

To: ALL EQUATOR PRINCIPLES FINANCIAL INSTITUTIONS (EPFIs)

CONCERNING: CIVIL SOCIETY EXPECTATIONS REGARDING THE EQUATOR PRINCIPLES (EPs) REVISION PROCESS

Nijmegen, October 11 2018

Dear EPFI representative,

It is almost a year since the Equator Principles Association (EPA) at its 2017 Annual Meeting in São Paulo, Brazil responded to the call¹ from almost 250 civil society organisations to fundamentally reform the Equator Principles, by announcing a ‘targeted update process’ that is to lead to a new set of Equator Principles (EP4) by mid-2019.²

This ‘update process’ is now firmly underway. Over the last few months several of our organisations have constructively engaged in the external stakeholder consultation process and provided input and suggestions on a wide range of topics. However, due to a lack of transparency with this process we do not know at this point how, or even if, this input is being considered in your internal discussions.

We understand that during your upcoming Annual Meeting in Washington, D.C. you will seek to establish a basic agreement between all EPFIs on the general direction of the update process with respect to four key identified topics: social impact and human rights; climate change; designated countries and applicable standards; and the scope of applicability of the EPs. Following such agreement, the concrete drafting process for EP4 will begin.

Given that this meeting will lead to important decisions relating to not only the revision process going forward but also to the revisions themselves, we thought it timely to share with you once more our expectations, as a broad range of civil society organisations, on the eventual outcome of the revision process. These will serve as the criteria for us to assess the outcome in a public response.

A CALL FOR AMBITION

Let us first state that it would be a severe mistake if the EPA were to approach this process with an insufficient level of ambition. This would result in an EP4 which, just like EP3, will not shield adopting banks from certain risks associated with financing large scale projects. In fact, it will perpetuate the current situation where adopting banks may still finance projects ‘under EPs’ that have devastating impacts for the environment and communities, often with serious knock-on impacts for project costs and bank reputations.³

It did not escape our attention that the process now underway is consistently presented by the EPA as an ‘update’, rather than a ‘revision’ process. Given the fundamental shortcomings of EP3 - hence our call last year for *fundamental* reform - EP4 should not merely be an adaptation of the current EPs.

We seek ambitious and robust new commitments on the four topics currently included in the revision process, in particular on climate change and human and community rights, as we have highlighted in several

¹ www.equatorbanksact.org

² <http://equator-principles.com/ep-association-news/ep-association-annual-meeting-2017-outcomes/>

³ For ample examples we refer to the ‘Dodgy Deals’ section of the BankTrack website:
<https://www.banktrack.org/search#category=dodgydeals>

communications from civil society groups over the past two years.⁴ In addition, EP4 must contain further substantial commitments to strengthening transparency and accountability.

A COMMITMENT ON COMBATING CLIMATE CHANGE

The EPs have so far failed to ensure that EPFIs adequately respond to climate change as an existential risk to the planet, as well as to their own business operations.

Climate change, long considered an urgent but future threat, is now upon us. We now all live in countries impacted one way or the other by climate change: heat waves and fires; droughts and water shortages; excessive rainfall and floods; hurricanes and hail storms; failing crops and shifting seasons; rising sea levels and warming oceans; the extinction of plant and animal species; creeping desertification; and forced migration and other climate-related disruptions of communities and livelihoods. What is already bad enough today will soon get worse as we start to reach tipping points, after which changes will accelerate and bring further havoc to an already severely strained planet.⁵

A great majority of the world's countries have responded to this severe risk by signing the 2015 Paris Agreement, with a central objective of "keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius".⁶ A recent IPCC report further emphasized the urgent necessity of aiming for that latter goal if we want to prevent global climate breakdown.⁷ Meeting this goal requires, amongst other things, an urgent, managed and just transition, away from fossil fuels and towards renewable energy sources. The development of new fossil fuel projects is incompatible with this goal.⁸

EP3 places no restrictions on the financing of projects related to the exploration, exploitation, transport and burning of fossil fuels (oil, gas, coal). EP3 also places virtually no obligation on project sponsors to ensure that projects financed 'under EPs' limit their impact on climate change. This is a direct contradiction of the stated objective of the EPs "to ensure that the projects we finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management practices". It also contradicts your stated belief that "climate change is important" and that "negative impacts on project-affected ecosystems, communities, and the climate should be avoided where possible".

To align the EPs with the Paris Agreement EP4 must see a drastic strengthening of the collective climate change commitments of EPFIs. This requires including in the preamble of the EPs an *explicit* commitment to fully align the EP initiative with the goals of the Paris Agreement. It also requires including stringent and binding criteria for all projects to be considered under the EP framework to be fully aligned with the Paris goals. Finally, it requires categorically excluding financial support for the construction of new fossil fuel extraction and transportation infrastructure, and fossil fuel-based power generation projects.

A COMMITMENT TO HUMAN RIGHTS AND COMMUNITY RIGHTS

The EPs have consistently failed to prevent the financing of projects involving severe and often foreseeable human rights abuses. In fact, it is one of these projects - the Dakota Access Pipeline (DAPL), with not only massive human rights violations but also massive damage to the reputation of the involved EPFIs and the EP initiative as a whole - that led a group of EPFIs to publicly argue for a 'significant improvement' of the EPs.⁹

⁴ See for example:

https://www.banktrack.org/download/letter_from_65_organizations_to_equator_principles_association_on_brazil_annual_meeting/170829_final_letter_to_epa_with_signatories_2.pdf

⁵ <http://www.pnas.org/content/115/33/8252>

⁶ <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>

⁷ http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf

⁸ See: <http://priceofoil.org/2016/09/22/the-skys-limit-report/>

⁹ See:

https://www.banktrack.org/download/letter_from_10_banks_to_epa_secretariat_on_designated_countries_eps/170522_letter_banks_on_designated_countries.pdf

The EPs reference the UN Guiding Principles on Business and Human Rights (UNGPs) but do not fully align with them - for example, by giving the impression that human rights due diligence is only required "in limited high-risk circumstances".¹⁰ To help prevent human rights violations in projects financed under the EPs, EP4 must ensure full alignment with the UNGPs. This would include ensuring that human rights due diligence is properly integrated into the banks' environmental and social review of projects. Likewise, the reporting, monitoring, and access to remedy requirements as outlined in the sections on transparency and accountability below must also be included.

EP4 must further include an explicit commitment to uphold the right of all Indigenous Peoples, whether in designated or non-designated countries (see below), to Free, Prior and Informed Consent (FPIC) regarding any projects affecting them and their traditional territories. It must ensure that projects that have not obtained such consent do not receive financing under the EPs. EP4 should also require strengthened due diligence and consultation processes to ensure that Indigenous Peoples' rights are fully respected. It is important that Indigenous Peoples and other project-affected communities have full access to grievance channels with project sponsors and financing banks when their rights and interests are violated.

EP4 must also contain specific commitments to respecting the land rights of communities in all transactions financed by EPFIs. This is necessary to prevent land-related abuses that arise when communities are actively denied the tools to have their existing land tenure rights recognised. The inability of many communities to assert or reasonably defend a legal claim to land not only deepens the likelihood of abuse against project-affected communities, it also increases EPFIs' exposure to significant risks, namely to handling the proceeds of corruption, fraudulent leases or extrajudicial violence and to financing operations on lands subject to uncertain, contradictory or overlapping legal claims.

EP4 should also move beyond the requirements included in Performance Standard 5 of the International Finance Corporation (IFC)¹¹ and exclude any financing to projects that require forcible evictions or that take place on lands acquired through forcible evictions within the last ten years. EP4 should also make a time-bound commitment to phase in community consent on land use as an industry standard - recognising that this is the most effective mechanism to protect projects against any legal or reputational shifts in perceptions of tenure rights and provides a single framework that can be applied across countries and contexts. This should be adopted in line with the right of Free, Prior and Informed Consent for Indigenous Peoples, and as a principle for non-indigenous communities as well. EP4 should explicitly state that where voluntary resettlement or transfer of land is consented to by communities, EP banks require that compensation should result in improved financial or living circumstances for affected individuals.

A COMMITMENT TO FULL TRANSPARENCY

The EPs have to date failed to capture the fundamental importance of full transparency, both for the proper implementation of the EPs on a project level and the overall credibility of the initiative.

It is not consistent or credible to claim that "adoption of and adherence to the EPs offers significant benefits to us, our clients, and local stakeholders through our clients' engagement with locally Affected Communities"¹², while at the same time not allowing communities access to loan information that is critical for them to have the necessary information to be able to engage with EP clients and EP processes.

Current transparency commitments in EP3 are wholly insufficient and must be substantially strengthened. EP4 must at a minimum require that adopting banks publicly disclose project names and project sponsors for all projects financed 'under EPs' immediately after financial close. Reporting by project name must no longer be subject to obtaining client consent in the current ad-hoc manner. All financing obtained from EPFIs must be conditional upon the project sponsor(s) agreeing to the loans being publicly reported by the banks.

¹⁰ See EP3, Principle 2

¹¹ https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps5

¹² Preamble: http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf

Data disclosure on the EPA website should also be improved so that all projects financed under the EPs are no longer listed per bank but included in a database searchable by year and by sector, with details of each EPFI taking part in the financing as well as project sponsor(s) names. Links to all documents publicly disclosed by the project sponsor(s) as part of their commitment to meet the requirements of EPs should also be included.

Publishing project loan information will also be critical to informing stakeholders of the benefits they are supposed to reap from the EPs being applied to the project. If client confidentiality considerations prevail over full transparency as to where, when, how and by whom the EPs are implemented, the supposed commitments to communities remain empty and largely meaningless.

While the commitments above would improve transaction reporting after financial close, good practice among financial institutions is now moving in the direction of disclosure of projects under consideration. This allows communities and civil society organisations to raise concerns about the project's environmental and social risks at an early stage. This would result in substantial benefits for EPFIs' risk management, which is claimed as key objective of the EPFIs. EP4 must, therefore, urge banks to disclose proposed as well as completed financing and move in the direction of ensuring this becomes standard practice amongst EPFIs.

A COMMITMENT TO ACCOUNTABILITY

The EPs have also failed to capture the fundamental importance of full accountability for the proper implementation of the EPs both on a project level and for the overall credibility of the initiative.

As discussed above, the lack of transparency with respect to banks' involvement in financing projects often leaves affected communities unaware of the potential benefits of the EPs and the protections they may incur to them. At the same time, the absence of any accountability mechanism within the EPA framework leaves communities without any means to seek redress from the financing banks for damage to their rights and legitimate interests that should have been prevented by the proper implementation of the EPs. Again, claims about the benefits for affected communities must be accompanied by firm commitments to these same communities, including recognition of the fact that even with the best intentions things can go wrong and sometimes do go wrong.

The UNGPs, referenced in EP3, explicitly require that "industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available". They go on to state that "such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties, or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. The legitimacy of such initiatives may be put at risk if the provision of such mechanisms is not made".¹³

Following this requirement, while the EPFIs need to ensure that project sponsors comply with the EPs, they also need to establish better accountability for themselves. Despite the clear requirements of the UNGPs, the EPs do not provide any means for grievances to be raised to EPFIs, in cases where affected people or their legitimate representatives believe the banks have not met their EPs commitments. This creates a fundamental problem of accountability - banks cannot currently be held accountable in a formal, structured way for meeting their responsibilities under the EPs. This approach potentially allows 'free riders' to sign up to the EPs without adequate implementation and puts the legitimacy of the EPs overall at risk.

EP4 must ensure that access to remedy is readily available for all communities affected by EPs projects through the establishment of not only project level grievance mechanisms by the project sponsor(s) but also at the level of the EPA initiative itself. This would require the establishment of a legitimate, independent complaints mechanism, created in consultation with potential users. It should pay close attention to the effectiveness criteria of the UNGPs. Furthermore, it should provide potential users with the option of reviewing bank compliance with the EPs or seeking remediation for impacts through mediated dialogue.

¹³ Emphasis added. [UN Guiding Principles](#), Principle 30 and 31, with commentary

A COMMITMENT TO FULL IMPLEMENTATION, GLOBALLY

The conflict surrounding DAPL also brought to light the fundamental shortcomings of EP3 in jurisdictions where the EPs consider it sufficient to be in compliance with the legal framework in order to equal or exceed the safeguards contained in the IFC Performance Standards and the World Bank Group Environmental, Health, and Safety Guidelines: the so-called Designated Countries.¹⁴ In this case, indigenous rights as well as other legitimate community rights and interests were not adequately safeguarded despite the United States' status as a designated country.

To shield banks from the risks associated with financing projects that lead to environmental damages and the violation of human and community rights despite being in compliance with local legislation, EP4 must ensure that projects financed 'under EPs' anywhere in the world will comply with the same robust safeguards. Common sense dictates that the distinction between designated and non-designated countries, criticised since the inception of the EPs in 2003, is finally abolished.

Good faith implementation of the EPs also requires that the scope be extended beyond direct project finance loans and 'corporate loans where proceeds are known'. Rather, the EPs should apply broadly to all finance, in whatever form, provided by adopting banks to companies planning to construct and/or operate projects with potential negative impacts on the environment and communities. For example, this should include the issuing of 'corporate bonds' to finance specific project undertakings.

We hope that this letter provides further guidance and inspiration for your meeting and will help lead to a new version of the EPs that is robust enough to assist banks in meeting the formidable social and environmental challenges of our times. We commit to continue closely following your revision process and welcome further engagement to assure a mutually beneficial end result.

Please do not hesitate to contact any or all of us through the contact email below.

Yours sincerely

Johan Frijns, director BankTrack, <johan@banktrack.org>

On behalf of:

1. Drew Hudson, **198 methods**, United States
2. Shin Furuno, **350.org** Japan, Japan
3. Kindra Mohr, **Accountability Counsel**, United States
4. Okereke Chinwike, **African Law Foundation (AFRILAW)**, Nigeria
5. Zoe Cina-Sklar, **Amazon Watch**, United States
6. Yedan Li, Ginger, **Association 3 Herissons**, France
7. Elana Berger, **Bank Information Center**, United States
8. Luiz, **Bretton Woods Project**, United Kingdom
9. Igor Vejnovic, **CEE Bankwatch Network**, International
10. Jorge Daniel Taillant, **Center for Human Rights and Environment**, USA/Argentina
11. Carla García Zendejas, **Center for International Environmental Law**, international
12. Bo Wen, **China Environmental Paper Network**, China
13. Paul Guy Hyomeni, **COCODHD**, Cameroun
14. Helen Rosenbaum, **Deep Sea Mining Campaign**, United Kingdom
15. Michelle Cook, **Divest, Invest, Protect**, United states
16. Bodo Ellmers, **European Network on Debt and Development (Eurodad)**, Europe
17. Thomas Küchenmeister, **Facing Finance**, Germany
18. Helen Tugendhat, **Forest Peoples Programme**, United Kingdom
19. Hozue Hatae, **Friends of the Earth Japan**, Japan
20. Karen Orenstein, **Friends of the Earth U.S.**, United States

¹⁴ <http://equator-principles.com/designated-countries/>

21. Julia Fish, **Fund our Future**, South Africa
22. Heike Drillisch, **GegenStroemung – CounterCurrent**, Germany
23. Adam McGibbon, **Global Witness**, United Kingdom
24. Diana Best, **Greenpeace International**, International
25. Natalie Bugalski, **Inclusive Development International**, United States
26. Johannes Rohr, **INFOE - Institute for Ecology and Action Anthropology**, Germany
27. Jocelyn Medallo, **International Accountability Project**, International
28. Maurice Ouma Odhiambo, **Jamaa Resource Initiatives**, Kenya
29. Made Ali, **JIKALAHARI**, Indonesia
30. Luke Fletcher, **Jubilee Australia**, Australia
31. Andy Whitmore, **London Mining Network**, United Kingdom
32. Bernadette Maheandiran, **Market Forces**, Australia
33. Charles Roche, **Mineral Policy Institute**, Australia
34. Robin Martinez, **National Lawyers Guild - Environmental Justice and Environmental Human Rights Committees**, USA
35. Annabel S perrero, **NGO Forum on ADB**, Philippines
36. Lorne Stockman, **Oil Change International**, International
37. Shona Hawkes, **Oxfam**, International
38. Chris Saltmarsh, **People & Planet**, United Kingdom
39. Andreas Missbach, **Public Eye**, Switzerland
40. Patrick McCully, **Rainforest Action Network**, United States
41. Sonia Hierzig, **ShareAction**, United Kingdom
42. Ben Cushing, **Sierra Club**, United States
43. Mark Meaney, **The Leeds School of Business CU Boulder**, United States
44. Regine Richter, **urgewald**, Germany
45. Osprey Orielle Lake, **Women's Earth and Climate Action Network (WECAN) International**, United States