



INDIAN LAW
RESOURCE CENTER

**Comments and Recommendations on
The IFC *Guide to
Human Rights Impact Assessment and Management,
Road-Testing Draft***

By
William J. David and Robert T. Coulter

November, 2008

602 North Ewing Street
Helena, Montana 59601
ph. (406) 449-2006 ph | fax (406) 449-2031

601 E Street, SE
Washington, DC 20003
ph. (202) 547-280 | fax (202) 547-2803

www.indianlaw.org

With the generous support of the C.S. Mott Foundation

**Comments and Recommendations on
The IFC *Guide to Human Rights Impact Assessment and Management,*
*Road-Testing Draft***

By William J. David* and Robert T. Coulter**
November, 2008

Prepared with the generous support of the C.S. Mott Foundation

Table of Contents

I. Introduction.....	1
II. Summary of Principal Recommendations.....	4
III. Setting the Baseline, Identifying Context, Scoping and Planning.....	6
IV. The Applicable International Law for Making a Human Rights.....	13
Impact Assessment	
1. International Labor Organization Convention 169	
2. Collective or Community Rights	
V. The IFC Itself Should Consult with Indigenous Leaders and Experts.....	21
VI. Greater Attention to the “Business Case” for Human Rights.....	21
1. Concrete Liability Issues	
2. International Human Rights and Domestic Laws	
VII. Consultation.....	25
VIII. Conclusion.....	30

* William J. David is an attorney of the Indian Law Resource Center.

** Robert T. Coulter is an attorney and is the Executive Director of the Indian Law Resource Center.

I. Introduction

The *Guide to Human Rights Impact Assessment and Management, Road-Testing Draft* (June, 2007) (the *Guide*), prepared by the International Finance Corporation (IFC) and the International Business Leaders Forum, was produced to give businesses, especially clients of the IFC, a tool for assessing and managing the risks associated with potential human rights violations related to projects proposed for funding by the IFC. The *Guide* has been distributed in a preliminary or “road-testing” edition, with a view to possible revision. This paper offers comments and suggestions on the preliminary edition from the point of view of indigenous peoples and their particular human rights concerns.

Our overall assessment of the *Guide* is very positive, perhaps most because it is gratifying to see a serious work that could materially improve the human rights performance of businesses – particularly those receiving public financing and support. Nevertheless, we have many concerns about the *Guide* and a number of suggestions for its improvement. Running through our analysis and suggestions is the awareness that the IFC is nothing other than the member countries that constitute and control it, and thus it is bound to respect and promote human rights just as the countries that make it up. The IFC, in all that it does, must be held to the same high standards of respect for human rights as the countries that act together in controlling and funding it.

Our specific criticisms and suggestions are not comprehensive nor exhaustive, but rather modest. They are some of the salient or most important matters that relate to indigenous peoples’ human rights. Our main points and suggestions are summarized below and discussed further in the body of this paper.

The place of the *Guide* in the work of the IFC deserves some examination. Where the *Guide* fits in the IFC framework is not clear from the *Guide* itself, and understanding where the *Guide* fits in the IFC framework will help to clarify what should be expected of the *Guide* and what standards it should meet. We will first look briefly at the IFC generally and then at its Policy on Social and Environmental Sustainability and its Performance Standards on Social and Environmental Sustainability.

The International Finance Corporation is a part of the World Bank Group. The IFC was created in 1956 with the purpose of supporting private sector investment in developing countries. The IFC is governed by its 179 member countries. Member countries contribute capital to the IFC, and the voting power of member countries is in proportion to the funds contributed. The primary clientele of the IFC is private corporations doing business in developing countries, and the IFC provides both financial products (loans, bonds, etc.) and advisory services to its “clients.”

There are two issues of particular interest to indigenous groups. One is the fact that the IFC funds a number of corporations and business sectors that traditionally adversely affect indigenous communities, such as resource extraction (mining, oil and gas

development) and large-scale infrastructure projects. The other is the fact that the IFC is a public, inter-governmental body; it is not simply an organization acting *on behalf of states*, but it is *almost all the world's countries acting together*. As a consequence, it is critical that indigenous peoples consistently monitor the activities of the IFC and advocate for IFC funding arrangements and other services that fully protect and promote human rights and that do not support the violation of indigenous rights by client corporations.

In 2006, the IFC adopted its Policy on Social and Environmental Sustainability, and this Policy is implemented in part by a group of eight Performance Standards on Social and Environmental Responsibility. The Policy commits the IFC to social and environmental sustainability and commits the IFC to review projects proposed for direct funding by applying the Performance Standards. The Policy makes compliance with the Performance Standards a part of the decision-making process for funding a project and also an on-going condition of IFC funding.

The purpose of the Policy and the Performance Standards is to “avoid adverse impacts on workers, communities, and the environment, or if avoidance is not possible, to reduce, mitigate, or compensate for the impacts, as appropriate.”¹ At the outset, we note that this policy formulation is not adequate for protection of human rights, because in the case of human rights it is not defensible to conclude that “avoidance is not possible,” and that therefore reduction, mitigation, or compensation for the impact is appropriate. Where human rights are concerned, the only lawful decision is to not violate the rights. This failure to recognize that there is an absolute prohibition against violating human rights is a failure that carries throughout the Policy, the Performance Standards, and the *Guide*. We will return to this point later.

The Policy requires that project proponents make an assessment of the project’s social and environmental risks and impacts, and the IFC’s review of the assessment is part of its due diligence in deciding whether to finance a project. The Policy is clear that “the roles and responsibilities of the private sector in respecting human rights are emerging as an important aspect of corporate social responsibility.”² This seems to imply that respect for human rights is a part of “social sustainability,” but it does not say that, and we could find nothing in the Policy or Performance Standards that says so. Guidance Note 1, which provides additional information about Performance Standard 1, includes a single paragraph on human rights, which concludes, “If human rights are likely to be a significant and specific risk for the project, companies can consider carrying out an

¹ International Finance Corporation, Policy on Social and Environmental Sustainability, Sec. 1, para. 4 (April 30, 2006).

² *Id.*, Sec. 2, para. 8.

HRIA along with the Social and Environmental Assessment.”³ The IFC should clarify that risks or impacts on human rights are matters that *must* be particularly assessed in the Social and Environmental Assessment.

Performance Standard 1 spells out the requirements for Social and Environmental Assessment and Management Systems. It is notable and regrettable that the Performance Standard does not once mention the term human rights. To be sure, some topics are mentioned that might be human rights matters, but the Performance Standard is silent on whether a human rights impact assessment is required as part of the Social and Environmental Assessment. This is crucially important, because the Social and Environmental Assessment is a required part of the financing decision-making process, and a separate human rights impact assessment would not appear to be a required part of the IFC review process. On the positive side, Performance Standard 1 provides detailed directions concerning disclosure of project information and the process of consultation with affected communities. We suggest below that the *Guide* should provide additional guidance on these matters in connection with making a human rights impact assessment.

Performance Standard 7, Indigenous Peoples, sets forth detailed requirements for projects that could affect indigenous communities and requires that impacts on indigenous communities be assessed as part of the Social and Environmental Assessment. It states that one of the objectives of the Performance Standard is “to ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures, and natural resource-based livelihoods of Indigenous Peoples.” Curiously, it does not say that an objective is to ensure IFC-financed projects do not violate human rights. The Performance Standard calls, in detail, for information disclosure, consultation, and informed participation by indigenous peoples.

It is within this framework that we look at the *Guide*. For reasons that are not apparent, the *Guide* is not, however, firmly tied to this IFC framework. The *Guide*, for example, on page 3, refers to social, environmental, and labor impact assessments, but does not mention the Social and Environmental Assessment that is required by the IFC. The *Guide* is unexplainably vague about its place in the IFC policy and procedure framework, and this is a significant fault.

Most important is the fact that nothing in the IFC Policy and Performance Standards makes a human rights impact assessment a requirement for any project proposed for financing by the IFC. It appears that the IFC *might but would not necessarily review* a human rights impact assessment as part of its due diligence in reviewing a proposed project. What is really the same thing, it is unclear whether or when a human rights impact assessment is ever actually required by the IFC beyond the

³ IFC, Guidance Note 1, Social and Environmental Assessment and Management Systems, p. 10, para. G23 (July 31, 2007). The Guidance Notes are available at www.ifc.org/enviro > Environmental and Social Standards > Guidance Notes.

requirement of the Social and Environmental Assessment. This failure to make a clear operative link between a human rights impact assessment and the IFC review procedures is not a fault of the *Guide* itself, except for the lack of clarity on the point. It is, however, our single greatest concern about the effectiveness of human rights protection in connection with IFC policy.

One final general observation and suggestion may be too obvious to be necessary. The future editions of the *Guide* should incorporate some of the major works that have appeared since the road-test draft was written. We particularly call attention to the recent reports of John Ruggie, the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.⁴ These reports contain a wealth of helpful analysis and information. We have noted some of the more important points in our discussion below, but we have made no attempt to point out all of the useful and relevant material. We also note the recent ILO study, “Governance, International Law & Corporate Social Responsibility” (2008).⁵

II. Summary of Principal Recommendations

1. The relationship between the Social and Environmental Assessment required by Performance Standard 1 and a human rights impact assessment should be clarified.
2. The IFC should make human rights impact assessments a required part of each Social and Environmental Assessment where any significant human rights impact is possible.
3. Future editions of the *Guide* should incorporate some of the major works that have appeared since the road-test draft was written.
4. Greater and more detailed attention should be given to the processes of scoping and baselining.

⁴ Some of the reports are already referenced in the *Guide*. Others include: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions, UN HRC, 4th Sess., Item 2, UN Doc. A/HRC/4/74 (5 February 2007); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Protect, Respect, and Remedy: A Framework for Business and Human Rights, U.N. HRC, 8th Sess., Item 3, UN Doc. A/HRC/8/5 (7 April 2008); Andrea Shamberg, “Stabilization Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative to the Secretary-General on Business and Human Rights,” (March 11, 2008).

⁵ Available on the ILO website at www.ilo.org/public/english/bureau/inst.

5. Attention should be given to the need for professional legal assistance for determining the applicable human rights law in many situations.
6. The section on determining the need for a human rights impact assessment needs additional treatment.
7. The *Guide* would be improved greatly by giving substantially more attention to how companies can be sure, in the process of scoping, that they have truly adequate and reliable information.
8. It would be useful to use more straightforward terms such as “potential human rights violations” or “human rights that could be violated or impaired by project activities,” or “human rights claims that must be addressed,” rather than euphemisms.
9. It would be better to make at least a preliminary determination of the probable, likely, or potential human rights issues at an earlier stage in the process.
10. The *Guide* would be strengthened by giving greater attention to the possible pitfall of arbitrarily or unjustifiably limiting the types of issues and considerations that are to be analyzed or assessed.
11. More information and guidance should be provided on the distinction between human rights impact assessments and other kinds of assessments, such as environmental impact assessments and social impact assessments.
12. The *Guide* should make it clearer that no matter how bad the human rights situation may be, this situation can never justify or excuse activities that violate, infringe or impair human rights.
13. The *Guide* should call attention to customary international law about human rights and to the extensive body of human rights law that has been developed by international courts and other international human rights bodies.
14. With regard to indigenous peoples, the *Guide* should not focus exclusively on ILO Convention 169, but should give attention to many other human rights treaties and instruments.
15. Attention should be given to the regional human rights systems, and perhaps regionally specific *Guides* should be prepared.
16. Whether the impact on human rights is direct or indirect, all human rights violations or infringements must be considered, and this point should be given more treatment in the *Guide*.

17. Greater attention could be given in the *Guide* to the suggested approach of using independent assessors.
18. The *Guide* should give attention to a much more extensive body of applicable law that must be considered in conducting a human rights impact assessment.
19. The *Guide* should give additional attention to the existence of human rights held by groups or communities.
20. The *Guide* would benefit substantially if the IFC or the *Guide*'s authors would consult with indigenous leaders and experts about the revision of the *Guide*.
21. The *Guide* would benefit from giving still more attention to the “business case” for human rights, and from making this treatment more forthright and explicit.
22. The operative connection between international human rights law and domestic law deserves much more attention.
23. The *Guide* would be strengthened greatly if it contained more detailed information and additional references concerning consultation with indigenous peoples.
24. Reference should be made to the ILO Manual on ILO Convention 169 that includes a detailed discussion of the consultation requirements of the Convention.
25. In regard to consultations, attention should be given to the decisions of the ILO committees set up to consider complaints.

III. Setting the Baseline, Identifying Context, Scoping and Planning

The topic of planning, scoping and baselining requires greater and more detailed treatment than it is given in the *Guide*. Some specific recommendations are discussed below.

“Scoping” is a term now in wide use to describe the initial or early part of many kinds of evaluations, assessments, or studies. It refers generally to the process of identifying the key issues or topics to be included, identifying the stakeholders and their views, determining the relevant geographical area(s), identifying existing data, selecting team members, and generally making a plan for an assessment or study. The term is scarcely used in the *Guide* and is not a topic of discussion as such, but many of the same considerations are included in the *Guide*'s sections on *Preparing to Use the Guide to Human Rights Impact Assessment and Management* (pp. 2-7) and *Implementing the Human Rights Impact Assessment and Management Process* (pp. 9-37). The most important sections are those entitled *Determining Whether a Full Human Rights Impact*

Assessment is Needed (p. 16), *Identify and Clarify the Business Project Context* (pp. 17-30), and *Set the Baseline - Articulate the Current Local Picture and Conditions* (pp. 32-37).

There is no doubt that private actors, that is, businesses, need to determine the scope of any assessment, and many users of the *Guide* or any other assessment tool will probably have insufficient skill and experience in identifying actual and potential human rights violations and in planning the elements of a human rights impact assessment. The *Guide* provides a wealth of helpful information about how to scope and otherwise plan an assessment, but a more detailed discussion on scoping human rights issues is needed.

In this regard, perhaps the most important area needing additional treatment is the section on determining the need for a human rights impact assessment. Obviously, if a negative determination is made unwisely or without adequate information, then there will be no impact assessment at all. However, the *Guide* gives only one page (p. 16) to this crucial step in the process. The danger, of course, is that a business, lacking adequate information and without conducting an adequate study, may be unaware of serious human rights issues and potential conflicts.

Often human rights issues are poorly covered in the press, and sometimes they are covered up or suppressed by governments and others. In our experience with indigenous peoples, it is often the case that the victims or impacted populations are remote, marginalized, and scarcely able to voice their objections or protect their rights. In many cases, the national law and legal authorities completely deny that the indigenous peoples have property rights to land or to natural resources. In these circumstances, which are not unusual, a company would have to assiduously seek out the relevant information and might well require the assistance of qualified legal and social experts to properly determine whether a human rights impact assessment is needed. The *Guide* would be improved greatly by giving substantially more attention to how companies can be sure that they have truly adequate and reliable information and that they do not mistakenly follow the misguided path taken by others in the past.

Once it is decided that a human rights impact assessment is needed, the two most important parts of scoping, or setting the baseline and identifying and clarifying the “business context,” are (1) identifying the human rights issues that are relevant and (2) identifying the applicable law concerning human rights. In general, the *Guide* devotes ample attention to the process of identifying issues, but does not provide sufficient guidance about the law that may be relevant for general purposes and particularly in respect to indigenous peoples.

Regarding identification of relevant human rights issues, the *Guide* uses the euphemism, “human rights challenges.” See, for example, p. 38 of the *Guide*. It would probably be useful to use more straightforward terms such as “potential human rights

violations”, “human rights that could be violated or impaired by project activities”, or “human rights claims that must be addressed”, to mention a few more specific terms.

The process recommended by the *Guide* does not forthrightly or clearly call for identifying these relevant human rights issues until rather late in the process – at the time of consultations with stakeholders. This means that crucial information for establishing the scope or plan of the assessment is not brought in until after the scope or plan has been set. It would seem better to make at least a preliminary determination of the probable, likely, or potential human rights issues at an earlier stage in the process, that is, at the first possible point in the process. These human rights issues are, after all, the very core and reason for the impact assessment. Stakeholders ought to be involved earlier in the process in order to provide information about the issues and problems that could arise. This information would seem to be essential to a properly planned assessment.

In social and environmental impact assessments, scoping exercises are sometimes carried out in a way that arbitrarily or unjustifiably limits the types of issues and considerations that businesses are willing to analyze or assess. When this occurs, of course, the impact assessment is likely to yield inadequate or very misleading conclusions. The same thing can occur in human rights impact assessments, and, perhaps, the *Guide* would be strengthened by giving greater attention to this possible pitfall. Indigenous issues are perhaps among the most likely to be dropped or excluded from consideration on the ground that the communities may be remote, they may be small and relatively powerless, or their rights and their ownership of lands and resources may be difficult to determine. Indigenous human rights issues may be inappropriately excluded from consideration in an impact assessment on geographical grounds; that is, the proposed area of impact of the project may be geographically limited to the site of actual activities, without consideration of “downstream,” causally remote impacts.

Human rights impact issues may be inappropriately or unjustifiably limited through failure to identify indigenous legal interests in land and natural resources. This is a particularly acute and widespread problem for indigenous peoples because of the frequent failure of the national and local legal systems to give proper and definitive recognition to indigenous ownership of lands and resources. A project proponent not alert to this possibility may consider only the existing, formal land titles in determining the property interests in affected lands and resources. The World Bank itself addresses this issue by paying particular attention to indigenous peoples’ customary rights to land and natural resources management practices prior to project implementation in its Operational Policy on Indigenous Peoples OP 4.10 (World Bank OP 4.10).⁶ Of course,

⁶ The World Bank Operational Manual, Operational Policies, Indigenous Peoples, OP 4.10, July 2005, at para. 16, 17. Paragraph 16 states,

Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply if the project affects such ties. In this situation, when carrying out the social

the HRIA is not meant to be used to avoid prior legal recognition of indigenous peoples' property rights to land and natural resources. Indigenous issues may not even be considered if project proponents mistakenly determine that the local populations are not indigenous but rather ethnic minorities.

The *Guide* rightly points out the distinction between other better-known kinds of assessments, such as environmental impact assessments and social impact assessments, but this distinction needs more detailed treatment. See pp. 3-4 of the *Guide*. We think that businesses and the cause of human rights would both benefit from more information and guidance on this point.

One aspect of this difference is the distinction between *prevention* of human rights violations and the more general *promotion* of human rights. It is a critically important distinction that the IFC and its clients should be aware of, and the *Guide* could well provide more information on this point. A corporation knowing that its activities may result in violations of human rights does not have the option of planning for mitigation or lessening of the harm; it must avoid and take steps to prevent any such

assessment and preparing the IPP/IPPF, the borrower pays particular attention to:

- (a) the customary rights^[17] of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods;
- (b) the need to protect such lands and resources against illegal intrusion or encroachment;
- (c) the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources; and
- (d) Indigenous Peoples' natural resources management practices and the long-term sustainability of such practices.

Paragraph 17 states,

If the project involves (a) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied (such as land titling projects), or (b) the acquisition of such lands, the IPP sets forth an action plan for the legal recognition of such ownership, occupation, or usage. Normally, the action plan is carried out before project implementation; in some cases, however, the action plan may need to be carried out concurrently with the project itself. Such legal recognition may take the following forms:

- (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or
- (b) conversion of customary usage rights to communal and/or individual ownership rights.

If neither option is possible under domestic law, the IPP includes measures for legal recognition of perpetual or long-term renewable custodial or use rights.

violations of human rights. Where pollution or environmental harm is concerned, it is sometimes permissible to mitigate the harm and take action to remediate any damage after the fact. But in regard to human rights, no violation is ever permissible. No amount of subsequent corrective action or “promotion of human rights” can excuse, justify, or correct a human rights violation. In contrast to rules against environmental pollution or degradation, human rights standards can never be violated “a little bit.” There are no permissible limits. International human rights law provides potential project-affected communities with legal means aimed at preventing human rights violations that could occur with the acquiescence or tolerance of the concerned state. For instance, communities can request that regional human rights bodies order the concerned state to immediately adopt protective measures in their favor.⁷ These measures have the potential to stop project activities that are likely to cause human rights violations.

Another way in which environmental and human rights impact assessments ought to differ is in the use of a baseline or baseline data. The *Guide* discusses the establishment of a baseline at pp. 31-37. The purpose of an environmental impact assessment is to determine the pre-existing environmental situation so as to determine the actual impact of the proposed activity on the local environment. Corporations can seek to locate their projects and activities in locations where the environment has already been compromised or damaged. In such cases, a baseline will identify the impact of placing additional stresses on the environment and may also be used to identify opportunities to mitigate the marginal impact of operations or to determine proper corrective or remedial measures. But a human rights baseline cannot be used this way. No matter how bad the human rights situation, this situation can never justify or excuse activities that violate, infringe or impair human rights. We wish this were clearer in the *Guide*.

Setting a baseline for a human rights impact assessment, according to the *Guide*, includes identifying the relevant framework of law concerning human rights. This process of identifying and understanding the applicable framework of law is extremely important, because it is only by reference to these laws and rules that one can know the human rights and related legal issues that may be relevant to the project. This is no simple process, especially in regard to indigenous peoples’ human rights.

As a general matter, the *Guide* does a commendable job of directing the user to relevant materials and sources for learning about human rights and determining the applicable human rights law. But there are some important omissions that need to be corrected. The *Guide* provides advice on ascertaining the law about human rights on pp. 18 and 19 in connection with identifying and clarifying the business project “context.”

⁷ See, for example, Rules of Procedure of the Inter-American Commission on Human Rights, Art. 25. Article 25(1) states, “In serious and urgent cases, and according to the information available, the Commission may, on its own initiative or at a request of a party, request that the State concerned adopt **precautionary measures to prevent irreparable harm** to persons.” (Emphasis added)

Relatively little is said about how to do this crucial task, perhaps because it can be so difficult. Determining what is the applicable law is often the most difficult task a lawyer faces when called upon for advice. It would surely be a daunting task for a non-lawyer unless the advice of a lawyer or other expert were available. For this reason, the World Bank Procedures on Indigenous Peoples (BP 4.10) requires the assistance of an appropriate legal expert, apart from a social expert in project appraisal.⁸ Earlier in project preparation, much can be done without professional legal assistance, but we think that in most situations some professional legal assistance would be required for determining the applicable law, and some attention should be given to this need in the *Guide*.

The *Guide* on page 19 provides its most specific guidance on determining the applicable law, as follows:

In particular, you need to establish which international conventions the host country of the project has signed and ratified, how it has incorporated the principles into its local laws and regulations, and whether any gaps are likely in the protection of human rights provided by the local law and their application.

Almost nothing more is said about finding the applicable law. The *Guide* provides a wealth of references, lists of possibly relevant instruments, and useful reading about human rights in the appendices to the *Guide*, especially in Appendices 3 and 5.

However, nothing in the *Guide* tells the user that human rights law prominently includes customary international law that is binding on all countries. The *Guide*, perhaps unintentionally, seems to suggest that the relevant international law is to be found entirely within the treaties or other instruments that the host country has ratified. This is not the case. A very substantial body of customary international law about human rights exists that could be relevant to business projects. Customary international law is established by the widespread practice of countries, where the countries understand that this practice is required by law.⁹ The *Guide* generally fails to call attention to customary international law, though a truly persistent student could eventually learn about it by reading some of the materials listed in the appendices.

The *Guide* also fails to mention the importance of the extensive body of human rights law that has been developed by international courts and other international human rights bodies such as the UN Human Rights Committee and other treaty monitoring bodies. Much of this important jurisprudence has been compiled and is accessible on the

⁸ The World Bank Operational Manual, Bank Procedures, Indigenous Peoples, BP 4.10, July 2005, at para. 10.

⁹ Ian Brownlie, *Principles of Public International Law* 6-10 (6th Ed. 2003).

internet.¹⁰ The use of this body of authoritative jurisprudence is discussed further below in Section IV.

Both of these points – the need to look to customary law and the need to refer as well to the jurisprudence of international human rights bodies – suggest that professional legal assistance advisable for this aspect of scoping and determining the context and baseline for a human rights impact assessment. Except in the simplest and clearest situations, a lawyer’s assistance or at least the advice of an experienced human rights expert would be required. The possible need for such assistance should be discussed in the *Guide*.

With respect to indigenous rights, the *Guide* focuses solely on treaty law, and with regard to indigenous peoples, the *Guide* refers only to the International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries.¹¹ This suggests that corporations may look to only one instrument for indigenous rights, but this is not the case.

A number of other international treaties and instruments also contain clear, detailed standards addressing indigenous rights, particularly the United Nations Declaration on the Rights of Indigenous Peoples, adopted on September 13, 2007, after this edition of the *Guide* was completed.¹² Other human rights treaties that should be considered both in determining the context and scoping, and in the assessment itself are discussed below in Section IV.

One suggestion for making the *Guide* more complete as to its international law references would be to consider the development of regionally specific *Guides*, particularly for the Inter-American human rights system, the African system, and the European system. Regionally specific *Guides* could provide more detailed information and guidance based upon the particular human rights instruments and jurisprudence of the region where the project is to be located or where it will operate.

Another problem that can arise in the planning, baselining or scoping phase of a human rights impact assessment is that the assessment process may be limited merely to an examination of a project’s *direct impacts*, or limited to only those activities and aspects of a project thought to *directly* cause an impact. The difference between *direct impact* and *indirect impact*, while important in environmental and social impact

¹⁰ See, for example, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 212 (2003).

¹¹ International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1384.

¹² UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/61/295 (2007).

assessment processes, should be avoided in the context of a human rights impact assessment. This observation was highlighted by the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations, who stated, “HRIAs should deviate from the ESIA [environmental and social impact assessment] approach of naming a project’s direct impacts and instead force consideration of how a project could interact with each and every right.”¹³ Whether the impact on human rights is direct or indirect, all human rights violations or infringements must be considered, and this point should be given more treatment in the *Guide*.

Finally, the report is correct to highlight the value of using external assessors to assist with human rights impact assessments. Two brief examples are given on page 12 of the *Guide*. This is a particularly encouraging suggestion because of the widespread perception that law is either subjective, subjectively interpreted, or subject to political pressure. Legal rules and norms, including human rights norms, are always subject to interpretation. Biased or incorrect interpretations are certainly possible and perhaps likely, particularly when corporations themselves lack adequate capacity to evaluate potential human rights liabilities. The retention of outside experts and, more important, the commitment to share unedited reports of their opinions with indigenous peoples, can be a very effective means for improving the quality and the credibility of a human rights impact assessment. Perhaps greater attention could be given in the *Guide* to this suggested approach.

IV. The Applicable International Law for Making a Human Rights Impact Assessment

We turn now to the substantive phase of a human rights impact assessment. The question of determining the applicable law is important not only in the initial phases of scoping, determining context, and baselining, but it is even more important in the central part of the process, assessing the possible human rights impacts of a project and the legal requirements for managing such human rights risks and concerns.

The *Guide*, as we noted earlier, provides an inadequate description of the international law that is relevant to indigenous rights in a human rights impact assessment. Appendix 4 of the *Guide*, at pp. 77-79, outlines some of the rights of indigenous peoples recognized in international law, and it lists without comment some of the principal UN instruments that contain human rights standards particularly relevant to indigenous peoples. The list is incomplete (omitting, for example, the Convention on Biological Diversity [Article 8(j)] and the Genocide Convention) and fails to mention any of the regional human rights declarations and treaties. As regards indigenous peoples, only ILO Convention 169 is actually discussed in Appendix 4. As a result, the treatment

¹³ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN HRC, 4th Sess., Item 2, at para. 26, UN Doc. A/HRC/4/74 (2007).

of the rights of indigenous peoples is so incomplete as to be substantially inaccurate and misleading for a reader without a background in human rights law.

In the remainder of this Section, we will look more closely at ILO Convention 169 and some specific ways in which the *Guide* could be improved as regards the identification and use of other applicable international human rights law.

1. International Labor Organization Convention 169

International Labor Organization Convention 169 forms almost the exclusive source of information in the *Guide* about the rights of indigenous peoples. While the Convention is of great importance, it cannot, alone, provide a complete or adequate definition of indigenous rights. The International Labor Organization is a tripartite organization, governed jointly by workers, employers, and states.¹⁴ The organs of the ILO that are of principal importance to the operation of Convention 169 are the Governing Body and the Committee of Experts on the Application of Conventions and Recommendations. The Governing Body, composed of 28 government members, 14 employer members, and 14 worker members, supervises the operations of the ILO.¹⁵

Convention 169 is a treaty and is therefore binding only upon the countries that ratify it (17 at this time). The Convention is by no means limited to labor-related rights but contains many articles covering a very wide range of human rights, including the right of indigenous peoples to decide their own priorities for development, the right to be free from discrimination, cultural and religious rights, rights to education, and much more. Some of the human rights of particular interest are rights to land,¹⁶ rights to natural

¹⁴ International Labor Organization, ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), A Manual, (International Labor Office: Geneva, 2003) (hereinafter ILO Manual) at 1.

¹⁵ ILO Manual at 2.

¹⁶ ILO Convention 169, Art. 14. Article 14(1) states, “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 people and shifting cultivators in this respect.” ILO 169 Articles 13-19 deal generally with issues of lands and territories.

resources¹⁷ and rights to consultation.¹⁸ The ILO hails consultation as “a fundamental principle of the Convention.”¹⁹

Convention 169, however, does not purport to be a comprehensive statement of the human rights of indigenous peoples. The Convention does not deal at all with the important right of self-determination. This topic was deliberately omitted, because it was considered to be beyond the competence of the ILO. One must, therefore look elsewhere for international standards concerning indigenous peoples’ rights to self-determination, autonomy, and related rights. These rights are covered extensively in the UN Declaration on the Rights of Indigenous Peoples.

Countries that have ratified Convention 169 must submit regular reports to the ILO on implementation of the Convention.²⁰ The ILO Committee of Experts on the Application of Conventions and Recommendations, comprised of 20 independent experts, receives and responds to these reports.²¹ The Committee of Experts may respond to country reports in one of two ways, through Observations or through Direct Requests.

A direct request by the Committee of Experts involves a request for more information or clarification of points raised in the country’s report on implementation of Convention 169. An observation involves “serious or long-standing cases of a government’s failure to fulfil its obligations or on noting cases of progress.”²²

¹⁷ ILO 169 Art. 15. Article 15(1) states, “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.”

¹⁸ ILO 169 Art. 6. Article 6(1) states,

(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;

(c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

¹⁹ ILO Manual at 15.

²⁰ *Id.* at 74.

²¹ *Id.*

²² *Id.*

The ILO Governing Body may receive and investigate “representations,” that is, complaints, regarding the application of Convention 169.²³ The ILO Governing Body creates a committee to review and render a report on representations that are properly filed. Representations must be filed by either a workers’ organization or an employer and must constitute a “claim that a country has failed to observe a ratified Convention.”²⁴ Because representations always involve a claim that a country has failed to fulfill its obligations under Convention 169, the committees’ responses to such representations are an excellent source of expert opinion on the application of Convention 169 and on the meaning of the rights recognized by the Convention in specific factual and legal situations. However, a determination against a state by the committee in a report on a representation does not compel or necessarily bring about corrective action from a state.

Although ILO Convention 169 is certainly an important instrument with respect to indigenous rights, there are three reasons why reliance on the Convention alone is not adequate. The first reason is that the Convention has been ratified by only 17 countries.²⁵ This is only a small fraction of the countries that have significant numbers of indigenous peoples. The Convention is a formal treaty, and it is therefore binding only upon the countries that have agreed to it, that is, the formal parties that have ratified the Convention.

Many of the provisions of ILO Convention 169 are properly regarded as rules of customary international law that are applicable in all countries,²⁶ but in order to ascertain the rules of customary international law concerning indigenous peoples, one must look beyond the Convention. ILO Convention 169 is by no means a complete statement of the relevant customary law, and indigenous peoples’ human rights cannot be comprehended or adequately understood without reference to customary international law and the decisions and recommendations of human rights courts and other human rights bodies.

For example, in the Americas, it is well-settled law that indigenous peoples hold a human right to property, including land and resources, under Article 21 of the American Convention on Human Rights, and this right to particular lands and resources can be established simply by demonstrating their historical use and possession.²⁷ However, the Inter-American Court of Human Rights has also held that for indigenous peoples, the

²³ Id. at 76.

²⁴ Id.

²⁵ International Labor Organization, Status of Ratifications of ILO C169, available online at www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169.

²⁶ See, e.g., *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. Commission Human Rights, at para. 130 (December 27, 2002).

²⁷ *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No.79, (Judgment of Aug. 31, 2001) at para. 151.

right to property must be interpreted in light of other human rights obligations the countries have assumed,²⁸ and they are subject to certain “safeguards.”²⁹ While detailing these safeguards is not necessary in the *Guide*, it may be helpful. The need to look to customary international law and the jurisprudence of various international human rights courts and human rights monitoring bodies is important for understanding all human rights, not only the human rights of indigenous peoples.

Laying aside the legal issues, to some extent the Convention is useful as a guide to best practices as regards indigenous peoples. But even as to best practices, the Convention alone cannot be considered an adequate resource. There are a number of other international instruments, which we mention below, that should be similarly recommended by the *Guide* with respect to best practices.

The second reason why reliance on Convention 169 alone is inadequate is that the Convention does not provide a particularly effective mechanism for seeking remedial relief where violations of indigenous rights occur. Complaints or “representations” can only be presented by workers’ organizations, not by indigenous persons or peoples *per se*. Once the committee set up by the Governing Body has acted on a “representation,” the matter is finished. The Expert Committee is empowered to follow-up on a report, but there is no body with binding authority to compel states to respect the provisions of the Convention. Some of the regional human rights systems, however, such as the Inter-American system, include a court with the power to make binding decisions in some cases. Complaints or cases of human rights violations can be made by any person to the Inter-American Commission on Human Rights. In a number of countries, victims of human rights violations can make complaints to the UN Human Rights Committee; and victims of discrimination can often take their concerns to the UN Committee on the Elimination of Racial Discrimination. The European and African systems of human rights provide still other options for victims. These regional and worldwide bodies may exercise considerable remedial powers in many kinds of cases. Companies considering projects with possible human rights implications need to be aware that these mechanisms and procedures could be invoked and could result in significant actions affecting or even ending a proposed business project.

The final issue with reliance only on ILO Convention 169 is the possible inference that indigenous rights are somehow optional for states. The *Guide* itself at page 78 notes that “[n]ational governments can currently override ILO Convention 169”. This comment in the *Guide* probably refers to the legal fact that a country is generally free to terminate its obligations under a treaty by abrogating or denouncing the treaty. However, countries that are parties to ILO Convention 169 are not free to denounce the

²⁸ The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H. R., (Ser. C) No. 172, (Judgment of Nov. 28, 2007) at para. 93.

²⁹ *Id.* at para. 129.

treaty at will, but have only a limited right to do so.³⁰ Because only the Convention is discussed as a source of human rights for indigenous peoples, one might logically conclude that the entire corpus of indigenous rights law is optional for states. But this is not the case, because the rights of indigenous peoples are to a great extent protected by customary international law as discussed above, by a number of other treaties, such as the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, by regional human rights treaties, and by other human rights instruments such as the UN Declaration on the Rights of Indigenous Peoples.

Indigenous peoples' rights are not comprehensively defined in any document, but rather they are contained in a large number of international instruments, which, taken together, form a corpus of international law. This is true for some other categories of human rights as well, such as the human rights of women, of minorities, and so forth. The only international instrument which addresses indigenous rights comprehensively, indeed more so than ILO 169, is the UN Declaration on the Rights of Indigenous Peoples.³¹ The UN Declaration on the Rights of Indigenous Peoples enjoys broad support from states and contains more detailed and more extensive standards than ILO Convention 169. The Declaration was adopted by the General Assembly by vote of 143 - 4, with 11 abstentions. Although the Declaration, of itself, does not constitute binding international law, many of its numerous provisions reflect existing rules of customary international law. Without doubt, the UN Declaration is the most extensive, authoritative, and widely supported statement of the human rights of indigenous peoples, and it should be prominently included in future editions of the *Guide*.

In addition to the UN Declaration, there are a number of human rights treaties and other human rights instruments which define standards of interest to project proponents, and some which allow indigenous peoples to obtain relief for violations of rights recognized in international law. These general instruments include, prominently the International Covenant on Economic Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. These are mentioned in the Appendices to the *Guide* but are not discussed as regards indigenous peoples. Though these treaties do not explicitly refer to indigenous peoples, the treaty monitoring bodies have provided expert guidance on how the treaty terms are to be applied to indigenous peoples. As we mentioned earlier, the *Guide* does not list the Convention on Biological Diversity (Article 8(j)) and the Genocide Convention, and it fails to mention any of the regional human rights declarations and treaties.

The general comments and recommendations of the UN Human Rights Committee and other UN monitoring committees provide important and authoritative interpretations of the covenants and conventions on many topics, including the rights of

³⁰ ILO Convention 169, Art. 39.

³¹ UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 295, UN Doc. A/RES/61/295 (2007).

indigenous peoples, and should be given some notice in the *Guide*.³² Additionally, the concluding recommendations of the various monitoring committees made after they have reviewed the periodic reports of the states also provide additional guidance and interpretation about the range and scope of human rights recognized in the various treaties, including indigenous peoples' rights.

In the Americas, indigenous human rights issues are more frequently addressed by the Inter-American Commission on Human Rights and Inter-American Court of Human Rights by reference to the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The reports of the Commission and the decisions of the Court have created a substantial and important body of law or jurisprudence on the rights of indigenous peoples. The decisions of the Court could have direct impact on the activities of project proponents, particularly when the project occurs in an area where the pre-existing aboriginal title has not been recognized by the state.³³ In extreme cases, the Inter-American Commission is capable of issuing precautionary measures to enjoin or compel actions from states in order to protect the lives of individuals.³⁴

To sum up these observations, it is entirely appropriate for the *Guide* to give attention to ILO Convention 169, but limiting consideration of indigenous peoples' human rights to the Convention is misleading. The principles of the Convention, particularly those related to consultation, may suggest "best practices," but they do not necessarily speak directly to the human rights obligations of states or companies engaging in consultations with indigenous peoples. The *Guide* should point out the complexity of indigenous rights, specifically that they cannot be defined by a single instrument. The *Guide* should give much greater attention to the universal human rights instruments and to customary international law. For project proponents to ignore or fail to take account of these parts of the applicable human rights law could create tangible risks to the financial security of a proposed project.

2. Collective or Community Rights

³² Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 38 (1994). See also, Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), UN Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 212 (2003).

³³ The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 24; The Case of the Saramaka People v. Suriname, *supra* note 25.

³⁴ Yakye Axa Indigenous Community of Exnet-Lengua People v. Paraguay, Petition 12.313, Report No. 2/02, Inter-Am. C.H.R., (Feb. 27, 2002).

Although human rights have historically been considered as rights of individuals, many of the most important human rights of indigenous peoples are held collectively by communities, tribes, nations, or peoples. The *Guide* at times speaks of human rights as only rights of individuals (for example, on pages viii and 2), but to its credit, the *Guide* does recognize the existence of some human rights held by groups or communities. More attention to this topic would be helpful and perhaps even crucial for a clear understanding of potential human rights issues involving indigenous peoples.

Some human rights have for many years been recognized as rights held by groups or peoples, not solely by individuals. Most prominent is the right of self-determination, which is guaranteed to “all peoples” by common Article One of the Covenant on Economic Social and Cultural Rights and the Covenant on Civil and Political Rights. Paragraph 2 of this same common Article One is particularly relevant to some business projects. It provides that all peoples have the right to freely dispose of their natural wealth and resources. It also states, “In no case may a people be deprived of its own means of subsistence.” This is another group right that is almost universally recognized and that is potentially important in a development project setting. The right of peoples to their natural resources is also guaranteed by Article 25 of the Covenant on Economic, Social and Cultural Rights. Other human rights long held by groups include the rights of families (Article 10 of the Covenant on Economic, Social and Cultural Rights) and the right of persons belonging to minorities “in community with other members of their group” to enjoy their own culture, to profess and practice their own religion, or to use their own language. (Article 27 of the Covenant on Economic, Social and Cultural Rights.) During the past 20 years, the collective rights of indigenous peoples have been recognized most explicitly in the United Nations Declaration on the Rights of Indigenous Peoples and in ILO Convention 169. In the Americas, indigenous peoples’ rights to land have been repeatedly recognized as collectively held property rights in human rights cases and decisions.³⁵

Collective rights need additional attention in the *Guide* because in a human rights impact assessment, collectively held human rights can pose a unique challenge. For example, conducting consultation with an indigenous people and acquiring prior and informed consent or broad community support for proposed project activities usually requires engaging representatives of the rights-holders, that is the people or community concerned. Indigenous human rights include extensive rights relating to self-governance and indigenous control over lands and resources. Failing to understand the extent of these collective rights or undermining traditional indigenous means of decision-making could easily run afoul of international human rights standards. The difficulty of negotiating these collective human rights is illustrated by a recent case before the Inter-American Court of Human Rights, which suggests that even in those situations where recognized traditional leaders are opposed to a human rights complaint, human rights

³⁵ Mary and Carrie Dann v. United States, *supra* note 23; The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 24; The Case of the Saramaka People v. Suriname, *supra* note 25; Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04 (October 12, 2004).

tribunals must nonetheless consider complaints of human rights violations raised by *community members*, including violations of collectively held property rights.³⁶ As a consequence, even securing the support of traditional leaders in the absence of a community consensus may not shield IFC clients from risks associated with human rights violations where collective rights are concerned.

V. The IFC Itself Should Consult with Indigenous Leaders and Experts

The *Guide* would benefit substantially if the IFC or the *Guide*'s authors would consult with indigenous leaders and experts about the revision of the *Guide*, and such consultation may be *required* by the UN Declaration on the Rights of Indigenous Peoples. The Declaration speaks directly to the obligations of both states and international organizations such as the International Finance Corporation. Article 41 of the Declaration states,

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 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.

This Article makes it clear that the International Finance Corporation itself has an obligation to contribute to the full realization of the rights and standards contained in the Declaration and must establish a consultative mechanism or some other means through which indigenous peoples can be involved in the preparation of the *Guide*, for example, and in the implementation of Performance Standard 7, among other activities of the IFC that affect indigenous peoples. It requires at the least that as the development of the *Guide* moves forward, the IFC make special efforts to consult with indigenous peoples through their leaders, especially those that otherwise may have grave difficulties communicating with the IFC directly on such matters. Indigenous experts and advocacy organizations could provide guidance and other assistance in developing effective means of ensuring the participation of indigenous peoples.

VI. Greater Attention to the “Business Case” for Human Rights

The *Guide* assumes and suggests throughout (see p. vii, for example), and correctly so, that there is a “business case” for recognition, protection, and promotion of human rights. In other words, there are sound business reasons for implementing a human rights impact assessment and management plan, even where the business or

³⁶ The Case of the Saramaka People v. Suriname, *supra* note 25, at paras. 77-185.

project might not be held formally or legally responsible for any human rights violations relating to the project. The role of the *Guide* is to provide non-state actors, specifically, private corporations, with guidance, methods, and other information about best practices to ensure compliance with international and domestic human rights law. Respect for human rights is essential for obtaining “social license” from project-affected communities and for reducing the risks that arise from human rights issues or violations relating to a project.

We believe that the *Guide* would benefit from giving still more attention to the “business case” for human rights and from making this treatment more forthright and explicit. For instance, it would seem useful to give more detailed and explicit attention to certain business interests, particularly those of publicly held corporations, that can be adversely affected by human rights issues or violations. For example, the social investing community, those who seek to make corporations more socially responsible by informing and mobilizing shareholders and other investors, has motivated a growing number of corporations to adopt or adhere to principles, codes, and other standards for the protection of the environment, human rights, and social welfare generally.³⁷ Investors (shareholders and lenders), underwriters, and others can and do use human rights laws and standards as benchmarks against which to measure businesses’ social performance and to estimate risks to businesses. The *Guide* should also more prominently mention recent developments in securities disclosure requirements,³⁸ as well as efforts by the

³⁷ These companies include, for example, Barrick, *Corporate Social Responsibility Charter*, available at www.barrick.com/Theme/Barrick/files/docs_ehss/CSR_Charter.pdf; BHP Billiton, *Sustainability Report (2007)*, available at www.bhpbilliton.com/bb/aboutUs/annualReports.jsp; 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/; 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; 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; Shell, *Sustainability Report 2007*, available at <http://sustainabilityreport.shell.com/2007/servicepages/welcome.html>; EnCana, *Aboriginal Guidelines*, available at www.encana.com/responsibility/consultation/aboriginal/index.htm; Alcan, *Indigenous Peoples Policy*, available at www.alcan.com/web/publishing.nsf/content/Alcan+Indigenous+Peoples+Policy; JP Morgan Chase, *Indigenous Communities*, available at www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indig; Total, *Policy regarding indigenous peoples*, available at www.total.com/static/fr/medias/topic1492/Total_Indigenous_People_Policy.pdf; Enbridge, *Indigenous Peoples Policy*, available at www.enbridge.com/pipelines/right-of-way/pdf/indigenouspeoplespolicy.pdf.

³⁸ See, for example, in the United Kingdom, the Occupational Pension Schemes (Investment) Regulations 2005, SI3378 (2005) requiring a Statement of Investment Principles; Australian Financial Services Reform Act 2001 (Cth); the Sarbanes-Oxley Act, Public Law 107-204 (July 30, 2002); and certain accountancy standards in the United States, such as FAS 144, Accounting for the Impairment or Disposal of Long-lived Assets (“mothballing” of sites and other assets), and Financial Accounting Standards Board, Interpretation No. 47, *Accounting for Conditional Asset Retirement Obligations* (FIN 47).

social investment community and larger pension funds to develop “ethical” funds that screen out apparent violators of human rights. The wealth of materials that have been produced in these areas by businesses are persuasive evidence that there are significant business reasons for taking strong measures to protect and respect human rights and environmental values.

Similarly, the *Guide* would benefit from more extensive discussion of how human rights issues or violations can create serious business risks. For example, it would be helpful to discuss the fact that in some situations where a business may not be held legally responsible for human rights violations related to the business, the *country* may be held responsible for the violations of human rights that occur within its territory.³⁹ When this occurs, the country may be compelled or it may decide to take actions that are devastating to the business project, such as revoking licenses, concessions, or permits to conduct certain business activities.⁴⁰ Naturally, persistent human rights violations and related injustices can lead as well to social unrest and political instability. As a result, even if formal legal liability is not attributable to the business or to the private corporation, its capital investment in a project may be at risk if human rights are not being respected. Including more concrete examples of these risks and providing a more frank and explicit discussion of these matters would help project proponents to better assess and manage human rights issues.

1. Concrete Liability Issues

The *Guide* does not give adequate attention to the concrete legal liabilities that corporations may face if human rights laws or standards are violated. By “concrete legal liability,” we mean formal legal responsibility that can be enforced or compelled by legal action in the legal system of the host country. Although many of these issues are noted in various Appendices, for example in Appendix 3 (pp. 71-72) and Appendix 4 (pp. 73 - 79), they should appear more prominently in the body of the *Guide*, because they represent “hard” legally enforceable liabilities that corporations may face. Failure to include such information in a more prominent fashion may lead corporate decision makers to conclude that businesses face no real liability from violations of international human rights law, when the opposite is clearly the case, albeit in narrowly defined circumstances. Issues of complicity (see Appendix 4, p. 72) with respect to violations of international criminal law or humanitarian violations are particularly relevant to indigenous peoples, given the potential for corporate-state entanglement in conflict zones.

³⁹ Case of Velasquez-Rodriguez v. Honduras, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 at para 182.

⁴⁰ See, for example, Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 24, at para. 153; Case of the Saramaka People v. Suriname, *supra* note 25, at para. 146.

It should be noted that the UN Special Representative has dealt with the issue of corporate responsibility for criminal activities and particularly dealing with the issue of complicity in two reports, one in 2007 and another in 2008.⁴¹ The 2007 report was listed in the *Guide*, Appendix 5. The Special Representative noted in his 2008 report that, at a minimum, corporate duties include a duty to respect human rights and that failure to meet the “duty to respect” may lead to concrete legal liabilities.⁴²

2. International Human Rights and Domestic Laws

Our second major observation about the business case for respecting human rights is that international human rights law is sometimes enforceable through the domestic laws of the host country or even some other country where the corporation may be found. This operative connection between international human rights law and domestic law is virtually unexplored in the text of the *Guide*, and it deserves much more attention. As we have already commented, one of the most powerful business motivations is the prospect of domestic legal liability, that is, a legal order to pay money or a legal order to do or not to do something. For example, the Alien Tort Claims Act in the United States permits an alien in the United States to sue a company or person in the United States for a tort or wrong committed in another country. The Act is referenced in Appendix 3, p. 72, but there is very little information in the body of the *Guide* with respect to the types of human rights standards that might be enforceable under the Act, the types of liability envisaged by the Act (monetary damages only), nor any discussion of any other such domestic or national laws. A discussion of the current legal interpretations of the Act by federal courts and the potential extent to which it might be applied to human rights violations abroad should be included in the *Guide*.

There are a number of other examples of domestic laws which can impose human rights-related requirements on businesses and which can result in civil and criminal liability. For example, several stock exchanges have developed requirements for reporting of rights-related performance of companies, and the United Kingdom has recast the fiduciary duty that directors and officers owe shareholders to include consideration of

⁴¹ 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, UN HRC, 4th Sess., Agenda item 2, at para. 30, UN Doc. A/HRC/4/35 (19 February 2007); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN HRC, 8th Sess., Agenda item 3, at paras. 73-81, UN Doc. A/HRC/8/5 (2008).

⁴² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN HRC, 8th Sess., Agenda item 3, at para. 54, UN Doc. A/HRC/8/5 (2008).

the impact of corporate activities on the environment and project-affected communities.⁴³ The 2007 report of the UN Special Representative of the Secretary-General discusses and illustrates the growing and complex web of domestic laws in many countries that may be applied to hold companies legally accountable, both civilly and criminally, for human rights violations.⁴⁴

Although the *Guide* suggests that project proponents should consider the specific legal context of each country, it does not provide information on the legal or political processes that could be applied to stop projects that violate international human rights standards or to compel actions from companies and others to ensure compliance with human rights standards. For example, constitutional actions, such as *amparo*; equitable actions such as suits for injunctions; and domestic enforcement of provisional measures or precautionary measures by international tribunals are left completely unexplained by the *Guide*. Each of these mechanisms offers victims of human rights abuses the possibility of relief and may delay or even halt the activities of corporate actors. We would not expect the *Guide* to list or detail every such possible legal remedy, but the existence of such remedies and, thus, such risks, should be clearly pointed out. At the very least, the *Guide* should provide an example of such a mechanism along with a brief explanation detailing the state's duty to implement human rights standards. In the Inter-American system, the *Velasquez-Rodriguez* case holds that this duty requires states to exercise due care to prevent human rights violations by *non-state actors*.⁴⁵

VII. Consultation

The *Guide* would be strengthened greatly if it contained more detailed information and additional references concerning consultation with indigenous peoples. The requirement of consultation is of such importance that corporations proposing projects that could affect indigenous peoples require more specific guidance on how to conduct consultations with indigenous peoples – and, no doubt, with other kinds of communities as well. The United Nations Declaration on the Rights of Indigenous Peoples calls for consultation, cooperation or participation with indigenous peoples in 16 of its 46 articles, on subjects ranging from protection of children from economic exploitation and repatriation of human remains, to “the approval of any project affecting

⁴³ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN HRC, 8th Sess., Agenda item 3, at para. 30, UN Doc. A/HRC/8/5 (2008).

⁴⁴ 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, UN HRC, 4th Sess., Agenda item 2, at paras. 19-32, UN Doc. A/HRC/4/35 (19 February 2007).

⁴⁵ Case of *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4.

their lands or territories and other resources” (Art. 32), and measures to implement the rights in the Declaration.⁴⁶ ILO Convention 169 contains at least 18 separate provisions requiring consultation, cooperation or participation.⁴⁷

This is a difficult topic and probably an unfamiliar one for most businesses. For one thing, indigenous peoples are not like most other stakeholders or interested parties. They usually have very different cultures from the surrounding population, and often they have their own distinct governments or representatives. But fortunately there is a significant amount of material and information available. We will mention just some of the possible material that would be helpful to include or reference in the *Guide*.

The *Guide* correctly highlights ILO Convention 169 as the leading international instrument on consultation standards regarding indigenous peoples. The Convention devotes an entire article to the requirements of consultation. For convenient reference, we reprint it in the footnote below.⁴⁸

In addition, the ILO has prepared and made available in paper format and on the Internet a Manual on ILO Convention 169 that includes a detailed discussion of the consultation requirements of Article 6.⁴⁹ The Manual explains and discusses the specific requirements of Article 6 and provides information about actual cases and situations involving consultations with indigenous peoples.

⁴⁶ These are Articles 11, 12, 14, 15, 17, 18, 19, 22, 23, 27, 29, 30, 31, 32, 36, and 38, UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007).

⁴⁷ These include provisions in Articles 2, 5, 6, 7, 15, 16, 17, 20, 22, 23, 25, 27, and 28, International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1384.

⁴⁸ Article 6 of ILO Convention 169 states:

- (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;
 - (c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

- (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.

⁴⁹ International Labor Organization, ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169) A Manual, (International Labor Office: Geneva, 2003) at 15.

Perhaps even more important are the decisions of the ILO committees set up to consider complaints in regard to compliance with the Convention. Several complaints or “representations” have been filed and considered dealing with the consultation requirements of the Convention, and these have resulted in public reports containing conclusions and recommendations. These authoritative and influential interpretations of the Convention are important to an understanding of the requirements of consultation with indigenous peoples. As we explained earlier, a committee of the ILO Governing Body reviews complaints or “representations” filed under Article 24 of the ILO Constitution that a state has failed to observe a convention to which it is a party. The committee makes conclusions and recommendations concerning the complaint. The committee reports are made public and are forwarded to the Committee of Experts for follow-up. The reports resulting from these complaints are available on the ILO website.⁵⁰ Some of the principal and most useful interpretations and observations are mentioned below.

The ILO Convention does not require that consultations result in agreement or consensus, only good faith negotiations towards one.⁵¹ The committee concluded in one case that the Convention does not create or require a list of specific requirements or “best practices” that must be followed in all situations; but the committee observed that the characteristics of adequate consultations proposed by the complainants constituted “a model which it would be desirable to apply.”⁵²

It is clear that consultations require early participation by indigenous groups.⁵³ Numerous interpretative opinions offered by the committees in response to individual complaints state that in order for a consultation process to be consistent with the obligations of the Convention, the consultation process must occur before any final decisions are made, or more accurately, while there remains time for the final output of the consultations to influence the final decision. In order for a consultation process to be sufficient, sufficient time must be allowed for indigenous peoples (or anyone) to receive information, consider the ramifications of the information, and provide input into the

⁵⁰ See www.enbridge.com/pipelines/right-of-way/pdf/indigenoupeoplespolicy.pdf.

⁵¹ Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at paras. 57, 59, 61-63, ILO Doc. 161999COL169B (2001).

⁵² Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR), at paras. 95, 106, ILO Doc. 162004MEX169A (2004). The complainants' proposals are recited principally in paras. 37-43.

⁵³ Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 38, ILO Doc. 162000ECU169 (2001).

process. The ILO committee reviewing one complaint recognized this, stating: “The adoption of rapid decisions should not be to the detriment of effective consultations for which sufficient time must be given to allow the country’s indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions.”⁵⁴ The phrase “in a manner consistent with their cultural and social traditions” is critically important, because it implies the consultation process must be both genuine and accessible, in a culturally relevant manner, to the indigenous people. If indigenous communities are contacted after an environmental impact study or a resource management plan has been completed, or if a license has already been granted to exploit the resource, the requirement of prior consultation will not have been met.⁵⁵

It is clear that there are some activities and situations that are clearly insufficient for fulfillment of consultative obligations. For example, failure to inform an indigenous organization or failure to consult prior to the signature of an agreement between a government and a private corporation violates consultation obligations of states.⁵⁶ Another case involving failure to adequately consult arose when a government engaged in a haphazard consultation with certain sub-groups of an indigenous group in an attempt to demonstrate overall consent.⁵⁷

Closely related to consultation is the requirement of benefit-sharing where development of natural resources will adversely affect indigenous peoples. Benefit sharing is required in most cases by Article 15(2) of the Convention. In one report on a complaint, the committee considered whether there had been efforts in connection with consultations to develop a mechanism whereby indigenous peoples could share in the

⁵⁴ Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at para. 79, ILO Doc. 161999COL169A (2001).

⁵⁵ Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, at para. 90, ILO Doc. 161999COL169B (2001).

⁵⁶ Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 30, ILO Doc. 162000ECU169 (2000).

⁵⁷ Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, at para. 63, ILO Doc. 161999COL169B (2001).

benefits of development.⁵⁸ Furthermore, the committee in another case distinguished between the requirement of sharing a project's benefits with indigenous people affected and the separate requirement of compensation for damages caused by a project.⁵⁹

The committee in one case report written in 2004 suggested a number of appropriate measures which the government should be urged to take in order to assure adequate mechanisms for consulting with indigenous peoples. The key part of the committee's recommendation is set out in full:

The Committee requests the [ILO] Governing Body to approve this report and, in light of the conclusions contained in paragraphs 81-107:

(a) to urge the Government to make additional and ongoing efforts to overcome the feeling of exclusion that is so apparent in the complainants' allegations;

(b) to request the Government that, when developing, specifying or implementing constitutional reforms through legislative or administrative measures, whether at the federal level or at the level of the various states, it ensure that Article 6 is fully applied in the process of adoption of such measures and that in applying that Article:

(i) it establish clear representativity criteria;

(ii) it take into account as far as possible the proposals made by the complainants as to the characteristics that consultations should have to be effective;

(iii) it determine a consultation mechanism which is adapted, as far as the method it uses is concerned, to the objective of achieving agreement or consent concerning the means proposed, irrespective of whether this is achieved or not;

(iv) it take into account, when determining the consultation mechanism, values, ideas, times, reference systems, and even ways of conceiving consultation, with indigenous peoples.⁶⁰

⁵⁸ Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB), at para. 40, ILO Doc. 161998BOL169 (1998).

⁵⁹ Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 45, ILO Doc. 162000ECU169 (2001).

⁶⁰ Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR), at para. 108, ILO Doc. 162004MEX169A (2004).

The issue of representativity criteria is particularly important in the context of indigenous communities, because it is necessary for the IFC to determine if and how a corporation has acquired “broad community support” and whether that support is legitimate. Sadly, there are many instances of corporations creating or using individuals and organizations that do not in fact represent indigenous communities. While the establishment of representativity criteria alone can not automatically rectify such situations, it does make it somewhat easier to determine whether a project enjoys authentic community support.

These recommendations are helpful, not only in the setting of a human rights impact assessment but also because they give added depth, context and meaning to the requirements of information disclosure, consultation and informed participation contained in IFC Performance Standard 7.

VIII. Conclusion

We hope that these observations and recommendations will be helpful in preparing a revised edition of the *Guide*. We recognize the difficulty of the task of producing a *Guide* that will be useful and contain adequate information without becoming burdensome and impracticable. For this reason, we have tried to keep our suggestions modest and limited in number. We also hope that other organizations and experts will offer additional suggestions and comments.

Of greater importance will be the progress of the IFC toward vigorous and forthright actions and policies to protect and promote human rights in all of its work and in relation to all of the projects it finances. There is still far to go, but we acknowledge and welcome the progress made thus far.