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July 23, 2021

Mr. Joseph Milewski
Chief, Environmental and Social Solutions Unit
Inter-American Development Bank
1300 New York Avenue, N.W.
Washington, D.C. 20577

RE: Comments on the Draft Guidelines of the Environmental and Social Performance Standards

Dear Mr. Milewski,

1. The purpose of this letter is to present our comments on the draft guidelines for the Environmental and Social Performance Standards that we consider pertinent. In particular, these comments focus on the draft guideline for Performance Standard 7 Indigenous Peoples (Draft Guideline 7). We are grateful for the attention to detail that the Environmental and Social Solutions Unit devoted to Draft Guideline 7 and for how comprehensively it addresses the many challenges that borrowing countries will encounter in implementing the Performance Standard 7 Indigenous Peoples (Performance Standard 7).

2. Our comments are divided into four sections. The first section focuses on acknowledging the areas where the Draft Guideline 7 provides clear and strong guidance, the second section focuses on issues that require clarification, the third section focuses on issues that require further research and analysis on the new safeguard measures adopted by Performance Standard 7, and the fourth group focuses on recommendations on issues and language to include in specific sections of the Draft Guideline in order to strengthen it.

I | Acknowledgments

3. The comments in this section address the ways in which Draft Guideline 7 make clear and strong statements on what borrowers should anticipate when implementing Performance Standard 7. We believe the I.D.B. has done a good job on acknowledging indigenous identity in a variety of contextual situations and establishing indigenous peoples' special relationship with their lands and territories, which are important to the Scope of Application of Performance

Standard 7.

4. Together, these unambiguous and robust guidelines leave no space for misunderstandings or erroneous interpretations and are key to ensuring that Performance Standard 7 offers the highest level of protections and access to benefit sharing and grievance mechanisms for all indigenous peoples and communities that could be affected by Bank-funded projects. These are the type of guidelines that we want to see for borrowers.

> *GL2. "Legal recognition is not a requirement for the application of ESPS 7, but if there is such recognition it should be respected."*
>
> *GL6. "The applicability of ESPS 7 is determined by meeting some or all of the four characteristics found in paragraph 5 of ESPS 7. Each characteristic is evaluated independently, and no characteristic is more important than the others. In addition, ESPS 7 applies to groups or communities, rather than individuals.*
>
> *GL8. "ESPS 7 applies to groups or communities of Indigenous Peoples who maintain a collective attachment to distinct habitats or ancestral territories and the natural resources therein. This may include:*
>
> - *Communities of Indigenous Peoples who are resident upon the lands affected by the project as well as those who are nomadic or who seasonally migrate over the territory, and whose attachment to ancestral territories may be periodic or seasonal in nature;*
> - *Communities of Indigenous Peoples who do not live on the lands affected by the project, but who retain ties to those lands through traditional ownership and/or customary usage, including seasonal or cyclical use. This may include Indigenous Peoples resident in urban areas who retain ties to lands affected by a project;*
> - *Communities of Indigenous Peoples who have lost collective attachment to lands and territories in the project area of influence, as a result of forced severance, conflict, involuntary resettlement programs by governments, dispossession from their lands, natural hazards and disasters or incorporation into an urban area but retain ties to lands affected by a project;*
> - *Groups of Indigenous Peoples who reside in mixed settlements, such that they form one part of a larger community; or*
> - *Communities of Indigenous Peoples with collective attachment to ancestral lands located in urban areas."*
>
> *GL9. "Projects affecting Indigenous Peoples who are resident within the project-affected area and who are part of a larger regional population of Indigenous Peoples, or who are substantially integrated with mainstream society, are still required to meet the requirements of ESPS 7."*
>
> *GL13. "The screening should also consider Indigenous Peoples who migrate (seasonally or otherwise) outside of their traditional territories into the project area of influence and the activities they carry out in that area."*
>
> *GL38. "While the agreement should be valid for the duration of the project, it is possible that the given consent could also be withdrawn."*

II | Concerns on issues or terms that require further clarification

"*Land tenure*"

5. Draft Guideline 7 uses the term "land tenure" when referring to indigenous peoples' land tenure systems. That is, the way indigenous peoples freely and independently determine the enjoyment of their land ownership without any external imposition or control. For example, GL46 requests borrowers to describe indigenous peoples' land and natural resources tenure systems when assessing the use of lands. GL47 uses "land tenure" when addressing projects that enhance indigenous peoples' land tenure security.

6. However, "land tenure" has a legal meaning in national law that is different from how the Draft Guideline 7 uses it. The civil codes of all the Bank's borrowing countries define "tenure" as the relationship that someone has with something acknowledging that someone else is the owner. Tenure is the opposite of possession. Civil codes define possession as the relationship that someone has assuming ownership -- that is, behaving as the rightful owner and holding or not a state-issued land title. Indigenous peoples' collective land ownership is based on possession, not tenure.

7. We strongly believe that Draft Guideline 7 should state and clarify that the legal meaning afforded to "land tenure" by borrowers' civil law does not apply. Otherwise, Draft Guideline 7 could contribute to the infringement of indigenous peoples' land claims. Indigenous peoples can claim full collective ownership over lands in their possession either via adverse possession lawsuits or within countries' land-titling procedures.

"Legal recognition"

8. Paragraph 17 of Performance Standard 7 uses the term "legal recognition" when referring to projects involving activities aimed at establishing the rights of indigenous peoples to their lands. Surprisingly, Draft Guideline 7 provides no guidance to borrowers on what should be understood by this term.

9. Almost all borrowing countries have a land titling system by which they try to provide legal security to indigenous peoples' lands. Such a system is based upon different administrative and legal procedures, including surveys or cadastres, titling, and registry of land titles into public records. These procedures are discussed in both the O.A.S.[1] and the U.N.[2] declarations on the rights of indigenous peoples. The Inter-American Human Rights Commission and Court deal

[1] *See*, American Declaration on the Rights of Indigenous Peoples, OEA/Ser.P, AG/doc.5537/16 (June 8, 2016) art. XXV(5) (stating that "Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of their lands, territories, and resources, in accordance with the legal system of each State and the relevant international instruments. States shall establish special regimes appropriate for such recognition and for their effective demarcation or titling").

[2] *See*, U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007), art. 26(3) (stating that "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned").

extensively with these matters in their reports[3] and key decisions.[4]

10. In our opinion, Draft Guideline 7 should clarify what "legal recognition" means in the projects in question. These terms may mean the entire country system mentioned above or they mean one, two or more of the procedures making up such system. Each of these procedures is equivalent to the "legal recognition" in question. If the goal is to fully recognize indigenous peoples' land tenure systems, then their lands must be surveyed, their collective ownership be recognized by a title, and such title be properly registered and protected. That's the only way to fully recognize their land tenure system in order to prevent legal challenges to their land ownership. Land ownership is the strongest property right. Usage or usufruct rights are diminished forms of property rights.

No individual titling of collectively held indigenous lands

11. Paragraph 17 of Performance Standard 7 states that, "The Borrower will not pursue projects that entail individual titling in indigenous territories." While Draft Guideline 7 supports this safeguard measure (GL47 and GL48), it also contains confusing language that suggests the Bank would support individual titling. The inclusion of this language is not only contradictory to Performance Standard 7, but also to applicable human rights standards and indigenous peoples' special relationship with their lands and territories. No international instrument supports individual over collective ownership of lands.[5]

12. The practice of allotting indigenous lands is one of the most destructive development practices. Converting communal ownership of indigenous lands to individual ownership undermines indigenous peoples' cohesive social and political structures, which, in turn, may assimilate or integrate them. Furthermore, because allotment is instrumental to opening indigenous lands, it paves the way for extractive industries interested in exploring and developing indigenous lands and resources, which gravely harms indigenous peoples and the

[3] *See*, Inter-Am. Comm'n H.R., Inter- Am. Comm'n H.R., *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter- American Human Rights System*, OEA/Ser.L/V/II, Doc. 59/09 (Dec. 30, 2009).

[4] *Case of the Xucuru Indigenous People and its members v. Brazil*, Inter. Am. H.R. Court (ser. C) No. 346 (Feb. 5, 2017); *Case of the Kaliña and Lokono Peoples v. Suriname*, Inter. Am. H.R. Court (ser. C) No. 309 (Nov. 25, 2015); *Case of the Kuna People of Madungandí and the Emberá People of Bayano and their members v. Panama*, Inter. Am. H.R. Court (ser. C) No. 284 (Oct. 14, 2014); *Case of Norín Catrimán et al. (Mapuche People's leaders, members and activists) v. Chile*, Inter. Am. H.R. Court (ser. C) No. 279 (May 29, 2014); *Case of the Kichwa People of Sarayaku v. Ecuador*, Inter. Am. H.R. Court (ser. C) No. 245 (Jun. 27, 2012); *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Inter. Am. H.R. Court (ser. C) No. 214 (Ago. 24, 2010); *Case of the Saramaka People v. Surinam,* Inter-Amer. H.R. Court (ser. C No. 146) (Mar. 29, 2006); *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Amer. H.R. Court (ser. C No. 146) (Mar. 29, 2006); *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter-Amer. H.R. Court (ser. C No. 142) (Feb. 6, 2006).

[5] The recently adopted 2016 American Declaration on the Rights of Indigenous Peoples recognizes and calls for respect of indigenous peoples' "collective rights that are indispensable for their existence, well- being, and integral development as peoples," such as their collective ownership of lands, territories, and resources. *See:* American Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. VI and art. XXV. The same is true with regards to the 2007 U.N. Declaration on the Rights of Indigenous Peoples and the 1989 International Labour Organization's Indigenous and Tribal Peoples Convention No. 169. *See:* U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 2, art. 2; and International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries art. 14, 15, ILOLEX C169 (June 27, 1989).

environment they depend upon for their physical and spiritual survival. Thus, under no circumstances should collectively held indigenous lands be converted to individual ownership.

13. The language and references supporting individual land titling should be removed from Draft Guideline 7 to avoid any misinterpretation or loopholes. When adopting Performance Standard 7, the Board made it clear that no individual titling will be supported. There is no reason for Draft Guideline 7 to suggest otherwise. We recommend the following actions.

> Remove sentence 9 from GL47: *"However, it must be also considered that individual land titling is permitted within some Indigenous Peoples territories and customary use, laws, and governance decision-making processes should be included as part of the E&S assessment of the project.*
>
> Omit reference to individual land titles from sentence 2 of GL62: *"Allocation of land titles should occur on an individual or a collective basis, based on the results of the SCA…"*

III | Issues that require further research

14. Performance Standard 7 adopted two new safeguard measures: (1) the use of indigenous peoples' consultation protocols for all consultation purposes (paragraph 13); and (2) the establishment of buffer zones to prevent forced contact with indigenous peoples in isolation (paragraph 12). While these safeguards already existed in borrowers' national laws or in practices followed by indigenous peoples, especially those located throughout the Amazon region, Standard 7 now recognizes them and requires borrowers to comply with them.

15. Furthermore, Performance Standard 7 is the only Bank policy to adopt these safeguards, no other policy does so. Neither the OP-765 Indigenous Peoples, the Inter-American Development Bank's previous indigenous peoples policy, nor the current policies of the World Bank and the International Finance Corporation relating to indigenous peoples recognize them. That is, these safeguard measures are "new" to the development finance sector.

16. Even though these safeguards are new, Draft Guideline 7 provides no guidance to borrowers about them. For example, Draft Guideline 7 only mentions indigenous consultation protocols once in GL23 and in a very general way without explaining what they are about and what their implications are with respect to other relevant safeguards or processes, such as those relating to general principles of engagement (GLs20-29) and the process of achieving free, prior and informed consent (GLs39-45). Surprisingly, GL18 and GL19, which are devoted to address safeguards relating to indigenous peoples in isolation, make no reference at all to the establishment of buffer zones. This is extremely worrying.

17. We suggest the following actions. First, provide as much guidance as possible on these two new safeguards in Draft Guideline 7. Second, once the Board approves all Guidelines, undertake further research on these issues and produce additional guidance materials, such as "working papers." The Bank is in a unique position to learn from both the practices followed by indigenous peoples and the legal approaches adopted by borrowing countries in order to build the

much-needed development finance knowledge on these two new safeguards. In so doing, the Bank should seek relevant input from both indigenous peoples and experts.

IV | Recommendations

International law

18. In addressing the international law framework, GL1fails to recognize the Inter-American Human Rights System. The Bank's member countries themselves have created this system by establishing its supervisory bodies (the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights), as well as by elaborating all its treaties and declarations.6 The system was created to address regional particularities following the same rational that led to the establishment of the Bank as a regional financial institution.

19. We strongly recommend that GL 1 is rephrased to highlight the importance of the Inter-American Human Rights System for the Bank's member countries. The legal standards on indigenous issues established by both the American Declaration on the Rights of Indigenous Peoples and the decisions of the system's supervisory bodies applying the American Convention on Human Rights have shaped and continue to shape countries' national laws and policies on indigenous peoples. Most of these standards are relevant for development finance.

Vulnerability analysis

20. GL14 addresses the analysis of vulnerability, which borrowers must perform as part of a risk assessment when indigenous communities are potentially affected by a bank-funded project. In so doing, it lists issues to consider but fails to include the opinion of the communities themselves. Engaging the indigenous community in question on issues relevant to establish their vulnerability is a logical step to undertake. We recommend that the opinion of the communities whose vulnerability is assessed be considered.

Informed consultation and participation

21. GL25 addresses how an informed consultation with indigenous peoples should be carried out. In so doing, it highlights the importance of providing available project information in a culturally appropriate manner. While this is a necessary step to undertake when consulting indigenous communities, we believe that all project documents of mandatory release must be made available without any delay or alteration. In the Mareñas Renovables Wind Power Project, a project partially funded by the Bank, the Independent Consultation and Investigation Mechanism found that no project document of mandatory release was made available to the affected indigenous communities. As a result, the preconditions for an informed consultation and participation were not met. We recommend that GL25 includes project documents of mandatory releases as part of the information to make available to the communities.

[6] *See*, O.A.S., Department of International Law, American Convention on Human Rights, Signatories and Ratifications, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited on Feb. 3, 2015). The countries that did not ratify the American Convention include Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, and United States.

Free, prior and informed consent

22. GL30 addresses good faith negotiations as part of the process aimed at obtaining the consent of indigenous communities who may be seriously harmed by project activities. However, it does not require borrowers to use indigenous consultation protocols if they exist. We believe it necessary to include these protocols. We recommend that borrowers are asked to use such protocols as a key component of their good faith negotiation approach, given the harmful circumstances in which consent is required.

23. The GL37 addresses what should be understood as "community consent." However, in doing so, it does not address what should be understood when the indigenous communities decide not to participate or engage in the consultation process. Indigenous peoples sometimes choose to express their opposition to a proposed project in the form of non-engagement, especially if they feel that the conditions underpinning the consultations are unfair and discriminatory. They may well proceed this way if their consultation protocols are not used by the borrowers. In our opinion, GL37 should state that those situations in which the indigenous communities decide not to participate or engage in a consultation process is not to be understood as a "community consent."

24. We hope that these comments can help the I.D.B. produce the strongest possible Guidelines so as to not lower any level of protection covered by the new Environmental and Social Policy Framework. We believe that, by means of the concerns and recommendations mentioned above, the I.D.B will be able to strengthen its body of expertise on indigenous matters, which is critical to promoting and protecting the rights of indigenous peoples.

Without further ado, we would like to express our highest regards and esteem.

Sincerely,

Leonardo A. Crippa
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Indian Law Resource Center