

# INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

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## **Submission to the 1st Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights**

July 2015

The Indian Law Resource Center (Center) welcomes the opportunity to offer this submission to the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Working Group). In June 2014, the Human Rights Council decided to establish this Working Group and decided that its first two sessions would be dedicated to “conducting constructive deliberations on the content, scope, nature and form of the future [legally binding] international instrument.”<sup>1</sup>

The Center is a non-profit law and advocacy organization established and directed by American Indians and is a Non-Governmental Organization in consultative status with the United Nations Economic and Social Council. The Center seeks to overcome the grave problems that threaten Native 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. Since its foundation in 1978, the Center has engaged in the development of policies and legal standards relating to indigenous issues and international financial institutions in major intergovernmental organizations, including the United Nations, the Organization of American States and the World Bank Group.

This submission offers our initial recommendations about the future instrument’s scope and its content. Specifically, we recommend that the instrument directly address indigenous peoples’ collective rights and that it include public sector financial institutions within its scope. It is important to seriously address these issues in this instrument, because the Guiding Principles on Business and Human Rights (Guiding Principles) do not address them.<sup>2</sup> Their inclusion in this instrument would fill this gap and help improve the human rights performance of businesses, particularly those receiving public sector financing and support.

The problem of human rights violations in business contexts is clear and well documented. Solving it will require an instrument that can clarify first, how existing human rights standards apply to business actors and secondly, where victims, especially indigenous peoples, can go to obtain remedies for human rights violations. Clarifying the standards that apply to business actors will improve the coherence of human rights law and will have the additional benefit of ensuring that all private business actors and public sector financial institutions compete on the same level legal grounds, adhere to the same standards, and are responsible for upholding the same set of human rights obligations. An instrument that imposes standards on only one set of business actors while leaving others unaccountable will be less effective at improving rights enjoyment and will likely result in various economic

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<sup>1</sup> Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, H.R. Council Res. 26/9, HRC/26/L.22/Rev.1 (June 2014).

<sup>2</sup> See, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK, United Nations Office of the High Commissioner for Human Rights (United Nations, 2011).

distortions as businesses seek to exploit the resulting differentials in human rights obligations. Ultimately, as international scholars conclude, such a situation would undermine the most basic aims of the law of responsibility:

- (1) to prevent or minimize breaches of obligations prescribed by law; and
- (2) to provide remedies for those subjects whose legal rights have been infringed due to such violations.<sup>3</sup>

### **Content: Indigenous Peoples' Collective Rights**

The Center urges the Working Group to directly address indigenous peoples' collective rights within the proposed instrument. Although historically human rights have often been understood as individual rights, many of the human rights of indigenous peoples are held collectively by communities, tribes, nations, or peoples. Serious attention to this topic is necessary to effectively protect indigenous peoples' human rights and to help business actors to clearly understand their human rights obligations in this area.

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 many business and development projects. It provides that all peoples have the right to freely dispose of their natural wealth and resources, and further states that "In no case may a people be deprived of its own means of subsistence." The right of peoples to their natural resources is also guaranteed by Article 25 of the Covenant on Economic, Social and Cultural Rights. Articles 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples explicitly recognize indigenous peoples right of self-determination and self-government respectively.

Indigenous peoples' ownership of their lands, territory, and natural resources is another important collective right. All of these collective rights of indigenous peoples have been recognized explicitly in the United Nations Declaration on the Rights of Indigenous Peoples (Article 26) and the International Labor Organization Convention 169 (Article 13-15). The United Nations Special Rapporteur Erica-Irene Daes in "Indigenous Peoples Permanent Sovereignty over Natural Resources" explains indigenous peoples' legal and governmental authority to manage and control the natural resources pertaining to their lands and territory and, in doing so, to enjoy the benefits of their development and conservation.<sup>4</sup> In the Americas, human rights cases and decisions have repeatedly recognized indigenous peoples' rights to land as collectively held property rights.<sup>5</sup> More recently, states have reached consensus on most of the provisions of the proposed American Declaration on the Rights of Indigenous Peoples relating to indigenous peoples' collective property rights to lands, territory and natural resources (Article XXIV).<sup>6</sup>

Indigenous peoples' collective rights deserve serious attention in the future instrument, because in conducting a human rights impact assessment, assessing the presence of and risks to collectively held human rights can pose a unique challenge. For example, conducting consultation with indigenous peoples and acquiring free, prior and informed consent for proposed project activities usually requires engaging with representatives of the rights-holders-- 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

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<sup>3</sup> MOSCHER HIRSCH, *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES* 7, 8 (Martinus Nijhoff Publishers, 1995).

<sup>4</sup> Final Report submitted by the Special Rapporteur Erica-Irene A. Daes, to the Sub-Commission on Promotion and Protection of Human Rights, *Indigenous Peoples' Permanent Sovereignty over Natural Resources*, E/CN.4/Sub.2/2004/30, para. 6 (July 13, 2004).

<sup>5</sup> *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); *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; *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; *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Report No. 40/04 (October 12, 2004).

<sup>6</sup> Outcome of the Eighteen Meetings of Negotiations in the Quest for Points of Consensus, held by the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 11 corr. 1 (June 4, 2015), Art. XXIV.

rights can lead to consultation processes that actually undermine traditional indigenous means of decision-making and run afoul of international human rights standards.

The complexity of addressing these collective human rights is illustrated by a recent case before the Inter-American Court of Human Rights, which suggests that in some instances even securing the support of traditional leaders, in the absence of a community consensus, may not shield corporations from risks associated with violations of collective human rights. In that case, the court noted that human rights tribunals must consider complaints alleging violations of human rights, including collectively held property rights, made by community members, even when recognized traditional leaders oppose the human rights complaint.<sup>7</sup> To effectively protect indigenous peoples' human rights and to set clear standards for businesses, the proposed instrument will need to give careful attention to the details of indigenous peoples' collective rights.

### **Scope: Public Sector Financial Institutions**

The Center urges the Working Group to include public sector financial institutions within the scope of the proposed instrument. Addressing the full range of actors involved in human rights violations in the business context will allow the Working Group to comprehensively address all relevant liability issues, including cases where corporate abuses occur in projects that have received public financing.

Public sector financial institutions are banks owned and controlled by one or more states. The Brazilian Development Bank<sup>8</sup> and China Development Bank<sup>9</sup> are examples of banks owned and controlled by only one state. The New Development Bank BRICS (formerly referred to as the BRICS Development Bank),<sup>10</sup> the International Bank for Reconstruction and Development (the World Bank),<sup>11</sup> the International Finance Corporation,<sup>12</sup> and the Inter-American Development Bank (IDB),<sup>13</sup> are all examples of banks controlled and owned by more than one state.

It is important for the Working Group to address the bank-business nexus within the proposed instrument for several reasons. First, public sector financial institutions often fund corporations in business sectors that disproportionately affect indigenous communities, such as resource extraction, energy development, and large-scale infrastructure projects. As one example, the IDB provides financial support to the Mareña Renovables Wind Power

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<sup>7</sup> The Case of the Saramaka People v. Suriname, *supra* note 5, at paras. 77-185.

<sup>8</sup> Brazilian Development Bank's By-laws, Brazil's Executive Branch Decree 4418, Art. 1, Oct. 11, 2002 ("The Brazilian Development Bank... a wholly-owned, federal government company governed by private law, owner of its assets, shall be governed by these By-laws and by the legal provisions applicable hereto").

<sup>9</sup> See 2014 Changes in Share Capital and Shareholders ("CDB's shareholders are the Ministry of Finance (MoF), Central Huijin Investment Ltd. (Juijin) and the National Council for Social Security Fund (NCSSF) ... The MoF is a unit of the State Council... Huijin is a wholly state-owned limited liability company...NCSSF is a governmental agency..."). <http://www.cdb.com.cn/english/NewsInfo.asp?NewsId=5835>.

<sup>10</sup> See The New Development Bank BRICS art. 2, Agreement, July 15, 2014, available at <http://ndbbrics.org/agreement.html> ("The founding members of the Bank are the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa. The membership shall be open to members of the United Nations, in accordance with the provisions of the Articles of Agreement of the New Development Bank. It shall be open to borrowing and non-borrowing members").

<sup>11</sup> See International Bank for Reconstruction and Development, Articles of Agreement art. 2, Feb. 16, 1989, available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> ("Section 1. Membership (a) The original members of the Bank shall be those members of the International Monetary Fund which accept membership in the Bank before the date specified in Article XI, Section 2 (e). (b) Membership shall be open to other members of the Fund, at such times and in accordance with such terms as may be prescribed by the Bank").

<sup>12</sup> See Articles of Agreement of the International Finance Corporation art. 2, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117 ("Section 1. Membership (a) The original members of the Corporation shall be those members of the Bank listed in Schedule A hereto which shall, on or before the date specified in Article IX, Section 2 (c), accept membership in the Corporation. (b) Membership shall be open to other members of the Bank at such times and in accordance with such terms as may be prescribed by the Corporation").

<sup>13</sup> Inter-Am. Dev. Bank, Agreement Establishing the Inter-American Development Bank art. II, § 1, Apr. 8, 1959, 10 U.S.T. 3029, 389 U.N.T.S. 69 ("(a) The original members of the Bank shall be those members of the Organization of American States which, by the date specified in Article XV, Section 1(a), shall accept membership in the Bank. (b) Membership shall be open to other members of the Organization of American States and to Canada, Bahamas and Guyana, at such times and in accordance with such terms as the Bank may determine...").

Project (now renamed “Energía Eólica del Sur”) in Oaxaca, Mexico.<sup>14</sup> In this project, a wind power company is constructing a wind farm and transmission lines on lands owned and possessed by indigenous communities. The project has resulted in numerous violations of the communities’ human rights, including their collective property rights. The Brazilian Development Bank,<sup>15</sup> the International Finance Corporation,<sup>16</sup> and the Inter-American Development Bank<sup>17</sup> also provide funding to similar private sector projects that can affect indigenous peoples in developing countries.

Secondly, almost no public sector financial institutions carry out any human rights due diligence or require client companies to do so. Although the Guiding Principles call for human rights due diligence to be carried out by private sector actors, these banks and their member states are failing to promote respect for human rights or to demand actions to effectively protect human rights in the business context.<sup>18</sup> Human rights due diligence measures, including human rights impact assessments and operational policies mandating human rights compliance, should be required prior to approving financing for private sector projects.

The International Finance Corporation (IFC) stands out as perhaps the only public sector financial institution that formally implements human rights due diligence into its activities. The IFC’s *Guide to Human Rights Impact Assessment and Management*, adopted in 2010, was developed in conjunction with the International Business Leaders Forum, in association with the UN Global Compact.<sup>19</sup> Still, the *Guide* is only a voluntary policy tool that IFC client companies can make use of if they choose—it is not part of the IFC’s mandatory environmental and social performance standards, their “safeguards” policy framework. The IFC’s existing voluntary human rights tools are insufficient to prevent human rights violations. Stronger, binding law is needed.

Thirdly, applying human rights standards to public sector financial institutions would clarify the rules and obligations for all actors. It would reduce legal and policy incoherence, help actors avoid unintentional rights violations and allow victims to better understand and assert their rights within the existing human rights framework. The victims in the Mareña Renovables project were obliged to seek a remedy from an internal project-complaint mechanism of the IDB. This mechanism applies standards unique to the IDB and operates without binding precedent or even significant institutional history. This institution-specific approach to rights protection is unpredictable and unreliable. In the aggregate it presents a cumbersome approach that risks deep fragmentation of relevant international law principles as each institution’s mechanism addresses cases independently of the broader international system, often without any reference to binding international legal standards.

Fourthly, because these banks’ internal project-complaint mechanisms are, by design and principle, severely limited in their ability to provide remedies to victims, they do not meet the applicable international human rights law standards relating to the right to an effective remedy.<sup>20</sup> The IDB’s Independent Consultation and Investigation Mechanism is a useful tool, but after a violation has occurred, it can only seek to identify and call attention to breaches of the IDB’s policies.<sup>21</sup> Such a system can provide useful internal feedback to the institution,

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<sup>14</sup> See Inter-Am. Dev. Bank, *ME-L1107: Energía Eólica del Sur (EES)*, <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=ME-L1107>

<sup>15</sup> Brazilian Development Bank’s By-laws, Brazil’s Executive Branch Decree 4418, Art. 9, *supra* note 8 (“The BNDES may also: II. finance investments made abroad by national companies, provided that they contribute towards the economic and social development of the country...”).

<sup>16</sup> See Articles of Agreement of the International Finance Corporation art. 1, *supra* note 12 (“The purpose of the Corporation is to further economic development by encouraging the growth of productive private enterprises in member countries, particularly in the less developed areas...”).

<sup>17</sup> Inter-Am. Dev. Bank, Agreement Establishing the Inter-American Development Bank art. I sec. 2, *supra* note 13 (“(iii) to encourage private investment in projects, enterprises, and activities contributing to economic development and to supplement private investment when private capital is not available on reasonable terms and conditions...”).

<sup>18</sup> GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 2, at 17.

<sup>19</sup> See International Finance Corporation, *Guide to Human Rights Impact Assessment and Management*, available at [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/)

<sup>20</sup> Leonardo A. Crippa, ‘Multilateral Development Banks and Human Rights Responsibility’, 25 Am. U. Int’l. L. Rev. 567-576 (2010).

<sup>21</sup> “The ICIM process includes two phases: a Consultation Phase that provides the opportunity to address requesters’ concerns applying consensual and flexible approaches and a Compliance Review Phase that enables requesters to ask for an investigation of a Bank-financed operation by a Panel of independent experts with the objective of establishing whether any Bank action or

but does little to remedy violations, and the value of its work as a deterrent to future violations is uncertain.

Finally, a treaty requiring business entities to conduct basic human rights due diligence makes economic sense. In the Mareña Renovables project discussed above, the project as designed failed, and all involved incurred significant costs. The company and local officials spent money and time initially fighting against accountability while the indigenous peoples bore the expenses of bringing the complaint;<sup>22</sup> the company and bank paid the costs of extensive delay and ultimate relocation of the project.<sup>23</sup> This economic waste could all have been avoided through human rights due diligence at the initial design stage to identify the relevant human rights issues, the rights holders, and the applicable law. Human rights due diligence is not about fighting development; it is about creating sustainable projects with reduced risks and better outcomes for both proponents and affected peoples.

## Conclusion

In order to be useful, this new instrument must be able to improve the lives of those whose human rights have been violated by business activities, regardless of whether those rights are individual or collective, and regardless of the details of the violator's entity structure. Many of the important substantive rights of indigenous peoples, including their rights of self-determination, self-government, and their right to their lands, territories and natural resources are collective rights. Effectively protecting these collective rights will require careful study and direct attention in the text of the proposed instrument.

Public sector financial institutions, such as international financial institutions, are legal entities with legal rights and obligations under international law as international intergovernmental organizations.<sup>24</sup> In many cases their investment activities are also functionally indistinguishable from those of private transnational corporations. They engage in the same sort of business activities and present the same sorts of jurisdictional barriers and complexities that too often prevent those whose rights have been violated from obtaining a remedy. To be effective and useful from a victim's perspective, this proposed treaty should not make arbitrary distinctions based on whether

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omission has resulted in non-compliance with a Relevant Operational Policy and direct, material adverse effects to the Requester." Inter-American Development Bank, *About Us: Evaluation and Monitoring*, at <http://www.iadb.org/en/about-us/evaluation-and-auditing.6080.html>.

<sup>22</sup> See Inter-American Development Bank, *Independent Consultation and Investigation Mechanism, Mexico – Mareña Renovables Wind Power Project (ME-MICI002-2012)*, <http://www.iadb.org/en/mici/complaint-detail.1804.html?ID=ME-MICI002-2012>

<sup>23</sup> See Inter-American Development Bank, *ME-L1107: Energía Eólica del Sur (EES)*, <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=ME-L1107> (prior the relocation of this project, it was called Mareña Renovables Wind Power Project).

<sup>24</sup> Sources supporting this view include (1) the jurisprudence of the International Court of Justice (The ICJ has concluded that the United Nations, as an international organization, 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 international organizations 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 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); (2) the Vienna Conventions (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); and (3) the International Law Commission's draft treaty provisions on the responsibility of international organizations (The International Law Commission, which has responsibility for elaborating the Draft Convention on Responsibility of International Organizations, has defined an international organization, 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)).

the actor is a private investment bank or a public sector financial institution. For victims, the important factor is that their human rights were violated.

This Working Group has the opportunity to create a practical instrument that will protect human rights and help individuals and communities to obtain justice for violations they may suffer due to business activities. The core benefits this instrument can offer victims are a clear legal standard that can be used to evaluate their claims and access to the existing international human rights system and its extensive body of law and guidance. While the true value of the instrument will be measured by its impact on individuals' and peoples' ability to enjoy their rights, clear legal standards that are applied fairly and evenly will also benefit business actors, including public sector financial institutions, by helping them to identify and reduce human rights risks in their undertakings in a clear and consistent manner.

## **Recommendations**

### **1. Directly address indigenous peoples' collective rights within the future instrument.**

*While the Center understands that all human rights, including both civil and political rights and economic and social rights are indivisible and interrelated, indigenous peoples' collective rights raise unique issues and it is often these rights that are at particular risk from business and development activities.*

### **2. Include public sector financial institutions within the scope of the proposed instrument.**

*Excluding these institutions from the scope of the treaty would create a significant gap in the treaty's coverage and encourage incoherence in the development and application of human rights law, thereby reducing the instrument's effectiveness.*

### **3. Hold a panel discussion on the question of the human rights obligations of public sector financial institutions.**

*Although these institutions often conduct the same kind of business activities as private sector entities, and thus risk violating human rights in the same ways, the types of projects they fund, the scale and scope of their activities, as well as their status as public sector institutions raise distinct questions that deserve focused attention during the development of this instrument.*

### **4. Hold a panel discussion on the distinction between human rights impact assessments and other kinds of assessments, such as environmental or social impact assessments.**

*All of these due diligence procedures share important features, but an effective human rights impact assessment requires a legal analysis, a specific approach that requires distinct skills and tools.*