

# Indigenous Peoples and the Asian Development Framework: Multilateral Development Banks and Development Agreements

## Indigenous Peoples and the World Bank Group

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## **Indigenous Peoples and the World Bank Group**

### **I. Introduction**

The International Bank for Reconstruction and Development (“the World Bank” or “the Bank”) was established as an intergovernmental organization in 1944 with the primary mandate of financing reconstruction and facilitating economic development post World War II. This mandate has been reinterpreted a number of times over the years culminating with a professed focus on poverty alleviation today.<sup>1</sup> While not true for all of its activities, poverty alleviation has largely been equated with economic growth and heavily influenced by neo-liberal economic principles. This is particularly the case for the Bank’s structural adjustment programmes and other non-project based interventions, such as technical assistance loans aimed at revising legislation and government policy.

As of May 2001, 184 countries were members of the Bank. By virtue of the Bank’s Articles of Agreement, an international treaty that acts as the constitution of the organization, and as a precondition to membership in the Bank, these countries must also be members of the International Monetary Fund. The Articles of Agreement vests ultimate decision making power in a Board of Governors and a Board of Executive Directors, including the authority to interpret the scope and meaning of the Articles.<sup>2</sup> There are presently 24 Executive Directors, five of which are appointed by the USA, Japan, Germany, France and the UK, being the countries holding the largest capital shares in the Bank, while the remainder are elected by the Governors representing the other 179 member states. Voting rights in the Bank are weighted according to the amount of capital shares held by each country. The USA by itself, as the largest donor, initially held over 37 percent of the voting power and today holds 16.50 percent.

A number of other institutions have been created and today form what is known as the World Bank Group (“the WBG”). These include the International Finance Corporation (“the IFC”), which was established in 1956 to provide financing for private sector entities working in developing countries rather than governments; the International Development Association, established in 1960 to provide grants to some governments rather than loans; and the Multilateral Investment Guarantee Agency (“MIGA”), which provides investment guarantees including political risk insurance to private sector bodies working in developing countries. The Bank is also a specialized agency of the United Nations by virtue of a 1948 Relationship Agreement with the UN Economic and Social Council. As such it is also a member of and active participant in the Inter-Agency Support Group to the UN Permanent Forum on Indigenous Issues and participates in other UN bodies, including the Working Group on Indigenous Populations.

The WBG is one of the largest financers of development projects and activities in the world. In 1999-2000, for instance, the Bank’s cumulative lending alone was US\$162,789 million. The WBG also styles itself as, and is perceived by some to be, the world’s pre-eminent development institution. Therefore, in addition to the amount of funds lent or granted, it also wields substantial influence over other actors in terms of policies and ideas. This applies to both governments and private sector entities alike. With regard to governments, for instance, the Bank has supported the revision of mining and petroleum related laws and institutions in over 100 countries in the period 1990-2003.<sup>3</sup> These revisions almost always focus in liberalizing the sector and creating incentives for foreign investment, while at the same time often reducing the regulatory powers of the state. In the private sector, more than 29 of the world’s largest commercial banks have adopted the IFC’s policies on environmental and social issues and apply these to the projects they finance. Industry groups or specific companies also often reference and apply WBG standards to their activities and projects.

Given the global reach of its activities and its influence on other actors, it is not surprising that the WBG often affects indigenous peoples, both directly and indirectly. In some cases, indigenous peoples are affected by a specific project financed by the WBG, in others they are affected by programmatic lending, such as structural adjustment or technical assistance loans. Most attention has focused on project lending as it affects indigenous peoples while the impact of programmatic lending has not been sufficiently critiqued. This is a serious omission given that until recently World Bank programmatic lending comprised around one half of the total amount of financing provided by the Bank and has a much greater impact than specific projects.

This paper focuses on the impact of WBG activities on indigenous peoples with a particular focus on the policies adopted by the WBG to mitigate adverse impacts on indigenous peoples. Section II addresses the World Bank and its policies that deal directly with or affect indigenous peoples. Section III focuses on the IFC's draft policy on indigenous peoples. Section IV provides a brief overview of the nature and extent of indigenous peoples' engagement with the WBG. Finally, section V identifies and discusses a number of issues concerning future strategic engagement.

## **II. The International Bank for Reconstruction and Development**

Since the early 1980s, the World Bank Group has adopted a number of policies – referred to as safeguard policies – designed to mitigate harm to indigenous peoples in WBG-financed projects. In 1981, it published a study entitled *Economic Development and Tribal Peoples: Human Ecologic Considerations*, which sought to provide guidelines for Bank operations.<sup>4</sup> It states that the Bank should avoid “unnecessary or avoidable encroachment onto territories used or occupied by tribal groups;” ruled out involvement with projects not agreed to by indigenous peoples; required guarantees from borrowers that they would implement safeguard measures; and advocated respect for indigenous peoples' right to self-determination.<sup>5</sup>

The first formal policy followed a year later in 1982 and was called *Operational Manual Statement 2.34 Tribal People in Bank-Financed Projects*. Although OMS 2.34 was adopted in response to “internal and external condemnation of the disastrous experiences of indigenous groups in Bank-financed projects in the Amazon region,”<sup>6</sup> it failed to incorporate many of the protections proposed in the 1981 study. Moreover, an internal implementation review conducted in 1986-87 found that only two out of thirty three Bank projects substantially complied with the policy.<sup>7</sup> Implementation failures and sustained criticism of Bank projects by indigenous peoples, NGOs and others,<sup>8</sup> led the Bank to revise and update OMS 2.34, concluding in 1991 with the adoption of Operational Directive 4.20 on Indigenous Peoples (“OD 4.20”).<sup>9</sup>

OD 4.20 strengthened Bank policy on indigenous peoples by requiring indigenous peoples' informed participation; accounting for indigenous preferences in project design; strengthening domestic legislation on indigenous peoples' rights; paying special attention to securing indigenous land and resource rights; and developing specialized Indigenous Peoples' Development Plans to provide for culturally appropriate benefits and mitigation plans in all projects affecting indigenous peoples.<sup>10</sup> While OD 4.20 was an improvement over its predecessor, it did not assuage critics of Bank projects, especially since compliance with the policy was inconsistent at best.<sup>11</sup>

OD 4.20 was the subject of a protracted and contentious revision process and was replaced in May 2005 by Operational Policy 4.10 on Indigenous Peoples (“OP 4.10” or “the OP”). This new policy, which now only applies to the public sector arm of the WBG, is technically a conversion of OD 4.20 to a new policy format rather than a full blown

revision.<sup>12</sup> Drafting commenced in 1996<sup>13</sup> and a draft for discussion was released to the public in March 2001.<sup>14</sup> A number of other drafts were subsequently produced.<sup>15</sup> These drafts were repeatedly and vigorously repudiated by indigenous peoples for being inconsistent with their internationally guaranteed rights and for offering few meaningful guarantees in relation to Bank-financed projects.<sup>16</sup> The same was also the case for the final policy which was adopted on 10 May 2005. The IFC will continue to use OD 4.20 until it adopts its new standards in early 2006.

Indigenous peoples have consistently demanded that WBG safeguard policies must, at a minimum, provide for their right to free, prior and informed consent, recognition and protection of territorial rights, self-identification (as the fundamental criterion in determining the peoples covered by the policy), a prohibition of involuntary resettlement, and respect for indigenous peoples' right to self-determination.<sup>17</sup> They explain that in many cases they continue to experience severe negative impacts and human rights abuses in relation to WBG projects and therefore a strong and effective safeguard policy that is grounded in and consistent with international human rights law is needed. Negative impacts and abuses have also been identified in internal WBG performance evaluations,<sup>18</sup> and documented by NGOs and intergovernmental human rights bodies.<sup>19</sup> WBG studies also have recognized that indigenous peoples "have often been on the losing end of the development process."<sup>20</sup>

The United Nations Permanent Forum on Indigenous Issues, the body responsible for overall coordination of UN system activities relating to indigenous peoples, has echoed indigenous peoples demands by recommending in 2003 that the WBG

Continue to address issues currently outstanding, including Bank implementation of international customary laws and standards, in particular human rights instruments, full recognition of customary land and resource rights of indigenous peoples, recognition of the right of free, prior informed consent of indigenous peoples regarding development projects that affect them, and prohibition of the involuntary resettlement of indigenous peoples.<sup>21</sup>

Indigenous peoples also point to the WBG's own evaluations that demonstrate that it repeatedly fails to adhere to its own policy prescriptions on indigenous peoples and that for this reason compliance, enforcement and grievance mechanisms must be built into policies and incorporated into project instruments and loan agreements if safeguards are to be meaningful and effective. A 2003 WBG review of OD 4.20, for instance, found that it was only applied, fully or partially, in 50 percent of projects affecting indigenous peoples and of those only 14 percent had the required Indigenous Peoples Development Plan.<sup>22</sup> Another WBG evaluation found that

Project results for [indigenous peoples] were not as satisfactory in the energy and mining, transportation, and environment sectors, which comprised 65 percent of Bank commitments evaluated for this second phase, and include projects with significant potential to harm IP. The majority of these projects neither mitigated adverse effects on IPs nor ensured that they received an equitable share of benefits;<sup>23</sup>

The evaluation also found that only 38 percent of a sample of WBG projects which did apply the policy satisfactorily mitigated adverse impacts and ensured benefits for indigenous peoples.<sup>24</sup>

WBG staff has responded to indigenous peoples' demands by stating that that such measures cannot be included in WBG policies at least in part because the WBG is prohibited from addressing the full range of human rights issues by its Articles of Agreement,<sup>25</sup> which requires that it not interfere in the "political affairs" of its members.<sup>26</sup>

Indigenous peoples counter that in contemporary international law, human rights are not considered to be domestic political affairs, but are of international concern, and at any rate that, since 1991, OD 4.20 has had as its stated “broad objective” ensuring “that the development process fosters full respect for their dignity, human rights, and cultural uniqueness.”<sup>27</sup>

A United Nations study concluded that if the WBG’s position on human rights “were to be considered legitimate, it would seriously erode the international rule of law.”<sup>28</sup> The views of the present General Counsel offer some encouragement that the WBG may review its position on human rights. In February 2004, he stated that the WBG “can and must take into account human rights violations in its process of making economic decisions. Moreover, because of the way international law has evolved with respect to concepts of sovereignty, and the range of issues that are considered to be of global concern, in doing so the Bank will not fall foul of the political prohibitions of the Articles.”<sup>29</sup>

## **A. Operational Policy 4.10 on Indigenous Peoples of 10 May 2005**

With this background in mind, this section summarizes and comments on selected provisions of OP 4.10 of 10 May 2005. The OP will likely be the standard applied by the public sector arm of the WBG for the next decade or more. Special attention is devoted to the use and meaning of the language ‘free, prior and informed consultation resulting in broad community support’ because in many respects the efficacy of the protections set forth in the OP may turn on its interpretation and use in practice.

### **1. The ‘Preambular’ Paragraphs**

Paragraph 1 provides that OP 4.10 “contributes to the Bank’s mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies and cultures of indigenous peoples.” This statement can be read two ways: as a conclusion – i.e., the OP as it presently stands does now ensure that the development process fully respects indigenous peoples’ dignity, human rights, etc., or; as a forward looking statement requiring that interpretation and implementation of the OP should be consistent with indigenous peoples’ dignity, human rights, etc. If it is the former, this is a dubious assertion as the OP itself clearly does not fully respect indigenous peoples’ human rights, economies, and cultures. If it is the latter, the OP should be interpreted and applied so as to fully respect indigenous peoples’ cultures, human rights, dignity and economies. This language is significantly different that OD 4.20, which states that fostering full respect for indigenous peoples’ dignity, human rights, etc., is a broad objective of the OD itself.

Paragraph 1 also states that for all projects proposed for Bank financing that affect indigenous peoples, the borrower must engage in free, prior and informed consultation (“FPICon”) with indigenous peoples.<sup>30</sup> It continues that the Bank “will provide project financing only where [FPICon] results in broad community support to the project by the affected Indigenous Peoples.” The definition and application of FPICon and ‘broad community support’ are key issues requiring clarification in the OP and may in large part determine whether the OP can be an effective safeguard for indigenous peoples’ rights and interests. FPICon and broad community support are addressed in detail below.

Paragraph 1 further provides that Bank-financed projects will include measures to avoid potential adverse effects or where avoidance is “not feasible” to “minimize, mitigate, or compensate for such effects.” In relation to this, in the past the Bank has often determined feasibility in solely economic terms, i.e., avoidance is not possible because it makes the project infeasible by raising costs. Finally, paragraph 1 provides that Bank projects will be designed to “ensure that Indigenous Peoples receive social and economic benefits that are

culturally appropriate and gender and inter-generationally inclusive.” For many indigenous peoples, the term ‘inter-generational’ includes ancestors and future generations: if the Bank is to fully respect indigenous peoples’ cultures, such relationships must also be respected. Most likely, however, the OP is referring to generations in the sense of youth, adults and elders.

Paragraph 2 explains that the Bank recognizes that indigenous peoples’ cultures and identities are “inextricably” related to traditional lands and resources and, therefore, “different risks and impacts can be expected in development projects.” It also acknowledges that indigenous peoples often have limited ability to assert and defend their rights and interests at the domestic level and to participate in and benefit from development. Finally, consistent with the Final Declaration of the 2002 World Summit on Sustainable Development, it affirms that indigenous peoples “play a vital role in sustainable development,” and that their rights are receiving increased attention and recognition in domestic and international law.<sup>31</sup>

## **2. Self-identification/Definition of Indigenous Peoples (Paras. 3 and 4)**

The OP does not employ a specific definition of the term “indigenous peoples” as does OD 4.20. Instead, it states that there is “no universally accepted definition” and therefore, it will “not define the term.”<sup>32</sup> Paragraph 4, however, states that for the purposes of the OP, the term “indigenous peoples” refers to “a distinct, vulnerable, social and cultural group” possessing a number of characteristics in varying degrees. These characteristics include: self-identification as indigenous and recognition by others; “collective attachment” to distinct habitats or territories and the natural resources therein; the presence of “customary cultural, social, economic or political institutions” separate from those of the dominant society; and, an indigenous language, often different from the national language.

Paragraph 4 further provides that indigenous peoples who have “lost collective” attachment because of “forced severance” remain eligible for application of the policy. Footnote 7 defines collective attachment to mean “that for generations there has been a physical presence in and economic ties to lands and territories traditionally owned, or customarily used or occupied by the group concerned, including areas which hold special significance for it, such as sacred sites. ‘Collective attachment’ also refers to the attachment of transhumant/nomadic groups to the territory they use on a seasonal or cyclical basis.” Forced severance is defined as

... loss of collective attachment to geographically distinct habitats or ancestral territories occurring within the concerned group members’ lifetime because of conflict, government resettlement programs, dispossession from their lands, natural calamities or incorporation of such territories into an urban area. ... “urban area” normally means a city or large town, and takes into account all of the following characteristics, no single one of which is definitive: (a) the legal definition of the area as urban under domestic law; (b) a high population density; and (c) a high proportion of non-agricultural economic activities relative to agricultural activities.

This definition of forced severance is highly problematic for a number of reasons. First, loss of collective attachment “within the concerned group members’ lifetime” probably refers to a period of 50-80 years, and therefore would exclude loss of lands and resources predating this period, lands and resources with which indigenous peoples most likely continue to maintain a variety of relationships. Second, the definition of urban areas would exclude non-legally designated areas, smaller population centers or population centers with a high proportion of agricultural activities. *Colono* or migrant communities

established on indigenous lands in the Amazon, for instance, would not qualify as urban areas under the policy and, assuming that such colonization did not occur outside of the lifetime of the members, unless this could be characterized as “dispossession from their lands,” would not qualify as a forced severance.

Finally, paragraph 4 provides that determinations of whether indigenous peoples are affected by a Bank project, thereby triggering the application of the OP, “may require a technical judgment (see paragraph 8).” Paragraph 8 contains the screening procedures through which the Bank determines the presence of indigenous peoples in a project area. In making this determination, the Bank will seek the opinions of “qualified social scientists with expertise on the social and cultural groups in the project area.” The Bank will also consult with indigenous peoples and the borrower government on this issue and the Bank may choose to “follow the borrower’s framework for identification of indigenous peoples during project screening when that framework is consistent with [the OP].” In other words, the Bank may choose to follow national law and policy related to the identification of indigenous peoples if it decides that that law and policy is consistent with the requirements of the OP. Self-identification is clearly not the primary or only criteria that the Bank will assess to determine the presence of indigenous peoples for the purposes of applying the policy and the potential use of national law definitions could be very problematic.

### **3. Use of Country Systems (Para. 5)**

Draft paragraph 5 was not found in OD 4.20 and represents a radical departure from previous WBG practice. It may also represent a substantial weakening of the safeguard policy system and raises a number of questions about the continued applicability of the Bank’s complaints mechanism, the Inspection Panel.<sup>33</sup> It reads:

If the borrower has a system that recognizes and protects the rights of indigenous peoples and provides an acceptable basis for achieving the objectives of this policy, the Bank may rely on that system. In deciding whether the borrower’s system is acceptable, the Bank assesses the system and identifies all relevant legal, policy and institutional aspects that need to be strengthened. Aspects thus identified must be strengthened by the borrower prior to the Bank’s agreement to rely upon the system to achieve the objectives of this policy.

This approach will essentially permit a borrower, provided the Bank approves, to apply its national legislation in Bank-financed projects instead of the Bank’s operational policies. Note particularly that, in order to be approved by the Bank, the borrower’s legislation need only comply with the objectives of the OP rather than the substantive requirements; this may allow much weaker standards to be applied to a project. Concern about this approach is sharpened given the nature of preliminary Bank papers on using country systems.<sup>34</sup> A draft operational policy called *Piloting the Use of Borrower Environmental and Social Safeguard Policies, Procedures, and Practices in Bank-Supported Projects*, for example, states that

The Bank considers a country’s relevant safeguard systems to be equivalent to its own safeguards policy framework if they are designed to achieve the objectives and adhere to the operational principles set out in Table A1 [see explanation below]. In determining equivalence, the Bank may take account of agreed improvements in the borrower’s systems that take place under the project concerned, including Bank-supported efforts to strengthen relevant institutional and human capacity, and incentives and methods for implementation. In addition, the Bank assesses whether country implementation practices, track record, and capacity going forward are acceptable.<sup>35</sup>

Among others, this language appears to sanction projects based on country systems, even where these systems are not equivalent to the Bank's safeguard framework provided the borrower agrees to make improvements as part of the project itself. This is worrying because borrowers have previously implemented projects without implementing agreed upon and concomitant safeguard measures, sometimes with the acquiescence of WBG managers, when these safeguards were mandatory prior conditions of project financing.<sup>36</sup>

With regard to indigenous peoples and determining country system/OP equivalency, Table 1A states that the policy objective is: "To design and implement projects in such a way that indigenous peoples (a) do not suffer adverse effects during the development process and (b) receive culturally compatible social and economic benefits."<sup>37</sup> The operational principles are:

1. Screen early for potential impacts on indigenous peoples, who are identified through criteria that reflect their social and cultural distinctiveness (including indigenous language, self-identification and identification by others, presence of customary institutions, or collective attachment to land).
2. Undertake meaningful consultation with affected indigenous peoples to solicit informed participation in designing and implementing measures to (a) avoid adverse impacts, or (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects.
3. Provide social and economic benefits to indigenous peoples in ways that are culturally appropriate, and gender and generationally inclusive. Consider options preferred by the affected groups.
4. Prepare mitigation plans, including documentation of the consultation process, and disclose them before appraisal in an accessible place and in a form and language that are understandable to key stakeholders.<sup>38</sup>

These statements clearly contradict what is found in the OP – note in particular the absence of FPIC resulting in broad community support – although it should be stressed that a footnote explains that these principles will be "updated as necessary when the ongoing conversion of the parent policy [OP 4.10] is completed."<sup>39</sup>

#### **4. Project Preparation**

Paragraph 6 lists a number of requirements for projects proposed for Bank financing that may affect indigenous peoples. These requirements are:

- Screening to determine if indigenous peoples have a collective attachment to the project area;
- A social assessment conducted by the borrower;
- A process of free, prior and informed consultation with indigenous peoples "at each stage of the project" to identify their views and to ascertain whether there is broad community support for the project;
- Preparation of either an Indigenous Peoples Plan or an Indigenous Peoples Planning Framework; and
- Disclosure of the IPP or IPPF

Paragraph 7 adds that the level of detail needed to meet the requirements in paragraph 6 will be "proportionate" to the complexity of the project and "commensurate" with the nature and scale of the "potential effects" on indigenous peoples, whether positive or negative. This paragraph provides some degree of latitude to the Bank and borrower when examining the extent to which paragraph 6's requirements must be accounted for and implemented, and heightens the importance of adequate and participatory impact

assessments. It should also be noted that there is no requirement that indigenous peoples participate in the impact assessments under the OP. If assessments are substandard or omit important elements or details, the Bank may choose a minimal application of the requirements in paragraph 6 and this is cause for concern given prior findings that potential impacts on indigenous peoples have often been underestimated, mischaracterized or unforeseen at the time of project preparation.<sup>40</sup>

## **5. Free, Prior and Informed Consultation resulting in Broad Community Support**

### **a. Background**

Indigenous peoples have consistently demanded that WBG policies on indigenous peoples recognize and require respect for indigenous peoples' right to give or withhold their free, prior and informed consent ("FPIC").<sup>41</sup> This was also recommended to the WBG by the World Commission on Dams ("WCD")<sup>42</sup> and, in 2004, by the Extractive Industries Review ("EIR").<sup>43</sup> The WBG rejected recognition of and respect for FPIC in relation to the recommendations of the WCD and the EIR and has failed to incorporate it into OP 4.10 and the IFC's draft Performance Standards.<sup>44</sup> Instead, the WBG Board of Executive Directors approved, in its decision on the EIR made in August/September 2004, that the standard to be adopted and applied will be 'FPICon resulting in broad community support'.<sup>45</sup>

Of the twenty four Executive Directors, only a few supported full recognition of and respect for FPIC. The Executive Director for Thailand/Indonesia, for instance, stated that "we do emphasise the community directly affected here as the principal stakeholder that should be recognized as the body for application of the notion of free, prior, informed consent (FPIC)."<sup>46</sup> The German and Swiss EDs made similar statements,<sup>47</sup> while the Dutch ED observed that

we note a degree of ambiguity with regard to the internationally recognized rights of indigenous peoples. ... It would be a major step forward if the Bank would address these aspects in a still more forthcoming and creative manner; much of what now still seems a controversy would become a new way of reconciling local tradition and the kind of globalisation that instils universally accepted principles of justice and participation in the operations of global players, be they industries, Banks or international organisations. It would therefore be a better understood signal if the approach of "prior informed consultation" would be replaced by the recognition of a necessary process of "consensus building" in line with the "broad support" by affected communities, including indigenous peoples that is already accepted as a prerequisite.<sup>48</sup>

### **b. What does the OP say?**

As noted above, paragraph 1 of OP 4.10 provides that for all projects proposed for Bank-financing that affect indigenous peoples the borrower must engage in FPICon with indigenous peoples. FPICon is defined in footnote 4 as:

"Free, prior and informed consultation with the affected Indigenous Peoples' communities" refers to a culturally-appropriate and collective decision-making process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project. It does not constitute a veto right for individuals or groups (see paragraph 10).

According to this definition, the following elements may be identified: meaningful and good faith consultation; informed participation; followed by a culturally appropriate and collective decision making process. Based on this definition, it appears that FPICon refers to a *process* comprised of the preceding elements rather than just consultation as such

(see, however, the discussion on paragraph 10 below). Paragraph 1 continues that the Bank “will provide project financing only where [FPICon] results in broad community support to the project by the affected Indigenous Peoples.” Conversely, if there is no ‘broad community support’ for the project, the Bank presumably will not continue to process or finance the project. This is ostensibly confirmed in paragraph 11, which states in part that:

The Bank subsequently satisfies itself through a review of the process and outcome of the consultation carried out by the borrower that the affected indigenous peoples’ communities have provided their broad support to the project. The Bank pays particular attention to the social assessment and to the record and outcome of the free, prior and informed consultation with the affected Indigenous Peoples’ communities as a basis for ascertaining whether there is such support. The Bank will not proceed further with project processing if it is unable to ascertain that such support exists.

Note that the Bank “pays particular attention” to the social assessment in addition to the outcome of the FPICon process and therefore, indigenous peoples’ support is not necessarily the decisive factor in whether the Bank may fund a project. In principle, this same language also does not preclude the Bank from assessing sources of information not mentioned above as a basis for ascertaining broad community support.

That FPICon resulting in broad community support is required in Bank projects is further confirmed in paragraph 6(c), which states that all proposed Bank projects that affect indigenous peoples require “a process of [FPICon] with the affected Indigenous Peoples’ Communities at each stage of the project, and particularly during project preparation in order to fully identify their views and to ascertain their broad community support to the project (see paragraphs 10 and 11).” This section adds an important requirement: that FPICon and broad community support are required at *each stage* of the project. However, in this respect, it is unclear in the OP if broad community support is required for the development of the Indigenous Peoples Plan, clearly a stage of the project, – “in consultation with the affected Indigenous Peoples’ Communities ...” (para. 12 and Annex B) – and it does not appear to be required in relation to the Indigenous Planning Framework required in paragraph 13. This seems to be confirmed in paragraph 15 on disclosure (see below).

While FPICon is defined in a footnote in paragraph 1 (subject to paragraph 10), there is no definition of broad community support other than by reference to paragraph 11. What do these paragraphs say and do they help further explain these concepts? Paragraph 10 provides that where the project affects indigenous peoples – determined on the basis of Bank screening processes, in which indigenous peoples will be consulted, and the social assessment – the borrower shall engage in FPICon with them. “To ensure such consultation, the borrower:

- (a) establishes an appropriate gender and inter-generationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples’ communities, the Indigenous Peoples Organizations (IPOs), if any, and other civil Society Organizations (CSOs) identified by the affected Indigenous Peoples’ communities;
- (b) use consultation methods<sup>[1]</sup> appropriate to the social and cultural values of the affected Indigenous Peoples’ communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth and children and their access to development opportunities and benefits; and

- (c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of the potential adverse affects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation."

The footnote associated with the term 'consultation methods' in sub-paragraph (b) states that "Such consultation methods (including using indigenous languages, allowing time for consensus building, and selecting appropriate venues) facilitate the articulation by Indigenous Peoples of their views and preferences. The 'Indigenous Peoples Guidebook (forthcoming) will provide good practice guidance on this and other matters."<sup>49</sup>

What is conspicuously absent from paragraph 10, however, is the informed participation component found in the footnoted definition of FPIC in paragraph 1. This omission is even more glaring given that ensuring informed participation is required in OD 4.20 and the Bank has repeatedly stated that OP 4.10 must, at a minimum, be consistent with OD 4.20. Informed participation is a substantially higher standard than consultation and requires active involvement in decision-making. Without explicit mention in paragraph 10 there is a real possibility that Bank staff and the borrower will mechanically follow the requirements set forth in paragraph 10, which require nothing more than consultation using methods designed by the borrower.

Paragraph 11, partly quoted above, provides that

In deciding whether to proceed with the project, the borrower ascertains, based on the social assessment (see paragraph 9) and the free, prior and informed consultation (see paragraph 10) whether the affected Indigenous Peoples' communities provide their broad support to the project. Where there is such support, the borrower prepares a detailed report that documents:

- (a) the findings of the social assessment;
- (b) the process of free, prior and informed consultation with the affected Indigenous Peoples' communities;
- (c) additional measures, including project design modification, that may be required to address adverse effects on Indigenous Peoples and to provide them with culturally appropriate project benefits;
- (d) recommendations for free, prior and informed consultations with and participation by Indigenous Peoples' communities during project implementation, monitoring and evaluation; and
- (e) any formal agreements reached with Indigenous Peoples' communities and/or IPOs.

As discussed above, the Bank reviews this report and the social assessment (and possibly other sources) to determine if broad community support exists; if it does not exist, according to paragraph 11, the Bank will not continue with project processing. There are a number of important questions and issues raised by this paragraph.

- i) There is no adequate definition of or attempt to explain what is meant by broad community support (i.e., does it mean a simple majority? three-quarters of the population? does it include decisions made in accordance with indigenous peoples' customary laws and through traditional or other representative institutions, etc.). The only indication of how to interpret the term is found in Bank Procedures 4.10, a policy to Bank staff adopted a month after OP 4.10, which states that Bank staff shall "verify that the borrower has gained the broad support from representatives of major sections of the community required under the policy;"<sup>50</sup>

ii) At this stage of project processing it is only the borrower and the Bank that ascertain whether broad community support exists – there is no explicit mechanism for indigenous peoples to state their views about the existence or non-existence of broad community support or the veracity of the borrower’s report and there is no provision for independent verification of its existence or non-existence. This could and should be addressed by requiring formal agreements with indigenous peoples, as proposed in sub-paragraph (e), and by requiring that these agreements codify the terms and conditions of broad community support as well as the nature of subsequent FPIC processes. Ideally, these agreements should be reflected in loan covenants that provide indigenous peoples’ standing to challenge future project implement should conditions be disregarded;

iii) In connection with point (ii) above, paragraph 15 provides for disclosure of the social assessment and draft Indigenous Peoples Plan/Indigenous Peoples Planning Framework to affected indigenous peoples’ communities “in an appropriate form, manner and language.” These are then approved by the Bank as the basis for project appraisal (the last phase of project processing prior to submission to the Board for approval) and subsequently released to the public and again to the affected indigenous peoples’ communities. While indigenous peoples can raise issues of concern regarding the social assessment and draft IPP/IPPF with both the borrower and the Bank informally, there is no explicit mechanism to do so in the policy and it does not appear from this paragraph that broad community support is required for the IPP/IPPF. The IPP/IPPF will in large part determine how the project will be implemented in relation to indigenous peoples and is therefore a critical component of the decision making process on whether to support the project;

iv) The elements of the social assessment, which are set forth in Annex A to OP 4.10, only indirectly concern assessing broad community support and then only implicitly as part of FPIC processes about avoiding or mitigating adverse impacts and benefits (see, paras. 2(d) and (e)). Therefore, it may be difficult to ascertain on the basis of a social assessment if broad community support exists. Further, while social impact assessments may be used as supplementary materials, the decisive voice in determining whether support exists must be indigenous peoples alone not the views of Bank or the borrower’s consultants that conduct social impact assessments;

v) The borrower alone, subject to review by the Bank and the recommendations of a social assessment consultant, makes recommendations with regard to future FPIC and participation in the various project phases – it is unclear whether indigenous peoples will have a role in formulating these recommendations via the initial FPIC leading to broad community support or otherwise, and there is no guarantee that the borrower will not ignore or reformulate indigenous peoples’ proposals in its report to the Bank. There is also no requirement that the borrower’s report be disclosed to indigenous peoples;

vi) It is unclear what happens when broad community support has been obtained initially and the project has been approved and funds disbursed, but indigenous peoples withhold such support in later stages of the project (see, para. 6(c) requiring [FPIC] at each stage of the project to ascertain their broad community support);

vii) There is no built-in grievance/complaints/mediation mechanism for addressing disputes about the existence of broad community support in the initial project discussions. Provision is made in Annex B, paragraph 2(h), pertaining to the Indigenous Peoples Plan, “as needed,” for “Accessible procedures appropriate to the project to address grievances by the affected Indigenous Peoples’ communities arising from project implementation. When designing the grievance procedures, the borrower takes into account the availability of judicial recourse and customary dispute

settlement mechanisms among the Indigenous Peoples.” The IPP, however, is developed after broad community support is obtained and therefore any grievance mechanisms will only apply to project implementation rather than to the initial broad community support determination.

## **6. Lands and Resources**

As with FPIC, the requirement that broad community support be obtained is triggered by an actual or potential impact on indigenous peoples’ traditional lands, territories and resources and therefore is dependent on a clear identification, recognition and protection of indigenous peoples’ rights to lands, territories and resources traditionally owned or otherwise occupied and used. While this may seem an obvious point, it is not uncommon for states to limit FPIC to lands that are legally recognized in their own legal systems rather than the lands and territories traditionally owned by indigenous peoples in accordance with their customary law and values, the standard employed in international law.<sup>51</sup> In many cases, there is a large disparity between the two categories and requiring FPIC only in connection with the former potentially exempts large areas of indigenous lands from the FPIC requirement.

In Guyana, for instance, FPIC applies only to “recognized” or titled lands thereby excluding approximately three-quarters of the lands traditionally owned and presently claimed by indigenous peoples.<sup>52</sup> The same also applies in the case of Australia’s Northern Territory where FPIC applies to aboriginal lands recognized under the Aboriginal Land Rights (Northern Territory) Act 1976, but not to lands that may be owned pursuant to the 1993 Native Title Act (Cth). With regard to the latter, a ‘right to negotiate’, subject to arbitration if agreement cannot be reached, applies, not FPIC.<sup>53</sup> How does the OP define indigenous lands and territories for the purposes of determining if indigenous peoples are affected and, if so, requiring that FPIC resulting in broad community support applies and does it require recognition and regularization of rights to lands, territories and resources?

In September 2004, the WBG recognized that “indigenous peoples can be particularly vulnerable to projects that affect them due to their unique collective ties to lands, territories and natural resources.”<sup>54</sup> At the same time it made a commitment that OP 4.10 will require recognition of the rights of indigenous peoples to lands and territories traditionally owned and customarily used and ensure that indigenous peoples receive due process guarantees, benefits and compensation “at least equivalent to what any landowner would be entitled to in the case of commercial development on their land....”<sup>55</sup> It is doubtful that draft OP 4.10 does adequately address land and resource rights and meets this commitment.

### **a. Identifying indigenous lands, territories and resources**

According to paragraphs 6(c), 8, 9 and 10, indigenous peoples must be present in or have a collective attachment to the project area **and** be affected by the project for the FPIC resulting in broad community support requirement to become operative. Footnote 7 of OP 4.10 states that collective attachment, “means that for generations there has been a physical presence in and economic ties to lands and territories traditionally owned, or customarily used or occupied by the group concerned, including areas which hold special significance for it, such as sacred sites.”

Apart from failing to recognize the substantial overlap between ‘traditionally owned’ and ‘customarily used or occupied’ in the sense that both are essentially grounded in and shaped by indigenous peoples’ customary law, the above definition may not fully acknowledge indigenous peoples’ multiple forms of attachments/relationships to traditional lands, territories and resources and reduces spiritual and religious relationships largely to site specific attachments. Also, OP 4.10 (para. 4) recognizes that some indigenous peoples may have lost collective attachment to all or parts of their traditional territories because of ‘forced severance’. The problematic nature of the definition of

forced severance is discussed above particularly in relation to its potential to artificially limit the application of the OP including the FPICon resulting in broad community support requirement.

### **b. Special Considerations**

Paragraph 16 states that due to indigenous peoples' close ties to lands and natural resources, special considerations apply which require that the borrower "pays particular attention" to the following when conducting social assessments and preparing IPPs/IPPFs:

- Customary rights, both individual and collective, pertaining to traditionally owned lands or territories, lands and territories customarily used or occupied and where access to natural resources is "vital to the sustainability of their cultures and livelihoods;"
- Protection of the above mentioned lands and resources from illegal – presumably 'illegal' under domestic law – encroachment or intrusion;
- The cultural and spiritual values that indigenous peoples attribute to their lands and resources;
- Indigenous peoples' natural resource management practices and the long term sustainability of those practices.

Footnote 16 defines 'customary rights' to lands and resources as "patterns of long standing community land and resource usage in accordance with indigenous peoples' customary laws, values, customs and traditions, including seasonal or cyclical use rather than formal legal title to land and resources issued by the State." The terminology used in paragraphs 16 (and 17) is confusing, although it is not clear how important this may be in practice. Specifically, the terms 'traditionally owned' and "customarily occupied or used" are largely synonymous – the only exception being in rare instances where indigenous peoples do not assign ownership or other rights under their customary laws. The real distinction is between lands owned in accordance with indigenous peoples' own laws and customs, but not legally recognized by the state, and those lands over which indigenous peoples hold title issued by the state that may or may not correspond to the full extent of lands, territories and resources traditionally/customarily owned.

Finally, mention is required of the phrase 'vital to sustainability of their cultures and livelihoods'. Non-indigenous people's property rights, including protection thereof, are not limited to those "vital" to cultural or livelihood sustainability and it is manifestly discriminatory to apply this standard to indigenous peoples.

### **c. Action on Lands, Territories and Resources**

Paragraph 17 of the OP provides

If the project involves (a) activities that are contingent on establishing legally recognized rights to lands and territories that indigenous peoples traditionally occupied, or customarily used and occupied (such as land titling projects); or (b) the acquisition of such lands, the [Indigenous Peoples Plan] sets forth an action plan for the legal recognition of such occupation, or usage. Normally, the action plan is undertaken prior to 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 form of:

- (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.

Whether this language requires prior recognition of indigenous peoples' rights of ownership to lands, territories and resources turns on whether a project can be classified as (a) or (b) in the first paragraph and whether there is a procedure under domestic law that allows for such recognition. For instance, if a project does not contain activities contingent on establishing legally recognized rights – other than a mention of land titling projects, there is no indication as to what kind of projects will fall into this category – or the “acquisition” of such lands – ‘acquisition’ essentially means a taking or expropriation of indigenous lands for project-related purposes – paragraph 17 will not apply at all. It is also unclear why the Bank cannot require that domestic laws be adopted to recognize ownership rights if they do not exist, rather than requiring that the IPP provide for legal recognition of custodial or use rights; presumably the latter will require some form of legislative action anyway.

There is therefore not a clear statement in the OP that prior resolution of and adequate guarantees for indigenous peoples' rights to lands, territories and resources are required in relation to all projects that affect indigenous peoples' lands, territories and resources as promised by the Board. Additionally, conversion of customary rights to individual ownership rights without the express free, prior and informed consent of the affected indigenous peoples is contrary to human rights law and indigenous peoples' cultures and customs.<sup>56</sup>

#### **d. Commercial Exploitation of Natural Resources**

If a project involves commercial exploitation of natural resources – defined in the OP as “minerals, hydrocarbon resources, forests, water, and hunting/fishing grounds – in indigenous peoples' territories (really areas where there is ‘collective attachment’), paragraph 18 requires that “the borrower ensures that as part of the [FPICon] process the affected communities are informed of (a) their rights to such resources under statutory and customary law; (b) the scope and nature of such proposed commercial development and the parties involved or interested in such development; and (c) the potential effects of such development on their livelihoods, environments, and use of such resources.” Also, the IPP must “enable” equitable benefit sharing and; at a minimum, the IPP must provide that indigenous peoples receive benefits in a culturally appropriate manner and that the “benefits, compensation and rights to due process [are] at least equivalent to that which any landowner with full legal title to the land would be entitled to in the case of commercial development on their land.”

The appropriateness of this paragraph is entirely dependent on the definition of broad community support and whether this is implicitly required as part of the definition of FPICon. Rather than rely on this, it is critically important that this paragraph explicitly require that FPICon resulting in broad community support is required, particularly in light of the often severe and negative impact of extractive industry projects on indigenous peoples.<sup>57</sup> As stated by Victoria Tauli-Corpuz, an indigenous leader from the Philippines, “For many indigenous peoples throughout the world, oil, gas and coal industries conjure images of displaced peoples, despoiled lands, and depleted resources. This explains the unwavering resistance of most indigenous communities with any project related to extractive industries.”<sup>58</sup> These abuses have also been documented by the WBG.<sup>59</sup>

#### **e. Commercial Exploitation of Cultural Resources or Knowledge**

Paragraph 19 concerns commercial exploitation of indigenous peoples' cultural resources or knowledge – the term “cultural resources” is not defined in the OP. Commercial exploitation is dependent on indigenous peoples' “prior agreement” and the IPP must reflect the nature and content of such agreements as well as provide for culturally appropriate and equitable benefit sharing. This formulation would be appropriate to use in connection with commercial exploitation of natural resources in paragraph 18 – or

indeed in place of FPICon resulting in broad community support throughout the OP – and it is disappointing that this is not applied in that context as well.

#### **f. Physical Relocation and Involuntary Restrictions on Access to Protected Areas**

Paragraphs 20 and 21 concern physical relocation and involuntary restrictions on access to protected areas. Paragraph 20 states that physical relocation should be avoided and is only an option in “exceptional circumstances, when it is not possible to avoid it ....” In such exceptional circumstances, relocation may then only take place with indigenous peoples’ broad community support subsequent to FPICon. If indigenous peoples do provide broad support, a resettlement plan, developed in accordance with OP 4.12 on Involuntary Resettlement, is required, which will be compatible with indigenous peoples’ preferences and requires a land-based resettlement strategy.<sup>60</sup> A right of return once the reasons for resettlement have ceased should also be included in the plan.

While the potential of paragraph 20 to provide adequate protection for indigenous peoples’ rights ultimately depends on what ‘broad community support’ means in practice, this paragraph is nonetheless a significant evolution in thinking within the Bank and especially when viewed in relation to the previous draft of OP 4.10 (dated 17 May 2004).<sup>61</sup> Not only have they ceased to use the term ‘involuntary resettlement’, this is the first time that the Bank has agreed that indigenous peoples have some degree of say about relocation and should broad support not exist that it will not fund the proposed project, at least the resettlement component (this could of course still be funded and take place outside of the Bank project itself and it remains to be seen how the Bank would address such a situation). On the other hand, ‘feasible’ probably still refers to economic feasibility as it will always be otherwise feasible to avoid relocation simply by not doing the project at all.

Paragraph 21 provides that involuntary restrictions on access to protected areas “should be avoided” except in exceptional circumstances where this is not feasible. Note that the term “involuntary” is employed as well as the absence of the term “broad community support” in relation to access restrictions, including potential restrictions to sacred areas. Where it is not feasible to avoid restrictions, the borrower prepares, with the FPICon of indigenous peoples, a process framework in accordance with OP 4.12.<sup>62</sup> This process framework is intended to result in the development of a management plan for a protected area and, according to paragraph 21, must “ensure that Indigenous Peoples participate in the design, implementation, monitoring and evaluation of the management plan, and share equitably in benefits ....” Finally, the management plan “should give priority to collaborative arrangements” allowing indigenous peoples to continue to use resources in an “ecologically sustainable manner.”

Paragraph 21 is troubling in a number of respects, most importantly because there has been a conscious choice to state that the envisaged restrictions will be “involuntary” and the failure to explicitly employ the term “broad community support”. Also, the Bank is one of the implementing agencies for funds from the Global Environment Facility, and therefore plays a significant role in funding protected areas in all regions of the world. Some GEF projects have been heavily criticized by indigenous peoples for, sometimes, gross violations of their rights, including forced resettlement and unilateral expropriation of traditional lands and resources. Independent studies conducted by NGOs, academics and others confirm many of these allegations.<sup>63</sup>

Moreover, it appears that FPICon in paragraph 21 is only related to the development of a process framework rather than whether there are involuntary restrictions in the first place. It is however possible that the general requirements of FPICon and broad community support set forth in paragraphs 1, 6(c), 10 and 11 would apply to all projects and therefore that paragraph 21 only deals with involuntary restrictions subsequent to broad community support for the project in general. Nonetheless, it appears that the Bank has consciously

created an exception to the broad community support requirement in this paragraph. It is also unclear whether protected areas would fall into either category (a) or (b) in paragraph 17 and therefore trigger the requirement that indigenous peoples' rights to lands, territories and resources be recognized and regularized prior to the establishment of protected areas.

If we apply the most negative interpretation of paragraph 21 it would appear to permit unilateral expropriation of indigenous peoples' lands, territories and resources in the name of nature conservation; non-consensual restrictions on access to protected areas including sacred areas located therein; and little more than participation in protected area management, which "should," rather than must, provide for continued use of resources. This paragraph, if this is the correct interpretation, also adds to the conclusion that OP 4.10 has not provided adequate protections for indigenous peoples' land and resource rights as the WBG committed to do in its response to the EIR.

The preceding 'worst case' interpretation is clearly contrary to indigenous peoples' rights in international law and contravenes the Convention on Biological Diversity. With regard to the former, the UN Human Rights Committee has emphasized that "securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27 [of the International Covenant on Civil and Political Rights]."<sup>64</sup> Under the Convention on Biological Diversity,<sup>65</sup> legally binding Decision VII/28 on Protected Areas, adopted in 2004 by the 7<sup>th</sup> Conference of Parties, the Convention highest decision making body, provides "that the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations."<sup>66</sup> This language clearly also requires full respect for indigenous peoples' rights in international human rights law ("applicable international obligations"). Additionally, pursuant to the Bank's Operational Policy 4.10 on Environmental Assessment, the Bank is enjoined from financing projects that contravene a borrower's obligations under international environmental law.<sup>67</sup> As of November 2004, the CBD has 182 parties, almost all of them members of the WBG, and is certainly part of the corpus of international environmental law.

## **B. Concluding Remarks**

While there are clear statements in OP 4.10 that the Bank will not process and finance projects unless indigenous peoples' communities have expressed their broad community support for a project in the initial stages of project processing – determined on the basis of, at a minimum, a social assessment and the outcome of a FPICon process – broad community support is not defined in any way; it is unclear whether or, if so when, it must be obtained in subsequent stages of the project or in relation to certain kinds of projects or project activities (i.e., involuntary restrictions to protected areas); it does not appear to be required at all in relation to the design of an IPP/IPPF; there is no mechanism for verification of and complaints about broad support; and, there are a number of problems related to the definitions of 'collective attachment' and 'forced severance' that may limit the applicability of the broad community support requirement. Additionally, the nature of and extent to which informed participation is required as part of FPICon, if at all, as distinct from mere consultation, is very unclear.

Although certain elements of the draft OP may be considered improvements over prior versions – the provision on physical relocation may fall into this category – the extent of some of these potential improvements, including that on relocation, ultimately turn on the definition of FPICon resulting in broad community support. Furthermore, the Bank's record of applying and adhering to its operational policies is poor and, assuming that an

acceptable definition of FPIC resulting in broad community support is possible, its efficacy remains subject to implementation and enforcement mechanisms. That OP 4.10 does not contain prompt and simple mechanisms for indigenous peoples to challenge and complain about faulty or false assessments of broad community support nor require that such support and the conditions thereof be subject to written agreements between the borrower and affected indigenous peoples should be seen in this context. Without prompt and effective grievance, complaints and verification mechanisms, adherence to OP 4.10 is largely dependent on the good will of the borrower and the Bank.

### **III. The International Finance Corporation**

The IFC is part of the private sector arm of the WBG and as such provides loans and other support to corporations and other private sector entities, including some of the world's wealthiest, rather than to governments. According to the IFC, its mission is "to promote sustainable private sector development in developing countries helping reduce poverty and improve peoples' [sic] lives. IFC believes that sound economic growth, grounded in sustainable private investment, is crucial to poverty reduction."<sup>68</sup> As the IFC often buys a stake in projects, it operates as both guarantor of environmental and social standards in projects and as an investor that stands to profit from the same projects.

The IFC has traditionally employed the safeguard policies used by the Bank, such as OD 4.20 on Indigenous Peoples. Citing the need to be more responsive to the needs of the private sector, particularly the differences in lending to the private as opposed to the public sector for which the safeguard policies were primarily designed, the IFC obtained Board approval to adopt a new set of safeguards in 2003. It subsequently proposed that the ten safeguard policies previously in use will be replaced by eight new 'performance standards' and an IFC Policy that will set out "IFC's roles and responsibilities in its investment operations, as well as the requirements that IFC's clients are expected to fulfil for IFC financing."<sup>69</sup> One of these performance standards addresses indigenous peoples.

The Performance Standards are complemented by the IFC's Policy on Social and Environment Sustainability, which sets forth the obligations of the IFC as distinct from requirements of clients contained in the Performance Standards, and by Guidance Notes, which contain non-binding principles of best practice that the client may or may not choose to follow. There is also a new IFC disclosure policy being developed that will define when and whether the IFC and client are required to disclose information to affected persons, communities or peoples, or to the general public. Given that policy requirements as well as best practice statements are spread over a number of documents and policies, the new IFC framework, at least as presently drafted, is confusing and it is sometimes difficult to ascertain with any specificity what is required in a given situation. Moreover, the IFC has allowed for a much higher degree of flexibility and discretion, both for itself and the client than is enjoyed under the existing policy framework without elaborating concomitant accountability measures. This raises serious questions about the degree to which IFC and clients can be held responsible for social and environmental problems caused by their activities.

The impact of the revision of the IFC's safeguard policies goes far beyond changes to the operating policies of the IFC itself. In the past three years more than 29 large commercial banks have agreed to follow a set of environmental and social standards known as the Equator Principles which are based on the IFC's safeguard policies.<sup>70</sup> These banks provided 80 percent (US\$55.1 billion) of all private sector direct foreign investment financing around the world in 2003.<sup>71</sup> Further, national export credit agencies (ECAs) are increasingly relying on IFC safeguard standards. Both the Equator Banks and various ECAs will adopt the new IFC standards as their own once they come into force. As the IFC revises its own policies, it

is in effect undertaking a global standard setting exercise affecting environmental and social issues in the vast majority of privately financed projects.

IFC supported operations have greatly affected some indigenous peoples. The Chad-Cameroon oil pipeline project (also funded in part by the Bank), for instance, passes through indigenous lands in Cameroon and has resulted in uncompensated and non-consensual losses of lands and resources, exacerbated conflicts with non-indigenous neighbours, and has caused an overall deterioration in indigenous peoples' economic and social well-being. Protected areas established under the project to off-set biodiversity loss have also resulted in violations of indigenous peoples' rights. A number of IFC supported mining projects – the Glamis operated mine in Guatemala and the Newmont operated Yanacocha mine in Peru, for instance – have also engendered substantial opposition from affected indigenous peoples. Will the proposed new IFC performance standard on indigenous peoples provide effective safeguards and ensure that this will not occur in the future?

## **A. Performance Standard 7 on Indigenous Peoples**

### **1. Objectives and Application**

As noted above the revised IFC safeguards include a performance standard on indigenous peoples ("PS7" or "the PS"). Other performance standards also affect indigenous peoples, for instance, PS5 on involuntary resettlement and PS8 on cultural resources. Similar to OP 4.10, the objectives of the PS7 are stated as: "to ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures and customary livelihoods of indigenous peoples;" to avoid or minimize risks to indigenous peoples occupying or using the affected area; to promote informed participation throughout the life of a project; to "foster good faith and meaningful engagement" with indigenous peoples when projects are to be located on traditional or customary lands; and to respect indigenous peoples' culture, knowledge and practices.<sup>72</sup> 'Engagement' is defined in PS1 as "disclosure of information, consultation, and informed participation, in a manner commensurate to the risks and impacts to the affected communities."

As with OP 4.10, PS7 does not employ a definition of the term 'indigenous peoples' as such observing that there is no accepted international definition. Instead it says that it will apply to indigenous peoples who are a "distinct social and cultural group possessing the following characteristics in varying degrees

- Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others
- Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories
- Customary cultural, economic, social, or political institutions that are separate from those of the dominant society or culture
- An indigenous language, often different from the official language of the country or region.<sup>73</sup>

### **2. Impact Assessment and Related Requirements**

PS7 contains a number of requirements that the client must meet. Many of these requirements are related to and derived from the environmental and social impact assessment process required by and set forth in PS1. Therefore, PS7 should be read conjunctively with the requirements in PS1 and, the need for indigenous peoples' meaningful and informed participation in impact assessment processes is heightened. This is particularly the case because impact assessments undertaken without indigenous peoples' participation often mischaracterize, underestimate or omit impacts that should require attention under PS7 or other performance standards. It is unclear whether

indigenous peoples' participation is required in impact assessment unless this requirement can be read into the following language in PS7, particularly the language "from as early as possible in the project planning ...:"

The client will establish an on-going relationship with the affected communities of Indigenous Peoples from as early as possible in the project planning through decommissioning of the project, through an on-going process to inform Indigenous Peoples of the risks and impacts that may be posed by the project, and to consult with and seek the informed participation of the Indigenous Peoples in decisions that affect them.

The non-binding Guidance Notes 14 and 20 to PS7 indicate that participation in impact assessment should be at least considered best practice, stating respectively that

As part of the S&EA process, and as required by the Performance Standard, the client will engage with the affected communities of Indigenous Peoples within the project's area of influence through the process of information disclosure, consultation and informed participation. The general characteristics of engagement with affected communities are described in Performance Standard 1 and Guidance Note 1, and further described below as they apply to Indigenous Peoples in particular. Further guidance on engagement processes is provided in IFC's Good Practice Manual Doing Better Business through Effective Public Consultation and Disclosure.

Clients should encourage participation of affected communities of Indigenous Peoples throughout the project in the process of project assessment and implementation. It is through an iterative process of listening to and incorporating concerns, sharing certain decisions, and adapting the project as necessary and feasible, that the project manages risks to the affected communities and improves its social performance. Engagement with the affected communities of Indigenous Peoples in important project decisions that may affect the interests of these communities should continue throughout the life of the project.

Guidance Note 11 to PS7 also states that "Useful guidance on the conduct of cultural, environmental and social impact assessments can also be found in the Akwé: Kon Guidelines." The Akwé: Kon Guidelines provide detailed information on impact assessments related to projects affecting indigenous lands and territories and were developed with substantial input by indigenous peoples prior to their adoption by the Conference of Parties to the Convention on Biological Diversity in March 2004.<sup>74</sup> It would be better if the Akwé: Kon Guidelines were directly incorporated into PS7, or, at minimum, were recognized as best practice in the Guidance Notes.

### **3. Specific Requirements**

Specific requirements contained in PS7 include the following (the FPICon and broad community support requirements will be discussed in sub-section 4 below):

- Client will identify indigenous peoples in the project's area of influence, as well as the nature and degree of the expected social, cultural (including cultural heritage), and environmental impacts on them and where possible avoid adverse impacts on indigenous peoples. Where avoidance is not possible, client will mitigate, minimize or compensate for adverse impacts;

This requirement should be viewed in light of the ambiguities surrounding indigenous peoples' right to informed participation in impact assessments in PS7. However, even with

informed participation, the client's impact assessments need not respect and incorporate indigenous peoples' views and preferences, all that need occur is that these views are incorporated into the client's decision making processes, which may reach conclusions contrary indigenous peoples' preferences. This conclusion is based on the IFC's own definition of 'informed participation' found in PS1, which states that "Informed participation involves organized and iterative consultation, leading to the client's incorporating into their decision-making process the views of the affected communities on matters that affect them directly, such as the design of mitigation measures, the sharing of development benefits and opportunities, and implementation issues."<sup>75</sup> This definition should be referenced wherever the term 'informed participation' is used on PS7 or elsewhere in the IFC framework (see, for instance, on Action Plans and development opportunities below).

The "project's area of influence" is defined in PS1 as:

- (i) the primary project site(s) and related facilities that the client (including its contractors) develops or controls (e.g., power transmission corridors, pipelines, canals, tunnels, relocation and access roads, borrow and disposal areas, construction camps);
  - (ii) **associated facilities** that are not funded as part of the project (funding may be provided separately by the client or by third parties including the government), and whose viability and existence depends exclusively on the project and whose goods or services are essential for the successful operation of the project;
  - (iii) areas potentially impacted by **cumulative impacts** from further planned development of the project, any existing project or condition, and other developments that are realistically defined at the time the S&EA is undertaken; and
  - (iv) areas potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later in time or at a different location. The area of influence does not include potential impacts that would occur without the project or independently of the project.<sup>76</sup>
- Mitigation, minimization or compensation measures, among others, must be clearly set forth in an Action Plan (governed by PS1), which must be developed with indigenous peoples' informed participation, and in a time bound plan such as an Indigenous Peoples Development Plan (IPDP) or a community development plan with separate components for indigenous peoples if the projects affects a broader group of persons/communities;

The Action Plan is the primary instrument that governs the life of a project, whereas an IPDP most likely will be an elaboration of certain elements of an Action Plan as it relates to indigenous peoples. Certain elements of the Action Plan may also be included in the financing agreement, the primary legal agreement applicable to a project, between the IFC and a client. Failure to comply with those elements incorporated into the financing agreement may allow the IFC to suspend the project or require other remedial action for breach of contract. This however assumes that the IFC is willing to take such action and its willingness also should be viewed in light of the fact that IFC will most likely also be an investor in the project itself. Further, while the Action Plan must be developed with indigenous peoples' participation, no such requirement is stated for the IPDP, unless the IPDP is considered an integral part of the Action Plan and this is unclear in PS1 and PS7.

- The client will establish an on-going relationship with the affected indigenous peoples from as early as possible in the project planning through decommissioning of the project, through an on-going, culturally appropriate

process to inform indigenous peoples of risks and impacts that may be posed by the project, and to consult with and seek the informed participation of indigenous peoples in decisions that affect them. In particular, the process will:

- Involve Indigenous Peoples' representative bodies (for example councils of elders or village councils, among others)
- Be inclusive of both women and men and of various age groups in a culturally appropriate manner
- Provide for sufficient time for Indigenous Peoples' collective decision making processes
- Facilitate the Indigenous Peoples' expression of their views, concerns, and proposals in the language of their choice
- Ensure that the grievance mechanism or procedure established for the project, as described in Performance Standard 1, is culturally appropriate and accessible for Indigenous Peoples;

The grievance mechanism referred to here is intended to act as a complaints mechanism and/or dispute resolution mechanism that will function at the project level. This most likely means that it will be an internal mechanism established and run by the client. It should not be viewed, however, as a substitute for recourse to national legal remedies, where these exist, or use of the IFC's complaints mechanism, known as the Compliance Advisor Ombudsman, should the complaint concern the failure of the IFC to comply with its responsibilities rather than the client specifically. The CAO performs largely the same function as the World Bank's Inspection Panel, receiving complaints about failures to adhere to safeguard policies.

- The client will provide development opportunities that are identified with the informed participation of the affected indigenous peoples. Such opportunities should be commensurate with the degree of project impacts, with the aim to improving their standard of living and livelihoods in a culturally appropriate manner, and to fostering the long-term sustainability of the natural resource on which they depend;
- If the project is to be located on traditional or customary lands under use, and adverse impacts can be expected on the customary livelihoods, and/or cultural, ceremonial or spiritual use that define the identity and community of the Indigenous Peoples, the client will respect their use by taking the following steps, in addition to the other requirements of this Performance Standard:
  - The client will document its efforts to avoid or at least minimize the size of land proposed for use by the project
  - Indigenous peoples' land use will be documented by experts using appropriate methods in consultation with the affected communities of indigenous peoples
  - The affected communities of indigenous peoples will be informed of their rights with respect to these lands under national law, including any national law recognizing any customary rights or use
  - The affected communities of indigenous peoples will be offered at least compensation and rights to due process available to those with full legal title to land in the case of commercial development of their land under national law, together with culturally appropriate development opportunities

The first three of these points should all be part of an adequate environmental and social impact assessment and do not add much, if anything, to what a responsible company

should be undertaken at present. Note also that, as with OP 4.10, PS7 focuses on only impacts to “customary livelihoods,” rather than all livelihoods. As noted with respect to the OP, this formulation is discriminatory as non-indigenous persons’ rights to their livelihoods are not limited only to those that are customary and many indigenous peoples’ livelihoods today are at least in part something other than customary.

The last point potentially undervalues indigenous peoples’ rights to and relationships with traditional lands, territories and resources, and undermines indigenous peoples’ rights in international law. Indigenous peoples’ rights to lands, territories and resources including attendant due process, cultural and other rights are not equivalent to the property rights of non-indigenous persons and are accorded higher degrees of protection under international law and some domestic legal regimes. One higher due process standard accorded to indigenous peoples’ property rights under international law – at least in part because of the applicability of the right to self-determination – is the right to give or withhold FPIC, including in cases of compulsory acquisition or takings and proposed resettlement. This right does not apply to non-indigenous persons in international law. It is therefore not appropriate that indigenous property rights be treated in the same manner as non-indigenous property rights. Also, many companies will do only the minimum that is required to comply with external requirements resulting in indigenous peoples’ being treated in same the manner as non-indigenous property holders. Finally, culturally appropriate development opportunities are required under other sections of PS7, therefore, the only requirement that this sections adds is one that undermines indigenous peoples’ internationally guaranteed rights. The significance of this language further amplified in relation to PS5 and PS7 as they apply to economic displacement of indigenous peoples due to involuntary takings of lands for project purposes (see below).

- “Care should be taken to ensure that any indigenous peoples’ land claim is not prejudiced during these steps.”

It is entirely unclear what the actual requirements are in relation to this statement nor is it clear how the term land claim may be understood and used in practice. In the first place, non-mandatory language ‘should’ is employed raising questions about whether the client is actually required to do anything pursuant to this section. Second, the term ‘care’ may imply a duty to exercise due diligence to verify if a ‘land claim’ exists (something that should be done as part of the impact assessment) or it may imply some other more or less onerous duty. With regard to ensuring that the client’s actions will not prejudice the ‘claim’, the term ‘prejudice’ is highly contextual and open to various interpretations, many of which may not comport with indigenous peoples’ views.

Use of the term ‘claim’ is also problematic in and of itself as indigenous peoples have rights in international law to own and control lands, territories and resources traditionally owned or otherwise occupied and used. States and corporations have, at a minimum, the obligation to respect those rights. Rights in this sense are not ‘claims’, but impose specific obligations of conduct and result applicable to others. Also, in principle any operation within indigenous peoples’ traditional territories that takes place without their consent may be considered a violation of rights and this is certainly prejudicial to those rights or a ‘claim’ over the same lands. The next question, considering that indigenous peoples’ rights are inherent, is whether a ‘claim’ must be cognizable under national law or even officially registered in order to be considered a ‘claim’ for the purposes of PS7?

The sentence in question refers only to avoiding prejudice “during these steps,” meaning during the actions under the four bullet points in the preceding section. If prejudice were to occur in relation to informing indigenous peoples about rights under national law or in documenting land use, the client presumably will have acted dishonestly or incompetently. Point four is by itself prejudicial to indigenous peoples’ rights and

therefore it is difficult to see how the client could avoid additional prejudice. The only way to avoid prejudice under the first point, at least without FPIC by indigenous peoples, would be simply to avoid any use of or encroachment on indigenous lands, something that would preclude the further application of PS7 entirely. Finally, the Guidance Notes provide no help in clearing up any of these difficulties saying only that "Indigenous Peoples' claims to land or resources will be documented as part of the S&EA process."<sup>77</sup>

- The client will make every effort to avoid the relocation of Indigenous Peoples from their communally held traditional or customary lands under use. If relocation is unavoidable, the client will not proceed unless it enters into good faith negotiation with the affected indigenous peoples and documents their informed participation, consistent with PS7 and PS5 as it relates to physical displacement. The footnote associated with this section adds that "Where members of the affected communities of Indigenous Peoples individually hold legal title, or where the relevant national law recognizes customary rights for individuals, the requirements of Performance Standard 5 will apply, rather than the requirements under this heading." In other words, good faith negotiation and other requirements will not apply to indigenous persons holding individual rights.

The language pertaining to good faith negotiation as it relates to physical displacement/relocation and cultural resources (see below), is discussed in the section on broad community support immediately following this section. Both the preceding section and PS5 cross reference each other and should be read conjunctively. PS 5 in particular states that when indigenous peoples are to be either physically or economically displaced, the requirements of PS7 must be followed as well as the requirements of PS5. In the case of physical relocation the above quoted language applies and should a negotiated settlement resulting in relocation be concluded, PS5 must then be reference for further requirements. In the case of economic displacement however there is no obligation for the client to reach a negotiated a settlement pursuant to either PS5 or PS7. As with OP 4.10, this may encompass involuntary restrictions on access to protected areas and takings of traditional indigenous lands, provided that physical displacement is not involved.

According to PS5, 'economic displacement' means the "loss of assets or access to assets that leads to loss of income sources or means of livelihood[] as a result of *project-related land acquisition*" (emphasis added). PS5 is clear that this may occur involuntarily including in the case of indigenous peoples. In defining its scope of application, PS5 specifies that it applies to land transactions that are for a private sector project acquired through expropriation or other compulsory procedures" and; "for a private sector project acquired through negotiated settlements with property owners or those with legal rights to land, including customary or traditional rights recognized or recognizable under the laws of the country, who do not have the option to retain the land."

Consequently, under the proposed IFC standards it is permissible for a company, or the government on behalf of a company, to take indigenous peoples' traditional lands and territories, and as long as physical displacement is not involved to do no more than (as provided by PS7) seek their informed participation in decision making and offer compensation and rights to due process at least equal to that available to persons with full legal title to land. While PS7 does at least ensure that indigenous peoples will be treated as the equivalent of any title holder irrespective of whether they are recognized as such by national law – an improvement over the terms of PS5 apply to persons without formal legal title – non-consensual expropriation of indigenous peoples' lands and territories amounts to a gross violation of their internationally guaranteed rights.

- Where a project uses the cultural resources, knowledge, innovations, and/or practices of indigenous peoples for commercial purposes, the client will inform the

Indigenous Peoples of (i) their rights under national law; (ii) the scope and nature of the proposed commercial development; and (iii) the potential consequences of such development. Before proceeding with the commercial development, the client will enter into good faith negotiation with the affected indigenous people, document their informed participation, and provide for fair and equitable sharing of benefits of such knowledge, innovation, or practice, consistent with their customs and traditions.

#### **4. FPICon and Broad Community Support**

While the FPICon and broad community support requirement is set out in various sections of OP 4.10, the requirement is not specifically stated at all in PS7. In order to understand how the principle operates in the IFC framework reference must be made to PS1 on impact assessment, the IFC Draft Procedure for Environmental and Social Review of Projects and the IFC Policy on Environmental and Social Sustainability, the latter two only applying to the IFC itself. These components of the policy framework are the only ones that explain and require FPICon and broad community support. As noted above, it is very likely that the Equator Banks and a number of ECAs will also adopt the IFC's new performance standards as their own operating policies. They will not however adopt the policies that only apply to the IFC. Therefore, the broad community support requirement – being absent from the performance standards – will not be included in policies adopted by the Equator Banks and ECAs, unless they choose to modify the IFC standards when they incorporate them into their own policies.

##### **a. Defining FPICon and Broad Community Support**

According to PS1, "Broad community support is a collective expression by the affected communities, through individuals and/or their recognized representatives, in support of the project. There may be broad community support even if some individuals or groups object to the project."<sup>78</sup> The terms 'individuals' and 'groups' in the last sentence refer to persons or groups within a 'community' and therefore indicates that broad community support may be determined to exist despite the objections of small numbers of individuals or small groups within a 'community'. Two of the main questions raised by this definition are:

- 1) What is the 'community' for the purposes of broad community support – is it a village, the entire indigenous people(s) or some sub-entity, such as a clan, for instance – and will this account for indigenous peoples' customary laws which may assign rights in different circumstances to different entities: individuals, families, extended families, clans, villages, geographically defined sub-groups or the entire nation or people? In this context, also, are the 'recognized representatives' those recognized by indigenous peoples or by the state/national law?
- 2) If broad community support can exist over the objections of individuals or groups within the 'community', how much of the 'community' must be in support or opposed for broad community support to exist or not exist? What does this say about traditional consensus-based decision making processes employed by indigenous peoples?

The IFC also provides a definition of FPICon, one that is substantially different from and less accommodating than that found in footnote 1 in OP 4.10. According to Guidance Note 45 to PS1, "Consultation should be 'free' (free of intimidation or coercion), 'prior' (timely disclosure of information) and 'informed' (relevant, understandable and accessible information), and apply to the entire project process and not to the early stages of the project alone." This is no more than a description of the terms preceding the word 'consultation' and should be part of any consultation process at present.

##### **b. Application of FPICon and Broad Community Support**

The major difference between the OP and IFC policy is that FPICon and broad community support is only required for **large** projects with **significant** adverse impacts under the IFC framework.<sup>79</sup> Under OP 4.10, FPICon and broad community support is required for **all** projects and at **each stage** of the project. This is a difference that is difficult to understand and justify, at least on the basis of any distinction between the nature of public and private sector projects. The only indication of the nature of a 'significant adverse impact' is found in the IFC's project categorization criteria, which indicate that such project impacts are "diverse, irreversible or unprecedented;" "may be partially mitigated or compensated, but cannot be completely avoided or fully mitigated;" and, "pose substantial risks to surrounding communities or environment."<sup>80</sup> Note also that if a project has such impacts but it is not further classified as a 'large' project, the FPICon and broad community support requirement is not applicable.

In addition to large projects with significant adverse impacts, PS7 most likely requires verified broad community support in relation to two other issues: relocation and the commercial use of cultural resources and traditional knowledge. This is not explicitly stated in PS7 although it is confirmed in the associated Guidance Notes and through personal communications with IFC staff. At least with regard to relocation, the Guidance Notes state that "IFC will evaluate the client's documentation of its engagement process to establish that broad community support for the relocation exists amongst affected communities."<sup>81</sup>

As stated in the preceding section, when relocation is unavoidable or where a project plans to commercially develop indigenous peoples' cultural resources or traditional knowledge, "the client will not proceed unless it enters into good faith negotiation with the affected indigenous peoples and documents their informed participation...." At least with regard to relocation, the logic employed by the IFC should be as follows: the client must negotiate the terms of relocation with affected indigenous peoples – should indigenous peoples agree, the next step will be for the client to develop a Resettlement Action Plan (as governed by PS1 and 5), which will be reviewed by IFC; however, if the negotiation between the client and indigenous peoples does not result in an agreement concerning resettlement, the IFC should acknowledge the failure to agree as evidence that broad community support does not exist and therefore decline to finance the project.

If the preceding is in fact what is required by PS7, it begs the question of why the IFC cannot clearly state this rather than only noting it in a non-mandatory Guidance Note? The language presently used in PS7 does not necessarily lead to the conclusion that broad community support or agreement subsequent to negotiation is required. It merely states that the client will **enter into** good faith negotiation without specifying any required result of the negotiation nor even that the negotiation has to have any result at all. As noted above, the requirement also only applies in cases of physical displacement but not to economic displacement. Moreover, the terms of a Resettlement Action Plan should be agreed to as part of the negotiations themselves not after the negotiations. This is the case because, assuming that the RAP does not simply codify the agreement reached in the negotiation, indigenous peoples' broad community support/agreement must be based on a full consideration of all relevant information, which includes the RAP.

While presumably negotiation must be with recognized representatives of the affected indigenous people(s), employing a negotiation process rather than an explicitly community-based decision making process – such as FPIC or perhaps even broad community support – fails to acknowledge substantial inequalities in bargaining power among the parties and the heightened possibilities for manipulation of the process. To address the last point, at a minimum, PS7 could specify and require that any negotiated settlement be ratified by the affected community/people as an integral part of the negotiation process and that it be independently verified to further guard against coercion or manipulation. Presumably indigenous peoples may insist on this in discussions with the

client, but the client is not required to agree with this, and may be reluctant to do so particularly if manipulation of the process or coercion is involved.

Finally, given that the IFC sometimes invests in projects that have commenced a number of years prior to its involvement, it is possible that project could involve relocation prior to IFC investment. The Guidance Notes acknowledge this situation and provide that

In cases where the host government has made the decision to relocate Indigenous Peoples, consultation with relevant government officials would be important to understand the rationale for such relocation, and whether a good faith negotiation based on informed participation of the Indigenous Peoples has been implemented regarding the aspects of the project and the relocation affecting communities of Indigenous Peoples, prior to the decision to finance the project.<sup>82</sup>

It is unclear what the result of such a retroactive analysis would be and this paragraph fails to state what action the client or the IFC should take if it is determined that good faith negotiation did not take place. Without a clear statement on this issue, it may create an incentive for governments and companies to forcibly relocate indigenous peoples prior to seeking support from the IFC (the same could also be the case in relation to the Bank under OP 4.10). Given that this language is found in the Guidance Notes, it appears that it is the client, at its discretion, rather than the IFC that should review the manner in which relocation took place. However, it is also possible that this is something the IFC, again at its discretion, should do as the Guidance Note says that this should be done “prior to the decision to finance the project,” which is the role of the IFC rather than the client.

### **c. Verification of Broad Community Support**

The OP and IFC policy frameworks are similar in that both require that the Bank and IFC respectively verify that broad community support exists as a precondition to financing the project. The IFC, for instance, states that

IFC will review the client’s documentation of the engagement process, and in addition, through its own investigation, assure itself that the client’s community engagement is one that involves free, prior and informed consultation and enables the informed participation of the affected communities, leading to broad community support for the project within the affected communities, before presenting the project for approval by IFC’s Board of Directors.<sup>83</sup>

The IFC’s Draft Environmental and Social Review Procedures, which contain the procedures IFC staff are required to follow when processing projects, provides very little information on how the IFC will conduct its “own investigation” to assure itself that broad community support exists. It simply states that IFC’s Environment and Social Department will “Support the [Transaction Leader]<sup>1</sup> in determining, in the case of large projects with significant adverse impacts, whether the project has Broad Community Support.”<sup>84</sup> For both the IFC and the Bank, no independent verification is required nor is any specific written confirmation or refutation by indigenous peoples required to demonstrate that broad community support exists or does not exist. Moreover, both the Bank and IFC will rely primarily, at least initially, on documentation produced by the borrowing government and the client, or consultants hired by the government and client, to determine if broad community support exists.

## **B. Concluding Remarks**

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<sup>1</sup> The Transaction Leader is the member of IFC’s Investment Department with overall responsibility for developing a particular project with a client. It corresponds to a Task Manager at the Bank.

The proposed IFC policy framework and PS7 in particular are fraught with problems, loopholes and ambiguities that render their effectiveness as meaningful safeguards for indigenous peoples questionable at best. In many cases, the framework seems to be based on the implicit proposition that indigenous peoples should trust the IFC (and in some cases the client) to ensure that rights and interests are protected. In other cases, it is clear that PS7 does not provide an effective guarantee at all for rights and interests as the text permits activities that are in direct contravention of those rights and interests.

The same problems (and more) as those identified in OP 4.10 exist with regard to FPIC and broad community support and the provisions pertaining to lands, relocation and procedural issues are weak, vague and flawed. In some cases, PS7 is weaker than the standards set forth in OP 4.10. With regard to the last point, a Bank memorandum to the IFC concerning the draft IFC safeguards also notes that PS7 is inconsistent with and weaker than OP 4.10.<sup>85</sup> The forgoing should be viewed in the context of an increasing focus on the private sector as development actors and the well documented problems faced by indigenous peoples with many private sector projects. While the IFC may argue that its involvement should decrease these problems, the evidence suggests that this has not necessarily been the case in the past, nor, based on a review of the proposed standards, will it be in the future.

Finally, it must be considered that IFC has to date only held one formal meeting (in May 2005) with indigenous peoples to discuss its proposed new safeguard standards and that this meeting only focused on a draft that was said not to reflect the full views of IFC management and was received by the participants a few hours before the meeting. Moreover, the IFC only considered directly consulting with indigenous peoples when indigenous peoples themselves and a few NGOs complained about their exclusion from the revision process. This should be contrasted with the consultation process employed in relation to OP 4.10, which, although far from adequate and acceptable, involved numerous meetings with indigenous peoples, at the regional as well as the global levels. These consultations took place over more than nine years. The IFC should be held to account for this substantial failure to adhere to what has become an accepted practice of direct consultations with freely chosen indigenous representatives when policies are being revised or changed. These issues are discussed in greater detail in the next section.

#### **IV. Indigenous Peoples' Engagement with the WBG**

While indigenous peoples' have been affected by the activities of the WBG from the earliest days of its operations, other than in relation to a few localized projects, sustained engagement is relatively recent, dating initially from the late 1980s to the early 1990s. Around this time, indigenous peoples highlighted the need for major reforms within the WBG to ensure compliance with safeguard policies and demanded direct participation in the drafting of OD 4.20. They also proposed that WBG projects be subject to tripartite agreements between the WBG, the borrower or client, and indigenous peoples where these projects would affect traditional territories. In 1990, indigenous peoples from the Amazon demanded not only direct participation in drafting of the OD but also, among others, that it be consistent with indigenous rights in international law, that no projects be financed without prior consent and the prioritization of indigenous peoples' own development initiatives.<sup>86</sup> These same demands were reiterated by the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests in 1992.<sup>87</sup>

Despite these demands, OD 4.20 was drafted internally by the Bank without any participation by or consultation with indigenous peoples. The same was also the case for OMS 2.34 adopted in 1982. As noted above, the process leading to the adoption of OP 4.10 was quite different and involved numerous meetings with indigenous peoples, both locally and globally. Nonetheless, this process was far from adequate and was severely

criticized by indigenous peoples.<sup>88</sup> For instance, it was only after the revision process had been underway for four years that the first set of consultation meetings were held with indigenous peoples in 1998. These meetings focused on an 'approach paper' developed internally by Bank staff and were held in Brazil, Costa Rica, Ecuador, Vietnam, The Philippines, India and Russia.

A first draft of OP 4.10 was released for comment in 2001 and was followed by 25 meetings in 14 countries. While the Bank expressed considerable pride at its consultation efforts, indigenous peoples who participated reported numerous negative experiences and complained that the process was seriously flawed. For instance, 11 of the 25 meetings lasted less than one day and were reportedly mostly taken up by presentations by Bank staff leaving little time for discussion; some participants were not given the required documents until a few hours before the meeting; and, some meetings lacked adequate translation services.

In relation to the consultation process in general, indigenous peoples were also told by the Bank that their key demands expressed during the discussion of the approach paper could not be incorporated into the revised policy and few changes would be made to the text of the draft OP. While subsequent statements by the Bank back-tracked somewhat on this position, this view seems to be a common feature of consultations: indigenous peoples expect that issues and concerns raised will be reflected in ongoing revisions of text or project design, whereas the WBG is of the view that consultation does not require incorporation of indigenous peoples' views. However, this is not restricted only to processes involving indigenous peoples as the WBG similarly rejected recommendations, including those pertaining to indigenous peoples, such as respect for FPIC, made by the World Commission on Dams and the Extractive Industry Reviews, both of which were processes either initially commissioned by the WBG itself or in which it played a major role.

Additional meetings were held with Bank staff prior to the adoption of the OP in May 2005, including a legal roundtable with Bank lawyers and high ranking officials in 2002, and a meeting during the 2004 session of the Permanent Forum on Indigenous Issues session.<sup>89</sup> A statement issued by indigenous peoples in relation to the legal roundtable stated, among others, that "indigenous peoples do not accept the World Bank's March 2001 revised Draft Indigenous Peoples Policy (OP/BP4.10) as an effective instrument for safeguarding the rights and interests of indigenous peoples affected by its development projects and programmes;" and, "that we as indigenous peoples consider that we have so far been denied the opportunity to significantly shape the outcome of the policy revision and that the Bank has not addressed our principal concerns and our proposals on how to improve the existing policy."<sup>90</sup>

Serious concerns have also been raised in relation to OP 4.10 subsequent to its adoption. For instance, a statement endorsed by 25 indigenous organizations and presented to the UN Permanent Forum on Indigenous Issues in May 2005 states that

The World Bank recently approved its Operational Policy on indigenous peoples (OP/BP 4.10) after seven years of consultations and revisions. ...

The newly revised policy has made important improvements in several areas, such as requiring that the commercial development of affected indigenous peoples' cultural resources and knowledge be conditioned upon their prior agreement to such development. Nevertheless, we continue to be extremely concerned about these Multilateral Development Banks lack of recognition of indigenous peoples' customary rights to their lands territories and natural resources and to their related right of free prior informed consent, and their derogation of international standards to national law. ...

Of specific concern is the World Bank's recent decision to require a process of free prior and informed consultation with affected indigenous peoples' communities

to ascertain their broad community support for a project, rather than requiring the free prior and informed consent of the affected indigenous people. By merely requiring the World Bank to verify that the borrower has gained the "broad support from representatives of major sections of the community"- with no guarantees as to what information will be disclosed and when, how such verification will be conducted and by who, and how the collective decision-making processes and structures of the affected indigenous people will be recognized and respected- the free prior and informed consultation process stands to reduce indigenous peoples rights to a mere technical procedure. The weakening of free prior and informed consent as an international standard for indigenous peoples stands to severely threaten the lands, territories, and natural resources of indigenous peoples and to undermine their internationally recognized human rights.<sup>91</sup>

This same statement also called on the Bank "to create a mechanism which will guarantee the full and effective participation of indigenous peoples in discussing and defining the meaning and application of conducting free prior and informed consultation and ascertaining broad community support with the Bank's management, legal counsel, and task teams (TT). Indigenous peoples' suggestions and comments should be reflected in the forthcoming Indigenous Peoples Guidebook and in any revisions made to BP 4.10."<sup>92</sup>

While the process leading to the adoption of OP 4.10 was far from adequate, it certainly was an improvement in relation to the adoption of OMS 2.34 and OD 4.20. It should also be contrasted with the process employed by the IFC as it revises its safeguard framework. As noted above, in the almost three years since the process began, the IFC has held only one formal meeting, in May 2005, with indigenous peoples to discuss its policy. This meeting was largely off-the-record; hastily organized with participants not receiving the documents until a few hours before the meeting; and did not deal with text that had been endorsed by IFC management with the result that many questions were simply deferred and unanswered. The May 2005 statement to the Permanent Forum quoted above, therefore:

Encourages the International Finance Corporation to conduct further consultations with indigenous peoples regarding the revision of its Performance Standards to ensure that indigenous peoples are able to provide recommendations as to how free prior and informed consent must be ascertained, and under which conditions, so as to ensure that indigenous peoples' customary land and natural resource rights are not undermined by the IFC and its private sector clients.<sup>93</sup>

Despite this call and despite the fact that a revised draft was released in September 2005 and is scheduled for final adoption in January 2006, the IFC has yet to initiate any formal consultation process with indigenous peoples' representatives to discuss PS7 and other components of the draft policy framework. Additionally, as discussed in section III above, the application of PS5 and PS7 will result in indigenous peoples' customary lands and natural resource rights being undermined and violated.

Indigenous peoples' experiences at the project level have not been much better than they have with policy processes, although there is some amount of variation depending on the nature of the project, the government involved and the degree to which indigenous peoples are organized in relation to the project. These projects have sometimes engendered substantial opposition by indigenous peoples and violent suppression of this opposition by some governments. Problems can and have occurred at all stages of projects: preparation, implementation, monitoring and closure, for example. Project preparation and design control the remainder of the project and, therefore, are the stages where indigenous peoples' input is most critical. According to Griffiths, however, it "is not

uncommon for indigenous communities to only learn of a project once it has already started after key assumptions [have been] made and decisions taken by outsiders."<sup>94</sup> Put another way, many projects may be and are viewed as top-down, external interventions that are imposed on indigenous peoples, do not take into account their rights, priorities and preferences, and more often than not place the majority of costs on indigenous peoples while the vast majority of benefits are enjoyed by others.

The preceding views are largely confirmed by internal WBG studies. A 2003 review of the implementation of OD 4.20, for instance, observed that the participation of indigenous peoples in decision-making in WBG projects affecting them was "low" and that just 20 percent of projects had included clear benchmarks to measure impacts on indigenous communities.<sup>95</sup> The same report also found that sustainability of results for indigenous peoples in all project types was also generally much lower than overall project sustainability indicators.<sup>96</sup> Another internal report reviewing OD 4.20 in relation to 87 projects approved after 2001 found that around 20 percent had little or no provision for enabling indigenous peoples' participation.<sup>97</sup> Of those that did have participation measures, the report concluded that these were normally confined to basic consultation meetings rather than meaningful participation.<sup>98</sup>

Finally, internal and external reviews have found that the entire safeguard system suffers from serious problems, both with regard to the substance of the policies as well as the institutional structures concerned with implementation and compliance. The Extractive Industries Review, for instance, concluded that "The reality in the field suggests that the current Safeguard Policies have been unable to ensure that 'no harm is done' and that this is due to both poor implementation rates and deficiencies in the policies themselves."<sup>99</sup> In reaching this conclusion the EIR in part relied on a 2002 general WBG evaluation of safeguard policies, which revealed that "performance in the area of safeguards has been only partially satisfactory. Fundamental reform of implementation and accountability processes is crucial. ... The current system does not provide the appropriate accountability structure to meet the WBG's commitments to incorporate environmental sustainability into its core objectives and to mainstream the environment into its operations."<sup>100</sup>

With regard to the then-draft OP 4.10, the EIR also concluded that "To be legitimate and effective, a Safeguard Policy must be seen by the intended beneficiaries to provide adequate safeguards and must be consistent with their internationally guaranteed rights. This is presently not the case [with draft OP 4.10]."<sup>101</sup> Highlighting the importance of attention to indigenous peoples' rights in relation to OP 4.10, the EIR's Eminent Person's, Dr. Emil Salim, stated that "the revision of the safeguard policy on indigenous peoples is a fundamental test of the World Bank's commitment to poverty alleviation through sustainable development."<sup>102</sup>

In a few projects, designated as ethno-development or 'do good projects' by the Bank and which targeted indigenous peoples in Latin America, indigenous peoples have acknowledged a higher degree of participation in and satisfaction with project design and results. According to Griffiths, improved performance in these projects was related to "long project preparation times, intensive staff inputs, willingness to pay unusually high transaction costs, strong borrower commitments to reform and genuinely participatory decision-making both in project preparation and implementation."<sup>103</sup> This could lead to the conclusion that these elements should all be part of any project affecting indigenous peoples. Nevertheless, even these projects have their critics, who argue that the projects have caused divisions in indigenous organizations and communities, failed to address underlying causes of poverty and have not effectively carried out the legal and policy reforms required to secure and protect indigenous peoples' land and resource rights.<sup>104</sup>

In order to comply with WBG safeguard policies, projects normally must have built in participation mechanisms. Under OP 4.10 and to a lesser extent the IFC's draft policy

framework, indigenous peoples' broad community support will now also be required in relation to projects. How this will work in practice and whether it will improve indigenous peoples' participation in, acceptance of and benefits derived from WBG projects remains to be seen. However, somewhere around fifty percent of World Bank operations is programmatic lending such as structural adjustment and technical assistance loans, which are not subject to the normal array of safeguard policies applying to projects, including those pertaining to indigenous peoples. Programmatic lending therefore also is not subject to any requirements concerning participation by indigenous peoples. These loans, which often have significant and long-lived negative impacts, are routinely designed and implemented behind closed doors and without any involvement of indigenous peoples or others.

In recent years, the Bank has begun to work through Poverty Reduction Strategy Papers with the goal of creating an alternative to traditional adjustment loans. While PRSP formulation processes do often require indigenous participation, indigenous peoples still complain that these processes disregard their concerns and still focus on conventional adjustment measures such as liberalization, increasing foreign investment and privatization. In some countries, indigenous peoples are not formally included in the process and are instead categorized simply as 'poor people' and lumped in with civil society in general. In others, indigenous peoples have managed to insert provisions in the PRSP, yet nonetheless maintain that these provisions are not implemented while the conventional adjustment-related provisions are prioritized.

The preceding indicates that there are major challenges to be faced when considering the nature and extent of future engagement with the WBG, be it at a policy, project or programme level. While some gains have been made in the past, these gains are tenuous, some exist mostly on paper, and others have yet to be tested in the real world, in particular in projects where governments are not committed to indigenous participation and rights. Additionally, some of what may be considered to be gains – the inclusion of broad community support, for instance – may actually represent serious set backs for indigenous peoples' rights in the long term. This will be especially the case if donor agencies, the private sector and other multilateral agencies, for example, adopt FPICon leading to broad community support in place of FPIC, the latter being employed by human rights bodies and some multi- and bilateral donors and private sector bodies. This is not far fetched as it is highly probable that the Equator Banks and a number of ECAs will adopt this terminology as part of incorporating IFC standards.

## **V. Conclusions and Strategic Issues**

When thinking about how to deal with the institutions that comprise the WBG, the fact that they are owned and controlled by states should always be borne in mind. While consensus decision-making at the board level of the institutions often has the effect of softening extreme positions put forth by certain states, many of the states bring the same issues, concerns and prejudices about indigenous peoples to WBG decisions that they hold in domestic affairs. In some cases, policies expressed at the WBG may be less favourable to indigenous peoples than domestic policies because it is finance ministries or their equivalents that are the primary domestic focal points in relation to the WBG. These ministries sometimes adopt positions that are at odds with the positions and policies of ministries or agencies that address indigenous issues and the latter are normally not involved in formulating positions expressed at the WBG.

The dynamics of decision-making at the WBG are further complicated by the fact that all but five of the Executive Directors represent groups of states on the board and must achieve consensus among these groups prior to expressing a position at board meetings. This can also lead to the adoption of positions that contradict national policies and even

national laws being expressed on behalf of certain countries. The Philippines, for instance, is represented at present by a Brazilian Executive Director. During the debate about FPIC at the WBG board meeting held in August/September 2004, this Executive Director was one of the most vigorous opponents of FPIC despite recognition of the right in the domestic law of the Philippines. Moreover, if it were so inclined, The Philippines would be unable to dissociate itself from such a view at the level of the board or to express a contrary view on its own.

While the board is the ultimate authority in the WBG, the role of WBG staff and especially management should not be minimized. Projects and policies are in the first place designed by staff and endorsed by management. WBG staff thus has a substantial role in shaping what is eventually submitted to the board and the board, normally after substantial informal and formal interaction with staff and sometimes even negotiation with management, often makes few significant changes to what has been developed and forwarded by staff. In this respect, it is also important to bear in mind that WBG staff overall remains heavily dominated by economists, who often have little understanding of social and environmental issues. Understanding of human rights issues and the role of human rights in development is also minimal.

Moving from WBG policy issues to actual projects the situation can be equally complicated because projects are basically government or corporate initiatives that receive funding from the WBG. In the process of developing projects, the practice within the WBG, although much more so in the case of the Bank, seems to be to negotiate project development and conditions with the government and client with varying degrees of attention to safeguard policy issues. This sometimes leads to safeguards being applied (or not applied) in very different ways in different countries, something that will become even more complex if the Bank begins to systematically employ the use of country systems (meaning national laws) in place of safeguard policies.

The issue of the application of safeguards is further confused by the practice of the Bank and sometimes the IFC not to fund more than one-third of the total project costs. This often requires that additional donors be brought in as co-financers. These additional donors may be other development banks, UN agencies, bilateral donors, ECA's or the private sector, some or all of whom may have their own safeguard standards. This may then require a working knowledge or two, three or more sets of (potentially contradictory) policy standards that apply to one project as well as any complaints or grievance mechanisms that may be associated with the various policies. This problem is sometimes avoided by all donors agreeing to apply one donors safeguard standards, but this is not always the case. With regard to IFC projects it is also important to ascertain if the company in question employs specific internal policies and how these may relate to indigenous peoples.

With the preceding in mind, this final section provides thoughts and suggestions concerning future strategic engagement with the WBG, both at the policy and project levels, as well as engagement with other institutions and fora that may enhance the efficacy of future engagement with the WBG. In formulating these suggestions, I have tried to ensure that they are general enough for adaptation to a variety of local situations and to thinking about a regional approach to these important issues. At the same time, given that there will be discussion of these issues in workshops and further elaboration of ideas and strategies, I have also tried to include mostly basic rather than detailed suggestions.

#### **A. Policy Level**

OP 4.10 was adopted a mere six months ago and only applies to projects that entered the funding pipeline after August 2005. It therefore does not apply to the majority of Bank

projects being developed and implemented. However, all projects that meet this time line need to be identified and carefully reviewed against the new standards contained in OP 4.10. One of the most important is clearly FPIC resulting in broad community support, particularly given the ambiguities surrounding this concept and the fact that its interpretation and utility may be strengthened and enhanced through practice in implementation or the opposite may be the case. The board of the Bank also committed to conducting a review of the first three years of implementation of OP 4.10, which will be carried out sometime in mid- to late-2008.

Bearing in mind that some indigenous peoples are opposed to and reject any engagement with the WBG, suggestions relating to OP 4.10 include:

- Ensuring that indigenous organizations, peoples and communities that are concerned with or may be affected by Bank projects are well informed about the requirements of OP 4.10 (and inter-connected OPs such as OP 4.01 on environmental assessment) and are able to insist that projects are at least consistent therewith. This is best done through direct training and the development of simple explanations of or guides to the Bank and its OPs with a special emphasis on OP 4.10. This training process should not treat Bank policy and projects in isolation from international human rights standards applicable to indigenous peoples;
- Establishing national and regional 'working groups' or the like to systematically identify and track Bank projects applying OP 4.10 with the aim of providing well documented inputs to the three year review of the OP agreed to by the board. In the same vein, these groups could advocate, together with indigenous peoples from other regions, for full indigenous participation in the three year review;
- Consistent with statements made to the UN Permanent Forum, advocating that the Bank establish or cooperate with mechanisms "which will guarantee the full and effective participation of indigenous peoples in discussing and defining the meaning and application of conducting free prior and informed consultation and ascertaining broad community support with the Bank's management, legal counsel, and task teams." One mechanism that the Bank could cooperate with in this respect is the UN Permanent Forum itself, which has begun work on FPIC methodology and mainstreaming FPIC in UN system activities pertaining to indigenous peoples;
- Irrespective of whether the Bank agrees to the preceding point, it is important for indigenous peoples, nationally, regionally and globally to proactively seek to define FPIC and broad community support in ways that are consistent with indigenous peoples' traditional (or otherwise prevailing and accepted) methods of collective decision making and use these 'definitions' both as a means of working with affected communities/peoples and as a way of influencing government and Bank understanding and implementation of the concept in Bank-financed projects;
- With regard to the last point above and in general, it is important to identify those in government with primary responsibility for Bank projects and policy issues and attempt to influence their thinking. In some cases, this may be helped by involving national agencies and bodies responsible for indigenous issues or even legislative committees or other bodies in any dialogue. The wisdom of such an approach is very much dependent however on local political and other realities;
- In principle, Bank-funded project have to respect national laws. In some countries, national laws contain higher levels of protection for indigenous peoples' rights

than OP 4.10. The Philippines' Indigenous Peoples' Rights Act is one such law, requiring FPIC and having, at least on paper, much higher protections for land and resource rights as the trigger for FPIC. In such countries, particular attention is required to assessing projects in relation to higher national legal standards in addition to OP 4.10 and in this sense it may be important to develop tailored training materials that focus on this aspect of Bank projects;

- A working relationship with the Indigenous Peoples' Unit at the Bank could also be useful in relation to all of the above as well as in general;
- Where a Bank project fails to adhere to the broad community support requirement or fails to apply the concept in an adequate manner, consideration could be given, where applicable, to filing a formal complaint with the Inspection Panel to seek a formal ruling on the nature and content of the concept (the risk would be that the Inspection Panel interprets the concept restrictively);
- Continue to provide input to and seek recommendations from the UN Permanent Forum with regard to the activities of Bank and interpretation and implementation of OP 4.10. Regional caucuses are the norm at the Permanent Forum and therefore, consideration can be given to formulating a regional position on OP 4.10 for discussion in the Asian caucus.

The IFC policy framework is still in draft form and although it is expected to be approved in January 2006, approval may take much longer. This makes it difficult to state concrete suggestions other than ones that pertain to the process of further elaborating the draft text and eventually its approval, or ones that apply to issues that almost certainly will appear in the final policy. Some of these are similar to those discussed above in relation to OP 4.10. I will begin with process issues:

- While there is not much time to do so, it is still important to submit national and regional statements expressing indigenous peoples' views on the IFC policy framework. At this time, this is best done by directing comments to Executive Directors rather than IFC staff, although until 25 November 2005, it is still possible to submit written comments electronically to the IFC. Comments to Executive Directors should be submitted not only to Asian EDs but also to all the EDs, and could focus on the lack of meaningful consultations with indigenous peoples as well as flaws with the substance. It is also important to raise these issues with Permanent Forum members and ask that they reiterate concerns to the IFC and others;
- The Equator Banks have a working group on the IFC policy revision process that provides input to the process as well as assesses implications for the Banks themselves. It is important to consider direct engagement with this group in order to seek strengthening of policy standards when these are incorporated into the common standards employed by the banks. This can be done using largely the same analysis as that employed for the IFC policy and in cooperation with sympathetic organizations monitoring the Equator Banks, such as the Bank Track Network. It is important to recall that these banks provide substantially more private sector financing than the IFC does and have expressed a willingness to address gaps in the IFC policy when they formulate or finalize their own standards;
- The points proposed in the section on OP 4.10 could all also apply to the IFC policy once adopted.

## **B. Project Level**

Projects present some of the same issues that were raised above in relation to policies – after all the policies apply primarily to projects – as well as some different issues. Interpretation and application of broad community support is one very important issue in relation to projects and policies, for instance. There will also be differences in the way an IFC project may be approached compared to a Bank project given that the former invariably involves private sector actors. Key suggestions include:

- Providing support to national and regional organizations to develop staff capacity to identify, advise affected communities on and monitor WBG-financed projects from as early in the project cycle as possible. Identifying projects early in the cycle is critical to success in influencing project design and subsequent implementation. A good understanding of the internal project processing cycle within the Bank is very important in this respect. As the project is designed through interactions between the government and the Bank, interventions should be addressed to both the Bank and government, although it may be strategic or, in some cases, the only option to focus more on the Bank and its compliance with safeguard policies – the only real means of holding the WBG accountable – if the government is inaccessible or unreceptive;
- Consultants are usually employed in the design of projects and it is also therefore important to try to identify and communicate with consultants, particularly those specifically addressing indigenous peoples' issues and legal issues;
- It is also important to identify the full range of financiers in WBG-funded projects, whether they have policies of their own and to what extent these apply to the project in question. It is also important to communicate concerns to all of the donors involved as one may raise issues with the Bank or the government and can assist in influencing the project in this way. It is not uncommon for certain donors to take and act on more supportive positions in relation to indigenous peoples' rights than the WBG and the government or client and this possibility should not be ignored;
- In IFC projects, it is important to identify company policies that may apply to indigenous peoples and also compare these to project criteria and performance. The company may also be a member of an industry group that has policies that can be raised, for instance, the International Business Leaders Forum or the International Council on Metals and Mining. These policies, with the exception of company policies, are almost always voluntary and therefore of limited utility. Pressure can also be brought to bear on companies through shareholder meetings and through investor groupings with an interest in the company;
- Finally, where national legal systems provide adequate remedies, strategic litigation against WBG projects could form part of an overall strategy for addressing deficits in rights protection. While domestic remedies may not always be sufficient to achieve adequate rights protection, litigation may nonetheless be useful as a means of exhausting local remedies for the purposes of having the case reviewed by an international human rights body. This option, however, is only available to indigenous peoples in those countries that have ratified the relevant human rights instruments and/or accepted the jurisdiction of human rights bodies to receive complaints.

This is an important strategic option over and above addressing specific cases because building a body of jurisprudence demonstrating that rights violations occur in WBG-projects strengthens the argument that OPs are inadequate and require strengthening and that the WBG in general needs to better address human

rights issues throughout its operations. While cases may not be brought against the Bank directly – it enjoys immunity from domestic legal action – they may nonetheless be brought against the government in relation to the same Bank-financed project and therefore decisions may apply by association to the Bank as well. The IFC is not necessarily immune and can be sued in countries where it maintains a country office. IFC client's may also be sued in domestic venues as may host governments for failure to protect indigenous peoples from violations perpetrated by corporations. In either case, where applicable, international complaints may then be filed once domestic remedies have been exhausted.

### **C. Programmatic Level**

Addressing issues at the programmatic level is a great deal more complicated than it is at either the policy or project levels. This is especially the case as many programmatic loans are not well publicized, if at all, and are not subject to the safeguard policies applying to indigenous peoples including the participation requirements set out therein. The main suggestion with regard to programmatic lending is to try and identify these loans and raise concerns before they are approved or otherwise at the earliest stage possible and to lobby both the government and the Bank to ensure that indigenous peoples are involved in decision making.

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## ENDNOTES

<sup>1</sup> *Working for a World Free of Poverty*. World Bank: Washington DC, 2003. Available at: <http://siteresources.worldbank.org/EXTABOUTUS/Resources/wbgroupbrochure.pdf>

<sup>2</sup> International Bank for Reconstruction and Development, *Articles of Agreement*, art. 9 (describing the process of review for any question of interpretation of the provisions of the Agreement). See, also, J. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at Multilateral Development Banks*, 52 U. KAN. L. REV. 241, at 271 (2004) (stating that “the charters place with the MDBs’ own governing bodies the complete authority to decide questions of charter interpretation or application”). For the views of two former General Counsels, see, Ibrahim F. I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 AM. U. J. INT’L L. & POL’Y 27, 29-30 (1992) and; K-Y. Tung, *Shaping Globalization*, *supra* note 43, at 34 (stating “It should be noted that while the General Counsel’s opinions carry enormous weight, the ultimate authority in interpreting the Articles of Agreement rests with the Bank’s Executive Directors, of whom there are twenty-four representing the 184 member countries”).

<sup>3</sup> *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, Vol. I, December 2003 (hereinafter ‘EIR Report’), 8. For a detailed overview of World Bank structural and sectoral lending related to extractive industries, see, H. Mainhardt-Gibbs, *The World Bank Extractive Industries Review: The Role of Structural Reform Programs towards Sustainable Development Outcomes*, August 2003. Available at: <http://www.eireview.org/doc/Structural%20Adjustment%20EIR%20Exec%20Summary%20Mainhardt%20Aug%2014.doc>

<sup>4</sup> ROBERT GOODLAND, *ECONOMIC DEVELOPMENT AND TRIBAL PEOPLES: HUMAN ECOLOGIC CONSIDERATIONS* (World Bank 1982).

<sup>5</sup> *Id.* at 3, 27.

<sup>6</sup> B. Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in, *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 324 (G.S. Goodwin-Gill & S. Talmon eds., Clarendon Press 1999).

<sup>7</sup> See OFFICE OF ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, WORLD BANK, *TRIBAL PEOPLES AND ECONOMIC DEVELOPMENT: A FIVE YEAR IMPLEMENTATION REVIEW OF OMS 2.34 (1982-1986) AND A TRIBAL PEOPLES’ ACTION PLAN* (World Bank 1987) (finding that projects were not complying with the new procedures for work involving tribal peoples).

<sup>8</sup> See generally Andrew Gray, *Development Policy, Development Protest: The World Bank, Indigenous Peoples and NGOs*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 267 (Jonathan A. Fox & L. David Brown eds., 1998) (describing the Bank projects and policies affecting indigenous peoples and criticism thereof).

<sup>9</sup> See Shelton Davis, *The World Bank and Operational Directive 4.20: The World Bank and Indigenous People*, in *INDIGENOUS PEOPLES AND INTERNATIONAL ORGANISATIONS* 75 (Lydia van de Fliert ed., 1994) (discussing the revision process completed by the Bank to their policy on indigenous peoples and the contours of the new policy, OD 4.20).

<sup>10</sup> *Operational Directive 4.20 on Indigenous Peoples* (1991), at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/0F7D6F3F04DD70398525672C007D08ED?OpenDocument>

<sup>11</sup> See THOMAS GRIFFITHS & MARCUS COLCHESTER, *REPORT ON A WORKSHOP ON ‘INDIGENOUS PEOPLES, FORESTS AND THE WORLD BANK: POLICIES AND PRACTICE’* 9-10 (2000) at <http://www.bicusa.org/mdbs/wbg/FinalsynthesisOctober2000.pdf> (noting substantial failures to comply with the policy).

<sup>12</sup> The International Finance Corporation is presently adopting its own safeguard policies. See *infra* and International Finance Corporation, *Policy and Performance Standards on Social and Environmental Sustainability*, Public Release Draft September 22, 2005 (hereinafter “IFC Draft”), available at [www.ifc.org/policyreview](http://www.ifc.org/policyreview) (esp., Performance Standard 7 on Indigenous Peoples and Performance Standard 5 on Involuntary Resettlement).

<sup>13</sup> See S. Davis et al., *Approach Paper on Revision of OD 4.20 on Indigenous Peoples* at <http://wbln0018.worldbank.org/essd/essd.nsf/28354584d9d97c29852567cc00780e2a/5e23e566bed37cd6852567cc0077f48d?OpenDocument> (recommending certain revisions to OD 4.20, specifically to identification of indigenous peoples, policy objectives and framework, and measures and procedures to facilitate policy implementation).

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<sup>14</sup> Draft OP 4.10, 23 March 2001, at <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/PoliciesDraftOP410March232001> For an extensive discussion of this draft, see Fergus MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527 (2002).

<sup>15</sup> See *Draft Operational Policy 4.10 Indigenous Peoples, Revised Consultation Draft* (unpublished World Bank doc.), 17 May 2004. Available at: [www.bicusa.org](http://www.bicusa.org)

<sup>16</sup> *Summary Report of World Bank Round Table Discussion of Indigenous Representatives and the World Bank on the Revision of the World Bank's Indigenous Peoples Policy*, 18 October 2002, at [http://forestpeoples.gn.apc.org/Briefings/World%20Bank/wb\\_ip\\_round\\_table\\_summary\\_oct\\_02\\_eng.pdf](http://forestpeoples.gn.apc.org/Briefings/World%20Bank/wb_ip_round_table_summary_oct_02_eng.pdf) See also, Thomas Griffiths, *Failure of Accountability: Indigenous Peoples, human rights and international development standards*. (Forest Peoples Programme, Moreton-in-Marsh 2003), at [www.forestpeoples.org](http://www.forestpeoples.org); *Summary of Consultations with External Stakeholders regarding the World Bank Draft Indigenous Peoples Policy (OP/BP 4.10) - last updated 7 October 2002* at [http://lnweb18.worldbank.org/ESSD/essd.nsf/1a8011b1ed265afd85256a4f00768797/c4a768e4f7c935f185256ba5006c75f3/\\$FILE/SumExtConsult-4-23-02.pdf](http://lnweb18.worldbank.org/ESSD/essd.nsf/1a8011b1ed265afd85256a4f00768797/c4a768e4f7c935f185256ba5006c75f3/$FILE/SumExtConsult-4-23-02.pdf); and, *Indigenous Peoples Statement at the 19th Session of the UNWIP (July 29, 2001)* at: <http://forestpeoples.gn.apc.org/briefings.htm> (criticizing that draft OP 4.10: "does not build upon and reinforce the positive language in the existing policy; fails to incorporate many of the key recommendations made by indigenous peoples during previous consultations on the Bank's 'approach paper' on the revision process; uses language that confuses consultation with effective participation; lacks binding provisions that seek to guarantee indigenous land and resource security; fails to recognize the right to free, informed prior consent; does not prohibit the involuntary resettlement of indigenous peoples; is not consistent with existing and emerging international standards on human rights and sustainable development; and does not advance international standards for dealing with indigenous peoples in development").

<sup>17</sup> *Id.*

<sup>18</sup> See among others, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results*. OED Report No. 25754, 10 April 2003, World Bank: Washington DC, at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016\\_20030501182633/additional/862317580\\_200306204005416.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016_20030501182633/additional/862317580_200306204005416.pdf); and, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An independent desk review* January 10, 2003, Country Evaluation and Regional Relations (OEDCR), OED Report No. 25332, World Bank: Washington, D.C. 2003

<sup>19</sup> See for instance, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 56 (observing that "...resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. Whereas the World Bank has developed operational directives concerning its own activities in relation to these issues ... and some national legislation specifically protects the interests of indigenous communities in this respect, in numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades"). See, also, Korina Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 HARVARD HUMAN RIGHTS J. 227 (2002).

<sup>20</sup> *The World Bank Participation Source Book*. (World Bank: Washington D.C. 1996), at 251.

<sup>21</sup> *Report of the Permanent Forum on Indigenous Issues on its Second Session*. UN Doc. E/2003/43; E/C.19/2003/22, at para. 33.

<sup>22</sup> OED Report No. 25332, *supra* note 18. For a discussion of institutional constraints in relation to safeguard policy compliance rates, see N. Bridgeman, *World Bank Reform in the "Post Policy" Era*, 13 GEORGETOWN INT'L ENVIRO. L. REV. 1013 (2001).

<sup>23</sup> OED Report No. 25754, *supra* note 18.

<sup>24</sup> *Id.*

<sup>25</sup> See The World Bank, International Bank for Reconstruction and Development, *Articles of Agreement*, (setting forth the purposes of the Bank), art. IV, sec.10 ("[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned"), at

<http://www.worldbank.org/html/extdr/backgrd/ibrd/arttoc.htm> See, also, Ibrahim F.I. Shihata, *Democracy and Development*, 46 INT'L & COMP. L.Q. 635, 638 (1997); and Ibrahim F. I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 AM. U. J. INT'L L. & POL'Y 27, 28 (1992). For a contrary view, see, SIGRUN I. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE*

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INTERNATIONAL MONETARY FUND (2001); and M. DARROW, *BETWEEN LIGHT AND SHADOW. THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* (2003).

<sup>26</sup> See *Summary Report of World Bank Round Table Discussion of Indigenous Representatives and the World Bank on the Revision of the World Bank's Indigenous Peoples Policy*, *supra* note 16.

<sup>27</sup> *Supra* note 10, at para. 6.

<sup>28</sup> *Globalization and its full impact on human rights. Final report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission decision 2000/105*. UN Doc. E/CN.4/Sub.2/2003/14, at para. 37.

<sup>29</sup> R. Danino, *The Legal Aspects of the World Bank's Work on Human Rights*. Paper presented at the New York University/Ethical Globalization Initiative Conference on Human Rights and Development: Towards Mutual Reinforcement, 1 March 2004, at 5. An edited version of this paper was published as: R. Danino: *The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts*. In: *HUMAN RIGHTS AND DEVELOPMENT TOWARDS MUTUAL REINFORCEMENT* (P. Alston & M. Robinson eds., 2005).

<sup>30</sup> Footnote 3 explains that the OP applies to all project components affecting indigenous peoples "regardless of the source of financing," presumably meaning that the OP applies when the Bank is a co-financer as well as the sole donor and irrespective of the particular source of financing within the Bank.

<sup>31</sup> *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002*. UN Doc. A/CONF.199/20/Corr.1, at 10, art. 25.

<sup>32</sup> It does note, in para. 4, that indigenous peoples may be referred to in different countries as "indigenous ethnic minorities," 'aboriginals,' 'hill tribes,' 'national minorities,' 'scheduled tribes' or 'tribal groups.'"

<sup>33</sup> The Inspection Panel is only authorized to review Bank compliance with its operational policies and is not permitted to assess national law standards. On the Inspection Panel in general, see DANA CLARK, JONATHAN FOX AND KAY TREAKLE (EDS), *DEMANDING ACCOUNTABILITY. CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL* (2003).

<sup>34</sup> See for instance, *Issues in Using Country Systems in Bank Operations*. Operations Policy and Country Services, World Bank, 8 October 2004 available at <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1097257794915/UseCountrySystems-10-08-04.pdf>

<sup>35</sup> *Id.* at 9-10.

<sup>36</sup> See *inter alia*, See Inspection Panel (2000) *The Quinghai Project: a component of the China-Western Poverty Reduction Project (Credit No.3255-CHA and Loan No.4501-CHA)* Inspection Panel Investigation Report, April 28, 2000; and, Dana Clark, *The World Bank and Human Rights: The Need for Greater Accountability*. 15 HARVARD HUMAN RIGHTS JOURNAL 205 (2002).

<sup>37</sup> *Supra* note 34, at 31.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Inter alia*, *supra* note 18.

<sup>41</sup> See *inter alia*, *Statement by indigenous peoples participating in the 19<sup>th</sup> Session of the UN Working Group on Indigenous Populations* *supra* note 16. For an overview of treaty provisions, jurisprudence and development policies on indigenous peoples' right to FPIC, see *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebteba Foundation*. UN Doc. E/CN.4/Sub.2/AC.4/2004/4, (8 July 2004). See also, Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, IV(2) SUSTAINABLE DEV. LAW & POLICY 43 (2004).

<sup>42</sup> *Dams and Development: A new framework for decision-making. The Report of the World Commission on Dams* (2000), 112 (see also, 267, 271, 278)

<sup>43</sup> *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review* (hereinafter "EIR Report"), Vol. I, December 2003, p. 21, 50, 60. The EIR was commissioned in 2001 by the President of the WBG, James Wolfensohn, to examine what role, if any, the WBG has in the oil, gas and mining sectors. It comprised a two year-long process of regional 'stakeholder' meetings, project site visits, commissioned research on particular issues, consideration of two internal WBG evaluations relating to extractive industries, and dialogue with World Bank staff. See *Extractive Industries and Sustainable Development. An Evaluation of World Bank Group Experience*. OED/OEG/OEU, World Bank (2003) and; *Extracting Sustainable Advantage? A review of how sustainability issues have been dealt with in recent IFC & MIGA extractive industries projects. Final*

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Report. Compliance Advisor Ombudsman, World Bank, April (2003). The EIR's Final Report, presented to the WBG in January 2004, was authored by Dr. Salim and contains a number of potentially far reaching recommendations about how the WBG conducts business and how human rights, including indigenous peoples' rights and FPIC, should be accounted for and respected in WBG policies and operations.

<sup>44</sup> IFC Draft *supra* note 12.

<sup>45</sup> *Striking a Better Balance – The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review. World Bank Group Management Response*, 17 September 2004, p. 7, 9, available at <http://www.worldbank.org/ogmc>

<sup>46</sup> *Statement of Rapee Asumpinpong, Extractive Industries Review and Management Response*, EDS2004-0626 (unpublished World Bank doc.), 2 August 2004, at 3.

<sup>47</sup> *Statement by Eckhard Deutscher, Striking a Better Balance – The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review – Draft World Bank Group Management Response*, EDS2004-0612 (unpublished World Bank doc.), 2 August 2004, 3; and *Statement by Pietro Veglio, The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review*, EDS2004-0610 (unpublished World Bank doc.), 2 August 2004, 4.

<sup>48</sup> *Statement by Ad Melkert, Management Response to the Extractive Industries Review*, EDS2004-0609 (unpublished World Bank doc.), 2 August 2004, at 3.

<sup>49</sup> According to the World Bank website: "A guidebook for Bank staff in implementing the Bank's Indigenous Peoples Policy is under preparation. Sections will be dedicated to special issues arising in each of the Bank's operational regions as well as the major sectors where projects affecting Indigenous Peoples can also be found. Specific guidelines for Bank staff in implementing the policy at different stages of the project cycle will also be provided," available at <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/TheIndigenousPeoplesPolicyGuidebook>

<sup>50</sup> *Bank Procedures 4.10 on Indigenous Peoples*, July 2005, at para. 7, available at: <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/DBB9575225027E678525703100541C7D?OpenDocument>

<sup>51</sup> See *inter alia*, *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of August 31, 2001. Inter-American Court of Human Rights, Series C No. 79, para. 146, 148, 164 (holding that states "must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores"). *Id.* at 164, 173.

<sup>52</sup> See *Government's Policy for Exploration and Development of Minerals and Petroleum of Guyana*. Georgetown: Government of Guyana, (1997), at 12 ("Government has decided that recognized Amerindian lands would stand exempted from any survey, prospecting or mineral agreements unless the agreement of the Captain and Council for the proposal is obtained by the Guyana Geology and Mines Commission in writing").

<sup>53</sup> *Native Title Act (Cth) 1993*, sec. 25-44. The right to negotiate was substantially limited by the *Native Title Amendment Act (Cth) 1998*, which exempted entire categories of lands from the right to negotiate and, in some situations, authorised States and Territories to substitute reduced procedural rights. See G Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998 (Cth)*, 22 U. OF NEW SOUTH WALES L. J. 564 (1999).

<sup>54</sup> *Supra* note 45, at 8.

<sup>55</sup> *Id.* at 9

<sup>56</sup> See among others, *Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP)*. Doc. GB 270/16/4; GB 270/14/4 (1998), at para. 26 (finding that "when communally owned indigenous lands are divided and assigned to individuals or third parties, the exercise of their rights by indigenous communities tends to be weakened and generally end up losing all or most of the lands, resulting in a general reduction of the resources that are available to indigenous peoples when they keep their lands in common").

<sup>57</sup> See *inter alia*, T. Downing, *Indigenous Peoples and Mining Encounters: Strategies and Tactics*, Minerals Mining and Sustainable Development Project: International Institute for Environment and Development and World Business Council: London (2002). (concluding that indigenous peoples experiences with the mining industry have largely resulted in a loss of sovereignty for traditional landholders; the creation of new forms of poverty due to a failure to avoid or mitigate impoverishment risks that accompany mining development; a loss of land; short and long-term health risks; loss of access to common resources; homelessness; loss of income; social

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disarticulation; food insecurity; loss of civil and human rights; and spiritual uncertainty). *Id.* at 3. See also, *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21. at paras. 66-7.

<sup>58</sup> EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK. (E. Caruso *et al.*, eds., Tebtebba Foundation & Forest Peoples Programme: Capitol Publishing House: Manilla, 2003), at 9.

<sup>59</sup> See OED Report No. 25754, *supra* note 18, at 26 (observing that mining and energy projects “risk and endanger the lives, assets, and livelihoods of [indigenous peoples]. Moreover, modern technology allows interventions in hitherto remote areas, causing significant displacement and irreparable damage to IP land and assets. In this context, IP living on these remote and resource rich lands are particularly vulnerable, because of their weaker bargaining capacity, and because their customary rights are not recognized in several countries”).

<sup>60</sup> For requirements of a resettlement plan, see *OP 4.12 on Involuntary Resettlement*, December 2001 (revised April 2004), para. 6, available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/CA2D01A4D1BDF58085256B19008197F6?OpenDocument>

<sup>61</sup> *Supra* note 15, para. 20 (providing that involuntary relocation may take place subsequent to “consultation” with indigenous peoples). See also, *id.* para. 9, which provides that:

Bank experience has shown that resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival. For this reason, the Bank satisfies itself that the borrower has explored all viable alternative project designs to avoid physical displacement of these groups. When it is not feasible to avoid such displacement, preference is given to land-based resettlement strategies for these groups (see para. 11) that are compatible with their cultural preferences and are prepared in consultation with them.

<sup>62</sup> OP 4.12, paragraph 7, provides that:

7. In projects involving involuntary restriction of access to legally designated parks and protected areas (see para. 3(b)), the nature of restrictions, as well as the type of measures necessary to mitigate adverse impacts, is determined with the participation of the displaced persons during the design and implementation of the project. In such cases, the borrower prepares a process framework acceptable to the Bank, describing the participatory process by which

- (a) specific components of the project will be prepared and implemented;
- (b) the criteria for eligibility of displaced persons will be determined;
- (c) measures to assist the displaced persons in their efforts to improve their livelihoods, or at least to restore them, in real terms, while maintaining the sustainability of the park or protected area, will be identified; and
- (d) potential conflicts involving displaced persons will be resolved.

The process framework also includes a description of the arrangements for implementing and monitoring the process.

<sup>63</sup> See, among others, T. Griffiths, *Indigenous Peoples and the Global Environment Facility (GEF). Indigenous Peoples’ experiences of GEF-funded Biodiversity Conservation – A critical study*. Forest Peoples Programme, UK (January 2005), available at:

[http://www.forestpeoples.org/documents/ifi\\_igo/gef/gef\\_study\\_jan05\\_eng.pdf](http://www.forestpeoples.org/documents/ifi_igo/gef/gef_study_jan05_eng.pdf); and K. Schmidt-Soltau, Conservation-related Resettlement in Central Africa: Environmental and Social Risks, *DEVELOPMENT AND CHANGE* **34**: 525-551 (2003).

<sup>64</sup> *Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments)*, at para. 8.

<sup>65</sup> Convention on Biological Diversity (June 5, 1992), at <http://www.biodiv.org/doc/legal/cbd-en.pdf>

<sup>66</sup> Decision VII/28 Protected Areas, at para. 22. In, *Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting*. UNEP/BDP/COP/7/21, pps. 343-64.

<sup>67</sup> See OP 4.01 on Environmental Assessment and OP 4.36 on Forests.

<sup>68</sup> IFC Draft, at 2.

<sup>69</sup> *Id.*, at 1.

<sup>70</sup> See *The Equator Principles*. Available at: <http://www.equator-principles.com>

<sup>71</sup> *IFC Strategic Directions 2004*, International Finance Corporation: Washington D.C., 23 March 2004, 2. Available at:

[http://www.ifc.org/ifcext/about.nsf/AttachmentsByTitle/2004StrategicDirections/\\$FILE/2004StrategicDirectionsPaper.pdf](http://www.ifc.org/ifcext/about.nsf/AttachmentsByTitle/2004StrategicDirections/$FILE/2004StrategicDirectionsPaper.pdf)

<sup>72</sup> IFC Draft, p. 25.

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<sup>73</sup> *Id.*, at 26.

<sup>74</sup> *Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, adopted by the 7<sup>th</sup> Conference of Parties to the Convention on Biological Diversity.

<sup>75</sup> IFC Draft, at 4

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.* at 113, Guidance Note 24.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> *Id.* at 3.

<sup>80</sup> *Id.* at 3 and Draft IFC Environmental and Social Review Procedures, at 4.2.2.

<sup>81</sup> *Id.* at 114, Guidance Note 28.

<sup>82</sup> *Id.* Guidance Note 29

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Draft IFC Environmental and Social Review Procedures*, Working Draft, Version 0.1, 22 September 2005, at 3.2.9. Available at: [www.ifc.org/policyreview](http://www.ifc.org/policyreview)

<sup>85</sup> See, *Memorandum of Ian Johnson, EESD World Bank, to Asaad Jabre, IFC*, 5 August 2005, available at: [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/IFC+Response+and+ESSD+letter/SF+ILE/IFC+Cover+Note+ESSD+Memo\\_.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/IFC+Response+and+ESSD+letter/SF+ILE/IFC+Cover+Note+ESSD+Memo_.pdf)

<sup>86</sup> *IWGIA Yearbook 1990*, IWGIA: Copenhagen, 71.

<sup>87</sup> *Charter of the Indigenous-Tribal Peoples of the Tropical Forests 1992*, article 25.

<sup>88</sup> The revision process pertaining to OP 4.10 as well as other WBG processes affecting indigenous peoples are discussed in detail in, T. Griffiths, *Indigenous peoples and the World Bank: experiences with participation*, Forest Peoples Programme, UK (July 2005), available at:

[http://www.forestpeoples.org/documents/ifi\\_igo/wb\\_ips\\_and\\_particip\\_jul05\\_eng.pdf](http://www.forestpeoples.org/documents/ifi_igo/wb_ips_and_particip_jul05_eng.pdf)

<sup>89</sup> The discussions held at the legal roundtable are summarized in, M. Castello, *World Bank Round Table Discussion of Indigenous Representatives and the World Bank on the Revision of the World Bank's Indigenous Peoples Policy. Summary Report*. Forest Peoples Programme, UK (2003), available at

[http://www.forestpeoples.org/documents/ifi\\_igo/wb\\_ip\\_round\\_table\\_summary\\_oct\\_02\\_eng\\_.pdf](http://www.forestpeoples.org/documents/ifi_igo/wb_ip_round_table_summary_oct_02_eng_.pdf)

<sup>90</sup> *Indigenous Peoples' Statement to a Round Table Discussion on the Revision of the World Bank Policy on Indigenous Peoples*, 18 October 2002, available at:

[http://www.forestpeoples.org/documents/ifi\\_igo/wb\\_ip\\_round\\_table\\_ip\\_statement\\_oct02\\_eng.shtml](http://www.forestpeoples.org/documents/ifi_igo/wb_ip_round_table_ip_statement_oct02_eng.shtml)

<sup>91</sup> *Multilateral Development Banks (MDBs) and Indigenous Peoples' Rights, including Free, Prior Informed Consent*, Statement to the Fourth Session of the UN Permanent Forum on Indigenous Issues (May 2005), available at:

[http://www.forestpeoples.org/documents/ifi\\_igo/wb\\_4\\_10\\_ip\\_statemnt\\_may05\\_eng.shtml](http://www.forestpeoples.org/documents/ifi_igo/wb_4_10_ip_statemnt_may05_eng.shtml)

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Griffiths, *supra* note 88, at 13.

<sup>95</sup> OED Report No. 25332, *supra* note 18, at 20.

<sup>96</sup> *Id.* at 36.

<sup>97</sup> OED Report No. 25754, *supra* note 18, at 11.

<sup>98</sup> *Id.* at 20.

<sup>99</sup> EIR Report, *supra* note 3, at 37.

<sup>100</sup> A. Liebenthal, *Promoting Environmental Sustainability in Development: An Evaluation of World Bank Performance*. Washington DC: World Bank 2002, at 21, 24.

<sup>101</sup> EIR Report, at 41.

<sup>102</sup> Letter of Dr. Emil Salim to J. Wolfensohn, President of the World Bank, 12 January 2004. Available at: <http://www.eireview.org/doc/Letter%20to%20Wolfensohn%2012%20Jan%202004-final.doc>

<sup>103</sup> *Supra* note 88, at 16.

<sup>104</sup> *Id.* at 15-16.