INDIAN LAW RESOURCE CENTER

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Written Comments of the Indian Law Resource Center On the World Bank's Draft OP 4.10

The draft OP 4.10 released for public comment in December of 2004 contains shortcomings that are likely to jeopardize the rights and interests of indigenous peoples. Highlighted below are the shortcomings most likely to undermine the international human rights standards applicable to indigenous peoples.

Lands and Related Natural Resources

The newly revised O.P 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. The 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 which will ensure that indigenous peoples' collective rights to their lands and resources will be recognized and upheld under any and all circumstances.

Specifically, in paragraph sixteen, the policy merely requires that the borrower "pay particular attention" to the customary land and resource rights of Indigenous Peoples. In paragraph seventeen, eighteen, and nineteen, OP 4.10 provides some parameters defining the circumstances that trigger special attention. Nevertheless, some of these parameters, particularly those listed in paragraph seventeen and eighteen, are unclear and inconsistent with indigenous peoples' rights under international law.

In paragraph seventeen, for example, OP 4.10 states that if a project involves:

a) activities that are contingent on establishing legally recognized rights to indigenous lands and territories traditionally owned or customarily used or occupied (such as land titling)
b) or the acquisition of such lands,

the Bank will require an IPP (Indigenous Peoples' Plan) that includes an action plan for the legal recognition of indigenous peoples' ownership, occupation, or usage of such lands.

As written, paragraph seventeen undermines the type and nature of legal recognition that should be required. Under international human rights law, indigenous peoples have the right to collective ownership and use of their lands and territories based on their longstanding use and occupancy of these lands and territories. These rights exist independently of the domestic laws of states. As such, legal recognition of indigenous peoples' ownership of their customarily used and occupied lands must be the standard used by the Bank, regardless of whether such rights are recognized under a borrower's domestic law.

In contrast, OP 4.10 does not require that the legal recognition of indigenous ownership be the standard; the draft language in paragraph seventeen will allow the Bank and borrowers to reduce indigenous peoples' rights to mere usufruct or user rights. By setting a lower standard, OP 4.10 stands in direct contravention of international law. In addition, action to secure the legal recognition of indigenous peoples' customarily used and occupied lands will be taken only for land title or land acquisition projects.

The legal recognition that is to be secured in paragraph seventeen applies only to those "lands and territories that Indigenous People traditionally owned, or customarily used or occupied." There exist many situations in which indigenous peoples have been illegally dispossessed of their traditional lands and now live and depend on lands that they have acquired by other means. The lands and territories that indigenous peoples may have acquired by means other than traditional or customary occupation or use, should therefore, also be covered by OP 4.10.

In addition, paragraph seventeen does not require the full and effective participation and the consent of indigenous peoples when measures are taken to secure the legal recognition of their lands and territories. In those cases in which customary usage rights are converted to ownership rights, this is particularly problematic because it may invite situations in which indigenous lands are converted to individual titles without the community's consent. Without guaranteeing indigenous participation and prior consent, OP 4.10 stands to severely jeopardize the rights and interests of indigenous peoples.

Paragraph eighteen is also highly problematic. This paragraph does not require that prior consent be obtained when activities involve the commercial development of natural resources on indigenous lands or territories. Furthermore, paragraph eighteen stipulates that any compensation that indigenous people receive as a result of such commercial development will be at least equivalent to that which any landowner would be entitled. Indigenous people are not comparable to "any landowner" given their rights as distinct peoples under international law. Paragraph eighteen also fails to cover project activities that affect indigenous peoples' lands and territories in general, and not just the natural resources located on those lands. Infrastructure and other large mega projects pose severe threats to indigenous lands, and they should also be covered by OP 4.10.

Free Prior Informed Consultation

OP 4.10 requires that when a project affects indigenous people, the borrower shall conduct free prior and informed consultations. In paragraph eleven, OP 4.10 states that those consultations, along with the social assessment required in paragraph nine, will be the two determining factors

used by the borrower to decide whether to proceed with a project or not. As written, the borrower possesses the ultimate discretion to determine whether indigenous communities have, or have not, provided their broad support. This discretion creates a genuine conflict of interest and undermines indigenous peoples' right to make all decisions with respect to their lands, territories and resources in accordance with their own laws and customs.

Free prior and informed consultation, leading to broad community support as determined by the borrower, is not an acceptable substitute for free prior informed consent. As a part of their collective rights to ownership of their property and self-determination, indigenous peoples' have the right to protect the use and disposition of their lands, territories, and resources. Indigenous' peoples' right to free prior informed consent is one of the particularly important incidents of their collective rights to property and self-determination. As such, international law requires that the Bank respect all rights of indigenous peoples, including the right of free prior informed consent. While ILO Convention 169, in particular, requires that consultations be conducted with the intent of achieving consent, this obligation arises independently of the commitment made by parties to ILO 169, as demonstrated in Inter-American Human Rights Commission and Court decisions regarding indigenous peoples' property rights.

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 permanently remove resources, make land uninhabitable, and effectively destroy indigenous communities that have rightful claims to own 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.

OP 4.10 should be rewritten to establish the free prior informed consent of indigenous peoples as a prerequisite for pursuing projects involving indigenous lands and resources. OP 4.10 should also require additional procedures for documenting the results of all consultations conducted and the views of affected indigenous peoples. As currently drafted, paragraph eleven requires that the process of consultations- not the results of the consultations- be documented only for those projects where the borrower has ascertained that there is broad community support. Consultations that do not result in broad community support should be documented and evaluated as well.

OP 4.10 also lacks specific procedures that specify what actions the Bank and its borrowers need to take should an indigenous community decide to rescind its consent. There may be situations in which the original conditions that gave rise to a community providing its consent are significantly altered, prompting the community to oppose the continuation of the project activity at issue. In such cases, indigenous peoples' objections must be respected. OP 4.10 also lacks a clear mechanism that allows indigenous peoples to dispute situations in which they feel that they have withheld their free prior and informed consent, yet the borrower has determined otherwise.

Physical Relocation of Indigenous Peoples

OP 4.10 contains some positive changes in comparison to OD 4.20 regarding the development of land-based resettlement plans where the physical relocation of indigenous peoples can not be avoided. Despite these advances, OP 4.10 contains serious gaps because the prerequisites for a resettlement plan center are determined by the borrower, without the consent and participation of the affected indigenous peoples.

Paragraph twenty specifies that the borrower will explore alternative project designs to avoid the physical relocation of indigenous peoples. Where there are no feasible alternatives, the borrower will not carry out physical relocation if broad community support from the affected indigenous peoples is not obtained as part of the consultation process. This creates yet another conflict of interest because discretion is left to the borrower to determine the basis for resettlement. Without an independent mechanism that will help verify and 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.

In regards to parks and protected areas, OP 4.10 also falls short. Paragraph twenty applies to parks and protected areas that have been established in areas that overlap with indigenous peoples' lands and territories. In such circumstances, OP 4.10 states that involuntary restrictions on indigenous peoples' access should be avoided; where it cannot be avoided then the borrower will prepare a process framework which provides guidelines for involving indigenous peoples' in a management plan. However, under international law, the fact that parks or protected areas might overlap 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. Indigenous peoples must be able to continue to access parks and protected areas and should receive fair compensation for loss of their lands that were included in those parks and protected areas without their consent.

Paragraph twenty should also be modified to include guidelines for dealing with parks and protected areas which are proposed, but have not yet been established. In such situations, due diligence must be applied to ensure that indigenous peoples' rights to ownership of their traditionally owned or customarily used or occupied lands and territories are first legally recognized and regularized. Establishment of any park or protected areas should not proceed until indigenous claims have been settled and indigenous peoples have provided their free prior informed consent.

Project Preparation

Throughout OP 4.10, particularly in the section about project preparation, there is no mention of the need to guarantee the participation of indigenous peoples in critical stages of project development and implementation. There is typically unequal bargaining power as between indigenous peoples and states, international financial institutions, and private development

interests. This requires particular care in ensuring that indigenous peoples participate in decisions that affect their rights and interests.

In OP 4.10, indigenous participation should be particularly guaranteed in relation to activities conducted under:

- Screening – in determining whether indigenous peoples are present in or have collective attachment to the project area.

- Social Assessment – in evaluating potential positive and adverse effects and examining project alternatives.

- Consultation – in developing and evaluating all consultation processes and results.

- Use of Country Systems – in determining whether a borrower's system is acceptable.

- Indigenous Peoples Plan/Planning Framework – in setting the measures by which the borrower will comply with OP 4.10.

Country Systems

The introduction of the use of country systems in paragraph five presents a new risk in OP 4.10. This approach will now seemingly 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. Absent these clarifications, paragraph five could negate important safeguard provisions.

State abuse of indigenous peoples' rights, including rights that are already recognized in some domestic legislation, is rampant. For this reason indigenous peoples have sought recourse at the United Nations and the Organization of American States for human rights violations they are not able to remedy in their respective countries. Given the unique legal and political vulnerabilities indigenous peoples face, it is all the more important that states not be allowed to rely on their own country systems, many of which still carry colonial remnants.

To effectively protect indigenous peoples from adverse development impacts and to increase their potential to equally share in the benefits of sustainable development, the strongest possible Bank policy on indigenous peoples is needed.