INDIAN LAW RESOURCE CENTER
CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS
601 E. Street S.E. • Washington, D.C. 20003 • 202-547-2800 • www.indianlaw.org

# The World Bank's Indigenous Peoples Policy: Successes and Setbacks in Indigenous Advocacy

October 2005

## 1. Background

Despite the World Bank's mission to reduce poverty, many of the development projects it has funded have caused significant damage and dislocation to indigenous communities. By the 1970s, the need for internal checks on the Bank to avoid the worst of these abuses had become clear. Under international pressure from indigenous peoples and others, the World Bank issued its first internal policy on "tribal peoples" in 1982, and a revised policy on indigenous peoples in 1991. In 1994, the Bank launched an effort to revise all of its internal policies, and in 1998 it presented for public review and consultation an approach paper on a new indigenous peoples policy. Seven years later, in May 2005, the Bank's Board of Directors officially approved the new policy.

Indigenous advocates and their supporters have led the efforts to reform the World Bank's indigenous policies and have made significant procedural and substantive progress. From the 1982 tribal peoples policy to the newly approved policy on indigenous peoples, known as Operational Policy 4.10, indigenous leaders and other advocates have forced a greater degree of transparency and openness in each revision process, and have won incremental improvements in the policies' substantive protections for the indigenous peoples. These victories have been hard-fought, and are a testament to the persistence and commitment of indigenous peoples to reform the institution. In a number of instances, indigenous leaders and their allies gained unprecedented access to Bank officials and thereby blazed a trail for other stakeholders seeking to improve Bank transparency and accountability.

Despite professing an interest in including indigenous peoples in the earliest stages of revising its indigenous peoples policy, the Bank crafted OP 4.10 behind closed doors, allowing only the most cursory input and hardly taking that input into account in the draft it first presented for public review in 2001. Indigenous advocates responded to this early draft and the process that produced it with strong criticism of the lack of transparency and the failure of the Bank to effectively consult with indigenous experts.

The Bank ultimately acceded to pressure from indigenous peoples to extend to a year and a half consultations originally scheduled to last three months. It failed, however, to heed advice about how to make these consultations effective. Consequently, in the Bank's consultations, indigenous peoples were sometimes informed of meetings only days in advance; asked to "consult" about documents completely unavailable in their own languages or first presented to

them on the day of the consultation; and expected to listen rather than dialogue. Time and again, participants protested these conditions, with little effect. In addition, the Bank agreed only after vigorous advocacy from indigenous leaders to complete part – but not all – of a review of the implementation of its 1991 policy before finalizing the new policy. Perhaps because of these procedural failures, the Bank also failed to respond to indigenous demands regarding many of the policy's core substantive protections for indigenous legal rights, especially rights to land, territories and resources.

Nonetheless, however, indigenous advocates won significant procedural and substantive victories in their efforts to improve the Bank policy. In 2002, a group of indigenous leaders who gathered in Washington for meetings of the Organization of American States secured a meeting with the Bank Vice-President in charge of the policy revision, Ian Johnson, to discuss the policy, and elicited a commitment to a serious meeting with the Bank's legal counsel.

That meeting, deemed a Legal Roundtable, took place over two days in October of 2002, and attracted some of the Bank's most senior lawyers and officials, as well as indigenous representatives from around the world. The meeting provided an opportunity for a serious dialogue about the internationally-recognized legal rights of indigenous peoples and the need for the policy to require respect for those rights. After a lengthy and substantive discussion, Vice-President Johnson announced that the Bank would withdraw its revised indigenous peoples' policy, redraft it to take better account of concerns that had been raised, and offer the redraft for public comment. This marked the first time in the Bank's history that it had withdrawn and redrafted a proposed revised safeguard policy, a significant milestone for indigenous rights advocates. The Roundtable also led to the establishment of a new Bank lending program dedicated to funding development projects initiated by indigenous peoples themselves.

Bank staff presented for public review a newly revised draft of the indigenous peoples policy in 2004. While the 2004 redraft did not include all the changes recommended by indigenous advocates, it did incorporate important improvements to the draft policy. These improvements result directly from indigenous advocacy and will benefit indigenous peoples affected by the Bank's development lending. For example, the redrafted policy dropped an earlier provision excluding "urban" indigenous peoples from coverage and expanded the requirement that the borrower prepare an indigenous peoples plan to apply whether or not the project was expected to adversely affect indigenous peoples. In addition, the redraft removed a provision that suggested that the borrower's domestic law could serve as a guide in determining whether a particular group qual group qualified as an indigenous people. Finally, the redraft also imposed a requirement that no physical relocation of indigenous peoples be conducted without the "broad support" of the community for such relocation.

Despite these significant improvements, indigenous advocates expressed grave concerns that the redrafted policy would not provide protections necessary to insure that indigenous peoples' international legal rights were upheld. Nonetheless, the Bank's Board of Directors approved the new policy in May, 2005. Accompanying the public record of its decision was a document prepared by the Bank's General Counsel, which concluded that the approved policy was "consistent with emerging international principles and practices related to indigenous peoples." Unfortunately, this "Legal Note" failed to analyze in any depth the emerging principles and

practices to which it referred, comprising instead a listing of existing sources of international law on the matter and a conclusory statement about the policy's consistency with them. For this reason, the document is not a serious analysis and does not directly address the international legal arguments made by indigenous advocates.

## 2. Policy Analysis

In its final form, OP 4.10 contains significant advances over the 1991 policy. Perhaps most importantly, OP 4.10 imposes new requirements on projects affecting lands traditionally used and occupied by indigenous peoples. While the policy does not require that legal rights be recognized in all such circumstances, it mandates procedures by which such recognition is to be sought in most cases. The new policy also strengthens the role of indigenous communities in decision-making by requiring their prior informed consultation on Bank-funded activities that will affect them, and requires "prior agreement" by indigenous peoples for any commercial development of indigenous cultural resources. Unlike the 1991 policy, OP 4.10 recognizes some of the special concerns raised by conservation areas and extractive industries. And, to a much greater extent than the 1991 policy, OP 4.10 emphasizes the need for "culturally appropriate" informational materials, project benefits, and consultation processes.

As indigenous advocates have long pointed out, however, OP 4.10 has serious shortcomings that are likely to allow Bank-funded activities to continue to jeopardize the rights and interests of indigenous peoples. As explored more fully below, many of these weaknesses flow from the Bank's refusal to require that project activities respect internationally-recognized legal rights.

### A. Lands and Related Natural Resources

The newly revised OP 4.10 recognizes that the identities and cultures of indigenous peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. OP 4.10 also states that when indigenous peoples' ties to land, forests, water, wildlife and other natural resources are affected by a Bank project, special considerations will apply.

While these statements reaffirm the importance of indigenous peoples' relationship to their lands and resources, OP 4.10 does not adequately clarify how "special considerations" will be applied and under what circumstances. In this regard, OP 4.10 lacks strong binding procedural language to ensure that indigenous peoples' collective rights to their lands and resources are recognized and upheld under all circumstances. In places, for example, the policy merely requires that the borrower "pay particular attention" to indigenous customary land and resource rights, and in others it makes only vague and inconsistent mention of the circumstances that would trigger such attention.

Under international human rights law, indigenous peoples have the right to collective ownership of their lands and territories based on their longstanding use and occupancy of those areas. These rights exist independently of countries' own laws. Since the Bank policy fails to impose clear

requirements that these internationally recognized rights be respected, it may not protect such rights when a borrower's domestic laws are lacking. Since this is the case in much of the world, this failure poses a grave threat to indigenous lands.

In addition, the policy does not require the full and effective participation and consent of indigenous peoples in the legal recognition of their lands and territories or when project activities involve the commercial development of their lands. This omission can be particularly problematic when a borrower's preferred means of legal recognition would parcel indigenous lands out to individuals rather than respect traditional collective ownership. Such parceling has led to widespread land loss and displacement in the US and elsewhere.

### B. Free Prior Informed Consultation

Despite indigenous advocates' insistence that Bank policies respect the principle of free prior informed consent, OP 4.10 instead embraces a novel standard of "free prior informed consultation leading to broad community support." As noted above, inclusion of this formulation represents an advance over the 1991 policy by placing new emphasis on indigenous decision-making. Nonetheless, however, the concepts of free prior informed consultation and broad community support fall short of international standards. International law increasingly recognizes the right of indigenous peoples to give free prior informed consent to development activities that affect them. This right flows from the right of indigenous peoples to their property, as discussed above, and to self-determination.

OP 4.10 provides that when a project will affect indigenous people, the borrower must conduct a social assessment and free prior and informed consultations. Based on the results of these activities, the borrower may determine whether to proceed. The borrower thus possesses ultimate discretion to assess social impacts and to determine whether indigenous communities have provided their support pursuant to free prior informed consultations. This discretion undermines indigenous peoples' right to make all decisions with respect to their lands, territories and resources in accordance with their own laws and customs.

Indigenous rights to lands, territories, and resources are often denied legal recognition or protection under domestic laws. In these situations the right of free prior informed consent is especially important. Large-scale development and extractive industries can obliterate resources, make land uninhabitable, and effectively destroy indigenous communities with rightful claims to the land and resources at issue. As a result, the right of free prior informed consent must be respected in all situations where indigenous rights and interests are claimed, even if the full range of indigenous ownership and governance rights is in dispute or may not be entirely clear or settled. This right does not amount to a "veto" by any individual, but instead respects whatever customary communal decision-making process an indigenous community employs.

### C. Physical Relocation of Indigenous Peoples

While OP 4.10 improves upon the 1991 policy's treatment of the issue of physical relocation of indigenous peoples, its provisions on relocation remain seriously flawed. The policy provides that the prerequisites for a resettlement plan are determined by the borrower, without requiring the consent and participation of the affected indigenous peoples. In addition, the OP gives the borrower discretion to determine whether there is an alternative project design that would avoid the physical relocation of indigenous peoples. Without an independent mechanism to assess the feasibility of alternatives and to verify that indigenous peoples have in fact provided their free prior informed consent if resettlement is pursued, OP 4.10 will not adequately protect indigenous peoples from forcible relocation. Such relocation has proven devastating to indigenous communities, which typically derive substantial cultural cohesion from their land bases.

### C. Parks and Protected Areas

In regards to parks and protected areas, OP 4.10 also falls short. In situations in which parks and protected areas have been established in indigenous peoples' lands and territories, OP 4.10 states that involuntary restrictions on indigenous peoples' access should be avoided. Where such restrictions cannot be avoided, however, the borrower may proceed as long as guidelines for involving indigenous peoples in a management plan are prepared.

Under international law, the overlap of parks or protected areas with indigenous lands does not justify derogation or limitation of indigenous peoples' rights to their lands and resources, including hunting, fishing, and gathering rights. OP 4.10 incorrectly assumes that the Bank and or the borrower can voluntarily decide to restrict these rights. As noted above, indigenous lands should not be subject to any external interference, however well-intentioned, without consent. Further, where parks and protected areas overlap with indigenous lands, indigenous peoples should be able to continue to access them and should receive fair compensation for any losses they sustain.

### D. Project Preparation

OP 4.10 fails even to mention the need to guarantee the participation of indigenous peoples in critical stages of project development and implementation. There is typically unequal bargaining power among indigenous peoples and states, international financial institutions, and private development interests. For this reason, special measures should be required to ensure that indigenous peoples participate in decisions that affect their rights and interests.

### E. Country Systems

OP 4.10's introduction of the use of country systems presents a new and serious risk This approach will allow a borrower, pursuant to Bank approval, to use its domestic laws as a basis for achieving the objectives of OP 4.10. If weak and subjective criteria are used to determine

equivalence, a country system approach may result in the application of standards significantly lower than those contained in OP 4.10.

For example, OP 4.10 does not specify what criteria and timeframe the Bank would use to ensure that deficiencies in the country's domestic system are "strengthened" prior to bestowing approval for the use of particular country system. There is also no mention of what the Bank would do if necessary improvements are not carried out, or if the domestic policies or legislation that were considered equivalent with OP 4.10 are later weakened.

### F. Summary

As indigenous advocates have long argued, while OP 4.10 improves upon the Bank's 1991 policy, it fails to ensure that Bank-financed development projects will fully respect the rights of indigenous peoples. This failure is likely to lead not only to the devastation of indigenous communities but also to increases in civil conflict and decreases in the productivity and development effectiveness of these projects. The policy also bodes ill for the Bank's overarching approach: to the extent that OP 4.10 can be seen as a model, the Bank apparently intends to continue to support development that does not conform to baseline legal rules increasingly embraced by the international community. This may well have serious impacts on biodiversity, the environment, workers' rights, and numerous other arenas. As long as the Bank continues to maintain that it is not bound by existing international laws, abuses are certain to continue.

## 3. Future Strategies

Indigenous leaders, NGOs and others have made historic progress in placing legal accountability, human rights, and participatory decision-making squarely on the agenda of the World Bank. We believe that our advocacy has changed the parameters of debate about policy design and implementation among these institutions.

Nevertheless, we have fallen short of fully realizing our objective to obtain strong, binding safeguard policies that integrate indigenous rights and standards. The World Bank's institutional resistance to acknowledging any obligation to comply with international human rights law threatens ultimate success in protecting indigenous communities from the harmful effects of top-down development projects. Given stagnation at this level, some advocates are now considering a strategy to create new legal standards at the United Nations that will obligate the MDBs to respect indigenous lands and the environment.

Almost thirty years ago, indigenous peoples approached the UN to seek recourse for human rights violations they could not remedy in their respective countries due to rampant discrimination and oppression. Initially, the United Nations was resistant to indigenous demands for recognition and protection of their rights. Many governments insisted that indigenous peoples were mere populations or ethnic minorities with no distinct rights as peoples. Today,

however, governments and indigenous leaders are working together to develop a UN Declaration on the Rights of Indigenous Peoples that will proclaim rights that must be respected by all member states. This historic struggle has taken decades; but the visionary leadership and persistence of indigenous peoples and their allies has permanently placed indigenous rights on the political and policy agenda of all states.

The World Bank has repeatedly denied that it bears legal responsibility to promote and protect human rights, arguing that it is not a state and that its articles of agreement prohibit it from addressing such concerns. New international legal standards are needed that will be directly and particularly applicable to the World Bank. Such new standards should be drafted to address clearly the Bank's specific activities and decisions that constitute, result in, or promote violations of human rights.

The process for developing international human rights law is relatively well established. In general, approval of new legal standards involves the human rights organs of the UN and is accomplished by educating and persuading states of the need for and wisdom of such standards.

Developing a strategy for creating new legal rules applicable to MDBs will require consultations among indigenous communities and leaders, potential allies and collaborators, and experts. Advocates will need to assess the level of interest and the capacity of various organizations and constituencies to contribute to the effort. Indigenous communities and NGOs, environmental groups, and others concerned with World Bank activities must be involved in developing this strategy collaboratively. It will also be important to evaluate the possibility of using the OAS, European and African human rights systems for developing standards. With sufficient support and collaboration, however, we can be hopeful that a framework will emerge to clarify the World Bank's human right obligations and increase the Bank's effectiveness in reducing poverty.