

EBRD Performance Requirement 7

Indigenous Peoples

Introduction

1. This Performance Requirement (PR) recognises that projects can create opportunities for Indigenous Peoples to participate in and benefit from project-related activities that may help them fulfil their aspiration for economic and social development. As government often plays a central role in the management of issues related to Indigenous Peoples, clients should cooperate and collaborate, as appropriate, with the responsible authorities and relevant communities in managing the risks and impacts of their activities.
2. There is no universally accepted definition of “Indigenous Peoples”. Indigenous Peoples may also be referred to in different countries by different terms. It is also recognised that groups who might not be classified as Indigenous People in one country or region, may be classified as such in another.
3. In the Policy and this PR, the term “Indigenous Peoples” is used in a technical sense to refer to a social and cultural group, distinct from dominant groups within national societies, possessing all of the following characteristics in varying degrees:
 - self-identification as members of a distinct indigenous ethnic or cultural group and recognition of this identity by others
 - collective attachment to geographically distinct habitats, traditional lands or ancestral territories in the project area and to the natural resources in these habitats and territories¹
 - descent from populations who have traditionally² pursued non-wage (and often nomadic/transhumant) subsistence strategies and whose status was regulated by their own customs or traditions or by special laws or regulations
4. The fact that a group, or members of a group, lead a nomadic or transhumant way of life, live in mixed or urban communities and/or only visit their traditional lands on a seasonal basis, having experienced forced severance, is no prima facie bar to the application of this PR.
5. This PR approaches Indigenous Peoples as partners, respecting them as people and peoples whose values can contribute greatly to their own, and to national socio-economic development. This PR recognises, however, that Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies, may be among the most marginalised and vulnerable segments of the population. Their economic, social and legal status often limits their capacity to defend their interests in, and rights (which may be both individual and/or collective) to lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. They are particularly vulnerable if their lands and resources are transformed or encroached upon by those who are not members of their communities.
6. This PR recognises that the identities, cultures, lands and resources of Indigenous Peoples are uniquely intertwined and especially vulnerable to changes caused by some types of investments so that their languages, cultures, religions, spiritual beliefs and institutions may be threatened. These characteristics

¹ A group that has lost “collective attachment to geographically distinct habitats or ancestral territories in the project area” because of forced severance remains eligible for coverage under this PR, if expected to be affected by the project. “Forced severance” refers to loss of collective attachment to geographically distinct habitats or ancestral territories because of conflict, government resettlement programmes, dispossession from their lands, natural disasters, or incorporation of such territories into an urban area. For purposes of this PR, “urban area” normally means a city or a large town, and takes into account all of the following characteristics, no single one of which is definitive: (i) the legal designation of the area as urban under domestic law; (ii) high population density; and (iii) high proportion of non-agricultural economic activities relative to agricultural activities.

² This applies even if the pursuit no longer takes place, as per previous footnote.

expose Indigenous Peoples to different types of risks and severity of impacts, including loss of identity, culture and natural resource-based livelihoods, as well as exposure to impoverishment and disease. It is further recognised that the roles of men, women and children in indigenous cultures may be different from those in the dominant groups; men and women may experience differential treatment both within their communities and within broader society, which may amount to discrimination. Children may be particularly marginalised due to their status as children, and also experience discrimination due to their indigenous status. Due to these realities, issues related to Indigenous Peoples are frequently complex. Moreover, the dominant culture may sometimes be unaware of or reluctant to admit the existence of an indigenous status for certain groups of people. Thus, special measures are required to ensure that indigenous men and women are not disadvantaged and that they are included in, and benefit from, Bank-supported projects as appropriate.

7. This PR recognises that the circumstances of Indigenous Peoples in the EBRD's countries of operations are unique due to their particular history. Indigenous Peoples may no longer be involved solely in customary subsistence livelihoods nor can their identity be associated solely with the pursuit of such traditional livelihoods and lifestyles. Furthermore, it is recognised that Indigenous Peoples often live in mixed ethnicity settlements. The continued existence of nomadism or transhumance and a history of involuntary resettlement have resulted in an expectation of continuing fixed links to specific territories which is not always appropriate. It is understood by this PR that Indigenous Peoples' means and patterns of livelihood may be quite distinct from the dominant culture, and may have also experienced change over time.

Objectives

8. Specific objectives are as follows:
 - to ensure that the transition process fosters full respect for the dignity, human rights,

aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples

- to both anticipate and avoid adverse impacts of projects on the lives and livelihoods of Indigenous Peoples' communities, or when avoidance is not feasible, to minimise, mitigate or compensate for such impacts
- to enable Indigenous Peoples to benefit from projects in a culturally appropriate manner
- to support the client to establish and maintain an ongoing relationship with the Indigenous Peoples affected by a project throughout the life of the project
- to foster good faith negotiation of the client with, and the informed participation of, Indigenous Peoples when projects are to be located on traditional or customary lands used by the Indigenous Peoples, when customary or non-traditional livelihoods will be affected by the project, or in the case of commercial exploitation of the Indigenous Peoples' cultural resources
- to recognise the principle, outlined in the UN Declaration on the Rights of Indigenous Peoples,³ that the prior informed consent of affected Indigenous Peoples is required for the project-related activities identified in paragraphs 30-34 below, given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects⁴
- to recognise the specific needs of men, women and children of Indigenous Peoples by addressing gender issues and mitigating potential disproportionate gender impacts of a project
- to recognise and respect the customary laws and customs of Indigenous Peoples and to take these into full consideration
- to respect and preserve the culture, knowledge and practices of Indigenous Peoples in accordance with their wishes.

Scope of application

9. This PR will apply when a project is likely to affect Indigenous Peoples. In ascertaining whether a particular group is considered as an Indigenous People for the purpose of this PR, the client may be required to seek expert advice.

³ General Assembly Declaration on the Rights of Indigenous Peoples adopted on 13 September 2007.

⁴ ILO Convention no. 169 (Indigenous and Tribal Peoples Convention) which covers a wide range of issues pertaining to Indigenous Peoples, including land, employment, health and social security and customary law. Consultation and participation constitute the cornerstone of the Convention.

10. The applicability of this PR will be established during the environmental and social assessment process according to the criteria outlined in paragraphs 2-7 below. Implementation of the actions necessary to meet these requirements is to be managed in accordance with this PR, and PRs 1, 5, 8 and 10 as applicable.

Requirements

11. In projects where Indigenous Peoples are likely to be affected,⁵ the client is required to carry out an assessment of impacts on Indigenous Peoples. Depending on the outcome of this, the client is expected to first avoid adverse effects and where this is not feasible, to prepare an Indigenous Peoples' Development Plan as per paragraph 19 below so as to minimise and/or mitigate any potential adverse impacts and identify benefits. The client is also expected to engage in informed consultation and participation with the affected indigenous communities, implement a specific grievance mechanism and identify and determine appropriate modalities for compensation and opportunities for communities to benefit. In carrying out consultation, the client will be mindful of the fact that in some cases there is a seasonality to the livelihood structure of Indigenous People and the client should design the consultation in a way that ensures that Indigenous Peoples' views are obtained with enough time to ensure adequate input into the design process.
12. Where the client has commenced project activities that may have affected and/or may affect Indigenous Peoples, the assessment will identify: (i) any gaps; and (ii) the corrective actions that may be required to ensure compliance with this PR. An action plan shall then be agreed.
13. Where the appropriate resource is not available within the client's organisation, the advice of experienced and independent social specialists should be sought throughout the course of the project development and implementation.

Assessment

14. Where there is a national legal requirement for a specific type of social assessment, the client shall carry this out, in addition to carrying out any additional social assessment required by this PR.
15. In cases where the project has not yet commenced, the client will identify through a social assessment process all communities of Indigenous Peoples who may be directly or indirectly affected, both positively and negatively, by the project, as well as the nature and degree of the expected social, cultural (including cultural heritage) and environmental impacts on them. This assessment will consider the specific vulnerability of indigenous communities to changes in their environment and way of life. The client will plan measures to: (i) avoid or mitigate adverse impacts; and (ii) share any project-related benefits.
16. In cases where construction, project-related activities or operations have already commenced in respect of a project, the client will provide all relevant information and documents (including those regarding the client's past performance) together with a record of documents already submitted to the authorities, to demonstrate that they have sought and acted upon the opinions of project-affected Indigenous Peoples following, to the extent possible, the process outlined in this PR.
17. If the requirements of paragraph 16 are not satisfied, the client will commission an objective and independent study of both the effects of the project on the Indigenous Peoples and their views regarding the project. This study, to be conducted in a culturally appropriate manner, will review the effects to date on the lives and livelihoods of Indigenous Peoples, the efforts of the client to both mitigate adverse effects and identify and share project benefits, and the level of Indigenous Peoples' participation in project planning and implementation.

Avoidance of adverse effects

18. All efforts should first be directed towards avoiding any adverse project effects on

⁵ Project-affected Indigenous Peoples are those whose socio-economic status and/or traditional culture and way of life are adversely impacted by project activities.

Indigenous Peoples. When avoidance of adverse effects is not feasible, the client will minimise, mitigate and provide compensation for these impacts in a fair, appropriate and proportional manner.

Preparation of an Indigenous Peoples Development Plan

19. The client's proposed actions to minimise, mitigate and compensate for adverse effects and to identify and share benefits will be developed with the informed participation of affected Indigenous Peoples and contained in a time-bound plan, such as an Indigenous Peoples Development Plan (IPDP), or a broader community development plan with separate components for Indigenous Peoples. The client will retain qualified social scientists with relevant and appropriate technical expertise to prepare the IPDP. The IPDP will systematically assess differentiated impacts of a project with respect to gender and different generations, and will include actions to address these impacts on groups in the community.

The level of details and the scope of an IPDP will vary according to the specific project and nature and scope of the project activities. In general an IPDP will comprise the following components:

Section I – Summary of the social assessment

- Baseline information: it is important that the baseline provides an understanding of both the community social structure of Indigenous Peoples and the intra-household roles and responsibilities. This will assist in developing an appropriate implementation plan.
- Key findings: analysis of impacts, risks and opportunities.

Section II – Consultation and participation

- Result of consultations and plan for future engagement.

Implementation plan

- Measures to avoid, minimise and mitigate negative impacts and enhance positive impacts.
- Measures to ensure continuation of community based natural resource management.
- Measures to participate in opportunities to benefit

from the project.

- Grievance mechanism.
- Costs, budget, time table and organisational responsibilities.
- Monitoring, evaluation and reporting.

Information disclosure, meaningful consultation and informed participation

20. The client will establish an ongoing relationship with the affected communities of Indigenous Peoples from as early as possible in the project planning process and throughout the life of the project. The engagement process will ensure their meaningful consultation in order to facilitate a common understanding of the nature and duration of the impacts; informed participation on matters that affect them directly; proposed mitigation measures; the sharing of development benefits and opportunities; and implementation issues.
21. The client shall ensure that the project-affected Indigenous Peoples are adequately informed in a culturally appropriate manner about the relevant PRs and about project plans affecting them, ensuring, where relevant, measures for effective participation by all parts of the community.
22. The process of community engagement will be culturally appropriate, respectful of the Indigenous Peoples' collective decision-making processes, and commensurate with the risks and potential impacts on the Indigenous Peoples. The client will provide adequate documented evidence to demonstrate that this process has been adequately carried out.
23. In particular, the engagement process will include the following:
 - involvement of Indigenous Peoples' representative bodies (for example, councils of elders or village councils, among others), Indigenous Peoples' organisations as well as individually affected indigenous persons
 - understanding and respect for any relevant customary laws
 - provision of sufficient time for Indigenous Peoples' collective decision-making process
 - facilitation of the Indigenous Peoples' expression of their views, concerns and proposals in the language of their choice, and without external

manipulation, interference or intimidation and in a culturally appropriate manner

- disclosure to Indigenous Peoples of all relevant plans and information on potential social and ecological impacts affecting indigenous communities in a culturally appropriate manner and language, and without jargon
- recognition of community heterogeneity, taking into account:
 - that Indigenous Peoples live in mixed communities with people who are not indigenous
 - that Indigenous communities are multi-vocal – consultations and participation must be inclusive of gender, generational and excluded groups
 - the dissemination of appropriate information to the EBRD, and the involvement of the EBRD in the consultation process, where practicable
- full documentation⁶ of the consultation process.

Grievance mechanism and prevention of ethnically based discrimination

24. The client will ensure that the grievance mechanism established for the project, as described in PR 10 is culturally appropriate and accessible for Indigenous Peoples; this may entail less reliance on written procedures and more use of verbal reporting channels.
25. In Bank-financed projects where implicit factors exist that exclude Indigenous Peoples and individuals from the benefits, such as employment opportunities, on ethnic grounds, the project activities will include such corrective measures as: (i) informing Indigenous Peoples' organisations and individuals of their rights under labour, social, financial and business legislation and of the recourse mechanisms available; (ii) appropriate and effective information dissemination, training, and measures to eliminate barriers to benefits and resources such as credit, employment, business services, health services and education services, and other benefits generated or facilitated by the projects; and (iii) granting to Indigenous workers, entrepreneurs

and beneficiaries the same protection afforded under national legislation to other individuals in similar sectors and categories, taking into account gender issues and ethnic segmentation in goods and labour markets, as well as linguistic factors.

Compensation and benefit-sharing

26. Participatory approaches will be the foundation of determining mitigation, benefit-sharing and customary lifestyle-supporting measures. The client will ensure that the affected Indigenous Peoples are compensated directly for any loss of livelihood (as calculated in accordance with this PR) incurred as a result of project-related activities and rehabilitate in agreement with the local community. Eligibility for compensation can either be individually or collectively based, or be a combination of both. Compensation will be available both for adverse effects on customary livelihoods and for negative impacts on wage or profit-dependent economic initiatives. The nature of "customary livelihoods" is to be interpreted flexibly (so as to include contemporary adaptations such as ethno-tourism and food processing). When calculating compensation, clients will adequately take into consideration the adverse social effects of the project on the traditional lifestyles and family life of Indigenous Peoples. This shall be undertaken in cooperation with Indigenous Peoples' representatives and experts. The provisions of this paragraph also apply in cases where the client has to pay compensation to local or regional government bodies.
27. Acceptable and legally feasible ways of compensation and implementation of IPDPs should be discussed during consultations with Indigenous Peoples. Based on these consultations, a mechanism for transferring the compensation and/or resources should be developed and agreed upon. This may need to be provided on a collective basis where the land and resources are collectively owned. If necessary, assistance/support should be facilitated by the client so as to enable the establishment of appropriate management and governance systems.

⁶ These can comprise written transcripts and records and/or audio recordings.

28. The client will provide, through the process of meaningful consultation with, and the informed participation of, the affected communities of Indigenous Peoples as provided for in paragraphs 20 to 23 above, opportunities for culturally appropriate development benefits. Such opportunities should be commensurate with the degree of project impacts, with the aim of improving their standard of living and livelihoods in an appropriate manner and of fostering the long-term sustainability of the natural resources on which they may depend. The client will document identified development benefits consistent with the requirements of this PR, and provide them in a timely manner. Strong support should be given to customary subsistence activities, including traditional economic activities and their modern derivatives such as crafts and ethno-tourism.

Special requirements

29. As Indigenous Peoples may be particularly vulnerable in the project circumstances described below, the following special requirements will also apply, in addition to the general requirements above. Common to these requirements is the need for the client to:

- enter into good faith negotiation with Indigenous Peoples
- ensure the Indigenous Peoples' informed and inclusive participation
- obtain the free, prior and informed consent (FPIC)⁷ of Indigenous Peoples before starting with an activity described below (paragraphs 30-35).

In the case of any of the following circumstances, the client will retain qualified independent social scientists to assist in conducting and documenting the activities described in paragraphs 30-35 of this PR.

Impacts on traditional or customary lands under use

30. Indigenous Peoples are often closely tied to

their customary lands and its forests, water, wildlife and other natural resources, and therefore special considerations apply if the project affects such ties. While these lands may not be under legal ownership pursuant to national law, use of these lands, including seasonal or cyclical use, by communities of Indigenous Peoples for their livelihoods, or cultural, ceremonial, or spiritual purposes that define their identity and community, can often be substantiated and documented.

31. If the client proposes to locate the project on, or commercially develop natural resources located within, customary lands under use, and adverse impacts⁸ can be expected on the livelihoods, or cultural, ceremonial, or spiritual uses that define the identity and community of the Indigenous Peoples, the client will respect their use by:

- entering into good faith negotiation with the affected communities of Indigenous Peoples, and document their free, prior and informed participation and consent as a result of the negotiation
- documenting its efforts to avoid or at least minimise the size of land used, occupied and/or owned by Indigenous Peoples which is proposed for the project
- documenting the Indigenous Peoples' land use by experts in collaboration with the affected communities of Indigenous Peoples without prejudicing any other Indigenous Peoples' land claim
- informing the affected communities of Indigenous Peoples of their rights with respect to these lands under national laws, including any national law recognising customary rights or use
- offering affected communities of Indigenous Peoples, at the minimum, fair compensation and due process to land in the case of commercial development of their land under national laws, together with culturally appropriate development opportunities; land-based compensation or compensation in kind will be offered in lieu of cash compensation where feasible
- providing, subject to the consent of the

⁷ There is no universally accepted definition of FPIC; however, for the purpose of this PR, consent refers to the process whereby the affected community of Indigenous Peoples arrive at a decision, in accordance with their cultural traditions, customs and practices.

⁸ Adverse impacts may include, but not be limited to, impacts occurring as a result of the loss of assets or resources, restriction on land use, or carrying out traditional lifestyle activities, resulting from project activities.

Indigenous Peoples, collective ownership rights to the land and natural resources are to be offered as compensation, unless prohibited by law

- giving adequate time to the affected indigenous communities to come to an internal agreement, without the client imposing its will directly or indirectly
- using functions such as an ombudsman and/or other such public institution within the relevant national system to facilitate community consent to the project and/or the proposed land use by the client and the mitigation package
- ensuring continued access to natural resources, identifying the equivalent replacement of resources or, as a final option, providing compensation
- ensuring fair and equitable sharing of benefits associated with project usage of the resources that are integral to the identity and livelihood of affected communities of Indigenous People
- providing affected communities of Indigenous Peoples with access, usage and transit on land the client is developing subject to overriding health, safety and security considerations.

32. During project implementation, the client will bring to the immediate attention of the EBRD any conflicts between Indigenous Peoples and the client that remain unresolved despite having gone through the project grievance mechanism; the client will also assess the facts and develop an appropriate approach to resolve the issue.

Relocation of Indigenous Peoples from traditional or customary lands

33. The client will explore feasible alternative project designs to avoid the relocation of Indigenous Peoples from their communally held traditional or customary lands. When relocation is unavoidable, the client will not carry out such relocation without obtaining FPIC for it from the affected Indigenous Peoples' communities as a result of good faith negotiations. These negotiations shall take into consideration Indigenous Peoples' laws, traditions, customs and land tenure and involve their full participation. Any relocation

of Indigenous Peoples will be consistent with the resettlement planning and implementation requirements of PR 5. Indigenous Peoples shall receive fair and equitable compensation for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged as a result of the project without their FPIC.

34. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the reason for their relocation cease to exist and the land should be fully reinstated.

Cultural heritage

35. Where a project proposes to use the cultural resources, knowledge, innovations or practices of Indigenous Peoples for commercial purposes, the client will inform the Indigenous Peoples of: (i) their rights under national and international law; (ii) the scope and nature of the proposed commercial development; and (iii) the potential consequences of such development. The client will not proceed with such commercialisation unless it: (i) enters into a good faith negotiation with the affected communities of Indigenous Peoples; (ii) documents their informed participation and their free, prior, informed consent to such an activity; and (iii) provides for fair and equitable sharing of benefits from commercialisation of such knowledge, innovation or practice, consistent with their customs and traditions.