PUBLIC DISCLOSURE AND GLOBAL SUSTAINABLE DEVELOPMENT IN THE BANKING INDUSTRY: THE EQUATOR PRINCIPLES

*By Poonam Puri**

Abstract

The Equator Principles are a set of voluntary standards for international financial institutions, first created in 2003 by some of the world's largest banks. They establish a framework for these institutions to adhere to in the evaluation, management, and mitigation of the social and environmental consequences of the projects they finance in excess of $10M. In 2006, the Principles were updated to include a reporting requirement (Principle 10). The study examines the significance of the reporting standards of the Equator Principles in the global sustainable development movement and its relationship to compliance and private enforcement. Specifically, the project finance reporting practices of all 67 member institutions are evaluated for depth, consistency, clarity, and accessibility, on a bank-by-bank and regional basis. Implications for compliance and enforcement are discussed.

The analysis shows that several Equator Principle Financial Institutions have reported their project financing activities inconsistently and lacking in depth, obscuring their role in international project financing and sustainable development. Furthermore, reporting by banks within the same country varied even more dramatically, and Equator Principle project finance reports were often difficult to access and appeared in various different formats. This lack of consistency, accessibility, and depth precludes a meaningful analysis of a bank's social and environmental performance by NGOs, researchers and other interested parties. Without standardized reporting, regional contributions to the world's large-scale projects are also indeterminable. Therefore, it is argued that the Equator Principles reporting guidelines should be updated to encourage more consistent and detailed reporting. The current minimum reporting requirements are rather superficial and do not allow for a meaningful evaluation of compliance with the spirit underlying the Equator Principles. Thus the Equator Principles' effectiveness in promoting transparent, sustainable development, and social and environmental responsibility by member financial institutions is called into question. The paper concludes by examining the challenges of private enforcement and ways forward to achieve the goals underlying the Equator Principles.

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I. Introduction

The Equator Principles (EPs) are one of many voluntary, non-biding mechanisms that govern corporate actions to promote sustainable development globally. The EPs were developed by some of the world's leading financial institutions in 2003 as a form of self-regulation, albeit one without any form of enforcement mechanism. Like the vast majority of these mechanisms, the EPs owe their existence to the sustainable development movement that became part of global discourse in 1987 following the World Commission on Environment and Development ("Brundtland Commission"). The definition of sustainable development that emerged from the commission is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[1] While this definition has been met with some criticism because of its vagueness,[2] it does contain the social, environmental, economic, and generational interests that form the core of sustainability even today. Sustainable development has similarly been described as "not the trade-off between business and the environment, but the synergy between them."[3]

Following the Brundtland Commission, sustainable development was integrated into a number of international accords as the sustainability movement began to gain traction with policy-makers. At the Rio Declaration in 1992, the United Nations (UN) confirmed that sustainable development had become a fundamental principle of international law.[4] In recent years, there has been a surge of international environmental agreements, including the EPs, which now form a body of legal norms and principles, collectively referred to as global environmental law,[5] through a process known as integration and harmonization.[6]

The importance of changing the behaviours of corporations to the sustainability movement was acknowledged as early as 1992.[7] Early attempts at regulation focused on polluters of air and water, primarily in the manufacturing industry. The results of a recent Environmental Protection Agency (EPA) study suggest that these efforts have been

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[1] Sam Headon, "Whose Sustainable Development? Sustainable Development under the Kyoto Protocol, the 'Coldplay Effect,' and the CDM Gold Standard" (Winter, 2009) 20 COLO. J. INT'L ENVTL. L. & POL'Y at 131.
[2] *Ibid* at 133.
[3] Dr. Alan D. Hecht, "The Next Level of Environmental Protection: Business Strategies and Government Policies Converging on Sustainability" (Fall, 2007) 8 SUSTAINABLE DEV. L. & POL'Y at 19.
[4] Headon, *supra* note 1 at 132.
[5] Tseming Yang & Robert V. Percival, "The Emergence of Global Environmental Law" (2009) 36 ECOLOGY L.Q. at 615. Other agreements that form part of global environmental law include the U.N. Framework Convention on Climate Change, the Kyoto Protocol, and International Tropical Timber Agreement, among others.
[6] *Ibid* at 636.
[7] Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis Canada Inc.: 2009) at 18.

somewhat successful in creating shifts in corporate behaviour and interest in environmental issues.[8] For example, a number of large retailers, most notably Wal-Mart, have insisted that their suppliers conform to certain environmental standards as a condition for doing business.[9] In some markets, Europe in particular, it has become increasingly important for companies to be socially and environmentally responsible, and in some cases independent certification is required to attract consumers.[10] Whether these changes in behaviour are a product of increased environmental regulation or a genuine concern about environmental issues among corporate actors is unclear. However, by focusing on the companies that visibly pollute or exploit resources, rather than the financial institutions that sponsor them, some believe early environmental regulations have done little to curb unsustainable trends.[11]

The desire of some states to achieve economic development and growth through attracting foreign investment may trump environmental and social concerns.[12] As these nations compete for foreign investment by continually undercutting each other, there is incentive to set low sustainability standards in order to reduce abatement costs.[13] This is what is termed the "race to the bottom," and is one of the primary concerns of sustainable development supporters, particularly in developing nations where the need for foreign investment is greater.

For example, in 2005, the Uruguayan government welcomed a paper pulp mill project ("Orion") that would be the largest capital investment in the country's history.[14] The investment, totaling 10% of the country's GDP, would have a significant and lasting impact on Uruguay's economy, increasing their GDP by 2% per year.[15] However, the Governor of the city expected to be most affected by the mill saw this project as an example of European corporations moving their operations to countries with lax environmental regulations.[16] The federal government in this case saw only the potential economic windfall to be gained by this project while failing to acknowledge the potential harm, both short- and long-term.

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[8] EPA study cited in Hecht, *supra* note 3 at 21.
[9] Yang & Percival, *supra* note 5 at 634.
[10] Antonio Vives, "Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries" (2008) 83 CHI.-KENT L. REV. at 227.
[11] Benjamin J. Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" (2008) 46 OSGOODE HALL L.J. at para 2.
[12] Natalie L. Bridgeman & David B. Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism" (Winter, 2008) 20 GEO. INT'L ENVTL. L. REV. at 196.
[13] Headon, *supra* note 1 at 140.
[14] Vivian Lee, "Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay" (Spring, 2008) 6 U. J. INT'L HUM. RTS. at 359.
[15] *Ibid* at 360.
[16] *Ibid* at 360.

More recently, environmental groups began focusing on commercial banks and private institutions that were funding environmentally damaging projects avoided by the World Bank and other public entities.[17] Because of the significant influence of these institutions on the sustainable practices of private companies,[18] and on the sustainability movement as a whole,[19] some have suggested that financial institutions should be viewed as having "special public responsibilities."[20] The potential role of financial institutions in advancing the sustainable development agenda will only continue to grow. With growing global energy demands, it is estimated that developing nations will require investment in electricity of U.S. $165 billion annually, increasing at a rate of about 3% per year through the year 2030.[21] To prevent a "race to the bottom" in these developing countries, it became critical to create environmental standards in countries that were the source of project funding.[22]

Mainstream financial institutions themselves saw sustainability and socially-responsible investment (SRI) as a "fringe sector," until they realized that the actions of the companies they funded had real financial repercussions for the banks.[23] This was due in part to the effect bad publicity had on the solvency of borrowers.[24] Fears of liability and litigation have also contributed to the increased awareness of social and environmental issues in the financial industry.[25] However, NGOs may have been the most influential in making financial institutions aware of the consequences of the project they finance. In project financing, banks are most concerned about the projected future cash flows from a project[26] since this is the source of the return on their investment. NGOs exposed the means by which borrowers produced those cash flows, which often involved exploitation of natural and human resources in countries desperate for foreign investment.

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[17] Miki Kamijyo, "The 'Equator Principles': Improved Social Responsibility in the Private Finance Sector" (Summer, 2004) 4 SUSTAINABLE DEV. L. & POL'Y at 35.

[18] Elisa Morgera, "Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation" (Winter, 2007) 18 COLO. J. INT'L ENVTL. L. & POL'Y at 151.

[19] Benjamin J. Richardson, "Joining Forces for Environmental Governance" book review (7) (2006) 2 MCGILL J.S.D.L.P. at para 12.

[20] Richardson, *supra* note 11 at para 8.

[21] Kirk Herbertson & David Hunter, "Emerging Standards for Sustainable Finance of the Energy Sector" (Spring, 2007) 7 SUSTAINABLE DEV. L. & POL'Y at 4.

[22] Richardson, *supra* note 11 at para 5.

[23] *Ibid* at para 4.

[24] *Ibid* at para 4.

[25] Julia Philpott, "Keeping it Private, Going Public: Assessing, Monitoring, and Disclosing the Global Warming Performance of Project Finance" (Spring, 2005) 5 SUSTAINABLE DEV. L. & POL'Y at 46.

[26] Equator Principles Preamble. Online: http://www.equator-princples.com/principles.shtml

The global reach of NGOs allows them to scrutinize the activities of private entities wherever they operate.[27] The role of NGOs is particularly important in developing countries, where poor and marginalized communities lack the resources to expose their hardship to the public.[28] NGOs were a primary driving force in the development of the EPs as they began to focus on financial institutions that were lending to governments and corporations involved in harmful environmental practices.[29]

After public outcries and demonstrations from NGOs regarding the lending practices of commercial banks, the targets of these criticisms convened to address the environmental and social issues that were damaging their public image. The product of this cooperation was the EPs, first revealed in 2003. The EPs are voluntary, normative standards, composed of 10 principles that guide financial institutions toward a desired performance,[30] with an end goal of making sustainable development itself a global standard. What makes the EPs unique in comparison to the multitude of other voluntary international agreements is that they focus on the financial sector, and project financing in particular. In the Preamble of the EPs, the importance of project finance and of the financial sector more generally to sustainable development is overtly recognized.[31] So too is the likelihood of such projects facing complex social and environmental issues locally and globally.[32] The EPs require that member financial institutions, known as Equator Principle Financial institutions (EPFIs) analyze these risks and create appropriate mitigation measures to manage them and ensure that their investments do not contribute to environmental harm.[33]

There is significant disagreement as to the real impact of the EPs on promoting sustainable development in project finance.[34] The IFC has observed a shift in institutional behaviour, whereby EPFIs use environmental assessment results to decide whether they want to be the lender to a particular borrower.[35] With private investments now dwarfing intergovernmental lending, and EPFIs accounting for the great majority of global project financing,[36] the EPs certainly have the potential to impact the type of development projects that receive funding. However, their impact may be limited because the EPs are voluntary and therefore cannot be enforced through traditional mechanisms of public law.[37] To that end, concerns persist that EPFIs fail to adequately consider the long-term

[27] Bridgeman, *supra* note 12 at 192.
[28] Richardson, *supra* note 11 at para 13.
[29] Jayne W. Barnard, "Corporate Boards and the New Environmentalism" (Winter, 2007) 31 WM. & MARY ENVTL. L. & POL'Y REV. at 312.
[30] Richardson, *supra* note 11 at para 27.
[31] EP Preamble. Online: http://www.equator-princples.com/principles.shtml
[32] EP Preamble. Online: http://www.equator-princples.com/principles.shtml. *see also* Lee, *supra* note 14 at 359.
[33] Yang & Percival, *supra* note 5 at 633.
[34] Lee, *supra* note 14 at 359.
[35] Philpott, *supra* note 25 at 46.
[36] Yang & Percival, *supra* note 5 at 633.
[37] *Ibid* at 633.

effects of the projects they fund under the EP framework, limiting the scope of their assessments to immediate social and environmental concerns.[38]

The case of the Orion paper mill exemplifies the ambivalence surrounding the EPs. While the Uruguayan government was enthusiastic about the economic benefits of the project as the country recovered from a period of recession,[39] an Argentina-based NGO, the Center or Human Rights and Environment (CEDHA), began a public shaming campaign in an attempt to hold ING Group and Calyon (the investment branch of France's Crédit Agricole) accountable to the EPs, among other international environmental and human rights laws.[40] Because the EPs are voluntary and do not establish a mechanism for self-enforcement, CEDHA's campaign was essentially limited to exposing the EPFIs to public scrutiny.[41] However, in letter to both banks, CEDHA stated that the evidence "shows beyond a doubt that these projects are in direct violations of IFC policy, an as a consequence, violate the Equator Principles." Following the CEDHA campaign, ING Group withdrew from the project, although ING stated that the decision was not based on EP compliance.[42] Calyon, on the other hand, did not withdraw, [43] as the project was determined to comply with the procedural requirements of the EPs.[44] The Orion mill was constructed and installed on schedule and has been operating since September 11, 2007.

The CEDHA's failure to stop the construction of the Orion paper mill in Uruguay demonstrates some of the limitations of the EPs as a regulatory mechanism. Furthermore, even if Calyon had also withdrawn, another bank not adhering to the EPs and with less fear of public backlash may have stepped in to fund the project. Despite these issues, the withdrawal of ING from the project shows the potential of voluntary commitments as "a forum in which interested non-state actors – individuals, NGOs and corporations – may participate actively in the development of corporate human rights responsibilities."[45] Moreover, having the funding provided by Calyon likely resulted in some mitigation of the environmental consequences; because of the assessment and consultation requirements imposed by the EPs, EPFI involvement can make admittedly damaging projects less harmful.[46] However, due to a lack of empirical research, it remains unclear whether, and to what degree, the EPs have advanced the sustainable development agenda, and what their impact is on the environment itself.[47]

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[38] Philpott, *supra* note 25 at 46.
[39] Lee, *supra* note 14 at 359.
[40] *Ibid* at 356.
[41] *Ibid* at 357.
[42] *Ibid* at 364.
[43] *Ibid* at 357.
[44] *Ibid* at 370.
[45] *Ibid* at 358.
[46] David B. Hunter, "Civil Society Networks and the Development of Environmental Standards at International Financial Institutions" (Winter, 2008) 8 CHI. J. INT'L L. at 469.
[47] Andrew Hardenbrook, "The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility" (January, 2007) 40 VAND. J. TRANSNAT'L L. at 231.

The EPs are but one example of regulatory reforms that are contributing to the changing landscape of the banking industry, where there is a growing emphasis on risk management and accountability to the public, creating a broader definition of "stakeholder" in the minds of financial institutions.[48] Similarly, judicial interpretations of the fiduciary duty of directors indicate that directors are to consider the interests of stakeholders when making decisions about the corporation.[49]

This study seeks to determine the effectiveness of the EPs as a regulatory mechanism for promoting sustainable development practices by EPFIs and their borrowers through an analysis of the data provided by the banks themselves pursuant to the reporting requirements of principle 10 of the EPs. A quantitative analysis of this data will allow us to answer a number of questions, including where financing for the most controversial projects is coming from, what trends exist in project financing as a result of increasing global environmental regulation, and what the impact of the recent global recession has had on project financing. A qualitative analysis will allow us to answer questions about whether banks are reporting up to or beyond the standards imposed by the EPs, and whether banks have chosen to disclose additional information about the projects they finance in order to meet the transparency demands of NGOs and other interested private parties. The analysis allows us to then suggest recommendations for reform to the EPs themselves and to bank practices and procedures.

This paper proceeds as follows. Part II provides the development and history of the EPs. Part III reviews existing literature on the EPs. Part IV describes the methodology of this study. Part V provides a discussion of the qualitative aspects of the EPFI reports. Part VI provides a quantitative analysis of the available project finance data. Part VII concludes.

II. Development & History of the Equator Principles

The World Bank is "recognized as a standard-setter in development finance and investment," whose principles often form benchmarks against which those of other institutions are compared.[50] The EPs were developed by 10 of the world's leading commercial banks in 2003 and were initially based on the World Bank's IFC Safeguards, a set of social and environmental principles that the World Bank implements when deciding whether to invest in development projects.[51] The World Bank Safeguard policy system itself, the cornerstone of which is the environmental impact assessment,[52] came to be as a result of worldwide public opposition to the World Bank's involvement in

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[48] Hunter, *supra* note 46 at 477. *See also* the Public Accountability Statement required by the *Bank Act,* (s. 459.3) S.C. 2001, c. 9, s. 125.
[49] *BCE Case*
[50] Hunter, *supra* note 46 at 459.
[51] *Ibid* at 450.
[52] *Ibid* at 442.

controversial projects during the 1970s and 1980s, "because they were designed with limited concern for impacts on local communities and the environment."[53]

Similarly, the EPs were not purely a product of the concern of these leading banks. The role of NGOs in their development cannot be overstated. For example, San Francisco based NGO, the Rainforest Action Network (RAN), created a "Global Finance Campaign" that was instrumental in bringing about the development of the EPs. Part of this campaign included a "BBQ the Banks" demonstration in front of the Wells Fargo headquarters.[54] Such public demonstrations supplemented the work NGOs were doing behind closed doors, and the public support that resulted from them gave the NGOs traction in their negotiations with the large, powerful, multinational financial institutions.[55]

The EPs are a form of market governance: voluntary process standards that enable "the assessment, verification, and communication of performance."[56] Because they are voluntary, they impose on EPFIs no responsibilities and create no rights for the communities affected by the projects being financed. While some argue that such regulations work when firms that are subject to them are conscious of and concerned about their reputations,[57] others question the viability of voluntary mechanisms as a form of social regulation for bringing about change.[58]

The original conception of the EPs, first agreed to in June 2003,* lacked accountability measures since reporting of project financing activities was not required. In 2006, the EPs were updated to include a tenth principle that applies to all EPFIs and imposes on them a requirement to disclose the number of projects financed and their categorization (see below) on an annual basis. The addition of a reporting requirement to the EPs addresses the calls for improved transparency and an accountability mechanism, whereby EPFIs can demonstrate they are implementing the EPs and show how they are making a difference.[59] However, as discussed in Part V, the lack of consistency and standardization in EPFI reporting creates problems for individuals and organizations interested in evaluating EPFI performance and the impact of the EPs in general.

The EPs apply to all project financing activities an EPFI undertakes and the duties of the EPFI in question will vary depending on the location of the project and the severity of the social and environmental harm the project is expected to cause. Project finance, for the

[53] *Ibid* at 439.
[54] Barnard, *supra* note 29 at 312.
[55] *Ibid* at 312.
[56] Benjamin J. Richardson, "Reforming Climate Finance Through Investment Codes of Conduct" (Fall, 2009) 27 WIS. INT'L L.J. at 494.
[57] Benjamin J. Richardson, "Protecting Indigenous Peoples Through Socially Responsible Investment" (2007) 6 INDIGENOUS L.J. at para 43.
[58] *Ibid* at para 43.
[59] Kamijyo, *supra* note 17 at 37.

purpose of the EPs, means any investments in projects exceeding $10M, and across all industries.[60]

For a complete description of the EPs, see Appendix #1. More generally, the EPs can be categorized as follows:[61]

(a) Applicable Social and Environmental Standards: Principle 3

Principle 3 outlines the social and environmental standards that will apply to a given project, and is dependent solely on the location of the project. For projects taking place in "high-income" OECD countries, domestic regulations will apply. Otherwise, the IFC performance standards apply. With the lack of specificity and consistency in the reporting of project location by EPFIs (as discussed in Part V), it is difficult to determine which standards applied to a given project.

(b) EPFI Responsibilities: Preamble and Principles 1 & 10

The EP Preamble states that an EPFI will only provide loans to projects that conform with Principles 1-9. However, the borrowers' responsibilities, below, must be completed to the EPFI's satisfaction, leaving significant room for interpretation and providing little guidance to borrowers given the shortage of case studies included in EPFI reporting, as discussed in Part V. Throughout the EPs, much deference is given to the banks, making for widely divergent social and environmental standards among EPFIs.

Beyond their responsibility to uphold the EPs, EPFIs must, prior to funding, assess and categorize the project based on the environmental and social harm it is expected to cause to affected communities and the environment as a whole. EPFIs must report annually the number of projects it has funded in each risk category. This requirement was added in 2006.

(c) Borrower Responsibilities: Principles 2 & 4-9

The majority of the principles relate to the responsibilities of borrowers. They must undertake these responsibilities for high-risk projects only, which are defined as "Category A and, where appropriate, Category B projects." In some instances, they apply only to projects not taking place in "high-income" OECD countries. These responsibilities include: completing a social and environmental assessment of the risks posed by the project; creating an action plan and management system to deal with such risks; consulting with and disclosing project information to the communities affected by the project; covenanting of compliance, and; appointing independent experts to assess, monitor, and report environmental and social harms caused by the project.

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[60] EP Preamble. Online: http://www.equator-princples.com/principles.shtml

[61] The following categorization of the EPs is unique, while the content of the descriptions is taken from the EPs themselves. Online: http://www.equator-principles.com/documents/Equator_Principles.pdf

The inconsistent reporting of project location by EPFIs, and to a lesser extent project categorization (see Part V), creates difficulties in determining what steps were taken by borrowers to mitigate and manage environmental and social risks for a given project, and whether the EPs were enforced by the EPFIs in question.

As of August 25th, 2010, the EPs have 67 signatories around the world (see Appendix #2), representing all continents and a vast majority of global project financing.[62] This study examines the reporting practices of each EPFI in order to deduce the effectiveness of the EPs as a voluntary mechanism for enhancing sustainable development practices in project finance. We hope to illuminate best practices in the area both to provide guidance for further improvements to the EPs and to encourage laggards to improve their reporting practices consistent with their peers'.

III. Literature Review

This part reviews the available literature on the EPs and categorizes the studies according to the context in which the EPs are examined.

(a) Voluntary regulatory mechanisms

The first area of study views the EPs in the context of voluntary regulatory mechanisms. One of the most prevalent criticisms of the EPs found in the literature is that they are merely a means to manage reputational risk by "green-washing" a firm's financing activities, making for positive public relations.[63] "Green-washing" is a form of "free-riding" whereby, in this case, an EPFI exploits the benefits of the perception of environmental stewardship without contributing positively to sustainable investment. This is supported by the fact that a number of EPFIs continue to be involved in environmentally controversial projects.[64]

The voluntary nature of the EPs eliminates the possibility of enforcement, and thus, liability on the part of EPFIs. Employing a non-binding regulatory mechanism inevitably leads to compliance concerns. Similarly, while EPFIs must "include covenants in project loan documentation under which the borrower agrees to maintain compliance with articulated environmental (and other) standards, lenders are not obligated to call an event of default if any such covenant is breached."[65] Without compliance on the part of both the

[62] Hunter, *supra* note 46 at 450. At the time of Hunter's writing, only 40 banks were members but already accounted for over 80% of global project financing.
[63] Joe W. (Chip) Pitts III, "Corporate Social Responsibility: Current Status and Future Evolution" (Spring, 2009) 6 RUTGERS J.L. & PUB. POL'Y at 374; *see also* Kamijyo, *supra* note 17 at 36.
[64] Richardson, *supra* note 11 at para 27; *see also* Morgera, *supra* note 18 at 187.
[65] Heather Hughes, "Enabling Investment in Environmental Sustainability" (Spring, 2010) 85 IND. L.J. at 624.

EPFIs and borrowers, or without a means of assessing their compliance, "green-washing" concerns become legitimized as institutions are able to hide their financing activities behind a façade of social and environmental responsibility.[66] Some go so far as to argue that because of the questionable legitimacy of voluntary mechanisms like the EPs, supplementary public regulation is inevitable and necessary.[67]

In addition to "green-washing" concerns, some have criticized the EPs' lack of accountability measures,[68] the lack of consideration of global warming issues,[69] and the lack of a consent model for affected communities.[70] Improved accountability and consideration of climate change would move the EPs closer to their stated purpose, and while a prior informed consent model, while ambitious, would better reflect established environmental standards.[71] In fact, the World Wildlife Fund (WWF) has stated that the EPs are "lagging behind relevant international standards and best practices."[72] Commentators have also called for improved transparency, "both in terms of disclosure of certain details of projects considered and accepted, and for greater communication with NGOs and other stakeholders in the consultation process,"[73] and for an independent complaints mechanism dealing with alleged violations of the EPs, one that would impose liability on EPFIs.[74]

(b) Accountability

On the other hand, a second class of studies views the EPs as a mechanism for improved accountability to public scrutiny. Proponents of the EPs argue that, regardless of a firm's motivations for joining, the EPs have created a mechanism by which the public may hold the financial sector accountable for its actions.[75] Furthermore, widely accepted standards in the financial sector could potentially, over the long term, reduce the need for regulatory controls of front-line companies, since both the construction and operation of projects must first pass the rigors of the EPs.[76] With proper compliance, pressures on states to develop regulations in various sectors would be significantly reduced. Also, by developing a baseline standard of environmental and social consideration, projects that are too harmful or controversial will not receive the necessary funding, regardless of the policies of the host country, effectively eliminating concerns about a "race to the bottom."

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[66] Hunter, *supra* note 46 at 471.
[67] Richardson, *supra* note 57 at para 68.
[68] Kamijyo, *supra* note 17 at 36.
[69] Philpott, *supra* note 25 at 45.
[70] Richardson, *supra* note 57 at para 48; *see also* Morgera, *supra* note 18 at 166.
[71] Morgera, *supra* note 18 at 166.
[72] *Ibid* at 187.
[73] Lee, *supra* note 14 at 371; *see also* Morgera, *supra* note 18 at 188.
[74] Lee, *supra* note 14 at 371; *see also* Bridgeman, *supra* note 12 at 221 where it is suggested a new mechanism be employed for this purpose.
[75] Lee, *supra* note 14 at 359.
[76] Richardson, *supra* note 11 at para 5.

(c) Domestic Regulation

A third group of studies also sees the potential benefits of the EPs. There exists a body of evidence suggesting that "race to the bottom" concerns may in fact be overblown and that the EPs can negate lax domestic environmental standards by superceding them. Widely accepted standards like the EPs may also create a precedent for domestic policy makers. In some cases, the judiciaries of developing nations, most notably Argentina and India, have used their power to interpret their domestic constitutions more broadly, to include a right to a healthy environment.[77] In fact, after the decision mandating that diesel buses be replaced with compressed natural gas buses, the air quality improved significantly.[78] Whether these discrete judicial interventions are sufficient to dismiss the notion of a "race to the bottom" remains unclear. Additionally, even with strict environmental regulations in place, developing nations may lack the resources to implement, monitor, and enforce them.[79] Corruption within regulatory and enforcement bodies of states, and unequal bargaining power between developing nations' governments and large corporations, may also play a role.[80]

(d) Socially Responsible Investment (SRI)

A fourth group of studies examines the EPs in the context of SRI.[81] SRI has been recognized primarily as a means of advancing sustainable development goals,[82] consistent with the stated goals of the EPs. The realization that less controversial projects could reduce reputational and borrower insolvency risks has led to what has been termed "the business case for SRI," which is based on the assumption that sustainable investment practices will make a firm "prosperous rather than merely virtuous." The business case for SRI emerged in part because of widely divergent opinions of what constitutes ethical investment,[83] which was the conception of SRI in its original form. As with other areas of study involving the EPs, affirmative conclusions are sparse: "While the expansion of SRI into mainstream financial markets has promised a more responsible approach to investments that have consequences for climate change, that promise remains unfulfilled."[84] There is quite simply a lack of evidence supporting any substantive improvements in the types of project being financed globally as a consequence of voluntary regulations, such as the EPs. Some argue that these voluntary standards have allowed "dubious investment practices masquerading as ethical choices to proliferate."[85]

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[77] Yang & Percival, *supra* note 5 at 635.
[78] *Ibid* at 634.
[79] Bridgeman, *supra* note 12 at 196.
[80] *Ibid* at 197.
[81] *See generally* Richardson, *supra* note 56.
[82] Richardson, *supra* note 11 at para 11.
[83] *Ibid* at para 32.
[84] Richardson, *supra* note 56 at 514.
[85] Richardson, *supra* note 11 at para 4.

(e) Transparency

A fifth area of study examines the EPs through the lens of transparency. In recent years, corporate social responsibility (CSR) supporters have used scandals as scapegoats to induce greater transparency from corporate actors. The Global Reporting Initiative (GRI), originally convened by a coalition of NGOs ("CERES"), is a product of a paradigm shift within corporations towards a balance between shareholder and stakeholder values, also termed the "triple bottom line."[86] By providing a common language and format for disclosure of corporate activities, the GRI has led to "(1) greater transparency; (2) consistency over time; and (3) comparability across firms and industries,"[87] among its 1000-plus member organizations. Some commentators suggest that full transparency can create value for firms by informing the market of the firm's environmentally responsible activities "and the expected benefits, quantifiable or not."[88] Furthermore, where there is a lack of transparency and high competition, this competition can lead managers to cut costs and focus on short-term goals of maximization of profits,[89] defeating the purpose of environmental regulations like the EPs.

Although the limited literature on point places the EPs in the same category as GRI as a mechanism for improved transparency, the analysis in this paper shows that this placement is unwarranted, and in fact, the EPs fail in achieving each of the 3 stated benefits of GRI. There is a dearth of analytical literature on the effects of the EPs on corporate transparency, primarily because no reporting requirement existed until 2006, and the present study seeks to fill a void of substantive analysis of the transparency resulting from principle 10.

(f) Case studies

A sixth group of literature provides case studies of specific EP financing projects. These studies may be the most illuminating as they chronicle an EPFI's application of the EPs, an example of which is the case of the Orion project in Uruguay. In that case, Calyon was satisfied that if the project met the IFC Safeguard minimum standards, the bank should proceed with funding it. In contrast, ING withdrew its funding despite the minimum requirements being met. Other case studies show EPFIs, such as Citibank and HSBC, have developed more stringent internal environmental performance standards and procedures than those required by the EPs,[90] suggesting a genuine commitment to SRI and sustainable development. Thus, case studies taken as a whole provide the extreme examples, both positive and negative, that are difficult to elucidate from quantitative, aggregate measures of financial institution performance.

(g) Lack of empirical research

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[86] Barnard, *supra* note 29 at 302.
[87] *Ibid* at 303.
[88] Vives, *supra* note 10 at 218.
[89] *Ibid* at 227.
[90] Philpott, *supra* note 25 at 47; *see also* Hecht, *supra* note 3 at 22.

Finally, a number of studies have called for further research and analysis to determine the effects and best practices of the EPs, and of SRI more generally.[91] Meanwhile, others believe that the "voluntary versus mandatory" debate has been exhausted and that focusing on the performance of firms will prove more fruitful.[92] The purpose of this study is to address both needs: (i) an analytical analysis of available data to determine the performance of EPFIs as a group and whether the EPs have brought about change in project financing trends, and (ii) comparing reporting practices of individual EPFIs to determine reporting best practices. This study will also provide some guidance for reform where necessary and develop general conclusions about the relationship between project financing, voluntary regulatory mechanisms and sustainable development.

IV. Methodology

We collected all available EP disclosure from all 67 EPFIs dating back to 2003. Disclosure was found in annual financial reports, corporate social responsibility reports or online at an EPFI's webpage; all possible sources were investigated before data was entered to account for scattered reporting practices.[93]

Two types of analysis were performed: "qualitative" and "quantitative". For the qualitative analysis we examined the quality of reporting practices for transparency, consistency and accessibility. In particular, we recorded the presence or absence of disclosure regarding project business sector, location, and amount financed. The raw data in the form of a positive ("Y") or negative ("N") marker was entered into a spreadsheet.

Our "quantitative" analysis examined the actual data provided by EPFIs regarding the risk category of financed projects. All reported data back to 2003 was entered into the spreadsheet, divided into "Category A", "B", "C", and "total" columns.[94] This data was analyzed to answer several questions regarding the impact of the EPs:

a) What percentage of high-, medium- and low-risk projects do EPFIs finance?
b) How does financing differ based on OECD status, continent and country?
c) What trends can be seem from 2007 to 2009?[95]

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[91] Richardson, *supra* note 11 at para 97.
[92] Kerr, Janda & Pitts, *supra* note 7 at 30.
[93] The consequences of this dispersion are discussed in *Accessibility*, below.
[94] In some cases EPFIs did not report its totals by category, in which case only the Totals column was used. This data was not used when performing further analysis regarding the risk-based distribution of project financing: any statistic mentioning, for example, what percentage of total financing high-risk projects constituted, does not take into account reported numbers that were not divided into risk categories.
[95] These years were chosen as they contain the largest amount of information, which should lead to more accurate data. Unfortunately, not all EPFIs have disclosed their 2009 project finance numbers at this time.

V. Qualitative Analysis

A qualitative analysis of EPFI data begins with one fundamental question: "how open are EPFIs with information regarding project financing under the EPs?" Openness can take numerous forms, and in this study we focus on three: Transparency, Consistency and Accessibility. As these forms of openness are distinct but intrinsically related, any discussion of one will inevitably lead to another.

Our analysis found that substantially all EPFIs are reporting the bare minimum required under principle 10, but further recommended reporting in the EP *Reporting Guidelines* lacks any stylistic or informational consistency. This lack of consistency prevents third parties from performing meaningful large-scale comparisons of EPFIs' performance in sustainable project financing. While data for the amount of high-, medium- and low-risk projects is readily available for analysis, further relevant information such as project location or business sector is either missing or presented in an inconsistent manner. This paper recommends updating the EP Reporting Guidelines to establish more stringent reporting regulations in line with the high-quality reporting presented by several EPFIs.

(a) Transparency

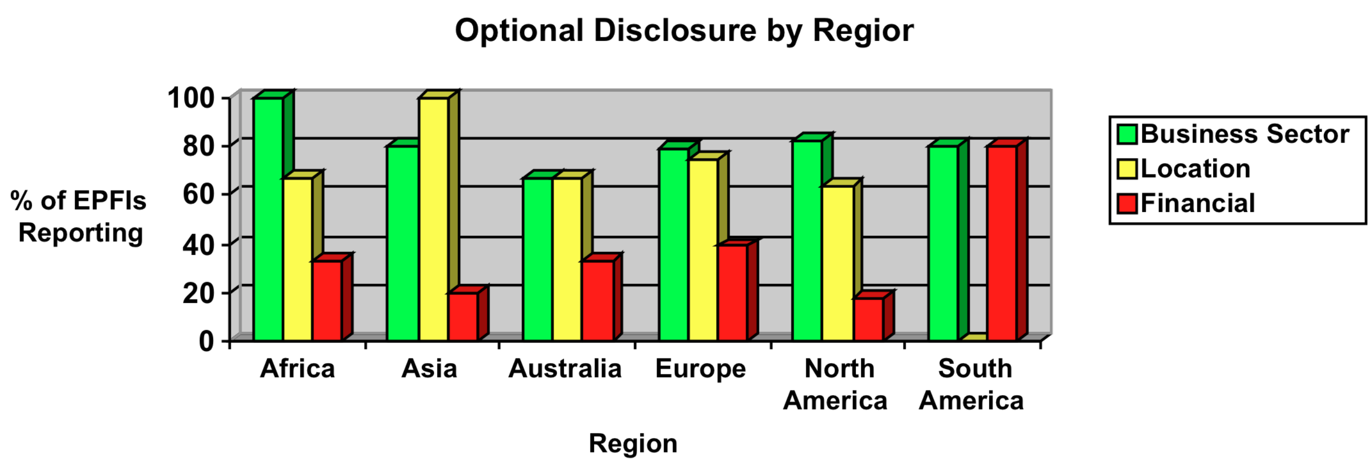
Roughly synonymous with "openness", transparency is the most important qualitative principle an EPFI should strive towards, and the impetus behind principle 10. Transparent reporting standards provide numerous benefits for local stakeholders as well as the public. Transparent reporting ensures a public review of the EPFI's compliance with EP rules and reporting standards; via this review mechanism, it fosters public trust in the EPFI's reporting as well as project financing practices. More importantly, reporting must be transparent in order to provide local stakeholders with the tools they need to apply their rights under the EPs.[96]

The EPs have extremely lenient reporting requirements: the EPFI must only report the number of projects per EP category. Our data shows that almost all EPFIs have fulfilled the basic reporting requirement. Some basic reporting failures are merely technical: EPFIs may have divided loans by category, but failed to specify exactly which deals were project finance.[97] However, two EPFIs failed to fulfill the basic reporting requirements: Caja Navarra provided alternate data regarding the total value of projects financed as well

[96] It is important to note that adopting the Equator Principles does not create any rights in, or liabilities to any person: they are merely an internal policy. Principle 6 demands that *borrowers* create a grievance mechanism for stakeholders: we believe that increased transparency by an EPFI can contribute to this Principle by providing local stakeholders with another source of information regarding projects in which they may have an interest.
[97] HSBC is a noteworthy example: they apply the EPs to all loans, but our data is only concerned with project finance, and information regarding their project finance categorization has been entered as "N/A".

as how many deals were rejected,[98] but not the required categorical information, and Nordea briefly mentioned only the business sector of projects financed.[99]

EPFIs may choose to report beyond the minimum requirements: expanded reporting can be seen as a commitment to transparency, and provides stakeholders with valuable information regarding local projects and EPFI performance. We focused on three expanded reporting categories: project sector, project location, and amount financed. The EP *Reporting Guidelines* specifically suggest sector and region info for reporting beyond the minimum.[100]



Most EPFIs chose to report the business sectors of financed projects. All African and a large majority (67% to 82%) of EPFIs in other regions chose to report the business sector. Despite the *Reporting Guidelines*, no standardized language for reporting sector information exists. Moreover, numerous EPFIs choosing to disclose financed business sectors do not further disclose the distribution of Category A/B/C projects within those sectors. Thus, it is difficult to make any conclusions regarding the exact nature of projects financed under the EPs.

Trying to determine *where* the projects being financed are taking place is even more difficult. Fewer EPFIs chose to disclose the location of projects, and among reporting EPFIs there is, again, little consistency regarding the details of regional information. No South American EPFIs disclosed regional information, and a small majority (64% - 75%) of EPFIs in other regions chose to disclose the information. All Asian reporting EPFIs disclosed regional information. It would be helpful to know where projects belonging to

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98 *Caja Navarra 2008 Social Responsibility Report* at 66.
99 *Nordea CSR Report 2009* at 14.
100 "Guidance to EPFIs on Equator Principles Implementation Reporting" at 2. Online: http://www.equator-principles.com/documents/EPReporting_2006-06-12.pdf. Also mentioned in the *Guidelines* is a breakdown by projects under review or fully funded, but reporting on this data was so rare and inconsistent among EPFIs as to be useless.

each category are being financed: the lack of current data prevents us from examining, for example, if the developing world is targeted by high-risk projects, or if highly-developed countries are progressing with regard to “greener” projects.

Lastly, very few EPFIs disclose the amount financed in each category: useful data for determining, for example, if one high-risk project was far more valuable than a large number of low-risk projects. 80% of South American EPFIs reported financial information, while other regions’ EPFIs reported at rates ranging from 0% - 39%.

The reasonably high rate of reporting with respect to optional information suggested in the *Reporting Guidelines* – especially compared to common disclosure *not* found in the *Guidelines* (financial information), signals that EPFIs are responsive to the EP’s best practices document. Unfortunately, the lack of formal categorization or format requirements for this optional information makes it difficult to perform large-scale analyses of disclosed data, and the creation of standards regarding, for example, the division of regional information into specified categories, would be quite helpful. More on this is discussed in *Consistency*, below.

(b) Consistency

The EP *Reporting Guidelines* make no mention of consistency, but we nevertheless examined the consistency of reporting *within* as well as *between* EPFIs. Consistent reporting standards allow stakeholders to compare information year-to-year across member financial institutions. They allow us to chart an EPFI’s progress not just regarding their reporting quality, but also their social and environmental performance.

The vast majority of EPFIs are consistent in their reporting quality from year-to-year. Once a reporting style is selected, it is unlikely to be changed for better or worse. This may be evidence of a lack of critical oversight of EP reporting standards: changes seldom occur with little pressure placed on EPFIs with sub-standard reporting practices to increase transparency. Financial institutions that have recently signed on to the EPs should also be encouraged to adopt high-quality reporting practices immediately after their grace period ends in order to avoid the complacency seen in other institutions.

Occasionally an EPFI experiments with minor changes in its reporting style or format. One EPFI, for example, provided no location information in its 2007 report, but did provide several project examples. Their 2008 report saw an expansion of business sector categories as well as effective location disclosure, but with no project examples. In their 2009 report, while the expanded sector information remains, the location disclosure is no longer divided by EP category. We are pleased to see an EPFI modifying its disclosure rather than remaining firmly entrenched in its reporting practices, but hope that further changes will move towards more transparent disclosure by combining the project examples of the older reports with the enhanced categorical information found in the 2008 report.

EPFIs exhibit far more variance when compared to each other. As noted above, substantially all EPFIs report the bare minimum required under the EPs, but then diverge with respect to additional information. Unfortunately, with no standardized requirements for how the optional information should be categorized, there is a large degree of inconsistency among those EPFIs reporting such information. Project location, for example, is often categorized by OECD status, continent, region or country, with further variation in how those broad categories are divided. Project sector divisions are even more troublesome, as the terminology used to define a project's sector is less concrete than, for example, OECD status.

Beyond the three most common categories of information described earlier, occasionally EPFIs choose to divulge other information. Examples include the project status (number of projects considered, approved, conditionally approved and rejected), descriptions of projects financed and case studies of successful or unsuccessful projects. Such information is always welcome and provides important context to statistics that are otherwise shallow and abstract, but consistency is needed in order to draw comparisons between EPFIs, regions, etc.

(c) Accessibility

Transparency and consistency are meaningless if information is not accessible by stakeholders. For stakeholders to make the most of the information and best practices to develop more quickly, reports need to be relatively easy to access and the data simple to disseminate. EP rules mandate annual disclosure, but allow for a variety of reporting media: disclosure in the annual Financial Report, a Corporate Social Responsibility Report, or a dedicated webpage.[101]

A number of examples highlight the importance of accessibility as well as its relationship with consistency. One EPFI maintained some of the highest quality reporting through 2008; including its EP disclosure in their Corporate Responsibility Report every year. EP data in their 2009 report was limited strictly to the number of projects reviewed. The 2009 report represented a transition period for the EPFI, as some information was moved to a secondary webpage, with occasional reminders throughout the report to visit the new webpage for more information. None of these reminders pertained to the EPs specifically, and full EP disclosure was found on a page buried four sub-pages away from the main CSR website. Months later the EP's Reporting website – which includes links to the newest available data for each EPFI – was updated to take the interested party directly to the EPFI's new CSR website instead of the less relevant CSR Report.

Similar problems plague other EPFIs. While the EP website maintains a database of recent disclosure, it is up to each EPFI to provide a link to its most recent report, and the database is updated frequently to reflect changes.[102] The report linked for one particular

[101] "Guidance to EPFIs on Equator Principles Implementation Reporting" at 3. Online: http://www.equator-principles.com/documents/EPReporting_2006-06-12.pdf
[102] Equator Principles. Online: http://www.equator-principles.com/reporting.shtml

EPFI on the EP website contains information up to and including 2008, on an official-looking website with no overt hints as to the archival nature of the report. Data for 2009 is actually found on a website that is superficially similar, but uses a different URL that is not immediately accessible from the 2008 version of the page.

Another EPFI discloses a wealth of information, but this information is scattered between a webpage containing lending history, an Excel spreadsheet, a "What We Finance" webpage, and a summary report in PDF format. Only the summary report contains the required EP disclosure.

Thus, technical problems such as these do not just prevent stakeholders from accessing and comparing older data, but often prevent them from finding out the most recent information which EPFIs are required to disclose. A coherent set of reporting practices, with better effort to integrate older reporting styles into new data, is vital to distributing important information to stakeholders and other interested parties. Easily accessible data is, if nothing else, a signal regarding the EPFI's commitment to transparency.

(d) Positive Examples

Several EPFIs should be applauded for their current reporting practices, and we hope others follow their lead regarding EP disclosure. Portugal's Millennium bcp disclosed all of its required information, but went further in specifying the nature of the project, the country in which it is located, the amount financed by the bank, the main social and environmental impacts (such as "Impact on the fauna and vegetation (eg. habitat of shrike birds)"), and mitigation measures demanded ("Assist birds in accidental collisions with the aero-generators, through an agreement established with a specialized hospital").[103] All of this disclosure was effectively reported in a concise section of its annual report, and not scattered around multiple forms of publishing media (or otherwise absent). While the amount of detail reported may not be appropriate for EPFIs that finance hundreds of projects, it is certainly a standard towards which other EPFIs could strive.

China's Industrial Bank Co. Ltd. also deserves special mention regarding its first post-adoption report.[104] The report takes great strides to mention the bank's adoption of the EPs, steps it has taken to promote sustainable financing, its internal control procedures and training sessions, raw data regarding its initial EP financing activities, specific examples of several financed projects, and comments from borrowers as well as third-parties regarding its EP activities. It is a remarkable initial report, and we hope that other EPFIs emerging from their grace period adopt some of IBC's reporting decisions.

(e) Conclusions/Implications

[103] *Millennium bcp 2009 Sustainability Report* at 43.
[104] China Industrial Bank Co. Ltd. Online:
http://download.cib.com.cn/netbank/download/en/Sustainability/2009_Report.pdf

Given the lack of direction given to EPFIs regarding the format and quality of their reporting, it is critical to examine the qualitative aspects of available EP disclosure. By highlighting reporting successes as well as failures, we hope that EPFIs will reevaluate and improve their reports. A long-term goal of this project is the development and refinement of industry-wide best practices, especially beyond the rather bare-bones *Reporting Guidelines* provided by the EPs.

VI. Quantitative Analysis

Transparency and consistency issues discussed above prevent us from performing meaningful analysis of the location in which high- and low-risk projects are being funded, as well as their business sectors. However, information EPFIs are required to disclose allows us to analyze the *sources* of high- and low-risk project financing, as well as to identify trends in sustainable project financing.

If the EPs are truly the "industry gold standard" for sustainable project finance, what type of impact should we expect to see? Should the EPs deter banks from financing high-risk projects? EP requirements between borrower and financier may be so onerous as to discourage high-risk projects from ever being initiated, and if true, we would expect to see a decrease in Category A projects being funded. Should we expect this "gold standard" to simply act as a mitigation mechanism without causing any changes to the types of projects being funded? This may provide solace to affected communities, but then would the EPs truly be advancing the sustainable development agenda?

The data provided in each EPFI's reports is aggregated below to aid in identifying trends that can tell us more about the role and impact of the EPs with respect to project finance and sustainable development.

(a) Data

i. Raw Data

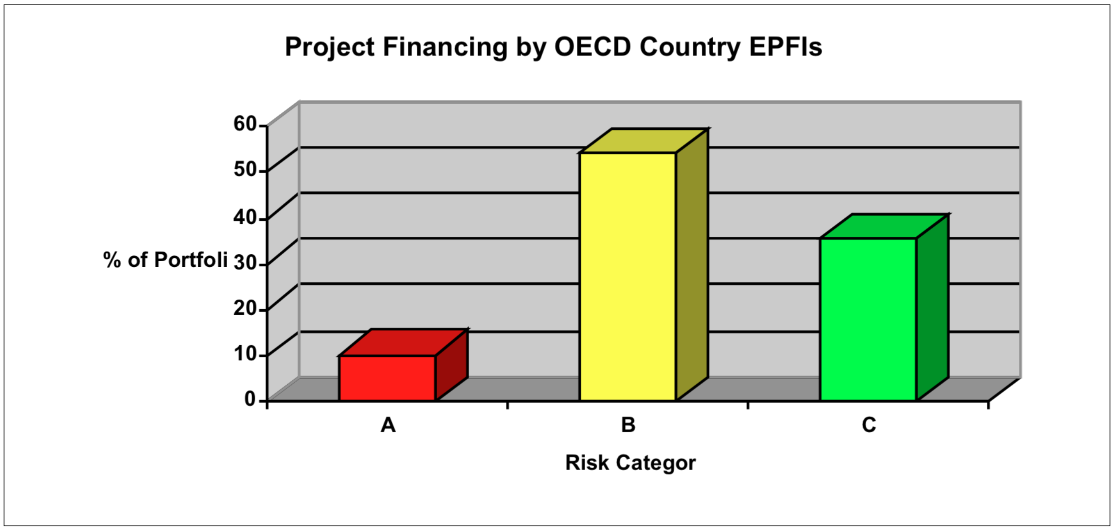
To give some context to the following discussion, reproduced below is some of the relevant data from our spreadsheet. The superscript "2" seen in the tables refers to data that includes projects that were somehow cumulatively reported. For example, the number of "A" projects reported by OECD-country-based EPFIs from 2007 to 2009 totals 272; the total being listed as 273 means that one high-risk project was reported without proper division by year. Likewise, reading downwards, a more significant problem was the lack of division into risk category: thus we see many more "Total (Year)" projects than one would find by simply adding those reported as "A", "B" and "C".

OECD Categorization	Category	Year			Total (Category)
		2007	2008	2009	
OECD Member Countries	**A**	99	88	85	**273** [2]
	B	522	504	428	**1458** [2]
	C	289	365	294	**948** [2]
	Total (Year)	**1074** [2]	**1123** [2]	**843** [2]	**3045** [2]
OECD Enhanced Engagement Countries	**A**	3	4	8	**15**
	B	8	26	13	**47**
	C	0	1	1	**2**
	Total (Year)	**11**	**31**	**22**	**64**
Non-OECD	**A**	N/A	0	2	**2**
	B	N/A	4	2	**6**
	C	N/A	10	8	**18**
	Total (Year)	**N/A**	**14**	**12**	**26**

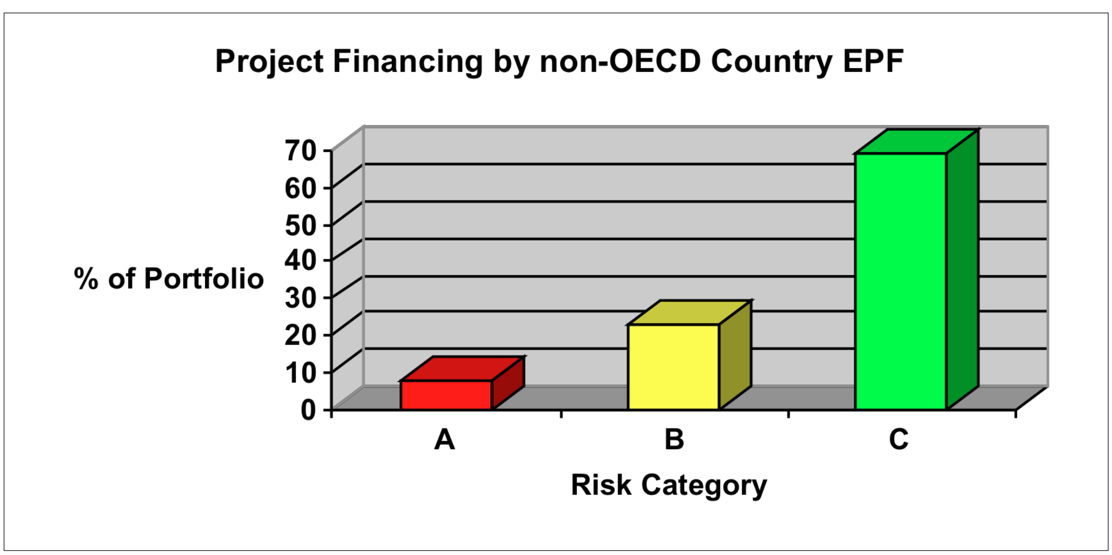
Region	Category	Year			Total Reported (since 2007)
		2007	2008	2009	
Africa	**A**	N/A	N/A	3	**3**
	B	N/A	N/A	3	**3**
	C	N/A	N/A	1	**1**
	Total (Year)	**N/A**	**N/A**	**7**	**7**
Asia	**A**	3	1	8	**12**
	B	50	23	49	**122**
	C	1	8	10	**19**
	Total (Year)	**54**	**32**	**67**	**153**
Australia	**A**	4	3	4	**11**
	B	10	29	8	**47**
	C	2	22	11	**35**
	Total (Year)	**16**	**54**	**23**	**93**
Europe	**A**	88	78	69	**235**
	B	444	419	362	**1225**
	C	272	322	268	**862**
	Total (Year)	**967** [2]	**985** [2]	**735** [2]	**2687** [2]
North America	**A**	4	6	5	**15**
	B	18	37	15	**70**
	C	14	20	8	**42**
	Total (Year)	**36**	**63**	**28**	**127**
South America	**A**	3	4	6	**14** [2]
	B	8	26	6	**44** [2]
	C	0	4	5	**9**
	Total (Year)	**11**	**34**	**17**	**67** [2]

ii. How does distribution of high/medium/low risk projects differ based on OECD status of EPFI home nations?

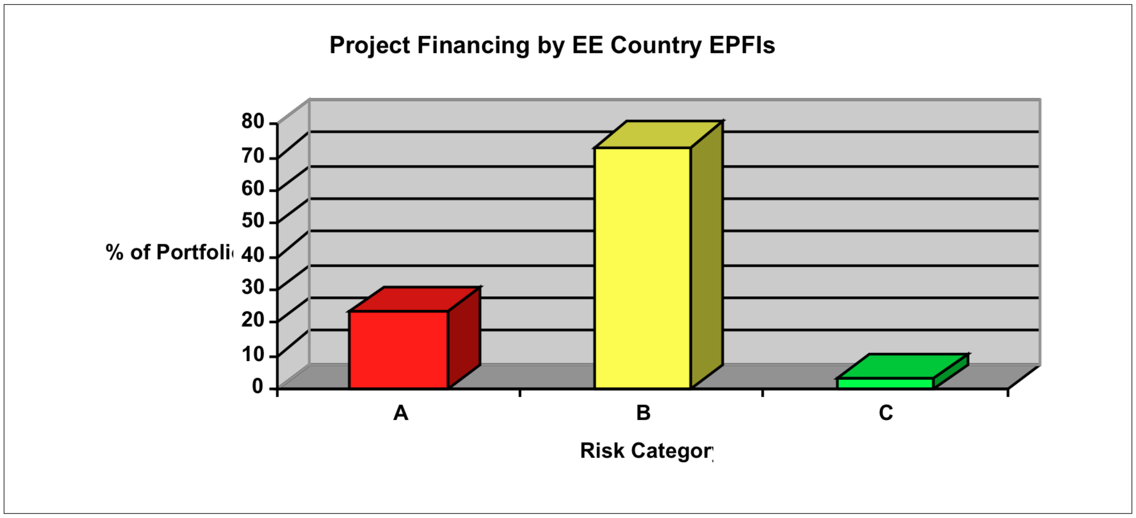
We first examined data based on the OECD status of an EPFI's host country in order to compare the funding of high, medium and low-risk projects by OECD, Enhanced Engagement ("EE") and non-OECD countries from 2007 through 2009. 17 OECD member states are represented by 51 EPFIs; 7 non-OECD states host 7 EPFIs; and 3 "Enhanced Engagement" states, which are non-OECD members with strong ties to the OECD, including participatory rights in committees, host 9 EPFIs.



In brief, OECD countries have a rather balanced portfolio, while EE countries focus almost exclusively on high- and medium-risk projects. Non-OECD countries lead the way in financing low-risk projects, though the sample size is extremely small. All data discussed in below represents the total number of projects in 2007, 2008 and 2009. Furthermore, all percentage values when discussing risk category are a percentage of *projects reported into a risk category*: out of 3135 total reported projects, 456 were not properly separated, and these are not included for the purposes of calculating the data below, but are included when calculating total reported project figures.



While high-risk category "A" projects form a small percentage of OECD member countries' portfolios (about 10%), these countries financed the largest actual amount of reported high-risk projects: 273 out of 290 total worldwide. The majority of OECD countries' financing was devoted to medium-risk category "B" projects, which formed 54.4% of their portfolios. Low-risk category "C" financing was also significantly represented at 35.4%. These figures are consistent with historical numbers from the World Bank: approximately 10% of the projects funded by the World Bank are category "A" projects, with category "B" projects representing a much larger proportion (57% in 2005).[105]



Enhanced Engagement countries financed the largest amount of high-risk projects as a percentage of their total portfolio: 23.4%, while non-OECD countries were far below at 7.7%. EE countries' financing was mostly represented by medium-risk "B" projects (73.4%), while non-OECD countries' "B" funding was less significant (23.1%). Conversely, low-risk "C" projects represented 69.2% of non-OECD countries' total financing and just 3.1% of EE countries' financing. While the relative importance of high-risk projects in EE EPFIs' portfolios compared to the percentage of high-risk projects financed by OECD and non-OECD countries is troubling, the massive share of low-risk project financing tackled by non-OECD EPFIs is quite encouraging.

However, one must take into consideration the relatively small sample size: out of 3135 reported projects, OECD countries were responsible for 3045. With just 90 projects financed by EE and non-OECD countries, portfolio percentages are not as meaningful as the raw amount of projects financed by EPFIs from OECD countries. This is particularly true in the case of non-OECD countries, which financed just 26 total projects. The numbers are slightly more reliable for EE EPFIs: out of 64 reported projects, just 2 were categorized as low-risk category "C" ventures; a staggeringly low number relative to other EPFIs.

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[105] Herbertson & Hunter, *supra* note 21 at 5.

The lack of effective disclosure regarding the location of these high-risk projects prevents us from making any conclusions about the distribution of these projects. We cannot state with any certainty if, for example, "OECD high-income" countries are intentionally placing high-risk projects in the developing world, or if they are simply contributing to environmental and social risk in their home states.

iii. How does distribution of high/medium/low risk projects differ based on the EPFI's home continent?

African and South American EPFIs finance the largest amount of high-risk category "A" projects as a share of their portfolio: 42.9% and 20.9%, respectively. Other continents only financed 7.8% - 11.8% "A" projects. The most significant contributor to high-risk project financing is Europe: while European financial institutions represent 31 of the 67 EPFIs (46%), European EPFIs financed 235 of 290 high-risk "A" projects (81%), and 2687 of 3135 of all reported projects (85%).

Low-risk category "C" project finance makes up approximately one-third of all financing for North American, European and Australian EPFIs (33.1%, 35.6%, and 37.6%, respectively). South America and Africa have similar numbers at 13.4% and 14.3%, respectively, though with the caveat of small sample size, as above. Asian EPFIs are struggling with low-risk project financing: just 12.4% of their portfolios are devoted to category "C" projects, which represent just 19 of 153 total projects; without Bank Muscat's recent disclosure, this number would be even lower at just under 7%.[106]
Medium-risk category "B" projects represented a large share of most continents' financing, ranking from 42.9% (Africa) to 79.7% (Asia).

iv. What general trends have occurred from 2007 through 2009?

Due in part to the global economic downturn, project financing among OECD countries decreased significantly in 2009: from 1074 projects in 2007 to just 843 in 2009 (-21%). The largest drop was in Category "B" projects (522 to 428; -18%), while low-risk "C" projects increased from 289 to 294 (+1.7%); though this was a 19% drop from 2008. There were slightly fewer "A" projects: from 99 to 85 (-14%). Thus, as a percentage of all projects financed, high-risk "A" project financing among OECD countries remained unchanged.

The sample sizes for EE and non-OECD countries are too small to make any serious analysis, however, among EE countries high-risk "A" projects have been steadily

[106] This number does not include the data provided by The Bank of Tokyo-Mitsubishi UFJ, Ltd., which provided data in a bulk "2006 to present" form which we could not enter into our data set, due to pollution from 2006 data. The Bank reported 11 "A" projects, 108 "B" projects, and 16 "C" projects from 2006 to 2009. If this data is added to our set, low-risk financing by Asian EPFIs comes to 25 of 288 projects, or 12.1%: still far below North America, Europe and Africa.

increasing: from 3 in 2007 to 8 in 2009. An explosion of medium-risk "B" projects in 2008 settled by 2009, while low-risk "C" project financing remained almost non-existent.

It is important to note that not all EPFIs have, to date, reported project financing numbers for 2009, and we expect the number of projects financed during 2009 to increase as reports are published. Nevertheless, a bank-by-bank observation confirms that project financing numbers have decreased significantly in 2009.

v. What specific trends have occurred from 2007 through 2009?

Breaking down broad trends into information by country is more troublesome due to the decreasing sample sizes, as well as the fact that not all banks reported information for all three relevant years: among all EPFIs that filed previous reports, 7 have not yet disclosed their 2009 EP progress.[107] However, promising numbers can be seen in some countries, and a discussion of trends among some major financiers is provided below.

Spanish EPFIs fund, by far, the largest number of low-risk category "C" projects as a percentage of their total financing (73%), and funded just three high-risk "A" projects from 2007 to 2009; unfortunately, this number has steadily increased: 0 in 2007, 1 in 2008, and 2 in 2009. These numbers do not include project financing from Caja Navarra, which has only reported its total financing numbers (not divided by category); it is possible that this EPFI is disguising high-risk project financing not in line with other Spanish EPFIs. Nevertheless, reported Spanish financing of high-risk projects is still far below the number of high-risk projects funded by EPFIs from France, Germany and the Netherlands.

French project financing seemingly skyrocketed from 2008 to 2009, but this is only a result of BNP Paribas' first report and the lack of pre-2009 data for Credit Agricole CIB. French project financing is characterized by a significant medium-risk component accompanied by fewer low- and high-risk projects: low-risk category "C" projects represented less than 20% of all French project financing in 2008 and 2009.

A glance at trends in Belgium and Germany may appear positive: in Belgium, 21 high-risk projects were financed in 2008 and none in 2009, while Germany saw a drop from 16 to 11 along with an increase in low-risk financing; however, these statistics are unreliable. Belgian EPFI BNP Paribas Fortis has not as of yet published an EP report for 2009, and it was responsible for the vast majority of high-risk projects among Belgian EPFIs. Nevertheless, available data for Belgium suggests a commitment to low-risk project financing, which constitutes approximately 52% of all projects financed from 2007 to 2009, with high-risk projects making up just 8% of the total in that same period. Similarly, German EPFI WestLB has not yet published a 2009 report, while German newcomer KfW Ipex-Bank emerged from its grace period with a first report. The German numbers, then, suggest some continuity when in reality 2007, 2008 and 2009 were represented by entirely different banks.

[107] As of Aug. 17, 2010.

All EPFIs from the United Kingdom have reported 2009 numbers, and we see a precipitous drop in all project financing: from 297 in 2007, to 168 in 2008, and just 102 in 2009. This financing is characterized by high levels of medium-risk category "B" projects, lower levels of low-risk "C" projects, and relatively few high-risk projects.

In Canada the trends are not encouraging: high-risk "A" project financing has increased to its highest recorded level since the introduction of the EPs (although this is still just 4 projects). At the same time, medium- and low-risk project financing has fallen from 2008 to 2009. As all 7 Canadian EPFIs have reported for 2009, these numbers are more reliable than most other countries' data. Conversely, only three of five EPFIs from the United States published 2009 data, and as expected the overall numbers show a steep decrease in all project financing; we expect the numbers to stabilize with the addition of reports from CIFI and Bank of America.

(b) Conclusions/Implications

Since European EPFIs are responsible for the vast majority of all project financing, the result that they are, in turn, responsible for the highest number of high-risk projects is unsurprising. The raw number of high-risk projects funded by these EPFIs, located in highly developed states, is nevertheless quite shocking. EPFIs in highly developed nations that represent the largest share of project financing are in the best position to reduce risk and simultaneously promote sustainable development, but the consistent number of high-risk projects being financed casts doubt on any assumption that the EPs could function to truly impact project financing practices.

While it is encouraging that these EPFIs have chosen to implement the EPs, allowing us and them to monitor borrowers in order to mitigate some of the damages implicit in a high-risk project, the lack of transparency regarding critical project details (such as location) keeps a "veil of secrecy" around high-risk project financing.

Lenient reporting requirements are a large part of the problem: with little required information, EPFIs can keep details of damaging transactions hidden from public scrutiny. While the EPs have published the *Reporting Guidelines* document, EPFIs should unite to examine their reporting practices and come up with a more concrete and transparent "Reporting Best Practices" document.

VII. Conclusion

Given the results of the analysis in this study, we are able to reach a number of conclusions.

(1) No decrease in Category A projects being funded by EPFIs occurred during the period of 2007-2009. This was seen despite the global recession that occurred in 2009. It may be concluded, then, that the EPs have not driven financial institutions away from financing

high-risk projects. However, without more detailed (and consistent) reporting on the size, location, and industry of the projects being funded, no further conclusions may be reached regarding the effectiveness of the EPs in promoting sustainable development. However, this suggests that "green-washing" concerns may be warranted since high-risk projects continue to receive funding and, as shown by the example of the Orion paper mill, proper mitigation of environmental and social harms may not always occur in those projects that cause the most harm.

(2) Individual EPFIs should make efforts to improve their reporting practices to reflect best practices. A stated benefit of voluntary international agreements such as the EPs is that the experiences of the signatories will lead to the development of best practices that can later be implemented by all firms. Consistency, transparency, and depth of reporting are key areas that could be improved in many EPFIs' reports. While the EPs recommend that firms include additional information in their reporting, many EPFIs have failed to exceed the minimum standards.

(3) The EP *Guidelines*, published in 2009,[108] should be expanded on and enforced more strictly. Case studies like that of the Orion paper mill suggest that EPFIs may adhere to the procedural requirements of the EPs without having a substantial impact on the actual social and environmental harm that results from the projects they are funding. Some of the *Guidelines*' suggestions, particularly those relating to reporting, could be integrated into the EPs themselves. Specifically, the *Guidelines* suggest the inclusion of location and sector of the projects in an EPFI's reporting, each of which would allow for a more meaningful analysis of firm performance and EP effectiveness.

(4) The EPs have not had the same impact on disclosure as other voluntary agreements have. While the GRI has improved reporting transparency, consistency across time, and comparability across firms and industries, the EPs have failed to make a significant impact in each of these respects. Although transparency has improved since the introduction of principle 10 by requiring firms to report the number of projects funded and what category they fall under, a number of firms have failed to meet these minimum standards or have presented their data in a manner that precludes a meaningful analysis of firm performance. Several firms have altered their reporting format, and the level of detail in their reporting, from year-to-year. Most important is the development of a standardized format for reporting, without which the performance of firms cannot be compared to their peers'.

(5) It is suggested that a 5-year review period for the reporting practices of EPFIs and of the EPs themselves be implemented. This review period would allow for the development of best practices and amendment to the EPs in order to respond to deficiencies. Most importantly, the results of these reviews should be made public in order to improve accountability.

[108] EP website: http://www.equator-principles.com/bestpractices.shtml

(6) Finally, it is recommended that an award be created for firms that demonstrate true commitment to the goals of the EPs (chief among them, sustainable development). Such an award would reward firms who have transparent reporting practices as well as make significant strides in the mitigation of environmental and social harms created by the projects they finance, particularly those in vulnerable developing nations (those without sufficient environmental regulations), and for being leaders in environmental and social stewardship. The positive public relations that would result from such an award would legitimize the EPs, reward those firms that are committed to them, and help in the development of best practices.

Determining "whether the banks are shifting their lending portfolios over time"[109] is critical to the analysis of the effectiveness of the EPs in advancing the sustainable development agenda, and of voluntary regulatory mechanisms more generally. Without accurate and detailed data presented in a consistent manner, it is impossible to conclusively establish industry trends. To demonstrate a commitment to sustainable development among its member banks and "protect the Equator brand,"[110] we recommend that reporting be monitored and regulated more stringently, such that meaningful data may be obtained from the reports, allowing for more detailed research in the future and accountability to the public. Until such research can take place, the EPs will continue to have their legitimacy and effectiveness questioned by a multitude of stakeholders.

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[109] Hunter, *supra* note 46 at 475.
[110] Online: http://www.equator-principles.com/abouttheeps.shtml

Appendix #1: The Equator Principles (2006)[111]

EPFIs will only provide loans to projects that conform to Principles 1-9 below:

Principle 1: Review and Categorization
When a project is proposed for financing, the EPFI will, as part of its internal social and environmental review and due diligence, categorize such projects based on the magnitude of its potential impacts and risks in accordance with the environmental and social screening criteria of the International Finance Corporation (IFC).

Principle 2: Social and Environmental Assessment
For each project assessed as being either Category A or Category B, the borrower has conducted a Social and Environmental Assessment ("Assessment") process to address, as appropriate and to the EPFI's satisfaction, the relevant social and environmental impacts and risks of the proposed project. The Assessment should also propose mitigation and management measures relevant and appropriate to the nature and scale of the proposed project.

Principle 3: Applicable Social and Environmental Standards
For projects located in non-OECD countries, and those located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database, the Assessment will refer to the then applicable IFC Performance Standards and the then applicable Industry Specific EHS Guidelines ("EHS Guidelines"). The Assessment will establish to a participating EPFI's satisfaction the project's overall compliance with, or justified deviation from, the respective Performance Standards and EHS Guidelines.

The regulatory, permitting and public comment process requirements in High-Income OECD Countries, as defined by the World Bank Development Indicators Database, generally meet or exceed the requirements of the IFC Performance Standards and EHS Guidelines. Consequently, to avoid duplication and streamline EPFI's review of these projects, successful completion of an Assessment (or its equivalent) process under and in compliance with local or national law in High-Income OECD Countries is considered to be an acceptable substitute for the IFC Performance Standards, EHS Guidelines and further requirements as detailed in Principles 4, 5 and 6 below. For these projects, however, the EPFI still categorizes and reviews the project in accordance with Principles 1 and 2 above.

The Assessment process in both cases should address compliance with relevant host country laws, regulations and permits that pertain to social and environmental matters.

Principle 4: Action Plan and Management System
For all Category A and Category B projects located in non-OECD countries, and those

[111] Online: http://www.equator-principles.com/documents/Equator_Principles.pdf

located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database, the borrower has prepared an Action Plan (AP) which addresses the relevant findings, and draws on the conclusions of the Assessment. The AP will describe and prioritize the actions needed to implement mitigation measures, corrective actions and monitoring measures necessary to manage the impacts and risks identified in the Assessment. Borrowers will build on, maintain or establish a Social and Environmental Management System that addresses the management of these impacts, risks, and corrective actions required to comply with applicable host country social and environmental laws and regulations, and requirements of the applicable Performance Standards and EHS Guidelines, as defined in the AP.

For projects located in High-Income OECD countries, EPFIs may require development of an Action Plan based on relevant permitting and regulatory requirements, and as defined by host-country law.

Principle 5: Consultation and Disclosure

For all Category A and, as appropriate, Category B projects located in non-OECD countries, and those located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database, the government, borrower or third party expert has consulted with project affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish, to the satisfaction of the EPFI, whether a project has adequately incorporated affected communities' concerns.

In order to accomplish this, the Assessment documentation and AP, or non-technical summaries thereof, will be made available to the public by the borrower for a reasonable minimum period in the relevant local language and in a culturally appropriate manner. The borrower will take account of and document the process and results of the consultation, including any actions agreed resulting from the consultation. For projects with adverse social or environmental impacts, disclosure should occur early in the Assessment process and in any event before the project construction commences, and on an ongoing basis.

Principle 6: Grievance Mechanism

For all Category A and, as appropriate, Category B projects located in non-OECD countries, and those located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database, to ensure that consultation, disclosure and community engagement continues throughout construction and operation of the project, the borrower will, scaled to the risks and adverse impacts of the project, establish a grievance mechanism as part of the management system. This will allow the borrower to receive and facilitate resolution of concerns and grievances about the project's social and environmental performance raised by individuals or groups from among project-affected communities. The borrower will inform the affected communities about the mechanism in the course of its community engagement process and ensure that the mechanism addresses concerns promptly and transparently, in a culturally appropriate manner, and is readily accessible to all segments of the affected communities.

Principle 7: Independent Review

For all Category A projects and, as appropriate, for Category B projects, an independent social or environmental expert not directly associated with the borrower will review the Assessment, AP and consultation process documentation in order to assist EPFI's due diligence, and assess Equator Principles compliance.

Principle 8: Covenants

An important strength of the Principles is the incorporation of covenants linked to compliance. For Category A and B projects, the borrower will covenant in financing documentation:

a) to comply with all relevant host country social and environmental laws, regulations and permits in all material respects;

b) to comply with the AP (where applicable) during the construction and operation of the project in all material respects;

c) to provide periodic reports in a format agreed with EPFIs (with the frequency of these reports proportionate to the severity of impacts, or as required by law, but not less than annually), prepared by in-house staff or third party experts, that i) document compliance with the AP (where applicable), and ii) provide representation of compliance with relevant local, state and host country social and environmental laws, regulations and permits; and

d) to decommission the facilities, where applicable and appropriate, in accordance with an agreed decommissioning plan.

Where a borrower is not in compliance with its social and environmental covenants, EPFIs will work with the borrower to bring it back into compliance to the extent feasible, and if the borrower fails to re-establish compliance within an agreed grace period, EPFIs reserve the right to exercise remedies, as they consider appropriate.

Principle 9: Independent Monitoring and Reporting

To ensure ongoing monitoring and reporting over the life of the loan, EPFIs will, for all Category A projects, and as appropriate, for Category B projects, require appointment of an independent environmental and/or social expert, or require that the borrower retain qualified and experienced external experts to verify its monitoring information which would be shared with EPFIs.

Principle 10: EPFI Reporting

Each EPFI adopting the Equator Principles commits to report publicly at least annually about its Equator Principles implementation processes and experience, taking into account appropriate confidentiality considerations.

Appendix #2: 67 Equator Principle Financial Institutions[112]

ABN AMRO Bank N.V. – EPFI
Absa Bank Limited – EPFI
Access Bank – EPFI
ANZ – EPFI
Arab African International Bank – EPFI
ASN Bank NV – EPFI
Banco Bradesco – EPFI
Banco de la República Oriental del Uruguay – EPFI
Banco do Brasil – EPFI
Banco Galicia – EPFI
Banco Santander – EPFI
Bancolombia S.A. – EPFI
BankMuscat – EPFI
Bank of America – EPFI
Bank of Tokyo-Mitsubishi UFJ – EPFI
Barclays plc – EPFI
BBVA – EPFI
BES Group – EPFI
BMCE Bank – EPFI
BMO Financial Group – EPFI
BNP Paribas – EPFI
Caixa Econômica Federal – EPFI
Caja Navarra – EPFI
Crédit Agricole Corporate and Investment Bank – EPFI
CIBC – EPFI
CIFI – EPFI
Citigroup Inc. – EPFI
CORPBANCA – EPFI
Credit Suisse Group – EPFI
Dexia Group – EPFI
DnB Nor – EPFI
EFIC – EPFI
EKF – EPFI
Export Development Canada – EPFI
FirstRand Bank Ltd – EPFI
FMO – EPFI
Fortis Bank NV/SA – EPFI
HSBC Group – EPFI
Industrial Bank Co., Ltd – EPFI
ING Group – EPFI
Intesa Sanpaolo – EPFI
Itau Unibanco S/A – EPFI

[112] Online: http://www.equator-principles.com/index.shtml

JPMorgan Chase – Associate
KBC – EPFI
KfW IPEX-Bank – EPFI
la Caixa – EPFI
Lloyds Banking Group Plc – EPFI
Manulife – EPFI
Mizuho Corporate Bank – EPFI
Millennium bcp – EPFI
National Australia Bank – EPFI
Nordea – EPFI
Nedbank Group – EPFI
Rabobank Group – EPFI
RBC – EPFI
Scotiabank – EPFI
SEB – EPFI
Societe Generale – EPFI
Standard Bank Group – EPFI
Standard Chartered Bank – EPFI
SMBC – EPFI
TD Bank Financial Group – EPFI
The Royal Bank of Scotland – EPFI
UniCredit Bank AG – EPFI
Wells Fargo & Company – Associate
WestLB AG – EPFI
Westpac Banking Corporation – EPFI