

# INDIAN LAW RESOURCE CENTER

## CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

www.indianlaw.org

MAIN OFFICE  
602 North Ewing Street, Helena, Montana 59601  
(406) 449-2006 | mt@indianlaw.org

ROBERT T. COULTER, ESQ.  
Executive Director  
JANA WALKER, ESQ.  
*Admitted only in AZ, DC, NM*  
HESTER M. DILLON, ESQ.  
Director of Development



WASHINGTON OFFICE  
601 E Street, S.E., Washington, D.C. 20003  
(202) 547-2800 | dcoffice@indianlaw.org

ARMSTRONG A. WIGGINS  
Director, Washington Office  
LEONARDO A. CRIPPA, ESQ.  
*Admitted only in Argentina*  
KARLA E. GENERAL, ESQ.  
*Admitted only in NY*  
GRETCHEN GORDON, ESQ.  
*Admitted only in CA*

January 7, 2013

### Submission to the FCPF Carbon Fund on the Methodological Framework

The Indian Law Resource Center is a non-profit law and advocacy organization established and directed by American Indians. We provide legal assistance to indigenous peoples in the Americas who are working to protect their lands, resources, human rights, environment and cultural heritage. For over 30 years, we have advocated for better policies on indigenous peoples' issues at the United Nations and the World Bank Group.

We welcome this opportunity to comment on the development of the Carbon Fund's (CF) Methodological Framework, especially as it relates to indigenous peoples potentially engaging in or affected by Emissions Reduction programs. These preliminary comments address Issue Paper 5: Safeguards and Issue Paper 6: Benefit-sharing. The submission's structure follows the relevant questions identified below and provides input with regard to issue of indigenous peoples' land and resource rights, FPIC, benefit-sharing and grievance mechanisms. These issues are addressed in also greater detail in our paper "[International Law Principles for REDD+: The Rights of Indigenous Peoples and the Legal Obligations of REDD+ Actors](#)," which is attached and available at <http://www.indianlaw.org/climate>.

Finally, the Indian Law Resource Center requests the opportunity to participate in the Design Forum on Safeguards in order to provide more detailed discussion of the issues presented here. For further information, please contact Leonardo Crippa at [lcrippa@indianlaw.org](mailto:lcrippa@indianlaw.org) or Gretchen Gordon at [ggordon@indianlaw.org](mailto:ggordon@indianlaw.org).

**Issue Paper 5: WB safeguards, reporting on Cancun safeguards; feedback and grievance mechanisms.** *Q1: Can Programs readily use existing WB safeguards policies and instruments (e.g., SESA, ESMF), or are additional actions necessary? Q4: Is there anything that needs to be reported that is not likely to fall under WB safeguards or the SIS?*

Existing World Bank safeguards and instruments are insufficient for meeting the FCPF's obligations under the Cancun Agreements and the FCPF Charter with regard to the rights of indigenous peoples.<sup>1</sup> Instead, the CF should make a clear statement that it will not finance ER programs that would contravene countries' international human rights and environmental obligations. The CF should provide additional guidance to clarify the rights implications of ER programs with regards to indigenous peoples, and provide reporting instruments that are able to effectively identify and address rights implications, including through use of human rights impact assessment.

While current World Bank safeguards state that the Bank will not finance project activities that contravene countries' obligations under international environmental treaties and agreements<sup>2</sup>, the same commitment is not made with regard to countries' international human rights obligations. The CF should thus clarify that it will not finance ER programs that would contravene countries' international obligations as identified in international human rights and environmental agreements, rulings of relevant tribunals, and customary international law.

World Bank safeguards additionally are insufficient because the standards therein fall below internationally recognized standards on the rights of indigenous peoples, including most notably for forest carbon programs, in the area of rights to lands, territories and resources. For example, the Indigenous Peoples Policy OP 4.10 does not require recognition of indigenous peoples' collective land and resource rights. It also allows the diminishment of indigenous peoples' full ownership rights to mere use rights, and permits the conversion of indigenous peoples' collective landholding to individual title. OP 4.10 additionally still allows resettlement of indigenous peoples or restriction of access to lands and natural resources without free, prior and informed consent. Bank safeguards also do not acknowledge indigenous peoples' right to development or ensure indigenous peoples' right to determine their own development path and to benefit from development projects. Moreover, serious shortcomings have been found in implementation of the World Bank's Indigenous Peoples safeguard, most notably with regard to respect for indigenous peoples' rights to lands and resources.<sup>3</sup>

The Carbon Fund's obligations to promote and support the safeguards included in the Cancun Agreements, and to provide information on how these safeguards are addressed and respected means that it is both necessary and possible for the Methodological Framework to provide general guidance on the fundamental rights of indigenous peoples and related implications for

---

<sup>1</sup> The FCPF Charter requires that FCPF activities respect the rights of indigenous peoples "under national law and applicable international obligations" Chapter II, Article 3, Section 3.1; The Cancun Agreements also require "... [t]hat actions complement or are consistent with... relevant international conventions and agreements" and that Parties respect "the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United National General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples."

<sup>2</sup> World Bank Environmental Assessment Policy OP 4.01, Para 3; See also, World Bank Physical Cultural Resources Policy OP 4.11, Para. 3 (identifying the UNESCO World Heritage Convention as among the country obligations that must not be contravened).

<sup>3</sup> Working Paper prepared for the World Bank's Operations Policy and Country Services: Implementation of the World Bank's Indigenous Peoples Policy, A Learning Review (FY 2006-2008) (Aug. 2011), at 81, [http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous\\_peoples\\_review\\_august\\_2011.pdf](http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf).

forest carbon programs.<sup>4</sup> The key reference point for this guidance should be the UN Declaration on the Rights of Indigenous Peoples. For a more detailed discussion of the rights implications of forest carbon projects and related performance indicators, please see Principle 5: Self-Determination & Self-Government; Principle 6: Lands, Territories, & Natural Resources; Principle 7: Participation in Decision-Making; Principle 8: Free, Prior & Informed Consent; Principle 9: Benefit-Sharing; and Principle 10: Effective Remedy in “[International Law Principles for REDD+: The Rights of Indigenous Peoples and the Legal Obligations of REDD+ Actors.](#)”

In order to effectively address rights implications for indigenous peoples and avoid harm, the Carbon Fund cannot rely solely on planning and reporting framework instruments utilized by World Bank safeguards. SESAs, ESMFs, Indigenous Peoples Plans, and Indigenous Peoples Planning Frameworks are not designed to identify and address the unique collective rights and heightened vulnerabilities of indigenous peoples impacted by forest projects. A 2011 study on implementation of the World Bank’s Indigenous Peoples’ Policy, for instance, found only 59 percent of social assessments in Indigenous Peoples Plans and 51 percent of Indigenous Peoples Planning Frameworks to be satisfactory,<sup>5</sup> with many failing to consider long-term or adverse impacts.<sup>6</sup> Other significant shortcomings in these reporting tools include lack of evidence of broad community support or verifiable information regarding the process by which community support was obtained, weaknesses in benefit-sharing and consent in commercial development of natural and cultural resources, and lack of appropriate grievance mechanisms.<sup>7</sup>

While SESAs capture some human impacts, they are designed to capture primarily those social impacts that derive from environmental conditions, not those that derive from policy reforms or engagement processes. Instead, human rights impact assessment (HRIA) is a more adequate tool for Carbon Fund programs to assess and avoid harms to indigenous peoples. HRIA identifies potentially impacted rights-holders and the minimum standards necessary to prevent rights violations. Human rights impact assessments are qualitatively different than social and environmental impact assessments in that they are able to identify the full range of human impacts, including impacts on indigenous peoples as collective rights-holders. HRIA is also able to identify which specific outcomes must be prevented (human rights violations), versus those which may be avoided or mitigated.

*Q3: What are best practices for country or Program feedback and grievance mechanisms?*

Countries have an obligation to provide redress for any human rights violations associated with ER programs. Indigenous peoples and local communities also have a right to effective remedy, which may include grievance mechanisms. In particular, where a violation of indigenous

---

<sup>4</sup> Guiding Principles Programmatic Element 3: Safeguards (stating that the ER Program “promotes and supports the safeguards included in UNFCCC guidance related to REDD+, and provides information on how these safeguards are addressed and respected, including through the application of appropriate grievance mechanisms.”)

<sup>5</sup> OPCS Implementation Paper, *supra* note (3), at 49, 51, 60.

<sup>6</sup> *Id.*, at 49, 59.

<sup>7</sup> *Id.*, at 46, 50, 82.

peoples' human rights is found, restitution must be provided or, when this is not possible, just, fair, and equitable compensation. According to the UN Declaration on the Rights of Indigenous Peoples, when indigenous peoples' land, territories and resource rights are violated, compensation must take the form of lands, territories, and natural resources equal in quality, size and legal status, or of monetary compensation or other appropriate redress as freely agreed upon by the peoples concerned.

Principles for effective grievance mechanisms include, but are not limited to, the following:

- Ensure that no ER project is implemented without first having in place mechanisms at the project and institutional level to hear complaints of (1) a violation of a right of the community, (2) environmental harm, or (3) lack of compliance with applicable laws and policies;
- Ensure that the complaint mechanism decision-making body or official is independent from those agencies and agents who have responsibility for the ER project at issue;
- Ensure that complaint mechanisms operate in an open and transparent manner, are consistent with human rights norms and have the power to bring about corrective action by the host country or financing or implementing agency as appropriate;
- Ensure that communities in the project area are aware of the existence of the grievance mechanism and how it operates and that the mechanism is accessible to communities in their native language without requiring legal or technical expertise or financial resources;
- Ensure that when either human rights violations or environmental harm are identified in the project area, the project grievance mechanism communicate and collaborate with the competent local and national authorities, including criminal prosecutors; and
- Ensure that, regardless of any grievance mechanism, no ER project-affected community is deprived of access to prompt and effective remedies available at the national and international level.

Another best practice is the use of enforceable tri-partite agreements in carbon projects, as was similarly recommended by the Bank's Extractive Industries Review for use in extractive industry projects.<sup>8</sup> Such agreements between institutions, governments, and indigenous peoples, would provide for multiparty enforcement of specific project activities, where consented to by indigenous peoples.

**Issue Paper 6: Benefit sharing mechanisms, including equitable distribution; carbon rights, land, and resources tenure; non-carbon benefits.** *Q1: Should the CF set best practices or other benchmarks for equitable distribution and the design of benefit sharing mechanisms? Or should it simply require that such mechanisms be in place and be transparently proposed?*

Yes, the CF should set benchmarks for equitable distribution and the design of benefit sharing mechanisms. The fact that World Bank projects have scored low with regard to compliance with

---

<sup>8</sup> Extractive Industries Review, Striking a Better Balance, The World Bank Group and Extractive Industries, Final Report, December 2003, available at: <http://go.worldbank.org/PIW55278X0>.

benefit-sharing provisions points to the need for more guidance and supervision, rather than less. Additionally, while the form of benefits should be determined by a community, the equitable nature of the arrangement should meet a minimum standard based on the community's rights under international law to own, use and manage their lands, territories and resources. The amount of benefits necessary to incentivize forest protection should build upon this base level. Benefit sharing should not be left to be interpreted as compensation or mitigation. Where under international law indigenous peoples are the owners of the resources in question, including through possession even without formal title, or where indigenous peoples provide the service of safeguarding the carbon resources in question, benefit sharing arrangements should reflect their position as rights-holders.

Measures should also be taken to ensure that indigenous peoples are able to participate effectively in monitoring the implementation of the agreed benefit-sharing process at national and local levels.

*Q2: How can the CF incentivize ER Programs to make progress on carbon rights and land and resource tenure, within the short timeframe of ER Programs up to 2020? Q3: What non-carbon benefits are most important for ER Programs to consider? Should the CF set best practices or other benchmarks for some or all of the benefits identified in the “Key Elements of the Methodological and Pricing Approach for the FCPF Carbon Fund” provided by the Participants Committee? I.e., “improving local livelihoods, building transparent and effective forest governance structures, making progress on securing land tenure, and enhancing or maintaining biodiversity and/or other ecosystem services”*

Yes, the CF should set benchmarks for non-carbon benefits, especially regarding land and resource tenure. In order to incentivize and measure timely progress toward non-carbon benefits, progress must be clearly defined with time-bound requirements. In particular, certain actions need to occur prior to initiation of a forest carbon project, while other actions and benefits may be realized during the course of project implementation. Securing land tenure, consistent with international law, is one such action that should be a precursor to the initiation of forest carbon projects. Otherwise, there is the likelihood that such activities are initiated without clarification of the tenure framework that will in large part determine obligations and beneficiaries of participation, FPIC, and benefit-sharing. A compliance indicator of merely “*making progress on securing land tenure*” does not provide a clear standard against which to measure or incentivize progress.

Additionally, the Methodological Framework should identify actions or characteristics which would make a program ineligible for financing. Failure to respect indigenous peoples' rights to lands, territories and resources, including forced relocation, should trigger the cessation of funding.

For more on compliance indicators, see implementation measures in [International Law Principles for REDD+: The Rights of Indigenous Peoples and the Legal Obligations of REDD+ Actors](#).