

# Lawyers For Community Tenure

A GLOBAL COALITION OF LAWYERS & ADVOCATES FOR SECURING COMMUNITY TENURE

## COMMUNITY TENURE, CLIMATE CHANGE, AND THE WORLD BANK SAFEGUARDS

This brief is released at the 19th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in Lima, Peru to highlight the critical nexus between the issues faced by Indigenous Peoples and local communities in securing tenure over forestlands, and the increase in carbon dioxide emissions from deforestation, forest degradation and land conversion for large scale agriculture, mining and other extractive industries.

### Community Tenure and Climate Change

A 2013 report released by the World Resources Institute and RRI observes, "With deforestation and other land uses now accounting for about 11 percent of annual global greenhouse gas emissions, weak legal protection for forest communities is not just a land or resource rights problem. It is a climate change problem (Stevens et al, 2014, 2)." Citing examples and data from 14 countries, this report found that "when Indigenous Peoples and local communities have no or weak legal rights, their forests tend to be vulnerable to deforestation and thus become the source of carbon emissions (25)." Conversely, "legal forest rights for communities and government protection of their rights tend to lower carbon dioxide emissions and deforestation (30)."

This year's COP likewise represents a valuable opportunity to build on the groundwork laid by the Warsaw Framework on REDD+ adopted in November 2013. This paves the way for performance-based payments from carbon emissions reductions through REDD+ activities. While REDD+ has currently not been a catalyst for tenure reform in Low and Middle Income Countries (Almeida et al, 2014, 1), but as funding for emissions reductions becomes more available, "they can create real incentives for governments to undertake the tenure reforms necessary to clarify and secure Indigenous Peoples' and local communities' rights to their land and resources, as well as ensure the reduction of emissions from deforestation and forest degradation on a long-term basis (Almeida et al, 2014, 7)."

### The Proposed World Bank Safeguards

The World Bank proposed a draft framework of new Environment and Social Standards (ESS), which was released for consultation with stakeholders in July 2014. It contains ten standards, which "set out the requirements for World Bank Borrowers relating to the identification and assessment of environmental and social risks and impacts associated with projects supported by the Bank through Investment Project Financing (World Bank Environment and Social Framework, Draft for Circulation as of 30 July 2014, 1)." These requirements are mandatory and the standards must be met throughout the project cycle.



**Lawyers for Community Tenure** is a global coalition of lawyers and advocates for securing community tenure. It serves as a legal reference group for the Rights and Resources Initiative (RRI), other networks and organizations, as well as Indigenous Peoples and local communities on legal strategies to secure indigenous and other community based property rights to lands and resources and other legal issues facing their work.

The Group was formalized at a meeting held in December 2013 in Tagaytay City, Philippines. Its succeeding work will include the preparation of common positions and collective opinions, updates on new legislations and/or reforms and their implications and sharing of best practices, through publications, participation in activities, and through their website.

The Group's current members are lawyers and practitioners who are recognized experts in the fields of environmental and natural resource law and policy, and Indigenous Peoples and community rights. They are a diverse group, representing various geographic regions, gender and fields of expertise.

This is the first Joint Opinion of the Group. Members provided input to this brief and have signed on voluntarily.

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The draft was widely criticized by civil society following its release, who saw the new safeguards as dilutions of existing standards and recognitions of rights. Among its most contentious provisions was the Alternative Approach, contained in ESS 7 on Indigenous Peoples. Paragraph 9 of ESS 7 provides that :

***“where the Borrower is concerned that the process of identifying groups for purposes of applying this ESS would create a serious risk of exacerbating ethnic tension or civil strife, or where the identification of culturally-distinct groups as envisioned in this ESS is inconsistent with the provisions of the national constitution, the Borrower may request the Bank to agree on an alternative approach, in which risks and impacts of the project on Indigenous Peoples will be addressed through the application of other ESSs.”***

The International Work Group for Indigenous Peoples Affairs (IWGIA) noted with concern the Alternative Approach provision, which they saw as allowing governments to “opt out of requirements designed

to protect Indigenous Peoples from unintended and negative consequences from development activities funded by the World Bank (IWGIA Statement, 2014, 2).” They noted that this would be a “major setback for Indigenous Peoples” in particular in Asia and Africa, where “many governments continue to violate Indigenous Peoples rights (2-3).” IWGIA further raised that this Alternative Approach “disregards international law on indigenous peoples’ rights and undermines achievements and standards of regional human rights mechanisms (3).”

The Asia Indigenous Peoples Pact (AIPP) and the Forest Peoples Program (FPP) also opposed this “opt out provision” saying that “If the decision on whether international human rights are to be respected or not rests solely with national governments, then the Bank is acting to undermine agreed international human rights standards (AIPP and FPP Statement, 2014, 2).” The AIPP and FPP statement also criticized the absence of “meaningful standards of land tenure governance (6)” in the draft.

## JOINT OPINION

The World Bank’s Safeguards Review is a welcome process. A review of the appropriateness and responsiveness of policies and systems is timely, with Climate Change contributing to the emergence of new issues in resource use and management.

We acknowledge that some of the standards and safeguards in the draft Framework are welcome additions. ESS 5 provisions against involuntary resettlement and forced eviction and the inclusion of Free, Prior and Informed Consent (FPIC) in ESS 7 paragraphs 19 to 22 provide a good start for further discussion.

However, we echo the concerns of Indigenous Peoples and local communities, support groups and civil society on several of the draft Framework’s standards and safeguards. In particular, we raise the following:

***The Alternative Approach in ESS7 Paragraph 9 risks undoing gains achieved in advancing community ownership of land, and may discourage governments’ recognition of Indigenous Peoples and local community’s right to the carbon in their forests.***

In recent years, there has been a trend toward legal recognition of communally held native or aboriginal lands. International law, including international customary law now mandates domestic legal recognition of aboriginal or indigenous property rights, as can be observed from international

instruments, principles, court decisions and recent and encompassing indicators reflected in international laws that recognize the rights of Indigenous Peoples and others in long occupied ancestral areas (Lynch, 2011, 6).

Recognition of community rights to land has extended to discussions on community ownership of forest carbon. Indigenous Peoples and local communities are recognized as stewards of the forests that they traditionally occupy. They have relied on these resources for subsistence and livelihood, consistent with principles of sustainable use. Non-recognition of their right to the carbon in these trees “would threaten to disrupt traditional systems of sustainable natural resource management. Even worse, it would tend to undermine existing local incentives to plant and conserve trees. This would be the opposite of what REDD+ purportedly aspires to achieve and would violate important REDD+ standards and safeguards agreed to at COP 16 in Cancun (La Viña and Lynch, 2011, 8-9).”

Even with these developments, “depth and implementation of laws remain limited,” by weak recognition of rights and flawed implementation of reforms (RRI, 2014,39).Peoples and local communities. By allowing a borrowing government to propose their own standards based on an assessment of circumstances that they determine, the Alternative Approach provision risks becoming a further disincentive for strengthening national systems of community land tenure and broader application of this recognition to the carbon rights of Indigenous

***The World Bank Safeguards could do more to uphold international norms on community ownership of land and resources.***

ESS 5 provides the standards on Land Acquisition, Restrictions on Land Use and Involuntary Resettlement. Under paragraph 4, these standards will doubtless apply where REDD+ activities cause communities to lose access to resource usage through the designation of protected areas, forests, biodiversity areas or buffer zones.

Under paragraph 6, these requirements apply to persons who: a) have formal legal rights to land or assets; b) who do not have formal rights to land or assets, but have a claim to land or assets that is recognized or recognizable under national law; and c) who have no recognizable legal right or claim to the land or assets they occupy or use. This classification affects the compensation and benefits the people receive in case of physical or economic displacement.

This paragraph should be further reviewed, along with the succeeding provisions on Compensation and Benefits for Affected Persons (paragraphs 8 to 13). Rights and standards under international law, including those protected by global and regional Human Rights Convention and well as 169 ILO convention, should be considered in addition to national laws and policies.

On the ground, the determination of “recognized or recognizable rights” is still unclear, and State policies can be largely discretionary on the part of national implementing authorities. As such, many poor forest communities still have no recognizable rights or claims to the lands that they occupy and the resources that they rely on. But their roles in forest management must be acknowledged and incentivized if REDD+ or any other forest carbon sequestration is to succeed. Their inclusion should not be premised on secure tenure, considering the vast forest areas that they inhabit and oversee.

## CONCLUSION

The policies of an international funding institution such as the World Bank contribute to the creation and reinforcement of norms on Indigenous Peoples rights to their lands and resources. With its influence, it should move in the direction of increased recognition of these rights rather than away from them. Only then will the Bank achieve its avowed purpose of “ending extreme poverty and promoting shared prosperity in its partner countries,” consistent with principles of equality, social development and inclusion.

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Please contact [asog.ccenvi@gmail.com](mailto:asog.ccenvi@gmail.com) for questions, comments or suggestions regarding this opinion. These will be referred to the relevant Group members.

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