



INDIAN LAW
RESOURCE CENTER

**Comments and Recommendations on the Forest Carbon
Partnership Facility and UN-REDD Programme's**

*Draft Guidelines on Stakeholder Engagement in REDD+ Readiness,
with a Focus on the Participation of Indigenous Peoples and other
Forest-Dependent Communities*

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June 2011

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ACRONYMS AND TERMS

Center	Indian Law Resource Center
ECOSOC	Economic and Social Counsel
FCPF	Forest Carbon Partnership Facility
FPIC	Free, Prior and Informed Consent
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFC	International Finance Corporation
ILC	International Law Commission
MDB	Multilateral Development Banks
Indigenous Policy	OP/BP 4.10 Indigenous Peoples
PSNR	Permanent Sovereignty over Natural Resources
UN	United Nations
UN Declaration	UN Declaration on the Rights of Indigenous Peoples
UN-REDD	UN-REDD Programme

I | INTRODUCTION

1. The Indian Law Resource Center (Center) is a non-profit law and advocacy organization established and directed by American Indians. We provide legal assistance to indigenous peoples in the Americas who are working to protect their lands, resources, human rights, environment and cultural heritage. We work to overcome the grave problems that threaten Native peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights and dignity, and by challenging the governments of the world to accord justice and equality before the law to all indigenous peoples of the Americas. Since 1978, we have been engaged at the UN level with the development of the recently adopted UN Declaration on the Rights of Indigenous Peoples (UN Declaration), among many other human rights law developments. We have been advocating for better policies at the World Bank Group on indigenous peoples' issues since 1980.
2. The *Draft Guidelines on Stakeholder Engagement in REDD+ Readiness, with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities (the Guidelines)*, prepared by the Forest Carbon Partnership Facility (FCPF) and the UN-REDD Programme (UN-REDD), was produced to give the public sector a tool for engaging stakeholders in REDD+ readiness, with an emphasis on the participation of indigenous peoples and forest-dependent communities. On June 6, 2011, the *Guidelines* became public and open for comments until July 1st. This paper offers comments and recommendations on the *Guidelines* from a legal perspective addressing indigenous peoples' particular human rights concerns.
3. Three issues of particular interest to indigenous groups exist within the *Guidelines*. First, both the FCPF and UN-REDD are agencies, which are part of larger international inter-governmental organizations in which the world's countries are acting together to make decisions. Second, both agencies provide advice to countries, which have assumed international human rights law obligations by ratifying at least one treaty and/or contributing to the crystallization of customary international law. Finally, there is a serious need to address the human rights dimension of development practices and programs, such as REDD+ programs. Thus, it is critical that indigenous peoples are consistently consulted regarding policy developments at both the FCPF and UN-REDD to ensure that REDD+ programs fully respect their legal rights.
4. Keeping in mind these issues, we address the *Guidelines* as a critical tool, which should not only engage indigenous peoples as "stakeholders," but more importantly, address them as rights-holders. For reasons that are not clear, the *Guidelines* group indigenous peoples with local communities and fail to address the collective rights of indigenous peoples at any stage of REDD+ programs taking place on their lands and/or affecting their natural resources. We also note that neither the FCPF nor the UN-REDD are developing a human rights impact assessment in order to provide countries with a critical tool to address today's challenge in development practices: the protection of human rights.

5. Indigenous peoples should be addressed as rights-holders, not merely as stakeholders, in the formulation and implementation of REDD+ strategies and policies. The *Guidelines* lacks clarity between the rights of indigenous peoples and the right of non-indigenous groups or individuals. This difference is critical because indigenous peoples, unlike non-indigenous communities, depend on their lands, territories, and natural resources for their economic, social and spiritual existence. Maintenance of this relationship is generally critical to the very existence of an indigenous people. In several places, the *Guidelines* mistakenly groups indigenous peoples and local communities, implying that these groups enjoy the same rights. Both domestic and international law recognizes indigenous peoples' distinct legal rights because indigenous peoples are distinct political, social and legal entities within existing nation-states. This particularity should not be underestimated. We suggest that the *Guidelines* better define the distinction between the rights enjoyed by indigenous peoples and the rights others enjoy.

6. In particular, indigenous peoples' permanent sovereignty over their natural resources (PSNR) should be the guiding international legal principle in both the REDD+ program cycle and the *Guidelines*. According to a critical UN Special Report, indigenous peoples' PSNR "might properly be described as a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources."¹ In our opinion, this approach should be incorporated in REDD+ programs, as it addresses indigenous peoples' rights to self-determination, self-government and natural resources as a whole within their special relationship with traditional lands. Surprisingly, not even the UN-REDD is embracing this legal approach, which is critical for the full respect of indigenous peoples' governments and rights to land, territories and natural resources.

7. The collective rights of indigenous peoples are of particular importance for REDD+ programs. Instead of guidance on how to seek free, prior and informed consent (FPIC), mandatory directions should be provided to countries on how to ensure that core substantial rights—including the right to self-determination, the right to self-government and full ownership rights to land, territory and natural resources—are not violated via REDD+ programs. REDD+ projects, including forest conservation and deforestation remediation, have the potential to create collisions between indigenous peoples' rights and environmental protection interests. In past conservation efforts' failure to guarantee these rights resulted in the loss of indigenous lands from the creation of protected areas on indigenous lands. For example, Guatemala's Protected Areas Law violates indigenous peoples' full ownership rights to land by only recognizing their right to remain on their land if they adapt to the distinct uses allowed within the protected area.² This law also weakens the right of self-determination and self-government by depriving indigenous communities, not only of any participation in the process of declaring a protected area in their territories, but also of management or control over their territories.³ As a UN

¹ U.N. Special Rapporteur, Erica-Irene A. Daes, *Indigenous Peoples' Permanent Sovereignty over Natural Resources*, ¶ 40, E/CN.4/Sub.2/2004/30 (July 13, 2004).

² See Protected Areas Law [Ley de Áreas Protegidas] of 1989, Art. 11, 18-22. See also Reglamento de Ley de Áreas Protegidas of 1990, Categoría Tipo V Reserva Natural Privada, Categoría Tipo VI Reserva de la Biosfera, a) Zona Natural o Núcleo.

³ *Ibid.*

agency, the UN-REDD must reverse such a discriminatory conservationist approach in order to live-up to the UN Declaration standards.

8. A human rights impact assessment should be developed not only to better address “social” issues, but also to assess the legal issues connected to REDD+ activities. This is a critical approach to identify, in a comprehensive and effective manner, the human rights risks that REDD+ activities imply not only for indigenous peoples, but also for other forest-dependent communities and individuals. Only a human rights impact assessment can properly address the diversity of the legal rights that a group or individual is entitled to in connection to a certain REDD+ program. The rights of indigenous peoples, other forest-dependent communities and individuals should be properly addressed along the REDD+ program cycle.

9. Surprisingly, neither the FCPF nor the UN-REDD is developing a human rights impact assessment to assure the effectiveness of REDD+ activities. There is an undeniable link between environmental and human rights issues that must be addressed in REDD+ activities. The development of REDD+ strategies and policies present a critical opportunity to develop the proper tool to address such a linkage in development practices and programs. We encourage the FCPF and UN-REDD to pay closer attention to this issue. We will return to this point later.

10. One final general observation and suggestion may be too obvious to be necessary. The future draft of the *Guidelines* should be made available with all the documents that the *Guidelines* itself refers to, in order to assure meaningful feedback from stakeholders. Within the present round of consultations, key components of the *Guidelines* were not made available, such as the UN-REDD’s FPIC and Recourse *Guidelines*.⁴ As a result, this round of consultations is not serious and we call for further consultations on the *Guidelines* making available all relevant documents.

11. The following comments correspond to the headings within the draft *Guidelines*.

II | SUMMARY OF PRINCIPAL RECOMMENDATIONS

- The FCPF and UN-REDD must adopt a guiding international legal principle recognizing indigenous peoples’ permanent sovereignty over natural resources in both the REDD+ program cycle and the *Guidelines*.
- The FCPF and UN-REDD must develop a human rights impact assessment to help countries prevent violations of the rights of indigenous peoples, other forest-dependent communities and individuals throughout the REDD+ program cycle.
- The FCPF and UN-REDD must ensure that no REDD+ program violates indigenous peoples’ collective rights, such as: the right to self-determination, the right to self-government and full ownership rights to land, territory and natural resources.

⁴ *Draft Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities*, Annex 1 (May 18, 2011).

- The FCPF and UN-REDD must ensure that the right of indigenous peoples to benefit from REDD+ programs taking place on their lands and/or affecting their natural resources is fully respected.
- The FCPF and UN-REDD should conduct further consultations on the *Guidelines* with indigenous peoples located in the countries in which the *Guidelines* will apply.
- The FCPF and UN-REDD should carry out further consultations on the *Guidelines* since the UN-REDD FPIC and Recourse *Guidelines*, a key component for REDD+ policy developments, was not made available for this round of consultations.
- The *Guidelines* should address indigenous peoples as rights-holders, not merely as stakeholders, in order to ensure appropriate consideration of indigenous peoples' legal rights.
- The *Guidelines* should offer greater clarity between the rights of indigenous peoples and the rights of other groups or individuals.
- The *Guidelines* should make sure that no country executes a REDD+ program without fully implementing FPIC with indigenous peoples when a program: (1) takes place in their 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 their human rights; and (3) may result in relocation from their lands and territories.
- Prior to the commencement of any REDD+ Readiness, the UN-REDD must develop a project-complaint mechanism, in which REDD+ program-affected communities can file complaints for proper investigation/redress of potential/existing negative impacts.

III | IMPORTANCE OF INDIGENOUS PEOPLES

12. We appreciate the *Guidelines*' recognition of the unique status of indigenous peoples and the need for safeguard policies that protect their rights. However, we reiterate here that the collective rights of indigenous peoples are of particular importance for a successful formulation and implementation of REDD+ activities. Including being stakeholders, indigenous peoples are also rights-holders, as they are entitled to legal rights recognized by domestic and international law. Failure to adopt a rights-holders approach in REDD+ activities will be a set back for both the FCPF and UN-REDD.

13. We welcome the UN-REDD focus on FPIC, but more needs to be done to secure full respect of indigenous peoples' legal rights in the context of UN-REDD programs. As stated earlier, indigenous peoples' PSNR must be the guiding legal principle in the formulation and implementation of REDD+ activities. We call the attention to the lack of transparency in this round of consultations because not all the necessary documents referred to in the *Guidelines* are

available for review. The UN-REDD's FPIC and Recourse Guidelines is not available yet and will not be available until the third quarter of 2011. The UN cannot call for consultations on the *Guidelines* without having completed all critical documents first, especially those related to FPIC. We encourage the UN-REDD to carry out further consultations with indigenous peoples making sure that all documents are made available in a proper and timely fashion.

14. We are seriously concerned about the current FCPF approach to REDD+ issues. First, there is no certainty on whether the World Bank safeguard policies applicable to FCPF will properly protect the rights of indigenous peoples in its REDD+ programs. Around eight months have passed since the World Bank's "Updating and Consolidation Process" started, but no draft policies have been made available for public comments. Then there is no way to realize the likelihood of the ten safeguard policies under review, especially the OP/BP 4.10 Indigenous Peoples policy (Indigenous Policy). Only by the end of this policy review process in late 2012 will indigenous peoples know whether the World Bank policies protect their legal rights.

15. Second, we believe the World Bank must update the Indigenous Policy in light of the UN Declaration. Its fellow member of the World Bank Group, the International Finance Corporation (IFC) in updating its PS 7 Indigenous Peoples policy, incorporated many relevant standards of the UN Declaration.⁵ We expect the World Bank to do the same. If, however, the World Bank adopts weaker standards, there is a real risk that the FCPF will be unable to carry out its REDD+ readiness activities in a way that will establish good governance practices and ultimately lead to successful REDD+ projects. The current Indigenous Policy falls short in meeting the UN Declaration standards. For example, it takes no notice of the rights of indigenous peoples to self-determination and to self-government; they are not even mentioned in the policy text. According to the UN Declaration, the right of indigenous peoples to self-determination includes the right to self-government, which implies the collective right to exercise full authority over land and natural resources.⁶ We believe this is critical to respect indigenous peoples' right to control their land, natural resources and livelihoods in REDD+ programs.

16. Finally, we disagree with the World Bank's belief that its current Indigenous Policy provides for a proper guidance on FPIC. Free, prior and informed consultation leading to broad community support does not meet the global accepted FPIC standard for indigenous peoples. This is why its fellow World Bank Group member, the IFC, and the UN General Assembly recently adopted the FPIC standard, rejecting the World Bank's approach. We do not understand why the World Bank is neither following the world community's stance on this issue, nor following the IFC's approach. We believe indigenous peoples deserve a clear explanation on this position and we call for a high-level discussion on this particular issue within the ongoing World Bank policy review.

IV | PRINCIPLES OF STAKEHOLDER ENGAGEMENT

⁵ See generally IFC Policy Review, available at <http://www.ifc.org/policyreview>

⁶ Leonard A. Crippa, "Multilateral Development Banks and the Human Right Responsibility," *American University International Law Review* 25, no.3 (2010): 564.

17. We welcome the *Guidelines*' governing principles on stakeholder engagement. It provides directions on how to carry out consultations in a proper and timely fashion; as well as establishes particular measures to take with respect to indigenous stakeholders. From our point of view, this is critical to ensure the full and effective participation of indigenous peoples in the development of REDD+ strategies and policies.

18. Meaningful consultation with indigenous peoples in REDD+ countries requires making relevant documents available in the native language. The UN Declaration Article 13 guarantees to indigenous peoples the right to use their own languages and requires states to ensure that indigenous peoples can understand and be understood.⁷ Furthermore, domestic laws in several REDD+ eligible countries have made indigenous languages official languages or have created substantial protection requiring that important materials are translated into indigenous languages. These countries include but are not limited to Bolivia,⁸ Colombia,⁹ Costa Rica,¹⁰ Mexico,¹¹ Guatemala¹² and Peru.¹³ We encourage the FCPF and UN-REDD to provide relevant documents in indigenous languages within the context of consultations on the *Guidelines* for indigenous peoples located in the countries in which the *Guidelines* will apply.

V | OPERATIONAL GUIDELINES FOR PARTICIPATION AND CONSULTATION

19. We appreciate that the FCPF and UN-REDD's provide operational guidelines to countries for REDD+ readiness and REDD+ programs. However, these guidelines and the evaluation of environmental and social risks within the same framework are not as effective in preventing human rights violations as a human rights impact assessment would be.

20. We believe that both the FCPF and UN-REDD have to comply with the human rights mandate of their parent organization: the UN. The UN Charter expressly calls for the universal respect of human rights without discrimination (Article 55.c), as well as for the cooperation with the UN for the achievement of this purpose (Article 56). The World Bank is a specialized agency of the UN by virtue of the agreement entered into with the ECOSOC¹⁴ in accordance

⁷ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007).

⁸ New Constitution of the State, Art. 5 (Bolivia) (English version, Oct. 2008). Article 5 also lists thirty-six of the indigenous languages of Bolivia.

⁹ Political Constitution of Colombia of 1991, Article 10 (English version).

¹⁰ Political Constitution of the Republic of Costa Rica, Article 76 (English version, 2009 translation).

¹¹ Ley General de Derechos Lingüísticos de los Pueblos Indígenas, Art. 9, 10.

¹² Law on National Languages of 2003, Art. 1, 3, 14.

¹³ Political Constitution of Peru, Articles 2.19, 48, *reprinted in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Adela Staines & Jefri J. Ruchti trans., William S. Hein & Co. 2011) (1993, As Consolidated to Law No. 29402 of 7 September 2009) .

¹⁴ Agreement between the United Nations and the International Bank for Reconstruction and Development art. 1(2), Apr. 15, 1948, 109 U.N.T.S. 341 ("The Bank is a specialized agency established by agreement among its member Governments and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Article 57 of the Charter of the United Nations. By reason of the nature of its international responsibilities . . . the Bank is, and is required to function as, an independent international organization.")

with related Articles of the UN Charter¹⁵, and the FCPF is an organ of the World Bank's Carbon Finance Unit. The UN-REDD is a collaboration between three organs of the United Nations: the United Nations Development Programme, the Food and Agriculture Organization of the United Nations and the United Nations Environment Programme. As bodies of the UN, the FCPF and UN-REDD are obligated to comply with the same human rights mechanisms that bind actions by the UN.

21. We encourage the FCPF and UN-REDD to reevaluate the effectiveness of social assessments and design a tool that can properly lead countries to assess and manage human rights risks. In guiding countries on national readiness management arrangements and stakeholders consultation, it is critical to address the human rights of those who will be impacted by REDD+ programs. Social assessments are not effective in measuring the human rights dimension of development practices and projects. For many years, this gap in development practices has been ignored by multilateral development banks. This is one reason why countries have been condemned by international human rights bodies because of human rights violations connected to development projects sponsored by these banks. In September 2010, the World Bank's Inspection Panel found numerous failures by the management group for Panama's Land Administration Project. Among other violations, the management group failed to pay adequate attention to land demarcation and failed to develop an Indigenous Peoples Development Plan as required by World Bank's Indigenous Policy, resulting in a lack of legal protection for indigenous territory.¹⁶ We hope due diligence measures are taken to prevent human rights violations related to REDD+ programs.

22. Human rights impact assessments are effective means to address human rights risks and manage human rights impacts. As agencies that provide advice to the public sector on developing governance structures necessary to support REDD+ projects, the FCPF and UN-REDD cannot ignore the need of developing a policy to address the human rights risks that countries will encounter throughout the REDD+ program cycle. Such a policy will help countries to fulfill their international human rights law obligations. The UN Economic and Social Council (ECOSOC) stated that for the purpose of ensuring that rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) are not undermined, obligations under the ICESCR should be considered in all aspects of a member state's *negotiations with international financial institutions*.¹⁷ Countries face human rights today in every single development project. We hope proper guidance on this challenge is provided to countries.

¹⁵ See U.N. Charter, art. 57 (stating that specialized agencies are those intergovernmental organizations operating in conjunction with the United Nations and pursuant to Article 63 of the Charter). Article 63(2), in turn, provides that ECOSOC "may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations." *Id.* art. 63(2).

¹⁶ The Inspection Panel, *Investigation Report, Panama: Land Administration Project (Loan No. 7045-PAN)*, ¶¶ 268, 332-340, 347 (Sept. 16, 2010).

¹⁷ ECOSOC, *Conclusions and Recommendations, Jordan*, ¶ 28, U.N. Doc. E/C.12/1/Add.46 (2000) (emphasis added).

23. Needless to say, lessons can be learned from recent related policy developments concerning business and human rights. First, the IFC, a member of the World Bank Group, made a critical step forward by adopting the Guide to Human Rights Impact Assessment and Management in June 2010.¹⁸ IFC's private sector clients can now start taking due diligence measures to address human rights issues. Finally, more recently, the UN Special Representative of the Secretary-General for Business and Human Rights issued a report containing a set of human rights guiding principles for states and business enterprises.¹⁹ The report explains that states have a fundamental responsibility under international law to prevent human rights abuses within their territories, including abuses committed by third parties or business enterprises, and states do not relinquish that responsibility by contracting with business enterprises.²⁰ States also must ensure that human rights are protected when states are acting as members of multilateral institutions.²¹ The report also indicates that private businesses have a responsibility to avoid causing or contributing to "adverse human rights impacts" caused by their own activities or activities directly linked to their operations, products, or services, and it recommends that businesses fulfill their responsibilities by developing human rights policy commitments, due diligence processes, and remediation processes for adverse human rights impacts.²²

24. As subjects of international law, the FCPF and UN-REDD must also realize their international law obligations and prevent human rights violations via REDD+ programs. In the *WHO* opinion, the International Court of Justice (ICJ) made it clear that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."²³ According to the UN International Law Commission (ILC), "[t]here is a breach of an international obligation by an international organization when an act is not in conformity with what is required by that obligation."²⁴ International obligations arise not only from treaties but also from other sources of law as enunciated in Article 38 of the ICJ Statue, especially from unwritten law such as customary international law and general principles.²⁵ For instance, many human rights law obligations arising out of the Universal Declaration of Human Rights have crystallized in binding rules of customary international law.²⁶

¹⁸ See IFC and International Business Leaders Forum, "Guide to Human Rights Impact Assessment and Management" (June 2010), available at <http://www.guidetohriam.org/welcome>

¹⁹ UN Special Representative of the Secretary-General for Business and Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011).

²⁰ *Id.* at ¶¶ 1, 3, 5.

²¹ *Id.* at ¶ 10.

²² *Id.* at ¶¶ 11, 13, 15.

²³ Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89-90 (Dec. 20) (emphasis added).

²⁴ ILC, *Responsibility of International Organizations-Titles and Texts of the Draft Articles 8-16 Adopted by the Drafting Committee*, art. 8, U.N. Doc. A/CN.4/L.666/Rev.1 (June 1, 2005)

²⁵ Leonard A. Crippa, *supra* note 6, at 555.

²⁶ ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 86 (2006).

25. Lastly, we made a final call to the FCPF to ensure that human rights issues are addressed in the World Bank's REDD+ programs. Since 2006, two General Counsels of the World Bank released consistent legal opinions by recognizing that the balance has now shifted in favor of protecting human rights in development practices.²⁷ First, Roberto Danino concluded that the Articles of Agreement do allow the Bank to acknowledge the human rights dimension of its policies and operations.²⁸ Secondly, Ana Palacio asserted that Mr. Danino's statement makes "the state of the law" clear and permits the Bank to properly update its internal legal stance according to the current international legal order.²⁹ Finally, its fellow member of the World Bank Group, the IFC, has made a critical step forward by adopting the Guide to Human Rights Impact Assessment and Management in June 2010.

VI | CONCLUSION

26. We hope that these observations and recommendations will be helpful in preparing a revised edition of the *Guidelines*. We recognize the difficulty of the task of producing common guidelines for agencies that are member of larger organizations with different mandates. However, critical legal approaches to the formulation and implementation of REDD+ policies should be the guiding principles to respect the human rights in play. For this reason, we have tried to keep our suggestions modest and limited in number. Closer attention should be paid to those core substantial rights of indigenous peoples that might be potentially affected by REDD+ programs; as well as to the legal approach that should guide REDD+ policies to assess and manage human rights risks. We realized that both issues are not addressed throughout the *Guidelines*.

For further information on our submissions or questions regarding the recommendations herein, please do not hesitate to contact:

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²⁷ Leonard A. Crippa, *supra* note 6, at 557-558.

²⁸ ROBERTO DANINO, GENERAL COUNSEL OF THE WORLD BANK, LEGAL OPINION ON HUMAN RIGHTS AND THE WORK OF THE WORLD BANK (Jan. 27, 2006) (on file with author) ("The World Bank's objectives and activities are deeply supportive of the substantive realization of human rights."), at 25.

²⁹ Ana Palacio, *The Way Forward: Human Rights and the World Bank* (2006), available at <http://go.worldbank.org/RR8FOU4RG0>.