

GUIDANCE NOTE ON EVALUATING PROJECTS WITH AFFECTED INDIGENOUS PEOPLES

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NOTE TO READER: THIS GUIDANCE IS PURELY VOLUNTARY AND IN NO WAY ALTERS OR AMENDS THE REQUIREMENTS SET OUT IN THE EP4 DOCUMENT AND CREATES NO NEW OBLIGATIONS ON EPFIs.

INTRODUCTION AND OVERVIEW

The following provides guidance for applying Principle 5 of Equator Principles 4 (EP4). More specifically, this guidance advises Equator Principles Financial Institutions (EPFIs) on the requirements for “Stakeholder Engagement” where projects may affect Indigenous Peoples communities. This Guidance Note applies globally to all projects within the scope of EP4.

EPFIs should also have regard to International Finance Corporation (IFC) Performance Standard 7 “Indigenous Peoples” of the IFC Performance Standards (PS7) and its associated Guidance Note (GN7). EPFIs should make themselves familiar with the text of both IFC PS7 and GN7 as these are used throughout this Guidance Note.

This Guidance Note does not introduce any new requirements beyond what is stated in EP4. The purpose of the Guidance Note is to help EPFIs to implement EP4 and can be used at the discretion of EPFIs.

At a minimum, Principle 5 requires that a process of “Informed Consultation and Participation” (ICP) be applied in relation to all projects affecting Indigenous Peoples. Projects must also comply with all relevant national law, including those laws implementing host country obligations under international law.

Under Principle 5, certain “special circumstances” trigger enhanced consultation requirements building on ICP, towards obtaining Free Prior and Informed Consent (FPIC) of affected Indigenous Peoples. The concept of FPIC is derived from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which is an international instrument with broad support that embodies a convergence of common understanding about the rights of Indigenous Peoples. As defined in EP4, FPIC builds on and expands the process of Informed Consultation and Participation, ensures the meaningful participation of Indigenous Peoples in decision-making, and focuses on achieving agreement. FPIC does not require unanimity, does not confer veto rights on individuals or sub-groups, and does not require the client to agree to aspects not within its control. Process elements to achieve FPIC are found in IFC PS7.

EP4 recognizes that there may be situations where agreement cannot be reached, even though a good faith negotiation process is followed and documented. Where the requirement for FPIC applies but it is

unclear if agreement has been achieved, the EPFI will determine if this qualifies as a justified deviation from the requirements of IFC PS7 and whether the client should pursue additional corrective actions to meet IFC PS7's objectives. The determination will be made with supporting advice from a qualified independent consultant. As stated in EP4, this may be the independent Environmental and Social Consultant or could be another qualified independent consultant, including legal advisors. Such determinations will, ultimately, be made by the EPFI in line with its risk tolerance.

Identifying Indigenous Peoples

Indigenous Peoples may be characterized by their close connection with the lands, territories and resources that provide their communities with the economic means for living and are important to them in a social, cultural and spiritual sense. The rights of Indigenous Peoples in relation to a project are collective rights related to the land, resources and/or cultural heritage affected by a project. Indigenous Peoples are very diverse, there are about 467 million Indigenous Peoples spread across approximately 90 countries.¹ There is no universally accepted definition of Indigenous Peoples, meaning it can be difficult to create a definition of Indigenous Peoples that is applicable globally. The Definitions section of the EP4 provides a general definition of "Indigenous Peoples" based on the IFC PS7 approach. That definition is applied in this Guidance Note (see section 9b.).

Interaction with laws and other standards

As noted above, projects must comply with all relevant national law, including those laws implementing host country obligations under international law, and with reference to IFC PS7. Legal benchmarking will likely be required for projects in jurisdictions where Indigenous Peoples laws on consultation already exist. More information to support such processes can be found in Section 9b.

Where any of the "special circumstances" defined in Principle 5 are met, an EPFI will work with its advisors to evaluate the consultation process with Indigenous Peoples and the outcomes of that process against the requirements of host country laws and IFC PS7.

Principle 5 and IFC PS7 describe the role of the EPFI in circumstances where Indigenous Peoples consultation is the responsibility of host country governments. Where this is the case, clients are expected to collaborate with the responsible government agency during the planning, implementation and monitoring of activities, to the extent permitted by the government agency. The aim is to achieve outcomes that are consistent with IFC PS7.

¹ <https://www.worldbank.org/en/topic/indigenouspeoples#1>

EP4 also contemplates financing decisions in scenarios where no agreement is reached, even though a good faith negotiation process is followed and documented. In such scenarios, it is for the EPFI to consider, with supporting advice and justification, whether to finance the project. In such circumstances, consideration should be given by the EPFI to whether the client should take any corrective actions to achieve IFC PS7’s objectives or whether there is a justified deviation from the requirements of IFC PS7.

SUGGESTED PROCESS

A diagram of the suggested process for EPFIs to apply Principle 5 is set out below, followed by a discussion of each step set out in the below sections:



1. Selection of advisors

To assist the EPFI to evaluate the consultation process with Indigenous Peoples, the EPFI may engage qualified independent consultants, including legal advisors. The addition of legal advisors in Principle 5 reflects the significant role of legal analysis of applicable host country law and any potential gaps between the requirements of host country law and the requirements of EP4. Advisors may be needed at several points throughout the process. The EP Association cannot provide advice on selection of advisors but peers in the EPFI community may share feedback on which advisors they have used and provide feedback on the quality of services delivered.

2. Evaluating if Indigenous Peoples Communities are affected by the project

The client, through a baseline study or Environmental and Social Impact Assessment (ESIA), should already have undertaken a process to identify Affected Communities (as that term is defined in EP4). The EPFI should consult this documentation to assess whether Indigenous Peoples are among the Affected Communities. The EPFI should also evaluate, with advisory support, whether the client has properly assessed this question, giving consideration to the language of EP4, IFC PS7 and GN7 and this Guidance Note.

The EP4 definition of “Indigenous Peoples” provides tests for considering whether Affected Communities are Indigenous Peoples. This assessment may involve:

- Desktop research on the nature and scope of the project and the project area, NGO activity relating to the project, legal claims by Indigenous Peoples, or overall socio-cultural context which can be used as a screening exercise for the project.
- Evaluation of the jurisdiction and geographic location of the project and whether Indigenous Communities are known to be present or active in these areas. If so, there is a potential impact on these communities.
- Legal analysis identifying laws related to Indigenous Peoples, including rights to own or use land or resources, or rights to be consulted. The baseline reference for the definition of Indigenous Peoples is that accepted under the host country’s law. However, it may be necessary to consider whether Indigenous Peoples communities may be impacted by a project even if they are not legally recognized by the host country government. Legal advice should be sought where claimed rights or interests of Indigenous Peoples may conflict with private or public ownership of lands, regardless of how old such conflicts may be.

The assessment may require retaining experts to commission further studies of ethnographic, anthropological and/or genealogical evidence, historical evidence and statements by members of a group about their ancestors and their connection with the land. It may also require the EPFI to commission a legal analysis of Indigenous Peoples rights recognized by the host country government. In some jurisdictions, host country governments may define or limit what communities may be engaged. Where this is the case, the process may be host country led and subject to different considerations, as described in EP4 and discussed below.

After having amalgamated all of the available information, the client should, with due consideration of expert advice, exercise judgment to decide if a particular group qualifies as Indigenous and is an Affected Community of the project. If this research suggests that the project could affect Indigenous Peoples that have not been previously identified, further inquiries should be made of the client to determine the adequacy of their analysis and whether further study is needed by the client.

3. Evaluating if impacts meet ‘special circumstances’

In light of the assessment and consultation work done by the client in step 2, the client and EPFI should consider whether the project would result in any of the four following “special circumstances”:

- ***(1) impacts on land and resources subject to traditional ownership or under the customary use of Indigenous Peoples.***

Such impacts would be assessed based on feedback provided by the Affected Communities of Indigenous Peoples themselves, as well as legal and other social baseline analyses. The EPFI should consider how the project may adversely affect lands and resources Indigenous Peoples own or use in a traditional sense. If there will be such impacts, consideration should be given to exactly what the impact of the project will be, who will be affected, and by what aspect of the project. The answer to these questions will guide the extent of consultation that will be required and how the impacts can be avoided or remediated as a mitigation approach. It should be noted that the definition of “traditional ownership” is subject to interpretation. In jurisdictions where specific definitions and tests exist in law for defining traditional ownership, such as Aboriginal native title, EPFI and their advisors may choose to defer to those definitions.

- ***(2) relocation of Indigenous Peoples from lands and natural resources subject to traditional ownership or under customary use***

This “special circumstance” encompasses project-related impacts that involve physical relocation of Indigenous Peoples communities from their lands. It also includes significant

disruptions caused by the project that would permanently prevent Indigenous Peoples from using their traditional lands or resources.

- **(3) significant impacts on critical cultural heritage**

“Significant impacts on critical cultural heritage” involves impacts caused by a project that adversely affect Indigenous Peoples cultural heritage. Significance of cultural heritage should be assessed in cooperation with the affected Indigenous Peoples communities and with the assistance of expert advice as necessary. It may include traditional knowledge of Indigenous Peoples which is intangible and includes knowledge, innovations and practices including folklore or traditional cultural expressions that have remained in use for sacred or ritual purposes (sacred groves, sacred bodies of water or waterways, trees or rocks). This potentially includes priority ecosystem cultural services. There is no clear definition in PS7 of what amounts to “significant” and as such EPFI will need to exercise their discretion and judgment in making such determinations.

- **(4) use of cultural heritage for commercial purposes**

This “special circumstance” relates to where the project involves the commercialized use of Indigenous Peoples cultural heritage by a client.

Where any one of these four impacts is identified, an independent review of the engagement process should be undertaken by the EPFI, with advisory support. The review should consider whether the engagement process is consistent with an enhanced process of stakeholder engagement known as FPIC (see section 4b. below). Such a process builds on the ICP process (described in section 4a. below) through a good faith negotiation process with Affected Communities of Indigenous Peoples. Where the special circumstances are not present, FPIC will not be applicable.

4a. Examining processes of consultation against ICP Standard

Principle 5 requires clients to undertake a process of ICP for any projects with potentially significant adverse impacts on Affected Communities, including Indigenous Peoples communities. This is done through a process of consultation with the Affected Community of Indigenous Peoples. In defining the scope of consultation, clients should consider the strength of the Affected Communities of Indigenous Peoples’ claim to the right, title or interest by reference to applicable legal standards. A client’s assessment of the strength of the claim (which may range from full legal title and recognition, to legal recognition but something less than full legal title, to no recognition from the host country), and of consultation owed (if any), is most appropriately done in consultation with the host government to determine applicable legal standards and, where appropriate, competent experts. Assessments of the scope of consultation should be made with advisory support with legal requirements taken into

consideration. It should be noted that some jurisdictions may not recognize the title of Indigenous Communities (or may seek to downplay such titles) regardless of legal status, in which case advice on how to proceed should be sought.

At a high level, ICP consists of the following aspects:

An engagement process	A client should undertake, as early as possible, an engagement process with the Affected Communities of Indigenous Peoples.
A framework document	The client and Affected Communities of Indigenous Peoples should agree as early as possible, on an engagement process reflected in a framework document or plan that is reflective of the scale of impact, strength of the asserted claim, and vulnerability of Affected Communities of Indigenous Peoples.
Free and voluntary consultation	ICP entails consultation that occurs freely and voluntarily, without external manipulation, interference, coercion or intimidation.
Access to information	Affected Communities of Indigenous Peoples should have access to relevant information at each stage of project implementation and prior to any decision that will affect them.
Community decision-making	The engagement process should take into account the social structures, leadership and decision-making processes of the Affected Communities of Indigenous Peoples, including what consent would look like from communities affected. Clients should also be sensitive to characteristics of the Affected Communities of Indigenous Peoples (including but not limited to language, history, culture, socio-economic conditions, seasonal harvesting, location or remoteness).
Sensitivity to the capacity of Indigenous institutions	The client should assess the capacity of the Affected Community of Indigenous Peoples' institutions to engage with the client and the project. Lack of capacity or economic need, in itself, is not determinative of whether a group has a right to be consulted. However, where the Affected Community of Indigenous Peoples lacks capacity or has greater economic need, funding may be necessary to ensure the Affected Community is able to effectively and meaningfully engage in the consultation process. This could also entail providing Indigenous Peoples with financial assistance to enable them to meaningfully participate in the consultation process, i.e., to fund traditional land use studies.
Consensus building	The Affected Community of Indigenous Peoples should have sufficient time for consensus building, which may be slower than the decision-making processes of the client.
Allocation of	Clients should allocate sufficient time to fully consider and address concerns of the

sufficient time	Affected Communities of Indigenous Peoples about the project.
Implementation of a grievance mechanism	A grievance mechanism should be implemented in consultation with the Affected Communities of Indigenous Peoples.

The client has a responsibility to work with Affected Communities of Indigenous Peoples to support a meaningful and appropriate engagement process. Affected Communities of Indigenous Peoples are similarly expected to work with the client to establish and participate in an acceptable engagement process. Good faith should be demonstrated by both parties for successful engagement.

Feedback on impacts will come from consultation processes. This feedback may also be evaluated with the assistance of experts, including anthropologists, social risk specialists, and legal advisors. These advisors can help the client and/or EPFI assess the appropriate scope of claimed rights and interests.

Where applicable, impacts and potential mitigation and avoidance options may be identified by, or in conjunction with, a government body or regulator. This is discussed in section 9a.

4b. Where special circumstances exist, has an engagement process consistent with Free Prior and Informed Consent (FPIC) been applied?

Where special circumstances exist, FPIC elements of IFC PS7 will be applicable.

FPIC should be considered with respect to the particular aspect of the project that relates to the special circumstances that have been identified. For example, if special circumstances arise due to a single piece of infrastructure associated with a larger project, FPIC would only be considered in relation to that one piece of infrastructure and not necessarily the rest of the project. As indicated in IFC GN7, where triggered and applicable, ICP and FPIC consultation expectations continue through the entire project-lifecycle (i.e. construction, implementation, monitoring, and closure) and not only prior to the start of a project.

In evaluating a consultation process where FPIC applies, an EPFI should consider the following types of questions:

- **Free:** How free was the engagement process?
 - Was the consultation process free of coercion, bias, bribery or rewards?
 - Were meetings and decisions held at locations and times and in languages and formats that could be accessed by stakeholders?

- Were all community members free to participate regardless of gender, age or standing?
- Did the Affected Communities of Indigenous Peoples contribute to the design of the engagement, taking into account culturally-specific decision-making processes?
- **Prior:** Was the engagement process undertaken early enough to affect decisions made on the project?
 - Did the engagement process allow time for project information to be disseminated and interpreted by the Affected Community of Indigenous Peoples, and for comments and recommendations to be formulated and discussed by Affected Community of Indigenous Peoples?
 - Was there enough time for feedback from the consultation to have a meaningful influence on the broad project design options (e.g., location, routing, sequencing, and scheduling)?
 - Did the consultation feedback have a meaningful influence on the choice and design of mitigation measures and the sharing of development benefits and opportunities?
- **Informed:** Were Affected Communities of Indigenous Peoples properly informed about the nature of the project, its risks, impacts and opportunities?
 - Was information disclosed in a way that could be understood by affected stakeholders, including from a cultural and language perspective?
 - Was this information provided early enough in the process to allow the information to be understood and considered by the Affected Community of Indigenous Peoples, with informed feedback provided to the client?
 - Will information sharing be ongoing throughout the life of the project?
 - Was the Affected Community of Indigenous Peoples provided with appropriate capacity funding to ensure meaningful participation in the consultation process?
- **Consent:**

FPIC entails a process that permits Affected Communities of Indigenous Peoples to define a collective position in response to a project while recognizing the fact that different and diverging viewpoints may exist within those communities.

For impacts arising from the above special circumstances, IFC PS7 puts forth a process aimed at reaching an agreement with the Indigenous Peoples communities impacted by a project. In these circumstances, the Client must (1) document the negotiation process that was mutually-agreed to by the client and the Affected Community of Indigenous Peoples; and (2) document the outcome of the negotiation process, evidencing agreement between the Client and Affected Community of Indigenous Peoples. An EPFI may rely on a memorialized

agreement (written, video-taped, or otherwise consistent with how the Affected Community in question documents its official agreements). Other approaches to identifying agreement consistent with IFC PS7 are described below.

5. Identify if agreement has been reached consistent with the EP and IFC PS7

IFC PS7 is generally silent on what processes should be utilized for confirming consent. In practice, some organizations will look to understand cultural decision-making processes of Indigenous Peoples communities themselves to aid in determining the best method for ascertaining agreement. Typically (although not always) this will be by a majority vote or a legitimate process of consensus building towards a collective position. As further explained below, IFC GN7 acknowledges that it is not necessary to obtain the unanimous support of all members of the Indigenous Peoples communities affected by the project. However, the outcome should reflect broad agreement on the legitimacy of the engagement process and decisions made.

IFC PS7 does not prescribe how to identify appropriate representative(s) of an Indigenous population, how competing intra or inter-Indigenous interests are to be managed, or how to determine which representative has final authority when assessing whether FPIC has been obtained. Where host country laws benchmark well against IFC PS7 requirements overall, mechanisms within such legal systems may be the best guide for making such determination. Where such tools do not exist, clients and the EPFI will need to exercise good judgment with the assistance of experts and legal advisors. Consideration should be given to gender balance and inclusion of potentially marginalized or vulnerable groups. The presence or lack of vulnerability is not the trigger for whether or not an Indigenous group needs to be consulted with – it is whether they are impacted and the nature of the potential impacts. Vulnerability may be relevant in determining the right approach to consultation (for example whether capacity building would be appropriate) but is not a precondition to consultation. Conversely the vulnerability of a group, in itself, does not trigger consultation where there are no impacts.

Agreements must be documented and may include details on the roles and responsibilities of the parties, as well as specific undertakings or commitments. Neither the EP nor IFC PS7 prescribe the content or scope of agreement, how it should be obtained, or its form (which could include: benefit sharing agreements, memoranda of understanding, letters of intent, a joint statement of principles, etc.). The agreement could include:

- terms on collaboration and consultation processes that will be followed throughout the life of the project;
- the handling of the environmental, social and cultural impacts of the project including the management of lands and resources;

- the framework for compensation and disbursements, employment and contract opportunities of the project;
- governance arrangements;
- other undertakings such as continued access to the lands and contributions to future development.

See IFC GN7 at paragraphs 34-38

If agreement has been reached, the decision to finance will not require further justification under Principle 5.

There may be situations where no agreement is reached (or there remain substantial dissenting views within a community or between communities) despite a good faith negotiation process having been followed and documented. For example, there may be a dispute within a community where a sub-group disagrees with the majority about the project. There could also be situations where one community among many Affected Communities does not support the project or some aspect of it. Such circumstances should trigger an assessment by the EPFI, in conjunction with advisor support, as to how the lack of agreement could be addressed and whether financing the project would be consistent with the EP and good international industry practice.

An FPIC process in the context of EP4 is a risk mitigation measure and a safeguard (both for the client and Affected Communities) against the project's environmental and social risks. EP4 calls for an independent expert to assess alignment of the process undertaken by the client with IFC PS7. The focus of EP4 is for the client to demonstrate the existence of a collaborative engagement process with the Indigenous Peoples affected, achieved through the application of IFC PS7 and host country legal requirements.

Footnote 7 to Principle 5 states that FPIC is not universally defined and does not require unanimity. In addition, FPIC is not interpreted to confer veto rights to individuals or sub-groups, or require the client to agree to aspects not within its control. Consequently, consistent with IFC GN7, FPIC may be achieved even when individuals or groups within an Affected Community explicitly disagree with an outcome. The FPIC process contemplated by IFC PS7 seeks conclusions that are considered legitimate by the majority of the concerned participants rather than unanimous support. This may result in an EPFI concluding that consent has been achieved even where there is dissent.

Where there is a lack of agreement that could impair the ability to achieve consent, the EPFI should consider:

- what options remain for the client to try to gain agreement with the Affected Communities of Indigenous Peoples, including how mediators or trusted third parties could help to work through differences;
- whether the client should take any corrective actions to achieve IFC PS7's objectives, including changes to the project that could be made to avoid impacts, or action that could be provided to remedy any unavoidable impacts (including with government-led efforts);
- whether there are likely to be any remaining and unmitigated impacts to the Affected Communities of Indigenous Peoples if the financing is done;
- whether in proceeding with financing there are likely to be operational, legal or reputational risks to the EPFI, and/or the client.

Where no agreement is obtained and response strategies are evaluated but do not resolve the issue, the decision to finance or not finance the project is left to the EPFI to determine, with justification in line with the risk tolerance of the EPFI. See section 8 below for more on how this should be done.

6. Evaluate adequacy of impact mitigation

Even in projects where FPIC has been obtained or where FPIC is not applicable, the project may have identified impacts that require mitigation.

Applying the mitigation hierarchy, the client should first consider ways to modify the project design or mode of operation in order to avoid or at least minimize negative impacts. For example, it may be possible that roads can be re-routed to avoid populated areas or impacts on culturally sensitive sites. Similarly, the site of the project's construction may be reduced to limit or avoid adverse impacts.

The Affected Community of Indigenous Peoples should be involved in the development of measures to avoid, mitigate, reduce or remedy adverse impacts. Traditional or local knowledge can help identify solutions or alternatives that the client may not be aware of. The client should provide any agreed remedial benefits in a timely and fair manner. Compensation will likewise be negotiated. In some circumstances monetary compensation is appropriate and can be used in positive ways. In other cases, monetary compensation may not address the project's negative impacts. In these instances, the client may aim to provide compensation 'in kind' complemented by rehabilitation programs, such as assistance to vulnerable groups within the community, technical support, training, etc. Where monetary compensation is provided, the client must take care to be compliant with all legislative reporting obligations and anti-bribery and corruption or transparency laws.

Collaboration with the Affected Community of Indigenous Peoples should inform the selected approach for remediation. In some circumstances, capacity development of the Community will facilitate the delivery of mitigation and compensation measures.

The client should remain cognizant that a project's impacts can differ within the same community. The project may therefore affect the rights of the entire community generally, while having specific effects on certain members of the group who engage in traditional activities on the land affected by the project. Eligibility for remediation can be either on an individual or collective basis or a combination of both.

Determination of eligibility and the mechanisms and structures for the delivery and management of remedial measures could take into consideration the results of the social assessment, the laws, institutions and customs of the Affected Community of Indigenous Peoples, the impacts of the project on the Affected Community and international standards, including industry best practices.

7. Evaluate opportunities for development benefits

Beyond simply mitigation of harm, private sector projects can offer Affected Communities of Indigenous Peoples opportunities to take part in and benefit from development projects. Private sector projects have a positive role to play in sustainable development relating to Indigenous Peoples. It is important to make a distinction between the benefits linked to the mitigation of negative impacts of the project and the broader opportunities, such as employment and economic opportunities the project may provide. Where these broader opportunities exist it is good practice for the client to assist the community to realize such benefits.

Identified benefits should aim to address the goals and preferences of the Indigenous Peoples, notably by improving their standard of living and their means of sustenance and by promoting the long-term viability of the natural resources on which they depend. The nature and scale of these broader development opportunities will vary according to the situation and needs of the Affected Communities of Indigenous Peoples and the opportunities that may arise from the project. It is therefore important for the client to identify, design and implement those opportunities in close consultation with the Affected Communities of Indigenous Peoples.

8. EPFI financing decision

Following evaluation of the project in a manner consistent with Principle 5, the EPFI may make a financing decision. Where adherence to Principle 5 is found, the decision will not require any further analysis under the EP. Where, however, there is potential deviation between the project and the

principles and processes found in Principle 5 or the EP more broadly, the EPFI should evaluate whether a decision to proceed with the financing would be internally justifiable. In such circumstances, a decision to proceed with a financing should be justified internally by the EPFI considering the risks to the Affected Communities themselves, the project, and the EPFI including any risk of legal and financial liabilities arising out of potential impacts on the project (i.e., delays in project delivery, etc.). A basic question will be how the client can adequately manage project risks throughout the life of the project, in line with the risk tolerance of the EPFI. Consistent with Principle 9, ongoing monitoring of Principle 5 implementation may occur at various stages of the project life-cycle.

While EPFIs will be informed throughout the process by experts, consultants and legal advisors, where appropriate, the ultimate decision to finance a project or not remains at the sole discretion of the EPFI. This decision ought to be informed by the best information available, in line with the individual EPFI's own risk tolerance. There may be instances where different EPFIs, presented with the same information, will choose to make different decisions based on their own internal processes and policies. For clarity, the EP continue to apply to a project within its scope that is financed in the context of a justified deviation, and a finding (by EPFI, consultant or advisor) of justified deviation consistent with the EP will not, in itself, affect the project's compliance with the EP. EPFIs are not required to inform the EPA of situations where they choose to proceed with financing on the grounds of a 'justified deviation', although EPFIs may choose to do so voluntarily.

9a.If the host country government is responsible for Indigenous Peoples engagement, what should be assessed?

Whether mandated by host country law or not, if a host country government decision-making process has been directly applied to a project concerning: (1) the development on or acquisition of lands subject to traditional ownership or under customary use or otherwise connected to critical cultural heritage of Indigenous Peoples, or (2) the relocation of Indigenous People's populations, the EPFI should consider whether the process was consistent with the elements of IFC PS7 and if not, whether corrective measures should be taken.

The EPFI should consider whether the client, to the extent possible, collaborated with the responsible government departments on Indigenous Peoples engagement. The EPFI may consider the documentation related to the client's involvement in the engagement process, descriptions of the benefits and programs offered by the government, the approach of the client to fill the gaps between government engagement and benefits conferred and the requirements of IFC PS7 and the financial and implementation responsibilities of the government and the client (or both) in the implementation of outcomes.

If national law does not include remedial measures, the EPFI should consider whether the client has established fair remedial processes for Affected Communities of Indigenous Peoples. See section 9b for guidance on how to assess overall alignment between IFC PS7 and host country government-led processes of consultation.

9b. Evaluating and benchmarking host country laws against IFC PS7

The IFC Performance Standards set a baseline of performance in the management of environmental and social issues. They do not limit or circumscribe the rights of host country governments to make decisions concerning the development of resources, but rather apply at the project level to guide EPFI due diligence regarding good international industry practice. Where there are inconsistencies between IFC PS7 and host country laws, IFC PS7 encourages clients to seek ways to comply with the IFC PS7 requirements and to achieve the objectives of IFC PS7, without contravening applicable laws. A legal benchmarking or gap analysis between host country laws and applicable performance standards may be carried out by qualified independent consultants such as legal advisors in the implementation of EP4. This may be appropriate, for example, where the client has adhered to host country laws in Designated countries addressing the same elements as IFC PS7. The purpose of such a benchmarking analysis is to identify whether the legal requirements followed by the client are at least as stringent as the requirements of the IFC PS7. Such benchmarking is applicable for all projects affecting Indigenous Peoples, globally. Considerations for clients, EPFI or legal advisors in benchmarking legal requirements against IFC PS7 could include analysis of the following elements:

- ***Policy Objectives***

The primary policy objectives of IFC PS7 are to: (1) respect the rights, dignity and culture of Indigenous Peoples; (2) mitigate adverse impacts on Indigenous Peoples, or where not possible, reduce adverse impacts through remediation; (3) foster sustainable relationships with Indigenous Peoples through engagement and consultation, or where necessary, to ensure FPIC; and (4) promote compliance with local law. Consideration should be given to whether applicable law aims to achieve these goals.

- ***Process for defining and identifying Indigenous Peoples affected by a project***

IFC PS7 defines Indigenous Peoples as a socially and culturally distinct group characterized by some or all of: (1) self-identification as members of an Indigenous, culturally distinct group; (2) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; (3) customary, cultural, economic, social or political institutions that are separate from those of the mainstream society or culture; or (4) a distinct language or dialect, often different from the official languages of the country or region in which they reside. Benchmarking should consider whether applicable law

establishes comparable definitions of Indigenous Peoples and requires clients to follow a process for identifying the existence of Indigenous Peoples communities within the project's area of influence that may be affected by project development.

- ***Processes for identifying measures to mitigate adverse impacts of project affected Indigenous Peoples***

Where adverse impacts on Indigenous Peoples are identified, a client should consider measures to avoid, minimize, mitigate or remedy those negative impacts or enhance positive ones. Benchmarking would consider if applicable law has comparable approaches, considering, for example, means to ensure continuation of Indigenous Peoples' livelihood; conservation and sustainable management of natural resources; measures to enable Indigenous communities to benefit from the project; grievance mechanisms; and processes to monitor, evaluate and report on implementation.

- ***Process for consultation and engagement of project-affected Indigenous Peoples***

Consideration should be given to whether applicable law requires consultation of Affected Communities of Indigenous Peoples, including elements such as (1) undertaking an engagement process as early as possible; (2) gaining agreement on an engagement process through a framework document or plan commensurate with the scale of impact and vulnerability of Affected Communities; (3) a voluntary process without external manipulation, interference, coercion or intimidation; (4) access to information about the project; (5) consideration of the social structures and decision-making of the Affected Communities of Indigenous Peoples communities; (6) allowing sufficient time for the Affected Communities to build consensus; and (7) establishing a project-level grievance mechanism as part of the consultation.

Appendix A: Additional Resources

The below resources are provided for informational purposes only and are not required for the implementation of EP4 and are in no way endorsed by the EP Association.

Akwé: Kon Guidelines, 2004.

The Secretariat of the Convention on Biological Diversity proposed the Akwé: Kon Guidelines, which call on States and private commercial actors to develop “a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community.” This best practice approach for private actors is clearly derived from international legal instruments on indigenous rights.

EBRD. *Guidance Note: Indigenous Peoples* (November 2010).

ICMM, *Mining and Indigenous Peoples, Position Statement*, May 2008.

The International Council on Mining and Metals (ICMM), which includes numerous global mining companies, notes in its mission statement that successful mining projects require the broad support of the communities in which they operate; this includes communities of Indigenous People. Support should extend through all steps of the mining process, from exploration to closure. Moreover, the ICMM emphasizes that the pursuit of agreements with Indigenous Peoples and other Affected Communities should include programs that generate net benefits (i.e., benefits of a social, economic, environmental and cultural nature) and broad community support for new projects or activities. ICMM members adhering to such standards should recognize that following consultation with local people and relevant authorities, a decision may be made not to proceed with development or exploration even if it is legally permitted.

Labeau, PC. “*Performance Standard 7: Indigenous Peoples*”, in TORRANCE, M. *IFC Performance Standards on Environmental & Social Sustainability: A Guidebook*. (2012, LexisNexis).

OECD Guidelines for Multinational Enterprises, 2011 Edition.

International and regional financial institutions have developed their own policies and guidelines for public or private projects affecting Indigenous Peoples. Among the latest of these developments is the OECD’s update of its Guidelines for Multinational Enterprises in May 2011. The update strengthens standards for corporations in the field of international human rights, including those pertaining to Indigenous Peoples.

Smith, G; Foley Hoag, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (July 2010).

UN Global Compact, *Good Practice Note, Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent*.

UN Global Compact, *The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*.

UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 9, Rev. 2, Indigenous Peoples and the United Nations Human Rights System*.

US Government Accountability Office (GAO), March 2019: <https://www.gao.gov/assets/700/697694.pdf>

GAO report that concludes additional US Federal Government actions will be needed for infrastructure Projects when it comes to consultation processes with the US Indigenous Peoples tribes.