



Environmental and Social Requirement 7

Indigenous Peoples



Indigenous Peoples

Introduction

1. This Environmental and Social Requirement (ESR) recognises that Indigenous Peoples are social groups with identities and livelihoods that are distinct from dominant groups in national societies. They may be among the most marginalised and vulnerable segments of the population. Their economic, social and legal status may limit their capacity to defend their rights to and interest in lands and resources (both natural and cultural). This, combined with their economic and spiritual dependence on these lands and resources, may make them particularly susceptible to any adverse impacts of projects. This ESR also acknowledges that Indigenous Peoples have unique knowledge and abilities and are potential partners in sustainable development, both contributing to and benefiting from the planning and implementation of project-related activities.
2. This ESR recognises that governments play a central role in safeguarding the rights of Indigenous Peoples. It outlines the responsibilities of the client to assess the potential for a project to impact Indigenous Peoples, to engage meaningfully with affected Indigenous Peoples and, under certain circumstances outlined in this ESR, to obtain their free, prior and informed consent (FPIC). This ESR also lays out client obligations to collaborate with affected Indigenous Peoples in the planning and implementation of measures to avoid, minimise, mitigate and compensate for adverse effects and to share project benefits.

Objectives

3. The objectives of this ESR are to:
 - ensure that projects fully respect the dignity, rights, aspirations, cultures, customary laws and livelihoods of Indigenous Peoples
 - both anticipate and avoid adverse risks and impacts¹⁰⁰ 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
 - promote sustainable development benefits and opportunities for Indigenous Peoples in a manner that is accessible, culturally appropriate and inclusive
 - establish and maintain an ongoing relationship with the Indigenous Peoples affected by a project throughout its lifecycle
 - ensure the effective participation of Indigenous Peoples in the design of project activities or mitigation measures that could potentially affect them, either positively or negatively
 - ensure good-faith negotiation with Indigenous Peoples and obtain their FPIC in the specific circumstances described in this ESR.

Scope of application

4. In this ESR, the term "Indigenous Peoples" is used in a technical sense to refer to a social and cultural group, distinct from dominant groups within a national society, possessing all of the following characteristics:¹⁰¹

¹⁰⁰ 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.

¹⁰¹ Some characteristics may have eroded or be less evident for some groups or communities through integration into the broader society or the wider economy, sometimes as a result of government policy.

- 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 territories¹⁰²
 - customary cultural, economic, social or political institutions, laws or regulations that are separate to those of the dominant society or culture
 - a distinct language or dialect, often different from the official language or dialect of the country or region.
5. A group, or members of a group, that 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 may also experience forced severance. Neither their present mode of living nor this forced severance renders such a group ineligible for application of this ESR.
 6. Implementation of the actions necessary to meet these requirements is to be managed in accordance with all relevant ESRs, as applicable.

Requirements

Assessment

7. The client will establish the applicability of this ESR as early as possible in the project lifecycle, but no later than during the environmental and social assessment process. Where the appropriate skills are not available within the client's organisation, it will seek the advice of experienced and independent social specialists to ascertain whether a particular group meets the criteria in paragraphs 4 to 6 of this ESR.
8. In projects likely to affect Indigenous Peoples, the client will carry out an assessment of impacts on Indigenous Peoples. The client will first avoid adverse effects and, where this is not feasible, prepare a development plan to minimise and/or mitigate any potential adverse impacts and identify opportunities to benefit affected Indigenous Peoples.
9. Where the project has not yet commenced, the client will commission an objective and independent study identifying all communities of Indigenous Peoples that may be directly or indirectly affected and, in consultation with affected Indigenous Peoples, assess the potential effects of the project on these groups and their views regarding the project. This assessment will consider the specific vulnerability of Indigenous Peoples to changes in their environment and way of life.
10. In cases where construction, project-related activities or operations have already commenced, the client will provide all relevant information and documents to demonstrate it has sought and acted upon the opinions of project-affected Indigenous Peoples. These should include documents on the client's past performance, effects to date on Indigenous Peoples and a record of documents already submitted to the authorities.
11. If the requirements of this ESR have not been satisfied, the client will carry out an assessment as outlined in paragraphs 7 to 10 of this ESR. This assessment will also: (i) review the effects to date on the lives and livelihoods of Indigenous Peoples; (ii) identify any shortfalls in relation to the requirements of this standard; and (iii) identify the corrective actions that may be required to achieve the intended outcomes of this ESR. The client will then agree to a corrective action plan with the EBRD.

¹⁰² A group that has lost "collective attachment to geographically distinct habitats, traditional lands or ancestral territories in the project area" because of forced severance remains eligible for coverage under this ESR. "Forced severance" refers to loss of collective attachment to geographically distinct habitats, traditional lands 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 the purposes of this ESR, "urban area" normally refers to a city or a large town and takes into account all of the following characteristics, no single one of which is definitive: (a) the legal designation of the area as urban under domestic law; (b) high population density; and (c) a high proportion of non-agricultural economic activities relative to agricultural activities.

Meaningful consultation and free, prior and informed consent

Meaningful consultation

12. The client will establish an ongoing relationship with affected communities of Indigenous Peoples as early as possible in the project planning process and undertake a process of meaningful consultation, as defined in ESR 10, commensurate with the project's risks and potential impacts on Indigenous Peoples. In addition, the consultation process will include:
 - the involvement of Indigenous Peoples' representative bodies (such as councils of elders or village councils), Indigenous Peoples' organisations and members of the affected communities of Indigenous Peoples
 - understanding and respect for any relevant customary laws
 - provision of sufficient time for Indigenous Peoples' collective decision-making processes
 - effective participation of Indigenous Peoples to enable meaningful influence on the project design (for example, siting, location, routing, sequencing and scheduling) and the choice and design of mitigation measures that could potentially affect them either positively or negatively
 - recognition of community heterogeneity, taking into account that:
 - Indigenous Peoples may live in mixed communities with non-Indigenous Peoples
 - communities of Indigenous Peoples are multi-vocal; consultations and participation must be multigenerational and inclusive of gender and excluded groups.

Free, prior and informed consent

13. There is no universally accepted definition of free, prior and informed consent (FPIC). However, for the purposes of this ESR, consent refers to the collective support of affected Indigenous Peoples for the proposed project activities that affect them. FPIC builds on and expands the process of meaningful consultation defined above and is established through good-faith negotiations between the client and affected Indigenous Peoples. Once this is concluded, the latter arrive at a decision in accordance with their cultural traditions, customs and practices. FPIC does not require unanimity and may be achieved even when individuals or groups within or among Indigenous Peoples explicitly disagree.
14. FPIC of affected Indigenous Peoples is required in circumstances where a project: (i) affects their customary lands or resources; (ii) relocates them from their traditional or customary lands; or (iii) affects or proposes to use their cultural resources.
15. In these circumstances, the client will retain qualified independent experts to assist in conducting and documenting the good faith negotiations and FPIC process.
16. FPIC is expected to be fully documented as a mutually agreed and legitimate process between the parties, carrying evidence of agreement between them as the outcome of the negotiations and clearly outlining benefit- and risk-sharing provisions. It requires that satisfactorily documented evidence be provided of the participation of the whole body of an affected indigenous community in the FPIC process. Specifically, the client will:
 - fully document the voluntary and mutually agreed process between the client and the project-affected Indigenous Peoples as to how the FPIC process will be carried out
 - provide evidence of agreement between the client and the affected indigenous community as to the outcome of the negotiations
 - provide evidence of legitimate representation and deliberative process among the affected indigenous community.

Impacts on customary lands and resources

17. Indigenous peoples are often closely tied to their customary lands and forests, water, wildlife and other natural resources. These ties can relate to livelihoods and/or cultural, ceremonial or spiritual dimensions and can define Indigenous Peoples' identities and communities. Special considerations, therefore, apply if

the project affects such ties. While these lands may not be under legal ownership according to national law, use of these lands by communities of Indigenous Peoples, including seasonal or cyclical use, can often be substantiated and documented.

18. If the client proposes to locate the project on or commercially develop natural resources located within customary lands, and if adverse impacts can be expected on the livelihoods, cultural, ceremonial, or spiritual uses that define the identity and community of the Indigenous Peoples thereon, the client will obtain their FPIC. Further to this, the client will:
 - document the Indigenous Peoples' land and resource use by experts in collaboration with the affected communities of Indigenous Peoples without prejudicing any other Indigenous Peoples' land claim; the assessment will be gender inclusive and specifically consider gender roles in the management and use of these resources
 - document its efforts to avoid or at least minimise the size of the proposed land to be used, occupied and/or owned by Indigenous Peoples for the project
 - inform affected Indigenous Peoples of their rights with respect to these lands under national law, including any laws recognising customary rights or use
 - give adequate time to affected communities of Indigenous Peoples to reach internal agreement, without the client imposing its will directly or indirectly
 - ensure continued access to natural resources, ensuring the equivalent replacement of resources or, as a final option, providing compensation
 - provide affected communities of Indigenous Peoples with access, use and transit on land that the client is developing, subject to overriding health, safety and security considerations.

Relocation of Indigenous Peoples from traditional or customary lands

19. 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 minimise the size of the land used and not carry out such relocation without obtaining the FPIC of affected Indigenous Peoples. Any relocation of Indigenous Peoples will meet the requirements of ESR 5. In addition, Indigenous Peoples will be entitled to receive fair and equitable compensation from the client for the lands, territories and resources 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.
20. Indigenous peoples are often closely tied to their land and related natural resources. Frequently, land is traditionally owned or under customary use or occupation. While Indigenous Peoples may not possess legal title to land as defined by national law, their use of the land, including seasonal or cyclical use for their livelihoods, or for cultural, ceremonial and spiritual purposes that define their identity and community, can often be substantiated and documented. Where projects involve (a) activities that are contingent on establishing legally recognised rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied, or (b) the acquisition of such lands, the client will prepare a plan for the legal recognition of such ownership, occupation or usage, with due respect to the customs, traditions and land-tenure systems of the Indigenous Peoples concerned. The objective of such plans will be the following: (a) full legal recognition of existing customary land-tenure systems of Indigenous Peoples or (b) conversion of customary usage rights to communal and/or individual ownership rights.¹⁰³ If neither option is possible under national law, the plan includes measures for the legal recognition of Indigenous Peoples' perpetual or long-term renewable custodial or use rights.
21. Where feasible, relocated Indigenous Peoples should be able to return to their traditional or customary lands should the reason for their relocation cease to exist. In such cases, the land should be fully reinstated.

¹⁰³ Conversion of customary usage rights to individual ownership rights will only be an objective following consultation with the Indigenous Peoples concerned and assessment of the impacts of such conversion on the communities and their livelihoods.

Cultural heritage

22. Where a project may significantly impact cultural heritage that is material to the identity and/or cultural, ceremonial or spiritual aspects of Indigenous Peoples, priority will be given to avoiding such impacts. Where significant impacts are unavoidable, the client will obtain the FPIC of affected Indigenous Peoples and meet the requirements of ESR 8.
23. 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 this ESR; (ii) the scope and nature of the proposed commercial development; (iii) the potential consequences of such development; and (iv) will obtain their FPIC. The client will also define and implement mechanisms that promote the fair and equitable sharing of benefits from the commercialisation of such knowledge, innovation or practice, consistent with the customs and traditions of the affected Indigenous Peoples.

Compensation and benefit sharing

24. The client will ensure, in agreement with the local community, that affected Indigenous Peoples are fairly compensated for any loss of livelihood incurred as a result of project-related activities. When calculating compensation, the client will meet the requirements of ESR 5 and take into consideration the adverse effects of the project on customary livelihoods,¹⁰⁴ including nomadic/transhumant practices, as well as the family life of Indigenous Peoples, with specific consideration of gender in relation to wage and non-wage subsistence activities. This will be undertaken in co-operation 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.
25. Mutually acceptable and legally feasible mechanisms for transferring the compensation and/or resources will be developed. These may be provided on a collective basis where the land and resources are collectively owned. The client will provide assistance to enable the establishment of appropriate management and governance systems that ensure the effective distribution of compensation to all eligible members, or the collective use of compensation in a manner that benefits all members of the group.
26. The client will provide affected Indigenous Peoples with opportunities for culturally appropriate development benefits. Such opportunities should be commensurate with the degree of project impact, 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. Development benefits will be provided in a timely manner.
27. The client's proposed actions to minimise, mitigate and compensate for adverse effects and to identify and share benefits will be 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. This plan will be developed in consultation with affected Indigenous Peoples. The client will also retain qualified experts with relevant and appropriate technical expertise to prepare the plan. 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 the different groups in the community, including all accompanying mitigation measures and benefit-sharing agreements. The level of detail and the scope of an IPDP will vary according to the project in question and the nature and scope of project activities.
28. Where implicit factors exist that exclude Indigenous Peoples and individuals from project benefits, such as employment opportunities, on ethnic grounds, the project activities will include corrective measures, such 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, as well as other benefits generated or facilitated by the project; and (iii) granting to indigenous workers, entrepreneurs and beneficiaries the same protection afforded under national law to other individuals in similar sectors and

¹⁰⁴ The nature of "customary livelihoods" is to be interpreted flexibly (so as to include contemporary adaptations such as ethno-tourism and food processing).

categories, taking into account gender issues and ethnic segmentation in goods and labour markets, as well as linguistic factors.

Grievance mechanism

29. The client will ensure that the grievance mechanism established for the project, as described in ESR 10, is culturally appropriate and accessible for Indigenous Peoples and takes into account the availability of judicial recourse and customary dispute-settlement mechanisms. This may entail less reliance on written procedures and greater use of verbal reporting channels.

Other considerations

30. 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.
31. Where the government has a defined role in the management of risks and impacts on Indigenous Peoples in relation to the project, the client will collaborate with the responsible government agency, to the extent feasible and permitted by the agency, to achieve outcomes that are consistent with the objectives of this ESR. In addition, where government capacity is limited, the client will play an active role in the planning, implementation and monitoring of activities to the extent permitted by the agency.