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Assessing the Potential Impact on Extractive Industries of IFC's Revised Social Standards

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Abstract

The International Finance Corporation (IFC) adopted its Policy on Environmental and Social Sustainability and Performance Standards in April, 2006. These standards are aimed at encouraging better management of environmental and social risk in major capital investments. They are often used as *de facto* benchmarks or regulatory guidelines in oil, gas and mining projects, even where IFC is not directly involved. The eight Performance Standards cover key operational areas: environmental and social management systems, including risk assessment and evaluation (PS 1); labor and working conditions (PS 2); resource efficiency and pollution prevention (PS 3), community health, safety and security (PS 4); land acquisition and involuntary resettlement (PS 5); biodiversity conservation and sustainable management of living natural resources (PS 6); indigenous people (PS 7); and cultural heritage (PS8). In January, 2012, IFC issued revised standards based on three years' experience with them.
This paper focuses on IFC's revised social performance standards (PS 1, PS 5 and PS 7, with reference to others) and analyzes their potential impacts on the oil, gas and mining industries. These standards introduce broad-based concepts that will require many companies to modify their existing development strategies. Such concepts include a defined hierarchy of stakeholder engagement; access to natural resources as a potential impact on land acquisition and resettlement; the importance of ecosystem services to human communities; and "Free, Prior and Informed Consent" during project development (FPIC). For each social standard, we focus on (a) new requirements or significant modifications of existing requirements; (b) expected pathways for implementation; (c) desired outcomes; and finally, (d) how compliance with new requirements might be assessed.

Potential implications for extractive industries are significant because new requirements are likely to increase the complexity of social risk assessment and management – for example, by providing broadly expanded access to communities, ethnic minorities, local leaders and NGOs. In turn, increased complexity often translates into greater uncertainty and extended timelines for project design and implementation. In an era of growing resource nationalism, global advocacy and more empowered stakeholders, the consequences of uncertainty – and the need for better management systems – will fall heavily on private companies. This paper will outline broad strategies to meet such challenges.

1. Introduction

On January 1, 2012, after three years of discussion, the International Finance Corporation (IFC) issued its revised Sustainability Policy, Access to Information Policy and Performance Standards (collectively known as "the

sustainability framework”). Despite internal recommendations to focus on risk management and avoid wholesale modification, the framework had in fact been substantially changed. Such changes included major revisions in individual performance standards and the *de facto* elaboration of new requirements. This paper focuses on IFC’s Sustainability Policy and on the three performance standards that most directly address potential social outcomes: *PS 1: Assessment and Management of Environmental and Social Risks and Impacts*; *PS 5: Land Acquisition and Involuntary Resettlemen*t; and *PS 7: Indigenous People*. It examines key changes in these standards, and analyzes their likely interpretation and potential implications for oil, gas and mining companies.
In redrafting its sustainability framework, IFC followed an extensive process of external consultation. It solicited public comment, maintained an interactive Web site, hired outside consultants and convened advisory groups. Nonetheless, it is difficult to determine what use IFC made of such advice, or indeed how revisions were made. This oversight becomes more difficult to understand in light of IFC’s admitted inexperience with its old standards: between 2006 and 2009, 290 projects came under review, but fewer than half triggered PS 5 and only a handful involved PS 7.[1] By contrast, many oil, gas and mining companies have been addressing similar issues since the mid-1990s – with mixed results, of course, yet also with notable successes.[2] In effect, IFC seems to have discounted “lessons learned” outside of the World Bank Group – thus closing itself off from evolving industry practice or outside experience. This decision helps to explain why the revised social performance standards are sometimes difficult to interpret or will apparently lead to contradictory results.

2. IFC’s Environmental and Social Sustainability Framework

IFC’s Sustainability Framework was first issued in 2006 with the proviso (imposed by its Board of Directors) to conduct a full-scale review in 2009. The framework involves three major components: a Policy on Environmental and Social Sustainability; eight performance standard addressing specific issues of environmental and social assessment and management, labor rights, pollution prevention, health and safety, and other questions; and an Access to Information Policy. The Sustainability Policy lays out IFC’s overall commitment to “help people help themselves and their environment” by ensuring “positive development outcomes.” Like environmental legislation in the U.S. and Canada, it sets out broad objectives for environmental and social performance, defines key terms and identifies the major responsibilities of IFC, its clients (i.e., borrowers) and other financial institutions that may be its partners in specific ventures.[3]

The performance standards play a role similar to that of regulations in U.S. and Canadian law. They spell out compliance targets that borrowers must meet and often describe specific procedures that should be followed. An extensive set of guidance notes (GN) provides additional definitions, interpretation and explanations. Finally, the Access to Information Policy emphasizes IFC’s commitment to transparency and good governance in its operations, and outlines its institutional disclosure obligations regarding investment and advisory services.

In 2009, IFC published a report on its experience with 290 projects approved over the previous three years. It analyzed how the 2006 performance standards had been applied to Category A and B projects (those with greatest potential impact). PS 1 on Environmental and Social Assessment and PS 2 on Labor and Working Conditions were triggered in practically every project. The numbers dropped slightly for PS 3 (Pollution Prevention and Abatement) and PS 4 (Community Health, Safety and Security). Others came into play far less often. At the extreme, PS 7 on Indigenous People was used in only two Category A and 11 projects in Category B. Many of the Category B projects applied it as a less-stringent precautionary measure in cases where indigenous peoples might be affected in the future. The standard’s toughest provisions were invoked only three times.

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[1] IFC, *Report on the First Three Years of Application* Washington: International Finance Corporation , July 29, 2009, p. 11, available at http://www1.ifc.org/wps/wcm/connect/90f2d88046b63bdaa9f7abb254bfb7d4/IFC_Third_Year_Report_PS_DP_.pdf?MOD=AJPERES.

[2][ii]For example, see Wasserstrom, Robert and Reider, Susan, “Petroleum Companies Crossing New Threshold in Community Relations,” *Oil & Gas Journal*, December 14, 1998, http://www.ogj.com/articles/print/volume-96/issue-50/in-this-issue/general-interest/petroleum-companies-crossing-new-threshold-in-community-relations.html .

[3]http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability+framework/2012+edition/sustainabilitypolicy .

IFC Performance Standards Triggered, 2006-2009[4]

Category (% of 290 projects)	A	B	Total
PS 1: Assessment and Management	100	100	100
PS 2: Labor and Working Conditions	100	99	99
PS 3: Pollution Prevention and Abatement	100	95	95
PS 4: Community Health and Safety	100	86	87
PS 5: Involuntary Resettlement	82	42	44
PS 6: Biodiversity	82	25	27
PS 7: Indigenous Peoples	18	4	5
PS 8: Cultural Heritage	73	17	16

Source: IFC, *Report on the First Three Years of Application*, Washington: International Finance Corporation, July 29, 2009, p. 11.

IFC's self-examination suggested that updates to the framework should focus on strengthening its risk management capabilities without wholesale modification or addition. Despite this cautionary advice, the review process evolved into a full-scale revision of many parts of IFC's sustainability framework. At the policy level, for example, significant changes included:

- New commitments on climate change, corporate governance, gender and human rights.
- Modified definitions of risk and impacts.
- Broadened roles and responsibilities for IFC, other financial institutions and borrowers.
- Re-defined sections on due diligence, investment types, advisory services and other technical issues.

The review process also produced major changes in individual performance standards and the *de facto* elaboration of new requirements. After a lengthy period of public comment, the revised policies and standards were re-issued on January 1, 2012.[5] The performance standards themselves are relatively short (50 pages in all), while accompanying guidance notes add another 271 pages.[6]

3. IFC's Sustainability Policy and Social Performance Standards (2012)

Social Performance Requirements in IFC's Sustainability Policy

IFC's revised Sustainability Policy strengthens the role of stakeholder engagement in all project financing activities. It now lays out a continuum of local-level engagement and risk management that runs the gamut from ongoing discussions with key stakeholders to "informed community participation" (ICP), "broad community support (BCS) and "free, prior and informed consent (FPIC)" when indigenous groups may experience adverse impacts. Specifically, the revised policy says:

> In cases where the business activity to be financed is likely to generate potential significant adverse impacts on communities (i.e., Affected Communities) or is likely to generate potential adverse impacts on Indigenous Peoples, IFC expects clients to engage in a process of Informed Consultation and Participation (ICP). In such cases, through its own investigation, IFC will determine whether the client's community engagement is one that involves ICP and enables the participation of the Affected Communities, leading to Broad Community Support for the business activity by Affected Communities. Broad Community Support is a collection of expressions by Affected Communities, through individuals or their recognized representatives, in support of the proposed business activity.

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[4] IFC, *Report on the First Three Years of Application*, p. 11.

[5] 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.

[6] In principle, IFC's performance standards have also been adopted by 75 "Equator Principle Financial Institutions (EFPIs)." Other components of IFC's sustainability framework fall outside the Equator Principle agreement.

> There may be BCS even if some individuals or groups object to the business activity. After the Board approval of the business activity, IFC continues to monitor the client's community engagement process as part of its portfolio supervision.
>
> In addition, where a proposed business activity triggers the Performance Standard 7 requirement of Free, Prior, and Informed Consent of Indigenous Peoples, IFC will undertake an in-depth review of the process conducted by the client as part of its environmental and social due diligence.[7]

These policy objectives are reflected in all eight performance standards, especially in the three that directly involve social performance.

Social Performance Standards

PS 1, PS 5 and PS 7 most clearly spell out IFC's expectations for social performance and risk management by its clients and partner institutions. They should be read as a single entity because they are often applied together or sequentially.

PS 1: Assessment and Management of Environmental and Social Risks and Impacts sets out the general obligation for IFC borrowers to analyze environmental and social risks and impacts and to address them through by adopting "an effective Environmental and Social Management System (ESMS)." In Paragraph 1, the ESMS is described as "a dynamic and continuous process initiated and supported by management, and involves engagement between the client, its workers, local communities directly affected by the project (the Affected Communities) and, where appropriate, other stakeholders." The accompanying guidance note emphasizes that stakeholder engagement plays a prominent role in managing risk. A typical paragraph (GN 25) reads:

> Stakeholder engagement is the basis for building strong, constructive, and responsive relationships that are essential for the successful management of a project's environmental and social impacts. Stakeholder engagement is an ongoing process that may involve, in varying degrees, the following elements: stakeholder analysis and planning, disclosure and dissemination of information, consultation and participation, grievance mechanism, and ongoing reporting to Affected Communities. The nature, frequency, and level of effort of stakeholder engagement may vary considerably and will be commensurate with the project's risks and adverse impacts, and the project's phase of development.

Project proponents (IFC's "clients") must meet extensive data requirements:

- Stakeholder identification and information (individuals, groups, local communities; vulnerable groups, broader stakeholders). Everyone who "may have an interest in or may be affected by" the project.
- Basic socioeconomic, geographic, demographic, historical, political and household information.[8]
- Impacts and risks within project area.
- Global and transboundary impacts.
- Cumulative impacts.

For projects with potentially significant impacts (Category A), PS 1 requires a formal procedure of "Informed Consultation and Participation (ICP)… leading to the client's incorporating into their decision-making process the views of the Affected Communities on matters that affect them directly" (Paragraph 31). Where indigenous people are involved, even more stringent rules apply: "the client is required to engage them in a process of ICP and in certain

[7] http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability+framework/2012+edition/sustainabilitypolicy , paragraphs 30 and 31.

[8] For a more detailed description of data requirements, see the World Bank's *Environmental Assessment Handbook,* Ch. 3 and IFC, *Good Practice Note. Addressing the Social Dimensions of Private Sector Projects*, available at http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_socialGPN/$FILE/SocialGPN.pdf .

circumstances the client is required to obtain their Free, Prior, and Informed Consent (FPIC)." This requirement will be discussed later on.

PS 5: Land Acquisition and Involuntary Resettlement is intended to protect land rights, access and use of natural resources and livelihoods of people displaced as a consequence of project-related land acquisition (including both temporary or permanent acquisition of property or access rights) and/or restrictions on land use development. Displacement may involve physical displacement (relocation) or economic displacement (loss of assets or access to resources that leads to loss of income sources or other means of livelihood).

In principle, PS 5 advocates avoiding adverse impacts; where avoidance is not possible, displacement should be minimized through alternative project design. PS 5 is triggered when: (a) rights holders "do not have the right to say no" (i.e., expropriation is possible) or (b) when they will experience "impairment of use" through imposition of restrictions on access and use. In such circumstances, project proponents are required to draft a land acquisition and resettlement action plan (where physical displacement takes place) or a livelihood development plan (where economic displacement alone occurs).[9] It is important to understand that PS 5 draws a clear distinction between compensation (paid for loss) and livelihood development (the obligation to ensure community welfare).

PS 7: Indigenous Peoples is intended to protect the basic human rights of native groups and ethnic minorities. It acknowledges that native groups "are often among the most marginalized and vulnerable segments of the population," particularly if they face loss of land or other resources. It cites six overall objectives:

- To ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.
- To anticipate and avoid adverse impacts of projects on communities of Indigenous Peoples, or when avoidance is not possible, to minimize and/or compensate for such impacts.
- To promote sustainable development benefits and opportunities for Indigenous Peoples in a culturally appropriate manner.
- To establish and maintain an ongoing relationship based on Informed Consultation and Participation (ICP) with the Indigenous Peoples affected by a project throughout the project's life-cycle.
- To ensure the Free, Prior, and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples when the circumstances described in this Performance Standard are present.
- To respect and preserve the culture, knowledge, and practices of Indigenous Peoples.

The FPIC requirement, first articulated in International Labor Organization Convention 169 on Indigenous People (1989), has given rise to a multitude of competing interpretations. Native rights advocates and their supporters argue that it should give indigenous groups the right to veto development projects within their traditional territories.[10] Not surprisingly, host-country governments often claim that restrictive interpretations violate national sovereignty and existing law. Ultimately, they insist that FPIC cannot derail investments that will benefit all citizens.

IFC seems to have taken a similar view. According to the PS 7 guidance notes (GN 4-48), FPIC focuses on avoiding significant adverse impacts from hydrocarbon exploration, mineral production or other activities and on providing benefits for native communities. It does not question whether such investments should take place at all. The notes also provide extensive procedures for conducting "good faith negotiations" with indigenous peoples leading to some form of compensation. They are silent what will happen if communities refuse to negotiate or simply oppose project development.

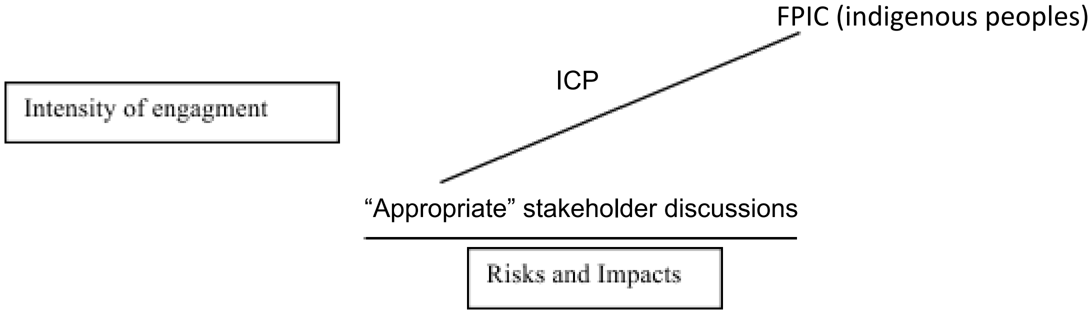
4. **2012 Revisions: Key Changes in Scope and Application**

[9] In the revised standard, "economic displacement" has been broadened to include restrictions on access and use of natural resources.

[10] For a recent example, see Greenspan, Emily, ed., *From Controversy to Consensus? Lessons learned from government and company consultations with indigenous organizations in Peru and Bolivia*, Washington: Oxfam America, 2012, available at http://www.oxfamamerica.org/files/samro-backgrounder-final-09-19-121.pdf .

PS 1: Assessment and Management of Environmental and Social Risks and Impacts

PS 1 now makes stakeholder engagement a central aspect of IFC's investment process. Engagement can now be conceptualized as a continuum that rises along with project risk and potential impact. IFC identifies three points on this continuum: stakeholder discussions, when proposed projects are unlikely to cause major impacts; informed consultation and participation (ICP), where greater effects are anticipated; and FPIC, when indigenous peoples are likely to experience adverse effects. As project risks and impacts rise, proponents are expected to develop increasingly intensive stakeholder engagement programs that involve greater consultation and empowerment.



PS 5: Land Acquisition and Involuntary Resettlement

Formerly, PS 5 applied primarily to outright land acquisition or impairment of certain use rights even when local people did not hold formal title. Project proponents were required to provide adequate compensation and "better or equal" livelihood opportunities. The standard has now been broadened to include "physical and/or economic displacement resulting from the following types of land-related transactions":

- Project situations where involuntary restrictions on land use and access to natural resources cause a community or groups within a community to lose access to resource usage where they have traditional or recognizable usage rights;
- Certain project situations requiring evictions of people occupying land without formal, traditional, or recognizable usage rights; or
- Restriction on access to land or use of other resources including communal property and natural resources such as marine and aquatic resources, timber and non-timber forest products, freshwater, medicinal plants, hunting and gathering grounds and grazing and cropping areas (Paragraph 5).

The guidance note adds that PS 5 is triggered where project-related *access and use* restrictions apply even though land is not actually acquired (e.g., buffer zones, biodiversity offsets, government exclusion areas) and where economic displacement occurs.

In Paragraph 28, PS 5 clarifies the application of its "better than or equal to" livelihood requirement for people affected by loss of access to or use of natural resources:

> In addition to compensation for lost assets…economically displaced persons whose livelihoods or income levels are adversely affected will also be provided opportunities to improve, or at least restore, their means of income-earning capacity, production levels, and standards of living: ….For persons whose livelihoods are natural resource-based and where project-related restrictions on access envisaged in paragraph 5 apply, implementation of measures will be made to either allow continued access to affected resources or provide access to alternative resources with equivalent livelihood-earning potential and accessibility. Where appropriate, benefits and compensation associated with natural resource usage may be collective in nature rather than directly oriented

towards individuals or households.

GN 60 explains:

> In addition, land acquisition may restrict a community's access to commonly held natural resource assets such as rangeland, pasture, fallow land, and non-timber forest resources (e.g., medicinal plants, construction, and handicraft materials), woodlots for timber and fuelwood, or riverine fishing grounds. The client will provide either land based compensation in the form of suitable replacement land, or access to assistance could take the form of initiatives that enhance the productivity of the remaining resources to which the community has access (e.g., improved resource management practices or inputs to boost the productivity of the resource base), in-kind or cash compensation for loss of access, or provide access to alternative sources of the lost resource.

P 7: Indigenous Peoples

The 2012 revisions have introduced two essential elements: vulnerability and FPIC (formerly, free, prior and informed *consultation*). Project developers must now conduct a "vulnerability assessment" to determine how indigenous communities may be "especially vulnerable" to adverse impacts and what countermeasures should be taken. According to GN 11, "the breadth, depth, and type of assessment should be proportional to the nature and scale of the proposed project's potential impacts on the Affected Communities and the vulnerability of the Affected Communities of Indigenous Peoples." It continues:

> …vulnerability refers to group- and/or community-level vulnerability defined by the nature of the relationship between the Affected Communities of Indigenous Peoples and mainstream society rather than household or individual level indicators of vulnerability. A competent expert should be engaged to carry out a vulnerability analysis as part of the project's assessment. Such analysis should use participatory approaches and reflect the views of the Affected Communities of Indigenous Peoples on expected project risks, impacts, and benefits.

Under PS 7, vulnerability analysis leads naturally to free, prior and informed consent. Borrowers must negotiate a "mutually accepted process" that produces agreement with affected communities on key project issues: a "fair and equitable sharing of benefits," continued use of critical resources, and compensation or "alternative livelihoods if project development results in the loss of access" to resources that play a central role in native life.[11]

IFC's recognizes that the "mutually accepted process" may not always yield an outcome that satisfies everybody; but companies must negotiate in good faith according to rules that native groups have accepted. Finally, PS 7 directs that "the client's proposed actions will be…contained in a time-bound plan, such as an Indigenous Peoples Plan [IPP], or a broader community development plan with separate components for Indigenous Peoples." And it advises that they may need help from qualified third-party experts or independent specialists – people who have worked with native groups and are trusted by them.

5. Implications for Oil, Gas and Mining Companies

IFC's revised sustainability framework represents a significant effort to minimize social conflict, decrease impoverishment and avoid other unwanted effects of its lending activities. It is based on a three-year "look-back" at 290 projects approved by IFC between 2006 and 2009. In the process, IFC has effectively expanded its requirements or added new ones. Rather than review each performance standard, we would like to focus on four major issues that will be significant for oil, gas and mining companies.

Continuum of Stakeholder Engagement

IFC's revised social standards place stakeholder participation at the core of project management. They establish a "continuum of stakeholder engagement" with levels of involvement that are "appropriate" for each project's specific

[11] IFC Performance Standard 7, Paragraphs 12-14.

context, risks and potential impact. Borrowers must clearly document their engagement activities and also establish effective grievance mechanisms. Yet IFC provides little guidance on how to determine appropriateness, the right level of engagement or the best way to engage. It seems to be more a question of "we'll know it when we see it," rather than a well-conceived approach. Nonetheless, companies should be prepared to acquire new competences, for example, in participatory needs assessment and program design. In most countries, experienced community development specialists are available who understand and have used such tools.

Broad Community Support (BCS)

Previously, IFC social specialists were required to verify that investments enjoyed "broad community support" (BCS). Minimal guidelines were provided to assist them and their findings remained unpublished. This approach was widely criticized by NGOs, human rights advocates, community leaders, development experts and other important actors.

Under its new Access to Information Policy, IFC will now publicize its BCS determination. In contentious projects (including most extractive ventures) this step is likely to intensify conflict and fuel opposition campaigns. Companies must learn to anticipate objections and design broadly inclusive plans for stakeholder engagement *before projects begin*. Stakeholders who have been consulted and whose views have been taken seriously often become project supporters. Company-sponsored local development plans should *always* be participatory. For appropriate models, companies can draw upon a wide range of "lessons learned" within their industry and across industries.

Land Acquisition and Resettlement

Oil, gas and mining companies should pay particular attention to PS 5, despite its somewhat misleading title, "Land Acquisition and Resettlement." The revised standard now addresses a broader range of development-induced impacts on livelihood, land and resources, including access to fisheries, forest, pasture, channels, transportation corridors and other non-monetary assets. Companies must make a comprehensive assessment of such resources, and they must provide "equal or better" opportunities to use or maintain them.

For oil and gas ventures, this requirement most clearly applies to projects with coastal and near-shore development that will affect artisanal fisheries. For mining, it occurs where large swathes of natural resources (.e.g., unoccupied customary lands covered by vegetation) are used by local people and are allocated exclusively to mining activities. Under these circumstances, project proponents will need to consider both physical and economic displacement, including any loss of access to resources. Although extractive companies have encountered such issues in the past, they have often paid inadequate attention in their assessments and mitigation plans.

Here we want to add a few cautionary notes. First, assessment of individual, household and community use of natural resources is challenging. Typically, resource use is affected by seasonal, geographic and species variability. Resources can be multi-purpose, used for subsistence, trade and medicinal purposes. Often, they involve extended supply chains. Intensification of use or production at one site can create major effects father away. And it may have disproportionately high impacts on sustainability and resource availability. Second, pre-project natural resource use may be unsustainable: they may already be in decline or adversely impacted by other developments. It is very important to establish comprehensive pre-project baselines and define clear boundaries of project responsibility through environmental and social assessment. IFC's limited guidance on mitigation potentially underplays the complexity of these scenarios.

Free, Prior and Informed Consent (FPIC)

Without question, the most contentious aspect of IFC's revised sustainability framework involves FPIC: the principle of free, prior and informed consent by indigenous people "when adverse impacts can be expected" within their traditional territories.[12] In South America, at least, oil and gas companies have often followed similar procedures – negotiating *ad hoc* agreements with native organizations – since the mid-1990s. Where such procedures break down, however, is precisely along the political fault lines that emerge when indigenous or other organizations actively contest official

[12] The previous standard was "free, prior and informed consultation."

policy or incumbent governments, as in contemporary Ecuador and Peru. Rather than focusing on the potential drawbacks of a proposed mine or well, such opposition is often based on broader issues of regional and national power. Even if IFC provides additional guidance on FPIC (for example, by recommending a process to secure or assess it), consensus will most likely remain elusive. On the contrary, it is most likely to trigger heightened levels of debate and advocacy. Without careful management, PS 7 may well make conflict worse rather than alleviate it.

Similar concerns have been raised by the International Council on Mining and Metals (ICMM):

> the term FPIC is used in different contexts; in some cases it is used in terms of being a *right* to approve or veto activities, and in others in terms of being a *principle* that decision-making processes should aim to achieve. There are also difficulties where the application of consent involves customary decision-making processes (for instance, if these require unanimity or exclude a significant proportion of the community, such as women). In customary societies, consent can involve anything from consensus through to autocratic and theocratic directive. The pursuit of “consensus” can also result in coercive practices if poorly handled by either traditional authorities or companies.[13]

Perhaps the most troubling aspect of PS 7 is that it effectively privatizes a responsibility that other international agreements (e.g., ILO 169 and the UN Declaration on the Rights of Indigenous People) reserve for government. One major example: at the same time as IFC was reviewing its performance standards, the UN Human Rights Council released the so-called “Ruggie Framework,” more formally known as the “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises” (2009).[14] The Framework, designed by Prof. John Ruggie of Harvard Law School, centrally holds governments responsible for protecting native rights; companies must “respect” such rights and avoid infringing them; while governments and international organizations must remedy legal or other deficiencies. Unlike at many readings of IFC’s revised performance standards, the Ruggie Framework does not suggest that private companies must assume primary responsibility for indigenous rights where governments fail to perform.

Where does this leave international companies that want to develop oil, gas or mineral resources near or within traditional indigenous territories? In practice, “free, prior and informed consent” may well shade into older requirements for “broad community support” – commonly signaled when local residents agreed to some sort of compensation or community benefits package. Such agreements did not necessarily require unanimous acceptance: if companies negotiated in good faith, and a reasonable number of local people signed on, then the requirement was met. In other words, it is likely that “prior consent” will focus on “participation in setting the terms and conditions that address the economic, social and environmental impacts of all phases of extraction and post-extraction operations,” not necessarily on the right to veto specific projects.[15]

6. Extractive Industries Face Increased Uncertainty

We would like to conclude with two broad concerns about IFC’s revised performance standards. Because they were written for general application across a range of investment vehicles (e.g., direct loans, loans via other institutions, advisory services, etc.), they are subject to considerable discussion and interpretation. IFC has also introduced new requirements that are poorly defined and understood or that lack consensus (e.g., FPIC and the common property/open access resource use in PS 5). In effect, the burden of distilling their meaning and applicability falls on private borrowers, who cannot expect much guidance or help. Moreover, by minimizing real-world lessons from extractive industries and others, IFC’s Sustainability Framework has made little use existing good practice. Instead, it has opened the door to continual contestation and debate among advocates, interest groups and project proponents.

In oil, gas and mining ventures, such debate will most likely increase uncertainty and project risk. To give one

[13] ICMM, *Good Practice Guide. Indigenous Peoples and Mining,* London, 2010, p. 24, available at http://www.icmm.com/library/indigenouspeoplesguide .

[14] http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx.

[15] The quote is from Greenspan, *From Controversy to Consensus,* p. 5.

example: it is not difficult to imagine a situation where PS 5 or PS 7 may end up creating what may be essentially un-resolvable conflicts. By putting the cart before the horse, IFC is effectively seeking “proof of concept” for its revised sustainability framework (or parts of it) with real world implications for its clients. The burden of this uncertainty falls first and foremost on private companies and should be taken into account in making future business decisions.