



First Peoples Worldwide
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Outcome Document on Draft Text of the Equator Principles IV

Background

Since late 2017, Equator Principles Association (EPA) has been conducting a targeted review of the social and environmental risk assessment framework encompassed within the Equator Principles. Indigenous Peoples, NGOs, investors, and others catalyzed the review process by calling for more responsible lending practices from the financial sector largely in response to the Dakota Access Pipeline (DAPL) situation. Many of these stakeholders watched as the human and environmental rights of the Standing Rock Sioux Tribe and other Sioux Tribes were trampled during construction. In fact, thirteen of the seventeen banks that financed DAPL were signatory Equator Principles Financial Institutions (EPFIs).¹ Directly after the United States government greenlighted DAPL, ten European banks issued a letter calling for revisions to the Equator Principles framework.² On June 24, 2019, the EPA finally released the updated draft Equator Principles, known as EP4. This was also the beginning of a second round of stakeholder consultation that formally ends on August 23, 2019 and is conducted by BSR (Business for Social Responsibility) on behalf of the EPA.

The following outcome document provides a full summary of First Peoples Worldwide's (First Peoples) involvement and observations of the EP4 consultation process, as well as the themes that surfaced repeatedly throughout the consultation process regarding the substantive changes necessary to strengthen EP4. First Peoples is also submitting a redlined version of EP4 with suggested revisions and an accompanying memorandum. Finally, First Peoples is submitting a letter with signatures from organizations and leaders around the world calling for an improved EP4 that respects the rights of Indigenous Peoples during project finance.

First Peoples Worldwide's Role in the Equator Principles review

First Peoples has actively monitored the review process since 2016. In May 2018, the EPA invited First Peoples Worldwide's Director Carla Fredericks to provide expertise on a webinar regarding Indigenous Peoples' rights and issues attendant to investment on and near Indigenous territories. Ms. Fredericks provided information regarding outcomes from First Peoples' case study, which calculates the financial losses associated with the failure to

¹ Hiroko Tabuchi, *Environmentalists Target Banks Behind Pipeline*, THE NEW YORK TIMES (Nov. 7, 2016).

² Open Letter to The Equator Principles Association, (May 22, 2017) signed by ABN-AMRO, BNP Paribas, BBVA, Credit Agricole CIB, FMO, Intesa SanPaolo, Natixis, NIBC, Rabobank, and Societe Generale.

adequately assess social risks during the DAPL situation.³ Ms. Fredericks also provided guidance on international best practices as to meaningful implementation of free, prior and informed consent (FPIC), including full operationalization of the consent framework laid out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

First Peoples presented the following four recommendations to the EPA during the webinar:

- 1) To end the distinction between Designated and non-Designated countries.
- 2) To establish a mechanism to facilitate the resolution of issues resulting from possible breaches of the standards.
- 3) To strengthen reporting on human rights due diligence.
- 4) To ensure robust consultation with Indigenous Peoples during the EP4 review process.

Unfortunately, the new draft, EP4, falls woefully short of providing the stronger framework for social and environmental risk assessment necessary to be fully protective of Indigenous Peoples and EPFIs. In fact, EP4 leaves both financial institutions and Indigenous Peoples as exposed to the negative consequences of risky investments as the third revision of the Equator Principles.

Importantly, the reason that DAPL galvanized worldwide attention is because the themes present in that case are present in Indigenous communities around the world. Themes such as the lack of consultation and consent solicited and given with and by affected Indigenous Peoples, minimal adherence to already sub-standard government policies, and a lack of due diligence regarding the actual impacts of development on Indigenous territories.⁴ This outcome document contains several examples of Indigenous Peoples who are asserting their rights under the UNDRIP and who are repeatedly being ignored by private entities and state governments. In many cases, the social risks of development were not adequately considered during the early project finance stages and have already or will likely soon generate social pressure, which will likely result in material loss for all entities involved.

For example, early reports regarding the social risks of proceeding as planned with locating the Thirty Meter Telescope on Mauna Kea – a mountain considered sacred by Native Hawaiians – were ignored.⁵ For over ten years, Native Hawaiians have voiced their opposition to construction via multiple avenues including through litigation and advocacy.⁶

³ First Peoples Worldwide, *Social Loss and Material Loss: The Dakota Access Pipeline*, (Nov. 2018), available at: https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf [hereinafter *Social Loss and Material Loss*]

⁴ See *Social Cost and Material Loss*, pg. 6.

⁵ The Keystone Center, *Assessment of the Risks for Siting the Thirty Meter Telescope on Mauna Kea*, (26 Oct. 2007).

⁶ Dennis Overbye, *Hawaii Telescope Project, Long Disputed, Will Begin Construction*, (10 July 2019).

The state of Hawaii gave permission for construction to begin during the week of July 15, 2019 and the protectors formed a line to halt construction.⁷ The Native Hawaiian's approach has been non-violent, consistent, and clear in opposition to the siting of the Thirty Meter Telescope. Entities responsible for the telescope would likely not now be facing significant social pressure, reputational harm or potential financial losses due to a late stage change in the project had they respected the Native Hawaiian's perspective years earlier.

This is only one case that shows that since 2016, when DAPL occurred, pressure from Indigenous Peoples to respect their human rights has only amplified; a challenge to which EP4 must respond in order to remain relevant in 2019 and beyond.

The EP4 Consultation Process

First Peoples has participated in almost every opportunity offered to non-industry stakeholders to provide feedback: attending the in-person non-industry consultation sessions, participating in both of the non-industry webinar sessions, and submitting feedback via the website. First Peoples did not attend the in-person consultation in Tokyo, but did attend both the non-industry consultation sessions in Toronto and London. While First Peoples has participated in the revision process as set forth by the EPA and BSR, there are several critical concerns regarding this process that render both the process and its outcomes hollow.

1. The timeline for stakeholder review is far too short to meaningfully gather and integrate feedback.

The external stakeholder revisions process began on June 24, 2019 with the release of the draft of EP4.⁸ The process was slated to end on August 9, 2019, giving stakeholders in different fields, varied geographies, and diverse constituencies a mere 46 days to review the draft, gather feedback from partners, prepare substantive comments, and organize the logistics necessary to participate in the consultations.

First Peoples was notified via email on August 7, 2019 that the timeline for submitting written feedback on EP4 was extended from August 9, 2019 to August 23, 2019. First Peoples applauds the Steering Committee and BSR for extending this timeline in response to stakeholder feedback regarding the short timeline for written feedback. However, announcing the extension just two days before the deadline meant that many stakeholders had already closed their internal processes in anticipation of submitting finalized documents on the original date. The additional time is responsive in part, but the root of the request was to allow for stakeholders to gather consensus from a variety of participants and to

⁷ Id; See also Aida Chavez, *Activists Camped at Hawaii's Mauna Kea face Government Opposition as they Attempt to Block Telescope Construction on Sacred Land*, THE INTERCEPT (24 July 2019).

⁸ EP Secretariat, *EP4 draft shared, stakeholder consultation begins*, EP Association News (June 24, 2019), available at: <https://equator-principles.com/ep-association-news/ep4-draft-consultation-begins/>.

allow institutional stakeholders to thoroughly review EP4, which takes a certain amount of time. Thus, the extension may only allow for a slight increase in perspectives as it was not part of an initial robust engagement effort.

Further, even with the two-week extension, the compressed timeline was vastly different than the EPA's initially proposed timeline, which stated that the second round of stakeholder engagement would occur between February and May 2019.⁹ The timeline in reality was thus flattened from a full four months to just under two months. While it is understandable that the release might be delayed due to internal negotiations or legal review, internal delays should not result in a condensed timeline for external stakeholder engagement.

The timeline neither conforms to best practices regarding stakeholder consultation, nor does it evidence a commitment to gathering and integrating feedback into a stronger document. In fact, the timeline itself suggests that the consultation process was instituted merely as a pro forma process rather than provide a substantive review. The EPA's clear commitment is to submit a draft of EP4 for vote by signatory EPFIs at the Annual Meeting in November, rather than developing a draft that reflects responsible project finance.

First Peoples has partnered with the Investor Alliance for Human Rights, and other key stakeholders, to request a new timeline for EP4 review. The request is for the following:

- 1) Extend the deadline for written submissions in the current consultation period by at least two more weeks;
- 2) Ensure that a summary of the consultation findings and any related recommendations are made public and that the final draft that will go to a vote is made public in advance of the final vote;
- 3) Provide for another round of review and public comment on an updated draft that incorporates revisions based on the current consultations, at the very least through another period of written submissions on an updated draft; and,
- 4) Conduct a more robust and rights-respecting outreach and consultation with affected rights-holders, their representatives, and expert organizations, particularly in relation to the rights of Indigenous Peoples and labor rights.

The goal of this request is to provide the time and space necessary to work together to build a strong and meaningful framework that does not risk irrelevance, as EP4 does in its current iteration.

2. The consultation process has proceeded without transparency and without due effort to gather feedback from a wide range of stakeholders. The process itself indicates little desire to invite stakeholders' perspectives or to integrate their feedback into EP4.

⁹ EP Secretariat, *Review of the Equator Principles – Towards EP4*, EP ASSOCIATION NEWS (March 16, 2018), <https://equator-principles.com/ep-association-news/review-of-the-equator-principles-towards-ep4/>

BSR and the EPA constructed a narrow consultation process for non-industry stakeholders that, at the very outset, seriously and intentionally limited feedback. The consultation process has required extensive work from non-industry stakeholders to determine basic logistical details. The times and general locations of the in-person consultations were announced only via email upon the release on June 24, 2019. There was no listing of the in-person consultation sessions in a publicly available and easily accessible location for those wishing to attend. These details could have been listed on the “Towards EP4” website, in the News Section of the Equator Principles Website, or clearly on the BSR website. Further, the consultation logistics were released only via email to entities that were likely already listed in an EPA database. The choice to only release this information via email to select entities belies any stated commitment to glean wide feedback as the emails only reach those with whom the EPA has engaged in the past, significantly narrowing the field of feedback with painfully obvious circularity.

The first consultation took place in Tokyo just over two weeks after the release of EP4. Given that it took the EPA more than a year to draft, negotiate, and review the text, it is unreasonable to assume that stakeholders would only require two weeks to review, comment, and provide feedback on the revisions.

Similarly, the act of hosting non-industry stakeholder consultations in Tokyo, London and Toronto, all major cities in the northern hemisphere, imposed significant financial barriers for many, if not most, non-industry stakeholders. At each of the consultations, less than 20 stakeholders were present and stakeholders filled the selected conference room each time. In many instances, key stakeholders were unaware that the consultations were taking place until First Peoples or other NGO partner reached out to them directly. Even though the invitations were said to be available publicly and emailed widely, the low attendance and lack of planning for a large group of attendees illustrates a process designed to limit and constrain feedback from the beginning.

3. The consultation sessions to discuss EP4 were not aligned with best practices for stakeholder engagement nor did they model best practices for the types of participant consultation and consent required by the Equator Principles.

BSR created meetings that did not provide the space or time necessary to create respectful and honest dialogue about the revisions in EP4. First Peoples notes the following concerns, which were echoed widely by other non-industry stakeholders that participated in the process:

- At each of the consultation sessions, there was not enough time to discuss each of the issues on the agenda, much less consider issues that were not included on the agenda;

- There was an overly narrow focus on technical feedback rather than allowing for the type of meaningful dialogue that ensures a wide range of perspectives are woven into the document;
- The consultations were not conducted in a way that was culturally sensitive or in locations that were accessible for all participants;¹⁰ and,
- There was an inappropriate balance of speaking time as between stakeholders and EPFI representatives, particularly at the Toronto consultation session.

For example, EPFI representatives were present at each consultation to provide answers to questions raised by stakeholders. In London, EPFI representatives provided helpful information germane to the discussion. However, at points during the Toronto consultation, the engagement inappropriately shifted from dialogue into debate. Rather than answer questions regarding the substance of EP4, some of the bank representatives took the opportunity to debate the importance of and significance of human rights norms without due respect for the stakeholders, the fact that the session was stakeholders' *only* in-person opportunity to provide feedback under closely followed time constraints, or the guiding rules set forth at the beginning of the engagement. Their manner and words showed little respect for the tribal leadership or other stakeholders present at the consultation session, and showed no commitment to integrating feedback at any level into the next draft of EP4. Further, one of the EPFI representatives speaking directly to former Standing Rock Sioux Chairman Dave Archambault II never acknowledged the fact that the bank they represented financed DAPL, but rather the representative continued to dispute the validity of former Chairman Archambault's perspective on the direct impacts of project finance on Standing Rock Sioux territories. These bank representatives have significant sway on the EPA Steering Committee but they consistently minimized the feedback provided by stakeholders, providing further evidence of a process built for one-way information dissemination rather than for substantive dialogue.

The EP4 consultation process did not even align with BSR's best practices on stakeholder engagement.¹¹ If this is how the EPA and BSR envisions stakeholder engagement, particularly with marginalized populations, then there is little reason to expect that EPFIs and clients will implement the more rigorous requirements within EP4 for the same; thus, setting up EP4 for operational irrelevance.

¹⁰ As BSR points out in the Five Step Guide to Stakeholder Engagement under Core Engagement Principles, "Respectful. This means considering context, location, format, and language; and, the context of stakeholder engagement, respecting means listening as well as sharing, and using an engagement approach that is culturally sensitive and accessible to all participants. This means considering context, location, format, and language" (28).

¹¹ BSR, *Five-Step Approach to Stakeholder Engagement*, <https://www.bsr.org/en/our-insights/report-view/stakeholder-engagement-five-step-approach-toolkit>; BSR, *The Future of Stakeholder Engagement*, <https://www.bsr.org/en/our-insights/report-view/the-future-of-stakeholder-engagement>; Ouida Chichester, *Stakeholder Groups Extractive Companies Should Engage to be Inclusive and Effective*, <https://www.bsr.org/en/our-insights/blog-view/stakeholder-groups-extractives-should-engage-to-be-inclusive-and-effective>.

Major Themes and Recommendations to Strengthen EP4

The following comments are related to the four key issue areas addressed in the targeted review of the Equator Principles: (1) Scope of Applicability, (2) Applicable Standards in Designated v. non-Designated Countries, (3) Human Rights and Social Risks, and (4) Climate Change. The comments also address other aspects of EP4. The below comments represent broader themes that surfaced repeatedly during the stakeholder engagement process, and were presented by a wide variety of participants at the non-industry consultation sessions. First Peoples is also submitting specific draft language in a redline document.

1. Scope of Applicability

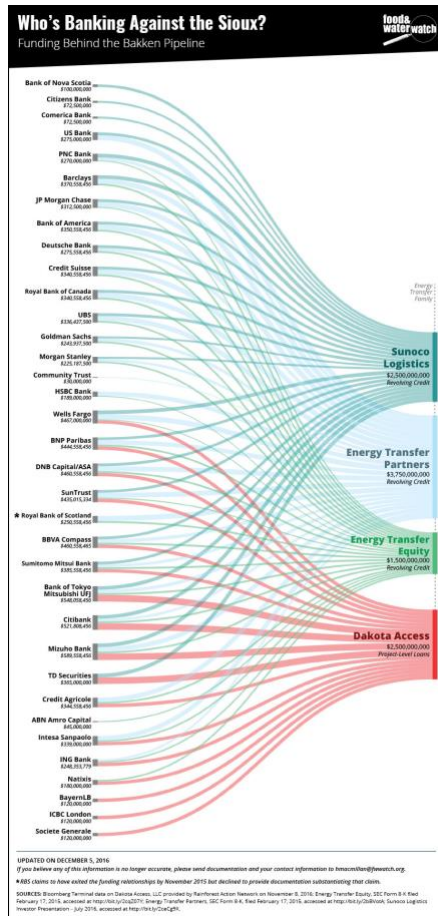
First Peoples, along with many non-industry stakeholders, are encouraged that the threshold for Project-Related Corporate Loans was reduced to US\$50 million in EP4. First Peoples also applauds that the scope of applicability was increased to include Project-Related Refinancing and Project-Related Acquisition Financing which better reflects the operational reality of most large infrastructure projects. However, the lowered threshold does not go far enough to address the fact that EP4 remains too limited in scope. EP4 still only applies to four types of financial products: project finance advisory services, project finance, project-related corporate loans, and bridge loans. Other types of common financial products, such as project bonds, are not covered. As many stakeholders mentioned during the consultation process, this creates a loophole through which EPFIs are able to finance activities without a proper environmental and social risk assessment.

Furthermore, as noted during the Toronto consultation and the August 6 webinar, the narrow scope of applicability in EP4 means that EPFIs may still incur significant reputational and material risk. When determining if a bank is financing a project with social and environmental impacts, the public does not make the distinction between what type of financial product a bank is providing or whether it is a Project-level or corporate-level loan. The DAPL situation provides a strong example. When the below graphic was released to the public, the #DefundDAPL movement amplified the initiative to close accounts associated with the financial institutions that were involved.¹² They were successful at prompting nearly \$4.4 billion worth of losses in account closures to DAPL-related banks.¹³ This amount does not include the additional losses due to reputational damage nor the impact on the banks that sold their shares in the project-level loan.¹⁴

¹² Graphic created by Food and Water Watch (Dec. 5, 2016), available at <https://www.foodandwaterwatch.org/news/who%27s-banking-dakota-access-pipeline>.

¹³ See Social Cost and Material Loss, pg. 46.

¹⁴ Id.



For these reasons, the scope of applicability of the Equator Principles should be expanded to include all products within the scope of project finance to adequately account for actual or potential impacts to Indigenous Peoples.

2. Applicable Standards in Designated versus non-Designated Countries

First Peoples strongly recommends removing the artificial distinction between Designated and non-Designated countries in Principle 3. As a global framework, the Equator Principles should be applied consistently and without qualification in all countries. The majority of stakeholders at the non-industry consultations put forth this recommendation, as did the ten European banks in their 2017 letter calling for revisions to the Equator Principles. Further, the Equator Principles must be directly aligned with international best practices and human rights norms to provide a truly comprehensive risk assessment framework that is salient for application in any location around the world.

- A. EP4 must eliminate the current country designations and require global application of the standards set forth in EP4 to be fully protective of the rights of Indigenous Peoples and of EPFIs.

The country distinctions first appeared in 2006 in the second version of the Equator Principles.¹⁵ According to information proffered during the recent consultation sessions, the country designation system was responsive to a request by EPFIs to limit the number of assessments required in certain countries for pragmatic reasons. The designations are determined by the World Bank Development Indicators Database, where Designated Countries are those listed as high-income countries *and* listed as OECD countries.¹⁶ Non-Designated countries are countries that are not enumerated on both lists.¹⁷

The assumption that high-income countries are the same countries with robust and comprehensive impact and risk assessment frameworks is flawed from the outset. The Equator Principles' system for creating country-level distinctions has also proven ineffective as social conflict generated from a lack of consent from Indigenous Peoples or from a lack of proper assessment as to their human rights has surfaced in Designated Countries around the world.

Further, the Equator Principles' rationale for designating countries is unique to this framework and creates additional process for EPFIs and clients when considering their obligations as against other international conventions in a given country. The Equator Principles system of designation may even mask existing frameworks that encourage a better risk assessment regime. For example, International Labour Organization 169 (ILO 169) provides a stronger approach to impact assessment and to risk definition in regards to projects affecting Indigenous Peoples as compared to the current draft text of EP4.¹⁸ The list of countries that have ratified ILO 169 is very different than the Equator Principles' designated country list; thereby adding a layer of complexity and unpredictability to EPFIs seeking to streamline their risk assessment process as to Indigenous Peoples.¹⁹ The Equator Principles' system for designating countries creates unnecessary confusion for EPFIs and clients when considering the best approach to assess risk and to engage Indigenous Peoples respectfully and within a rights-based paradigm.

B. EP4 must be directly aligned with international human rights standards to provide a robust and comprehensive risk assessment framework for application in any country worldwide.

Where each EPFI operates in multiple different national contexts at any given time, the EP4 framework has an opportunity to provide clarity and predictability as to the best methods to assess and operationalize respect for the environmental and human rights of Indigenous Peoples in any context. The Equator Principles cannot substitute for adherence to national

¹⁵ Equator Principles II (June 2006).

¹⁶ *Id.* at pg. 3.

¹⁷ *Id.*

¹⁸ International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169.

¹⁹ The 23 countries that have ratified C169 – Indigenous and Tribal Peoples Convention, 1989 are listed here: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314.

laws, but it can provide the compass necessary for EPFIs and clients to engage with Indigenous Peoples in a rights-based framework that goes beyond mere compliance by recognizing the recommendations below.²⁰

First, Indigenous Peoples – regardless of the country in which they are living – generally have less political, economic, legal and social power.²¹ Thus, projects that affect their communities, lands, territories and resources must be approached with heightened due diligence. Conversely, by taking a more fulsome approach to due diligence with these projects, EPFIs and clients can better consider and manage risks.

Enhanced due diligence and impact assessment can provide a safeguard for EPFIs and Indigenous Peoples to have a better understanding of the particular legal and political environment at play. Currently, the Keystone XL pipeline slated to cross Sioux territories in the United States is delayed, in part, because of significant legal uncertainty due to a number of suits filed to delay construction.²² Additionally, TransCanada is a foreign company and will likely rely on United States federal law, however the pipeline goes directly through Rosebud Sioux land and the company will be subject to their specific legal and regulatory codes.²³

Second, there are significant variances in local and national laws between countries generally, and this is magnified when applied to the rights of Indigenous Peoples. For example, the United States, Canada, Australia and New Zealand - all high-income OECD countries and thus Designated Countries - were the last to endorse the UNDRIP. Their reluctance to recognize the rights of Indigenous Peoples is mirrored in their bare minimum approach to operationalizing the rights of Indigenous Peoples in their national social and environmental risk assessment frameworks.²⁴ Further, most national frameworks emphasize compliance which is far from the comprehensive risk assessment necessary to

²⁰ UN Human Rights, Interpretive Guide, pg. 77.

²¹ See generally Gillette H. Hall, Harry Anthony Patrinos, *World Bank Study: Indigenous Peoples, Poverty and Development*, World Bank, (June 2014), highlights reported on World Bank Blogs, Gillette Hall & Ariel Gandolfo, *Poverty and exclusion among Indigenous Peoples: The global evidence*, (Aug. 9, 2016) at <https://blogs.worldbank.org/voices/poverty-and-exclusion-among-indigenous-peoples-global-evidence>. See also, The Lancet, *Indigenous and tribal peoples' health*, The Lowitja Institute Global Collaboration (July 2016) Vol. 388, Issue. 10040, p. 131- 157.

²² Center for Biological Diversity, *New Legal Challenges Launched to Keystone XL Pipeline Approval*, (July 2019); Rebecca Elliot, et. al, *Keystone XL Pipeline Faces Uncertain Future*, WALL STREET JOURNAL, (9 Nov. 2018).

²³ As stated by Rodney Bordeaux, President, Rosebud Sioux Tribe in a letter to tribal leaders, May 2019, available at Native American Rights Fund website, *Keystone XL Pipeline*, <https://www.narf.org/cases/keystone/>.

²⁴ Report of the Special Rapporteur on the rights of indigenous peoples on her mission to the United States of America, (A/HRC/36/46/Add.1) (9 August 2017); Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada, (GE.18-06413(E)) (23 April 2018); Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, (A/HRC/36/46/Add.2) (8 August 2017); Report of the special rapporteur on the rights of indigenous peoples, the situation of indigenous peoples in Canada, James Anaya, (A/HRC/27/52/Add.2).

adequately screen for human rights concerns. As a global standard, the Equator Principles must have broad applicability to maximize their reliability for EPFIs and Indigenous Peoples alike.

If EP4 is to provide a clear, global standard, it must do so in a way that maximizes efficiency by adequately encompassing international conventions and obligations instead of requiring additional layers of analysis. A credible EP4 would provide an easily operationalized framework to be deployed uniformly in all jurisdictions such that the specific risks posed by the Project are analyzed against a common set of criteria.

3. Human Rights and Social Risk

A. Adherence to international standards and norms is necessary to create a comprehensive risk assessment framework that operates as a high global benchmark.

While stakeholders called for a wide review of the environmental and social risk framework encompassed by the Equator Principles, a commitment to better assess human rights risk was within the constraints set forth in the targeted review process. First Peoples is encouraged that international instruments and the United Nations Guiding Principles on Business and Human Rights (UNGPs) are explicitly referenced in EP4. However, the principles and norms of these instruments are not carried forward into the operational framework presented by the draft. For example, the grievance mechanism in Principle 6 does not require the specific criteria listed within the UNGPs to create assurances for EPFIs and affected communities alike that an operational grievance mechanism has been established and maintained.²⁵ In this way, EP4 falls short of the standards set internally to implement the UNGPs.

Additionally, given that the genesis of the EP4 revision after DAPL, it is notable that there is no explicit reference to the United Nations Declaration on the Rights of Indigenous Peoples in the current version. This obvious omission reveals a failure to do the hard work of operationalizing respect for Indigenous Peoples' human rights since the UNDRIP represents an international consensus on the minimum standards for the survival, dignity and well-being of Indigenous Peoples.²⁶

Explicit reference to the UNDRIP must be included in EP4. And, each of the Principles must both make reference to and incorporate the norms and principles of the UNGPs and core

²⁵ UNGP Principle 31 states that effective non-state grievance mechanisms are effective if they are: legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.

²⁶ See generally UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/ adopted in the General Assembly, 2 October 2007 (A/RES/61/295)*, preamble and arts. 3,4; See also Expert Mechanism Report on FPIC, para. 3 (hereinafter Expert Mechanism Report on FPIC); See also Johannes Rohr and José Aylwin, *Interpreting the UN Guiding Principles for Indigenous Peoples*, International Work Group for Indigenous Affairs, Report 16 (June 2014).

international conventions. Doing so will provide a strong scaffolding for the Equator Principles as a framework that can be relied upon by EPFIs to fulfill their responsibility to respect the rights of Indigenous Peoples and to properly assess the social risks that emerge when client companies fail to account for, prevent, mitigate and account for human rights.²⁷ Because social risk can lead to significant financial losses, both financial institutions and clients have a fiduciary duty to their shareholders to effectively assess social risks.²⁸ Thus, as a matter of materiality, weaving the norms of each of the core international norms into each Principle and including explicit reference to those instruments provides clarity as to the wide lens necessary for EPFIs and clients to adequately assess social risk.

Similarly, there is a long history of national governments offering land concessions or courting finance for projects that infringe upon the rights of Indigenous Peoples while simultaneously representing to outside entities that they have adequately solicited Indigenous consent. The government of Argentina is currently soliciting foreign investment for oil and gas development in the Vaca Muerta region of Argentina, which has the 2nd largest shale gas reserves in the world.²⁹ The Mapuche Peoples live on and near the region and some of the proposed development is on their government recognized territory.³⁰ However, Mapuche leaders have not been recognized in their desire to ensure that all development proceeds in a responsible manner, including ensuring benefits inure to the communities, and that companies are responsible to clean up pollution.³¹ The Mapuche have protested development and blocked construction as a means by which to have their opposition clearly stated.³² Violence has broken out and, to date, one protestor disappeared under suspicious circumstances and one young Mapuche protester has been killed.³³ Thus, EP4 must be aligned directly with international best practices so that EPFIs will not become complicit in human rights violations by being allowed the latitude to accept and rely upon host country representations regarding social and environmental impacts to the detriment of Indigenous Peoples.

In its current form, without incorporation of international norms and best practices, EP4 does not provide a clear, consistent and credible framework that would prevent material losses due to social risk. Nor does it comport with EPFI's and the EPA's responsibility to respect the human rights of Indigenous Peoples.

B. Option 2 to operationalize FPIC is the better option and it must be strengthened into a consent-based framework that safeguards Indigenous Peoples and EPFIs.

²⁷ For more information on how and why banks should implement FPIC, see Shona Hawkes, *Consent is Everybody's Business: Why banks need to act on free, prior and informed consent*, OXFAM (20 Aug. 2019).

²⁸ See generally, *Social Cost and Material Loss*, supra note 3.

²⁹ Juliana Castilla, *Indigenous Mapuche thwart Argentina shale development*, REUTERS (8 Sept. 2017).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Benjamin Gedan, Christopher Phalen, *Argentina's Shale Energy Plans Run into Trouble*, AMERICAS QUARTERLY, (13 Feb. 2018).

First Peoples, along with the majority of non-industry participants at the consultation sessions, asserts that Option 2 is the better option for operationalization of FPIC as to Indigenous Peoples. The foremost reason that Option 2 is vastly preferred over Option 1 is that it requires clients to demonstrate that they have received the affirmative consent of Indigenous Peoples. The process of consultation discussed in Option 1 is in stark contrast to consent as enumerated in the UNDRIP, which requires meaningful engagement in a process that leads to a moment in which Indigenous Peoples have the right to give or to withhold their consent.³⁴

Maori peoples are currently defending a parcel of land with historical, cultural and spiritual significance near Ihumatao from development where the government of New Zealand approved a housing development on that parcel.³⁵ The United Nations Committee on the Elimination of Racial Discrimination recognized in this case that consent from the Maori was not adequately sought.³⁶ Social unrest has grown and yet development is still being pursued.

First Peoples has provided specific revisions to the wording of Option 2 so that it better aligns with international best practices on FPIC in the accompanying redline document. First Peoples is also providing links to international authorities to assist EPFIs and clients in operationalizing the types of meaningful engagement that support a consent-based framework. First Peoples' FPIC Due Diligence Questionnaire is included as a resource that provides practical questions and guidelines to ensure that engagement is proceedings according to best practices.³⁷

EP4's Option 2 relies heavily on International Finance Corporation Performance Standard 7 (IFC PS7), both in process and substance to operationalize FPIC. However, this reliance is misplaced for several reasons. First, the IFC Performance Standards were created in 2006 and last amended in 2012.³⁸ Thus, IFC PS7 is outdated as to best practices and, at a minimum, does not reflect the development of emerging practices to implement FPIC over the last seven years. Second, Option 2 replicates the narrow scope of application regarding when the client must obtain the FPIC of Indigenous Peoples.³⁹ This application unduly constrains application of FPIC to only three instances. In fact, FPIC is explicitly

³⁴ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), G.A. Res. 61/295 (13 September 2007), Art. 32 enumerates the right for Indigenous Peoples to determine the priorities for the lands, territories and resources, and their right to be consulted prior to development of their resources.

³⁵ Shannon Haunui-Thompson, *Explainer: Why Ihumatao is being occupied by protectors*, RMZ, (24 July 2019).

³⁶ UN CERD (2017), *Concluding Observations: New Zealand*, CERD/C/NZL/CO/21-22, para. 18-19.

³⁷ First Peoples Worldwide, *Free, Prior and Informed Consent Due Diligence Questionnaire*, (Nov. 2016) available at: https://www.colorado.edu/program/fpw/sites/default/files/attached-files/fpic_due_diligence_questionnaire-2.pdf

³⁸ World Bank Group, International Finance Corporation, Performance Standards on Environmental and Social Sustainability (Jan. 2012) [hereinafter IFC PS].

³⁹ IFC PS7 paras. 13 - 17.

referred to six times in the UNDRIP and is widely applicable to any situation with any impact on Indigenous Peoples, their lands, territories and resources.⁴⁰ Thus, EP4's verbatim reliance on IFC PS7 suffers the same pitfalls in scope and application and, in doing so, fails to provide forward-thinking global leadership on implementation of FPIC as a global standard.

Similarly, EP4 directly quotes language from IFC PS7 (12) stating that there is no universally accepted definition of FPIC, and then proceeds to define FPIC as to IFC application.⁴¹ In fact, there are internationally accepted norms and practices that define and guide implementation of FPIC. The list of these resources is included in First Peoples' submission to BSR and the EPA.

Further, IFC PS7 does not emphasize the reasons to engage with Indigenous Peoples in processes beginning in the early project design phases, including those processes that are implemented by the host country government. Where early engagement is not only a best practice in terms of operationalizing a consent-based framework for FPIC, it is necessary if clients and EPFIs want to properly understand and mitigate project's social and environmental risks.

In short, EP4 has an opportunity to provide leadership moving forward into 2020 to create a global standard reflective of the social conflict generated from lack of consent and environmental degradation over the past decade, and to conform with the Sustainable Development Goals. As written, EP4 continues the status quo that precipitated and, in some cases, instigated these human rights violations and environmental damage.

4. Climate Change

Indigenous Peoples are those on the front lines of climate change.⁴² The fluctuations in weather patterns will substantially change the local economy of lifeways of Indigenous Peoples, and Indigenous Peoples, like marginalized communities everywhere, will be more susceptible to the negative consequences of increased acute weather events. It is no accident that Indigenous Peoples hold 80% of the biodiversity in the world and that they manage 35% of the world's remaining intact forest.⁴³ For this reason, and to preserve the

⁴⁰ FPIC is enumerated in UNDRIP Arts. 10,11, 19, 28, 29, 32. See also Study of the Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, (A/HRC/39/62) (10 August 2018), Sec. III(B)(13).

⁴¹ IFC PS7 para. 12.

⁴² See information and reports produced by the United Nations Educational, Scientific and Cultural Organization, particularly *Climate Frontlines: A global forum for indigenous peoples, small islands and vulnerable communities*, accessed at: <http://www.unesco.org/new/en/natural-sciences/priority-areas/links/climate-change/projects/climate-frontlines/>.

⁴³ The World Bank, *The Role of Indigenous Peoples in Biodiversity Conservation*, (2008), <https://siteresources.worldbank.org/INTBIODIVERSITY/Resources/RoleofIndigenousPeoplesinBiodiversityConservation.pdf>; Wildlife Conservation Society, et. al., *Policy Brief: Supporting Indigenous Peoples who Manage Intact Forests is Crucial to Achieving Climate Goals*, <https://c532f75abb9c1c021b8c->

environment for generations to come as Indigenous Peoples have done, EP4 should include criteria for all projects that are directly linked to the Paris Agreement in 2015 and the Task Force on Climate-related Financial Disclosures (TCFD) recommendations.⁴⁴ These criteria must be a part of the early engagement with Indigenous Peoples and required of all potentially funded projects. Instituting FPIC and meaningful engagement in this way, with an added focus on climate, will allow EPFIs and client's to better understand the environmental impacts attendant to each project.⁴⁵ FPIC thus provides a safeguard for climate risk, human rights risk and financial risk.

EP4 requires reporting on Project-related GHG emissions, but it does not require that the client take action based on the findings of the Alternative Analysis to opt for the least GHG intensive option, for example.⁴⁶ Further, while EP4 requires reporting and accountability for Scope 1 and 2 emissions, there is no requirement that either the client or the EPFI report on how the project will effectively mitigate or address climate chaos. Taking note of the existence of the TCFD recommendations does little to ensure that EPFIs and clients use the standardized metrics presented therein to assess and to report on risks to the climate. EP4 therefore shows little leadership to harness the unique ability of social and environmental risk analysis, which occurs early in project design, to prevent the negative social and environmental consequences of climate change.

As stated by many participants at the non-industry consultation sessions, EP4 must not only require reporting and assessment of physical and transition risks, but must also require decision-making that supports the goal of the Paris Agreement to “pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”⁴⁷ Without taking specific steps in this regard to require assessment, reporting and decision-making regarding the ability of a Project to hold the increase of the global average temperature to below 2°C, EP4's framework remains outdated.⁴⁸

5. Grievance Process

Though not part of the targeted review process, the existing language of Principle 6 as well as the edits included in EP4 give cause for concern. First Peoples, along with many

e46e473f8aadb72cf2a8ea564b4e6a76.ssl.cf5.rackcdn.com/2018/09/12/8vckock8bw_Policy_Brief_WCS_CDU_UMD_Indigenous_Lands_and_Intact_Forest_Landscapes_v5.pdf.

⁴⁴ United Nations Framework Convention on Climate Change, “The Paris Agreement,” Art. 2(1)(a), (Dec. 2015), available at :

http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf, [hereinafter The Paris Agreement]; See also Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017).

⁴⁵ See generally Intergovernmental Panel on Climate Change, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, (August 2019).

⁴⁶ This and other recommendations have also been submitted by BankTrack.

⁴⁷ The Paris Agreement, Art. 2(1)(a), (Dec. 2015).

⁴⁸ *Id.*

participants at the non-industry stakeholder consultation sessions, noted that the lack of explicit mention of the UNGPs in Principle 6 and the lack of specificity as to requirements for EPFIs or clients goes against the EPA's stated commitment to implement the "Protect, Respect, Remedy" framework. If EP4 is truly committed either to instituting Principle 6, or to implementing the UNGPs, then the current version must be revised in line with the UNGPs to include measurable and specific criteria that evidences the existence of effective and rights-based grievance mechanisms.

UNGP Principle 29 sets forth the ways that a robust grievance process is a necessary part of a comprehensive stakeholder engagement system to understand, integrate and act upon information regarding the impacts of a project in real time. A well-designed mechanism can generate a number of benefits, including the early identification of issues which can lead to better opportunities for mutual negotiation and discussion, and possible avoidance of litigation, protests and reputational harms to the client, the EPFI and the Equator Principles.⁴⁹ Similarly, because environmental human rights risks vary widely depending on the project's location, a scoping grievance mechanism with multiple nodes for input can give the EPA and EPFIs necessary information to ensure that they are meeting their human rights responsibilities within that specific context.⁵⁰

The Equator Principles must incorporate access to remedy in two important respects: 1) to require an effective operational-level grievance mechanism at the Project level, and 2) to provide an accountability mechanism for all stakeholders when EPFIs finance projects that are not in compliance with Equator Principles standards.

A. EP4 must make explicit reference to the UNGPs in Principle 6 and must ensure clients truly implement the norms of UNGP Principles 30 and 31.

First, clients should be required to institute a grievance mechanism as to all projects, not just those in Categories A or B. Second, UNGP Principles 30 and 31 must be set forth in EP4 to ensure that a grievance mechanism is properly instituted and to ensure that grievances are heard and addressed by the most appropriate party. An effective grievance mechanism is a critically important channel for communities to raise concerns regarding human rights and environmental issues.

Finally, EP4 Principle 6 should explicitly set forth the criteria by which clients and EPFIs can measure the effectiveness of an operational-level grievance mechanism as stated in UNGP Principle 31.

B. EP4 should include a grievance mechanism at the EPA level to best align with the UNGPs, and to enhance the effectiveness of the Equator Principles.

⁴⁹ See United Nations Human Rights, Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, HR/PUB/12/02, (2012) pg 74.

⁵⁰ See *id.*, pg 77.

As aligned with Principle 30, the EPA should set up a grievance mechanism at the EPA level to accept feedback along two axes. First, to identify when EPFIs fund projects that are not in line with the goals and standards of the Equator Principles. Second, to create an option for communities to send feedback when the feedback is not accepted or addressed by the client. Many stakeholders at the non-industry consultation sessions pointed to the hypothetical scenario where an individual's complaint against a client's behavior might not be taken seriously or might be used against that individual since the grievance mechanism is directly attached to the company creating the negative impacts. EP4 should thus provide multiple options for reporting grievances so that they can be addressed quickly and without repercussions to the reporter. In this way, the EPA is uniquely situated to prevent human rights abuses that could accompany whistleblower reports.

The EPA, by instituting this mechanism, would increase the effectiveness of the Equator Principles framework by providing a method for continuous learning by EPFIs where allegations of non-compliance by clients could be investigated and understood clearly, thereby allowing banks to use their leverage to address and resolve disputes as early as possible.⁵¹ A mechanism at this level would also allow the EPA and the Steering Committee to identify instances of EPFI non-compliance, thereby providing information that feeds into the organizational commitment to create a strong brand associated with robust environmental and social risk assessment.

By instituting more specific criteria for clients on grievance mechanisms, and by instituting mechanisms to ensure EPFI compliance with the Equator Principles, EP4 cannot only provide a critical step to prevent human rights violations but also forge an innovative pathway for respectful and sustainable project finance for decades to come.

Conclusion

First Peoples Worldwide has closely monitored the Equator Principles revision process because project finance represents a unique opportunity to begin projects with long-term impacts in Indigenous communities in a rights-based manner that is protective of people and planet. The Equator Principles is also a distinct instrument to standardize a global approach that respects the self-determination and the rights of Indigenous Peoples globally.

Unfortunately, the draft text of EP4 and the ensuing consultation process does not take advantage of the opportunity for global leadership. The consultation process was not adequately designed for meaningful non-industry stakeholder engagement. As such, First Peoples is concerned that the feedback provided by BSR to the EPA and the EPFI Secretariat will not accurately reflect the vital concerns submitted by non-industry

⁵¹ See letter submitted by Accountability Counsel, the Investor Alliance for Human Rights, and BankTrack for further information on the benefits of designing and instituting an Equator Principles accountability mechanism.

stakeholders. First Peoples again calls upon BSR and the EPA to provide non-industry stakeholders with the revised draft for comment within an appropriate timeline before a vote by EPFIs.

Financial institutions globally are already recognizing the importance of early respect for human rights. For instance, the Royal Bank of Scotland announced on August 7, 2019 that it will not provide financial backing for energy developers in Alaska's Arctic National Wildlife Refuge.⁵² This is in direct response to the devastating, permanent damage that would occur due to oil and gas drilling, the forced relocation of more than 5,000 people for the project, and the detrimental effects to the livelihoods and culture of the Gwich'in people who reside near the refuge.⁵³ Banks, alone, are leading best practices as to sustainable finance.

Indigenous Peoples around the world are actively resisting the imposition of finance and investment that does not proceed in line with their rights as enumerated in the UNDRIP. When investment does not do so, Indigenous Peoples are the first to experience violence and are the first to experience the negative impacts of imposed development. Accordingly, the risks of investment without a social license to operate have grown precipitously since 2016. First Peoples urges the EP Association Steering Committee and all EPFIs to acknowledge their responsibility to respect the human rights of Indigenous Peoples by seriously considering all non-industry stakeholder feedback and the recommendations in this document by voting on a stronger EP4 that reflects our shared reality in 2019 and beyond.

As currently written, EP4 does not set forth a strong risk management framework to provide a dynamic starting place from which EPFIs can build better and more responsive social and environmental screening processes. In fact, by setting a subterranean minimum expectation of clients and EPFIs, the Equator Principles - if not further revised - can no longer be relied upon as a proxy for responsible and sustainable project finance.

⁵² Heather Richards, Royal Bank of Scotland won't fund Alaska refuge drilling, Energywire (Aug. 7, 2019); Also, Royal Bank of Scotland Joins Growing Number of Financial Institutions Rejecting Arctic Refuge Drilling, (Aug. 6, 2019) <https://www.sierraclub.org/press-releases/2019/08/royal-bank-scotland-joins-growing-number-financial-institutions-rejecting>.

⁵³ See *id.*