

# INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

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## **Comments on the Forest Carbon Partnership Facility (FCPF) Carbon Fund (CF) draft Methodological Framework (MF) – September 5, 2013.**

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### Introduction

1. The Indian Law Resource 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 fighting to protect their lands, resources, human rights, environment and cultural heritage. For over 30 years, we have advocated for better policies on indigenous peoples' issues at the United Nations and the World Bank Group.
2. The Center submits these comments on the *Forest Carbon Partnership Facility (FCPF) Carbon Fund (CF) draft Methodological Framework (MF) – September 5, 2013*. We urge the FCPF Facility Management Team (FMT) and Carbon Fund Participants to seriously reconsider the treatment of indigenous peoples' land and resource rights prior to adoption of any final MF.
3. The success of the Carbon Fund in curbing deforestation and mitigating climate change is dependent on the ability of indigenous peoples to sustainably and securely manage their lands and resources without threat of eviction or encroachment. Unfortunately, the year-long process of designing the CF's draft MF was not made accessible to indigenous peoples. While the FCPF received extensive comments and inputs from civil society organizations, including the Center, on issues of indigenous peoples' land and resource rights, these issues were sidelined in the official design process, and have largely been watered down or removed entirely from the current draft MF.

## The Carbon Fund and the rights of indigenous peoples

4. The Carbon Fund can only succeed if it provides a framework that guides countries to respect indigenous peoples' rights to self-determination and collective ownership of their lands and resources. Much of the forest stocks and carbon sinks that still exist on the planet remain intact largely because of indigenous peoples who have sustainably used and conserved their resources and protected them from destructive activities of governments and private interests. Scientific studies have confirmed that community-led conservation activities are more successful at preventing deforestation than strategies such as protected areas, which try to remove or exclude indigenous peoples from their lands and natural resources.<sup>1</sup>

5. The CF needs indigenous peoples in order to succeed at mitigating climate change. At the same time, Emissions Reduction (ER) programs cannot be successful in an environment of land conflicts and evictions. Legal recognition of indigenous peoples' collective rights to own, use, develop, and control their lands, territories, and resources is both an essential human rights safeguard and a necessary incentive for indigenous peoples' participation in ER programs.

## The MF design process sidelined indigenous peoples and their issues of concern

6. The process of developing a draft Methodological Framework for the Carbon Fund sidelined the involvement of indigenous peoples and meaningful inclusion of the issues most critical to them. The original plan for the MF drafting process provided for treatment of land rights through both an issue paper as well as a design forum on carbon rights and land rights. The land rights issue paper, however, was either never produced or never released. Therefore, although the Center and other civil society organizations worked to ensure the participation of one indigenous representative to address the issue of land and resource rights, the forum moved forward on the issue of carbon rights without a critical examination of the fundamental issue of land rights. The summary from that design forum has yet to be made public.

7. The FMT promised a future issue paper and design forum specifically on land. However, no issue paper was released, no design forum was scheduled, and the draft MF was produced without an analysis or discussion of land rights. The decision to drop the area of analysis most critical to indigenous peoples calls into question the legitimacy of the MF and raises questions as to whether the design process of the last 12 months was conducted in good faith.

## Lack of attention to indigenous peoples' collective rights

8. The Carbon Fund is required to promote and support the Reducing Emissions from Deforestation and Forest Degradation (REDD+) safeguards under the United Nations Framework Convention on Climate Change (UNFCCC). Both the FCPF Charter and the UNFCCC Cancun

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<sup>1</sup> See e.g. Andrew Nelson & Kenneth Chomitz, *Protected Area Effectiveness in Reducing Tropical Deforestation: A Global Analysis of the Impact of Protection Status*, in WORLD BANK INDEPENDENT EVALUATION GROUPS EVALUATION BRIEF 7 (Oct. 2009), available at [www://http://siteresources.worldbank.org/INTOED/Resources/protected\\_areas\\_eb.pdf](http://siteresources.worldbank.org/INTOED/Resources/protected_areas_eb.pdf).

Agreements require the Carbon Fund to respect the rights of indigenous peoples, including under applicable international agreements and obligations.<sup>2</sup>

9. The MF, however, provides no indicators on indigenous peoples' distinct collective rights, most notably rights of self-determination and collective ownership of their lands and resources, and related international standards. In fact, in the 43-page MF draft document, there are only two references to indigenous peoples at all – 1) as one of several potential beneficiaries of ER programs, and 2) in a mention of the World Bank Indigenous Peoples Plan and other planning documents.

10. Despite the recommendation from the 2012 Global Action Plan of Indigenous Peoples Relating to FCPF<sup>3</sup> that the FCPF “promote the respect and recognition of the rights of indigenous peoples” and “actively encourage governments to provide legal measures to respect, recognize and protect the rights of indigenous peoples in all stages of REDD+ consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169,” the current draft MF does not require respect for indigenous peoples' self-determination and right to give or withhold their free, prior and informed consent, through their self-governing institutions, to projects that would affect their lands or resources.

11. The MF does not require recognition of indigenous peoples' collective ownership of their lands and resources, consistent with international law. In fact, the current draft has eliminated even the language of previous drafts requiring a work plan to make progress on securing land tenure. In a previous draft, Criterion 37 stated, “ER Program explains how relevant key issues related to land and resource tenure systems identified in the assessment are considered in the design of the ER Program.” The corresponding indicator read, “ER Program explains how relevant key issues, including over contested or legally unclear land and resource tenure regimes, identified in the assessment have been taken into consideration in the design of the ER Program and presents a work program to advance progress on these issues.” These provisions have been removed.

12. Instead, the MF now only requires that an assessment of land tenure be made publicly available (Criterion 32) with an explanation of how relevant issues identified in the assessment have been or will be taken into consideration in the design and implementation of the ER Program. Moreover, this assessment has been watered down from previous drafts so that it is now largely a theoretical exercise, relying on prior assessments to merely describe the “range of land and resource tenure rights...and categories of rights-holders.” As per the current draft, only “if necessary” does the ER Program undertake additional assessment of issues such as “the legal status of such rights, any contested areas, how significant disputes related to such rights have been addressed, and the ability to transfer Title to ERs to the Carbon Fund.”

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<sup>2</sup> International Bank of Reconstruction and Development Charter Establishing the Forest Carbon Partnership Facility, May 11, 2011, art. 3, § 3.1.(d); UNFCCC Conference of the Parties, Nov. 29-Dec. 10, 2010, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, appendix 1(2), FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

<sup>3</sup> Available at

<http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Feb2013/Final%20Global%20Action%20Plan%20IP%20Dialogue%20with%20FCPF.pdf>.

13. The MF should require not only recognition of indigenous peoples' collective ownership rights to their lands and resources within the ER program, but also an assessment that examines the existing legal recognition and implementation of land and resource rights, *vis a vis* international human rights standards, including the UN Declaration. Where gaps in recognition and protection of indigenous peoples' land and resource rights are identified, appropriate measures should be identified and implemented to prevent rights violations within the ER program.

14. The draft MF's language on benefit-sharing should also be strengthened to protect indigenous peoples' land and resource rights and rights of self-determination. The MF criterion and indicators do not provide protection where governments may claim ownership of indigenous peoples' lands and/or resources, including carbon, in violation of international law. The MF should state that benefit-sharing agreements must ensure that indigenous peoples share equitably in all the benefits of REDD+, according to their rights either as owners of the land and resources generating carbon emissions or as those doing the work of conserving resources and generating emissions reductions. Design and implementation of the Benefit-Sharing Plan should comply with both domestic law and international obligations.

15. Incorporating indicators on indigenous peoples' rights is entirely feasible. For instance, what now appears as Criterion 26 on drivers of deforestation could easily be modified as follows to address the rights of indigenous peoples:

*The ER Program describes how the ER Program addresses the fundamental rights of indigenous peoples, as identified in the UN Declaration on the Rights of Indigenous Peoples.*

- *Indicator: The ER Program Document identifies any rights of indigenous peoples potentially at risk, in particular collective rights to lands, territories and resources.*
- *Indicator: The ER Program identifies currently planned ER Program Measures to prevent rights violations, the entities that would undertake them, and their capacity to implement these ER Program Measures.*

#### Overreliance on World Bank safeguards vs. UNFCCC safeguards

16. In relying almost exclusively on World Bank safeguards, the MF falls short of the FCPF Charter and UNFCCC obligations to respect the rights of indigenous peoples. The present draft MF states that "The World Bank's view is that the World Bank safeguards policies, procedures and practices are consistent with the Cancun safeguards for REDD+." This statement, however, provides more confusion than direction and is not supported by actual analysis. In fact, the Indigenous Peoples Policy does not meet international standards on the rights of indigenous peoples, especially with regard to indigenous peoples' rights to self-determination and collective ownership of their lands, territories and resources.<sup>4</sup> Additionally, implementation of the Policy in

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<sup>4</sup> See Indian Law Resource Center, Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies, May 2013, available at [www.indianlaw.org/mdb](http://www.indianlaw.org/mdb); See also Follow-up on the recommendations of the Permanent Forum: Comprehensive dialogue with United Nations agencies and funds, Permanent Forum on Indigenous Issues 12<sup>th</sup> Session, 28 May 2013, E/C.19/2013/L.6.

practice reveals a significant lack of compliance with requirements on recognition of land and resource rights as well as requirements to secure broad community support for projects.<sup>5</sup>

17. Furthermore, the Bank's legal department has acknowledged possible areas of inconsistency between the Indigenous Peoples Policy and the UN Declaration on the Rights of Indigenous Peoples, i.e. regarding rights to lands, territories and resources, and rights to free, prior, informed consent,<sup>6</sup> and senior staff have stated that part of the process of the ongoing World Bank safeguards review is to make the Indigenous Peoples Policy "consistent, or more consistent" with the UN Declaration.<sup>7</sup>

18. The draft MF's one indicator that "the ER Program meets the World Bank social and environmental safeguards, and promotes and supports the safeguards included in UNFCCC guidance related to REDD+" does not provide any guidance or clarity on what the UNFCCC safeguards mean for ER programs. Moreover, by referencing at the end of the indicator, not the UNFCCC safeguards themselves, but the FMT's chart lining up UNFCCC safeguards with relevant Bank safeguards, the MF implies that UNFCCC safeguards are irrelevant so long as World Bank safeguards are followed. This not only undermines UNFCCC safeguards, but leaves countries without adequate guidance as to how to protect the rights of indigenous peoples in ER programs.

### Recommendations

19. The recommendations in the Center's January 2013 submission on the MF<sup>8</sup> are still relevant today. They can be summarized as follows:

- To be compliant with the UNFCCC and FCPF Charter, Carbon Fund operations must be consistent with Cancun safeguards, including respect for the rights of indigenous peoples.
- Therefore the Carbon Fund should make a clear statement that it will not finance emissions reduction programs that would contravene countries' international human rights and environmental obligations.
- World Bank safeguard policies aren't consistent with international standards on the rights of indigenous peoples, including the UN Declaration on the Rights of Indigenous Peoples and decisions of regional human rights courts. Therefore operational policies and instruments (e.g. the Indigenous Peoples Plan) aren't sufficient to measure and report on compliance. Additional criteria and instruments are needed, including the use of human rights impact assessment.

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<sup>5</sup> See Working Paper prepared for the World Bank's Operations Policy and Country Services: *Implementation of the World Bank's Indigenous Peoples Policy, A Learning Review (FY 2006-2008)* (Aug. 2011) para. 46, 50, 81.

<sup>6</sup> See 'Consultation Workshop and Dialogue on Indigenous Peoples' Self-determined Development or Development with Identity, Tivoli, Italy, 14-17 March 2008', UN Doc E/C.19/2008/CRP.11 (18 Apr. 2008) (Adopted by the Permanent Forum on Indigenous Issues, 7<sup>th</sup> Session, 21 Apr.-2 May 2008) para. 99.

<sup>7</sup> Statement by Luis Felipe Duchicela, World Bank Senior Advisor on Indigenous Peoples and Ethnic Minorities, at the UN Permanent Forum on Indigenous Issues 12<sup>th</sup> Session, May 2013.

<sup>8</sup> Indian Law Resource Center, Submission to the FCPF Carbon Fund on the Methodological Framework, January 7, 2013, available at [www.indianlaw.org/climate](http://www.indianlaw.org/climate).

- Additional criteria are also needed to clearly explain the content of indigenous peoples' fundamental rights and best practices relating to lands and resources, benefit-sharing, and grievance mechanisms.
- Progress on securing land and resource rights can be incentivized through time-bound requirements. Securing protection of land rights, consistent with international law, should be a precondition for carbon projects.
- The MF should identify actions or characteristics which would make an ER program ineligible for financing, such as failure to respect indigenous peoples' rights to lands, territories and resources, including any forced relocation.

20. We have already seen the evictions and human rights violations that can occur when a financial value is placed on indigenous peoples' lands and resources. Without strong protections for indigenous peoples' fundamental rights, indigenous peoples won't have an incentive to participate in ER programs. What's worse, ER programs will be used to take Indian lands and resources, displacing indigenous peoples from their lands and sustainable livelihoods.

21. It seems that what is needed to develop an effective methodological framework for the Carbon Fund is not another round of comments and proposed revisions, but genuine willingness from the Fund and its members to consult in good faith and to honor their obligations to respect the human rights of indigenous peoples.

22. For additional information or clarifications, please contact Gretchen Gordon at [ggordon@indianlaw.org](mailto:ggordon@indianlaw.org).