THE DRAFT WORLD BANK OPERATIONAL POLICY 4.10 ON INDIGENOUS PEOPLES: PROGRESS OR MORE OF THE SAME?

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[R]evision of the safeguard policy on indigenous peoples is a fundamental test of the World Bank's commitment to poverty alleviation through sustainable development."[2]

I. INTRODUCTION

Since the early 1980s, the World Bank Group (WBG)[3] 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.[4] 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 tribal peoples, requires guarantees from borrowers that they would implement safeguard measures, and advocates respect for indigenous peoples' right to self-determination.[5]

The first formal policy followed a year later in 1982 and was called Operational Manual Statement 2.34: Tribal People in Bank-Financed Projects (OMS 2.34). 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,"[6] it failed to incorporate many of

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2. Letter from Dr. Emil Salim, Eminent Person conducting the Extractive Industries Review, to James Wolfensohn, President of the World Bank, (Jan. 12, 2004), *at* http://www.eireview.org/doc/Letter%20to%20Wolfensohn%2012%20Jan%202004-final.doc.

3. The World Bank Group comprises the International Bank for Reconstruction and Development, the International Development Association (referred to as the public sector arm of the WBG), the International Finance Corporation and the Multilateral Investment Guarantee Agency (referred to as the private sector arm of the WBG).

4. ROBERT GOODLAND, ECONOMIC DEVELOPMENT AND TRIBAL PEOPLES: HUMAN ECOLOGIC CONSIDERATIONS (1982).

5. *Id*. at 3, 27.

6. Benedict 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., 1999).

the protections proposed in the 1981 study. Moreover, an internal implementation review conducted in 1986-87 found that only two out of thirty-three WBG projects substantially complied with the policy.[7] Implementation failures and sustained criticism of WBG projects by indigenous peoples, NGOs and others,[8] led the WBG to revise and update OMS 2.34, concluding in 1991 with the adoption of Operational Directive 4.20 on Indigenous Peoples (OD 4.20).[9]

OD 4.20, which is currently in force, strengthened WBG 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.[10] While OD 4.20 is an improvement over its predecessor, it has not assuaged critics of WBG projects, especially since compliance with the policy has been inconsistent at best.[11]

OD 4.20 has been the subject of a protracted and contentious revision process and is set to be replaced in the first half of 2005 by Operational Policy 4.10 on Indigenous Peoples ("OP 4.10" or "the OP"). This new policy, which will only apply to the public sector arm of the WBG ("the Bank"), is technically a conversion of OD 4.20 to a new policy format rather than a full blown revision.[12]

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7. *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 (1987) (finding that projects were not complying with the new procedures for work involving tribal peoples).

8. *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).

9. *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).

10. WORLD BANK GROUP, THE WORLD BANK OPERATIONAL MANUAL, Operational Directive 4.20: Indigenous Peoples (1991), *at* http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/0F7D6F3F04DD70398525672C007D08ED?OpenDocument.

11. *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.wrm.org.uy/actors/WB/IPreport.html (noting substantial failures to comply with the policy).

12. The International Finance Corporation, which is part of the private sector arm of the WBG and has previously employed OD 4.20 and other general WBG safeguard policies, is presently adopting its own safeguard policies. *See* International Finance

It has been under discussion since 1996[13] and was first released to the public as a draft for discussion in March 2001.[14] Since then a number of other drafts have been produced.[15] These drafts have been repeatedly repudiated by indigenous peoples as being inconsistent with their internationally guaranteed rights and for offering few meaningful guarantees in relation to WBG-financed projects.[16]

Corporation, Consultation Draft, Policy on Social and Environmental Sustainability and Performance Standards, Aug.12 2004, *available at* www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Policy+and+Performance+Standards/$FILE/Policy_Perfomance.pdf (esp., Performance Standards 7 on Indigenous Peoples and Natural Resource Dependent Communities, and Performance Standard 5 on Involuntary Resettlement).

13. *See* Shelton Davis et al., *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results*, Apr. 10, 2003, *available at* lnweb18.worldbank.org/.../acee14f0e07cd8f385256d0b0073946a/$FILE/IP_evaluation_phase_2.pdf (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).

14. WORLD BANK GROUP, DRAFT OPERATIONAL POLICIES: OPERATIONAL POLICY 4.10, Mar. 23, 2001, *available 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).

15. *See* WORLD BANK GROUP, THE WORLD BANK OPERATIONAL MANUAL OPERATIONAL, POLICY 4.10: INDIGENOUS PEOPLES, May 17, 2004 (unpublished consultation draft).

16. World Bank Round Table Discussion of Indigenous Representatives and the World Bank on the Revision of the World Bank's Indigenous Peoples Policy, Oct. 18, 2002, *available at* 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* (2003), at www.forestpeoples.org; Summary of Consultations with External Stakeholders Regarding the World Bank Draft Indigenous Peoples Policy (Draft OP/BP 4.10), Oct. 7, 2002, *at* http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/SummaryofExternalConsultation-English/$FILE/SumExtConsult-100802.pdf; Indigenous Peoples Statement at the 19th Session of the United Nations Working Group on Indigenous Populations, 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").

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.[17] 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[18] and documented by NGOs and intergovernmental human rights bodies.[19] WBG studies also have recognized that indigenous peoples "have often been on the losing end of the development process."[20]

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

> [c]ontinue 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

17. *Id*.

18. *See*, WORLD BANK GROUP, IMPLEMENTATION OF OPERATIONAL DIRECTIVE 4.20 ON INDIGENOUS PEOPLES: AN EVALUATION OF RESULTS, OED Report No. 25754, 10 Apr. 10, 2003, *at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016_20030501182633/additional/862317580_200306204005416.pdf; WORLD BANK GROUP, IMPLEMENTATION OF OPERATIONAL DIRECTIVE 4.20 ON INDIGENOUS PEOPLES: AN INDEPENDENT DESK REVIEW, Jan. 10, 2003, OED Report No. 25332.

19. *See, e.g.*, Rodolfo Stavenhagen, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, para. 56, UN Doc. E/CN.4/2002/97.
(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 HARV. HUM. RTS. J. 227 (2002).

20. WORLD BANK, THE WORLD BANK PARTICIPATION SOURCE BOOK 251 (1996).

> projects that affect them, and prohibition of the involuntary resettlement of indigenous peoples.[21]

Indigenous peoples also point to the WBG's own evaluations that demonstrate that it consistently fails to adhere to its own policy prescriptions on indigenous peoples. 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.[22] Another WBG evaluation found that

> [p]roject 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.[23]

The evaluation also found that only 38 % of a sample of WBG projects which did apply the policy satisfactorily mitigated adverse impacts and ensured benefits for indigenous peoples.[24]

WBG staff have responded to indigenous peoples' demands by stating 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,[25] its constituent instrument, which requires that it not

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

22. Implementation of Operational Directive 4.20 on Indigenous Peoples, *supra* note 18. This study also found 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. *Id*. For a discussion of institutional constraints in relation to safeguard policy compliance rates, *see* Natalie L. Bridgeman, *World Bank Reform in the "Post Policy" Era*, 13 GEO. INT'L ENVITL. L. REV. 1013 (2001).

23. Implementation of Operational Directive 4.20 on Indigenous Peoples, *supra* note 18.

24. *Id*.

25. *See* The World Bank, International Bank for Reconstruction and Development, Articles of Agreement, 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*

interfere in the political affairs of its borrowers.[26] Indigenous peoples counter that in contemporary international law, human rights are not considered to be domestic political affairs, but are of international concern, and 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."[27] 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."[28] 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."[29]

With this background in mind, this article summarizes and comments on selected provisions of the most recent and final draft of OP 4.10.[30] This draft was approved by a sub-committee of the WBG's Board of Executive Directors, known as the Committee on Development Effectiveness, on 29 November 2004 and was released for a 90 day-long public comment period on 1 December 2004. It will be submitted to the WBG's Board for adoption in the first half of 2005 and likely will 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

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

26. *See* World Bank Round Table Discussion of Indigenous Representatives, *supra* note 16.

27. THE WORLD BANK OPERATIONAL MANUAL, OP 4.20, s*upra* note 10, para. 6.

28. J. Oloka-Onyango & Deepika Udagama, Globalization and it Full Impact on Human Rights, para. 37, UN Doc. E/CN.4/Sub.2/2003/14, (final report submitted in accordance with Sub-Commission decision 2000/105).

29. Roberto 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, Mar. 1, 2004, at 5.

30. WORLD BANK GROUP, THE WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICY 4.10: INDIGENOUS PEOPLES, Dec. 1 2004, *at* http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/IndigenousPeoples.

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 turn on its interpretation and use in practice.

II. DRAFT OPERATIONAL POLICY 4.10

A. 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: (1) as a conclusion – i.e., the OP as it presently stands, now ensures that the development process fully respects dignity, human rights, etc., or (2) 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 from 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,[31] the borrower must engage in free, prior and informed consultation ("FPICon") with indigenous peoples. 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

31. 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.

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.[32]

B. 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."[33] 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

32. United Nations, Report of the World Summit on Sustainable Development, Aug. 26 - Sept. 4, 2002, at 10, art 25, UN Doc. A/CONF.199/20/Corr.1, at 10, art. 25.

33. 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.'"

transhuman/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 classify 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.

C. 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.[34] 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.[35] 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

34. 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, *see generally* DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (Dana Clark, Jonathan Fox & Kay Treakle, eds., 2003).

35. *See e.g.*, WORLD BANK GROUP, ISSUES IN USING COUNTRY SYSTEMS IN BANK OPERATIONS, Oct. 8, 2004, *at* http://siteresources.worldbank.org/PROJECTS/Resources/40940-1097257794915/UseCountrySystems-10-08-04.pdf.

> 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.[36]

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.[37]

With regard to indigenous peoples and determining country system/OP equivalency, Table 1A states that the policy objective is "[t]o 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."[38] The operational principles are:

> - 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).
> - 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.
> - 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.
> - Prepare mitigation plans, including documentation of the consultation process, and disclose them before appraisal in an

36. *Id*. at 9-10.

37. *See inter alia*, Inspection Panel, The Qinghai Project: A Component of the China-Western Poverty Reduction Project, Inspection Panel Investigation Report, Apr. 28, 2000; Dana Clark, *The World Bank and Human Rights: The Need for Greater Accountability*. 15 HARV. HUM. RTS. J. 205 (2002).

38. ISSUES IN USING COUNTRY SYSTEMS IN BANK OPERATIONS, *supra* note 35, at 31.

> accessible place and in a form and language that are understandable to key stakeholders.[39]

These statements clearly contradict what is found in the OP – note in particular the absence of FPICon 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."[40]

D. 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 assessments. There is no requirement that indigenous peoples participate in the assessments. If assessments are substandard, or omit important elements or details, the Bank may choose a minimal application of the requirements in paragraph 6. 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.[41]

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39. *Id*.
40. *Id*.
41. *See* IMPLEMENTATION OF OPERATIONAL DIRECTIVE 4.20 ON INDIGENOUS PEOPLES, *supra* note 18.

E. Free, Prior, and Informed Consultation Resulting in Broad Community Support

1. 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").[42] This was also recommended to the WBG by the World Commission on Dams ("WCD")[43] and, in 2004, by the Extractive Industries Review ("EIR").[44] 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

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42. *See inter alia*, Indigenous Peoples Statement at the 19th Session, *supra* note 16. For an overview of treaty provisions, jurisprudence and development policies on indigenous peoples' right to FPIC, *see* Antoanella-Iulia Motoc, 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, July 8, 2004, UN Doc. E/CN.4/Sub.2/AC.4/2004/4. *See* also, Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, IV(2) SUST. DEV. LAW & POL'Y 43 (2004).

43. DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING: THE REPORT OF THE WORLD COMMISSION ON DAMS 112 (2000). See also, *id*. at 267, 271, 278.

44. International Council on Mining and Metals, Striking a Better Balance: The World Bank Group and Extractive Industries, The Final Report of the Extractive Industries Review, (2004), 21, 50, 60, *at* http://www.icmm.com/indres/372ICMMCommentsonWBManagementDraftResponse.pdf. 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* WORLD BANK GROUP, EXTRACTIVE INDUSTRIES AND SUSTAINABLE DEVELOPMENT: AN EVALUATION OF WORLD BANK GROUP EXPERIENCE, July 29, 2003, *at* http://www.bicusa.org/bicusa/issues/energy_and_extractive_industries/EIR_Volume_III.pdf; WORLD BANK GROUP, COMPLIANCE ADVISOR OMBUDSMAN, EXTRACTING SUSTAINABLE ADVANTAGE? A REVIEW OF HOW SUSTAINABILITY ISSUES HAVE BEEN DEALT WITH IN RECENT IFC & MIGA EXTRACTIVE INDUSTRIES PROJECTS, Apr. 2003, *at* http://www.cao-ombudsman.org/pdfs/FINAL%20EIR%20Report%20(April%2003)2.doc 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.

International Finance Corporation's draft Performance Standards.[45] 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.[46]

FPIC was a contentious issue during the discussions pertaining to the EIR's recommendations and a number of the Executive Directors addressed this issue in their written statements at the August 3, 2004 board meeting. A few supported full recognition of and respect for FPIC. The Executive Director for Thailand/Indonesia, for instance, stated that "we do emphasize 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)."[47] The German and Swiss EDs made similar statements,[48] 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.[49]

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45. Policy on Social and Environmental Sustainability and Performance Standards, *supra* note 12.

46. Striking a Better Balance, *supra* note 44, at 7, 9.

47. Statement of Rapee Asumpinpong, Extractive Industries Review and Management Response, Aug. 2, 2004, EDS2004-0626, at 3 (unpublished World Bank document).

48. 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, Aug. 2, 2004, EDS2004-0612 (unpublished World Bank document), at 3; Statement by Pietro Veglio, The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review, Aug. 2, 2004, EDS2004-0610, at 4 (unpublished World Bank document).

49. Statement by Ad Melkert, Management Response to the Extractive Industries Review, Aug, 2, 2004, EDS2004-0609, at 3 (unpublished World Bank document).

The majority however were either silent (Australia/New Zealand, Russia, the United States); emphasised consultation as the appropriate standard without mentioning FPIC (the Nordic countries, Canada, Italy, and Japan); or were strongly opposed, citing state sovereignty and primacy of national law, state ownership of subsoil resources, and discrimination if indigenous peoples were accorded "veto" rights (UK, Pakistan, Saudi Arabia, a joint African statement, Venezuela/Spain/Central America, Kuwait, France, and Brazil/Latin America). The Brazil/Latin American and the joint African statements both cited a legal opinion on FPIC written for the Board by the WBG's General Counsel to further justify their opposition.[50] This opinion maintains that recognition of FPIC by the WBG would contravene the Bank's Articles of Agreement as this would give "the equivalent of a veto right to parties other than those specified in the countries' 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."[51] The logic employed here is obscure given that the WBG's member-states are all represented on its Board of Executive Directors and the Board, subject to the rules of international treaty law, has ultimate authority to interpret the Articles of Agreement.[52] As with any other policy statement adopted

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50. Statement by Paulo Gomes and Louis Kasekende, The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review, Aug. 2, 2004, EDS2004-0625, at 2 (unpublished World Bank document, joint African statement); Statement by Otaviano Canuto, The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review, Aug. 2, 2004, EDS2004-0617, at 2-3 (unpublished World Bank document).

51. World Bank, Vice President and General Counsel, General Counsel IFC and Vice President and General Counsel MIGA, Legal Note on Free, Prior and Informed Consultation, Aug. 2, 2004, para. 3 (unpublished World Bank document) (footnote omitted). The omitted citation states that 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(c); IFC Article III, Section 3(jj))." *Id*.

52. Articles of Agreement, *supra* note 25, art. 9, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049699~~menuPK:58863~pagePK:43912~piPK:36602~theSitePK:29708,00.html (describing the process of review for any question of interpretation of the provisions of the Agreement). *See also*, John Head, *For Richer or for Poorer: Assessing the Criticisms Directed at Multilateral Development Banks*, 52 U. KAN. L. REV. 241, 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: The Role of Human Rights – Comment on the Grotius Lecture by Mary Robinson*, 19 AM. U. INT'L L. REV. 27, 41-2 (2003), (stating "It should be noted that while the General Counsel's opinions carry enormous weight, the ultimate authority in

by the WBG, the member governments would be involved in determining the conditions of WBG financing through their participation in the Board, which reaches decisions by consensus.

The opinion further argues that 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 global institution whose members are sovereign governments possessed of their own rights to determine whether to follow the terms of any international convention."[53] This statement is also difficult to understand, particularly given the fundamental principle of *pacta sunt servanda* in international treaty law:[54] the principle that internal law may not be invoked as justification for failure to perform a treaty,[55] and the positive obligations incumbent on states-parties to international human rights instruments to give effect to the terms of those treaties in their domestic law and to provide effective remedies to enforce the rights recognized therein.[56] It also contradicts in principle the provisions of two existing WBG policies that require that the WBG not finance activities that contravene member-states' obligations under ratified environmental treaties.[57]

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interpreting the Articles of Agreement rests with the Bank's Executive Directors, of whom there are twenty-four representing the 184 member countries").

53. *Legal Note on Free, Prior and Informed Consultation*, *supra* note 51.

54. Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331, art. 26. "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

55. *Id*. art. 27.

56. *See e.g.*, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 2.
See also, UN Human Rights Committee, General Comment No. 3: Implementation at the National Level, July 29, 1981, art. 2; *available a*t http://www.unhchr.ch/tbs/doc.nsf/0/c95ed1e8ef114cbec12563ed00467eb5?Opendocument; UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties, Apr. 29, 2004, *available at* http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/0/7fe15c0f9b9dc489c1256ed800498f39?OpenDocument.

57. WORLD BANK GROUP, THE WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICY 4.01: ENVIRONMENTAL ASSESSMENT (1999) (revised in 2004) para. 3; WORLD BANK GROUP, THE WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICY 4.36: FORESTRY (2002) para. 6. *See also*, Charles Di Leva, *International Environmental Law and Development*, 10 GEO. INT'L ENVT'L. L. REV. 501 (1998); Ibrahim Shihata, *Implementation, Enforcement and Compliance with International Environmental Agreements - Practical Suggestions in Light of the World Bank's Experience*, 9 GEO. INT'L ENVT'L L REV. 37 (1996); and M.A. Bekhechi, *Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities, in* MAX PLANCK YEARBOOK ON UNITED NATIONS LAW, Vol. 3, (J.A. Frowstein & R. Wolfrum eds., 1999).

2. What does the OP say?

This section of the article looks at how FPICon resulting in broad community support has been used in OP 4.10 and its interpretation and eventual application as part of the overall process of developing and approving World Bank projects that affect indigenous peoples. This analysis also generally applies to the IFC's draft Performance Standards, as these employ largely the same language as OP 4.10.[58]

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

58. *See* Policy on Social and Environmental Sustainability and Performance Standards, *supra* note 12, Pt. 2, 21.

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 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:

> - 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;
> - uses consultation methods, 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
> - 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 "[s]uch 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."[59]

What is conspicuously absent from paragraph 10, however, is the informed participation component found in the footnoted definition of FPICon 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. Informed participation needs to be explicitly added to and explained in paragraph 10 rather than relying on implicit incorporation via a footnote. 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:
>
> - the findings of the social assessment;
> - the process of free, prior, and informed consultation with the affected Indigenous Peoples' communities;
> - 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;

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59. 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.

> - recommendations for free, prior, and informed consultations with and participation by Indigenous Peoples' communities during project implementation, monitoring and evaluation; and
> - 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.

> (1) There is no definition of or attempt to otherwise 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.);
>
> (2) 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 FPICon processes. Ideally, these agreements should be reflected in loan covenants that provide indigenous peoples' standing to challenge future project implement should conditions be disregarded;
>
> (3) In connection with point 2 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;

(4) 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 FPICon 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, and not the views of Bank or borrower consultants that conduct social-impact assessments;

(5) The borrower alone, subject to review by the Bank and the recommendations of a social assessment consultant, makes recommendations with regard to future FPICon and participation in the various project phases – it is unclear whether indigenous peoples will have a role in formulating these recommendations via the initial FPICon 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;

(6) 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 [FPICon] at each stage of the project to ascertain their broad community support);

(7) 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.

3. FPICon resulting in broad community support – FPIC by another name?

As discussed above, the Board of the WBG rejected recognition of FPIC and its incorporation into WBG policies and practice in favour of FPICon resulting in broad community support.[60] This was condemned by indigenous peoples, who stated that the WBG's "misappropriation and manipulation of FPIC as free, prior and informed consultation is unacceptable and lacks any basis in international law."[61] While OP 4.10 uses the terminology approved by the Board, it has further elaborated its content in the context of concrete operational principles that will be applied to projects. How then does FPICon resulting in broad community support compare with FPIC?

FPIC has been defined as the consensus/consent of indigenous peoples determined in accordance with their customary laws and practices.[62] In some cases, indigenous peoples may choose to express their consent through procedures and institutions that are not formally or entirely based on customary law and practice, such as statutory councils or tribal governments. Regardless of the nature of the process, the affected indigenous people(s) retain the right to refuse consent or to withhold consent until certain conditions are met. Consent must be obtained without coercion or manipulation, at an early stage of project design, and after the project proponent's full disclosure of the intent and scope of the activity in language and process understandable to the affected indigenous peoples. It may be required in a number of project stages, i.e., options assessment, social, cultural and environmental impact assessment, project design, implementation, monitoring and evaluation.[63]

FPIC has a number of elements that need to be accounted for in its implementation: a) free; b) prior; c) informed, and d) consent. To this obvious list, a fifth component should be added: adequate recognition of indigenous

60. Striking a Better Balance, *supra* note 44.

61. Comments on the World Bank Management Response to the Final Report of the Extractive Industries Review. Submitted by Indigenous Peoples' Organisations, July 18, 2004, *at* http://eireview.info/doc/IP%20EIR%20ManRes-short-sig.doc.

62. *See inter alia*, Aboriginal Lands Rights (Northern Territory) Act, 1976, § 42(6), 77A (Austl.); Philippines Indigenous Peoples Rights Act, 1997, § 3(g), 59 (defining and setting forth requirements for FPIC).

63. *See e.g.*, Seventh Conference of Parties to the Convention on Biological Diversity, Decision VII/16F, Annex: The 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.

peoples' rights to their lands, territories, and resources traditionally owned or otherwise occupied and used. The following are examples of what may be required under each component.

a. Free

It is a general principle of law that consent is not valid if obtained through coercion or manipulation. While no legislative or regulatory measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained. In the Philippines, for instance, the National Commission of Indigenous Peoples is charged with certifying the consent of indigenous peoples/communities. Nonetheless, studies demonstrate that in the Philippines, indigenous peoples' consent is still often manipulated and/or coerced.[64] The formulation in OP 4.10 includes 'free' presumably with the same meaning as above. It does not however include any verification or certification procedure to ensure that broad community support has been freely obtained.

b. Prior

To be meaningful, informed participation and consent must be sought at the earliest stage of project design. The decision-making process should be expansive enough to ensure that the affected people(s) have enough time to understand the information received, to request additional information or clarification, to seek advice, and to determine or negotiate conditions. The appropriate amount of time needed, however, may vary depending on, among others, the number of affected persons, communities or peoples, the complexity of the proposed activity, and the amount of information provided or requested.

While OP 4.10 includes the term "prior," the sequencing of activities in the OP determines at which stage broad community support will be sought. A

64. *See*, Implementation of the Indigenous Peoples Rights Act (IPRA) in the Philippines: Challenges and Opportunities, (background paper prepared by Ruth Sidchogan-Batani, Research Coordinator, Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education); Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples, Organized by the Office of the United Nations High Commissioner for Human Rights Geneva, Dec. 15-17, 2003. UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.4; Raymundo D. Rovillos, Salvador B. Ramo, & Catalino Corpuz, Jr, When the 'Isles of Gold' turn into Isles of Dissent: A Case Study on the Philippine Mining Act of 1995, *available at* http://forestpeoples.gn.apc.org/Briefings/Private%20sector/eir_internat_wshop_philippine_case_eng.pdf (presented to the EIR's Eminent Person and participants at the meeting on Indigenous Peoples, Extractive Industries and the World Bank Oxford, England, Apr. 15, 2003).

reading of the provisions indicates that broad community support will be sought after the borrower has submitted a proposal to the Bank, after the Bank conducts screening to identify if indigenous peoples are affected by the proposed project and after the social assessment is conducted by social scientists employed by the borrower and acceptable to the Bank. This is early in the project cycle, although it could be earlier, (i.e., requiring that the borrower obtain broad community support prior to submitting the proposal to the Bank). Also, the OP notes that the consultation process must allow sufficient time for consensus building and be culturally appropriate, presumably also in terms of the time required for decision-making and consensus building.

c. Informed

An FPIC procedure must involve consultation with and participation by affected indigenous peoples, which includes the full and legally accurate disclosure of information concerning proposed developments in a form which is both accessible and understandable to them. OP 4.10 requires that broad community support be an informed decision, but does not specify in detail what this means other than to say that all relevant information, including on potential adverse impacts, must be provided and that use of indigenous languages is an important element of consultation. Furthermore, disclosure of and presentation of the IPP does not appear to be required as part of FPICon resulting in broad community support and therefore, critical information seems to be lacking from the decision making process.

d. Consent

Consent is a right to say yes or no to a project or activity and is normally the end result of a process of discussion, consultation, and participation. Negotiation may also be involved to reach agreement on the proposal as a whole, certain components thereof, or conditions that may be attached to the granting of FPIC. FPIC should be documented in legally binding and enforceable agreements that set forth any associated terms and conditions as well as the enforcement and reparations mechanisms to address and remedy violations. Finally, FPIC must be based on specific activities for which consent has been granted. While consent may initially be granted for one set of activities, any intended change of activities will require a new application for FPIC. In OP 4.10, there is currently no definition or even partial explanation of broad community support, other than the plain meaning of the words themselves, with which to compare it with the definition of FPIC above. On this basis and in light of a number of other ambiguities concerning when and if broad community support is required in relation to the various project stages or even different kinds of projects, it is

difficult to conclude that FPICon resulting in broad community support is equivalent to FPIC. This becomes even more evident in relation to the OP's provisions on lands and resources.

e. Recognition and Regularization of Rights to Lands, Territories, and Resources

The requirement that FPIC 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.[65] 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.[66] 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.[67] How does the OP define indigenous lands and

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65. *See* Mayagna (Sumo) Awas Tingni Community Case, Inter-Am. Ct. H.R., Judgment of Aug. 31, 2001, Ser. 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.

66. *See* GOVERNMENT OF GUYANA, GOVERNMENT'S POLICY FOR EXPLORATION AND DEVELOPMENT OF MINERALS AND PETROLEUM OF GUYANA 12 (1997) ("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").

67. Native Title Act, 1993 (Cth), § 25-44. The right to negotiate was substantially limited by the Native Title Amendment Act, 1998 (Cth), 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* Garth Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998* (Cth)", 22 U. NEW SOUTH WALES L. J. 564 (1999).

territories for the purposes of determining if indigenous peoples are affected and, if so, requiring that FPICon resulting in broad community support applies and does it require recognition and regularization of rights to lands, territories and resources?

F. Lands 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."[68] 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 . . ."[69] It is doubtful that draft OP 4.10 adequately addresses land and resource rights and meets the commitment stated above.

1. 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 FPICon 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, this definition may not fully acknowledge indigenous peoples' multiple forms of attachments and 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 requirement of FPICon resulting in broad community support requirement.

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68. Striking a Better Balance, *supra note* 44, at 8.
69. *Id*. at 9.

2. 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 or customarily owned. Finally, mention is required of the phrase "vital to sustainability of their cultures and livelihoods." Non-indigenous peoples' 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.

3. Action on Lands, Territories and Resources

Paragraph 17 of the draft 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:
>
> > full legal recognition of existing customary land tenure systems of Indigenous Peoples; or
> >
> > 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 – what is meant by 'acquisition' is also unclear and undefined – 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. Therefore there is 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.[70]

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70. *See also*, Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Peru of the Indigenous and Tribal Peoples Convention (No. 169), 1989, made under article 24 of the ILO Constitution by the General Confederation of

4. 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.[71] As stated by Victoria Tauli-Corpuz, an indigenous leader from the Philippines, "[f]or many indigenous peoples throughout the world, oil, gas and coal industries conjure images of displaced peoples, despoiled lands, and depleted resources. This explains the

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Workers of Peru (CGTP). Doc. GB 270/16/4; GB 270/14/4 (1998), 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").

71. *See* THEODORE E. DOWNING, ET AL, INDIGENOUS PEOPLES AND MINING ENCOUNTERS: STRATEGIES AND TACTICS (2002) *at* http://www.iied.org/mmsd/mmsd_pdfs/057_downing.pdf (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 disarticulation, food insecurity, loss of civil and human rights, and spiritual uncertainty). *Id.* at 3. *See also*, Erica-Irene A. Daes, Special Rapporteur, Indigenous People and their Relationship to Land (final working paper), para. 66-67, UN Doc. E/CN.4/Sub.2/2001/21.

unwavering resistance of most indigenous communities with any project related to extractive industries."[72] These abuses have also been documented by the WBG.[73]

5. 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 in place of FPICon resulting in broad community support throughout the OP. It is disappointing that this is not applied in that context as well.

6. 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 an option only 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.[74] A right of return, once the reasons for resettlement have ceased, should also be included in the plan.

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72. EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK. 9 (Emily Caruso *et al*., eds., 2003).

73. *See* IMPLEMENTATION OF OPERATIONAL DIRECTIVE 4.20 ON INDIGENOUS PEOPLES, *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").

74. For requirements of a resettlement plan, see WORLD BANK GROUP, OPERATIONAL POLICY 4.12: INVOLUNTARY RESETTLEMENT, Dec. 2001 (revised Apr. 2004), para. 6 *at* http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/CA2D01A4D1BDF58085256B19008197F6?OpenDocument.

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).[75] Not only have they ceased to use the term "involuntary resettlement," this is the first time that the Bank (albeit in a yet to be approved draft) 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, or at least the resettlement component (this could of course still be funded and take place outside of the Bank project itself). 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.[76] This process framework is intended to

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75. Draft Operational Policy 4.10 Indigenous Peoples, *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.

76. OP 4.12, paragraph 7, provides that:

"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.

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." Moreover, it appears that FPICon in this paragraph 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]."[77] Under the Convention on Biological Diversity,[78]

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77. Office of the High Commissioner for Human Rights, Concluding Observations of the Human Rights Committee: Australia, July 28, 2000, para. 8. *at* http://www.unhchr.ch/tbs/doc.nsf/0/e1015b8a76fec400c125694900433654?Opendocument .

legally binding Decision VII/28 on Protected Areas, adopted in 2004 by the 7th 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."[79] 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.[80] 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.

III. CONCLUSION

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 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

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78. Convention on Biological Diversity, June 5, 1992, *at* http://www.biodiv.org/doc/legal/cbd-en.pdf.

79. Decision VII/28 Protected Areas, Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting, 343-64.

80. OP 4.01 Environmental Assessment, su*pra* note 57.

FPICon 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. The answer to the question posed in the title to this article – is OP 4.10 progress or more of the same? – therefore would seem to be that only time will tell.