



AIDSESP
Asociación Interétnica
de Desarrollo de la
Selva Peruana



April 20, 2020

Mr. Roberto Manrique

Inter-American Development Bank
1300 New York Avenue, N.W.
Washington, D.C. 20577

RE: Comments on the Draft Environmental and Social Policy Framework

Dear Mr. Manrique,

1. The Interethnic Association for the Development of the Peruvian Rainforest (AIDSESP) and the Indian Law Resource Center, in conjunction with the undersigned indigenous organizations, address you and the appropriate personnel at the Inter-American Development Bank (I.D.B.) in order to present the comments on the Draft Social and Environmental Policy Framework that we consider pertinent. In particular, these comments focus on the drafts of the Environmental and Social Performance Standards No. 7 Indigenous Peoples (Draft Standard No. 7) and No. 1 Assessment and Management of Environmental and Social Risks and Impacts (Draft Standard No. 1).

2. These comments support, in all its terms, the Proposal of Indigenous Organizations on the Draft of Standard No. 7 that, together with AIDSESP and its nine indigenous federations of the Peruvian Amazon, we presented to the I.D.B. on March 4, 2020 in Lima, Peru. These comments provide the reasons why we proposed changes to the language of the Draft Standard No. 7. Attached is the Proposal of Indigenous Organizations as signed by AIDSESP and its nine indigenous federations, as well as your acknowledgment of receiving it.

Environmental and Social Performance Standard No. 7 Indigenous Peoples

3. Our proposals are divided into three groups. The first group of proposals focuses on the scope of application of the Draft Standard No. 7, the second group focuses on two guiding principles on safeguards and development, and the third group focuses on specific safeguards. All of these proposals are based on the language used by the World Bank's Environmental and Social Standard No. 7 Indigenous Peoples (Standard No. 7) of 2016 and the I.D.B.'s Operative Policy OP-765 Indigenous Peoples (Policy OP-765) of 2006, the I.D.B.'s current policy on indigenous peoples.

I | Scope of Application

4. These proposals address two specific situations: (i) indigenous families that relocate seasonally and (ii) cross-border indigenous peoples. The Draft Standard No. 7 does not consider either of these real situations that many indigenous peoples and families of the region encounter. Therefore, we request that both of these situations be included within the scope of the Draft Standard No. 7.

Families that relocate seasonally

Likewise, this policy applies to those families who, in certain seasons of the year, move to surrounding areas or outside of the territories of the indigenous peoples to which they belong for hunting, gathering, or traditional ceremonies.

5. There are indigenous hunter-gatherer groups in our region that temporarily move to surrounding areas or outside of their territories. The same occurs during the celebration of traditional ceremonies. For example, families of the Ashanika peoples in the area of Ucayali, Peru. This is done without ceasing to belong to the nation or indigenous people of which they are members of and without losing the special bond that unites them with the indigenous territory where they live. The source of the language suggested here is the World Bank's Standard No. 7 (see paragraph 9) along with some minor changes. Please note that this source also considers the situation of nomadic groups, whose existence and applicability is unknown to our region. Therefore, the reference to nomadic groups is not part of our proposal.

Cross-border indigenous peoples

In regional projects of two or more countries or in border areas with indigenous peoples, the Bank will adopt the necessary measures so that its projects do not adversely affect cross-border indigenous peoples, such as processes of good-faith consultations and negotiations, territorial legal security programs and other health programs, free transit, bi-nationality (in the context of applicable legal norms), among others, bearing in mind the organizational structures of the corresponding indigenous peoples.

6. The existence of indigenous peoples and communities divided by a border of two or more countries is another particularity of our region. For example, the Yanomami peoples are divided by the borders of Brazil and Venezuela. The source of the language suggested here is the current Policy OP-765 (see Section IV Policy Guidelines, page 9). Apart from some edits to the language of this source, the only considerable change is the addition of “bearing in mind the organizational structures of the corresponding indigenous peoples.” This addition is due to the need and relevance of ensuring that the borrowing countries in question adopt pertinent measures that take into account not only the corresponding indigenous community or people, but also the national indigenous organizations through which such an indigenous community or people is represented by in each of the countries.

II | Guiding Principles

7. These proposals address two guiding principles, namely: (i) indigenous rights and (ii) indigenous development. Both principles come from the Policy OP-765. In other words, these are principles that govern the application of the current I.D.B. policy on indigenous peoples, which the Draft Standard No. 7 completely eliminates. In our opinion, both principles are key to ensure that projects do not cause harm and, in fact, benefit the indigenous communities of the region.

Indigenous rights

Indigenous rights include the rights of indigenous peoples and individuals whether they originated in indigenous legislation issued by States, in relevant national legislation, in the applicable international norms in force within each country, or in indigenous legal systems, which as a whole are called “applicable legal norms.” Indigenous legal systems will be considered in accordance with the rules for their recognition established in the legislation of the corresponding country. In the absence of said rules, such systems will be recognized as long as they are consistent with national legislation and do not

contradict the fundamental rights established in legislation and international standards.

The Bank will take into account the respect for indigenous rights established in the applicable legal norms according to their relevance to the Bank's operations, always bearing in mind the norm that grants greater protection to indigenous peoples.

The “applicable international standards” include, among other applicable human rights and environmental law instruments, the I.L.O. Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples, the American Declaration on the Rights of Indigenous Peoples, the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, and the Escazú Agreement.

8. This language essentially reflects the entire definition of indigenous rights established by the Policy OP-765 (see pages 5, 8). Indeed, the first paragraph and the first part of the second paragraph of the language suggested here are verbatim. The only change is constituted by the phrase added to the end of the second paragraph: “*always bearing in mind the norm that grants greater protection to indigenous peoples.*” This responds to the need to ensure that, within the framework of the scope of the Draft Standard No. 7, the standard that best protects indigenous peoples prevails. This is because the protection provided by the national law of a country often differs from that provided by international law.

9. The third paragraph of this language is an update of a similar paragraph that exists in the Policy OP-765. The update includes the specific mention of these international standards jointly adopted by countries, including the United Nations Declaration on the Rights of Indigenous Peoples of 2007, the American Declaration on the Rights of Indigenous Peoples of 2016, and the Escazú Accord of 2018 (“Regional Agreement on Access to Information, Public Participation, and Access to Justice in Environmental Matters in Latin America and the Caribbean”). All of these instruments protect the rights of indigenous peoples and the healthy environment on which they depend upon for their physical and cultural survival and were adopted after 2006, the year in which the I.D.B. adopted its Policy OP-765.

10. The Draft Standard No. 7 lacks a similar guiding principle. Note that the Draft includes “respect for the human rights of indigenous peoples” as its first objective (see page 103). However, it does not have a provision on what should be understood by the human rights of indigenous peoples. That is, the Draft addresses this matter in a vague, abstract manner without any precision in this regard. Therefore, the borrowing countries have no specific guideline on how to achieve this goal.

Indigenous development

Indigenous development refers to the process that includes satisfying the development needs as identified by indigenous peoples, harmony with the environment, good management of territories and natural resources, the creation of an indigenous economy, the participation of indigenous women in the development process, and the respect of indigenous values and rights, in accordance with their own cosmovision and governability.

The Bank will support the national governments and indigenous peoples of the region, through their representative organizations, to incorporate indigenous development in local and regional development agendas and in the Bank’s project inventory. This will be achieved through specific initiatives and the integration of complementary measures in general activities, operations, and initiatives so long as they are technically feasible and appropriate.

11. Likewise, this first paragraph almost completely reflects the definition of “development with indigenous peoples’ identity” as established by the Policy OP-765 (see Section I Definitions, page 5). However, three key elements are added to such a definition: (1) *satisfaction of the development needs as identified by indigenous peoples*; (2) *creation of an indigenous economy*; and (3) *participation of indigenous women in the development process*. These new elements seek to establish the active and determinant role of indigenous peoples and women in the development process of their communities.

12. The second paragraph also reflects a provision of the Policy OP-765 (see Section IV Policy Guidelines, page 6). The only change suggested here is constituted by the addition of the phrase: “*by means of their representative organizations*.” This addition responds to the need to ensure that, within the framework of the inclusion of indigenous development in national development agendas and in the Bank’s project inventory, both the Bank and the borrowing countries keep in mind the indigenous organizations that represent indigenous peoples at the national level for such purposes.

13. The Draft Standard No. 7 lacks a similar guiding principle. Note that this Draft only considers mitigation measures for the affected indigenous peoples (see paragraph 19), of which constitutes an approach that is contrary to the proactive approach established by Policy OP-765. Needless to say, the development of indigenous peoples is not to be reduced to mere mitigation measures and only taken into account when indigenous peoples are adversely affected by projects. The I.D.B. must play a proactive role in terms of indigenous development, not reactive and passive one.

III | Specific safeguards

14. These proposals address three specific safeguards: (i) cadastre, titling, and registration of indigenous lands and territories; (ii) indigenous peoples in isolation or initial contact; and (iii) free, prior, and informed consent.

Cadastre, titling, and registration of indigenous lands and territories

When projects deal with land-related issues and directly or indirectly affect indigenous territories, the Bank will support the strengthening of the systems used by borrowers to title and register territories in traditional possession and/or use by indigenous peoples in order to legally recognize the right of ownership or collective domain over such territories

The Bank will not support those projects in which the borrowers pursue individual titling [in] indigenous territories or recognize diminished property rights for its indigenous peoples, such as the right of use.

15. The safeguard measure suggested here is fundamental to ensure that borrowing countries provide legal security to indigenous peoples over their lands and territories. This proposal is based on the lessons being learned about the I.D.B.-funded Cadastre, Titling, and Registration of Rural Lands in Peru – Third Phase Project (PTRT-3), as a result of the complaint that AIDSESEP presented to the Independent Mechanism of Consultation and Research (M.I.C.I. by its Spanish acronym) in 2015. In addition, this proposal includes part of the approach to this matter reflected in the World Bank’s Standard No. 7, the I.D.B.’s Policy OP-765 and Draft of Standard No. 7. However, the language proposed is not a copy of any of these policies or the Draft because none of these policies approaches the matter with the necessary clarity and determination.

16. Cadastre, titling, and registration constitute key administrative procedures for the legal

recognition of the right of ownership or collective domain of indigenous peoples over their lands and territories. All of the countries in the region have a system equipped with each of these three procedures. In our opinion, it is essential that the Draft Standard No. 7 has a specific, comprehensive safeguard for each of these administrative procedures, not limited to just one of them. A safeguard limited to titling, for example, is not sufficient enough to ensure that Bank-funded projects that deal with the administration or regularization of rural lands achieve the proposed objectives.

17. These three procedures are interrelated because each resulting procedure determines the other. While cadastre determines the geographic location and boundary limits of the land, titling determines the legal recognition of a right and ownership, and registration the recording of such a title, rendering third parties to oppose it, including state agencies and private sector companies and individuals. In other words, the result of each of these procedures has legal implications on the lands and territories under traditional possession of indigenous communities.

18. The first paragraph of this proposal establishes a positive measure. Such a measure consists of urging the I.D.B. to support those projects that deal with land-related matters and directly or indirectly affecting indigenous territories in order to ensure that such projects legally recognize the right of ownership or collective domain of indigenous peoples over such lands and territories under their possession and/or traditional use. This collective right must be materialized in a collective title that recognizes the corresponding indigenous community's or peoples' ownership of such a right in accordance with the legal standards established in the United Nations Declaration of the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples.

19. The second paragraph establishes a negative measure consisting of not supporting those Bank projects that contradict what the first paragraph of this proposal establishes. First, for example, it is suggested that the I.D.B. does not support projects that seek individual titling on indigenous lands and territories because such projects would lead to damaging the social cohesion and communal organization of the affected indigenous peoples. Second, it is also suggested that the I.D.B. does not support those projects that seek recognition of diminished land ownership rights, such as the limited right of use. International legal standards require countries to grant indigenous peoples full property rights to their lands, such as the so-called right of ownership or domain.

Indigenous peoples in isolation or initial contact

Projects will respect the rights of indigenous peoples who live in isolation or in recent contact (P.I.A.C.I. by its Spanish acronym) to remain isolated and live freely in accordance with their culture.

In order to prevent any direct or indirect contact with indigenous peoples in isolation or recent contact, their lands and territories, and their ways of life, appropriate measures shall be included to (i) safeguard the collective and individual physical, territorial, and cultural integrity of said peoples and (ii) recognize, respect, and protect the intangibility of their lands and territories, environment, health and culture, including the establishment of buffer zones.

Aspects of a project that would generate unwanted contact will no longer be processed.

20. This safeguard measure is primarily based on the Draft Standard No. 7. Note that the I.D.B. was the first multilateral development bank to include a safeguard measure meant to prevent its projects from affecting indigenous peoples that live in isolation or in initial contact in the region (see Policy OP-765, Section IV Policy Guidelines). Only the third paragraph of this proposal includes the language of the

World Bank's Standard No. 7.

21. The first paragraph proposes the language of the Draft Standard No. 7 (see paragraph 10), which calls for the respect of the rights of indigenous peoples who are under both circumstances. The change suggested here consists of eliminating the term "voluntary," which we understand is not necessary and corresponds more to an archeological view of this subject. The other suggested small change is constituted by the addition of the term "in initial contact" in order to be consistent with the use of such terms in laws and policies of the borrowing countries located along the Amazon Basin and Gran Chaco.

22. The second paragraph establishes measures meant to prevent any direct or indirect contact with indigenous peoples who are under these circumstances. These measures emanate from the Draft Standard No. 7 with three changes, namely: (i) adding the term "intangibility" when referring to indigenous lands and territories; (ii) eliminating the reference to "avoid coming into contact with them as a consequence...of the project" as it is considered unnecessary; and (iii) adding "the establishment of buffer zones" because this is a good practice adhered to by several borrowing countries in the region.

23. The third paragraph suggested here is verbatim of a negative measure established in the World Bank's Standard No. 7. This measure consists of refraining the Bank from supporting those projects that contradict the provisions of the first two paragraphs of this proposal, because these would generate unwanted contact with indigenous peoples who are under these circumstances.

Free, Prior, and Informed Consent

The borrower shall, as a result of a consultation process, [...] obtain the free, prior, and informed consent (F.P.I.C.) of indigenous peoples:

- a. When the project, plan, or program impacts the lands, territories, and resources of the traditional property or customary use of indigenous peoples or involves the use of the natural resources located on such lands;*
- b. When the transfer of indigenous peoples from their lands and natural resources subject to the traditional property regime or under customary use is inevitable;*
- c. Where a project may have a significant impact on a critical cultural heritage of indigenous peoples.*

In those instances where indigenous peoples have developed their own consultation protocols, the borrower shall include them within the framework of the three circumstances mentioned above.

The Bank will not support those projects under these three circumstances that do not have the F.P.I.C. of the corresponding indigenous peoples.

The refusal of an indigenous peoples to participate in a consultation processes aimed at obtaining their F.P.I.C. or their silence within the framework of a consultation process should not be understood as their support for the project in question. All of this in accordance to exercise their self-determination and self-government rights.

The borrower should also adopt these measures when proposing to expand or relocate any project that falls within the three circumstances mentioned above.

The Bank's Safeguard Unit is responsible for ensuring compliance with the commitments assumed by the borrower as the result of the consultation process in question.

Eliminate:

Paragraph 13. Free, prior, and informed consent does not necessarily require unanimity and can be achieved even if there are people or groups within the community who explicitly disagree.

24. The safeguard measure suggested here is based primarily on the Draft Standard No. 7. The first paragraph establishes the three circumstances in which borrowing countries are required to obtain F.P.I.C. from the indigenous peoples potentially affected by Bank-funded projects. These three circumstances are consistent with those recently established by the World Bank's Standard No. 7.

25. The following paragraphs of this proposal gather the lessons learned from the implementation of projects that affected indigenous peoples, as well as the initiatives adopted by indigenous peoples to ensure the respect for their rights within the framework of consultation processes. Particular attention is paid to the vicissitudes of the Mareña Renovables Wind Project in Mexico, a project partially funded by the I.D.B., which motivated the Indian Law Resource Center to file a complaint with M.I.C.I.

26. The second paragraph contains an initiative adopted by indigenous peoples that is particularly relevant to the consultation processes aimed at obtaining F.P.I.C. Indeed, the language suggested here requires the borrowing country to bear in mind the consultation protocols established by indigenous peoples and communities, which were created precisely in response to the requirement that both countries and private sector companies carry out a consultation process with indigenous peoples. Among others, it is worth mentioning the "Bio-cultural Protocol of the Miskitu People of the Honduran Mosquitia," Honduras, as well as the "Autonomous Protocol for relations with the outside world, including the consultation and the free, prior and informed consent" of the Arhuaco People of the Sierra Nevada in Santa Marta, Colombia. Therefore, this second paragraph requires that when such consultation protocols exist, the borrowing countries make use of them within the framework of consultation processes aimed at obtaining F.P.I.C.

27. The third paragraph suggests a negative measure, which is that the I.D.B. does not support those projects that contradict what is established in the first two paragraphs of this proposal. In other words, it is suggested that the I.D.B. does not support those projects that have not obtained the F.P.I.C. when required, as well as those projects where the borrowers did not make use of the consultation protocols established by indigenous peoples.

28. The fourth paragraph suggested here establishes how the two particular circumstances that usually take place during a consultation process should be interpreted. These circumstances include (i) the refusal of an indigenous peoples to participate in a consultation process; and (ii) the silence of an indigenous peoples with the framework of an ongoing consultation process. It is established here that under these two circumstances, it should be understood that the indigenous peoples to consult or being consulted reject the project, not the opposite.

29. The fifth paragraph of this proposal addresses those changes that take place throughout the life of a project, which also must require obtaining the F.P.I.C. of the corresponding indigenous peoples. These changes include: (i) expansion of the project area; and (ii) the relocation of the project. The latter, for example, occurred during the Mareña Renovables Wind Project in Mexico when it was subsequently relocated and renamed the Southern Wind Project in Mexico due to the complaint filed with M.I.C.I.

30. The last paragraph of this proposal seeks to ensure compliance with the commitments assumed by the borrowers as a result of a consultation process. In the framework of consultation meetings, borrowers often make commitments to the indigenous communities that are being consulted. Unfortunately, the majority of these commitments are not fulfilled, which motivates the communities in question to abandon the ongoing process and abstain from giving their F.P.I.C. This is why it is proposed that the Safeguard Unit of the I.D.B. ensures compliance with such commitments.

Environmental and Social Performance Standard No. 1 Assessment and Management of Environmental and Social Risks and Impacts

31. The Draft Standard No. 1 is essential for the identification of socio-environmental risks and the management of subsequent impacts. Furthermore, as it is known, Standard No. 1 fulfills the function of being transversal to all other proposed socio-environmental standards. However, this Draft does not establish how those human rights risks and impacts (i.e.: the rights of indigenous peoples) should be identified and managed. In our opinion, the I.D.B. should create a new instrument that guides borrowing countries on how to identify human rights risks and manage subsequent impacts.

32. Note that the failure to address human rights risks and impacts is not consistent with the objective of the Draft Social and Environmental Policy Framework to prevent projects financed by the I.D.B. from affecting human rights. In particular, this gap is also not consistent with the objective of Draft Standard No. 7 to ensure that projects financed by the I.D.B. respect the rights of indigenous peoples.

33. The failure to address the human rights risks and impacts contradicts the advances achieved by the international community to protect these rights within the framework of businesses -- both private and public sector. In this sense, it is necessary to mention the Human Rights Impact Study Guide adopted in 2010 by the International Finance Corporation in conjunction with the International Forum of Business Leaders and the United Nations Global Compact. Other examples to mention include the Guiding Principles on Business and Human Rights adopted in 2011 by the United Nations Human Rights Council, the Inter-American Guidelines on Business and Human Rights adopted in 2019 by the Inter-American Commission on Human Rights, and the current development of a Treaty on Transnational Corporations and Human Rights by the United Nations Human Rights Council.

Without further ado, we take this opportunity to express our highest consideration and esteem.



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