

9<sup>TH</sup> AUGUST 2019

# REVISION OF THE EQUATOR PRINCIPLES

The Danish Institute for Human Rights (DIHR) welcomes this opportunity to provide comments on the draft of the revised Equator Principles (EP4). The inclusion of the pledge to respect human rights in line with the UN Guiding Principles on Business and Human Rights (UNGPs) in the Preamble demonstrates a commitment by the Equator Principles Association (EPA) to align with internationally authoritative standards on business and human rights. However, a disconnect remains between this commitment and its incorporation in the operative provisions of the draft.

DIHR comments will touch upon several areas where changes would be needed to ensure that the implementation of the revised standard enables Equator Principles financial institutions (EPFI) to meet their responsibility to respect human rights under the UNGPs and responsible business conduct standards such as the OECD Guidelines for Multinational Enterprises.<sup>1</sup> These comments are not exhaustive and DIHR recommends that in the next step of legal review, the EPA draws upon these international standards to ensure adequate integration of the human rights lens in its standards and due diligence procedures.

## DESIGNATED VS NON-DESIGNATED COUNTRIES

The EP4 differentiates between “designated” and “non-designated” countries to determine the mode of application of its environmental and social standards. This is a significant deviation from international business and human rights standards. UNGPs clarify that business enterprises, including EPFI, are under a responsibility to assess and address actual and potential human rights impacts wherever they operate. While businesses can prioritize actions, the basis for prioritization should be the *severity*<sup>2</sup> of actual and potential impacts and not the *location* of projects. In other words, business enterprises, including EPFI, are expected to first assess all their impacts and risks and prioritize for prevention and mitigation those of highest severity. While country context is one relevant dimension to consider when assessing impacts, other dimensions include sector risks, project specific risks and risks associated with the business partners, for instance. Prioritisation then should not entail ‘scoping out’ certain projects from E&S due diligence but should be used to sequence interventions.

According to Principle 3 of EP4, projects in designated countries should only be assessed for their compliance with the national legislation on environmental and social issues. This downplays the risk of business and human rights abuses in high income countries and sets a lower standard of conduct than required by the UNGPs which clarify that business should benchmark impacts against international human rights standards.<sup>3</sup> According to UNGP#11, the corporate responsibility to respect human rights “exists over

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<sup>1</sup> See OECD Due Diligence Guidance for Responsible Business Conduct (2018) that provides practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises, available at <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>

<sup>2</sup> See UNGP#14, Severity of impacts is judged by the scale, scope, irremediable character of abuses.

<sup>3</sup> See UNGP#11 and UNGP#12.

*and above compliance with national laws and regulations protecting human rights” (UNGP#11 commentary). Moreover, companies are expected to “seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements” (UNGP #23). DIHR therefore recommends the removal of provisions that endorse the application of a qualitatively different and potentially lower standard of responsible business conduct across countries.*

### **ALIGNMENT WITH HUMAN RIGHTS STANDARDS**

According to EP4, the projects located in non-designated countries and some projects in designated countries should be assessed for their compliance with the applicable IFC Performance Standards on Environmental and Social Sustainability (IFC PS). It should be, however, noted that the coverage of human rights in the IFC PS do not guarantee full alignment with UNGPs. For example, the IFC PS do not stringently apply human right standards as benchmarks for environmental and social due diligence expectations and processes.<sup>4</sup> The IFC provision whereby human rights due diligence can complement environmental and social risk impact identification in limited high-risk circumstances is an indication of an incomplete alignment with the UNGPs.<sup>5</sup> DIHR recommends that EP4 be amended to include (i) a requirement for including the implementation of the UNGPs in the compliance covenants, (ii) specification of the circumstances that would trigger a stand-alone human rights impact assessment, similar to specifications around needs for a climate assessment given on page 11. In addition, a human rights gap analysis of the IFC PS could be of benefit to EPFIs.

### **STRONGER EMPHASIS ON HUMAN RIGHTS IMPACTS/RISKS**

EP4 expands the definition of environmental and social impacts and risks to include human rights (see Principle 1, 2). However, only a few operative clauses referencing “environmental and social impacts” explicitly mention “human rights”. DIHR recommends either a clarification at the outset that “environmental and social impacts” encompass human rights, or consistent references to human rights in all formulations that touch upon “environmental and social impacts and risks” (e.g. by adding ‘including human rights’.

The current draft requires a stronger emphasis on the substantive implications of the adoption of a human rights lens to impact assessment. For example, the Preamble of EP4 states that “(...) *we believe negative impacts on Project-affected ecosystems, communities and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimized, mitigated and/or offset*”. However, this

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<sup>4</sup> The IFC PS do reference the ILO Conventions in IFC PS2, make a reference to human rights principles in IFC PS4 and references to the rights of indigenous peoples in IFC PS7.

<sup>5</sup> See IFC Performance Standard 1, Assessment and Management of Environmental and Social Risks and Impacts 2012, footnote 12, p. 3: “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.” It should be noted that those circumstances are not further defined.

statement does not consider the difference between environmental and human rights impacts, i.e. negative human rights impacts cannot be offset in the same way as environmental impacts and require remediation. DIHR recommends that EP4 reflect this in its references to the avoidance, restoration and remedy of impacts.

Moreover, EP4 Principle 1 on review and categorisation does not explicitly reference the methodology for prioritization introduced by the UNGPs. According to UNGP#24, if businesses need to prioritize actions to address impacts, they should start with the most severe. UNGP#14 advises that any severity assessment should take into account the parameters of: (i) scale, i.e. gravity of impacts; (ii) scope, i.e. number of affected people; and (iii) remediability, i.e. whether those aggrieved can be restored to their situation as it was before the impact occurred.

#### **STAKEHOLDER ENGAGEMENT**

EP4 Principle 5 requires the consultation and information of stakeholders regarding the project impacts but falls short of an explicit requirement that stakeholders be involved in the assessment of impacts. UNGP #18 clarifies that the identification of risks and impacts should involve the meaningful engagement with affected rights holders. Moreover, international treaties such as the ILO Convention on Indigenous and Tribal Peoples No 169 (C169) require the participation of Indigenous Peoples in impact assessments that touch upon their rights. DIHR therefore recommends an amendment of the Principle 5 to reflect international standards on stakeholder engagement.

#### **INDIGENOUS PEOPLES**

DIHR considers that the second option proposed in the revised draft has a greater potential to close some human rights protection gaps in respect of indigenous peoples. However, it should be noted that any option that relies only on IFC Performance Standard No. 7 (IFC PS7) risks falling short of international legal standards. IFC PS7 is not fully aligned with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169 - the two globally applicable standards on the rights of Indigenous Peoples. Below are some non-exhaustive examples of non-alignment:

- Free Prior and Informed Consent (FPIC) in IFC PS7 is restricted to a consultation process at a particular point in time. However, FPIC as defined by UNDRIP, or the right to be consulted in good faith with the objective of achieving agreement or consent to the proposed measures as defined by C169, is not intended as a one-off action in the design of a project, rather it is viewed as an ongoing process.
- The criteria for identification of indigenous peoples in IFC PS7 are not consistent with the approach generally accepted at international level for the identification of indigenous peoples.<sup>6</sup> For example,

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<sup>6</sup> Based on the criteria outlined in Article 1 of ILO Convention No. 169.

PS7 adds criteria such as language which may narrow its scope of application compared to international law.

- C169 and UNDRIP both base indigenous land rights on traditional occupation and use, not legal recognition by states. IFC PS7 is ambiguous about requiring compliance with national law on the one hand, and whilst on the other hand recognising that indigenous peoples may not have formal land titles under national law but that the use of their land can often be substantiated. In circumstances where national laws, including those laws implementing host country obligations under international law, do not fully comply with international legal obligations, this could result in a significant discrepancy in the identification of indigenous peoples' lands when applying EP4 and IFC PS7 as opposed to international standards.

Given these compliance gaps, DIHR recommends that EP4 references the two international standards on indigenous people in the context of Principle 5 and align any reference to IPs with the substantive content of these standards.

### **HUMAN RIGHTS EXPERTISE**

UNGP #18 provides that business enterprises should draw on internal and/or independent human rights expertise when assessing human rights impacts. Principle 3 and 7 of EP4 provide for the use of an independent consultant in the assessment and review of category A and some category B projects. Principle 7 notes that the consultant must have "expertise in evaluating the types of environmental and social risks and impacts relevant to the projects". DIHR recommends the amendment of this provision to include a reference to human rights and indigenous peoples' expertise.

### **NON-JUDICIAL GRIEVANCE MECHANISM**

DIHR welcomes the amendment of Principle 6 to include references to "effective grievance mechanisms" and "affected communities and workers". It should be noted that the paragraph could be further aligned with UNGPs by:

- Referencing the UNGPs effectiveness criteria, e.g. legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, a source of continuous learning (UNGP#31);
- Clarifying that the purpose of the grievance mechanism is to provide remedy to affected people in addition to the "resolution of concerns and grievances";
- Clarify that EPFI have a distinct responsibility to provide remedy in cases of causing or contributing to adverse human rights impacts.<sup>7</sup>

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<sup>7</sup> See UNGP#13 on the three forms of business involvement with adverse human rights impacts: cause, contribute and directly linked. See UNGP#22 on the responsibility to remediate adverse impacts that companies have caused or contributed to.

## **REPORTING AND TRANSPARENCY**

The reporting requirements outlined in Principle 10 of EP4 - for both the client and the EPFI - are not aligned with the UNGPs<sup>8</sup> and the disclosure policy<sup>9</sup> of the financial institution, i.e. IFC, on whose standards the EPA rely on. DIHR recommends that for category A projects, clients should be required to disclose, at a minimum, the full ESIA, the ESMP and the EP Action Plan. DIHR also recommends that the EPFI public reporting should include information about the human rights risks and impacts it is connected to via project finance and the measures taken to avoid and address these impacts.

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<sup>8</sup> See UNGP#21: "In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. (...) In all instances, communications should: (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences; (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved; (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality."

<sup>9</sup> See IFC Access to Information Policy (2012).