



# INDIAN LAW

## RESOURCE CENTER

### **Comments on the World Bank’s Proposed “Environmental and Social Framework”**

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Ensuring consistency with the UN Declaration on the Rights of  
Indigenous Peoples

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February, 2015

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## Ensuring consistency with the UN Declaration on the Rights of Indigenous Peoples

By Leonardo A. Crippa\* & Rosalie Francis\*\*  
February, 2015

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## I | INTRODUCTION

1. The Indian Law Resource Center (Center) welcomes the opportunity to provide comments on the World Bank's (Bank) proposed "Environmental and Social Framework" (Framework), which includes an Environmental and Social Policy (Policy) and ten Environmental and Social Standards (Standards). While the Policy defines the Bank's responsibility in providing public financing for investment projects, the Standards establish the borrowing countries' role and responsibility for fulfilling the requirements for receiving Bank financial support.
2. The Center is a non-profit law and advocacy organization founded and directed by Native American lawyers and indigenous experts. The Center provides legal assistance without charge to indigenous peoples in North, Central and South America who are working to protect their lands, resources, human rights, environment and cultural heritage. For more than thirty-five years, the Center has been at the forefront of legal and policy standard setting procedures on indigenous issues ensured in intergovernmental organizations, such as the UN, the Organization of American States (OAS), and the World Bank.
3. This submission provides an expert assessment on whether or not the Framework's constituent policy instruments take into account the applicable legal standard established by the UN Declaration on the Rights of Indigenous Peoples (UN Declaration). It also lays out the regional particularities of indigenous peoples of the Americas, which must be properly taking into account by the Framework's constituent policies, especially *Standard 7 Indigenous Peoples*, to prevent harm to indigenous peoples' governments, lands, natural resources, and environment. Based on the identified gaps, the Center provides recommendations on how to overcome them.
4. This submission urges a paradigm shift toward a development practice in which the Bank works with indigenous peoples as collective legal rights-holders and equal partners, and not as mere stakeholders. In our opinion, "particular attention should be given to collective substantive rights, including self-determination and ownership of lands, rather than merely participatory rights, such as those relating to participation in decision making or consultation."<sup>1</sup> These collective substantive rights are the most important rights recognized and protected by the UN Declaration. We have noticed that multilateral development banks (MDBs), states, NGOs and corporations have deliberately used participatory rights "to give the false impression that the views of indigenous peoples are being taken into account when in fact they are not."<sup>2</sup>
5. The Center is particularly concerned about the proposed *Standard 7 Indigenous Peoples* "alternative approach" clause (*see* Standard 7, para. 9). The reason is because this clause gives borrowing countries the option to avoid the application of the entire policy. This not only represents a major step backwards in more than thirty years of policy making on indigenous issues, but also contradicts this policy's main commitment "to ensure that the development process fosters full respect for the human rights" of indigenous peoples (*see* Standard 7

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<sup>1</sup> Leonardo A. Crippa & Chris Foley, Indian Law Resource Center & IUCN Commission on Environmental, Economic and Social Policies, *Conservation and Indigenous Peoples in Mesoamerica: A Guide* 2, 3 (Jan. 2015).

<sup>2</sup> IUCN INTER-COMMISSION TASK FORCE ON INDIGENOUS PEOPLES, INDIGENOUS PEOPLES AND SUSTAINABILITY, CASES AND ACTIONS 87 (IUCN Indigenous Peoples and Conservation Initiative International Books 1997).

Objectives). In the Americas, indigenous peoples are present in all countries and, in some of them, make up the majority of the population. For example, in Guatemala there are more than six million indigenous peoples who make up more than sixty percent of the total population.<sup>3</sup> In other countries, such as Peru<sup>4</sup> and Bolivia,<sup>5</sup> indigenous peoples make up almost the fifty percent of the population. The Bank should not allow the use of this clause by borrowing countries of the Americas, especially by those with a long-standing policy and practice of taking indigenous lands and/or slaughtering indigenous peoples and communities.

6. The Center has actively participated in Phase 1 of the Bank’s safeguard review and update process. In July 2014, the Bank launched Phase 2 by releasing the Framework for public comments. The Framework is supposed to reflect the inputs received during Phase 1 on both “emerging areas” and the Bank’s existing safeguard policies. The Center provided critical inputs to discussions held during Phase 1. In March 2013, Leonardo A. Crippa, Center’s Senior Attorney, participated as an expert in the External Focus Group on Indigenous Peoples’ Free, Prior and Informed Consent held in Manila, Philippines. A month later, Leonardo reported to the public the outcomes of discussions held in Manila.<sup>6</sup> In May 2013, the Center filed written comments on the “emerging areas” and the existing safeguard policies.<sup>7</sup> Finally, during the 2013 World Bank Fall Annual Meetings, the Center held a high-level panel discussion on indigenous peoples’ lands and development with a focus on land administration projects in Nicaragua and Guatemala.<sup>8</sup>

## **II | REGIONAL PARTICULARITIES OF INDIGENOUS PEOPLES IN THE AMERICAS**

7. The Bank has committed to consider the particularities of indigenous issues in the different regions. During an update given to the public in April 2014, the Safeguard Team recognized “the need to reflect regional distinctions”<sup>9</sup> when particularly referring to the *Standard 7 Indigenous Peoples*. The Center welcomes the Bank’s attention to these issues, such as the situation of indigenous peoples living in voluntary isolation or initial contact (*see* Standard 7,

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<sup>3</sup> International Work Group for Indigenous Affairs, *Indigenous Peoples in Guatemala*, <http://www.iwgia.org/regions/latin-america/guatemala> (last visited Feb. 27, 2015).

<sup>4</sup> In Peru, forty five percent of the population is indigenous. Minority Rights Group International, *WORLD DIRECTORY OF MINORITIES AND INDIGENOUS PEOPLES - PERU : OVERVIEW, 2007*, available at <http://www.refworld.org/docid/4954ce0b2.html> (last visited Feb. 27, 2015).

<sup>5</sup> In Bolivia, forty one percent of the population is indigenous, with a total population of almost three million indigenous peoples. International Work Group for Indigenous Affairs, *Indigenous Peoples in Guatemala*, <http://www.iwgia.org/regions/latin-america/bolivia>.

<sup>6</sup> *See generally* Leonardo A. Crippa, Senior Attorney, Indian Law Resource Center, Address at the World Bank and International Monetary Fund’s Annual Meetings: Key Recommendations to the Bank on FPIC (April 2013) (presentation on file with the Indian Law Resource Center).

<sup>7</sup> *See generally* Leonardo A. Crippa et. al, Indian Law Resource Center, *Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies* (May 2013), <http://www.indianlaw.org/sites/default/files/ILRC%20WB%20Submission%20Final.pdf>

<sup>8</sup> All presentations made by the experts, including Alf Jerve, Isabel Lavandez-Paccieri, and Liza Grandia, are available in the Indian Law Resource Center’s website: <http://www.indianlaw.org/mdb/Oct-2013-panel>

<sup>9</sup> Mark King, Member, World Bank Safeguard Team, *Keynote Address at the World Bank and International Monetary Fund’s Annual Meetings: Setting Standards for Sustainable Development 15* (April 2014) (presentation available in the World Bank’s Review and Update of the Safeguard Policies website).

para. 17). However, we encourage the Bank to pay attention also to other particularities of indigenous peoples in the Americas, which can help the Bank properly prevent not only harm to their communities and environment, but also violations of their human rights.

8. The particularities of indigenous issues in the Americas are legal matters, not mere concepts developed by anthropologists or the Bank's "field specialists". All countries in the Americas acknowledge the existence of indigenous peoples within their borders. Many of them have either adopted a special legislation on indigenous peoples' rights or addressed them within existing legislation. All of them have endorsed the UN Declaration,<sup>10</sup> and many have ratified the binding International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, including Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Venezuela.<sup>11</sup>

9. Moreover, the particularities of indigenous issues in the Americas are deeply rooted in regional human rights law. The OAS is elaborating the Draft American Declaration on the Rights of Indigenous Peoples (OAS Draft Declaration) to reflect the particularities of indigenous peoples of the region. Recently, the OAS has resumed the negotiations aiming at completing all negotiations by May 2015.<sup>12</sup> The American Convention on Human Rights (American Convention), the most important binding human rights treaty in the region, has been ratified by 26 of the 35 countries that make up the OAS.<sup>13</sup> The Inter-American Court of Human Rights (Inter-American Court), our regional court, has issued a number of binding decisions on indigenous peoples' rights and environmental protection, which should be taken into account by the Bank. Otherwise, the Bank will contribute to the borrowers' violation of indigenous peoples' human rights. For this very reason, it is imperative that a human rights impact assessment is performed to assess related risks and identify right-holders.

### *Recommendations*

- The Bank should remove the "alternative approach" clause from the *Standard 7 Indigenous Peoples* (see Standard 7, para. 9). If not, the Bank should explicitly prohibit

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<sup>10</sup> The UN General Assembly adopted the UN Declaration on Thursday, 13 September 2007, by a vote of 144 states in favor, 4 against (Australia, Canada, New Zealand and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). United Nations Bibliographic Information System, UN Voting Records,

<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares61295> (last visited on Dec. 29, 2014). Afterwards, the United States, Canada and Colombia reversed their positions and endorsed the Declaration.

<sup>11</sup> See, ILO, Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169) (Sept. 5, 1991), [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314) (last visited on Dec. 29, 2014). Convention text available at <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.

<sup>12</sup> OAS Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Calendario de Reuniones de Negociaciones para la Búsqueda de Consensos– De Enero a Mayo 2015, OEA/Ser.K/XVI, GT/DADIN/doc. 434/15 (Jan. 27, 2015). See also, OAS Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Work Plan (2014-2015), OEA/Ser.K/XVI, GT/DADIN/doc.429/14 rev. 1 (Dec. 16, 2014).

<sup>13</sup> See, OAS, Department of International Law, American Convention on Human Rights, Signatories and Ratifications, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited on Feb. 3, 2015). The countries that did not ratify the American Convention include Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, and United States.

its application in borrowing countries or regions where the presence of indigenous peoples is indisputable or significant, such as the majority of countries in the Americas.

- The Bank should ensure that a human rights impact assessment is performed when investment projects take place in indigenous peoples' lands and/or affect their natural resources. For this purpose, both the *Policy* and the *Standard 7 Indigenous Peoples* should require such an assessment to be made.

## II.1 | Indigenous self-determination, self-government, development and conservation

10. Surprisingly, none of the proposed Standards explicitly uphold indigenous peoples' right to self-determination, self-government, development and conservation. While *Standard 7 Indigenous Peoples* does include support to indigenous peoples' development priorities (see Standard 7 para. 32, 33), it fails short in making it clear that the rights in question to uphold are indigenous peoples' self-determination and self-government. An explicit reference to these rights will not only strengthen the Bank's pursue of these particular development goals, but more importantly, will uphold the principle of self-determination as a guiding development practice throughout the projects cycle.

11. The UN Declaration clearly recognizes the right of self-determination (Article 3)<sup>14</sup> and the right of self-government (Article 4).<sup>15</sup> This recognition "is the crystallization of a new right for indigenous peoples as distinct peoples within states, not merely the right to participate in the political life of the country as part of the whole people of the state."<sup>16</sup> Coupled with the right to development (Article 23)<sup>17</sup> and the right to conservation (Article 29),<sup>18</sup> the right of self-determination and self-government are meant to help countries and MDBs eradicate indigenous peoples' poverty by embracing their self-determined development and conservation priorities and

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<sup>14</sup> UN Declaration, Art. 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

<sup>15</sup> UN Declaration, Art. 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

<sup>16</sup> Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1, 2 (2010).

<sup>17</sup> UN Declaration, Art. 23.

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

<sup>18</sup> UN Declaration, Art. 29

Indigenous peoples have the right to the conservation of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

strategies, not imposing them. Similar provisions are being discussed throughout the negotiations of the OAS Draft Declaration.<sup>19</sup>

12. *Standard 6 Biodiversity Conservation and Sustainable Management of Living Natural Resources* ignores the role and the rights of indigenous peoples within its promoted conservation and environmental protection model. Key sections of this policy, including the “Objectives”, “Scope of Application” (*see* para. 4-6), and “Sustainable Management of Living Natural Resources” (*see* para. 26), fail to include indigenous peoples self-determined conservation institutions and management practices as a “sustainable management standard”. This is particularly important when conservation projects, such as protected areas, are created on indigenous lands without taking into account indigenous peoples’ governmental authority to control and manage the lands and resources under their possession.

13. The Bank’s approach to conservation contradicts not only the UN Declaration (Article 29),<sup>20</sup> but also the International Union for the Conservation of Nature’s (IUCN) rights-based

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<sup>19</sup> OAS Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, art. III, IV, XVIII, XXIX, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 8 20 (Feb. 20, 2015).

**Article III**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[**Approved** on Feb. 10.15 - Fifteenth Meeting of Negotiations in the Quest for Points of Consensus -*Pending consultations by the Delegation of Argentina*]

**Article IV**

Nothing included in this Declaration shall be construed so as to authorize or foster any action aimed at breaking up or diminishing, fully or in part, the territorial integrity, or political unity, sovereignty, and independence of the States, or other principles contained in the Charter of the Organization of American States. [**Approved** on Feb. 10.15 - Fifteenth Meeting of Negotiations in the Quest for Points of Consensus -*Pending consultations by the delegation of Argentina*]

**Article XVIII.** [Right to] protection of a healthy environment

1. Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being. (**Approved** on April 16, 2008 – Eleventh Meeting of Negotiations in the Quest for Points of Consensus)

[...]

4. Indigenous peoples have the right to participate fully and effectively in the formulation, planning, organization and implementation of measures, programs, laws, policies, and any other public [or private] activity that could affect the environment, for the conservation, use and management of their [the] lands [, territories] [and resources].

[...]

7. Indigenous peoples have the right to create their own protected areas or areas of conservation on their lands [and territories] that shall be recognized, respected, and protected by the state. States shall not create protected areas or areas of conservation of any sort on lands [or territories] that indigenous peoples have historically or traditionally used, possessed or occupied or have otherwise acquired, without the free, prior and informed consent of the indigenous peoples affected. In the creation of said areas, states shall not [under any circumstances / except under the circumstances set out in Article 25 of this Declaration] require the forced transfer or relocation of indigenous peoples’ communities, impose restrictions or inhibit the traditional uses of the land, their way of life, or their means of subsistence.

**Article XXIX.** Right to development

1. Indigenous peoples have the right to maintain and determine their own priorities with respect to their political, economic, social, and cultural development in conformity with their own world

approach to conservation. IUCN “is the world’s oldest and largest global environmental organization, with more than 1,200 government and NGO Members and almost 11,000 volunteer experts in some 160 countries.”<sup>21</sup> The IUCN approach in question, which is reflected in about three Resolutions<sup>22</sup> and a special study,<sup>23</sup> calls IUCN members to ensure due respect of the rights of indigenous peoples in conservation, in particular their right of self-determination.

14. Some countries of the region have even adopted special legislation recognizing the right of self-determination and self-government, and indigenous peoples are exercising these rights. This legal matter cannot be ignored by the Bank. For example, Nicaragua’s Law 28 Statue of Autonomy of the Regions of the Atlantic Coast of Nicaragua, creates a regime of autonomy for two regions of the Atlantic Coast of Nicaragua inhabited by indigenous peoples<sup>24</sup> in accordance to a related National Constitution provision.<sup>25</sup> Accordingly, indigenous peoples in Nicaragua have also set up their own governments. For instance, the Mayagna Nation has three distinct governmental authorities: 75 Mayagna communities called the *Mapaki*; 9 indigenous territorial governments known as the *Alas Yalahna*; and the *Sulani Uduhna*, the Mayagna Nation Government.<sup>26</sup> Furthermore, indigenous peoples have codified their customary rules and

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view. They also have the right to be guaranteed the enjoyment of their own means of subsistence and development, and to engage freely, in all their economic activities [**Approved.** February.10.15 - Fifteenth Meeting of Negotiations in the Quest for Points of Consensus -*Pending consultations by the Delegations of Argentina and Venezuela*]

2. This right includes the development of policies, plans, programs, and strategies in the exercise of their right to development and to implement them in accordance with their political and social organization, norms and procedures, their own world views and institutions. [**Approved.** February.10.15 - Fifteenth Meeting of Negotiations in the Quest for Points of Consensus] [...]

<sup>20</sup> UN Declaration, Art. 29

Indigenous peoples have the right to the conservation of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

<sup>21</sup> IUCN, What is IUCN, <http://www.iucn.org/about/> (last visited Feb. 24, 2015).

<sup>22</sup> See IUCN, Resolution 4.056 *Rights-based approaches to conservation*, (calling IUCN governmental and non-governmental members to “develop and/or work towards application of rights-based approaches, to ensure respect... [and] fulfillment of human rights, tenure and resource access rights, and/or customary rights of indigenous peoples... in conservation); Resolution 4.052 *Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, (endorsing the UN Declaration and calling upon all IUCN members to endorse the UN Declaration and to apply it in their relevant activities); Resolution 4.048, *Indigenous peoples, protected areas and implementation of the Durban Accord*, (called all IUCN members “to work with indigenous peoples’ organizations to ensure that protected areas which affect or may affect indigenous peoples’ lands, territories, natural and cultural resources are not established without indigenous peoples’ free, prior and informed consent and to ensure due recognition of the rights of indigenous peoples in existing protected areas”). All these IUCN Resolutions were adopted at the 2008 IUCN World Conservation Congress, and are available at [http://www.iucn.org/congress\\_08/assembly/policy/](http://www.iucn.org/congress_08/assembly/policy/)

<sup>23</sup> See IUCN INTER-COMMISSION TASK FORCE ON INDIGENOUS PEOPLES, INDIGENOUS PEOPLES AND SUSTAINABILITY, CASES AND ACTIONS (IUCN Indigenous Peoples and Conservation Initiative International Books 1997).

<sup>24</sup> Law 28 - Statue of Autonomy of the Regions of the Atlantic Coast of Nicaragua (Sept. 7, 1987), art. 1, 6.

<sup>25</sup> See Constitution of Nicaragua, art. 181 (Jan. 1, 1987) (stating that “The State shall organize by means of a law the regime of autonomy for the indigenous peoples and ethnic communities of the Atlantic Coast, which regime must provide for, among other matters: the functions of their government organs, their relation with the Executive and Legislative Power and with the municipalities, and the exercise of their rights”) (translation ours).

<sup>26</sup> See Brochure from the Mayagna Nation (Oct. 21, 2014) (on file with the Indian Law Resource Center).



established them as positive laws, such as the Statute of the Rama and Kriol Peoples' Territory.<sup>27</sup> Apart from regulating the elections and functioning of the Rama and Kriol Peoples' Territorial Government, the Statute devotes an entire section to a range of issues relating to management of the territory and the natural resources.<sup>28</sup>

### *Recommendations*

- *Standard 7 Indigenous Peoples* should include a statement upholding indigenous peoples' self-determined development priorities and institutions as a guiding principle for all projects aiming at benefiting indigenous peoples' development needs, provide support to them, and uphold them in case of conflicts with borrowing countries' projects.
- *Standard 6 Biodiversity Conservation and Sustainable Management of Living Natural Resources* should include indigenous peoples self-determined conservation institutions and management practices as a "sustainable management standard".
- *Standard 6 Biodiversity Conservation and Sustainable Management of Living Natural Resources* should ensure that no Bank-supported harvesting operation affect indigenous peoples' food sovereignty, ability to hunt, fish, gather, or practice traditional agriculture, and access to cultural and sacred sites.

## **II.2 | Indigenous collective ownership over lands and resources**

15. Unfortunately, the proposed *Standard 7 Indigenous Peoples* only asks borrowing countries to take actions toward legal recognition of "custodial or use rights", not of full collective ownership of lands and resources under their possession<sup>29</sup> (*see* Standard 7, para. 23). This shortcoming leaves the lands that indigenous peoples currently possess without any safeguard when Bank-funded projects take place in said lands. While the situation of indigenous peoples' "traditionally owned" lands (*see* Standard 7, para. 23) is considered for the purpose of setting the safeguard measure, the policy removes that situation later when stating the actual measure: borrowers' obligation to legally recognize indigenous peoples' land rights.

16. This shortcoming can perpetuate unjust taking of Indian lands, especially those perpetrated in the name of conservation when protected areas are created in indigenous territories. While "custodial" has no legal meaning in the law of property, "use" does refer to a diminished form of property of the land, which falls below the regional legal standard: collective ownership. According to the Inter-American Court, States must issue to the indigenous peoples concerned a

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<sup>27</sup> *See* Rama and Kriol Peoples, Estatuto del Territorio Rama y Kriol [Statute of the Rama and Kriol Peoples' Territory] (2010) (on file with the Indian Law Resource Center).

<sup>28</sup> *Id.* at Title IV, at 16-22 (2010) (devoting eight chapters to regulate management of their territory and natural resources).

<sup>29</sup> An indigenous community is in possession ("posesión" in Spanish) of land when it functions on the understanding that the land is theirs and that, as a result, the community concerned may assert legal claims to the land. *See e.g.*, Argentina's Civil Code Art. 2351 (stating that there is possession when a person holds a thing with the intention to exercise ownership rights).

collective title that reflects full community ownership of the land,<sup>30</sup> not “custodial or use rights.” Some countries, such as Nicaragua, have adopted a special legislation in order to issue such titles and properly recognize indigenous peoples’ collective ownership of lands.<sup>31</sup>

17. The shortcoming in question can also undermine indigenous peoples’ ownership over the lands they currently possess, which can be subject to either a land titling procedure or a judicial determination. A number of the Inter-American Court’s decisions upheld indigenous peoples’ collective ownership of lands under their possession. In the *Awás Tingni* decision, the Court stated that “[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”<sup>32</sup> In the *Saramaka* decision, it concluded that “[t]he “community forests” permits are essentially revocable forestry concessions that convey limited and restricted use rights, and are therefore an inadequate recognition of the Saramakas’ property rights.”<sup>33</sup>

18. In the Americas, collective ownership based on current possession is not a minor or isolated issue. The majority of indigenous peoples of the Americas are in this particular situation. That is, they lack title but possess their traditional lands. In countries with civil-law legal systems, such as almost all countries in the Americas, indigenous peoples can claim full ownership over lands in their possession via adverse possession claims.<sup>34</sup> Such a lawsuit can be filed against the State or a private sector entity. For this very reason, many countries in the region, such as Argentina<sup>35</sup> and Paraguay,<sup>36</sup> have created land-titling procedures to title lands that are under the possession of indigenous peoples. Lack of a specific safeguard addressing these particular circumstances can infringe the borrowers’ ongoing efforts to issue titles to indigenous peoples acknowledging their collective ownership.

19. The approach taken by *Standard 7 Indigenous Peoples* contradicts the Bank’s own past successful development practices reflected in land administration projects. For example, the Bank-funded Nicaragua Land Administration Project in Nicaragua helped the country to implement Law 445, which regulates the regime of collective ownership rights of indigenous

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<sup>30</sup> *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, at para. 194 (Nov. 28, 2007).

<sup>31</sup> 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 (regulating the regime of collective ownership rights of indigenous peoples).

<sup>32</sup> *Case of the Awás Tingni (Sumo) Community v. Nicaragua*, Inter-Am. HR Court (Serie C No. 79), para. 151.

<sup>33</sup> *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, at para. 113 (Nov. 28, 2007).

<sup>34</sup> See e.g., Argentina’s Civil Code, Art. 3948 (determining that adverse possession is a remedy in order to acquire full ownership rights based on the possession of land)

<sup>35</sup> For example, in 1996 Argentina created the Programa de Regularización y Adjudicación de Tierras a la Población Aborigen de la Provincia de Jujuy [Land Titling Program for Indigenous Peoples of Jujuy], in order to grant official land titles to the indigenous communities located in the Jujuy Province.

<sup>36</sup> Because of the lack of effective protection of indigenous peoples’ full ownership rights to land, the Inter-American Human Rights Court issued two decisions against Paraguay, in which the Court ordered Paraguay to provide the land titling procedure with more resources to grant land titles to indigenous communities possessing lands in a timely fashion. See *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 146), Mar. 29, 2006. See also *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 125), June 17, 2005.

peoples.<sup>37</sup> In the *Awás Tingni* decision,<sup>38</sup> the Inter-American Court 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 "custodial or use rights."

### *Recommendations*

- *Standard 7 Indigenous Peoples* should request borrowing countries to also recognize indigenous peoples' ownership of lands under their possession, and not limit such recognition to use rights.
- *Standard 7 Indigenous Peoples* should prevent borrowing countries' recognition of limited property rights to land, such as use rights, especially when indigenous lands are subject to land titling procedures aimed at recognizing their collective ownership or judicial determination.
- *Standard 7 Indigenous Peoples* should provide financial support for the implementation of the Inter-American Court's decisions on indigenous peoples' collective ownership to land, which order numerous countries *inter alia* to:
  - Adopt legislative, administrative, and any other measures necessary to ensure that indigenous peoples have the ability to fully exercise collective ownership over their lands;<sup>39</sup>
  - Adopt legislative and any other measures 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;<sup>40</sup>
  - Abstain from taking any actions that could harm indigenous peoples' territories or affect their lands and resources, whether it be through state agencies/agents actions, or that of third parties.<sup>41</sup>

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<sup>37</sup> 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.

<sup>38</sup> *Case of the Awás 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").

<sup>39</sup> *Case of the Xákmok kásek Indigenous Community v. Paraguay*, Inter-Amer. HR Court (Serie C No. 214), para. 281 (Aug. 24, 2010).

<sup>40</sup> *Case of the Awás Tingni (Sumo) Community v. Nicaragua*, Inter-Amer. HR Court (Serie C No. 79), para. 173(3) (Aug. 31, 2001); *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter-Amer. HR Court (Serie C No. 142), para. 233 (June 17, 2005); *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Inter-Amer. HR Court (Serie C No. 146) para. 210, 235 (Mar. 29, 2006); *Case of the Saramaka People v. Suriname*, Inter-Amer. HR Court (Serie C No. 185), para. 214(5) (Nov. 28, 2007).

<sup>41</sup> *Case of the Xákmok kásek Indigenous Community v. Paraguay*, Inter-Amer. HR Court (Serie C No. 214), para. 291 (Aug. 24, 2010).

## II.3 | Indigenous peoples in voluntary isolation or initial contact

20. The *Standard 7 Indigenous Peoples* addresses indigenous peoples in voluntary isolation or initial contact and calls for “appropriate measures to... protect their lands and territories, environment, health and culture, as well as measures to avoid all undesired contact with them.” (see para. 17). However, it fails to prohibit financial support to borrowers’ projects that will take place on areas where indigenous peoples in voluntary isolation inhabit and/or will directly or indirectly affect them. Noticeably, the existing policy language implicitly accepts financial support to such projects, which certainly paves the way to force contact with them.

21. The question of indigenous peoples in voluntary isolation is a regional particularity that is found to exist primarily in South America, in the Amazon and Chaco regions. This situation has led Peru,<sup>42</sup> Ecuador<sup>43</sup> and Brazil,<sup>44</sup> among others countries, to adopt specific domestic legislation to protect them. It also led some countries, including Ecuador,<sup>45</sup> Bolivia,<sup>46</sup> Brazil<sup>47</sup> and Paraguay,<sup>48</sup> to include specific provisions in their national constitution to recognize their ownership to lands and resources, prohibit all types of extractive industry activities in their lands, and their right to live in isolation in their territory.

22. Regional human rights law standards also provide strong protection to indigenous peoples in voluntary isolation or initial contact. For example, Article XXVI of the OAS Draft Declaration recognizes their rights to remain in that condition and to live freely in accordance with their cultures.<sup>49</sup> It also directs States to adopt policies that recognize and protect the lands, territories, environment and cultures of these peoples as well as their life, and individual and collective integrity.<sup>50</sup> OAS Member States and indigenous peoples of the Americas have already agreed

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<sup>42</sup> 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).

<sup>43</sup> 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).

<sup>44</sup> See Lei 6001 Dispoe 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).

<sup>45</sup> 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).

<sup>46</sup> 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).

<sup>47</sup> *Ibid* para 63, (recognizing their ownership rights to land and resources).

<sup>48</sup> *Ibid* para 63, (recognizing their ownership rights to land and resources).

<sup>49</sup> OAS Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, art. XXVI, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 8 20 (Feb. 20, 2015).

**Article XXVI.** Indigenous peoples in voluntary isolation or initial contact

1. Indigenous peoples in voluntary isolation or initial contact have the right to remain in that condition and to live freely and in accordance with their cultures. (**Agreed upon by consensus** in October, 2005 – Sixth Meeting of Negotiations in the Quest for Points of Consensus)

<sup>50</sup> OAS Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, art. XXVI, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 8 20 (Feb. 20, 2015).

**Article XXVI.** Indigenous peoples in voluntary isolation or initial contact

upon this provision. Accordingly, the Inter-American Commission's *Special Report on Indigenous Peoples in Voluntary Isolation and Initial Contact* recommends States not only to "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",<sup>51</sup> but also to immediately modify existing licenses or authorizations to ensure the full respect for the rights of indigenous peoples in voluntary isolation.<sup>52</sup>

23. The Inter-American Development Bank, a regional MDB, has also taken steps to protect the rights of indigenous peoples in voluntary isolation. Its Operational Policy on Indigenous Peoples asks borrowers to "avoid contact with them as a direct or indirect consequence of the project."<sup>53</sup> In our opinion, this is a step in the right direction as such projects have the potential to infringe the human rights of indigenous peoples in voluntary isolation, including the right to life, right to health, right to humane treatment, and land and natural resource rights.

### *Recommendations*

- *Standard 7 Indigenous Peoples* should prohibit financial support to projects that will take place in the areas with a presence of indigenous peoples in voluntary isolation or initial contact.
- *Standard 7 Indigenous Peoples* should state that any project that will directly or indirectly affect indigenous peoples in voluntary isolation and initial contact will not be financially supported.
- *Standard 7 Indigenous Peoples* should ask borrowers to avoid contact with indigenous peoples in voluntary isolation, whether as a direct or indirect consequence of their project.

## III | CONCLUSION

24. The Bank's Framework recognizes that indigenous peoples have a significant role to play in development practices and that their cultural identity and well-being must not be threatened by borrowers' investment projects. This is a positive acknowledgement by the Bank, but unfortunately it falls short in fulfilling indigenous peoples' development demands, which go beyond a mere cultural acknowledgment. Indigenous peoples are collective right holders and not mere stakeholders, and as such the Bank is legally and ethically obligated to acknowledge their particular status and rights. The current Bank policy falls short in meeting this demand.

25. The Framework must include a clear and strong recognition of the rights of indigenous peoples to self-determination, self-government, ownership of lands, development and

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2. The states shall adopt adequate policies and measures with the knowledge and participation of indigenous peoples and organizations to recognize, respect, and protect the lands, territories, environment, and cultures of these peoples as well as their life, and individual and collective integrity. (**Agreed upon by consensus** in October, 2005 – Sixth Meeting of Negotiations in the Quest for Points of Consensus)

<sup>51</sup> *Supra* note 46 at p. 78, rec. 11.

<sup>52</sup> *Ibid*, at p.79, rec. 12.

<sup>53</sup> Inter-Amer. Development Bank, Operational Policy on Indigenous Peoples (OP-765), Feb. 22, 2006, page 38.

conservation. These rights, which are at the core of indigenous peoples' demand, go beyond participatory rights and the Bank must ensure that borrowers are cognizant of their legal and ethical obligations to indigenous peoples as distinct peoples within the existing nation-states.