

# **BEP Indigenous Development Report**

**The Right of Indigenous Peoples to Participation in Development – An Overview of  
International Human Rights Instruments**



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## 1 Introduction

The term “development” is not found, for instance, in the Charter of the United Nations. But the Charter, in its preamble, Article 1 and Chapter IX, commits the organisation and its member states to international cooperation in promoting economic and social rights. Article 1 identifies international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms as one of the purposes of the Organization. Moreover, Article 55 of Chapter IX on International Economic and Social Co-operation provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Even though the 1948 Universal Declaration on Human Rights of 1948 emphasises the promotion of social progress, non-discrimination, participation in public life and the right to an adequate standard of life, it does not explicitly recognise the right to development.

The right to development was made an explicit right under international law only in 1986 when the UN General Assembly adopted the Declaration on the Right to Development. Article 1 of this Declaration provides that “the right to development is an alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural rights and political development, in which all human rights and fundamental freedoms can be fully realized.” Subsequent articles of the Declaration elaborate these principles and clarify the nature of the right to development. Under Article 2 the human person is the central subject of development and should be the active participant and beneficiary of the right to development. In Article 8 it is recommended “that States should encourage popular participation in all spheres as an important factor in development...”

In the years to follow attempts were made in the UN to build up a consensus on the right to development. In the late 1980s the United Nations Development Programme (UNDP) published the

first of a series of reports on Human Development, introducing the notion of “human development”. In these reports development is defined as “a process of enlarging people’s choices” containing four elements, the fourth of which is described as the element of empowerment. Empowerment requires according to the UNDP reports that development is *by* the peoples, not only *for* the people. In other words, people should participate fully in the decisions and processes that shape their lives.

The Declaration and Programme of Action of the 1993 World Conference on Human Rights in Vienna finally settled the debate whether the right to development is to be regarded as a genuine human right. The 1993 World Conference also reaffirmed the interdependence between development, democracy, full participation and human rights and fundamental freedoms.

In 1994, the UN Secretary-General *Boutros-Ghali* presented his Agenda for Development. The 1994 Agenda strongly endorses democracy as a component of development. According to the Agenda “democracy and development are linked in fundamental ways”, *inter alia*, because democracy is the only basis for managing competing ethnic, religious and cultural interest in a way that minimises the risks of violent internal conflict, and because people’s participation in decision-making processes which affect their lives is a basic tenet of development.

The notion of a *rights-based approach to development* is part of the efforts to enhance the human rights programme and to integrate it into the broad range of United Nations other activities (“mainstreaming human rights”), also in the areas of development. A rights-based approach to development has been described as a conceptual framework for the process of human development that is normatively based in international human rights standards and operationally directed to promoting and protecting human rights. A rights-based approach to development integrates the norms, standards and principles of international human rights system into the policies, processes and plans of development. The rights-based approach to development is therefore seen to enclose the following core elements:

- Express linkage to rights
- Accountability
- Empowerment
- Participation
- Non-discrimination

Empowerment means that development should focus on beneficiaries as the owners of rights and the directors of development, and emphasise the human person as the centre of the development process; directly or through their advocates and organisations of civil society. The aim is to give the people the power, capacities, capabilities and access needed to change their lives, improve their own communities and influence their own destinies.

Moreover, a rights-based approach to development requires a high degree of participation, including from communities, civil society, minorities, indigenous peoples, women and other groups affected groups. Their participation must be free, active, and meaningful. Mere formal or “ceremonial” contacts

with the beneficiaries of development are not sufficient. An active and meaningful participation by the beneficiaries may provide a safeguard against unintended harm by development projects.

The United Nations independent expert on development, *Dr. Arjun K. Sengupta*, has defined the right to development as a particular process of development that allows the realisation of economic, social and cultural rights, as well as civil and political rights and all fundamental freedoms, by expanding the capabilities and choice of the individual. According to the independent expert the realisation of the right to development therefore has to be based on a programme of coordinated actions in the form of a *development plan*. This plan would be based entirely on decentralised decision-making with the participation and empowerment of the beneficiaries, and would have to be formulated through a process of consultation with civil society and the beneficiaries in a non-discriminatory and transparent manner.

This report focuses on indigenous peoples as beneficiaries of development, and in particular on their right under international law to participate in development the formulation and implementation of development programmes and plans that affect or may affect them. In addition to providing an overview of the international instruments on the right to development the report also studies international human rights provisions on the right of indigenous peoples to participate in public decision-making affecting their interests in general. Some international codes of conduct are studied as examples of attempts to implement participatory rights of indigenous peoples set forth in the relevant human rights instruments.

## 2 Human Rights Provisions on Indigenous Participation in Development

### 2.1 Introduction

Indigenous peoples are not against development policies that bring improvements nationally or locally as such. But development processes on the national level which have failed to include a meaningful participation of particularly indigenous peoples have not always been consistent with the wishes and interests of indigenous peoples. There are also examples of development projects having had serious negative impact on indigenous peoples traditional livelihoods, environment, use of land and culture, and which may have contributed to the assimilation of such peoples contrary to, for instance, the guiding principles of the 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. Many indigenous peoples do not have the information, knowledge, organisational capacities or political channels required to influence development processes which affect them. Therefore, they have consistently insisted that they be empowered to affect decisions that have an impact on their communities and rights.

### 2.2 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries was adopted by the General Conference of the International Labour Organisation in 1989. The Convention, which came internationally into force in 1991, is legally binding upon the states which have ratified it.

The Convention does not provide a general definition of the concept of an indigenous people but it defines those groups to which the Convention applies. In the Convention the term “indigenous peoples” is used throughout its text. This does not necessarily mean that indigenous peoples would be “peoples” in the sense that this concept is understood, for instance, in the Charter of the United Nations or the Declaration on the Right to Development. Under Article 2, paragraph 3 of the ILO Convention the use of the term peoples in the Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The main objective of the revision of the ILO Convention was to remove the assimilationist orientation of the earlier ILO standard on indigenous peoples – ILO Convention No. 107 of 1957. The 1989 Convention specifically recognises the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions within the framework of the states in which they live. In its preamble it is reaffirmed that in many parts of the world indigenous peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population, and that their laws, values, customs and perspectives have often been eroded. The preamble further calls attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding.

The 1989 Convention does not set forth a right of indigenous peoples to development as such. But Article 7, on the other hand, provides that indigenous peoples have the right to decide their own priorities for the process of development and to participate in development plans and programmes. Article 7 reads:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

In addition to Article 7 on the participation of indigenous peoples in development some other provisions of the Convention require the effective participation of indigenous peoples in matters that affect them in general, and in particular their way of life, traditional livelihoods, lands, territories or natural resources. Article 6 specifies the obligation of governments to take measures to secure the participation of indigenous peoples in matters that affect them. According to this provision the governments shall in applying the provisions of the Convention (including Article 7):

(a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 6 uses both the term “participation” and the term “consultation”. Indigenous peoples have under Article 6 a right to participate – to at least the same extent as other sectors of the population – at all levels of decision-making in elective institutions and administrative and other bodies responsible for “policies and programmes which concern them.” In addition, indigenous peoples must be consulted through appropriate procedures, and in particular through their representative institutions, whenever consideration is being given to “legislative or administrative measures which may affect them directly”. Since the implementation of plans and programmes for national and regional development commonly require the taking of legislative or administrative measures the provision on consultation is of relevance for the right of indigenous peoples to participate in development as well.

The right of indigenous people to be consulted is further specified in Article 6, paragraph 2 which requires the consultations to be carried out in application of the Convention be undertaken, in good

faith and in a form appropriate to the circumstances, with the objective of achieving “agreement” or “consent” to the proposed measures. Although Article 6, paragraph 2 thus does not explicitly require that indigenous peoples must consent or agree to all proposed legislative or administrative measures it clearly follows from this provision that the consultations undertaken must not be formal ones only. The objective of all such consultations must be the achievement of agreement or consent.

It should also be observed that indigenous peoples do not only have the right to participate in the implementation of plans and programmes for national and regional development which may affect them directly, but that they also have the right to participate in their formulation and evaluation.

The fact that many indigenous peoples’ lack the economic resources necessary for effective participation is taken into consideration in Article 6, paragraph 1c which requires that the governments establish means for the full development of indigenous peoples’ own institutions and initiatives, and that they in appropriate cases provide the necessary resources for this purpose.

By October 2002 the ILO Convention No. 169 has been ratified by 17 states with indigenous peoples: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru and Venezuela. Indigenous people living in other countries cannot successfully invoke the provisions of this Convention. Therefore, certain other provisions on indigenous participation are studied below.

### 2.3 The Rio Conference on Environment and Development

The Rio Declaration adopted by the Rio Conference on Environment and Development, Rio de Janeiro, 3-4 June 1992 include a principle on indigenous participation in environmental management and development – Principle 22. This Principle establishes that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Even though Principle 22 is not very specific as for indigenous peoples’ participation in development it underlines the importance – because of their unique knowledge and practices - of involving such peoples in the achievement of a sustainable development.

### 2.4 The UN Draft Declaration on the Rights of Indigenous Peoples

Within the United Nations there is no legally binding instrument on indigenous peoples similar to that of the ILO Convention No. 169. But in 1993, the members of the Working Group on Indigenous Populations agreed upon a draft United Nations Declaration on the rights of indigenous peoples. One year later the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Draft



adopted and submitted the draft Declaration to the Commission on Human Rights by resolution 1994/94. Since 1995, the draft Declaration has been considered by an open-ended inter-sessional Working Group established in accordance with Commission on Human Rights resolution 1995/35 and ECOSOC resolution 1994/32.

The draft Declaration does not expressly address the right to development but it does require that indigenous peoples participate effectively in the exercise and implementation of the right to development. According to draft Article 23 indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, they have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Indigenous peoples also have under draft Article 30 the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including “the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development utilization or exploitation of mineral, water or other resources”. On other words, indigenous peoples would according to the provision have a right of veto, that is, a right say no to development projects that have adverse effects on their traditional lands, territories or other resources. Draft Article 30 provides further that pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

In addition to those directly addressing indigenous participation in development programmes the draft Declaration contain several provisions on the right of indigenous peoples to take part in public decision-making and administration on a more general level. Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own indigenous decision-making institutions. They also have the right to participate fully through procedures determined by them, in devising legislative or administrative measures that may affect them (draft Article 20). An additional requirement is that states shall obtain “the free and informed consent of the peoples concerned before adopting and implementing such measures” (draft Article 20).

In conclusion, the draft Declaration would considerably strengthen indigenous peoples’ right of participation in development, and particularly in development plans and programmes that affect their lands, territories and other natural resources. It should nevertheless be observed that even if adopted by the General Assembly the Declaration would not be legally binding for the states with indigenous peoples. The aim is that the UN General Assembly would be able to adopt the Declaration in 2004. So far, the progress has been slow in the inter-sessional Working Group of the Commission on Human rights.

### 3 Participatory Rights of Persons Belonging to Minorities

#### 3.1 Indigenous Peoples and Rights of Minorities

Many indigenous peoples do not wish to be characterised as minorities. It is naturally a question for the indigenous peoples constituting numerical minorities themselves to decide whether or not they wish to benefit from international human rights provisions on the protection of persons belonging to minorities. In practice, for instance, the Human Rights Committee has considered a number of communications submitted by indigenous peoples concerning alleged violations of the rights of persons belonging to minorities in Article 27 of the International Covenant on Civil and Political Rights.

#### 3.2 Article 27 of the International Covenant on Civil and Political Rights

Article 27 of the International Covenant on Civil and Political Rights is, so far, the only legally binding human rights provision on the international level on the protection of persons belonging to minorities. This provision reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Notwithstanding that Article 27 is a provision on the protection of the culture, language and religion of persons belonging to minorities and not a provision on the right to take part in the conduct of public affairs, it has certain political implications. In its General Comment 23(50)<sup>1</sup> on Article 27 the Human Rights Committee has concluded that the enjoyment of the cultural rights under Article 27 may, particularly in the case of indigenous peoples, require positive legal measures of protection and measures to ensure “the effective participation of members of minority communities in decisions which affect them”. The Committee does not specify how minority communities could participate “effectively” in such decisions.

Today, 147 states are parties to the Covenant on Civil and Political Rights.

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<sup>1</sup> UN Doc. HRI/GEN/1/Rev.1 at 38 (1994).

### 3.3 Article 2 of the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

References to the “effective participation” of persons belonging to minorities are also found in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Declaration is not legally binding upon the UN member states but expresses morally binding principles for the states to take into consideration in their treatment of their minorities.

Article 2, paragraph 2 and 3 of the Declaration set forth certain rights of political participation of persons belonging to minorities:

2.2 Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

2.3 Persons belonging to minorities have the right to participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

While Article 2, paragraph 2 deals with the right to participation in all aspects of the public life of a society in general, Article 2, paragraph 3 deals specifically with the right of persons belonging to minorities to “participate effectively in decisions ... concerning the minority to which they belong or the regions in which they live”.

In 2001, the Chairperson of the Working Group on Minorities of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Mr. Asbjorn Eide*, submitted a commentary to the Declaration in 2001.<sup>2</sup> According to this Commentary effective participation provides channels for consultation between and among minorities and governments. Among measures that may increase the chances of minorities to participate in the exercise of authority over matters affecting themselves and the society in which they live are:

- The establishment of proportional representation systems or forms of preference voting;
- Decentralization of powers based on the principle of subsidiarity, whether called self-government or devolved power, and whether the arrangements are symmetrical or asymmetrical;
- Establishment of advisory or consultative bodies involving minorities should be established within appropriate institutional frameworks. These bodies should be attributed political weight and effectively consulted on issues affecting the minority population;

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<sup>2</sup> Eide, Asbjorn: Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. UN Doc. E/CN.4/Sub.2/AC.5/2001/2.

- Access to public sector employment across the various ethnic, linguistic and religious communities;
- Reduction of barriers to the acquisition of citizenship for members of minorities and forms of participation by resident non-citizens should also be developed, including local voting rights after a certain period of residence and inclusion of elected non-citizen observers in municipal, regional and national legislative and decision-making assemblies.

Under Article 2, paragraph 4 of the Declaration persons belonging to minorities have the right to maintain their own associations. Like everybody else persons belonging to minorities also have the right to assemble and to form their associations and thereby to try to make the greatest possible impact on national and regional decision-making.

#### 4 Indigenous Participation in Development – Some International and Regional Codes of Conduct

##### 4.1 The United Nations Development Programme (UNDP)

The United Nations Development Programme (UNDP) is a UN organisation that promotes and supports programmes for sustainable human development. UNDP is the UN's principal provider of development aid, advocacy and grant support to developing countries. Since 1993, many of UNDP's small grants programmes and its regional and national programmes have involved indigenous peoples' communities. In addition, UNDP has supported projects under the Indigenous Knowledge Programme. The small grants programmes commonly involve direct assistance to local communities through NGOs and Community Based Organisations (CBOs).

Paragraph 9 of Chapter 4 of the UNPD Programming Manual (of Dec. 2000) on formulating programmes and projects sets forth guidelines on participation, including participation of indigenous peoples, in the organisation's programmes and projects. This paragraph reads:

- a. The participation of target groups ensures that potential opportunities and risks, including lessons drawn from experience, are taken into account in the design. This participation promotes stakeholder's ownership and commitment, without which the results are unlikely to be lasting. In addition, participation in all phases of a programme or project promotes respect for the human rights of all individuals, including those belonging to indigenous groups, who may be affected by the programme or project;  
Ensuring participation requires investment of time and resources, for which adequate provisions should be made:
- b. Women's participation should be ensured throughout the stages of the programme or project cycle.
- c. GEF has specific guidelines on participation and information disclosure which require that all GEF financed projects "provide for full disclosure of non-confidential information, and consultation with, and participation as appropriate of, major groups and local communities throughout the project cycle."

GEF is the Global Environment Facility of the UNDP. GEF Small Grants Programme supports small-scale activities conducted by NGO's and community groups that address environmental problems. The Operational Policies on Public Involvement in GEF-Financed Projects defines the concept of public involvement as follows:

5. Public involvement consists of three related, and often overlapping, processes: information dissemination, consultation, and "stakeholder" participation. Stakeholders are the individuals, groups, or institutions that have an interest or stake in the outcome of a GEF-financed project. The term also applies to those potentially affected by a project. Stakeholders include recipient country governments, implementing agencies, project executing agencies, groups contracted to conduct project activities at various stages of the project, and other groups in the civil society which may have an interest in the project.

6. Information dissemination refers to the availability and distribution of timely and relevant information on GEF-financed projects. Aspects of dissemination include appropriate notification and disclosure of project information and proper public access to it.

7. Consultation pertains to information exchanges among the government, the Implementing Agency, project executing agencies, and other stakeholders. Although decision making authority rests with the government, the Agency, and project executing agencies, periodic consultations throughout the project cycle help managers make informed choices about project activities. Consultation further provides opportunities for communities and local groups to contribute to project design, implementation, and evaluation.

8. Stakeholder participation is where stakeholders collaboratively engage, as appropriate, in the identification of project concepts and objectives, selection of sites, design and implementation of activities, and monitoring and evaluation of projects. Developing strategies for incorporating stakeholder participation throughout the project cycle is particularly necessary in projects which impact the incomes and livelihoods of local groups, especially disadvantaged populations in and around project sites (for example, indigenous communities, women, and poor households).

#### 4.2 The Asian Development Bank

The Asian Development Bank (ADB) is a multilateral development finance institution established in 1966 and dedicated to reducing poverty in Asia and the Pacific. Currently the ADB has 61 member states. Membership is open to members and associate members of the United Nations Economic and Social Commission for Asia and the Pacific – formerly the United Nations Economic Commission for Asia and the Far East – and other regional countries and non-regional developed countries which are members of the United Nations or of any of its specialised agencies. The strategic objectives of the

ADB are the promotion of economic growth, development of human resources, the improvement of the status of women and the protection of the environment.

The ADB has issued, as a part of the Bank's Operational Manual, Bank Policies (PB) and Operational Procedures (OP) on Indigenous Peoples (of Dec. 2000). These require that the borrower prepare an indigenous peoples development plan if indigenous peoples are likely to be affected significantly or adversely by a project financed by the ADB. The key elements in such an Indigenous Peoples Development Plan is defined in great detail as follows:

As reflected in para. 38 of the policy document on indigenous peoples, responsibility for preparation of an indigenous peoples plan rests with the relevant government or other project sponsor. The Bank will support the efforts of the government or project sponsor as necessary and appropriate. Key elements in ensuring that an appropriate indigenous peoples development plan is prepared include:

- i. preparation, during project design, of a development plan that takes into full account the desires and preferred options of indigenous peoples affected by the project;
- ii. studies to identify potential adverse effects on indigenous peoples to be induced by the project, and to identify measures to avoid, mitigate, or compensate for these adverse effects;
- iii. measures to ensure the capacity or the strengthening of the social, legal, and technical skills of government institutions to be responsible under the project for dealing with indigenous peoples;
- iv. involvement of appropriate existing institutions, local organizations, and nongovernment organizations with expertise in matters relating to indigenous peoples;
- v. consideration in project design of local patterns of social organization, cultural belief, and ancestral territory and resource use;
- vi. support for viable and sustainable production systems that are adapted to the needs and local environments and circumstances of indigenous peoples;
- vii. avoidance of creating or aggravating the dependency of indigenous peoples on project entities, and instead promoting self-reliance among these peoples;
- viii. capacity building for indigenous peoples communities and organizations to facilitate and support effective participation in development processes; and
- ix. adequate lead time and arrangements for extending follow-up, especially in dealing with indigenous peoples in remote or neglected areas where little previous experience is available.

Consultation with indigenous peoples groups is key to developing an effective, accurate, responsive indigenous peoples development plan.

Indigenous peoples often lack the information, knowledge, analytical and organizational capacities, and political channels and power to influence and direct development processes that directly or indirectly affect their lives. The following basic principles should apply to Bank-supported projects that affect indigenous peoples:

i. All development plans for indigenous peoples, including provisions for mitigation measures, should be based on full consideration of the options and approaches, including requirements for consultation, that best meet the interests of individuals and communities affected by projects. Qualified specialists should be involved in the formulation of such plans and mitigation measures, in consultation with the persons affected, both men and women. The development of approaches, plans, and mitigation measures must include consultation with the peoples affected.

ii. When it is indicated that a project will have adverse effects on indigenous peoples, it is necessary that the scope and impact of such adverse effects be thoroughly assessed by qualified experts or agencies, and that appropriate mitigation measures are identified in feasibility studies. It is preferable that the net impact a project will have on indigenous peoples be not only positive, but also be perceived by indigenous peoples as positive. If individuals or communities must lose their social support systems or ways of life so that a project can proceed, they should be compensated appropriately.

iii. Project design should take into consideration the social and cultural context of affected peoples, and their skills and knowledge relating to local resource management. Project design should draw upon the strengths of indigenous peoples organizations and communities, as well as traditional social organizations and indigenous knowledge, and as far as feasible should avoid introducing undesirable or unacceptable changes in the way of life of indigenous communities.

iv. During project preparation, those preparing the project should promote the formation or strengthening of indigenous peoples' organizations to facilitate their participation in project identification, planning, execution, and evaluation. As needed, provision should be made to train indigenous peoples in project management activities.

v. Where previous experience and knowledge of working successfully with indigenous peoples is lacking, pilot-scale operations should be carried out and evaluated prior to the execution of full-scale efforts.

vi. If government institutions responsible for interaction with indigenous peoples do not possess the necessary legal, social, and technical capacities, or if their relationship with indigenous peoples is weak, the involvement of experienced local community organizations and nongovernment organizations that can serve as intermediaries and that are acceptable to all parties involved, including governments, should be sought. Consideration should be given to traditional representative institutions. Approaches to developing the capacity of government institutions should be explored.

vii. Bank approval of a project should not be based only on the concept and quality of project design, but also on the orientation, capacity, and operational record of the government agencies or other project sponsors concerned in executing the project.

### 4.3 The World Bank

The World Bank is one of the world's largest sources of development assistance. The Bank works in more than 100 developing economies and works with government agencies, nongovernmental organisations and the private sector to formulate assistance strategies. The World Bank is owned by more than 184 member countries which are represented by a Board of Governors and a Board of Directors.

In 1982, the World Bank issued a brief operational policy statement which outlined procedures for protecting the rights of so-called “tribal people” in Bank-financed development projects. As a result of increasing criticism from Latin American indigenous organisations, NGOs and anthropologists towards the protectionist and integrationist approach of the 1982 directive the World Bank, after two years of discussion within the Bank and some consultations with outside organisations and experts, in 1991 issued a revised Operational Directive (OD) 4.20 on Indigenous Peoples.

Operational Directives (ODs) are internal guidelines for the design and implementation of the World Bank's development projects and are binding on the staff of the Bank. The objective of OD 4.20 is to ensure that indigenous peoples benefit from development projects, and to avoid or mitigate potentially adverse effects on indigenous peoples caused by Bank-assessed activities. The OD describes Bank policies and processing procedures for projects that affect indigenous peoples. It sets out basic definitions, policy objectives, guidelines for the design and implementation of project provisions or components for indigenous peoples as well as processing and documentation requirements.

According to the Operational Directive the Bank's strategy for addressing the issues pertaining to indigenous peoples must be based on the “informed participation” of the indigenous peoples themselves. Identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are defined in the OD as core activities for any project that affects indigenous peoples and their rights to natural and economic resources.

The OD requires that for any investment project that affects indigenous peoples the borrower should prepare an *indigenous peoples development plan* that is consistent with the Bank's policy. The OP lays down prerequisites for and contents of successful development plans for indigenous peoples. Among these is the requirement that the institutions responsible for government interaction with indigenous peoples should possess the social, technical, and legal skills needed for carrying out the proposed development activities. Implementation arrangements should be kept simple. They should normally involve appropriate existing institutions, local organizations, and non-governmental organizations (NGOs) with expertise in matters relating to indigenous peoples.

OD 4.20 also includes a strategy for local participation according to which strategy mechanisms should be devised and maintained for participation by indigenous people in decision-making throughout project planning, implementation and evaluation. According to the OD many of the larger groups of indigenous people have their own representative organizations that provide effective



channels for communicating local preferences. Traditional leaders occupy pivotal positions for mobilizing people and should be brought into the planning process, with due concern for ensuring genuine representation of the indigenous population. According to the strategy no foolproof methods exist to guarantee full local-level participation and sociological and technical advice provided through the Regional environment divisions (REDs) is often needed to develop mechanisms appropriate for the project area.

From July 2001 to February 2002 the World Bank was engaged in a process of consultation with external stakeholders on a draft policy on Indigenous Peoples (draft Operational Policies/Bank Procedures; OP/BP 4.10). The revision of the Indigenous Peoples Policy (OD 4.20) is a part of larger, Bank-wide process of converting policies from the Operational Directive (OD) format into an Operational Policies (OP) format structure which clearly distinguishes between policy and procedure (both of which are mandatory) and good practice (which is advisory).

The draft Operational Policies (OP 4.10) on Indigenous Peoples (as of March 23, 2001) contains more detailed and specific requirements on policies with regard to Bank-assisted operations which may affect indigenous peoples. Bank-assisted operations which may affect indigenous peoples would require:

- a) Screening to identify whether there are indigenous groups in the project area;
- b) Meaningful consultation with all such affected groups;
- c) Mechanisms incorporated into project design and implementation to:
  - foster the informed participation of such affected groups in gender inclusive manner;
  - avoid, where feasible, or minimise and mitigate, adverse impacts upon them
  - ensure that benefits intended for them are culturally appropriate.

To ensure meaningful consultation the borrower must provide relevant information to indigenous groups affected by Bank-assisted projects, in a timely and culturally appropriate manner. To facilitate such consultation the borrower shall according to the draft

- a) establish an appropriate framework for dialogue, including adequate gender and generational representation;
- b) involve local representative indigenous organisations in discussions, as appropriate, and
- c) use culturally appropriate consultation methods which allow indigenous peoples – both men and women – to express their views and preferences.

According to the draft the borrower should consider the view and preferences of indigenous peoples in deciding whether to proceed with the project and what additional measures, including modification of the project design, are required to address adverse impacts and enhance project benefits. The Bank should review the borrowers project proposal to ensure its consistence with this policy.

Above it was established that the current Operational Directive 4.20 requires the Bank's strategy for addressing the issues pertaining to indigenous peoples be based on the "informed participation" of indigenous peoples. Draft Operational Policies 4.10 requires the "meaningful participation" of such peoples affected by development projects. In the vocabulary of the draft OP meaningful participation denotes that the borrower must establish an appropriate framework of *dialogue* with the affected indigenous peoples, involve local representative indigenous organisations in *discussions* and use culturally appropriate *consultation methods* which allow indigenous peoples to express their views and preferences.

The question is whether such discussions and consultations really amounts to a meaningful participation of indigenous peoples in development processes. The Participation Sourcebook of the World Bank itself, which addresses the participation of poor and other disadvantaged stakeholders – defines participation as a process through which stakeholders "influence" and "share control" over development initiatives and the decisions and resources which affect them. The Sourcebook further recognises that all stakeholders, especially poor and disadvantaged ones, must be enabled to influence and share control over development initiatives and the decisions and resources which affect them. The Sourcebook emphasises that "consultation is not participation, even though consultation and listening are essential prerequisites for participation".

The global, regional and national consultation process with governments, NGOs and indigenous peoples on the draft Operational Policies ended in February 2002. Some of the criticism directed towards the draft concerned specifically the right of participation. Many of the participants in the consultation process insisted on the inclusion into the Operational Policies of the principle of "free, prior and informed consent" ("the right to say no") of indigenous peoples with regard to development projects that affect them. Other participants required the right of participation be broadened to include all indigenous peoples, not only those directly affected by a particular development project. Some of the participants were of the view that the draft Operational Policies confuses consultation with participation by assigning indigenous peoples mostly passive roles in the process of development.

## 5 Conclusions

In conclusion, the right of indigenous peoples to participate in development processes has been recognised in some international human rights instruments as well as some international codes of conduct. But the question is still whether instruments such as the ILO Convention No. 169 or the World Bank's Operational Directive 4.20 provide participatory rights that would give indigenous peoples a real influence and a shared control over development processes. It is nonetheless evident that none of the instruments that have been studied above, with the exception of the draft UN Declaration, require that the states obtain their free and informed consent prior to the implementation of development projects that affect their lands, territories or other resources.