

INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

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Jim Yong Kim
President
The World Bank
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**RE: Breaking the Ambivalence:
Ending Allotment on Indigenous Lands, Raising Concerns over the Use
of Consultations to Overcome the Rights of Indigenous Peoples, and
Ensuring No-Contact with Indigenous Peoples in Voluntary Isolation**

Dear President Kim:

The purpose of this letter is to express our concerns on the World Bank's (Bank) second draft of the indigenous peoples policy, the Environmental and Social Standard 7 Indigenous Peoples (ESS7). As it stands today, ESS7 embraces three development practices that are quite harmful to indigenous peoples: the division of collectively held indigenous lands among individual community members, the increased use of consultations as a means to overcome the rights of indigenous peoples, and contact with indigenous peoples in voluntary isolation. We urge the Bank to change current language of the ESS7 to explicitly prohibit financial support to projects leading to these major impacts. This is the time for the Bank to break up the existing ambivalent policy language and take a clear position on these three harmful development practices. Otherwise, the Bank would adopt a standard that not only is contrary to the goals of the Bank's indigenous peoples policy, but also falls below applicable international and domestic law rules.

The Indian Law Resource Center (Center) is a non-profit law and advocacy organization established and directed by Native American attorneys and experts. We provide legal assistance without charge to indigenous peoples in the Americas who are working to protect their lands, resources, human rights, environmental and cultural heritage. Since the early 1980s, we have been advocating for better policies on indigenous issues within public sector financial institutions, such as the World Bank and other multilateral development banks.

1. Ending Allotment on Indigenous Lands

The Bank must put an end to the policy of allotting indigenous lands for development purposes. As a U.S. citizen, you know how destructive this policy was for Indian nations in the U.S. About 90 million acres of Indian land were removed from Indian ownership and control, among other serious impacts.¹ This destructive U.S. allotment policy has no place in the ESS7, and should not be promoted in the developing world. The 1934 Indian Reorganization Act (IRA) ended the process of allotment on Indian lands in the U.S.² Given the passage of the IRA, the U.S. should not support the Bank's indigenous peoples policy, ESS7, since it endorses and encourages the allotment of indigenous lands.

The current language of ESS7 endorses the conversion of property rights to land to individual ownership.³ The Bank should re-think this approach and make the right decision by removing such conversion from the ESS7—the first draft ESS7 did so.⁴ If not, the Bank will continue to support borrowing countries' processes of allotment on indigenous lands, one of the most destructive development practices. The policy of allotting indigenous lands aims at breaking up collectively-held lands, wiping out indigenous peoples' cohesiveness and assimilating them. Because allotment is instrumental in opening up indigenous lands, it paves the way for extractive, infrastructure, forestry, and other industries interested in indigenous lands and resources.

Instead of learning from its own past policy and practice shortcomings in preventing harm to project-affected indigenous communities, the Bank is perpetuating them by endorsing the U.S. allotment policy on indigenous lands. The Bank's own accountability mechanism, the Inspection Panel, has concluded that Bank-financed projects supporting activities contingent on establishing individual ownership do harm indigenous peoples. In 2006, the Inspection Panel concluded that individual titling supported by the Honduras' Land Administration Project was harmful to indigenous peoples⁵ because it decreased the Garifuna people's collective lands, which placed their cultural integrity and economic base at risk.⁶ The Inspection Panel reached the same conclusion with regard to the Panama's Land Administration Project impacts on the

1 See, Indian Land Tenure Foundation, History of Allotment, <https://www.iltf.org/resources/land-tenure-history/allotment> (last visited on June 22, 2016). See also, Indian Country Today, How U.S. Allotment Process Devastated Indian Lands, <http://indiancountrytodaymedianetwork.com/2013/11/18/government-engineered-allotment-policy-devastating-indians-152224> (last visited on June 22, 2016).

2 The Indian Reorganization Act, 25 U.S.C. § 461 *et seq* (1934).

3 World Bank Environmental and Social Framework: Second Draft for Consultations, ESS7 Indigenous Peoples, July 1, 2015, para. 21 (“The objective of... plans [contingent on establishing rights to lands and territories] will be the following: (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.”)

4 World Bank Environmental and Social Framework: First Draft for Consultations, ESS7 Indigenous Peoples, July 30, 2014, para. 23 (removing former paragraph 17 of the OP 4.10 Indigenous Peoples Policy, which included language relating to conversion to individual ownership).

5 See, The Inspection Panel, Investigation Report, Honduras: Land Administration Project, (IDA Credit 3858-HO), June 12, 2007, para. 378. [http://ewebapps.worldbank.org/apps/ip/PanelCases/38-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/38-Investigation%20Report%20(English).pdf).

6 *Id.* at para. 378.

Naso and Ngabe indigenous peoples.⁷ The OP 4.10 Indigenous Peoples, the Bank's existing indigenous peoples policy, allowed financial support to individual land titling.⁸

The ESS7 standard is contrary to applicable legal rules. No international instrument supports individual over collective ownership of lands. The recently adopted 2016 American Declaration on the Rights of Indigenous Peoples (American Declaration) recognizes and calls for respect of indigenous peoples' "collective rights that are indispensable for their existence, well-being, and integral development as peoples,"⁹ such as their collective ownership of lands, territories, and resources.¹⁰ The same is true with regards to the 2007 U.N. Declaration on the Rights of Indigenous Peoples¹¹ and the 1989 International Labour Organization's Indigenous and Tribal Peoples Convention No. 169.¹²

The Bank should follow the successful development practices upheld in its Nicaragua Land Administration Project, which fully supported the recognition of collective ownership of land. This is the right approach. The Bank helped Nicaragua implement the Nicaraguan Law 445, which regulates the regime of collective ownership rights of indigenous peoples.¹³ In the *Awas Tingni* decision,¹⁴ the Inter-American Court of Human Rights ordered Nicaragua to adopt such legislation. In turn, this helped Nicaragua issue collective titles acknowledging indigenous peoples' collective ownership over lands under their possession, not "individual ownership" nor "custodial or use rights."

2. Raising Concerns over the Use of Consultations to Overcome the Rights of Indigenous Peoples

Resorting to consultations as a means to overcome the rights of indigenous peoples for development purposes is not a safeguard measure, it is the opposite. The increasing use of consultation proceedings with indigenous peoples has become the Bank's formula for getting around their collective rights, especially those relating to land and natural resources. The Bank should not adopt a policy that allows individual titling with consultation because it has proven to

⁷ See, The Inspection Panel, Investigation Report, Panama: Land Administration Project, (Loan No. 7045-PAN), Sept. 16, 2010. [http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation%20Report%20(English).pdf).

⁸ The World Bank Operational Manual, OP 4.10 Indigenous Peoples, July, 2005, para. 17 ("Such legal recognition may take the following forms: ... (b) conversion of customary usage rights to communal and/or individual ownership rights.")

⁹ Organization of American States, American Declaration on the Rights of Indigenous Peoples Art. VI, OEA/Ser.P, AG/doc.5537/16 (June 8, 2016).

¹⁰ Organization of American States, American Declaration on the Rights of Indigenous Peoples Art. XXV, OEA/Ser.P, AG/doc.5537/16 (June 8, 2016).

¹¹ U.N. Declaration on the Rights of Indigenous Peoples Art. 26, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007).

¹² International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries Art. 14, 15, ILOLEX C169 (June 27, 1989).

¹³ See, Law 445, Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Rivers Bocay, Coco, Indio and Maíz, Jan. 22, 2003.

¹⁴ Case of the *Awas Tingni (Sumo) Community v. Nicaragua*, Inter- Amer. HR Court (Serie C No. 79), para. 173(3) (ordering Nicaragua to adopt "legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores").

be extremely harmful and detrimental to indigenous peoples. We urge the Bank to stop promoting this practice in the developing world.

The practice of consulting as a means to abrogate indigenous peoples' communal rights to land can be seen throughout the Americas. Instead of honoring indigenous peoples' communal rights to their land, states and developers have resorted to consultations with indigenous peoples to justify the detrimental practice of individual titling. In fact, a majority of the Bank's projects favor individual, private land ownership and reject communal or collective land ownership.¹⁵

In Professor Liza Grandia's study on Guatemala's 1998 Land Administration Project in Petén, she assessed that State land agencies informed the Q'eqchi' Maya indigenous people that their land had to be surveyed and the title had to be in an individual's name since the villages' councils had no legal standing, according to the State.¹⁶ Yet, before State agencies began the Project, 4/5ths of Q'eqchi' communities presided over and governed their lands.¹⁷ Numerous fieldworkers and project managers asserted that the Q'eqchi' preferred individual titles, but anthropologists and Q'eqchi' leaders asserted that they favored communal land titles.¹⁸ Of this contradiction, Grandia's study depicted that, "Even if not of their preference, many indigenous communities accepted the individual and private land titling process to avoid conflicts with government authorities in the context of civil war. Nowadays, due to the threat of being left without any rights over their lands, [they] continue to accept the individual land titling."¹⁹

Additionally, even with consultations, individual titles are dangerous to indigenous peoples' safety, as they receive threats to sell their titles at little to no cost.²⁰ Though dangerous to indigenous peoples' lands, culture, and safety, individual titling of land by the Bank is rationalized because it allows the Bank to access credit and use the indigenous peoples' lands as collateral.²¹ One recommendation to this problem based on Grandia's studies is to, "Expand existing options concerning legalization of land in order to recognize the rights of indigenous peoples relating to their collective land tenure and organization."²²

3. Ensuring No Contact with Indigenous Peoples in Voluntary Isolation

For the very first time, the Bank is addressing the question of indigenous peoples in voluntary isolation into the indigenous peoples policy. This is a step in the right direction that merits decisive protective policy language to actually preserve the integrity of these particular

15 Liza Grandia, *Unsettling: Land Dispossession and Enduring Inequity for the Q'eqchi' Maya in the Guatemalan and Belizean Frontier Colonization Process* 232 (2006).

16 Grandia, L. (2013). *Missing the Community for the Cadastre* [PowerPoint slides]. Retrieved from <http://indianlaw.org/sites/default/files/Grandia.pdf>.

17 *Id.*

18 Liza Grandia, *ENCLOSED: CONSERVATION, CATTLE, AND COMMERCE AMONG THE Q'EQCHI' MAYA LOWLANDERS* 129 (2012).

19 Jorge Grunberg, Liza Grandia, Bayron Milian, et. al, *TIERRA E IGUALDAD; DESAFIOS PARA LA ADMINISTRACION DE TIERRAS EN PETEN, GUATEMALA* 98 (2012).

20 Grandia, L. (2013). *Missing the Community for the Cadastre* [PowerPoint slides]. Retrieved from <http://indianlaw.org/sites/default/files/Grandia.pdf>.

21 *Id.* at Enclosed 134.

22 Jorge Grunberg, Liza Grandia, Bayron Milian, et. al, *TIERRA E IGUALDAD; DESAFIOS PARA LA ADMINISTRACION DE TIERRAS EN PETEN, GUATEMALA* 108 (2012).

peoples. Setting an explicit prohibition of financial support to projects affecting them will achieve such protection and prevent them from being further processed by Bank Management. However, the current language of ESS723 implicitly allows such financial support because it is ambivalent on whether or not to fund the projects at stake.

The question of indigenous peoples in voluntary isolation is a regional particularity, which is found to exist primarily in South America, in the Amazon and Chaco regions. The American Declaration, a regional human rights instrument, calls all countries of the Americas to protect their lands, culture, and environmental and collective integrity.²⁴

The Bank should follow the advice of regional human rights bodies, such as the Inter-American Commission on Human Rights, which calls relevant institutions to abstain from endorsing actions that would force contact with these peoples. The Commission's *Special Report on Indigenous Peoples in Voluntary Isolation and Initial Contact* recommends states to not only "refrain from granting licenses or authorizations for activities related to the extraction of natural resources... in areas with a presence of indigenous peoples in voluntary isolation and initial contact,"²⁵ but to also immediately modify existing licenses or authorizations to ensure the full respect for the rights of indigenous peoples in voluntary isolation.²⁶

Applicable domestic laws prohibit all forms of contact with indigenous peoples in voluntary isolation. No exception has been made for development purposes. Peru,²⁷ Ecuador,²⁸ and Brazil²⁹ adopted specific legislation to protect indigenous peoples and prohibit contact with them. The particularity of this issue also led some countries, including Ecuador,³⁰ Bolivia,³¹ Brazil,³² and Paraguay,³³ to include specific provisions in their national constitutions regarding indigenous peoples to recognize their ownership of lands and resources, prohibit all types of

23 World Bank Environmental and Social Framework: Second Draft for Consultations, ESS7 Indigenous Peoples, July 1, 2015, para. 16 ("Projects that may have potential impacts on these peoples require appropriate measures to recognize, respect and protect their land and territories, environment, health and culture, as well as measures to avoid all undesired contact with them as a consequence of the project.")

24 Organization of American States, American Declaration on the Rights of Indigenous Peoples Art. XXVI, OEA/Ser.P, AG/doc.5537/16 (June 8, 2016).

25 Inter-Amer. C.H.R., *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, OEA/SER.L/V/II, Doc.47/13, Dec. 30, 2013, p. 78, rec. 11.

26 Inter-Amer. C.H.R., *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, OEA/SER.L/V/II, Doc.47/13, Dec. 30, 2013, p.79, rec. 12.

27 See generally Ley 28736 para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento Voluntario y en Situación de Contacto Inicial [Law 28736 for the Protection of Indigenous or First Peoples in Isolation and Initial Contact], Peru, May 16, 2006 (establishing a legal framework to protect indigenous peoples in voluntary isolation or initial contact located in the Peruvian Amazon region).

28 See Presidential Decree 2187, Ecuador, Jan. 3, 2007 (creating protected areas where indigenous peoples in voluntary isolation live and prohibiting infrastructure and extractive industry projects in such areas).

29 See Lei 6001 Dispo e sobre o Estatuto do Indio [Law 6001 on Indians], Brasil, Dec. 19, 1973, Art. 14, 18 (recognizing the existence of indigenous peoples in voluntary isolation and declaring that their lands are free from resource extraction).

30 Constitution of Ecuador, art. 57, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (recognizing their ownership rights and specifically prohibiting all types of extractive activities in their lands).

31 Inter-Amer. C.H.R., *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, OEA/SER.L/V/II, Doc.47/13, Dec. 30, 2013, para 62, (recognizing their right to live in isolation in their territory).

32 *Ibid* para 63, (recognizing their ownership rights to land and resources).

33 *Ibid* para 63, (recognizing their ownership rights to land and resources).

extractive industry activities in their lands, and protect their right to live in isolation in their territory.

It is in the best interest of the Bank to continue making final changes to the indigenous peoples policy in order to ensure that project-activities neither lead to harm against indigenous peoples nor contribute to non-compliance with countries' domestic laws. The Center remains eager to work towards producing the strongest possible Bank policy on indigenous peoples. We also welcome the Bank's Safeguard Team members, especially those from the legal department, to engage in dialogue on these issues.

Sincerely,



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