

This document, prepared by the World Bank Legal Department, and dated April 8, 2005, was submitted to the Board of Executive Directors in connection with its consideration of the Indigenous Peoples Policy on May 10, 2005. The document is posted for public view in accordance with the World Bank Policy on Disclosure of Information.

**Legal Note on Indigenous Peoples**

**Senior Vice President and General Counsel**

**April 8, 2005**

1. During the discussion of the proposed revisions to the Bank's Operational Policy on Indigenous Peoples (draft OP 4.10) at the Committee on Development Effectiveness (CODE), on November 15, 2004, the General Counsel was requested to provide a Legal Note on two related issues: (i) the practice under the international system on the use of the terms "Indigenous Peoples" and "Tribal People"; and (ii) an overview of the emerging principles of international law on indigenous peoples, and the extent to which the proposed Bank Policy is consistent with such principles.

2. The Note concludes that: (i) the practice of the international system has shifted to the use of the term "Indigenous Peoples"; and (ii) the proposed Bank Policy is consistent with the emerging international principles and practices relating to Indigenous Peoples.

**I. Survey of International Legal Instruments**

**A. International Labor Organization Conventions**

3. The International Labor Organization (ILO) adopted Convention 107, "Indigenous and Tribal Populations Convention, 1957." This Convention was the first international legal instrument to deal exclusively with indigenous and tribal populations. Although Convention 107 includes provisions on the protection of the rights of indigenous and tribal peoples, the Convention basically calls for "national integration" and "progressive integration" of those groups "into the life of their respective countries." The Convention was ratified by 27 countries, but 9 of those countries later denounced it and became parties to ILO Convention 169 (see paragraph 4 below). Eighteen countries are still parties to ILO Convention 107.

4. In 1989, the ILO adopted Convention 169, "Convention Concerning Indigenous and Tribal Peoples in Independent Countries." Like ILO Convention 107, this Convention also uses both the terms "indigenous peoples" and "tribal people." It purports to revise ILO Convention 107. Currently, it is ratified by 17 countries, 13 of which are in

Latin America, three in Europe and one in the Pacific. The Convention includes detailed provisions on the protection of those peoples and their land rights. It requires the free and informed consent of the indigenous and tribal peoples when their relocation is considered necessary. When consent can not be obtained, Convention 169 requires its Parties to follow “appropriate procedures established by national law and regulations.”

## **B. Other International Conventions**

5. The International Covenant on Civil and Political Rights, adopted by the United Nations (UN) General Assembly in 1966, does not make a specific reference to indigenous or tribal peoples. However, the Covenant deals in Article 27 with ethnic, religious and linguistic minorities. It stipulates that in states where such minorities exist, persons belonging to such minorities shall not be denied the right “to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>1</sup> Currently, 52 countries are parties to this Covenant.

6. The Convention on Biological Diversity, adopted in 1992, requires in paragraph (j) of Article 8 that each Contracting Party, subject to its national legislation, shall “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices...” The paragraph encourages the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. This is the only reference to indigenous communities in this Convention, and there is no specific mention of the term “tribal communities” there.<sup>2</sup> The Convention has thus far been ratified by 188 countries.

## **C. The United Nations System**

7. The United Nations system started using the term “indigenous people” rather than “tribal people” as early as 1982. In that year, the Working Group on Indigenous Populations was established, pursuant to Economic and Social Council Resolution 1982/34, as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights. Subsequently, the “United Nations Voluntary Fund for Indigenous Populations” was established in 1985. In the same year, the Working Group began preparing a draft declaration on the rights of indigenous peoples (see paragraph 16 below).

8. On December 21, 1993, the United Nations General Assembly issued Resolution 48/163, proclaiming the period 1994-2004 as “The International Decade of the World’s

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<sup>1</sup> The International Covenant on Economic, Social and Cultural Rights which was adopted by the UN General Assembly on the same day does not make any reference to indigenous or tribal people, nor to ethnic, religious or linguistic minorities.

<sup>2</sup> Similarly, the International Treaty on Plant Genetic Resources for Food and Agriculture, adopted in November 2001, and entered into force in June 2004, uses the term “indigenous communities.” Article 9.1 of the Treaty recognizes the enormous contribution that the local and indigenous communities have made for the conservation and development of plant genetic resources.

Indigenous People.” The Resolution set the goals of the Decade as strengthening the international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health. This Resolution was followed by Resolution 50/157 on December 21, 1995, adopting a “Programme of Activities for the International Decade of the World’s Indigenous People.” Details of the program are included in an Annex to the Resolution. The Resolution specifies the adoption by the General Assembly of a declaration on the rights of indigenous people as a major objective of the Decade (see paragraph 16 below). The Decade ended in 2004. However, the General Assembly issued another resolution in December 2004 proclaiming the period 2005-2014 as “The Second International Decade of the World’s Indigenous People.”<sup>3</sup>

9. In 1995, the United Nations Development Programme (UNDP) issued the draft “Guidelines for Support of Indigenous Peoples.” Those Guidelines have not yet been formally adopted by UNDP. However, in August 2001, UNDP issued its policy paper “UNDP and Indigenous Peoples – A Policy of Engagement.”<sup>4</sup> The objective of the Policy is to guide the work of UNDP in building sustainable partnership with indigenous peoples and their organizations to reduce poverty and attain peace.

10. In July 2000, the United Nations Economic and Social Council issued Resolution 2000/22, establishing the “Permanent Forum on Indigenous Issues” as a subsidiary organ of the Council. The Forum is to serve as an advisory body to the Council with a mandate to discuss indigenous issues, within the mandate of the Council, relating to economic and social development, culture, the environment, education, health and human rights. In 2002, the General Assembly of the United Nations adopted resolution 57/191, establishing a voluntary fund for the Forum for the purpose of financing the implementation of recommendations made by the Forum.

11. Although none of the other United Nations agencies has a specific policy on indigenous peoples, both the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the International Fund for Agricultural Development (IFAD), have used the term “indigenous peoples” consistently. In 2001, UNESCO adopted the “UNESCO Universal Declaration on Cultural Diversity.” Paragraph 14 of the action plan for the implementation of the Declaration requires “respecting and protecting traditional knowledge, in particular that of indigenous peoples.” In 2003, IFAD issued the “Indigenous Peoples and Sustainable Development – Discussion Paper.” The Paper highlights and discusses IFAD’s experience with indigenous peoples.

#### **D. Declarations, Resolutions and Recommendations**

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<sup>3</sup> UN General Assembly Resolution A/RES/59/174.

<sup>4</sup> The UNDP Policy states that “The term ‘indigenous peoples,’ ‘indigenous ethnic minorities’ and ‘tribal groups’ are used to describe social groups that share similar characteristics, namely social and cultural identity that is distinct from dominant groups in society.” The Policy goes on to state that the “United Nations human rights bodies, ILO, the World Bank and international law apply four criteria to distinguish indigenous peoples.” Those four criteria are the same characteristics specified by the World Bank for identifying indigenous peoples in Operational Directive 4.20, as well as in the current draft Policy.

12. The Rio Declaration on Environment and Development, adopted in 1992, refers in paragraph 22 to “indigenous peoples and their communities and other local communities.” The Declaration calls for recognition and support of their identity, culture and interests, and their effective participation in the achievement of sustainable development.

13. Similarly, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in June 1993, includes a special section under Part II on Indigenous People. The section consists of five paragraphs referring repeatedly to “indigenous people.” It urges the states to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them.

14. The European Union Council Resolution of November 30, 1998, deals with “Indigenous Peoples within the framework of the development cooperation of the Community and the Member States.” The Resolution uses the term “indigenous peoples” throughout its 11 paragraphs. The Council acknowledges that development cooperation should contribute to enhancing the right and capacity of indigenous peoples to their self development.<sup>5</sup>

15. Although the International Convention on the Elimination of all Forms of Racial Discrimination, adopted in 1965, does not refer to indigenous or tribal peoples, the Committee on the Elimination of Racial Discrimination issued in 1997 “General Recommendation XXIII” on the rights of Indigenous Peoples. The Recommendation calls on the state parties to ensure that members of the indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.

16. The Working Group on Indigenous Populations began preparing a draft declaration on the rights of indigenous peoples in 1985. The Working Group agreed on a final text of the draft declaration in 1993. The draft declaration has been under review since 1994 by the Inter-sessional Working Group of the Commission on Human Rights on the draft declaration on the rights of indigenous peoples. The draft declaration has not yet been adopted.<sup>6</sup>

17. The Permanent Council of the Organization of the American States (OAS), Committee on Judicial and Political Affairs, established in 1999 a Working Group to prepare a Draft American Declaration on the Rights of Indigenous Peoples. Work is still underway on the Draft Declaration.

#### **E. Multilateral Development Banks**

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<sup>5</sup> The Member States of the Council of Europe adopted in 1995 the “Framework Convention for the Protection of National Minorities.” This Convention uses neither the term “indigenous” nor “tribal.”

<sup>6</sup> During the ten years of negotiations, only two of the 45 articles of the draft Declaration have been agreed upon by the Working Group. Those are Article 5 (the right to a nationality), and Article 43 (rights and freedoms recognized under the draft Declaration are equally guaranteed to male and female indigenous individuals).

18. The Asian Development Bank adopted in 1998 “The Bank Policy on Indigenous Peoples.” The Policy states that the term “indigenous peoples,” as used in the Policy, encompasses a generic concept not easily reflected in a single term. The Policy further recognizes that the term “indigenous peoples” is the term used in United Nations documents, and is used throughout the Policy solely for convenience.

19. The Inter-American Development Bank (IDB) is currently working on its “Operational Policy on Indigenous Peoples,” as well as “Strategic Framework for Indigenous Development.”<sup>7</sup> Moreover, IDB’s current policy on Involuntary Resettlement refers to indigenous communities, and requires that they give their informed consent to their resettlement, and to the compensation measures thereon.

#### **F. World Bank Policies**

20. In 1982, the World Bank became the first multilateral financial institution to issue a policy on tribal people. Operational Manual Statement (OMS) 2.34 was entitled “Tribal People in Bank-financed Projects.” It defined tribal people by the existence in varying degrees of certain characteristics, a number of which apply to indigenous peoples.<sup>8</sup> The OMS included detailed provisions on the protection of those people, and required that the design of projects include measures or components necessary to safeguard their interests. Since ILO Convention 107 called for integration of indigenous and tribal populations, OMS 2.34 was the first international instrument to deal exclusively with the protection and promotion of the rights of tribal/indigenous people.

21. In 1991, the World Bank replaced its OMS 2.34 with Operational Directive (OD) 4.20 on “Indigenous Peoples.” The OD substituted the term “tribal” under the OMS with “indigenous” and reiterated some of the characteristics specified under the OMS for identification of indigenous peoples. The OD goes beyond the safeguard provisions of the OMS, and requires that indigenous peoples benefit from the development process. It states that one of its objectives is ensuring that the development process fosters full respect for the dignity, human rights and cultural uniqueness of indigenous peoples. The OD requires the preparation of an indigenous peoples development plan for any project affecting indigenous peoples (whether adversely or positively), and lays down procedures for protection of their land rights.

22. On August 3, 2004, in the context of their discussion of the Management Response to the Extractive Industries Review, the Executive Directors of the World Bank endorsed “free, prior and informed consultation leading to broad community support. As advised by each of the General Counsel of the World Bank, IFC and MIGA in a joint Legal Note of August 2, 2004, concerning free prior and informed consent (FPIC): “Where a country is not one of the few that have incorporated FPIC into their domestic legal framework, requiring FPIC would be inconsistent with the Bank Group’s role as a

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<sup>7</sup> Both documents have been approved by the Policy and Evaluation Committee of the Board of Directors of IDB on March 11, 2004.

<sup>8</sup> In fact characteristic (i), in paragraph 2 of the OMS, dealt with “possessing indigenous leadership ...”

global institution whose members are sovereign governments, possessed of their own rights to determine whether to follow the terms of any international convention. Indeed, this would create a conflict with the Articles of Agreement, as the Bank Group would, in effect, be giving the equivalent of a veto right to parties other than those specified in the country's legal framework. This would be inconsistent with the Bank Group's governance structure, which establishes the critical role of member governments in Bank Group financing."<sup>9</sup>

## **II. Use of the Terms “Indigenous Peoples” and “Tribal People”**

23. In summary, the survey above shows that international practice has shifted to the term “indigenous people,” or “peoples.” Aside from ILO Conventions 107 and 169, the terms “tribal people,” and “tribal population” are no longer in use in any other international instrument. Thus, the use of the term “indigenous peoples” in the draft Bank Policy is consistent with international practice.

24. The survey also indicates that the term “indigenous peoples” is used largely in a generic sense, and covers groups of people identified by certain characteristics. Other terms used include “indigenous ethnic minorities,” “tribal groups,” and “scheduled tribes.” In line with the current OD 4.20, the draft Policy proposes to use the term “Indigenous Peoples” in a similar generic sense to refer to a distinct, vulnerable social and cultural group meeting certain characteristics in varying degrees. Those characteristics, which are spelt out in the draft Policy, are (i) self identification as indigenous and recognition of this identity by others; (ii) collective attachment to land and natural resources therein; (iii) customary cultural, economic, social or political institutions separate from those of the dominant society; and (iv) an indigenous language often different from the official language of the country. As a result, the use of the term “indigenous peoples” in the draft Bank Policy will continue to ensure that the Policy applies only to those groups who meet those characteristics, regardless of whether they are referred to as indigenous, tribal or by any other name in the domestic context.

## **III. Emerging International Principles and Practices and the Proposed Bank Policy**

25. The survey above also reveals that there is no universally accepted convention or treaty which comprehensively addresses the rights of indigenous peoples. However, there are emerging international principles and practices relating to Indigenous Peoples. Those principles and practices are not universally binding in nature, but nevertheless, the proposed Policy is consistent with them.

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<sup>9</sup> The World Bank Group and Extractive Industries, Legal Note on Free Prior and Informed Consultation, SecM2004-0369/IDA/SecM2004-0559, August 3, 2004. Regarding the Bank Group's governance structure, the Legal Note added: “The primary role of member governments in Bank Group operations is reflected, for instance, in the requirement for Bank lending to or with the guarantee of the member (IBRD Article III, Section 4) and in the specific prohibition on IDA financing or IFC financing if the member objects (IDA Article V, Section 1 (e); IFC Article III, Section 3 (ii)).”

26. ILO Convention 169 remains the most widely quoted international legal instrument on the rights of indigenous peoples. However, ILO Convention 169 does not represent established and universally accepted principles of international law. Since its adoption in 1989, only 17 countries have ratified it.<sup>10</sup> Thirteen of those 17 countries are in Latin America, three in Europe and one in the Pacific. No country in East Asia, South Asia, Africa, or the Middle East is a party to this Convention. Moreover, 18 other countries are still parties to ILO Convention 107 which calls for “progressive integration” of indigenous and tribal populations, and which ILO Convention 169 was designed to replace.

27. The UN draft declaration on the rights of indigenous peoples has been under review by the Inter-sessional Working Group since 1994, but has not yet been adopted. Indeed, the declarations, resolutions and recommendations discussed above (including the UN and the OAS draft declarations on the rights of indigenous peoples when they are finally adopted) are political statements, and, as such, are not legally binding. Unlike conventions and treaties, they are not subject to signature and ratification by the states voting for them. Accordingly, they do not create legal obligations on those states.

28. Nevertheless, the international instruments and practices surveyed above, including the General Assembly Resolutions, indicate the emergence of international principles and practices, particularly with regard to (i) consultation with, and participation of indigenous peoples on decisions affecting them, and (ii) recognition and protection of the rights of indigenous peoples, including land rights and rights to natural and cultural resources. In addition, other sources for these emerging principles can be found in national legislation<sup>11</sup> and court decisions<sup>12</sup> on the rights of indigenous peoples.

29. The World Bank has contributed to the emergence of those principles and practices. OMS 2.34, issued in 1982, represented the first international legal instrument exclusively to deal with protection of tribal and indigenous peoples and their rights, thus contributing to the emergence of international principles and practices with regard to the rights of indigenous peoples. In 1991, OD 4.20 on Indigenous Peoples strengthened and expanded the protection of the rights under the OMS, and has had influence on the policies of some other multilateral development banks. The proposed World Bank OP 4.10 on Indigenous Peoples includes detailed provisions on the rights of indigenous peoples. Such provisions include:

- (i) free, prior and informed consultation leading to broad community support for any project affecting indigenous peoples, and that the Bank will not

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<sup>10</sup> According to Article 38 (2) of the Convention, the Convention required only two instruments of ratification to enter into force.

<sup>11</sup> A number of constitutions such as those of Brazil, Ecuador, Peru, the Philippines, Uganda and Venezuela, include provisions on the rights of indigenous peoples. In addition, some countries, such as Australia, the Philippines and Russia, have passed specific laws on the rights of indigenous peoples.

<sup>12</sup> In June 1992, the High Court of Australia confirmed the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands. Similarly, in September 2001 the Inter-American Court of Human Rights issued a decision recognizing the Awas Tingni community rights to its traditional lands and natural resources in Nicaragua.

proceed further with project processing if it is unable to ascertain that such support exists;<sup>13</sup>

(ii) recognition and protection of land rights of indigenous peoples, including sharing of benefits on projects involving commercial development of such lands;

(iii) restricting physical relocation, and requiring broad community support for such relocation;

(iv) the need for prior agreement with indigenous peoples for the use of their traditional knowledge, and for sharing of benefits thereon; and

(v) the requirement for an Indigenous Peoples Plan for all projects affecting indigenous peoples.

30. In summary, the proposed Bank Policy on Indigenous Peoples (draft OP 4.10) is consistent with the emerging international principles and practices. Indeed, the earlier OMS, and the current OD have contributed to such emerging principles, and the proposed policy, if approved, is also likely to make such a contribution.