



**INDIAN LAW**  
RESOURCE CENTER

**Comments on the UN-REDD Programme Guidelines on Free,  
Prior and Informed Consent**

By

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## ACRONYMS AND TERMS

<b>Cancun Agreements Center</b>	UNFCCC Cancun Agreements Indian Law Resource Center
<b>Common Understanding</b>	UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming
<b>FCPF</b>	Forest Carbon Partnership Facility
<b>FPIC</b>	Free, Prior and Informed Consent
<b>FPIC Guidelines</b>	Draft UN-REDD Programme Guidelines on Free, Prior and Informed Consent
<b>MDBs</b>	Multilateral Development Banks
<b>Panel</b>	Inspection Panel
<b>Principles and Criteria</b>	Draft Social and Environmental Principles and Criteria
<b>REDD+</b>	Reduction of Emissions from Deforestation and Forest Degradation
<b>Stakeholders Engagement Guidelines</b>	Draft UN-REDD and FCPF Guidelines on Stakeholder Engagement in REDD+ Readiness, with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities
<b>UN Declaration</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>UN-REDD</b>	UN-REDD Programme
<b>Bank</b>	World Bank

## I | INTRODUCTION

1. The Indian Law Resource Center (Center) welcomes the opportunity given by the UN-REDD Programme (UN-REDD) to comment on the development of public sector policy lending instruments addressing the Reduction of Emissions from Deforestation and Forest Degradation (REDD+) in developing countries. The “Guidelines on Free, Prior and Informed Consent” (FPIC Guidelines), which was prepared by UN-REDD, outlines a “normative, policy and operational framework for UN-REDD Programme partner countries to seek FPIC [Free, Prior and Informed Consent]”.<sup>1</sup>

2. Generally speaking, the Center is particularly interested in discussing the implications of REDD+ projects taking place in indigenous lands. Grassroots indigenous organizations from Mexico, Central and South America have made inquiries to us regarding REDD+, because they are concerned that REDD+ programs and projects will affect their lands, natural resources and governing institutions. As a matter of both legal obligations and sound policy, potentially project-affected indigenous communities must be fully informed about their countries’ REDD+ proposals and the developing policies within UN-REDD and the World Bank’s (Bank) Forest Carbon Partnership Facility (FCPF).

3. From a legal perspective, this paper offers the Center’s comments and recommendations on the proposed FPIC Guidelines addressing indigenous peoples’ particular human rights concerns. It also addresses issues not currently addressed by UN-REDD policies. This approach has governed all of our previous contributions addressing UN-REDD policy developments, such as the comments filed on the “Draft Guidelines on Stakeholder Engagement in REDD+ Readiness, with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities”<sup>2</sup> (Stakeholders Engagement Guidelines) and the “Draft Social and Environmental Principles and Criteria”<sup>3</sup> (Principles and Criteria).

4. The Center is encouraged by the UN-REDD’s acknowledgment of the UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (Common Understanding) and the obligation to adopt a human rights-based approach within its policies. However, we are concerned that the human rights based-approach has not been effectively incorporated into UN-REDD policies. As stated above, we are concerned about critical human rights issues not addressed by current policy drafts, including coherence with human rights standards and effective assessment, recognition and protection of indigenous peoples’ rights of self determination and full ownership rights to their land and natural resources, and the right to effective remedy, including through project complaint mechanisms.

5. The Center believes that the above indicated issues are critical not only for the survival of

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<sup>1</sup> UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Draft for Comments 4, Dec. 2011, available at [http://www.un-redd.org/NewsCentre/FPIC\\_Guidelines\\_Open\\_For\\_Review/tabid/79163/Default.aspx](http://www.un-redd.org/NewsCentre/FPIC_Guidelines_Open_For_Review/tabid/79163/Default.aspx)

<sup>2</sup> Indian Law Resource Center's Comments and Recommendations on the Forest Carbon Partnership Facility and UN-REDD Programme "Draft Guidelines on Stakeholder Engagement in REDD+ Readiness, with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities", June 2011.

<sup>3</sup> Indian Law Resource Center's Comments and Recommendations on the UN-REDD Programme "Social and Environmental Principles and Criteria, Draft for Consultations", Aug. 2011.

indigenous peoples, but also for the effectiveness of UN-REDD supported projects when taking place in indigenous territories. We hope the concerns outlined in this paper are fully addressed at the upcoming UN-REDD Policy Board meeting, which is scheduled to take place on March 25–26, 2012, and prior to any adoption of final policy documents.

## II | HUMAN RIGHTS STANDARDS AND ASSESSMENT

6. UN-REDD is falling short of its obligations to adopt a policy framework aimed at preventing human rights violations, especially violations of the rights of indigenous peoples. The UN-REDD is required under the Common Understanding to “apply a consistent Human Rights-Based Approach to common programming processes” at the global, regional and country level. The Common Understanding embraces the following three core understandings:

- 1) All programmes of development co-operation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
- 2) Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
- 3) Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.<sup>4</sup>

7. In addition to the requirements of international human rights law, the U.N. Framework Convention on Climate Change Cancun Agreements (Cancun Agreements) emphasize that “[p]arties should, in all climate change related actions, fully respect human rights.”<sup>5</sup> Additionally, the Cancun Agreements call for the adoption of safeguards in REDD+ to ensure “[r]espect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations...”<sup>6</sup>

8. Despite these obligations in human rights and climate agreements, we have not seen a UN-REDD policy in which host countries and implementing agencies are required to assess the human rights risks of REDD+ projects in advance. The UN-REDD Principles and Criteria certainly do not fulfill such expectations.

9. As a matter of policy, UN-REDD should require that REDD-related policies and projects are consistent with international human rights standards. This can be done by incorporating those standards within UN-REDD policies and incorporating participatory human rights impact

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<sup>4</sup> The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies, [http://www.undg.org/archive\\_docs/6959-The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN.pdf](http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf)

<sup>5</sup> U.N. Framework Convention on Climate Change Conference of the Parties, Nov. 29-Dec. 10, 2010, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, ¶ 8, FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

<sup>6</sup> Id., at Appendix 1: Guidance and Safeguards for Policy Approaches and positive incentives on issues relating to reducing the emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forest and enhancement of forest carbon stocks in developing countries, 2(c).

assessment in all REDD+ programs and projects, from policy development through implementation and evaluation. In so doing, UN-REDD will materialize not only the indicated policy approaches outlined in the Cancun Agreements, but also the “human rights-based approach to development”. Policies that instead encourage social and environmental impact or risk and benefits assessments that are not explicitly linked to existing international human rights standards and do not require compliance with such standards, are not reflective of a human rights-based approach and are not sufficient to prevent rights violations.

10. The fact that other organizations engaged in REDD+, such as the Bank, lack a human rights policy should not prevent UN-REDD from adopting one. The Bank’s ten environmental and social safeguard policies do not address human rights and have repeatedly fallen short in preventing and mitigating undue harm to people.<sup>7</sup> Indeed, only two policies address "social" issues<sup>8</sup> and, as will be explained below, the Bank is creating additional funding mechanisms, which could be used to fund climate and forestry programs without applying the existing safeguard policies.<sup>9</sup> Clearly, neither the Bank nor the FCPF safeguards constitute a policy framework that UN-REDD should rely upon for the purpose of preventing human rights violations. Instead, the lack of sufficient human rights protections within Bank policies, as well as the lack of sufficient human rights protections within many REDD+ host nations, conveys an obligation on UN-REDD to be that much more diligent in its own policies and standards so as to ensure that UN agencies engaged in REDD+ are not aiding or facilitating rights abuses.

11. The Center believes that international intergovernmental organizations engaged in REDD+, such as the UN and the Bank, must take due diligence measures to prevent human rights violations. Indigenous peoples, as well as other groups and individuals, are entitled to fundamental human rights under international law. We certainly disagree with the FCPF's belief, as stated in the "Report of the Global Dialogue with Indigenous Peoples on the Forest Carbon Partnership Facility", that "international obligations" are limited to the International Labor Organization Convention 169.<sup>10</sup> Such a limited and baseless perspective ignores binding treaty law obligations assumed by countries at the UN and at regional organizations, as well as international obligations arising from *ius cogens* norms and customary international law. In our opinion, this perspective does not comply even with the FCPF’s own Charter (Section 3.1(c)<sup>11</sup> and (d)),<sup>12</sup> which orders the FCPF to ensure consistency with the United Nations Framework

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<sup>7</sup> INDEPENDENT EVALUATION GROUP, SAFEGUARDS AND SUSTAINABILITY POLICIES IN A CHANGING WORLD: AN INDEPENDENT EVALUATION OF WORLD BANK GROUP EXPERIENCE 8 (2010).

<sup>8</sup> E.g. Indigenous Peoples (OP/BP 4.10) and Involuntary Resettlement (OP/BP 4.12).

<sup>9</sup> See Indian Law Resource Center's Comments and Recommendations in the World Bank's Draft "OP/BP 9.00 Program-for-Results-Financing, Set. 2011, <http://www.indianlaw.org/sites/default/files/2011-09-30%20P4R%20Comments%20ENG%20II.pdf>

<sup>10</sup> Forest Carbon Partnership Facility, "Report on the Global Dialogue with Indigenous Peoples on the Forest Carbon Partnership Facility" 4, [http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Nov2011/Guna\\_Yala\\_Dialogue\\_Final\\_Report\\_EN.pdf](http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Nov2011/Guna_Yala_Dialogue_Final_Report_EN.pdf)

<sup>11</sup> International Bank for Reconstruction and Development, Charter Establishing the Forest Carbon Partnership Facility § 3.1(c), May 11, 2011 (stating that "[t]he operations of the Facility shall: ... (c) Seek to ensure consistency with UNFCCC Guidance on REDD”).

<sup>12</sup> *Id.*, at § 3.1(d) (determining that "[t]he operations of the Facility shall: ... Comply with the World Bank's Operational Policies and Procedures, taking into account the need for effective participation of Forest-Dependent

Convention on Climate Change guidance on REDD and respect the rights of indigenous peoples under national law and applicable international obligations. We recommend UN-REDD not be misled into adopting a similarly limited and groundless approach to international human rights law obligations regarding indigenous peoples.

12. UN-REDD must take into account all relevant norms of international human rights law when developing a human rights impact assessment policy. In so doing, UN-REDD should consider norms arising from treaties, customs and general principles of law.<sup>13</sup> Interpretations of these sources by regional human rights courts should guide UN-REDD, especially those coming from the African Commission on Human and Peoples Rights<sup>14</sup> and the Inter-American Court of Human Rights.<sup>15</sup> With regard to the rights of indigenous peoples, discussed further below, the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)<sup>16</sup> is widely recognized as the current minimum standard for protecting the rights of indigenous peoples. The Center's "Principles of International Law for Multilateral Development Banks"<sup>17</sup> can assist UN-REDD in developing a human rights impact assessment policy that complies with these obligations and standards. Please, let us know if we can be of assistance in generating a greater understanding of human rights obligations and policy mechanisms for ensuring rights protections.

### III | INDIGENOUS PEOPLES

13. UN-REDD has no policy specifically protecting indigenous peoples' territories and governments, which are indispensable for their survival as distinct peoples within existing nation-states. For many years, indigenous peoples have advocated at the UN for the full recognition of core collective rights, such as full ownership rights to their lands and natural resources and the right to self-determination. It is in virtue of these rights that indigenous peoples can control, use, manage and benefit from their lands and natural resources according to their governing institutions, laws and customs. Recognition and protection of these core rights is critical to REDD+ projects taking place in indigenous territories, and must be effectively addressed by the UN-REDD. The UN Declaration entailed a process of more than 30 years in which indigenous peoples and States forged common ground on the need of protecting indigenous territories and governments. The UN Declaration is a global statement of the law concerning indigenous peoples, which enjoys today full support from the world community.

14. The Cancun Agreements that govern REDD+ explicitly call for the adoption of

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Indigenous Peoples and Forest Dwellers in decisions that may affect them, respecting their rights under national law and applicable international obligations").

<sup>13</sup> See Statute of the International Court of Justice Art. 38(1).

<sup>14</sup> E.g. In the Matter of The Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. the Republic of Kenya, decision issued by the African Commission on Human and Peoples Rights in May 2009, endorsed by the African Union on February 4, 2010.

<sup>15</sup> E.g. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights (Series C No. 79), Aug. 31, 2001.

<sup>16</sup> United Nations Declaration on the Rights of Indigenous Peoples, U.N.Doc.A/RES/61/295/Annex (Sept. 13, 2007).

<sup>17</sup> Indian Law Resource Center's "Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights", Jan. 2009,

[http://www.indianlaw.org/sites/default/files/Principles%20Memo%20FINAL%20ENG\\_0\\_0.pdf](http://www.indianlaw.org/sites/default/files/Principles%20Memo%20FINAL%20ENG_0_0.pdf)

safeguards to protect the rights of indigenous peoples. They clearly request “[r]espect for the knowledge and rights of indigenous peoples [...], by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>18</sup>

15. Both the UN Declaration<sup>19</sup> and leading cases arising from the African<sup>20</sup> and Inter-American Human Rights systems<sup>21</sup> fully recognize indigenous peoples' collective ownership rights over their land and natural resources and the right to self-determination. The law is clear with regard to these core collective rights of indigenous peoples.

16. Surprisingly, UN-REDD has not developed a specific policy aimed at protecting the rights of indigenous peoples. None of the UN-REDD's draft policies afford due protection of indigenous peoples' territories and governing institutions. Both the Stakeholders Engagement Guidelines and the FPIC Guidelines focus only on the mere participation of indigenous peoples in States' REDD+ programs and projects. In both policies, indigenous peoples are addressed as mere “stakeholders” or grouped within an undefined umbrella of “forest-dependent communities”. This approach is a considerable mistake because it obscures the connection between the specific rights of different actors and impacted communities and the obligations of UN-REDD partner countries hosting projects and implementing agencies. By obfuscating the identity of rights holders and an analysis of their specific rights and the obligations these rights imply, this approach openly undermines the legal rights that indigenous peoples located in UN-REDD partner countries are entitled to under international law. The collective right of self-determination, for instance, is a right of indigenous peoples, but it is not a right of “stakeholders” or “forest-dependent communities”. Therefore, deriving an analysis of impacts and obligations from these constructed categories is likely to lead to REDD+ programs that violate indigenous peoples' rights of self-determination.

17. Finally, the UN-REDD's Principles and Criteria and FPIC Guidelines ignore a key legal principle that properly protects indigenous territories and governments: indigenous peoples' permanent sovereignty over their natural resources.<sup>22</sup> Indigenous peoples' permanent sovereignty over natural resources is the general principle of international law that “[p]eoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation”.<sup>23</sup> It entails generally “legal, governmental control and management authority over natural resources, particularly as an aspect of the right to self-determination”<sup>24</sup> and carries an obligation on States to “respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural

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<sup>18</sup> U.N. Framework Convention on Climate Change Conference of the Parties, *supra* note 6.

<sup>19</sup> See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 16, at 3, 4, 26.

<sup>20</sup> *In the Matter of The Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. the Republic of Kenya*, *supra* note 14.

<sup>21</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 15.

<sup>22</sup> U.N. Econ. & Soc. Council, Sub-Comm. on the Promotion & Protection of Human Rights, Final Report of the Special Rapporteur, Erica-Irene A. Daes: Indigenous Peoples' Permanent Sovereignty Over Natural Resources, U.N. Doc.E/CN.4/Sub.2/2004/30 (July 13, 2004).

<sup>23</sup> *Id.*, at 6.

<sup>24</sup> *Id.*, at 18.

resources.”<sup>25</sup> By failing to recognize indigenous peoples’ permanent sovereignty over their natural resources, UN-REDD policies do not address indigenous peoples’ core collective rights and ignore a well-established legal principle embraced by human rights bodies and instruments, including the UN Special Representative,<sup>26</sup> the UN Declaration<sup>27</sup> and core rulings from regional human rights courts.<sup>28</sup>

18. The Center encourages UN-REDD to develop a stand-alone policy protecting the rights of indigenous peoples, including their rights of self-determination, full ownership rights over their lands, territories and resources, and permanent sovereignty over their natural resources. In so doing, UN-REDD should ensure that such a policy is "consistent with international standards regarding the rights of indigenous peoples, including those enshrined in the United Nations Declaration on the Rights of Indigenous Peoples."<sup>29</sup> We are sure that the three UN mechanisms with specific mandates regarding the rights of indigenous peoples—i.e. UN Special Rapporteur on the Situation of Human Rights and Indigenous Peoples, UN. Permanent Forum on Indigenous Issues and UN Expert Mechanism on the Rights of Indigenous Peoples—will be more than interested in such a policy development, as they expressed identical concern in a 2010 letter to the President of the Bank.<sup>30</sup> Of course, we are also interested in seeing this policy development.

#### **IV | PROJECT COMPLAINT MECHANISM**

19. Despite the fundamental human right to an effective remedy as well as the requirements of the Common Understanding that “[d]evelopment cooperation contribute[e] to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights,<sup>31</sup> the UN-REDD does not have a project-complaint mechanism in place. We believe that policies are meaningless without effective monitoring and mechanisms for ensuring compliance, and guaranteeing impacted communities effective remedy, including effective access to administrative remedies, domestic courts, international mechanisms, and a specific project-complaint mechanism. The effectiveness of UN-REDD policies depends on their proper and timely application by partner countries and implementing agencies. Indigenous peoples and other local communities should have access to a complaint mechanism in which any non-compliance with policies and violation of their rights through UN-REDD-supported projects can be effectively and timely addressed and remedied.

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<sup>25</sup> *Id.*, at 40.

<sup>26</sup> *Ibid.*

<sup>27</sup> See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 19.

<sup>28</sup> See *In the Matter of The Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. the Republic of Kenya*, *supra* note 20. See also *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 21.

<sup>29</sup> Letter from James Anaya, U.N. Special Rapporteur on the Situation of Human Rights and Indigenous Peoples, Carlos Mamani, Chairperson of the U.N. Permanent Forum on Indigenous Issues & Jose Carlos Morales, Chairperson of the U.N. Expert Mechanism on the Rights of Indigenous Peoples to Robert B. Zoellick, President of The World Bank (July 22, 2010) 1, 2, <http://www.indianlaw.org/sites/default/files/UN%20Special%20Rapporteur%20Letter%20to%20the%20WB%20President%207.22.2010.pdf>

<sup>30</sup> *Ibid.*

<sup>31</sup> *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, *supra* note 4.

20. UN-REDD's concept of a "grievance and accountability" mechanism, as reflected in the FPIC Guidelines,<sup>32</sup> is not consistent with a "human rights-based approach". UN-REDD must rethink its approach to this critical issue. In our opinion, UN-REDD is simply trying to develop a mechanism similar to those utilized by multilateral development banks (MDBs). These mechanisms, however, were not designed to address *human rights*. Indeed, they were created for the purpose of addressing "undue harm to people and the environment",<sup>33</sup> which MDBs decided to call "social and environmental impacts" instead of human rights violations. The Bank's Inspection Panel (Panel), for instance, is a fact-finding body that operates on behalf of the Executive Board of Directors and is restricted solely to "receiving complaints for inspections and carrying out investigations to report its findings to the Board"<sup>34</sup> with regard to "the question of whether the Bank is complying with *its own operational policies and procedures*".<sup>35</sup> Those operational policies and procedures do not include human rights protections.

21. UN-REDD should not address human rights violations as "social impacts", as the Bank does. As stated earlier, the Bank lacks a safeguard policy in which human rights are addressed. This is why, for example, the Panel itself had to request that the Bank's Board of Executive Directors address human rights violations against indigenous peoples associated with specific projects related to forestry<sup>36</sup> and land administration,<sup>37</sup> among others issues.<sup>38</sup>

22. UN-REDD should not take the Bank's accountability mechanism as a model for the following reasons: (1) the Bank does not have a human rights-based approach to development;

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<sup>32</sup> UN-REDD Programme Guidelines on Free, Prior and Informed Consent, *supra* note 1, at § 5.

<sup>33</sup> World Bank Safeguard Policies, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html> (last visited Nov. 17, 2011).

<sup>34</sup> The World Bank Inspection Panel, International Bank for Reconstruction and Development (Resolution No. IBRD 93-10) & International Development Association (Resolution No. IDA 93-6) 12-15 (Sept. 22, 1993).

<sup>35</sup> THE INSPECTION PANEL, THE INSPECTION PANEL AT 15 YEARS. ACCOUNTABILITY AT THE WORLD BANK 6 (2009).

<sup>36</sup> THE INSPECTION PANEL, THE INVESTIGATION REPORT: DEMOCRATIC REPUBLIC OF CONGO TRANSITIONAL SUPPORT FOR ECONOMIC RECOVERY GRANT (TSERO) (IDA Grant No. H 1920-DRC) & EMERGENCY ECONOMIC AND SOCIAL REUNIFICATION SUPPORT PROJECT (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC) (2007) (In response to a 2005 request for inspection, the Panel reviewed two Bank-financed operations involving forest zoning and forestry concessions in the DRC. The Panel found that the Bank failed to identify the existence of Pygmy people within the project area, failed to consult with these peoples or to ensure their participation in project design, and failed to apply the Bank's Indigenous Peoples Policy or to identify or assess significant impacts on Pygmy people's lands, cultural property rights, and livelihoods).

<sup>37</sup> THE INSPECTION PANEL, THE INVESTIGATION REPORT: HONDURAS LAND ADMINISTRATION PROJECT (IDA Credit 3858-HO) (2007) (In response to a 2006 petition, the Panel found that the Bank failed to seek input and participation by affected Garifuna communities and their leaders regarding a Bank-financed land reform project in Honduras. The Panel noted that proceeding with titling of indigenous peoples lands without an appropriate legal/regulatory framework was inadequate in protecting the Garifuna people's rights).

<sup>38</sup> THE INSPECTION PANEL, THE INVESTIGATION REPORT: CHAD-CAMEROON PETROLEUM AND PIPELINE PROJECT (Loan No. 4558-CD); PETROLEUM SECTOR MANAGEMENT CAPACITY BUILDING PROJECT (Credit No. 3373-CD) & MANAGEMENT OF THE PETROLEUM ECONOMY (Credit No. 3316-CD) -210-7 (2001) (The Panel reviewed a Bank-sponsored pipeline project in regards to allegations of environmental harms and good governance and human rights abuses, including the torturing, by security forces, of the petitioner of the Inspection Panel complaint – an outspoken opponent of the pipeline and a member of Chad's parliament. In response to Bank Management's insistence that human rights issues are not of direct concern to the Bank, the Panel stated in its report that it addressed human rights issues because it "felt obligated to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies")

(2) the Panel lacks advisory powers concerning policy reforms;<sup>39</sup> (3) the Panel has no decision-making power regarding the suggested remedial actions to take once investigation is completed;<sup>40</sup> and (4) the Panel has no advisory powers to supervise full implementation of remedial actions.<sup>41</sup>

23. UN-REDD should create a project-complaint mechanism specifically designed to prevent human rights violations. For this purpose, UN-REDD should develop an umbrella policy in virtue of which partner countries will be required to carry out human rights impact assessments in all projects. Needless to say, UN-REDD should not take the Bank's approach as it only considers its Environmental Assessment Policy to operate as an overarching policy.<sup>42</sup>

24. Finally, a UN-REDD project complaint mechanism should be based on the main elements of due process of law guarantees. UN-REDD should take into account relevant international legal standards arising from UN human rights treaties and customary international law; as well as those construed by regional human rights courts based on regional human rights treaties. In other words, the core elements of due process of law must be reflected in administrative procedures, such as the UN-REDD project complaint mechanism.

25. Finally, under no circumstances, should victims of human rights violations associated with REDD+ projects be deprived of access to prompt and effective remedies at the national level. The right to an effective remedy is a fundamental human right enshrined in international human rights law. Moreover, partner countries' violations of international human rights law obligations via REDD+ projects are not exempt from human rights supervisory bodies, especially regional courts in charge of determining international responsibility and proper redress for violations.

## V | FPIC GUIDELINES

26. We are not able to comment on the specific details of the current draft FPIC Guidelines because such guidelines are meaningless without a policy framework providing for protection of indigenous peoples' substantive rights, especially the rights of self-determination and permanent sovereignty over their natural resources. As stated in our 2005 paper on FPIC, we believe FPIC should not substitute or diminish the substantial legal rights in play, such as full ownership rights to land and natural resources and the right to self-determination.<sup>43</sup> Sadly, both the FPIC Guidelines and the Stakeholders Engagement Guidelines are doing so.

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<sup>39</sup> The World Bank Inspection Panel, *supra* note 34.

<sup>40</sup> *Id.*, at 22.

<sup>41</sup> Review of the Resolution Establishing the Inspection Panel-1996 Clarification of Certain Aspects of the Resolution 1 (Oct. 17, 1996) (confirming that 'the Board will continue to act on investigations on the basis of recommendations of Management with respect to such remedial action as may be needed.')

<sup>42</sup> World Bank Environmental Assessment,

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:20543912~menuPK:1286357~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html> (last visited Nov. 17, 2011).

<sup>43</sup> Contribution of Indian Law Resource Center: Indigenous Peoples' Right Of Free Prior Informed Consent With Respect To Indigenous Lands, Territories and Resources (Jan. 2005), available at <http://www.indianlaw.org/content/indigenous-peoples'-right-free-prior-informed-consent>

27. UN-REDD must adopt a true human rights-based approach that ensures compliance with current international human rights standards and guarantees respect for the rights of indigenous peoples and other communities, including effective access to remedy for any violation of those rights. In the absence of such a framework that adequately protects substantive rights, FPIC protocols, rather than helping to avoid rights violations, can actually facilitate them.

28. UN-REDD should seriously rethink this approach and return to a policy approach that starts with and is guided in all areas by the essential goal of human rights protection.

## VI | CONCLUSION

29. The Center is seriously concerned with the UN-REDD approach to climate financing, which at a rhetorical level embraces the "human rights based approach to development," but which thus far at a practical level has failed to translate that approach into effective policy. It is clear that within UN-REDD policymaking there is significant misunderstanding of the law concerning human rights, especially the legal rights that indigenous peoples are entitled to under international law. This is very disappointing after more than 30 years of a standard-setting process at the UN, in which indigenous peoples educated both UN agencies and UN member countries regarding their collective rights.

30. UN-REDD is moving away from a "human rights based approach to development" by following the Bank's policy approach to "social issues" and "social impacts". Instead of addressing "social issues" in REDD+ projects, UN-REDD policies and project complaint mechanisms should address *human rights* issues. Likewise, instead of using the Bank' promoted policy language, UN-REDD should used straightforward human rights language and standards. There is no reason to keep confusing host countries with such a double standard just because the Bank refuses to address the human rights dimension of its policies and practices. Unless UN-REDD makes this shift, it will be setting a harmful precedent in climate financing by not taking into account partner countries' international human rights law obligations. This clearly is not in compliance with the Cancun Agreements with respect to much needed safeguards for REDD+ projects.

31. Surprisingly, UN-REDD is only focusing on the *participation* of indigenous peoples in REDD+ programs and projects promoted by States, rather than the *protection of their substantive rights*. The FPIC Guidelines is a concrete example of such a focus, in which indigenous peoples are lumped in with other "stakeholders" and "forest-dependent communities". We are very concerned about this approach, as well as UN-REDD's lack of a stand-alone policy identifying and protecting the specific rights of indigenous peoples, especially their rights to their territories and resources and their rights of self-determination. This approach obfuscates the collective rights of indigenous peoples and thus cannot be effective at protecting those rights.

32. In connection to the above, UN-REDD should learn from similar mistakes made by other UN agencies in the past. Indigenous peoples made it clear that they want to be considered neither as vulnerable groups nor as populations. That is why they moved away from past working groups on minorities and indigenous "populations". Moreover, that is why today the three UN

mechanisms related to indigenous issues address the rights of indigenous "peoples".

33. We have learned that the Bank is considering adopting a similarly misguided consolidation approach in its upcoming safeguards policy review. As we made clear to Bank Management, "including the indigenous peoples policy into a safeguard policy covering all vulnerable groups amounts to a regression of almost 30 years of policy development."<sup>44</sup> Once again, we hope that UN-REDD does not follow the Bank's approach, but instead recognizes that the lack of sufficient protection of human rights within the Bank requires that UN-REDD ensure human rights due diligence within its own policies and procedures to avoid any complicity with or facilitation of human rights abuses.

34. The UN-REDD has an obligation to be a leader in the protection of human rights. Instead, the UN-REDD's policy proposals appear to be taking the lead from institutions like the Bank, which has consistently refused to acknowledge its obligations towards the human rights of communities directly impacted by its projects. That approach has led to devastating violations of the rights of indigenous peoples all over the world, and it must not be replicated through REDD+.

35. The work of the UN and its agencies has helped usher in a greater understanding of human rights and their undeniable connection to and contribution to the goals of development, climate justice, and environmental protection. It is critical that this understanding of the fundamental importance of a human rights-based approach not remain solely within the confines of theory or rhetoric, but instead be operationalized throughout all aspects of UN-REDD policy and implementation.

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<sup>44</sup> Letter from to Indian Law Resource Center to the President of the World Bank Robert Zoellick, July 11, 2011, <http://www.indianlaw.org/sites/default/files/07%2011%202011%20Indian%20Law%20Resource%20Center%20Ltr%20to%20Pres%20%20Zoellick.pdf>