

February 14, 2002

Navin Rai, Coordinator
Indigenous Peoples Policy
MSN 5-509
The World Bank
1818 H Street NW
Washington, D.C. 20433

Dear Mr. Rai:

As you know, the Indian Law Resource Center has been involved in the revision of the World Bank's policy directive on Indigenous Peoples since this process began in the 1990s. We have participated in workshops and commented on substantive and procedural issues related to the OD 4.20, the approach paper, and OP/BP 4.10. As the current consultation period appears to be drawing to a close, we would like to reiterate some of the central points we have raised regarding the revision process and the draft OP/BP.

1. Process

Once again, we must register our concerns about the timing and methodology of the 2001-2002 consultation process.

As you know, the Operations Evaluations Department (OED) is currently reviewing the implementation of OD 4.20. Although this review will not be completed until early 2003, the draft OP/BP 4.10 has been released and consultations on it are scheduled to close on February 15, 2002. This sequence is fundamentally flawed. We expect the OED review to provide useful information regarding OD 4.20 and its implementation, and we strongly believe that this information should be factored in to consideration of OP/BP 4.10. Indigenous peoples and other stakeholders, as well as Bank staff, Executive Directors and others, should have the results of the OED review in order to make informed decisions about the OP/BP. For this reason we once again urge you to suspend the close of the consultation period and submission of the OP/BP to CODE pending completion of the OED review. In addition, we ask that the Bank conduct meaningful consultations with indigenous peoples after the OED review has been disseminated.

The consultations themselves have also been seriously flawed. As reports from

the consultation meetings show, critical problems include failure to publicize the meetings broadly and sufficiently in advance; failure to allot sufficient time for the meetings; failure to disseminate documents prior to the meetings; and failure to structure the meetings such that they facilitate effective participation by indigenous peoples. The timeframe for these consultations practically guaranteed such flaws, as we cautioned the Bank in a letter sent by the Forest Peoples Programme on behalf of a group of NGOs in July, 2001.

2. Substance

As a legal organization, we are deeply concerned that OP/BP 4.10 fail to uphold international human rights standards applicable to indigenous peoples. These standards are applicable to the activities of the Bank.. First, we believe such standards to be binding on the Bank as a matter of law. The members states of the World Bank cannot collectively through the Bank violate rights they are bound to uphold individually. The Bank is therefore bound to abide by customary international law and to refrain from assisting any state in violating its international legal obligations. Second, such international legal obligations are in any event binding upon the borrower and donor state members of the Bank. As President Wolfensohn and others have recognized, enforcement of international human rights standards is necessary to the establishment of a stable framework for sustainable development and the ultimate fulfillment of the goals of the Bank.

The Bank has already clarified that it will not assist in projects that contravene a borrower's obligations under international environmental law. (OP 4.01, Environmental Assessment, OP 4.36, Forests, explicate the Bank's position in this regard). Whether or not the Bank believes itself to be bound by international law, we believe this policy of respect for international law must be extended to indigenous peoples. Already, OP/BP 4.10 expressly seeks to "foster[] full respect for the dignity, human rights, and cultures of indigenous peoples," and is intended to be "read together with" OPs 4.01 and 4.36. This tentative commitment to respecting indigenous rights must be formalized in OP 4.10 such that adherence to the law regarding indigenous peoples becomes a precondition to Bank assistance. The same sound policy rationale underlying the environmental law precondition in OP 4.01 and 4.36 applies in the context of indigenous peoples: respect for the rights and obligations established by international law is essential to sustainable development. Especially for indigenous peoples, whose economies, cultures, and religions are inexorably linked to their lands and territories, the promotion and protection of human rights is essential, including their rights to land, cultural identity, and self-determination. The essential linkage of sound development policies to respect for indigenous rights has been documented in many Bank studies and has been underscored in many Bank reports.

For these reasons we highlight the following areas in which the OP/BP must be improved.

A. Land rights

As drafted, OP/BP 4.10 fails to ensure that the collective rights of indigenous peoples to their customary lands and territories will be upheld. Stated more bluntly, the draft authorizes if not invites projects in which the Bank would be a party to the violation of indigenous land rights that are protected by international law.

The right to property is a human right enshrined in the Universal Declaration of Human Rights and guaranteed by the Convention on the Elimination of All Forms of Racial Discrimination, the American Declaration on the Rights and Duties of Man, and the African Charter on Human and Peoples' Rights, among other international legal instruments. Since the promulgation of OD 4.20 in 1991, the collective rights of indigenous peoples to their customarily used and occupied lands and territories have been confirmed and amplified. Today, these rights are widely considered to be guaranteed by customary international law. In August 2001, the Inter-American Court of Human Rights found in the Case of the Community of Awas Tingni v. Nicaragua that the American Convention on Human Rights guarantees indigenous peoples' rights to their traditional lands and territories whether or not the state recognizes formal legal title to those lands. In the Awas Tingni case, the Court ordered the government of Nicaragua to demarcate and title Awas Tingni lands and to establish effective mechanisms for the demarcation and titling of all other indigenous lands within its national borders. This decision is binding on all member states of the OAS (all states in this hemisphere but Cuba), including, of course, those that have ratified the American Convention and acceded to the jurisdiction of the Inter-American Court. Those states that have not ratified the Convention are also obligated to respect the Court's judgment, because they are bound by the OAS Charter to comply with the American Declaration on the Rights and Duties of Man which also guarantees the right to property.

Outside of the Americas, the Awas Tingni decision now stands as the leading judicial precedent in the international law of indigenous land rights. Around the world it will be cited by many indigenous peoples, states and international institutions in many governmental, non-governmental and judicial forums. Some will undoubtedly argue that the Bank is not bound in a strict legal sense by the decision in certain of the Bank's activities both inside and outside of the Americas. Nevertheless, the Bank is bound to decide whether it should in good conscience and as a matter of sound development policy adhere to the sound reasoning of the Inter-American Court's decision. In this regard the Bank's indigenous policy will significantly influence how long it will take for indigenous peoples everywhere to be respected as the rightful owners of their homelands.

B. Informed consent

OP/BP 4.10 fails to establish the informed consent of indigenous peoples as a prerequisite to pursuing Bank-assisted projects that will affect them. Such prior informed consent is increasingly recognized as a right of indigenous peoples under customary international law and has been affirmed by the World Commission on Dams, International Labor Organization Convention 169, and the Inter-American Court of Human Rights in the Awasi Tingni decision. When proposed Bank projects involve indigenous lands and resources – the lawful property of indigenous peoples – the indigenous peoples have the right to say either yes, yes with conditions or no. The OP/BP fails to properly protect the right to prior informed consent, providing real protection only in cases where indigenous cultural property is to be subject to commercial use. This provision, which states that indigenous peoples must “agree” to such projects, must be strengthened to require free and informed prior consent, as well as extended to apply to all projects affected indigenous peoples.

C. Self-Identification

Like OD 4.20, OP 4.10 attempts to identify indigenous peoples by listing some common characteristics and referring to the borrower’s domestic law. Deference to state practice in identifying indigenous peoples is unacceptable, of course, because states’ assimilation policies have often denied indigenous people their identity, both as individuals and as peoples. To comply with indigenous rights standards the policy should emphasize self-identification as the primary criterion for identifying indigenous peoples and by extension for determining when the policy applies. Indigenous peoples’ right to their distinct cultures and identities is enshrined in numerous international instruments, including the Convention on the Elimination of All Forms of Racial Discrimination and the recent Declaration of Programme of Action of the World Conference Against Racism.

D. Resettlement

The Indigenous Peoples Policy must not allow the Bank to assist in the forcible relocation of indigenous peoples. The Bank must squarely face the fact that in the history of the relations of states to indigenous peoples, forcible relocation has been a particularly cruel and destructive weapon used repeatedly against indigenous peoples. The Bank must develop the most stringent safeguards to prevent such harm today. Customary international law, articulated and confirmed by the Inter-American Development Bank and the World Commission on Dams, and by international instruments, prohibits the involuntary resettlement of indigenous peoples, which tends to destroy the economic, social, and cultural fabric of indigenous societies.

E. Baseline studies

OP/BP 4.10 fails to provide for baseline studies prior to all projects affecting indigenous peoples. Such studies are necessary to ensure that Bank projects benefit indigenous peoples and do so in ways that are culturally appropriate.

F. Parks and Protected Areas

Under international law, the fact that parks or protected areas might overlap with indigenous lands does not justify derogation of indigenous peoples' rights to their lands and natural resources, including hunting and fishing rights. For this reason, and because biologically rich lands under indigenous stewardship are so often targeted by states and others for protected status, the Bank should require not only a process for the informed participation of indigenous peoples, as currently provided in OP/BP 4.10, but also the free and informed consent of indigenous peoples to such projects.

G. Participatory Monitoring

To ensure borrower compliance and increase the likelihood of project success, borrowers should be required to provide for monitoring by indigenous peoples during project implementation and evaluation.

H. Structural Adjustment and Other Lending

The shift within the Bank toward structural adjustment and other programmatic lending increases the need for application of OP/BP 4.10 throughout Bank activities. Indigenous peoples' rights must be upheld in all Bank lending.

I. Displaced Peoples

Indigenous peoples who have been displaced or otherwise pressured to leave their ancestral territories should not be punished by exclusion from this policy. For this reason OP/BP should be revised to extend to all indigenous peoples, including those who "have left their communities of origin."

The Indian Law Resource Center remains eager to assist you in producing the strongest possible Bank policy on indigenous peoples. We especially urge you to take into consideration all of the views expressed by indigenous peoples and organizations during the consultations and during the OED review. Thank you for your consideration.

Sincerely,

Steven M. Tullberg
Director
Indian Law Resource Center
Washington Office