

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

15 October 2019

Luiz Gabriel Todt de Azevedo
Division Chief - Environmental, Social and Corporate Governance
Inter-American Development Bank Invest
1350 New York Avenue N.W.
Washington, D.C. 20577

RE: Review Process and Environmental and Social Sustainability Policy

Dear Mr. Acevedo:

The Articulation of the Indigenous Peoples of Brazil (A.P.I.B.), the Coordination of the Indigenous Organizations of the Brazilian Amazon (C.O.I.A.B.) and the Indian Law Resource Center (the Center) address you, and to whom it may concern at the Inter-American Development Bank Invest (I.D.B. Invest), for the purpose of presenting our comments and recommendations on the public consultation process and the draft Environmental and Social Sustainability Policy (Draft Policy).

I | Review Process

I.D.B. Invest is concluding the public consultation process on its Draft Policy after an intense period of four months, in which five face-to-face meetings and three virtual meetings were held.¹ However, unfortunately, none of these meetings were dedicated to indigenous peoples. All this, despite the expressed request made in this regard by representatives of the Center in a meeting held with officials of the I.D.B. Invest on April 23, 2019. At that meeting, the Center shared the public letter addressed to Mr. President Luis Alberto Moreno in which the Center and more than ten indigenous organizations asked for the inclusion of indigenous peoples in the policy review process.²

¹ Véase, B.I.D. Invest, *Plan de Consulta: Borrador de BID Invest – Política de Sostenibilidad Ambiental y Social*, junio 2019. Véase también, B.I.D. Invest, *Consulta Política de Sostenibilidad Ambiental y Social*, <https://www.idbinvest.org/es/consultation/environmental-and-social-sustainability-policy> (visita de 20 sept. 2019).

² Carta de Indian Law Resource Center y otros a Presidente del B.I.D. Luis Alberto Moreno, <https://indianlaw.org/sites/default/files/documents/2018-11-21%20FINAL%20Letter%20to%20IDB%20SPA.pdf> (visita de 20 sept. 2019).

The lack of effort on the part of the I.D.B. Invest to consult indigenous peoples is contrary to the practice supported by the I.D.B. Group, under which the I.D.B. Group included indigenous peoples of the region in the processes of establishing and reviewing safeguard policies. For example, under the presidency of Mr. Enrique V. Iglesias, the I.D.B. Group included indigenous peoples in the process of preparing its Operational Policy on Indigenous Peoples of 2006. In addition, an Indigenous Advisory Committee composed of representatives from indigenous organizations of the region was created to “accompany the process of reviewing and defining the final draft of [this Policy].”³

The eventual final version of the Draft Policy that the I.D.B. Invest submits to the Executive Board for consideration at the end of 2019 will lack any contribution from the indigenous peoples of the region. This procedure constitutes an unprecedented practice within the I.D.B. Group and sets a bad precedent for any similar process in the future. Not a single face-to-face consultation meeting with indigenous representatives has taken place thus far. Under the presidency of Mr. Enrique V. Iglesias, the I.D.B. Group held approximately 44 face-to-face meetings at the regional level.⁴

II | Draft Policy

The Draft Policy reflects the commitments made by the I.D.B. Invest, as well as the responsibilities of its clients: the private sector and state-owned enterprises. In this sense, the policy framework that governs the I.D.B. Invest includes both the Draft Policy⁵ and the Social and Environmental Performance Standards of the International Financial Corporation (Performance Standards of the I.F.C.) of 2012,⁶ among other policies, which are mandatory for clients of the I.D.B. Invest.⁷

However, both the Draft Policy and the Performance Standards of the I.F.C. have significant gaps in their protections for indigenous peoples of the region. These gaps include, but are not limited to: (1) a safeguard that considers the distinctive and unique particularity of our region (e.g. indigenous peoples in voluntary isolation and/or initial contact); and (2) a policy instrument on how to identify and manage the risks associated with human rights norms protected by national and international law (e.g. the Guide to Human Rights Impact Assessment and Management prepared by the I.F.C., the International Forum of Business Leaders and the Office of the United Nations Global Compact-Guide).⁸ If consulted, indigenous peoples would have highlighted these gaps, among others.

³ B.I.D., Unidad de Pueblos Indígenas y Desarrollo Comunitario, *Criterio de Elegibilidad y Selección del Consejo Asesor Indígena*, agosto 2004 (en archivos con el Centro).

⁴ B.I.D., Unidad de Pueblos Indígenas y Desarrollo Comunitario, *Informe sobre el proceso de consulta – Estrategia para el Desarrollo Indígena y Política Operativa sobre Pueblos Indígenas*, 2 septiembre 2005, pág.1.

⁵ B.I.D. Invest, *Política de Sostenibilidad Social y Ambiental*, junio 2019, https://www.idbinvest.org/sites/default/files/Sustainability_Policy-Spanish.pdf

⁶ C.F.I., *Normas de Desempeño*, 1 enero 2012, disponibles en https://www.ifc.org/wps/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards (visita 8 octubre 2019).

⁷ *Política de Sostenibilidad Social y Ambiental*, supra nota 6, pág. 4-7 (determinando que las Normas de Desempeño de la C.F.I., entre otras, deben ser cumplidas por los clientes).

⁸ C.F.I., Foro Internacional de Líderes Empresariales y Oficina del Pacto Mundial de Naciones Unidas, *Guía de evaluación y gestión de impactos en los derechos humanos*, 2010, https://www.unglobalcompact.org/docs/issues_doc/human_rights/GuidetoHRIAM-ES.pdf

First, both the Draft Policy and the Performance Standards that it supports, fail to have a safeguard in place that is designed to prevent harm to indigenous peoples who live in voluntary isolation or initial contact in the Amazon and Gran Chaco regions of South America. Note that both the I.D.B.'s Operational Policy on Indigenous Peoples (OP-765) of 2006,⁹ which is surprisingly dismissed by the I.D.B. Invest,¹⁰ and the World Bank's Socio-Environmental Standard 7 on Indigenous Peoples of 2016¹¹ contain a specific safeguard to protect these peoples because of their high vulnerability.

The delicate situation of indigenous peoples in voluntary isolation or initial contact is a distinct and unique issue in our region that has been addressed by relevant countries and the international community. For example, the countries of the Amazon basin have adopted specific laws and/or administrative measures for the protection of these peoples.¹² In addition, both the Inter-American Commission on Human Rights (2013)¹³ and the U.N. High Commissioner for Human Rights (2009)¹⁴ have adopted reports with recommendations aimed at their protection. Lastly, the American Declaration on the Rights of Indigenous Peoples, which was prepared by all the countries in the region *vis-à-vis* indigenous peoples, contains a specific article designed to adequately protect these peoples.¹⁵

Second, both the Draft Policy and the Performance Standards that it supports fails to include the above-mentioned Guide and/or other similar policies as an integral instrument of the mandatory compliance policy framework for its clients. Note the potential this Guide has to compliment the Performance Standard 1 Assessment and manage the environmental and social risks and impacts of the I.F.C. That is why Guidance Note 1 of the I.F.C emphasizes that “it may be useful [to clients] to refer to the human rights aspects of the risks and impacts identification and management processes, as well as consult the different human rights risk scenarios presented in the Guide.”¹⁶

Due diligence processes must be improved in order to identify potential human rights impacts. The usual evaluation of social impacts is not the ideal tool to effectively identify impacts on human rights. In our region, virtually every social impact derived from a development project becomes a human rights issue, especially when such a project takes place on or around indigenous territories. Land conflicts are countless in the region. The noticeable increase in human rights impacts and their connection with development projects is data of our current reality that cannot

⁹ B.I.D., *Política Operativa sobre Pueblos Indígenas OP-765*, 22 febrero 2006, pág. 9, 10.

¹⁰ *Política de Sostenibilidad Social y Ambiental*, supra nota 6, pág. 4-7 (excluyendo a las políticas operativas del B.I.D. como aquellas de cumplimiento obligatorio por sus clientes).

¹¹ Banco Mundial, *Estándar Socio Ambiental 7 Pueblos Indígenas*, 4 agosto 2016, párr. 19.

¹² 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, 30 diciembre 2013, pág. 29-45. Véase también, C.I.D.H., *Situación de los derechos humanos de los pueblos indígenas y tribales de la Panamazonía*, OAS/Ser.L/V/II. Doc. 176, 29 septiembre 2019, pág. 153-195. Ambos informes analizan la situación de estos pueblos y reflejan las medidas legislativas y administrativas adoptadas por los países correspondientes.

¹³ *Ibid.*

¹⁴ Alto Comisionado de Naciones Unidas para los Derechos Humanos, *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, 30 junio 2009.

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

¹⁶ C.F.I., *Nota de Orientación 1 Evaluación y gestión de riesgos ambientales y sociales*, 1 enero 2012, pág. 17, párr. NO48, https://www.ifc.org/wps/wcm/connect/4ec5cb68-fc58-47e2-9237-f3ac8cb3890a/GN1_Spanish_2012.pdf?MOD=AJPERES&CVID=mRQjLY3

continue to go unnoticed by public sector banks, such as the I.D.B Invest, which finance companies in the private sector.

This is why the international community is developing instruments for assessing human rights impacts. For example, the State Parties to the United Nations, in conjunction with private sector companies, have begun to develop norms of international law (e.g. the Guiding Principles on Business and Human Rights of 2011),¹⁷ as well as holding forums (e.g. the Annual Forum on Business and Human Rights¹⁸ and the Intergovernmental Working Group to develop a treaty on business and human rights¹⁹) aimed at determining how to prevent human rights violations arising from private sector projects. A similar approach is taking place within the framework of the Organization of American States system.²⁰

III | Recommendations

Based on the comments above, we recommend that I.D.B. Invest:

1. Evaluate the possibility of obtaining inputs from the indigenous peoples of the region, through their representative organizations, on the Draft Policy and the Socio-Environmental Performance Standards that it supports. In our opinion, any effort made in this manner will be beneficial not only for this particular review process that is concluding, but also for the eventual process of developing interpretive guides that the I.D.B. Invest decides to carry out regarding such Performance Standards, especially Performance Standard 7 on Indigenous Peoples.
2. Include a safeguard measure aimed at protecting Indigenous Peoples in voluntary isolation or initial contact. This may be done in the following way: (1) adding such safeguard in the relevant section of the Draft Policy (e.g. “Section II. I.D.B. Invest Commitments” as well as in “Section III. Client Responsibilities;” and/or (2) adding such safeguard to the annex of the Performance Standard 7 on Indigenous Peoples with a note to clarify and highlight the need to consider the particularities of this distinct region.
3. Obtain inputs from both indigenous peoples and relevant government agencies of the countries that share the Amazon basin and the Gran Chaco region on the content of the safeguards aimed at protecting indigenous peoples in voluntary isolation or in initial contact.
4. Consider the evaluation of impacts on human rights to complement the usual evaluation of social impacts. For example, this could be possible by including the Guide for evaluation and management of impacts on human rights and/or another similar instrument as an instrument

¹⁷ Consejo de Derechos Humanos de N.U., *Principios rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para 'proteger, respetar y remediar'*, Resolución 17/4, 16 junio 2011, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_sp.pdf

¹⁸ Alto Comisionado de Naciones Unidas para los Derechos Humanos, *Foro sobre Empresas y Derechos Humanos*, <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx> (visita 8 octubre 2019).

¹⁹ Consejo de Derechos Humanos de N.U., *Grupo de Trabajo Intergubernamental sobre Empresas Transnacionales y Otras Empresas Comerciales con respecto a Derechos Humanos*, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx> (visita 8 octubre 2019).

²⁰ Relatoría sobre Derechos Económicos, Sociales, Culturales y Ambientales de la Comisión Interamericana de Derechos Humanos, *Empresas y Derechos Humanos*, informe en desarrollo.

within the socio-environmental policy framework that the Draft Policy supports. In this way, explicit reference to this guide could be made in the sections of the Draft mentioned above. Another possible way that I.D.B. Invest can address this issue could be by making a decision to develop its own instrument for assessing impacts on human rights. The creation of this internal control mechanism is important to ensure that investments do not affect indigenous territories and/or indigenous peoples' human rights.

Without further ado, we take this opportunity to express our best regards.



Leonardo A. Crippa
Senior Attorney
Indian Law Resource Center

f/Articulation of the Indigenous
Peoples of Brazil (A.P.I.B.)

f/Coordination of Indigenous
Organizations of the Brazilian
Amazon (C.O.I.A.B.)