

THE NEW WORLD BANK SAFEGUARD STANDARD FOR INDIGENOUS PEOPLES:

WHERE DO WE START?

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Abstract

The paper analyzes the international legal instruments intended to guide development on lands where competing assertions of State authority and indigenous land rights show no likelihood of foreseeable resolution. Examined is the tension between the aspirations of UNDRIP and the practical policies guiding multilateral development agencies and particularly the World Bank. The new Environmental and Social Framework of the Bank and associated Environmental and Social Standard 7 pertaining to Indigenous Peoples, is then analyzed from this perspective. Finally the paper reports on the Grand Bend Wind Project in Canadian province of Ontario, and the policies on which it relies, as a case study for successfully proceeding notwithstanding claim uncertainty.

Key Words:

ESF, ESS7, UNDRIP, FPIC, Indigenous, Renewable Energy, Project Finance

A. INTRODUCTION

The conflict between indigenous land interests and State and private development interests continues in 2017 to be a major point of uncertainty in developed and developing economies alike. Long term struggles have taken root in a number of countries as land restitution becomes more accessible, information about successful claims in other jurisdictions spreads, and more and more land tenure information is being recorded outside of conventional government systems. Worldwide there are 370 million indigenous peoples, who constitute 5% of the global population, 15% of the world's poor and about one third of the 900 million people classed as extremely poor.¹ Many indigenous groups are involved in struggles to protect their territorial claims to land and protect their environments. In rural areas, many are vulnerable to land grabbing for extractive industries, conservation areas and commercial agriculture.²

On August 4th, 2016, after extensive consultations, the World Bank's Board of Directors (the "**Bank**" and the "**Board of Directors**") approved a new draft Environmental and Social Framework ("**ESF**"), continuing the process of modernization for policies aimed at preventing Bank-funded development projects from harming the environment and people.³ Standard 7 on *Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities* ("**ESS7**")⁴ is the principle safeguard standard that borrowing countries are expected to follow to protect the rights of indigenous groups. The paper will analyse this new ESS7 including how it has evolved over the last two drafts.

The fundamental question is how ESS7 can be implemented where territorial claims threatening State sovereignty remain unresolved. This is the main point of friction between recognition of Indigenous rights and implementing pro-development policies. ESS7 takes great strides to balance heightened recognition of indigenous rights alongside a cautious respect for State sovereignty and building State institutions to encourage a waning reliance on Bank funding. It is

¹ Rural Poverty Portal, "Statistics and key facts about indigenous peoples", *International Fund for Agricultural Development*, online at <http://www.ruralpovertyportal.org/topic/statistics/tags/indigenous_peoples>.

² United Nations International Law Commission, 2013.

³ The World Bank, "World Bank Board Approves New Environmental and Social Framework", online at <<http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework>>.

⁴ World Bank, *Environmental and Social Framework, Setting Environmental and Social Standards for Investment Project Financing*, August 4, 2016 [ESS7].

a strong improvement over past drafts. However as the borrower carries much of the onus to ensure ESS7 has been attained, care must be used to ensure the borrower and Bank's mutual interest to minimize project risk doesn't also adopt structures to minimize legitimate indigenous concerns. Examples of existing policies and case studies wrestling with the implementation of the shared goals of ESS7 are therefore imperative in achieving an acceptable outcome.

One such case study, the Grand Bend Wind Project of south-western Ontario, Canada is an example of effective policy facilitating a strategy to encourage development on contested land. The result is a 50-50 partnership of a wind power generation project successfully built and reaching commercial operation (May 2016) notwithstanding an existing court claim for aboriginal title overlapping the project leases.

Care must obviously be used in developing policy and programs that incentivize indigenous participation in the development process to ensure a meaningful process is both present and lasting. There is also no substitute for experience. However this paper emphasizes that proponents engaging in early, meaningful, and appropriately resourced consultation with indigenous rights claimants regarding development impacts, in a regulatory environment that is conducive to consent, will be far more likely to be rewarded with certainty in what is regularly perceived as a very murky field. In turn, greater engagement with proponents provides an avenue for interested indigenous groups to participate in an otherwise inaccessible commercial mainstream.

B. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The *United Nations Declaration on the Rights of Indigenous Peoples* (“**UNDRIP**”) was adopted by the UN General Assembly in 2007⁵. This step codified a decades long transition of international human rights law from the protection of the self-determination of States, to the self-

⁵ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 [UNDRIP]. Initially adopted by 143 countries, with 4 countries against being Australia, Canada, New Zealand, and the United States. All 4 countries have now endorsed the declaration. 11 countries abstained, two of which (Columbia and Samoa) have since endorsed the document. 34 countries, mainly African nations, were absent.

determination of the individuals living within them⁶. The transition has occurred in step with the increasing interconnectivity of international business, promoting a standardized accountability for its trans-boundary operation.

In practice, UNDRIP clarifies the normative floor for the protection of indigenous rights against which actions of the international development community are evaluated. Its adoption was not without controversy. Thirty-four countries, mainly African nations, were absent from the vote. Concerns about the practical and legal consequences of UNDRIP caused four key countries, Canada, the United States, Australia, and New Zealand, each with sizeable indigenous populations and histories of colonialism alongside active resource development in indigenous traditional territories to vote *against* the declaration's adoption in 2007.⁷ Subsequent endorsement by each of these four has been qualified: none have fully enacted its provisions into their national constitutions or domestic laws, each instead ratifying it as an aspirational document.⁸ In 2016, Canada announced it is a “full supporter of the Declaration without qualification” and that by adopting and implementing the declaration, it is “breathing life” into the constitutional protections afforded to indigenous rights; however subsequent statements clarifying it will be implemented “in accordance with the existing constitution” is indeed a qualification by couching pledges of support in language that subtly indicates Canadian law could constrain compliance with the declaration.⁹

This reluctance reflects the current tensions that exist between the moral imperatives embodied by UNDRIP and the practical priorities of achieving a predictable development environment for projects undertaken in indigenous traditional territory. Drafters of policy must balance increasing calls to entirely avoid negative impacts of development alongside apprehension that consideration of these ideals increase the ever-present risk of inactivity that populations aching for better infrastructure and development outcomes can ill-afford.

⁶ See Oliver W. MacLaren “Blowin’ in the Wind: Strategies for Implementing FPIC and Maintaining Peace”, *2015 World Bank Conference on Land and Poverty*, online: <<http://www.oktlaw.com/blog/walking-the-talk-the-skinny-on-self-determination/>>.

⁷ Blaine Favel and Ken S. Coates, “Understanding UNDRIP: Choosing action on priorities over sweeping claims about the United Nations Declaration on the Rights of Indigenous Peoples”, *Aboriginal Canada and the Natural Resource Economy Series*, #10, May 2016, at pg. 16-19.

⁸ *Ibid.* at 19.

⁹ Lorraine Land, “TRC@1: Pop goes the weasel words? Translating UNDRIP into action”, *OKT Blog*, May 12, 2016, online: <<http://oktlaw.com/trc1-pop-goes-weasel-words-translating-undrip-action/>>

The Standing Rock Sioux's protest of the approvals necessary to complete construction of the Dakota Access Pipeline provides a good domestic illustration of the fight being waged to see these aspirations implemented. After years of vocal environmental opposition and months of on-the-ground protest by the Standing Rock Sioux and their allies, in late 2016 President Obama directed the U.S. government to complete a full environmental impact study, denying a key permit necessary to complete the buildout of the pipeline across the Missouri River. Mere months later, under President Trump, this lengthy environmental review requirement has been abruptly cancelled and the remaining permit approvals fast-tracked.¹⁰ The long and uncertain approval process, the protests halting construction, the ordering of further environmental impact studies and now this dramatic reversal evidences a development process unable to rise above the polemics of partisan politics, and thus, an uncertain outcome. For the noble aspirations of UNDRIP to be taken seriously, it is critical that practical solutions for its implementation are achieved in industrialized and industrializing nations alike. Without this, an increasingly cynical environment of either inactivity or a trampling of dearly held rights will take root.

There should be no illusions about the formidable challenge this presents. Canada arguably represents a nation prepared to confront its complicated history regarding the treatment of its indigenous citizens. The extent of their subjugation to the state has only recently become a part of the national Canadian consensus, and only with persistent and courageous work (undertaken most recently by a national truth and reconciliation commission) in a legal environment that protects freedom of expression, have explanations for the deep mistrust, doggedly persistent addiction and suicide rates, and low uptake of state sanctioned education and development initiatives in many of the country's indigenous communities been revealed.¹¹ Practical and achievable steps to allow the country to move beyond the outrage of these revelations is the work now before us.

¹⁰ Sam Levin, "Last stand: 'water protectors' return to Standing Rock as drilling set to begin", *The Guardian*, 8 Feb 2017, online at <<https://www.theguardian.com/us-news/2017/feb/08/standing-rock-dakota-access-pipeline-last-stand>>.

¹¹ See *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015, online at: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>; See also the *Report of the Royal Commission on Aboriginal Peoples, 1996*, online at: <<http://www.loppar.gc.ca/content/lop/researchpublications/prb9924-e.htm>>.

In its July 2015 Concluding Observations on the Sixth Periodic Report of Canada, the UN Human Rights Committee noted:

While noting explanations provided by the State party, the Committee is concerned about reports of the potential extinguishment of indigenous land rights and titles. It is concerned that land disputes between indigenous peoples and the State party which have gone on for years impose a heavy financial burden in litigation on the former. The Committee is also concerned at information that indigenous peoples are not always consulted, to ensure that they may exercise their right to free, prior and informed consent to projects and initiatives concerning them, including legislation, despite favourable rulings of the Supreme Court.¹²

These revelations are of course not unique to Canada. Adoption of UNDRIP's protections interrupts a historical timeline that has led to indigenous people being identified internationally as uniquely and especially vulnerable to the impacts of development. Consensus for protection has arisen as a result of dark national histories and ongoing human rights violations. Without diminishing these histories, it is urgently argued, as Richard Rorty writes, that "those with the responsibility of persuading nations to exert themselves remind these nations of what they can take pride in and are capable of achieving as well as what they should be ashamed of. There are indeed many things to temper such pride; however nothing that has been done should make it impossible [for a nation of self-determining peoples] to regain self-respect." Rorty argues that to say that certain past acts *do* make this impossible is to abandon an antiauthoritarian vocabulary of shared social hope implemented through the strength of strong public institutions. "If a nation is found unforgivable, it will be unachievable; cultural politics will be given preference over real politics," undermining the very idea that public institutions established by self-determining states might be able to serve social justice.¹³

C. THE NEW ENVIRONMENTAL AND SOCIAL FRAMEWORK AND THE SAFEGUARD STANDARD ON INDIGENOUS PEOPLES

1. A Focus On "Implementability"

¹² UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, Advance Unedited Version, 7- 8 July 2015, online: http://www.nupge.ca/sites/nupge.ca/files/documents/ccpr_c_can_co_6_21189_e.pdf at 5.

¹³ Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth Century America*, Massachusetts, London, England, Harvard University Press, Cambridge, 1998.

The Bank is a crucial actor in designing the practical steps necessary to breathe life into UNDRIP's aspirations. While slower than some of its peers, it nevertheless is facing this challenge squarely. In August 2016, a new ESF was approved by the Board of Directors, concluding a four year process to update existing Bank protections and bring them in line with those of other development institutions.¹⁴ The consultations informing the ESF have been touted as the largest ever conducted by the Bank: nearly 8,000 stakeholders composed of governments, development experts, and civil society groups from 63 countries. Following approval, an intensive preparation and training period runs until 2018 in order to equip practitioners for the transition.¹⁵

The key for the purposes of this paper is the deep consideration apparent in the ESF to establishing a morally defensible foundation from which development projects can rise. The Bank's reconciliation of widely varying views expressed during consultations prioritizes "implementability and improved coverage of environmental and social issues in order to achieve more effective risk management outcomes."¹⁶ The framework is of course firmly pro-development. But wise alignment of decreased project risk (a lender and developer concern) and meeting standards for environmental and social protections (an impacted party concern) means implementing the protections in a particular project is decoupled from an aspirational ideal. Instead, it's simply good business. By employing, where feasible, existing capacities of a borrowing country to implement the ESF, it is expected from this experience that risk of future projects in these countries will also decrease, whether financed by the Bank or not.¹⁷ Thus aspirations are still applied, but to the influence a project applying the ESF will have on future ones.

¹⁴ *World Bank Board Approves New Environmental and Social Framework*, August 4, 2016, Washington, D.C., online: < <http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework>>.

¹⁵ *Ibid.* The framework is expected to go into effect in early 2018.

¹⁶ World Bank Board of Directors, *Review and Update of the World Bank's Safeguard Policies: Proposed Environmental and Social Framework, August 4, 2016* at Executive Summary.

¹⁷ *Ibid.* at III A.

2. Addressing Gaps in Capacity

Impacts of transformative development projects are massive, and outcomes will vary from jurisdiction to jurisdiction. No project is implemented in a vacuum, nor does a uniform set of facts exist on which to overlay a uniform framework. As a project moves through the design and development stages and towards construction and operation, capacities on the ground of borrower agencies, stakeholders, and consultants hold enormous influence on a project's perceived success.

The Bank lists as a key concern "limited capacity among in-country institutions and individuals", and there is a corresponding emphasis in the ESF on strengthening this capacity.¹⁸ The priority is evident from the available funding sources identified to see it through: Borrowing as part of the project financing; reimbursable advisory services; funding from Bank donors; the Bank's own budget; and in some cases the borrowing countries own resources. Beyond this, the Bank is seeking to establish a multi-donor trust fund for fragile and post-conflict countries with a higher level of need for capacity building.

Thus there is recognition for an appropriate level of human and financial resourcing to bridge the gap between where the Bank's role ends and the borrowing country's begins. This is a development outlook that seeks sustainable results. But is it broad enough? Through the ESF consultations, out of 21 categories of concern, three of the four most discussed issues were those in which indigenous peoples are front and centre: (i) land acquisitions, (ii) involuntary resettlement, and (iv) the broad category of indigenous peoples itself.¹⁹ While capacity for borrowers in meeting the requirements of the ESF is a key concern, commitments to ensure adequate priority to build capacity of impacted indigenous groups is subtler. There is willingness to provide "a program for indigenous peoples, following up on commitments made during consultations, comprising information and training sessions." This is a decidedly lukewarm approach.

¹⁸ *Ibid.* at III A. The process involves a needs assessment; followed by short term training on the ESF (especially regarding the safeguards a borrowers are required to implement); followed by long-term systematic institution building.

¹⁹ *Ibid.* at III.A. Labour and working conditions was the third most discussed issue. While not implicating indigenous peoples directly, it remains an important indirect issue of concern in many cases, as the only mitigation measure for the removal of traditional livelihoods in remote areas is frequently employment with the project itself.

Concern about resourcing indigenous groups is likely the result of forceful pushback on indigenous issues both during the ESF consultation process and generally as an accompanying criticism to UNDRIP. The Board of Directors acknowledges even the term ‘Indigenous Peoples’ poses potential conflict in some states to the promotion of ethnic unity and fostering a cohesive national identity.²⁰ Indeed, previous iterations of the ESF evidence the amount of consideration the Bank has given to this. After publishing a draft that incorporated the concept of Free, Prior, and Informed Consent, “**FPIC**” (discussed below), the 2014 draft ESF included an “alternative approach” clause in the draft ESS7 that allowed states to opt out of the safeguards (and therefore the FPIC requirement) amidst concerns the process of identifying groups for purposes of applying the safeguards would create a serious risk of “exacerbating ethnic tensions or civil strife, or where the identification of culturally-distinct groups as envisioned in [the safeguards] is inconsistent with the provision of the nation constitution.”²¹ Obviously, allowing borrowing countries to opt out of application of the safeguards was a problematic inclusion and drew intense criticism. The Bank’s next draft ESF removed the “alternative approach” clause from the draft ESS7 but maintained a vague waiver achieving approximately the same effect.²²

3. ESS7: General Requirements

Hence, we now turn our analysis to the final version of ESS7, the principle safeguard standard borrowing countries are obliged to follow to protect the rights of indigenous peoples.²³ ESS7 seeks to enhance opportunities for indigenous peoples to participate in, and benefit from,

²⁰ *Ibid.* at III.D – ESS7 was eventually renamed to apply to “Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities” as an obvious result of sensitivities accorded to rights of indigenous peoples at international law.

²¹ *Supra*, note 6.

²² Emily Greenspan, “*Why should the World Bank support Free, Prior and Informed Consent? Their report explains*” 19 Feb, 2016, Oxfam: The Politics of Poverty, online at: <<https://politicsofpoverty.oxfamamerica.org/2016/02/why-should-the-world-bank-support-free-prior-and-informed-consent-their-report-explains/>>.

²³ Policy and Standards issued by the World Bank Board of Directors are Mandatory Requirements of the Bank and subject to an inspection panel. Procedure, Directives for Bank Staff, and Regulations for Borrowers issued by Management are Mandatory and Subject to an Inspection Panel. Checklists, case studies, guidance, examples, tools issued by Management are non-mandatory guidance. Compliance with the safeguards is facilitated through a binding Environmental and Social Commitment Plan, which sets out the project commitments and is part of the financing agreement. The ESCP forms the basis for monitoring the environmental and social performance of the project, defines the means and frequency of reporting on the implementation of measures and actions required to achieve compliance with ESSs, and specified any aspects of the national environmental and social framework that are to be used.

development in ways that don't threaten their identity and well-being. A key recognition in the safeguard is the role that a marginalized status (economic, social, and legal) frequently plays in limiting the capacity of indigenous groups to defend their right to participate in and benefit from development projects. This reflects a well understood principle among indigenous rights advocates: the *capacity* to self-govern has been eroded by their vulnerability notwithstanding that the *right* to self-govern exists.

At the assessment stage, ESS7 prescribes that the determination of vulnerability and corresponding protections required to be adopted are shared between the Bank and the borrower. The lingering presence of the "alternative approach" to opt-out of the safeguard has been repurposed as an acknowledgment in ESS7 that:

Particular national and regional contexts and the different historical and cultural backgrounds will form part of the environmental and social assessment of the project. Assessment is intended to support identification of measures to address concerns that project activities may exacerbate tensions between different ethnic or cultural groups.²⁴

How the breathing room the Bank has afforded itself with this language plays out on the ground remains to be seen. However compared to either the 'alternative approach' or subsequent waiver, it is a pragmatic solution that espouses common sense at the assessment stage over unquestioning deference to a potential borrower's status quo of reluctance to treat indigenous rights seriously.

The Bank then takes the responsibility to determine whether indigenous people have a collective attachment to a project area, and may decide to seek additional advice from experts as well as indigenous groups themselves. The borrower, to the extent of its capacity, is required to assess degree of impacts, prepare consultation strategies and where directed by the Bank, consult experts to meet the planning requirements of the ESS.

Where an assessment requires engagement, the borrower will undertake an engagement process with the affected indigenous group. This process involves engagement planning, disclosure of information, and development of measures and actions in consultation with affected groups, all to be contained in a time-bound *Indigenous Peoples Plan* that (along with any agreements

²⁴ ESS7, supra note 4 at 107.

reached and other commitments to accomplish such commitments) forms a part of the binding Environmental and Social Commitment Plan entered between the borrower and the Bank.

4. ESS7: Free, Prior, and Informed Consent

In addition to the general requirements of ESS7 set out in the previous section, the Bank takes a strong and conclusive step forward by requiring FPIC in the following circumstances:

- when the project will have adverse impacts on land and natural resources subject to traditional ownership/customary use occupation;
- when the project will cause relocation on land; or
- when the project will have significant impacts on an indigenous group's cultural heritage that is material to the identity, cultural and/or spiritual aspects of the affected indigenous group's lives.²⁵

The controversial matter of veto is sidestepped by the confirmation that where FPIC is identified as a requirement for a project, and is *not* obtained, the entire project may not be jeopardized however *those aspects of the project requiring FPIC will not be processed further.*

While paragraphs 25 – 30 of ESS7 put parameters around the scope and process to obtain FPIC, a precise definition appears to have been eschewed in favour of the broad flexibility required by the Bank to employ uniform processes across widely different jurisdictions. Unequivocally, the requirement of FPIC in situations that would otherwise require deep consultation is welcome. Concerns remain, however. The process of pursuing FPIC is largely borrower and Bank driven. What constitutes “significant impact on an indigenous group's cultural heritage” is a determination the Bank ultimately leaves to itself, and thus, despite the strong progress in the current ESS, future criticism regarding decisions made in this regard are virtually assured.

5. Resourcing FPIC

Perhaps the largest area of concern comes from a resourcing perspective. ESS7 paragraph 36, outlining a permissive environment where indigenous groups “may seek support” for various initiatives to better position themselves to potentially participate in the development process falls far short of what is needed to guarantee meaningful participation. This is especially the case in juxtaposition with paragraph 35 of ESS7 which precisely directs borrowers to request “Bank

²⁵ ESS7, supra note 4 at para. 24.

technical or financial support...to strengthen consideration and participation of Indigenous Peoples in the development process”. While the ESS7 recognizes that consent must be free from coercion, a paternalistic process that sees the borrower overwhelmingly determine the best path forward risks undermining concerns of indigenous groups in favour of the perceived urgency (from each of the Bank and borrower’s perspectives) of the project.

To achieve consent indigenous groups must be properly resourced to meaningfully engage, interpret, and respond to project information on a level playing field.

A strong comparison to the Bank’s process steps in paragraph 30 of ESS7 were recently provided in submissions of Inuvialuit Regional Corporation²⁶ before the Supreme Court of Canada, who submit that the steps required to achieve FPIC in situations of deep consultation included six elements:

1. Freedom from force, intimidation, manipulation, coercion or pressure by a proponent [Freedom];
2. Mutual agreement on a process for consultation [Procedural Consensus];
3. Robust and satisfactory engagement with the Aboriginal group prior to approval [Robust Engagement];
4. Sufficient and timely information exchange [Information and Understanding];
- 5. Proper resourcing, both technical and financial, to allow the indigenous group to meaningfully participate;**
6. Shared overarching objective of obtaining the reasonable consent of the indigenous group [Objective Consent].

...

To satisfy the Meaningful Participation element, attention must be given to the “implications of power imbalances.” The party seeking to obtain consent must ensure that the [indigenous rights holder] has adequate financial and technical resources to responsibly study the risks and rewards of a proposed development on present and future generations, to

²⁶ The Inuvialuit Regional Corporation represents the communities of Aklavik, Inuvik, Tuktoyaktuk, Paulatuk, Sachs Harbour, and Ulukhaktok, located in the Inuvialuit Settlement Region of the Northwest Territories, Canada

understand their legal rights with respect to the proposal, and to present their positions for consideration.²⁷

[Emphasis added]

FPIC's ultimate objective is to consult effectively with affected parties to allow them to give or withhold consent for a project.²⁸ "It underpins the right [of indigenous peoples] to exert sovereignty over their lands and natural resources, to redress violations, and to establish the criteria for negotiations with states on matters affecting them."²⁹

The ESS7 gets much of this right. However the "informed" component is crucial to conducting a legitimate consultation leading to consent. ESS7 takes pains to ensure key project information is communicated from the Bank and borrower to the impacted community, and is presented in an understandable manner. But the reality is that the volume of information shared is more often than not too voluminous and too technical. To have meaningful engagement, indigenous communities need resources and expertise. Absent this, it's impossible to make a decision that is informed.

Indeed, the "informed" component of FPIC concerns the nature of the dialogue established between the parties. Deep consultation cannot be unidirectional; information sharing needs to be done between both parties. The "informed" component of FPIC also concerns the availability, the quality and the understanding of the information provided by the developer to the community.

²⁷ Inuvialuit Regional Corporation, *Factum of the Intervenor*, Supreme Court of Canada, SCC Court File No: 36692 at paras. 23 and 29.

²⁸ Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, Inter-American Commission on Human Rights and Organization of American States (OAS), (2015), online: OAS website <<http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>> at 91 referring to *Saramaka People v. Suriname*, Judgment of November 28, 2007, Inter American Court of Human Rights, (Ser.C), No. 172 (2007), at para. 134 [*Saramaka*].

²⁹ Paul Joffe, Jackie Hartley & Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: triumph, hope, and action* (Saskatoon: Purich Pub., 2010). at 120. See also *Rombouts, S J. Having a say: indigenous peoples, international law and free, prior and informed consent* (Oisterwijk: Wolf Legal Publishers, 2014) at 72-73 [*Rombouts*] citing Kymlicka W, "Theorising Indigenous Rights", *University of Toronto Law Journal* 49, 1999 at 285. The Food and Agriculture Organization (FAO), in a document on FPIC, explains the link between the ICCPR and ICESCR and their interpretation by the Human Rights Committee who recognized the FPIC as an expression of self-determination: see *Respecting free, prior and informed consent, Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition*, FAO, Rome (2014), online: FAO Website <<http://www.fao.org/3/a-i3496e.pdf>> at 5-6 [*FAO*].

The “informed” component of FPIC will more likely be achieved if all parties participate fully in the consultation process. While the technical information on the project will be provided by the developer of the project, no one is in a better position than the impacted indigenous community to interpret this information from a perspective that incorporates their environment, culture, traditional knowledge and ceremonial sites. Accordingly assessing, designing mitigation measures, and implementing protections regarding project impacts is the work of a partnership among equals.³⁰ Public participation needed from the earliest stage of a project must not be hindered by mistrust caused by an absence of independent expert assessments on the borrower’s project information.³¹

This lack of trust is uniformly the reason for poor participation at public stakeholder meetings, and this is especially the case where the proponent is the state. Communities are disillusioned by meetings they believe to be exercises in public-relations. Oxfam notes these “trust barriers that often exist among vulnerable communities”³² need to be addressed in order to measure the opinion of the host community.

This is heightened in the context of ESS7’s inclusion of FPIC given the Bank’s recognition of the marginalization of indigenous groups. The cultural status quo will obviously influence a group’s ability to express concerns and talk openly to corporate agents or government representatives. While the power dynamics and the legitimacy of the rights-holders’ participation speaks to the “free” component necessary to reach FPIC, transparency and support to the community to achieve its own evaluation of the information received is related to the “informed” component of the consent. The informed input of a community that is not restricted from obtaining outside expert advice is essential.

The host community should have access to all documents pertaining to the project for their own

³⁰ Marcus Colchester, Research Paper A TFD Publication Number 11 July 2010, Free, Prior and Informed Consent Making FPIC work for forests and peoples, <http://www.forestpeoples.org/sites/fpp/files/publication/2015/10/tfdfpicresearchpapercolchesterlo-res.pdf>.

³¹ Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment, 2004, online: Secretariat of the Convention on Biological Diversity at Executive Summary at [Akwé: Kon].

³² *Community Voice in Human Rights Impact Assessment*, (2015), online: Oxfam America Website <https://www.oxfamamerica.org/static/media/files/COHBRA_formatted_07-15_Final.pdf > at 6 [Oxfam *Community Index*] at 20.

assessment, and where legitimately necessary, should feel more or less unrestricted in hiring a third party expert to interpret the impacts.

Professional services are expensive but necessary. It is crucial to have access to the right support in order to help the community assess the extent of the impacts but also the potential opportunities that could be available to the members of the communities (i.e. jobs, business opportunities, social measures, etc.). In our opinion, the “informed” component of FPIC will only be successful if the information provided from the company to the community is fully analysed and understood by them.

Adequate funding is therefore essential for the community to have access to their own legal, financial, environmental, and archeological advisors³³. The Akwe: Kon Guidelines offer a good summary of the necessity to obtain funding to help the community to participate in the process:

“E. Identification and provision of sufficient human, financial, technical and legal resources for effective indigenous and local community participation in all phases of impact assessment procedures.

18. Early identification by the State and affected indigenous and local communities and, as circumstances warrant, provision of necessary human, financial, technical and legal resources, particularly to those indigenous and local communities, to support indigenous and local expertise, will facilitate effective indigenous and local community participation in the impact assessment process. In general, the larger the proposed development, the greater and more widespread the potential impacts and therefore potentially greater are the requirements for support and capacity-building”.

[Emphasis added]

It is common practice for indigenous communities to request funds for the negotiation of Impact and Benefits Agreement’s with companies developing natural resources projects in Canada. Funding sources can come from a negotiated participation agreement with the developer, national government, international organizations or donor agencies³⁴. As mentioned by Gibson and O’Faircheallaigh in their IBA toolkit, such funding will consist of a very small portion of the

³³ Akwé: Kon supra note 32 at 25.

³⁴ *Ibid.*

costs associated to the development of a project³⁵. Therefore, the financing of this consultation process will help engage the community and put them in a better position to give or withhold consent.

D. CASE STUDY OF THE *GREEN ENERGY ACT*, FIT PROGRAM, AND GRAND BEND WIND PROJECT

In 2009, the government of the Canadian province of Ontario introduced the *Green Energy Act*³⁶, legislation designed to phase out coal production and rapidly introduce a renewable energy (wind, solar, biomass, hydro) economy to the province. Fixed price contracts for large renewable projects (greater than 500kW) were issued to eligible proponents by way of a Feed-in-Tariff Program (“**FIT Program**”) to develop certainty regarding the return on investment. Policies proactively incentivizing indigenous ownership were implemented to minimize project interference. Side-stepping the question of veto, the province of Ontario set out to implement policies that would facilitate consent from indigenous groups by way of their meaningful participation in these projects.

Further than mandating agreement, the province instead established a regime to assist indigenous communities to become part-owners alongside project proponents. This was accomplished through a number of policy instruments. The province created an Aboriginal Renewable Energy Fund (“**AREF**”) to allow communities to explore potential partnerships related to proposed projects in their territories, engage in pre-feasibility studies, and engage in partnership negotiations with a view to reaching agreement.³⁷ Priority points were awarded to project applicants seeking to develop a project with an indigenous partner, thereby increasing the likelihood of a successful application. Over and above this, an increased electricity purchase price called an ‘Aboriginal Price Adder’, indexed to proportionate indigenous project ownership, was permitted to be charged by successful applicants, thereby increasing the amount of revenue generated by the project.

³⁵ Ginger Gibson and Ciaran O’Faircheallaigh, *IBA Community Toolkit*, The Gordon Foundation, June 25, 2015, online: <<http://gordonfoundation.ca/publication/669>>. The IBA toolkit mentions few reasons why a company will fund the consultation and negotiation process, see page 84.

³⁶ *Green Energy Act, 2009*, SO 2009, c12, Sch. A.

³⁷ For more information on the current iteration of the Aboriginal Renewable Energy Fund, see online at: <<http://www.aboriginalenergy.ca/aboriginal-renewable-energy-fund>>.

These measures were seen as welcome in a jurisdiction where (i) consent is not recognized until title is established at law; and (ii) the government's obligations to consult with indigenous groups are generally offloaded onto project proponents. And certainly, in the field of renewable energy, the willingness of communities to engage in project ownership is already heightened as there is some alignment between this form of energy generation and many indigenous groups' values of sustainability, environmental protection, and care for future generations. On their own however, these incentives would likely be insufficient to create an environment conducive to achieving consent. Certainly, a sticking point in the proponent/indigenous group negotiations would be how vulnerable communities with poor to non-existent credit histories would be capable of obtaining the funds needed to buy a meaningful share of a proposed project at an interest rate that would allow it to meaningfully share in the economic benefits generated by the project.

A foundational pillar of the FIT Program's indigenous incentives, therefore, is the Aboriginal Loan Guarantee Program ("ALGP").³⁸ With this program, the province provides a government guarantee to assist credit-challenged indigenous communities to secure the financing they need to purchase an ownership stake in renewable energy and transmission projects in the province. A frequent tool used by development agencies to support government borrowers or encourage foreign direct investment against political risk³⁹, a guarantee is a form of security that accompanies a financial transaction where a third party agrees to make loan or insurance payments if a borrower cannot. It is attractive to a lender because it minimizes risk – the likelihood of being repaid is assured. This decrease in risk allows a lender to loan money at a lower interest rate, which increases returns to the borrower. As of 2014, the Ontario Financing Authority ("OFA") reported that the ALGP had leveraged \$130 million in approved loan guarantees supporting the investments of eight communities, representing over 10,000

³⁸ Ontario Financing Authority, *Aboriginal Loan Guarantee Program: Home Page*, Queen's Printer for Ontario 2014, online: <<http://www.ofina.on.ca/algp>>.

³⁹ See the Multilateral Investment Guarantee Agency ("MIGA"), an arm of the World Bank that promotes foreign direct investment by providing political risk insurance and credit enhancement to investors and lenders against losses caused by non-commercial risks, online: <<http://www.miga.org/whoweare/index.cfm>>. MIGA is a member of the World Bank Group, and states that its mission is "to promote foreign direct investment into developing countries to help support economic growth, reduce poverty, and improve people's lives."

indigenous people, in four projects that have invested over \$2.8 billion in the province. The ALGP envelope currently totals \$650 million.⁴⁰

Through this regime, in 2012, Toronto based renewable energy company Northland Power Inc. (“NPI”) approached two aboriginal communities located at the north and south ends of the St. Clair river (northeast of Detroit, MI, located on the Canadian side), Walpole Island First Nation and Aamjiwnaang First Nation (“WIFN” and “AFN” respectively) to build a 100MW on-shore wind farm.⁴¹ WIFN has long been an active community in asserting its rights to its traditional territory, and WIFN and AFN had no recent history in collaborating in any projects. Significant mistrust of wind projects and a strong anti-wind lobby in the surrounding counties contributed to a challenging environment to see these projects approved.⁴² WIFN has an active aboriginal title claim to the waterbeds under Lake Huron and the lands in their traditional territory. Filing this litigation preceded the release of the Supreme Court of Canada decision, *Tsilhqot’in Nation v. British Columbia*⁴³, awarding aboriginal title for the first time in Canadian law.

However, despite an ongoing aboriginal title claim and significant mistrust of policies encouraging investment risk, loans, and indebtedness designed by the provincial government, WIFN and AFN formed a partnership with NPI to develop the project jointly, each holding a 50% ownership stake. The parties took full advantage of the provincial policy tools available to them.⁴⁴ Financial close for the senior construction financing was achieved in March of 2015, and the project entered commercial operation in May of 2016.⁴⁵

What was achieved by this government policy was an interim measure between claim assertion and resolution allowing for the practical implementation of the standard of consent as set out in ESS7. Here, the government took responsibility for creating conditions conducive to consent, with the result being a regulatory environment in which proponents and indigenous groups were

⁴⁰ *Supra*, note 38.

⁴¹ Information site for the Grand Bend Wind Farm located online: <<http://grandbend.northlandpower.ca/>>.

⁴² See for example: <<http://ontario-wind-resistance.org/2014/06/28/grand-bend-wind-project-approved-another-40-massive-turbines-along-huron-coast/>>.

⁴³ *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256.

⁴⁴ See press briefing of Northland Power, online:

<http://grandbend.northlandpower.ca/site/northland_power___grand_bend_wind_farm/assets/pdf/npi_gbwf_10.3x11.42_pr01_apr5_v2.pdf>.

⁴⁵ For a 360 degree video of the Grand Bend Wind Farm, see online at: <<https://www.youtube.com/watch?v=z0vApaVTes>>.

keen to participate. Certainly alternative models have seen the proponent largely taking this responsibility, however the strength of the *Green Energy Act* and the FIT Program is the government's continuing stake, by way of its policy tools and the ALGP, in the relationship itself, sowing the seeds of reconciliation. What is also clear from this example is the active and participatory nature of consent. Whereas discussions regarding consultation characteristically revert to competing assessments of its adequacy, discussions that prolong rather than avoid conflict, consent is objectively far easier to assess. In turn, in an assessment regarding the mitigation of risk, a demonstration that consent has been achieved is accordingly of much greater value than a determination that consultation has been adequate.

Accordingly, if meaningful consent is the standard sought, the approach to achieving it must allow for properly resourced consultations with indigenous groups. Absent this, uncertainty will be more likely, and a characteristic lack of trust will likely contribute to the entrenchment of anti-development positions and the escalation of conflict. Rather, in situations requiring deep consultation, the Bank and borrowers need to have a vested and lasting interest in facilitating consent that is properly informed, with an urgent focus placed on fostering an environment conducive to it. In doing so, this will require the groups uniquely impacted by the proposed development to be able to adequately provide their informed input, requiring the benefits of development to such groups be both justifiable and clearly demonstrable.

E. CONCLUSION

The growing significance of indigenous concerns regarding development on contested lands has mandated an examination of solutions. With new safeguards governing the Bank's approval of projects occurring on lands claimed by indigenous people, successful examples are instructive. Canada's pivot over the last 40 years towards broader reconciliation with its indigenous people, and accompanying policies, provide a useful case study in which best practices may be developed and shared. In the context of a country grappling with how to implement its international legal obligations alongside an economy heavily dependent on the development of natural resources, inclusive approaches to development in Canada provide contemporary backdrops for determining what kinds of initiatives may ultimately prove successful.

Proper consultation and securing consent of indigenous communities hosting a development project on their traditional territories is an important factor in determining that a project will reach commercial operation on budget and on time. Beyond mere consultation, in certain industries we have found that equity partnerships are a valuable tool in securing consent. Equity partnerships encourage reciprocal cultural awareness training: in addition to the developer engaging the community, a community becomes aware of the pressures and motivations driving the development. Accordingly, a shared-interest approach is suggested to achieve successful negotiation.