WHY THE IFC'S FREE, PRIOR, AND INFORMED CONSENT POLICY DOES NOT MATTER (YET) TO INDIGENOUS COMMUNITIES AFFECTED BY DEVELOPMENT PROJECTS

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INTRODUCTION

In May 2011,[1] the International Finance Corporation ("IFC"), the commercial lending arm of the World Bank, revised its Policy and Performance Standards on Social and Environmental Sustainability. The revised standards require that projects financed by the IFC obtain the free, prior, and informed consent ("FPIC") of indigenous peoples affected by such projects.[2] This marks a watershed moment in international development history. After decades of wrangling and negotiations among nongovernmental organizations, host countries, private industry, and development banks,[3] there now appears to be a growing consensus that when a development project affects indigenous peoples, the project must obtain the FPIC of such affected indigenous peoples.[4] Indeed, witnesses to the evolution—as reflected in documents

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[1] On May 12, 2011, the board of the International Finance Corporation ("IFC") voted to amend the IFC's Policy and Performance Standards on Social and Environmental Sustainability, to incorporate the principle of free, prior, and informed consent for indigenous peoples. *See* INT'L. FIN. CORP. [IFC], UPDATE OF IFC'S POLICY AND PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY, AND ACCESS TO INFORMATION POLICY 8 (2011), *available at* http://www1.ifc.org/wps/wcm/connect/fca42a0049800aaaaba2fb336b93d75f/Board-Paper-IFC_SustainabilityFramework-2012.pdf [hereinafter IFC UPDATE OF SUSTAINABILITY FRAMEWORK]. The policy became effective for projects initiated after January 1, 2012. IFC, PERFORMANCE STANDARDS AND GUIDANCE NOTES (2012), *available at http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/Performance+Standards+and+Guidance+Notes+2012/* (last accessed June 4, 2012) (noting that the 2012 update of the "IFC's Sustainability Framework applies to all investment and advisory clients whose projects go through the IFC's initial credit review process after January 1, 2012.").

[2] *See* INT'L FIN. CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 2 – 5 (2012), *available at* http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf [hereinafter PERFORMANCE STANDARDS] (Performance Standard 7 lays out the relevant parameters of free, prior, and informed consent).

[3] *See, e.g.*, IFC UPDATE OF SUSTAINABILITY FRAMEWORK, *supra* note 1, at 8 (noting that during its review of the Policy and Performance Standards on Environmental and Social Sustainability and Access to Information the IFC received many recommendations that it adopt a policy of free, prior, and informed consent, "particularly from representatives of Indigenous Peoples," while clients of the IFC and certain industry groups "stressed the need to limit" the scope of the policy. This tension is evident across sectors). For example, the July 11, 2011, report of James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples, explains how the lack of consultation of indigenous peoples prior to extractive industry projects led to social conflicts. JAMES ANAYA, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES 11 (2011).

[4] *See* IRENE SOSA, LICENSE TO OPERATE: INDIGENOUS RELATIONS AND FREE PRIOR AND INFORMED CONSENT IN THE MINING INDUSTRY 5 (2011) (noting that recently "NGOs, multilateral development banks and multi-stakeholder initiatives have increasingly helped to

such as the International Labor Organization Convention No. 169 ("ILO 169"),[5] the 2007 United Nations Declaration on the Rights of Indigenous Peoples ("UN DRIP"),[6] and the World Bank Operational Policy 4.10—Indigenous Peoples,[7] among others, might even call it a sea change. For the first time, private entities that rely on IFC financing will be obligated to obtain the consent of indigenous communities affected by their deeds. The importance of this move cannot be overstated.

The IFC's policy would appear to eliminate, if not significantly mitigate, the myriad economic risks that accompany large projects. Such risks include the risk of project disruption as a result of civil unrest, local protests, or violence directly related to a project.[8] In theory, obtaining the free, prior, and informed consent of indigenous peoples prior to a project could curtail these risks, which in turn could affect the economics of a project.[9] This might bode well for developers of large projects, who often face tight construction timelines;[10] banks, which rely exclusively on the project's assets as a source of security for project debt[11] and look solely to the revenue stream generated by the project to repay the loans

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raise the bar [regarding consensual frameworks] further, advocating the right of indigenous people to give or withhold free, prior and informed consent to projects that can have substantial impact on their lands.").

5 ILO, Indigenous and Tribal Peoples Convention, 1989 (No. 169), adopted June 27, 1989, 28. I.L.M. 1282 (entered into force Sept. 5, 1991), *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314.

6 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007), *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (noting that several countries were added to the list of sponsors of the draft resolution).

7 THE WORLD BANK, OP 4.10 – INDIGENOUS PEOPLES (2005), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html.

8 *See* Michael B. Likosky, *Mitigating Human Rights Risks Under State-Financed and Privatized Infrastructure*, 10 IND. J. GLOBAL LEGAL STUD. 65, 67 (2003); Sheldon Leader, *Risk management, project finance and rights-based development*, *in* GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT, 109 (Sheldon Leader & David Ong eds., 2011).

9 *See* Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 71 (2008) (noting that developers who obtain the consent of local communities may gain a competitive advantage due to the stability of the project).

10 Shalanda H. Baker, *Unmasking Project Finance: Risk Mitigation, Risk Inducement, and an Invitation to Development Disaster?*, 6 TEX. J. OIL GAS & ENERGY L. 273, 314 (2011).

11 *Id.* at 312.

provided to project participants;[12] and host governments, which are often left in charge of managing civil unrest caused by development failures.[13]

This article responds to these recent developments and argues that, despite all of the good news, FPIC may not be a panacea. In particular, it argues that FPIC's limitations stem from a narrow interpretation of consent. Under this narrow interpretation, consent lacks teeth and the ability to affect in any meaningful way the social and environmental risks that often accompany large projects. These risks are consistently passed on to third parties, and include the risk of displacement, environmental devastation, and diminishment of quality of life. Under the narrow interpretation that is likely to be adopted by the IFC, FPIC may be merely another linguistic turn in the long history of engagement between the developer and the developed.

Rather than accept this narrow construction of FPIC, this article suggests a broader interpretation that links community engagement to a project's contractual infrastructure. Under this approach, FPIC would allow affected indigenous communities to negotiate, *ex ante*, to mitigate the harm of development. The details of this negotiation would be memorialized in an "Environmental and Social Risk Agreement." By tying certain environmental and social outcomes to potential loan defaults, for example, an FPIC-based agreement of this nature could empower communities to reject or redistribute the social and environmental risks that often accompany development. Moreover, the economic risks that often accompany unpopular projects might be curtailed, resulting in a win-win scenario for all of the parties involved in the project.

This novel approach recognizes the inefficacy of the current domestic and international legal regimes to mitigate *ex ante* harm in the large-project context.[14] This recommendation also speaks directly to the growing literature addressing the gaps in international law with respect to

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[12] *Id.* at 300.

[13] *See* SCOTT HOFFMAN, THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE 75 (2008) (explaining that "the risk structure of a project can allocate too much risk to the host country, leaving the project company with insufficient financial responsibility for taking excessive risks").

[14] *Ex ante* approaches to mitigating the harm of corporations have gained some traction in the international human rights community. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 475 (2001) (noting that focusing on the *ex ante* duties of corporations provides a good starting point for theorizing the liability of corporations for violations of international law). The approach suggested in this article takes the analysis of Professor Ratner and others a step closer to the harm, and argues for penetrating the contractual mechanism that gives power to the corporation in the development context.

the activities of private actors.[15] By penetrating a project's contractual arrangement directly, indigenous peoples can utilize private law to directly address potential harm.

On a practical level, the approach advocated herein attempts to disrupt the discursive space that produced FPIC. In this narrow space, development is a *fait accompli*, and the true mechanisms for distributing risks in large projects—contracts—are never made legible to the individuals such projects most intimately affect.[16] Flipping this discursive frame provides space for authentic indigenous engagement at the power center of large projects. This approach also aims to honor the underlying social justice narrative that serves as the basis for FPIC: the self-determination of indigenous peoples.

How exactly did FPIC emerge as one of the few meaningful opportunities for community engagement in large projects? Part I of this article provides a brief overview of the evolution of FPIC, beginning with the construction of indigenous engagement as a risk to be managed by project developers. Part II introduces a case study that explores the historical issues surrounding consent within the modern context of clean-energy development. The section discusses the wind development underway in Oaxaca, Mexico, where Mexican law affords special protection to indigenous communities, and the numerous wind projects currently under development significantly impact indigenous communities and regularly involve the IFC.[17]

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[15] *See, e.g.*, Jena Martin-Amerson, *What's in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1 (2011); Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183 (2010); John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007).

[16] *See generally* HOFFMAN, *supra* note 13, at 5.

[17] The IFC has been a key player in the development of wind resources in Oaxaca. In a 2009 proposal to Clean Technology Fund requesting support for and lauding the potential of developing wind energy in Oaxaca, the IFC stated, "Mexico is one of the most promising yet untapped areas for wind energy development in Latin America." INT'L FIN CORP., CLEAN TECHNOLOGY FUND PROJECT PROPOSAL FOR MEXICO: PRIVATE SECTOR WIND DEVELOPMENT (CURRENT INFORMATION DOCUMENT) 7 (2009), *available at* http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/Current_Information_Ducument_Mexico_Private_Sector_Wind.pdf (Specifically, "[t]he region of the Isthmus of Tehauntepec in the State of Oaxaca represents a world-class wind resource"). Since the publication of this document in 2009, the IFC has been active, and was a key player in the financing and development of the Eurus Wind Project in Oaxaca, the largest wind project in Latin America and the Caribbean, among others. *IFC Completes EURUS Loan*, INT'L FIN. CORP. (2009), *available at* http://www1.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/infrastructure/news/ifc+completes+eurus+loan; *Acciona's Eurus Windpark in Mexico*

With the foregoing empirical grounding, Part III queries how FPIC might be interpreted by the IFC going forward. It suggests a narrow spectrum of interpretation that includes two possibilities: (1) granting communities veto power over the project or, more likely, (2) free, prior, informed consultation "plus," where indigenous communities and developers engage in a robust consultation process that gives rise to (a) a presumption of consent and (b) a document memorializing the process and agreements reached therein. This spectrum reveals the limited conceptual frame offered by FPIC. This conceptual frame confines the array of options to a narrow discursive space that undermines any meaningful opportunities to shift and avoid project risks. In Part IV, the conceptual frame is disrupted and a more expansive interpretation of FPIC is offered: a basis for engaging the true risk-mitigation tool of international development—contract.

I. HISTORY OF FPIC

Tracing the comprehensive history of FPIC requires traversing terrain that includes myriad nongovernmental organizations, grassroots advocacy networks, and soft-law frameworks across diverse industries such as forestry, mining, dams, infrastructure development, and wind. Without attempting to cover all of that territory here, this section offers a brief snapshot of FPIC's history. After providing this brief history, the second section will describe the IFC's path to incorporating FPIC as a mechanism for consent.

A. EVOLUTION OF FPIC

One way to understand the evolution of FPIC is to view its evolution through two primary narrative lenses: (1) private investment community, and (2) international development community. One narrative stems from the international investment community that promotes, develops, and finances large projects. Proponents of this narrative are generally banks; a heightened sensitivity to economic risk characterizes the narrative. The other dominant narrative originates from the international development community, including agencies such as the United Nations ("UN") and the World Bank. These agencies create

Financed, INT'L FIN. CORP. (June 14, 2010), http://www1.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/infrastructure/news/accionas+eurus+windpark+in+mexico+financed.

norms for the behavior of international actors, primarily states and, increasingly, provide soft-law frameworks to guide the behavior of private actors such as corporations.[18] Each narrative is briefly addressed below.

1. Private Investment Community Narrative

Engagement with local communities is an indispensable part of creating large-scale projects. Beginning in the 1990s, the corporate community began to acknowledge that successful engagement of local communities could play an important role in the success of projects.[19] As a result, the term "social license" began to seep into the development parlance.[20] As Ethical Funds, a twenty-five year old Canadian mutual fund committed to socially responsible investing states, a social license encompasses "broad acceptance [of a developer's] activities by society or the local community."[21] Moreover, as the Fund suggests, a failure to obtain a social license can lead to "serious delays and costs."[22] These delays have real economic costs. The risks associated with such costs are sometimes referred to as "human rights risks" or "social risks."[23] The international investment community has come to realize that the adoption of a policy of active engagement with the local community helps to mitigate these risks, which ultimately mitigates the costs associated therewith. One vivid example of this realization exists in the Equator Principles, a set of guidelines specifically created to mitigate the environmental and social risks of development.[24]

In 2002, nine international financial institutions and the IFC came together to develop a comprehensive voluntary banking industry

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[18] *See, e.g.*, UNITED NATIONS, THE UN "PROTECT, RESPECT AND REMEDY" FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS 1 – 3 (2010), *available at* http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf.

[19] Laplante & Spears, *supra* note 9, at 78 (recounting history of corporate social responsibility movement).

[20] *See id.* at 80 (noting that beginning in the early 2000s companies had begun to recognize the need to obtain a "social license" to operate from both local and international communities).

[21] ETHICAL FUNDS, *Glossary*, http://www.ethicalfunds.com/Pages/SRI/Glossary.aspx (last visited July 14, 2012).

[22] *Id.*

[23] *See, e.g.*, EQUATOR PRINCIPLES, http://www.equator-principles.com/ (last visited July 18, 2012). *Cf.* HOFFMAN, *supra* note 13, at 100 (referring to the potential negative effects of development as "political risk").

[24] *History of the Equator Principles*, EQUATOR PRINCIPLES, http://www.equator-principles.com/index.php/about-ep/about-ep/history-of-the-eps (last visited Aug. 15, 2012).

framework to address environmental and social risks in projects across sectors.[25] The view among the group was that limiting these risks could benefit all stakeholders, including banks.[26] The initial group of nine banks relied on the IFC's Policy and Performance Standards on Social and Environmental Sustainability to provide a baseline for the principles, and in 2003, ten banks adopted the first set of principles.[27] A bank's adoption of the principles and becoming an "Equator Principle Financial Institution" or "EPFI" means that such bank will only provide loans to projects that adhere to the Equator Principles.[28] This is significant, given that most projects rely on funding from multiple banks. One bank in a large consortium of lenders could therefore single-handedly raise the environmental and social standards implemented by the project developer.

Unfortunately, the ten Equator Principles, revised in 2006, are fairly vague.[29] Moreover, given their voluntary nature, it is unclear whether a project's deviation from the principles would invite any real penalty.[30] The banks' ultimate priority in large-project financing is to receive loan payments, which might outweigh the need to enforce a project's adherence to the voluntary framework. The Equator Principles, though vague and unenforceable, are a start, and in many ways are emblematic of the types of instruments yielded by the Private Investment Community Narrative.[31]

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[25] *Id.*

[26] The Equator Principles June 2006 (July 2006), 1 *available at* http://www.equator-principles.com/index.php/about-ep/about-ep/history-of-the-eps (last visited Aug. 15, 2012).

[27] *See History of the Equator Principles*, *supra* note 24.

[28] Currently there are seventy-three EPFI's. *About The Equator Principles*, EQUATOR PRINCIPLES, http://www.equator-principles.com/index.php/about-ep/ (last visited Aug. 15, 2012).

[29] *See* Robert F. Lawrence & William L. Thomas, *The Equator Principles and Project Finance: Sustainability in Practice*, 19 FALL NAT. RESOURCES & ENV'T 20, 26 (2004) (noting that the vagueness of the Equator Principles may limit their ability to provide lenders with guidance).

[30] The current Equator Principles feature a disclaimer that states, "[a]s with all internal policies, these Principles do not create any rights in, or liability to, any person, public or private. Institutions are adopting and implementing these Principles voluntarily and independently, without reliance on or recourse to the IFC or the World Bank." *About the Equator Principles*, *supra* note 28, at 6.

[31] The Equator Principles are currently being revised and updated to reflect the new IFC Sustainability Framework and to incorporate climate change principles. The Equator Principles Association expects to finalize and launch "EP III" from October 2012 to January 2013. *Id*.

2. International Development Community Narrative

By contrast, within the international development community, in agencies such as the UN and the International Labour Organization ("ILO"), a moral imperative appears to pervade the discourse related to indigenous participation.[32] In 1989, the ILO adopted the Indigenous and Tribal Peoples Convention, 1989 (No. 169), known as ILO 169, a binding legal document that entered into force in 1991.[33] ILO 169 is often recognized as key document in the movement to enshrine the principle of free and informed consent into international law. Consultation features prominently in the convention, but the objective of the parties (the states and communities) is ultimately "to achieve agreement or consent."[34] Twenty-two states have ratified the convention,[35] which provides that such states must obtain the free and informed consent of indigenous peoples prior to relocating or resettling the community, although a failure to obtain consent merely requires relocation consistent with the domestic law.[36] Although other frameworks followed ILO 169, the 2007 United Declaration on the Rights of Indigenous Peoples ("UNDRIP") carried the greatest impact.

The UNDRIP marked a watershed moment in dealings with indigenous peoples.[37] The declaration states, in relevant part, that

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[32] *See, e.g.*, Indigenous and Tribal Peoples Convention, *supra* note 5, at pmbl. ("[r]ecognizing the aspirations of [indigenous and tribal 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 frameworks of the States in which they live").

[33] *Id.*

[34] Stephanie Baez, Note, *The "Right Redd Framework: National Laws that Best Protect Indigenous Rights in a Global Redd Regime*, 80 FORDHAM L. REV. 821, 841 (2011). Article 16 of ILO 169 refers to "free and informed consent." Although the word "prior" is not used in the language of Article 16, it appears to be implied. Indigenous and Tribal Convention, *supra* note 5, art. 16. *See* ILO, INDIGENOUS & TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169 61, 62 (2009) (noting that governments are obligated to consult indigenous peoples "prior to exploration or exploitation of sub-surface resources" and "[p]rior to relocation, which should take place only with the free and informed consent of indigenous peoples").

[35] ILO, RATIFICATIONS OF C169 – INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169), *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO (last visited July 14, 2012).

[36] Indigenous and Tribal Peoples Convention, *supra* note 5, art. 16.2. *See also* AMY K. LEHR & GARE A. SMITH, FOLEY HOAG, IMPLEMENTING A CORPORATE FREE, PRIOR, AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES 6 (2010) (describing the conditional nature of FPIC under International Labor Organization Convention No. 169).

[37] *See* Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 927 (2011) (noting

indigenous peoples shall not be relocated by states without free, prior, and informed consent;[38] that states must acquire the free, prior, and informed consent of indigenous peoples prior to "adopting and implementing legislative or administrative measures that may affect them";[39] and that states must obtain the free and informed consent of indigenous peoples prior to the "approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[40] This language marked a sea change in the development discourse. Previously, the free, prior, and informed "consultation" with the goal of consent standard had provided the baseline for states.[41] The UNDRIP raised the bar from consultation to consent.

The UNDRIP was the product of eleven years of discussion initiated by a working group established in 1995 by the Commission on Human Rights.[42] The declaration was introduced in 2007, and at the time, 143 countries voted to approve it, eleven countries abstained, and four countries—the United States, Canada, New Zealand, and Australia—voted to oppose it.[43] Since then, all four opposing countries have reversed their positions.[44]

In general, and perhaps to a fault, the consultation frameworks in existence prior to the IFC's implementation of FPIC stressed process over substance.[45] Indeed, as argued by Cesar Rodriguez-Garavito, at

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that the "Declaration on the Rights of Indigenous Peoples is the most comprehensive and far-reaching document articulating the rights of indigenous peoples to date.").

38 United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 6, art. 10.

39 *Id.* art. 19.

40 *Id.* art. 32.

41 *See* Indigenous and Tribal Peoples Convention, *supra* note 5, art. 6.2 ("[t]he 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.").

42 Cesar Rodriguez-Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOBAL LEGAL STUD. 263, 287 (2011).

43 *United Nations Adopts Declaration on Rights of Indigenous Peoples*, UNITED NATIONS (Sept. 13, 2007), http://www.un.org/apps/news/story.asp?NewsID=23794.

44 *United States' Backing for Indigenous Rights Treaty Hailed at UN*, UNITED NATIONS (Dec. 17, 2010), http://www.un.org/apps/news/story.asp?NewsID=37102&Cr=indigenous&Cr1=&Kw1=indigenous&Kw2=&Kw3= (noting that the originally opposing countries had all reversed positions to endorse the declaration); Erny Zah, *Leaders applaud Obama's support For indigenous-rights declaration*, NAVAJO TIMES, Dec. 22, 2010, http://www.navajotimes.com/news/2010/1210/122210rights.php.

45 *See* Rodriguez-Garavito, *supra* note 42, at 266.

times the very act of introducing standards into the domain of ethnicity—where collective claims of cultural identity, self-determination, and control over territories and resources abound—promotes a culture of legality. The culture of legality, in turn, promotes process versus substance and brackets certain issues, such as power asymmetry.[46] As the following section explains, the IFC's new framework does not stray from a process-driven approach.

B. IFC ADOPTION

In May 2011,[47] the board of the IFC approved sweeping changes to its Policy and Performance Standards on Social and Environmental Sustainability (also referred to as the Sustainability Framework), which consists of the following three components: (1) Policy on Environmental and Social Sustainability, which outlines the IFC's obligations with respect to environmental and social sustainability; (2) Performance Standards, which details IFC clients' responsibilities for mitigating their environmental and social risks; and (3) Access to Information Policy, which addresses transparency issues.[48] The Sustainability Framework initially became effective on April 30, 2006.[49] The 2011 modifications were the result of an intensive study undertaken in 2009 by IFC management, as detailed in the 2009 report, *IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Report on the First Three Years of Application*.[50] Of particular relevance to this article is *Performance Standard 7: Indigenous Peoples*, which changed significantly from its 2006 iteration to the present version.

Prior to the adoption of the 2011 changes, *Performance Standard 7: Indigenous Peoples*, adopted in 2006, provided that projects financed with the support of the IFC engage in free, prior, and informed consultation with indigenous peoples in danger of being negatively

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[46] *Id.* at 278. *See also* Laplante & Spears, *supra* note 9, at 83 (noting that critics of the consultation model of community engagement lacks the ability to empower affected communities because it merely requires an exchange of information).

[47] *See* UPDATE OF SUSTAINABILITY FRAMEWORK, *supra* note 1.

[48] *See IFC's Sustainability Framework*, INT'L FIN. CORP., http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/ (last visited June 4, 2012).

[49] UPDATE OF SUSTAINABILITY FRAMEWORK, *supra* note 1.

[50] *Id.*

impacted.[51] At the time, this policy lagged behind many of the progressive policies emerging among its peers within the industry, such as the Inter-American Development Bank.[52] In the first few years of implementation, the IFC faced criticism from civil society groups who saw the policy as weak.[53]

These critiques did not go unnoticed, and in the 2009 report analyzing the first years of application, the writers expressed concern regarding *Performance Standard 7*, noting that "ongoing submissions from NGOs indicate that they will urge IFC to mainstream human rights in the [Performance Standards],"[54] and that in light of the 2007 United Nations General Assembly adoption of the Declaration on the Rights of Indigenous Peoples, "advocacy groups expect multilateral development institutions to adopt a 'consent' standard for projects dealing with indigenous peoples."[55] To some extent, the authors ultimately resist this assertion, and plead ignorance with respect to indigenous peoples given that "*IFC's experience with indigenous peoples issues has been limited so far*, and [that] IFC will need to understand better whether and how the 'consent' standard can be put into operation in the field, and whether and how the 'consent' standard is materially different from the current provisions in PS7, before it can take a position on the matter."[56] This is a fascinating assertion, given the IFC's prominence in the international development community and the World Bank's long history of interaction with indigenous communities.[57]

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[51] INT'L FIN. CORP., INTERNATIONAL FINANCE CORPORATION'S PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY 29 (2006).

[52] For example, in 1998 the Inter-American Development Bank's policy on resettlement required the informed consent of indigenous peoples as a condition of resettlement. *See* INTER-AMERICAN DEV. BANK, INVOLUNTARY RESETTLEMENT OPERATION POLICY AND BACKGROUND 3 (1998).

[53] *See* LEHR & SMITH, *supra* note 36, at 15 (noting critiques of the IFC Performance Standards by civil society groups "for falling below the standard of consent, as well as for insufficient transparency regarding what the IFC considers to indicate consent, and a failure to give communities a sufficient role in deciding what indicates their consent.").

[54] INT'L FIN. CORP., IFC'S POLICY AND PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY, AND POLICY ON DISCLOSURE OF INFORMATION: REPORT ON THE FIRST THREE YEARS OF APPLICATION 31 (2009), *available at* http://www1.ifc.org/wps/wcm/connect/d9f9008049800946a606f6336b93d75f/PPS%2BOverview%2Bof%2BConsultation%2Band%2BEngagement_English.pdf.

[55] *Id.*

[56] *See id.* (emphasis added).

[57] The World Bank was the first multi-national development bank to develop a policy with respect to indigenous peoples. It adopted Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10) over thirty years ago, in 1982. *See* World Bank, *supra* note 7.

Despite the purported ignorance of the IFC in the handling of indigenous peoples, the concept of free, prior and informed consent made its way into the 2011 Performance Standards, which may be more of a testament to the skills of advocacy groups rather than the IFC's willingness to transform interactions between developers and the developed. The requirements section of *Performance Standard 7: Indigenous Peoples* now provides, in relevant part:[58]

> *Participation and Consent*
>
> 11. Affected Communities of Indigenous Peoples may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In recognition of this vulnerability, in addition to the General Requirements of this Performance Standard, **the client will obtain the FPIC of the Affected Communities of Indigenous Peoples** in the circumstances described in paragraphs 13-17 of this Performance Standard. FPIC applies to project design, implementation, and expected outcomes related to impacts affecting the communities of Indigenous Peoples. When any of these circumstances apply, the client will engage external experts to assist in the identification of the project risks and impacts.
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> 12. **There is no universally accepted definition of FPIC.** For the purposes of Performance Standards 1, 7, and 8, "FPIC" has the meaning described in this paragraph. FPIC builds on and expands the process of [Informed Consultation and Participation] described in Performance Standard 1 and will be established through good faith negotiation between the client and Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.[59]

By the IFC's own admission, ambiguity surrounds the FPIC provision. At the time of this writing, the IFC had done little to clarify what exactly is meant by the key aspects of the FPIC provision, particularly paragraph 12. Several possibilities exist, two of which are

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[58] Performance Standard 7 Indigenous Peoples is twenty-two paragraphs long and divided into four sections: Introduction, Objectives, Scope of Application, and Requirements. *See* INT'L FIN. CORP., PERFORMANCE STANDARD 7, INDIGENOUS PEOPLES 6 (2012) *available at* http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf (last accessed July 14, 2012) [hereinafter IFC PERFORMANCE STANDARD 7].

[59] *Id.* at 7.

fully explored in Part III below. First, however, it is necessary to contextualize the impact of projects routinely financed and promoted by the IFC that intimately, and sometimes adversely, impact the lives of indigenous peoples.

II. MEXICAN LAW AND LOCAL CONCERNS WITH WIND DEVELOPMENT

A. HISTORICAL CONTEXT

The relentless breeze that blows in the Isthmus of Tehuantepec in Oaxaca, Mexico, portends the latest battle in the storied history of a region that has been at the heart of development struggles for centuries.[60] The Isthmus of Oaxaca is the narrow strip of land that separates the Atlantic Ocean from the Pacific Ocean, and because of its strategic location, nations of peoples from the Spanish, to the Americans, to the British, have attempted to carve paths through its narrow corridor.[61] The Mexican government finally succeeded in creating a railway linking the oceans,[62] and fascination with the region's riches persists. Recent Mexican administrations have earmarked the Isthmus as the linchpin for several mega-development projects, such as a super highway linking all of the countries in Latin America, large shrimp farms, and oil development.[63] As in so many areas of the world, the presence of an abundance of natural resources in the Isthmus has yielded few actual benefits to the indigenous communities that currently live in the area and rely on farming and fishing to support a subsistence way of life, but

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[60] WENDY CALL, NO WORD FOR WELCOME xxii-iii (2011) (noting that the Spanish were the first to obsess over creating a passage between the Pacific Ocean and the Gulf of Mexico in the Isthmus of Oaxaca).

[61] *Id.* at 47.

[62] *Id.* at 48 – 49.

[63] *Id.* at 17 – 18 (discussing the Trans-Isthmus Megaproject, "a large spider-web of industrial-development projects" which includes "one hundred and fifty proposed projects, including twenty-four petrochemical facilities, a dozen industrial shrimp farms, two oil refineries, several industrial parks for maquiladora assembly facilities, a quarter-million acres of tree plantations, and a new network of highways and railroads to carry the products of all this industrialization, to international markets.").

instead has brought conflict.[64] The wind now forms a part of this long narrative, and the latest efforts to develop it have proven controversial.[65]

The Isthmus of Oaxaca is one of the windiest places in the world, a fact that has not escaped large wind project developers and financiers, such as the International Finance Corporation and the Inter-American Development Bank.[66] In the early 1990s, with technical assistance from the World Bank, the Mexican government began piloting various wind farm projects in the Isthmus in an effort to convince international corporations of the viability of wind development.[67] These nascent efforts were met with resistance. Indigenous communities complained of environmental degradation, takings of land without just compensation, a loss of birds and the disruption of the water table, along with a general disruption of indigenous lifeways.[68] The context of these complaints is important. Mexico takes great pride in its indigenous heritage. It was also the first country to ratify ILO 169, respecting the rights of indigenous peoples.[69] Moreover, the rights of indigenous peoples are constitutionally protected.[70]

B. COMMUNITY CONCERNS

Notwithstanding these very specific legal rights, projects in the region proliferated with no real check on development. In fact, the

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[64] *Id.* at 137, 175, 197 (discussing effect of development in the beach town of Huatulco, in the Isthmus of Oaxaca, on the local community of farmers, resistance against the Plan Puebla Panama and potential destruction to lagoons due to proliferation of shrimp farms).

[65] The opposition has been heated, and stems from perceived unfairness in the terms of the land leases; and claims of cultural and environmental destruction. Martin Pasqualetti, *Social Barriers to Renewable Energy Landscapes*, GEOGRAPHICAL REV., April 1, 2011. Moreover, the promises of economic development have not yet borne fruit. *See* IFC PERFORMANCE STANDARD 7, *supra* note 58, at 215 (statement of Asamblea en Defensa de la Tierra y el Territorio) ("They promise progress and jobs, and talk about millions in investment in clean energy from the winds that blow through our region, but the investments will only benefit businessmen, all the technology will be imported. . . and the power won't be for local inhabitants").

[66] *See* INT'L FIN. CORP., *supra* note 17 (stating that the Inter-American Development Bank and the IFC are working closely to develop Mexico's wind energy sector).

[67] *See* Baker, *supra* note 10, at 282.

[68] *See id.* at 284 – 91.

[69] ILO, *supra* note 35.

[70] Article 2 of the Mexican Constitution provides broad protection to indigenous peoples in Mexico. Of particular relevance is indigenous peoples' right to self-determination and autonomy to determine their social, economic, political, and cultural organization, including the preservation of communal property rights. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

international development community[71] and the Mexican government[72] have embraced the concept of wind development in Oaxaca as a clean alternative to powering the operations of large corporate entities such as Cemex, the Mexican cement manufacturer, which is also one of the largest corporations in the world;[73] Walmart;[74] Heineken; and Coca-Cola.[75] It is rather ironic to consider that the largest wind farms in the world are being developed in rural Oaxaca, the second poorest state in Mexico, itself a developing country.[76] Although the purported environmental benefits from the wind projects underway in the Isthmus are numerous,[77] several reports from the region indicate unfair dealing with respect to the indigenous communities residing in the region.[78]

One of the key issues is land. From the beginning, indigenous community leaders have raised serious questions regarding the transfer of land from indigenous hands to private entities.[79] Land leases form the basis for the transfers.[80] Such leases typically involve complex calculations related to compensation,[81] and several communities have reported that copies of the documentation related to their land are in

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[71] *See* DANA R. YOUNGER, IFC INFRASTRUCTURE DEP'T, THE CLEAN TECHNOLOGY FUND AND WIND ENERGY FINANCING IN MEXICO, *available at* http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/CTF_TF_Comm_Mexico_Wind.pdf (noting that "Oaxaca's wind resource is recognized as one of the best in the world" and that IFC and Inter-American Development Bank resources can be used to catalyze the private wind sector).

[72] *President Vicente Fox's Administration Seeks Expansion in Nuclear, Wind Energy Sectors*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Aug. 16, 2006; Jason Fargo, *Mexico Moves Forward with Major Wind Power Developments*, OIL DAILY, Mar. 10, 2010.

[73] *See* Baker, *supra* note 8, at 285; *Company Profile*, CEMEX, http://www.cemex.com/AboutUs/CompanyProfile.aspx (last visited July 18, 2012).

[74] *Mexico: Wal-Mart Unveils Wind Power Store Plan*, JUST-STYLE, May 7, 2010.

[75] *Vestas Gets 396 Mw Turbines Order From Mexico*, REUTERS, March 12, 2012, *available at* http://www.reuters.com/article/2012/03/12/vestas-mexico-idUSL5E8EC4AP20120312; Vladimir Pekic, *Mexican Wind Farms Confront Delays in Securing Financing*, RENEWABLE ENERGY REP., Apr. 4, 2011.

[76] Baker, *supra* note 10, at 279.

[77] *Mexico Alternatives: Wind Power Generates Heated Mixed Reactions*, USA TODAY, June 18, 2009.

[78] Baker, *supra* note 10, at 287.

[79] *Id.* at 285 – 87.

[80] *IFC Completes Eurus Loan*, INT'L. FIN. CORP., http://www1.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/infrastructure/news/ifc+completes+eurus+loan (noting that local community will receive land-lease payments).

[81] Baker, *supra* note 10, at 287. *See also* Erik Vance, *The 'Wind Rush': Green Energy Blows Trouble into Mexico, Green Energy's Big Success is a Rude Awakening in the Isthmus of Mexico.*, CHRISTIAN SCI. MONITOR, Jan. 26, 2012 (noting the complexities of rental payments and confusion regarding terms).

Spanish, a language not uniformly read or understood within the region.[82] Others have reported even more egregious behavior, such as not receiving copies of the agreements or instances of coercion.[83] These claims appear against the backdrop of Mexican law, the government's outspoken commitment to indigenous rights, and the complex land ownership system common in Oaxaca—the *ejido*—which restricts individual alienation of land without a community process.[84]

If the numerous claims made by various indigenous community members have merit, there may be remedies under Mexican law to mitigate the harm already suffered;[85] however, injunctive relief may be impractical to effectuate in any meaningful way, given that once the roads and windmills related to a project are in place, the disruption to the watershed and subsistence way of life has already occurred.

From a contractual standpoint, the *ejido* land ownership structure makes matters more complex. The *ejido* structure provides that land is communally owned.[86] Recent changes in Mexican law make it clear that land in the *ejido* is alienable to private interests so long as the alienation of such land is first validated through a community consent process.[87] The claims emerging from the Oaxaca projects indicate that developers often worked to enter into leases with individuals rather than engaging in a community process involving the land.[88] If substantiated, these assertions could form the basis for repudiating the contracts or render them altogether void.[89]

C. COMMUNITY ENGAGEMENT

As the foregoing discussion illustrates, the issues surrounding the Oaxaca wind developments are numerous and varied, and range from social to environmental concerns. Reports from the region indicate that local communities have found it difficult to engage project developers in

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[82] Baker, *supra* note 10, at 287.

[83] *Id.*

[84] *Id.* at 286.

[85] *See* Vance, *supra* note 81 (noting Mexican law of free and informed consent) *See also* discussion of adoption of ILO 169 *supra* at Part II.A.

[86] *See* Vance, *supra* note 81 (statement of Ben Cokelet of the Project on Organizing, Development, Education and Research) ("Oaxaca is the center of communal landownership. There is probably no worse place to make a land deal in Mexico.").

[87] Baker, *supra* note 10, at 286 n.73.

[88] *Id.* at 286.

[89] *Id.*

ways that do not involve protests or threats of civil disobedience.[90] The IFC's new sustainability framework, including the requirement to obtain the FPIC of affected indigenous peoples for any large project, may provide an interesting opening for meaningful participation and engagement of the people in Oaxaca.

As in any large-scale infrastructure or energy project, complex contractual arrangements breathe life into the dozen or more wind projects underway in Oaxaca.[91] In every project, these contractual relationships provide the framework within which risks are measured and distributed.[92] The discourse supporting the FPIC framework offers FPIC as a tool whereby the developer's economic risks—primarily framed as human rights or social risks—are mitigated outside of the project's contractual framework.[93] If utilized to penetrate a project's contractual framework, FPIC could also address the social and environmental risks faced by indigenous communities, thereby providing an opportunity to mitigate multiple categories of risk. Despite its potential, FPIC contains several flaws and ambiguities. Highlighted below are a few of these gaps.

III. THE MYTHOLOGY OF CONSENT UNDER FPIC

There is broad speculation about what the IFC's new FPIC policy might mean,[94] as the importance of the IFC performance standards to the international development community cannot be understated. A significant number of large development projects in the world routinely involve the IFC.[95] In addition, given that seventy-seven banks have

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[90] *Id.* at 284 n.58.

[91] HOFFMAN, *supra* note 12, at 7.

[92] *Id.*

[93] *Managing Social Risk: Notes from the Peruvian Amazon*, PETROLEUM ECONOMIST, July 14, 2011 (noting that the lack of free, prior, and informed consent is often at "the heart of many social conflicts" in communities affected by development).

[94] *See, e.g.*, UN-REDD Programme, *UN-REDD Programme Guidelines on Free, Prior and Informed Consent Draft for Comment* 4 (December 2011) *available at* http://www.unredd.net/index.php?option=com_docman&task=cat_view&gid=1333&Itemid=53 (noting that there is no universally agreed upon definition of FPIC); CLAUDIA FELDKAMP, FASKEN MARTINEAU, FPIC: LEGAL REQUIREMENTS AND PRACTICAL REALITIES, *available at* http://onthegroundgroup.com/documents/5%20-%20Fasken%20Martineau1.pdf (stating that "'Consent' was controversial as to meaning and when required").

[95] By its own accounting, the IFC provides approximately one third of the financing provided by development banks to the private sector in developing countries. *IFC Key Facts*, INT'L. FIN. CORP.,

signed on to the Equator Principles, which specifically incorporate the IFC's Sustainability Framework,[96] the reach of FPIC is substantially broader. This raises the stakes surrounding the meaning of FPIC, a term that, even by the IFC's own accounting, has no clear meaning. The options for interpreting the provision are numerous but depend largely on the framing.

As previously noted, banks (including the IFC) and project developers frame participatory frameworks such as FPIC as a way to mitigate the various social and environmental risks that accompany project development. Consent is almost always conceptualized as aspirational, given that the motivation underlying FPIC's adoption is not justice, but mitigation of a developer's economic risk. The Equator Principles—a voluntary framework—reflect this approach.

The UN Declaration on the Rights of Indigenous Peoples, on the other hand, frames FPIC as a part of indigenous peoples' right to self-determination and control of their destiny.[97] This framing leaves room for justice, and suggests FPIC as a right to be asserted, rather than a policy to be followed (or not) subject to the economic reality of a development project.

A casual observer of the newly christened principle of free, prior, and informed consent might balk at either construction, in particular the supposed novelty of the concept. "Of course," such observer might offer, "any individual facing the imminent violence of a large industrial project within his home territory must always offer his free, prior, and informed consent prior to the enactment of such violence on his or her community, traditional resources, and lifeways." The obviousness of the construct is obfuscated in the construct itself. By framing FPIC as novel and gratuitous, both the banks and the international development community have created a mythology of justice. In this mythology, the injustice of the development project is obfuscated, and the options for a negotiated

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http://www1.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc/ifckeyfacts (last visited, Aug. 16, 2012).

[96] *See About the Equator Principles*, *supra* note 28 (noting that the IFC's Performance Standards and the World Bank's Environmental, Health, and Safety Guidelines serve as the basis for the Equator Principles). *See also* IFC Update of Sustainability Framework, *supra* note 1 (discussing important role of IFC's Performance Standards to the international development investment community).

[97] United Nations, *supra* note 6, art. 3 ("[i]ndigenous peoples have the right to self-determination.").

justice are presented along a narrow spectrum.[98] It is this mythology of justice that frames the options offered by the new FPIC provision, two of which are presented below.

A. VETO POWER

A broad reading of FPIC would give indigenous communities full veto power over projects.[99] This view is currently not supported by the IFC,[100] but such an interpretation could provide real benefits for indigenous communities, not least of which is the right to self-determination. Putting aside questions of how developers would identify the appropriate voices in the community in order to obtain their consent or the potential for widespread corruption and co-opting of community

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[98] The major failing of the new FPIC framework is that it treats development as a *fait accompli*. Indeed, the elephant in the room is that development is always already required and consent is viewed within an extraordinarily narrow spectrum. The IFC guidance does little to mitigate this effect, and in practice this effect may be difficult, if not impossible, to overcome. This is especially true if indigenous communities must rely on project developers to provide information regarding the environmental and social risks associated with a project after such developers have expended significant financial resources. Once the development train has left the station, there may be little for indigenous communities to do other than utilize the existing framework of the transaction to redistribute the risks associated with the project. Lehr and Smith highlight this concern as well, stating "a number of [non-governmental organizations] that work closely with indigenous groups expressed concern that after exploration has begun, it becomes very difficult for indigenous groups to refuse the project. Indigenous groups may see the project as a *fait accompli* and feel it is not possible to stop it." LEHR & SMITH, *supra* note 36, at 32.

[99] *Cf.* Erik B. Bluemel, *Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making*, 30 AM. INDIAN L. REV. 55, 78 – 79 (2005 – 06) (arguing that providing indigenous peoples veto power undermines principles of democracy, given that "[i]ndigenous groups are not universally viewed as legitimate international lawmakers" and allowing indigenous participation in the international legal regime would undermine the legitimacy of international law). This assertion reinforces the narrow discursive frame within which indigenous rights are imagined. International law defines legitimate actors and the scope of such actors' legitimate behavior. If this is the only viable frame through which indigenous rights may be enforced, indigenous communities will never be viewed as "legitimate" or legible.

[100] *See* INT'L. FIN. CORP, GUIDANCE NOTE 7 INDIGENOUS PEOPLES 9 (Jan. 1, 2012), *available at* http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf [hereinafter IFC GUIDANCE NOTES] (noting that the process of Informed Consultation and Participation and FPIC "should ensure the meaningful participation of Indigenous Peoples in decision-making, focusing on achieving agreement while not conferring veto rights to individuals or sub-groups, or requiring the client to agree to aspects not under their control"). *Cf.* LEHR & SMITH, *supra* note 36, at 8 – 9, stating that "[c]onsent is free if indigenous communities are informed that they can reject the company's specified activities. . . ." Lehr and Smith note that a key concern raised by states regarding the veto approach is its potential to undermine sovereignty. *See* LEHR & SMITH, *supra* note 36, at 37. For example, if a state grants a concession within an area inhabited by indigenous peoples, and the community vetoes the project, the state's ability to develop natural resources within its territory is arguably diminished.

leaders, veto power could greatly empower indigenous peoples affected by development projects. Despite this potential, the veto power interpretation may yet be unrealistic given the timelines involved in large-scale project development.

For example, the FPIC requirement would not be triggered until the IFC or a bank bound by FPIC vis-à-vis the Equator Principles has agreed to finance a project. By the time the financing of a project is imminent, project developers have already invested significant resources in the project, including environmental assessments, profit modeling, and engagement of the relevant contractors to build the project.[101] Moreover, the Private Investment Community Narrative that frames indigenous participation as a risk-mitigation tool leaves little room for project cancellation. It is therefore unlikely that project developers or banks would ever endorse the veto interpretation, especially without a mechanism in place to compensate the developer for its sunk costs.

I now turn to the more likely interpretation of FPIC—consultation "plus."

B. CONSULTATION "PLUS"

One possible and likely interpretation of FPIC is as consultation, "plus" something else.[102] Under this soft approach, "consent" doesn't mean consent at all. Rather, project developers would engage in a robust community-consultation process, memorialize the process in writing, and conclude that such consultation "plus" is sufficient to meet FPIC standards and the need to mitigate risks. Perhaps unsurprisingly, this approach is advocated by the IFC.

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[101] Indeed, many project components are in place even prior to approaching financial institutions for potential financing. The project "Offering Memorandum" is used to solicit banks for potential financing. The memorandum is comprehensive, and typically includes, among other things, "experience of the project sponsors; the identity and experience of the major project participants, including the contractor, operator, suppliers, and off-take purchasers; information on the host government; summaries of the project contracts; project risks and how the risks are addressed; proposed financing terms; the construction budget; financial projections; and financial information about the project sponsors and other project participants." HOFFMAN, *supra* note 13, at 306. Unless the project developer has anticipated IFC or EPFI financing, it is difficult to imagine such developer implementing the IFC's guidance on FPIC after the Offering Memorandum stage.

[102] *See, e.g.*, LEHR & SMITH, *supra* note 36, at 8 (noting that "consent and engagement are closely related concepts that can form part of the same process[,] and that [t]he terms engagement and consent should not be used interchangeably, as consent is a heightened or extra layer added to the engagement processes that companies normally undertake).

To assist its clients—project developers—with utilizing the new FPIC framework outlined in Performance Standard 7, the IFC published a twenty-six page document entitled "Guidance Note 7 Indigenous Peoples."[103] The notes provide a section-by-section analysis of the provisions of Performance Standard 7.[104] Of particular relevance to this article are those sections interpreting and providing guidance on paragraphs ten through twelve of Performance Standard 7, *Participation and Consent*, discussed in Part I, *supra*.

Together, these Guidance Notes paint a picture that looks very much like a consultation "plus" model of consent. In this case, the "plus" is two-fold, comprising "a process and an outcome."[105] According to Guidance Note 25, the FPIC two-part process "builds upon the requirements for [Informed Consultation and Participation][106] (which include requirements for free, prior and informed consultation and participation)." In addition to the consultation process, the new FPIC model now requires an FPIC agreement established through good-faith negotiation[107] that, according to the IFC, "captures the Affected Communities' broad agreement on the legitimacy of the engagement process and the decisions made"[108] and "document[s] the roles and responsibilities of both parties and specific commitments."[109] Despite this laudable effort to broaden the scope of engagement for indigenous communities affected by IFC-financed projects, a close reading of the Guidance Notes reveals important inconsistencies. These inconsistencies raise questions about the enforceability of agreements entered under the new guidelines. A few of these concerns are discussed below.

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[103] See IFC GUIDANCE NOTES, *supra* note 100.

[104] The Guidance Notes discussed in this article are current as of the date of publication; however, the IFC may update the notes from time to time. *See* IFC PERFORMANCE STANDARD 7, *supra* note 58, ¶ 8 (discussing the purpose of the Guidance Notes, stating that "[a] set of eight Guidance Notes, corresponding to each Performance Standard, and an additional Interpretation Note on Financial Intermediaries offer guidance on the requirements contained in the Performance Standards, including reference materials, and on good sustainability practices to help clients improve project performance. These Guidance/Interpretation Notes may be occasionally updated.").

[105] IFC GUIDANCE NOTES, *supra* note 100, at 9.

[106] The acronym, "ICP," is used as shorthand for the term "Informed Consultation and Participation." To be clear about the extent to which consultation and participation are relied on under the new framework, the fully described term, Informed Consultation and Participation, rather than the acronym, ICP, is used in the text of this article.

[107] IFC GUIDANCE NOTES, *supra* note 100, at 9.

[108] *Id.* at 11.

[109] *Id.* at 12.

1. Defining "Free" Community Engagement

Although not explicitly stated, the discussion in the first set of Guidance Notes appears to go to the "free" aspect of FPIC. *General Principles of Engagement* opens by stating that the client "should engage with the Affected Communities of Indigenous Peoples within the project's area of influence through a process of information disclosure and [Informed Consultation and Participation (ICP)]."[110] Further, the "process of ICP entails consultation that occurs freely and voluntarily, without any external manipulation, interference or coercion, and without intimidation."[111] Although the engagement process envisioned by the IFC is robust, the agency is careful not to use the term "consent" in its explanatory notes, stating that the "engagement process will take account of existing social structures, leadership, and decision-making processes as well as social identities such as gender and age, and be cognizant of" protecting the rights of women and other potentially marginalized groups.[112] Clients of the IFC should also utilize existing decision-making structures and note capacity deficiencies that limit the ability of affected indigenous communities to reach consensus regarding a project.[113]

In general, the guidance notes are permissive and avoid mandatory language, such as "shall." For example, the *General Principles of Engagement* provision first states that the project developer "should" seek the active participation of the affected communities of indigenous peoples. The note continues in this discretionary vein, and uses "may" to describe important aspects of community engagement, such as the project developer's option to provide communities an opportunity to assess project risks and impacts; and enabling community access to legal advice with respect to rights and entitlements to compensation, due process, and benefits under domestic law.[114] According to the additional guidance provided in the note, clients "should" also ensure the representation of all groups' views in the decision making and "[s]hould facilitate a culturally appropriate decision-making process for communities" where none exists.[115] This soft language provides the benefit of flexibility for project developers but

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[110] *Id.* at 7.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 8.
[115] *Id.*

creates uncertainty for those seeking to hold such project developers to a discernable standard under the new FPIC framework.

The next Guidance Note addresses the grievance process and mirrors the vague language of the prior notes. The IFC suggests that the client make available culturally appropriate mechanisms designed in consultation with the Affected Communities of Indigenous Peoples, and that "if necessary," the "grievance mechanism should provide for fair, transparent, and timely redress of grievances at no cost."[116] Moreover, "[a]s part of the engagement process, all members of the Affected Communities of Indigenous Peoples should be informed" of the grievance mechanism.[117] The IFC makes no effort to specify the types of grievances that may be addressed by the project developer or, with respect to fairness and transparency, what legal standards should govern. In addition, the heavy utilization of "should" in the note mitigates its potential effectiveness and generally confers broad latitude to the developer seeking to create a grievance mechanism, while providing little direction to or legal specificity for advocates or actual communities who might seek redress for project harms.

2. Defining "Prior" and "Informed"

The next set of notes appears to correlate to the terms "prior" and "informed." The IFC notes that the process of Informed Consultation and Participation "will frequently span an extended period of time" and "[p]roviding adequate information to the members of the indigenous community about a project's potential adverse impacts and proposed minimization and compensation measures may involve an iterative process involving various segments of the community."[118] Moreover, and keeping in line with the idea of FPIC as consultation "plus," the same Guidance Note provides:

> Thus, (i) consultation should start as early as possible in the risks and impacts assessment process; (ii) client engagement processes should aim to ensure that the entire population of Affected Communities of Indigenous Peoples is aware of and understands the risks and impacts associated with project development; and (iii) project information should be made available in an understandable form, using indigenous languages where appropriate; and (iv) the communities

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[116] *Id.* at 8 – 9.
[117] *Id.*
[118] *Id.* at 8.

> should have sufficient time for consensus building and developing responses to project issues that impact upon their lives and livelihoods; and (v) clients should allocate sufficient time to fully consider and address Indigenous Peoples' concerns and suggestions about the project in the project design and implementation.[119]

This note fails to acknowledge the reality of large-project work, which involves significant upfront investments by the project developer.[120] By the time an IFC client—the project developer—has enough information to be able to inform affected indigenous communities of the myriad risks and impacts associated with the project and indigenous communities have digested and formulated a response to the information provided, significant resources have been expended. This decreases the ability of communities to change the trajectory of a project in any meaningful way.

The timing concern is somewhat addressed in Guidance Note 29, under the heading *Application of Free, Prior and Informed Consent*, where the IFC states:

> In certain cases it may not be possible to define all aspects of the project and its locations, identify Affected Communities (including Indigenous Peoples) and review project environmental and social assessment and related mitigation plans before decisions are taken about project design aspects (e.g., exploration phase activities in the extractive industries). In the absence of these elements, achieving FPIC prior to approving a project *may not be feasible and/or considered meaningful* because the determination should be closely related to the defined impacts of a known project on directly Affected Communities. The appropriate sequencing of achieving FPIC is generally to first agree on key principles through an overall framework, and then consult on specific aspects once designs are further advanced and locations are determined. In such circumstances the client should (i) develop forward-looking stakeholder engagement strategies that ensure that relevant stakeholders are aware of potential development pathways; (ii) ensure that stakeholders have adequate awareness, understanding and access to information concerning their resource rights (lands, forests, tenure systems, government established compensation frameworks, etc); and (iii) commit to

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[119] *Id.*

[120] Indeed, in a document advising a client on the potential challenges and benefits of adopting a policy of free, prior, and informed consent, attorneys Amy K. Lehr and Gare A. Smith of Foley Hoag note the difficulty with obtaining the "prior" consent of indigenous peoples in any true sense stating, "Companies do not hold the power to seek FPIC in a manner that is truly 'prior' as ILO Convention No. 169 and the Declaration appear to utilize the term, whereby a State gains consent before a concession is granted. Companies can, however, adhere to the principle of gaining consent 'prior,' and seek consent before commencing specified stages of operations." LEHR & SMITH, *supra* note 36, at 8.

> implementing a process of FPIC for any subsequent project development adversely impacting Indigenous Peoples in the manner described in GN27, once such impacts become known. Documents that may be submitted in the process of achieving FPIC may include a framework agreement on engagement and consultation, agreements demonstrating FPIC, and [Indigenous Peoples Plans].[121]

The language, "[i]n the absence of these elements, achieving FPIC prior to approving a project may not be feasible and/or considered meaningful" indicates broad flexibility with respect to the implementation of the policy. In light of this flexibility, it is difficult to imagine many circumstances where the "prior" aspect of FPIC has meaning. Practically speaking, once the project developer has enough information to provide actual data regarding environmental and community risks to affected indigenous communities, the project will have already received its initial equity funding, a commitment that could prove difficult to unwind.[122] Moreover, the process of courting banks to obtain debt financing is also likely to be underway at this point.[123] In essence, once affected indigenous communities become engaged in the project process, the development train has already left the station. This timing directly informs the question of whether the "consent" component of FPIC has teeth at all. Guidance Note 30, also under the *Application of Free, Prior and Informed Consent* section, does little to clarify this conundrum, stating:

> Similarly, there may be situations where likely project scope and location are known, but where the engagement process with Affected Communities of Indigenous Peoples is not yet sufficiently advanced to have obtained FPIC at the time of project approval. In such cases the overall principles and engagement process, and criteria for obtaining FPIC, should be agreed on before project approval. As a minimum FPIC should be obtained prior to any of the circumstances requiring FPIC taking place.[124]

The logic of the provision is circular at best, and at worst, nonsensical. In particular, the last sentence of the paragraph, "[a]s a minimum FPIC should be obtained prior to any of the circumstances

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[121] IFC GUIDANCE NOTES, *supra* note 100, at 9 (emphasis added).

[122] Equity investments in projects may occur at any of the following four points in the project timeline: development stage, construction stage, upon completion, and operation stage. HOFFMAN, *supra* note 13, at 37.

[123] *See id.* at 306 (noting that project risks are often included in the Offering Memorandum to banks).

[124] IFC GUIDANCE NOTES, *supra* note 100, at 11.

requiring FPIC taking place," illustrates the difficulty of timing FPIC to fit the life cycle of a standard project development such that meaningful outside participation and consent are achieved.

Moreover, the IFC suggests that "project approval" may be obtained prior to obtaining FPIC; however, if FPIC is a requirement for all projects financed by the IFC, IFC "project approval" should not be a possibility unless FPIC is in place.[125] It is unclear, then, on the face of the Guidance Note, whose "approval" might be obtained prior to FPIC, but at the very least, the provision makes clear that a project may proceed without FPIC, so long as the relevant criteria are in place to obtain FPIC. Again, this circularity raises concerns about the true meaning of "consent" if, as previously suggested, the train has left the station and consent is obtained *ex post facto*.

The remaining sections of the Guidance Notes provide the essence of the "plus" of the consultation "plus" aspect of FPIC. Although the provisions suffer from the same ambiguity that is pervasive in the other Guidance Notes, they could provide a narrow opening through which affected indigenous communities may negotiate actual benefits.

3. "Consent" = Consultation "Plus"

Rather than give meaning to FPIC, the IFC states "[i]t is recognized that there is no universally accepted definition of FPIC and that the definition and practices related to FPIC are evolving."[126] In addition, the process of "FPIC comprises a process and an outcome" that "builds upon the requirements for [Informed Consultation and Participation] (which include requirements for free, prior and informed consultation and participation) and additionally requires Good Faith Negotiation (GFN) between the client and Affected Communities of Indigenous Peoples . . .The outcome, where the GFN process is successful, is an agreement and evidence thereof."[127] In a rare use of mandatory language, the IFC then states, "FPIC *will be* established through a process of GFN between the client and Affected Communities of Indigenous Peoples."[128] The IFC then notes that "[w]here the GFN

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[125] *See supra* note 1.

[126] IFC GUIDANCE NOTES, *supra* note 100, at 9.

[127] *Id.*

[128] *Id.* at 12 – 13 (emphasis added).

process is successful, an agreement should document the roles and responsibilities of both parties and specific commitments."[129]

Next, the IFC lays out in detail the potential scope of the agreements that a successful FPIC might yield, noting that the agreement:

> may include: (i) agreed engagement and consultation process; (ii) environmental, social and cultural impact management (including land and resource management); (iii) compensation and disbursement framework or arrangements; (iv) employment and contracting opportunities; (v) governance arrangements; (vi) other commitments such as those pertaining to continued access to lands, contribution to development, etc.; and (vii) agreed implementation/delivery mechanisms to meet each party's commitments. The agreement between parties should include requirements to develop time-bound implementation plans such as a Community Development Plan or an [Indigenous Peoples Plan]. Examples of agreements include a memorandum of understanding, a letter of intent, and a joint statement of principles.[130]

This provision provides a critical pathway for a more useful interpretation of FPIC. In particular, the binding language with respect to good-faith negotiation and the requirement for documentation of the FPIC process could prove invaluable to communities seeking to give "consent" meaning under the FPIC framework. The following section lays out one potential option to bring FPIC to life: utilizing the framework to provide a basis for shifting the environmental and social risks that often accompany large projects and disproportionately burden indigenous communities back to project developers.

IV. CONTRACTUAL BASIS FOR RISK SHIFTING

What is missing from the foregoing discussion is an interpretation of FPIC that offers a clear entrée into the complex array of contractual arrangements that could actually shift the risks of development. The IFC's most likely interpretation of the FPIC standard—consultation "plus"—does little to establish an explicit *quid pro quo* whereby the environmental and social risks of large development projects, even those that purport to be "clean," are adequately distributed. The IFC makes clear that the scope of FPIC is limited, stating that Informed Consultation and Participation and FPIC

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[129] *Id.*

[130] *Id.*

"should ensure the meaningful participation of Indigenous Peoples in decision-making, focusing on achieving agreement while not conferring veto rights to individuals or sub-groups, or requiring the client to agree to aspects not under their control."[131] This harkens back to the early days of FPIC, where the "C" represented consultation, and consent was merely aspirational.

Despite these limitations, the IFC's guidance provides a narrow opening through which its vision of FPIC, as a doctrine of consultation "plus," might be conceptualized as a contractual framework. The guidance states that the developer and indigenous communities "should *agree* on appropriate engagement and consultation processes as early as possible, commensurate with the scale of impact and vulnerability of the communities . . . ideally [] done through a framework document or plan that identifies . . . the reciprocal responsibilities of parties to the engagement process and agreed avenues of recourse in the event of impasses . . . . *Where appropriate, it should also define what would constitute consent from Affected Communities of Indigenous Peoples*."[132] This narrow opening holds tremendous promise. Relying on the Oaxaca wind development case study, the following sections provide a basis to argue for an interpretation of this opening that allows FPIC to be utilized as a basis for contractual risk shifting.

This framing could meet the twin goals of mitigating social and human rights risks for project developers, while also offering affected communities a real seat at the negotiating table and the ability to affect their destiny. To date, the literature has been largely silent on this particular possibility for FPIC, but given the existence of contract as the animating feature of large projects, it may prove to be the most effective way to mitigate the environmental and social externalities associated with large projects.[133]

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[131] *Id.* at 9.

[132] *Id.* (emphasis added).

[133] Lehr and Smith advocate for the adoption of formal consent agreements by companies seeking the consent of indigenous communities affected by their operations. *See* LEHR & SMITH, *supra* note 36, at 43 – 44. Such agreements could include benefit arrangements, details regarding grievance mechanisms, and tie future consent to project milestones. The approach urged in this article is more robust. Communities would have the ability to tie their agreement to the principle agreements of the project transaction, thereby motivating banks to monitor the activities of project developers and giving project developers added incentive to protect the rights of local indigenous communities.

A. STANDARD RISK MANAGEMENT

1. Commercial and Political Risks

Risk pervades all development projects, and in this respect the wind projects in Oaxaca are no different. Project developers face substantial risks, which are most often framed as commercial risks.[134] For wind developers, there is the risk that the windmills built may not generate the energy required under the power purchase agreements. In this circumstance, and depending on the contractual agreement, a private buyer like Heineken or Cemex could opt not to purchase the energy generated by the project.[135] This could jeopardize the project developer's ability to service the project debt, which would pose a financial risk to the project and to the banks that financed the project.[136]

Another possible financial risk relates to construction delays. If the project faces significant cost overruns and the risks have not been adequately covered by the contractual arrangement with the builder of the project, the flow of funds to the banks could be jeopardized, causing the project to go into default.[137] In addition, political instability or a change of law could lead to the expropriation of the project.[138] Given the relative political stability in Mexico, however, this is unlikely.[139]

The foregoing financial risks are typically anticipated and redistributed through contract. In the first example, where the energy produced is insufficient, the power purchase agreement would likely require the offtaker—Walmart, Cemex, or Heineken, for example—to "take" the energy produced or "pay" for its failure not to purchase the energy.[140] Although there could still be a financial shortfall within the

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[134] *See* Baker, *supra* note 10, at 314.

[135] This type of arrangement is typically called a "take and pay" or "take if offered" contract, wherein the buyer only has an obligation to pay the developer if the developer has the ability to deliver the product that was contracted for. HOFFMAN, *supra* note 13, at 210.

[136] *Id.* (noting that in this type of arrangement the project developer bears the risk).

[137] *Id.*at 165.

[138] *Id.* at 48.

[139] *See Alta Ventures Mexico Fund I Announces a $70MM USD Final Close to Invest in Mexico and Latin America*, ALTA VENTURES (Aug. 17, 2012), http://www.altaventures.com/index.php/en/news/alta-ventures-closes-fund-i (venture capital fund notes that "Mexico has positive and growing demographics, low country debt, and macro-financial and political stability").

[140] HOFFMAN, *supra* note 13, at 210 (noting that in this type of contractual arrangement, the purchaser of energy "makes payments for capacity *whether or not* the project company actually generates the good or service at the purchaser's request").

project, the contractual agreement significantly mitigates this risk. Similarly, in the example involving construction delays, the contractor responsible for building the project typically receives a premium to absorb the risk of construction delay.[141] If the project fails to meet the construction timeline, the contractor faces penalties.[142] Moreover, with respect to political risk, a host government agreement between the project developer and Mexico would likely cover risks associated with changes of law, forcing Mexico to compensate the developer for any change in law that might lead to a diminishing return on the developer's investment.[143] Finally, NAFTA and other international investment agreements also protect investors from host government expropriation by creating economic disincentives for the host government who might engage in this type of activity.[144]

2. Social and Environmental Risks

As previously discussed, within the past twenty years, the development community, including banks and project developers, has begun to expand the scope of financial risk to include social and environmental risks.[145] The Equator Principles were purportedly designed to mitigate these risks, and the IFC's new Sustainability Guidelines are also designed toward this end.[146] In the context of Oaxaca, common social risks to the wind developments have included protests[147] and litigation[148] related to the land leases, leading to potential delays. Environmental risks run the gamut, from damage to the water table, as suggested by some engineers and community leaders in the La Ventosa region of Oaxaca, to destruction of protected species of birds.[149] Despite the recent focus on these types of issues, it is well known that local communities typically bear the brunt of such social and environmental

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[141] *Id.* at 165.

[142] *Id.* at 166.

[143] *Id.* at 151.

[144] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

[145] *See supra* Part I.A.1.

[146] *IFC Sustainability*, INT'L FIN. CORP., http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability (last visited July 18, 2012).

[147] Ronald Buchanan, *Mexico's CFE invites bids for three wind farms as the country begins to tap its wind capacity*, GLOBAL POWER REP., Nov. 12, 2009.

[148] *Mexico Alternatives*, *supra* note 77.

[149] Baker, *supra* note 10, at 287 – 89.

risks. Indeed, in a previous article, I argued that the very financial structure of most project developments allows project developers to take tremendous risks without recourse, leaving local communities and the environment to absorb them.[150]

If aggressively utilized, the new FPIC framework might be game changing. It could provide an opportunity for local communities to participate, via contract, in the risk-mitigation game. The following two sections address these possibilities.

B. BRINGING FPIC TO LIFE: A PRACTICAL APPROACH

The IFC guidance makes clear that under its consultation "plus" framework, a successful FPIC process must include good-faith negotiation and an agreement.[151] As previously noted, this framing of FPIC precludes the opportunity to halt a project, but communities, armed with the risk-assessment information required under Performance Standard 7, could feasibly enter into agreements that address concrete concerns based on actual data. These agreements could effectively shift social and environmental risks back to those in the best position to mitigate such risks—the project developers.

The Guidance Notes suggest several examples of agreements that might meet the FPIC standard: a memorandum of understanding, a letter of intent, and a joint statement of principles.[152] Typically, unless specific language to the contrary is included, none of the foregoing types of agreements is binding. If one assumes that the IFC's list is not exhaustive, a creative, more expansive, reading of FPIC could contemplate an "Environmental and Social Risk Agreement," not unlike a Community Benefits Agreement entered in community development projects in the United States.[153] In this case, however, violations of the agreement would be tied to a default under the primary loan agreement of the project. This raises the stakes, both for project developers and the banks involved, thus increasing the likelihood that project developers would comply with the terms.

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[150] *See generally id*.

[151] IFC GUIDANCE NOTES, *supra* note 100, at 9.

[152] *Id*. at 12 – 13.

[153] Community Benefits Agreements are a relatively new feature of community development that provide a way for community to engage directly with developers via contract. Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENVTL. L. 205, 220 (2012).

The Environmental and Social Risk Agreement should be specific. Affected indigenous communities would rely on the actual data supplied to them pursuant to FPIC and translate the risks into contract terms. In the event that a project developer's activities trigger certain risks, the project developer must mitigate the risks or face penalties and the risk of default. The signing of such Environmental and Social Risk Agreement by the project developer would be a condition of the financial closing, which would force the project developer to engage indigenous communities throughout the project development phase. This is crucial because the scope of social and environmental risks is not known early on in the project development. This contractual approach is consistent with the IFC principle of sustained community engagement and could yield real benefits for affected indigenous communities. Moreover, given that contracts take numerous forms, the possibilities are endless. Despite these possibilities, there are potential limitations to this approach, a few of which are addressed below.

The first issue is community capacity. In many cases, affected indigenous communities comprise the most marginalized segment of the local population and often lack access to formal education, legal representation, or any of the tools that are legible to international project developers, who are typically Western and almost always sophisticated, repeat industry players.[154] The IFC guidance implores project developers to work to build and rely on local capacity, but it falls short of making access to legal representation or other nongovernmental support a mandatory part of FPIC.[155] Providing these basic tools to communities could work to level the playing field and strengthen the impact of any Environmental and Social Risk Agreement. The capacity issues facing indigenous communities in Oaxaca illustrate the importance of access to representation and NGO support. For example, legal representation would allow local farmers to obtain all of the information regarding the risks and benefits of entering into land leases with project developers, in their native language, rather than relying on boiler-plate documents provided by the developers. Engagement with NGOs could also ensure that Mexican law regarding interacting with indigenous communities is followed.

Any deficits in capacity are compounded by the lack of transparency that is pervasive in the development community.

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[154] *See* Likosky, *supra* note 8, at 67.

[155] IFC GUIDANCE NOTES, *supra* note 100, at 7.

International development banks, even those with a very public mission such as the IFC, are notoriously private regarding transaction terms.[156] Project developers also lack real incentives to disclose deal terms.[157] Some scholars have addressed this concern,[158] and if communities who only engage on a one-off basis are to negotiate in meaningful ways with project developers, lifting the veil on transactions is key. Such communities are at a marked disadvantage to seasoned repeat industry players who frequently engage in complex project transactions. Broader deal transparency and access to, at a minimum, a database of other Environmental and Social Risk Agreements entered into by other affected indigenous communities, could cure this information asymmetry.

It is also worth noting that "The Indigenous Peoples" are not a monolith. As acknowledged by the IFC, indigenous communities mirror others, in that there is often a range of opinions with respect to any given issue.[159] In the case of Oaxaca, a community *ejido* process exists to bring members to consensus.[160] A fractured negotiation process could benefit certain community members at the expense of others. Moreover, in the Oaxaca example, women are frequently excluded from key meetings with community leaders.[161] Project developers would be well served to structure information distribution in ways that engage all community members and ensure a robust negotiation process that includes all voices.

There is also the question of whether indigenous community processes are ill suited to Western contract principles. As noted in the IFC guidance, and as reflected in Oaxaca, indigenous community decision-making processes are often iterative and involve extensive discussions in order to reach consensus.[162] Indeed, in his discussion of the free, prior, and informed consultation process in Colombia, Professor Rodriguez-Garavito notes that it often appeared that communities would start from scratch at the beginning of each meeting, even after it appeared consensus had be reached in prior discussions.[163] By contrast,

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[156] *See* Baker, *supra* note 10, at 307 – 08.

[157] Since deal terms often reflect the product of negotiations, disclosure of one transaction's terms could undermine the effectiveness of negotiating with entities in future transactions.

[158] *See* PETER ROSENBLUM & SUSAN MAPLES, CONTRACTS CONFIDENTIAL: ENDING SECRET DEALS IN THE EXTRACTIVE INDUSTRIES (2009) (discussing need for greater transparency).

[159] IFC GUIDANCE NOTES, *supra* note 100, at 8.

[160] CALL, *supra* note 60, at 190.

[161] *Id.* at 191.

[162] IFC GUIDANCE NOTES, *supra* note 100, at 6 n.4.

[163] Rodriguez-Garavito, *supra* note 42, at 295.

large-development projects contracts are fairly precise and built on the assumption that most major contingencies have been addressed in the documents.[164] This cultural mismatch may prove insurmountable and could jeopardize any attempt to superimpose a contractual arrangement within a traditional indigenous decision-making process.

Environmental and Social Risk Agreements have the potential to bridge this divide. Arguably, in many ways indigenous communities are built on ideals of sustainability.[165] In fact, the communal structure of land ownership and decision-making in Oaxaca implicitly acknowledges that injury to one community member results in injury to the entire community. Additionally, the watershed in Oaxaca is linked, as are issues related to crop-flooding and food shortages. Although Western contract is steeped in individualism, the careful integration of indigenous concepts regarding sustainability could lead to overall community benefits and build project developers' capacity to engage in sustainable development.[166] In this way, both constituencies win, even if the process does not mirror a Western project negotiation.

Finally, the Environmental and Social Risk Agreement approach to FPIC proposed in this article poses additional costs to developers. Some might argue that these added costs could chill development, but two things might mitigate this effect. First, some type of agreement is already contemplated under the FPIC framework. Given the prominence of the IFC within the international development community, the IFC's full adoption of the approach suggested here would prevent a "race to the bottom." Quite simply, private developers would have very few other options with respect to obtaining project financing. The Environmental and Social Risk Agreement could therefore provide the floor, rather than the ceiling, for what is possible in large projects.

Second, host governments are often left with damage control in the face of project-related social unrest or long-term environmental harm resulting from projects.[167] In light of this reality, the Environmental and

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[164] *See* HOFFMAN, *supra* note 13, at 38 (noting that all risks in the transaction must be allocated to satisfy the project developers' desire to obtain financing without recourse to their assets).

[165] Bosire Maragia, *The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge all that is Needed?*, 18 GEO. INT'L ENVTL. L. REV. 197, n.10 (2006) (discussing sustainable activities practiced by indigenous societies).

[166] Sustained engagement with indigenous communities in Oaxaca could allow developers to create a set of best practices uniquely suited to the ecology, culture, and environment of the region. Ultimately, this could reduce transaction costs for the developer and honor the traditional lifeways of the local population.

[167] HOFFMAN, *supra* note 13, at 75.

Social Risk Agreement approach could arm host countries with the tools to recalibrate the costs and benefits of development. This redistribution could greatly benefit host governments, which are generally poorer than the countries from which project developers hail and who often face significant capacity issues of their own. Given that developing countries have long struggled to change development dynamics,[168] they might embrace this development model. Rather than a race to the bottom, where host governments lower barriers to entry for project developers, poorer countries might coalesce around the idea of risk redistribution, penalizing defectors.

C. UTILIZING THE ENVIRONMENTAL AND SOCIAL RISK AGREEMENT TO CURE DEFICIENCIES IN OAXACA

Utilizing the expanded FPIC framework to penetrate private contractual arrangements in Oaxaca might yield benefits that the existing legal frameworks have yet to provide. The reports filtering out of Oaxaca indicate key concerns related to both procedural and substantive aspects of the various land leases entered by developers; potential environmental degradation as a result of the pervasive wind farms in the area; and inadequate distribution of project benefits, including economic benefits.[169] These harms may be broadly categorized as social and environmental risks. This section gives a brief overview of potential ways in which a Enivronmental and Social Risk Agreement might prove helpful to affected indigenous communities in Oaxaca, bearing in mind that many of the cultural and spiritual costs borne by the communities are not captured within the proposed framework.[170]

As a threshold matter, the process by which some developers entered into lease agreements with various indigenous farmers could be flawed. Allegedly, the process failed to adhere to the *ejido* structure of land ownership that requires community consent before a particular

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[168] *See* Natsu Taylor Saito, *Decolonization, Development, and Denial*, 6 FLA. A&M U. L. REV. 1 (2010) (providing an overview of the various efforts of third world peoples to reject the hegemony of the Global North).

[169] Baker, *supra* note 10, *passim.*

[170] This approach also accepts the idea of development as a *fait accompli*, which is less than ideal. A more perfect solution to the situation in Oaxaca would give the indigenous communities affected by the wind developments veto power over the projects. *See, e.g.*, LEHR & SMITH, *supra* note 36, at 29 (describing the De Beers Victor Lake project in Canada, where the company publicly stated in English and the First Nation's language that it would not initiate the project without the consent of the indigenous community).

parcel of land is alienated to a private interest.[171] Adherence to the IFC's basic FPIC requirements requiring community engagement could both ensure participation of the community and mitigate environmental risk in unique ways.

For example, the communal framing of indigenous land ownership and decision-making in Oaxaca implicitly recognizes that one individual's alienation of his land to allow wind development affects the entire *ejido*. Subjecting the wind developers' plans to community scrutiny effectively erects a filter through which developers' plans must pass prior to implementation. Local knowledge might prove crucial to preserving various portions of the watershed, and communities could be empowered through FPIC's consultation process to limit development of certain areas of cultural, spiritual, or environmental significance to the community.

With respect to the "plus" aspect of the FPIC process, through the *ejido* leadership structure in Oaxaca, community leaders could memorialize the agreement with respect to the land and include additional social and environmental provisions that operate to redistribute risks. For example, rather than offer a specific farmer certain compensation in order to build on his or her land, the Environmental and Social Risk Agreement with the *ejido* could promise benefits tied to overall windmill productivity to each member of the *ejido*; recognition that even one windmill on the property affects each member of the *ejido*, her access to resources, and her ability to thrive on her land. These long-term environmental and social risks could be quantified and calibrated to actual compensation, for which project developers would be responsible throughout the lifetime of the project.

A failure to provide these minimum benefits to the community could be tied to default in the loan agreement, which could incentivize the project developer to adhere to the terms of the agreement. The community members could further guarantee payment by requiring that the agreement governing cash flow and the order of payment for various entities within the project include certain payments to the community. In this way, environmental risks, which are typically borne by community members, are shifted back to the project developer.

The foregoing brief example illustrates one way in which the environmental and social risks of a project could be shifted back to project developers utilizing the FPIC framework. As previously noted,

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[171] Baker, *supra* note 10, at 145.

without veto power, the framework assumes that development is always already required.[172] The framework also fails fully to capture the long-term social and environmental risks that persist once a project developer obtains its return on investment and the project is either shut down or transferred to a government interest. These concerns are admittedly quite significant; this article merely attempts to reframe the ways in which community consent and risk are managed within the context of large projects.

CONCLUSION

In response to the question implicitly raised by this article—does the IFC's new FPIC policy even matter?—the landscape appears murky. What is clear, however, is that unless a broad reading of FPIC is undertaken, many of the environmental and social risks that accompany large development projects are unlikely to disappear anytime soon, and the harms suffered by indigenous communities in large-project settings will persist. It is difficult to imagine that the advocates who pushed for the IFC's implementation of a free, prior, and informed consent model envisioned a construct in which "consent" did not mean consent at all, but meant a robust consultation process "plus" something else; however, utilizing the consultation "plus" model of FPIC to penetrate the dense web of contracts that bring projects to life and mitigate risks is one powerful interpretation that could have lasting effects in indigenous communities. In many respects this solution is woefully inadequate; however, at this juncture it may be the best option available.

[172] *See supra* note 98.