

PROTECTING AND SUPPORTING INDIGENOUS PEOPLES IN LATIN AMERICA: EVALUATING THE RECENT WORLD BANK AND IDB POLICY INITIATIVES

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SYNOPSIS

In this article, John Head draws on his experience with international financial institutions to offer both descriptive and prescriptive observations about the recent legal initiatives taken by the World Bank and the Inter-American Development Bank ("IDB") on issues relating to the interests of indigenous peoples, particularly in Latin America. He focuses on three questions: Are those recent initiatives helpful? Are they legal? And are they enough? In addressing those three questions—which he answers yes, yes, and no, respectively—Mr. Head explains (1) why, as a practical matter, it is vitally important that the World Bank and the IDB contribute to the multilateral efforts to protect and assist indigenous peoples in Latin America, (2) why, as a legal matter, he dismisses criticisms raised by some commentators alleging that involvement by international financial institutions in such issues constitutes unlawful "mission creep" or tramples on the sovereignty of their member states, and (3) why, in looking to the future, the most appropriate way to assure that the international development finance institutions continue contributing to the well-being of indigenous peoples is by updating the charters of those institutions.

INTRODUCTION

For my contribution to this conference on trade and foreign investment in the Americas, I wish to offer some brief observations about specific initiatives that the two international development finance institutions most closely involved in Latin America—the World Bank and the Inter-American Development Bank ("IDB")—have taken recently regarding the treatment and the future of indigenous peoples in that region. I am very grateful to Professor Kevin Kennedy for inviting me to participate in the conference in order to learn from the other

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participants and to offer my own views. Moreover, I greatly appreciate the opportunity to have my views published in the Michigan State University Journal of International Law.¹

In particular, I thank the Journal editors for permitting me to present my comments in what I call a “hybrid” form—a cross between an essay and a more traditional law journal article. Under this “hybrid” approach, I shall dispense with both (i) introductory descriptions of the World Bank and the IDB themselves, and (ii) an explanation of how issues relating to indigenous peoples fit into the larger context of sustainable development. After all, I believe it is safe to assume that the audience and participants in this conference (and probably most readers as well) are already familiar with the main legal, demographic, and institutional contours of the topics I shall be discussing. Besides, detailed treatments of those subjects are easily available elsewhere.² Instead of allocating time and space to them, I shall focus on the specific observations I wish to make here regarding the recent policy initiatives with the World Bank and the IDB relating to indigenous peoples. In making those observations, I have used more of an essay format, with relatively light footnoting.

Accordingly, I shall proceed directly (in Part I) to a summary of the historical and institutional backdrop that is specifically pertinent to the positions taken by the World Bank and the IDB on issues relating to indigenous peoples, and I shall then turn to a description (in Part II) of the current legal and policy initiatives those two institutions have undertaken very recently. These include the new Operational Directive No. 4.10 adopted in mid-2005 by the World Bank and a new policy on indigenous peoples also being finalized now in the IDB.

Then I assess these new legal and policy initiatives. I present that assessment in the form of three questions. First, I ask (in Part IIB)

1. I also wish to thank David Dean for his valuable assistance in the preparation of these observations, and to express my appreciation also to Lucia Orth and to my fellow participants in the conference for offering helpful comments and suggestions. As usual, research assistance from the University of Kansas General Research Fund is also gratefully acknowledged.

2. I have tried to identify, in the form of several footnote citations, a range of source materials to which I would direct persons who wish to learn more about these foundational subjects and issues. In addition, I have given general citations to sources from which I have drawn guidance in arriving at my own views. However, with the kind permission of Journal editors, I have intentionally kept footnotes to a minimum, in keeping with the ‘hybrid’ format of my contribution, as described above.

whether those World Bank and IDB initiatives are helpful, in the sense of making a useful contribution to an important need in Latin America. Next, I ask (in Part IIC) whether the recent World Bank and IDB initiatives are legal, in the sense of remaining faithful to the limitations (especially the so-called “political prohibitions”) set forth in those institutions’ governing charters and respecting the sovereignty of their member countries. Third, I ask (in Part IID) whether those World Bank and IDB initiatives are enough—or whether instead the initiatives are in fact too timid or narrowly focused to meet the challenge of supporting and protecting indigenous peoples in Latin America.

I close my contribution with a summary of my views and with some brief concluding observations about the future we can anticipate. In particular, I suggest how we can prepare for legal and institutional reforms that would promise an enriched future for indigenous peoples in Latin America, despite a history of mistreatment and a host of obstacles.

I. HISTORICAL AND INSTITUTIONAL BACKDROP

In order to lay the groundwork for my discussion (in Part II) of recent initiatives undertaken by the World Bank and the IDB on issues affecting indigenous peoples, I shall sketch out in the following paragraphs (a) the evolution of the legal framework at the multilateral level in respect of indigenous peoples and (b) the corresponding evolution of World Bank and IDB approaches to issues affecting indigenous peoples.

A. The Development of International Legal Principles Regarding Indigenous Peoples

The overall history of the development of a legal framework regarding the definition, treatment, rights, status, and participation of indigenous peoples in international law constitutes a rich tapestry that is described eloquently in numerous works.³ For present purposes, I

3. See, e.g., 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’LL. REV. 527 (2002); Lorie M. Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSAJ. INT’L & COMP. L. 385 (2004); David H. Getches, *Indigenous*

wish to highlight three milestones in that evolution that I regard as especially noteworthy.⁴

The first of these milestones was laid in 1966 with the adoption by the United Nations General Assembly ("UNGA") of the International Covenant on Civil and Political Rights.⁵ Although that treaty makes no specific reference to indigenous or tribal peoples, it does deal in Article 27 with ethnic, religious, and linguistic minorities. In particular, Article 27 stipulates that in states where such minorities exist, persons belonging to such minorities shall not be denied the right "to enjoy their own culture, to profess and practice their own religion, or to use their own language."⁶ The International Covenant on Civil and Political Rights has extraordinarily broad support in the international community, having been ratified by 152 countries.⁷

A second milepost was laid in 1989, when the International Labour Organization adopted Convention 169 to supersede its earlier Conven-

Peoples' Rights to Water Under International Norms, 16 COLO. J. INT'L ENVTL. L. & POL'Y 259 (2005); Jeremy Firestone et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219 (2005); *Indigenous Development: Poverty, Democracy and Sustainability*, (D. Iturralde & E. Krotz eds., 1996) <http://www.iadb.org/sds/doc/ind96%2D102e.pdf> (last visited Sep. 9, 2005); David E. Cahn, Note, *Homeless for Generations: Land Rights for the Chocoe Indians from Mogue, Panama*, 28 FORDHAM INT'L L.J. 232 (2004); Michael Holley, *Recognizing the Rights of Indigenous Peoples to Their Traditional Lands: A Case Study of an Internally-displaced Community in Guatemala*, 15 BERKELEY J. INT'L L. 119 (1997); L. Roberto Barroso, *The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies*, 7 ST. THOMAS L. REV. 645 (1995); Laurie Sargent, *The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention 169: Real Rights or Rhetoric?*, 29 U. MIAMI INTER-AM. L. REV. 451 (1998); Dean B. Suagee, *Recent Developments: Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?*, 21 AM. INDIAN L. REV. 365 (1997); Jeffrey N. Gesell, *Customary Indigenous Law in the Mexican Juridical System*, 26 GA. J. INT'L & COMP. L. 643 (1997).

4. In constructing this abbreviated survey, I have relied heavily on information in a recent briefing note prepared by the World Bank Legal Department in connection with the discussion of proposed revisions to that institution's operational policy on indigenous peoples. See World Bank Legal Department, *Legal Note on Indigenous Peoples*, Apr. 8, 2005 [hereinafter World Bank Legal Note], <http://siteresources.worldbank.org/INTINDPEOPLE/Publications/20571167/Legal%20Note.pdf> (last visited Sep. 9, 2005).

5. International Covenant on Civil and Political Rights, art. 27, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

6. *Id.* art. 27.

7. Current information about participation in the International Covenant on Civil and Political Rights is available on the Office of the United Nations High Commissioner for Human Rights website, www.unhchr.ch/pdf/report.pdf (last visited Sep. 9, 2005).

tion 107, dating from 1957. The 1957 treaty ("ILO Convention 107") had called for "national integration" and "progressive integration" of indigenous and tribal peoples into "the life of their respective countries."⁸ By contrast, the 1989 treaty ("ILO Convention 169") includes detailed provisions on the protection of indigenous and tribal peoples and their land rights.⁹ In particular, it requires the free and informed consent of the indigenous and tribal peoples when their relocation is considered necessary¹⁰; and when such consent cannot be obtained, ILO Convention 169 requires the states that have become parties to it to follow "appropriate procedures established by national law and regulations."¹¹ Seventeen countries, including 13 in Latin America, have ratified ILO Convention 169.¹²

What I regard as a third milestone in the development of legal principles regarding indigenous peoples actually encompasses a three-year period. From 1992 to 1995, substantial attention was given within the United Nations system and in several international conferences to the interests of indigenous peoples. Unlike the treaties referred to above, most of the results of this attention did not constitute legal obligations; but they did serve to solidify the international consensus that special measures should be taken to protect and benefit indigenous peoples. In 1992, the Rio Declaration on Environment and Development, emerging from the conference of that year on those topics, called

8. Indigenous and Tribal Populations Convention, Jun. 2, 1959, arts. 2-4, 107 I.L.O. 1957, <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Sep. 9, 2005).

9. See generally International Labour Organization Convention No. 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991). Some key provisions appear at Article 4 (calling for "special measures" to be adopted to safeguard "the persons, institutions, property, labour, cultures and environment of the peoples concerned"), Article 6 (requiring that governments consult with indigenous peoples on measures which may affect them directly, "in good fair and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures"), and Article 14 (providing that the "rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised" and that measures shall be taken to safeguard the rights of indigenous peoples to use lands they do not own but "to which they have traditionally had access for their subsistence and traditional activities"). *Id.* arts. 4, 6, 14.

10. *Id.*; see also art. 16(2).

11. *Id.*

12. See World Bank Legal Note, *supra* note 4, ¶ 4. Current information about participation in ILO conventions is also available on the ILO website, <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Sep. 9, 2005).

for recognition and support of the identity, culture, and interests of indigenous peoples, as well as for their effective participation in achieving sustainable development.¹³ In 1993, the Vienna Declaration and Programme of Action, adopted by the World Conference of Human Rights held that year, urged states to ensure the full and free participation of indigenous people in all aspects of society.¹⁴ Also in that year, a U.N. Working Group on Indigenous Populations (established in 1982) agreed on a final text of a draft declaration on the rights of indigenous peoples, including the right to strengthen their distinct political, economic, social, and cultural characteristics, as well as legal systems, while retaining all rights to participate in the social, cultural, and political life of the State.¹⁵

Also in 1993, the UNGA issued Resolution 48/163, proclaiming the period 1994-2004 as "The International Decade of the World's Indigenous People."¹⁶ And in 1995 the UNGA adopted a "Programme of Activities" for that International Decade.¹⁷ These included, among other things, (i) educating indigenous and non-indigenous societies concerning the situation, cultures, languages, rights, and aspirations of indigenous people; (ii) suggesting that member states ratify and implement ILO 169 and develop national plans for the decade; and (iii) asking indigenous organizations to "establish and support indigenous schools."¹⁸

13. Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5, 31 I.L.M. 874 (1992).

14. Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661, art. 20.

15. Draft United Nations Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994). The specific reference to strengthen cultural and other characteristics appears in Article 4.

16. International Decade of the World's Indigenous People, G.A. Res. 48/163, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/RES/48/163 (1993).

17. Programme of Activities for the International Decade for the World's Indigenous People, U.N. GAOR, 50th Sess., U.N. Doc. A/Res/50/157 (Dec. 21, 1995).

18. *Id.* ¶¶ 3, 49, 52, 57. Also in 1995, according to several sources, the United Nations Development Programme ("UNDP") issued a set of draft "Guidelines for Support of Indigenous People." *See, e.g.*, the references to these draft "Guidelines" in World Bank Legal Note, *supra* note 4, ¶ 5, and on the UN website, <http://www.undp.org/cso/resource/evaluations/guidelines.html> (last visited Sep. 11, 2005). These guidelines, however, seem to have been superseded and are difficult to locate now.

As the foregoing summary indicates, several entities have shown increasing interest in providing protection and benefit for indigenous peoples. Several of the initiatives to do so are still underway, and so far it is difficult to assert with certainty what sort of legal framework applies to indigenous peoples—that is, what specific legal rights they have, what specific legal obligations states have to protect them, and so forth. Indeed, even the definition of “indigenous peoples” remains unsettled.¹⁹

Having said that, I shall attempt a thumbnail sketch of the key international legal principles that are already in place or that seem to be emerging in respect of indigenous peoples. In doing so, I shall draw from various sources (without trying to provide specific citations to those sources)²⁰ that I regard as most reliable and most carefully formulated—including, in fact, the newly approved World Bank policy that I discuss in Part II of this essay.

First, as a definitional matter, the term “indigenous peoples” seems to encompass these elements: indigenous peoples typically have a collective attachment to geographically distinct habitats or ancestral territories; they have (or have had) customary institutions (cultural, social, political, and perhaps economic) that are separate from those of the dominant society and culture; they often have an indigenous language. In many cases there is a high degree of self-identification (by a member of the indigenous people) and at least some degree of recognition by others of this different identity.

Second, it appears that one of the key legal principles applicable to indigenous peoples centers on land and natural resources. The specific rights that are claimed (or alleged, or desired, depending on what degree

19. For discussions of the appropriate definition of “indigenous peoples,” or other related terms, see Firestone et al, *supra* note 3, 223-31; Graham, *supra* note 3, 387-89; Sompong Sucharitkul, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section I—The Inter-temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. 3, 5-10 (2002); Benedict Kingsbury, “Indigenous Peoples” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’LL. 414, 419-26 (1998); Anna Natividad Martinez, *Intertribal Conflicts and Customary Law Regimes in North Africa: A Comparison of Haratin and Ait ‘Atta Indigenous Legal Systems*, 5 TRIBAL L.J. 3 (2004).

20. In addition to the World Bank Legal Note, I have relied heavily on an excellent article examining IP issues from an environmental law perspective. See Firestone et al., *supra* note 3, at 223-40.

of certainty one seeks) in this regard often include ownership, typically collective ownership, of land, but in some cases it is a right of access and use of land and the resources on it.

A third element of the international legal principles regarding indigenous peoples, closely related to the second, is that special consideration needs to be given to the ways in which legislative, political, or development project decisions or actions would specially affect indigenous peoples, particularly because of the environmental or social repercussions such decisions and actions could have on them. A special area of attention in this regard is involuntary resettlement required under some resettlement projects.

A fourth element relates to participation. In many cases the dominant population of a state has denied opportunities for indigenous and tribal peoples to participate in the life of the state, especially the political and economic life of the state. Where this has occurred, steps to ensure opportunities for such participation are called for; and the form of this participation often will depend on the social structure within the indigenous community. For example, an indigenous people that relies on collective decision-making through consultations among elders should (it is claimed) be permitted to follow that method of participation.

A final principle, or emerging principle, in the legal framework relating to indigenous peoples focuses on autonomy and self-government. In the past decade or so, the definition and understanding of the right to self-determination have been expanded to incorporate the right to self-governance in matters relating to indigenous peoples' internal and local affairs.²¹ By some accounts, the scope of the right itself extends as far as requiring states to recognize "indigenous law" (which might encompass oral tradition) as a part of their own legal systems.²²

Having attempted this thumbnail sketch of principles relating to indigenous peoples, I hasten to add a disclaimer as to its simplicity, and I urge the interested reader to study the numerous more detailed analyses provided by far more qualified observers. For purposes of my contribution to this conference, however, I hope this abbreviated account will suffice as a backdrop to our examination of what the World Bank and the IDB have done in this area.

21. See Firestone et al., *supra* note 3, at 236.

22. *Id.* at 237.

B. The Evolution of World Bank and IDB Approaches to Issues Affecting Indigenous Peoples

The World Bank²³ started giving explicit attention to indigenous peoples in 1982. The actions it took then, and its subsequent actions about a decade later, are summarized as follows in a World Bank legal note prepared in April 2005.²⁴

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

In 1991, the World Bank replaced its OMS 2.34 with Operational Directive (OD) 4.20 on “Indigenous Peoples.” The OD replaced the

23. The World Bank technically consists of two legally distinct institutions --- the International Bank for Reconstruction and Development (“IBRD”), formed at the Bretton Woods Conference in 1944, and the International Development Association (“IDA”), established in 1960 to provide lower cost financing to less economically developed countries. For further details about the World Bank—its structure, status, purposes, operations, membership, finances, and other aspects—see JOHN W. HEAD, *THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS: AN EVALUATION OF CRITICISMS LEVELED AT THE IMF, THE MULTILATERAL DEVELOPMENT BANKS, AND THE WTO* 3, 30-46 (2005) [hereinafter HEAD, *FUTURE OF THE GEOS*]. The legal instruments establishing and governing the IBRD and the IDA are, respectively, the Articles of Agreement of the International Bank for Reconstruction and Development [hereinafter “IBRD Charter”] and the Articles of the International Development Association [hereinafter “IDA Charter”], as cited in HEAD, *FUTURE OF THE GEOS*, *supra*, at 311 and 341, respectively, and reprinted at 311-39 and 341-63. In addition, of course, these charters, along with voluminous details about the World Bank, are available on its website, www.worldbank.org.

24. For other accounts describing World Bank policy and practice regarding indigenous peoples, see generally, MacKay, *supra* note 3. See also Sidney L. Harring, “*God Gave Us This Land*”: *The Ovahimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa*, 14 GA. J. INT’L & COMP. L. 35, 97-101 (2001); Traci L. McClellan, Note, *The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples*, 19 WIS. INT’L L.J. 249, 265 (2001).

term “tribal” under the OMS with “indigenous” and reiterated some of the characteristics specified under the OMS for identification of indigenous peoples. The OD goes beyond the safeguard provisions of the OMS, and requires that indigenous peoples benefit from the development process. It states that one of its objectives is ensuring that the development process fosters full respect for the dignity, human rights and cultural uniqueness of indigenous peoples. The OD requires the preparation of an indigenous peoples development plan for any project affecting indigenous peoples (whether adversely or positively), and lays down procedures for protection of their land rights.²⁵

In 1996, an internal working group in the World Bank began reviewing OD 4.20 in the context of a change in the character and structure of operational policies. That review, which led to later papers and consultations, ultimately yielded the new OP 4.10 that is described and discussed in Part II of this essay.²⁶

The IDB²⁷ followed the lead of the World Bank regarding indigenous peoples, as all four of the regional multilateral developments banks (“MDBs”)²⁸ often do on many issues.²⁹ In the mid-1980s, the IDB, giving special attention to quality control, began to reactively address the potential negative effects of its lending policies and programs on indigenous peoples—that is, the IDB (according to an IDB account) “began to systematically address the potential negative impacts of its projects on indigenous communities.”³⁰ In 1990, the IDB adopted

25. World Bank Legal Note, *supra* note 4, ¶¶ 20-21.

26. For a brief chronology leading to the issuance of a draft of OP 4.10 in March 2001, see MacKay, *supra* note 3, at 585-86.

27. For general information on the IDB and its relationship to the World Bank, see HEAD, FUTURE OF THE GEOS, *supra* note 23, at 3. The IDB was established in 1959. See *id.* at 30-31 n.45. Its governing document is the Agreement Establishing the Inter-American Development Bank [hereinafter “IDB Charter”], cited at HEAD, FUTURE OF THE GEOS, *supra* note 23, at 365 reprinted at 365-401. For more details on the IDB’s structure, status, purposes, operations, membership, and finances, see its website, www.iadb.org.

28. The three other regional MDBs are the African Development Bank, formed in 1963, the Asian Development Bank, formed in 1965, and the European Bank for Reconstruction and Development, formed in 1990. For summary descriptions of these institutions, see HEAD, FUTURE OF THE GEOS, *supra* note 23, at 31 nn.46-48, and the websites of those institutions, which are (respectively) www.afdb.org, www.adb.org, and www.ebrd.org.

29. The AsDB, AfDB, and EBRD also have announced policies on indigenous peoples. They can be found at their websites, at the website addresses cited *supra* note 28.

30. Inter-American Development Bank, Indigenous Peoples and Community Development Unit, *Profile: Strategic Framework for Indigenous Development* 4 at GN-2295 (Mar. 11, 2004) [hereinafter IDB March 2004 IP Profile].

internal procedures that, while remaining focused on quality control and almost entirely still reactive in nature, would nevertheless better enable the Bank to address the risks to indigenous peoples. This was accomplished by providing for the adoption of project changes that would mitigate or avoid potential negative impacts of those projects on indigenous peoples.³¹

The IDB's position regarding indigenous peoples shifted focus more dramatically in 1994 when the institution issued documents relating to the Bank's Eighth Capital Replenishment.³² In those documents, the IDB announced that indigenous peoples would be one of the Bank's target priority groups.³³ To facilitate compliance with the mandate set forth in that regard, the Indigenous Peoples and Community Development Unit ("IPCDU") was created within the IDB. The work of the IPCDU, as described by the chief of that unit, includes responsibility "for indigenous peoples issues, involuntary resettlement, community consultation and participation (shared with other IDB staff), and sociocultural soundness analysis."³⁴ It is to carry out this responsibility in four functional areas: (i) developing the IDB's "policies, strategies, best practices, methodologies and guidelines in the four thematic areas mentioned above," participating in "the quality control and enhancement of all [IDB] operations," supporting "project teams . . . in the design and monitoring of [IDB] operations that require expertise in the area of indigenous peoples, community development or involuntary resettlement," and taking a "[l]eadership role in the development of innovating, experimental or pilot projects for indigenous development."³⁵

With the IPCDU in place, the Bank's role in the protection of indigenous rights became more proactive; since the time of the Eighth Replenishment, the Bank claims that it has increasingly attempted to

31. *Id.* at 4.

32. Inter-American Development Bank, Report on the Eighth General Increase in Resources of the Inter-American Development Bank, AB-1704 (1994), <http://www.iadb.org/exr/eight/indexe.htm> (last visited Sep. 9, 2005).

33. *Id.* ¶ 2.27. See also Iturralde, *supra* note 3, at 27. The term "target priority groups" appears in the Iturralde article but not in the IDB document itself.

34. Anne Deruyttere, Indigenous Peoples and Sustainable Development: The Role of the Inter-American Development Bank (Apr. 8, 1997), <http://www.iadb.org/sds/doc/IND%2D97101E.PDF> at 13 (last visited Sep. 9, 2005).

35. *Id.*

include indigenous peoples in the activities of the IDB and has labored to protect indigenous peoples individual and collective rights.³⁶ Throughout the 1990s and into the current decade, then, it was that Eighth Replenishment mandate and the IPCDU that served mainly to structure and focus the IDB's indigenous peoples ("IP")³⁷ policies.³⁸

The most recent development in the IDB regarding its approach toward indigenous peoples occurred in the last couple of years. In 2003, the IDB decided to develop a specific IP policy strategy that it says is designed to orient its staff on how to include indigenous issues in a more cross-cutting and systematic way in its projects and programs.³⁹ To this end, in March 2004 a committee of the IDB's Board of Executive Directors approved a "profile" of a policy,⁴⁰ and on that basis the Board authorized preparation of both a Strategic Framework for Indigenous Development ("Framework") and an Operational Policy on Indigenous Peoples ("Policy"). In June 2005, the drafts of the Framework and the Policy, as prepared by the IPCDU, were authorized for public information and consultation, and those drafts were, at the time of this writing, under consideration by the IDB's Board of Executive Directors.⁴¹

Therefore, as things stand now within the IDB, the applicable IP policy is found in the Eighth Replenishment documents mentioned above, supplemented by the "profile" dating from March 2004 and,

36. *Id.*

37. In the remainder of this article, I usually use the shorthand abbreviation "IP policies" instead of the rather awkward "policies relating to indigenous peoples" or "indigenous peoples' policies." However, when I use it not as an adjective but rather as a noun, I do not abbreviate "indigenous peoples."

38. Inter-American Development Bank, Indigenous Peoples and Communities Development Unit, Consultation Process on the Strategic Framework for Indigenous Development and the Operational Policy on Indigenous Peoples (June 7, 2004), <http://www.iadb.org/sds/doc/IND-Consultationplan.pdf> [hereinafter IDB IP Consultation Process].

39. *Id.*

40. See IDB March 2004 IP Profile, *supra* note 30.

41. See Inter-American Development Bank, Sustainable Development Department, Indigenous Peoples and Community Development Unit, [Draft] Operational Policy on Indigenous Peoples (last visited Sept. 1, 2005) [hereinafter IDB September 2005 Draft IP Policy]; see also Inter-American Development Bank, Sustainable Development Department, Indigenous Peoples and Community Development Unit, [Draft] Strategy for Indigenous Development, Sept. 1, 2005, <http://www.iadb.org/sds/doc/INDSGN2387E.pdf> [hereinafter IDB September 2005 Draft IP Strategy].

most directly, in the Framework and the Policy. It is the policy emerging from those documents that I describe more fully and assess in part II of this essay.

II. ASSESSMENT OF RECENT WORLD BANK AND IDB POLICY INITIATIVES REGARDING INDIGENOUS PEOPLES

The summaries I have offered above in Part I—first on the development of legal principles regarding indigenous peoples and then on the increasing attention given to indigenous peoples by the World Bank and the IDB—serve as background against which I now turn to an assessment of the new initiatives taken by those two institutions in this area. In undertaking that assessment, I first explain what the new initiatives are (that is, what content they carry), and then I address three evaluative questions: Are those recent initiatives helpful? Are they legal? And are they enough? I answer those three questions yes, yes, and no, respectively.

A. What Are They?

1. *World Bank policy*

As noted above, the World Bank issued OMS 2.34 in 1982 and OD 4.20 in 1991. After a few years of experience with OD 4.20, the World Bank undertook a re-drafting effort that was just concluded in mid-2005 with the final adoption of OP 4.10 by the World Bank Board of Executive Directors.⁴² The process involved several drafts, on which comments were solicited and received. Indeed, it is important in reviewing commentaries on World Bank proposals regarding the new OP 4.10 to pay close attention to which draft is being commented on, as the draft went through several iterations. For example, as explained below, one of the most comprehensive (and critical) commentaries on

42. For the World Bank's announcement of the Executive Board's approval of OP 4.10 in May 2005, the text of the policy as adopted, and an indication that the new policy will affect all projects after July 1, 2005, see <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html> [hereinafter World Bank OP 4.10].

the draft of OP 4.10, provided by Fergus MacKay,⁴³ is now outdated in several respects because the World Bank made substantial changes to the draft of OP 4.10 after his article was published.

I offer below some highlights of the World Bank's OP 4.10. However, because the precise formulation of the policy statement was subjected to intense scrutiny, criticism, and redrafting, it is important not to rely entirely on a summary. For that reason, the text of OP 4.10 is reproduced in its entirety in the Appendix to this essay, and the following enumeration of highlights should be supplemented by a study of that OP 4.10 text.

- OP 4.10 has slightly altered the World Bank's application of the term "indigenous peoples." It is no longer a criterion that a social or cultural group relies primarily on subsistence-oriented production.
- Forced severance of a group from its geographically distinct habitat or ancestral territories will not disqualify the group from coverage under OP 4.10.
- The World Bank now requires the borrower to engage in a process of free, prior, and informed consultation on all projects that affect indigenous peoples.
- The World Bank will undertake a screening process, early in a project's preparation, to determine whether indigenous peoples are present in, or have a collective attachment to, the project area.
- If the screening indicates necessity, a social assessment (OP 4.10 Annex A outlines the elements of the social assessment) of the potential positive and adverse effects on the indigenous peoples will be made. Where adverse effects may be significant, a consultation and participation between the borrower and the affected indigenous peoples will occur, with the borrower obligated to use consultation methods appropriate to the social and cultural values of the affected indigenous peoples.
- Every project that affects indigenous peoples will require the preparation of either an Indigenous Peoples Plan or an Indigenous Peoples Planning Framework. (The requirements for these documents are outlined in the OP 4.10 Annexes B and C, respectively.)
- Before a project can proceed, the World Bank must satisfy itself that the borrower has complied with all the requirements of the process, including receiving broad support for the project from the affected indigenous peoples' communities.
- The Borrower must make the Indigenous Peoples Plan (or an Indigenous Peoples Planning Framework) and the social assessment report available

43. See generally MacKay, *supra* note 3.

to the indigenous peoples communities in an appropriate form, manner and language.

- When a project involves activities that are contingent on establishing legally recognized rights to lands traditionally owned, occupied or used by indigenous peoples, the Indigenous Peoples Plan will set forth an action plan for legal recognition of the indigenous peoples' rights to those lands.
- The World Bank may, at a member country's request, support the country in its development planning and poverty reduction strategies by providing financial assistance for initiatives designed to specifically benefit indigenous peoples.⁴⁴

2. IDB policy

How does the IDB policy on indigenous peoples—or, more precisely, the current re-draft of that policy—differ from, or resemble, the World Bank policy? Although differences exist, it appears that the general contours are very similar.

For one thing, the target groups for both policies—that is, “indigenous peoples”—are apparently the same, although the IDB has moved closer to an actual definition of that term than the World Bank policy has done. While the IDB “profile” dating from March 2004 declined to offer an exacting definition of “indigenous peoples,”⁴⁵ the September 2005 final draft of the IDB Operational Policy does define the term, saying that it includes peoples who meet these three criteria:

- (i) they are descendants from populations inhabiting Latin America and the Caribbean at the time of the conquest or colonization; (ii) irrespective of their legal status or current residence, they retain some or all of their own social, economic, cultural, and political institutions and practices; and (iii) they recognize themselves as belonging to indigenous or precolonial cultures or peoples.⁴⁶

In respect of such indigenous peoples, the IDB policy calls for a mainstreaming of the notion of “development with identity” of

44. See generally World Bank OP 4.10, *supra* note 42.

45. See IDB March 2004 IP Profile, *supra* note 30, ¶ 3.1. However, that “profile,” citing for guidance ILO Convention 169, noted what it called “a growing convergence in the national and international legal frameworks” toward a definition of indigenous peoples that would identify them as persons who are “descendants of the cultures that existed prior to colonization, who occupied a given geographic region prior to the conquest, and who, whatever their current legal status, preserve all or part of their social, economic, cultural, and political institutions, self-identification playing an important part in this definition.” *Id.*

46. IDB September 2005 Draft IP Policy, *supra* note 41, ¶ 1.1.

indigenous peoples within the institution's operations. The notion of "development with identity" is explained in this manner:

*"Development with identity" of indigenous peoples involves a holistic approach to addressing the conditions of material poverty, inequality, and exclusion, with a view to increasing their access, with a gender perspective[,] to opportunities for socioeconomic development, while at the same time strengthening their identity, culture, territoriality, natural resources, and social organizations, under the premise that sustainable development requires the initiative of the beneficiaries and respect for their individual and collective rights, and that the development of indigenous peoples significantly benefits society as a whole.*⁴⁷

In order to facilitate indigenous peoples' "development with identity," the IDB policy identifies these four policy areas⁴⁸:

- greater visibility to the indigenous peoples and their specificity, by incorporating indigenous conceptions of poverty and well-being, and by measuring indicators that are broken down by ethnic group.
- strengthening indigenous capacity to manage development, in order to "overcome welfare-type assistance from the state, promote appropriation of the projects by the target population and bolster its self-esteem, and make territorially-integrated development viable."
- improving access to and quality of social and financial services available to indigenous peoples, by bringing down barriers to access and considering financial services adapted to traditional indigenous economies and supplementary to conventional credit.
- promoting rights, regulations, and juridical security of indigenous peoples, in order to help transform rhetoric into action—that is, to facilitate the further incorporation into domestic law of internationally-recognized rights of indigenous peoples to their territories and natural resources in a variety of aspects including rural development, natural resources, labor and financial markets, education, health, and intellectual property. In this connection, the IDB policy supports "ensuring prior consent and informed participation when decisions are made that might harm" indigenous peoples.

In addition to this proactive approach to IP issues—that is, a commitment to supporting the development of indigenous peoples as an

47. IDB March 2004 IP Profile, *supra* note 30, ¶ 2.1 (emphasis in original). A footnote to that paragraph explains that the term "development with identity" originated in Bolivia in the early 1990s.

48. These are paraphrased from IDB March 2004 IP Profile, *supra* note 30, ¶ 5.2. Similar themes are emphasized in the more recent IDB policy documents [hereinafter IDB March]. See, e.g., IDB September 2005 Draft IP Policy, *supra* note 41, ¶ 4.3.

affirmative matter—the IDB policy also includes numerous “safeguards designed to protect or minimize exclusion and adverse impacts that [IDB] operations might generate with respect to indigenous peoples and their rights.”⁴⁹ Especially noteworthy in that respect is the IDB’s approach to the issue of consent or consultation:

For cases of particularly significant potential adverse impacts that carry a high degree of risk to the physical, cultural, or territorial integrity of the affected indigenous peoples or groups, the [IDB] will further require and verify that the project proponent [defined to include the borrower] demonstrate that it has, through a good faith negotiation process consistent with the internal decision-making mechanisms of the affected indigenous peoples or groups, obtained agreements regarding the operation and measures to address the adverse impacts that support, in the [IDB’s] judgment, . . . the sociocultural viability of the operation.⁵⁰

By my reading, this language clearly provides that an IDB-supported project cannot go forward without the consent of an indigenous people on the measures needed to limit injury to that people, although it is not clear (to me) that it would in all circumstances prohibit a project as to which that people has a general objection. In this regard, the draft Strategy (also released in September 2005) is clearer, calling for “agreements demonstrating the project’s socio-cultural feasibility” and requiring “appropriate consultation, coordination, agreement/consent, and participation procedures.”⁵¹ Although the formulations differ somewhat, the IDB approach on this issue of consent seems roughly similar to the approach taken in the World Bank policy summarized above, which provides that there must be “free, prior, and informed consultation with the affected Indigenous Peoples’ communities” and that there must be shown, emerging from that consultation, adequate evidence “that the affected Indigenous Peoples’ communities have provided their broad support to the project.”⁵²

Having very briefly described the new World Bank and IDB policies on indigenous peoples, I now turn to the first of the three questions that I wish to examine regarding those policies.

49. IDB September 2005 Draft IP Policy, *supra* note 41, ¶ 4.1.

50. *Id.* ¶ 4.4(a)(iii).

51. *Id.* ¶ 7.7(e), (f). Likewise, the March 2004 Profile, as noted above, refers expressly to a consent requirement. See IDB March 2004 IP Profile, *supra* note 30, ¶ 2.1, summarized and partially quoted in the text accompanying *supra* note 47.

52. World Bank OP 4.10, *supra* note 42, ¶ 11.

B. Are They Helpful?

Some people would answer “no” to this question. That is, they would take the position that the World Bank and IDB initiatives regarding indigenous peoples do no good, or perhaps that they do some good but do more harm than good. Having studied at some length a wide variety of criticisms leveled at the MDBs in general,⁵³ I would anticipate three main types of rationales being offered to support that negative answer. These would concentrate, respectively, on (i) the content of the policies, claiming that there is a mismatch between the perceived problem and the proposed solution, (ii) the level of governance at which solutions are appropriate, claiming that whatever action should be taken (if any) toward addressing the issues affecting indigenous peoples is for national governments, or even local governments, to handle, rather than raising these issues to the international level, and (iii) on the competence of the World Bank and the IDB, claiming that even if IP issues are to be addressed at the international level, the IDB and the WB are unsuited to the take on matters that have such important social and cultural dimensions. Allow me to explain each of these three alternative positions more fully and, in doing so, offer my own counter-arguments to each.

1. *The content of the policies*

First, a claim that the new World Bank and IDB policies toward indigenous peoples are unhelpful might focus on the content of the policies themselves and the perceived problem they are allegedly designed to address. The new policies, it might be said, are wrong-headed as a substantive matter because they are not needed in the first place; expressed differently, those policies try to solve a problem that does not in fact exist. Alternatively, the policies might be attacked on substantive grounds because they do not reflect current international law regarding indigenous peoples.

In my view, this claim fails in either of its forms. For one thing, it seems beyond serious debate that the world in general faces a deep,

53. See HEAD, *FUTURE OF THE GEOS*, *supra* note 23, at Appendix A (providing a survey of recent literature critical to the global economic organizations, including the MDBs).

abiding, and unsolved problem of dealing with a broad range of IP issues. Moreover, the problem is perhaps most pressing in Latin America—if for no other reason because of the large numbers of indigenous peoples in that region. According to one source, “the total number of indigenous persons [in Latin America] comes to 40 to 50 million, i.e., 10% of the region’s population. In countries such as Bolivia, Guatemala, and Peru, the indigenous population accounts for at least half of the total population, with high rates of demographic growth.”⁵⁴ Many of these indigenous peoples straddle border areas, as the territories they have traditionally occupied are situated in more than one country.

What problems exist with respect to these indigenous peoples in Latin America? A glance at some troubling statistics, recently presented in a study by two World Bank staff members,⁵⁵ offers an answer that focuses on persistent poverty, poor education, high child labor rates, and low levels of basic health care:

- Over the past decade, few gains were made in reducing the share of indigenous people in poverty. For example, in Latin American countries where poverty rates are falling among non-indigenous people, those rates either are not falling or are falling less, among indigenous people.⁵⁶
- The net impact of economic crisis tends to be worse for indigenous people than for non-indigenous people, judging from data in at least two Latin American countries.⁵⁷
- Being indigenous increases an individual’s probability of being poor in Latin America, and the poverty of indigenous people tends to be deeper—that is, further below the poverty line—than is the case for non-

54. IDB March 2004 IP Profile, *supra* note 30, ¶ 3.2.

55. See generally Gillette Hall and Harry Anthony Patrinos, *Indigenous Peoples, Poverty and Human Development in Latin America: 1994-2004* (2005), <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:20505834~menuPK:258559~pagePK:146736~piPK:226340~theSitePK:258554,00.html> (last visited Sep. 11, 2005) [hereinafter Hall and Patrinos]. The study examines whether the Indigenous Peoples’ Decade (1994-2004) saw improvements in the conditions among indigenous peoples in the five Latin American countries with the largest indigenous populations—Bolivia, Ecuador, Guatemala, Mexico, and Peru.

56. *Id.* at 3. In Bolivia, for example, the poverty rate among non-indigenous people dropped by 8% in the 1990s but did not drop among indigenous people. *Id.*

57. *Id.* at 3-4. The study posits that economic “crises may be particularly harmful to indigenous people’s well-being; even though the impact of the shock tends to be less severe, the recovery of their incomes post-shock is severely constrained, such that the net effect of the crisis is more negative for the indigenous than non-indigenous.” *Id.*

indigenous people. Moreover, this situation has persisted over the past decade.⁵⁸

- Indigenous people in Latin America receive fewer years of education—up to 6.4 years less in Peru, for example—than non-indigenous people receive; and the labor earnings that indigenous people derive from each year of schooling are lower than for non-indigenous people.⁵⁹ This might reflect in part the fact that education outcomes (judged by standardized test scores) are substantially worse for indigenous people.⁶⁰
- There are higher child labor rates among indigenous people than among non-indigenous people.⁶¹
- Indigenous people, especially women and children, continue to have less access to basic health services; therefore, major differences persist between health indicators for indigenous people versus non-indigenous people, with indigenous people exhibiting worse health outcomes in virtually every basic health indicator.⁶²

Similar assessments appear in a recent IDB document focusing on IP issues. It offers these observations:

In view of the wealth of their civilizations and natural resources in pre-Columbian times, the indigenous peoples have suffered and to this day are dispossessed of their ancestral lands, marginalized, and impoverished. . . . [I]ndigenous peoples, especially indigenous women, are among the poorest and most marginalized strata. . . . [A]dvances in access to health, education, and basic infrastructure . . . have been less [for indigenous people] compared to other sectors of the population. In other words, the gap in terms of access to basic services has increased between the indigenous and non-indigenous sectors. Indigenous women have the highest rates of maternal mortality in the region, and the gender gap in education, which has been closing throughout the region, has widened among indigenous peoples. In addition, there is mounting concern among broad sectors of the indigenous movement that the conventional indicators for measuring poverty do not reflect the indigenous view of well-being and should be supplemented by indicators that take up indigenous values such as quality of the natural environment, legal security of their territories, and quality of social capital of the indigenous communities and organizations.⁶³

58. *Id.* at 4-5.

59. *Id.* at 5-6.

60. *Id.* at 7.

61. *Id.*

62. *Id.* at 8. For example, the portion of non-indigenous children that are stunted in Mexico is 14%; the percentage for indigenous children is 44%. *Id.* at 9.

63. IDB March 2004 IP Profile, *supra* note 30, ¶ 3.3.

I conclude from these troubling facts, which are but representative of many others presented and discussed in the literature and the popular press, that IP issues demand action, especially as they arise in the context of Latin America. But is the action that the World Bank and the IDB have taken the correct kind of action? More precisely, do the newly announced policies of those institutions properly reflect the current state of international law regarding treatment of IP issues?

Some commentators have said they do not. In a strenuously critical law journal article published in 2002, Fergus MacKay has asserted that the version of OP 4.10 that he was reviewing failed to reflect international legal standards in at least three respects: its treatment of land and resources, its requirements regarding consent, participation, and consultation, and its reference to involuntary resettlement.⁶⁴ Specifically, he offered these criticisms:

[H]uman rights standards, as set out in treaties, in jurisprudence interpreting those treaties, and in emerging standards, all require that countries recognize and respect indigenous ownership rights, at a minimum, over lands traditionally occupied. All that [draft] OP 4.10 requires is that Borrowers consider doing so.⁶⁵

[The draft OP 4.10 uses “consultation” and other such terms] inconsistently so that it is difficult to ascertain with any certainty which standard is to be used in what context. . . . [And] [i]rrespective of which standard applies, . . . the Borrower merely “considers the views and preference of indigenous peoples” when deciding to move ahead with the project. [However, to] be consistent [with international legal requirements], the OP must, at a minimum, require indigenous peoples’ effective or meaningful participation. Furthermore, . . . given the status attributed to the norm prohibiting racial discrimination, the [World Bank] policy should comply with the standard set by the Committee [on the Elimination of Racial Discrimination]: ensuring effective participation and informed consent.⁶⁶

While previous drafts of OP 4.10 addressed the issue of involuntary resettlement in some detail, the present draft makes only one reference in a footnote to the issue. [This] illustrates a major deficiency in OP 4.10: its failure to address an issue of vital importance in the larger scheme of indigenous peoples’ human rights. . . . [I]t is clear that international law

64. MacKay, *supra* note 3, at 589-619.

65. *Id.* at 604.

66. *Id.* at 606, 607, 610.

requires the obtainment of consent prior to resettlement By failing to address this issue,[draft] OP 4.10 again falls far short⁶⁷

I applaud the careful assessment that Mr. MacKay has offered—indeed, his extensive documentation of the development of norms in international law that specifically apply to indigenous peoples constitutes a major contribution. However, I believe his conclusions do not pack much punch when applied to the version of the World Bank policy as adopted in mid-2005. Why? In part because the final version of the World Bank's new OP 4.10 is different from the draft version on which Mr. MacKay was commenting;⁶⁸ and in part because I regard the international legal rules governing indigenous peoples as somewhat less definitive and binding than Mr. MacKay suggests.

As for the first of these points, it is evident that OP 4.10 underwent significant change after the time of Mr. MacKay's review and the time the policy was issued in its final form. Perhaps Mr. MacKay's assessment contributed importantly to that change; I do not know. In any event, each of the three main criticisms that Mr. MacKay raised, and as are reflected in the excerpts offered above, were largely overcome in the final version of OP 4.10.

Specifically, the final version of OP 4.10, in addressing issues of land and resources, now requires in paragraph 17 that where pertinent, the Indigenous People's Plan (IPP) prepared for a project "sets forth an action plan for the legal recognition of . . . ownership, occupation, or usage" of land by indigenous peoples. It explains that "[s]uch legal recognition may take the following forms: (a) full legal recognition of existing customary land tenure of Indigenous Peoples; or (b) conversion of customary usage rights to communal and/or individual ownership rights." If neither of these two options is available, "the IPP includes measures for legal recognition of perpetual or long-term renewable custodial or use rights."⁶⁹

67. *Id.* at 612-13, 616, 619.

68. Mr. MacKay's article, published in 2002, offered a critique of the version of the draft OP 4.10 that the World Bank released for comment in March 2001. *Id.* at 604 n.293. As noted above in section I of this article, that March 2001 version was succeeded by other versions that differed from it. Some of the key points in the final version of OP 4.10 as approved in May 2005 appear in section IIA of this article, and the full text of OP 4.10 as adopted appears in the Appendix to this article.

69. World Bank OP 4.10, *supra* note 42, ¶ 17. The use of IPPs is already part of World Bank practice. For an example of the contents called for in IPPs, see World Bank, *Indigenous*

Likewise, the final version of OP 4.10 includes more detailed and protective provisions on consultation, participation, and consent—the second of the three main grounds on which Mr. MacKay criticized the earlier draft of the policy. As I pointed out above, the final version of OP 4.10 applies the standard of “free, prior, and informed consultation,” which it defines in detail in paragraph 10 to include “opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples’ communities,” and other pertinent organizations.⁷⁰ Moreover, paragraph 11 of OP 4.10 provides that the World Bank will review the outcome of such consultation “to satisfy itself that the affected Indigenous Peoples’ communities have provided their broad support to the project” and that it will “not proceed further with project processing if it is unable to ascertain that such support exists.”⁷¹ At the same time, a footnote to the introductory paragraph of OP 4.10 does assert that the policy on consultation “does not constitute a veto right for individuals or groups.”⁷²

The final version of OP 4.10 also includes more detailed and protective provisions on involuntary resettlement, and on physical relocation generally—the third of the three main grounds on which Mr. MacKay criticized the earlier draft of the policy. The policy first requires, in light of the adverse impacts that physical relocation can have on indigenous peoples in particular, that such physical relocation be carried out only “[i]n exceptional circumstances, when it is not feasible to avoid relocation,” and that even in these exceptional circumstances, “the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples’ communities as part of the free, prior, and informed consultation process”—a process that, according to the policy, must involve preparation of a resettlement plan that is “compatible with the Indigenous Peoples’ cultural preferences” and that, where possible “should allow the affected Indigenous Peoples to return to the lands and

Peoples Development Plan Guide, Report No. IPP119, Guarantee Facility Project, Republic of Peru, (Feb. 2005), http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20050408130211 (last visited July 27, 2005).

70. World Bank OP 4.10, *supra* note 42, ¶ 10.

71. *Id.* ¶ 11.

72. *Id.* ¶ 1 n.4.

territories they traditionally owned, or customarily used or occupied, if the reasons for their relocation cease to exist.”⁷³

I regard these as appropriate provisions on the topics they cover. They include more detailed terms on the issues of land rights, consultation, and resettlement, and hence they improve on the provisions that Mr. MacKay found objectionable in an earlier draft of OP 4.10. Considering the final version of OP 4.10 as a whole, I believe it also represents an improvement over the old policy it replaces and that it shows that the World Bank is moving toward an appropriate handling of issues affecting indigenous peoples.

Moreover, judging from the current state of development of new policy initiatives being undertaken by the IDB, I would say that it, too, is improving on its old policy and is moving toward an appropriate handling of issues affecting indigenous peoples.

I have chosen my words carefully in those last two sentences. In expressing my view I have said that the World Bank and IDB policies are “moving toward” an appropriate handling of IP issues. Perhaps the World Bank and the IDB have not gone as far as they should, as a practical matter, in this regard—this will be the topic of section IID, below—but I believe they have made very significant progress and should be applauded and supported in that regard. I also said that the World Bank and IDB policies “represent an improvement over the policies they replace.” I regard this as self-evident, given the fact that both institutions have not only (i) moved beyond the reactive posture that they formerly look toward IP issues—that is, beyond merely working to prevent undue injury to indigenous peoples affected by development—to endorse a more proactive posture, but have also (ii) sought public input, and responded to such input, in carefully drafting their new policies. The result, in my view, is a policy framework in both institutions that responds to the needs and interests of indigenous peoples and that fairly accurately reflects the current state of the law at the international level regarding IP issues.

Why do I make that last assertion, that the World Bank and IDB policies on IP issues accurately reflect the current state of the law at the international level regarding such issues? After all, in some respects the final version of OP 4.10 might still fall short of the standards that

73. *Id.* ¶ 20.

Mr. MacKay urged in evaluating an earlier draft of that policy. For example, there is surely some difference between “consultation” and “consent”—and as noted above the final version of OP 4.10 does not use the term “consent,” as Mr. MacKay said it should. Likewise, the IDB policy, at least as expressed in the draft Operational Policy released in September 2005, does not use the term “consent.”

The reason I regard the World Bank and IDB policies on IP issues as reflecting fairly accurately the current state of international law is that I question whether international legal norms—and by this I mean definite, binding, treaty obligations or rules of customary international law—in the area of indigenous peoples’ rights have progressed as far as Mr. MacKay asserts, at least as those norms would be applicable to any of the MDBs. It is important to bear in mind that it was only a little more than 15 years ago, in 1989, that one of the premier international organizations dealing with some aspects of human rights matters—the ILO—adopted the modern view that indigenous peoples are not to be the target of “national integration” into “the life of their respective countries” (the view expressed in ILO Convention 107, dating from 1957)⁷⁴ but instead are to be protected in a wide variety of ways.⁷⁵ Moreover, that 1989 ILO treaty has been adopted only by about one-tenth of the countries in the world.⁷⁶ Even though many of its parties are Latin American countries, it would be difficult to assert persuasively that such sparse participation in that treaty creates binding law generally.

Some of the other evidence Mr. MacKay relies on to find binding rules of international law regarding indigenous peoples also strikes me as questionable. For example, he cites several sources that, either by their nature or by their failure to garner widespread support, do not in my view establish binding rules. These include observations of the U.N. Human Rights Committee,⁷⁷ the Inter-American Commission on Human Rights,⁷⁸ and the Committee on the Elimination of Racial

74. See *supra* note 8 and accompanying text.

75. See *supra* note 9 and accompanying text.

76. See *supra* text accompanying note 12 (stating that seventeen countries, including 13 in Latin America, have ratified ILO Convention 169).

77. See, e.g., MacKay, *supra* note 3, at 590-92, 596-97.

78. *Id.* at 598-99, 616, 618.

Discrimination,⁷⁹ as well as U.N. General Assembly resolutions⁸⁰ and draft declarations or resolutions of the United Nations and of the Organization of American States.⁸¹ Even the most broadly based of those types of sources—resolutions of the UN General Assembly—are widely regarded as being non-binding in and of themselves, especially if they not have attracted universal support among UN members, which is true of a key resolution that Mr. McKay cites.⁸²

Moreover, I am not persuaded by Mr. MacKay's assertion that the World Bank has an obligation to reflect in its policies the terms of treaties that bind the World Bank's member states. Mr. MacKay acknowledges that as a matter of treaty law, the World Bank "is not directly bound" to any human rights treaties because it is not a party to any such treaties,⁸³ but he goes on to suggest that such treaties "may restate or inform the content of binding rules of customary international law,"⁸⁴ which the World Bank is bound to follow. Yet Mr. MacKay does not sufficiently explain why the World Bank should be regarded as having a legal obligation, presumably as a matter of customary international law, to press its member countries to observe treaty obligations that those countries have undertaken.

To illustrate my general point—that the World Bank and IDB policy initiatives have not fallen short of the legal obligations to which they are subject—I shall return once more to the issue of consultation and consent. The World Bank Legal Department addressed that issue directly in its April 2005 advice to the Board of Executive Directors. In doing so, it noted the difference between "broad community support," which the Bank endorses in its policy, and "consent," which it does not:

On August 3, 2004, in the context of their discussion of the Management Response to the Extractive Industries Review [of the draft OP 4.10], the

79. *Id.* at 609-10.

80. *Id.* at 561 (citing a declaration that a "right to development" constitutes a basic human right); *see also infra* note 103.

81. *See* Mackay, *supra* note 3, at 603-04.

82. *Id.* at 561, citing the 1986 U.N. General Assembly Declaration on the Right to Development. Four of the seven G-7 countries—the United States, Germany, Japan, and the United Kingdom—did not vote for that declaration. *See* WESTON, FALK, AND CHARLESWORTH, SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 1304 (1997).

83. *See* MacKay, *supra* note 3, at 563.

84. *Id.*

Executive Directors of the World Bank endorsed “free, prior and informed consultation leading to broad community support.[“] As advised by each of the General Counsel of the World Bank, IFC and MIGA in a joint Legal Note of August 2, 2004, concerning free prior and informed consent (FPIC): “Where a country is not one of the few that have incorporated FPIC into their domestic legal framework, requiring FPIC would be inconsistent with the Bank Group’s role as a global institution whose members are sovereign governments, possessed of their own rights to determine whether to follow the terms of any international convention.”⁸⁵

Accordingly, while I tend to agree with many of the norms that Mr. MacKay says the MDBs should honor—a point I shall elaborate on below in section IID—I do not regard some of those norms to have been firmly established as legally binding, at least as far as the World Bank and the IDB are concerned. For this reason, combined with the point I made above—that the final version of OP 4.10 does in fact address some of the issues Mr. MacKay found troublesome—I conclude that the World Bank policy, as well as the corresponding IDB policy in its current state of formulation, can be regarded as reflecting generally accepted views on the legal regime governing indigenous peoples. Both policies deal with the five main elements I identified above⁸⁶ as being highlights of the modern regime on IP issues: (1) appropriately broad definitions of indigenous peoples, (2) special rights of indigenous peoples over land and natural resources, (3) environmental and social effects of development on indigenous peoples, (4) rights of participation by indigenous peoples in decision-making on these and other matters affecting them and their culture, and (5) some attention to autonomy and self-government, depending on the specific circumstances.

2. The level of governance at which to address IP issues

A second assertion that critics might make to claim that the new World Bank and IDB policies are unhelpful is that if any action is to be taken toward addressing the issues affecting indigenous peoples, such action should be taken by national governments, or even local governments, rather than being elevated to the international level. I also disagree with this assertion; it is clear to me that some effective action

85. World Bank Legal Note, *supra* note 4, ¶ 22.

86. See text following *supra* note 20.

is needed at the multilateral level—that is, by multilateral institutions. Why? Because the issues themselves are multilateral, not purely national. I believe this is true both as a logical matter and as a practical matter.

As a logical matter, IP issues are at least largely international in character because they concern the relations between existing nation-states and groups within the borders of those nation-states (and indeed sometimes overlapping the borders of two or more nation-states). In particular, many IP issues revolve around the maltreatment or marginalization of indigenous people by the government authorities of the nation-states. Although the specific rules governing those relations might not be clear (a point I have urged above) it is surely incontrovertible that the rules themselves, like other human rights rules, are largely international in nature.

In addition, I believe support is growing for the recognition that indigenous peoples have, or should have, some attributes of sovereignty⁸⁷ or, at the very least, some rights of self-determination.⁸⁸ If this is true, the case becomes ever clearer as a logical matter that the issues of indigenous peoples cannot be handled merely at the national level, although the government entities most directly affected are of course national governments. Expressed differently: indigenous peoples enjoy a stature on the international stage that requires handling of pertinent issues on an international level.

Moreover, as a practical matter, it often simply does not work to rely on national governments to care adequately for the concerns of indigenous peoples. This has been illustrated in numerous settings. Indeed, much of the literature—both in the popular press and in legal scholarship—highlights the fact that some national governments treat indigenous peoples within their state borders with neglect, disrespect,

87. For these purposes, I am attracted to the “bundle of entitlements” view of sovereignty, in which sovereignty (as typically held by nation-states) is seen as a bundle or cluster of rights or entitlements. See ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 16-25 (1987) (summarizing “bundle of entitlements” view), *reprinted in* BURNS H. WESTON, RICHARD A. FALK, AND HILARY CHARLESWORTH, *INTERNATIONAL LAW AND WORLD ORDER* 65-68 (1997).

88. Many contributors to the literature on indigenous peoples assert that indigenous peoples have a right to self-determination. See, e.g., MacKay, *supra* note 3, at 592-93; see generally Graham, *supra* note 3 (exploring “indigenous self-determination”).

or open hostility.⁸⁹ An example offered by the Indigenous Peoples Human Rights Project relates to the Mapuche people of Chile and Argentina. Despite some protection having been promised in a 1993 law passed in Chile, the Mapuche people have allegedly received no benefit from the law because of lax enforcement; instead, they have reportedly been forced off their lands to make way for hydroelectric development and have suffered injury to their lands by forestry companies.⁹⁰

In short, for both logical and practical reasons, a proper location of responsibility for handling IP issues is at the international level, through multilateral action, rather than purely at the national level. There needs to be international action, not just state action.

3. *The role of international economic organizations*

I have tried above to rebut two grounds on which critics might claim that the World Bank and IDB policies on indigenous peoples are unhelpful: (i) that the policies are flawed in content, because they either take aim at an imaginary target or take aim at the wrong target; and (ii) that although IP issues warrant action, such action should be taken at the national level, not the international level. In my view, action is clearly needed, and it is needed at the international level.

But such action must be effective. What does that take? It takes influence and competence. I assume few, if any, observers would claim that the World Bank or the IDB lack the means of influence. Along with the other international financial institutions—most notably the other multilateral development banks and the International Monetary Fund—the World Bank and the IDB provide billions of dollars each

89. For legal scholarship along these lines, see generally Cahn, *supra* note 3, Sargent, *supra* note 3, Gesell, *supra* note 3, and Barroso, *supra* note 3; see also Parastoo Anita Mesri, *The Violation of the Human Right to Health as a Factor in the Zapatista Revolution of Chiapas, Mexico*, 10 TULSA J. COMP & INT'L L. 473 (2003); Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701 (2004).

90. *The Mapuche People of South America*, Indigenous Peoples' Human Rights Project, http://www.hrusa.org/indig/reports/mapuche.htm#_ftn1 (last visited Aug. 18, 2005). See also Lyra Spang, *Guatemala: Sipacapa Community Says No to Mining!*, Bank Information Center USA (June 30, 2005), http://www.bicusa.org/bicusa/issues/latin_america/2191.php (reporting on alleged refusal of Guatemalan government to recognize indigenous community's rights against corporate plans to operate an open pit mine located in near the indigenous community).

year in financial assistance to countries in Latin America.⁹¹ Hence, at the very least, these international entities are likely to have some important and lasting influence on states in terms of their relationship to indigenous peoples. That influence takes numerous forms, including the conditioning of financial benefits on certain prescribed proper behavior by member states' governments.

But are the World Bank and the IDB competent, as a practical matter, to exercise such influence? I shall discuss legal competence or authority below, in subsection IIC; here I refer solely to practical competence—that is, whether the institutions are competent as a factual matter to handle IP issues. In my views, the answer is “yes.” I believe these MDBs, and indeed all the MDBs (although not the IMF), have or can fairly easily obtain the competence to handle IP issues within the context of their operations and their relationships with member states. After all, substantial resources have already been allocated within the World Bank and the IDB to the addressing of IP issues: staff members have been hired and trained; policy documents have been prepared; practices have been defined; meetings have been conducted; lessons have been learned and recorded;⁹² related initiatives have been undertaken;⁹³ and relations with NGOs and other official entities with specific expertise and energy on IP issues have been developed. As the World Bank and the IDB continue to exercise influence on such issues,

91. In one recent year, for example, the World Bank devoted over US\$5.4 billion in loans to the Latin America and Caribbean region, and the IDB provided about US\$4.2 billion in loans to its borrowing member countries. See World Bank, Annual Report 2004, 103 (2004), http://www.worldbank.org/annualreport/2004/download_report.html (last visited Sept. 11, 2005) (providing a graphical representation of World Bank loan distribution in 2004); see also Inter-American Development Bank, Annual Report 2004, 16 (2004), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=516464>.

92. The World Bank Operations Evaluation Department—the unit responsible for evaluating World Bank operations—undertook a review, starting in 2001, of the institution's performance on IP issues under its old IP policy, OD4.20 dating from 1991. See Bank Information Center, *Indigenous Peoples and the World Bank* (2005), http://bicusa.org/bicus/issues/indigenous_peoples_and_the_world_bank/index.php (last visited July 30, 2005) [hereinafter BIC, *Indigenous Peoples*]; see also World Bank Operations Evaluations Department, *Operation Evaluation Department Report*, <http://www.worldbank.org/oed/index/html> (last visited July 30, 2005).

93. The World Bank's attention to IP issues extends far beyond the adopting and implementation of OP 4.10. For example, in May 2003, a World Bank Vice President announced the creation of a new Global Fund for Indigenous People, supported by the World Bank. The fund began functioning in early 2004. BIC, *Indigenous Peoples*, *supra* note 92.

the last of these points—that these MDBs can draw on the resources of NGO and official expertise and energy—will become even more important.

Therefore, my answer to the first of the three questions I am posing about the recent World Bank and IDB policies on IP issues—“Are they helpful?”—is “yes.” I regard those policy initiatives as both necessary, given the very serious problems and disparities facing indigenous peoples in Latin America, and largely reflective of generally accepted views on the legal regime affecting indigenous peoples, at least in terms of MDBs’ obligations to participate in that regime. Moreover, I believe action must be taken at the multilateral level, by multilateral institutions with adequate influence—largely but not only financial in character—to pressure states into acting in accordance with those generally accepted views. And I think the World Bank and the IDB have, or can obtain, the practical competence (that is, competence as a factual matter) to handle IP issues.

C. Are They Legal?

In my view, legal competence is just as important as practical competence. Even if the World Bank and the IDB as a practical matter have, or can get, the competence to handle IP issues, I believe they should not do so if it would constitute *ultra vires* action—that is, if it would overstep the legal authority set forth in their governing charters. Therefore I now address the second key question in my assessment of the recent package of World Bank and IDB policy initiatives regarding IP issues: are they legal?

Some critics of the World Bank in particular, and of all the multilateral development banks (“MDBs”) in general, would answer “no” to this question. I answer “yes.” I have expressed my general views on this subject elsewhere, most recently in a book on global economic organizations,⁹⁴ so I shall only summarize them here, beginning with my assessment of the “mission creep” argument as it applies to MDB involvement in IP issues.

94. See HEAD, FUTURE OF THE GEOS, *supra* note 23, at 120, 121-29. For an earlier expression of my views in this area, see John W. Head, *For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241, 269-76, 280-83 (2003).

1. "Mission creep"

According to one line of criticism, the MDBs have become far too broad and scattered in their focus, and hence less effective in their operations, because they have responded to every policy fad that has come along.⁹⁵ The result of this looseness has been both a dilution of the MDBs' commitment to true economic development and an expansion of MDB purposes and operations into areas in which, under their charters, they have no authority. The MDBs have, it is claimed, embarked on an adventure into *ultra vires* activity by getting involved in environmental protection, judicial reform, micro-credit, women's rights, indigenous peoples issues, involuntary resettlement, governance, corruption, and other matters that are not expressly provided for in their charters.

I largely dismiss this criticism, both in its broader form (that is, applied to MDB operations generally) and as it might be invoked specifically against World Bank and IDB initiatives on IP issues. The "mission creep" criticism has been raised both in the context of the International Monetary Fund ("IMF") and in the context of the MDBs, and I believe it holds no more water in one context than in the other. The most persuasive analysis I have seen of the "mission creep" criticism in the IMF context is the one offered by Professor Bob Hockett of Cornell. Hockett rebuts the criticism on several grounds, including the point that the IMF's charter vests in the IMF itself all power to interpret its own charter—a matter that raises "a nearly irrebuttable presumption in favor of formal legality" of IMF action.⁹⁶ Beyond that, however, is the fact that the IMF's charter provisions are actually quite broad in their formulation—the result, Hockett explains, of an intentional effort by the persons drafting it "to incorporate a good deal of 'creative ambiguity' into the [charter's] final draft in order to provide for future contingencies and to secure agreement."⁹⁷

95. For some examples of recent literature making this claim against the MDBs, see HEAD, *FUTURE OF THE GEOS*, *supra* note 23, at 246-47.

96. Robert Hockett, *From Macro to Micro to "Mission-Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153, 180 (2002).

97. *Id.* at 178. Hockett illustrates the breadth of IMF charter provisions on surveillance, consultations, and conditionality. *Id.* at 180-90.

I believe the same analysis applies in respect of the MDBs—and especially the World Bank and the IDB in the context of IP issues. First, I believe it would be difficult to assert, as a legal matter, that the MDBs have acted *ultra vires*, given the fact that their charters (like the IMF charter) provide for self-interpretation. That is, the charters give the MDBs' own governing bodies complete authority to decide questions of charter interpretation and application.⁹⁸ In addition, the MDB charters (again, like the IMF charter) are drafted broadly enough, presumably on purpose, to permit the MDBs to give at least some attention to such issues as those I enumerated above—environmental protection, judicial reform, micro-credit, women's rights, indigenous peoples issues, involuntary resettlement, governance, corruption, and the like—because any and all of these can have a bearing on the central objective of economic development that is prescribed for all of the MDBs in their charters.⁹⁹

Given these factors, I dismiss the “mission creep” claim insofar as it is legal in character. Instead, I submit that the MDBs have, as World Bank General Counsel Ibrahim Shihata urged us to conclude over a dozen years ago with regard to the World Bank, remained largely true to their charter provisions, especially if we are prepared to take a “purposive” or “teleological” approach to charter interpretation.¹⁰⁰

98. For the World Bank and IDB charter provisions on charter interpretation, see IBRD Charter, *supra* note 23, art. IX; IDA Charter, *supra* note 23, art. X; IDB Charter, *supra* note 27, art. XIII. In the context of the IMF, Bob Hockett has noted that the power of self-interpretation that such provisions grant “is most unusual in the . . . international (not to mention domestic) legal systems.” Hockett, *supra* note 96, at 178-79.

99. One of the first provisions in each of the MDB charters is a broad statement of the institution's purposes. See, e.g., IBRD Charter, *supra* note 23, art. I; IDA Charter, *supra* note 23, art. I; IDB Charter, *supra* note 27, art. I. All of these “statement-of-purpose” provisions are drafted broadly. For example, Article 1 of the IDB Charter states that the IDB's purpose “shall be to contribute to the acceleration of the process of economic and social development of the regional developing member countries, individually and collectively.” Article 2 of the IDB Charter, entitled “Functions”, then enumerates five areas of activity C again in broad terms, such as “to promote the investment of public and private capital for development purposes.” See also IDB Charter, *supra* note 27, arts. 1, 2(a)(i).

100. IBRAHIM SHIHATA, I THE WORLD BANK IN A CHANGING WORLD 3, 69 (1991) (positing that a “purposive” or “teleological” approach is perfectly justified in the case of the charters of multilateral institutions and is consistent with well-established rules of treaty interpretation). Similar to the notion of “purposive” or “teleological” interpretation is the notion of “evolutive” interpretation, well established in the civil law tradition because of the desire to remain true to the spirit of a written law while being responsive to changing circumstances. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 45-46 (2d ed. 1984). For a careful

2. *Trampling on national sovereignty*

Closely related to the “mission creep” criticism leveled at the MDBs—and perhaps in this context maybe merely a subsidiary complaint—is the “trampling on national sovereignty” criticism. This is a claim that the MDBs are interfering with national sovereignty of their borrowing member countries when they make such matters as those mentioned above—environmental protection, judicial reform, micro-credit, women’s rights, indigenous peoples issues, involuntary resettlement, governance, corruption, and the like—the subject of conditions placed on their member countries’ access to MDB financial resources. Such conditionality, it might be claimed, violates the “political prohibition” provision found in most MDB charters and also violates the principle of self-determination.¹⁰¹

I find this criticism unpersuasive both generally and in the specific context of World Bank and IDB policies that make access to their financial resources available only to those countries that adopt and implement the policies and prescriptions urged by those two institutions regarding the handling of IP issues. I shall summarize three reasons for dismissing this criticism.

First, states are under no legal obligation to accept the conditions of an MDB loan, for the simple reason that states are under no legal obligation to seek an MDB loan in the first place—or, indeed, to become a member of any MDB. It is no doubt true as a practical matter that a government might find no financial backing for a certain type of project (for example, a project for the construction of a road or a hospital or a school) other than MDB financing, because such a project might be unattractive to any commercial financier. However, it also remains true that if a government is dead-set against adopting certain policies or requirements that an MDB proposes to include in a loan agreement—for example, a requirement that the government provide for

examination of the considerations that the MDBs can and should take into account in interpreting their charters, see John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decision: An Interpretive Analysis of IBRD and IDA Articles of Agreement*, 33 CORNELL L. J. 331, 343-69 (2001) (discussing “ordinary meaning analysis,” “secondary intrinsic sources,” and the *travaux préparatoires* or preparatory works).

101. For some examples of recent literature making this claim against the MDBs, see HEAD, *FUTURE OF THE GEOS*, *supra* note 23, at 241.

prior, free, and informed consultation with indigenous peoples before proceeding with a project—that government can decide to do without the project. There is no legal obligation on the government to surrender or diminish its sovereignty. Hence the MDB in such circumstances does no violence to a “political prohibition” in its charter, such as the provision of Article VIII, Section 5(f) of the IDB Charter, which reads as follows:

The Bank, its officers and employees 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. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purpose and functions stated in Article I.¹⁰²

Second, there is likewise no legal obligation on the MDBs to provide financing for whatever projects their member governments propose. International law contains no generally accepted “right to development assistance” under which a country is legally entitled to receive financial assistance from another country or from an international financial institution owned by (itself and) other countries.¹⁰³ If such a legal entitlement did exist, of course, this “trampling of national sovereignty” criticism might pack some punch; but notwithstanding the efforts of the 1970s to create a new international economic order,¹⁰⁴ preferential economic treatment for less economically developed countries has thus far been confined to particular circumstances specially negotiated, as in the case of (i) the Generalized System of Preferences to provide lower tariffs on goods from less economically developed countries and (ii) special application of new rules adopted in the Uruguay Round of trade negotiations,¹⁰⁵ or to the establishment of “soft-loan” authority within

102. IDB Charter, *supra* note 27, art. VIII, sec. 5(f).

103. For citations to authorities on the purported “right to development”, see HEAD, FUTURE OF THE GEOS, *supra* note 23, at 136 n.75. As indicated there, I agree with the position expressed in IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 5-6 (3d ed. 1999) (asserting that as a general rule “there does not exist any right to development in the legal sense”).

104. For a citation to various instruments, mainly generated by the UN General Assembly, calling in the 1970s for a new international economic order, see HEAD, FUTURE OF THE GEOS, *supra* note 23, at 137 n.76.

105. For details regarding these trade-related measures to provide preferential treatment for LDCs, see *id.* at 137 nn.77-78.

the World Bank and the regional development banks, under which those institutions make long-maturity loans at zero or near-zero interest rates to less economically developed countries.¹⁰⁶

Third, this criticism rests on a legal misperception about the principle of self-determination. Even if the principle of self-determination amounts to something more than just a slogan,¹⁰⁷ it surely cannot mean that a government of a state can take action that would be regarded by the international community as impinging on the rights (including perhaps even the right to self-determination) of indigenous peoples located within that state's borders.

In sum, the World Bank and the IDB do not, in my view, trample on the sovereignty of borrowing member countries by implementing policies on IP issues, including in particular those requiring for prior consultation, the preparation of protection plans, and the like.

D. Are They Enough?

This is the third question I address in my assessment of the new World Bank and IDB policy initiatives regarding IP issues: Do those initiatives go far enough, or are they instead too timid to satisfy the obligations of international law and to meet the challenge of supporting and protecting indigenous peoples in Latin America? As I explain in the following paragraphs, my views on this point have three main elements. First, I believe that the new World Bank and IDB policy initiatives do not go far enough as a *practical* matter, although I disagree with the view that these institutions have, as a *legal* matter, actually fallen short of international legal obligations binding on them (or on their members). Second, although I believe that in fact the World Bank and the IDB should take considerably more action to support and protect indigenous peoples in Latin America, they probably cannot do so—at least not to the extent their critics call for—without exceeding the limitations of their charters. Third, the obvious solution, though

106. For details on the “soft-loan” operations of the MDBs, *see id.* at 33-34. As noted there, typical terms on a “soft” loan from the World Bank include a maturity of 40 years and a service charge of 0.75%. *Id.* at 33 n.51.

107. For my views on the principle of self-determination, *see generally* John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination*, 46 U. KAN. L. REV. 283 (1998). In that article I question whether the principle amounts to much more than a mere slogan. *See id.* at 283, 301-04.

difficult to implement, is for the World Bank and the IDB members to undertake a revision of their charters.

1. *More is needed as a practical matter*

As noted above, at least one observer has suggested that the World Bank policy on IP issues falls short of international legal obligations.¹⁰⁸ In his 2002 article, Fergus MacKay asserted not only that the draft version of OP 4.10 that he was reviewing had inadequate provisions as a policy matter but also that it fell short as a legal matter and hence reflected a refusal of the World Bank to live up to (or even to fully acknowledge) its obligations under international law regarding indigenous peoples.¹⁰⁹

I have already discussed my reasons for disagreeing with Mr. MacKay's views.¹¹⁰ Having said that, I do agree with the proposition inherent in Mr. McKay's criticism—that the MDBs should do more to help protect and support indigenous peoples. In other words, while I see no *legal* requirement that they do so, I do see a *practical* need for them to do so. To support this, I need do no more than refer to the types of statistics that I offered above in section IIB of this essay: poverty rates among indigenous people remain unacceptably high, relative incomes for indigenous people have declined in at least some Latin American countries, education is doing less good for indigenous people, indigenous peoples suffer from high child labor rates, access to basic health services is less for indigenous people, and so forth.¹¹¹ While the policy initiatives that the World Bank and the IDB have been taking are helpful, I suspect that few observers—either inside or outside those institutions—expect those initiatives to do all that could be done by the World Bank or the IDB if they were entirely unfettered by limitations in their charters. But they are not, and it is to that point that I turn next.

108. See *supra* text accompanying notes 57-59.

109. See MacKay, *supra* note 3, at 620-21.

110. See *supra* text accompanying notes 60-75.

111. See *supra* text following note 55 (bullet points itemizing problems facing indigenous peoples).

2. *Enhancing abilities to address IP issues through charter amendments*

Although I have expressed the view in section IIC, above, that the new World Bank and IDB policy initiatives regarding indigenous peoples do not constitute *ultra vires* action, it should be obvious that there are indeed limits to what those institutions can do and still be true to their charters. Expressed differently, while I do not believe the World Bank and the IDB have upset what former World Bank General Counsel Ibrahim Shihata called the “delicate balance”—a balance between (i) being faithful to the terms of an institution’s charter and (ii) having that institution interpret its charter in a way that reflects changing views and circumstances—I do believe that the World Bank and the IDB *would* upset that “delicate balance” if they expanded their attention to indigenous peoples issues to the extent that they should.

In another context, I have explained that the evolution of MDBs over the sixty years since the IBRD was first established at the Bretton Woods conference may be divided into three “generations.”¹¹² The World Bank and the IDB belong to the first and second of these, respectively, dating back as they do from the mid-1940s and the late 1950s. As such, they have charters that are outdated compared with the charter of the European Bank for Reconstruction and Development, established in 1990. That newer MDB has a more contemporary charter that allows—indeed requires—the institution to exert influence over the political reform of its countries in which it operates.¹¹³ I have urged that we should recognize now the beginning of a fourth “generation” of MDBs, in which these institutions have broader responsibilities to encourage improvement in the governance of their member states.

To provide for such broader responsibilities, I have proposed that MDB charters be amended to include various new provisions.¹¹⁴ These

112. See HEAD, FUTURE OF THE GEOS, *supra* note 23, at 44-46, 122-23. The observations I offer in this paragraph and the next two paragraphs draw heavily from that earlier work. See also John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of “International” Law*, 42 U. KAN. L. REV 605, 636, 641-44 (1994) [hereinafter *Supranational Law*].

113. For a description of this “political mandate,” as well as the “economic mandate” and the “environmental mandate” also found in this institution’s charter, see HEAD, FUTURE OF THE GEOS, *supra* note 23, at 45, 122.

114. In making such proposals, I have explained that I am fully aware of the “Pandora’s Box issue” regarding charter amendments for international organizations—that is, that any

include the definition and adoption of certain institutional principles—transparency, participation, legality, competence, and accountability—and also the incorporation of certain treaty norms of international law into the MDB charters. I need not spell out here all the details of that proposal, but I shall summarize in the following paragraphs how (i) the third of those five principles and (ii) my proposal for incorporating free-standing treaty provisions into the MDB charters might work in respect of IP issues. I shall start with the latter of these points.

Certain treaties that bear on the rights of indigenous peoples are broadly accepted by the international community. These include the International Covenant on Civil and Political Rights (“ICCPR”)¹¹⁵ and the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),¹¹⁶ both originating from the 1960s and now enjoying support from nearly all states.¹¹⁷ The main treaty targeted more narrowly on indigenous peoples is the ILO Convention 169 referred to earlier, with less than 20 parties.¹¹⁸ Under my proposal, the main substantive provisions of both the ICCPR and the CERD would be incorporated by reference into the MDBs’ charters, by way of amendments to those charters. Depending on negotiations undertaken in connection with such charter amendments, ILO Convention 169

attempt to open up such charters for the purpose of making amendments, however narrowly focused, might unleash a storm of proposals, demands, and rhetoric that would send the organizations into chaos. For my response to that concern, see HEAD, FUTURE OF THE GEOS, *supra* note 23, at 216-17. In short, I believe the global economic organizations, including the MDBs, must change or die, and that some of the necessary changes require amendments to their charters. I am not, of course, the first person to make such claims. See, e.g., MacKay, *supra* note 3, at 529, citing *Blair Calls for Urgent Reform of IMF, World Bank*, BUS. DAY, Sep. 22, 1998, at 1 (discussing British Prime Minister Tony Blair’s request that the charters of the IMF and World Bank be rewritten).

115. International Covenant on Civil and Political Rights, 993 U.N.T.S. 171, 6 I.L.M. 368 (1967) (hereinafter “ICCPR”). Article 27 of the ICCPR provides that states shall not deny religious, ethnic, or linguistic minorities the “right, in community with the other members of their group, to enjoy their own culture.”

116. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) (hereinafter “CERD”). Article 2 of the CERD provides that states “undertake by all appropriate means and without delay a policy of eliminating racial discrimination,” which is defined broadly in Article 1.

117. The ICCPR has been ratified by 152 countries, and the CERD has been ratified by 169 countries. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004*, <http://www.unhcr.org> (last visited Sep. 9, 2005).

118. See ILO 169, *supra* note 9; see also, *supra* note 12.

(along with other treaties on other subjects, of course) might also be incorporated by reference into the MDBs' charters.

In addition, other amendments to the MDBs' charters would call for a certain type of "legality" principle to be expressly made applicable to each institution's operations. Language that I have proposed for this purpose would read as follows:

The Bank shall take all action necessary and appropriate to ensure

- (a) that it follows, and sees that any recipient of Bank financial assistance follows, adequate procedures to assess in advance the social impact of any development projects for which Bank financing is used,
- (b) that no person directly affected by any development project for which Bank financing is used is worse off than before such project was undertaken,
- (c) that it observes and promotes, both in its own operations and in its dealings with members, the respect for and protection of human rights and fundamental freedoms, and
- (d) that it acts consistently with the rules and principles of international law on human rights.¹¹⁹

In order to avoid inconsistency between these provisions and the "political prohibition" provisions appearing in most of the MDBs' charters, those "political prohibition" provisions also would be amended under my proposal. The prohibition would still apply except as modified by the specific provisions of the amendments.¹²⁰

In my view, this proposal has several benefits. First, it would quiet or even obviate any debate as to the legal authority of the MDBs, including the legal authority of the World Bank and the IDB to involve themselves in matters relating to indigenous peoples.¹²¹ Second, it would force MDBs and their members to confront directly the question

119. See HEAD, FUTURE OF THE GEOS, *supra* note 23, at 529 (proposed Protocol to the Asian Development Bank charter).

120. See *id.* at 530.

121. In this respect, my proposal could address a key concern that has been expressed about OP 4.10: that it lacked references to treaty obligations and to international law generally. See *Critique by the Forest Peoples Programme of the World Bank's December 2004 Draft revised policy on Indigenous Peoples (OP 4.10)*, Forest Peoples Programme, http://www.forestpeoples.org/Briefings/World%20Bank/wb_ip_dft_pol_4_10_dec04_eng.htm, (Dec. 23, 2004) (last visited July 30, 2005) (noting in part C.2 that the December 2004 revision of the draft OP 4.10 makes only "passing and inconsequential mention of indigenous peoples' rights established under international law" and "does not deal with or note the relevance of particular international human rights instruments").

of how to balance the aims of economic development with the aims of protecting and supporting indigenous peoples. Third, it would provide strong incentives to borrowing member states to abide by treaty obligations that most of them had already undertaken independently of the MDB charter amendments I am proposing.

I am fully aware of the difficulties that would attend the negotiating of such charter amendments. Having worked in three international financial institutions, and having significant experience with a fourth, I realize that such negotiations are unlikely to be undertaken in today's political environment, especially with the current Bush Administration taking the United States down a road of dim-witted unilateralism. However, political environments change, especially if thoughtful citizens have a plan for improvement and the political will to press for it. I shall return briefly to this point in the final paragraphs of this essay.

CONCLUDING OBSERVATIONS

In my contribution to this conference on trade and foreign investment in the Americas, I have offered some observations on recent policy initiatives in the World Bank and the IDB regarding indigenous peoples. Allow me to highlight the key points that I have tried to convey:

- The last two decades have seen the development of *new perspectives* on IP issues, as reflected not only in international law generally but also in the policies applied by the World Bank and the IDB; and now both of those two MDBs have engaged in important revisions of their IP policies.
- The World Bank and IDB policies are *helpful* in three respects.
 - * First, they address very serious problems and disparities that face indigenous peoples in Latin America, and in doing so they largely reflect generally accepted views on the legal regime affecting indigenous peoples, at least in terms of MDBs' obligations to participate in that regime.
 - * Second, these new policy initiatives respond to the reality that action must be taken at the multilateral level, by multilateral institutions with adequate influence to pressure states into acting in accordance with those generally accepted views.
 - * Third, the World Bank and the IDB have, or can obtain, the practical competence (that is, competence as a factual matter) to handle IP issues adequately.
- The World Bank and IDB policies are *legal* in the sense that they do not constitute *ultra vires* action—that is, they do not overstep the legal

authority set forth in their governing charters. Two reasons support this position:

- * These policy initiatives do not amount to legal “mission creep” because the MDBs’ charters are all drafted broadly enough to permit the institutions to consider “development” broadly, and because the MDBs’ charters vest in the institutions themselves the power to interpret their own charters.
- * Nor do the new IP policy initiatives trample on the sovereignty of the MDBs’ member states; those states are under no legal requirement to surrender sovereignty, and the institutions are under no obligation to provide financing on terms they regard as imprudent.
- Although the World Bank and the IDB have not fallen short of their obligations in international law regarding IP issues, as a practical matter, their efforts are *not enough*; they should do more to protect and support indigenous peoples, especially where the need is so great in Latin America. To be most effective, the MDBs’ charters should be amended to express clearly a requirement that these institutions and their member countries are to hew to certain human rights norms, including some set forth in treaty provisions that would be incorporated by reference into the MDBs’ charters.

In offering a preview of this article I indicated that I see some prospect for a bright future for indigenous peoples. How can that be if, as I have acknowledged, the important changes that I have proposed in the MDBs’ charters—aimed at facilitating a more effective role for those institutions in protecting and supporting indigenous peoples—are unlikely in today’s political environment?

My answer rests on a willingness to take a longer view and to anticipate change. There are doubtless some shortcomings in World Bank and MDB policies as recently reformulated. However, those policies are unquestionably better than the ones they are replacing; and this reflects the bigger picture, in which the new norms emerging in international law generally on IP issues are better than the ones they are replacing. In other words, taking a longer view backwards—over the past two decades—gives cause for encouragement over what has been accomplished.

Taking a longer view forward can do the same. We can take encouragement from the momentum built up over the past two decades in respect of the MDBs’ attention to IP issues and anticipate further improvements in the next two decades. However, such improvements will not come on their own. In my view, two conditions must converge for the interests of indigenous peoples to be served better in the future.

First, the community of MDB “constituents”—national government officials, local (intended) beneficiaries, NGOs, other advocates and academics, and of course the international civil servants who run the MDBs—must devote their efforts to planning for the next “generation” in the evolution of MDBs. It is to this end that I have offered proposals for charter amendments that would, among other things, give the MDBs substantially more responsibility over human rights issues, including IP issues.

Second, we must watch for developments in international political circumstances that will be conducive to implementing those plans for the next “generation” of MDBs. This is what has happened three times in the past. It was out of the dramatically changed political and economic circumstances of the 1940s—the ending of a war that was widely regarded as having its roots partly in isolationist economic policies—that the IBRD was established (along with the IMF and the GATT). It was out of the dramatically changed political and economic circumstances of the late 1950s—the massive decolonization that had already swept across south and Southeast Asia and was underway in Africa—that the IDA was established (along with the first three of the regional MDBs). And it was out of the dramatically changed political and economic circumstances of the late 1980s and early 1990s—the fall of authoritarianism and central planning in Eastern and Central Europe, to be followed by the collapse of the entire Soviet Union—that the EBRD was established.

In each of those instances, political and economic storms set the stage for expanded visions of multilateralism, as made manifest in new legal and institutional frameworks. I consider it likely that more storms will come, and that they will open the opportunity for further improvements in how the global community handles global problems. In those improvements, I believe, lies the promise of an enriched future for indigenous peoples in Latin America, despite a history of neglect and a host of obstacles.

APPENDIX

World Bank Policy on Indigenous Peoples

OP 4.10—effective July 2005

(available from the World Bank website, www.worldbank.org)

[Note: Annexes to OP 4.10 are not reproduced here]

1. This policy [1] contributes to the Bank's[2] 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. For all projects that are proposed for Bank financing and affect Indigenous Peoples,[3] the Bank requires the borrower to engage in a process of free, prior, and informed consultation.[4] The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples.[5] Such Bank-financed projects include measures to (a) avoid potentially adverse effects on the Indigenous Peoples' communities; or (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects. Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive.

2. The Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease. Gender and intergenerational issues among Indigenous Peoples also are complex. As social groups with identities that are often distinct from dominant groups in their national societies, Indigenous Peoples are frequently among the most marginalized and vulnerable segments of the population. As a result, their economic, social, and legal status often limits their capacity to defend their interests in and rights to lands, territories, and other productive resources, and/or restricts their ability to participate in and benefit from development. At the same time, the Bank recognizes that Indigenous Peoples play a vital role in sustainable

development and that their rights are increasingly being addressed under both domestic and international law.

3. Identification. Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of “Indigenous Peoples,” this policy does not define the term. Indigenous Peoples may be referred to in different countries by such terms as “indigenous ethnic minorities,” “aboriginals,” “hill tribes,” “minority nationalities,” “scheduled tribes,” or “tribal groups.”

4. For purposes of this policy, the term “Indigenous Peoples” is used in a generic sense to refer to a distinct, vulnerable, social and cultural group[6] possessing the following characteristics in varying degrees:

- (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;[7]
- (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (d) an indigenous language, often different from the official language of the country or region.

A group that has lost “collective attachment to geographically distinct habitats or ancestral territories in the project area” (paragraph 4 (b)) because of forced severance remains eligible [*sic*] for coverage under this policy.[8] Ascertaining whether a particular group is considered as “Indigenous Peoples” for the purpose of this policy may require a technical judgment (see paragraph 8).

5. Use of Country Systems. The Bank may decide to use a country’s systems to address environmental and social safeguard issues in a Bank-financed project that affects Indigenous Peoples. This decision is made in accordance with the requirements of the applicable Bank policy on country systems.[9]

PROJECT PREPARATION

6. A project proposed for Bank financing that affects Indigenous Peoples requires:

- (a) screening by the Bank to identify whether Indigenous Peoples are present in, or have collective attachment to, the project area (see paragraph 8);
- (b) a social assessment by the borrower (see paragraph 9 and Annex A);
- (c) a process of free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project (see paragraphs 10 and 11);
- (d) the preparation of an Indigenous Peoples Plan (see paragraph 12 and Annex B) or an Indigenous Peoples Planning Framework (see paragraph 13 and Annex C); and
- (e) disclosure of the Indigenous Peoples Plan or Indigenous Peoples Planning Framework (see paragraph 15).

7. The level of detail necessary to meet the requirements specified in paragraph 6 (b), (c), and (d) is proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether adverse or positive.

SCREENING

8. Early in project preparation, the Bank undertakes a screening to determine whether Indigenous Peoples (see paragraph 4) are present in, or have collective attachment to, the project area.^[10] In conducting this screening, the Bank seeks the technical judgment of qualified social scientists with expertise on the social and cultural groups in the project area. The Bank also consults the Indigenous Peoples concerned and the borrower. The Bank may follow the borrower's framework for identification of Indigenous Peoples during project screening, when that framework is consistent with this policy.

SOCIAL ASSESSMENT

9. *Analysis.* If, based on the screening, the Bank concludes that Indigenous Peoples are present in, or have collective attachment to, the

project area, the borrower undertakes a social assessment to evaluate the project's potential positive and adverse effects on the Indigenous Peoples, and to examine project alternatives where adverse effects may be significant. The breadth, depth, and type of analysis in the social assessment are proportional to the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether such effects are positive or adverse (see Annex A for details). To carry out the social assessment, the borrower engages social scientists whose qualifications, experience, and terms of reference are acceptable to the Bank.

10. *Consultation and Participation.* Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the borrower:

- (a) establishes an appropriate gender and intergenerationally 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 local civil society organizations (CSOs) identified by the affected Indigenous Peoples' communities;
- (b) uses consultation methods^[11] 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
- (c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation.

11. In deciding whether to proceed with the project, the borrower ascertains, on the basis of 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:

- (a) the findings of the social assessment;
- (b) the process of free, prior, and informed consultation with the affected Indigenous Peoples' communities;

- (c) additional measures, including project design modification, that may be required to address adverse effects on the Indigenous Peoples and to provide them with culturally appropriate project benefits;
- (d) recommendations for free, prior, and informed consultation with and participation by Indigenous Peoples' communities during project implementation, monitoring, and evaluation; and
- (e) any formal agreements reached with Indigenous Peoples' communities and/or the IPOs.

The Bank reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself 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 does not proceed further with project processing if it is unable to ascertain that such support exists.

INDIGENOUS PEOPLES PLAN/PLANNING FRAMEWORK

12. *Indigenous Peoples Plan.* On the basis of the social assessment and in consultation with the affected Indigenous Peoples' communities, the borrower prepares an Indigenous Peoples Plan (IPP) that sets out the measures through which the borrower will ensure that (a) Indigenous Peoples affected by the project receive culturally appropriate social and economic benefits; and (b) when potential adverse effects on Indigenous Peoples are identified, those adverse effects are avoided, minimized, mitigated, or compensated for (see Annex B for details). The IPP is prepared in a flexible and pragmatic manner,[12] and its level of detail varies depending on the specific project and the nature of effects to be addressed. The borrower integrates the IPP into the project design. When Indigenous Peoples are the sole or the overwhelming majority of direct project beneficiaries, the elements of an IPP should be included in the overall project design, and a separate IPP is not required. In such cases, the Project Appraisal Document (PAD) includes a brief summary of how the project complies with the policy, in particular the IPP requirements.

13. *Indigenous Peoples Planning Framework.* Some projects involve the preparation and implementation of annual investment programs or

multiple subprojects.[13] In such cases, and when the Bank's screening indicates that Indigenous Peoples are likely to be present in, or have collective attachment to, the project area, but their presence or collective attachment cannot be determined until the programs or subprojects are identified, the borrower prepares an Indigenous Peoples Planning Framework (IPPF). The IPPF provides for the screening and review of these programs or subprojects in a manner consistent with this policy (see Annex C for details). The borrower integrates the IPPF into the project design.

14. *Preparation of Program and Subproject IPPs.* If the screening of an individual program or subproject identified in the IPPF indicates that Indigenous Peoples are present in, or have collective attachment to, the area of the program or subproject, the borrower ensures that, before the individual program or subproject is implemented, a social assessment is carried out and an IPP is prepared in accordance with the requirements of this policy. The borrower provides each IPP to the Bank for review before the respective program or subproject is considered eligible for Bank financing. [14]

DISCLOSURE

15. The borrower makes the social assessment report and draft IPP/IPPF available to the affected Indigenous Peoples' communities in an appropriate form, manner, and language.[15] Before project appraisal, the borrower sends the social assessment and final IPP/IPPF to the Bank for review.[16] Once the Bank accepts the documents as providing an adequate basis for project appraisal, the Bank makes them available to the public in accordance with *The World Bank Policy on Disclosure of Information*, and the borrower makes them available to the affected Indigenous Peoples' communities in the same manner as the earlier draft documents.

SPECIAL CONSIDERATIONS

Lands and Related Natural Resources

16. Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply

if the project affects such ties. In this situation, when carrying out the social assessment and preparing the IPP/IPPF, the borrower pays particular attention to:

- (a) the customary rights^[17] of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods;
- (b) the need to protect such lands and resources against illegal intrusion or encroachment;
- (c) the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources; and
- (d) Indigenous Peoples' natural resources management practices and the long-term sustainability of such practices.

17. If the project involves (a) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied (such as land titling projects), or (b) the acquisition of such lands, the IPP sets forth an action plan for the legal recognition of such ownership, occupation, or usage. Normally, the action plan is carried out before 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 following forms:

- (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or
- (b) 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.

COMMERCIAL DEVELOPMENT OF NATURAL AND CULTURAL RESOURCES

18. If the project involves the commercial development of natural resources (such as minerals, hydrocarbon resources, forests, water, or hunting/fishing grounds) on lands or territories that Indigenous Peoples traditionally owned, or customarily used or occupied, the borrower ensures that as part of the free, prior, and informed consultation process the affected communities are informed of (a) their rights to such

resources under statutory and customary law; (b) the scope and nature of the proposed commercial development and the parties interested or involved in such development; and (c) the potential effects of such development on the Indigenous Peoples' livelihoods, environments, and use of such resources. The borrower includes in the IPP arrangements to enable the Indigenous Peoples to share equitably in the benefits[18] to be derived from such commercial development; at a minimum, the IPP arrangements must ensure that the Indigenous Peoples receive, in a culturally appropriate manner, benefits, compensation, and rights to due process at least equivalent to that to which any landowner with full legal title to the land would be entitled in the case of commercial development on their land.

19. If the project involves the commercial development of Indigenous Peoples' cultural resources and knowledge (for example, pharmacological or artistic), the borrower ensures that as part of the free, prior, and informed consultation process, the affected communities are informed of (a) their rights to such resources under statutory and customary law; (b) the scope and nature of the proposed commercial development and the parties interested or involved in such development; and (c) the potential effects of such development on Indigenous Peoples' livelihoods, environments, and use of such resources. Commercial development of the cultural resources and knowledge of these Indigenous Peoples is conditional upon their prior agreement to such development. The IPP reflects the nature and content of such agreements and includes arrangements to enable Indigenous Peoples to receive benefits in a culturally appropriate way and share equitably in the benefits to be derived from such commercial development.

PHYSICAL RELOCATION OF INDIGENOUS PEOPLES

20. Because physical relocation of Indigenous Peoples is particularly complex and may have significant adverse impacts on their identity, culture, and customary livelihoods, the Bank requires the borrower to explore alternative project designs to avoid physical relocation of Indigenous Peoples. In exceptional circumstances, when it is not feasible to avoid relocation, the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and

informed consultation process. In such cases, the borrower prepares a resettlement plan in accordance with the requirements of OP 4.12, *Involuntary Resettlement*, that is compatible with the Indigenous Peoples' cultural preferences, and includes a land-based resettlement strategy. As part of the resettlement plan, the borrower documents the results of the consultation process. Where possible, the resettlement plan should allow the affected Indigenous Peoples to return to the lands and territories they traditionally owned, or customarily used or occupied, if the reasons for their relocation cease to exist.

21. In many countries, the lands set aside as legally designated parks and protected areas may overlap with lands and territories that Indigenous Peoples traditionally owned, or customarily used or occupied. The Bank recognizes the significance of these rights of ownership, occupation, or usage, as well as the need for long-term sustainable management of critical ecosystems. Therefore, involuntary restrictions on Indigenous Peoples' access to legally designated parks and protected areas, in particular access to their sacred sites, should be avoided. In exceptional circumstances, where it is not feasible to avoid restricting access, the borrower prepares, with the free, prior, and informed consultation of the affected Indigenous Peoples' communities, a process framework in accordance with the provisions of OP 4.12. The process framework provides guidelines for preparation, during project implementation, of an individual parks and protected areas' management plan, and ensures that the Indigenous Peoples participate in the design, implementation, monitoring, and evaluation of the management plan, and share equitably in the benefits of the parks and protected areas. The management plan should give priority to collaborative arrangements that enable the Indigenous Peoples, as the custodians of the resources, to continue to use them in an ecologically sustainable manner.

INDIGENOUS PEOPLES AND DEVELOPMENT

22. In furtherance of the objectives of this policy, the Bank may, at a member country's request, support the country in its development planning and poverty reduction strategies by providing financial assistance for a variety of initiatives designed to:

- (a) strengthen local legislation, as needed, to establish legal recognition of the customary or traditional land tenure systems of Indigenous Peoples;
- (b) make the development process more inclusive of Indigenous Peoples by incorporating their perspectives in the design of development programs and poverty reduction strategies, and providing them with opportunities to benefit more fully from development programs through policy and legal reforms, capacity building, and free, prior, and informed consultation and participation;
- (c) support the development priorities of Indigenous Peoples through programs (such as community-driven development programs and locally managed social funds) developed by governments in cooperation with Indigenous Peoples;
- (d) address the gender^[19] and intergenerational issues that exist among many Indigenous Peoples, including the special needs of indigenous women, youth, and children;
- (e) prepare participatory profiles of Indigenous Peoples to document their culture, demographic structure, gender and intergenerational relations and social organization, institutions, production systems, religious beliefs, and resource use patterns;
- (f) strengthen the capacity of Indigenous Peoples' communities and IPOs to prepare, implement, monitor, and evaluate development programs;
- (g) strengthen the capacity of government agencies responsible for providing development services to Indigenous Peoples;
- (h) protect indigenous knowledge, including by strengthening intellectual property rights; and
- (i) facilitate partnerships among the government, IPOs, CSOs, and the private sector to promote Indigenous Peoples' development programs.

1. This policy should be read together with other relevant Bank policies, including *Environmental Assessment* (OP4.01), *Natural Habitats* (OP 4.04), *Pest Management* (OP 4.09), *Physical Cultural Resources* (OP 4.11, forthcoming), *Involuntary Resettlement* (OP 4.12), *Forests* (OP 4.36), and *Safety of Dams* (OP 4.37).

2. "Bank" includes IBRD and IDA; "loans" includes IBRD loans, IDA credits, IDA grants, IBRD and IDA guarantees, and Project Preparation Facility (PPF) advances, but does not include development policy loans, credits, or grants. For social aspects of development policy operations, see OP 8.60, *Development Policy Lending*, paragraph 10. The term "borrower" includes, wherever the context requires, the recipient of an IDA grant, the guarantor of an IBRD loan, and the project implementing agency, if it is different from the borrower.

3. This policy applies to all components of the project that affect Indigenous Peoples, regardless of the source of financing.

4. "Free, prior, and informed consultation with the affected Indigenous Peoples' communities" refers to a culturally appropriate and collective decisionmaking [*sic*] 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).

5. For details on "broad community support to the project by the affected Indigenous Peoples," see paragraph 11.

6. The policy does not set an *a priori* minimum numerical threshold since groups of Indigenous Peoples may be very small in number and their size may make them more vulnerable.

7. "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 that hold special significance for it, such as sacred sites. "Collective attachment" also refers to the attachment of transhumant/nomadic groups to the territory they use on a seasonal or cyclical basis.

8. "Forced severance" refers to 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. For purposes of this policy, "urban area" normally means a city or a large town, and takes into account all of the following characteristics, no single one of which is definitive: (a) the legal designation of the area as urban under domestic law; (b) high population density; and (c) high proportion of nonagricultural economic activities relative to agricultural activities.

9. The currently applicable Bank policy is OP/BP 4.00, *Piloting the Use*

of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects. Applicable only to pilot projects using borrower systems, the policy includes requirements that such systems be designed to meet the policy objectives and adhere to the operational principles related to Indigenous Peoples identified in OP 4.00 (see Table A1.E).

10. The screening may be carried out independently or as part of a project environmental assessment (see OP 4.01, *Environmental Assessment*, paragraphs 3, 8).

11. Such 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.

12. When non-Indigenous Peoples live in the same area with Indigenous Peoples, the IPP should attempt to avoid creating unnecessary inequities for other poor and marginal social groups.

13. Such projects include community-driven development projects, social funds, sector investment operations, and financial intermediary loans.

14. If the Bank considers the IPPF to be adequate for the purpose, however, the Bank may agree with the borrower that prior Bank review of the IPP is not needed. In such case, the Bank reviews the IPP and its implementation as part of supervision (see OP 13.05, *Project Supervision*).

15. The social assessment and IPP require wide dissemination among the affected Indigenous Peoples’ communities using culturally appropriate methods and locations. In the case of an IPPF, the document is disseminated using IPOs at the appropriate national, regional, or local levels to reach Indigenous Peoples who are likely to be affected by the project. Where IPOs do not exist, the document may be disseminated using other CSOs as appropriate.

16. An exception to the requirement that the IPP (or IPPF) be prepared as a condition of appraisal may be made with the approval of Bank management for projects meeting the requirements of OP 8.50, *Emergency Recovery Assistance*. In such cases, management's approval stipulates a timetable and budget for preparation of the social assessment and IPP or of the IPPF.

17. "Customary rights" to lands and resources refers to 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.

18. The "Indigenous Peoples Guidebook" (forthcoming) will provide good practice guidance on this matter.

19. See OP/BP 4.20, *Gender and Development*.