



December 8, 2011

Working Group on the Issue of Human Rights and Transnational Corporations  
United Nations  
Geneva, Switzerland  
Via email: [wg-business@ohchr.org](mailto:wg-business@ohchr.org)

**RE: Recommendations to the Working Group on the Establishment of a Work Programme**

Dear Working Group Members:

The Indian Law Resource Center (Center) would like to take this opportunity to express our appreciation for the work that the United Nations Working Group on the Issue of Human Rights and Transnational Corporations (Working Group) has undertaken to discuss the challenges in the implementation of the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (Principles). We have closely followed the development of these Principles by the Special Representative of the United Nations Secretary-General on Business and Human Rights, John Ruggie. We have read the final document with great interest and we are encouraged by the effort to work towards its implementation.

The Center is a non-profit law and advocacy organization established and directed by American Indians. The Center was founded in 1978 to foster the preservation and well-being of Native nations throughout the Americas. For over 30 years, we have provided legal assistance to indigenous peoples working to protect their lands, natural resources, human rights, environment and culture. The Center seeks to overcome the grave problems that threaten indigenous peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights and dignity, and by challenging the governments of the world to accord justice and equality before the law to all indigenous peoples of the Americas.

The Center remains ready and willing to contribute to the work of this Working Group. We support all the identified components and activities of its

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mandate. However, we believe it is critical that this Working Group pays particular attention to the need of fully addressing the human rights performance of businesses—particularly those receiving public financing and support. For that purpose, the Working Group should develop regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations human rights bodies and specialized agencies, such as the World Bank and the International Finance Corporation.

As an international indigenous law and advocacy organization, the Center is gravely concerned about the negative impacts development related projects have on indigenous communities. With that in mind, we have decided to provide the Working Group with key documents addressing such concerns, which fall within the issues to be addressed by this Working Group. Please find attached a document entitled “*Comments and Recommendations on the IFC Guide to Human Rights Impact Assessment and Management, Road-Testing Draft.*” This document offered comments and suggestions on the then draft of the guide addressing the particular human rights concerns that indigenous peoples have with regard to development policies and practices affecting them.

In addition, we have attached our “*Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights.*” The Center has drafted these international legal principles requiring multilateral development banks (MDBs) to comply with contemporary norms of international human rights law. Deep and widespread concern about the environmental, human rights, and other social impacts of development projects financed by (MDBs) has resulted in a proliferation of voluntary codes and voluntary principles and policies for corporations and other businesses. But despite the development and adoption of these voluntary codes and principles by many businesses few observers today believe that corporate performance, or state performance for that matter, in developing countries in respecting human rights and protecting the environment is adequate.

The Center looks forward to providing the Working Group with further information and we hope to be part of future dialogue sessions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Leonardo A. Crippa', with a long horizontal line extending to the right.

Leonardo A. Crippa  
Senior Attorney  
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**INDIAN LAW**  
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**Comments and Recommendations on  
The IFC *Guide to  
Human Rights Impact Assessment and Management,  
Road-Testing Draft***

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November, 2008

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

**Comments and Recommendations on  
The IFC Guide to Human Rights Impact Assessment and Management,  
Road-Testing Draft**

By William J. David\* and Robert T. Coulter\*\*  
November, 2008

*Prepared with the generous support of the C.S. Mott Foundation*

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## I. Introduction

The *Guide to Human Rights Impact Assessment and Management, Road-Testing Draft* (June, 2007) (the *Guide*), prepared by the International Finance Corporation (IFC) and the International Business Leaders Forum, was produced to give businesses, especially clients of the IFC, a tool for assessing and managing the risks associated with potential human rights violations related to projects proposed for funding by the IFC. The *Guide* has been distributed in a preliminary or “road-testing” edition, with a view to possible revision. This paper offers comments and suggestions on the preliminary edition from the point of view of indigenous peoples and their particular human rights concerns.

Our overall assessment of the *Guide* is very positive, perhaps most because it is gratifying to see a serious work that could materially improve the human rights performance of businesses – particularly those receiving public financing and support. Nevertheless, we have many concerns about the *Guide* and a number of suggestions for its improvement. Running through our analysis and suggestions is the awareness that the IFC is nothing other than the member countries that constitute and control it, and thus it is bound to respect and promote human rights just as the countries that make it up. The IFC, in all that it does, must be held to the same high standards of respect for human rights as the countries that act together in controlling and funding it.

Our specific criticisms and suggestions are not comprehensive nor exhaustive, but rather modest. They are some of the salient or most important matters that relate to indigenous peoples’ human rights. Our main points and suggestions are summarized below and discussed further in the body of this paper.

The place of the *Guide* in the work of the IFC deserves some examination. Where the *Guide* fits in the IFC framework is not clear from the *Guide* itself, and understanding where the *Guide* fits in the IFC framework will help to clarify what should be expected of the *Guide* and what standards it should meet. We will first look briefly at the IFC generally and then at its Policy on Social and Environmental Sustainability and its Performance Standards on Social and Environmental Sustainability.

The International Finance Corporation is a part of the World Bank Group. The IFC was created in 1956 with the purpose of supporting private sector investment in developing countries. The IFC is governed by its 179 member countries. Member countries contribute capital to the IFC, and the voting power of member countries is in proportion to the funds contributed. The primary clientele of the IFC is private corporations doing business in developing countries, and the IFC provides both financial products (loans, bonds, etc.) and advisory services to its “clients.”

There are two issues of particular interest to indigenous groups. One is the fact that the IFC funds a number of corporations and business sectors that traditionally adversely affect indigenous communities, such as resource extraction (mining, oil and gas

development) and large-scale infrastructure projects. The other is the fact that the IFC is a public, inter-governmental body; it is not simply an organization acting *on behalf of states*, but it *is almost all the world's countries acting together*. As a consequence, it is critical that indigenous peoples consistently monitor the activities of the IFC and advocate for IFC funding arrangements and other services that fully protect and promote human rights and that do not support the violation of indigenous rights by client corporations.

In 2006, the IFC adopted its Policy on Social and Environmental Sustainability, and this Policy is implemented in part by a group of eight Performance Standards on Social and Environmental Responsibility. The Policy commits the IFC to social and environmental sustainability and commits the IFC to review projects proposed for direct funding by applying the Performance Standards. The Policy makes compliance with the Performance Standards a part of the decision-making process for funding a project and also an on-going condition of IFC funding.

The purpose of the Policy and the Performance Standards is to “avoid adverse impacts on workers, communities, and the environment, or if avoidance is not possible, to reduce, mitigate, or compensate for the impacts, as appropriate.”<sup>1</sup> At the outset, we note that this policy formulation is not adequate for protection of human rights, because in the case of human rights it is not defensible to conclude that “avoidance is not possible,” and that therefore reduction, mitigation, or compensation for the impact is appropriate. Where human rights are concerned, the only lawful decision is to not violate the rights. This failure to recognize that there is an absolute prohibition against violating human rights is a failure that carries throughout the Policy, the Performance Standards, and the *Guide*. We will return to this point later.

The Policy requires that project proponents make an assessment of the project’s social and environmental risks and impacts, and the IFC’s review of the assessment is part of its due diligence in deciding whether to finance a project. The Policy is clear that “the roles and responsibilities of the private sector in respecting human rights are emerging as an important aspect of corporate social responsibility.”<sup>2</sup> This seems to imply that respect for human rights is a part of “social sustainability,” but it does not say that, and we could find nothing in the Policy or Performance Standards that says so. Guidance Note 1, which provides additional information about Performance Standard 1, includes a single paragraph on human rights, which concludes, “If human rights are likely to be a significant and specific risk for the project, companies can consider carrying out an

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<sup>1</sup> International Finance Corporation, Policy on Social and Environmental Sustainability, Sec. 1, para. 4 (April 30, 2006).

<sup>2</sup> *Id.*, Sec. 2, para. 8.

HRIA along with the Social and Environmental Assessment.”<sup>3</sup> The IFC should clarify that risks or impacts on human rights are matters that *must* be particularly assessed in the Social and Environmental Assessment.

Performance Standard 1 spells out the requirements for Social and Environmental Assessment and Management Systems. It is notable and regrettable that the Performance Standard does not once mention the term human rights. To be sure, some topics are mentioned that might be human rights matters, but the Performance Standard is silent on whether a human rights impact assessment is required as part of the Social and Environmental Assessment. This is crucially important, because the Social and Environmental Assessment is a required part of the financing decision-making process, and a separate human rights impact assessment would not appear to be a required part of the IFC review process. On the positive side, Performance Standard 1 provides detailed directions concerning disclosure of project information and the process of consultation with affected communities. We suggest below that the *Guide* should provide additional guidance on these matters in connection with making a human rights impact assessment.

Performance Standard 7, Indigenous Peoples, sets forth detailed requirements for projects that could affect indigenous communities and requires that impacts on indigenous communities be assessed as part of the Social and Environmental Assessment. It states that one of the objectives of the Performance Standard is “to ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures, and natural resource-based livelihoods of Indigenous Peoples.” Curiously, it does not say that an objective is to ensure IFC-financed projects do not violate human rights. The Performance Standard calls, in detail, for information disclosure, consultation, and informed participation by indigenous peoples.

It is within this framework that we look at the *Guide*. For reasons that are not apparent, the *Guide* is not, however, firmly tied to this IFC framework. The *Guide*, for example, on page 3, refers to social, environmental, and labor impact assessments, but does not mention the Social and Environmental Assessment that is required by the IFC. The *Guide* is unexplainably vague about its place in the IFC policy and procedure framework, and this is a significant fault.

Most important is the fact that nothing in the IFC Policy and Performance Standards makes a human rights impact assessment a requirement for any project proposed for financing by the IFC. It appears that the IFC *might but would not necessarily review* a human rights impact assessment as part of its due diligence in reviewing a proposed project. What is really the same thing, it is unclear whether or when a human rights impact assessment is ever actually required by the IFC beyond the

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<sup>3</sup> IFC, Guidance Note 1, Social and Environmental Assessment and Management Systems, p. 10, para. G23 (July 31, 2007). The Guidance Notes are available at [www.ifc.org/enviro](http://www.ifc.org/enviro) > Environmental and Social Standards > Guidance Notes.

requirement of the Social and Environmental Assessment. This failure to make a clear operative link between a human rights impact assessment and the IFC review procedures is not a fault of the *Guide* itself, except for the lack of clarity on the point. It is, however, our single greatest concern about the effectiveness of human rights protection in connection with IFC policy.

One final general observation and suggestion may be too obvious to be necessary. The future editions of the *Guide* should incorporate some of the major works that have appeared since the road-test draft was written. We particularly call attention to the recent reports of John Ruggie, the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.<sup>4</sup> These reports contain a wealth of helpful analysis and information. We have noted some of the more important points in our discussion below, but we have made no attempt to point out all of the useful and relevant material. We also note the recent ILO study, “Governance, International Law & Corporate Social Responsibility” (2008).<sup>5</sup>

## II. Summary of Principal Recommendations

1. The relationship between the Social and Environmental Assessment required by Performance Standard 1 and a human rights impact assessment should be clarified.
2. The IFC should make human rights impact assessments a required part of each Social and Environmental Assessment where any significant human rights impact is possible.
3. Future editions of the *Guide* should incorporate some of the major works that have appeared since the road-test draft was written.
4. Greater and more detailed attention should be given to the processes of scoping and baselining.

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<sup>4</sup> Some of the reports are already referenced in the *Guide*. Others include: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions, UN HRC, 4<sup>th</sup> Sess., Item 2, UN Doc. A/HRC/4/74 (5 February 2007); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Protect, Respect, and Remedy: A Framework for Business and Human Rights, U.N. HRC, 8<sup>th</sup> Sess., Item 3, UN Doc. A/HRC/8/5 (7 April 2008); Andrea Shamberg, “Stabilization Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative to the Secretary-General on Business and Human Rights,” (March 11, 2008).

<sup>5</sup> Available on the ILO website at [www.ilo.org/public/english/bureau/inst](http://www.ilo.org/public/english/bureau/inst).



5. Attention should be given to the need for professional legal assistance for determining the applicable human rights law in many situations.
6. The section on determining the need for a human rights impact assessment needs additional treatment.
7. The *Guide* would be improved greatly by giving substantially more attention to how companies can be sure, in the process of scoping, that they have truly adequate and reliable information.
8. It would be useful to use more straightforward terms such as “potential human rights violations” or “human rights that could be violated or impaired by project activities,” or “human rights claims that must be addressed,” rather than euphemisms.
9. It would be better to make at least a preliminary determination of the probable, likely, or potential human rights issues at an earlier stage in the process.
10. The *Guide* would be strengthened by giving greater attention to the possible pitfall of arbitrarily or unjustifiably limiting the types of issues and considerations that are to be analyzed or assessed.
11. More information and guidance should be provided on the distinction between human rights impact assessments and other kinds of assessments, such as environmental impact assessments and social impact assessments.
12. The *Guide* should make it clearer that no matter how bad the human rights situation may be, this situation can never justify or excuse activities that violate, infringe or impair human rights.
13. The *Guide* should call attention to customary international law about human rights and to the extensive body of human rights law that has been developed by international courts and other international human rights bodies.
14. With regard to indigenous peoples, the *Guide* should not focus exclusively on ILO Convention 169, but should give attention to many other human rights treaties and instruments.
15. Attention should be given to the regional human rights systems, and perhaps regionally specific *Guides* should be prepared.
16. Whether the impact on human rights is direct or indirect, all human rights violations or infringements must be considered, and this point should be given more treatment in the *Guide*.

17. Greater attention could be given in the *Guide* to the suggested approach of using independent assessors.
18. The *Guide* should give attention to a much more extensive body of applicable law that must be considered in conducting a human rights impact assessment.
19. The *Guide* should give additional attention to the existence of human rights held by groups or communities.
20. The *Guide* would benefit substantially if the IFC or the *Guide*'s authors would consult with indigenous leaders and experts about the revision of the *Guide*.
21. The *Guide* would benefit from giving still more attention to the “business case” for human rights, and from making this treatment more forthright and explicit.
22. The operative connection between international human rights law and domestic law deserves much more attention.
23. The *Guide* would be strengthened greatly if it contained more detailed information and additional references concerning consultation with indigenous peoples.
24. Reference should be made to the ILO Manual on ILO Convention 169 that includes a detailed discussion of the consultation requirements of the Convention.
25. In regard to consultations, attention should be given to the decisions of the ILO committees set up to consider complaints.

### **III. Setting the Baseline, Identifying Context, Scoping and Planning**

The topic of planning, scoping and baselining requires greater and more detailed treatment than it is given in the *Guide*. Some specific recommendations are discussed below.

“Scoping” is a term now in wide use to describe the initial or early part of many kinds of evaluations, assessments, or studies. It refers generally to the process of identifying the key issues or topics to be included, identifying the stakeholders and their views, determining the relevant geographical area(s), identifying existing data, selecting team members, and generally making a plan for an assessment or study. The term is scarcely used in the *Guide* and is not a topic of discussion as such, but many of the same considerations are included in the *Guide*'s sections on *Preparing to Use the Guide to Human Rights Impact Assessment and Management* (pp. 2-7) and *Implementing the Human Rights Impact Assessment and Management Process* (pp. 9-37). The most important sections are those entitled *Determining Whether a Full Human Rights Impact*

*Assessment is Needed* (p. 16), *Identify and Clarify the Business Project Context* (pp. 17-30), and *Set the Baseline - Articulate the Current Local Picture and Conditions* (pp. 32-37).

There is no doubt that private actors, that is, businesses, need to determine the scope of any assessment, and many users of the *Guide* or any other assessment tool will probably have insufficient skill and experience in identifying actual and potential human rights violations and in planning the elements of a human rights impact assessment. The *Guide* provides a wealth of helpful information about how to scope and otherwise plan an assessment, but a more detailed discussion on scoping human rights issues is needed.

In this regard, perhaps the most important area needing additional treatment is the section on determining the need for a human rights impact assessment. Obviously, if a negative determination is made unwisely or without adequate information, then there will be no impact assessment at all. However, the *Guide* gives only one page (p. 16) to this crucial step in the process. The danger, of course, is that a business, lacking adequate information and without conducting an adequate study, may be unaware of serious human rights issues and potential conflicts.

Often human rights issues are poorly covered in the press, and sometimes they are covered up or suppressed by governments and others. In our experience with indigenous peoples, it is often the case that the victims or impacted populations are remote, marginalized, and scarcely able to voice their objections or protect their rights. In many cases, the national law and legal authorities completely deny that the indigenous peoples have property rights to land or to natural resources. In these circumstances, which are not unusual, a company would have to assiduously seek out the relevant information and might well require the assistance of qualified legal and social experts to properly determine whether a human rights impact assessment is needed. The *Guide* would be improved greatly by giving substantially more attention to how companies can be sure that they have truly adequate and reliable information and that they do not mistakenly follow the misguided path taken by others in the past.

Once it is decided that a human rights impact assessment is needed, the two most important parts of scoping, or setting the baseline and identifying and clarifying the “business context,” are (1) identifying the human rights issues that are relevant and (2) identifying the applicable law concerning human rights. In general, the *Guide* devotes ample attention to the process of identifying issues, but does not provide sufficient guidance about the law that may be relevant for general purposes and particularly in respect to indigenous peoples.

Regarding identification of relevant human rights issues, the *Guide* uses the euphemism, “human rights challenges.” See, for example, p. 38 of the *Guide*. It would probably be useful to use more straightforward terms such as “potential human rights

violations”, “human rights that could be violated or impaired by project activities”, or “human rights claims that must be addressed”, to mention a few more specific terms.

The process recommended by the *Guide* does not forthrightly or clearly call for identifying these relevant human rights issues until rather late in the process – at the time of consultations with stakeholders. This means that crucial information for establishing the scope or plan of the assessment is not brought in until after the scope or plan has been set. It would seem better to make at least a preliminary determination of the probable, likely, or potential human rights issues at an earlier stage in the process, that is, at the first possible point in the process. These human rights issues are, after all, the very core and reason for the impact assessment. Stakeholders ought to be involved earlier in the process in order to provide information about the issues and problems that could arise. This information would seem to be essential to a properly planned assessment.

In social and environmental impact assessments, scoping exercises are sometimes carried out in a way that arbitrarily or unjustifiably limits the types of issues and considerations that businesses are willing to analyze or assess. When this occurs, of course, the impact assessment is likely to yield inadequate or very misleading conclusions. The same thing can occur in human rights impact assessments, and, perhaps, the *Guide* would be strengthened by giving greater attention to this possible pitfall. Indigenous issues are perhaps among the most likely to be dropped or excluded from consideration on the ground that the communities may be remote, they may be small and relatively powerless, or their rights and their ownership of lands and resources may be difficult to determine. Indigenous human rights issues may be inappropriately excluded from consideration in an impact assessment on geographical grounds; that is, the proposed area of impact of the project may be geographically limited to the site of actual activities, without consideration of “downstream,” causally remote impacts.

Human rights impact issues may be inappropriately or unjustifiably limited through failure to identify indigenous legal interests in land and natural resources. This is a particularly acute and widespread problem for indigenous peoples because of the frequent failure of the national and local legal systems to give proper and definitive recognition to indigenous ownership of lands and resources. A project proponent not alert to this possibility may consider only the existing, formal land titles in determining the property interests in affected lands and resources. The World Bank itself addresses this issue by paying particular attention to indigenous peoples’ customary rights to land and natural resources management practices prior to project implementation in its Operational Policy on Indigenous Peoples OP 4.10 (World Bank OP 4.10).<sup>6</sup> Of course,

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<sup>6</sup> The World Bank Operational Manual, Operational Policies, Indigenous Peoples, OP 4.10, July 2005, at para. 16, 17. Paragraph 16 states,

Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply if the project affects such ties. In this situation, when carrying out the social

the HRIA is not meant to be used to avoid prior legal recognition of indigenous peoples' property rights to land and natural resources. Indigenous issues may not even be considered if project proponents mistakenly determine that the local populations are not indigenous but rather ethnic minorities.

The *Guide* rightly points out the distinction between other better-known kinds of assessments, such as environmental impact assessments and social impact assessments, but this distinction needs more detailed treatment. See pp. 3-4 of the *Guide*. We think that businesses and the cause of human rights would both benefit from more information and guidance on this point.

One aspect of this difference is the distinction between *prevention* of human rights violations and the more general *promotion* of human rights. It is a critically important distinction that the IFC and its clients should be aware of, and the *Guide* could well provide more information on this point. A corporation knowing that its activities may result in violations of human rights does not have the option of planning for mitigation or lessening of the harm; it must avoid and take steps to prevent any such

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assessment and preparing the IPP/IPPF, the borrower pays particular attention to:

- (a) the customary rights<sup>[17]</sup> of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods;
- (b) the need to protect such lands and resources against illegal intrusion or encroachment;
- (c) the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources; and
- (d) Indigenous Peoples' natural resources management practices and the long-term sustainability of such practices.

Paragraph 17 states,

If the project involves (a) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied (such as land titling projects), or (b) the acquisition of such lands, the IPP sets forth an action plan for the legal recognition of such ownership, occupation, or usage. Normally, the action plan is carried out before project implementation; in some cases, however, the action plan may need to be carried out concurrently with the project itself. Such legal recognition may take the following forms:

- (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or
- (b) conversion of customary usage rights to communal and/or individual ownership rights.

If neither option is possible under domestic law, the IPP includes measures for legal recognition of perpetual or long-term renewable custodial or use rights.

violations of human rights. Where pollution or environmental harm is concerned, it is sometimes permissible to mitigate the harm and take action to remediate any damage after the fact. But in regard to human rights, no violation is ever permissible. No amount of subsequent corrective action or “promotion of human rights” can excuse, justify, or correct a human rights violation. In contrast to rules against environmental pollution or degradation, human rights standards can never be violated “a little bit.” There are no permissible limits. International human rights law provides potential project-affected communities with legal means aimed at preventing human rights violations that could occur with the acquiescence or tolerance of the concerned state. For instance, communities can request that regional human rights bodies order the concerned state to immediately adopt protective measures in their favor.<sup>7</sup> These measures have the potential to stop project activities that are likely to cause human rights violations.

Another way in which environmental and human rights impact assessments ought to differ is in the use of a baseline or baseline data. The *Guide* discusses the establishment of a baseline at pp. 31-37. The purpose of an environmental impact assessment is to determine the pre-existing environmental situation so as to determine the actual impact of the proposed activity on the local environment. Corporations can seek to locate their projects and activities in locations where the environment has already been compromised or damaged. In such cases, a baseline will identify the impact of placing additional stresses on the environment and may also be used to identify opportunities to mitigate the marginal impact of operations or to determine proper corrective or remedial measures. But a human rights baseline cannot be used this way. No matter how bad the human rights situation, this situation can never justify or excuse activities that violate, infringe or impair human rights. We wish this were clearer in the *Guide*.

Setting a baseline for a human rights impact assessment, according to the *Guide*, includes identifying the relevant framework of law concerning human rights. This process of identifying and understanding the applicable framework of law is extremely important, because it is only by reference to these laws and rules that one can know the human rights and related legal issues that may be relevant to the project. This is no simple process, especially in regard to indigenous peoples’ human rights.

As a general matter, the *Guide* does a commendable job of directing the user to relevant materials and sources for learning about human rights and determining the applicable human rights law. But there are some important omissions that need to be corrected. The *Guide* provides advice on ascertaining the law about human rights on pp. 18 and 19 in connection with identifying and clarifying the business project “context.”

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<sup>7</sup> See, for example, Rules of Procedure of the Inter-American Commission on Human Rights, Art. 25. Article 25(1) states, “In serious and urgent cases, and according to the information available, the Commission may, on its own initiative or at a request of a party, request that the State concerned adopt **precautionary measures to prevent irreparable harm** to persons.” (Emphasis added)

Relatively little is said about how to do this crucial task, perhaps because it can be so difficult. Determining what is the applicable law is often the most difficult task a lawyer faces when called upon for advice. It would surely be a daunting task for a non-lawyer unless the advice of a lawyer or other expert were available. For this reason, the World Bank Procedures on Indigenous Peoples (BP 4.10) requires the assistance of an appropriate legal expert, apart from a social expert in project appraisal.<sup>8</sup> Earlier in project preparation, much can be done without professional legal assistance, but we think that in most situations some professional legal assistance would be required for determining the applicable law, and some attention should be given to this need in the *Guide*.

The *Guide* on page 19 provides its most specific guidance on determining the applicable law, as follows:

In particular, you need to establish which international conventions the host country of the project has signed and ratified, how it has incorporated the principles into its local laws and regulations, and whether any gaps are likely in the protection of human rights provided by the local law and their application.

Almost nothing more is said about finding the applicable law. The *Guide* provides a wealth of references, lists of possibly relevant instruments, and useful reading about human rights in the appendices to the *Guide*, especially in Appendices 3 and 5.

However, nothing in the *Guide* tells the user that human rights law prominently includes customary international law that is binding on all countries. The *Guide*, perhaps unintentionally, seems to suggest that the relevant international law is to be found entirely within the treaties or other instruments that the host country has ratified. This is not the case. A very substantial body of customary international law about human rights exists that could be relevant to business projects. Customary international law is established by the widespread practice of countries, where the countries understand that this practice is required by law.<sup>9</sup> The *Guide* generally fails to call attention to customary international law, though a truly persistent student could eventually learn about it by reading some of the materials listed in the appendices.

The *Guide* also fails to mention the importance of the extensive body of human rights law that has been developed by international courts and other international human rights bodies such as the UN Human Rights Committee and other treaty monitoring bodies. Much of this important jurisprudence has been compiled and is accessible on the

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<sup>8</sup> The World Bank Operational Manual, Bank Procedures, Indigenous Peoples, BP 4.10, July 2005, at para. 10.

<sup>9</sup> Ian Brownlie, *Principles of Public International Law* 6-10 (6<sup>th</sup> Ed. 2003).

internet.<sup>10</sup> The use of this body of authoritative jurisprudence is discussed further below in Section IV.

Both of these points – the need to look to customary law and the need to refer as well to the jurisprudence of international human rights bodies – suggest that professional legal assistance advisable for this aspect of scoping and determining the context and baseline for a human rights impact assessment. Except in the simplest and clearest situations, a lawyer’s assistance or at least the advice of an experienced human rights expert would be required. The possible need for such assistance should be discussed in the *Guide*.

With respect to indigenous rights, the *Guide* focuses solely on treaty law, and with regard to indigenous peoples, the *Guide* refers only to the International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries.<sup>11</sup> This suggests that corporations may look to only one instrument for indigenous rights, but this is not the case.

A number of other international treaties and instruments also contain clear, detailed standards addressing indigenous rights, particularly the United Nations Declaration on the Rights of Indigenous Peoples, adopted on September 13, 2007, after this edition of the *Guide* was completed.<sup>12</sup> Other human rights treaties that should be considered both in determining the context and scoping, and in the assessment itself are discussed below in Section IV.

One suggestion for making the *Guide* more complete as to its international law references would be to consider the development of regionally specific *Guides*, particularly for the Inter-American human rights system, the African system, and the European system. Regionally specific *Guides* could provide more detailed information and guidance based upon the particular human rights instruments and jurisprudence of the region where the project is to be located or where it will operate.

Another problem that can arise in the planning, baselining or scoping phase of a human rights impact assessment is that the assessment process may be limited merely to an examination of a project’s *direct impacts*, or limited to only those activities and aspects of a project thought to *directly* cause an impact. The difference between *direct impact* and *indirect impact*, while important in environmental and social impact

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<sup>10</sup> See, for example, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 212 (2003).

<sup>11</sup> International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1384.

<sup>12</sup> UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/61/295 (2007).



assessment processes, should be avoided in the context of a human rights impact assessment. This observation was highlighted by the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations, who stated, “HRIAs should deviate from the ESIA [environmental and social impact assessment] approach of naming a project’s direct impacts and instead force consideration of how a project could interact with each and every right.”<sup>13</sup> Whether the impact on human rights is direct or indirect, all human rights violations or infringements must be considered, and this point should be given more treatment in the *Guide*.

Finally, the report is correct to highlight the value of using external assessors to assist with human rights impact assessments. Two brief examples are given on page 12 of the *Guide*. This is a particularly encouraging suggestion because of the widespread perception that law is either subjective, subjectively interpreted, or subject to political pressure. Legal rules and norms, including human rights norms, are always subject to interpretation. Biased or incorrect interpretations are certainly possible and perhaps likely, particularly when corporations themselves lack adequate capacity to evaluate potential human rights liabilities. The retention of outside experts and, more important, the commitment to share unedited reports of their opinions with indigenous peoples, can be a very effective means for improving the quality and the credibility of a human rights impact assessment. Perhaps greater attention could be given in the *Guide* to this suggested approach.

#### **IV. The Applicable International Law for Making a Human Rights Impact Assessment**

We turn now to the substantive phase of a human rights impact assessment. The question of determining the applicable law is important not only in the initial phases of scoping, determining context, and baselining, but it is even more important in the central part of the process, assessing the possible human rights impacts of a project and the legal requirements for managing such human rights risks and concerns.

The *Guide*, as we noted earlier, provides an inadequate description of the international law that is relevant to indigenous rights in a human rights impact assessment. Appendix 4 of the *Guide*, at pp. 77-79, outlines some of the rights of indigenous peoples recognized in international law, and it lists without comment some of the principal UN instruments that contain human rights standards particularly relevant to indigenous peoples. The list is incomplete (omitting, for example, the Convention on Biological Diversity [Article 8(j)] and the Genocide Convention) and fails to mention any of the regional human rights declarations and treaties. As regards indigenous peoples, only ILO Convention 169 is actually discussed in Appendix 4. As a result, the treatment

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<sup>13</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN HRC, 4<sup>th</sup> Sess., Item 2, at para. 26, UN Doc. A/HRC/4/74 (2007).

of the rights of indigenous peoples is so incomplete as to be substantially inaccurate and misleading for a reader without a background in human rights law.

In the remainder of this Section, we will look more closely at ILO Convention 169 and some specific ways in which the *Guide* could be improved as regards the identification and use of other applicable international human rights law.

## **1. International Labor Organization Convention 169**

International Labor Organization Convention 169 forms almost the exclusive source of information in the *Guide* about the rights of indigenous peoples. While the Convention is of great importance, it cannot, alone, provide a complete or adequate definition of indigenous rights. The International Labor Organization is a tripartite organization, governed jointly by workers, employers, and states.<sup>14</sup> The organs of the ILO that are of principal importance to the operation of Convention 169 are the Governing Body and the Committee of Experts on the Application of Conventions and Recommendations. The Governing Body, composed of 28 government members, 14 employer members, and 14 worker members, supervises the operations of the ILO.<sup>15</sup>

Convention 169 is a treaty and is therefore binding only upon the countries that ratify it (17 at this time). The Convention is by no means limited to labor-related rights but contains many articles covering a very wide range of human rights, including the right of indigenous peoples to decide their own priorities for development, the right to be free from discrimination, cultural and religious rights, rights to education, and much more. Some of the human rights of particular interest are rights to land,<sup>16</sup> rights to natural

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<sup>14</sup> International Labor Organization, ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), A Manual, (International Labor Office: Geneva, 2003) (hereinafter ILO Manual) at 1.

<sup>15</sup> ILO Manual at 2.

<sup>16</sup> ILO Convention 169, Art. 14. Article 14(1) states, “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic people and shifting cultivators in this respect.” ILO 169 Articles 13-19 deal generally with issues of lands and territories.

resources<sup>17</sup> and rights to consultation.<sup>18</sup> The ILO hails consultation as “a fundamental principle of the Convention.”<sup>19</sup>

Convention 169, however, does not purport to be a comprehensive statement of the human rights of indigenous peoples. The Convention does not deal at all with the important right of self-determination. This topic was deliberately omitted, because it was considered to be beyond the competence of the ILO. One must, therefore look elsewhere for international standards concerning indigenous peoples’ rights to self-determination, autonomy, and related rights. These rights are covered extensively in the UN Declaration on the Rights of Indigenous Peoples.

Countries that have ratified Convention 169 must submit regular reports to the ILO on implementation of the Convention.<sup>20</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations, comprised of 20 independent experts, receives and responds to these reports.<sup>21</sup> The Committee of Experts may respond to country reports in one of two ways, through Observations or through Direct Requests.

A direct request by the Committee of Experts involves a request for more information or clarification of points raised in the country’s report on implementation of Convention 169. An observation involves “serious or long-standing cases of a government’s failure to fulfil its obligations or on noting cases of progress.”<sup>22</sup>

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<sup>17</sup> ILO 169 Art. 15. Article 15(1) states, “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.”

<sup>18</sup> ILO 169 Art. 6. Article 6(1) states,

(1) In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

<sup>19</sup> ILO Manual at 15.

<sup>20</sup> *Id.* at 74.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

The ILO Governing Body may receive and investigate “representations,” that is, complaints, regarding the application of Convention 169.<sup>23</sup> The ILO Governing Body creates a committee to review and render a report on representations that are properly filed. Representations must be filed by either a workers’ organization or an employer and must constitute a “claim that a country has failed to observe a ratified Convention.”<sup>24</sup> Because representations always involve a claim that a country has failed to fulfill its obligations under Convention 169, the committees’ responses to such representations are an excellent source of expert opinion on the application of Convention 169 and on the meaning of the rights recognized by the Convention in specific factual and legal situations. However, a determination against a state by the committee in a report on a representation does not compel or necessarily bring about corrective action from a state.

Although ILO Convention 169 is certainly an important instrument with respect to indigenous rights, there are three reasons why reliance on the Convention alone is not adequate. The first reason is that the Convention has been ratified by only 17 countries.<sup>25</sup> This is only a small fraction of the countries that have significant numbers of indigenous peoples. The Convention is a formal treaty, and it is therefore binding only upon the countries that have agreed to it, that is, the formal parties that have ratified the Convention.

Many of the provisions of ILO Convention 169 are properly regarded as rules of customary international law that are applicable in all countries,<sup>26</sup> but in order to ascertain the rules of customary international law concerning indigenous peoples, one must look beyond the Convention. ILO Convention 169 is by no means a complete statement of the relevant customary law, and indigenous peoples’ human rights cannot be comprehended or adequately understood without reference to customary international law and the decisions and recommendations of human rights courts and other human rights bodies.

For example, in the Americas, it is well-settled law that indigenous peoples hold a human right to property, including land and resources, under Article 21 of the American Convention on Human Rights, and this right to particular lands and resources can be established simply by demonstrating their historical use and possession.<sup>27</sup> However, the Inter-American Court of Human Rights has also held that for indigenous peoples, the

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<sup>23</sup> Id. at 76.

<sup>24</sup> Id.

<sup>25</sup> International Labor Organization, Status of Ratifications of ILO C169, available online at [www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169).

<sup>26</sup> See, e.g., *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. Commission Human Rights, at para. 130 (December 27, 2002).

<sup>27</sup> *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No.79, (Judgment of Aug. 31, 2001) at para. 151.

right to property must be interpreted in light of other human rights obligations the countries have assumed,<sup>28</sup> and they are subject to certain “safeguards.”<sup>29</sup> While detailing these safeguards is not necessary in the *Guide*, it may be helpful. The need to look to customary international law and the jurisprudence of various international human rights courts and human rights monitoring bodies is important for understanding all human rights, not only the human rights of indigenous peoples.

Laying aside the legal issues, to some extent the Convention is useful as a guide to best practices as regards indigenous peoples. But even as to best practices, the Convention alone cannot be considered an adequate resource. There are a number of other international instruments, which we mention below, that should be similarly recommended by the *Guide* with respect to best practices.

The second reason why reliance on Convention 169 alone is inadequate is that the Convention does not provide a particularly effective mechanism for seeking remedial relief where violations of indigenous rights occur. Complaints or “representations” can only be presented by workers’ organizations, not by indigenous persons or peoples *per se*. Once the committee set up by the Governing Body has acted on a “representation,” the matter is finished. The Expert Committee is empowered to follow-up on a report, but there is no body with binding authority to compel states to respect the provisions of the Convention. Some of the regional human rights systems, however, such as the Inter-American system, include a court with the power to make binding decisions in some cases. Complaints or cases of human rights violations can be made by any person to the Inter-American Commission on Human Rights. In a number of countries, victims of human rights violations can make complaints to the UN Human Rights Committee; and victims of discrimination can often take their concerns to the UN Committee on the Elimination of Racial Discrimination. The European and African systems of human rights provide still other options for victims. These regional and worldwide bodies may exercise considerable remedial powers in many kinds of cases. Companies considering projects with possible human rights implications need to be aware that these mechanisms and procedures could be invoked and could result in significant actions affecting or even ending a proposed business project.

The final issue with reliance only on ILO Convention 169 is the possible inference that indigenous rights are somehow optional for states. The *Guide* itself at page 78 notes that “[n]ational governments can currently override ILO Convention 169”. This comment in the *Guide* probably refers to the legal fact that a country is generally free to terminate its obligations under a treaty by abrogating or denouncing the treaty. However, countries that are parties to ILO Convention 169 are not free to denounce the

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<sup>28</sup> The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H. R., (Ser. C) No. 172, (Judgment of Nov. 28, 2007) at para. 93.

<sup>29</sup> *Id.* at para. 129.

treaty at will, but have only a limited right to do so.<sup>30</sup> Because only the Convention is discussed as a source of human rights for indigenous peoples, one might logically conclude that the entire corpus of indigenous rights law is optional for states. But this is not the case, because the rights of indigenous peoples are to a great extent protected by customary international law as discussed above, by a number of other treaties, such as the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, by regional human rights treaties, and by other human rights instruments such as the UN Declaration on the Rights of Indigenous Peoples.

Indigenous peoples' rights are not comprehensively defined in any document, but rather they are contained in a large number of international instruments, which, taken together, form a corpus of international law. This is true for some other categories of human rights as well, such as the human rights of women, of minorities, and so forth. The only international instrument which addresses indigenous rights comprehensively, indeed more so than ILO 169, is the UN Declaration on the Rights of Indigenous Peoples.<sup>31</sup> The UN Declaration on the Rights of Indigenous Peoples enjoys broad support from states and contains more detailed and more extensive standards than ILO Convention 169. The Declaration was adopted by the General Assembly by vote of 143 - 4, with 11 abstentions. Although the Declaration, of itself, does not constitute binding international law, many of its numerous provisions reflect existing rules of customary international law. Without doubt, the UN Declaration is the most extensive, authoritative, and widely supported statement of the human rights of indigenous peoples, and it should be prominently included in future editions of the *Guide*.

In addition to the UN Declaration, there are a number of human rights treaties and other human rights instruments which define standards of interest to project proponents, and some which allow indigenous peoples to obtain relief for violations of rights recognized in international law. These general instruments include, prominently the International Covenant on Economic Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. These are mentioned in the Appendices to the *Guide* but are not discussed as regards indigenous peoples. Though these treaties do not explicitly refer to indigenous peoples, the treaty monitoring bodies have provided expert guidance on how the treaty terms are to be applied to indigenous peoples. As we mentioned earlier, the *Guide* does not list the Convention on Biological Diversity (Article 8(j)) and the Genocide Convention, and it fails to mention any of the regional human rights declarations and treaties.

The general comments and recommendations of the UN Human Rights Committee and other UN monitoring committees provide important and authoritative interpretations of the covenants and conventions on many topics, including the rights of

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<sup>30</sup> ILO Convention 169, Art. 39.

<sup>31</sup> UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 295, UN Doc. A/RES/61/295 (2007).

indigenous peoples, and should be given some notice in the *Guide*.<sup>32</sup> Additionally, the concluding recommendations of the various monitoring committees made after they have reviewed the periodic reports of the states also provide additional guidance and interpretation about the range and scope of human rights recognized in the various treaties, including indigenous peoples' rights.

In the Americas, indigenous human rights issues are more frequently addressed by the Inter-American Commission on Human Rights and Inter-American Court of Human Rights by reference to the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The reports of the Commission and the decisions of the Court have created a substantial and important body of law or jurisprudence on the rights of indigenous peoples. The decisions of the Court could have direct impact on the activities of project proponents, particularly when the project occurs in an area where the pre-existing aboriginal title has not been recognized by the state.<sup>33</sup> In extreme cases, the Inter-American Commission is capable of issuing precautionary measures to enjoin or compel actions from states in order to protect the lives of individuals.<sup>34</sup>

To sum up these observations, it is entirely appropriate for the *Guide* to give attention to ILO Convention 169, but limiting consideration of indigenous peoples' human rights to the Convention is misleading. The principles of the Convention, particularly those related to consultation, may suggest "best practices," but they do not necessarily speak directly to the human rights obligations of states or companies engaging in consultations with indigenous peoples. The *Guide* should point out the complexity of indigenous rights, specifically that they cannot be defined by a single instrument. The *Guide* should give much greater attention to the universal human rights instruments and to customary international law. For project proponents to ignore or fail to take account of these parts of the applicable human rights law could create tangible risks to the financial security of a proposed project.

## 2. Collective or Community Rights

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<sup>32</sup> Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 38 (1994). See also, Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), UN Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 212 (2003).

<sup>33</sup> The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 24; The Case of the Saramaka People v. Suriname, *supra* note 25.

<sup>34</sup> Yakye Axa Indigenous Community of Exnet-Lengua People v. Paraguay, Petition 12.313, Report No. 2/02, Inter-Am. C.H.R., (Feb. 27, 2002).

Although human rights have historically been considered as rights of individuals, many of the most important human rights of indigenous peoples are held collectively by communities, tribes, nations, or peoples. The *Guide* at times speaks of human rights as only rights of individuals (for example, on pages viii and 2), but to its credit, the *Guide* does recognize the existence of some human rights held by groups or communities. More attention to this topic would be helpful and perhaps even crucial for a clear understanding of potential human rights issues involving indigenous peoples.

Some human rights have for many years been recognized as rights held by groups or peoples, not solely by individuals. Most prominent is the right of self-determination, which is guaranteed to “all peoples” by common Article One of the Covenant on Economic Social and Cultural Rights and the Covenant on Civil and Political Rights. Paragraph 2 of this same common Article One is particularly relevant to some business projects. It provides that all peoples have the right to freely dispose of their natural wealth and resources. It also states, “In no case may a people be deprived of its own means of subsistence.” This is another group right that is almost universally recognized and that is potentially important in a development project setting. The right of peoples to their natural resources is also guaranteed by Article 25 of the Covenant on Economic, Social and Cultural Rights. Other human rights long held by groups include the rights of families (Article 10 of the Covenant on Economic, Social and Cultural Rights) and the right of persons belonging to minorities “in community with other members of their group” to enjoy their own culture, to profess and practice their own religion, or to use their own language. (Article 27 of the Covenant on Economic, Social and Cultural Rights.) During the past 20 years, the collective rights of indigenous peoples have been recognized most explicitly in the United Nations Declaration on the Rights of Indigenous Peoples and in ILO Convention 169. In the Americas, indigenous peoples’ rights to land have been repeatedly recognized as collectively held property rights in human rights cases and decisions.<sup>35</sup>

Collective rights need additional attention in the *Guide* because in a human rights impact assessment, collectively held human rights can pose a unique challenge. For example, conducting consultation with an indigenous people and acquiring prior and informed consent or broad community support for proposed project activities usually requires engaging representatives of the rights-holders, that is the people or community concerned. Indigenous human rights include extensive rights relating to self-governance and indigenous control over lands and resources. Failing to understand the extent of these collective rights or undermining traditional indigenous means of decision-making could easily run afoul of international human rights standards. The difficulty of negotiating these collective human rights is illustrated by a recent case before the Inter-American Court of Human Rights, which suggests that even in those situations where recognized traditional leaders are opposed to a human rights complaint, human rights

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<sup>35</sup> Mary and Carrie Dann v. United States, *supra* note 23; The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 24; The Case of the Saramaka People v. Suriname, *supra* note 25; Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04 (October 12, 2004).



tribunals must nonetheless consider complaints of human rights violations raised by *community members*, including violations of collectively held property rights.<sup>36</sup> As a consequence, even securing the support of traditional leaders in the absence of a community consensus may not shield IFC clients from risks associated with human rights violations where collective rights are concerned.

## **V. The IFC Itself Should Consult with Indigenous Leaders and Experts**

The *Guide* would benefit substantially if the IFC or the *Guide*'s authors would consult with indigenous leaders and experts about the revision of the *Guide*, and such consultation may be *required* by the UN Declaration on the Rights of Indigenous Peoples. The Declaration speaks directly to the obligations of both states and international organizations such as the International Finance Corporation. Article 41 of the Declaration states,

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

This Article makes it clear that the International Finance Corporation itself has an obligation to contribute to the full realization of the rights and standards contained in the Declaration and must establish a consultative mechanism or some other means through which indigenous peoples can be involved in the preparation of the *Guide*, for example, and in the implementation of Performance Standard 7, among other activities of the IFC that affect indigenous peoples. It requires at the least that as the development of the *Guide* moves forward, the IFC make special efforts to consult with indigenous peoples through their leaders, especially those that otherwise may have grave difficulties communicating with the IFC directly on such matters. Indigenous experts and advocacy organizations could provide guidance and other assistance in developing effective means of ensuring the participation of indigenous peoples.

## **VI. Greater Attention to the “Business Case” for Human Rights**

The *Guide* assumes and suggests throughout (see p. vii, for example), and correctly so, that there is a “business case” for recognition, protection, and promotion of human rights. In other words, there are sound business reasons for implementing a human rights impact assessment and management plan, even where the business or

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<sup>36</sup> The Case of the Saramaka People v. Suriname, *supra* note 25, at paras. 77-185.

project might not be held formally or legally responsible for any human rights violations relating to the project. The role of the *Guide* is to provide non-state actors, specifically, private corporations, with guidance, methods, and other information about best practices to ensure compliance with international and domestic human rights law. Respect for human rights is essential for obtaining “social license” from project-affected communities and for reducing the risks that arise from human rights issues or violations relating to a project.

We believe that the *Guide* would benefit from giving still more attention to the “business case” for human rights and from making this treatment more forthright and explicit. For instance, it would seem useful to give more detailed and explicit attention to certain business interests, particularly those of publicly held corporations, that can be adversely affected by human rights issues or violations. For example, the social investing community, those who seek to make corporations more socially responsible by informing and mobilizing shareholders and other investors, has motivated a growing number of corporations to adopt or adhere to principles, codes, and other standards for the protection of the environment, human rights, and social welfare generally.<sup>37</sup> Investors (shareholders and lenders), underwriters, and others can and do use human rights laws and standards as benchmarks against which to measure businesses’ social performance and to estimate risks to businesses. The *Guide* should also more prominently mention recent developments in securities disclosure requirements,<sup>38</sup> as well as efforts by the

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<sup>37</sup> These companies include, for example, Barrick, *Corporate Social Responsibility Charter*, available at [www.barrick.com/Theme/Barrick/files/docs\\_ehss/CSR\\_Charter.pdf](http://www.barrick.com/Theme/Barrick/files/docs_ehss/CSR_Charter.pdf); BHP Billiton, *Sustainability Report (2007)*, available at [www.bhpbilliton.com/bb/aboutUs/annualReports.jsp](http://www.bhpbilliton.com/bb/aboutUs/annualReports.jsp); Chevron, *Energy Partnership: 2007 Corporate Responsibility Report*, available at [www.chevron.com/globalissues/corporateresponsibility/2007/documents/Chevron\\_2007CR\\_1\\_intro.pdf](http://www.chevron.com/globalissues/corporateresponsibility/2007/documents/Chevron_2007CR_1_intro.pdf); Chevron, Human Rights Statement, available at [www.chevron.com/globalissues/humanrights/](http://www.chevron.com/globalissues/humanrights/); ConocoPhillips, *Code of Business Ethics and Conduct for Directors and Employees* (Feb. 9, 2007), available at [www.conocophillips.com/NR/rdonlyres/147E8B57-9169-4FA7-BB23-A41207B26D2D/0/13\\_CodeofEthics.pdf](http://www.conocophillips.com/NR/rdonlyres/147E8B57-9169-4FA7-BB23-A41207B26D2D/0/13_CodeofEthics.pdf); Newmont Mining, *Proposal No. 4—Stockholder Proposal Requesting a Report Regarding Newmont’s Community Policies and Practices (2007)*, available at [www.newmont.com/en/pdf/CRR\\_Shareholder\\_proposal\\_2007.pdf](http://www.newmont.com/en/pdf/CRR_Shareholder_proposal_2007.pdf); Shell, *Sustainability Report 2007*, available at <http://sustainabilityreport.shell.com/2007/servicepages/welcome.html>; EnCana, *Aboriginal Guidelines*, available at [www.encana.com/responsibility/consultation/aboriginal/index.htm](http://www.encana.com/responsibility/consultation/aboriginal/index.htm); Alcan, *Indigenous Peoples Policy*, available at [www.alcan.com/web/publishing.nsf/content/Alcan+Indigenous+Peoples+Policy](http://www.alcan.com/web/publishing.nsf/content/Alcan+Indigenous+Peoples+Policy); JP Morgan Chase, *Indigenous Communities*, available at [www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indig](http://www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indig); Total, *Policy regarding indigenous peoples*, available at [www.total.com/static/fr/medias/topic1492/Total\\_Indigenous\\_People\\_Policy.pdf](http://www.total.com/static/fr/medias/topic1492/Total_Indigenous_People_Policy.pdf); Enbridge, *Indigenous Peoples Policy*, available at [www.enbridge.com/pipelines/right-of-way/pdf/indigenouspeoplespolicy.pdf](http://www.enbridge.com/pipelines/right-of-way/pdf/indigenouspeoplespolicy.pdf).

<sup>38</sup> See, for example, in the United Kingdom, the Occupational Pension Schemes (Investment) Regulations 2005, SI3378 (2005) requiring a Statement of Investment Principles; Australian Financial Services Reform Act 2001 (Cth); the Sarbanes-Oxley Act, Public Law 107-204 (July 30, 2002); and certain accountancy standards in the United States, such as FAS 144, Accounting for the Impairment or Disposal of Long-lived Assets (“mothballing” of sites and other assets), and Financial Accounting Standards Board, Interpretation No. 47, *Accounting for Conditional Asset Retirement Obligations* (FIN 47).

social investment community and larger pension funds to develop “ethical” funds that screen out apparent violators of human rights. The wealth of materials that have been produced in these areas by businesses are persuasive evidence that there are significant business reasons for taking strong measures to protect and respect human rights and environmental values.

Similarly, the *Guide* would benefit from more extensive discussion of how human rights issues or violations can create serious business risks. For example, it would be helpful to discuss the fact that in some situations where a business may not be held legally responsible for human rights violations related to the business, the *country* may be held responsible for the violations of human rights that occur within its territory.<sup>39</sup> When this occurs, the country may be compelled or it may decide to take actions that are devastating to the business project, such as revoking licenses, concessions, or permits to conduct certain business activities.<sup>40</sup> Naturally, persistent human rights violations and related injustices can lead as well to social unrest and political instability. As a result, even if formal legal liability is not attributable to the business or to the private corporation, its capital investment in a project may be at risk if human rights are not being respected. Including more concrete examples of these risks and providing a more frank and explicit discussion of these matters would help project proponents to better assess and manage human rights issues.

## 1. Concrete Liability Issues

The *Guide* does not give adequate attention to the concrete legal liabilities that corporations may face if human rights laws or standards are violated. By “concrete legal liability,” we mean formal legal responsibility that can be enforced or compelled by legal action in the legal system of the host country. Although many of these issues are noted in various Appendices, for example in Appendix 3 (pp. 71-72) and Appendix 4 (pp. 73 - 79), they should appear more prominently in the body of the *Guide*, because they represent “hard” legally enforceable liabilities that corporations may face. Failure to include such information in a more prominent fashion may lead corporate decision makers to conclude that businesses face no real liability from violations of international human rights law, when the opposite is clearly the case, albeit in narrowly defined circumstances. Issues of complicity (see Appendix 4, p. 72) with respect to violations of international criminal law or humanitarian violations are particularly relevant to indigenous peoples, given the potential for corporate-state entanglement in conflict zones.

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<sup>39</sup> Case of Velasquez-Rodriguez v. Honduras, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 at para 182.

<sup>40</sup> See, for example, Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 24, at para. 153; Case of the Saramaka People v. Suriname, *supra* note 25, at para. 146.

It should be noted that the UN Special Representative has dealt with the issue of corporate responsibility for criminal activities and particularly dealing with the issue of complicity in two reports, one in 2007 and another in 2008.<sup>41</sup> The 2007 report was listed in the *Guide*, Appendix 5. The Special Representative noted in his 2008 report that, at a minimum, corporate duties include a duty to respect human rights and that failure to meet the “duty to respect” may lead to concrete legal liabilities.<sup>42</sup>

## **2. International Human Rights and Domestic Laws**

Our second major observation about the business case for respecting human rights is that international human rights law is sometimes enforceable through the domestic laws of the host country or even some other country where the corporation may be found. This operative connection between international human rights law and domestic law is virtually unexplored in the text of the *Guide*, and it deserves much more attention. As we have already commented, one of the most powerful business motivations is the prospect of domestic legal liability, that is, a legal order to pay money or a legal order to do or not to do something. For example, the Alien Tort Claims Act in the United States permits an alien in the United States to sue a company or person in the United States for a tort or wrong committed in another country. The Act is referenced in Appendix 3, p. 72, but there is very little information in the body of the *Guide* with respect to the types of human rights standards that might be enforceable under the Act, the types of liability envisaged by the Act (monetary damages only), nor any discussion of any other such domestic or national laws. A discussion of the current legal interpretations of the Act by federal courts and the potential extent to which it might be applied to human rights violations abroad should be included in the *Guide*.

There are a number of other examples of domestic laws which can impose human rights-related requirements on businesses and which can result in civil and criminal liability. For example, several stock exchanges have developed requirements for reporting of rights-related performance of companies, and the United Kingdom has recast the fiduciary duty that directors and officers owe shareholders to include consideration of

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<sup>41</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: Mapping international standards of responsibility and accountability for corporate acts, UN HRC, 4<sup>th</sup> Sess., Agenda item 2, at para. 30, UN Doc. A/HRC/4/35 (19 February 2007); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN HRC, 8<sup>th</sup> Sess., Agenda item 3, at paras. 73-81, UN Doc. A/HRC/8/5 (2008).

<sup>42</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN HRC, 8<sup>th</sup> Sess., Agenda item 3, at para. 54, UN Doc. A/HRC/8/5 (2008).

the impact of corporate activities on the environment and project-affected communities.<sup>43</sup> The 2007 report of the UN Special Representative of the Secretary-General discusses and illustrates the growing and complex web of domestic laws in many countries that may be applied to hold companies legally accountable, both civilly and criminally, for human rights violations.<sup>44</sup>

Although the *Guide* suggests that project proponents should consider the specific legal context of each country, it does not provide information on the legal or political processes that could be applied to stop projects that violate international human rights standards or to compel actions from companies and others to ensure compliance with human rights standards. For example, constitutional actions, such as *amparo*; equitable actions such as suits for injunctions; and domestic enforcement of provisional measures or precautionary measures by international tribunals are left completely unexplained by the *Guide*. Each of these mechanisms offers victims of human rights abuses the possibility of relief and may delay or even halt the activities of corporate actors. We would not expect the *Guide* to list or detail every such possible legal remedy, but the existence of such remedies and, thus, such risks, should be clearly pointed out. At the very least, the *Guide* should provide an example of such a mechanism along with a brief explanation detailing the state's duty to implement human rights standards. In the Inter-American system, the *Velasquez-Rodriguez* case holds that this duty requires states to exercise due care to prevent human rights violations by *non-state actors*.<sup>45</sup>

## VII. Consultation

The *Guide* would be strengthened greatly if it contained more detailed information and additional references concerning consultation with indigenous peoples. The requirement of consultation is of such importance that corporations proposing projects that could affect indigenous peoples require more specific guidance on how to conduct consultations with indigenous peoples – and, no doubt, with other kinds of communities as well. The United Nations Declaration on the Rights of Indigenous Peoples calls for consultation, cooperation or participation with indigenous peoples in 16 of its 46 articles, on subjects ranging from protection of children from economic exploitation and repatriation of human remains, to “the approval of any project affecting

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<sup>43</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN HRC, 8<sup>th</sup> Sess., Agenda item 3, at para. 30, UN Doc. A/HRC/8/5 (2008).

<sup>44</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: Mapping international standards of responsibility and accountability for corporate acts, UN HRC, 4<sup>th</sup> Sess., Agenda item 2, at paras. 19-32, UN Doc. A/HRC/4/35 (19 February 2007).

<sup>45</sup> Case of *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4.

their lands or territories and other resources” (Art. 32), and measures to implement the rights in the Declaration.<sup>46</sup> ILO Convention 169 contains at least 18 separate provisions requiring consultation, cooperation or participation.<sup>47</sup>

This is a difficult topic and probably an unfamiliar one for most businesses. For one thing, indigenous peoples are not like most other stakeholders or interested parties. They usually have very different cultures from the surrounding population, and often they have their own distinct governments or representatives. But fortunately there is a significant amount of material and information available. We will mention just some of the possible material that would be helpful to include or reference in the *Guide*.

The *Guide* correctly highlights ILO Convention 169 as the leading international instrument on consultation standards regarding indigenous peoples. The Convention devotes an entire article to the requirements of consultation. For convenient reference, we reprint it in the footnote below.<sup>48</sup>

In addition, the ILO has prepared and made available in paper format and on the Internet a Manual on ILO Convention 169 that includes a detailed discussion of the consultation requirements of Article 6.<sup>49</sup> The Manual explains and discusses the specific requirements of Article 6 and provides information about actual cases and situations involving consultations with indigenous peoples.

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<sup>46</sup> These are Articles 11, 12, 14, 15, 17, 18, 19, 22, 23, 27, 29, 30, 31, 32, 36, and 38, UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007).

<sup>47</sup> These include provisions in Articles 2, 5, 6, 7, 15, 16, 17, 20, 22, 23, 25, 27, and 28, International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1384.

<sup>48</sup> Article 6 of ILO Convention 169 states:

- (1) In applying the provisions of this Convention, governments shall:
  - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - (c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
- (2) The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

<sup>49</sup> International Labor Organization, ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169) A Manual, (International Labor Office: Geneva, 2003) at 15.

Perhaps even more important are the decisions of the ILO committees set up to consider complaints in regard to compliance with the Convention. Several complaints or “representations” have been filed and considered dealing with the consultation requirements of the Convention, and these have resulted in public reports containing conclusions and recommendations. These authoritative and influential interpretations of the Convention are important to an understanding of the requirements of consultation with indigenous peoples. As we explained earlier, a committee of the ILO Governing Body reviews complaints or “representations” filed under Article 24 of the ILO Constitution that a state has failed to observe a convention to which it is a party. The committee makes conclusions and recommendations concerning the complaint. The committee reports are made public and are forwarded to the Committee of Experts for follow-up. The reports resulting from these complaints are available on the ILO website.<sup>50</sup> Some of the principal and most useful interpretations and observations are mentioned below.

The ILO Convention does not require that consultations result in agreement or consensus, only good faith negotiations towards one.<sup>51</sup> The committee concluded in one case that the Convention does not create or require a list of specific requirements or “best practices” that must be followed in all situations; but the committee observed that the characteristics of adequate consultations proposed by the complainants constituted “a model which it would be desirable to apply.”<sup>52</sup>

It is clear that consultations require early participation by indigenous groups.<sup>53</sup> Numerous interpretative opinions offered by the committees in response to individual complaints state that in order for a consultation process to be consistent with the obligations of the Convention, the consultation process must occur before any final decisions are made, or more accurately, while there remains time for the final output of the consultations to influence the final decision. In order for a consultation process to be sufficient, sufficient time must be allowed for indigenous peoples (or anyone) to receive information, consider the ramifications of the information, and provide input into the

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<sup>50</sup> See [www.enbridge.com/pipelines/right-of-way/pdf/indigenoupeoplespolicy.pdf](http://www.enbridge.com/pipelines/right-of-way/pdf/indigenoupeoplespolicy.pdf).

<sup>51</sup> Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at paras. 57, 59, 61-63, ILO Doc. 161999COL169B (2001).

<sup>52</sup> Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR), at paras. 95, 106, ILO Doc. 162004MEX169A (2004). The complainants' proposals are recited principally in paras. 37-43.

<sup>53</sup> Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 38, ILO Doc. 162000ECU169 (2001).

process. The ILO committee reviewing one complaint recognized this, stating: “The adoption of rapid decisions should not be to the detriment of effective consultations for which sufficient time must be given to allow the country’s indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions.”<sup>54</sup> The phrase “in a manner consistent with their cultural and social traditions” is critically important, because it implies the consultation process must be both genuine and accessible, in a culturally relevant manner, to the indigenous people. If indigenous communities are contacted after an environmental impact study or a resource management plan has been completed, or if a license has already been granted to exploit the resource, the requirement of prior consultation will not have been met.<sup>55</sup>

It is clear that there are some activities and situations that are clearly insufficient for fulfillment of consultative obligations. For example, failure to inform an indigenous organization or failure to consult prior to the signature of an agreement between a government and a private corporation violates consultation obligations of states.<sup>56</sup> Another case involving failure to adequately consult arose when a government engaged in a haphazard consultation with certain sub-groups of an indigenous group in an attempt to demonstrate overall consent.<sup>57</sup>

Closely related to consultation is the requirement of benefit-sharing where development of natural resources will adversely affect indigenous peoples. Benefit sharing is required in most cases by Article 15(2) of the Convention. In one report on a complaint, the committee considered whether there had been efforts in connection with consultations to develop a mechanism whereby indigenous peoples could share in the

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<sup>54</sup> Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at para. 79, ILO Doc. 161999COL169A (2001).

<sup>55</sup> Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, at para. 90, ILO Doc. 161999COL169B (2001).

<sup>56</sup> Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 30, ILO Doc. 162000ECU169 (2000).

<sup>57</sup> Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, at para. 63, ILO Doc. 161999COL169B (2001).



benefits of development.<sup>58</sup> Furthermore, the committee in another case distinguished between the requirement of sharing a project's benefits with indigenous people affected and the separate requirement of compensation for damages caused by a project.<sup>59</sup>

The committee in one case report written in 2004 suggested a number of appropriate measures which the government should be urged to take in order to assure adequate mechanisms for consulting with indigenous peoples. The key part of the committee's recommendation is set out in full:

The Committee requests the [ILO] Governing Body to approve this report and, in light of the conclusions contained in paragraphs 81-107:

(a) to urge the Government to make additional and ongoing efforts to overcome the feeling of exclusion that is so apparent in the complainants' allegations;

(b) to request the Government that, when developing, specifying or implementing constitutional reforms through legislative or administrative measures, whether at the federal level or at the level of the various states, it ensure that Article 6 is fully applied in the process of adoption of such measures and that in applying that Article:

(i) it establish clear representativity criteria;

(ii) it take into account as far as possible the proposals made by the complainants as to the characteristics that consultations should have to be effective;

(iii) it determine a consultation mechanism which is adapted, as far as the method it uses is concerned, to the objective of achieving agreement or consent concerning the means proposed, irrespective of whether this is achieved or not;

(iv) it take into account, when determining the consultation mechanism, values, ideas, times, reference systems, and even ways of conceiving consultation, with indigenous peoples.<sup>60</sup>

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<sup>58</sup> Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB), at para. 40, ILO Doc. 161998BOL169 (1998).

<sup>59</sup> Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 45, ILO Doc. 162000ECU169 (2001).

<sup>60</sup> Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR), at para. 108, ILO Doc. 162004MEX169A (2004).

The issue of representativity criteria is particularly important in the context of indigenous communities, because it is necessary for the IFC to determine if and how a corporation has acquired “broad community support” and whether that support is legitimate. Sadly, there are many instances of corporations creating or using individuals and organizations that do not in fact represent indigenous communities. While the establishment of representativity criteria alone can not automatically rectify such situations, it does make it somewhat easier to determine whether a project enjoys authentic community support.

These recommendations are helpful, not only in the setting of a human rights impact assessment but also because they give added depth, context and meaning to the requirements of information disclosure, consultation and informed participation contained in IFC Performance Standard 7.

## **VIII. Conclusion**

We hope that these observations and recommendations will be helpful in preparing a revised edition of the *Guide*. We recognize the difficulty of the task of producing a *Guide* that will be useful and contain adequate information without becoming burdensome and impracticable. For this reason, we have tried to keep our suggestions modest and limited in number. We also hope that other organizations and experts will offer additional suggestions and comments.

Of greater importance will be the progress of the IFC toward vigorous and forthright actions and policies to protect and promote human rights in all of its work and in relation to all of the projects it finances. There is still far to go, but we acknowledge and welcome the progress made thus far.



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# **Principles of International Law for Multinational Development Banks**

## **The Obligation to Respect Human Rights**

By

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January, 2009

Deep and widespread concern about the environmental, human rights, and other social impacts of development projects financed by multilateral development banks (MDBs) has resulted in a proliferation of voluntary codes and voluntary principles and policies for corporations and other businesses. But despite the development and adoption of these voluntary codes and principles by many businesses, as we discuss below, few observers today believe that corporate performance, or state performance for that matter, in developing countries in respecting human rights and protecting the environment is adequate. Nor would an informed observer conclude that the law for protecting human rights and the environment is yet sufficiently effective, especially in guarding against human rights violations and environmental harm resulting from MDB supported projects.

It is notable that none of the voluntary codes, principles or policies contains or proposes any binding rules of international law that would apply to MDBs and that would require MDBs, like the states that comprise them, to respect, promote, and protect human rights in all MDB activities. It is axiomatic that important community and civic values, such as human rights, environmental rights, and environmental protection must be incorporated into enforceable rules of law both at the international level and at the domestic or state level. This has been done to a significant degree as regards the obligations of states to respect and promote human rights. But MDBs have generally insisted that they are not legally required to respect, promote, and protect human rights as states are.

The World Bank, for example, has taken the position, in accordance with the opinion of its then General Counsel, that, in its financing activities, it cannot take into consideration non-economic matters such as human rights. This position was based upon a restrictive interpretation of the Articles of Agreement, Article IV, Section 10 of the International Bank for Reconstruction and Development (the WB) and Article 5, Section 6 of the International Development Association (IDA) Articles of Agreement.<sup>1</sup>

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<sup>1</sup> Memorandum from the General Counsel of the World Bank, Ibrahim Shihata, Issues of "Governance" in Borrowing Members – The Extent of their Relevance under the Bank's Articles of Agreement (1999) (on file with Indian Law Resource Center).

However, there are no provisions in MDBs' constitutive instruments expressly preventing their consideration of human rights issues, and the Articles of Agreement can no longer be interpreted as precluding MDBs' consideration of human rights obligations under international law, because the protection of human rights has become a matter of legitimate international concern.<sup>2</sup> MDBs are parts of larger intergovernmental organizations which, by the terms of their Charters or constitutional instruments, require respect for human rights. For instance, the WB is a specialized agency of the United Nations (UN), according to the agreement entered into with the UN Economic and Social Council (ECOSOC)<sup>3</sup> in accordance with related Articles of the UN Charter.<sup>4</sup> The UN Charter expressly calls for universal respect for human rights and fundamental freedoms without discrimination,<sup>5</sup> as well as for action in cooperation with the UN for the achievement of this purpose.<sup>6</sup>

In January of 2006, the outgoing WB General Counsel released a legal opinion recognizing that the balance has now shifted in favor of protecting human rights.<sup>7</sup> The General Counsel pointed out that the Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, because it is now evident that human rights are an intrinsic part of the Bank's mission.<sup>8</sup>

This legal opinion constituted a clear advance from the previous restrictive legal interpretation. However, a subsequent opinion of the WB General Counsel regards the Articles as permissive in regard to human rights: allowing but not mandating action on the part of the Bank in relation to human rights.<sup>9</sup> According to this opinion, the WB's role is a facilitative one, helping its members realize their human rights obligations.<sup>10</sup> Human rights would not be the basis for increased conditions on Bank financing, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business.<sup>11</sup>

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<sup>2</sup> Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 143 (Oxford Univ. Press 2006).

<sup>3</sup> World Bank, Relationship Agreement, art. 1(2).

<sup>4</sup> See U.N. Charter, art. 57. Finally, Article 63(2) provides that ECOSOC "...may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations." *Id.* art. 63(2).

<sup>5</sup> U.N. Charter, art. 55(c).

<sup>6</sup> U.N. Charter, art. 56. See Mac Darrow, BETWEEN LIGHTS AND SHADOWS, THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 125 (Oxford Portal Oregon 2003).

<sup>7</sup> Memorandum from the General Counsel of the World Bank, Roberto Danino, Legal Opinion on Human Rights and the Work of the World Bank 17 (Jan. 27, 2006) (on file with Indian Law Resource Center).

<sup>8</sup> *Id.* at 25.

<sup>9</sup> Memorandum from the General Counsel of the World Bank, Ana Palacios, The Way Forward: Human Rights and the World Bank (2006). Available at <http://www1.worldbank.org/devoutreach/october06/article.asp?id=388>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

MDBs have developed operational policies on specific human rights topics, but these policies do not reflect accepted international human rights related standards. For their operational policies, MDBs generally choose their own definitions and standards of human rights. These standards are seldom based directly on internationally agreed standards, though they are influenced by them.<sup>12</sup> These choices have as much to do with what is politically acceptable within and among the participating entities as with objective human rights needs.<sup>13</sup> For instance, the Inter-American Development Bank (IDB) has adopted an Operational Policy on Indigenous Peoples that does not reflect the existing international standards on the collective rights of indigenous peoples.<sup>14</sup>

MDBs have also developed inspection mechanisms for accountability purposes. Some scholars consider that, legally, these mechanisms have turned out to be “effective” forums in which project-affected people can raise claims that relate to their rights as indigenous peoples or as involuntarily resettled people, and in which they can challenge the interpretation and implementation of MDBs’ internal policies and procedures.<sup>15</sup> But, from an international human rights law viewpoint, they are not effective in addressing human rights violations resulting from MDB financed projects. The UN Secretary General’s Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has found these mechanisms to be ineffective.<sup>16</sup>

Having in mind the enormous and often irreversible human rights and environmental consequences of MDB financed projects and the inadequacy of the present legal and policy framework for protecting human rights and the environment, we feel that concrete and enforceable rules of international law must be recognized and applied to MDBs. Such rules of international law are justified both by existing principles of international law and by the fact that, as a practical matter, such concrete rules are needed to protect the Earth and our human rights.

The draft Principles of Law flow from existing and widely accepted rules of international human rights law, and they are offered here as a starting point for further discussion and elaboration by all concerned. We have no illusion that this set of draft Principles is necessarily correct or complete, and we look forward to criticisms, suggestions, and alternative drafts. If it is agreed that international law should be clarified and extended explicitly to reach MDBs, and we believe it should, then the

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<sup>12</sup> U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Interim Report*, ¶ 53, U.N. Doc. E/CN.4/2006/97 (2006).

<sup>13</sup> *Id.* at 53.

<sup>14</sup> See generally Indian Law Resource Center, *Comentarios al Borrador de Política Operativa sobre Pueblos Indígenas publicado por el Banco Interamericano de Desarrollo*, July 29, 2005. Available at <http://www.indianlaw.org/main/resources/1/4>.

<sup>15</sup> Daniel Bradlow D., *Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT’L L. 410 (2005) (analyzing the legal and practical significance of MDBs’ inspection mechanisms).

<sup>16</sup> U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Interim Report*, *supra* note 12, at 53.

particular human rights and environmental rules should be or could be elaborated in further detail. Just as Principle 4 contains certain detailed rules particularly addressing certain rights of indigenous peoples, the Principles might usefully be enlarged and improved to embrace more clearly all individuals and peoples and to provide greater specificity as to the rights to be protected.

We believe that these Principles should be written so as to command respect by MDBs for the human rights of all, not just indigenous peoples. We have drafted the Principles in that way, but we have also included some specific elements to protect human rights of particular importance to indigenous peoples. We recognize that further detailed principles would be justified to address other issues particularly affecting other categories of individuals or groups. Such additions and suggestions are welcomed and encouraged.

These draft Principles, or a refined and improved version of them, are proposed with a view toward eventual adoption and recognition as existing principles of international law applying directly to multilateral development banks. These are not conceived as merely voluntary or aspirational principles. They are elements of international law that are evolving and crystallizing as binding rules of law through the regular practice of states and through the growing recognition of the legal rules by states. While they are in the process of becoming universally accepted, there would be great value in clarifying and developing this area of law in a positive manner. It would, therefore, be desirable for the UN Human Rights Council or the regional organizations such as the Organization of American States (OAS) to formally recognize and adopt these Principles of Law or some similar principles that result from further dialogue and debate.

### **Draft Principles of International Law for Multilateral Development Banks**

1. Multilateral development banks, as inter-governmental organizations, are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. A multilateral development bank is not, however, subject to treaty obligations concerning human rights, unless all the member countries are parties to a human rights treaty.

2. Multilateral development banks, in all their activities, shall take reasonable and prudent measures to assure their activities, loans, or other actions do not cause, enable, support, encourage, or prolong the violation of human rights by any state, agency, corporation, or business.

3. Multilateral development banks shall exercise due diligence to investigate, gather evidence, examine the law, and review proposals in order to assure that proposals, projects and businesses that receive any sort of support from them (MDBs) do not directly or indirectly violate or infringe upon the human rights of anyone or any community or people.



4. In particular, multilateral development banks shall, with respect to projects or businesses receiving multilateral development bank support in any form, assure through the project review process and through on-going review and monitoring that the following standards, *inter alia*, are met:

- 1) Projects, their sponsors, directors, and participating entities shall respect the human rights of all individuals and communities, including indigenous peoples, as those rights are established both by international law and by the law of the country where the project or business is located.
- 2) Projects, their sponsors, directors, and participating entities shall respect the traditional and collective ownership of land by indigenous peoples and local communities, as well as individual rights of ownership.
- 3) Projects, their sponsors, directors, and participating entities shall recognize, respect and work to preserve the cultures and ways of life of indigenous peoples, national, cultural, and linguistic minorities, and other such communities.
- 4) Projects, their sponsors, directors, and participating entities and the states where they are located shall recognize the duly established governments of indigenous peoples and other communities as representatives of the interests of their respective communities and respect their systems of governance.
- 5) Projects, their sponsors, directors, and participating entities shall assess the potential social and environmental impacts of the projects, including human rights impacts, prior to MDB funding or support for such projects.
- 6) Businesses and the states where they are located shall consult in good faith with indigenous and local communities prior to undertaking a project that may affect the community.
- 7) Projects, their sponsors, directors, and participating entities shall include the participation of indigenous and local communities in the design and implementation of the projects to lessen any adverse impact on them.
- 8) Projects, their sponsors, directors, and participating entities shall not dislocate indigenous or other communities without their free, prior, and informed consent. If relocation occurs with such consent, the community must receive compensation, including compensation in the form of land of comparable quantity and quality, if possible and so desired by the community.

9) Projects, their sponsors, directors, and participating entities shall have precise, written policies consistent with these Principles to govern their interaction with indigenous and local communities.

5. Multilateral development banks have the on-going responsibility to monitor and periodically review the human rights performance of all projects or businesses receiving support.

6. Multilateral development banks shall undertake measures to implement these Principles, including educational measures for MDB staff, for MDB member states, and for the clients of the MDBs, among others.

7. Multilateral development banks shall institute written procedures for the submission and consideration of complaints of human rights violations on behalf of any person or group with respect to any project or activity of the bank. Such procedures shall result in a written report where a human rights violation has occurred and recommendations for corrective action by the bank and by the project as appropriate. Multilateral development banks shall take prompt and effective action to correct any human rights violation identified by such a report and shall take effective measures to prevent future violations.

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In considering and drafting this body of Legal Principles for multilateral development banks, we have drawn upon a rich and extensive body of human rights instruments, treaties, and international legal jurisprudence.<sup>17</sup> We refer throughout to human rights instruments relevant to indigenous peoples, especially the UN Declaration on the Rights of Indigenous Peoples and ILO No. Convention 169 concerning Indigenous

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<sup>17</sup> See, e.g., UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/61/295 (2007); Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/II.95 Doc.6 (1997); International Labor Organization, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 328 UNT.S. 247, 28 I.L.M. 1382 (1989); 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; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195; 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; Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003); International Finance Corporation's Performance Standards on Social and Environmental Sustainability, *Performance Standard 7: Indigenous Peoples*, at 28-31, Apr. 30, 2006, available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_PerformanceStandards2006\\_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf); Inter-American Development Bank, Sustainable Development Department Indigenous Peoples and Community Development Unit, *Operational Policy on Indigenous Peoples* (Feb. 22, 2006), available at [http://www.iadb.org/sds/ind/index\\_ind\\_e.htm](http://www.iadb.org/sds/ind/index_ind_e.htm).

and Tribal Peoples. The UN Declaration was adopted by the General Assembly in 2007 and is formally non-binding, though it contains much that is already part of customary international law. The ILO Convention No. 169 is binding on the 17 states that have ratified it. We give attention to the rights of indigenous peoples because of our particular interest, but we believe that these draft Principles are equally important for protecting the rights of all persons and all peoples.

In addition, we have considered and drawn from many voluntary principles of businesses, NGOs, and others, including some lesser known standards and norms regarding corporate responsibility, business and human rights, and environmental and social justice. See below at note 40 *et seq.* Some of the most relevant legal authorities and other materials are set forth following each of the draft Principles.

**Principle 1. Multilateral development banks, as inter-governmental organizations, are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. A multilateral development bank is not, however, subject to treaty obligations concerning human rights, unless all the member countries are parties to a human rights treaty.**

MDBs are international intergovernmental organizations (IOs) created by agreements among states,<sup>18</sup> on either a universal or regional basis,<sup>19</sup> focused on the public or private sector<sup>20</sup> to carry out their respective mandates for economic and social development of developing member states.<sup>21</sup> MDBs are exclusively comprised of states.<sup>22</sup> Although there is neither a definition of the term “non-state actor” under

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<sup>18</sup> MDBs are creatures of states since states create them through instruments such as the Articles of Agreements. MDBs’ Articles of Agreement are treaties within the meaning of that term in Article 2 of the Vienna Convention on the Law of Treaties (Vienna Convention) of 1969. *See* Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, U.N.T.S. 18232. According to Article 5, the Vienna Convention applies to MDBs’ Articles of Agreements, because they are treaties constituting international organizations. *See id.* art. 5.

<sup>19</sup> Universal MDBs, like the World Bank (WB), operate in developing member countries around the world. *See* World Bank, Articles of Agreement, art. I (i), Dec. 27, 1945. Regional MDBs operate in specific regions of the world. *See, e.g.,* Inter-American Development Bank, available at <http://www.iadb.org/>; European Bank for Reconstruction and Development, available at <http://www.ebrd.com/>; Asian Development Bank, available at <http://www.adb.org/>; and African Development Bank, available at [http://www.afdb.org/portal/page?\\_pageid=473,1&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,1&_dad=portal&_schema=PORTAL).

<sup>20</sup> On one hand, the WB and the IDB mainly carry out their operations and projects in the public sector, providing loans to states to promote development in developing member countries. On the other hand, only the IFC focuses on private enterprises operating in member countries. *See* International Finance Corporation, Articles of Agreement, art. 1.

<sup>21</sup> For instance, the IDB operates in Latin American developing countries. According to the IDB’s Articles of Agreement, the Bank’s purpose is to contribute to the development of the regional developing member countries, individually and collectively. *See* Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank, art. I, sec. 1 (Dec. 30, 1959).

<sup>22</sup> MDBs’ membership is only open to states, whether regional or non-regional. For instance, according to the IDB’s Articles of Agreement, the original members are the members of the Organization of American States, but the membership is also open to non-regional countries that are members of the International Monetary Fund if admitted by the Bank under the rules of its Board of Directors. *See* Inter-American

international law nor a uniform use of the term by legal authorities,<sup>23</sup> MDBs should not be considered non-state actors, inasmuch as they are intergovernmental organizations in which states act collectively. Multilateral development banks include the World Bank Group, the Inter-American Development Bank, the European Bank for Reconstruction and Development, the African Development Bank Group, and the Asian Development Bank.

MDBs are governed by the collective decisions adopted by their decision-making organs, which are exclusively comprised of member states. For instance, according to the IDB's Articles of Agreement, all the power of the Bank is vested in the Board of Governors who can delegate functions to the Board of Executive Directors<sup>24</sup> – all these organs are exclusively comprised of member states.<sup>25</sup> Member states' voting rights in the decision-making organs are proportional to a country's subscription in the Bank's capital stock.<sup>26</sup> Moreover, MDBs themselves expressly regulate their "relations with other organizations" under their respective Articles of Agreement.<sup>27</sup>

There is a growing legal consensus that intergovernmental organizations such as MDBs are subjects of international law, and, therefore, legal rights and obligations under international law apply to them. Several sources support this view, including: (1) the jurisprudence of the International Court of Justice (ICJ);<sup>28</sup> (2) the Vienna Conventions;<sup>29</sup>

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Development Bank, Agreement Establishing the Inter-American Development Bank, art. II, sec. 1, *supra* note 21.

<sup>23</sup> For some scholars, the term "non-state actor" refers to armed opposition groups within a domestic context that are independent of states, e.g., rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, etc. See generally Philip Alston, *The 'Not-a-Cat' Syndrome*, in NON-STATES ACTORS AND HUMAN RIGHTS 15 (Philip Alston ed., Oxford Univ. Press 2005) (defining non-state actors and identifying key factors concerning their performance under international human rights law). For others, non-state actors are all those actors, not state agents, that operate at the international level and are relevant to international relations. *Id.* at 15. Finally, a third position considers non-state actors to be those affected people with no contractual relationship with MDBs whose living conditions are directly or indirectly affected by the MDB-financed operations. See generally Daniel Bradlow D., *Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403, 411 (2005) (analyzing the legal and practical significance of MDBs' inspection mechanisms).

<sup>24</sup> Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank, art. VIII sec. 2, *supra* note 21.

<sup>25</sup> *Id.* art. VIII, sec. 3(a) and (b).

<sup>26</sup> John Ruthrauff, AN INTRODUCTION TO THE WORLD BANK, INTER-AMERICAN DEVELOPMENT BANK, AND THE INTERNACIONAL MONETARY FUND 6 (2d ed. 1997).

<sup>27</sup> See, e.g., Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank art. XIV sec. 2, *supra* note 21. See also World Bank, Articles of Agreement, art. V, sec. 8, "Relationship to Other International Organizations"; and International Finance Corporation, Articles of Agreement, art. IV, sec. 7, "Relationship to Other International Organizations".

<sup>28</sup> The ICJ has concluded that the United Nations, as an IO, is a subject of international law. In the *Reparations* opinion of 1949, the Court stated that the UN was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 1949 I.C.J. 179 (Apr. 11, 1949). Since this opinion, the debate about the legal personality of IOs has evolved considerably. Indeed, thirty years later, in the *WHO* opinion of 1980, the Court established that international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon

and (3) the International Law Commission's draft treaty provisions on the responsibility of IOs.<sup>30</sup> Thus, the obligations and responsibilities of international human rights law, especially, should be applied to MDBs. As established in the principal human rights treaties and rules of customary international law, these obligations are: (1) to respect human rights;<sup>31</sup> (2) to adopt domestic measures;<sup>32</sup> and (3) to redress human rights violations.<sup>33</sup> Though these obligations were originally stated in a form applying to individual states, they are suitable for application, *mutatis mutandis*, to IOs such as MDBs.

MDBs, in all their activities, are obligated to respect human rights; but many affirmative human rights obligations cannot be applied in the same way as to states. For example, MDBs are not obliged as such to fulfill obligations that, by their nature, can

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them under general rules of international law, under their constitutions, or under international agreements to which they are parties. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 173 (Dec. 20, 1980).

<sup>29</sup> The Vienna Convention on the Law of Treaties of 1969 refers to international organizations when defining its scope of application and the term "international organizations". See Vienna Convention on the Law of Treaties, art. 5 and art. 2(1)(i), *supra* note 18. In addition, three other Vienna Conventions use the same legal definition and take the same approach: (1) the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, art. I(1)(1) (Mar. 14, 1975); (2) the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, art. 2(1)(n) (Aug. 23, 1978); and (3) the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, art. 2(1)(i).

<sup>30</sup> The International Law Commission (ILC), which has responsibility for elaborating the Draft Convention on Responsibility of International Organizations, has defined an international IO, in Article 2, as "...an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to states, other entities." U.N. Internat'l L. Comm'n, *Responsibility of international organizations - Titles and texts of the draft articles 1, 2 and 3 adopted by the Drafting Committee*, ¶ 1, U.N. Doc. A/CN.4/L.632 (June 4, 2003).

<sup>31</sup> Some of the relevant international instruments are: Organization of American States, American Convention on Human Rights, art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 1, Nov. 17, 1988, O.A.S.T.S. No. 69; U.N. Charter, art. 55(c); Universal Declaration of Human Rights, preamble, G.A. Res. 217A (Dec. 12, 1948); International Covenant on Civil and Political Rights, arts. 2(1) and 2(2), G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, art. 2(2), G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 7, G.A. Res. 45/158 (Dec. 18, 1990); International Convention on the Elimination of All Forms of Racial Discrimination, preamble, G.A. Res. 2106 (XX) (Dec. 21, 1965); Council of Europe, European Convention for the Protection of the Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221; Council of Europe, European Social Charter, preamble (Oct. 18, 1961); Organization of African Unity, African Charter of Human and People's Rights, art. 1 (June 27, 1981); League of Arab States, Arab Charter of Human Rights, art. 2 (Sept. 15, 1994).

<sup>32</sup> See Organization of American States, American Convention on Human Rights, art. 2, *supra* note 31; Organization of African Unity, African Charter of Human and People's Rights, art. 1, *supra* note 31; International Covenant on Economic, Social and Cultural Rights, art. 2(1), *supra* note 31; International Covenant on Civil and Political Rights, art. 2(2), *supra* note 31.

<sup>33</sup> See Organization of American States, American Convention on Human Rights, art. 63(1), *supra* note 31. The obligation in question is a well-established rule of customary international law. See Case of De la Cruz-Flores v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 115 (Nov. 18, 2004), para. 139.

only be fulfilled by the state itself, such as implementing the right to basic primary education, or the obligation to enact domestic legislation.<sup>34</sup> But MDBs would, under these Principles, have obligations not to act in a way that prevents a borrowing state from fulfilling its obligations to provide such education.<sup>35</sup> While MDBs cannot themselves enact domestic legislation, MDBs can be complicit in a state violation of human rights by causing, forcing, or enabling a state to violate human rights. This is particularly true, for instance, when MDBs finance projects which involve the adoption of new domestic legislation that is not in accordance with accepted international human rights standards. With respect to the obligation to redress human rights violations, MDBs can breach this obligation by financing projects in states that have been condemned by international tribunals for human rights violations or for failing to redress such violations. This concept was asserted by the UN Economic and Social Council when it called upon the WB to pay enhanced attention in their activities to respect for economic, social and cultural rights, including facilitating the development of appropriate remedies for responding to violations of those rights.<sup>36</sup>

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 41:  
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration [on the Rights of Indigenous Peoples] through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.
- ILO Convention No. 169, Article 2(1):  
Governments shall have the responsibility for developing, with the participation of the [indigenous] peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

**Principle 2. Multilateral development banks, in all their activities, shall take reasonable and prudent measures to assure their activities, loans, or other actions do not cause, enable, support, encourage, or prolong the violation of human rights by any state, agency, corporation, or business.**

In order to comply with this Principle, MDBs should institute appropriate procedures or other measures to avoid human rights violations that could foreseeably occur in connection with projects they finance or support. Diligent and rigorous human

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<sup>34</sup> Andrew Clapham, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 151 (Oxford Univ. Press 2006).

<sup>35</sup> *Id.*

<sup>36</sup> U.N. ECOSOC, *Procedural Decisions*, U.N. Doc. E/1999/22, para. 515 (1999)

rights impact assessments or equivalent measures should be required by MDBs prior to funding decisions that could have human rights implications.

“Human rights” includes, at least, all those rights recognized in customary international law, in any treaty applicable in the particular situation, or in the domestic law of the state concerned. International human rights tribunals have construed the obligation of states to prevent, investigate and punish human rights violations. In the *Velasquez-Rodriguez* case, the Inter-American Court determined that the state has a legal duty to take reasonable steps to prevent human rights violations, as well as to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim receives adequate compensation.<sup>37</sup> This principle places analogous obligations on MDBs in connection with their activities and operations in member states’ territories, especially the IFC, when dealing with the private sector.

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2):  
States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

**Principle 3. Multilateral development banks shall exercise due diligence to investigate, gather evidence, examine the law, and review proposals in order to assure that proposals, projects and businesses that receive any sort of support from them (MDBs) do not directly or indirectly violate or infringe upon the human rights of anyone or any community or people.**

This Principle adds specific requirements to the more general rule in Principle 2. The Inter-American Court has emphasized the importance of due diligence when considering human rights violations. In the *Velasquez-Rodriguez* case, the Court stated that an illegal act that violates human rights and that is initially not directly imputable to a state can lead to the international responsibility of that state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the American Convention on Human Rights.<sup>38</sup> Likewise, the Court concluded that what is decisive is whether a violation of the rights recognized by the

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<sup>37</sup> Case of Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), para. 174.

<sup>38</sup> *Id.* at 172.

American Convention on Human Rights has occurred with the support or the acquiescence of the government, or whether the state has allowed the act to take place without taking measures to prevent it or to punish those responsible.<sup>39</sup> The legal rationale of the *Velasquez-Rodriguez* case is applicable to MDBs, as they can contribute to the violation by a state of human rights by funding projects that result in or contribute to human rights violations.

Other relevant legal authorities relating to indigenous peoples include:

- ILO Convention No. 169, Article 7(3):  
Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

**Principle 4. In particular, multilateral development banks shall, with respect to projects or businesses receiving multilateral development bank support in any form, assure through the project review process and through on-going review and monitoring that the following standards, *inter alia*, are met:**

Principle 4 states nine specific requirements, all relating to MDB decisions to finance or not finance public and private sector projects in developing countries. The requirements form a kind of checklist for human rights issues that could be used by an MDB in its review process.

The particular requirements included in this draft of Principle 4 are related primarily, but not exclusively, to indigenous peoples and some of the key human rights issues that affect them. It is clear that this list of requirements could be enlarged to embrace more issues and more possible human rights concerns. Indeed it would be desirable to make the list as complete as possible, within the limits of reasonableness and practicability. As we have mentioned previously, we believe that these Principles should be as universal as possible, applying to and making applicable all relevant human rights.

The specific requirements of Principle 4 are based in part upon some of the many voluntary business principles and codes that have been developed and espoused by businesses, human rights organizations and advocates, environmental organizations, and others. They are also based upon the relevant human rights treaties, international human rights declarations, and other instruments, as well as the human rights jurisprudence of international courts and human rights bodies.

For many years, there has been an increasing trend in business to promote socially responsible investment, which includes protecting the human rights and interests of local

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<sup>39</sup> *Id.* at 173.



communities. As part of this trend, businesses themselves, NGOs, other entities, and experts have developed policies and general guidelines to demonstrate devotion to corporate responsibility for investors and to actually act responsibly. Businesses that have developed policies that relate to human rights and environmental and social justice include Barrick,<sup>40</sup> BHP Billiton,<sup>41</sup> Chevron,<sup>42</sup> Conoco,<sup>43</sup> Newmont Mining,<sup>44</sup> and Shell.<sup>45</sup> Some companies, such as EnCana,<sup>46</sup> Alcan,<sup>47</sup> JP Morgan,<sup>48</sup> Total,<sup>49</sup> and Enbridge,<sup>50</sup> have formed policies or guidelines that relate specifically to indigenous peoples and their special needs. Companies working with certain industries, such as cement,<sup>51</sup> mining,<sup>52</sup> banking,<sup>53</sup> and oil,<sup>54</sup> have attempted to address human rights issues and spearhead corporate responsibility initiatives. International initiatives have also addressed human rights in business, and these include the Global Compact,<sup>55</sup> the UN

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<sup>40</sup> Barrick, *Corporate Social Responsibility Charter*, available at [www.barrick.com/Theme/Barrick/files/docs\\_ehss/CSR\\_Charter.pdf](http://www.barrick.com/Theme/Barrick/files/docs_ehss/CSR_Charter.pdf).

<sup>41</sup> BHP Billiton, *Sustainability Report (2007)*, available at [www.bhpbilliton.com/bb/aboutUs/annualReports.jsp](http://www.bhpbilliton.com/bb/aboutUs/annualReports.jsp).

<sup>42</sup> Chevron, *Energy Partnership: 2007 Corporate Responsibility Report*, available at [www.chevron.com/globalissues/corporateresponsibility/2007/documents/Chevron\\_2007CR\\_1\\_intro.pdf](http://www.chevron.com/globalissues/corporateresponsibility/2007/documents/Chevron_2007CR_1_intro.pdf); Chevron, *Human Rights Statement*, available at [www.chevron.com/globalissues/humanrights/](http://www.chevron.com/globalissues/humanrights/).

<sup>43</sup> ConocoPhillips, *Code of Business Ethics and Conduct for Directors and Employees* (Feb. 9, 2007), available at [www.conocophillips.com/NR/rdonlyres/147E8B57-9169-4FA7-BB23-A41207B26D2D/0/13\\_CodeofEthics.pdf](http://www.conocophillips.com/NR/rdonlyres/147E8B57-9169-4FA7-BB23-A41207B26D2D/0/13_CodeofEthics.pdf).

<sup>44</sup> Newmont Mining, *Proposal No. 4—Stockholder Proposal Requesting a Report Regarding Newmont’s Community Policies and Practices* (2007), available at [www.newmont.com/en/pdf/CRR\\_Shareholder\\_proposal\\_2007.pdf](http://www.newmont.com/en/pdf/CRR_Shareholder_proposal_2007.pdf).

<sup>45</sup> Shell, *Sustainability Report 2007*, available at <http://sustainabilityreport.shell.com/2007/servicepages/welcome.html>.

<sup>46</sup> EnCana, *Aboriginal Guidelines*, available at [www.encana.com/responsibility/consultation/aboriginal/index.htm](http://www.encana.com/responsibility/consultation/aboriginal/index.htm).

<sup>47</sup> Alcan, *Indigenous Peoples Policy*, available at [www.alcan.com/web/publishing.nsf/content/Alcan+Indigenous+Peoples+Policy](http://www.alcan.com/web/publishing.nsf/content/Alcan+Indigenous+Peoples+Policy).

<sup>48</sup> JP Morgan Chase, *Indigenous Communities*, available at <http://www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indi>.

<sup>49</sup> Total, *Policy regarding indigenous peoples*, available at [www.total.com/static/fr/medias/topic1492/Total\\_Indigenous\\_People\\_Policy.pdf](http://www.total.com/static/fr/medias/topic1492/Total_Indigenous_People_Policy.pdf).

<sup>50</sup> Enbridge, *Indigenous Peoples Policy*, available at <http://www.enbridge.com/pipelines/right-of-way/pdf/indigenousspeoplespolicy.pdf>.

<sup>51</sup> Cement Sustainability Initiative (CSI), *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005), available at [www.wbcscement.org/pdf/cement\\_initiative\\_arp.pdf](http://www.wbcscement.org/pdf/cement_initiative_arp.pdf).

<sup>52</sup> Mining and Environment Research Network, *Corporate Social Responsibility and the Mining Sector*, available at [www.mineralresourcesforum.org/docs/pdfs/merncsr.pdf](http://www.mineralresourcesforum.org/docs/pdfs/merncsr.pdf).

<sup>53</sup> Equator Principles (July 2006), available at [www.equator-principles.com](http://www.equator-principles.com).

<sup>54</sup> Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, available at [www.celb.org/xp/CELB/downloads/ebi.pdf](http://www.celb.org/xp/CELB/downloads/ebi.pdf).

<sup>55</sup> United Nations Global Compact, *The Ten Principles*, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>. United Nations Global Compact, Business Leaders Initiative on Human Rights, Office of the High Commissioner on Human Rights, *A Guide for Integrating Human Rights into Business Management*, available at [www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/guide\\_hr.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/guide_hr.pdf).

Special Representative on Business and Human Rights,<sup>56</sup> and the ISO Standard on Social Responsibility.<sup>57</sup>

Increased environmental awareness, both in law and practice, has also contributed to the increasing focus on corporate responsibility and how business affects the environment.<sup>58</sup> In the wake of growing demand for corporate responsibility, some companies have become specifically devoted to promoting social investment, which can also promote respect for human rights generally.<sup>59</sup> These so-called social investment companies screen companies for investment based on human rights and socially responsible activities.<sup>60</sup>

NGOs and other entities have also engaged in the effort to force companies to become more socially responsible, including Amnesty International,<sup>61</sup> Rainforest Action Network,<sup>62</sup> Greenpeace,<sup>63</sup> OECD,<sup>64</sup> Conservation International,<sup>65</sup> Sierra Club,<sup>66</sup> and

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<sup>56</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, A/HRC/4/35 (Feb. 19, 2007); Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (Apr. 7, 2008).

<sup>57</sup> International Standards Organization (ISO), *About the Standard*, available at [http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07\\_gen\\_info/aboutStd.html](http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/aboutStd.html).

<sup>58</sup> See generally Mary Lou Egan, et. al., *France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reports To Promote Environmentally Sustainable Economic Development*, A paper prepared for presentation at the 25th Annual Research Conference of the Association for Public Policy and Management, Washington, DC (November 2003), available at [www.bendickegan.com/pdf/EganMauleonWolffBendick.pdf](http://www.bendickegan.com/pdf/EganMauleonWolffBendick.pdf); Gary S. Guzy, *Memorandum: EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting* (Dec. 1, 2000), available at

[www.epa.gov/compliance/resources/policies/ej/ej\\_permitting\\_authorities\\_memo\\_120100.pdf](http://www.epa.gov/compliance/resources/policies/ej/ej_permitting_authorities_memo_120100.pdf); Executive Order 12898, FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (Feb. 11, 1994), available at [www.epa.gov/Region2/ej/exec\\_order\\_12898.pdf](http://www.epa.gov/Region2/ej/exec_order_12898.pdf).

<sup>59</sup> See, e.g., Calvert Group, *Issue Brief: Indigenous Peoples' Rights*, available at [http://www.calvertgroup.com/sri\\_ibindigenousspeoplesrights.html](http://www.calvertgroup.com/sri_ibindigenousspeoplesrights.html).

<sup>60</sup> See, e.g., Social Investment Forum, *Socially Responsible Mutual Fund Charts: Screening & Advocacy*, available at [www.socialinvest.org/resources/sriguide/srifacts.cfm](http://www.socialinvest.org/resources/sriguide/srifacts.cfm).

<sup>61</sup> Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), available at [www.amnesty.org/en/library/info/ACT70/001/1998/en](http://www.amnesty.org/en/library/info/ACT70/001/1998/en).

<sup>62</sup> See, e.g., Rainforest Action Network, *Agribusiness Impact on Indigenous Communities Fact Sheet*, available at [http://ran.org/campaign/rainforest\\_agribusiness/resources/fact\\_sheets/peoples\\_rights\\_vs\\_agribusiness\\_the\\_case\\_of\\_food\\_sovereignty/](http://ran.org/campaign/rainforest_agribusiness/resources/fact_sheets/peoples_rights_vs_agribusiness_the_case_of_food_sovereignty/).

<sup>63</sup> Greenpeace, *Bhopal Principles on corporate accountability*, available at [www.sacredland.org/PDFs/Greenpeace\\_Bhopal.pdf](http://www.sacredland.org/PDFs/Greenpeace_Bhopal.pdf).

<sup>64</sup> Organization for Economic Co-Operation and Development, *The OECD Guidelines for Multinational Enterprises* (2000), available at [www.oecd.org/document/28/0,2340,fr\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,2340,fr_2649_34889_2397532_1_1_1_1,00.html).

<sup>65</sup> Conservation International, *Reinventing the Well: Approaches to Minimizing the Environmental and Social Impact of Oil Development in the Tropics*, Volume 2/1997, available at [www.celb.org/xp/CELB/downloads/PublicationOrderForm.pdf](http://www.celb.org/xp/CELB/downloads/PublicationOrderForm.pdf).

Nature Conservancy.<sup>67</sup> Some organizations, such as Ceres,<sup>68</sup> Forest Peoples Programme,<sup>69</sup> and Oxfam,<sup>70</sup> have advocated for recognition of particular human rights by creating relevant principles or guidelines that can then be adopted by specific companies.

Experts, including scholars and advocates for the interests of business and indigenous peoples, have also addressed the intersection between indigenous peoples and business. From a rights based perspective, some of these experts have focused on indigenous peoples' rights to existence, self-determination, and non-discrimination, which, in essence, protect the way of life of indigenous peoples.<sup>71</sup> Experts from various fields have also come together to create principles or guidelines related to corporate responsibility generally and indigenous peoples, directly or indirectly.<sup>72</sup>

Finally, several international documents and summits have addressed how to involve and protect indigenous peoples in global efforts to preserve the environment and biodiversity. For example, at the 2002 World Summit on Sustainable Development, the parties addressed how to implement environmental policies and repeatedly called for cooperation with and participation of indigenous peoples.<sup>73</sup> The Summit is an international conference mainly organized by the UN, at which heads of states, national delegates, and leaders from NGOs, businesses, and other major groups meet to discuss direct action toward meeting difficult challenges, including improving people's lives and conserving natural resources.<sup>74</sup>

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<sup>66</sup> Sierra Club, *Sierra Club Guidelines* (Oct. 17, 1998), available at [www.sierraclub.org/policy/conservation/transcorp.asp](http://www.sierraclub.org/policy/conservation/transcorp.asp).

<sup>67</sup> Nature Conservancy, *The Nature Conservancy and Indigenous Peoples*, available at [www.nature.org/partners/partnership/art14301.html](http://www.nature.org/partners/partnership/art14301.html).

<sup>68</sup> Ceres Principles (1989), available at [www.ceres.org/](http://www.ceres.org/).

<sup>69</sup> Forest Peoples Programme and Tebtebba Foundation, *Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises* (Dec. 29, 2006), available at <http://www.business-humanrights.org/Documents/Forest-Peoples-Tebtebba-submission-to-SRSG-re-indigenous-rights-29-Dec-2006.pdf>.

<sup>70</sup> Oxfam International and Social Capital Group, *Corporate Social Responsibility in the Mining Sector in Peru*, available at [http://www.oxfamamerica.org/newsandpublications/publications/research\\_reports/corporate-social-responsibility-in-the-mining-sector-in-peru](http://www.oxfamamerica.org/newsandpublications/publications/research_reports/corporate-social-responsibility-in-the-mining-sector-in-peru).

<sup>71</sup> See generally Marcos A. Orellana, *Indigenous Peoples, Mining, and International Law*, MINING MINERALS AND SUSTAINABLE DEVELOPMENT (January 2002), available at [www.iied.org/mmsd/mmsd\\_pdfs/002\\_orellana\\_eng.pdf](http://www.iied.org/mmsd/mmsd_pdfs/002_orellana_eng.pdf).

<sup>72</sup> The Global Sullivan Principles, available at <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp>.

<sup>73</sup> United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development.

<sup>74</sup> The Tenth Session of the UN Commission on Sustainable Development acted as the global Preparatory Committee for the 2002 Summit, which was focused on turning plans into action by evaluating the obstacles to progress and the results achieved in Agenda 21 since its adoption in 1992. Agenda 21 is an unprecedented global plan of action for sustainable development adopted by 178 governments at the UN Conference on the Environment and Development, Rio de Janeiro, 1992. Agenda 21 is available at <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>

**Principle 4(1). Projects, their sponsors, directors, and participating entities shall respect the human rights of all individuals and communities, including indigenous peoples, as those rights are established both by international law and by the law of the country where the project or business is located.**

Every project, especially those that receive public financing, must respect the human rights of all persons, including the rights of communities, peoples and other groups. Of course, the human rights referred to are those established by applicable international law and standards, as well as by domestic law. These rights apply equally to all persons regardless of race, gender, age, disability, economic status, or any other distinguishing feature. Such human rights include, but are not limited to, the rights to life, liberty, property, due process of law, access to justice, nondiscrimination, food, water, shelter, and self-determination.

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 1:  
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
- UN Declaration on the Rights of Indigenous Peoples, Article 2:  
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
- UN Declaration on the Rights of Indigenous Peoples, Article 7:
  1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
  2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.
- UN Declaration on the Rights of Indigenous Peoples, Article 17(1):  
Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
- ILO Convention No. 169, Article 3(1):  
Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.
- ILO Convention No. 169, Article 4(1):

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Relevant existing policies and principles include:

- Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), at 4-5: “Companies should cooperate in creating an environment where human rights are understood and respected . . . . Human rights are designed to protect the inherent dignity of the human person, regardless of her or his culture or background, and by their very nature are universal . . . . These rights cover civil, political, economic, cultural and social activities and are regarded not only as universal, but also as indivisible and interdependent. Multinational companies should adhere to these international standards even if national laws do not specify them.”
- United Nations Global Compact, *The Ten Principles*: “Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses.” The UN Global Compact is a global corporate citizenship initiative, which set up a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, the environment, and anti-corruption.<sup>75</sup>
- United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 44(j): “Subject to national legislation, recognize the rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices, and, with the approval and involvement of the holders of such knowledge, innovations and practices, develop and implement benefit-sharing mechanisms on mutually agreed terms for the use of such knowledge, innovations and practices.”
- Greenpeace, *Bhopal Principles on corporate accountability*: “4. Protect Human rights: Economic activity shall not infringe upon basic human and social rights. States have the responsibility to safeguard the basic human and social rights of citizens, in particular the right to life; the right to safe and healthy working conditions; the right to a safe and healthy environment; the right to medical treatment and to compensation for injury and damage; the right to information and the right of access to justice by individuals and by

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<sup>75</sup> United Nations Global Compact, *The Ten Principles*, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

groups promoting these rights. Corporations must respect and uphold these rights. States must ensure effective compliance by all corporations of these rights and provide for legal implementation and enforcement.”

- Global Sullivan Principles: “Express our support for universal human rights and, particularly, those of our employees, the communities within which we operate and parties with whom we do business.” The Global Sullivan Principles of Social Responsibility is a voluntary code of conduct built on a vision of corporate social responsibility by the Leon H. Sullivan Foundation. Its objective is to have companies and organizations of all sizes, in widely disparate industries and cultures, working toward the common goals of human rights, social justice, and economic opportunity.<sup>76</sup>

**Principle 4(2). Projects, their sponsors, directors, and participating entities shall respect the traditional and collective ownership of land by indigenous peoples and local communities, as well as individual rights of ownership.**

Unquestionably, the right of all persons and groups to the land and other property they own must be respected, but because of its unusual and complex nature, indigenous peoples’ land and resource ownership deserves particular attention. As is well recognized in law and materials that address indigenous peoples, indigenous peoples are intricately linked to their land, as they have typically inhabited the land since time immemorial and their ways of life often depend on the land and natural resources. Indigenous peoples usually own their land and natural resources collectively, and, although they may not hold formal title to the land, they own it by reason of their long-standing occupation and use. This part of Principle 4 is intended to call special attention to this particular concern, and it calls upon MDBs and the projects they fund to respect the land and natural resources belonging to indigenous peoples.

Relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2)(b):  
2. States shall provide effective mechanisms for prevention of, and redress for... (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- UN Declaration on the Rights of Indigenous Peoples, Article 26:  
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.  
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by

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<sup>76</sup> The Global Sullivan Principles are available at [www.thesullivanfoundation.org/gsp/default.asp](http://www.thesullivanfoundation.org/gsp/default.asp).

reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

- UN Declaration on the Rights of Indigenous Peoples, Article 27:  
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
- ILO Convention No. 169, Article 4(1):  
Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
- ILO Convention No. 169, Article 13(1):  
... governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
- ILO Convention No. 169, Article 14:
  1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
  2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
  3. ...
- ILO Convention No. 169, Article 15(1):  
The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
- The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No.79 (Judgment of Aug. 31, 2001);  
The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H. R.

(Ser. C) No. 172 (Judgment of Nov. 28, 2007); *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Report No. 40/04 (October 12, 2004); *The Case of Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. Commission on Human Rights (December 27, 2002).

Relevant existing policies and principles include:

- United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 7(h): “Provide access to agricultural resources for people living in poverty, especially women and indigenous communities, and promote, as appropriate, land tenure arrangements that recognize and protect indigenous and common property resource management systems.”
- Calvert Group, *Issue Brief: Indigenous Peoples' Rights*: “Companies that fail Calvert's Indigenous Peoples rights criteria do so because they: Do not respect the lands and rights of Indigenous Peoples, and have direct ongoing conflicts with indigenous communities regarding livelihoods, cultures, habitat, and environment ... .”
- Enbridge, *Indigenous Peoples Policy*: “respect indigenous peoples’ traditional ways, the land, heritage sites, and the Environment.”
- Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, at 9: “Many areas with significant biodiversity remaining are also the traditional areas of indigenous, tribal or traditional peoples. Indigenous people often are ethnically different from the dominant national culture, and frequently their traditional territories, whether terrestrial or marine, are not recognized by national governments. The economies, identities and forms of social organization of indigenous people are often closely tied to maintaining the biodiversity and ecosystems that contain them intact. However, multiple pressures exerted on indigenous and other rural communities have made this a challenging proposition in many settings. There are often overlaps between lands set aside for legally designated parks and protected areas and lands customarily owned or used by indigenous peoples. Because of these factors, issues related to indigenous people and oil and gas development are complex and require special measures to ensure that indigenous people, like other local communities, are not disadvantaged and that they are included in and can benefit from projects supporting biodiversity conservation or oil and gas development.” The Energy and Biodiversity Initiative is a partnership between companies and major conservation organizations, which began in 2001 and ceased in 2007. It has produced practical guidelines, tools and models to improve the



environmental performance of energy operations, minimize harm to biodiversity, and maximize opportunities for conservation wherever oil and gas resources are developed.<sup>77</sup>

- *The Nature Conservancy and Indigenous Peoples*: “Included in The Nature Conservancy’s seven core values is a ‘Commitment to People,’ which states that we ‘respect the needs of local communities by developing ways to conserve biological diversity while at the same time enabling humans to live productively and sustainably on the landscape.’”

**Principle 4(3). Projects, their sponsors, directors, and participating entities shall recognize, respect and work to preserve the cultures and ways of life of indigenous peoples, national, cultural, and linguistic minorities, and other such communities.**

Indigenous peoples, as well as all other peoples and communities, should enjoy the right to culture and to live in keeping with that culture if they so choose, as their cultures and ways of life are intrinsically valuable and worthy of preservation. Moreover, indigenous peoples, as discussed above, often depend on the land and natural resources for subsistence, to practice their religion, and to engage in cultural activities. For this reason, projects should particularly recognize the link between indigenous cultures and ways of life and the land that they inhabit. For example, in projects that may affect the environment and biodiversity, the projects should recognize and take account of the traditional knowledge of indigenous peoples regarding preservation of the environment and biodiversity according to their traditional and cultural ways. Projects should avoid sacred sites and other areas vitally important to indigenous peoples.

Relevant legal authorities include:

- International Covenant on Civil and Political Rights,<sup>78</sup> Article 27:  
In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.
- UN Declaration on the Rights of Indigenous Peoples, Article 5:  
Indigenous peoples have the right to maintain and strengthen their distinct...social and cultural institutions ... .
- UN Declaration on the Rights of Indigenous Peoples, Article 8:  
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

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<sup>77</sup> Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, available at [www.celb.org/xp/CELB/downloads/ebi.pdf](http://www.celb.org/xp/CELB/downloads/ebi.pdf).

<sup>78</sup> 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* March, 23, 1976.

2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; ...
- UN Declaration on the Rights of Indigenous Peoples, Article 9:  
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.
  - UN Declaration on the Rights of Indigenous Peoples, Article 11:
    1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.
    2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
  - UN Declaration on the Rights of Indigenous Peoples, Article 12(1):  
Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
  - UN Declaration on the Rights of Indigenous Peoples, Article 31:
    1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ...
    2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.
  - ILO Convention No. 169, Article 2:
    1. Governments shall have the responsibility for developing, with the participation of the [indigenous] peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
    2. Such action shall include measures for: ... (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; ... .
  - ILO Convention No. 169, Article 4(1):

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

- ILO Convention No. 169, Article 8(2):  
These peoples shall have the right to retain their own customs and institutions ...

Relevant existing policies and principles include:

- United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 7(e): “Develop policies and ways and means to improve access by indigenous people and their communities to economic activities and increase their employment through, where appropriate, measures such as training, technical assistance and credit facilities. Recognize that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities.” 40(d): “Promote programmes to enhance in a sustainable manner the productivity of land and the efficient use of water resources in agriculture, forestry, wetlands, artisanal fisheries and aquaculture, especially through indigenous and local community-based approaches.” 54(h): “Promote the preservation, development and use of effective traditional medicine knowledge and practices, where appropriate, in combination with modern medicine, recognizing indigenous and local communities as custodians of traditional knowledge and practices, while promoting effective protection of traditional knowledge, as appropriate, consistent with international law.”
- EnCana, *Aboriginal Guidelines*: “EnCana’s community relations program will build, enhance and maintain positive relations in the Aboriginal community by... Respecting cultural and individual differences ... .”
- Alcan, *Indigenous Peoples Policy*: “Alcan accepts the diversity of indigenous peoples. We acknowledge the unique and important interests that they have for the land and environment as well as their history, culture and traditional ways of life.”
- BHP Billiton, *Sustainability Report (2007)*, at 238: “Recognizing and respecting Indigenous people's culture, heritage and traditional rights and supporting the identification, recording, management and protection of Indigenous cultural heritage. There are many Indigenous communities around the world that are traditional owners of land impacted by our operations or live nearby.”

- Chevron, *Human Rights Statement*: “We value and respect the cultures and traditions of the many communities in which we work.”

**Principle 4(4). Projects, their sponsors, directors, and participating entities and the states where they are located shall recognize the duly established governments of indigenous peoples and other communities as representatives of the interests of their respective communities and respect their systems of governance.**

Indigenous peoples, in addition to mechanisms of the state, have their own systems of government. These governments are able to represent the interests of their communities both within and without the community. As some businesses, states, and other organizations focus on Western forms of government, they have sometimes overlooked and discounted traditional forms of government of indigenous peoples. In implementing projects that will affect indigenous peoples, among others, it is vital to use indigenous peoples’ own system of government and respect their governance during the consultation and subsequent participation process.

Relevant legal authorities include:

- International Covenant on Civil and Political Rights, Article 1:
  1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
  2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
  3. ...
- UN Declaration on the Rights of Indigenous Peoples, Article 3:
 

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- UN Declaration on the Rights of Indigenous Peoples, Article 4:
 

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
- UN Declaration on the Rights of Indigenous Peoples, Article 5:
 

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic ... institutions ... .
- UN Declaration on the Rights of Indigenous Peoples, Article 20(1):
 

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in

the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

- ILO Convention No. 169, Article 4(1):  
Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Relevant existing policies and principles include:

- J. Hunt and D.E. Smith, *Ten key messages from the preliminary findings of the Indigenous Community Governance Project* (2005), at 1: "... strengthening Indigenous community governance starts first with negotiating and clarifying the appropriate contemporary relationships among the different Indigenous people within a region or community. That leads directly into the work of designing systems of representation and organizational arrangements which reflect those important relationships. Working through Indigenous relationships and systems of representation thus becomes the basis for working out organisational structures, institutions and procedures. The emphasis should be on starting with locally relevant Indigenous relationships and forms of representation, and designing governance structures from there."
- JP Morgan Chase, *Indigenous Communities*: "They have given indigenous people the opportunity and, if needed, culturally appropriate representation to engage in informed participation and collective decision-making ... . Consultation approaches that rely on existing customary institutions, the role of community elders and leaders, and the established governance structure for tribal and indigenous communities; Governmental authorities at the local, regional or national level have provided mechanisms for the affected communities to be represented or consulted, and international and local laws have been upheld ... ."

**Principle 4(5). Projects, their sponsors, directors, and participating entities shall assess the potential social and environmental impacts of the projects, including human rights impacts, prior to MDB funding or support for such projects.**

Before undertaking measures to initiate any project, the state, business or IFI itself should fully and accurately assess the social and environmental impact of the proposed project. Such an assessment should provide insight into whether and how to proceed with the project, including how to minimize the impact of the proposed project on the environment and affected communities.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 29(1):  
Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
- ILO Convention No. 169, Article 4(1):  
Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
- ILO Convention No. 169, Article 7(4):  
Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Relevant existing policies and principles include:

- Cement Sustainability Initiative (CSI), *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005): “The World Business Council for Sustainable Development (WBCSD) Cement Sustainability Initiative (CSI) has initiated a task force (one of six) to address the local impacts of the cement industry on land and communities. Impacts from quarries and cement plants may be positive (e.g. creating jobs and providing products and services) or negative (e.g. disturbance to the landscape and biodiversity, dust and noise). The most useful tool for evaluating and managing the impacts of a cement site is a thorough Environmental and Social Impact Assessment (ESIA), undertaken with rigorous scientific analysis and stakeholder engagement. ... An ESIA report will cover methods and key issues, the legislative framework, the consultation process, the social and environmental baseline, consideration of alternatives, prediction and evaluation of significant social and environmental impacts, mitigation or offset measures, and environmental and social management and monitoring plans.” The Cement Sustainability Initiative was formed by major cement companies for the purpose of helping the cement industry to address the challenges of sustainable development. Among others, its purpose is to explore what sustainable development means for the cement industry and identify and facilitate actions that companies can take as a group and individually to accelerate the move towards sustainable development.<sup>79</sup>

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<sup>79</sup> Cement Sustainability Initiative, *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005), available at [www.wbcscement.org/pdf/cement\\_initiative\\_arp.pdf](http://www.wbcscement.org/pdf/cement_initiative_arp.pdf).

- Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, at 28: “Oil and gas companies traditionally use Environmental Impact Assessments (EIAs) to identify and address the potentially significant environmental effects and risks associated with a project. In many cases, companies have also begun to use Social Impact Assessments (SIAs) to understand their potential impact on surrounding communities. Recently, some companies have begun to address environmental and social impacts in a single assessment process, an Environmental and Social Impact Assessment (ESIA). This increasing integration of the two processes has resulted from the recognition that environmental and social impacts are often inextricably linked, particularly related to issues such as the health impacts of pollution or traditional use of ecological resources by indigenous and rural communities.”
- Greenpeace, *Bhopal Principles on corporate accountability*: “9. Implement the precautionary principle and require environmental impact assessments: States shall fully implement the Precautionary Principle in national and international law. Accordingly, States shall require corporations to take preventative action before environmental damage or health effects are incurred, when there is a threat of serious or irreversible harm to the environment or health from an activity, a practice or a product. Governments shall require companies to undertake environmental impact assessments with public participation for activities that may cause significant adverse environmental impacts.”
- BHP Billiton, *Sustainability Report (2007)*, at 83: “All sites are required to identify their key stakeholders and consider their expectations and concerns for all operational activities, across the life cycle of operations. Sites are also required to specifically consider any minority groups (such as Indigenous groups) and any social and cultural factors that may be critical to stakeholder engagement.”
- Chevron, *Stakeholder Engagement: Growing Successful Partnerships*: “Our Environmental, Social and Health Impact Assessment (ESHIA) process, deployed as a corporate process in early 2007, requires that all new capital projects be evaluated for potential environmental, social and health impacts. ESHIA is used to anticipate and plan the manner in which significant impacts are mitigated and benefits are enhanced during the planning, construction, operation and decommissioning of a project. Stakeholder engagement is central to the ESHIA process throughout the life of a project.”
- Equator Principles (July 2006): “*Principle 2: Social and Environmental Assessment*: For each project assessed...the borrower has conducted a Social and Environmental Assessment (“Assessment”) process to address, as appropriate and to the EPFI’s satisfaction, the

relevant social and environmental impacts and risks of the proposed project. ... The Assessment should also propose mitigation and management measures relevant and appropriate to the nature and scale of the proposed project.” The Equator Principles constitute a banking industry framework for addressing environmental and social risks in project financing.<sup>80</sup>

**Principle 4(6). Businesses and the states where they are located shall consult in good faith with indigenous and local communities prior to undertaking a project that may affect the community.**

A necessary precursor to undertaking any project that will affect indigenous and local communities or their lands and resources is consultation in good faith with the potentially affected peoples or communities. This necessarily includes providing the affected peoples or communities in a timely manner with full and accurate information about the project and its potential consequences. The information should be portrayed in a culturally sensitive and appropriate manner to the members of the community or the indigenous government as the case may be who will communicate with the rest of the community and make decisions on behalf of the community. Such information is essential to meaningful consultation and participation of indigenous and local communities in later steps of the project.

Consultation in good faith with affected communities, especially with indigenous peoples, is essential, but it is not a simple or self-evident process. As recognized in several international instruments related to indigenous peoples, indigenous peoples have the right to be consulted prior to beginning any project that will affect them or their lands and natural resources. Consultation must be meaningful, in that indigenous peoples must actually have the opportunity to influence the project, including whether and how it is undertaken, and in good faith, in that the businesses and government must actually take the opinions of the indigenous and local communities into consideration.

The right of consultation is not to be confused with the right to control the occupation, use and disposition of one’s own lands and resources. Where an indigenous people, or anyone, owns land or resources that will be developed or materially affected by a project, then mere consultation will not suffice. Where the lands or resources are owned by an indigenous people or by a person or community, then the consent of the owner is indispensable. The right to own property is covered in Principle 4(2) above.

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<sup>80</sup> They were originally developed by the banks gathered in October 2002 in London, including the International Financial Corporation, and launched in June 2003 in Washington DC. They were adopted by more than forty financial institutions and are intended to serve as a common baseline and framework for the implementation by each Equator Principles Financial Institution of its own internal social and environmental policies, procedures and standards related to its project financing activities. *See* Equator Principles, available at [www.equator-principles.com](http://www.equator-principles.com).



Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 19:  
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- UN Declaration on the Rights of Indigenous Peoples, Article 32(1):  
Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- ILO Convention No. 169, Article 6:
  1. In applying the provisions of this Convention, governments shall:
    - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
    - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - ...
  2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Relevant existing policies and principles include:

- EnCana, *Aboriginal Guidelines*: “EnCana’s community relations program will build, enhance and maintain positive relations in the Aboriginal community by ... Ensuring that potentially affected communities are provided with the necessary information required for open collaborative dialogue. ... Where EnCana is active the Company will encourage the development of community-based Aboriginal businesses which benefit both the Aboriginal communities and the Company by: Advising local Aboriginal communities of EnCana’s activities... .”
- Ceres Principles (1989): “We will inform in a timely manner everyone who may be affected by conditions caused by our company that might endanger health, safety or the environment. We will regularly seek advice and counsel through dialogue with persons in communities near our facilities.”

- Total, *Policy regarding indigenous peoples*: "... communicate plans of the operations to the indigenous groups through presentations and local meetings, in accordance with the existing regulations ... inform the indigenous groups about the development of operations ... ."
- JP Morgan Chase, *Indigenous Communities*: "Provided information on the ways in which the project may have a potentially adverse impact on them in a culturally appropriate manner at each stage of project preparation, implementation and operation."
- *OECD Guidelines for Multinational Enterprises*, at para. 35: "Information about the activities of enterprises and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest." The *Guidelines for Multinational Enterprises* were developed by the Organization for Economic Co-operation and Development, an organization that provides a setting where governments compare policy experiences, seek answers to common problems, identify good practices and coordinate domestic and international policies.<sup>81</sup>
- Equator Principles (July 2006): "*Principle 5: Consultation and Disclosure*: ... the government, borrower or third party expert has consulted with project affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish, to the satisfaction of the EPFI, whether a project has adequately incorporated affected communities' concerns... ."
- EnCana, *Aboriginal Guidelines*: "EnCana's community relations program will build, enhance and maintain positive relations in the Aboriginal community by...Ensuring timely discussions with local Aboriginal communities when EnCana's activities might impact on those communities... ."
- Alcan, *Indigenous Peoples Policy*: "We will strive to increase our awareness of the concerns and interests of indigenous peoples through respectful, open and transparent dialogue."

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<sup>81</sup> The Guidelines constitute a set of voluntary recommendations to multinational enterprises in all the major areas of business ethics, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. See *OECD Guidelines for Multinational Enterprises*, available at [www.oecd.org/document/28/0,2340,fr\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,2340,fr_2649_34889_2397532_1_1_1_1,00.html).

- Enbridge, *Indigenous Peoples Policy*: “ensure forthright and sincere consultation with indigenous peoples about Enbridge’s projects that affect them, to facilitate a shared understanding of interests and appropriate courses of action, ... .”
- BHP Billiton, *Sustainability Report* (2007), at 240: “At our operations and projects, we undertake early consultations and assessments with Indigenous peoples to ascertain whether our proposed activities are likely to impact cultural heritage values and, in conjunction with Indigenous peoples and relevant authorities, how best to plan and undertake those activities to avoid or minimize such impacts.”
- Chevron, *Human Rights Statement*: “We consult actively with a diverse range of knowledgeable stakeholders to build upon our understanding of the human rights issues present in our operating environments.”

**Principle 4(7). Projects, their sponsors, directors, and participating entities shall include the participation of indigenous and local communities in the design and implementation of the projects to lessen any adverse impact on them.**

If indigenous and local communities will be affected by a project, they should be involved in its design and implementation throughout the life of the project. Their participation in the project ensures that they are able to participate in the decision making related to the project to lessen the impact on the communities and perhaps bring benefits to the communities from the project. The participation of indigenous and local communities must be meaningful and real, which means that they must have the ability to sway decisions or even stop the project according to their interests. Participation must be an active role, and it must be much more than mere consultation or a seeking of indigenous views or a sharing of information.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 18:  
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.
- UN Declaration on the Rights of Indigenous Peoples, Article 23:  
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, 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.

- UN Declaration on the Rights of Indigenous Peoples, Article 32:
  1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
  2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
  3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Relevant existing policies and principles include:

- United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 40(h): “Enact, as appropriate, measures that protect indigenous resource management systems and support the contribution of all appropriate stakeholders, men and women alike, in rural planning and development.” 42(e): “Promote full participation and involvement of mountain communities in decisions that affect them and integrate indigenous knowledge, heritage and values in all development initiatives.” 44(l): “Promote the effective participation of indigenous and local communities in decision and policy-making concerning the use of their traditional knowledge.” 45(h): “Recognize and support indigenous and community-based forest management systems to ensure their full and effective participation in sustainable forest management.” 46(b): “Enhance the participation of stakeholders, including local and indigenous communities and women, to play an active role in minerals, metals and mining development throughout the life cycles of mining operations, including after closure for rehabilitation purposes, in accordance with national regulations and taking into account significant transboundary impacts.”
- Global Sullivan Principles: “Work with governments and communities in which we do business to improve the quality of life in those communities — their educational, cultural, economic and social well-being — and seek to provide training and opportunities for workers from disadvantaged backgrounds.”
- EnCana, *Aboriginal Guidelines*: “EnCana’s community relations program will build, enhance and maintain positive relations in the Aboriginal community by: Maintaining dialogue between the

Company and Aboriginal people; ... Considering support of Aboriginal events and programs in areas where EnCana conducts its business; and Taking pride in our contributions to communities and in our care for the environment. EnCana will seek Aboriginal input on proposed developments and business plans to encourage the involvement of those who may be affected by our operations.”

- Barrick, *Corporate Social Responsibility Charter*, at 2: “Barrick fully considers social, cultural, environmental, governmental and economic factors when evaluating project development opportunities. In those communities in which we operate, we interact with local residents, governments, non-governmental organizations, international agencies and other interested groups to facilitate long-term and beneficial resource development. We give priority to building partnerships in entrepreneurial endeavors that contribute to enhancing local capacity and we also commit to providing financial support of organizations through our charitable donations, budgets and policies. The employment of indigenous peoples and local community members is also a priority. Barrick respects the interests of all members of the communities in which we conduct business and encourages open and constructive dialogue and interaction with them. We take the responsibility to listen carefully, be responsive and provide information that is accurate, appropriate and timely.”
- Enbridge, *Indigenous Peoples Policy*: “promote participation by indigenous communities in Enbridge’s community investment funding programs.”

**Principle 4(8). Projects, their sponsors, directors, and participating entities shall not dislocate indigenous or other communities without their free, prior, and informed consent. If relocation occurs with such consent, the community must receive compensation, including compensation in the form of land of comparable quantity and quality, if possible and so desired by the community.**

Dislocation of indigenous and local communities must be avoided at all costs. Projects that dislocate indigenous and local communities must first have the genuine consent of the communities to be relocated. Obviously, such projects should not be undertaken unless absolutely necessary for economic development and human wellbeing. In such rare situations in which dislocation is agreed to by the affected communities, the displaced indigenous and local communities should not receive monetary compensation alone, rather they should receive comparable land in quantity and quality. As indigenous peoples in particular rely on the land to live, it is vital that they be able to continue their way of life and reliance on the land.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2)(c):
  2. States shall provide effective mechanisms for prevention of, and redress for... (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; ... .
- UN Declaration on the Rights of Indigenous Peoples, Article 10:
 

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
- UN Declaration on the Rights of Indigenous Peoples, Article 28:
  1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
  2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
- UN Declaration on the Rights of Indigenous Peoples, Article 32:
  1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
  2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
  3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
- ILO Convention No. 169, Article 16:
  1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
  2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Relevant existing policies and principles include:

- Forest Peoples Programme and Tebtebba Foundation, *Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises* (Dec. 29, 2006), at 55-56: "Due to the importance attached to indigenous peoples' cultural, spiritual and economic relationships to land and resources, international law treats relocation as a serious human rights concern. In international instruments, strict standards of scrutiny are employed and indigenous peoples' free and informed consent must be obtained. Additionally, relocation may only be considered as an exceptional measure in extreme and extraordinary cases."
- Rainforest Action Network, *Agribusiness Impact on Indigenous Communities Fact Sheet*: "Forced displacement is a serious issue for communities worldwide who live in areas proposed for agricultural expansion. The issue is particularly threatening for Indigenous peoples, who are rarely granted official land rights to their native territories by national governments. Indigenous peoples face racial discrimination that impedes their rights to self-determination and sovereignty. Agricultural expansion threatens not only their homes, but their sacred sites and the lands they have traditionally used for subsistence."
- Conservation International, *Reinventing the Well: Approaches to Minimizing the Environmental and Social Impact of Oil Development in the Tropics*, Volume 2/1997, at 4.1.3: "Even if governments and corporations act to protect people and their environment, it is only through the active involvement of affected communities and stakeholders that their interests can be fully safeguarded. Local people should participate in the process from the start, planning, questioning, designing, challenging and

evaluating projects under consideration in their territories. Interested stakeholders should increase their knowledge of potential social impacts, seek professional assistance to fully understand their legal rights, and demand the right to participate in all social impact assessments and management contingency plans. Empowered stakeholders should elicit the participation of local populations, help disseminate information throughout communities and conduct environmental and social hearings.”

**Principle 4(9). Projects, their sponsors, directors, and participating entities shall have precise, written policies consistent with these Principles to govern their interaction with indigenous and local communities.**

All of the above mentioned principles should be encompassed in a working and practical policy that has direct application to the project, and the policy should be firmly established and implemented before the project receives MDB funding. Such a policy, which may be provided in part by the MDB itself, would aim to ensure that the principles are known and followed throughout the process of the project. The policy would govern the project as well as inform others about their rights and responsibilities related to indigenous peoples throughout the process of the project. In order to be implemented effectively, such a policy may include training and educating those involved with the project, a method of complaint or recourse in the case of violation, and a process for periodic review of the policy.

Relevant existing policies and principles include:

- Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), at 5-6: “Multinational companies can improve their ability to promote human rights by developing an explicit company policy on human rights. ... The primary responsibility for monitoring company policies and practices lies with the company itself. However, all systems for monitoring compliance with voluntary corporate codes of behavior should be credible and their reports should be independently verifiable.” Annexed Checklist: “Company policy on human rights. All companies should adopt an explicit company policy on human rights which includes public support for the Universal Declaration of Human Rights. Companies should establish procedures to ensure that all operations are examined for their potential impact on human rights, and safeguards to ensure that company staff are never complicit in human rights abuses. The company policy should enable discussion with the authorities at local, provincial and national levels of specific cases of human rights violations and the need for safeguards to protect human rights. It should enable the



establishment of programs for the effective human rights education and training of all employees within the company and encourage collective action in business associations to promote respect for international human rights standards.”

- *OECD Guidelines for Multinational Enterprises*, para. 7:  
“Governments have the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction subject to international law and to the international agreements to which it has subscribed ... .”
- Equator Principles (July 2006): “*Principle 6: Grievance Mechanism:* ... to ensure that consultation, disclosure and community engagement continue throughout construction and operation of the project, the borrower will, scaled to the risks and adverse impacts of the project, establish a grievance mechanism as part of the management system. This will allow the borrower to receive and facilitate resolution of concerns and grievances about the project’s social and environmental performance raised by individuals or groups from among project-affected communities. The borrower will inform the affected communities about the mechanism in the course of its community engagement process and ensure that the mechanism addresses concerns promptly and transparently, in a culturally appropriate manner, and is readily accessible to all segments of the affected communities.”
- ConocoPhillips, *Code of Business Ethics and Conduct for Directors and Employees* (Feb. 9, 2007), at 8: “Upon receipt of a complaint, the Corporate Ethics Office and the General Counsel will (1) determine whether the complaint actually pertains to Accounting Matters and (2) when possible, acknowledge receipt of the complaint to the sender. Complaints relating to Accounting Matters will be reviewed under Audit and Finance Committee direction and oversight by the General Counsel, Internal Audit or such other persons as the Audit and Finance Committee determines to be appropriate. Confidentiality will be maintained to the fullest extent possible, consistent with the need to conduct an adequate review. Prompt and appropriate corrective action will be taken when and as warranted in the judgment of the Audit and Finance Committee. The Company will not discharge, demote, suspend, threaten, harass or in any manner discriminate against any employee in the terms and conditions of employment based upon any lawful actions of such employee with respect to good faith reporting of complaints regarding Accounting Matters or otherwise as specified in Section 806 of the Sarbanes-Oxley Act of 2002.”
- Newmont Mining, *Proposal No. 4—Stockholder Proposal Requesting a Report Regarding Newmont’s Community Policies and Practices* (2007), at 2: “The Board of Directors has established the Environmental, Health and Safety Committee, a standing committee

of the Board, which is comprised of at least three independent directors. The Committee is charged with overseeing a wide variety of Company policies and practices designed to achieve environmentally sound and responsible resource development. Therefore, it is well suited to review and evaluate the Company's policies and practices relating to its engagement with host communities around its operations. In conducting its review and evaluation of such policies, the Committee will also evaluate any existing and potential opposition to Newmont's operations from those communities. The results of that review will be included in a report (omitting confidential information and prepared at reasonable cost) made available to the stockholders prior to the 2008 annual meeting of stockholders. In particular, the Committee will meet at least twice a year to (a) review the effectiveness of the policies and systems for managing community risks associated with the Company's activities; (b) prepare a public assessment of the Company's community affairs performance; (c) report to the Board the Committee's findings, conclusions and recommendations on specific actions or decisions the Board should consider; (d) engage independent experts or advisors, to the extent it is deemed necessary, who have recognized expertise in community affairs; and (e) oversee Newmont's policies, standards, systems and resources required to conduct its activities in accordance with the Company's Core Values."

**Principle 5. Multilateral development banks have the on-going responsibility to monitor and periodically review the human rights performance of all projects or businesses receiving support.**

The UN Economic and Social Council (ECOSOC) has emphasized that IOs and states that have created and managed them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights.<sup>82</sup>

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 40:  
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules

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<sup>82</sup> U.N. ECOSOC, *Procedural Decisions*, *supra* note 36.

and legal systems of the indigenous peoples concerned and international human rights.

**Principle 6. Multilateral development banks shall undertake measures to implement these Principles, including educational measures for MDB staff, for MDB member states, and for the clients of the MDBs, among others.**

This Principle requires MDBs to take the kind of ordinary implementation measures that would be required of states. Examples of such implementation requirements can be found in nearly all human rights instruments.

**Principle 7. Multilateral development banks shall institute written procedures for the submission and consideration of complaints of human rights violations on behalf of any person or group with respect to any project or activity of the bank. Such procedures shall result in a written report where a human rights violation has occurred and recommendations for corrective action by the bank and by the project as appropriate.**

The internal complaint procedure required by this Principle is critical in order for MDBs to address the human rights concerns that frequently emerge from their projects and/or activities they support. These procedures should be carried out by MDBs in an effective and transparent fashion, and these procedures must allow project-affected people to make complaints of human rights violations concerning a project and/or operation to an MDB body or official. The body or official should be independent from those who have responsibility for the project or activity in question. Naturally, the normal rules of fairness, openness and record keeping must be observed.

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**If you would like to:**

- **Make comments, suggestions, or corrections relating to this memorandum or to the draft Principles of Law for Multilateral Development Banks; or**
- **Learn what you can do to promote stronger laws for protecting human rights and the environment,**

**Contact: Armstrong Wiggins, Washington Office Director, Indian Law Resource Center, 202.547.2800 [dcoffice@indianlaw.org](mailto:dcoffice@indianlaw.org)  
601 E Street, S.E., Washington, D.C. 20003**