

# RECOMMENDATIONS TO IDB'S SOCIAL AND ENVIRONMENTAL SAFEGUARDS

## INFORMATIVE SUMMARY



**Coalición Regional**  
Por la transparencia y la participación



D E R E C H O  
A M B I E N T E Y  
R E C U R S O S  
N A T U R A L E S



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REGIONAL COALITION FOR TRANSPARENCY AND PARTICIPATION

DERECHO, AMBIENTE Y RECURSOS NATURALES (DAR FOR ITS ACRONYM IN SPANISH)

DECEMBER, 2020



## **RECOMMENDATIONS TO IDB'S SOCIAL AND ENVIRONMENTAL SAFEGUARDS**

Informative Summary

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**Analysis of the new IDB's Environmental and Social Policy Framework**

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# ABBREVIATIONS AND ACRONYMS

<b>AIDSESP</b>	Inter-ethnic Association of the Peruvian Forest Development
<b>LAC</b>	Latin America and the Caribbean
<b>ANP</b>	Protected Natural Areas
<b>IDB</b>	Inter-American Development Bank
<b>CCF</b>	Contingent Credit Facility for Natural Disaster Emergencies
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>COICA</b>	Coordinator of the Indigenous Organizations of the Amazon Basin
<b>I/A Court HR</b>	Inter-American Court of Human Rights
<b>SEA</b>	Strategic Environmental Assessments
<b>EIA</b>	Environmental Impact Studies
<b>GHG</b>	Greenhouse gases
<b>GREFI</b>	Regional Group on Financing and Infrastructure
<b>IPPC</b>	Conference of the Parties or the Intergovernmental Panel on Climate Change
<b>MICI</b>	Independent Consultation and Investigation Mechanism
<b>ESPF</b>	Environmental and Social Policy Framework
<b>ND</b>	Performance Standards
<b>UN</b>	United Nations Organization
<b>PIACI</b>	Indigenous People in Isolation and Situation of Initial Contact
<b>RTKNN</b>	Kugapakori Nahua Nanti Territorial Reserve and others
<b>ESMS</b>	Environmental and Social Management System

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Photo: Mario Durán

## INTRODUCTION

During 2020, the Inter-American Development Bank (IDB) invested USD 12.6 billion in Latin America and the Caribbean (LAC), while the IDB group (made up of IDB Invest, IDB Lab and the IDB) mobilized USD 1 Billion to help member countries with the acquisition and distribution of vaccines against COVID-19, becoming a strategic financial stakeholder to fight against the pandemic<sup>1</sup>. Also in that year, the new IDB president was elected and its social and environmental safeguards were reformed, now called the Environmental and Social Policy Framework (ESPF). The new ESPF seeks to expand measures on socio-environmental aspects and changes the focus of processes towards principles.

As result, the IDB now has ten (10) Performance Standards (PS) and has also included environmental and human rights standards governed at the international level<sup>2</sup>; for example, respect for the right to prior consultation of indigenous peoples. Another important advance has been the creation of an exclusion list of projects, activities and initiatives prohibited from financing. However, the aforementioned list has also considered exceptions that allow the execution of some activities, finding gaps about the clarity in the distinction of responsibilities between the borrowers and the IDB, the way in which compliance with the safeguards would be guaranteed and respect for the collective rights of indigenous peoples.

In order to prepare the first draft, face-to-face consultations were held in Panama and Lima, which lacked an adequate methodology for collecting and discussing the recommendations. In addition, the planned consultations in Washington were not rescheduled despite lockdown measures throughout the region due to COVID-19, which

<sup>1</sup> See: <https://www.iadb.org/es/noticias/grupo-bid-aprueba-record-de-us21600-millones-en-prestamos-en-2020>

<sup>2</sup> In the ESPF we find the standards included in the Paris Agreement, the indigenous rights framework, the human rights framework, the principles related to the adequate, sustainable use and protection of natural resources, among others.

hurt civil society participation due to connectivity problems. Finally, the period granted for the collection of recommendations from the first and second drafts was insufficient due to the fact that civil society did not carry out an exhaustive review of each norm due to the difficulties of the pandemic.

It is worth mentioning that, Derecho, Ambiente y Recursos Naturales (DAR), in coordination with other organizations of the Regional Coalition for Transparency and Participation (hereinafter the Regional Coalition), the Regional Group on Financing and Infrastructure (GREFI), as well as the IDB Working Group, the Coordinator of Indigenous Organizations of the Amazon Basin (COICA) and the Inter-ethnic Association of the Peruvian Forest Development (AIDSESP), participated jointly in the entire ESPF reform process. From this, recommendations were generated in the two moments of consultations and advocacy actions to highlight the main changes requested to the document. This work resulted in the inclusion of several recommendations in the final document that was approved by the IDB, which will be discussed later.

Finally, a comparative analysis was carried out between the recommendations requested by civil society and what was finally included in the final document approved by the IDB. In this sense, the first block will develop the observations to the transversal provisions, while the second block, will develop the environmental and social PS, in accordance with the index proposed by the ESPF.

Photo: Jhonel Rodríguez







Photo: Viviana Araujo

## 1. ABOUT THE CONSULTATION PROCESS OF THE ESPF DRAFTS

The first consultation process of the ESPF presented some elements that limited the effective participation of civil society, such as: i) for the face-to-face consultations, only 4 countries of the region were selected, despite the fact that the IDB has headquarters in each Latin American capital; ii) said consultations overlapped with other ongoing consultation processes (IDB Invest, IDB and IDB Access to Information Policy); iii) the call made by the IDB lacked adequate dissemination channels, which meant that the issues could not be addressed with all the stakeholders involved or those who might be (local-based organizations or workers' unions); iv) the spaces for participation lacked adequate intercultural methodologies that made it possible to know the background of each PS and/or the collection of recommendations; and v) the time limits granted for face-to-face consultations were limited and insufficient. Despite its complexity, only one working day was arranged for the 10 PS to dialogue.

Regarding the second stage, due to the pandemic, representatives of civil society requested the postponement of the public consultations. Despite having included the principle of transparency in the profile of Modernization of Environmental and Social Policies in order to make the process more flexible and guide participatory collaboration in its discussion, only a period of 30 days was granted to send the recommendations. Therefore, said term turned out to be insufficient and inappropriate.

Finally, the series of observations presented were evidenced in the content of their PSs, such as the lack of sanctions for irreversible impacts or the lack of identification of responsibilities necessary for citizen oversight of the investments made by the IDB. Despite this, the several advances included in the final document compared to the previous version of safeguards that the IDB had are recognized, reaching several goals as result of the work and advocacy of civil society.



Photo: Rolando Mondragon

## 2. ANALYSIS OF THE TRANSVERSAL PROVISIONS OF THE ESPF-IDB

### 2.1. IDB COMMITMENTS TO ENVIRONMENTAL AND SOCIAL SUSTAINABILITY

According to the provisions of PS #1, borrowers would be required to conduct an environmental and social assessment, and prepare projects that comply with the ESPF. However, although the ESPF defines guidelines that regulate the borrower's activity during the preparation and execution of the financed project, the bank has not established specific guidelines for clients to respond to the effects and impacts that such projects would generate. For example, when there is a state breach of human rights, the lack of public services, and/or the lack of prior, free and informed consultation processes, when they want to implement legislative or administrative measures.

Likewise, for the first draft, the Regional Coalition recommended the application of protection standards regarding human rights and indigenous peoples, such as ILO Convention 169, the United Nations Declaration on the rights of indigenous peoples and the United Nations Declaration on the Rights of Peasants and Other People who Work in Rural Areas, the Escazú Agreement, among others. The positive thing was that aspects of these treaties were included in the second draft. This implied an advance to demand its fulfillment in favor of the communities that live in the areas surrounding the projects.

On the other hand, the IDB has created an exclusion list of prohibited financing activities. One of its main objectives is to promote the change in energy consumption, which could also imply changes in State policies on energy matrices. Thus, it has been financing

hydroelectric and solar energy projects. However, these types of projects also involve social and environmental risks that the States and the IDB must take into account.

It is worth noting, the language used in the ESPF stands out for offering principles such as standards that guide the actions of the customer and the bank, but which are not “mandatory”. In addition, there is also an absence of specific rules that consider the context of the clients and the role of the IDB for the recovery of the region due to the COVID-19 pandemic.

Finally, it will be a great challenge for civil society organizations, indigenous peoples and/or local communities, to implement the observations and recommendations to respect the international framework of human rights standards, governed by the principle of non-regressively. In this sense, it is important to monitor compliance with the PSs by using guidelines that measure their degree of effectiveness and/or results.

## 2.2. OBJECTIVES AND SCOPE OF THIS DOCUMENT

Regarding this point, and despite the fact that socio-environmental management is one of its objectives, it was identified that the bank did not establish specific obligations for new breaches that the borrowers may commit or those that may occur during the execution of the project in this regard.

Regarding the effects on the environment, natural resources and/or indigenous peoples, “the IDB will require the borrower to submit a complete and detailed justification for any alternative it proposes”. Although the ESPF is applied mainly to “those loans in support of policy reforms that, according to the bank, require an environmental analysis”, most of the time it is the governments themselves (public entities), who during the preparation and/or the execution of public policies omits an adequate identification of risks and potential damages. It is for this reason that the IDB must be more demanding with borrowers and establish mandatory compliance rules.

In response to the latter, the bank decided that the ESPF will be applied to investment loans, non-reimbursable resources for investment and investment guarantees, but not to those “operations under the Contingent Credit Facility for Natural Disaster Emergencies and of Public Health (CCF)”. However, countries may claim the emergency situation due to COVID-19 and not be subject to IDB regulation. Therefore, it is necessary to be alert to any omission or lack of compliance with the ESPF.

To that extent, it is necessary to strengthen the organic and institutional capacities of the IDB’s Independent Consultation and Investigation Mechanism (MICI), as well as its investigation, response, and execution functions regarding cases reported by indigenous organizations. Even though this proposal was highlighted during the first and second ESPF review processes, it was not included. Therefore, it is necessary to effectively integrate the opinions of indigenous peoples during the pre-investment and loan formulation stage.

Finally, it is pending to indicate by the IDB on how the socio-environmental impacts will be addressed in the loans that are outside the ESPF, as is the case of the financing granted to the National Competitiveness and Productivity Plan, and the implementation of the Leticia Pact, where there are already budgetary items for Colombia<sup>3</sup> and Peru<sup>4</sup>, pending Bolivia, Brazil and Ecuador. This will become a scenario to consider during 2021.

3 IDB. Recovered from <https://www.iadb.org/es/project/CO-G1025> y <https://www.iadb.org/es/project/CO-G1027>

4 IDB. Recovered from <https://www.iadb.org/en/project/PE-T1456>



## 2.3. ROLES AND RESPONSIBILITIES OF THE IDB AND ITS BORROWERS

The ESPF represents the obligations of the borrowers to act with due diligence and to identify and implement measures that integrate social and environmental impacts and risks. In this sense, the IDB's obligations are to seek adequate channels and necessary mechanisms to counteract the negative impacts and consequences that the projects they finance will produce.

Thus, in accordance with the provisions of PS #10, the borrower will be responsible for carrying out a participation plan according to the nature and scale of the project, as well as its potential risks and impacts. This measure will require States to comply with the standards of access to information and participation, making it necessary for the IDB to monitor and evaluate the effectiveness of the aforementioned plans, as well as the integration of the different approaches in human rights, gender, and interculturality, among others. On the other hand, it is observed that the ESPF had to include additional measures to adapt the participation mechanisms and access to information in the context of epidemics or pandemics.

Due to the pandemic, it was observed that the participation of civil society and indigenous peoples decreased in the last stage of the ESPF review process. In this sense, it is necessary for the IDB to dialogue and execute the ESPF in a coordinated manner during the implementation of the new policy and its guidelines, with the assistance and integration of the needs of groups in vulnerable situations.

In cases where the IDB co-finances projects with other institutions, common approaches such as the principles of non-dilution, proportionality, transparency, and results-orientation should be adopted, ensuring that the respective results are the same as if the ESPF had been applied.

Finally, it is necessary to mention that the IDB grants its loans through different requirements, forms, instruments and /or obligations, having as a common point the application of safeguards, whose level of demand varies according to each case. That is, the safeguards that are required; for example, to a financial intermediary differs from those required if they are multiple works operations, construction operations, results-based loans or policy reforms, or if they are technical cooperation and pre-investment operations. Therefore, it is important to monitor these different instruments.

**Table 1: Types of IDB Loan Management Instruments**

Instruments or agents	What are they?	What safeguards or requirements must be met?
<b>Financial intermediaries</b>	They assume delegated responsibility for assessing environmental and social risks and impacts, managing risks and impacts, monitoring them, and carrying out general portfolio management.	The IDB will conduct a due diligence analysis on the corresponding intermediary and its portfolio to evaluate. The IDB will conduct a due diligence analysis on the corresponding intermediary and its portfolio to evaluate.
<b>Multiple-site operations</b>	(i) They are physically similar, but independent of each other; (ii) its feasibility does not depend on the execution of a certain number of projects, and (iii) its individual size does not justify direct financing by the bank	The IDB performs the due diligence analysis in environmental and social matters, based on the selected representative sample.



Instruments or agents	What are they?	What safeguards or requirements must be met?
<b>Operations under construction</b>	Projects already under construction	The IDB will finance projects that are already under construction, only if the borrower can demonstrate that the operation meets all relevant requirements of the environmental and social performance standards.
<b>Results-based loans</b>	It is an investment loan that finances the costs of activities (for example, goods, works and services) related to the achievement of these results. It is disbursed once these have been properly achieved and verified.	The bank will assess whether the borrower's ESMS is adequate to carry out the activities that the loan is expected to finance, in accordance with the requirements of the environmental and social performance standards.
<b>Policy-based loans</b>	They provide flexible and liquid (fungible) financing to the bank's borrowing member countries, to support policy reforms and/or institutional changes in a given sector or subsector. Policy-based loans are capped at 30% of the bank's total loans. <sup>5</sup>	In the design phase of a loan operation, in support of policy reforms, the bank will verify whether certain proposed policy reforms or institutional changes supported by the operation have significant and direct negative effects on the environment and natural resources of the country.
<b>Technical cooperation operations and previous investment</b>	The IDB finances technical cooperation programs for institutional strengthening, knowledge transfer, and studies, which include diagnoses and pre-investment and sector studies, which support the preparation of projects. Programs can be targeted for specific projects in a single country or for trade, integration or regional initiatives. Technical cooperation programs can be non-reimbursable (grants), reimbursable (loans), or contingent recovery (reimbursable if the program obtains additional financing). <sup>6</sup>	The terms of reference and products of these studies must comply with the applicable requirements of the Environmental and Social Policy Framework.

Source: Denisse Linares.

## 2.4. GRIEVANCE MECHANISMS AND ACCOUNTABILITY

During the first and second review stages, recommendations and observations were made regarding the capacity for dialogue with civil society and with the groups most affected by the projects they had been financing. Thus, the incorporation of complaint mechanisms was requested that were not subject to the approval of customers, but

<sup>5</sup> IDB. *Policy-based loan categories*. Recovered from <https://www.iadb.org/es/acerca-del-bid/financiamiento-al-sector-publico/prestamos-basados-en-politicas>

<sup>6</sup> IDB. *Technical cooperation*. Recovered from <https://www.iadb.org/es/cooperacion-tecnica>

were required by the bank at key moments, to be efficient, fast and, above all, culturally appropriate. Therefore, the following complaint resolution channels were strengthened: 1) the project's complaint mechanism; 2) relevant local grievance mechanisms; and 3) directly to the IDB, which will respond within a reasonable time. In addition, the MICI was identified as the most immediate complaint mechanism.

On the other hand, retaliation, threats, intimidation, harassment and/or violence exercised against those who express their opinion or opposition to a project financed by the bank or towards the borrower were rejected, this being a transcendent provision, due to the current situation of environmental defenders in Latin America. The pending challenge is how to specify this provision in promoting adequate mechanisms and protocols to safeguard the lives of these communities and people when they exercise their rights to protest or when they defend the environment. Lastly, the IDB faces the challenge of strengthening the functioning of governance and governability mechanisms, especially in countries that have seen their public institutions and local communities weakened.

## 2.5. ACTIVITY EXCLUSION LIST

As previously mentioned, the ESPF establishes a detailed list of exclusion of projects, activities or initiatives that are prohibited from financing due to the dangers, risks and damages that they imply for the territories where they are carried out; therefore, either directly or through intermediaries, clients whose activities violate agreements, laws and/or regulations will not be financed.

Photo: DAR



Thus, the IDB has identified as activities incompatible with environmental sustainability: i) coal mining or related coal energy activities; ii) oil exploration and development projects; and, iii) gas exploration and development projects. Regarding the second and third point, in the Amazonian territories there are a large number of extractive concessions, therefore, recognizing the importance of not financing these types of projects that are not environmentally sustainable, allows analyzing more viable initiatives with the environment and, in special, with the participation of indigenous peoples.

In turn, in different countries of the region there is a greater tendency towards operations based on fracking, this is even more harmful<sup>7</sup> than traditional forms of extraction, also included in the exclusion list. An example is the Vaca Muerta projects in Argentina (financed by the American company Overseas Private Investments Corporation)<sup>8</sup>, PEMEX in Mexico, among others.<sup>9</sup>

However, this progress would be limited as the ESPF has provided that: «[...] in exceptional circumstances, and depending on individual cases, the possibility of financing gas exploration and extraction infrastructure will be considered where this entails a clear benefit in terms of access to energy for the poor and minimizing greenhouse gas emissions [...]». In other words, the IDB may evaluate, on a case-by-case basis, the granting of financing for gas extraction projects. It is known that in the Amazon there are large amounts of gas reserves that are superimposed on the territories of indigenous peoples, whose projects present a high degree of contamination that affects the surrounding areas. For example, in the case of Block 88 (Camisea), located in Peru, the human rights of indigenous peoples in a situation of isolation and in a situation of initial contact (PIACI) of the Kugapakori, Nahua, Nanti and other Territorial Reserve (RTKNN), are affected due to cases of mercury contamination of the Nahua people.

Considering this, it is urgent for the bank to comply with international standards and commitments such as the recommendations given by the Inter-American Commission on Human Rights (IACHR) "in attention to the principle of no contact, to analyze whether the peoples in voluntary isolation give their consent or not to the presence of people outside their own, in their ancestral territories".<sup>10</sup> On the other hand, the IDB must evaluate, based on objective reports, the effectiveness of generating energy for the poorest, because this justification is invalidated when, in projects such as Camisea in Peru, «the main destination of the natural gas that is produced is export, followed in importance by electricity generation and, to a lesser extent, industrial consumption. A small part is used in the vehicle sector and only 1% in homes and small businesses»<sup>11</sup>.

7 See: <https://nuso.org/articulo/geopolitica-del-fracking-impactos-y-riesgos-ambientales/>

8 Spaltro, S. USA approves financing for US\$ 1100 millions for Vaca Muerta PPP vial and renewable energies. Recovered from: <https://www.cronista.com/economia/politica/EE.UU.-aprueba-financiamiento-por-us-1100-millones-para-Vaca-Muerta-PPP-vial-y-energias-renovables-20190911-0046.html>

9 Mexican Alliance Against Fracking. Recovered from <https://nofrackingmexico.org/informacion-oficial-confirma-que-el-fracking-sigue-avanzando-en-mexico/>

10 DAR, DPLF, HRREC. (2018). *Amicus Curiae regarding the rights of indigenous peoples in isolation and initial contact (PIACI) of the RTKNN*. Recovered from [http://www.dplf.org/sites/default/files/amicus-\\_dar\\_dplf\\_ottawa\\_version\\_final.pdf](http://www.dplf.org/sites/default/files/amicus-_dar_dplf_ottawa_version_final.pdf)

11 Citizen proposal. *Camisea gas: its history, its reality, perspectives for the southern Andean region*. Recovered from <https://propuestaciudadana.org.pe/wp-content/uploads/2019/11/El-gas-de-camisea.-Su-historia-su-realidad-y-las-perspectivas-para-el-Sur-Andino.pdf?fbclid=IwAR1BCr8WGO-DAGrCzRIT3QcLXSb0zODEl6kCE6qIcKRgEgTRuQkEewhyLO>





Photo: Rolando Mondragon

## 3. ANALYSIS OF ENVIRONMENTAL AND SOCIAL PERFORMANCE STANDARDS

### 3.1. ASSESSMENT AND MANAGEMENT OF ENVIRONMENTAL AND SOCIAL RISKS AND IMPACTS (PS #1)

During the civil society participation stage, comments were included on this PS related to: i) the Environmental and Social Management System (ESMS); ii) environmental and social performance, and its implications regarding the liability of borrowers and the bank; and iii) the prevention, mitigation and compensation of the impacts and damages caused in the projects.

Thus, this PS ordered the borrower to establish a general environmental and social framework that defines the environmental and social objectives and principles (understood as guidelines) and, if they are not complied with, to ensure the best way to repair the damages. In addition, a tool such as the «mitigation hierarchy was included to anticipate and avoid, or failing that, minimize risks and, when there are residual impacts, compensation measures or compensation for risks and impacts for workers, people affected by the project and the environment»<sup>12</sup>. However, this PS does not provide

<sup>12</sup> IDB (2020, September). *Environmental and Social Policy Framework*. Recovered from <http://www.iadb.org/document.cfm?id=EZSHARE-2131049523-12>



sanctions or stoppage of activities for the damages, therefore, the States would have their own responsibility to monitor and/or sanction.

In addition, the PS adopts a definition of project that does not cover all of its activities, but only those approved at first, with the possibility of adding activities and/or subsequent changes to its design. This provision is risky because those responsible will not be able to be identified after they have abandoned the project, which means that those affected are not fully remedied or compensated. Therefore, it is important to clearly establish the responsibility of the borrower and thus be able to identify the risks that these situations represent for the project, as well as the opportunities for collaboration with those third parties. In addition, the “use of an effective grievance mechanism, which can facilitate an early indication (and quick fix) for those who believe that a borrower’s actions have harmed them,” is supported.<sup>13</sup>

A thorough job was done to classify and identify vulnerable populations that could be affected and their related rights (environment, climate change, health, etc.). It was also mentioned that the borrower will consider risks and impacts related to human rights, gender, natural hazards and climate change throughout the evaluation process, which implies that such work is carried out with due diligence and in line with the Guiding Principles on Business and Human Rights of the United Nations.

We reiterate that these measures do not establish clear sanctions; therefore, such work is the direct responsibility of the States parties. Reality shows that public institutions have poorly planned investment projects; an example of this is Law No. 28736, Peru’s PIACI Law and the pressure exerted by economic power groups on PIACI territories, which makes it any type of preventive policy difficult when formulating projects in search of respect for the intangibility and non-contact of these peoples. It is argued that more than 10 million people in Peru<sup>14</sup> would be harmed with projects on their territories. Therefore, the current context requires the bank to adopt tools that allow governments to compensate and repair the damages caused, and not only remain mere recommendations.

In addition, the PS indicates that the risk and impact identification process will be based on recent baseline data on environmental and social aspects, with an adequate level of detail. Reason why these tools could be provided from the planning of policies, plans and programs, through Strategic Environmental Assessments (SEA), which should be considered from the design stage, so that the cumulative, synergistic impacts of the social, biological, physical, economic aspects, among others, in the territories are fully understood in an integral way.

Thus, for the development of studies in fragile ecosystems, the participation of the academy must be articulated with civil society and indigenous organizations, these studies must be included in the planning of policies, plans and programs, through Environmental Impact Studies (EIS) and EAE, as well as those loans aimed at policies and plans that seek to transform the structure of the State. In Peru, for example, there is already a lawsuit for the application of the consultation in the EIA of the Amazon Waterway project. Finally, environmental surveillance and monitoring programs must also be expressly included, in order to guarantee the participation of citizens and local communities throughout the life of the project.

<sup>13</sup> Idem

<sup>14</sup> See: <http://dar.org.pe/dar-opina-aprobar-la-intangibilidad-estricta-de-las-reservas-para-piaci-significa-un-atentado-contra-la-iniciativa-privada/>

### 3.2. LABOR AND WORKING CONDITIONS (PS #2)

Civil society made recommendations and/or criticisms for governments on the recognition of the dignity of the worker and the employment relationship. In this regard, the jurisprudence of the Inter-American Court of Human Rights (I/A Court HR) has made these same questions, therefore, they should be considered as part of a guideline of the bank itself, without neglecting its oversight role. Therefore, the IDB has done well to detail the several requirements that governments must meet to preserve the integrity, health, and well-being of workers during the targeted quarantines that are being implemented to reactivate the economy<sup>15</sup>. Despite this, it is observed that in recent months, for example, in the mining sector the number of infected has increased<sup>16</sup>.

### 3.3. RESOURCE EFFICIENCY AND POLLUTION PREVENTION (PS #3)

This PS is based on the mitigation hierarchy and the “polluter pays” principle. Thus, it was established that the scope of the document was determined by “the process of identifying risks and environmental and social impacts and the execution of its necessary activities would be the responsibility of the borrower.” In this regard, the main criticism is related to the lack of specific tools that help to identify investment projects that are about to be executed or in execution, and that will increase greenhouse gases (GHG). Within the framework of good international practices, the measures carried out will have to fit into a technically and financially feasible proposal. This includes World Bank guidelines on the environment, otherwise measures will be taken to minimize impacts on human health and the environment, leaving open the possibility of damage that cannot be avoided. Furthermore, it is not clear which activities are beyond the technical and financial possibilities, and this PS must be aligned with the list of prohibited activities, listed in Annex I of the ESPF.

Although this PS focuses on the impacts that high water consumption can generate on people and on biodiversity, it does not include the differentiated impacts between women and men, as well as the collective impacts. Likewise, its implementation must include the commitments assumed in the Conference of the Parties or the Intergovernmental Group of Experts on Climate Change (IPPC), despite the fact that in previous PSs international standards and/or treaties were already considered true. For future projects, it is recommended that tools that implement and harmonize climate commitments with access to information and accountability mechanisms prevail. Finally, the concept of circular economy is mentioned as an alternative to begin to limit the excess consumption of natural resources, so its learning and implementation is urgent<sup>17</sup>.

15 Miranda, B. *Coronavirus in Latin America: the double problem caused by the pandemic for mining in the region*. Recovered from <https://www.bbc.com/mundo/noticias-52371359>

16 Servindi (2020, May 20th). *500 mining workers infected with COVID-19*. Recovered from <http://www.servindi.org/actualidad-noticias/20/05/2020/suben-500-trabajadores-mineros-infectados-con-covid-19>

17 The essence of this concept is centered, according to Nußholz (2017), on resources and the need to innovate business models based on circular value propositions, which change from individual transactions between actors in the value chain to multiple transactions through circular business models. Recovered from <https://www.redalyc.org/jatsRepo/280/28062322016/html/index.html>

### 3.4. COMMUNITY HEALTH, SAFETY AND SECURITY (PS #4)

The regulation of this PS seeks to prevent the impacts on the health and safety of local communities when facing the risks posed by climate change as a result of infrastructure projects, being necessary the development of technical capacities to counteract them. Therefore, if there is a high risk for local communities, the State must adopt preventive behavior and have an independent third party to monitor and evaluate it accordingly. To date, no punitive measures have been established in the event of an eventual affectation. In addition, this PS places special emphasis on the effects that occur in the provisioning and regulatory ecosystem services, as well as the risks arising from endemic and non-endemic diseases, caused by the contamination of natural resources and conflicts or the pressures that arise.

Along the same lines, it is observed that the pandemic has shown the serious shortcomings of the development model in LAC governments, therefore, DAR considers that the current scenario and that of the post-pandemic create a great opportunity to promote and reactivate financing that focuses on the primary needs such as the health of peoples in vulnerable situations, it being important that the implementation of the ESPF foresees such scenarios and does not leave political and economic responsibility to the States that, during the state of emergency, have gone through high the rights and demands of indigenous peoples.

Regarding the prevention and management of conflicts, the ESPF indicates that the responsibility falls on the States and, specifies that they must be guided by the principles of responsibility and good practices, in addition, indicating that only "reasonable inquiries" will be made when they make use of law enforcement agencies in conflict resolution. Therefore, it is still pending to present a clear and mandatory measure to foresee, evaluate and address situations of conflict or threats to environmental defenders, being necessary for the IDB to show its concern at the increase in the murders of these people in the context of the extractive and infrastructure industries. Therefore, its practical visibility is urgent to avoid promoting a development that ignores the social context of criminalization and increased murders in LAC.

### 3.5. LAND ACQUISITION AND INVOLUNTARY RESETTLEMENT (PS #5)

This rule established that the concepts of physical displacement (relocation or loss of home) and economic displacement (loss of access to assets or sources of income) would be part of the responsibilities of the borrowers, as part of the acquisition of land and the involuntary resettlement of the projects financed by the bank. Although there is already a specific PS for indigenous peoples, PS #5 provides that, in the case of indigenous peoples, prior consultation will be carried out in accordance with the provisions of PS #7. However, the final document is not clear regarding the impact they suffer when they are forcibly transferred, or about the regulations that protect the right to free, prior and informed consent. On this point, international treaties on indigenous peoples, such as ILO Convention 169 and the UN Declaration on Indigenous Peoples, show that given the serious damage to integrity, life and development models (involuntary resettlement), free consent is necessarily required, the procedures of which must be in accordance with the law.

Table 2: International standards on indigenous peoples

Situations that require consent	International Legal Sources
<p><b>Transfer of indigenous peoples</b></p>	<p><b>ILO Convention 169</b>                      Art. 16. When exceptionally the transfer or relocation of indigenous peoples is considered necessary, they should only be carried out with the free, prior and informed consent. And when they cannot give their consent at the end of the adequate procedures established by national legislation.</p>
	<p><b>UN Declaration on Indigenous Peoples</b>                      Art. 10. No transfer will be made:                      a. Without the free, prior and informed consent of indigenous peoples.                      b. Without a prior agreement on fair and equitable compensation.</p>

Source: Rodrigo Orcotorio.

Finally, it is necessary for the IDB, and especially the States, to respect the right to prior consultation and free consent, even if they are universally claimed rights, not to make an express mention of them (or to leave the interpretation in documents officials such as the ESPF) would only leave the door open to its violation or poor implementation by the States, contributing to its flexibility.

Photo: Alicia Gómez/AAS





### 3.6. BIODIVERSITY CONSERVATION AND SUSTAINABLE MANAGEMENT OF LIVING NATURAL RESOURCES (PS # 6)

This PS provides for the identification of direct, indirect and cumulative impacts on biodiversity and ecosystem services, especially those that threaten the destruction of the habitat of exotic species and cause hydrological changes; but “when it is not possible to avoid impacts, measures should be defined to minimize them and restore biodiversity and ecosystem services”<sup>18</sup>. Thus, this PS applies to projects that i) are located in modified, natural and critically important habitats; ii) may affect ecosystem services managed directly by the borrower or over which the borrower has considerable influence, or that depend on such services; or, iii) include the production of living natural resources (agriculture, livestock, fishing and forestry).

However, the IDB has left open the possibility of executing activities that represent considerable threats that could be irreversible, or whose resilience capacity could be long-term, which would affect not only the resources themselves, but also the people who depend on them. For these reasons, the locks to consider and approve this possibility must be very strict and have the binding opinions of all sectors. For this reason, DAR recommended that the IDB make an express mention of biodiversity as a form of conservation of natural resources, as well as of protected natural areas (ANP), the territories of indigenous peoples and the territorial and indigenous reserves for the PIACI, including its various categories. Despite this, the ESPF did not expressly incorporate any of these areas, but it did mention legally protected and internationally recognized areas. The IUCN definition was used to include and categorize ANPs.

Finally, it is necessary to take into account those areas that are in the process of categorization or in a situation of controversy for the change of category, because many times that definition does not depend on scientific or technical aspects, but on economic and political interests, therefore that it is necessary to clarify the role of the IDB in these cases.

### 3.7. INDIGENOUS PEOPLES (PS #7)

Recommendations made by indigenous organizations and different civil society organizations during public consultations have been incorporated into the final document of the ESPF, making express mention of the treaties and norms necessary to strengthen the guarantee of human rights. However, the ESPF did not adapt its regulation to international standards regarding the right of self-identification, which is based on respect for the right to indigenous identity; therefore, it would continue to justify that States or institutions establish their own definitions. Thus, in an attempt to describe what the IDB understands by indigenous peoples, it detailed a series of requirements contrary to international standards established in legal instruments such as ILO Convention 169 and that even go against pro persona principles, progressivity and non-regressivity in matters of human rights, good faith and *pacta sunt servanda*.

Regarding the PIACIs, it was recommended that the IDB include the obligation that States, borrowers and other actors have to guarantee the principle of non-contact and the intangibility of their territories in the face of any type of projects, extractive interventions

<sup>18</sup> IDB (2020, September). *Social and Environmental Policy Framework*. Recovered from <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-2131049523-12>

or related activities, of according to international jurisprudence. It should be noted that the ESPF incorporated the indication that the projects must ensure that no contact is established with these peoples, either as a direct or indirect consequence of the project.<sup>19</sup>

In addition, it was recommended that indigenous legal systems, their rules and their own cultural characteristics (consultation and consent protocols) should be recognized. In this regard, the PS incorporates the recognition of the implementation of indigenous consultation protocols in the interaction processes between the borrower and the community<sup>20</sup>, as a step forward in the strengthening of the right to prior consultation. However, it did not establish measures or sanctions to be imposed in the event of non-compliance with the agreements reached in the framework of a consultation process.

Regarding free, prior and informed consent, the ESPF added that “[t]he borrower will not attempt to carry out projects that involve the granting of individual land titles in indigenous territories”.<sup>21</sup> However, it did not establish, in a reliable way, respect for the decision not to grant consent by indigenous peoples. In this sense, the IDB has yet to reformulate and adapt the content of this right to international standards.

Finally, the IDB still has pending the identification of measures aimed at guiding the fulfillment of the obligations by the borrowers, in relation to the effective recognition of the territorial rights of indigenous peoples through cadastral, titling and registration. To this end, during the consultation held in Lima, the indigenous organizations recommended that an express prohibition be included so that the IDB does not finance those projects that undermine this effective recognition. This recommendation has been incorporated into the final document of the ESPF, by providing for the non-titling of individual properties in indigenous territories.

### 3.8. CULTURAL HERITAGE (PS #8)

Regarding this regulation, the IDB reproduces the inconsistencies identified on the right to consultation, by not adapting the regulation to an intercultural approach, which limits the identification and inclusion of the different views of indigenous peoples about their cultural heritage. Therefore, we recommend that international standards of respect for cultural heritage be taken into account, for example, the one established by the jurisprudence of the Inter-American Court<sup>22</sup>, which includes a complexity of symbols, manifestations that must be known, more even if the activities of a loan imply confronting, talking with these manifestations, so that they are not transformed or transgressed.

### 3.9. GENDER EQUALITY (PS #9)

Even though the inclusion of the gender approach in the ESPF has had a significant advance, it is still pending to make visible the differentiated impacts on the lives of indigenous women, which requires a special regulation. However, it is important to recognize that in the ESPF, at the foot of the page, valuable treaties on the protection of

<sup>19</sup> Ibidem, page 100.

<sup>20</sup> Idem.

<sup>21</sup> Idem.

<sup>22</sup> I/A Court HR (1997). *Protection of the heritage of Indigenous Peoples. Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities Chairperson of the Working Group on Indigenous Populations*. Recovered from <https://www.corteidh.or.cr/tablas/r912.pdf>

women's rights have been incorporated, such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Declaration on the Elimination of Violence against Women (1993).

In addition to the above, the mention of the sexual division of labor and the impact it has on women to achieve their economic empowerment also stands out. This PS also regulates the situation of sexual exploitation and abuse of minors, and requires the borrower to adopt differentiated measures to prevent and punish these behaviors<sup>23</sup>. Likewise, it is important to point out that the differentiated situation of "women, girls, sexual and gender minorities" has been expressly incorporated".<sup>24</sup>

Finally, it is essential that international institutions such as the IDB develop their financing policies making visible and addressing structural problems that require substantial changes at the social level and in State institutions, promoting a policy framework consistent with the international obligations on gender issues assumed by many of its borrowers. Therefore, it is important that the IDB continues to strengthen its policy framework by financing projects focused on human rights, gender, and interculturality; and, also, continue to address structural causes.

### 3.10. STAKEHOLDER ENGAGEMENT AND INFORMATION DISCLOSURE (PS #10)

In this regard, it was observed that this PS included the Escazú Agreement as a source to "implement the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters"<sup>25</sup> when it emphasizes the borrower's relationship with stakeholders. On this point, the IDB recognizes as stakeholders: i) those who are affected or are likely to be affected by the project ("people affected by the project"); and, ii) who may have an interest in the project ("other stakeholders").

Thus, the participation will be carried out according to the magnitude of the project's impacts, it will be implemented based on a participation plan that will integrate the recommendations of the stakeholders and that will be prepared by the borrower. This opens the doors to new ways of guaranteeing the right to information and environmental participation, especially in the current context where these rights have been weakened during the project approval processes. It is necessary that co-creation is also included in the development of these plans, so that the same stakeholders are part of the construction of the participation process and thus can influence decision-making.

Finally, the IDB is still pending to propose specific actions on mechanisms of transparency, anti-corruption and access to information with inclusive and intercultural approaches, taking into account that, at present, the region is going through a long crisis unleashed by crimes corruption, and misappropriation of funds in projects carried out in biologically diverse areas and with the presence of indigenous communities.

<sup>23</sup> Ibid, paragraph 19, page 118.

<sup>24</sup> Ibid, paragraph 11, page 115.

<sup>25</sup> Ibid, page 121.



Photo: Asier Solana

## CONCLUSIONS

The IDB, although it has included several recommendations made by the civil society in its safeguards, at least 18, still maintains critical aspects in terms of human rights and environmental standards, such as the lack of specific commitments when facing new breaches by clients. In any case, the IDB has established that the new PSs should apply to projects already financed that require an environmental analysis, with the exception of those initiatives that have operations under the CCF. In addition, in the face of the pandemic, it's a risk that serious omissions in the application of the policy could arise since it was necessary to reinforce measures in the current context.

It is necessary to maintain a continuous supervision and vigilance on the implementation guides of each PS, in order to generate greater specifications. Although it is true that the nature of these guides is voluntary, it is necessary to strengthen them with a greater commitment from the IDB and with the vigilance of civil society, from the local to the international levels.

On the other hand, the current health emergency has implied a weakening in the participation processes and, in turn, the threats and socio-environmental risks to the detriment of the communities have not stopped. This situation has to be taken into account by the bank, since 2021 is presented as a scenario with great uncertainty for the region. This puts rights such as participation and prior consultation at risk of not being respected. For this reason, the IDB must include measures of sanitary control, consultation and participation in a transversal manner, so that they adapt to current needs and achieve the strengthening of human rights.





Photo: Gisella Valdivia

## RECOMMENDATIONS

### ON INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

- ▶ The IDB must expressly and effectively incorporate the standards recognized in international instruments on human rights, particularly those referring to the protection of indigenous peoples; as well as incorporating the principle of non-regressivity. In this sense, the IDB must correct the incongruities of the ESPF and give it a greater focus on human rights; therefore, it could not allow the financing of projects that do not comply with said standards.
- ▶ The IDB must eliminate its regulation based on declarative measures and define clear obligations in accordance with the principle of due diligence, which allow a true role of supervision, monitoring and inspection of compliance with the PS. In the same vein, the IDB must avoid the use of ambiguous language in regulating its safeguards.

### ON SUPERVISION AND INSPECTION OBLIGATIONS

- ▶ The IDB must comply with its obligations in terms of supervision and oversight of the financing it grants to governments. Currently, the ESPF persists in reducing these functions and powers to their borrowers.

## ABOUT INDIGENOUS PEOPLES

- ▶ The IDB must expressly regulate and guarantee the effective participation of indigenous peoples, as well as their right to grant prior, free and informed consent, in accordance with international frameworks. It must also guarantee the full exercise of their collective rights, the right to prior consultation (before any measure that affects them) and the express recognition of the prior consultation protocols by the peoples themselves, for the operation of various projects or policies.
- ▶ Commitments on climate change must be, in addition to an obligation on the part of the States, obligations for the IDB. It is necessary to consider the level of impact of extractive activities and infrastructure works on the Amazon and indigenous peoples, who are the protectors of forests and natural resources (indigenous defenders).
- ▶ The IDB must expressly include biodiversity as a form of conservation of natural resources, as well as natural protected areas, the territories of indigenous peoples, and territorial and indigenous reserves for the PIACI.
- ▶ The IDB must oblige the borrower to maintain the PIACI territories as intangible areas and recognize indigenous peoples as the main actors in their protection. In this way, the obligation of the States, the borrowers and other actors to guarantee the principle of non-contact and the intangibility of their territories in the face of any type of projects, extractive interventions or related activity must be incorporated, in accordance with international jurisprudence on the protection of these peoples.
- ▶ The IDB must guarantee the safety and integrity of indigenous peoples during the economic reactivation, taking into account the current state of pandemic and the terrible consequences that lack of access to public services would entail.
- ▶ The IDB must take responsibility for the adverse effects produced by the forced displacement of indigenous peoples, as a result of resettlement and not leave them under the responsibility of governments, which have shown not to have the capacity to do so. On the other hand, it must guarantee the regulatory framework on the right to free, prior and informed consent in the event of possible resettlement or displacement.
- ▶ The IDB must respect the right to indigenous identity. In this sense, it should not use terms not accepted by indigenous peoples and apply the provisions of Article 1 of ILO Convention 169.
- ▶ The IDB must respect the right of indigenous peoples to carry out resource use activities and other ancestral activities in different areas. To do this, it must establish protection mechanisms that prevent them from being negatively impacted by the projects it finances.
- ▶ The IDB must regulate its framework by identifying the differentiated impacts on indigenous women due to the projects it finances.

## ON TRANSPARENCY, CITIZEN PARTICIPATION AND ENVIRONMENTAL JUSTICE

- ▶ The IDB must incorporate mechanisms of transparency, anti-corruption, access to information, environmental justice and protection of environmental defenders, with an inclusive and intercultural approach that does not allow exclusions. Therefore, it is necessary to continue promoting the ratification of the Escazú Agreement by the States, as well as its effective implementation.
- ▶ The IDB must include the implementation of the SEA for the design of policies, plans and programs, so that it is planned in a comprehensive manner and includes all stakeholders, in order to prevent cumulative and synergistic impacts, integrating health aspects.
- ▶ The IDB must incorporate face-to-face participation and consultation mechanisms, once the pandemic is over, because many civil society organizations and indigenous peoples have not been able to fully participate in this process. In addition, this is important so that the bank can rethink its strategy, in order to incorporate into the proposal, the current global health emergency situation, as well as the provisions to safeguard populations in vulnerable situations, such as indigenous peoples who do not count with specific care plans (health, educational, economic) of the States of the region (for example, relationship protocols and comprehensive care). Based on this, a post-pandemic strategy should be considered and resources provided for it.
- ▶ The IDB must adapt its ESPF to a binding approach, under which clear obligations are established that, in addition, are regulated under the principle of due diligence.

Photo: DAR





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