

Office of the United Nations High Commissioner for Human Rights

Recommendations for EBRD's Environmental and Social Policy (ESP)

15 March 2019

Introduction

1. The Office of the UN High Commissioner for Human Rights (OHCHR) welcomes the opportunity to comment on the revised draft Environmental and Social Policy (ESP) of the European Bank for Reconstruction and Development Bank's (EBRD or "Bank").
2. Given OHCHR's mandate, as well as the constraints of time, OHCHR's comments focus principally on the content and potential impacts of the draft safeguards from the perspective of international human rights law, particularly in relation to social risk management, accompanied by specific comments and recommendations in relation to draft Performance Requirements 2, 5, 7, 9 and 10. We note that the EBRD is among the leaders in seeking to align its ESP with international human rights legal standards, for reasons which cannot be attributed to the EBRD's explicitly "political" mandate, alone.¹ Our comments aim to further strengthen these attributes of the ESP, to help ensure that the ESP is implemented in accordance with the evolving and contextual specificities of international human rights law, for more sustainable development outcomes and superior long-run investment returns.

Environmental and Social Policy

Human rights

3. OHCHR welcomes the EBRD'S reaffirmed commitment not to "knowingly finance projects that would contravene national laws or country obligations under relevant international treaties and agreements" (para. 2.3.) as well as the Bank's commitment to "the respect for human rights in the projects" it finances (para. 2.4).
4. The draft policy further preserves the current ESP's formulation regarding the client's human rights responsibilities within their business activities: "*EBRD will require clients...to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts*" caused by their business activities (ibidem). OHCHR notes that this formulation is, at the level of principle, consistent with the current framework regulating the human rights responsibilities

¹ Agreement Establishing the EBRD, art. 1. The alignment is evident in connection with social (labour) rights requirements, for example, not civil and political rights alone.

of business corporations, as reflected in the United Guiding Principles of Business and Human Rights (UNGPs)² (the most authoritative global standard in the business and human rights field).

5. However, for the sake of consistency with the UNGPs, OHCHR would recommend that the drafting be amended to avoid the implication that “avoiding infringement of the rights of others” are “addressing human rights risk and impacts” can be separated from the corporate responsibility to respect human rights. The requirement that clients should address “the human rights risks and impacts *caused by the business activities of clients*” may also need to be clarified and more closely aligned with the UNGPs, in OHCHR’s view. The UNGPs provide that businesses actors should address not only the impacts which they directly cause, but also those impacts that they contribute to, or are directly linked to through their business relationships.³ The central mechanism through which the corporate responsibility to respect human rights is made effective, is to carry out human rights due diligence (HRDD) processes, to “identify, prevent, mitigate and account for how they address their impacts on human rights human rights.”⁴ The language included in the International Financial Corporation (IFC) 2012 ESP may provide helpful guidance in this regard.⁵

6. Moreover, OHCHR recommends that the draft ESP should strive to reflect not only the corporate responsibility to respect, but also, in accordance with the UNGPs, the responsibility that pertains to business enterprises to “enable the remediation of any adverse human rights impacts they cause or to which they contribute.”⁶ OHCHR would also recommend that the UNGPs be referenced in a footnote to paragraph 2.4 to guide the interpretation of the EBRD’s commitments in relation to corporate responsibility.

7. OHCHR welcomes the EBRD’s new commitment to “seek to progressively strengthen processes to identify human rights risks during the appraisal of projects” (para 2.4). As part of its engagement with MDBs and other development financing institutions, OHCHR has documented that where human rights risks are not mitigated projects can easily harm the people they intend to benefit, prevent people from accessing development benefits, or may flare up into protracted and damaging conflicts.⁷ In OHCHR’s view, human rights risk information should be dealt with in the

² According to the “Protect, Respect and Remedy” framework from which the UNGPs derive from, business enterprises are expected to “respect human rights”, which means that they should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.” UNGPs, para. United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, (A/HRC/17/31 (2011) [hereinafter “UNGPs”], para 11.

³ Ibidem, para. 13(b).

⁴ Ibidem, para. 15(b).

⁵ IFC Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts (2012), fn 12 (“In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business”).

⁶ Ibidem, para. 15(c).

⁷ OHCHR, Frequently Asked Questions on Human Rights and Multilateral Development Banks (2017), p. 1, available at:

[Bankshttps://www.ohchr.org/Documents/Issues/Development/DFI/FAQonMultilateralDevelopmentBanksandHumanRights.pdf](https://www.ohchr.org/Documents/Issues/Development/DFI/FAQonMultilateralDevelopmentBanksandHumanRights.pdf). To similar effect see IDB, Lessons from Four Decades of Infrastructure Project-Related

same way as other potentially relevant information sources, including in relation to project social and environmental risk assessment, implementation monitoring and mitigation or remedial measures.⁸ An indicative list of sources of human rights risk information could be included to guide the work of EBRD operational staff in this regard.

8. OHCHR notes however that paragraph 2.4. is limited to the EBRD's project appraisal phase. According to the HRDD standard set forth in the UNGPs, and in line with the logic of due diligence more generally, HRDD should be considered as an ongoing process rather than a one-time event or intermittent exercise.⁹ In this connection, OHCHR recommends that the ESP should reflect EBRD's commitment not only to identify potential or actual human rights risks at the appraisal phase, but also throughout the life cycle of the project, and to support the client in the prevention, mitigation, tracking, and communicating of those risks.

9. OHCHR notes that the draft ESP removes footnote no. 7 in the current policy, which lists a number of international instruments which guide the EBRD in implementing the ESP. OHCHR would recommend that the footnote be retained, as it reflects an authoritative list of core internationally recognized human rights. (The footnote requires technical correction, given that, generally understood, the International Bill of Human Rights comprises the UN Declaration of Human Rights (UDHR), along with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)). The International Bill of Human Rights, along with the International Labour Organisation core labour conventions, are commonly seen as a minimum human rights framework guiding corporate responsibility.¹⁰ The footnote could further clarify that, depending on the circumstances, the EBRD may need to consider additional standards, as those relevant to specific ESP performance standards.

Vulnerable groups

10. OHCHR welcomes the EBRD's continuing commitment to "vulnerable groups" (para. 2.6), consistent with the human rights principle of equality and non-discrimination and with the commitment in the 2030 Sustainable Development Agenda to "leave no one behind".¹¹ However OHCHR recommends that the term "vulnerable groups" be replaced with "vulnerable or marginalised" groups, in order to recognise agency and the social construction of vulnerability, and avoid the implication that any particular group is inherently vulnerable. The draft ESP partially captures this concern, but in OHCHR's view the change should be reflected more systematically, except where inherent vulnerability is specifically at issue.¹² In line with the World Bank's guidance

Conflicts in Latin America and the Caribbean (Sept. 2017), citing poor stakeholder engagement and other social and governance factors among the drivers of violent conflict and project failure.

⁸ Ibidem, at 4.

⁹ UNGP, para. 17(c)

¹⁰ See. e.g., UNGPs, para. 12.

¹¹ General Assembly resolution 70/1: Transforming our world: the 2030 Agenda for Sustainable Development (2015).

¹² See e.g. Draft EBRD PR 1, paras. 11, 18; Draft EBRD PR 7, para. 1; Draft EBRD PR 10, para. 11.

on these issues, population groups could be defined not only as groups disproportionately or more adversely affected by projects impacts than other, but also as groups that “may be more limited than others in their ability to take advantage of a project’s benefits”.¹³

11. OHCHR welcomes the retention of the footnote (no. 4) which contains an indicative list of vulnerable (or marginalised) groups. OHCHR would recommend the inclusion of the formula “or other status” as part of the list of groups. The formula is common to the formulation of the right to equality and non-discrimination as formulated in core UN human rights instruments (e.g. UDHR art. 2, art. ICCPR, art. 2; ICESCR, art. 2.2). OHCHR recommends that the term “elderly” be replaced by “older persons”, which reflects current terminology in relation to aged-based discrimination. Given the universal character of the international human rights regime, the reference to “persons who may not be protected though...public international law” seems out of place and should be deleted, in OHCHR’s view.

European Union environmental law

12. OHCHR welcomes the EBRD’s commitment to abide by the European Union (EU) “environmental principles, practices and substantive standards” (para 2.2) in accordance with the 2006 European Principles for the Environment to which the EBRD is signatory. However, the content of footnote 3 may understate the scope of this commitment, in OHCHR’s view. We note that EU environmental principles, practices and substantive standards may be drawn from EU treaties (primary legislation) and Multilateral Environmental Agreements (MEAs) ratified by the EU, and not only EU secondary legislation, as footnote 3 implies. The list of secondary legislation could also usefully include EU decisions, recommendations, and opinions. The reference to the Court of First Instance should be replaced by a reference to the General Court, in accordance with changes introduced in the 2009 Treaty of Lisbon. Lastly, the reference to “procedural norms” may be subject to confusion in the context of the EU environmental law, where many of the substantive regulations deal with individuals’ procedural rights.¹⁴

UNECE conventions

13. OHCHR welcomes the reference in para 4.13 to the United Nations Economic Commission for Europe (UNECE) instruments regarding information disclosure and stakeholder engagement. We note that the UNECE Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) and the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) have been

¹³ World Bank, Bank Directive: Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups, Number EXC5.07-DIR.117 (4 August 2016) [hereinafter World Bank 2016 Directive], p. 1.

¹⁴ See e.g., Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information (28 January 2003).

ratified by a majority (90%) of the EBRD countries of operation.¹⁵ We note further that both the Aarhus and the Espoo conventions are part of the EU substantive environmental law, which, under the European Principles for the Environment, should govern the EBRD's operations (para.2.2).

14. However we note that the draft ESP limits the relevance of the UNECE conventions to the requirement that clients should "bea[r] in mind the spirit and principles" of those conventions, and only in relation to "projects...that have the potential to have significant environmental impacts" (para. 4.13). OHCHR recommends that this requirement be reworded to reflect the client's responsibility to apply "the principles, practices and substantive standards" of the Aarhus and Espoo Conventions "in proportion to the potential environmental impacts" of the proposed project – and not only in relation to projects with significant impacts.

15. In OHCHR's view the ESP should also require that the "public consultations activities" conducted by the Bank on its own initiative (para 4.13, in fine), and the requirements of EBRD Performance Requirement 10, be interpreted and implemented in accordance with the UNECE conventions and relevant international human rights standards.

Protection from reprisals or retaliation

16. OHCHR welcomes the adoption, in January 2019, of the EBRD Statement Against Civil Society and Project Stakeholders, declaring that Bank does not "tolerate actions by EBRD clients or other project counterparties that amount to retaliation – including threats, intimidation, harassment, or violence – against those who voice their opinion regarding the activities of the EBRD or its clients."¹⁶ OHCHR recommends that this important commitment be restated, and the EBRD statement cited, as part of the Bank's commitments in the ESP (para. 2.1-2.11), and be communicated systematically to clients and reflected in all loan and investment agreements.

Exclusion list

17. OHCHR welcomes the fact that the Environmental and Social Exclusion List (ESP, Appendix I) includes a prohibition against knowingly financing projects involving forced evictions (para. b). However, in OHCHR's view, the list should be strengthened to include projects involving forced labour or "harmful or exploitative forms of child labor," as included in the Asian Infrastructure Investment Bank (AIIB) Environmental and Social Exclusion List, with reference to applicable ILO standards.¹⁷

¹⁵ As of 6 March 2019, 27 of the 30 EBRD countries of operations that are part of the UNECE have ratified the Aarhus Convention and the Espoo Convention.

¹⁶ Retaliation Against Civil Society and Project Stakeholders (January 2019), p. 1, available at: [file:///C:/Users/Luis.Rodriguez/Downloads/retaliation%20\(1\).pdf](file:///C:/Users/Luis.Rodriguez/Downloads/retaliation%20(1).pdf)

¹⁷ AIIB, Environmental and Social Exclusion List, in Environmental and Social Framework (February 2016), p. 43ff.

Category A projects

18. OHCHR notes the indicative list of category A projects is the same as that contained in the Bank's existing ESP. In OHCHR's view, consideration could be given to the possibility of including other projects with potentially significant adverse environmental and/or social impacts, as identified in the specific performance results. This could include, by way of illustration, projects requiring indigenous peoples' free, prior, and informed consent (FPIC) (PR 7, para. 14)

PR 1 – Assessment and Management of Environmental and Social Risks and Impacts

Human rights studies

19. OHCHR welcomes the reference to specific human rights impact assessment (HRIA) studies as part of the client's environmental and social assessment. OHCHR would recommend that PR1 incorporate HRIAs as a mandatory requirement when the nature of the business operation or the operating context involves heightened human rights risks.

Third party risk: Supply chains

20. OHCHR welcomes the inclusion of specific requirements governing business relationships between the client and third party employers, including supply chains. In this connection, paragraph 25 of PR 1 requires the client to "make reasonable efforts to identify risks associated with its primary supply chains" and, "[w]here the client can reasonably exercise control over its primary suppliers," adopt and implement a supply chain management system to address environmental and social risks and impacts from the operations of these suppliers." As part of the elements to be taken into account in the supply chain assessment or monitoring, PR 1 refers, inter alia, to "whether the client caused or contributed to the issues" as well as "the client's leverage over the supplier" (ibid).

21. OHCHR notes however that, according to the UNGPs, the corporate responsibility to respect human rights extends to companies' human rights impacts that are *directly linked* to their business relationships "even if they have not contributed to those impacts."¹⁸ Therefore, from a human rights due diligence perspective, the focus should be on the potential material impacts of business activities throughout the value chain, taking into account the likelihood and severity of impacts and the nature and context of the operations.¹⁹ The Guiding Principles also specify that businesses should not take their existing leverage as a given, but rather, should seek to increase their leverage as far as possible.

¹⁸ UNGP, para 13(b).

¹⁹ Ibid., para 18(b).

22. In light of the above, the client’s due diligence should not be limited to first-tier business relationships but should also include secondary suppliers or sub-suppliers depending on the adverse environmental and social risks or impacts. The assessment and management of supply-chain risks should be guided first and foremost by an objective assessment of the significance of those risks, in addition to the extent of the client’s factual responsibility for those risks or impacts and its level of control over the supplier. The Organisation of Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct provides concrete examples of methodologies that business enterprises could employ to assess and address material risks, including traceability or chain of custody schemes, identification of “choke or control suppliers,” cascading disclosure, flow-down provisions or specific requirements for primary suppliers to conduct due-diligence over their sub-suppliers.²⁰

PR 2 – Labour and working conditions

Normative framework

23. OHCHR welcomes EBRD’s continuous commitment to worker’s rights as reflected in the objectives of PR 2, which is explicitly guided by the ILO core labour conventions. OHCHR further welcomes the PR’s objective to “respect and protect the fundamental principles and rights of workers” (para. 2), in line with the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

24. OHCHR notes that, despite this objective, a number of provisions under PR 2 remain framed by reference to national labour and employment legislation. In OHCHR’s view, and in line with the policies of other MDBs, the specific performance requirements under PR 2 should not only be framed by national regulations, but by the principles and minimum standards set forth in the ILO core conventions and other relevant instruments. In this regard, OHCHR recommends that the principle that “the client will comply with all relevant national laws or international labour standards” in relation to child labour (para.15) be amended to “...relevant national laws and international labour standards,” and that this principle should apply across the full scope of PR 2.

Child labour

25. OHCHR recommends that the requirement that the client should be guided by the highest labour standard regarding the “employment of minors” (para. 3) should apply across the full scope of PR 2, in line with international labour and human rights standards. These standards, which include ILO Convention 138 on Minimum Age, Convention 182 on the Worst Forms of Child Labour, and the UN Convention on the Rights of the Child (art. 32), should be referenced in this section in order to

²⁰ OECD Due Diligence Guidance for Responsible Business Conduct (2018), pp. 68-71.

guide the interpretation and implementation of the requirements established therein (similar to PR 9, fn 34 in relation to supply-chain risks).

Forced labour

26. OHCHR recommends that para. 13 of PR 2 explicitly reference ILO Convention 29 on Forced Labour and its supplementing protocol (P29), ILO Convention 105 on the Abolition of Forced Labour, ICESCR (art. 6, CESCR General Comment No. 18), ICCPR (art. 9) and ECHR (art. 4), in order to guide the interpretation and implementation of PR 2's forced labour requirements.

Non-discrimination and equal opportunity

27. OHCHR recommends that para. 14 of PR 2 explicitly reference ILO Convention 100 on Equal Remuneration, ILO Convention 111 on Discrimination on Employment and Occupation, ICESCR (arts. 2 and 6), the UN Convention on the Elimination of Discrimination against Women (art. 11) and the UN Convention on the Rights of Persons with Disabilities (art. 27), in order to guide the interpretation and implementation of PR 2's requirements regarding non-discrimination and equal opportunity. In relation to para. 14, point 3, OHCHR recommends that the term "reasonable adaptation" be replaced by "reasonable accommodation," in line with the UN Convention on the Rights of Persons with Disabilities (art. 2). The latter definition could be reproduced in a footnote.

28. OHCHR welcomes the explicit incorporation of measures to prevent and address all violence and harassment in the labour context, and the definition of violence and harassment in fn. 30. OHCHR notes that this definition reflects, in broad terms, the current legal understanding of the concept, as reflected in the ILO proposed Convention Concerning the Elimination of Violence and Harassment in the World of Work. In line with the latter standards, however, the notion of "gender-based violence" (GBV) should be redrafted to cover all forms of "gender-based violence and harassment" and defined as "all violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment".²¹

29. OHCHR would also recommend that the exclusion clause in the last part of the section be redrafted to include measures required under international as well as national law. This is particularly relevant in relation to time-bound "special measures" that may be needed to address entrenched or structural discrimination, which are specifically authorised under international human rights instruments.²²

²¹ See Proposed Convention Concerning the Elimination of Violence and Harassment in the World of Work, art. 1(2), reproduced in ILO, Report V (1): Ending violence and harassment in the world of work (International Labour Conference, 108th Session, 2019), p. 16, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_637108.pdf

²² International Convention on the Elimination of Racial Discrimination, art. 1.4; Convention on the Elimination of Discrimination Against Women, art. 4.

Workers' Organizations

30. OHCHR would recommend that this section be renamed "Freedom of Association and Collective Bargaining," in line with the commitment in PR 2 to respect the fundamental rights of workers under international standards. In line with this commitment, paragraph 15 should not be limited to affirming the client's obligation "to inform," but should also require that clients "respect" workers' rights.

31. Given the increasing constraints on the freedom of association and collective bargaining in many countries, and the increasing gaps between national and international legal standards on these issues, in OHCHR's view it is particularly important to cite ILO Convention 87 on Freedom of Association, Convention 98 on the Right to Organise and Collective Bargaining, ICESCR (art. 8) and ICCPR (art. 22), as a guide to the interpretation and implementation of PR 2.

Non-Employee Workers

32. OHCHR welcomes the inclusion of specific requirements governing business relationships between the client and third party employers (contractors or other intermediaries). As noted earlier, under the UNGPs, the corporate responsibility to respect human rights (and hence, the scope of a company's due diligence) extends to impacts that are directly linked to a company's business relationships whether or not the company has caused or contributed to those impacts.²³ The responsibilities of third party employers should not be limited to identifying potential risks and monitoring performance (paras. 22-23), but also to preventing or mitigating those risks. This is particularly important in relation to those requirements dealing directly with workers' rights as guaranteed by international labour and human rights.

Supply chains

33. As noted earlier, according to the UNGPs, companies' due diligence responsibilities extend to entities with which they are connected through business relationships and are *not* predetermined by the existing level of their control or influence over suppliers. Rather, companies should seek to extend their influence (leverage) as far as possible. The responsibility of business enterprises to respect human rights, including in its business relationships, should be guided by internationally recognized human rights (including fundamental principles and rights at work), and by an assessment of the nature of the client's operations and the context in which the client operates.

34. With these factors in mind, OHCHR recommends that the client's due diligence regarding the supply-chain should not be limited to primary suppliers (paras. 25-27) or by the client's level of control over the supplier (*supra*, comments on PR 1, para. 25). Moreover, in OHCHR'S view, the identification of risks in the operations, products and services of the suppliers should not be limited

²³ UNGP, paras 13(b) and 17(a).

to risks of child and/or forced labour (para. 25-26), but rather, should address the full scope of the client’s requirements under PR 2.

PR 5 – Land acquisition, involuntary resettlement and economic displacement

Normative framework

35. OHCHR welcomes the reference to international human rights as the normative framework governing involuntary resettlement (para. 2). Forced evictions from development projects are, regrettably, commonplace, and may have devastating impacts on a broad range of human rights. In OHCHR’s view, the current formulation (“*Application of this PR is consistent with the universal respect for, and observance of human rights*”) should be amended to ensure that the application of PR 5 “should be consistent” (and not necessarily “is” inherently consistent) with international human rights. International human rights standards relevant to resettlement (in general terms, and particularly in relation to different national and local contexts) may evolve rapidly. It is vital to ensure that PR 5 (and other ESP requirements) are interpreted and implemented in light of this evolving and potentially complex body of law.

36. OHCHR welcomes and endorses the reference to specific human rights likely to be impacted by resettlement activities, including the rights to property, to adequate housing and the continuous improvement of living conditions (the text in the second sentence of paragraph should read “rights”, in plural). The explicit reference to the UDHR and the ICESCR (fn 56) is also welcome. OHCHR recommends the inclusion of a reference to ICCPR, art. 13 (protection of the privacy, family, home or correspondence), as a recognised competent of the right to adequate housing, and that footnote 56 be reformulated to include not only the definition of adequate housing, but of the *right to* adequate housing.²⁴

37. Finally, in line with the strong human rights foundations of PR 5, OHCHR recommends that paragraph 2 explicitly recognise that land is not a mere commodity, but an essential element for the realization of human rights.²⁵

Definition of forced eviction

38. OHCHR welcomes the clear statement in PS 5 of the objective to avoid forced evictions, and notes that footnote 59 refers to removals from homes and/or land “without the provision of, and access to, appropriate forms of legal and other protection.” OHCHR recommends that this definition

²⁴ See OHCHR-UN Habitat, *The Right to Adequate Housing*, Factsheet No. 21 (rev 1), pp. 3-4, affirmed in https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf

²⁵ <https://www.ohchr.org/en/issues/landandhr/pages/landandhumanrightsindex.aspx>

be accompanied by a reference to applicable international human rights standards and the authoritative definition of “forced eviction” of the UN Committee on Economic, Social and Cultural Rights.²⁶ The same formula could be incorporated in paragraph 13.

Definition of land rights

39. The definition of “land rights” in the policy (fn 62) could be amended to make it more consistent the requirements of PR 7 and international standards on indigenous peoples’ land rights. In this regard, the definition could be widened to include customary rights derived from the use of lands and resources for cultural or spiritual practices.

Avoidance of displacement

40. OHCHR welcomes EBRD’s policy commitment to avoid displacement as part of the mitigation hierarchy for Bank-financed projects (para. 13). However, in OHCHR’s view, the current draft should be revised in order to highlight avoidance as the Bank’s preferred approach. For instance, the policy could explicitly affirm that the Bank will not finance projects involving resettlement unless it is strictly unavoidable and after consideration of other feasible alternative projects.

41. OHCHR notes that public health and safety are considered as legitimate grounds for relocation of communities and individuals, and as such need to be construed narrowly. However, paragraph 13 seems to suggest that the resettlement could be justified by public health and safety concerns associated with the implementation of an EBRD-supported project. In OHCHR’s view, such an exception could potentially undermine EBRD’s resettlement avoidance objective and should be deleted.

Entitlement to compensation

42. OHCHR notes that the draft policy limits resettlement compensation (in-kind or in-cash) to persons who “have formal legal rights to the land...or assets” under national law (Category (i)) (paras 27, 28). In cases where affected persons lack formal legal rights or have a legitimate (but as yet unrealised) legal claim to the land or assets (Category ii), the policy only provides for resettlement assistance as well as legal support to obtain recognition of their claim “so that they can further be provided with compensation” (para. 28). This distinction does not appear to be consistent with international human rights standards.

43. The UN Basic Principles and Guidelines on Development-based Evictions and Displacement, which summarises relevant standards in this field, states that: “[a]ll those evicted, irrespective of

²⁶ Committee on Economic, Social and Cultural Rights, *General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions* (1997), para. 14.

whether they hold title to their property, should be entitled to compensation for the loss, salvage and transport of their properties affected, including the original dwelling and land lost or damaged in the process,” including losses related to “informal property.”²⁷ The latter provisions are particularly important in countries where national laws provide limited recognition of property rights, including customary land tenure.

44. OHCHR notes that the safeguard policies of other MDBs provide wider recognition of compensation entitlements in the context of involuntary resettlement. For instance, IFC Performance Standard 5 recognizes the entitlement to compensation for persons “who do not have formal legal rights to land or assets, but have a claim to land that is recognized or recognizable under national law” (para. 17). Moreover, the IFC policy recognizes the entitlement of people who do not have rights over the land they occupy to relocation with security of tenure, restoration of lost livelihoods and compensation for non-land assets (fn 8). In light of these factors, OHCHR strongly recommends that the compensation scheme in PR 5 establish the entitlement to compensation for persons with recognized or recognizable land claims and other persons who do not have formal legal rights over the land they occupy prior to a specified cut-off date.

PR 7 – Indigenous peoples

Normative framework

45. OHCHR welcomes the PR objective to ensure that projects fully respect the human rights of indigenous peoples (para. 3). OHCHR would recommend that the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the ILO Convention on Indigenous and Tribal peoples (C169) be referenced in a footnote to para. 3, in order to guide the interpretation and implementation of PR 7, particularly as it relates to relocation, cultural heritage, compensation and benefit-sharing.²⁸ The draft policy could also reference specific business-oriented guidance in relation to indigenous rights, such as that produced by the UN Global Compact.²⁹

46. OHCHR also welcomes the incorporation of new and detailed requirements regarding impacts on indigenous customary land and resources, as well as the requirement to obtain indigenous peoples’ free, prior and informed consent (FPIC).

²⁷ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, Annex 1, para. 61.

²⁸ See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Corporate responsibility with respect to indigenous rights*, A/ HRC/15/37 (2010), paras 38ff.

²⁹ UN Global Compact, *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* (2013), available at https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf

Indigenous land, territories and resources

47. In line with international instruments, OHCHR would recommend that PR 7 refers systematically to indigenous lands, territories and natural resources and defines the notion of indigenous territories (now mentioned only once, in para 3), according to ILO Convention 169³⁰. In OHCHR's view, this would help to ensure that PR7's scope of application extends to geographic areas that indigenous peoples occupy or otherwise use for their livelihoods or for cultural, ceremonial or spiritual purposes, and to clients' specific obligations in relation to "customary lands and resources" (paras 16-19).

48. OHCHR welcomes the affirmation in PR 7 of the need for special consideration in relation to projects affecting indigenous customary lands and natural resources (para. 16), in line with international human rights standards. Indigenous peoples typically maintain special cultural and spiritual relationships with the territories they have traditionally inhabited or otherwise used, and therefore they may experience human rights impacts differently to other population groups.

Forced relocation

49. Given the above factors, the forced or involuntary removal of indigenous peoples from their traditional territories has been, and continues to be, a major form of violation of indigenous peoples' rights and a threat to their survival as distinct societies. OHCHR welcomes the specific provisions regarding the relocation of indigenous peoples from their traditional or customary lands (paras. 18-19), including, in addition to PR5 requirements, the requirements to explore alternative project designs and mitigate impacts; to obtain FPIC; to provide fair and equitable compensation, and to ensure the possibility of return.

50. However, in line with international standards, there should be a more explicit recognition of the general rule that indigenous peoples shall not be removed from the lands and territories they occupy, save in exceptional cases and subject to appropriate guarantees.³¹ By way of comparison, the Inter-American Development Bank requires, as a guarantee in such exceptional cases, that the "resettlement component will result in direct benefits to the affected community relative to their prior situation."³² A similar formulation could be included in PR 7, along with an explicit commitment by the Bank not to finance projects involving indigenous peoples' removal from their lands if their removal may endanger indigenous peoples' physical or cultural survival.³³

³⁰ ILO Convention 169, art. 13.2.

³¹ UNDRIP, ART. 10; ILO Convention 169, art. 16.1.

³² IDB, Involuntary Resettlement (July 1998) ("Indigenous communities).

³³ See Inter-American Court of Human Rights, *Case of the Indigenous Community Yakye Axa*, Judgment of June 17, 2005 (Merits, Reparations and Costs), Serie C (No. 125), para. 137 and *Case of the Indigenous Community Sawhoyamaxa*, Judgment of March 29, 2006 (Merits, Reparations and Costs), Serie C (No. 146), para. 118.

51. International standards further affirm that, in exceptional cases where indigenous peoples are removed from the lands they occupy, relocation should not take place without their FPIC, and they should be entitled to mutually agreed “just and fair compensation”,³⁴ with a general preference for land-to-land compensation.³⁵ OHCHR notes that, under PR 7, indigenous peoples would be entitled to receive compensation in the event that their lands have been taken or damaged by a project without their “FPIC” (para 18). However, in line with international standards and PR5, OHCHR recommends that this provision be amended to ensure that indigenous peoples are duly compensated when removed from their lands even with their consent.

Benefit- sharing

52. In addition to indigenous peoples’ entitlement to “opportunities for culturally appropriate development benefits” (para. 24), OHCHR recommends that the policy explicitly affirm that affected communities should be fully consulted and that any development benefits and “time-bound plan” (para. 25) should be developed in agreement with affected indigenous peoples.

PR 9 – Financial Intermediaries

53. OHCHR notes that the strengthening of the financial sector is among the EBRD’s operational priorities, including through fostering “deeper and broader financial intermediation” in countries where the Bank operates.³⁶ However, OHCHR notes with concern that environmental and social sustainability of projects financed by Financial Intermediaries’ (FIs) investment and lending has been particularly difficult to achieve in practice. Many serious human rights violations have been associated with FI operations including forced evictions, land grabbing, and reprisals against human rights and environmental defenders.³⁷

54. The IFC’s recent experience is illustrative. In 2011, a CAO-initiated compliance appraisal of the IFC’s financial sector investment revealed that the IFC’s procedures were not commensurate with the organisation’s environmental and social objectives, and were inadequate to assess and monitor risks and impacts at the sub-client level.³⁸ Despite certain recent improvements in the management of the IFC’s FI portfolio, a further assessment by the CAO in 2017 underscored the IFC’s

³⁴ UNDRIP, art. 10.

³⁵ ILO Convention 169, art. 16.3.

³⁶ EBRD, Financial Sector Strategy 2016 – 2020 (13 January 2016), p. 5.

³⁷ See e.g. the four-part investigative series conducted by Inclusive Development, Information Center, Accountability Counsel, Urgewald, and 11.11.11 under the title “Outsourcing Development: Lifting The Veil on the World Bank Group’s Lending through Financial Intermediaries” (2016-17), available at <https://www.inclusivedevelopment.net/what-we-do/campaigns/outsourcing-development/>

³⁸ CAO Audit of a Sample of IFC Investments, CAO Compliance C-I-R9-Y10-F135 (10 October 2012), available at: http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf

continuing lack of adequate capacity to assess FI clients' compliance with environmental and social requirements.³⁹

55. In view of these factors, OHCHR considers that PR 9 should be strengthened and should spell out more precisely the FI's requirements in relation to the assessment and management of sub-project risks and the EBRD's due diligence responsibilities in this regard (which should be reflected in the ESP).

Scope of application

56. OHCHR welcomes the widening of the EBRD FI policy to all sub-projects financed by FI clients with funds provided by the Bank (para. 5). In relation to the sub-projects excluded from the application of the scope of application of PR 7 because of their negligible adverse impacts (para. 7), OHCHR recommends that the ESP should include a list of specific examples, such as those included in the current policy (ESP 2014 - PR 9, para.7) and the World Bank's Environmental and Social Standard on FIs (ESS 9, fn. 6). The Bank's standards provide that FIs should be required to comply with national law even in relation to projects with minimal or no risk adverse impact (ESS 9, para. 9).

57. A list of specific examples could be also included in relation to the "additional or alternative environmental and social requirements" that FI clients may be required to adopt in relation to specific sub-projects.⁴⁰ OHCHR would also recommend that the ESP, or alternatively the Project Complaints Mechanism (PCM) policy, clarify the admissibility (eligibility) of complaints pertaining to FI sub-projects.

Environmental and Social Management System (ESMS)

58. OHCHR notes that the draft PR 9 preserves the language requiring FI clients to put in place environmental and social managements systems (ESMS), except when the FI can document evidence of an existing ESMS. The objectives and standards that should guide newly established or existing ESMS are not spelled out in the policy, however, unlike other MDBs. For instance, the World Bank requires that the ESMS "will enable the [sub-]project to achieve objectives materially consistent with this ESS and other ESSs, as applicable" (ESS 5, fn 5), and that when an ESMS already exists, the FI may be required to enhance or modify it accordingly (ibid., para 7).

³⁹ CAO Third Monitoring Report of IFC's Response to: CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries (6 March 2017), available at: http://www.cao-ombudsman.org/newsroom/documents/documents/CAOMonitoringReport_FIAudit_March2017.pdf

⁴⁰ This may include, by way of illustration, voluntary initiatives such as those listed in the existing PR 9 (para. 16) (Equator Principles, the UNEP Finance Initiative, and the Principles for Responsible Investment). Other relevant sectorial GIP include the UN Global Compact and the Voluntary Principles on Security and Human Rights (referred to in PR 4, para. 51).

59. In this regard, OHCHR recommends that the establishment of new ESMS (or the improvement of an existing one) should at least be guided by the objectives and basic standards set forth in the rest of the ESP. As indicated in the World Bank’s guidance on FIs, the ESMS should be commensurate with “the highest level of environmental and social risk that is anticipated in FI subprojects and/or portfolios.”⁴¹ This is particularly relevant given that sub-projects involving “environmentally or socially sensitive business activities” (such as Category A projects or projects listed in the FI Referral List) require compliance with specific PRs.

60. OHCHR notes that the ESMS should ensure compliance with national law, in line with the EBRD’s wider commitment in this regard (ESP, para 3.3). However, depending on the specific sub-project, and in line with the requirements of other PRs, consistency with the objectives of EBRD environmental and social framework may require higher standards. In this connection, the World Bank’s guidance on FIs clarifies that FI’s social and environmental assessment and management processes should be guided, in addition to the World Bank’s own ESSs, by “national and/or international law.”⁴² In OHCHR’s view, the optimal and most prudential formulation from a risk management perspective would be “*national and international law, whichever sets the higher standard.*”

61. OHCHR notes that, while PR 9 contains specific requirements regarding FIs’ organisational capacities, it does not specify necessary elements of the FI’s environmental and social policies as part of the ESMS, in contrast to corresponding policies of the World Bank⁴³ and the IFC.⁴⁴ OHCHR would suggest that PR 9 spell out further details in this regard, and that PR 1 should be identified as the framework for the design and implementation of FI environmental and social procedures (para. 13).

62. In a similar vein, OHCHR recommends that PR 9 should provide more detailed elaboration regarding FI portfolio monitoring which, as proposed, would be limited to the submission to the EBRD of annual environmental and social reports. In OHCHR’s view, and in line with policies of other MDBs, the requirement of annual reporting should be complemented with regular progress reporting proportional with the nature and risks of the specific project (see e.g. World Bank ESS 9 para. 21). PR 9 should also include specific requirements regarding the FI’s communication of “significant accidents or incidents” relating to the project and any material developments which may alter the FI’s risk profile (ibid., para 22). OHCHR also recommends sub-project visits for higher risk FIs, in line with the evolving practice of the IFC.

⁴¹ The World Bank, Guidance Note for Borrowers. ESS 9: Financial Intermediaries (June 2018) [hereinafter WB Guidance on ESS9], para. GN7.3, available at: <http://pubdocs.worldbank.org/en/484961530217326585/ESF-GN9-June-2018.pdf>

⁴² Ibidem, para. GN7.3.

⁴³ ESS 5, para. 14.

⁴⁴ IFC, Interpretation Note on Financial Intermediaries, IN24-IN26.

63. In OHCHR's view, PR 9 should include the requirement that the ESMS should be revised periodically, including in the case of significant changes to the FI's environmental and social risk profile or to its portfolio, in line with the World Bank's ESF (ESS 10).

Applicable requirements for FI sub-projects

64. OHCHR notes that, as a general principle, there is no requirement for FIs to comply with PRs other than PR 9 (with the exceptions of PR 2 and the occupational and safety requirements of PR 4 in relation to the FI's own labour management systems). In this regard, OHCHR welcomes the inclusion in the draft PR 9 of an exclusion list of "environmentally or socially sensitive business activities" that, if financed by the FI with EBRD funds, should be referred to the Bank, and which are required to comply with specific PRs (PR 9, Appendix I). OHCHR also welcomes the requirement that FI sub-projects comply with all PRs when they fall within the scope of the indicative list of Category A projects (ESP, Appendix 2).

65. Despite these improvements, OHCHR notes that the scope of application of the Bank's PRs to FI sub-projects may still be narrower than comparable provisions of other MDBs' safeguard policies. While the list of Category A projects included in the ESP is only "indicative" (not exhaustive), we note that only 2 out of the 28 types of projects included in the list refer to social risks and impacts. Moreover, the FI Referral list seems to be more limited than comparable exclusion lists in the World Bank and IFC policies. The latter institutions require compliance with the relevant requirements of their environmental and social standards in relation to sub-projects involving "higher risk transactions" associated with "involuntary resettlement, risk of adverse impacts on indigenous peoples, significant risks to or impacts on the environment, community health and safety, biodiversity, cultural heritage or significant occupational health and safety risks."⁴⁵ The World Bank also includes sub-projects involving significant risks or impacts on labour and working conditions.⁴⁶ OHCHR recommends that the proposed EBRD FI Referral List be strengthened in line with the World Bank and IFC standards.

Ineligibility

66. OHCHR recommends that, in addition to the identification of projects that would require compliance with all or specific PRs, PR 9 should provide for the possibility that specific sub-projects may be excluded (considered ineligible for FI financing) in the legal agreement between the EBRD and the FI client (ESS para. 16.a).

⁴⁵ IFC, Interpretation Note on Financial Intermediaries, IN24-IN26.

⁴⁶ World Bank ESS 9, para. 11.

Stakeholder engagement and information disclosure

67. OHCHR notes that the requirements in PR 9 regarding stakeholder engagement and disclosure, while preserving the wording of the existing policy, are limited in scope and appear not to fully reflect the EBRD's and ESP's commitments to transparency and stakeholder engagement. OHCHR recommends that PR 10 should be identified as the frame of reference for FIs' social and environmental procedures. Consistent with the requirements of PR 10, FI clients should be required to identify potential stakeholders and devise a stakeholder engagement plan in cases where there are significant social or environmental risks, including but not limited to Category A projects.

68. OHCHR recommends that the disclosure requirements in paragraph 16 be strengthened and should require, without qualifications, the FI's disclosure of (i) their environmental and social policy; (ii) a summary of their ESMS; (iii) ESIA reports *and* other project documents for Category A projects *and* other projects included in the IFC referral list; and (iv) monitoring reports in relation to these projects. In OHCHR's view, PR 9 should also mandate public disclosure of these documents by the EBRD on the Bank's website.

PR 10 - Information Disclosure and Stakeholder Engagement

Normative framework

69. PR 10 acknowledges that "open and transparent engagement" between the client and stakeholders is "an essential element of good international practice (GIP) and corporate citizenship" (para. 1). In OHCHR's view, it should also be acknowledged that information disclosure and stakeholder engagement in relation to development projects are anchored in international human rights obligations reflected in the UDHR and other core international and international human rights treaties, including those pertaining to the right to participation in public affairs and the right to access to information.⁴⁷ These rights play a crucial role in the promotion of multiparty democracy, pluralism, social inclusion and economic development, pertinent to the Bank's mandated objectives.

70. The 2030 Agenda for Sustainable Development also incorporates specific human rights commitments in this regard, including the objective of ensuring "responsive, inclusive, participatory and representative decision-making at all levels (SDG target 16.7) and ensuring "public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements" (SDG target 16.10). OHCHR recommends that the human rights to access

⁴⁷ The right to political participation is affirmed, inter alia, in art 21 UDHR and art. 25 ICCPR. The right to access to information is affirmed, inter alia, in the UDHR, art. 19; ICCPR, art. 19, and the European Convention on Human rights, art. 19. See OHCHR's separate submission in relation to the EBRD's draft Access to Information Policy, 6 March 2019.

to information and to participation under international law explicitly be referenced in PR 10, consistent with the Bank's purposes and overarching commitment to ensure respect for human rights in the projects it finances (para 2.4).

71. Detailed requirements regarding information disclosure and stakeholder engagement are also reflected in the Aarhus and Espoo Conventions. As noted earlier, these instruments have been ratified by a large majority of the EBRD countries of operation as well as by the EU. OHCHR recommends that the UNECE conventions, which are referenced in the draft ESP (para. 4.13), should also explicitly be reflected in the PR 10, along with the expectation that the clients should be guided, in the interpretation and implementation of PR 10, by the principles, practices and standards set forth in these two conventions and other relevant standards.

72. OHCHR also recommends that the introduction to PR 10 should indicate that the requirements regarding stakeholder engagement should apply, as applicable, to the consultations carried out by the EBRD on its own initiative (ESP, para. 4.13), without prejudice to the Bank's responsibilities under its access to information policy and directive.

Scope of application

73. OHCHR notes with concern that the scope of application of PR 10 is circumscribed to "projects that are likely to have adverse environmental and or social risks and impacts". Given the important contributions of stakeholders' information and participation to investment performance and sustainable development, and given the strong anchoring of participation in environmental and human rights law, OHCHR strongly recommends that PR 10 should be applicable to *all* EBRD-financed projects, *in a manner proportional* to the adverse environmental or social risks and impacts. Similar qualifications could be included in relation to specific requirements.

Protection from reprisals or retaliation

74. The EBRD Statement Against Civil Society and Project Stakeholders (January 2019), regarding including threats, intimidation, harassment, or violence by EBRD clients or other project counterparties against affected communities and other stakeholders, is of particular relevance for the PR 10 objectives, including the objective of ensuring that their grievances are responded to and managed appropriately (para. 3). Therefore, OHCHR recommends that the EBRD Statement explicitly be referenced in PR 10 and that necessary measures to prevent and remedy intimidation or retaliation be included as client requirements.

Grievance mechanism

75. OHCHR welcomes the establishment of grievance mechanism as part of the client's requirements under PR 10. This is consistent with the UNGPs which call upon business enterprises to establish or participate in "effective operational-level grievance mechanisms" for individuals and

communities who may be adversely impacted by their business activities.⁴⁸ In this regard, OHCHR recommends that PR 10 reflect the UNGP’s effectiveness criteria for non-judicial grievance mechanisms, which are the most authoritative source of guidance on this topic.⁴⁹

Concluding remarks

76. OHCHR is grateful for the opportunity to contribute to the EBRD’s consultation on its draft ESP. We hope that our comments are useful, and that the final version of the Bank’s policies will fully reflect best practice in other MDBs and applicable law, thereby assuring maximum respect for the human rights of communities and individuals affected by EBRD projects and superior development outcomes. We look forward to our continuing dialogue and stand ready to provide further comments and clarifications on request.

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⁴⁸ UNGPs, para. 29.

⁴⁹ Ibid., para. 31.