



INDIAN LAW
RESOURCE CENTER

**Submission to the World Bank on the
Review and Update of its Social and Environmental Safeguard
Policies**

By
Leonardo A. Crippa, Gretchen Gordon, and Chris Foley

May, 2013

602 North Ewing Street
Helena, Montana 59601
ph. (406) 449-2006 | fax (406) 449-2031

www.indianlaw.org

601 E Street, SE
Washington, DC 20003
ph. (202) 547-2800 | fax (202) 547-2803

With the generous support of the C.S. Mott Foundation

Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies

By Leonardo A. Crippa,* Gretchen Gordon** and Chris Foley***
May, 2013

TABLE OF CONTENTS

Introduction.....	3
Section I Integrated Framework.....	6
Section II “Emerging Areas”	8
A Human Rights.....	8
B Free, Prior and Informed Consent	10
C Land “Tenure” and Natural Resources.....	12
Section III Exiting Safeguard Policies	13
A Indigenous Peoples Policy	13
B Involuntary Resettlement Policy	19
C Environmental Assessment Policy	21
Conclusion.....	22
Notes.....	22

* J.D. 2001 & Civil-Law Notary 2002, Universidad Nacional de Tucuman, Argentina; LL.M. 2008, American University; Senior Attorney, Indian Law Resource Center.

** J.D. 2011, University of California, Berkeley; Staff Attorney, Indian Law Resource Center.

*** J.D. 2011, Temple University; Legal Intern, Indian Law Resource Center.

INTRODUCTION

1. The Indian Law Resource Center (Center) welcomes this opportunity to provide input to the World Bank's (Bank) Review and Update of its Social and Environmental Safeguard Policies. The Center is a non-profit law and advocacy organization established and directed by American Indians. We provide legal assistance to indigenous peoples in the Americas who are working to protect their lands, resources, human rights, environment and cultural heritage. The Center has been advocating for better policies on indigenous peoples' issues within international institutions, including the United Nations and the World Bank, since 1980.
2. The Bank is reviewing eight of its ten Environmental and Social Safeguard Policies¹ and the Policy on Piloting the Use of Borrower Systems for Environmental and Social Safeguards, which embrace a "do-no harm" approach. In October 2012, the Bank launched a two-year review process with the objective of developing a new "integrated framework," which would "build on the existing core principles of the safeguard policies."² Unfortunately, the Safeguard Team has neither provided a definition of the "integrated framework" nor indicated its constituent elements in the consultation meetings held in Phase 1.
3. Phase 1 of the review process additionally included discussions on several denominated "emerging areas," to determine if and how they can be addressed by the Bank. These "emerging areas" include human rights, labor and occupational health and safety, gender, disability, the free, prior, and informed consent (FPIC) of indigenous peoples, land tenure and natural resources, and climate change.³ The Safeguard Team has conducted specific meetings with external focus groups on each of these areas. However, it neither described how the "integrated framework" would look in relation to these areas, nor committed to incorporate the inputs received from the experts.
4. Moreover, the Center strongly disagrees with the Bank's characterization of the indicated areas as "emerging." The Center itself has been engaging on development-related issues of human rights, and indigenous peoples' collective ownership of lands, territories, environment and natural resources since 1980. Many of these issues have been addressed by the world community for more than 60 years—e.g. labor rights since 1919 with the creation of the International Labor Organization. The Universal Declaration of Human Rights was adopted in 1948. In our opinion, the problem is that Bank policies and practice have ignored these major legal developments embraced by the world community the Bank is part of.
5. The safeguards review represents a critical opportunity for the Bank to bring its policies and practices in line with its mission of ending poverty through sustainable development. This can't be achieved however, unless the Bank truly understands and acknowledges the unique rights that indigenous peoples have within development processes. Despite the Bank's longstanding goal of ending poverty, indigenous peoples remain the poorest of the poor, pushed to the bottom of every socioeconomic indicator.⁴ It is clear that current approaches that either situate indigenous peoples as passive recipients of development, or worse, as obstacles to or casualties of development, are not working.

6. Indigenous peoples are natural partners for development strategies. Indigenous peoples have been engaging in sustainable development for millennia, practicing well-honed and time-tested strategies for resource management and climate adaptation. It is indigenous peoples who know best what their development needs are and how best they can be met. And it is indigenous peoples who are best positioned to design, manage and administer their own development.

7. The Center's overall concern is the Bank's lack of understanding that indigenous peoples' self-determination and collective ownership of lands, territories, environment and resources are a necessary prerequisite for successful development intervention. Indigenous peoples have the right to collective ownership and use of their lands, territories, environment, and resources based on their longstanding use and occupancy of these lands and territories. These indigenous rights are recognized in international human rights law, and they arise independently of domestic laws of states. Indigenous peoples also have the right of self-determination, which includes the right of self-governance. The right of indigenous peoples to self-governance includes the collective right to exercise full authority, free from outside interference or manipulation, over their lands, territories and resources.

8. As a part of their collective rights to ownership of their property and self-determination, indigenous peoples have the right to protect and to determine the use and disposition of their lands, territories and resources. Indigenous peoples' right of free prior informed consent is one of the particularly important incidents of their collective rights to property and self-determination. The right of free, prior informed consent refers to two things: 1) the right of indigenous peoples to forbid, control or authorize activities that are on their lands and territories or that involve their resources, and 2) the right of indigenous peoples to forbid, control or authorize activities not on their lands, but which may substantially affect their lands, territories and resources or may affect their human rights.

9. The right of indigenous peoples to self-governance, including the right to make all decisions with respect to their lands, territories and resources, is a collective right exercised through their governments and representatives in accordance with their own laws and customs. Indigenous individuals do not have a right when acting as individuals to authorize or veto any activity affecting the collective rights of indigenous peoples.

10. Indigenous peoples' right of free prior informed consent includes both the right to make all decisions related to development and other activities affecting their lands or resources and their right to make decisions about activities taking place outside of their lands that may significantly affect them, especially when those activities may affect their human rights. Full respect for indigenous peoples' human rights requires that such activities not proceed without the free prior informed consent of the people or peoples concerned.

11. When indigenous peoples exercise full collective ownership over their lands, territories, environment, and resources, they can be protagonists of their own development - managing their own resources and providing for their own social and economic development. When indigenous peoples do not have full ownership rights to their lands and resources, they are subject to eviction, poverty, and abuse, in many cases becoming "landless peasants."

12. Along with many Indian leaders, the Center urges the Bank to work with indigenous peoples not as “stakeholders,” but as self-governing peoples, equal partners in development, and collective rights-holders. Unfortunately, the Bank does not work through indigenous peoples’ governments to meet development goals. The Bank does not acknowledge a government-to-government relationship between indigenous peoples and borrowers. Most concerning, the Bank does not respect indigenous peoples’ ownership and decision-making authority over their lands, territories and resources. We hope the Bank will use this opportunity to reconfigure its engagement with indigenous peoples, in order to work with borrowing countries and indigenous peoples as equal partners in development.

13. In this submission, the Center offers various recommendations from a legal perspective addressing indigenous peoples’ particular human rights concerns on the various issues and policies under review. Our submission reflects critical developments in international law and policy, especially the 2007 adoption of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration).⁵ The Declaration codifies what were already accepted practices and standards on indigenous peoples, and it represents the most authoritative statement on the rights held by and the obligations owed to indigenous peoples. We also take into account the 2010 agreements reached at the 16th Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC) in Cancun (Cancun Agreements), which call for full respect of human rights⁶ and the rights of indigenous peoples⁷ in climate change related actions. These developments took place after the Bank’s last review of its policies; therefore, they should now be taken into account throughout this ongoing review process.

14. First, the Center provides recommendations on the Bank’s “integrated framework” idea, in order to frame its discussion and determination. In our opinion, the Bank’s review process is an historic moment and opportunity to work towards a framework that will allow indigenous peoples to influence decisions on development activities that will affect them, fully participate in the design and implementation of borrowers’ proposed projects, and directly benefit from the benefits that derive from them. Thus far, however, the construct of the new framework as well as the elements and structures under consideration remain unclear, and little information has been provided in this regard. This lack of clarity raises concerns that the restructuring of the safeguards system may actually lead to the dilution of existing policies and the diminishment of their impact on project design and implementation. We are particularly concerned that the Indigenous Peoples Policy may be diluted by merging it with a broader policy on vulnerable groups. As stated in our 2011 letter to former World Bank President Robert Zoellick, such a dilution would be a significant step backward, confusing the rights that distinct groups enjoy and lowering the standard for all groups, especially for indigenous peoples.⁸

15. Secondly, the Center addresses several of the Bank’s “emerging areas” relevant for indigenous peoples — human rights; FPIC; and land “tenure” and natural resources. In our opinion, the Bank must address these areas in a way that is consistent with the particular status and distinctive rights that indigenous peoples enjoy under international law. For instance, in its approach to human rights, the Bank must recognize that indigenous peoples are entitled to collective human rights as peoples—i.e. the right of self-determination and collective ownership over their lands and resources. No other group enjoys said rights. We strongly urge the Bank

not to use these broad concepts without addressing their specific legal meaning within the context of indigenous peoples.

16. Land “tenure” is a vague concept that the Bank should flesh out with legally accurate content in relation to indigenous peoples. As distinct peoples within countries, indigenous peoples are entitled to a full collective right of ownership to the lands and resources under their possession, not a diminished or subordinate form of ownership. This is neither an individual right to lands nor a mere collective use or usufruct right. This is why UN law asserted indigenous peoples’ permanent sovereignty over their natural resources as a means to reflect their legal and governmental authority to control and manage their lands and resources.⁹ Both the UN Declaration and regional human rights courts’ case-law have affirmed the collective nature of this right.

17. The principle of FPIC, as mentioned above, additionally demands careful and exacting scrutiny. The Center strongly believes that incorporation of FPIC will not on its own resolve the broader challenges of development facing indigenous peoples. The Bank’s approach to FPIC should be rooted in, and in addition to, strong protections for indigenous peoples’ substantive rights (collective ownership rights to land and resources, self-government rights, and the right to development connected to benefit sharing) and procedural rights (due process of law), from which FPIC derives.

18. Finally, the Center highlights gaps and provides recommendations on key safeguard policies, including the policies on Indigenous Peoples, Involuntary Resettlement, and Environmental Assessment. It is time for the Bank to bring these safeguard policies in line with current international human rights standards, especially those arising from the UN Declaration. We particularly urge the Bank not to limit its discussions on indigenous peoples to FPIC, but to take this opportunity to develop an “integrated framework” that respects indigenous peoples’ substantive rights of self-determination and collective ownership of land and resources, as well as their right to due process of law in consultation proceedings.

Section 1 **INTEGRATED FRAMEWORK**

The Bank should maintain a distinct safeguard policy for Indigenous Peoples

19. Since the early 80’s, the Bank has maintained a stand-alone policy on indigenous peoples. Among other reasons, the Bank adopted a specific social safeguard policy on indigenous peoples, in order to both strengthen the rule of law in many regions of the world and prevent lawsuits that indigenous peoples could bring to domestic courts when lands under their possession and/or ownership were adversely affected by a Bank-funded project. Thirty years later, these reasons are still present, and international law has evolved considerably towards a stronger protection of indigenous peoples’ rights. Because major global climate and forest-related initiatives governed by the Bank’s safeguards increasingly target indigenous peoples’ lands and resources, it is even more imperative for the Bank to strengthen the policy and maintain its ability to address the unique rights of indigenous peoples.

20. The Bank has positioned itself as a leading global institution by maintaining a stand-alone Indigenous Peoples Policy. The policy has been subject to various reviews, and Bank Staff have gained awareness of the need to pay particular attention to indigenous issues in all lending activities. Other Multilateral Development Banks (MDBs) have followed the Bank's leadership in this regard by adopting similar policies. This policy approach, among other developments, has allowed the Bank to play a critical role in climate finance. Indeed, donor countries are relying on the Bank's existing safeguard policies to guide borrowing countries in undertaking major climate change-related programs under the Forest Carbon Partnership Facility (FCPF), including Reducing Emissions from Deforestation and Forest Degradation (REDD+). For all these reasons, the new Indigenous Peoples Policy should be clearer and stronger.

21. As indicated in our 2011 letter to former World Bank President Robert Zoellick, diluting the Indigenous Peoples Policy into a safeguard policy covering all vulnerable groups would amount to a regression of almost 30 years of policy development.¹⁰ Such a change would not only be inconsistent with recent international law developments on the rights of indigenous peoples—i.e. the 2007 adoption of the UN Declaration, but also undermine current partnerships with donor and developing countries on climate finance. A merged vulnerable groups policy would not be able to address the unique rights of indigenous peoples and would affect the FCPF relationship with delivery partners, such as the UN-REDD Programme and the Inter-American Development Bank (IDB), because the Bank's safeguard standards would ultimately fall below its partners' standards as well as those under the 2010 Cancun Agreements.¹¹

The Bank should embrace a “do-good” approach to end poverty, strengthening safeguard planning instruments to ensure development benefits

22. The Center congratulates the World Bank President on his renewed commitment to end poverty. However, we believe that to be successful, serious efforts should target indigenous peoples, who have been pushed to the bottom of every socioeconomic indicator, including suffering from the highest rates of poverty. In addition to prioritizing indigenous peoples-driven development projects, the development of Indigenous Peoples Plans and Indigenous Peoples Planning Frameworks are key opportunities for the Bank to take into account indigenous peoples' own development priorities. The Bank should incorporate “do-good” elements within the new safeguard framework and strengthen requirements to include development benefits within planning instruments.

23. One of the most essential steps for both preventing harm and doing good by indigenous peoples is to ensure that Bank-financed activities respect and secure indigenous peoples' collective ownership rights to their land and resources as a key strategy to ensure indigenous peoples' economic development, good governance, and development sustainability. For example, changes made in Nicaragua's law and policy to recognize indigenous peoples' self-government¹² and collective ownership rights,¹³ have not only ended armed conflicts around land issues, but also allowed indigenous communities to manage and control their lands,¹⁴ benefit from the sustainable use of their resources,¹⁵ and access economic resources for development purposes. These changes were possible because of a regional human rights court's ruling in the case of the Awas Tingni Community v. Nicaragua,¹⁶ a case handled by the Center.

24. Indigenous peoples located in countries without a similar approach to indigenous issues are sadly facing a very different situation. For example, this is the case of indigenous peoples located in Guatemala. Guatemalan law addresses indigenous communities as peasant communities,¹⁷ not as distinct peoples within the country, which denies their self-government and collective ownership rights. Indigenous peoples are then forced to live under extreme poverty situations without any chance to benefit from the use of their lands and resources, which are increasingly given to private companies for “development” projects—i.e. extractive industry, energy and infrastructure projects.¹⁸ As a result, indigenous peoples become “peasants without lands.” The Chixoy Hydroelectric Power Project in Guatemala, a project funded by the Bank and the Inter-American Development Bank (IDB), illustrates this situation, as it resulted in the relocation of thousands of people, primarily Maya Achi Indians, among other major development disasters.¹⁹

25. The planning instruments established within the Bank’s social safeguard policies—i.e. Indigenous Peoples Plan, Indigenous Peoples Planning Framework, and Involuntary Resettlement Plan—are essential for the functioning of the safeguards. They are additionally increasingly required under partnerships on climate finance, such as the Bank’s Forest Carbon Partnership Facility and the Carbon Fund. The FCPF’s Carbon Fund Design Forums are paying a great deal of attention to these plans. Additionally, the FCPF is reaching consensus on related issues with donor and developing countries based on the existence of these plans. The Bank should strengthen these plans and make them play a more prominent role within the new “integrated framework.” The plans arising from the Indigenous Peoples Policy, in particular, provide the Bank a critical opportunity to both address indigenous peoples as owners of their lands, territories, environment, and resources and allow them to be partners, not passive recipients or victims, in development processes.

Section II **“EMERGING AREAS”**

A | HUMAN RIGHTS

The Bank should create a working group to continue discussing how to implement a rights-based development framework

26. While an important discussion was begun during the consultations and external focus groups, more opportunity for dialogue is needed. In particular, an in-depth and ongoing exchange between Bank Staff and experts is needed to jointly identify gaps and opportunities within the new safeguard integrated framework to introduce those specific human rights that are needed to ensure development outcomes and sustainability. This effort will shed light on how to bring the various safeguard policies in line with international human rights standards. This will be instrumental in gaining clarity not only on the role and responsibility of the Bank and borrowers, but also on the use of human rights in the “do-no harm” and “do-good” approaches.

27. Expertise and experience should be the guiding criteria in determining membership of the working group in question. We believe it should be comprised of both project and safeguard

staff at the Bank, external experts, and interested Board members. The Bank will be instrumental in contributing with the practical experience it has gained in addressing the rights of indigenous peoples within its safeguard framework and through its capacity building efforts via the Nordic Trust Fund. Representatives of indigenous peoples' governments can provide both expertise and practical experience in discussing issues related to management of indigenous lands and resources. Lessons learned from the External Advisory Panel created by the International Finance Corporation (IFC) for the purpose of reviewing the Guide to Human Rights Impact Assessment and Management should also play a role.

28. Time and focus are critical. This working group should be created immediately and run parallel to the safeguard consultation process. One task could be to develop a draft human rights impact assessment (HRIA) methodology geared specifically toward Bank-funded projects and programs. Of course, this and other tasks should be strictly related to the goal of reducing related risks in development projects and ensuring project governance.

The Bank should adopt a policy statement that it will not finance activities that cause or contribute to human rights violations or contravene borrowers' international obligations

29. The Bank is falling below the standards of other banks by not making clear its position on this regard. Indeed, several MDBs have already adopted such a prohibition, including the European Bank for Reconstruction and Development (EBRD),²⁰ the European Investment Bank (EIB),²¹ and the IDB.²²

30. Surprisingly, the Bank's safeguard policies currently do not effectively prohibit financing for activities that cause or contribute to human rights violations. The Environmental Assessment Policy, the Forest Policy and the Physical Cultural Resources Policy, all contain provisions stating that the Bank will not finance project activities that would contravene borrowers' obligations under "relevant international environmental treaties and agreements."²³ However, there is no statement regarding Bank financing for activities that would contravene borrower obligations under human rights treaties.

31. The distinction between country obligations under human rights treaties and those under environmental treaties is an arbitrary one. Many environmental agreements include human rights-related commitments, such as the right to information or right to effective remedy, while many human rights treaties include environmental protection requirements.²⁴ For example, the Inter-American Court of Human Rights' ruling in the *Awas Tingni* case made it clear that destroying the indigenous environment by promoting logging activities on indigenous lands violates the community's human rights—i.e. collective ownership to lands and resources.²⁵

32. Moreover, as the Inspection Panel has pointed out, the Bank had previously under OMS 2.20 not made such a distinction, instead opting to prohibit financing of projects that violate a country's international obligations, environmental or otherwise, "applicable to the project and area."²⁶ Regrettably, in the consolidation of policies under the Investment Lending Review last

fall, this important provision was eliminated, leaving only the limited provisions in the safeguards relating to obligations under environmental agreements.

33. The Bank's Independent Evaluation Group (IEG) has recommended more balanced thematic coverage by the safeguards, and in particular, that the Bank "ensure adequate coverage of social effects."²⁷ The IEG and borrowing countries have also requested more support to bolster client systems. Recognizing the human rights implications of Bank-financed activities and supporting borrowers in meeting their related international obligations would support both of these goals.

The Bank should require the use of Human Rights Impact Assessment (HRIA) to identify rights-holders located in the project area and human rights risks related to project activities

34. There is growing acknowledgment of the utility of HRIA in achieving development goals.²⁸ Unfortunately, the Bank neither requires borrowers to address the rights implications of proposed-projects nor to assess the adequacy of the legal framework applicable in the area where the projects will take place. These measures are critical in preventing both negative human rights impacts and subsequent lawsuits against executing agencies and other project actors.

35. HRIAs support the capacity of both the Bank and borrower to fulfill their obligations to rights-holders by providing guidance on the human rights implications of development activities.²⁹ Because they are rooted in a legal framework, HRIAs are able to flesh out the meaning of key development principles, such as equality, transparency, inclusion or participation.³⁰

36. HRIAs should inform project design, implementation and evaluation. For this purpose, safeguard plans should be revised to incorporate relevant HRIA outcomes and to include adequate measures to address risks and prevent violations. Finally, project outcomes should be monitored and evaluated based on human rights indicators and collection of disaggregated data for different rights-holders—i.e. indigenous peoples, women, and persons with disabilities. Participatory monitoring and third-party verification should also be utilized to provide more objective measurements.

B | FREE, PRIOR AND INFORMED CONSENT

The Bank should require that borrowers obtain the FPIC of indigenous peoples, with third-party verification, for any projects (1) on or involving indigenous peoples' lands, territories or natural or cultural resources, or (2) which may substantially affect their lands, territories or natural or cultural resources or (3) may affect their human rights

37. FPIC is an important principle that has gained significant traction in international law and policy arenas in recent years. International and regional human rights instruments and bodies

widely recognize the duty of States to obtain the FPIC of potentially affected indigenous peoples.³¹ FPIC is also increasingly being adopted by MDBs,³² and national governments.³³

38. Free prior and informed consent must be understood as a part of indigenous peoples' collective rights to ownership of their property and self-determination, wherein indigenous peoples have the right to protect and to determine the use and disposition of their lands, territories and resources. Indigenous peoples' right of free prior informed consent refers to two things: 1) the right of indigenous peoples to forbid, control or authorize activities that are on their lands and territories or that involve their resources, and 2) the right of indigenous peoples to forbid, control or authorize activities not on their lands, but which may substantially affect their lands, territories and resources or may affect their human rights.³⁴

39. The right of indigenous peoples to self-governance, including the right to make all decisions with respect to their lands, territories and resources, is a collective right exercised through their governments and representatives in accordance with their own laws and customs. Indigenous peoples' right of free prior informed consent includes both the right to make all decisions related to development and other activities affecting their lands or resources and their right to make decisions about activities taking place outside of their lands that may significantly affect them, especially when those activities may affect their human rights. Full respect for indigenous peoples' human rights requires that such activities not proceed without the free prior informed consent of the people or peoples concerned.

40. The obligation to obtain the FPIC of indigenous peoples is a continuous obligation that lasts throughout the life of a project. FPIC should be pursued at the grassroots level and arise from those indigenous communities potentially affected by a development project, not from regional or national indigenous organizations.

41. The Indigenous Peoples Policy unfortunately utilizes a standard of "free, prior, and informed consultation" resulting in "broad community support" as the minimum condition for projects that affect indigenous peoples.³⁵ The requirement of "broad community support" in lieu of FPIC undermines indigenous peoples' representative institutions and decision-making processes by imposing an external process and measurement of support or opposition. It also prevents indigenous peoples from exercising control over their own development and the use of their lands and resources.

42. The Indigenous Peoples Policy does not require independent verification of even the weaker standard of "broad community support." Lack of evidence of the existence of broad community support has been identified as a significant problem.³⁶ The Indigenous Peoples Policy does not provide indigenous peoples the opportunity to withdraw their consent in relation to a project activity affecting them, in particular when project conditions change.³⁷ It also lacks a clear mechanism to allow indigenous peoples to dispute situations in which they feel that they have withheld consent, yet the borrower has determined otherwise.³⁸

43. While several multilateral banks have adopted FPIC requirements, related protocols have at times been contradictory or undermined effective implementation. The IFC's FPIC

requirement in Performance Standard 7, for instance, does not make clear that it is indigenous peoples' representative institutions which may decide to give, withhold, or withdraw consent.³⁹ The Asian Development Bank (ADB) similarly uses a confusing definition of consent inconsistent with FPIC.⁴⁰

C | LAND “TENURE” AND NATURAL RESOURCES

The Bank should ensure that all policies promote and protect the special relationship that indigenous peoples have with their lands and resources, including through protection of relevant rights

44. As indicated earlier, the Bank must flesh out vague terms such as land “tenure” in a manner that is accurate and respectful of the status and rights that indigenous peoples enjoy under international law. Indigenous peoples’ development, and in fact physical and cultural survival, is intricately linked to their lands and resources. Indigenous peoples have a “distinctive and profound spiritual and material relationship with their lands and resources”⁴¹ and this relationship forms the “fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”⁴²

45. The realization of indigenous peoples’ rights to own their lands and resources is therefore “critical to the future well-being, the alleviation of poverty, the physical and cultural survival, and the social and economic development of indigenous peoples.”⁴³ Indigenous peoples own their land and resources collectively, and though they often lack official title, their aboriginal title, or ownership by reason of long-standing possession, is recognized in international law.⁴⁴ Because they are distinct peoples, indigenous peoples have what is referred to as permanent sovereignty over their natural resources, or “legal, governmental control and management authority.”⁴⁵

46. In many countries in which the Bank operates, however, indigenous peoples' collective ownership rights to their lands and resources are not recognized or fully protected.⁴⁶ Examples include where the State purports to hold the right to extinguish aboriginal title at will;⁴⁷ fails to acknowledge collective ownership of lands, territories, environment, and natural resources;⁴⁸ claims to hold land in trust while retaining rights of disposal or development;⁴⁹ fails to acknowledge the presence of indigenous peoples or their land-use regimes;⁵⁰ recognizes only limited use rights to traditionally held territories;⁵¹ or denies that indigenous peoples are capable of enjoying subsurface rights to their lands.⁵²

47. When development activities are initiated in areas where indigenous peoples’ land and resource rights are not respected, projects may result in expropriation, evictions, or restrictions on indigenous peoples’ access to critical resources.⁵³ Such impacts may result not only from large infrastructure projects, but also from projects involving the creation of parks or other conservation efforts.⁵⁴

48. Even development projects specifically geared toward addressing access to land and insecurity of property rights over lands can have adverse effects for indigenous peoples if their collective ownership rights are not protected. Land reform efforts that rely on individual titles,

for instance, require “productive use” for recognition of land claims, or fail to recognize indigenous peoples’ customary rights, can lead to rights violations and a failure of development goals, as several World Bank-financed land administration cases have shown.⁵⁵ Moreover, agrarian reforms throughout the Americas have proven to be unsuccessful in preventing both conflicts around lands and harm to indigenous peoples, instead often involving the partialling of collectively held Indian lands, which are then open to transactions based on individual land titles. As a result, indigenous peoples become landless peasants.

49. A 2011 implementation review of the Indigenous Peoples Policy emphasized the loss of development opportunities when projects do not address indigenous peoples’ collective ownership rights to land and resources.⁵⁶ The study noted that compliance with the Indigenous Peoples Policy’s requirements on recognition of land and resource rights scored the lowest of all indicators measured.⁵⁷

50. As stated earlier, recognition and protection of indigenous peoples’ collective ownership rights to land and resources can in itself be a powerful development strategy—providing food security, opportunities for economic growth, access to credit and capital, and the social stability necessary for economic development as peoples.⁵⁸ Protection of indigenous peoples’ communal lands is critical for environmental protection and for sustainable development.⁵⁹ As the IEG Forest Strategy Review noted, “poverty reduction based on Bank-supported forest initiatives will have to address the formal recognition of traditional rights, culture, and other values that are important to poor indigenous peoples and forest-dependent communities.”⁶⁰

Section III **EXISTING SAFEGUARD POLICIES**

A | INDIGENOUS PEOPLES POLICY

The Bank should incorporate the standards reflected in the UN Declaration on the Rights of Indigenous Peoples into the Indigenous Peoples Policy

51. In the years since the development of the Indigenous Peoples Policy, significant advances have taken shape in the field of indigenous rights. The 2007 adoption of the UN Declaration clarified the global consensus on indigenous rights, and “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”⁶¹ Today, no country in the world opposes the Declaration. Though the Declaration is not binding in itself, many of its provisions are based upon rules arising from binding treaties and international customary law. The Declaration’s provisions are now utilized in various fora – from multilateral climate and environmental agreements,⁶² to regional human rights bodies,⁶³ to private industry codes⁶⁴ and domestic law.⁶⁵

The Bank should require use of human rights impact assessment for projects affecting indigenous peoples

52. For Bank projects that trigger the Indigenous Peoples Policy, borrowers are required to undertake a social assessment.⁶⁶ The assessment, however, does not utilize HRIA. Little guidance is provided in terms of how the social assessment should be conducted, while a 2011 implementation review found indigenous peoples social assessments to be generally inadequate.⁶⁷ Similarly, the review found nearly half of Indigenous Peoples Plans and Planning Frameworks to be unsatisfactory, with many failing to consider long-term or adverse impacts.⁶⁸

53. It is beneficial that the Indigenous Peoples Policy requires a review of the “legal and institutional framework applicable to Indigenous Peoples.”⁶⁹ However, in an implementation review, only 66% of social assessments were found to provide an adequate description of the relevant legal framework.⁷⁰ The review also expressed “significant concern” over the failure to incorporate legal issues into project design.⁷¹ Inspection Panel cases have demonstrated that such lackluster assessments can be responsible for rights violations and project failures. In the Honduras Land Administration Project, for instance, analysis of a property law and its inconsistency with the International Labor Organization (ILO) Convention 169 was not incorporated into a land titling project design.⁷²

54. As discussed above, the use of HRIA methodologies could improve the quality of social assessments, assisting both Bank staff and borrowers in identifying relevant legal gaps and human rights risks, and helping to ensure that these risks are examined and addressed within project design. Countries throughout the Americas that are part of the regional human rights system are obliged to adopt domestic measures to prevent violations of the rights protected by national constitutions and the American Convention on Human Rights, a treaty ratified by almost all countries in the region.

The Bank should ensure that borrowers work with and through indigenous peoples’ self-governing institutions

55. The Indigenous Peoples Policy does not provide clear guidance that borrowers must identify, and work with and through, the democratic institutions and decision-making structures of indigenous peoples whose rights are implicated by the proposed project.⁷³ Only those grassroot indigenous communities potentially affected by the project are the decision makers, not regional or national indigenous organizations.

56. Indigenous peoples’ rights of self-determination and self-government, and to maintain and develop their own political and economic institutions, are inherent rights, independent of the existence or absence of recognition by a State.⁷⁴ Under international law, participation and consultation of indigenous peoples is to be through their own representative institutions.⁷⁵

57. According to the Inspection Panel, failure to adequately account for local indigenous institutions in project consultations has been a significant problem.⁷⁶ In the Honduras Land Administration Project, consultations were conducted with a regional entity created under the auspices of the project,⁷⁷ rather than with the Garífuna people’s existing representative organizations,⁷⁸ which “divided the community and marginalized the existing representatives”

and risked making “the process of land demarcation and titling vulnerable to manipulation” potentially resulting in the loss of the Garífuna people’s claims to their collective lands.⁷⁹

The Bank should ensure that Indigenous Peoples Plans and Planning Frameworks are developed in a way that enables indigenous peoples to determine their own development priorities as collective owners of their lands and resources

58. Often indigenous peoples are treated as passive recipients of development, or worse, they are positioned as obstacles to, or casualties of, development. While the Indigenous Peoples Policy requires that Indigenous Peoples Plans⁸⁰ and Planning Frameworks⁸¹ be developed in consultation with indigenous peoples, it does not provide an active role for indigenous peoples themselves to articulate development plans based on their own development priorities. This shortcoming becomes even more critical in light of the fact that consultation processes are often not conducted effectively.⁸² Additionally, while the Indigenous Peoples Policy has several provisions consistent with supporting indigenous peoples’ active role as development partners, these provisions are unfortunately sidelined as optional initiatives available at the borrower’s request, rather than as objectives or priorities of the policy.⁸³

59. The Indigenous Peoples Policy does contemplate a role for indigenous peoples’ co-administration of projects within the context of parks and protected areas. It provides for indigenous peoples’ participation in design, implementation, monitoring and evaluation of parks and protected areas management plans and benefit-sharing.⁸⁴ The policy states that priority should be given for collaborative arrangements and small-scale, community-level management approaches that enable indigenous peoples to continue to use resources in an ecologically sustainable manner.⁸⁵ These provisions should be strengthened to require management or co-management by indigenous peoples for any project taking place on indigenous peoples’ lands or involving indigenous peoples’ resources. As the IEG’s Forest Sector Review noted, facilitating resource management by local communities is an important poverty reduction strategy.⁸⁶

60. Indigenous peoples have the right to “determine and develop priorities and strategies for exercising their right to development,”⁸⁷ and “for the development or use of their lands or territories, or other resources.”⁸⁸ Under the UN Declaration, indigenous peoples have the right “to be actively involved in developing and determining health, housing and other economic and social programmes affecting them, and as far as possible, to administer such programmes through their own institutions.”⁸⁹

61. The International Fund for Agricultural Development (IFAD), as a matter of policy, has a focus on community driven development with a strategy of supporting indigenous peoples’ management of resources, stating that indigenous peoples and affected communities are to have an active role in project preparation and implementation, including effective control over resources.⁹⁰

The Bank should require due process of law protections within all consultation proceedings where indigenous peoples' interests and/or rights are subject to determination

62. The Bank's model for borrower consultations with indigenous peoples is built upon several elements: (1) a gender and intergenerationally inclusive framework;⁹¹ (2) use of methods appropriate to the social and cultural values of the affected indigenous peoples;⁹² and (3) sharing of project information with affected indigenous peoples.⁹³ While there is value in including these elements in the policy consultation model, the policy is missing critical due process of law guarantees to prevent related lawsuits based on human rights law. It should be noted that all State proceedings, including consultation proceedings, must provide for due process rights where decisions may affect human rights.⁹⁴

63. The due process guarantees missing in the Indigenous Peoples Policy include that consultations be carried out within a reasonable time⁹⁵ and by a competent, independent, and impartial authority.⁹⁶ Currently under the Policy, the borrower country, without any intervention or verification by a third party, carries out consultations.⁹⁷ Needless to say, borrowers cannot be considered independent and impartial authorities, due to their significant and obvious interest in the project in question.⁹⁸

64. Other missing due process elements include the following: (1) provision of information in a form understood by them, including provision of a translator or interpreter, if the language spoken in the project area is native, not the State official language;⁹⁹ (2) adequate time and means for the consultation, in order to comprehend project information and realize its rights implications;¹⁰⁰ and (3) provision of legal counsel, if not already engaged by the indigenous peoples.¹⁰¹ All of these elements are upheld by the UN Declaration.

65. Unfortunately, information regarding project activities is often not disclosed in a manner accessible to indigenous peoples. Inaccessible information has been cited in several Inspection Panel cases.¹⁰² The Panel has stressed the "critical need to ensure that the necessary, meaningful consultations with, and information disclosure to the affected people take place, in a manner that is both timely (before final decisions are made) and understandable (using local languages, and turning complex project information into layman's language)."¹⁰³

66. In connection to the above, there are significant problems in the project information that is prepared by borrowers. Only 59% of social assessments in Indigenous Peoples Plans and 51% of Indigenous Peoples Planning Frameworks were found to be satisfactory,¹⁰⁴ with many failing to consider long-term or adverse impacts.¹⁰⁵ Additionally, while the Indigenous Peoples Policy provides for disclosure of relevant project information,¹⁰⁶ disclosure of indigenous peoples' statutory and customary rights, scope and nature of proposed development, and potential effects of development is only explicitly required in cases of *commercial* development of indigenous peoples' natural or cultural resources.¹⁰⁷ Moreover, a study of projects affecting indigenous peoples found only one-fourth showed evidence of culturally or linguistically appropriate disclosure.¹⁰⁸

The Bank should adopt as a governing policy requirement respect for indigenous peoples' full collective ownership rights to their lands and natural resources, including both traditional lands and those they have otherwise acquired

67. The Indigenous Peoples Policy does not effectively ensure that projects fully respect indigenous peoples' collective ownership rights to their lands, territories and resources. Borrowers are instructed merely to, within the social assessment and preparation of an Indigenous Peoples Plan or Planning Framework, "pay particular attention to" the customary rights of indigenous peoples.¹⁰⁹ This provision provides no clarity whatsoever to the borrowers nor to indigenous peoples. As a result, the Bank's clients often undertake project-related activities that are detrimental to indigenous peoples' lands and resources, often resulting in legal actions before domestic courts for judicial protection and redress because of rights violations. Naturally, this situation ensures neither project governance nor sustainability. In our opinion, the Bank should clarify this vague provision by clearly instructing borrowers to fully respect the collective ownership rights to lands and resources of those indigenous communities located within the project area, consistent with international law.

68. Under international law, indigenous peoples have rights to full collective ownership over lands, territories and resources under their possession, including both traditional lands and those they have otherwise acquired.¹¹⁰ This includes legal, governmental control and management authority, or what is known as indigenous peoples' permanent sovereignty over their natural resources.¹¹¹ States have an obligation to recognize these rights¹¹² enshrined in core international treaties¹¹³ the UN Declaration¹¹⁴ and other instruments.¹¹⁵

69. Unlike the Bank, other MDBs have linked their policies to international human rights standards regarding indigenous peoples' lands, territories and resources. The IDB requires projects involving land rights to comply with applicable law, including international law, and includes gap-filling measures where domestic regulations do not comply.¹¹⁶ The European Investment Bank requires that where customary rights to lands and resources of indigenous peoples are affected by a project, an Indigenous Peoples Development Plan be prepared which reflects the principles of the UN Declaration.¹¹⁷

The Bank should require legal recognition and regularization of indigenous peoples' full collective ownership rights to their lands, territories and natural resources prior to initiation of any development activities

70. The Indigenous Peoples Policy does not require such legal recognition and regularization as a precursor to development activities that would affect indigenous peoples' lands or resources. Borrowers are required to secure legal recognition only where the project itself is primarily a titling project or involves the acquisition of indigenous peoples' lands.¹¹⁸ This means that Bank-financed projects that will significantly impact indigenous peoples' land rights can proceed in the absence of legal recognition or protection for those rights.

71. Additionally, even in the two narrow situations in which legal recognition is required, borrowers are not required to recognize indigenous peoples' full collective ownership rights. Instead, the policy provides the option that borrowers recognize only use rights, or apportion communal lands to individuals through granting of individual title.¹¹⁹ This is unacceptable and violates collective ownership rights to land and resources, which are at the heart of indigenous peoples and nations.

72. The requirement applies only to those lands that indigenous peoples traditionally owned, or customarily used or occupied.¹²⁰ The Indigenous Peoples Policy remains silent about the situation of those lands that indigenous peoples have acquired by means other than traditional or customary occupation or use. In many situations indigenous peoples have been illegally dispossessed of their traditional lands and now live and depend on lands that they have acquired by other means;¹²¹ these lands must also be protected in accordance with indigenous peoples' full ownership rights.¹²²

73. States have an obligation to take measures to protect indigenous peoples' rights to their lands, territories and resources prior to implementing any development activities that might threaten those rights. In a foundational case dealing with the granting of forest concessions on indigenous peoples' untitled lands, the Inter-American Court held that the government of Nicaragua had an obligation to carry out the delimitation, demarcation, and titling of an indigenous community's lands and that until that was done "the State must abstain from any acts that might affect the existence, value, use or enjoyment of the property..." either directly or through the acts of third parties.¹²³

The Bank should ensure that benefit-sharing with indigenous peoples is consistent with ownership rights and their right to development, providing more clarity and security on benefit-sharing agreements

74. While indigenous peoples' participation in project benefits is encouraged in several provisions of the Indigenous Peoples Policy,¹²⁴ the policy only explicitly provides for equitable benefit-sharing in three situations: (1) commercial development of natural resources;¹²⁵ (2) commercial development of indigenous peoples' knowledge or cultural resources;¹²⁶ and (3) physical relocation or restriction of access to resources due to parks or protected areas created in indigenous lands.¹²⁷ The policy falls short of requiring that whenever indigenous peoples' lands, territories, natural or cultural resources are affected; benefits are to be shared equitably with them consistent with their ownership rights and right to development. Moreover, neither policy requires that benefit-sharing agreements undergo third-party verification. Not surprisingly, failure to comply with benefit-sharing provisions has been raised as a widespread concern in Bank reviews.¹²⁸

75. Under international law, the development or commercialization of natural or cultural resources located on indigenous lands requires benefit-sharing as part of indigenous peoples' rights to lands, territories and resources. For example, ILO Convention 169¹²⁹ and the Convention on Biological Diversity¹³⁰ have clear provisions in this regard, as do regional bodies,¹³¹ requirements that are also reflected in many domestic laws.¹³²

76. Benefit-sharing agreements are essential if indigenous peoples are to benefit from development activities. They are also critical for current arrangements with partners under the FCPF and other climate finance arrangements. The Bank should strengthen and help bring clarity to benefit-sharing agreements. The establishment of third party verification of the agreements reached with potentially affected communities, among other measures, will certainly strengthen them. The Center believes that these agreements are one of the vehicles that could help the Bank to more successfully alleviate poverty for indigenous peoples.

The Bank should ensure that measures are taken to screen for the possible presence of indigenous peoples living in voluntary isolation, and proscribe Bank support for projects that may impact them

77. The Bank's Indigenous Peoples Policy does not address the unique development risks for indigenous peoples living in voluntary isolation, nor their rights, including the right to remain in isolation as they desire.¹³³ In many parts of the world, indigenous peoples live in voluntary isolation,¹³⁴ meaning that they have chosen to avoid or withdraw from contact with dominant society as a survival strategy in the face of past aggressions and invasions of their lands and territories.¹³⁵ Indigenous peoples in voluntary isolation or initial contact¹³⁶ are extremely vulnerable to harms stemming from development projects taking place in their lands and territories or surrounding areas.¹³⁷ Both direct and indirect contact of peoples in voluntary isolation often bring devastating consequences, including loss of land and resources, spread of epidemics,¹³⁸ forced assimilation or loss of traditional ways of life,¹³⁹ and even the disappearance of entire peoples.

78. International standards related to indigenous peoples in voluntary isolation and initial contact have been developed by various human rights bodies.¹⁴⁰ Several States, including Brazil, Venezuela, Peru, Bolivia and Ecuador, have also adopted related legal measures.¹⁴¹ The Inter-American Development Bank requires that projects with potential impacts on peoples in voluntary isolation include appropriate measures to recognize, respect and protect their lands, territories, environment, health and culture, and to avoid contact with them.¹⁴²

B | INVOLUNTARY RESETTLEMENT

The Bank should expressly prohibit the physical relocation of indigenous peoples, or any restrictions on indigenous peoples' livelihood activities or access to their lands, territories, or resources without their free, prior and informed consent

79. While the Indigenous Peoples Policy and the Involuntary Resettlement Policy both seek to avoid involuntary relocation of indigenous peoples, they do not expressly prohibit it. Under the Indigenous Peoples Policy, physical relocation of indigenous peoples is permitted where "not feasible to avoid" and where "broad community support" has been ascertained.¹⁴³ This standard allows for the relocation of indigenous peoples without their free, prior and informed consent.

80. The Bank standard for restricting access of indigenous peoples to their lands, territories and resources is even lower. The application of the Involuntary Resettlement Policy and related provisions in the Indigenous Peoples Policy are limited to restriction of access to lands and resources only regarding development of parks and protected areas, not other development activities.¹⁴⁴ Unlike the Bank, both the IFC and the Asian Development Bank's policies on involuntary resettlement apply to involuntary restrictions on land use generally.¹⁴⁵

81. While the Indigenous Peoples Policy states that restrictions on access to resources should be avoided, it allows that "in exceptional circumstances, where it is not feasible to avoid restricting access," restrictions may go forward with the "free, prior, and informed consultation" of indigenous peoples on a process framework.¹⁴⁶ In this case, there is no mention of securing even broad community support, let alone FPIC.

82. Physical removal of indigenous peoples or restricting access to their lands and resources is widely acknowledged to cause destruction of indigenous peoples' social structures and livelihoods, and to result in impoverishment. This is why international law recognizes that indigenous peoples have a right not to be divested of their lands, territories or resources,¹⁴⁷ forcibly removed from their lands or territories¹⁴⁸ or divested of their means of subsistence.¹⁴⁹ Any relocation of indigenous peoples requires their free, prior, and informed consent, and only may proceed after an agreement on compensation, including, where possible, the option of return.¹⁵⁰

The Bank should ensure that when lands and natural resources have been taken from indigenous peoples, redress measures take the form of lands, territories and resources equal or better in quality, size and legal status

83. Neither the Indigenous Peoples Policy nor the Involuntary Resettlement Policy clearly requires land-based resettlement strategies. While the Indigenous Peoples Policy states that resettlement plans involving indigenous peoples are to include a land-based resettlement strategy,¹⁵¹ the Involuntary Resettlement Policy states merely that "preference is given" to "land-based resettlement strategies" for indigenous peoples.¹⁵² The Involuntary Resettlement Policy additionally allows that non-land-based resettlement options are permissible where sufficient land is not available or where the "provision of land would adversely affect the sustainability of a park or protected area."¹⁵³

84. Neither policy requires that indigenous peoples be ensured equal or greater ownership rights over their replacement land, consistent with international law. According to both policies, strategies are to be compatible with indigenous peoples' and local communities' cultural preferences and prepared in consultation with them.¹⁵⁴ The Involuntary Resettlement Policy provides that replacement land should have at least an equivalent "combination of productive potential, locational advantage, and other factors."¹⁵⁵ The Involuntary Resettlement Policy states that "alternative assets are to be provided with adequate tenure arrangements"¹⁵⁶ but does not require a minimum standard regarding the legal status of replacement land.

85. If indigenous peoples do not have secure ownership rights over replacement land, they are at risk of being evicted or encroached upon. Under international law, where indigenous

peoples' lands are taken, damaged or used without their free, prior and informed consent, or where indigenous peoples are deprived of their means of subsistence, they have a right to redress.¹⁵⁷ This redress "shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress," unless otherwise freely agreed upon by the peoples concerned.¹⁵⁸ Both the UN Declaration and regional courts affirm that indigenous peoples' ownership rights apply both to traditional lands as well as those acquired through other means, including resettlement arrangements.¹⁵⁹

C | ENVIRONMENTAL ASSESSMENT

The Bank should reformulate this policy to be an integrated assessment policy, wherein both human rights and environmental risks and impacts are addressed comprehensively

86. The Environmental Assessment Policy is not designed as an integrated or balanced assessment; rather it is an environmental assessment (EA) in the strict sense of the word. Despite the intention of the EA policy to "consider natural and social [project] aspects in an integrated way,"¹⁶⁰ the policy does not sufficiently capture human risks and impacts. Social assessment is insufficiently operationalized within the policy and generally subsumed within the language of 'environment.' The coverage of human impacts is narrowly constructed - limited to human health and safety, involuntary resettlement, indigenous peoples, and physical cultural resources.¹⁶¹

87. The EA Policy additionally does not identify relevant human rights standards or related risks. Although it requires borrowers to include an assessment of the relevant legal framework within project documents,¹⁶² it is not clear that this assessment should include relevant international human rights law or identify related gaps in the protections provided by domestic laws.¹⁶³ It is also not clear that the assessment should identify the steps necessary to address human rights risks and prevent violations. Moreover, regardless what impacts are assessed, only those which trigger the Indigenous Peoples Policy, the Involuntary Resettlement Policy, or the Physical Cultural Resources Policy require mitigation measures. This means that myriad human rights impacts are never addressed. For additional inputs, see comments above on the use of HRIAs.

88. As has been evidenced in Inspection Panel cases, the human rights framework can be important for catching serious project risks.¹⁶⁴ Moreover, because the EA Policy is the mechanism for risk categorization of Bank projects, it is critical that this assessment include human rights-related impacts. As the IEG has noted, the Bank "would benefit from the development and introduction of transparent criteria for assessing social and environmental risks...to ensure more consistent risk-based categorization of the projects it supports."¹⁶⁵ The human rights framework can serve to both anchor risk assessment to more transparent and universal standards and to ensure comprehensive coverage.

CONCLUSION

89. The safeguard policy review presents an historic opportunity for the Bank to upgrade and strengthen the safeguard framework so that it effectively protects the human rights of indigenous peoples. The Bank must recognize indigenous peoples' right to collective ownership and use of their lands, territories and resources and right of self-determination. Doing so would help the Bank to regain its position as a global leader and to fulfill its mission of poverty reduction and sustainable development. The creation of a new safeguards framework presents the opportunity for the Bank to move beyond a "do-no harm" approach to one that ensures positive development in real partnership with borrower countries, indigenous peoples, and local communities located in the project area.

¹ These safeguard policies are: (1) OP4.01 Environmental Assessment; (2) OP 4.04 Natural Habitats; (3) OP4.09 Pest Management; (4) OP 4.10 Indigenous Peoples; (5) OP4.11 Physical Cultural Resources; (6) OP 4.12 Involuntary Resettlement; (7) OP4.36 Forests; and (8) OP 4.37 Safety of Dams.

² Approach Paper for the Review and Update of the World Bank's Safeguard Policies, Oct. 10, 2012, Approach Paper for the Review and Update of the World Bank's Safeguard Policies, Oct. 10, 2012, 22, <http://siteresources.worldbank.org/EXTSAFEPOL/Resources/5844341306431390058/SafeguardsReviewApproachPaper.pdf>.

³ *Id.*, at 35.

⁴ "Indigenous Peoples worldwide continue to be among the poorest of the poor and continue to suffer from higher poverty, lower education, and a greater incidence of disease and discrimination than other groups, according to a new World Bank study: Indigenous Peoples, Poverty, and Development." World Bank, April, 26, 2010, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,contentMDK:22551137~pagePK:210058~piPK:210062~theSitePK:407802,00.html>.

⁵ U.N. Declaration, G.A. Res. 61/295, pmbL., U.N. Doc A/RES/61/295 (Sept. 13, 2007).

⁶ UNFCCC 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 [Cancun Agreements], para. 8, FCCC/CP/2010/7/Add.1 (Mar. 15, 2011)

⁷ *Id.*, at appendix 1(2).

⁸ Letter from the Indian Law Resource Center to World Bank President Robert Zoellick on Updating and Reviewing the World Bank Indigenous Peoples Policy, July 11, 2011, <http://indianlaw.org/sites/default/files/07%2011%202011%20Indian%20Law%20Resource%20Center%20Ltr%20to%20Pres%20%20Zoellick.pdf>.

⁹ U.N. Special Rapporteur, Erica-Irene Daes, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, E/CN.4/Sub.2/2004/30 [hereinafter Daes Permanent Sovereignty].

¹⁰ Letter from the Indian Law Resource Center to World Bank President Robert Zoellick, supra note 8, at 2.

¹¹ See Leonardo A. Crippa, *Climate Change: Its Potential to Melt the Glacial Resistance to Human Rights at the World Bank*, in CLIMATE CHANGE, INDIGENOUS PEOPLES, AND THE SEARCH FOR LEGAL REMEDIES (Elizabeth Kronk et al. eds., Edward Elgar Publishing, Jan. 2013).

¹² See Ley 28, Estatuto de la Autonomía de las Regiones de la Costa Atlántica de Nicaragua 1 [Statute on Autonomy of Atlantic Coast Regions of Nicaragua], Sept. 7, 1987 (establishing the autonomy of the regions where indigenous communities are located in the Atlantic Coast of Nicaragua).

¹³ See Ley 445, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maiz 29, 31 [Law on Indigenous Peoples' Collective Property Rights in the Atlantic Coast and the Bocay, Coco, India and Maiz Rivers], Jan. 22, 2003 (stating that indigenous communities are entitled to a collective ownership right over their lands, and calling national and municipal state agencies to respect said rights).

¹⁴ *Id.*, at 33 (determining that indigenous communities living on the various islands located in the Atlantic Coast have exclusive fishing rights over marine resources within Nicaragua's territorial sea area).

¹⁵ *Id.*, at 34 (establishing that indigenous communities are entitled to specific percentages of all revenues and taxes

derived from the use and/or exploitation of the natural resources located in indigenous lands).

¹⁶ See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, Aug. 31, 2001 [hereinafter *Awas Tingni v. Nicaragua*].

¹⁷ See Decreto 24-99, Ley del Fondo Nacional de Tierras [National Land Funds Law], May 13, 1999. See also Decreto 1551, Ley de Transformación Agraria [Agrarian Reform Law], Nov. 7, 1962.

¹⁸ Letter from Indian Law Resource Center to U.S. Secretary of State John Kerry on Guatemala, Apr. 26, 2013, http://indianlaw.org/sites/default/files/ILRC%20letter%20to%20Sec.%20Kerry_Guatemala_0.pdf

¹⁹ See Government of Guatemala, Coordinadora de Comunidades Afectadas por la Hidroeléctrica de Chixoy, Organization of American States, World Bank and Inter-American Development Bank, *Informe de Identificación y Verificación de Daños y Perjuicios Ocasionados a las Comunidades Afectadas por la Construcción de la Hidroeléctrica Chixoy* [Report on the Identification and Verification of Damages Caused to Communities Affected by the Chixoy Dam] 5 (2009), <http://www.avidima.org/documentos/informes/informedeidentificacionyverificacionaprobado-final-%5b1%5d.pdf> (last visited 8 September 2012).

²⁰ EBRD, *Environmental and Social Policy*, para. 4, (2008), <http://www.ebrd.com/downloads/research/policies/2008policy.pdf>

²¹ EIB, *Statement of Environmental and Social Principles and Standards*, paras. 6, 30, 46 (2009), http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf.

²² Inter-American Development Bank, *Operational Policy on Indigenous Peoples (OP-765)*, and *Strategy for Indigenous Development (GN -2387-5)*, 19-20 (July 2006).

²³ Environmental Assessment OP 4.01 para. 3; Forests OP 4.36 para. 6; Physical Cultural Resources OP 4.11 para. 3.

²⁴ See Dinah Shelton, *Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002, Geneva: Background Paper No. 1, <http://www2.ohchr.org/english/issues/environment/environ/bp1.htm>. See also, e.g., UNFCCC 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,” App. 1(2), FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

²⁵ See *Awas Tingni v. Nicaragua*, supra note 16.

²⁶ The Inspection Panel, *Investigation Report, Honduras: Land Administration Project (Report No. 39933-HN)* (June 12, 2007), para. 255, p. 71, noting in footnotes that OMS 2.20, operative between 1984 and 2012 required that the Bank “be satisfied” that “the project plan is consistent with the terms of” existing “international agreements that are applicable to the project and area,” was complemented, not superseded by OMS 2.36, dated May 1984 and issued after 2.20. OMS 2.36 contains a prohibition on Bank funding for projects that will “contravene any international environmental agreements to which the member country concerned is a party.” [hereinafter *Panel Report, Honduras*]

²⁷ INDEPENDENT EVALUATION GROUP, ‘SAFEGUARDS AND SUSTAINABILITY POLICIES IN A CHANGING WORLD: AN INDEPENDENT EVALUATION OF WORLD BANK GROUP EXPERIENCE xxi (2010) [hereinafter IEG SAFEGUARDS EVALUATION], http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards_eval.pdf (last visited Sept. 28, 2012).

²⁸ See Office of High Commissioner for Human Rights Press Release, *UN Experts Urge World Bank to Adopt Human Rights Standards On the Eve of Key Gathering In Washington*, April 18, 2013. See also, Special Rapporteur on Right to Education, 1998, recommending ex ante HRIAs during policy development; Special Rapporteur on Health, 2003, calling for ‘appropriate impact analyses’ during policy-making processes; Special Rapporteur on Right to Food, 2009, calling on Brazil to conduct ex ante ‘impact assessments on the right to food,’ all cited in Eitan Felner, *Study on Human Rights Impact Assessments: A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development*, COMMISSIONED BY THE NORDIC TRUST FUND/THE WORLD BANK, February 2013, 5, available at http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf [hereinafter *Study on HRIA*] On the need for businesses to conduct human rights due diligence, see United Nations Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 17 (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

²⁹ *Study on HRIA*, supra note 28, 2-3.

³⁰ *Id.*, at x.

³¹ See e.g., UN Declaration, Arts. 10,11,29,32; International Labor Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, Art. 16 [hereinafter ILO 169]; HRC, *Outcome of the universal periodic review: New Zealand*, A/HRC/DEC/12/106 (Oct. 9, 2009). U.N. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, A/HRC/12/34 (July 15, 2009); U.N. Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, A/HRC/EMRIP/2010/2 (May 17, 2010); *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 17 (Nov. 28, 2007) [hereinafter *Saramaka v. Suriname*]; *In the Matter of The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. The Republic of Kenya*, African Commission on Human and Peoples' Rights (May 2009), endorsed by the African Union on February 4, 2010 [hereinafter *Welfare Council v. Kenya*].

³² See e.g. IFC Performance Standards on Environmental and Social Sustainability, Performance Standard 7: Indigenous Peoples, para. 11 (Jan. 1, 2012); EBRD Environmental and Social Policy, Performance Requirement 7: Indigenous Peoples, para. 4 (2008); IFAD, Policy on Improving Access to Land and Tenure Security, p. 16.

³³ See e.g. Australia, Canada, New Zealand, Philippines, Russian Federation, and Venezuela.

³⁴ U.N. Dep't of Eco. & Soc. Affairs, Div. for Soc. Policy & Dev., Workshop on Free, Prior, & Informed Consent, Contribution of the Indian Law Resource Center, Indigenous Peoples' Right of Free Prior Informed Consent with Respect to Indigenous Lands, Territories & Resources, at 1, U.N. Doc. PFII/2004/WS.2/6 (Jan. 17-19, 2005).

³⁵ See OP 4.10 para. 1. As a comparison, OP 4.10 does require indigenous peoples' prior agreement in the singular situation of projects involving commercial development of their cultural resources. See para. 19. This is not, however, required for any other type of development.

³⁶ See Working Paper prepared for the World Bank's Operations Policy and Country Services': *Implementation of the World Bank's Indigenous Peoples Policy, A Learning Review (FY 2006-2008)* (Aug. 2011) para. 50 [hereinafter *OPCS Working Paper*].

³⁷ See Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya [hereinafter Anaya A/66/288], A/66/288 (Aug. 10, 2011) at 86.

³⁸ ILRC's Comments on the World Bank's Draft OP 4.10 at 3 [hereinafter ILRC Comments] (Febr. 2005) (on file with author).

³⁹ See IFC Performance Standard 7, Indigenous Peoples, para. 12. See also Guidance Note 7, GN 33, (describing FPIC as "broad agreement").

⁴⁰ The ADB defines "consent of affected Indigenous Peoples communities" as "a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized representatives, of broad community support for such project activities. Broad community support may exist even if some individuals or groups object to the project activities." Safeguard Policy Statement, Indigenous Peoples Safeguards, June 2009.

⁴¹ U.N. Special Rapporteur, Erica-Irene Daes, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and their Relationship to Land*, para.121, E/CN.4/Sub.2/2001/21. [hereinafter Daes, *Relationship to Land*]

⁴² *Awat Tingni v. Nicaragua*, supra 16 at 159.

⁴³ Daes, *Permanent Sovereignty*, supra 9 at para. 57; See also Daes, *Relationship to Land*, supra 41 at 86.

⁴⁴ See para. 68 for full discussion.

⁴⁵ Daes, *Permanent Sovereignty*, supra 9 at para.18; ILO 169 Art. 15, 7.

⁴⁶ Daes, *Relationship to Land*, supra 41 at Section III.

⁴⁷ Daes, *Permanent Sovereignty*, supra 9 at 25.

⁴⁸ Valérie Couillard and Jérémie Gilbert, *Land rights under international law: historical and contemporary issues, LAND RIGHTS AND THE FOREST PEOPLES OF AFRICA: HISTORICAL, LEGAL AND ANTHROPOLOGICAL PERSPECTIVES*, 34, 36 (Forest Peoples Programme 2009) [hereinafter Couillard and Gilbert].

⁴⁹ Couillard and Gilbert 28, 30.

⁵⁰ Daes, *Relationship to Land*, supra 41 at 32; Bill Vorley, L. Cotula and M. Chan, *Tipping the Balance: Policies to shape agricultural investments and markets in favour of small-scale farmers*, IIED/OXFAM, December 2012, 31 [hereinafter Vorley]; Klaus Deininger and Derek Byerlee et.al., *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?*, THE WORLD BANK, 2011, 98.

⁵¹ Thomas Griffiths, *Indigenous peoples, land tenure and land policy in Latin America*, LAND REFORM, 2004 Issue 1, 55 [hereinafter Griffiths].

⁵² *Id.*, 52.

⁵³ See Daes, *Relationship to Land*, supra 41 at 22; Griffiths supra 51, at 37, 49 and 51; Special Rapporteur on the Right to Food, *Interim report of the Special Rapporteur on the right to food*, A/65/281 (Aug. 11, 2010) (by Olivier De Schutter), para. 9, p. 6 [hereinafter De Schutter]; Vorley, supra 50, at 31.

⁵⁴ Couillard and Gilbert, supra 48, at 23; De Schutter, para. 8; Griffiths, supra 50, at 57.

⁵⁵ See e.g. *Panel Report Honduras*, supra 26 at xxii (finding that titling and regularization of indigenous peoples lands went forward without sufficient measures to protect related land rights); see also The Inspection Panel, *Investigation Report, Panama: Land Administration Project (Report No. 56565-PA)*, Sept. 16, 2010 at xxi (Finding that lack of resolution of proposed Comarca boundaries may have contributed to progressive deterioration of land conflicts, which eventually led to evictions.).

⁵⁶ OPCS Working Paper, supra 36, para. 81.

⁵⁷ *Id.*, para. 46.

⁵⁸ Griffiths, supra 50 at 51; WORLD BANK, REVIEW OF IMPLEMENTATION OF THE WORLD BANK'S FOREST STRATEGY "SUSTAINING FORESTS" POLICY, MID-TERM REVIEW, 93 (2007) available at <http://go.worldbank.org/12MIEH1MC0> [hereinafter SUSTAINING FORESTS]; De Schutter, supra 53 at para. 22; Extractive Industries Review, *Striking A Better Balance, Volume I, The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, December 2003, 40; U.N. Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, at 41 (Dec. 2009), available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf (identifying "security of rights to territories, lands and natural resources" as the main "indicators to measure status of and trends in indigenous peoples' well-being at global, regional, national and local levels").

⁵⁹ Martin Adams, B. Cousins and S. Manona, *Land Tenure and Economic Reform in Rural South Africa: Constraints and Opportunities*, Working Paper 125, Overseas Development Institute, 10 (1999); V. M. Toledo, B. Ortjespejel, et. al., *The Multiple Use Of Tropical Forests By Indigenous Peoples In Mexico: A Case Of Adaptive Management*, CONSERVATION ECOLOGY 7(3), at 9 (2003), <http://www.consecol.org/vol7/iss3/art9>; German Andrade and Heidi Rubio-Torgler, *Sustainable Use of the Tropical Rain Forest: Evidence from the Avifauna in a Shifting-Cultivation Habitat Mosaic in the Colombian Amazon*, CONSERVATION BIOLOGY 8.2, 545 (1994); Andrew Nelson & Kenneth Chomitz, *Protected Area Effectiveness in Reducing Tropical Deforestation: A Global Analysis of the Impact of Protection Status*, in WORLD BANK INDEPENDENT EVALUATION GROUPS EVALUATION BRIEF 7 (Oct. 2009), available at [www://http://siteresources.worldbank.org/INTOED/Resources/protected_areas_eb.pdf](http://siteresources.worldbank.org/INTOED/Resources/protected_areas_eb.pdf) (finding that indigenous peoples-managed forests had more success preventing deforestation than protected areas had.)

⁶⁰ SUSTAINING FORESTS, supra 58 at 4.

⁶¹ UN Declaration Art. 43.

⁶² See e.g., Cancun Agreements, supra 6 at appendix 1(2).

⁶³ *Saramaka v. Suriname* supra 31; *Welfare Council v. Kenya* supra 31.

⁶⁴ E.g., Roundtable on Sustainable Palm Oil, *Roundtable on Sustainable Palm Oil Principles and Criteria for Sustainable Palm Oil Production, Including Indicators and Guidance*, October 2007, at http://www.rspo.org/files/resource_centre/keydoc/2%20en_RSPO%20Principles%20and%20Criteria%20for%20Sustainable%20Palm%20Oil%20Production%20%282007%29.pdf

⁶⁵ See e.g. *Aurelio Cal, et al. v. Attorney General of Belize*, Supreme Court of Belize (Claim No 171) (October 18, 2007) para. 133; and Bolivia's Law No. 3760 (Nov. 7, 2007).

⁶⁶ OP 4.10 Annex A- Social Assessment.

⁶⁷ OPCS Working Paper, supra 36 at 49.

⁶⁸ *Id.*, at 49, 59.

⁶⁹ OP 4.10 Annex A- Social Assessment 2(a).

⁷⁰ OPCS Working Paper, supra 36 at 49.

⁷¹ *Id.* at 49.

⁷² See *Panel Report, Honduras*, supra 26 at para. 378.

⁷³ OP 4.10 Annex A.

⁷⁴ See UN Declaration Arts. 5, 20; *Awais Tingni v. Nicaragua*, supra 16 at para 159.

⁷⁵ UN Declaration Arts. 18, 19.

⁷⁶ THE INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK: INSPECTION PANEL AT 15 YEARS REPORT 72 (The World Bank, 2009), available at

<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>, [hereinafter INSPECTION PANEL AT 15].

⁷⁷ *Panel Report, Honduras*, supra 26 at xviii.

⁷⁸ *Id.* at xix.

⁷⁹ *Id.* at xix-xx.

⁸⁰ OP 4.10 para. 12.

⁸¹ *Id.*, para. 13.

⁸² INSPECTION PANEL AT 15 YEARS, supra 76 at 72.

⁸³ OP 4.10 para. 22.

⁸⁴ *Id.*, para. 21.

⁸⁵ *Id.*, paras. 21, 14.

⁸⁶ SUSTAINING FORESTS, supra 58 at 3.

⁸⁷ UN Declaration Art. 23.

⁸⁸ UN Declaration Arts. 32, 26.

⁸⁹ UN Declaration Art 23; *See also* ILO 169 Art. 7(1).

⁹⁰ IFAD, *Engagement with Indigenous Peoples Policy*, 15 (Nov. 2009), available at http://www.ifad.org/english/indigenous/documents/ip_policy_e.pdf.

⁹¹ OP 4.10 para. 10(a).

⁹² *Id.*, para. 10(b).

⁹³ *Id.*, para. 10(c).

⁹⁴ Both the European and Inter-American human rights courts agree on this rule. *See* Albert and Le Compte, Eur.Court. H.R., Para. 39 (1983); *Case of Baena Ricardo et. al v. Panama*, Inter-Am. Ct.H.R. (ser. C) No. 72, at 125-29 (Feb. 2, 2001).

⁹⁵ According to the European Court of Human Rights, three factors should be taken into account in determining the reasonableness of the time required to carry out a proceeding: (1) the complexity of the case; (2) the procedural activity of the interested party; and (3) the conduct of the judicial authorities. *Vernillo v. France*, Eur. Ct. H.R., para. 30 (1991); *Motta v. Italy*, Eur. Ct. H.R., para.16 (1991); *Ruiz-Mateos v. Spain*, Eur. Ct. H.R art. I, paras. 30-54 (1993). The Inter-American Court of Human Rights followed the same analysis. *Genie Lacayo Case v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 30, para. 77 (Jan. 29, 1997); UN Declaration Art. 40 states that indigenous peoples have the right to *prompt* decisions through just and fair procedures.

⁹⁶ *See generally*, Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, 25 AM. U. INT'L L. REV. 574, 575 (2010) (discussing whether the deciding body should be or not an actual court). UN Declaration Art. 27 calls for a fair, *independent and impartial* process to adjudicate indigenous peoples land rights.

⁹⁷ OP 4.10 para. 10.

⁹⁸ Situations in which the deciding body's impartiality and interests are so obvious lead to the violation of due process of law rights. *See, e.g., Case of Cantoral-Benavides v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 69), Aug. 18, 200, Para. 114 (determining the impartiality of the military courts of the State because the armed forces had the dual function of combating insurgent groups with military force, and of judging and imposing sentence upon members of such groups).

⁹⁹ UN Declaration Art. 13.2.

¹⁰⁰ *See* UN Declaration Arts. 40, 13.2.

¹⁰¹ *See Chahal v. United Kingdom*, Eur. Ct. H.R., para. 152 (1996) (finding the remedies at issue ineffective where the deciding body's—the Home Secretary—decision could not be reviewed by another authority, and failed to provide adequate procedural safeguards, such as the right to counsel.)

¹⁰² *See e.g.,* The Inspection Panel, *Investigation Report, Nigeria: West African Gas Pipeline Project (Report No. 42644-GH)* (April 25, 2008); The Inspection Panel, *Investigation Report, Independent State of Papua New Guinea: Smallholder Agriculture Development Project (Report No. 64458-PG)* (Sept. 19, 2011), at 151. The Inspection Panel, *Investigation Report, Democratic Republic of Congo: Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project (Report No. 40746-ZR)* (August 31, 2007), at xxv.

¹⁰³ INSPECTION PANEL AT 15, supra 76 at 72.

¹⁰⁴ OPCS Working Paper, supra 36 at 49, 51, 60.

¹⁰⁵ *Id.*, at 49, 59.

¹⁰⁶ OP 4.10 para. 9.

¹⁰⁷ *Id.*, at paras. 18, 19.

¹⁰⁸ See OPCS Working Paper, supra 36 at 51 (noting that “the review found evidence of 15 cases (or one-fourth of the total) where in-country disclosure was done in an appropriate form, manner or language so as to be culturally appropriate for indigenous peoples.”)

¹⁰⁹ OP 4.10 para. 16.

¹¹⁰ UN Declaration Arts. 26, 32.

¹¹¹ Daes, *Permanent Sovereignty*, supra 9 at 18.

¹¹² *Id.*, at 6.

¹¹³ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, at 1. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, at 1.

¹¹⁴ UN Declaration at 4, 8, 26, 27, 28, 29, 30, 32.

¹¹⁵ See e.g. Organization of African Unity, African Charter of Human and People’s Rights, art. 21 (June 27, 1981); Convention on Biological Diversity, 1760 UNTS 79 (1992), at 3; United Nations Conference on the Human Environment Stockholm, June 16, 1972, *Stockholm Declaration*, at principle 21, A/CONF.48/14; UNFCCC, FCCC/INFORMAL/84 (May 9, 1992), at prml, para. 8; United Nations Conference on Environment and Development, Aug. 12, 1992, *Rio Declaration*, at principle 2, A/CONF.151/26 (vol. I); Vienna Convention on the Succession of States in Respect of Treaties, A/CONF.80/31 (Aug. 22, 1978), at 13, as corrected by A/CONF.80/31/Corr.2 (Oct. 27, 1978).

¹¹⁶ See IDB, Operational Policy on Indigenous Peoples, 8 (2006).

¹¹⁷ EIB, Statement of Environmental and Social Policies and Standards, para. 53 (2009).

¹¹⁸ See OP 4.10 para. 17.

¹¹⁹ *Id.*

¹²⁰ ILRC Comments, 1-2.

¹²¹ *Id.*

¹²² UN Declaration Art. 26.2.

¹²³ *Awes Tingni v. Nicaragua*, supra 16 at para. 173; See also *Maya Indigenous Communities of the Toledo District*, Case 12.053, Inter-Am. C.H.R. Report 40/04 (2004).

¹²⁴ OP 4.10 paras. 12, 18, 19.

¹²⁵ *Id.*, at para. 18.

¹²⁶ *Id.*, at para. 19.

¹²⁷ *Id.*, at para. 21.

¹²⁸ OPCS Working Paper, supra 36 at 46.

¹²⁹ ILO 169, Art. 15.

¹³⁰ Convention on Biological Diversity, 1760 UNTS 79 (1992) at 8(j).

¹³¹ *Saramaka v. Suriname*, at 129, 138; *Welfare Council v. Kenya*, at 228 (determining that the absence of benefit-sharing with indigenous peoples violates their right to development).

¹³² Nicaragua’s Law 445, for instance, includes indigenous communities as one of the necessary direct beneficiaries of the benefits derived from the development of natural resources located on the indigenous communities’ lands. Ley 445, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maiz [Law on Indigenous Peoples’ Collective Property Rights in the Atlantic Coast and the Bocay, Coco, India and Maiz Rivers], Jan. 22, 2003, at 34.

¹³³ *Ibid* at 8, 12 and 13; Unión de Nativos Ayoreo de Paraguay (UNAP), Iniciativa Amotocodie (IA), International Work Group for Indigenous Affairs (IWGIA), *The Case of the Ayoreo*, IWGIA Report 4, Paraguay, at 33 (2009).

¹³⁴ Office Of The United Nations High Commissioner For Human Rights (OHCHR) and International Work Group For Indigenous Affairs (IWGIA), *Report on the Regional Seminar on Indigenous Peoples in Isolation and Initial Contact in the Amazon Region and the Gran Chaco* (Santa Cruz De La Sierra, Bolivia: 20-22 November 2006), E/C.19/2007/Crp.1. (Feb. 15, 2007), [hereinafter *Santa Cruz*] at 3.

¹³⁵ See Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples; report prepared by the secretariat, *Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco*, A/HRC/EMRIP/2009/6 (June 30, 2009) [hereinafter *Draft Guidelines*] at 5.

¹³⁶ According to the Expert Mechanism on the Rights of Indigenous Peoples, a people is considered “in initial

contact” if it remains vulnerable (to disease, loss of territory, etc.) as a result of its situation with regard to contact or so long as it remains at risk of extinction owing to problems generated by mainstream society and the consequences arising at the moment of contact, regardless of how long this situation lasts.” *Id.* at para. 11.

¹³⁷ *Santa Cruz*, supra 134 at 6; *Draft Guidelines*, supra 135 at 15-16.

¹³⁸ WORLD RAINFOREST MOVEMENT, INDIGENOUS PEOPLES: THEIR FORESTS, STRUGGLES AND RIGHTS, 51, 89 and 111 (2005) <http://www.wrm.org.uy/peoples/Book/text.html>. *Santa Cruz*, supra 134 at 7; *Draft Guidelines*, supra 135 at 6

¹³⁹ *Santa Cruz*, supra 134 at 7; *Draft Guidelines*, supra 135 at 6.

¹⁴⁰ *Draft Guidelines*, supra 135 at 133; Programme of Action for the Second International Decade of the World’s Indigenous People; the Permanent Forum on Indigenous Issues at, inter alia, the 5th session; the 2005 Belem Declaration on Isolated Indigenous Peoples issued by the International Alliance for the Protection of Isolated Indigenous Peoples; the current draft version of the Organization of American States Declaration on the Rights of Indigenous Peoples; The *Santa Cruz de la Sierra Appeal*, adopted at conclusion of the *Regional Seminar on Indigenous Peoples in Isolation and Initial Contact in the Amazon Region and the Gran Chaco*, organized by the Office Of The United Nations High Commissioner For Human Rights (OHCHR) and International Work Group For Indigenous Affairs (IWGIA), and held in Santa Cruz De La Sierra, Bolivia: 20-22 November 2006,.

¹⁴¹ *Santa Cruz*, supra 134 at 9 and 14.

¹⁴² IDB, *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development* (2006) at 11.

¹⁴³ OP 4.10 para. 20.

¹⁴⁴ OP 4.12 para. 3(b); OP 4.10 para. 21.

¹⁴⁵ See IFC Performance Standard 5, para. 1; ADB Safeguard Policy Statement, 2009, App. 2, para. 5.

¹⁴⁶ OP 4.10 para. 21.

¹⁴⁷ UN Declaration Arts. 26, 28, 32.

¹⁴⁸ *Id.*, Art. 10; ILO 169 Art. 16.

¹⁴⁹ *Id.*, at Art. 20.

¹⁵⁰ UN Declaration Art. 10; see also ILO 169 Art. 16.

¹⁵¹ OP 4.10 para. 20.

¹⁵² OP 4.12 para. 9.

¹⁵³ *Id.*, at para. 11.

¹⁵⁴ OP 4.10 para. 20; OP 4.12 paras. 9, 11.

¹⁵⁵ OP 4.12 para. 11.

¹⁵⁶ *Id.*, at ft note 13.

¹⁵⁷ UN Declaration Arts. 20, 28, 32.

¹⁵⁸ *Id.*, Art. 28.2; See also ILO 169 art 16.

¹⁵⁹ See e.g. UN Declaration Art. 26; Case of the Moiwana Community v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, para. 133 (June 15, 2005).

¹⁶⁰ See OP 4.01 para. 4.

¹⁶¹ See OP 4.10 para. 3.

¹⁶² E.g. *Id.*, at para 3; See also Op 4.01, Annex B- Content of an Environmental Assessment Report for a Category A Project, at para. 2(b) (Policy, legal, and administrative framework: “Discusses the policy, legal, and administrative framework within which the EA is carried out. Explains the *environmental* requirements of any cofinanciers. Identifies relevant international *environmental* agreements to which the country is a party.”) [emphasis added]

¹⁶³ See also discussion above on contravening borrowers’ human rights obligations, at para 29.

¹⁶⁴ See e.g. the Chad-Cameroon Pipeline case where petitioners “alleged that the government of Chad had indulged in political repression, coercion, and torture, which had stifled free and open debate and inhibited the Requesters and other elements of civil society from participating in the design and implementation of the projects under consideration.” INSPECTION PANEL AT 15, supra 76 at 50; see also *Panel Report, Honduras* supra 26.

¹⁶⁵ IEG SAFEGUARDS EVALUATION, supra 27 at 70.