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Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights

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*Principles of International Law
for
Multilateral Development Banks*

The Obligation to Respect Human Rights

By
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January, 2009

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Principles of International Law for Multinational Development Banks

The Obligation to Respect Human Rights

By

Robert T. Coulter,^{*} Leonardo A. Crippa,^{**} Emily Wann^{***}

January, 2009

Deep and widespread concern about the environmental, human rights, and other social impacts of development projects financed by multilateral development banks (MDBs) has resulted in a proliferation of voluntary codes and voluntary principles and policies for corporations and other businesses. But despite the development and adoption of these voluntary codes and principles by many businesses, as we discuss below, few observers today believe that corporate performance, or state performance for that matter, in developing countries in respecting human rights and protecting the environment is adequate. Nor would an informed observer conclude that the law for protecting human rights and the environment is yet sufficiently effective, especially in guarding against human rights violations and environmental harm resulting from MDB supported projects.

It is notable that none of the voluntary codes, principles or policies contains or proposes any binding rules of international law that would apply to MDBs and that would require MDBs, like the states that comprise them, to respect, promote, and protect human rights in all MDB activities. It is axiomatic that important community and civic values, such as human rights, environmental rights, and environmental protection must be incorporated into enforceable rules of law both at the international level and at the domestic or state level. This has been done to a significant degree as regards the obligations of states to respect and promote human rights. But MDBs have generally insisted that they are not legally required to respect, promote, and protect human rights as states are.

The World Bank, for example, has taken the position, in accordance with the opinion of its then General Counsel, that, in its financing activities, it cannot take into consideration non-economic matters such as human rights. This position was based upon a restrictive interpretation of the Articles of Agreement, Article IV, Section 10 of the International Bank for Reconstruction and Development (the WB) and Article 5, Section 6 of the International Development Association (IDA) Articles of Agreement.¹

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¹ Memorandum from the General Counsel of the World Bank, Ibrahim Shihata, Issues of "Governance" in Borrowing Members – The Extent of their Relevance under the Bank's Articles of Agreement (1999) (on file with Indian Law Resource Center).

However, there are no provisions in MDBs' constitutive instruments expressly preventing their consideration of human rights issues, and the Articles of Agreement can no longer be interpreted as precluding MDBs' consideration of human rights obligations under international law, because the protection of human rights has become a matter of legitimate international concern.² MDBs are parts of larger intergovernmental organizations which, by the terms of their Charters or constitutional instruments, require respect for human rights. For instance, the WB is a specialized agency of the United Nations (UN), according to the agreement entered into with the UN Economic and Social Council (ECOSOC)³ in accordance with related Articles of the UN Charter.⁴ The UN Charter expressly calls for universal respect for human rights and fundamental freedoms without discrimination,⁵ as well as for action in cooperation with the UN for the achievement of this purpose.⁶

In January of 2006, the outgoing WB General Counsel released a legal opinion recognizing that the balance has now shifted in favor of protecting human rights.⁷ The General Counsel pointed out that the Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, because it is now evident that human rights are an intrinsic part of the Bank's mission.⁸

This legal opinion constituted a clear advance from the previous restrictive legal interpretation. However, a subsequent opinion of the WB General Counsel regards the Articles as permissive in regard to human rights: allowing but not mandating action on the part of the Bank in relation to human rights.⁹ According to this opinion, the WB's role is a facilitative one, helping its members realize their human rights obligations.¹⁰ Human rights would not be the basis for increased conditions on Bank financing, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business.¹¹

² Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 143 (Oxford Univ. Press 2006).

³ World Bank, Relationship Agreement, art. 1(2).

⁴ See U.N. Charter, art. 57. Finally, Article 63(2) 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).

⁵ U.N. Charter, art. 55(c).

⁶ U.N. Charter, art. 56. See Mac Darrow, BETWEEN LIGHTS AND SHADOWS, THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 125 (Oxford Portal Oregon 2003).

⁷ Memorandum from the General Counsel of the World Bank, Roberto Danino, Legal Opinion on Human Rights and the Work of the World Bank 17 (Jan. 27, 2006) (on file with Indian Law Resource Center).

⁸ *Id.* at 25.

⁹ Memorandum from the General Counsel of the World Bank, Ana Palacios, The Way Forward: Human Rights and the World Bank (2006). Available at <http://www1.worldbank.org/devoutreach/october06/article.asp?id=388>.

¹⁰ *Id.*

¹¹ *Id.*

MDBs have developed operational policies on specific human rights topics, but these policies do not reflect accepted international human rights related standards. For their operational policies, MDBs generally choose their own definitions and standards of human rights. These standards are seldom based directly on internationally agreed standards, though they are influenced by them.¹² These choices have as much to do with what is politically acceptable within and among the participating entities as with objective human rights needs.¹³ For instance, the Inter-American Development Bank (IDB) has adopted an Operational Policy on Indigenous Peoples that does not reflect the existing international standards on the collective rights of indigenous peoples.¹⁴

MDBs have also developed inspection mechanisms for accountability purposes. Some scholars consider that, legally, these mechanisms have turned out to be “effective” forums in which project-affected people can raise claims that relate to their rights as indigenous peoples or as involuntarily resettled people, and in which they can challenge the interpretation and implementation of MDBs’ internal policies and procedures.¹⁵ But, from an international human rights law viewpoint, they are not effective in addressing human rights violations resulting from MDB financed projects. 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.¹⁶

Having in mind the enormous and often irreversible human rights and environmental consequences of MDB financed projects and the inadequacy of the present legal and policy framework for protecting human rights and the environment, we feel that concrete and enforceable rules of international law must be recognized and applied to MDBs. Such rules of international law are justified both by existing principles of international law and by the fact that, as a practical matter, such concrete rules are needed to protect the Earth and our human rights.

The draft Principles of Law flow from existing and widely accepted rules of international human rights law, and they are offered here as a starting point for further discussion and elaboration by all concerned. We have no illusion that this set of draft Principles is necessarily correct or complete, and we look forward to criticisms, suggestions, and alternative drafts. If it is agreed that international law should be clarified and extended explicitly to reach MDBs, and we believe it should, then the

¹² 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).

¹³ *Id.* at 53.

¹⁴ See generally Indian Law Resource Center, *Comentarios al Borrador de Política Operativa sobre Pueblos Indígenas publicado por el Banco Interamericano de Desarrollo*, July 29, 2005. Available at <http://www.indianlaw.org/main/resources/1/4>.

¹⁵ Daniel Bradlow D., *Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT’L L. 410 (2005) (analyzing the legal and practical significance of MDBs’ inspection mechanisms).

¹⁶ 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*, *supra* note 12, at 53.

particular human rights and environmental rules should be or could be elaborated in further detail. Just as Principle 4 contains certain detailed rules particularly addressing certain rights of indigenous peoples, the Principles might usefully be enlarged and improved to embrace more clearly all individuals and peoples and to provide greater specificity as to the rights to be protected.

We believe that these Principles should be written so as to command respect by MDBs for the human rights of all, not just indigenous peoples. We have drafted the Principles in that way, but we have also included some specific elements to protect human rights of particular importance to indigenous peoples. We recognize that further detailed principles would be justified to address other issues particularly affecting other categories of individuals or groups. Such additions and suggestions are welcomed and encouraged.

These draft Principles, or a refined and improved version of them, are proposed with a view toward eventual adoption and recognition as existing principles of international law applying directly to multilateral development banks. These are not conceived as merely voluntary or aspirational principles. They are elements of international law that are evolving and crystallizing as binding rules of law through the regular practice of states and through the growing recognition of the legal rules by states. While they are in the process of becoming universally accepted, there would be great value in clarifying and developing this area of law in a positive manner. It would, therefore, be desirable for the UN Human Rights Council or the regional organizations such as the Organization of American States (OAS) to formally recognize and adopt these Principles of Law or some similar principles that result from further dialogue and debate.

Draft Principles of International Law for Multilateral Development Banks

1. Multilateral development banks, as inter-governmental organizations, are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. A multilateral development bank is not, however, subject to treaty obligations concerning human rights, unless all the member countries are parties to a human rights treaty.

2. Multilateral development banks, in all their activities, shall take reasonable and prudent measures to assure their activities, loans, or other actions do not cause, enable, support, encourage, or prolong the violation of human rights by any state, agency, corporation, or business.

3. Multilateral development banks shall exercise due diligence to investigate, gather evidence, examine the law, and review proposals in order to assure that proposals, projects and businesses that receive any sort of support from them (MDBs) do not directly or indirectly violate or infringe upon the human rights of anyone or any community or people.

4. In particular, multilateral development banks shall, with respect to projects or businesses receiving multilateral development bank support in any form, assure through the project review process and through on-going review and monitoring that the following standards, *inter alia*, are met:

- 1) Projects, their sponsors, directors, and participating entities shall respect the human rights of all individuals and communities, including indigenous peoples, as those rights are established both by international law and by the law of the country where the project or business is located.
- 2) Projects, their sponsors, directors, and participating entities shall respect the traditional and collective ownership of land by indigenous peoples and local communities, as well as individual rights of ownership.
- 3) Projects, their sponsors, directors, and participating entities shall recognize, respect and work to preserve the cultures and ways of life of indigenous peoples, national, cultural, and linguistic minorities, and other such communities.
- 4) Projects, their sponsors, directors, and participating entities and the states where they are located shall recognize the duly established governments of indigenous peoples and other communities as representatives of the interests of their respective communities and respect their systems of governance.
- 5) Projects, their sponsors, directors, and participating entities shall assess the potential social and environmental impacts of the projects, including human rights impacts, prior to MDB funding or support for such projects.
- 6) Businesses and the states where they are located shall consult in good faith with indigenous and local communities prior to undertaking a project that may affect the community.
- 7) Projects, their sponsors, directors, and participating entities shall include the participation of indigenous and local communities in the design and implementation of the projects to lessen any adverse impact on them.
- 8) Projects, their sponsors, directors, and participating entities shall not dislocate indigenous or other communities without their free, prior, and informed consent. If relocation occurs with such consent, the community must receive compensation, including compensation in the form of land of comparable quantity and quality, if possible and so desired by the community.

- 9) Projects, their sponsors, directors, and participating entities shall have precise, written policies consistent with these Principles to govern their interaction with indigenous and local communities.
5. Multilateral development banks have the on-going responsibility to monitor and periodically review the human rights performance of all projects or businesses receiving support.
6. Multilateral development banks shall undertake measures to implement these Principles, including educational measures for MDB staff, for MDB member states, and for the clients of the MDBs, among others.
7. Multilateral development banks shall institute written procedures for the submission and consideration of complaints of human rights violations on behalf of any person or group with respect to any project or activity of the bank. Such procedures shall result in a written report where a human rights violation has occurred and recommendations for corrective action by the bank and by the project as appropriate. Multilateral development banks shall take prompt and effective action to correct any human rights violation identified by such a report and shall take effective measures to prevent future violations.

* * *

In considering and drafting this body of Legal Principles for multilateral development banks, we have drawn upon a rich and extensive body of human rights instruments, treaties, and international legal jurisprudence.¹⁷ We refer throughout to human rights instruments relevant to indigenous peoples, especially the UN Declaration on the Rights of Indigenous Peoples and ILO No. Convention 169 concerning Indigenous

¹⁷ See, e.g., UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/61/295 (2007); Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/II.95 Doc.6 (1997); International Labor Organization, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 328 UNT.S. 247, 28 I.L.M. 1382 (1989); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3; Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003); International Finance Corporation's Performance Standards on Social and Environmental Sustainability, *Performance Standard 7: Indigenous Peoples*, at 28-31, Apr. 30, 2006, available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf); Inter-American Development Bank, Sustainable Development Department Indigenous Peoples and Community Development Unit, *Operational Policy on Indigenous Peoples* (Feb. 22, 2006), available at http://www.iadb.org/sds/ind/index_ind_e.htm.

and Tribal Peoples. The UN Declaration was adopted by the General Assembly in 2007 and is formally non-binding, though it contains much that is already part of customary international law. The ILO Convention No. 169 is binding on the 17 states that have ratified it. We give attention to the rights of indigenous peoples because of our particular interest, but we believe that these draft Principles are equally important for protecting the rights of all persons and all peoples.

In addition, we have considered and drawn from many voluntary principles of businesses, NGOs, and others, including some lesser known standards and norms regarding corporate responsibility, business and human rights, and environmental and social justice. See below at note 40 *et seq.* Some of the most relevant legal authorities and other materials are set forth following each of the draft Principles.

Principle 1. Multilateral development banks, as inter-governmental organizations, are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. A multilateral development bank is not, however, subject to treaty obligations concerning human rights, unless all the member countries are parties to a human rights treaty.

MDBs are international intergovernmental organizations (IOs) created by agreements among states,¹⁸ on either a universal or regional basis,¹⁹ focused on the public or private sector²⁰ to carry out their respective mandates for economic and social development of developing member states.²¹ MDBs are exclusively comprised of states.²² Although there is neither a definition of the term “non-state actor” under

¹⁸ MDBs are creatures of states since states create them through instruments such as the Articles of Agreements. MDBs’ Articles of Agreement are treaties within the meaning of that term in Article 2 of the Vienna Convention on the Law of Treaties (Vienna Convention) of 1969. *See* Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, U.N.T.S. 18232. According to Article 5, the Vienna Convention applies to MDBs’ Articles of Agreements, because they are treaties constituting international organizations. *See id.* art. 5.

¹⁹ Universal MDBs, like the World Bank (WB), operate in developing member countries around the world. *See* World Bank, Articles of Agreement, art. I (i), Dec. 27, 1945. Regional MDBs operate in specific regions of the world. *See, e.g.,* Inter-American Development Bank, available at <http://www.iadb.org/>; European Bank for Reconstruction and Development, available at <http://www.ebrd.com/>; Asian Development Bank, available at <http://www.adb.org/>; and African Development Bank, available at http://www.afdb.org/portal/page?_pageid=473,1&_dad=portal&_schema=PORTAL.

²⁰ On one hand, the WB and the IDB mainly carry out their operations and projects in the public sector, providing loans to states to promote development in developing member countries. On the other hand, only the IFC focuses on private enterprises operating in member countries. *See* International Finance Corporation, Articles of Agreement, art. 1.

²¹ For instance, the IDB operates in Latin American developing countries. According to the IDB’s Articles of Agreement, the Bank’s purpose is to contribute to the development of the regional developing member countries, individually and collectively. *See* Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank, art. I, sec. 1 (Dec. 30, 1959).

²² MDBs’ membership is only open to states, whether regional or non-regional. For instance, according to the IDB’s Articles of Agreement, the original members are the members of the Organization of American States, but the membership is also open to non-regional countries that are members of the International Monetary Fund if admitted by the Bank under the rules of its Board of Directors. *See* Inter-American

international law nor a uniform use of the term by legal authorities,²³ MDBs should not be considered non-state actors, inasmuch as they are intergovernmental organizations in which states act collectively. Multilateral development banks include the World Bank Group, the Inter-American Development Bank, the European Bank for Reconstruction and Development, the African Development Bank Group, and the Asian Development Bank.

MDBs are governed by the collective decisions adopted by their decision-making organs, which are exclusively comprised of member states. For instance, according to the IDB's Articles of Agreement, all the power of the Bank is vested in the Board of Governors who can delegate functions to the Board of Executive Directors²⁴ – all these organs are exclusively comprised of member states.²⁵ Member states' voting rights in the decision-making organs are proportional to a country's subscription in the Bank's capital stock.²⁶ Moreover, MDBs themselves expressly regulate their "relations with other organizations" under their respective Articles of Agreement.²⁷

There is a growing legal consensus that intergovernmental organizations such as MDBs are subjects of international law, and, therefore, legal rights and obligations under international law apply to them. Several sources support this view, including: (1) the jurisprudence of the International Court of Justice (ICJ);²⁸ (2) the Vienna Conventions;²⁹

Development Bank, Agreement Establishing the Inter-American Development Bank, art. II, sec. 1, *supra* note 21.

²³ For some scholars, the term "non-state actor" refers to armed opposition groups within a domestic context that are independent of states, e.g., rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, etc. *See generally* Philip Alston, *The 'Not-a-Cat' Syndrome*, in *NON-STATES ACTORS AND HUMAN RIGHTS* 15 (Philip Alston ed., Oxford Univ. Press 2005) (defining non-state actors and identifying key factors concerning their performance under international human rights law). For others, non-state actors are all those actors, not state agents, that operate at the international level and are relevant to international relations. *Id.* at 15. Finally, a third position considers non-state actors to be those affected people with no contractual relationship with MDBs whose living conditions are directly or indirectly affected by the MDB-financed operations. *See generally* Daniel Bradlow D., *Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 *GEO. J. INT'L L.* 403, 411 (2005) (analyzing the legal and practical significance of MDBs' inspection mechanisms).

²⁴ Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank, art. VIII sec. 2, *supra* note 21.

²⁵ *Id.* art. VIII, sec. 3(a) and (b).

²⁶ John Ruthrauff, *AN INTRODUCTION TO THE WORLD BANK, INTER-AMERICAN DEVELOPMENT BANK, AND THE INTERNACIONAL MONETARY FUND* 6 (2d ed. 1997).

²⁷ *See, e.g.*, Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank art. XIV sec. 2, *supra* note 21. *See also* World Bank, Articles of Agreement, art. V, sec. 8, "Relationship to Other International Organizations"; and International Finance Corporation, Articles of Agreement, art. IV, sec. 7, "Relationship to Other International Organizations".

²⁸ The ICJ has concluded that the United Nations, as an IO, is a subject of international law. In the *Reparations* opinion of 1949, the Court stated that the UN was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 1949 I.C.J. 179 (Apr. 11, 1949). Since this opinion, the debate about the legal personality of IOs has evolved considerably. Indeed, thirty years later, in the *WHO* opinion of 1980, the Court established that international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon

and (3) the International Law Commission's draft treaty provisions on the responsibility of IOs.³⁰ Thus, the obligations and responsibilities of international human rights law, especially, should be applied to MDBs. As established in the principal human rights treaties and rules of customary international law, these obligations are: (1) to respect human rights;³¹ (2) to adopt domestic measures;³² and (3) to redress human rights violations.³³ Though these obligations were originally stated in a form applying to individual states, they are suitable for application, *mutatis mutandis*, to IOs such as MDBs.

MDBs, in all their activities, are obligated to respect human rights; but many affirmative human rights obligations cannot be applied in the same way as to states. For example, MDBs are not obliged as such to fulfill obligations that, by their nature, can

them under general rules of international law, under their constitutions, or under international agreements to which they are parties. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 173 (Dec. 20, 1980).

²⁹ The Vienna Convention on the Law of Treaties of 1969 refers to international organizations when defining its scope of application and the term "international organizations". See Vienna Convention on the Law of Treaties, art. 5 and art. 2(1)(i), *supra* note 18. In addition, three other Vienna Conventions use the same legal definition and take the same approach: (1) the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, art. I(1)(1) (Mar. 14, 1975); (2) the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, art. 2(1)(n) (Aug. 23, 1978); and (3) the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, art. 2(1)(i).

³⁰ The International Law Commission (ILC), which has responsibility for elaborating the Draft Convention on Responsibility of International Organizations, has defined an international IO, in Article 2, as "...an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to states, other entities." U.N. Internat'l L. Comm'n, *Responsibility of international organizations - Titles and texts of the draft articles 1, 2 and 3 adopted by the Drafting Committee*, ¶ 1, U.N. Doc. A/CN.4/L.632 (June 4, 2003).

³¹ Some of the relevant international instruments are: Organization of American States, American Convention on Human Rights, art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 1, Nov. 17, 1988, O.A.S.T.S. No. 69; U.N. Charter, art. 55(c); Universal Declaration of Human Rights, preamble, G.A. Res. 217A (Dec. 12, 1948); International Covenant on Civil and Political Rights, arts. 2(1) and 2(2), G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, art. 2(2), G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 7, G.A. Res. 45/158 (Dec. 18, 1990); International Convention on the Elimination of All Forms of Racial Discrimination, preamble, G.A. Res. 2106 (XX) (Dec. 21, 1965); Council of Europe, European Convention for the Protection of the Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221; Council of Europe, European Social Charter, preamble (Oct. 18, 1961); Organization of African Unity, African Charter of Human and People's Rights, art. 1 (June 27, 1981); League of Arab States, Arab Charter of Human Rights, art. 2 (Sept. 15, 1994).

³² See Organization of American States, American Convention on Human Rights, art. 2, *supra* note 31; Organization of African Unity, African Charter of Human and People's Rights, art. 1, *supra* note 31; International Covenant on Economic, Social and Cultural Rights, art. 2(1), *supra* note 31; International Covenant on Civil and Political Rights, art. 2(2), *supra* note 31.

³³ See Organization of American States, American Convention on Human Rights, art. 63(1), *supra* note 31. The obligation in question is a well-established rule of customary international law. See *Case of De la Cruz-Flores v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 115 (Nov. 18, 2004), para. 139.

only be fulfilled by the state itself, such as implementing the right to basic primary education, or the obligation to enact domestic legislation.³⁴ But MDBs would, under these Principles, have obligations not to act in a way that prevents a borrowing state from fulfilling its obligations to provide such education.³⁵ While MDBs cannot themselves enact domestic legislation, MDBs can be complicit in a state violation of human rights by causing, forcing, or enabling a state to violate human rights. This is particularly true, for instance, when MDBs finance projects which involve the adoption of new domestic legislation that is not in accordance with accepted international human rights standards. With respect to the obligation to redress human rights violations, MDBs can breach this obligation by financing projects in states that have been condemned by international tribunals for human rights violations or for failing to redress such violations. This concept was asserted by the UN Economic and Social Council when it called upon the WB to pay enhanced attention in their activities to respect for economic, social and cultural rights, including facilitating the development of appropriate remedies for responding to violations of those rights.³⁶

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 41:
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration [on the Rights of Indigenous Peoples] through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.
- ILO Convention No. 169, Article 2(1):
Governments shall have the responsibility for developing, with the participation of the [indigenous] peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Principle 2. Multilateral development banks, in all their activities, shall take reasonable and prudent measures to assure their activities, loans, or other actions do not cause, enable, support, encourage, or prolong the violation of human rights by any state, agency, corporation, or business.

In order to comply with this Principle, MDBs should institute appropriate procedures or other measures to avoid human rights violations that could foreseeably occur in connection with projects they finance or support. Diligent and rigorous human

³⁴ Andrew Clapham, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 151 (Oxford Univ. Press 2006).

³⁵ *Id.*

³⁶ U.N. ECOSOC, *Procedural Decisions*, U.N. Doc. E/1999/22, para. 515 (1999)

rights impact assessments or equivalent measures should be required by MDBs prior to funding decisions that could have human rights implications.

“Human rights” includes, at least, all those rights recognized in customary international law, in any treaty applicable in the particular situation, or in the domestic law of the state concerned. International human rights tribunals have construed the obligation of states to prevent, investigate and punish human rights violations. In the *Velasquez-Rodriguez* case, the Inter-American Court determined that the state has a legal duty to take reasonable steps to prevent human rights violations, as well as to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim receives adequate compensation.³⁷ This principle places analogous obligations on MDBs in connection with their activities and operations in member states’ territories, especially the IFC, when dealing with the private sector.

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2):
States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Principle 3. Multilateral development banks shall exercise due diligence to investigate, gather evidence, examine the law, and review proposals in order to assure that proposals, projects and businesses that receive any sort of support from them (MDBs) do not directly or indirectly violate or infringe upon the human rights of anyone or any community or people.

This Principle adds specific requirements to the more general rule in Principle 2. The Inter-American Court has emphasized the importance of due diligence when considering human rights violations. In the *Velasquez-Rodriguez* case, the Court stated that an illegal act that violates human rights and that is initially not directly imputable to a state can lead to the international responsibility of that state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the American Convention on Human Rights.³⁸ Likewise, the Court concluded that what is decisive is whether a violation of the rights recognized by the

³⁷ Case of *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), para. 174.

³⁸ *Id.* at 172.

American Convention on Human Rights has occurred with the support or the acquiescence of the government, or whether the state has allowed the act to take place without taking measures to prevent it or to punish those responsible.³⁹ The legal rationale of the *Velasquez-Rodriguez* case is applicable to MDBs, as they can contribute to the violation by a state of human rights by funding projects that result in or contribute to human rights violations.

Other relevant legal authorities relating to indigenous peoples include:

- ILO Convention No. 169, Article 7(3):
Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

Principle 4. In particular, multilateral development banks shall, with respect to projects or businesses receiving multilateral development bank support in any form, assure through the project review process and through on-going review and monitoring that the following standards, *inter alia*, are met:

Principle 4 states nine specific requirements, all relating to MDB decisions to finance or not finance public and private sector projects in developing countries. The requirements form a kind of checklist for human rights issues that could be used by an MDB in its review process.

The particular requirements included in this draft of Principle 4 are related primarily, but not exclusively, to indigenous peoples and some of the key human rights issues that affect them. It is clear that this list of requirements could be enlarged to embrace more issues and more possible human rights concerns. Indeed it would be desirable to make the list as complete as possible, within the limits of reasonableness and practicability. As we have mentioned previously, we believe that these Principles should be as universal as possible, applying to and making applicable all relevant human rights.

The specific requirements of Principle 4 are based in part upon some of the many voluntary business principles and codes that have been developed and espoused by businesses, human rights organizations and advocates, environmental organizations, and others. They are also based upon the relevant human rights treaties, international human rights declarations, and other instruments, as well as the human rights jurisprudence of international courts and human rights bodies.

For many years, there has been an increasing trend in business to promote socially responsible investment, which includes protecting the human rights and interests of local

³⁹ *Id.* at 173.

communities. As part of this trend, businesses themselves, NGOs, other entities, and experts have developed policies and general guidelines to demonstrate devotion to corporate responsibility for investors and to actually act responsibly. Businesses that have developed policies that relate to human rights and environmental and social justice include Barrick,⁴⁰ BHP Billiton,⁴¹ Chevron,⁴² Conoco,⁴³ Newmont Mining,⁴⁴ and Shell.⁴⁵ Some companies, such as EnCana,⁴⁶ Alcan,⁴⁷ JP Morgan,⁴⁸ Total,⁴⁹ and Enbridge,⁵⁰ have formed policies or guidelines that relate specifically to indigenous peoples and their special needs. Companies working with certain industries, such as cement,⁵¹ mining,⁵² banking,⁵³ and oil,⁵⁴ have attempted to address human rights issues and spearhead corporate responsibility initiatives. International initiatives have also addressed human rights in business, and these include the Global Compact,⁵⁵ the UN

⁴⁰ Barrick, *Corporate Social Responsibility Charter*, available at www.barrick.com/Theme/Barrick/files/docs_ehss/CSR_Charter.pdf.

⁴¹ BHP Billiton, *Sustainability Report (2007)*, available at www.bhpbilliton.com/bb/aboutUs/annualReports.jsp.

⁴² Chevron, *Energy Partnership: 2007 Corporate Responsibility Report*, available at www.chevron.com/globalissues/corporateresponsibility/2007/documents/Chevron_2007CR_1_intro.pdf; Chevron, *Human Rights Statement*, available at www.chevron.com/globalissues/humanrights/.

⁴³ ConocoPhillips, *Code of Business Ethics and Conduct for Directors and Employees* (Feb. 9, 2007), available at www.conocophillips.com/NR/rdonlyres/147E8B57-9169-4FA7-BB23-A41207B26D2D/0/13_CodeofEthics.pdf.

⁴⁴ Newmont Mining, *Proposal No. 4—Stockholder Proposal Requesting a Report Regarding Newmont’s Community Policies and Practices* (2007), available at www.newmont.com/en/pdf/CRR_Shareholder_proposal_2007.pdf.

⁴⁵ Shell, *Sustainability Report 2007*, available at <http://sustainabilityreport.shell.com/2007/servicepages/welcome.html>.

⁴⁶ EnCana, *Aboriginal Guidelines*, available at www.encana.com/responsibility/consultation/aboriginal/index.htm.

⁴⁷ Alcan, *Indigenous Peoples Policy*, available at www.alcan.com/web/publishing.nsf/content/Alcan+Indigenous+Peoples+Policy.

⁴⁸ JP Morgan Chase, *Indigenous Communities*, available at <http://www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indi>.

⁴⁹ Total, *Policy regarding indigenous peoples*, available at www.total.com/static/fr/medias/topic1492/Total_Indigenous_People_Policy.pdf.

⁵⁰ Enbridge, *Indigenous Peoples Policy*, available at <http://www.enbridge.com/pipelines/right-of-way/pdf/indigenousspeoplespolicy.pdf>.

⁵¹ Cement Sustainability Initiative (CSI), *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005), available at www.wbcscement.org/pdf/cement_initiative_arp.pdf.

⁵² Mining and Environment Research Network, *Corporate Social Responsibility and the Mining Sector*, available at www.mineralresourcesforum.org/docs/pdfs/merncsr.pdf.

⁵³ Equator Principles (July 2006), available at www.equator-principles.com.

⁵⁴ Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, available at www.celb.org/xp/CELB/downloads/ebi.pdf.

⁵⁵ United Nations Global Compact, *The Ten Principles*, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>. United Nations Global Compact, Business Leaders Initiative on Human Rights, Office of the High Commissioner on Human Rights, *A Guide for Integrating Human Rights into Business Management*, available at www.unglobalcompact.org/docs/issues_doc/human_rights/guide_hr.pdf.

Special Representative on Business and Human Rights,⁵⁶ and the ISO Standard on Social Responsibility.⁵⁷

Increased environmental awareness, both in law and practice, has also contributed to the increasing focus on corporate responsibility and how business affects the environment.⁵⁸ In the wake of growing demand for corporate responsibility, some companies have become specifically devoted to promoting social investment, which can also promote respect for human rights generally.⁵⁹ These so-called social investment companies screen companies for investment based on human rights and socially responsible activities.⁶⁰

NGOs and other entities have also engaged in the effort to force companies to become more socially responsible, including Amnesty International,⁶¹ Rainforest Action Network,⁶² Greenpeace,⁶³ OECD,⁶⁴ Conservation International,⁶⁵ Sierra Club,⁶⁶ and

⁵⁶ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts*, A/HRC/4/35 (Feb. 19, 2007); Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (Apr. 7, 2008).

⁵⁷ International Standards Organization (ISO), *About the Standard*, available at http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/aboutStd.html.

⁵⁸ See generally Mary Lou Egan, et. al., *France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reports To Promote Environmentally Sustainable Economic Development*, A paper prepared for presentation at the 25th Annual Research Conference of the Association for Public Policy and Management, Washington, DC (November 2003), available at www.bendickegan.com/pdf/EganMauleonWolffBendick.pdf; Gary S. Guzy, *Memorandum: EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting* (Dec. 1, 2000), available at www.epa.gov/compliance/resources/policies/ej/ej_permitting_authorities_memo_120100.pdf; Executive Order 12898, FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (Feb. 11, 1994), available at www.epa.gov/Region2/ej/exec_order_12898.pdf.

⁵⁹ See, e.g., Calvert Group, *Issue Brief: Indigenous Peoples' Rights*, available at http://www.calvertgroup.com/sri_ibindigenousspeoplesrights.html.

⁶⁰ See, e.g., Social Investment Forum, *Socially Responsible Mutual Fund Charts: Screening & Advocacy*, available at www.socialinvest.org/resources/sriguide/srifacts.cfm.

⁶¹ Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), available at www.amnesty.org/en/library/info/ACT70/001/1998/en.

⁶² See, e.g., Rainforest Action Network, *Agribusiness Impact on Indigenous Communities Fact Sheet*, available at http://ran.org/campaign/rainforest_agribusiness/resources/fact_sheets/peoples_rights_vs_agribusiness_the_case_of_food_sovereignty/.

⁶³ Greenpeace, *Bhopal Principles on corporate accountability*, available at www.sacredland.org/PDFs/Greenpeace_Bhopal.pdf.

⁶⁴ Organization for Economic Co-Operation and Development, *The OECD Guidelines for Multinational Enterprises* (2000), available at www.oecd.org/document/28/0,2340,fr_2649_34889_2397532_1_1_1_1,00.html.

⁶⁵ Conservation International, *Reinventing the Well: Approaches to Minimizing the Environmental and Social Impact of Oil Development in the Tropics*, Volume 2/1997, available at www.celb.org/xp/CELB/downloads/PublicationOrderForm.pdf.

Nature Conservancy.⁶⁷ Some organizations, such as Ceres,⁶⁸ Forest Peoples Programme,⁶⁹ and Oxfam,⁷⁰ have advocated for recognition of particular human rights by creating relevant principles or guidelines that can then be adopted by specific companies.

Experts, including scholars and advocates for the interests of business and indigenous peoples, have also addressed the intersection between indigenous peoples and business. From a rights based perspective, some of these experts have focused on indigenous peoples' rights to existence, self-determination, and non-discrimination, which, in essence, protect the way of life of indigenous peoples.⁷¹ Experts from various fields have also come together to create principles or guidelines related to corporate responsibility generally and indigenous peoples, directly or indirectly.⁷²

Finally, several international documents and summits have addressed how to involve and protect indigenous peoples in global efforts to preserve the environment and biodiversity. For example, at the 2002 World Summit on Sustainable Development, the parties addressed how to implement environmental policies and repeatedly called for cooperation with and participation of indigenous peoples.⁷³ The Summit is an international conference mainly organized by the UN, at which heads of states, national delegates, and leaders from NGOs, businesses, and other major groups meet to discuss direct action toward meeting difficult challenges, including improving people's lives and conserving natural resources.⁷⁴

⁶⁶ Sierra Club, *Sierra Club Guidelines* (Oct. 17, 1998), available at www.sierraclub.org/policy/conservation/transcorp.asp.

⁶⁷ Nature Conservancy, *The Nature Conservancy and Indigenous Peoples*, available at www.nature.org/partners/partnership/art14301.html.

⁶⁸ Ceres Principles (1989), available at www.ceres.org/.

⁶⁹ Forest Peoples Programme and Tebtebba Foundation, *Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises* (Dec. 29, 2006), available at <http://www.business-humanrights.org/Documents/Forest-Peoples-Tebtebba-submission-to-SRSG-re-indigenous-rights-29-Dec-2006.pdf>.

⁷⁰ Oxfam International and Social Capital Group, *Corporate Social Responsibility in the Mining Sector in Peru*, available at http://www.oxfamamerica.org/newsandpublications/publications/research_reports/corporate-social-responsibility-in-the-mining-sector-in-peru.

⁷¹ See generally Marcos A. Orellana, *Indigenous Peoples, Mining, and International Law*, MINING MINERALS AND SUSTAINABLE DEVELOPMENT (January 2002), available at www.iied.org/mmsd/mmsd_pdfs/002_orellana_eng.pdf.

⁷² The Global Sullivan Principles, available at <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp>.

⁷³ United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development.

⁷⁴ The Tenth Session of the UN Commission on Sustainable Development acted as the global Preparatory Committee for the 2002 Summit, which was focused on turning plans into action by evaluating the obstacles to progress and the results achieved in Agenda 21 since its adoption in 1992. Agenda 21 is an unprecedented global plan of action for sustainable development adopted by 178 governments at the UN Conference on the Environment and Development, Rio de Janeiro, 1992. Agenda 21 is available at <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>

Principle 4(1). Projects, their sponsors, directors, and participating entities shall respect the human rights of all individuals and communities, including indigenous peoples, as those rights are established both by international law and by the law of the country where the project or business is located.

Every project, especially those that receive public financing, must respect the human rights of all persons, including the rights of communities, peoples and other groups. Of course, the human rights referred to are those established by applicable international law and standards, as well as by domestic law. These rights apply equally to all persons regardless of race, gender, age, disability, economic status, or any other distinguishing feature. Such human rights include, but are not limited to, the rights to life, liberty, property, due process of law, access to justice, nondiscrimination, food, water, shelter, and self-determination.

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 1:
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
- UN Declaration on the Rights of Indigenous Peoples, Article 2:
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
- UN Declaration on the Rights of Indigenous Peoples, Article 7:
 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.
- UN Declaration on the Rights of Indigenous Peoples, Article 17(1):
Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
- ILO Convention No. 169, Article 3(1):
Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.
- ILO Convention No. 169, Article 4(1):

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Relevant existing policies and principles include:

- Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), at 4-5: “Companies should cooperate in creating an environment where human rights are understood and respected Human rights are designed to protect the inherent dignity of the human person, regardless of her or his culture or background, and by their very nature are universal These rights cover civil, political, economic, cultural and social activities and are regarded not only as universal, but also as indivisible and interdependent. Multinational companies should adhere to these international standards even if national laws do not specify them.”
- United Nations Global Compact, *The Ten Principles*: “Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses.” The UN Global Compact is a global corporate citizenship initiative, which set up a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, the environment, and anti-corruption.⁷⁵
- United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 44(j): “Subject to national legislation, recognize the rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices, and, with the approval and involvement of the holders of such knowledge, innovations and practices, develop and implement benefit-sharing mechanisms on mutually agreed terms for the use of such knowledge, innovations and practices.”
- Greenpeace, *Bhopal Principles on corporate accountability*: “4. Protect Human rights: Economic activity shall not infringe upon basic human and social rights. States have the responsibility to safeguard the basic human and social rights of citizens, in particular the right to life; the right to safe and healthy working conditions; the right to a safe and healthy environment; the right to medical treatment and to compensation for injury and damage; the right to information and the right of access to justice by individuals and by

⁷⁵ United Nations Global Compact, *The Ten Principles*, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

groups promoting these rights. Corporations must respect and uphold these rights. States must ensure effective compliance by all corporations of these rights and provide for legal implementation and enforcement.”

- Global Sullivan Principles: “Express our support for universal human rights and, particularly, those of our employees, the communities within which we operate and parties with whom we do business.” The Global Sullivan Principles of Social Responsibility is a voluntary code of conduct built on a vision of corporate social responsibility by the Leon H. Sullivan Foundation. Its objective is to have companies and organizations of all sizes, in widely disparate industries and cultures, working toward the common goals of human rights, social justice, and economic opportunity.⁷⁶

Principle 4(2). Projects, their sponsors, directors, and participating entities shall respect the traditional and collective ownership of land by indigenous peoples and local communities, as well as individual rights of ownership.

Unquestionably, the right of all persons and groups to the land and other property they own must be respected, but because of its unusual and complex nature, indigenous peoples’ land and resource ownership deserves particular attention. As is well recognized in law and materials that address indigenous peoples, indigenous peoples are intricately linked to their land, as they have typically inhabited the land since time immemorial and their ways of life often depend on the land and natural resources. Indigenous peoples usually own their land and natural resources collectively, and, although they may not hold formal title to the land, they own it by reason of their long-standing occupation and use. This part of Principle 4 is intended to call special attention to this particular concern, and it calls upon MDBs and the projects they fund to respect the land and natural resources belonging to indigenous peoples.

Relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2)(b):
2. States shall provide effective mechanisms for prevention of, and redress for... (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- UN Declaration on the Rights of Indigenous Peoples, Article 26:
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by

⁷⁶ The Global Sullivan Principles are available at www.thesullivanfoundation.org/gsp/default.asp.

reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

- UN Declaration on the Rights of Indigenous Peoples, Article 27:
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
- ILO Convention No. 169, Article 4(1):
Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
- ILO Convention No. 169, Article 13(1):
... governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
- ILO Convention No. 169, Article 14:
 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
 3. ...
- ILO Convention No. 169, Article 15(1):
The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
- The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No.79 (Judgment of Aug. 31, 2001);
The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H. R.

(Ser. C) No. 172 (Judgment of Nov. 28, 2007); *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Report No. 40/04 (October 12, 2004); *The Case of Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. Commission on Human Rights (December 27, 2002).

Relevant existing policies and principles include:

- United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 7(h): “Provide access to agricultural resources for people living in poverty, especially women and indigenous communities, and promote, as appropriate, land tenure arrangements that recognize and protect indigenous and common property resource management systems.”
- Calvert Group, *Issue Brief: Indigenous Peoples' Rights*: “Companies that fail Calvert's Indigenous Peoples rights criteria do so because they: Do not respect the lands and rights of Indigenous Peoples, and have direct ongoing conflicts with indigenous communities regarding livelihoods, cultures, habitat, and environment”
- Enbridge, *Indigenous Peoples Policy*: “respect indigenous peoples’ traditional ways, the land, heritage sites, and the Environment.”
- Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, at 9: “Many areas with significant biodiversity remaining are also the traditional areas of indigenous, tribal or traditional peoples. Indigenous people often are ethnically different from the dominant national culture, and frequently their traditional territories, whether terrestrial or marine, are not recognized by national governments. The economies, identities and forms of social organization of indigenous people are often closely tied to maintaining the biodiversity and ecosystems that contain them intact. However, multiple pressures exerted on indigenous and other rural communities have made this a challenging proposition in many settings. There are often overlaps between lands set aside for legally designated parks and protected areas and lands customarily owned or used by indigenous peoples. Because of these factors, issues related to indigenous people and oil and gas development are complex and require special measures to ensure that indigenous people, like other local communities, are not disadvantaged and that they are included in and can benefit from projects supporting biodiversity conservation or oil and gas development.” The Energy and Biodiversity Initiative is a partnership between companies and major conservation organizations, which began in 2001 and ceased in 2007. It has produced practical guidelines, tools and models to improve the

environmental performance of energy operations, minimize harm to biodiversity, and maximize opportunities for conservation wherever oil and gas resources are developed.⁷⁷

- *The Nature Conservancy and Indigenous Peoples*: “Included in The Nature Conservancy’s seven core values is a ‘Commitment to People,’ which states that we ‘respect the needs of local communities by developing ways to conserve biological diversity while at the same time enabling humans to live productively and sustainably on the landscape.’”

Principle 4(3). Projects, their sponsors, directors, and participating entities shall recognize, respect and work to preserve the cultures and ways of life of indigenous peoples, national, cultural, and linguistic minorities, and other such communities.

Indigenous peoples, as well as all other peoples and communities, should enjoy the right to culture and to live in keeping with that culture if they so choose, as their cultures and ways of life are intrinsically valuable and worthy of preservation. Moreover, indigenous peoples, as discussed above, often depend on the land and natural resources for subsistence, to practice their religion, and to engage in cultural activities. For this reason, projects should particularly recognize the link between indigenous cultures and ways of life and the land that they inhabit. For example, in projects that may affect the environment and biodiversity, the projects should recognize and take account of the traditional knowledge of indigenous peoples regarding preservation of the environment and biodiversity according to their traditional and cultural ways. Projects should avoid sacred sites and other areas vitally important to indigenous peoples.

Relevant legal authorities include:

- International Covenant on Civil and Political Rights,⁷⁸ Article 27:
In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.
- UN Declaration on the Rights of Indigenous Peoples, Article 5:
Indigenous peoples have the right to maintain and strengthen their distinct...social and cultural institutions
- UN Declaration on the Rights of Indigenous Peoples, Article 8:
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

⁷⁷ Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, available at www.celb.org/xp/CELB/downloads/ebi.pdf.

⁷⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March, 23, 1976.

2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; ...
- UN Declaration on the Rights of Indigenous Peoples, Article 9:
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.
 - UN Declaration on the Rights of Indigenous Peoples, Article 11:
 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.
 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
 - UN Declaration on the Rights of Indigenous Peoples, Article 12(1):
Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
 - UN Declaration on the Rights of Indigenous Peoples, Article 31:
 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ...
 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.
 - ILO Convention No. 169, Article 2:
 1. Governments shall have the responsibility for developing, with the participation of the [indigenous] peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
 2. Such action shall include measures for: ... (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
 - ILO Convention No. 169, Article 4(1):

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

- ILO Convention No. 169, Article 8(2):
These peoples shall have the right to retain their own customs and institutions ...

Relevant existing policies and principles include:

- United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 7(e): “Develop policies and ways and means to improve access by indigenous people and their communities to economic activities and increase their employment through, where appropriate, measures such as training, technical assistance and credit facilities. Recognize that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities.” 40(d): “Promote programmes to enhance in a sustainable manner the productivity of land and the efficient use of water resources in agriculture, forestry, wetlands, artisanal fisheries and aquaculture, especially through indigenous and local community-based approaches.” 54(h): “Promote the preservation, development and use of effective traditional medicine knowledge and practices, where appropriate, in combination with modern medicine, recognizing indigenous and local communities as custodians of traditional knowledge and practices, while promoting effective protection of traditional knowledge, as appropriate, consistent with international law.”
- EnCana, *Aboriginal Guidelines*: “EnCana’s community relations program will build, enhance and maintain positive relations in the Aboriginal community by... Respecting cultural and individual differences”
- Alcan, *Indigenous Peoples Policy*: “Alcan accepts the diversity of indigenous peoples. We acknowledge the unique and important interests that they have for the land and environment as well as their history, culture and traditional ways of life.”
- BHP Billiton, *Sustainability Report (2007)*, at 238: “Recognizing and respecting Indigenous people's culture, heritage and traditional rights and supporting the identification, recording, management and protection of Indigenous cultural heritage. There are many Indigenous communities around the world that are traditional owners of land impacted by our operations or live nearby.”

- Chevron, *Human Rights Statement*: “We value and respect the cultures and traditions of the many communities in which we work.”

Principle 4(4). Projects, their sponsors, directors, and participating entities and the states where they are located shall recognize the duly established governments of indigenous peoples and other communities as representatives of the interests of their respective communities and respect their systems of governance.

Indigenous peoples, in addition to mechanisms of the state, have their own systems of government. These governments are able to represent the interests of their communities both within and without the community. As some businesses, states, and other organizations focus on Western forms of government, they have sometimes overlooked and discounted traditional forms of government of indigenous peoples. In implementing projects that will affect indigenous peoples, among others, it is vital to use indigenous peoples’ own system of government and respect their governance during the consultation and subsequent participation process.

Relevant legal authorities include:

- International Covenant on Civil and Political Rights, Article 1:
 1. All 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.
 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
 3. ...
- UN Declaration on the Rights of Indigenous Peoples, Article 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.
- UN Declaration on the Rights of Indigenous Peoples, Article 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.
- UN Declaration on the Rights of Indigenous Peoples, Article 5:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic ... institutions
- UN Declaration on the Rights of Indigenous Peoples, Article 20(1):

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in

the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

- ILO Convention No. 169, Article 4(1):
Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Relevant existing policies and principles include:

- J. Hunt and D.E. Smith, *Ten key messages from the preliminary findings of the Indigenous Community Governance Project* (2005), at 1: "... strengthening Indigenous community governance starts first with negotiating and clarifying the appropriate contemporary relationships among the different Indigenous people within a region or community. That leads directly into the work of designing systems of representation and organizational arrangements which reflect those important relationships. Working through Indigenous relationships and systems of representation thus becomes the basis for working out organisational structures, institutions and procedures. The emphasis should be on starting with locally relevant Indigenous relationships and forms of representation, and designing governance structures from there."
- JP Morgan Chase, *Indigenous Communities*: "They have given indigenous people the opportunity and, if needed, culturally appropriate representation to engage in informed participation and collective decision-making Consultation approaches that rely on existing customary institutions, the role of community elders and leaders, and the established governance structure for tribal and indigenous communities; Governmental authorities at the local, regional or national level have provided mechanisms for the affected communities to be represented or consulted, and international and local laws have been upheld"

Principle 4(5). Projects, their sponsors, directors, and participating entities shall assess the potential social and environmental impacts of the projects, including human rights impacts, prior to MDB funding or support for such projects.

Before undertaking measures to initiate any project, the state, business or IFI itself should fully and accurately assess the social and environmental impact of the proposed project. Such an assessment should provide insight into whether and how to proceed with the project, including how to minimize the impact of the proposed project on the environment and affected communities.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 29(1):
Indigenous peoples have the right to the conservation and protection 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.
- ILO Convention No. 169, Article 4(1):
Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
- ILO Convention No. 169, Article 7(4):
Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Relevant existing policies and principles include:

- Cement Sustainability Initiative (CSI), *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005): “The World Business Council for Sustainable Development (WBCSD) Cement Sustainability Initiative (CSI) has initiated a task force (one of six) to address the local impacts of the cement industry on land and communities. Impacts from quarries and cement plants may be positive (e.g. creating jobs and providing products and services) or negative (e.g. disturbance to the landscape and biodiversity, dust and noise). The most useful tool for evaluating and managing the impacts of a cement site is a thorough Environmental and Social Impact Assessment (ESIA), undertaken with rigorous scientific analysis and stakeholder engagement. ... An ESIA report will cover methods and key issues, the legislative framework, the consultation process, the social and environmental baseline, consideration of alternatives, prediction and evaluation of significant social and environmental impacts, mitigation or offset measures, and environmental and social management and monitoring plans.” The Cement Sustainability Initiative was formed by major cement companies for the purpose of helping the cement industry to address the challenges of sustainable development. Among others, its purpose is to explore what sustainable development means for the cement industry and identify and facilitate actions that companies can take as a group and individually to accelerate the move towards sustainable development.⁷⁹

⁷⁹ Cement Sustainability Initiative, *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005), available at www.wbcscement.org/pdf/cement_initiative_arp.pdf.

- Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, at 28: “Oil and gas companies traditionally use Environmental Impact Assessments (EIAs) to identify and address the potentially significant environmental effects and risks associated with a project. In many cases, companies have also begun to use Social Impact Assessments (SIAs) to understand their potential impact on surrounding communities. Recently, some companies have begun to address environmental and social impacts in a single assessment process, an Environmental and Social Impact Assessment (ESIA). This increasing integration of the two processes has resulted from the recognition that environmental and social impacts are often inextricably linked, particularly related to issues such as the health impacts of pollution or traditional use of ecological resources by indigenous and rural communities.”
- Greenpeace, *Bhopal Principles on corporate accountability*: “9. Implement the precautionary principle and require environmental impact assessments: States shall fully implement the Precautionary Principle in national and international law. Accordingly, States shall require corporations to take preventative action before environmental damage or health effects are incurred, when there is a threat of serious or irreversible harm to the environment or health from an activity, a practice or a product. Governments shall require companies to undertake environmental impact assessments with public participation for activities that may cause significant adverse environmental impacts.”
- BHP Billiton, *Sustainability Report (2007)*, at 83: “All sites are required to identify their key stakeholders and consider their expectations and concerns for all operational activities, across the life cycle of operations. Sites are also required to specifically consider any minority groups (such as Indigenous groups) and any social and cultural factors that may be critical to stakeholder engagement.”
- Chevron, *Stakeholder Engagement: Growing Successful Partnerships*: “Our Environmental, Social and Health Impact Assessment (ESHIA) process, deployed as a corporate process in early 2007, requires that all new capital projects be evaluated for potential environmental, social and health impacts. ESHIA is used to anticipate and plan the manner in which significant impacts are mitigated and benefits are enhanced during the planning, construction, operation and decommissioning of a project. Stakeholder engagement is central to the ESHIA process throughout the life of a project.”
- Equator Principles (July 2006): “*Principle 2: Social and Environmental Assessment*: For each project assessed...the borrower has conducted a Social and Environmental Assessment (“Assessment”) process to address, as appropriate and to the EPFI’s satisfaction, the

relevant social and environmental impacts and risks of the proposed project. ... The Assessment should also propose mitigation and management measures relevant and appropriate to the nature and scale of the proposed project.” The Equator Principles constitute a banking industry framework for addressing environmental and social risks in project financing.⁸⁰

Principle 4(6). Businesses and the states where they are located shall consult in good faith with indigenous and local communities prior to undertaking a project that may affect the community.

A necessary precursor to undertaking any project that will affect indigenous and local communities or their lands and resources is consultation in good faith with the potentially affected peoples or communities. This necessarily includes providing the affected peoples or communities in a timely manner with full and accurate information about the project and its potential consequences. The information should be portrayed in a culturally sensitive and appropriate manner to the members of the community or the indigenous government as the case may be who will communicate with the rest of the community and make decisions on behalf of the community. Such information is essential to meaningful consultation and participation of indigenous and local communities in later steps of the project.

Consultation in good faith with affected communities, especially with indigenous peoples, is essential, but it is not a simple or self-evident process. As recognized in several international instruments related to indigenous peoples, indigenous peoples have the right to be consulted prior to beginning any project that will affect them or their lands and natural resources. Consultation must be meaningful, in that indigenous peoples must actually have the opportunity to influence the project, including whether and how it is undertaken, and in good faith, in that the businesses and government must actually take the opinions of the indigenous and local communities into consideration.

The right of consultation is not to be confused with the right to control the occupation, use and disposition of one’s own lands and resources. Where an indigenous people, or anyone, owns land or resources that will be developed or materially affected by a project, then mere consultation will not suffice. Where the lands or resources are owned by an indigenous people or by a person or community, then the consent of the owner is indispensable. The right to own property is covered in Principle 4(2) above.

⁸⁰ They were originally developed by the banks gathered in October 2002 in London, including the International Financial Corporation, and launched in June 2003 in Washington DC. They were adopted by more than forty financial institutions and are intended to serve as a common baseline and framework for the implementation by each Equator Principles Financial Institution of its own internal social and environmental policies, procedures and standards related to its project financing activities. *See* Equator Principles, available at www.equator-principles.com.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 19:
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- UN Declaration on the Rights of Indigenous Peoples, Article 32(1):
Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- ILO Convention No. 169, Article 6:
 1. In applying the provisions of this Convention, governments shall:
 - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - ...
 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Relevant existing policies and principles include:

- EnCana, *Aboriginal Guidelines*: “EnCana’s community relations program will build, enhance and maintain positive relations in the Aboriginal community by ... Ensuring that potentially affected communities are provided with the necessary information required for open collaborative dialogue. ... Where EnCana is active the Company will encourage the development of community-based Aboriginal businesses which benefit both the Aboriginal communities and the Company by: Advising local Aboriginal communities of EnCana’s activities... .”
- Ceres Principles (1989): “We will inform in a timely manner everyone who may be affected by conditions caused by our company that might endanger health, safety or the environment. We will regularly seek advice and counsel through dialogue with persons in communities near our facilities.”

- Total, *Policy regarding indigenous peoples*: "... communicate plans of the operations to the indigenous groups through presentations and local meetings, in accordance with the existing regulations ... inform the indigenous groups about the development of operations"
- JP Morgan Chase, *Indigenous Communities*: "Provided information on the ways in which the project may have a potentially adverse impact on them in a culturally appropriate manner at each stage of project preparation, implementation and operation."
- *OECD Guidelines for Multinational Enterprises*, at para. 35: "Information about the activities of enterprises and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest." The *Guidelines for Multinational Enterprises* were developed by the Organization for Economic Co-operation and Development, an organization that provides a setting where governments compare policy experiences, seek answers to common problems, identify good practices and coordinate domestic and international policies.⁸¹
- Equator Principles (July 2006): "*Principle 5: Consultation and Disclosure*: ... the government, borrower or third party expert has consulted with project affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish, to the satisfaction of the EPFI, whether a project has adequately incorporated affected communities' concerns... ."
- EnCana, *Aboriginal Guidelines*: "EnCana's community relations program will build, enhance and maintain positive relations in the Aboriginal community by...Ensuring timely discussions with local Aboriginal communities when EnCana's activities might impact on those communities... ."
- Alcan, *Indigenous Peoples Policy*: "We will strive to increase our awareness of the concerns and interests of indigenous peoples through respectful, open and transparent dialogue."

⁸¹ The Guidelines constitute a set of voluntary recommendations to multinational enterprises in all the major areas of business ethics, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. See *OECD Guidelines for Multinational Enterprises*, available at www.oecd.org/document/28/0,2340,fr_2649_34889_2397532_1_1_1_1,00.html.

- Enbridge, *Indigenous Peoples Policy*: “ensure forthright and sincere consultation with indigenous peoples about Enbridge’s projects that affect them, to facilitate a shared understanding of interests and appropriate courses of action,”
- BHP Billiton, *Sustainability Report* (2007), at 240: “At our operations and projects, we undertake early consultations and assessments with Indigenous peoples to ascertain whether our proposed activities are likely to impact cultural heritage values and, in conjunction with Indigenous peoples and relevant authorities, how best to plan and undertake those activities to avoid or minimize such impacts.”
- Chevron, *Human Rights Statement*: “We consult actively with a diverse range of knowledgeable stakeholders to build upon our understanding of the human rights issues present in our operating environments.”

Principle 4(7). Projects, their sponsors, directors, and participating entities shall include the participation of indigenous and local communities in the design and implementation of the projects to lessen any adverse impact on them.

If indigenous and local communities will be affected by a project, they should be involved in its design and implementation throughout the life of the project. Their participation in the project ensures that they are able to participate in the decision making related to the project to lessen the impact on the communities and perhaps bring benefits to the communities from the project. The participation of indigenous and local communities must be meaningful and real, which means that they must have the ability to sway decisions or even stop the project according to their interests. Participation must be an active role, and it must be much more than mere consultation or a seeking of indigenous views or a sharing of information.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 18:
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.
- UN Declaration on the Rights of Indigenous Peoples, Article 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.

- UN Declaration on the Rights of Indigenous Peoples, Article 32:
 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Relevant existing policies and principles include:

- United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 40(h): “Enact, as appropriate, measures that protect indigenous resource management systems and support the contribution of all appropriate stakeholders, men and women alike, in rural planning and development.” 42(e): “Promote full participation and involvement of mountain communities in decisions that affect them and integrate indigenous knowledge, heritage and values in all development initiatives.” 44(l): “Promote the effective participation of indigenous and local communities in decision and policy-making concerning the use of their traditional knowledge.” 45(h): “Recognize and support indigenous and community-based forest management systems to ensure their full and effective participation in sustainable forest management.” 46(b): “Enhance the participation of stakeholders, including local and indigenous communities and women, to play an active role in minerals, metals and mining development throughout the life cycles of mining operations, including after closure for rehabilitation purposes, in accordance with national regulations and taking into account significant transboundary impacts.”
- Global Sullivan Principles: “Work with governments and communities in which we do business to improve the quality of life in those communities — their educational, cultural, economic and social well-being — and seek to provide training and opportunities for workers from disadvantaged backgrounds.”
- EnCana, *Aboriginal Guidelines*: “EnCana’s community relations program will build, enhance and maintain positive relations in the Aboriginal community by: Maintaining dialogue between the

Company and Aboriginal people; ... Considering support of Aboriginal events and programs in areas where EnCana conducts its business; and Taking pride in our contributions to communities and in our care for the environment. EnCana will seek Aboriginal input on proposed developments and business plans to encourage the involvement of those who may be affected by our operations.”

- Barrick, *Corporate Social Responsibility Charter*, at 2: “Barrick fully considers social, cultural, environmental, governmental and economic factors when evaluating project development opportunities. In those communities in which we operate, we interact with local residents, governments, non-governmental organizations, international agencies and other interested groups to facilitate long-term and beneficial resource development. We give priority to building partnerships in entrepreneurial endeavors that contribute to enhancing local capacity and we also commit to providing financial support of organizations through our charitable donations, budgets and policies. The employment of indigenous peoples and local community members is also a priority. Barrick respects the interests of all members of the communities in which we conduct business and encourages open and constructive dialogue and interaction with them. We take the responsibility to listen carefully, be responsive and provide information that is accurate, appropriate and timely.”
- Enbridge, *Indigenous Peoples Policy*: “promote participation by indigenous communities in Enbridge’s community investment funding programs.”

Principle 4(8). Projects, their sponsors, directors, and participating entities shall not dislocate indigenous or other communities without their free, prior, and informed consent. If relocation occurs with such consent, the community must receive compensation, including compensation in the form of land of comparable quantity and quality, if possible and so desired by the community.

Dislocation of indigenous and local communities must be avoided at all costs. Projects that dislocate indigenous and local communities must first have the genuine consent of the communities to be relocated. Obviously, such projects should not be undertaken unless absolutely necessary for economic development and human wellbeing. In such rare situations in which dislocation is agreed to by the affected communities, the displaced indigenous and local communities should not receive monetary compensation alone, rather they should receive comparable land in quantity and quality. As indigenous peoples in particular rely on the land to live, it is vital that they be able to continue their way of life and reliance on the land.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2)(c):
 2. States shall provide effective mechanisms for prevention of, and redress for... (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- UN Declaration on the Rights of Indigenous Peoples, Article 10:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
- UN Declaration on the Rights of Indigenous Peoples, Article 28:
 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
- UN Declaration on the Rights of Indigenous Peoples, Article 32:
 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
- ILO Convention No. 169, Article 16:
 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Relevant existing policies and principles include:

- Forest Peoples Programme and Tebtebba Foundation, *Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises* (Dec. 29, 2006), at 55-56: "Due to the importance attached to indigenous peoples' cultural, spiritual and economic relationships to land and resources, international law treats relocation as a serious human rights concern. In international instruments, strict standards of scrutiny are employed and indigenous peoples' free and informed consent must be obtained. Additionally, relocation may only be considered as an exceptional measure in extreme and extraordinary cases."
- Rainforest Action Network, *Agribusiness Impact on Indigenous Communities Fact Sheet*: "Forced displacement is a serious issue for communities worldwide who live in areas proposed for agricultural expansion. The issue is particularly threatening for Indigenous peoples, who are rarely granted official land rights to their native territories by national governments. Indigenous peoples face racial discrimination that impedes their rights to self-determination and sovereignty. Agricultural expansion threatens not only their homes, but their sacred sites and the lands they have traditionally used for subsistence."
- Conservation International, *Reinventing the Well: Approaches to Minimizing the Environmental and Social Impact of Oil Development in the Tropics*, Volume 2/1997, at 4.1.3: "Even if governments and corporations act to protect people and their environment, it is only through the active involvement of affected communities and stakeholders that their interests can be fully safeguarded. Local people should participate in the process from the start, planning, questioning, designing, challenging and

evaluating projects under consideration in their territories. Interested stakeholders should increase their knowledge of potential social impacts, seek professional assistance to fully understand their legal rights, and demand the right to participate in all social impact assessments and management contingency plans. Empowered stakeholders should elicit the participation of local populations, help disseminate information throughout communities and conduct environmental and social hearings.”

Principle 4(9). Projects, their sponsors, directors, and participating entities shall have precise, written policies consistent with these Principles to govern their interaction with indigenous and local communities.

All of the above mentioned principles should be encompassed in a working and practical policy that has direct application to the project, and the policy should be firmly established and implemented before the project receives MDB funding. Such a policy, which may be provided in part by the MDB itself, would aim to ensure that the principles are known and followed throughout the process of the project. The policy would govern the project as well as inform others about their rights and responsibilities related to indigenous peoples throughout the process of the project. In order to be implemented effectively, such a policy may include training and educating those involved with the project, a method of complaint or recourse in the case of violation, and a process for periodic review of the policy.

Relevant existing policies and principles include:

- Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), at 5-6: “Multinational companies can improve their ability to promote human rights by developing an explicit company policy on human rights. ... The primary responsibility for monitoring company policies and practices lies with the company itself. However, all systems for monitoring compliance with voluntary corporate codes of behavior should be credible and their reports should be independently verifiable.” Annexed Checklist: “Company policy on human rights. All companies should adopt an explicit company policy on human rights which includes public support for the Universal Declaration of Human Rights. Companies should establish procedures to ensure that all operations are examined for their potential impact on human rights, and safeguards to ensure that company staff are never complicit in human rights abuses. The company policy should enable discussion with the authorities at local, provincial and national levels of specific cases of human rights violations and the need for safeguards to protect human rights. It should enable the

establishment of programs for the effective human rights education and training of all employees within the company and encourage collective action in business associations to promote respect for international human rights standards.”

- *OECD Guidelines for Multinational Enterprises*, para. 7:
“Governments have the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction subject to international law and to the international agreements to which it has subscribed”
- Equator Principles (July 2006): “*Principle 6: Grievance Mechanism:* ... to ensure that consultation, disclosure and community engagement continue throughout construction and operation of the project, the borrower will, scaled to the risks and adverse impacts of the project, establish a grievance mechanism as part of the management system. This will allow the borrower to receive and facilitate resolution of concerns and grievances about the project’s social and environmental performance raised by individuals or groups from among project-affected communities. The borrower will inform the affected communities about the mechanism in the course of its community engagement process and ensure that the mechanism addresses concerns promptly and transparently, in a culturally appropriate manner, and is readily accessible to all segments of the affected communities.”
- ConocoPhillips, *Code of Business Ethics and Conduct for Directors and Employees* (Feb. 9, 2007), at 8: “Upon receipt of a complaint, the Corporate Ethics Office and the General Counsel will (1) determine whether the complaint actually pertains to Accounting Matters and (2) when possible, acknowledge receipt of the complaint to the sender. Complaints relating to Accounting Matters will be reviewed under Audit and Finance Committee direction and oversight by the General Counsel, Internal Audit or such other persons as the Audit and Finance Committee determines to be appropriate. Confidentiality will be maintained to the fullest extent possible, consistent with the need to conduct an adequate review. Prompt and appropriate corrective action will be taken when and as warranted in the judgment of the Audit and Finance Committee. The Company will not discharge, demote, suspend, threaten, harass or in any manner discriminate against any employee in the terms and conditions of employment based upon any lawful actions of such employee with respect to good faith reporting of complaints regarding Accounting Matters or otherwise as specified in Section 806 of the Sarbanes-Oxley Act of 2002.”
- Newmont Mining, *Proposal No. 4—Stockholder Proposal Requesting a Report Regarding Newmont’s Community Policies and Practices* (2007), at 2: “The Board of Directors has established the Environmental, Health and Safety Committee, a standing committee

of the Board, which is comprised of at least three independent directors. The Committee is charged with overseeing a wide variety of Company policies and practices designed to achieve environmentally sound and responsible resource development. Therefore, it is well suited to review and evaluate the Company's policies and practices relating to its engagement with host communities around its operations. In conducting its review and evaluation of such policies, the Committee will also evaluate any existing and potential opposition to Newmont's operations from those communities. The results of that review will be included in a report (omitting confidential information and prepared at reasonable cost) made available to the stockholders prior to the 2008 annual meeting of stockholders. In particular, the Committee will meet at least twice a year to (a) review the effectiveness of the policies and systems for managing community risks associated with the Company's activities; (b) prepare a public assessment of the Company's community affairs performance; (c) report to the Board the Committee's findings, conclusions and recommendations on specific actions or decisions the Board should consider; (d) engage independent experts or advisors, to the extent it is deemed necessary, who have recognized expertise in community affairs; and (e) oversee Newmont's policies, standards, systems and resources required to conduct its activities in accordance with the Company's Core Values."

Principle 5. Multilateral development banks have the on-going responsibility to monitor and periodically review the human rights performance of all projects or businesses receiving support.

The UN Economic and Social Council (ECOSOC) has emphasized that IOs and states that have created and managed them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights.⁸²

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 40:
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules

⁸² U.N. ECOSOC, *Procedural Decisions*, *supra* note 36.

and legal systems of the indigenous peoples concerned and international human rights.

Principle 6. Multilateral development banks shall undertake measures to implement these Principles, including educational measures for MDB staff, for MDB member states, and for the clients of the MDBs, among others.

This Principle requires MDBs to take the kind of ordinary implementation measures that would be required of states. Examples of such implementation requirements can be found in nearly all human rights instruments.

Principle 7. Multilateral development banks shall institute written procedures for the submission and consideration of complaints of human rights violations on behalf of any person or group with respect to any project or activity of the bank. Such procedures shall result in a written report where a human rights violation has occurred and recommendations for corrective action by the bank and by the project as appropriate.

The internal complaint procedure required by this Principle is critical in order for MDBs to address the human rights concerns that frequently emerge from their projects and/or activities they support. These procedures should be carried out by MDBs in an effective and transparent fashion, and these procedures must allow project-affected people to make complaints of human rights violations concerning a project and/or operation to an MDB body or official. The body or official should be independent from those who have responsibility for the project or activity in question. Naturally, the normal rules of fairness, openness and record keeping must be observed.

If you would like to:

- **Make comments, suggestions, or corrections relating to this memorandum or to the draft Principles of Law for Multilateral Development Banks; or**
- **Learn what you can do to promote stronger laws for protecting human rights and the environment,**

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