



COMMENTS AND RECOMMENDATIONS ON THE UNITED NATIONS DEVELOPMENT PROGRAMME’S DISCUSSION PAPER: “PROPOSAL FOR ENVIRONMENTAL AND SOCIAL COMPLIANCE REVIEW AND GRIEVANCE PROCESSES”

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June 18, 2012.

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TERMS AND ACRONYMS

Indian Law Resource Center	Center
International Inter-governmental Organization	IIO
Multilateral Development Banks	MDBs
Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights	MDBs Principles
Principles of International Law for REDD+: The Rights of Indigenous Peoples and the Legal Obligations of REDD+ Actors	REDD+ Principles
Reduction of Emissions from Deforestation and Forest Degradation	REDD+
United Nations	UN
United Nations Development Programme	UNDP
United Nations Development Group	UNDG
United Nations Declaration on the Rights of Indigenous Peoples	UN Declaration
UN-REDD Programme	UN-REDD
World Bank's Forest Carbon Partnership Facility	FCPF

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 United Nations (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. Since 1980, we have been advocating for better policies on indigenous peoples' issues at the World Bank Group.

2. The *Discussion Paper: Proposal for Environmental and Social Compliance Review and Grievance Processes (Discussion Paper)*,¹ prepared by the United Nations Development Programme (UNDP), was produced as a foundation for further discussions on UNDP's developing compliance review and grievance processes. UNDP has launched a consultation on the *Discussion Paper* until June 18th, 2012. From a legal perspective, this paper offers comments and recommendations addressing indigenous peoples' long-standing demands towards having all development agencies address the human rights dimension of their practices, including policies and project-complaint mechanisms. There is a clear need for this type of guidance when development projects affect indigenous peoples' self-determined governing institutions, environment, lands, territories and natural/cultural resources.

3. Four issues of particular interest to indigenous groups exist within the *Discussion Paper*: First, UNDP is part of a larger international inter-governmental organization (IIO) in which the world's countries are acting together to make decisions. Second, because it is a Delivery Partner of the World Bank's Forest Carbon Partnership Facility (FCPF)² and seeks to capture further climate change-related funds, UNDP is working towards establishing the processes at issue. Third, these processes are meant to process complaints filed by people affected by UNDP-supported projects, including those related to the Reducing the Emissions from Deforestation and Forest Degradation (REDD+).³ Finally, both UNDP and the UN-REDD Programme (UN-REDD) provide advice to developing countries, which have assumed international human rights law obligations by ratifying, at least, one treaty and/or contributing to the crystallization of relevant rules of customary international law.

4. With these issues in mind, we address the *Discussion Paper* as a critical starting point for much needed further discussions on the processes at issue. In our opinion, these processes should not only be informed by existing related development practices, but more importantly, incorporate relevant principles of international human rights law. For reasons that are not clear, UNDP only takes into account the "accountability" mechanisms approach promoted by

¹ United Nations Development Programme, *Proposal for Environmental and Social Compliance Review and Grievance Processes, Discussion Paper* [UNDP Discussion Paper], April 2012.

² *Id.*, at 5

³ *Ibid.*

multilateral development banks (MDBs), and fails to incorporate critical standards reflected in the UN Common Understanding on the Human Rights-Based Approach to Development Cooperation (Common Understanding).⁴ From an international human rights law perspective, and as discussed in our *Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights* (MDBs Principles),⁵ the “accountability” mechanisms are not effective in addressing human rights violations resulting from MDBs financed projects.⁶ Significantly, the UN Secretary General’s Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has found these mechanisms to be ineffective.⁷

5. UNDP must live up to the human rights principles deeply rooted in all UN human rights bodies and agreed upon by all UN development agencies. As pointed out in our MDBs Principles, processes such as the outlined in the *Discussion Paper*, should consider human rights violations associated with supported development projects and take corrective actions as appropriate.⁸ The Common Understanding states that:

- *All programmes of development co-operation, policies and technical assistance* should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
- *Human rights standards* contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments *guide all development cooperation and programming in all sectors and in all phases of the programming process.*
- *Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.*⁹

6. Clearly, the standards outlined in the Common Understanding must play a central role in shaping the processes at issue. UNDP should pay particular attention to the principle on *Accountability and Rule of Law*, which refers to the obligation of States and duty-bearers “to comply with the *legal norms and standards enshrined in human rights instruments.*”¹⁰ Thus, as highlighted in the Common Understanding, “[p]rogrammes [should] *monitor and evaluate* both outcomes and *processes* guided by human rights standards and principles.”¹¹

7. One final general observation and reminder may be too obvious to accentuate. In developing the processes in question, UNDP should endorse the United Nations Development Group (UNDG) Guidelines on Indigenous Peoples’ Issues.¹² Surprisingly, the *Discussion Paper*

⁴ U.N. Human Rights Based Approach Portal, The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies (2003) [Common Understanding], available at <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> (last visited June 18, 2012).

⁵ Robert T. Coulter, Leonardo A. Crippa, et al., Indian Law Resource Center, Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights (2009) [MDBs Principles], http://indianlaw.org/sites/default/files/Principles%20Memo%20FINAL%20ENG_0_0.pdf

⁶ *Id.*, at 4.

⁷ U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Interim Report* ¶ 53, U.N. Doc. E/CN.4/2006/97 (2006), at 53.

⁸ MDBs Principles, *supra* note 5, at 40.

⁹ Common Understanding, *supra* note 4, at 1 (the emphasis is ours).

¹⁰ *Id.*, at 2 (the emphasis is ours).

¹¹ *Id.*, at 3 (the emphasis is ours).

¹² United Nations Development Group Guidelines on Indigenous Peoples’ Issues (2008), <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>

did not call attention to this critical guideline, which was developed to “[s]et out the broad normative, policy and operational *framework for implementing a human rights based and culturally sensitive approach to development for and with indigenous peoples.*”¹³

II | RECOMMENDATIONS

1. The proposed UNDP’s processes should be guided by the UN Common Understanding and the UNDG Guidelines on Indigenous Peoples’ Issues.
 - a. The *Discussion Paper* should bring also to the table for further discussions the human rights based and culturally sensitive approach to the processes at issue.
 - b. UNDP should learn lessons from the MDBs’ “accountability” mechanisms, but more importantly, from the UN human rights standards almost unanimously accepted by all UN Member States.
 - c. It would be useful to use more straightforward terms such as “human rights compliance” rather than “social compliance.”
2. The *Discussion Paper* should call attention to customary international law about human rights and to the extensive body of human rights law that has been developed by international courts and other international human rights bodies on critical principles that should inform the processes in question.
3. In particular, the proposed UNDP’s Compliance Review Process should pay greater and more attention to:
 - a. The principles of due process of law and the right to an effective remedy, in order to ensure not only the process’ performance in an effective and timely fashion, but also development projects’ good governance and effectiveness.
 - b. The principle of non-discrimination and equality, for the purpose of embracing a culturally and gender sensitive approach to the process’s staffing to ensure expertise within its organizational structure, especially on indigenous and gender issues.
4. The Grievance Process should pay particular attention to the obligation to prevent human rights violations, since human rights can neither be negotiated nor mitigated in the same way as other project impacts.
5. The *Discussion Paper* should make it evident that no matter how grave the human rights challenges may be, this situation can never justify or excuse non-compliance with applicable policies and international human rights obligations.

¹³ *Id.*, at 3 (the emphasis is ours).

6. More clarification and guidance should be provided on the relationship between the Compliance Review Process and the Grievance Process.
7. The *Discussion Paper* would benefit substantially if the UNDP or the *Discussion Paper's* authors would consult with UN human rights bodies, the UN Inter-agency Support Group on Indigenous Issues, experts and indigenous peoples about the revision of the *Discussion Paper*.

III | COMPLIANCE REVIEW PROCESS

8. The *Discussion Paper* lays out seven critical principles that would govern the overall establishment and implementation of UNDP's Compliance Review Process. However, UNDP is not being guided by relevant principles of international human rights law. In so doing, UNDP's compliance review process is neither furthering the realization of human rights, nor helping developing countries to meet their human rights obligations and/or right-holders to claim their rights. As further explained below, we strongly believe that human rights principles would strengthen both the functioning and organizational structure, and staffing of this process.

9. To ensure the process works in an effective and timely fashion, the principles of due process of law and effective remedy¹⁴ should also become central elements. As stated in our *Principles of International of Law for REDD+: The Rights of Indigenous Peoples and the Legal Obligation of REDD+ Actors* (REDD+ Principles),¹⁵ these principles are intrinsically connected¹⁶ and essential for assuring not only the prompt and successful protection of substantive legal rights, but also development projects' good governance and effectiveness.¹⁷ Indeed, they are the only ones that actually define what effectiveness¹⁸ and reasonableness of time¹⁹ mean under international law. They have been recognized extensively in core universal and regional human rights instruments,²⁰ and may be considered a norm of customary

¹⁴ To fulfill the right to an effective remedy, someone who alleges a rights violation must have access to a decision-making body that is adequate and effective at protecting legal rights, which must be able to provide a prompt decision in assessing whether there was a violation of a legal right (Case of Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C No. 4), para. 64-66 (July 29, 1988); Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, 25 AM. U. INT'L. REV. 573 (2010).

¹⁵ Leonardo A. Crippa & Gretchen Gordon, Indian Law Resource Center, *Principles of International of Law for REDD+: The Rights of Indigenous Peoples and the Legal Obligation of REDD+ Actors* (2012) [REDD+ Principles], http://www.indianlaw.org/sites/default/files/Indian%20Law%20Resource%20Center_REDD+%20Principles.pdf

¹⁶ *Id.*, at 42.

¹⁷ *Ibid.*

¹⁸ Case of Velásquez-Rodríguez v. Honduras, *supra* note 14, at 66 (July 29, 1988) (determining that an effective remedy is a remedy "capable of producing the result for which it was designed").

¹⁹ According to the European Court of Human Rights, three factors should be considered when determining the reasonableness of the time required to carry out a proceeding: (1) the complexity of the case, (2) the procedural activity of the interested party, and (3) the conduct of the judicial authorities. Vernillo v. France, Eur. Ct. H.R., para. 30 (1991); Motta v. Italy, Eur. Ct. H.R., para. 16 (1991); Ruiz-Mateos v. Spain, Eur. Ct. H.R. art. I, paras. 30-54 (1993). The Inter-American Court of Human Rights has followed the same analysis, and determined that is necessary to do a comprehensive analysis of the entire proceedings before domestic courts as an overall assessment. *See* Genie Lacayo v. Nicaragua, Inter-Am. Ct. H.R. (ser. C No. 30), at 77 (Jan. 29, 1997); Suárez-Rosero v. Ecuador, Inter-Am. Ct. H.R. (ser. C No. 35), at 73 (Nov. 12, 1997).

²⁰ *See e.g.* Universal Declaration of Human Rights, art. 8, 10, G.A. Res. 217A (Dec. 12, 1948); United Nations Declaration on the Rights of Indigenous Peoples [UN Declaration], art. 40, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007); American Convention on Human Rights, art. 8, 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; European Convention for the Protection of the Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, 213 U.N.T.S. 221; African Charter of Human and People's Rights, art. 7 (June 27, 1981).

international law.²¹ Since States cannot suspend these principles even during states of emergency,²² UNDP can neither ignore nor overrule them as a UN agency. We believe the essentials of these principles should inform *mutatis mutandi* the compliance review process.

10. To guarantee there is non-discrimination and equality in the process's Structural Organization and Staffing, UNDP should strongly embrace the principles of non-discrimination. It is critical to ensure cultural and gender diversity is endorsed within composition of the panel charged with carrying out the compliance review. The principle of non-discrimination is the peremptory norm of international law, which the UNDG supports²³ and UNDP should not ignore in this instance. The UNDG has acknowledged the principles of self-determination²⁴ and non-discrimination and equality, including gender equality.²⁵ Endorsing these principles would also be consistent with the principles advocated by the UN Declaration.²⁶ Furthermore, this would set a higher standard than the MDBs, which only require their panel members to be different nationalities with a suitable level of knowledge of the economic, social and developmental issues, technical competence and independence from the Bank they are affiliated with.²⁷ We believe specific guarantees for non-discrimination and equality, with perhaps a particular consideration for appointing indigenous and women professionals, will adequately reflect the UNDP's commitment to their policies regarding indigenous peoples.

IV | GRIEVANCE PROCESS

11. The *Discussion Paper* also outlines a Grievance Process to address “project-related disputes.” However, there is a lack of clarity regarding: (1) the relationship between this process and the Compliance Review Process; (2) the difference between them; and (3) whether or not the use of the Grievance Process precludes the use of the other process. Whatever the response to these questions is, we believe the *Discussion Paper* must make it clear that regardless of the human rights challenges facing the project; this situation can never justify or excuse non-compliance with applicable policies and international human rights obligations. Needless to say, this call should be made with regard to both processes.

12. Our comments and recommendations on the Compliance Review Process should apply *mutatis mutandi* to the Grievance Process. However, we believe the Grievance Process should pay particular attention to the obligation to prevent human rights violations, provided that neither

²¹ Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, *supra* note 14, at 572.

²² According to the Inter-American Court of Human Rights, rights which may not be suspended or limited in their full and effective exercise are, among others: the right to judicial and prompt protection, those preventing discrimination; right to life; right to humane treatment; freedom from slavery; and the right to personal liberty. These rights are guaranteed even in the event of a state of emergency only involving the time period in which a war, public danger or other emergency has threatened the independence or security of a State Party. *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H. R. (ser. A No. 7) at 4, 12 (January 30, 1987).

²³ UNDG Guidelines on Indigenous Peoples' Issues, *supra* note 12, at 4, 11, 12.

²⁴ *Id.*, at 11-14.

²⁵ *Id.*, at 12, 25-26, 32.

²⁶ See UN Declaration, *supra* note 20, at 2, 8(2), 11(2), 17(3), 18, 22, 27, 40, 41, 42.

²⁷ See e.g. The World Bank Operational Manual, BP 17.55, Annex A, January 1999, para. 2, 4, 5; See also The Inter-American Development Bank Policy Establishing The Independent Consultation and Investigation Mechanism, February 2010, para. 75, 78, 87.

human rights can be negotiated nor their violations be mitigated as they imply irreparable harm to people.²⁸

V | CONCLUSION

13. We hope that these comments and recommendations will be helpful in preparing a revised edition of the *Discussion Paper*. We welcome the progress made thus far and acknowledge the challenges in developing the processes at issue. We are aware that there is still a long way to go. Accordingly, we have tried to keep our suggestions modest and limited in number focusing only in those issues that were not clearly or not addressed at all in the *Discussion Paper*.

14. Of greater importance will be the progress of the UNDP toward vigorous and forthright actions to embrace the human rights based and cultural and gender sensitive approach to the processes outlined in the *Discussion Paper*. It is time for the UN system as a whole to bring development practices in line with human rights standards. Widely promoted UN principles of international human rights law must be incorporated not only into the policies that would govern UNDP supported projects, but also into the processes that would hear and address project complaints.

14. In developing the processes in question, UNDP should lead development practices instead of following what MDBs have promoted for decades: strong focus on environmental protection with zero consideration of human rights. Indigenous peoples and other vulnerable groups in the developing world expect higher standards from UN development agencies, not identical to MDBs standards. This is very concerning for indigenous peoples, because of the devastating human rights consequences that MDBs financed projects caused to indigenous communities.

²⁸ REDD+ Principles, *supra* note 15, at 21.