



**Comments and Recommendations on the World Bank's Draft  
*OP/BP 9.00 Program-for-Results Financing***

By

Leonardo A. Crippa, Philomena Kebec and Gretchen Gordon

September, 2011

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

[www.indianlaw.org](http://www.indianlaw.org)

601 E Street, SE  
Washington, DC 20003  
ph. (202) 547-280 | fax (202) 547-2803

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

**Comments and Recommendations on the World Bank’s Draft**  
***OP/BP 9.00 Program-for-Results Financing***

By Leonardo A. Crippa\*, Philomena Kebec\*\* and Gretchen Gordon\*\*\*

September, 2011

**Table of Contents**

I   INTRODUCTION.....	4
II   SUMMARY OF PRINCIPAL RECOMMENDATIONS.....	4
III   PROCESS & TRANSPARENCY.....	5
IV   SUBSTANCE & SAFEGUARDS.....	6
IV.1   Excluding Safeguards Policies.....	6
IV.2   “Integrated Risk Assessment” Not Meeting Standards.....	7
IV.3   Funding High Risk Activities.....	8
IV.4   Programmatic Concerns.....	9
IV.5   Avoiding a Rights-based Approach.....	12
V   RECOURSE & ACCOUNTABILITY.....	14
VI   CONCLUSIONS.....	15

---

\* JD 2001, Universidad Nacional de Tucuman, Argentina; LLM 2008, American University; Attorney, Indian Law Resource Center.

\*\* JD 2008, University of Minnesota; Attorney, Indian Law Resource Center.

\*\*\* JD 2011, University of California, Berkeley; Legal Fellow, Indian Law Resource Center.

## ACRONYMS AND TERMS

<b>Center</b>	Indian Law Resource Center
<b>Guide</b>	Guide to Human Rights Impact Assessment and Management
<b>IDB</b>	Inter-American Development Bank
<b>IFC</b>	International Finance Corporation
<b>ILO</b>	International Labor Organization
<b>OAS</b>	Organization of American States
<b>P4R</b>	Program for Results
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>Bank</b>	World Bank
<b>WBG</b>	World Bank Group

## **I | INTRODUCTION**

1. The World Bank (Bank) is developing a new policy called OP/BP 9.00 Program-for-Results Financing (P4R). We welcome the idea of the Bank supporting country development and capacity building through P4R. These goals, however, are not served by eliminating safeguards and mechanisms of transparency and accountability for impacted communities. P4R completely rewrites the Bank's Indigenous Peoples Policy. At a minimum, indigenous peoples must be consulted prior to any consideration of such a drastic shift in Bank policy.

2. Before submitting the P4R proposal to the board for approval, management needs to address several fundamental questions regarding the rationale and functioning of such a program, including: (1) how protection will be ensured without the safeguard policies and why it is necessary to eliminate them; (2) how transparency will be provided at the project level, not just the program level; (3) how risk assessment will adequately measure social and environmental risks at the project level; and (4) the impact of the P4R policy on the accessibility and effectiveness of the Inspection Panel for affected communities.

3. Today, there is worldwide consensus regarding the principle that indigenous peoples have a right to exist and that their right to exist is contingent on the exercise of rights to self-determination and others. Many of these principles are contained within the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted by the United Nations in 2007. Currently, no country opposes the U.N. Declaration.

4. National programs for economic development and systemic reform have often negatively impacted indigenous peoples. Certain programs that fall within P4R program categories have led to the near extinction of entire peoples. Accordingly, the prevention of these atrocities requires the full and effective participation of indigenous peoples in the development of national programs that will affect them. Article 18 of the UNDRIP calls for such a participation by indigenous peoples in decision-making processes in matters that would affect their rights.<sup>1</sup>

## **II | SUMMARY OF PRINCIPAL RECOMMENDATIONS**

- I. As an international intergovernmental organization, the World Bank should reflect existing international human rights law standards in the P4R Policy, especially those concerning the rights of indigenous peoples as outlined in the UNDRIP. (See paragraph 39 for specific recommendations.)
- II. As the proposed P4R Policy poses great risks to indigenous peoples, including an effective redrafting of the Bank's Indigenous Peoples Policy, it is essential that the Bank meaningfully consult with indigenous peoples prior to any consideration of a P4R policy.
- III. The P4R Policy should either include the established safeguard policies or devise a more rigorous means of screening out harmful programs.

---

<sup>1</sup> United Nations Declaration on the Rights of Indigenous Peoples, Art. 26, G.A. Res. 61/295, Annex, U.N. Doc.A/RES/61/295/Annex, art. 3 (Sept. 13, 2007).

- IV. The P4R Policy should provide potential program-affected communities with access to information at the project level.
- V. If safeguards policies do not apply, the P4R Policy should require indigenous communities' free, prior and informed consent when a supported program: (1) takes place on indigenous peoples' lands or involves their natural/cultural resources; (2) takes place not on their lands, but which may substantially affect their lands, territories and natural/cultural resources or may infringe on their human rights; or (3) may result in relocation of indigenous people from their lands and territories.
- VI. The P4R Policy should require the full and effective participation of indigenous peoples in the development of programs that would affect their rights.
- VII. The P4R Policy should also require sharing of benefits with indigenous communities when a program implicates the development/commercialization of their natural and cultural resources.
- VIII. Any P4R Policy must be subject to the Inspection Panel. If existing safeguard policies do not apply, the P4R Policy must provide comparable standards on which to judge compliance.

### **III | PROCESS & TRANSPARENCY**

5. The policy shift contemplated by P4R represents an about face on decades of policy development relating to social and environmental safeguards. At the Annual Meetings, Bank officials admitted that this policy is still shifting, and it is clear from the P4R Policy Paper that many important questions remain. The proposed P4R Policy is not ready to be voted on in November; informed consultation requires at least a comment period on an additional draft.

6. Through P4R, the Bank is proposing a radical change to its policies related to the protection of indigenous peoples, yet Bank management has held no consultations with indigenous peoples. Despite the fact that the Bank has held several meetings with indigenous peoples in the course of the last year, the P4R policy has not been shared at these meetings. The Bank had important opportunities to do so, including the "Dialogues between the Vice-Presidency of the World Bank and Indigenous Peoples" held in November 2010, and at the UN Permanent Forum on Indigenous Issues held in May 2011. Omitting such important policy changes from these discussions may lead many to conclude that the Bank is not serious about engaging with indigenous peoples and holds these meetings only for their public relations value.

7. We have noticed a trend in the Bank to ignore that policy changes at the Bank, in addition to the safeguard policies, affect indigenous peoples. Many developments in the Bank have serious implications for the rights of indigenous peoples, including the "Energy Sector Strategy." As opposed to what the Bank apparently assumes, energy projects do affect the livelihoods and survival of indigenous peoples. The conflict between the indigenous peoples of the Xingu River Basin and Brazil over the construction of the Belo Monte hydroelectric dam illustrates this

point.<sup>2</sup> Likewise, it is wrong to assume that the changes contemplated by P4R would not impact indigenous peoples. We expect that the Bank will inform and consult with indigenous peoples on new policies under development, especially P4R.

#### **IV | SUBSTANCE & SAFEGUARDS**

8. P4R implies a major shift in Bank lending. Indeed, the draft P4R Policy proposes lending that will not be regulated by the safeguard mechanisms designed to mitigate social and environmental impacts. In addition, the P4R Policy fails to adequately measure the potential risks to indigenous communities and others, and fails to effectively exclude high-risk activities. Needless to say, the Bank must develop protections for indigenous communities and others to ensure that the supported programs actually achieve better results and do not harm vulnerable groups.

##### **IV.1 | Excluding Safeguards Policies**

9. Under the proposed P4R Policy, lending will be exempted from 26 OPs/BPs, including the safeguards most critical for the protection of indigenous peoples. Among others, the eliminated safeguards policies include: OP/BP 4.01 Environmental Assessment; OP/BP 4.04 Natural Habitats; OP/BP 4.10 Indigenous Peoples (Indigenous Peoples Policy); OP/BP 4.11 Physical Cultural Resources; OP/BP 4.12 Involuntary Resettlement (Involuntary Resettlement Policy); and OP/BP 4.36 Forests.

10. These safeguards are the result of a decades-long process of analysis, advocacy and negotiation. They are designed to predict the potential impact on human and environmental welfare, and to assess the likelihood that certain negative outcomes might result. While we would like to see the Bank's safeguards policies strengthened and brought into compliance with international human rights standards, P4R instead takes us back to a scenario of Bank lending in which anything goes.

11. P4R proposes a significantly lower level of protection. In place of the 26 eliminated safeguards, the draft P4R Policy establishes a new "environmental and social systems assessment."<sup>3</sup> In so doing, the Bank has collapsed 320 pages of safeguards into two and a half pages. Many of these policies are critically important for protecting indigenous peoples and ensuring that Bank resources are not funding harmful projects.

12. With P4R, the Bank's Indigenous Peoples Policy, which is used to determine what results and risks the Bank will not fund and what processes need to be taken to avoid risks, has been replaced with a short and vague list of things the Bank will "consider" in an assessment.<sup>4</sup> In other words, whereas the Indigenous Peoples Policy identifies certain outcomes which are not acceptable, with P4R, nothing is out of bounds. Everything was put back on the table in terms of acceptable risk. For example, as explained below, the proposed P4R Policy undermines existing

---

<sup>2</sup> We understand that the Bank has not financed this project; BNDES, Brazil's national development bank, is heavily involved in its development. We note, however, that Brazil received a \$1.3 billion loan from the Bank in 2009-10; a significant portion of this loan was directed at the improvement of BNDES' social and environmental policies. Noticeably absent from BNDES' new social and environmental policy, are safeguard policies strong enough to have prevented the Belo Monte crisis.

<sup>3</sup> World Bank, Draft OP 9.00 – Program-for-Results Financing (2011), para. 8.

<sup>4</sup> *Ibid.*, at 28.

safeguards concerning consultations with indigenous peoples and the displacement of indigenous peoples from their lands and territories.

13. Under the existing Indigenous Peoples Policy “[F]or all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples.”<sup>5</sup> Although this policy falls short of the international standard of free, prior and informed consent, as established in the UNDRIP, as well as the recently adopted International Finance Corporation (IFC) Performance Standard 7 on Indigenous Peoples, it is far stronger than the P4R Policy, which requires no consultation whatsoever.

15. Under the proposed P4R, a social and environmental assessment will merely “*consider the degree to which*” the Program systems “(j) undertake free, prior, and informed consultations if the Indigenous Peoples are potentially affected (positively or negatively), to determine whether there is broad community support for the Program activities.”<sup>6</sup> Thus, in P4R there is no requirement that a borrower consult with indigenous peoples regarding projects and programs that may affect them. Further, under the P4R Policy, the Bank may fund programs and projects that are opposed by affected indigenous communities.

16. The existing Involuntary Resettlement Policy requires a borrower to explore alternative project designs to avoid physical relocation of Indigenous Peoples. It prohibits any relocation without obtaining broad support for it from the affected Indigenous Peoples’ communities, as part of the free, prior and informed consultation process. Additionally, the policy requires the borrower to prepare a resettlement plan that is compatible with the Indigenous Peoples’ cultural preferences and includes a land-based resettlement strategy.

17. Under the proposed P4R policy, however, the only requirements on displacement of indigenous peoples are merely that the social and environmental assessment “*considers... to what degree the Program systems... (d) manage land acquisition and loss of access to natural resources in a way that avoids or minimizes displacement, and assist the affected people in improving, or at the minimum restoring their livelihoods and living standards.*”<sup>7</sup> Therefore, a borrower is no longer required to obtain broad support from Indigenous Peoples prior to effectuating any resettlement, and borrowers are no longer prohibited from engaging in forced resettlement with World Bank funds.

18. In redrafting these standards within P4R, the Bank is not only establishing a new funding mechanism, but it is rewriting a majority of its safeguard policies to significantly narrow their scope. The Bank’s current Indigenous Peoples policy is that OP/BP 4.10 applies to all projects for which a Project Concept Review takes place on or after July 1, 2005. With P4R, the Bank is dramatically limiting the scope of OP/BP 4.10 and other safeguards as they apply to the Bank’s portfolio.

---

<sup>5</sup> World Bank, OP 4.10 – Indigenous Peoples (2005), para. 1.

<sup>6</sup> World Bank, BP 9.00 – Program-for-Results Financing (2011), para. 29.

<sup>7</sup> World Bank, *supra* note 3, para. 8.

## IV.2 | “Integrated Risk Assessment” Not Meeting Standards

19. Under P4R, the Bank’s consideration for program financing will be based on an “integrated risk assessment.” Though this assessment is to be “informed by” the results of the environmental and social systems assessments, the Policy makes it clear that the focus of this risk assessment is the “risk to achieving the program’s results and development objectives.”<sup>8</sup> Likewise, Assessment and Appraisal is based on “the risks to achieving Program objectives and results.”<sup>9</sup>

20. Thus, whether the Bank funds a project will largely be based on whether that project is likely to succeed in reaching its stated outcomes or results – i.e. patients served, roads built, etc. These are the results which will serve as Disbursement Linked Indicators. This approach, however, ignores negative social and environmental impacts, which may not have been contemplated within the Program’s desired results. There is no mechanism for linking those impacts and indicators to disbursement decisions.

21. Indigenous peoples are too often not “seen” by project designers. The Inspection Panel Democratic Republic of Congo case illustrates this risk. In that case, a Bank DPL loan was provided for a forest zoning project in the Congo, however, neither the Project documents nor Bank management review recognized the existence of Pygmy communities in Project-affected areas, despite their obvious presence. The Bank failed to apply the Indigenous Peoples Policy and indigenous peoples were not consulted on a forest concession policy that would impact their fundamental rights to land, territory, resources and cultural survival.<sup>10</sup>

22. P4R’s approach to risk assessment is also problematic in that it aggregates risks at the program level. How will assessment of a program’s overall risks account for the specific risks posed at the project or sub-project level? As an example, a P4R-funded conservation program could establish a national park system and in one park, expel the indigenous peoples living there, since P4R makes no requirement that consent be given prior to any resettlement of indigenous peoples. If the program meets its results of protecting land, how will the fact that in one project, some indigenous peoples no longer have access to their land and resources be calculated in the overall assessment at the program level? Will it be significant enough in the aggregate to impact funding or program design?

## IV.3 | Funding High Risk Activities

23. Bank officials have justified the elimination of safeguards policies on the basis that P4R funding will only apply to low to moderate risk activities, stating that activities that pose a risk of potentially significant and irreversible adverse impacts on the environment and/or affected people (Category A) are ineligible for P4R financing. This is not, however, reflected in the Policy. The proposed P4R Policy explicitly allows such activities to be included “if they are deemed to be important to the integrity of the Program, their monetary value and/or potential environmental and social impacts in relation to the overall Program are modest [to be explained

---

<sup>8</sup> *Ibid.*, at 10.

<sup>9</sup> World Bank, *supra* note 6, para. 9.

<sup>10</sup> See generally Inspection Panel, Investigation Report No. 0746-ZR (Aug. 31, 2007), available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FINALINVREPwhole.pdf>



in a Guidance Note]”<sup>11</sup> and they adhere to fiduciary, environmental and social assessments. Thus activities that pose significant risks (Category B), as well as activities that pose significant and irreversible risks (Category A), remain eligible for P4R funding – without any of the safeguards policies designed to mitigate their high level of risk.

24. Even if the OP 9.00 is modified to effectively exclude Category A, the fact that significant risk (Category B) projects can be funded through P4R without any effective safeguards is extremely problematic. The Independent Evaluation Group found that Category B projects are less well managed.<sup>12</sup> We believe that Category B projects often pose the most social and environmental concerns. Even Category C projects require robust safeguards, as has been evidenced by Inspection Panel cases—i.e. the Cambodia Land Management case.

25. Projects designed as forest management or conservation programs, which fall into one of the sectors identified for possible P4R funding,<sup>13</sup> may appear low risk. However, they have in many cases involved serious human rights violations for forest-dependent communities. As one example, consider the Honduras Land Administration Project case before the Inspection Panel. In that case, the Bank provided a Category B loan to establish an integrated decentralized land administration system. The Inspection Panel found that the project could “contribute to the demise of [the Garifuna peoples’] titles and claims to their collective lands” and that the Bank approved consultation process “was inconsistent with the core provisions of OD 4.20 on consultation, representation, and participation.”<sup>14</sup> Another example is the previously mentioned Inspection Panel case regarding the Democratic Republic of the Congo, which was classified as Category B. This same type of project could be eligible for P4R financing of the forestry/climate sector. In the Congo case, the Panel found that “the financing of policy and institutional reforms in a sensitive sector like the forests of DRC, and related advice and technical assistance, can lead to highly significant environmental and social impacts, even if it does not involve direct financing of the mechanical and organizational tools for industrial logging.” The Panel noted “its concern that Development Policy Lending is being used for supporting activities which in earlier times have been financed as projects. This effectively bypasses the environmental and social safeguard policies that apply to projects.”<sup>15</sup>

#### **IV.4 | Programmatic Concerns**

26. Sectors identified for possible P4R funding include health, local government/decentralization, education, urban development, water and sanitation, forestry/climate change, agriculture, transport, and rural development.<sup>16</sup> Projects in these areas—i.e. forestry, transport and education—can have major impacts on indigenous peoples. Indeed,

---

<sup>11</sup> World Bank, *supra* note 3, para. 9.

<sup>12</sup> “World Bank Group projects categorized as having high environmental or social risk (category-A) are relatively better managed, but these projects are less than 10 percent of the portfolio. Financial intermediary projects across the Bank Group and Bank projects categorized as medium risk (category-B), which are more than 50 percent of the portfolio, are less well supervised.” Independent Evaluation Group 2011, p. 11, available at [http://ieg.worldbankgroup.org/content/dam/ieg/EvalBriefs/eb\\_safeguards.pdf](http://ieg.worldbankgroup.org/content/dam/ieg/EvalBriefs/eb_safeguards.pdf)

<sup>13</sup> World Bank Policy Paper Annex D Illustrative list of Possible Program-for-Results Operations.

<sup>14</sup> See generally Inspection Panel, Annual Report 2007-2008, p. 53, available at [http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Insp\\_Panel\\_2008Final-LowRes.pdf](http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Insp_Panel_2008Final-LowRes.pdf)

<sup>15</sup> See generally Inspection Panel, Investigation Report No. 40746 – ZR, *supra* note 10.

<sup>16</sup> World Bank Policy Paper Annex D, *supra* note 13.

they have led to human rights violations for indigenous peoples and undue expense on the part of states because of the failure to respect the right of indigenous peoples to fully and effectively participate in the development of programs that affect their rights.

27. *Transportation systems.* Transportation systems built within indigenous peoples' territories often violate the rights of indigenous peoples to their land, territories and natural resources.<sup>17</sup> The building of transportation networks within, or in close proximity to, indigenous peoples' lands and territories additionally encourages encroachment on the part of non-indigenous individuals and entities. Roads constructed within the Amazon and other remote areas have given miners access to indigenous peoples' territories; likewise, the development of oil and gas projects or logging on indigenous peoples' territories becomes economically feasible after roads are built. For indigenous peoples, resource extraction conducted by outsiders often leads to human rights violations. Those seeking to exploit indigenous peoples' natural resources often fail to get their consent. Instead, they invade and simply take valuable resources. This usually involves depositing toxic substances in the environment or creating irreparable damage to sensitive ecosystems. Illegal gold miners use mercury to separate the gold from other minerals; oil and gas development leads to contamination by toxic petrochemicals. The resource extractors take the valuable substances and leave behind ecological damage. Because indigenous peoples often depend on the environment to meet their needs, the damage can threaten their very existence. Indigenous peoples often cannot depend on court systems or law enforcement to protect their interests because they lack legal title over their territories and the legal systems generally favor non-indigenous interests.

28. During the 1970s, Brazil received a loan from the World Bank to build a road through the territory of the Yanomami. Road workers brought malaria and many Yanomami died because they had no resistance to the disease. The road provided access for miners and loggers to reach Yanomami territory for the first time, leaving behind pollution and damaging the delicate ecosystem that fed the Yanomami and provided them with medicines. Prostitution became a way for many Yanomami women to avoid starvation, often leaving them sick and abused. The Yanomami successfully advocated for their interests, garnering support from international NGOs, and appealing to the O.A.S.<sup>18</sup> and the U.N. The U.N. General Secretary finally interceded on behalf of the Yanomami and pressured Brazil to provide the Yanomami with redress for the violations of their human rights, including the right to control their territories. Brazil's investment into the road was effectively lost; additionally, Brazil had to incur costs related to remedying the healthcare crisis within Yanomami communities.

29. Indigenous peoples have become aware of how roads through their territory can harm them. Instead of waiting for a road to be built, they are preemptively organizing to prevent construction. In Bolivia, indigenous peoples have been protesting against the construction of a road through the Territorio Indigena y Parque Nacional Isiboro Secure (TIPNIS) because of harm that the road would cause to the environment and their interests. On September 26, 2011, President Evo Morales announced that road construction would stop. The Bolivian government had high hopes for this road. It was meant to connect Cochabamba and the Andean highlands to the Amazonian Beni region, stimulating trade and shortening transportation delays. Unfortunately, the Bolivian government failed to follow domestic law, which requires

---

<sup>17</sup> UNDRIP, Art. 26.

<sup>18</sup> See generally Inter-Am. C.H.R., Yanomami vs. Brazil, Case 7615, Resolution 12/85 (Jan. 20, 1989).

meaningful consultations with indigenous peoples living within the TIPNIS to gain their consent for the construction of the road. With much of the road already completed, Bolivia will likely lose a significant investment, and incur additional costs, for its failure to respect the rights of indigenous peoples.

30. *Educational programs.* The failure of governments to respect the rights of indigenous peoples to self-determination and self-government, coupled with prevailing racism against indigenous peoples, led to the creation of abusive educational programs in many countries. Many countries<sup>19</sup> removed, or continue to remove, indigenous children from their homes and communities to attend residential schools. Away from the care and protection of their communities, many children experienced physical, sexual and psychological trauma. The effects of the residential school system continue to be present in many indigenous communities today.<sup>20</sup> The trauma experienced by indigenous communities and indigenous individuals has a social cost borne by indigenous communities and the state in which they live. This social cost is expressed indirectly in higher healthcare costs and lower levels of productivity,<sup>21</sup> and directly in the form of reparations.<sup>22</sup>

31. Because these types of programs have the potential for creating such long-lasting and pervasive harm to indigenous communities, and because the conditions that created the boarding schools (systemic racism directed at indigenous people and the failure of governments to institute policies respecting the right of indigenous peoples to self-determination) continue to exist and inform state policy on indigenous peoples in many countries, the Bank should adopt safeguards within P4R that specifically acknowledge the rights of indigenous peoples to control their educational systems and allow indigenous individuals to access educational opportunities without discrimination.

32. *Forestry programs.* Indigenous peoples have the right of permanent sovereignty over their natural resources (PSNR). This concept encompasses the right of indigenous peoples to exercise self-determination and self-government, and to own, control and manage their lands, territories and natural resources. This principle is particularly applicable to national forestry programs. If countries undertake forestry projects within indigenous peoples' territories without recognizing or protecting the rights of the affected indigenous peoples to their PSNR, conflict is likely to arise. In the case of *Awás Tingni (Sumo) Mayagna Community v. Nicaragua*, Nicaragua

---

<sup>19</sup> Residential school programs for indigenous children existed, or continue to exist, in the United States, Mexico, Canada, Peru, Venezuela, Columbia, Russia, China, New Zealand, Brazil, Australia, Norway, Sweden, Finland, Botswana, Sierra Leon, Indian, and Malaysia.

<sup>20</sup> See Prime Minister Stephen Harper, on behalf of the Government of Canada, Statement of Apology – to former students of Indian Residential Schools, June 11, 2008, available at <http://www.ainc-inac.gc.ca/eng/1100100015644>. See also Boarding School Project, Indigenous Peoples and Boarding Schools, available at <http://www.boardingschoolhealingproject.org/files/bshpreport.pdf>.

<sup>21</sup> See generally Roberta Stout and Sheryl Peters, *kiskinohamâtôtâpânâsk: Intergenerational Effects on Professional First Nations Women Whose Mothers are Residential School Survivors*, August 2011, available at <http://www.pwhce.ca/pdf/kiskino.pdf>.

<sup>22</sup> See *id.* and see *Canada and Plaintiffs and Independent Counsel and the Assembly of First Nations and Inuit Representatives and The General Synod of the Anglican Church of Canada, The Presbyterian Church of Canada, the United Church of Canada and Roman Catholic Entities, Residential Schools Settlement Agreement*, May 8, 2006, available at <http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf> (class action settlement agreement providing for more than \$200 million in reparations, plus more than \$10,000 available to each survivor of the residential schools (more than 150,000 students attended the schools)).

incurred a substantial cost for failing to recognize the PSNR rights of the Awas Tingni community.<sup>23</sup>

33. In her report on PSNR, the former Special Rapporteur on Indigenous Issues, Erica-Irene Daes explained that respect for PSNR is critical to the survival of indigenous peoples.<sup>24</sup> She relayed a key selection from the *Awas Tingni* case to explain how the rights of indigenous peoples to self-determination, property and life are interconnected.

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with their land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>25</sup>

34. Several concepts from this selection are worth highlighting. First, indigenous peoples have the right to live freely in their own territory. This means that they have the right to manage their lands, territories and resources and use these resources to further their economic, cultural and spiritual existence. Second, indigenous peoples depend on the exercise of this level of self-determination in order to maintain their cultural identity now and in the future. Accordingly, the right for indigenous peoples to exist is very closely connected to their right to PSNR.

35. The right of indigenous peoples to self-determination and to own and control their lands, territories and natural resources is recognized by international law instruments and international courts' decisions. The UNDRIP recognizes, "by virtue of that right [self-determination] they freely determine their political status and freely pursue their economic, social and cultural development."<sup>26</sup> The right of self-government is closely related to the right of self-determination and allows indigenous peoples to autonomously govern their internal and local affairs,<sup>27</sup> and "maintain and strengthen their distinct political, legal, economic, social and cultural institutions."<sup>28</sup> The International Labor Organization Convention 169 "Indigenous and Tribal Peoples Convention" (ILO Convention 169) recognizes that indigenous peoples have the right to control their own institutions, ways of life, and economic development.<sup>29</sup> Additionally, the ILO Convention 169 recognizes that indigenous peoples have the right to regulate their natural resources by "participat[ing] in the use, management and conservation of [their natural] resources."<sup>30</sup>

36. In the *Saramaka* case, the Inter-American Court of Human Rights explained how the right to self-determination and self-government is related to the rights of indigenous peoples to

---

<sup>23</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter. Amer. C. R.H (Series C No. 79), Aug. 31, 2001.

<sup>24</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Protection of Human Rights, *Final report: Indigenous peoples' permanent sovereignty over natural resources*, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) (prepared by Special Rapporteur Erica-Irene A. Daes).

<sup>25</sup> *Id.*, para. 25 (citing *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 23, para. 159).

<sup>26</sup> UNDRIP, Art. 3.

<sup>27</sup> *Id.*, Art. 4.

<sup>28</sup> *Id.*, Art. 5.

<sup>29</sup> ILO Convention 169, preamble.

<sup>30</sup> *Id.* Art. 15(1).

own and control their lands, territories and natural resources.<sup>31</sup> The Court found that the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognized that indigenous peoples have the right to self-determination and by virtue of this right, they may “freely pursue their economic, social and cultural development,” and may “freely dispose of their natural wealth and resources” in order that they are not “deprived of [their] own means of subsistence.”<sup>32</sup> The Court determined that Article 21 of the American Convention on Human Rights must be interpreted consistently with the ICESCR.<sup>33</sup> More recently, in the *Endorois* case, the African Commission on Human and Peoples’ Rights determined that the absence of benefit-sharing with indigenous peoples violates the right to development, which is protected under Article 14 of the African Charter of Human and Peoples’ Rights.<sup>34</sup>

#### IV.5 | Avoiding a Rights-based Approach

37. As a “leading” public development institution, the Bank should address human rights issues connected to projects supported by P4R. As acknowledged by former Senior Vice President and General Counsel Roberto Dañino (Dañino) in 2006, “human rights and international human rights law have become increasingly relevant to helping the Bank achieve its mission and fulfill its purposes by supporting *better development practices and more sustainable, equitable outcomes*.”<sup>35</sup>

38. The exclusion of a human rights-based approach in regard to P4R would constitute a significant step backward for the Bank. The IFC, a member of the World Bank Group, has incorporated human rights issues by adopting the Guide to Human Rights Impact Assessment and Management (June 2010) and updating its PS 7 Indigenous Peoples in light of the UNDRIP (August 2011), a global human rights instrument.

39. The proposed P4R Policy can be significantly improved by incorporating critical human rights prevention measures to secure better results. As suggested by Dañino, “[w]here violations or non-fulfillment of obligations are at issue, and where these have an economic impact, *the Bank should take these into account*.”<sup>36</sup> The Draft OP 9.00 can be improved in three particular sections as follows:

1. Eligibility of projects for P4R financing. We recommend that the following projects are excluded from consideration: (1) following the “integrated risk assessment,” projects that are determined to have the potential to lead to human rights violations against people or peoples; and (2) projects proposed by member countries with poor human rights records or with past project implementation records where considerable adverse social impacts were identified by the Inspection Panel or other relevant Bank agencies.

---

<sup>31</sup> *Saramaka People v. Suriname*, Inter. Amer. Ct. H.R. (Serie C No. 172), Nov. 28, 2007, para. 93.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> In the Matter of The Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya, decision issued by the African Commission on Human and Peoples Rights in May, 2009, endorsed by the African Union on February 4, 2010, para. 229.

<sup>35</sup> See Roberto Dañino, Senior Vice-President and General Counsel of the World Bank, “Legal Opinion on Human Rights and the Work of the World Bank”, Jan. 27, 2006, at 1 (the emphasis is ours).

<sup>36</sup> *Ibid.*, at 7 (the emphasis is ours).

2. “Environmental and social systems assessment.”<sup>37</sup> We recommend that language is added as follows: (a) “avoid negative human rights impacts”;<sup>38</sup> (d) “prevent forced relocation of indigenous peoples from their ancestral lands”;<sup>39</sup> and (e) “ensure benefit sharing with indigenous peoples in regard to projects that imply the use or exploitation of cultural or natural resources pertaining to their lands.”<sup>40</sup> The IFC’s updated Sustainability Framework contains critical measures related to these issues.
3. “Integrated risk assessment.”<sup>41</sup> We recommend that human rights risks are included in this assessment. For this purpose, the “environmental and social systems assessment” should address human rights issues as indicated above.

40. We expect the Bank to help participating countries in realizing their human rights law obligations by adopting the recommendations indicated above. In so doing, the Bank will “*avoid imposing a ‘double punishment’* on the people of its member countries by withholding development assistance from those already disadvantaged by their countries’ poor human rights records.”<sup>42</sup>

## **V | RECOURSE & ACCOUNTABILITY**

41. P4R fails to ensure that communities will have sufficient access to information about Bank funded activities. Risks arise at the project level, not just at the program level; communities need information on specific activities and projects within the program, not just the aggregate program.

42. In connection to the above, P4R eliminates communities’ access to effective accountability mechanisms. The proposed P4R Policy provides that communities harmed by P4R projects will still be able to bring their complaints before the Inspection Panel. The problem is that the Inspection Panel passes judgment on whether the Bank has complied with its policies, most notably the safeguard policies. By excluding P4R financing from the safeguard policies, there will effectively be no standards against which to measure Bank compliance.

43. Under the proposed P4R Policy, the Inspection Panel cannot even pass judgment on whether a Category A project was improperly funded through P4R since the OP 9.00 leaves that determination dependent on a Guidance Note definition of “modest” potential environmental and social impacts.<sup>43</sup> Guidance Notes are not policies for the purposes of the Inspection Panel.

## **VI | CONCLUSIONS**

44. There are better ways to meet the Bank’s goals. The stated goals of P4R—to support country-driven initiatives and domestic capacity building, to improve results by linking disbursement with results rather than inputs, and to provide more flexibility necessary to ensure

---

<sup>37</sup> World Bank, *supra* note 3, at 8.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> World Bank, *supra* note 3, at 10.

<sup>42</sup> See Roberto Dañino, *supra* note 35, at 8 (the emphasis is ours).

<sup>43</sup> World Bank, *supra* note 3, at 9.

those outcomes—are laudable. We support the Bank moving toward an approach that empowers borrowing countries to achieve better development results. But this is not achieved by eliminating safeguards, transparency and accountability and avoiding a human rights-based approach.

45. In a standard risk assessment, costs and benefits are tallied up and if the overall tally is positive, the project goes forward. The point of safeguards is to state that some costs are unacceptable, regardless of the end sum analysis. Safeguards are a recognition that some results, such as forced resettlement of indigenous peoples, are out of bounds. By eliminating safeguards policies, P4R does not help countries develop stronger democratic processes and regulatory frameworks. Instead, it sends a message that anything goes, as long as overall “results” are achieved.

46. If P4R becomes an avenue for funding climate programs, such as through the Forest Carbon Partnership Facility and efforts to reduce emissions from deforestation and degradation (REDD), it could be channeling a massive amount of lending to forest management projects with high risk for indigenous peoples.

47. If the Board believes that some of the safeguard procedures are hindering positive development outcomes, it should study this question, in consultation with countries and communities, and provide an analysis of which aspects of safeguards are essential and which might be improved or streamlined. This analysis should in fact be happening through the existing safeguards review process. Instead the Bank appears to be running an end run around the entire accountability system.