



AIDSESP
Asociación Interétnica
de Desarrollo de la
Selva Peruana



August 5, 2020

Mr. Roberto Manrique

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

RE: Comments on the Second Draft of the 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 address you in order to submit our comments on the Inter-American Development Bank's (I.D.B.) second draft of the Environmental and Social Policy Framework (Second Draft Policy), in particular the second draft of the Environmental and Social Performance Standard No. 7 Indigenous Peoples (Second Draft Standard No. 7).

2. We welcome the changes made in the Second Draft Policy, in particular those reflecting the input we provided in our first set of comments.¹ However, we remain concerned about the following outstanding issues relating to the Second Draft Standard No. 7: (1) a new provision allowing the conversion of collective property rights to lands to individual ownership; (2) the lack of a provision relating to indigenous development; and (3) no consideration of protocols developed by indigenous peoples for consultation purposes. We remind the I.D.B. that these safeguard measures are critical to ensuring the physical and cultural survival of indigenous peoples. Failure to do so would indicate the I.D.B.'s limited understanding of the current best practices in development and the numerous existing domestic and international law standards that recognize and support indigenous peoples' collective land ownership and self-determination rights.

I | Conversion of collective property rights to land to individual ownership

3. The Second Draft Standard No. 7 adds a new provision that supports the conversion of indigenous peoples' collective property rights to lands to individual ownership. Surprisingly,

¹ See, AIDSESP & Indian Law Resource Center *et. al*, Comments on the Draft Environmental and Social Policy Framework (April 20, 2020), <https://indianlaw.org/sites/default/files/documents/2020-04-20%20Joint%20Comments%20%28EN%29.pdf>. See also, Letter from Armstrong Wiggins, Director of the Indian Law Resource Center's Washington Office, to the I.D.B. Executive Directors and Counselors on Indigenous Peoples' Joint Comments on the Draft Environmental and Social Framework (June 17, 2020), <https://indianlaw.org/sites/default/files/documents/2020-06-17%20Letter%20to%20IDB%20EDs%20re%20Joint%20Comments.pdf>

instead of devising a provision to safeguard indigenous peoples' collective land rights and prohibit allotment of indigenous lands, the I.D.B. decided to copy the World Bank's controversial approach. The I.D.B. decided to include this provision, which is a literal copy of a World Bank indigenous peoples policy provision,² in the Second Draft Policy without explanation or consultation, similar to how the World Bank proceeded in the second phase of its policy review process.³ In our opinion, this constitutes a major step backwards and is ill-advised because collectively held lands are critical both for indigenous peoples' physical and cultural survival, as well as for environmental protection and climate change resistance.

4. The new provision of the Second Draft Standard No. 7 (paragraph 17) states that the objective of this Standard's action plan to legally recognize indigenous peoples' property rights to land includes "... (b) [the] conversion of customary usage rights to communal and/or individual ownership rights" (the emphasis is ours). This provision, which was not included in the previous Draft Standard No. 7, would allow borrowing countries to divide up indigenous communities' collectively held lands located within the project area, adversely affect their special attachment to their lands, and threaten their continued existence as a distinct people within existing nation-states.

5. The sudden endorsement of the conversion of collective rights to lands to individual ownership contradicts the input provided by more than ten indigenous organizations from the region. Their proposed policy text stated: "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."⁴

6. This policy shift is drastic and dangerous. Breaking up collectively held indigenous lands for development purposes is a bad practice. From a policy perspective, it contradicts all six objectives of the I.D.B.'s own stated objectives under Standard No. 7, and it undermines the entire Policy Framework's safeguards aimed at protecting the environment and fighting climate change. Legally, the proposed policy contributes to the state violation of all international human rights instruments⁵ and the Inter-American Court of Human Rights' decisions⁶ upholding indigenous peoples' collective ownership to their lands, territories, and resources. Finally, it contradicts several countries' laws and/or land titling procedures aimed at recognizing

² World Bank Environmental and Social Framework, Second Draft for Consultations (July 1, 2015), para. 21, <https://indianlaw.org/sites/default/files/World%20Bank%20ESF%20Second%20Draft.pdf>

³ Indian Law Resource Center, Comments on the World Bank's Environmental and Social Framework Second Draft, (January 2016), para. 7-8, <https://indianlaw.org/sites/default/files/2016-02-01%20ILRC%20Comments%20FINAL%20ENG.pdf>

⁴ AIDSESEP & Indian Law Resource Center *et. al*, Comments on the Draft Environmental and Social Policy Framework (April 20, 2020), para. 14, <https://indianlaw.org/sites/default/files/documents/2020-04-20%20Joint%20Comments%20%28EN%29.pdf>

⁵ These instruments include the 2016 America Declaration on the Rights of Indigenous Peoples, the 2007 United Nations Declaration on the Rights of Indigenous Peoples, and the 1989 International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples.

⁶ *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Inter-Am. H.R. Court (Series C No. 400), February 6, 2020; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 146), Mar. 29, 2006; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 125), June 17, 2005; *Case of the Awas Tingni (Sumo) Community v. Nicaragua*, Inter-Amer. HR Court (Serie C No. 79), August 31, 2001.

indigenous peoples' collective land ownership—*e.g.* Argentina,⁷ Nicaragua,⁸ Paraguay,⁹ Panama,¹⁰ etc.

II | Indigenous Development

7. Indigenous development is a cross-cutting, guiding principle that is key to ensuring that projects do not cause harm, but, in fact, benefit the indigenous communities of the region. It is relevant for both the Policy and Standards that the I.D.B. will eventually adopt. While the Second Draft Policy does include participation and benefit sharing for indigenous peoples, it falls short in encouraging projects aiming at fulfilling indigenous peoples' development needs and interests.

8. Despite stakeholder requests for the I.D.B. to pursue a “do good, beyond do not harm” approach,¹¹ the Second Draft Standard No. 7 only considers mitigation measures for project-affected indigenous communities (see paragraphs 22-24). This approach falls below 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, which upholds indigenous development.¹² As written, this draft does not respect the determinate role of indigenous peoples and women in self-determining their communities' development needs and priorities.

9. As indigenous peoples stated in their joint comments, indigenous peoples' development is not to be reduced to mere mitigation measures and only taken into account when indigenous

⁷ For example, in 1996 Argentina created the Programa de Regularización y Adjudicación de Tierras a la Población Aborigen de la Provincia de Jujuy [Land Titling Program for Indigenous Peoples of Jujuy], in order to grant official land titles to the indigenous communities located in the Jujuy Province. *See also, Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Inter-Am. H.R. Court (Series C No. 400), February 6, 2020 (ordering Argentina to delimit, demarcate and grant a single title for 132 indigenous communities and over all the territory, without prejudice to any agreements reached between the communities on the use of the communal territory).

⁸ *See*, Law No. 445, Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Rivers Bocay, Coco, Indio and Maíz, Jan. 22, 2003.

⁹ Because of the lack of effective protection of indigenous peoples' full ownership rights to land, the Inter-American Court of Human Rights issued two decisions against Paraguay, in which the Court ordered Paraguay to provide the land titling procedure with more resources to grant land titles to indigenous communities possessing lands in a timely fashion. *See Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 146), Mar. 29, 2006. *See also Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 125), June 17, 2005.

¹⁰ *See*, Panama Constitution, art. 127. Various laws create indigenous territories called “comarcas” that are held collectively by indigenous peoples. *See*, Law No. 34 Establishing the Wargandi Kuna Comarca, July 25, 2000; Law No. 99 Establishing the Kuna Yala Comarca, Dec. 23, 1998; Law No. 10 Establishing the Gnobe-Bugle Comarca, Mar. 10, 1997; Law No. 24 Establishing the Madugandi Kuna Comarca, Dec. 12, 1996; and Law No. 22 Establishing the Darien Embera Comarca, Nov. 8, 1983.

¹¹ *See*, Feedback Summary Report of the Public Consultation Process, July 6, 2020, p. 5, 8, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1953718872-77>

¹² *See*, I.D.B. Operative Policy OP-765 Indigenous Peoples, February 22, 2006, Section I Definitions, page 5, and Section IV Policy Guidelines, page 6; <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2032081>

peoples are adversely affected by projects.¹³ In our opinion, the I.D.B. must play a more proactive role in terms of indigenous development, not a reactive and passive one. We would like the I.D.B. to rethink its approach to indigenous development and return to its existing Strategy to Indigenous Development as included in its Policy OP-765, keeping in mind that it is a principal aspiration of indigenous peoples to gain I.D.B. support for projects seeking to fulfill their own development needs.

III | Indigenous Consultation Protocols

10. Indigenous peoples' joint comments addressed the importance of utilizing indigenous consultation protocols aimed at obtaining free, prior, and informed consent (F.P.I.C.).¹⁴ These protocols are created by indigenous peoples precisely in response to the requirement that both borrowing countries and/or private sector companies carry out a consultation process with indigenous peoples. When such indigenous consultation protocols exist, borrowing countries must include them within the framework of consultation processes aimed at obtaining F.P.I.C.

11. The Second Draft Standard No. 7 does not mention such protocols, instead addressing the matter in a vague manner. The language used in the Second Draft Standard No. 7 is not specific enough, rather referring to indigenous consultation processes as "culturally appropriate processes" and "Indigenous Peoples' customary decision-making." Indigenous consultation protocols are specific instruments and initiatives established by each indigenous peoples to ensure the respect for their rights within the framework of consultation processes and should be treated as such. Therefore, the I.D.B. must be more explicit in its support for indigenous consultation protocols.

IV | Conclusion

12. The Second Draft Policy does reflect that the I.D.B. has taken positive steps to improve its existing, outdated environmental and social policies, especially those regarding indigenous peoples. However, as indicated in this paper, there are still outstanding issues that the I.D.B. needs to address in order to produce the strongest and most effective environmental and social policy framework in order to safeguard the rights of indigenous peoples and tackle the inequalities that indigenous peoples throughout the region encounter.

13. Most of these issues have been thoroughly discussed and documented throughout this review process and can be properly addressed by eliminating certain provisions (conversion of collective property rights to land to individual ownership), bringing back provisions that exist in the current indigenous peoples policy (indigenous development), and incorporating more direct, inclusive language (indigenous consultation protocols).

¹³ AIDESEP & Indian Law Resource Center *et. al*, Comments on the Draft Environmental and Social Policy Framework (April 20, 2020), para. 11-13, <https://indianlaw.org/sites/default/files/documents/2020-04-20%20Joint%20Comments%20%28EN%29.pdf>

¹⁴ AIDESEP & Indian Law Resource Center *et. al*, Comments on the Draft Environmental and Social Policy Framework (April 20, 2020), para. 26, <https://indianlaw.org/sites/default/files/documents/2020-04-20%20Joint%20Comments%20%28EN%29.pdf>

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



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