

OCTOBER 1, 2020

## Updated Equator Principles Take Effect

The fourth version of the Equator Principles (EP4), a financial industry benchmark used by Equator Principle Financial Institutions (EPFIs) to assess and manage environmental and social risk in international project finance, takes effect on October 1, 2020. EPFIs commit that they will not finance projects that do not comply with applicable EP4 requirements, reinforcing the increasing significance of climate change, human rights and Indigenous consultation in project due diligence.

### Human Rights

EP4 clarifies that human rights due diligence is to be carried out in accordance with the *United Nations Guiding Principles on Business and Human Rights* and that an assessment of the potential adverse effects that a project may have on human rights must be completed even for lower-risk projects that do not require a full impact assessment.

### Climate Change

EP4 confirms that EPFIs have a responsibility to improve the availability of climate-related information when conducting risk assessments. Climate-change risk assessments under EP4 should be aligned with the risk categories outlined in the recommendations of the *Task Force on Climate-related Financial Disclosures*. EP4 requires an assessment of the physical risks of climate change for most projects. For projects with total annual emissions of at least 100,000 tonnes of carbon dioxide equivalent, EP4 requires an assessment of climate-change transition risks and an analysis of less carbon-intensive alternatives.

### Free, Prior and Informed Consent

EP4 strengthens the Free, Prior and Informed Consent (FPIC) requirements for consultations with Indigenous communities, a move triggered, in part, by the Dakota Access Pipeline controversy. Some EPFI banks financing that project were criticized for not adequately screening potential impacts to Indigenous communities.

Under EP4, transactions in designated (high-income OECD) countries, like Canada and the United States, must now be benchmarked against the FPIC requirements set out in the *International Finance Corporation Performance Standard 7, Indigenous Peoples (IFC7)*. Due diligence for all projects affecting Indigenous peoples must also include a process of “informed consultation and participation,” to be performed in compliance with the rights and protections afforded to Indigenous peoples under project-host-country laws.

### Key Takeaway

In Canada, the most significant change brought about by EP4 is arguably the new FPIC requirement for consultations with Indigenous peoples, which potentially imposes a more stringent standard than what is currently required under Canadian law (even as compared with the enhanced consultation requirements under the federal *Impact Assessment Act*). However, EP4 confirms that there is no single universally accepted definition of FPIC and does not define the concept other than to state that FPIC does not require unanimity or confer a veto right to individuals or subgroups. EP4 also contemplates justified deviations from the FPIC requirements in IFC7 in circumstances in which it is unclear whether FPIC has been achieved following documented good faith negotiations that are IFC7 compliant.

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