

INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

www.indianlaw.org

MAIN OFFICE
602 North Ewing Street, Helena, Montana 59601
(406) 449-2006 | mt@indianlaw.org



WASHINGTON OFFICE
601 E Street, S.E., Washington, D.C. 20003
(202) 547-2800 | dcoffice@indianlaw.org

ROBERT T. COULTER, ESQ.
Executive Director
JANA L. WALKER, ESQ.
Admitted only in AZ, DC, NM
CHRISTOPHER T. FOLEY, ESQ.
Admitted only in PA

ARMSTRONG A. WIGGINS
Director, Washington Office
LEONARDO A. CRIPPA, ESQ.
Admitted only in Argentina

November 21, 2018

Luis Alberto Moreno

President
Inter-American Development Bank
1300 New York Avenue, NW
Washington, D.C. 20577

RE: Review and Update of the Operational Policy on Indigenous Peoples

Distinguished President Moreno,

The purpose of this letter is to express the concerns of the Indian Law Resource Center (Center), together with the undersigned indigenous organizations from the Americas and the indigenous communities affected by the Mareña Renovables Wind Power Project in Mexico (Mareña Project) financed by the Inter-American Development Bank (I.D.B.), with respect to the review and update of the OP-765 Operational Policy on Indigenous Peoples (Indigenous Policy). At the same time, we would like to express our interest in contributing our point of view with regards to the policy's shortcomings given its importance for the wellbeing of our communities and the environment upon which they depend.

The undersigned indigenous organizations and the Center represent indigenous communities throughout the region and/or provide legal assistance or other types of aid free of charge. For more than two years, we have played a key role—rightly so—in the creation of the I.D.B. Indigenous Policy, which was approved by the Board of Directors (Board) in 2006.¹ Moreover, many of our representatives served on the then operational Indigenous Advisory Council, a body created by the I.D.B. with the purpose of ensuring indigenous participation in the creation of the policy.²

In our opinion, instead of being satisfied with the Management's limited internal review of the Indigenous Policy, the I.D.B. should carry out a consultation process with the participation of the indigenous peoples and communities affected by its projects in a manner similar to what was done

¹ Política Operativa sobre Pueblos Indígenas (OP-765), I.D.B. Doc. No. GN2386-8 (Feb. 22, 2006).

² B.I.D., Unidad de Pueblos Indígenas y Desarrollo Comunitario, *Criterio de Elegibilidad y Selección del Consejo Asesor Indígena*, Agos. 2004 (en archivos con el Centro).

under former President Enrique V. Iglesias to produce this very policy. We believe that the Indigenous Policy does not meet current international legal standards regarding the collective rights of indigenous peoples nor does it align with the safeguard measures approved in 2016 by the World Bank's Board for its new policy on indigenous peoples.

In 2017, the I.D.B. Board approved, with no objections, the recommendations made by the Independent Consultation and Investigation Mechanism (I.C.I.M.) regarding the Mareña Project, including one regarding the review and update of the Indigenous Policy. The I.C.I.M. highlighted that “contrary to other policies, the language of the [Indigenous Policy] does not offer clear guidance for its application.”³ Because of this, the Board ordered Management to ensure that the “institutional and normative framework of the projects affecting indigenous peoples are based on the best international practices allowing the Bank to work most effectively.”⁴

Please note that during the Ninth General Capital Increase, the I.D.B.'s Governors Assembly committed to “ensure that risk management practices and capacities meet the standards set by international best practices.”⁵ The Office of Evaluation and Oversight agrees with this commitment.⁶ Moreover, in the context of the Overview Framework of Cancun Declaration of 2010, the I.D.B. Governors requested that the Board adopt “a revised set of social safeguards in accordance with international best practices.”⁷ While in 2011 the Independent Advisory Group suggested postponing the policy review until other institutions concluded their review processes,⁸ it must be noted that the World Bank and the International Finance Corporation (I.F.C.) concluded their processes in 2016 and 2012, respectively.

Unfortunately, the I.D.B. Management has not made any effort to consult with indigenous peoples and experts on indigenous rights regarding the Indigenous Policy's shortcomings. Other public sector financial institutions, like the World Bank and the I.F.C., did, in fact, ensure indigenous people's participation in the review process of their respective indigenous policies. For example, in 2012, the World Bank's Board ordered a search for diverse perspectives from a large and varied group of interested indigenous individuals, including representatives of indigenous peoples, community leaders affected by the bank-financed projects and indigenous organizations from civil society at the local, national and international levels that were dedicated to advocacy and legal defense.⁹ The consultation was carried out in three phases over the course of about four years, which included a considerable number of in-person meetings with indigenous peoples around the world.¹⁰

³ M.I.C.I., *Informe de Verificación de la Observancia: Proyecto Eólico Mareña Renovables*, Informe No. ME-MICI002-2012, Sept. 14, 2016, pág. 71 (en archivos con el Centro).

⁴ M.I.C.I., *Notificación a Leonardo A. Crippa sobre Decisión Final del Directorio Ejecutivo en relación al Informe de Verificación de la Observancia del “Proyecto Eólico Mareña Renovables*, Sept. 14, 2016 (en archivos con el Centro).

⁵ Reunión Anual de Asamblea de Gobernadores del B.I.D., *Declaración de Cancún*, Doc. AB-2728, Mar. 21, 2010, párr. 4(g).

⁶ Oficina de Evaluación y Supervisión, *Evaluación de Salvaguardias Ambientales y Sociales*, Sept., 2017, párr. 1(5).

⁷ Asamblea de Gobernadores del B.I.D., *Informe sobre el Noveno Aumento General de Recursos del Banco Interamericano de Desarrollo*, Doc. AB-2764, Mayo 21, 2010, pág. 36.

⁸ Grupo Asesor Independiente sobre Sostenibilidad, *Informe Final al Banco Interamericano de Desarrollo*, Ene., 2011, pág. 18.

⁹ Banco Mundial, *The World Bank's Safeguard Policies, Proposed Review and Update, Approach Paper*, Oct. 10, 2012, párr. 44.

¹⁰ Banco Mundial, *World Bank Safeguards Review and Update, Dialogue with Indigenous Peoples – October 2013-March 2014*, pág. 1, https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/final_summary_dialogue_with_ip_october_2013-march_2014.pdf (visita de Agos. 28, 2018).

The I.F.C. made similar efforts for approximately three years to review and update Performance Standard 7 Indigenous Peoples.¹¹ Additionally, these institutions held meetings with experts regarding the issue of free, prior, and informed consent.¹²

1. Non-compliance with I.C.I.M.'s recommendation

The actions taken by the Management to comply with this recommendation in particular fall short, contradict the Indigenous Policy and do not meet the standards of I.D.B. practice within the framework of this policy's creation. Rather than review this policy in light of applicable and relevant international standards for bank-financed projects that affect indigenous peoples, the Management decided to simply conduct a "preliminary gap analysis"¹³ by comparing it with the World Bank's 2016 policy on indigenous peoples. These actions in no way meet the definition of an exhaustive, substantive process of reviewing and updating the I.D.B.'s Indigenous Policy.

It is necessary to highlight that neither the Board nor I.C.I.M. recommended that the Management conduct the preliminary gap analysis mentioned above. We stress that both bodies asked for a "review and update of the policy with the goal of strengthening the management capacity [of the I.D.B.] in this area."¹⁴ To our surprise, the Management believed that the implementation of this recommendation was concluded because—by their measures—it completed the preliminary analysis mentioned previously and participated in World Bank workshops regarding the implementation of their 2016 policy, including their policy on indigenous peoples.¹⁵

By reducing the review and update of the Indigenous Policy to a mere "preliminary gap analysis," the Management ignored all best practices and international standards that were developed after the Board adopted this policy in 2006. These developments include, but are not limited to, the American Declaration on the Rights of Indigenous Peoples (the American Declaration) of the Organization of American States (O.A.S.) in 2016,¹⁶ the I.F.C.'s Guide to Human Rights Impact Assessment and Management of 2010,¹⁷ the United Nations' Declaration on the Rights of Indigenous Peoples of 2007 (U.N. Declaration)¹⁸ and nine key decisions adopted by the Inter-American Court of Human Rights (Inter-American Court) concerning indigenous peoples and projects in their

¹¹ Véase, C.F.I., *Sustainability Framework – 2012 Edition*, https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/ifcsustainabilityframework_2012 (visita de Agos. 28, 2018).

¹² Véase, Banco Mundial, *World Bank's Safeguard Policies Review and Update - Expert Focus Group on the Emerging Area Free, Prior, and Informed Consent of Indigenous Peoples*, Mar. 21, 2013, https://consultations.worldbank.org/Data/hub/files/safeguards_focus_group_fpic_manila_summary_final_0.pdf (visita de Agos. 28, 2018). Véase también, C.F.I., *Workshop: Free, Prior and Informed Consultation v. Consent*, July 29, 2010 (en archivos con el Centro).

¹³ Janine Ferretti, Jefa, Unidad de Salvaguardias Ambientales, *Informe de Avance sobre las medidas adoptadas por la Administración del BID para abordar las recomendaciones formuladas por el MICI en su Informe de Verificación de la Observancia del Proyecto de Energía Eólica Mareña Renovables*, Mar. 8, 2018, párr. 3.2.

¹⁴ M.I.C.I., *Informe Mareña Renovables*, supra nota 3, pág. 71 (el énfasis es nuestro).

¹⁵ Janine Ferretti, Jefa, Unidad de Salvaguardias Ambientales, *Informe Final sobre las medidas adoptadas por la Administración del BID para abordar las recomendaciones formuladas por el MICI en su Informe de Verificación de la Observancia del Proyecto de Energía Eólica Mareña Renovables*, Agos., 2018, Anexo 1, pág. 1.

¹⁶ Declaración Americana sobre los Derechos de los Pueblos Indígenas, G.A. Res. 2888 (XLVI-O/16) (Jun. 15, 2016).

¹⁷ C.F.I., International Business Leaders Forum & United Nations Global Compact, *Guide to Human Rights Impact Assessment and Management*, 2010, https://www.unglobalcompact.org/docs/issues_doc/human_rights/GuidetoHRIAM.pdf (visita de Agos. 30, 2018).

¹⁸ Declaración de Naciones Unidas sobre los Derechos de los Pueblos Indígenas, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

territories.¹⁹ By ignoring these standards, the Management places the I.D.B. in an isolated and regressive position compared to other public sector financial institutions.

The Management's "review" overlooks their very own Indigenous Policy because it only considered the World Bank's policy on indigenous peoples as the point of reference, not the broader applicable international norms regarding indigenous peoples. Of note, the Indigenous Policy adopted "a human rights-based approach to development" and, therefore, demands that "indigenous rights" be taken into account. We would like to point out that beyond defining "indigenous rights" as those rights established by domestic law as well as "applicable international norms,"²⁰ the policy demands that special attention be paid to international human rights instruments and the jurisprudence built by the Inter-American Court.²¹ The World Bank's policy on indigenous peoples is not and would never be considered a human rights instrument.

By the Management's standards, the I.D.B. Indigenous Policy "aligns" with the World Bank's policy on indigenous peoples.²² We disagree with the Management on this point. This policy does not meet the safeguards-related standards established by the World Bank's new policy. For example, the World Bank policy requires that borrowers obtain free, prior, and informed consent from the indigenous communities that may potentially be affected by a project²³ while the I.D.B. policy does not.²⁴ When such consent is not possible under the World Bank's judgment, their policy indicates that those aspects of the project will not be processed further.²⁵ The I.D.B. policy does not consider this situation under any circumstances.

Perhaps of more concern is the fact that, according to the I.D.B. policy, "the lack of interest" by indigenous peoples in participating in the consultation process should be interpreted by the Management as acceptance of the project in question rather than rejection.²⁶ That is to say that, contrary to the World Bank safeguard referring to consent mentioned above, the I.D.B. policy attributes the "lack of interest" or silence as having a completely different legal meaning. In practical terms, this "lack of interest" provision could mean that the Indigenous Policy in its totality is devoid

¹⁹ Caso del Pueblo Indígena Xucuru y sus miembros vs. Brasil, Corte I.D.H. (ser. C) No. 346 (Febr. 5, 2017); Caso de los Pueblos Kaliña y Lokono vs. Suriname, Corte I.D.H. (ser. C) No. 309 (Nov. 25, 2015); Caso del Pueblo Indígena Kuna de Madungandí y Emberá de Bayano y sus miembros vs. Panamá, Corte I.D.H. (ser. C) No.284 (Oct. 14, 2014); Caso de Norín Catrimán et al. (Líderes, miembros y activistas del Pueblo Indígena Mapuche) vs. Chile, Corte I.D.H. (ser. C) No. 279 (Mayo 29, 2014); Caso del Pueblo Indígena Kichwa de Sarayaku vs. Ecuador, Corte I.D.H. (ser. C) No. 245 (Jun. 27, 2012); Caso de la Comunidad Indígena Xákmok Kásek vs. Paraguay, Corte I.D.H. (ser. C) No. 214 (Agos. 24, 2010); Caso del Pueblo Saramaka Vs. Surinam, Corte I.D.H. (ser. C) No. 172 (Nov. 28, 2007); Caso de la Comunidad Indígena Sawhoyamaxa vs. Paraguay, Corte I.D.H. (ser. C) No. 146 (Mar. 29, 2006); Caso de la Comunidad Indígena Yakye Axa vs. Paraguay, Corte I.D.H. (ser. C) No. 142 (Febr. 6, 2006).

²⁰ Política Operativa sobre Pueblos Indígenas (OP-765), *supra* nota 1, pág. 5.

²¹ *Ibid.*, nota al pie 3.

²² Janine Ferretti, Jefa, Unidad de Salvaguardias Ambientales, *Informe de Avance*, *supra* nota 13, párr. 3.3.

²³ Estándar 7 Pueblos Indígenas/Comunidades Locales Tradicionales Históricamente Desatendidas de África Subsahariana [Estándar 7 Pueblos Indígenas], Agos. 4, 2016, párr. 24-28.

²⁴ Política Operativa sobre Pueblos Indígenas (OP-765), *supra* nota 1, pág. 8, 9 (llamando a "la realización de procesos de consulta y negociación de buena fe con los afectados indígenas" y "acuerdos" solo en casos de "impactos potenciales adversos especialmente significativos").

²⁵ Estándar 7 Pueblos Indígenas, *supra* nota 23, párr. 27.

²⁶ Política Operativa sobre Pueblos Indígenas (OP-765), *supra* nota 1 nota al pie 15 (estableciendo que "en forma excepcional, cuando no haya interés por parte de los indígenas potencialmente afectados de participar en los procesos de consulta, el proponente del proyecto podrá satisfacer este requisito mediante la presentación de evidencia de lo siguiente: sus intentos de buena fe de realizar la consulta, el hecho de que no existan condiciones para desarrollar la consulta con un análisis de los motivos y condiciones del por qué no se participa y cuáles son los fundamentos de ambos; y los medios alternativos utilizados para identificar las medidas de mitigación necesarias y socioculturalmente apropiadas").

of meaning because the borrowers could use this to avoid compliance with the consultation requirement. On many occasions, indigenous peoples choose to express their opposition to a project by not getting involved, especially if they believe that the governing conditions around the project consultation are unfair or discriminatory. This non-involvement could in no way be interpreted as a “lack of interest” as the Indigenous Policy suggests.

The failure to consult with indigenous peoples equates to a regression in the policy of engagement with indigenous peoples that the I.D.B. has maintained. We would like to emphasize that for over two years under the presidency of Mr. Enrique V. Iglesias, the I.D.B. included indigenous peoples in the process of the creation of its Indigenous Policy. For example, around 44 face-to-face meetings were conducted at the regional level in addition to electronic consultations.²⁷ Moreover, the I.D.B. created an Advisory Indigenous Council, which was formed by representatives of indigenous organizations from the region, to “accompany the process of reviewing the final draft of the Indigenous Policy.”²⁸ No other financial institution has adopted a similar method. Today, instead of building on this good practice and thus strengthening the relationships established with indigenous organizations from the region, the Management decided to ignore it and go ahead without indigenous feedback.

2. The Indigenous Policy does not meet current international standards

Current international standards on indigenous peoples’ collective rights should be the reference points for the I.D.B., not the internal policies of other institutions. Strengthening policies regarding indigenous peoples by incorporating international legal standards, a key component of the policy itself, is not something to avoid; rather, it is the way forward. Both the World Bank and the I.F.C. worked on this with respect to the U.N. Declaration of 2007 by incorporating into their respective policies some of the standards established—*i.e.*, free, prior, and informed consent²⁹ and benefit-sharing,³⁰ among others. As prime examples of regional standards, the American Declaration and the Inter-American Court’s decisions are of particular importance for the I.D.B.

The American Declaration is the result of negotiations between indigenous peoples and O.A.S. member states,³¹ including those who make up the I.D.B. Board. In 2017, the O.A.S. adopted a Plan of Action, which requests the “cross-cutting implementation and incorporation...of indigenous peoples’ rights as recognized by the [American Declaration] into all areas of public life of the States.”³² In 2018, Colombia, in its capacity as an O.A.S. member state, explicitly called upon the I.D.B. to help implement the Declaration given its status as a regional actor.³³

²⁷ Véase, B.I.D., Departamento de Desarrollo Sostenible, Unidad de Pueblos Indígenas y Desarrollo Comunitario, *Informe sobre el proceso de consulta – Estrategia para el Desarrollo Indígena y Política Operativa sobre Pueblos Indígenas*, Sept. 2, 2005, pág.1.

²⁸ B.I.D., Unidad de Pueblos Indígenas y Desarrollo Comunitario, *Criterio de Elegibilidad y Selección del Consejo Asesor Indígena*, *supra* note 2.

²⁹ Véase, Estándar 7 Pueblos Indígenas, *supra* note 23, párr. 24-28 (solicitando que el prestamista “obtenga el CLPI de los Pueblos Indígenas afectados” en tres circunstancias particulares). Véase también, Norma de Desempeño 7 Pueblos Indígenas, C.F.I. Enero 1, 2012, párr. 11-17.

³⁰ Estándar 7 Pueblos Indígenas, *supra* note 23, párr. 20-22. Véase también, Norma de Desempeño 7 Pueblos Indígenas, *supra* nota 29, párr. 19.

³¹ Véase, Grupo de Trabajo Encargado de la Elaboración de la Propuesta de Declaración Americana sobre los Derechos de los Pueblos Indígenas, <http://www.oas.org/consejo/sp/CAJP/Indigenas.asp> (visita de Agos. 29, 2018).

³² Plan de Acción de la Declaración Americana sobre los Derechos de los Pueblos Indígenas, O.E.A. AG/doc.5576/17 (Jun. 14, 2017), pág. 4.

³³ Declaración de Andrés Gonzalez Díaz, Embajador de Colombia ante la O.E.A., Agos. 9, 2018, en 2:09:15-2:12:15,

We identified several shortcomings in the Indigenous Policy related to issues that are not adequately covered by the Indigenous Policy's existing safeguards. These issues include, but are not limited to, the following: (1) cadastre, demarcation, titling, registry and indemnification or protection of indigenous lands; (2) the free, prior, and informed consent of indigenous peoples; and (3) the active participation and consideration of indigenous women in projects; and 4) indigenous peoples in voluntary isolation. These issues require a policy that develops safeguard measures in greater detail in light of current international standards with the goal of preventing harm to indigenous peoples and helping countries strengthen their respective systems and procedures.

The cadastre, titling, demarcation, registry, and indemnification or protection of indigenous peoples' collectively-held lands are discussed in the American Declaration.³⁴ The Inter-American Commission and Court deal extensively with these matters in their reports³⁵ and key decisions.³⁶ These issues are of vital importance not only for the wellbeing and survival of indigenous peoples but also in the struggle against climate change. The I.D.B. has committed to helping countries in the region in this struggle.³⁷

Many of these countries have a system by which they try to provide legal security to indigenous peoples' lands through cadastre,³⁸ titling, demarcation,³⁹ and registry of land titles into public records⁴⁰ and the indemnification,⁴¹ or protection⁴² of indigenous lands. Additionally, some

https://www.youtube.com/watch?v=IznT8_b1_tk&index=3&list=PLkh9EPEuEx2tZ4zuqBaAJkJAy1cDYIzk5&t=0s (visita de Agos. 29, 2018).

³⁴ Declaración Americana sobre los Derechos de los Pueblos Indígenas, *supra* note 16, art. XXV (estableciendo que “los Estados establecerán los regímenes especiales apropiados para [el] reconocimiento [del derecho de los pueblos indígenas a sus tierras, territorios y recursos] y su efectiva demarcación o titulación”).

³⁵ Véase, C.I.D.H., *Derechos de los Pueblos Indígenas y Tribales sobre sus Tierras Ancestrales y Recursos Naturales*, OEA/Ser.L/V/II. Doc. 56/09, Dic. 30, 2009.

³⁶ Véase, Caso de la Comunidad Indígena Xákmok Kásek vs. Paraguay, *supra* note 19; Caso de la Comunidad Indígena Sawhoyamaya vs. Paraguay, *supra* note 19; Caso de la Comunidad Indígena Yakye Axa vs. Paraguay, *supra* note 19.

³⁷ B.I.D., *Informe de Sostenibilidad 2017*, pág. 6, disponible en <https://publications.iadb.org/handle/11319/8815> (indicando que “el BID se ha comprometido a apoyar los esfuerzos de los países miembros con el fin de traducir la agenda [del Acuerdo de París sobre Cambio Climático] en metas, políticas, programas y proyectos significativos a nivel de país”).

³⁸ Véase, por ejemplo, Argentina: Ley 26160 *Declarase la emergencia en materia de posesión y propiedad de las tierras que tradicionalmente ocupan las comunidades indígenas originarias del país...*, Nov. 23, 2006, art. 4 (creando un programa nacional destinado al “relevamiento técnico —jurídico— catastral de las tierras que en forma tradicional, actual y pública ocupan las comunidades indígenas”).

³⁹ Nicaragua: Ley No. 445 *Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las regiones Autónomas de la Costa Atlántica de Nicaragua...*, Ene. 22, 2003, art. 41 (creando la Comisión Nacional de Demarcación y Titulación como agencia encargada del proceso de demarcación y titulación de tierras indígenas); CONSTITUCIÓN DE LA REPÚBLICA FEDERATIVA DE BRASIL (1988), art. 231 (indicando que corresponde a la Unión demarcar [las tierras de las comunidades indígenas]”).

⁴⁰ Véase, por ejemplo, Argentina: *Convenio entre la Secretaria de Desarrollo Social de la Presidencia de la Nación y el Ministerio de Bienestar Social de la Provincia de Jujuy de Regularización y Adjudicación de Tierras a la Población Aborigen de Jujuy*, Dic. 27, 1997 (creando un programa de titulación de tierras de comunidades indígenas en Jujuy, Argentina).

⁴¹ Véase, por ejemplo, Nicaragua: Ley No. 445, *supra* nota 39, Ene. 22, 2003, art. 59. (estableciendo que “cada una de las comunidades, una vez obtenido su título podrá iniciar con el apoyo técnico y material de la Oficina de Titulación Rural (OTR), la etapa de saneamiento de sus tierras, en relación con terceros que se encuentren dentro de las mismas”); Panamá: Ley 72 *Que establece el procedimiento especial para la adjudicación de la propiedad colectiva de tierra de los pueblos indígenas que no están dentro de las Comarcas*, Dic. 23, 2008, art. 12 (resaltando que “en caso de usurpación o de invasión de las tierras reconocidas a través del título de propiedad colectiva [indígena], las autoridades competentes deberán hacer cumplir los derechos de propiedad de dichas áreas”).

⁴² Véase, por ejemplo, CONSTITUCIÓN DE LA REPÚBLICA FEDERATIVA DE BRASIL (1988), art. 231 (indicando que

seek or have secured financial support from public sector financial institutions to strengthen such systems. Nevertheless, the Indigenous Policy does not address these systems in detail and, as a result, the borrowing countries do not receive any guidance regarding how they should or should not proceed when an I.D.B.-financed project is contingent upon any part of these systems, which seek to provide legal protection for indigenous lands. The World Bank's new policy on indigenous peoples provides guidance on this matter.⁴³

The probability of causing harm to indigenous communities regarding these issues due to such projects is very high. It is because of this that indigenous peoples are expressing their concerns to relevant public sector financial institutions. On the one hand, indigenous communities in the Amazon brought forth a complaint to I.C.I.M. about their serious concerns regarding a land titling project in Peru that was financed by the I.D.B.⁴⁴ On the other hand, Maya Q'eqchi' communities alerted the World Bank Management to irregularities in the cadastre process that was conducted on their lands in Guatemala as part of a land administration project.⁴⁵ These complaints are also why both the Inter-American Commission⁴⁶ and the Court⁴⁷ have processed and continue to receive cases against countries because their systems violate indigenous peoples' collective property rights over their lands when these systems fail to function effectively and in a timely manner.

Free, prior and informed consent plays a vital role not only in preventing harm to indigenous peoples, but also in helping achieve project goals. The consent in question is a procedural right (the right to give or not give consent) that is incidental or part of substantive rights—*i.e.*, the collective property rights of indigenous peoples over lands in their possession, the right to self-determination and self-governance. This is why, as opined by the Inter-American Court, “when development or large-scale investment projects could have a major impact on an [indigenous] territory, the State has the obligation to not only consult with [indigenous peoples] but also obtain their free, prior and informed consent according to their customs and traditions.”⁴⁸ The American Declaration explicitly demands that consent be secured “before approving any project that could affect their lands or territories and other resources, particularly with regards to development, use or exploitation of mineral, water or other resources.”⁴⁹ The Declaration also requires consent in other situations.⁵⁰

corresponde a la Unión... proteger [las tierras de las comunidades indígenas] y hacer que se respeten todos sus bienes”).

⁴³ Véase, Estándar 7 Pueblos Indígenas, *supra* note 23, párr. 29.

⁴⁴ M.I.C.I., Proyecto de Titulación y Registro de Tierras en Peru – Tercera Fase (PTRT-3), Caso No. MICI-PE-2015-0094, disponible en <https://www.iadb.org/en/mici/idb-public-registry-country> (visita de Sept. 26, 2018) .

⁴⁵ Carta de Comunidades Maya Q'eqchi' de El Estor al Banco Mundial sobre el Proyecto de Administración de Tierras en Guatemala, Abr. 9, 2013 (en archivos con el Centro).

⁴⁶ Véase, por ejemplo, C.I.D.H., Audiencia: Titulación de tierras colectivas y protección de los pueblos indígenas Emberá, Wounaan, Kuna, Buglé, Ngöbe, Naso y Bribi en Panamá, Oct. 5, 2018, disponible en

https://www.youtube.com/watch?v=s5bxtsrkiDc&t=0s&list=PL5QlapyOGhXtxcMOpG35GCa2M7dJo_QVh&index=33;

Audiencia: Demarcación y titulación de tierras indígenas en el Caribe, Oct. 4, 2018, disponible en

https://www.youtube.com/watch?v=rs9FUsGi3y4&t=0s&list=PL5QlapyOGhXtxcMOpG35GCa2M7dJo_QVh&index=27.

Véase también, por ejemplo, C.I.D.H., Comunidad Maya Q'eqchi' Agua Caliente

⁴⁷ Véase, por ejemplo, Caso de la Comunidad Indígena Xákmok Kásek vs. Paraguay, *supra* nota 19; Caso de la Comunidad Indígena Sawhoyamaxa vs. Paraguay, *supra* nota 19; Caso de la Comunidad Indígena Yakye Axa vs. Paraguay, *supra* nota 19.

⁴⁸ Caso del Pueblo Saramaka Vs. Surinam, *supra* nota 19, párr. 134.

⁴⁹ Declaración Americana sobre los Derechos de los Pueblos Indígenas, *supra* note 16, XXIX(4).

⁵⁰ *Ibid.*, art XIII(2) (exigiéndolo ante la privación de bienes culturales, intelectuales, religiosos y espirituales indígenas), XVIII(3) (exigiéndolo cuando las personas indígenas estén por ser sometidas a programas de investigación, experimentación biológica o médica y esterilización), XXIII(2) (exigiéndolo ante medidas legislativas y administrativas que afecten a pueblos indígenas), XXVIII(3) (exigiéndolo ante medidas para reconocer y proteger el patrimonio cultural y propiedad intelectual indígena).

Both the World Bank and the I.F.C. included consent requirements in their respective policies on indigenous peoples. In effect, consent is now required for projects that (1) will affect indigenous lands and natural resources, (2) will necessitate the relocation of indigenous peoples and (3) will have significant impacts on indigenous cultural heritage.⁵¹ The I.D.B. is falling behind because its Indigenous Policy only requires “good faith consultations and negotiation processes.”⁵² Also, contrary to what the World Bank and the I.F.C. believe, the I.D.B. Management is of the opinion that their policy standard is equal to free, prior and informed consent.⁵³

The necessity of safeguards for indigenous women is laid out in both the U.N. and O.A.S. declarations on the rights of indigenous peoples.⁵⁴ Safeguards are important to ensure that women are equal contributors to the consultation process and that they are insulated from harmful project-related activities. Accordingly, the World Bank’s 2016 policy on indigenous peoples requires borrowers to institute protective measures for the rights of indigenous women in development and consultation processes.⁵⁵

However, the Indigenous Policy is limited in regard to safeguards for indigenous women. The Indigenous Policy expresses a general commitment to the economic advancement of indigenous women by proposing to support measures to reduce discriminatory labor practices by improving access to vocational, educational and economic opportunities.⁵⁶ While this is a laudable effort, the I.D.B. policy fails to ask borrowers to take concrete actions to protect indigenous women as the World Bank’s policy does. For example, the World Bank policy requires its borrowers to specifically include women in the development and consultation processes,⁵⁷ allow for women to express concerns about projects and views on lands and natural resources,⁵⁸ protect women workers,⁵⁹ and give women special consideration in resettlement plans.⁶⁰ As a result, indigenous women are susceptible to harm when an I.D.B.-financed project impacts their communities.

Finally, the countries of the Amazon basin have adopted specific laws and/or administrative measures regarding the protection of indigenous peoples in voluntary isolation since the approval of the Indigenous Policy.⁶¹ Furthermore, both the Inter-American Commission (2013)⁶² and the U.N.

⁵¹ Véase, Estándar 7 Pueblos Indígenas, *supra* nota 23, párr. 24-28. Véase también, Norma de Desempeño 7 Pueblos Indígenas, *supra* nota 29, párr. 13-17.

⁵² Política Operativa sobre Pueblos Indígenas (OP-765), *supra* note 1, pág. 8.

⁵³ Janine Ferretti, Jefa, Unidad de Salvaguardias Ambientales, *Informe Final sobre las medidas adoptadas por la Administración del BID para abordar las recomendaciones formuladas por el MICI en su Informe de Verificación de la Observancia del Proyecto de Energía Eólica Mareña Renovables*, *supra* note 15, Anexo 1, párr. 3(9).

⁵⁴ Declaración Americana sobre los Derechos de los Pueblos Indígenas, *supra* note 16, art. 12,15. Véase también, Declaración de Naciones Unidas sobre los Derechos de los Pueblos Indígenas, *supra* note 18, art. 9.

⁵⁵ Estándar 7 Pueblos Indígenas, *supra* nota 23, párr. 30(d), 35(b).

⁵⁶ Estrategia para el desarrollo indígena, IDB Doc. No. GN-2387-5 (Feb. 22, 2006), pág. 36, párr. a, b.

⁵⁷ Estándar 7 Pueblos Indígenas, *supra* nota 23, párr. 30(d), 35(b).

⁵⁸ Estándar 5 Adquisición de Tierras, Restricciones sobre el Uso de la Tierra y Reasentamiento Involuntario [Estándar 5 Tierras y Reasentamiento Voluntario], Agos. 4, 2016, párr. 11(d).

⁵⁹ Estándar 2 Trabajo y Condiciones Laborales, Agos. 4, 2016, párr. 15.

⁶⁰ Estándar 5 Tierras y Reasentamiento Voluntario, *supra* nota 53, párr. 18.

⁶¹ Véase, C.I.D.H., *Pueblos indígenas en aislamiento voluntario y contacto inicial en las Américas: Recomendaciones para el pleno respeto a sus derechos humanos*, OEA/Ser.L/V/II. Doc. 47/13, Dic. 30, 2013, pág. 29-45 (haciendo un análisis de las medidas constitucionales, legislativas y administrativas adoptadas por los países de la Región Amazónica).

⁶² *Ibid.*

(2009)⁶³ have issued reports about indigenous peoples living in isolation in the Amazon region and Gran Chaco that contained specific recommendations regarding their protection and respect. Lastly, the countries in the region agreed to an article in the American Declaration to adequately protect these peoples.⁶⁴ Given this context, the need to revise the Indigenous Policy's safeguard measures on these peoples, becomes clear.

We would be thrilled to learn the I.D.B. has acknowledged the importance of including the participation of indigenous peoples of the region in the review and update of the Operational Policy on Indigenous Peoples and has decided in the 2019 annual meeting to take steps to ensure such participation. We anxiously hope to work with the Management to conduct an exhaustive review of the policy with the goal of improving their safeguards in light of best international standards.

Without further ado, we would like to express our highest regards. We look forward to hearing from you soon.

Sincerely,



Leonardo A. Crippa
Senior Attorney
Indian Law Resource Center
(United States)

F/Indigenous communities affected by the
Mareña Renovables Wind Power Project
(Mexico)

Signatories:

Asamblea de Pueblos Indígenas del Istmo de
Tehuantepec en Defensa de la Tierra y del
Territorio
(Mexico)

Consejo de Organizaciones Aborígenes de Jujuy
(Argentina)

Asociación de Abogados y Notarios Mayas
(Guatemala)

Consejo Indígena del Pueblo Tacana
(Bolivia)

Asociación Interétnica de Desarrollo de la Selva
Peruana
(Peru)

Corporación de Abogados Indígenas
(Panama)

Coordenação das Organizações Indígenas da
Amazônia Brasileira

MASTA (Moskitia Asla Takanka)
(Honduras)

⁶³ C.I.D.H., *Proyecto de directrices de protección para los pueblos indígenas en aislamiento y en contacto inicial de la Región Amazónica y el Gran Chaco*, A/HRC/EMRIP/2009/6, Jun. 30, 2009.

⁶⁴ Declaración Americana sobre los Derechos de los Pueblos Indígenas, *supra* note 16, art. XXVI.

(Brazil)

Coordinadora de la Organizaciones Indígenas de la Cuenca Amazónica (Regional)

Maya Leaders Alliance (Belice)

Confederación de Pueblos Autóctonos de Honduras (Honduras)

Organización Nacional Indígena de Colombia (Colombia)

Copied:

Julie T. Katzman, Vice-Presidente Ejecutiva

José Mauricio Silva, ED Centro América

Germán Quintana, Secretaría

Juan Bosco Martí Ascencio, ED México

Alex Foxley, ED Chile

Patrick Jean Herve, ED Francia

Alicia Montalvo Santamaría, ED España

Rosa Matilde Guerrero Murgueytio, ED Ecuador

Armando José León Rojas, ED Venezuela

Sergio Díaz Granados, ED Colombia

Carlos Augusto Pared Vidal, ED República Dominicana

Sergio Savino Portugal, ED Brasil

Eliot Pedrosa, ED Estados Unidos

Toshiyuki Yasui, ED Japon

Estefania Antonella Bazzoni, ED Italia

Ute Heinbuch, ED Alemania

Fernando Ernesto de León de Alba, ED Panamá

Rachel Bayly, Departamento del Tesoro de Estados Unidos

Guillermo Enrique Rishchynski, ED Canadá

Andrew Robert Morrison, División de Genero y Diversidad