under international human rights law in order to provide a context against which to evaluate the bank’s operational policy. Against this context, the analysis then discusses some of the most problematic aspects of the policy: the limited scope of application; limited recognition of the right to free prior informed consent; lack of effective protection for all indigenous lands, territories, and natural resources; and lack of measures that guarantee meaningful indigenous input and participation.

¹ See Preamble, para. 2. The policy also notes in Section 4.4 (d) that the Bank will not finance projects that exclude indigenous peoples from project benefits on the basis of ethnicity.

² Section 4.2 (a)

³ Section 4.4 (e)

⁴ Section 4.4 (g)

I. Overview of International Human Rights Law With Regard to Indigenous People

Throughout the Americas indigenous peoples confront grave human rights problems. Many of the most egregious threats they face result from illegal land expropriation, large infrastructure projects, forced displacement, deforestation, and extractive industry projects that undermine their physical and cultural survival. Many of these problems stem from an inadequate recognition by states, corporations, and international financial institutions that indigenous peoples have the right to own, manage, and control their customary lands and natural resources. International human rights law, however, has progressively developed over the last three decades toward an explicit recognition that indigenous peoples have collective rights that must be upheld. The need to protect the special relationship that indigenous peoples have to their lands, territories, and natural resources has been specifically affirmed by international human rights instruments and the jurisprudence of the United Nations and the Organization of American States.

International Labor Organization Convention 169 on Indigenous and Tribal Peoples⁵—an international treaty that is specific to indigenous peoples—includes provisions that advance land and resource rights, cultural integrity, and non-discrimination in economic and social development for indigenous peoples. ILO Convention 169 also provides legal authority for the right of indigenous people to be consulted regarding decisions, including those related to development projects, which affect their lands and natural resources.⁶

The rights of indigenous peoples are also protected under general international human rights treaties. For example, The United Nations Human Rights Committee, which is the body responsible for interpreting and monitoring compliance with the Covenant on Civil and Political Rights, interpreted Article 27 of the Covenant to mean that the practices necessary for the cultural survival of an indigenous people, especially those related to the use of their customary land tenure systems, must be protected.⁷ Further, the Human Rights Committee determined that indigenous peoples' enjoyment of cultural rights may require states to take *positive legal measures of protection* to ensure effective participation in decisions that affect them.⁸ The Committee on the Elimination of Racial Discrimination (CERD) has reached similar conclusions. In its General Recommendation No. 23, CERD affirmed that the Convention against Racial Discrimination should oblige states to fulfill the principles of non-discrimination and equality by taking measures to 'recognize and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories, and resources.'⁹ The Committee on Economic Social and Cultural Rights, which monitors the UN Covenant on Economic Social and Cultural Rights, has reprimanded states through its periodic reporting procedures for failing to adequately protect the land and resource rights of indigenous peoples by granting concessions to private corporations without the consent of the affected peoples.¹⁰

⁵ The ILO signatories in the Inter-American System include: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, Venezuela.

⁶ In general see Articles 4;6;7;8;11;12;13;14; 15; 16

⁷ See UNHRC General Comment No. 23: The rights of minorities (Art. 27) 08/04/94.

CCPR/C/21/Rev.1/Add.5 para. 7

⁸ Ibid.

⁹ See CERD General Comment 23 Concerning Rights of Indigenous Peoples (1997), para. 5

¹⁰ For example, in its 2004 Concluding Observations on Ecuador, the Committee strongly urged "the State party to ensure that indigenous people participate in decisions affecting their lives. The Committee particularly requests that the State party consult and seek the consent of the indigenous peoples concerned prior to the

The Inter-American human rights system has developed a body of rulings that further affirms the rights of indigenous peoples. In the *Awes Tingni v. Nicaragua* case, the Mayagna Sumo community alleged that Nicaragua violated its state obligations under the American Convention on Human Rights because it had wrongfully granted a logging concession to a Korean company without its consent. In ruling on the case, the Inter-American Court on Human Rights found that “By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.”¹¹

The Inter-American Court cited the special and complex relationship that indigenous peoples have with their lands and natural resources in the *Awes Tingni* case, and ruled that indigenous peoples have collective rights to their lands and resources which arise from their own customs and traditions. The Court specified that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.”¹² The decision rendered by the Inter-American Court concluded that indigenous peoples have collective rights, as a matter of international law, to the lands and natural resources they have traditionally used and occupied, and that such rights exist independent of national law. The legal principles affirmed in the *Awes Tingni* case, and other jurisprudence rendered by the Inter-American human rights bodies, are binding on Nicaragua and should be upheld by all states that have ratified the American Convention on Human Rights.

In addition, it can be argued that a growing body of decisions rendered by the Inter-American Commission on Human Rights also protects the property rights of indigenous peoples. In the *Mary and Carrie Dann v. United States* case, the petitioners alleged that the attempts of the United States to unilaterally ‘extinguish’ Western Shoshone aboriginal land rights violated their rights to equality, property, and judicial protection among others. Based on an interpretation of evolving legal norms,¹³ including the principles upheld in the American Draft Declaration on the Rights of Indigenous Peoples,¹⁴ the Commission concluded that indigenous peoples’ human rights includes the need for states to recognize aboriginal title, and “to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.”¹⁵ The Commission also found that the American Declaration’s provisions on fair trial and property oblige a member state to ensure that determination of indigenous land rights be based upon a process of fully informed and mutual

implementation of natural resources-extracting projects and on public policy affecting them.” 7/05/2004 UN Doc E/c.12/1/Add.100, para. 35.

¹¹ Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua, Inter-American Court on Human Rights, August 31, 2001 Judgement, para 149.

¹² Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua, Inter-American Court on Human Rights, August 31, 2001 Judgement, para. 151.

¹³ Case of Mary and Carrie Dann v. United States, Inter-American Commission on Human Final Report paras. 124 & 125

¹⁴ Ibid. paras. 129 & 131

¹⁵ Ibid. para. 130

consent of the whole community.¹⁶ In the *Maya Indigenous Communities v. Belize* case, the Commission found that when the government granted oil exploration and logging concessions without effective consultation with, and the informed consent, of the Maya people, it violated the communities' human rights.¹⁷

Taken together as a whole, this progressive development of international human rights law and jurisprudence has established a set of general international legal principles¹⁸ applicable in the context of indigenous peoples. These principles include the right of indigenous peoples to exercise legal ownership over their customary lands and natural resources. This right arises from indigenous peoples' culture, customs, and traditional land tenure systems and is a prerequisite for exercising other collective rights, including the right of self-government and self-determination. International human rights law, grounded in these legal principles, thus limits and conditions the actions of states in authorizing development projects or resource extraction projects within the traditional territories of indigenous peoples. In principal, the IDB, as a public multilateral financial institution composed of member states, should be constrained by international human rights norms and standards as well.

II. Scope of Application of the Operational Policy Is Too Narrow to Comply with International Law

The safeguard section of the IDB's operational policy does not require the borrower to take special measures for all projects that impact indigenous peoples. Rather, the policy specifies that the borrower¹⁹ (either the government or corporation) should consider the need for protective measures depending on the degree and nature of harm that may potentially be inflicted on indigenous peoples. The policy specifies two general scenarios in which special measures should apply: 1) when a project or operation will lead to adverse impacts, or 2) when a project will lead to *significant* adverse impacts that pose 'high risks' for indigenous peoples.²⁰ Such a restrictive scope of application opens up the potential for borrowers to

¹⁶ Ibid. para. 140

¹⁷ Case of the Maya Indigenous Communities v. Belize, Inter-American Commission on Human Rights Final Report October 2004, paras. 141 & 144

¹⁸ International legal experts have also contributed to the development of these evolving legal principles. UN Special Rapporteur Erica Daes, for example, has specified that "[T]he developments during the past two decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories. Indigenous peoples' permanent sovereignty over natural resources might properly be described as a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources. Indigenous peoples, if deprived of the natural resources pertaining to their lands and territories, would be deprived of meaningful economic and political self-determination, self-development, and, in many situations, would be effectively deprived of their cultures and the enjoyment of other human rights."

Final report of the UN Special Rapporteur, Erica-Irene A. Daes. Indigenous peoples' permanent sovereignty over natural resources. E/CN.4/Sub.2/2004/30 July 13, 2004 (paras. 39; 40; 58).

¹⁹ This analysis uses the word borrower to refer to either the country or private corporation that is receiving IDB funds for a given project or operation and to whom this policy applies to. The IDB policy uses the term 'project proponent'. In this analysis, the term 'borrower' is synonymous with the IDB's use of the term 'project proponent.'

²⁰ Section 4.4(a)(i)(ii) and Section 4.4 (a)(iii)

inconsistently or unreliably apply protective measures based on their own subjective criteria and discretion. This methodology stands in direct contravention of indigenous peoples' guaranteed rights under international human rights law.

Article 6 of the ILO Convention 169 specifically requires that indigenous peoples be consulted through appropriate procedures whenever administrative or legislative measures are being considered that will directly affect them. Article 7 of the Convention articulates the right of indigenous peoples to determine and pursue their own priorities in the process of development as it affects their lives and the lands they occupy, and to exercise control over their own social, economic, and cultural development. Article 7 specifically states that indigenous peoples have the right to “participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.” When these articles are read together, along with other international human rights norms that protect the rights of indigenous peoples to cultural integrity and property, they protect the right of indigenous peoples to some measure of self-government. The rights of indigenous peoples to self-government and to participate in *all* decisions that affect them are not limited to only those circumstances in which the impacts will be adverse, or will pose significant high risk impacts. Even the World Bank’s Operational Policy on Indigenous Peoples (OP 4.10) guarantees that “for **all projects** that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in *broad community support* to the project by the affected Indigenous Peoples.”²¹ Thus, the IDB’s policy clearly falls below international law standards as well as practices applied by the World Bank. The correct standard would be for the IDB’s policy to require that its borrowers take special measures for **all** projects that directly impact indigenous peoples, not just those with significant adverse impacts.

The IDB’s operational policy essentially establishes an artificial categorization system that will allow borrowers to consider applying special safeguards only in extreme cases. This is particularly true because the borrower decides when to apply safeguard measures based on its own criteria, rather than following accepted international human rights standards or a bank-imposed set of criteria. The borrower’s discretion to define what it considers to be an ‘adverse’ or ‘significant adverse’ impact, and to determine whether such impacts pose ‘high risks’ to indigenous peoples creates a strong bias since borrowers are likely to define these terms based on their own interests rather than on legally recognized rights favorable to indigenous peoples.

III. The Operational Policy Undermines Indigenous People’s Right to Free Prior Informed Consent

As described in section one, indigenous peoples have collective rights as a matter of international law to the lands and natural resources they have traditionally used and occupied. As an incident of their property rights, and their rights to self-determination and self government, indigenous peoples have the right to give or withhold their free prior and informed consent to activities affecting these lands and natural resources. The IDB’s

²¹ World Bank Operational Policy on Indigenous People (O.P. 4.10), July 2005, para. 1

operational policy, however, fails to acknowledge or protect this right. Instead, the IDB merely advances the following suggested safeguard measures:

1) If the Bank Supports a Project with Adverse Impacts, then the Borrower should:

- Prepare a socio-cultural evaluation
- Implement a socio-culturally appropriate and duly documented consultation and good faith negotiation process
- Incorporate measures for mitigation, restoration, and or compensation²²

2) If the Bank Proceeds with a Project with *Significant* Adverse Impacts with *High Risks*, the Borrower should also:

- Provide evidence of agreements reached with affected indigenous peoples if the Bank determines that such agreement is needed to ensure the ‘socio-cultural’ viability of the project.²³

Based on the categorizations the operational policy makes, as reflected above, the IDB does not require in most cases that indigenous peoples agree in order for a project to go forward, but simply that they be part of a consultation and good faith negotiation *process*. The operational policy does not specify that the negotiation *process* is required to result in any particular result or outcome. In contrast, for example, the International Finance Corporation’s²⁴ Performance Standard No. 7 on Indigenous Peoples : requires that when a client proposes to locate a project on, or commercially develop natural resources located within, traditional or customary lands under use, and adverse impacts can be expected, “*the client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and the **successful outcome** of the negotiation.*”²⁵ Thus, the IDB’s operational policy merely bestows indigenous peoples with a passive right to be consulted and not an active right that allows indigenous peoples to determine whether or not the project is allowed to go forward. In addition, the criterion that the IDB will use to determine what is considered to be a fair and equitable consultation and a ‘good faith’ negotiation process is not defined in the policy.

Furthermore, the implementation section of the operational policy includes the following caveat: “As an exception, when the potentially affected indigenous peoples **show no interest in taking part in the consultation process**, the project proponents may satisfy this requirement by presenting evidence of the following: its good faith efforts to consult the affected peoples; the fact that there are no enabling conditions to carry out the consultation along with an analysis of the reasons and circumstances for this situation; and the basis for both and the alternative means used to identify necessary and socio-culturally appropriate mitigation measures.”²⁶

This caveat could render most of the policy meaningless. Indigenous peoples sometimes choose to express their opposition to a proposed project in the form of non-engagement, especially if they feel that the conditions underpinning the consultations are unfair and discriminatory. The “show no interest” provision could easily be invoked by borrowers to avoid complying with the consultation requirement. Logically, it would also seem that if the borrowers did not need to consult with the affected peoples, they would also

²² Sections 4.4 (a)(ii) and 5.3(b)

²³ Sections 4.4(a)(iii) and 5.3(c)

²⁴ The International Finance Corporation is a World Bank entity that lends to private actors.

²⁵ International Finance Corporation Performance Standard No. 7 on Indigenous Peoples, April 2006, para. 13

²⁶ IDB Operational Policy on Indigenous Peoples Footnote 16

not need to conclude a good faith negotiation process if the project is expected to result in adverse impacts. Such loopholes could conveniently favor the borrowers and undermine the rights and interests of indigenous peoples.

Another detrimental caveat written into the policy deals with those scenarios in which there will be projects with *significant* adverse impacts that also pose ‘high risks’. In such situations, the borrower needs to provide evidence of agreement with affected indigenous peoples only if the Bank believes that such agreement ‘*is necessary for the socio-cultural viability*’ of the project. The policy, however does not define how the Bank will interpret ‘socio-cultural viability.’²⁷ As a result, for those projects that will result in significant adverse impacts, agreements would theoretically only be obtained from indigenous peoples based on whether or not the Bank thinks that such agreements are needed. The input and opinions of indigenous peoples on this matter would not necessarily influence the decision-making process about when and why agreements are required.

The policy also fails to provide specific procedures that establish what actions the Bank and its borrowers need to take if an indigenous community decides to rescind its agreement, especially when the original conditions that gave rise to a community providing its consent are significantly altered. In the rare cases in which indigenous agreement is a precondition of project implementation, the policy also lacks a clear mechanism that would allow indigenous peoples to dispute a situation in which they feel that they have withheld their agreement, yet the borrower and Bank determine otherwise.

There are also unclear and contradictory requirements regarding sequencing. In order to adequately effectuate a right to consent/agreement, consultation, and or negotiation, such procedures must occur prior to the project being initiated and must be based on timely access to all relevant information about impacts and risks. The policy’s implementation section states that agreements that are reached between the borrower and affected peoples- for projects with significant adverse impacts- must be provided by the borrower no later than the day that the Board of Executive Directors will consider the operation.²⁸ Presumably, this condition is included to help ensure that indigenous agreement is obtained *before* the project is approved. However, footnote 18 significantly undermines this condition by allowing the following exceptions: 1) evidence of agreement may be presented before the first disbursement for operations with significantly adverse impacts (if the borrower shows that indigenous peoples agree that additional rounds of negotiations are needed to finalize the agreements) and 2) for operations with investments not specified a priori (as long as there is a *plan* for consultation and negotiation that is agreed on with affected indigenous peoples in the early stages of project processing).²⁹ These exceptions eviscerate the prior agreement condition for significantly adverse projects and thereby undermine the ability of indigenous peoples to prevent projects with irreparable harm from occurring in the first place.

Finally, the policy appears to be based on the presumption that a project will proceed, and therefore the negotiation process will be focused exclusively on determining mitigation and compensation measures for damages suffered.³⁰ The policy does not envision a negotiation

²⁷ Section 4.4 (a)(iii)

²⁸ Section 5.3(c)

²⁹ IDB Operational Policy on Indigenous People Footnote 18

³⁰ The implementation section of the policy, V(5.3(b)(i) states that the borrower will be responsible for implementing consultation and good faith negotiation processes with the affected indigenous peoples in relation to project design, analysis of alternatives, preparation, due diligence, and execution. The very next sentence in

process that would result in the determination of the terms upon which project design and implementation must be conditioned—if the affected peoples agree to the project—including equitable sharing of any commercial benefits derived from the project. In sum, rather than recognizing the right of indigenous peoples to give or withhold their free prior informed consent, or to give their consent with conditions, the IDB policy establishes a hollow process that is not likely to guarantee any specific protections for indigenous peoples.

IV. Special Safeguard Measures for Projects that Impact Indigenous Territories, Lands and Resources Fail to Meet International Legal Standards

The failure of the IDB to meaningfully recognize indigenous peoples' right to free prior informed consent is especially problematic in the context of projects that impact indigenous lands, territories, and natural resources. With regard to the property rights of indigenous peoples, international human rights law imposes extremely high substantive and procedural constraints on states' ability to authorize natural resource extraction without the consent of indigenous peoples affected. States must ensure recognition of the particular and collective interest that indigenous peoples have in the occupation and use of their traditional lands and resources, and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation. ILO Convention 169 specifically mandates that indigenous peoples are to have a say in any resource exploration or extraction on their lands and to benefit from those activities.

The IDB's operational policy does not adequately require that the borrower consider all of the varied interests that indigenous peoples have in their lands, territories, and resources. The policy only calls for the application of special safeguard measures if an IDB project or operation will impact the '*legal status, possession, or management* of territories, land or natural resources traditionally occupied or used by indigenous peoples or their cultural resources'. The 'special measures' that should be 'triggered' are differentiated in the following manner:

- 1) If a project impacts the *legal status, possession, or management* of indigenous territories, land, and natural resources:**
 - Respect for rights recognized in applicable legal norms³¹
- 2) If a project deals with natural resource extraction and management, or the management of protected areas:**
 - Prior consultation mechanisms
 - Mechanisms for the participation of indigenous peoples in the utilization, administration, and management of these resources
 - Fair compensation for damages suffered
 - Participation in benefits, whenever possible³²

this section, however, contradicts this; the sentence states that only measures regarding mitigation, restoration, and compensation must be included in the loan contract. Since the loan contract is the only document that binds the borrower, the outcomes of the negotiation are only meaningful with regard to mitigation and compensation plans, but not necessarily with regard to other topics discussed during the negotiations.

³¹ Section 4.4 (b)

³² Section 4.4 (b)

3) If a project will adversely impact indigenous cultural and knowledge resources:

- Bank operations, *when relevant*, will use a consultation and good faith negotiation process to identify the potential risks and impacts, and to design appropriate measures
- In cases of the commercial development of indigenous cultural and knowledge resources, the Bank will require prior agreement by the affected peoples and provisions for equitable participation in the benefits derived from such commercial development.³³

This list of special circumstances and measures that are supposedly triggered if a project will impact indigenous lands and resources is fundamentally flawed. In practical terms, the language used is vague, inconsistent, and contradictory and does not specify whether the Bank or the Borrower will bear the responsibility for applying special safeguard measures. Substantively, the list is virtually meaningless. First, the special considerations outlined above apply only when a project affects the legal status, possession, or management of lands, territories, and natural resources; they do not apply when the project affects the occupancy or use of indigenous lands and resources. This may jeopardize indigenous peoples' multiple and varied forms of attachments and relationships to their traditional lands, territories, and resources. For example, special safeguard measures might not apply equally to lands to which indigenous peoples lack legal title but that they use for fishing and hunting or for spiritual and cultural purposes.

Second, the policy does not stipulate that indigenous peoples' customary land and resource rights must be fully recognized and protected, nor that free prior informed consent—or agreement—is required for projects that will impact those rights and interests. The operational policy states that 'respect for indigenous rights recognized in international norms'³⁴ will be considered, but it is not clear what this means. The IDB defines applicable norms³⁵ as the combination of norms that protect indigenous rights, and which originate in national legislation; applicable international norms in force for each country (including the corresponding international jurisprudence of the Inter-American Court of Human Rights); or in the indigenous internal, customary rights and juridical systems.³⁶ Although mention of international norms and indigenous customary law is an important step forward, the operational policy nevertheless states that 'the bank will take into account respect for the rights of indigenous peoples and individuals established in the applicable legal norms *according to their relevance to Bank operations.*'³⁹ This is yet another exception that will likely allow the Bank to subjectively determine when respect for indigenous peoples' land and resource rights is required and to what extent. The policy fails to include provisions that stipulate that before a project that will impact indigenous lands and resources can proceed, prior resolution of and adequate guarantees for indigenous peoples' rights to lands, territories, and resources must first be implemented.

Third, with respect to projects that entail natural resource extraction or that deal with protected areas, the operational policy merely allows for prior consultation 'mechanisms' and

³³ Section 4.4 (e)

³⁴ Section 1.2 and Section 4.4

³⁵ Section 1.2

³⁶ It should be noted that in Section 1.2, the policy states that "indigenous juridical systems will be taken into account according to the rules for their recognition established in the legislation of each country. In the absence of such rules these systems will be recognized whenever they are consistent with national legislation and do not contradict fundamental rights established in national legislation and in international norms." The operational policy thus suggests that the IDB may determine that national legislation trumps other sources of law, including indigenous peoples' customary laws.

‘mechanisms for participation.’³⁷ The policy does state that indigenous peoples should receive just compensation for damages suffered and ‘whenever’ possible participate in project benefits³⁸, but it does not require equitable benefit sharing derived from the commercial development of indigenous peoples’ natural resources. The lack of strong, binding operational language allows broad discretion and will thus not likely help prevent potential abuse, manipulation, and expropriation of indigenous lands and natural resources for commercialization or conservation purposes. Such loopholes undermine indigenous economic self-sufficiency and the potential for indigenous peoples to exercise their rights to self-governance.

The provisions related to projects that impact the cultural resources and traditional knowledge of indigenous peoples provide somewhat stronger protections than those regarding lands and natural resources. These provisions explicitly state that the Bank will require the prior agreement of indigenous peoples when their cultural and knowledge resources are to be commercially developed, and indigenous peoples should receive equitable benefits.³⁹

V . Implementation Measures Fail to Guarantee Indigenous Input & Participation

The implementation provisions included in the IDB’s operational policy are highly problematic because they fail to provide sufficient guarantees for indigenous participation and input at all stages of a proposed project. As mentioned above, international human rights law affirms principles that protect indigenous peoples’ right to meaningfully participate in decisions that affect them, especially those that impact their lands and natural resources. Meaningful participation includes influencing the decision-making process. Indigenous peoples, at a minimum, should be entitled to full and effective consultation and participation throughout the planning, design, implementation, and evaluation of a project prior to the Bank’s decision to proceed with a project.

The IDB policy, however, mentions indigenous participation only twice. During the programming and identification stage of a proposed project, the Bank performs a technical review in which it assesses what types of impacts a project may have for indigenous peoples, and depending on the nature and scale of those impacts, determines whether a socio-cultural analysis and/or consultation and good faith negotiation process will be needed.⁴⁰ The implementation section states that the Bank will conduct the technical review ‘taking into account the perspectives of indigenous peoples.’⁴¹ It later states, however, that the technical review will rely only on inputs from indigenous peoples who might be affected ‘*whenever possible*.’⁴² As in other instances the Bank—apparently without written standards—is entitled to decide when it is “impossible” to obtain or use indigenous inputs. This is particularly problematic because without indigenous input and participation, the Bank may

³⁹ Section 4.4 (c)

⁴⁰ Section 4.4 (b)

⁴¹ Section 4.4 (b)

⁴² Section 4.4 (e)

³⁹ Section 4.4 (e)

⁴⁰ Section 5.3 (a)

⁴¹ Section 5.3 (a)

⁴² Section 5.3 (a)

underestimate or misrepresent what the true impacts will be, and may therefore eviscerate indigenous peoples' right to provide their agreement.

The policy also specifies that the Bank will verify that the borrower will 'fulfill *the measures agreed* to meet the requirements of the policy with respect to each project, including socioculturally appropriate mechanisms for the participation of affected indigenous peoples in the monitoring and evaluation of *those measures*.'⁴³ It can be reasonably assumed that the measures that are needed to meet the requirements of the policy will be agreed to by the Bank and the borrower only. Indigenous peoples will thus be limited to participating in monitoring and evaluating only the measures that the Bank and borrower think are appropriate.

In general, the operational policy is plagued with a lack of strong, binding operational language that clearly establishes what the Bank is responsible for. The technical review, for example, is supposed to be conducted by the 'responsible Bank division.'⁴⁴ Affected indigenous peoples might reasonably wonder what division this refers to and what the qualifications of its staff are. In addition, the operational policy does not specify what documents⁴⁵ will be produced by the Bank to ensure and measure compliance with the policy. A lack of specific requirements regarding requisite documentation, and whether or not such information is to be disclosed to affected indigenous peoples and when, would undermine any consultation or negotiation process conducted with affected communities. The policy also fails to clearly and explicitly state when the Bank will refrain from proceeding with a project. Only in the provisions regarding uncontacted peoples does the policy state that the Bank will only finance projects that respect the right of these peoples to remain in said isolated condition and to live freely according to their culture. Without a strong articulation of the responsibilities of the Bank and the sequencing that condition when such responsibilities should be fulfilled, the operational policy lacks meaningful and verifiable procedural protections for indigenous peoples.

VI. Conclusion

The Inter-American Development Bank's Operational Policy on Indigenous includes provisions that establish some limited safeguards for indigenous rights. The policy establishes that these safeguards should apply to Bank-supported operations and activities, including non-financial products (such as structural adjustment loans).⁴⁶ The bulk of the policy, however, fails to provide meaningful protections for indigenous peoples. The policy

⁴³ Section 5.3 (d)

⁴⁴ Section 5.3(a)

⁴⁵ In contrast, the World Bank Operational Policy on Indigenous Peoples (OP 4.10) references many different types of instruments or documents that may need to be produced for project preparation depending on the circumstances and nature of the project. Such instruments/documents may include: an Indigenous Peoples Plan; Resettlement Action Plan; Process Framework for Parks and Protected Areas; and an Indigenous Peoples Planning Framework. The relevant documents/instruments needed are to be made available to affected indigenous communities at an accessible place and in a culturally appropriate form, manner, and language and should be appropriately reflected in the project design. If these criterion are met and approved by the Bank, the documents then serve as the basis for a full project appraisal. The loan agreement provides for the borrower's obligation to implement all of the relevant instruments/documents. Upon the completion of the project, an Implementation Completion Report is conducted to evaluate project compliance with OP 4.10 (See Bank Procedures 4.10).

Detailed disclosure requirements are not included in the IDB's Operational Policy on Indigenous Peoples.

⁴⁶ Section 3.1

is inconsistent with international human rights law, and it specifically fails to recognize and respect the full range of indigenous peoples' rights and interests to their customary lands, territories, and natural resources. Further, it fails to recognize the right of indigenous peoples to free prior and informed consent and the need to apply consent for all projects that affect indigenous peoples. The policy includes numerous caveats that allow the Borrower to avoid complying with even a minimum standard of consultation. In cases where the borrower should implement a good faith negotiation process, the emphasis is on mitigation and compensation measures rather than the prevention of irreparable harm. The policy uses vague, contradictory, and inconsistent language. As such it provides little to no meaningful restrictions on Bank activities. And finally, the policy fails to provide effective and meaningful measures for indigenous peoples to provide input and participation throughout the project cycle.