



## First Peoples Worldwide

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### Memorandum re: Proposed Redline Revisions to EP4

The following memorandum describes proposed revisions made by First Peoples Worldwide to the draft of the fourth version of the Equator Principles (EP4) released on June 24, 2019. This memorandum is written to provide clarity regarding the purpose of the proposed revisions.

The specific revisions in the redline document are proposed in parallel to the global changes necessary to ensure EP4's relevance moving forward. For example, First Peoples Worldwide (First Peoples) recommends eliminating the distinction between Designated and non-Designated Countries in Principle 3. The distinction itself is based on the flawed premise that host country laws are sufficiently protective of Indigenous Peoples and that host country risk assessment processes adequately screen for social risks related to development on Indigenous lands, territories and resources. The proposed redline revisions are therefore complimentary to the global changes necessary to strengthen EP4 to maximize protections for EPFIs and Indigenous Peoples in today's global economy.

#### 1. Preamble –

- a. In the second sentence of the Preamble, add “prevent” and “mitigate” to mirror the stronger standards set by the language of the *United Nations Guiding Principles on Business and Human Rights (UNGPs)*, through which EPFIs have a responsibility to respect human rights, which is referenced in the Preamble of EP4. The language of the UNGPs has been added throughout these proposed revisions of EP4 to ensure that the standards within the UNGPs are adequately integrated and implemented by EPFIs as through the Equator Principles.
- b. In the last sentence of paragraph 1, delete “Where appropriate.” As Equator Principles signatories, EPFIs must always encourage their clients to identify, prevent, and account for potential or actual adverse risks and projects in line with the Equator Principles *without qualification*.
- c. In the same sentence, replace “address” with “identify, prevent, mitigate and account for” to better align the Equator Principles with the *UNGPs* as stated in the Preamble and as explained in this memorandum 1(a).
- d. Under the first bullet, add core human rights instruments. The UNGPs demonstrate the responsibility of EPFIs to respect Human Rights, and adding the human rights instruments that delineate those rights provides necessary clarity to EP4 as a standard setting framework.
- e. Add “prevent” and “mitigate” instead of “manage” to the first sentence of paragraph 3 to bring the language of EP4 up to the level of the UNGPs.



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- f. Create a new paragraph starting with “We will not provide...”; add “where the client will not, or is unable to” to the first sentence of paragraph 4; and delete “relevant”. First, creating a new paragraph elevates the critical moments when EPFIs will *not* finance a particular project. Second, this revision retains the stronger language in Equator Principles III that clearly delineates when projects that do not comply with the Equator Principles are excluded from financing.
2. Scope –
    - a. In 5(ii), add “or in potential or actual social or environmental impacts” to require that any changes to potential or actual social or environmental impacts are identified and accounted for through the lens of the Equator Principles during refinancing.
    - b. In the last paragraph, add “actual or potential” environmental and social risks and impacts to better reflect the standards set forth in the UNGPs.
  3. Principle 1 – In paragraph 1, add “as well as other relevant human rights and environmental risk guidance promulgated by the United Nations” in reference to other international standards that are necessary and useful to identify the social and environmental impacts of a project. EPFIs can then assign risk based on a more comprehensive impact assessment.
  4. Principle 2 –
    - a. In paragraph 1, add a sentence to ensure that if the client does not conduct an Assessment process to the EPFI’s satisfaction, that the EPFI must then conduct its own due diligence (Assessment process) on the environmental and social risks and impacts of a proposed Project. With this additional layer of accountability through assessment, EP4 can be said to provide maximum protection for financial institutions as for Affected Communities and the environment.
    - b. Add “identify, prevent...” and “remedy” and delete “minimise” and “offset” to bring EP4 up to the standard set forth in the UNGPs.
    - c. In paragraph 2, delete the qualification “For Category A, and as appropriate, Category B Projects” to ensure that all the assessment standards are applied uniformly so that all social and environmental impacts are duly considered for all projects.
  5. Principle 3 –
    - a. Remove the distinction between Designated and non-Designated countries. As a global framework, the Equator Principles must apply regardless of project location.



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- b. In the new fourth paragraph, add language that requires Project compliance with the most stringent relevant standards, as between the IFC Performance Standards and the EHS Guidelines, *or* the host country laws, regulations and permits pertaining to environmental and social issues.
  - c. In the new fifth paragraph, delete the added language regarding additional processes for Designated Countries. Again, this comports with ensuring that the most robust social and environmental risk assessment standards in EP4 are applied uniformly around the world.
6. Principle 5 –
- a. In the third paragraph, delete the phrase “commensurate to the Project’s risks and impacts” to ensure that all appropriate Assessment Documents will be made available to Affected Communities without qualification. For the same reasons, and to ensure that all stakeholders have access to the same information, delete the phrase “where relevant.”
  - b. In paragraph 4, add a requirement that the client communicate the results of the Stakeholder Engagement process, not just document the process. Disclosing the results of the Stakeholder Engagement process will allow the EPFI to monitor whether the process was free and fair, and conducted according to the standards in Principle 5 paragraph 2. Further, disclosing the report to Affected Communities and all stakeholders gives those stakeholders an opportunity to comment on whether the reported process reflects the actual process undertaken, thus adding a layer of critical accountability to those most impacted by the Project.
  - c. The last sentence of paragraph 4, replace “should” with “shall” and replace the language “at a minimum” to ensure that disclosures occur as a requirement of the Stakeholder Engagement Process.
7. Principle 5 – Options for free, prior and informed consent (FPIC) as to Indigenous Peoples
- a. Remove Option 1 as an insufficient operationalization of FPIC.
  - b. The suggested language for Option 2 makes specific reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ensures the language of EP4 is aligned with the international understanding of FPIC.<sup>1</sup> Explicit reference to the UNDRIP is imperative to demonstrate an understanding

<sup>1</sup> The language regarding the Declaration is found in many United Nations reports, however is specifically referenced in the statement by then Chairperson of the UN Permanent Forum on Indigenous Issues Victoria Tauli-Corpuz at the signing of the Declaration on 13 September 2007. The statement can be referenced here: <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Statement-Press-Release-IDWIP-2007.pdf>.



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- of the need for enhanced and specialized mechanisms to integrate Indigenous Peoples' specific concerns as a part of a risk assessment process. As noted in a recent report, "The provisions of the [UNDRIP], including those to [FPIC], do not create new rights for Indigenous Peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous Peoples...."<sup>2</sup>
- c. In the second paragraph, replace "will need to" with "must" to require Project compliance with national and international laws protecting and respecting the rights of Indigenous Peoples.
  - d. In suggested paragraph 3, the added language is taken directly from EP4 Principle 3 to encourage EPFIs to align their risk management framework with the Equator Principles as a starting point. EPFIs and clients may further align FPIC due diligence procedures with the UNGPs and the UNDRIP, along with best practices within international human rights standards, as a matter of best practices.
  - e. The suggested language in paragraph 4 expands the duty for a client to show that they have secured the affirmative consent of the affected Indigenous Peoples to a Project. The addition of "potential or actual" also expands that duty in line with the language of the UNGPs. While all Projects with potential impacts on Indigenous Peoples must implement IFC PS7 and institute Informed Consultation and Participation, the requirement for affirmative consent offered in Option 2 should be widened to properly assess risk and to meet the responsibility to respect human rights as indicated in the UNGPs.
  - f. In paragraph 4, replace outdated language taken directly from IFC PS7. Add "displacement" as a specific situation for application of FPIC. Expand language to include all significant impacts on culture, not solely "critical cultural heritage...". And, include "traditional knowledge or traditional expression" as explicit situations for consideration.
  - g. In paragraph 5, add that EPFIs expect clients to work with the host government to achieve outcomes consistent with the UNDRIP, as well as IFC PS7 and Principle 5.
  - h. In paragraph 5, add language that, in the case that the host government is responsible for soliciting and obtaining the FPIC of affected Indigenous Peoples, the client is responsible to ensure that the host country does so in accordance with internationally recognized best practices regarding FPIC and in alignment with the norms established within the UNDRIP. If the client does not do so, it is

<sup>2</sup> 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, para. 3 (10 August 2018) (hereinafter Expert Mechanism Report on FPIC).



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- the responsibility of the EPFI to ensure that the client itself properly obtains the FPIC of affected Indigenous Peoples before proceeding with the project. This double layer of accountability requires due diligence on the part of the client and the EPFI to provide maximum assurance that the host country is not misrepresenting their solicitation of FPIC, or their processes to the detriment of the rights of Indigenous Peoples to give or withdraw consent according to the UNDRIP and international human rights standards.
- i. The language added for suggested paragraph 6 addresses the situation where the FPIC of Indigenous Peoples affected by the Project has not been obtained. The language is taken directly from IFC PS7 (15) but is applied to a broader situation in Principle 5 of EP4. The language here provides an operational mechanism that 1) implements an iterative process of dialogue and negotiation with Indigenous Peoples, and 2) provides a better path to a mutually agreeable Project design.
  - j. Footnote 2 is revised to reflect changes that are further described in note 13 of this memorandum.
8. Principle 6 –
- a. The language added to paragraph 2 is taken directly from IFC PS 1 (35) to “receive and facilitate resolution of Affected Communities’ concerns and grievances about the Project’s environmental and social performance.” Adding the purpose of a grievance mechanism directly into EP4 better aligns with the “Protect, Respect and Remedy” framework of the UNGPs. The added language demonstrates a commitment on the part of clients and EPFIs to use the mechanism as a critical aspect of stakeholder engagement that can feed back into the Project design and implementation.
  - b. Suggested paragraph 3 ensures that the client and the EPFI have assessed and integrated any grievance mechanisms already established by the affected Indigenous Peoples, Affected Communities or other stakeholders. EPFIs will increase their ability to receive feedback by integrating established mechanisms into the Project’s operational-level mechanism because leaders and individuals within affected communities will already know how to access existing mechanisms and may feel more comfortable doing so. Adding this as a requirement within EP4’s risk frameworks adds another critical piece of scaffolding to ensure a robust feedback loop from communities to EPFIs that provide comprehensive information for social and environmental risk assessment. Finally, recognition of Indigenous Peoples’ own grievance mechanisms equates to recognition of the authority of Indigenous governance



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and is a critical aspect to partnership with Indigenous Peoples during Project conceptualization, design and implementation.<sup>3</sup>

9. Principle 7- In paragraph 2, replace “to determine whether” with “during” to ensure that the most robust due diligence process is undertaken and that additional information informs that process but does not substitute for a more fulsome process.
10. Principle 8 –
  - a. As to Project Finance and Project Related Corporate Loans, add “Equator Principles” as a required covenant in documentation to ensure compliance with the EP4 framework.
  - b. Add a covenant, suggested letter “(d)”, requiring the client to establish an operational-level grievance mechanism as an explicit aspect of Project Finance.
  - c. As to Project-Related Refinancing and Project-Related Acquisition Financing, replace “reasonable” with “appropriate” to ensure that the most stringent standards are applied throughout the lifecycle of a Project.
11. Principle 10 –
  - a. In the first bullet of reporting requirements, delete “a summary of” to require reporting on the full ESIA to all stakeholders online. Further, add a sentence to require clients to post relevant documents online so that Affected Communities and stakeholders can view the information from which the ESIA was drawn. As a risk management framework, EP4 should require full transparency of information that clients and EPFIs use to make critical decisions about Projects that have lasting impacts on people and the environment
12. Exhibit 1: Glossary of Terms:
  - a. “Environmental and Social Assessment (Assessment)” – Delete the parenthesis and phrase “if applicable” to ensure wide inclusion of human rights and climate change risks in all assessments.
  - b. “Environmental and Social Assessment Documentation (Assessment Documentation)” – Delete “should” and replace with “shall” to require that all documentation include the assessment of adverse human rights impacts.
  - c. “Environmental and Social Management Plan (ESMP)” – Add “identify” and replace “mitigate” with “account for”; and add the words “prevention, mitigation and remediation” as language taken directly from the UNGPs. This language is a stronger replacement for “minimization and “compensation/offset”. The actions

<sup>3</sup> IWGIA, *Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples*, Report 16, (42). Available at: [https://www.iwgia.org/images/publications//0684\\_IGIA\\_report\\_16\\_FINAL\\_eb.pdf](https://www.iwgia.org/images/publications//0684_IGIA_report_16_FINAL_eb.pdf).



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- of identification, prevention, mitigation and remediation are stronger to adequately address human rights and climate change impacts.
- d. “Free, Prior, and Informed Consent (FPIC)” – Details regarding redlines are described in note 13 below.
  - e. “Indigenous Peoples” –
    - i. A more updated definition has been added to the EP4 definition. The description offered in new paragraph 3 is more encompassing than IFC PS7 because it recognizes that detachment from land and resources at issue did not have to occur in the lifetime of the Project affected Indigenous Peoples, but rather their attachment to the lands and resources survives from prior to colonization and forced relocation.
    - ii. Similarly, as the single, recognized, global consensus on the rights of Indigenous Peoples, add explicit reference to the UNDRIP as a standard for the rights of Indigenous Peoples. ILO Convention 169 is added as a reference for the non-discrimination of Indigenous Peoples.
  - f. “United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)” – Add the UNDRIP as a reference point for EP4s and clients. Adding the UNDRIP as a Term to EP4 demonstrates a commitment to operationalizing the rights of Indigenous Peoples during project finance through the Equator Principles.
13. Exhibit 1: Glossary of Terms “FPIC” - The definition of FPIC as inserted via redline into the draft text of EP4 is repeated below with citations to supporting documents. The amended definition better reflects the global consensus on FPIC as it can be operationalized to create a comprehensive social and environmental risk assessment. The revised language of Principle 5, Option 2, Footnote 2 is excerpted from this longer definition.

There is international consensus around FPIC as a human rights norm. FPIC is grounded in Indigenous Peoples’ rights to self-determination and to be free from discrimination, as guaranteed by core international Human Rights instruments.<sup>4</sup> Indigenous Peoples’ rights are expressed in the UNDRIP. The rights of Indigenous Peoples to determine their political, social, economic and cultural priorities are safeguarded by the fair implementation of FPIC.<sup>5</sup>

<sup>4</sup> Notably, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. See 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).

<sup>5</sup> Expert Mechanism Report on FPIC, para. 14.



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Pursuant to the UNDRIP, the right to be consulted, the right to participate and the rights to their lands, territories and resources are all intertwined and encompassed in FPIC.<sup>6</sup>

FPIC, as operationalized in Principle 5, builds on and expands the process of Informed Consultation and Participation to ensure the meaningful participation of Indigenous Peoples in decision-making, and to focus on fostering negotiations and dialogue with Indigenous Peoples and/or their chosen representatives towards mutually acceptable arrangements prior to decisions on proposed Projects.

“Free” refers to consent that is given voluntarily and absent of coercion, intimidation or manipulation.<sup>7</sup> “Prior” means consent that is sought sufficiently in advance of any authorization or commencement of Project activities.<sup>8</sup> Any process of consultation and participation should be undertaken at the conceptualization or design phases before crucial decisions have been made.<sup>9</sup> “Informed” means that information should be presented in a manner and form understandable to the affected Indigenous Peoples with due specificity regarding the nature and size of the Project and Project impacts.<sup>10</sup> “Consent” is the decision made by Indigenous Peoples through their leaders and/or customary decision-making processes wherein they are entitled to give or to withhold consent to proposals that affect them.<sup>11</sup>

The best practices around implementation of the UNDRIP and operationalization of FPIC as a human rights norm are described in full context in the following resources:

- Shona Hawkes, *Consent is Everybody's Business: Why banks need to act on free, prior and informed consent*, OXFAM (20 Aug. 2019).
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), G.A. Res. 61/295 (13 September 2007).
- 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).

<sup>6</sup> *Ibid.*

<sup>7</sup> Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent, E/C.29/2005/3 (hereinafter Report of International Workshop).

<sup>8</sup> *Ibid.*, at 46(i).

<sup>9</sup> Expert Mechanism Report on FPIC, para. 21(a).

<sup>10</sup> Report of International Workshop, para. 46(i).

<sup>11</sup> Expert Mechanism Report on FPIC, para. 25.





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- Report of the Special Rapporteur to the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, (A/73/176) (17 July 2018).
- 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 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, *Human rights and transnational corporations and other business enterprises*, (A/71/291) (4 August 2016).
- Report of the Special Rapporteur on the rights of Indigenous Peoples, James Anaya, *Extractive Industries and indigenous peoples*, (A/HRC/24/41) (1 July 2013).
- UN-REDD Programme Guidelines on Free, Prior and Informed Consent (2013).
- Report of the Special Rapporteur on the rights of Indigenous Peoples to the Human Rights Council, James Anaya, (A/HRC/21/47) (6 July 2012).
- Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent, (E/C.29/2005/3) (17 Feb. 2005).

### Further resources:

- 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).
- Report of the Special Rapporteur on the rights of indigenous peoples to the Human Rights Council, (A/HRC/39/17) (10 Aug. 2018).
- IRBC Working Group Enabling Remediation, Discussion Paper (May 2019).
- Carla Fredericks, Operationalizing FPIC, ALBANY L. REV. 1 (2017).
- Cathal M. Doyle, Indigenous Peoples, *Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent*, Routledge Research in Human rights Law (London and New York, Routledge, 2015), chap. 5.
- Johannes Rohr and José Aylwin, *Interpreting the UN Guiding Principles for Indigenous Peoples*, International Work Group for Indigenous Affairs, Report 16 (June 2014).
- Kristen A. Carpenter and Angela R. Riley, Indigenous Peoples and the Jurisgenerative Moment in Human Rights, 102 CALIF. L. REV. 173 (2014).



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