The Impact of the Equator Principles on Lender Liability: Risks of Responsible Lending

by

Ryan Hansen

London School of Economics and Political Science

LL.M. Dissertation – August 2006

Updated November 2006

Abstract

With great power comes great responsibility. Although the world's leading financial institutions are unlikely to be mistaken for superheroes, they would do well to remember that maxim as they rush to cast themselves as champions of sustainable development. Leading lenders have been quick to adopt the Equator Principles, a voluntary set of environmental and social guidelines applicable to their project finance activities. By adopting more responsible lending practices, however, lenders increase their control over project activities, potentially exposing themselves to greater liability risks.

Part I of the paper sets forth the content of the Equator Principles and their impact on the operations of lenders that adopt them—called Equator Principles Financial Institutions ("EPFIs"). Part II outlines the current scope of lender liability for environmental damage and describes how the steps EPFIs take to protect their project investments generate liability risks. Part III surveys existing methods for holding lenders accountable for their projects' social and economic harms and explains why EPFIs are prime targets for such liability. The paper concludes with reflections on the Principles endeavor and the evolving liability risks that accompany sustainable financing.

The Impact of the Equator Principles on Lender Liability:
Risks of Responsible Lending

Introduction

Throughout history lenders have been despised as callous and greedy. Shakespeare's Shylock, the vengeful moneylender who sought a pound of flesh as a penalty for late payment on a loan in *The Merchant of Venice*,[1] is perhaps the most sinister depiction. Today, however, many of today's most prominent project finance[2] lenders are determined to cast themselves in a more positive light by "moulding a new world which places the environment, sustainability and respect for human rights at the core of their businesses[.]"[3] The new world they envision revolves around the Equator Principles, a voluntary set of social and environmental guidelines lenders pledge to apply to their project finance activities.[4] Whether these lenders truly

---

[1] William Shakespeare, *The Merchant of Venice*, Act I, Scene III, lines 127-135, *available at* http://www.bartleby.com/70/1913.html (accessed 24 July 2006). The character is often seen more as an indictment of Jews than of lenders in general. *See* Samuel Aaron Tannenbaum, *Shakespeare's The Merchant of Venice: A Concise Bibliography* (New York: S.A. Tannenbaum, 1941) foreword ("*Shylock*, as the play is sometimes called, is one of the bulwarks of anti-semitism.").

[2] Project finance is defined by the Basel Committee on Banking Supervision as:

> [A] method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure. Project finance may take the form of financing of the construction of a new capital installation, or refinancing of an existing installation, with or without improvements.
>
> In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the facility's output, such as the electricity sold by a power plant. The borrower is usually an SPE ["Special Purpose Entity"] that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the project's cash flow and on the collateral value of the project's assets.

Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards* ("Basel II") (November 2005) 49, paras. 221-222 *at* http://www.bis.org/publ/bcbs118.pdf (accessed 27 July 2006). *See generally* Scott L. Hoffman, *The Law and Business of International Project Finance: A Resource for Governments, Sponsors, Lenders, Lawyers, and Project Participants* (Ardsley, NY: Transnational Publishers, 2nd ed, 2001); Peter K. Nevitt and Frank J. Fabozzi, *Project Finance* (London: Euromoney, 7th ed, 2000).

[3] Paul Watchman, 'Banks, Business and Human Rights' (2006) 02 JIBFL 46.

[4] The Principles, information on their historical development, and a list of adopting institutions can be found at www.equator-principles.com. As of 26 October 2006, 43 financial institutions had adopted

appreciate the demands of their commitment remains to be seen. Pioneers exalt at the promise of a new world, but what of the perils? In short, what are the risks of responsible project finance lending?

This paper explores some of the potential risks awaiting lenders committed to navigating the Equator course. Like many recent corporate social responsibility ("CSR") initiatives,[5] the stated goal of the Principles is admirable: to ensure "that the projects [adopting institutions] finance are developed in a manner that is socially responsible and reflect sound environmental management practices."[6] To this end the Principles track the social and environmental standards the World Bank and its private lending arm, the International Finance Corporation ("IFC"), apply to the projects they finance in developing countries. Good intentions aside, profit considerations feature prominently in the Principles' appeal; after all, costly social or environmental problems jeopardize a borrower's ability to service its project debt. Lenders are thus likely to view the Principles as a responsible and profitable tool for

---

the current version of the Principles, which were substantially revised on 6 July 2006. *See* Equator Principles Financial Institutions ("EPFIs"), Press Release, *Financial Institutions Announce Revision of Equator Principles Underscoring the Global Application of Environmental and Social Risk Management* (6 July 2006) *at* http://www.equator-principles.com/documents/EP_Readoption_Press_Release_FINAL.pdf (accessed 29 July 2006).

[5] CSR is a concept whereby companies voluntarily integrate social and environmental considerations into their business operations beyond existing legal requirements and contractual obligations. European Commission, Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final (July 2002) 5 *at* http://ec.europa.eu/employment_social/soc-dial/csr/csr2002_en.pdf (accessed 31 July 2006). Examples of recent CSR initiatives include: United Nations Environment Programme Financial Initiative ("UNEP FI"), Principles of Responsible Investment, *at* http://www.unpri.org/files/pri.pdf (accessed 24 July 2006); Collevecchio Declaration on Financial Institutions and Sustainability, *at* http://www.foe.org/camps/intl/declaration.html (accessed 23 July 2006); United Nations, United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights ("UN Draft Norms on Human Rights"), U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003) *at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument (accessed 24 July 2006); Corporation of London and Department of Environment, Food and Rural Affairs ("DEFRA"), *Financing the Future: The London Principles—The Role of UK Financial Services in Sustainable Development* (London: DEFRA, August 2002) 7 *at* http://www.cityoflondon.gov.uk/NR/rdonlyres/13F2434D-2209-4836-AEE3-D5C2E6A5F75E/0/SUS_financingfuture.pdf (accessed 30 July 2006); Organization for Economic Co-operation and Development ("OECD"), *The OECD Guidelines for Multinational Enterprises* (OECD: 2000) *at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (accessed 24 July 2006); United Nations, United Nations Global Compact, *at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (accessed 24 July 2006); and the UNEP FI, Statement by Financial Institutions on the Environment and Sustainable Development (May 1997) *at* http://www.unepfi.org/signatories/statements/fi/ (accessed 23 July 2006).

[6] Principles, Preamble.

managing project risk rather than a source of risk. Indeed, like all internal policies, the Principles do not purport to create rights in, or liability to, third parties.[7] Nevertheless, lenders that implement the Principles may increase their risk of liability for: (1) environmental damage caused by the projects they finance; and (2) violations of the social and economic rights of project-affected individuals.

Part I of this paper sets forth the content of the Equator Principles and their impact on the operations of lenders that adopt them—called Equator Principles Financial Institutions ("EPFIs"). Part II outlines the current scope of lender liability for environmental damage and describes how the steps EPFIs take to protect their project investments generate liability risks. Part III surveys existing methods for holding lenders accountable for their projects' social and economic harms and explains why EPFIs are prime targets for such liability. The paper concludes with reflections on the Principles endeavor and the evolving liability risks that accompany this new world of sustainable financing.

Part I: Content of the Principles and their Impact on EPFI Practice

The Equator Principles arose from sustained external and internal pressure on financial institutions to live up to their CSR promises. External pressure came from stakeholders, governments and their agencies, multilateral lending agencies ("MLAs") such as the World Bank and IFC, and socially responsible investment funds, with international advocacy groups and NGOs the most forceful advocates for improvement. Internally, boards, CEOs, and chairpersons committed to CSR were also important agents of change.[8] Finally, in October 2002 a small number of influential banks gathered in London and, in conjunction with the IFC, agreed to develop a framework for handling the environmental and social risks attendant to

[7] Principles, Disclaimer.

[8] Freshfields Bruckhaus Deringer, *Banking on Responsibility: Part 1 of Freshfields Bruckhaus Deringer Equator Principles Survey 2005: the Banks* 23 (July 2005) *available at* http://www.freshfields.com/practice/environment/publications/pdfs/12057.pdf (accessed 25 July 2006).

project financings.[9] On 4 June 2003, the fruits of the partnership were revealed in Washington, DC with the launch of the first version of the Equator Principles.[10]

On 6 July 2006, an updated version of the Principles was released to coincide with revisions to the IFC and World Bank standards on which they are based. The revised Principles have expanded from nine to ten and incorporate many of the proposals forwarded by NGOs and industry stakeholders over the past three years. In short, the scope and rigor of EPFI oversight has been expanded, prompting EPFIs to exercise an exceptional degree of control over project activity. Before considering the potential consequences of that control, however, it is necessary to first explore precisely what compliance with the new Principles entails.

A. Preamble

The final sentence of the Preamble summarizes the fundamental commitment of EPFIs. It reads: "We will not provide loans to projects where the borrower will not or is unable to comply with our respective social and environmental policies and procedures that implement the Equator Principles."[11] The statement elucidates an important precept: it is the individual policies and procedures of the lending EPFIs, not the Principles themselves, which furnish the ultimate compliance benchmark. There is accordingly a great deal of flexibility built into the Principles; each EPFI is free to decide for itself how to incorporate them into its operations.[12] This flexible approach has helped speed adoption of the Principles because each EPFI retains the discretion to fashion policies and procedures tailored to their organization and the particular project under review, including whether deviations from IFC or World Bank guidelines are warranted. Instead of resisting a rigid external system, EPFIs

---

[9] EPFIs, *Frequently Asked Questions About the Equator Principles* FAQ 1 (2006) *at* http://www.equator-principles.com/faq.shtml (accessed 29 July 2006). ABN AMRO, Barclays, Citigroup and WestLB drafted the Principles in collaboration with the IFC. The "founding four" institutions were joined by Calyon, Credit Suisse First Boston, HVB Group, Rabobank Group, Royal Bank of Scotland, and Westpac Banking Corporation, all of which committed to apply the Principles. Freshfields Bruckhaus Deringer, supra note 8, at 23.

[10] EPFIs, supra note 9, at FAQ 1. The 2003 Principles are reproduced in Freshfields Bruckhaus Deringer, supra note 8, at 130-133.

[11] Principles, Preamble.

[12] "These Principles are intended to serve as a common baseline and framework for the implementation by each EPFI of its own internal social and environmental policies, procedures and standards related to its project financing activities." *Id*.

invest ownership in "their" social and environmental standards, integrating sustainable development practices in line with the Principles at a level and pace that best fits their organizational profile.

Whether such flexibility best fits the goal of sustainable development is a point of debate. EPFIs contend that flexibility is required in a competitive market and that market forces in turn help temper variances in Principles implementation. Chris Beale, managing director of global corporate investment at Citigroup, believes that the widespread syndication of project financing loans has produced a degree of standardization, as participating EPFIs must agree on how to categorize, evaluate and address project risks.[13] Standardizing effects aside, however, NGOs contend that the absence of uniform implementation standards makes it difficult to assess how effectively EPFIs have integrated sustainability concerns into their lending decisions.[14] NGOs are particularly disappointed that the revised Principles lack an independent accountability mechanism to affirm that EPFIs are in fact living up to their social and environmental commitments.[15] EPFIs may well be correct that the market both compels and restrains flexibility. Nevertheless, greater transparency is needed to assess whether the Principles are truly making a difference in EPFI practice.

B. Principle 10: EPFI Reporting

The addition of new Principle 10 is a tentative step towards greater transparency, requiring EPFIs to report at least annually about their Principles implementation processes and experience.[16] A footnote to Principle 10 clarifies that "[s]uch reporting should at a minimum include the number of transactions screened by each EPFI, including the categorisation accorded to transactions (and may include

---

[13] Jane Monahan, "Principles in Question" *The Banker* 60 (7 March 2005) *at* http://www.equator-principles.com/documents/Principles_in_question.pdf (accessed 31 July 2006).

[14] Robert F. Lawrence and William L. Thomas, *The Equator Principles and Project Finance: Sustainability in Practice?* 19-FALL Nat. Resources & Env't 26 (2004); William L. Thomas, "Equator-Risk and Sustainability" in *Project Finance International Yearbook 2004* 16 (Essex: Euromoney Yearbooks, 14th ed, 2004).

[15] BankTrack, *Equator Principles II: NGO Comments on the Proposed Revision of the Equator Principles* 11-12 (26 April 2006) *at* http://www.banktrack.org/doc/File/Our%20Publications/BankTrack%20publications/060428%20EPII%20NGO%20position%20paper%20Public%20version%20final.pdf (accessed 31 July 2006).

[16] Principles, Principle 10.

a breakdown by sector or region), and information regarding implementation."[17] Even with this small injection of transparency, however, the form and content of reports are still likely to vary considerably.

While this obscurity frustrates NGOs keen to judge lenders' commitment to the Principles, lenders may have valid reasons for refusing to disclose their internal procedures or explain the reasons for their financing decisions, most notably a desire to protect proprietary knowledge and uphold their duty to preserve client confidentiality. Banks are especially keen to maintain client confidentiality in those jurisdictions where unauthorized disclosure carries civil or criminal liability.[18] Richard Burrett, ABN AMRO's global head of sustainable development, epitomizes the frustration lenders feel towards NGOs that hammer on about insufficient transparency, remarking, "Client confidentiality is something NGOs have struggled to understand."[19] Some lenders opt in favor of confidentiality in part to avoid having the information misinterpreted; an excess of failed projects would suggest initial screening procedures were insufficient, whereas too few would lead to accusations that the Principles were not being scrupulously applied.[20]

Recently enacted national laws and international accounting standards on corporate transparency and financial reporting could help fill the transparency and accountability void. In May 2001, for example, the French National Assembly passed legislation requiring listed companies to disclose environmental and social issues in their annual reports.[21] Similar "triple bottom line" CSR disclosure laws are taking

---

[17] *Id.* at Footnote 6.

[18] Malcom Forster, Paul Watchman and Charles July, 'The Equator Principles—Making a Difference? Part 2' (2005) 07 JIBFL 255. In England, for example, banks require explicit customer consent prior to the disclosure of confidential information. *Turner* v *Royal Bank of Scotland plc* [1999] 2 All E.R. [Comm] 664. The requirement is an important part of the Business Banking Code. British Bankers' Association, *Business Banking Code* para. 11.1 (March 2005), *available at* http://www.bba.org.uk/content/1/c4/52/26/BusinessBankingCode2005.pdf (accessed 9 August 2006).

[19] Anita Hawser, "A Matter of Principles" *Global Finance Magazine* (January 2005)*, available at* http://www.equator-principles.com/gfm2.shtml (accessed 31 July 2006).

[20] Roz Bulleid, "Putting Principles into Practice" *Environmental Finance* (June 2004), *available at* http://www.equator-principles.com/ef2.shtml (accessed 31 July 2006).

[21] French National Assembly, Law n° 2001-420 of 15 May 2001 relevant to the new economic regulations, J.O n° 113 du 16 mai 2001 page 7776, *available at* http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOX0000021L (accessed 6 August 2006).

hold in industrialized countries across the globe.[22] Despite the dynamic growth in CSR reporting laws, few contain explicit requirements, according much leverage to companies in the way they interpret and present data.[23] Although some EPFIs have also taken it upon themselves to describe in detail the steps they have taken to implement the Principles,[24] it appears that much of EPFI practice will remain shrouded in secrecy.

C. Scope

None of the foregoing should imply that the Principles' requirements are unclear, or that EPFIs can waive them as a public relations banner without putting in place tools to facilitate their observance. On the contrary, the Principles impose a number of concrete requirements on signatory institutions. The new Scope section frames those requirements, obliging EPFIs to apply the Principles that follow "to all new project financings globally with total project capital costs of US $10 million or more, and across all industry sectors."[25] EPFIs further agree to apply the Principles to the expansion or upgrade of existing project facilities where such changes are likely to cause "significant" social or environmental impacts or materially alter the status quo.[26] Lastly, EPFIs undertake to apply the Principles to their project finance advisory activities, counsel clients on their content, application and benefits, and request that clients indicate their intent to abide by the Principles when later soliciting financing.[27]

---

[22] An overview of global CSR disclosure laws is available from the Center for Corporate Citizenship at Boston College ("BCCCC"), *Mandated and Voluntary Corporate Disclosure of Social, Environmental, and Governance Data: Changes and Trends at* http://www.bcccc.net/index.cfm?fuseaction=Page.viewPage&pageId=1184&nodeID=3&parentID=1013&grandparentID=886 (accessed 6 August 2006).

[23] *Id.*

[24] *See, e.g.*, HSBC's Principle-by-Principle breakdown in the Equator Principles section of its website at www.hsbc.com, as well as the category-specific reporting in its yearly Corporate Social Responsibility Report. HSBC, *HSBC Corporate Social Responsibility Report 2005* 12 *at* http://www.hsbc.com/hsbc/csr/csr-reports-and-updates (accessed 1 August 2006).

[25] Principles, Scope.

[26] *Id.*

[27] *Id.*

D. Principle 1: Project Review and Categorization

Principle 1 requires EPFIs to categorize projects in accordance with established IFC criteria: "Projects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented" (Category A); projects with "potential limited adverse impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures" (Category B); and projects with "minimal or no social or environmental impacts" (Category C).[28] Categorization occurs "[w]hen a project is proposed for financing[.]"[29]

The initial categorization is crucial because it determines the steps the EPFI will require the borrower to take under the remaining Principles, as well as the EPFI's own degree of project scrutiny. Generally speaking, Category A projects will trigger extensive due diligence obligations for both the borrower and the EPFI, with those obligations decreasing in scope and scale for Category B projects, and all but disappearing for projects in Category C. Because lower categorization reduces due diligence costs, NGOs worry that EPFIs will be tempted to slot projects into lower risk categories than they deserve in an effort to reduce the costs to the borrower.[30] Although industry commentators acknowledge that competitive pressures arise during the categorization process, they deny that projects are downgraded in this manner.[31] Indeed, such a strategy appears penny wise and pound foolish; devoting too little attention to genuine project risks could open the door to expensive project complications in the future. To be sure, Principle 1 leaves ample room for professional discretion. Yet by setting a consistent benchmark for project categorization and requiring EPFI social and environmental scrutiny at the nascent proposal stage, when unsatisfactory project fundamentals can be more easily altered, Principle 1 ensures that sustainability concerns are identified and addressed before financing is extended.

---

[28] *Id.* at Annex I.

[29] *Id.* at Principle 1.

[30] Forster et al., supra note 18, at 254.

[31] Freshfields Bruckhaus Deringer, supra note 8, at 90.

In practice this means banks must develop the capacity to identify the nature and extent of a project's potential adverse social or environmental impacts. The IFC is becoming increasingly selective in its funding of extractive industries projects—particularly in the lucrative oil, coal, and gas industries—and EPFIs can no longer count on the IFC to involve itself in a project and perform the expert screening role.[32] Many EPFIs have built up significant competence in environmental matters, but few have adequate social assessment capabilities, leaving a worrying shortage of EPFI personnel with the knowledge necessary to make an informed categorization.[33] Accordingly, EPFIs are looking to the IFC as a wellspring for developing their own expertise. The IFC has been more than willing to oblige; it has trained hundreds of EPFI employees on its social and environmental policies and procedures,[34] and recently selected four private firms to train EPFI staff on its new Performance Standards.[35] In addition, former IFC staff now serve as EPFI consultants.[36] EPFIs have so far devoted hefty resources to improving their social and environmental prowess; they have recruited outside specialists, trained and redeployed staff internally, or employed a mixture of both strategies.[37] EPFIs are undoubtedly becoming more proficient in their assessment capabilities. Nevertheless, it is unrealistic to expect them to develop robust social and environmental expertise in such a short time frame.

In the interim, vast disparities in expertise threaten to hamper the Principles' credibility and increase risks for EPFIs. A failure to properly assess project risks

---

[32] Frank Amalric, Center for Corporate Responsibility and Sustainability, *The Equator Principles: A Step Towards Sustainability?* (University of Zurich, CCRS Working Paper No. 01/05, January 2005) *at* http://www.banktrack.org/doc/File/Policies%20and%20processes/Equator%20Principles/050101%20The%20Equator%20Principles;%20a%20step%20towards%20sustainability.pdf (accessed 4 August 2006).

[33] Forster et al., supra note 18, at 253.

[34] By the end of 2004 the IFC had trained over 700 staff at 15 EPFIs. Suellen Lazarus, IFC, "Banking on the Future: The Equator Principles and the Project Finance Market" in *Euromoney Syndicated Lending Handbook 2005* 6 (London: Euromoney Yearbooks, 4th ed, December 2004) *at* http://www.equator-principles.com/documents/SyndLend-IFC02.pdf (accessed 25 July 2006).

[35] IFC, *External Training on IFC's New Performance Standards on Social and Environmental Sustainability at* http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards_Training (accessed 4 August 2006).

[36] Forster et al., supra note 18, at 253.

[37] *Id.*

may unwittingly embroil EPFIs in just the type of unsustainable venture the Principles were designed to keep them from funding. In the case of project loan syndications, the bank chosen to examine and monitor a project's social and environmental components—the so-called Environment Bank—will likely be an EPFI. If the Environment Bank is not up to the task, it places the reputations of the other syndicate members in jeopardy,[38] and increases their risk of financial loss or liability. Some of these latter risks are explored in more detail below. First, however, it is important to consider how the remaining Principles seek to avoid such negative outcomes.

E. Principles 2 and 3: The Social and Environmental Assessment and its Applicable Standards

The Principles attempt to head off reputational and financial risks by prescribing policies and procedures that EPFIs and their borrowers can follow to identify any potential social or environmental problems, avoid them if possible, and if unavoidable, ensure that they are reduced and effectively addressed. Principles 2 and 3 designate the form and substance of the sustainability inquiry. Under Principle 2, EPFIs agree to require the borrower to conduct a Social and Environmental Assessment ("SEA") for any proposed Category A or B project. The EPFI must be satisfied that the SEA: (1) accurately identifies the project's relevant social and environmental impacts and risks; and (2) contains appropriate proposals for their mitigation and management.[39] A list illustrating potential issues EPFIs expect to see addressed in an SEA is set out in the Principles' Exhibit II, and includes issues such as host country and international legal requirements, protection of human rights and biodiversity, socio-economic impacts, and a full panoply of social and environmental concerns.

Principle 3 designates the new IFC Performance Standards (Exhibit III) and industry-specific EHS Guidelines (Exhibit IV) as the applicable social and environmental standards the borrower must meet throughout the project's lifecycle.[40] The eight Performance Standards articulate the borrower's responsibilities regarding:

1. Development and implementation of an SEA and management system;

[38] *Id.* at 253-254.

[39] Principles, Principle 2.

[40] *Id.* at Principle 3, Exhibits III and IV.

2. Labor and working conditions;
3. Pollution prevention and abatement;
4. Community health, safety and security;
5. Land acquisition and involuntary resettlement;
6. Biodiversity conservation and sustainable natural resource management;
7. Indigenous peoples; and
8. Cultural heritage.[41]

The IFC has developed a set of Guidance Notes to accompany each Performance Standard, and the Principles encourage EPFIs to refer to them for guidance on or interpretation of the Standards.[42] The EHS Guidelines, meanwhile, are an amalgamation of the guidelines in Part III of the World Bank's PPAH and a series of IFC guidelines published on its website between 1991 and 2003. The current EHS Guidelines will eventually be replaced with a new set incorporating cleaner production and environmental management systems. To ensure their standards keep pace with emerging best practice, EPFIs commit to measure compliance according to the EHS Guidelines then in force, including any later amendments.[43] EPFIs must be satisfied that the borrower's SEA demonstrates compliance with, or justified deviations from, the relevant Performance Standards and EHS Guidelines.[44]

Although EPFIs are intent on keeping standards high, they are equally keen to keep costs down, both for themselves and for prospective borrowers. Undertaking an SEA for a major project is itself an expensive commitment; some of the IFC and World Bank standards go beyond the typical requirements of even the most highly developed countries.[45] Principle 3 thus proposes a streamlined process for projects in

[41] IFC, *Performance Standards on Social and Environmental Sustainability* (30 April 2006) *available at* http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf (accessed 4 August 2006).

[42] Principles, Exhibit III; IFC, *Guidance Notes: Performance Standards on Social and Environmental Sustainability* (30 April 2006) *available at* http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_GuidanceNote_full/$FILE/GuidanceNote_full.pdf (accessed 4 August 2006).

[43] Principles, Exhibit III.

[44] *Id.* at Principle 3.

[45] Lawrence and Thomas, supra note 14, at 24.

High-Income OECD Countries (as defined by the World Bank's DID) whereby EPFIs will accept, as a substitute for an SEA based on the Performance Standards and EHS Guidelines, an equivalent assessment done in compliance with local or national law.[46] EPFIs will, however, continue to categorize and review such assessments in accordance with Principles 1 and 2.

F. Principles 4, 5 and 6: Project Management, Consultation and Disclosure, and Grievance Mechanism

Principles 4, 5 and 6 catalog EPFI standards for ensuring that project risks are carefully managed, affected parties are adequately informed and consulted, and their grievances addressed. As with Principle 3, where a project is situated in a High-Income OECD Country, Principles 4, 5 and 6 permit borrowers to demonstrate compliance through adherence to the relevant host country legal requirements. To satisfy Principle 4, a borrower must prepare an Action Plan ("AP") for all Category A and B projects which addresses the impacts and risks identified in the SEA and proposes strategies to correct, mitigate, and monitor them. Borrowers must furthermore design a Social and Environmental Management Plan ("SEMP") to carry out those strategies in accordance with the host country's relevant social and environmental laws and regulations, as well as with the applicable Performance Standards and EHS Guidelines.[47]

Principle 5 defines what EPFIs will consider adequate consultations with and disclosures to affected parties. For all Category A and appropriate Category B projects, the borrower, host government, or third-party experts are to consult with project-affected communities in a "structured and culturally appropriate manner."[48] Where significant adverse project impacts are anticipated, the EPFI must be satisfied that the consultation process was "free, prior and informed[,]" facilitated participation and adequately incorporated community concerns.[49] In each case the borrower should make copies or non-technical summaries of the SEA and AP documents available

---

[46] Principles, Principle 3.

[47] *Id.* at Principle 4.

[48] *Id.* at Principle 5.

[49] *Id.*

early in the assessment process, before any construction begins, and on an ongoing basis thereafter. Lastly, the borrower must document the results of the consultation process so that EPFIs or third-party experts can verify Principles compliance.

Principle 6 carries EPFI community engagement demands further by requiring borrowers to employ a grievance mechanism as part of its SEMP for all Category A and appropriate Category B projects. The mechanism is to be disclosed to the community during the consultation process and remain readily accessible to receive and facilitate resolution of issues concerning the project's social and environmental performance. The borrower must ensure that concerns are addressed promptly and transparently, as well as in a culturally appropriate manner.[50]

Although community engagement is envisioned as the task of the borrower, in some cases EPFIs may find it necessary to participate in the process directly. The host government may not want project assessments made public or may wish to silence community views it sees as hostile to the project. If host governments make effective disclosure or consultation impossible, borrowers may lack the leverage to persuade them to adopt a more Principles compliant stance. As the providers of finance for an important local project, EPFIs can use their clout to pressure the host government for more disclosure or better access to project affected communities. In some instances, local communities may be more willing to engage with EPFIs than with borrowers if there is an impression that the borrower is unwilling or unable to address their grievances.[51]

G. Principles 7, 8 and 9: Independent Expert Review, Monitoring and Reporting, Covenants

Principles 7, 8 and 9 aim to secure objectivity and accountability throughout the life of the project. Principles 7 and 9 bring objectivity to the due diligence, project monitoring and reporting processes by requiring independent expert review, while 8 makes the borrower accountable by tying various loan covenants to Principles compliance. Because the three Principles collectively place EPFI's in position to

---

[50] *Id.* at Principle 6.

[51] Rachel Bailey, Tracy Ryan and Nicky Hodges, "Building Sustainability Into Syndication" *Environmental Finance* 30 (July/August 2006), *available at* http://www.equator-principles.com/documents/ef7equator_Bailey_p28-30.pdf#search=%22Bailey%20Ryan%20and%20Hodges%20sustainability%20environmental%20finance%22 (accessed 11 September 2006).

"sign-off" on a project's conformity with the applicable social and environmental standards or to exercise remedies when they are breached, they are likely to be the key conduits for holding EPFI's liable for a project's social or environmental harms. How they are implemented is thus of central importance to assessing EPFI liability risk.

Principle 7 stipulates that for all Category A and appropriate Category B projects an independent social or environmental expert will review the borrower's SEA, AP, and consultation process documentation. The review will assist the EPFI's due diligence and establish Equator Principles compliance prior to any project loan approval.[52] The insertion of an independent expert review process should help alleviate NGO concerns that EPFIs will be inclined to rubber stamp a lax borrower due diligence effort in order to maintain a profitable business relationship. It should also help EPFIs detect gaps in assessment areas and prevent them from funding unsound projects due to inadequate internal social and environmental expertise. In addition to examining the borrower's due diligence documentation, the expert review may need to include site visits, consultations with affected parties, or further technical studies. The advising expert will owe the EPFI a duty of care, which could very well extend to participants in a loan syndication.[53] Principle 7 does not, however, mandate that EPFIs accept the expert's compliance appraisal. As with every element of the Principles, EPFIs hold the final say on whether borrowers have met their standards.

The initial due diligence inquiry will typically culminate with loan documents that contain detailed conditions precedent for the borrower to fulfill before it can begin to draw on the loan facility.[54] Similar conditions will have to be satisfied and specific representations and warranties repeated before additional funds will be dispersed. These requirements allow EPFIs to maintain a degree of negative control over the project by withholding funds when social or environmental aspects are not to their satisfaction.[55] Included will likely be provisions whereby the borrower:

---

[52] Principles, Principle 7.

[53] Freshfields Bruckhaus Deringer, supra note 8, at 93.

[54] *Id.* at 112-113.

[55] *Id.*

1. Certifies that its social and environmental representations and warranties are true and correct;
2. Provides copies of any necessary authorizations, permits or approvals;
3. Provides copies of all internal, expert and consultant reports that address the adequacy of the due diligence process, including the project categorization, SEA, SEMP, compliance with applicable laws, regulations and guidelines;
4. Represents and warrants that no social or environmental claims against it are threatened or pending.

Of course, EPFIs do not surrender all control over borrower activity at the moment the project funds are dispersed. Rather, they retain their sway over the project's construction and operation through the use of loan covenants that make borrower compliance with the Principles a continuing obligation. The types of social and environmental loan covenants that EPFIs require are set out in Principle 8.

Principle 8 is perhaps the most important of all the Principles; it maximizes EPFI influence over a project by requiring borrowers to comply with the Principles or face possible default and EPFIs' enforcement of remedial rights under the loan agreement.[56] For all Category A and B projects, borrowers must covenant to:

1. Comply with relevant host country social and environmental laws, regulations and permits in all material respects;
2. Comply with any applicable AP in all material respects during the project's construction and operation;
3. Periodically report to EPFIs on compliance with 1 and 2 above. The frequency of reporting should be proportionate to the severity of the project's impacts, or as required by law, but not less than annually; and
4. Decommission the facilities in accordance with an agreed decommissioning plan, where appropriate

If the borrower breaches the social and environmental covenants, EPFIs will grant the borrower a grace period and attempt to work with them to reestablish compliance. If constructive engagement proves unsuccessful, the EPFIs reserve the right to exercise

[56] Benjamin J. Richardson, 'The Equator Principles: The Voluntary Approach To Environmentally Sustainable Finance' (2005) 14(11) EELR. 280, 290.

remedies, as they consider appropriate.[57] Depending on the project loan documentation and security structure, these could include:

1. Declaring the borrower to be in default and accelerating or foreclosing on the debt (invoked only if the project is totally unsalvageable);[58]
2. Refusing to authorize any further drawdowns;
3. Freezing distributions to sponsors from the project's proceeds account;
4. Mandating a build-up of retentions in the proceeds account;
5. Requesting additional collateral or payment of a sponsor guarantee, surety bond, or Standby Letter of Credit;[59] or
6. Invoking any step-in rights to security over tangible project assets or SPE shares.[60]

Quite apart from their desire to avoid bad NGO publicity, then, borrowers have powerful financial incentives to follow through on their social and environmental undertakings.

Principle 9 should assist EPFIs in determining whether borrowers have stayed true to their commitments. It provides that for the life of all Category A and appropriate Category B projects, EPFIs will require that monitoring and reporting on a project's compliance be carried out by an independent environmental expert, social expert, or both. Alternatively, EPFIs may require a borrower to retain qualified and experienced external experts to verify its monitoring information, which would then

---

[57] Principles, Principle 8.

[58] Philip R. Wood, *Project Finance, Subordinated Debt, and State Loans* 28 (London: Sweet & Maxwell, 1995).

[59] With a Standby Letter of Credit, the bank issuing the credit agrees to reimburse the project lender for any financial loss caused by the borrower's default. Ultimately, however, the issuing bank will be indemnified or reimbursed via a separate agreement with one of the project's corporate sponsors, which the bank will demand as a condition precedent to issuance of the Standby Letter of Credit. Wendy N. Duong, *Partnerships with Monarchs—Two Case Studies: Case Two* 26 U. Pa. J. Int'l Econ. L. 69, 76-77 (Spring 2005). For more on Standby Letters of Credit, *see* Roy Goode, *Abstract Payment Undertakings in International Transactions* 22 Brook. J. Int'l. L 1, 1-4, 16-17 (1996), as well as the UNCITRAL Secretariat's Explanatory Note to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. UNCITRAL Secretariat, Explanatory Note, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 30th Sess., U.N. Doc. A/CN.9/431 (1996) *available at* http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf (accessed 10 August 2006).

[60] Duong, supra note 59, at 76-77.

be shared with EPFIs.[61] Again, it is likely that any independent experts owe a duty of care to EPFIs, but it is in the end up to the EPFIs to decide whether a borrower has satisfied its particular standards.

Whether EPFIs will publicly disclose the compliance reports they receive from independent experts is an open question. Regardless of the level of confidentiality a project's corporate sponsors or host governments would prefer to maintain, any social or environmental shortcomings are unlikely to remain secret. First, NGOs will have their own expert monitors and will publicize their findings.[62] Second, in some jurisdictions, authorities may be under a legal obligation to publish the results of any social or environmental investigation or regulatory review. Lastly, disclosure will be required where the IFC or another MLA is a member of the lending syndicate.

An example of the current trend towards extensive disclosure is the recent IFC-supported Baku-Tbilisi-Ceyhan ("BTC") oil pipeline project, which carries oil from the Caspian Sea through Azerbaijan and Georgia to Turkey. BTC project documents such as the EIA are available on the IFC website,[63] while independent assessment reports and information regarding the handling of specific complaints can be found on the website of the CAO.[64] Even corporate BTC sponsors such as BP provide access to project reports via the Internet.[65] Disclosure of independent expert reports could act as a favorable counterbalance to criticism of a project; even where

---

[61] Principles, Principle 9.

[62] NGOs are committed to monitor and document any violations of standards by projects, which they view as a critical foundation for bringing legal claims for damages or other forms of redress. Nicholas Hildyard, The Corner House, *Holding Funders and Companies to Account—Litigation and Standards* 18-19 (Paper Presented to American Anthropological Association Annual Meeting, Washington, D.C., 3 December 2005) *available at* http://www.thecornerhouse.org.uk/pdf/document/IFIaccnt.pdf (accessed 8 August 2006). Advances in monitoring and international networking technologies make environmental harms in particular virtually impossible to hide. Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. Rev. 115, 167-170 (April 2004).

[63] IFC, *BTC Oil Pipeline Project—Project Documents at* http://www.ifc.org/ifcext/btc.nsf/Content/Project_Documents (accessed 8 August 2006).

[64] Office of the Compliance Advisor Ombudsman ("CAO"), *Georgia and Turkey, Azerbaijan: Baku-Tbilisi-Ceyhan (BTC) Main Export Pipeline at* http://www.cao-ombudsman.org/html-english/complaint_btc.htm (accessed 8 August 2006).

[65] BP, *Baku-Tbilisi-Ceyhan Pipeline at* http://www.bp.com/subsection.do?categoryId=9006630&contentId=7013422 (accessed 8 August 2006).

the reports do not give the project a clean bill of health, the public scrutiny can help foster collaborative solutions that defuse opposition and improve project sustainability.[66] In such an increasingly open reporting environment, the Principles' call for reviews and reports of independent experts, coupled with loan covenants linked to Principles compliance, bring an improved measure of transparency, objectivity, and accountability to EPFI project financings.

As the above discussion illustrates, the Principles impose a number of specific requirements on adopting institutions, which they in turn apply to project borrowers. By adopting and implementing the Principles, EPFIs agree to shoulder responsibility for assessing and monitoring a borrower's social and environmental activities. Having explored what the Principles require, we can rightly ask: how might they create rather than suppress social and environmental risks for adopting institutions?

The myriad ways in which EPFIs can implement the Principles, coupled with the unique loan arrangements specific projects entail and the various host country and foreign laws they involve, engender a calculation of liability risk that is highly individualistic; the resulting EPFI exposure will differ substantially depending on the circumstances. Nevertheless, because the Principles do impose a recognizable set of consistent standards on all project financings within their purview, and because of the increasing convergence of international environmental and human rights law, it is possible to broadly sketch the increased liability risks EPFIs are apt to encounter. We will begin by examining the contours of the liability risks lenders face under existing environmental law, highlighting the areas where EPFI risk is paramount. Thereafter will follow a brief discussion of the emerging legal methods available to bring businesses to account for their involvement in violations of social and economic rights and the reasons EPFIs are at greater risk of being targeted for such liability.

---

[66] Ann L. MacNaughton and John Stephens, *Improving Infrastructure Project Results in Sensitive Areas, U.S. and Abroad* 11-13 (American Bar Association, Section of Environment, Energy and Resources (SEER), Presentation Materials from the SEER Annual Fall Meeting, 10 October 2003) *at* http://www.abanet.org/environ/committees/adr/infrastructuremacnaughton.pdf (accessed 8 August 2006). BankTrack has stressed the mutual benefits of disclosure in its advice to EPFIs. *See generally* BankTrack, *Transparency and the Equator Principles: Proposals for EP Bank Disclosure* (28 November 2004) *at* http://www.banktrack.org/doc/File/Our%20Publications/BankTrack%20publications/041128%20Transparency%20for%20the%20Equator%20banks.pdf (accessed 16 August 2006).

Part II: Lender Liability for Environmental Damage

Laws aimed at protecting the environment are a staple of every modern legal system. Although their substance and form inevitably differ by jurisdiction, general principles of international environmental law pervade. One is the 'polluter pays' principle, which holds that the party or parties responsible for environmental damage should bear its costs. The 'polluter pays' approach to environmental liability is endorsed by international environmental instruments such as the 1992 Rio Declaration[67] and is the bedrock of environmental legislation in the United States, the European Union, and Japan,[68] as well as in developing countries such as India.[69] Its incorporation into the developing world's emerging environmental legal framework is propelled by international treaties, MLAs, NGOs, and by the general convergence of global environmental policies.[70] Accordingly, regardless of where a project is located, EPFI liability for environmental damage is likely to hinge on whether the applicable law deems the EPFI a polluter. Once labeled a polluter the EPFI may face criminal sanctions as well as civil liability.[71] The focus here is on civil liability, however, and we now turn to consider the types of public and private damages claims EPFIs are likely to encounter.

---

[67] Report of the United Nations Conference on Environment and Development, 3-14 June 1992, Rio Declaration on Environment and Development, Annex I, Principle 16, U.N. Doc A/CONF.151/26/Rev.1 (1992), 31 I.L.M. 874, 877, *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163.

[68] Eric Thomas Larson, Note, *Why Environmental Liability Regimes in the United States, The European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle*, 38 Vand. J. Transnat'l L. 541 (March 2005). Indeed, the EU has gone so far as to incorporate the principle as Article 174(2) of the European Community Treaty. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts—Consolidated Version of the Treaty Establishing the European Union, Oct. 2, 1997 O.J. (C 340), art. 174(2).

[69] *Indian Council for Enviro-Legal Action* v *Union of India & Others* (1996) 3 SCC 212, para. 67, in UNEP et al., *Compendium of Judicial Decisions on Matters Related to the Environment: National Decisions Vol 1* (December 1998) 394, 414 *at* http://www.unep.org/padelia/publications/Jud.Dec.Nat.pre.pdf (accessed 15 August 2006).

[70] Larson, supra note 68, at 574-575.

[71] The subject of lender liability for environmental damage is well covered elsewhere and a thorough review is beyond the scope of this paper. *See generally* Joseph J. Norton, Ray Auerback, and Jeffrey M. Gaba (eds), *Environmental Liability for Banks* (London: LLP, 1995); John Jarvis and Michael Fordham, *Lender Liability: Environmental Risk and Debt* (London: Cameron May, 1993).

A. Public Environmental Liability

Environmental laws provide a variety of bases on which public authorities could hold EPFIs liable for a project's environmental harms. Although the level of EPFI involvement required to trigger liability differs by statute, the common predicates are the rather open-ended notions of control and responsibility.[72] In many instances statutory liability for environmental damage fixes responsibility on the "owner" or "operator" of the polluting enterprise. Examples include the United States' CERCLA legislation, which imposes liability for cleanup expenses on any owner or operator of a site contaminated with hazardous waste,[73] and the recent EU Directive on environmental liability, which requires the operator to bear the cost of prevention or remediation of environmental damage.[74] The definition of operator is usually broad enough to include any party exercising control over the activities of the polluting enterprise—lenders included.[75] The class of potential polluters is even broader in England, where environmental laws such as the Environmental Protection Act 1990 impose liability on any person that "causes or knowingly permits" pollution.[76] The position is similar in Canada, where legislation extends liability to

---

[72] Jarvis and Fordham, supra note 71, at 121-127, 160-163.

[73] Larson, supra note 68, at 551. CERCLA stands for Comprehensive Environmental Response, Compensation and Liability Act of 1980, otherwise known as "Superfund". 42 U.S.C. §§ 9601-75 (1980). For an overview of lender liability under CERCLA, *see* Edward F. Mannino and Richard E. Kaye (eds), *Lender Liability and Banking Litigation* § 6.05 (New York: American Lawyer Media, 2005).

[74] Directive 2004/35/EC on environmental liability with regard to the prevention of and remedying of environmental damage, (2004) OJ L143/56, art. 8(1).

[75] Under the EU Directive, for instance, an operator is "any natural or legal, private or public person who operates or controls the occupational activity[.]" *Id.* art. 2(6). *See also* Bernat Mullerat, 'European Environmental Liability: One Step Forward' (2005) 16(6) ICCLR 263, 265 ("Operational control is not limited to group companies, but reaches to any third party exercising control, whether as client or creditor."). For more on operator liability in the EU, *see* Gerrit Betlem, "Transnational Operator Liability" in Gerrit Betlem & Edward Brans (eds), *Environmental Liability in the EU* (London: Cameron May, 2006), Chapter 7, pp. 149-188, *available at* http://www.law.soton.ac.uk/blp/ELD_Oxford/betlem_2006.pdf#search=%22Mullerat%20european%20environmental%20liability%22 (accessed 11 September 2006).

[76] Richard Hooley, 'Lender Liability for Environmental Damage' (2001) 60(2) CLJ 405, 408; Environmental Protection Act 1990, s. 33. For a summary of lender environmental liability in the UK, *see* Jonathan Marks, "Domestic Environmental Liability" in William Blair (ed), *Banks, Liability and Risk* 146-152 (London: LLP, 3d ed, 2001).

persons who cause or fail to prevent pollution of the waters, shores or banks.[77] And in Brazil, the liability net will ensnare "any party that in any way participates in the practice of" activities harmful to the environment, or "fail[s] to prevent [their] practice, when action could have been taken[.]"[78]

Statutory liability is particularly threatening to lenders where it is strict (liability attaches regardless of fault) as well as joint and several (each responsible party is liable for the entire cost of remediation).[79] CERCLA has perhaps been the most feared, imposing liability on a wide range of potentially responsible parties ("PRPs") in a form that is strict, joint and several, and retroactive, i.e. it applies to pollution that occurred prior to its enactment.[80] Foreign defendants whose polluting activities take place abroad are also within the reach of CERCLA liability if the pollution they are responsible for resides within the United States.[81] The EU Directive imposes liability on operators for the full costs of preventing or remedying environmental harm, including harm to protected species and natural habitats, though it allows them to recover those costs if they can prove they were not at fault.[82] Member States may apportion liability jointly and severally among responsible parties.[83] And while the Directive purports not to apply retroactively, the European

---

[77] Dianne Saxe, 'Trustees' and Receivers' Environmental Law Update' (1998) 49 C.B.R. (3d) 138; Ontario Water Resources Act, R.S.O. 1990, c. O.40, s. 30 (1); *R. v. Sault Ste. Marie (City)* [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30.

[78] Law No. 9.605 of 12 February 1998, Regulates Criminal and Administrative Penalties Relating to Behavior and Activities Harmful to the Environment, and Sets Forth Other Provisions, art. 2. (Westlaw database: Brazil Environmental, Health and Safety Laws and Regulations (accessed 22 August 2006)).

[79] George McKenzie and Simon Wolfe, 'The Impact of Environmental Risk on the UK Banking Sector' (2004) 14 *Applied Financial Economics* 1005, 1007. The imposition of strict liability is sometimes defended as a form of "*social* justice" enforced in the name of the general welfare of society. H.L.A. Hart, *The Concept of Law* 166 (Oxford: Oxford University Press, 2d ed, 1994). This makes it highly amenable to the environmental context, where the costs of environmental damage are typically born by society as a whole.

[80] CERCLA liability extends to owners, operators, generators, transporters, and arrangers for transport or disposal of hazardous wastes. Mannino and Kaye, supra note 73, at § 6.05.

[81] *Pakootas* v *Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1079 (9th Cir. 2006).

[82] Owen McIntyre, 'The All Consuming Definition of "Waste" and the End of the "Contaminated Land" Debate?' (2005) 17 J. Envtl. L. 109, 125. *See* Directive 2004/35/EC, supra note 74, arts. 1(b) (extending liability for harm to protected species and natural habitats) and 8(3)-(4) (allowing operator to escape liability upon proof of innocence).

[83] Directive 2004/35/EC, supra note 74, art. 9.

Court of Justice's ruling in *Van de Walle & Ors v Texaco Belgium SA* leaves the door open for possessors of contaminated land to face liability for its cleanup costs regardless of when the contamination arose.[84]

The potential severity of lender environmental liability is no less under statutory regimes in the developing world. India's Environment Protection Act 1986, for example, empowers the government to "take all such measures as are necessary and appropriate for protecting the 'environment' . . . and wherever necessary impose the costs of remedial measures on the offending industry."[85] Indonesia's 1997 Law on Environmental Management requires the party responsible for a business or activity that exerts a major and significant impact on the environment to "assume absolute responsibility for the losses inflicted[.]"[86] As this brief legislative survey indicates, regardless of where the projects they finance are located, EPFIs commitment to responsible lending may entice governments to hand them a steep environmental remediation bill.

B. Liability for Private Environmental Damage

Because any large-scale environmental problem is likely to affect both public and private interests, the costs of government-mandated cleanup may be just the tip of the liability iceberg. A citizen who has suffered losses due to environmental damage from a project will typically be able to initiate a claim for compensation from the party responsible. Whether the claim arises from a specific environmental statute or from general tort principles in civil or common law, the claimant will need to establish a causal link between the EPFIs actions or omissions and the environmental harm.[87] On what bases and to what degree will private parties who have suffered environmental harm be able to hold EPFIs accountable?

---

[84] McIntyre, supra note 83, at 126. *See* Directive 2004/35/EC, supra note 74, art. 17(1) (non-retroactivity); Case No. C-1/03 *Van de Walle & Ors* v *Texaco Belgium SA* [2005] 1 CMLR 8 ECJ.

[85] *Indian Council for Enviro-Legal Action*, supra note 69, para. 69 at 416.

[86] Law No. 23/1997, The Law on Environmental Management, art. 35 (Westlaw database: Indonesia Environmental, Health & Safety Laws and Regulations (accessed 22 August 2006)).

[87] Myfanwy Badge, *Transboundary Accountability for Transnational Corporations: Using Private Civil Claims* 2, 8-9 (Chatham House, Working Paper, March 2006) *at* http://www.chathamhouse.org.uk/pdf/research/il/ILP_TNC.pdf (accessed 17 August 2006) (citing the general tort principles in Anthony M. Dugdale (ed), *Clerk & Lindsell on Torts* ch. 2 (London: Sweet & Maxwell, 19th ed, 2005). The element of causation is essential to any finding of liability in tort. "[L]iability in torts can be imposed only if the harm has been caused in the appropriate way by the

Private claims against EPFIs are likely to be founded on the concepts of negligence, trespass, breach of statutory duty, nuisance, and the rule in *Rylands* v *Fletcher*.[88] Damages for breach of the first three are generally based on fault, whereas the latter imposes strict liability on defendants for any foreseeable damage caused by the escape of a non-natural substance brought onto their land that is "likely to do mischief if it escapes[.]"[89] It is in essence a tort of strict liability for damages from hazardous activities. It was on this theory that the Indian Supreme Court held Union Carbide fully liable for damages resulting from a toxic gas leak at its subsidiary's chlorine plant in Bhopal.[90] Despite the rule's common-law pedigree, the civil codes of countries such as France and Germany permit similar strict liability claims.[91]

Environmental claimants harmed in one jurisdiction may even pursue remedies in the courts and under the laws of another. Indian claimants, for example, sued Union Carbide in the United States under the Alien Tort Statute ("ATS")[92] for

---

wrong. A's wrong must be what the law calls the 'proximate' cause of B's harm." Jules Coleman, "Theories of Tort Law" in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy (Winter 2003 Edition)*, *at* http://plato.stanford.edu/archives/win2003/entries/tort-theories/ (accessed 17 August 2006).

[88] Hooley, supra note 76, at 406; Jarvis and Fordham, supra note 71, at 33-41. Although the rule in *Rylands* v. *Fletcher* or similar incarnations appears in England, the United States, and India, in Australia the rule has been subsumed within the tort of negligence. Jacqueline D. Lipton, 'Project Financing and the Environment: Lender Liability for Environmental Damage in Australia' (1996) 11(1) JIBL 7, 15-17.

[89] *Rylands* v *Fletcher* (1866) LR 1 Ex 265, 279-280. The modern contours of the English rule are sketched in *Transco Plc* v *Stockport MBC* [2004] 2 AC 1, 10-12. *See also* Donal Nolan, 'The Distinctiveness of *Rylands* v *Fletcher*' (2005) 121(Jul) LQR 421-451 (tracing the rule's evolution and arguing for its abolition).

[90] *M.C. Mehta* v *Union of India*, [1987] AIR, SC 965, 1086, 1098-1100, paras 31-33, in Peter T. Muchlinski, *Multinational Enterprises and the Law* 325-327, 341 (Oxford: Blackwell Publishing, 2004).

[91] *Transco Plc*, 2 AC at 9 (citing Walter van Gerven, Jeremy Lever and Peter Larouche, *Cases, Materials and Text on National, Supranational and International, Tort Law* 205 (Oxford: Hart Publishing, 2000)). The basic provisions of strict as well as fault-based tort liability under the French and German civil codes are set forth in Badge, supra note 87, at 58-60.

[92] 28 U.S.C. § 1350 (2000). The ATS stems from the Judiciary Act of 1789 and provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (Sept. 24, 1789). ATS claims are most likely to be framed as human rights violations. *See* James Boeving, *Half Full . . . Or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 Geo. Int'l Envtl. L. Rev. 109, 138 (Fall 2005) (concluding that "the human rights proxy rationale is the only available route" for environmental alien tort claims). ATS claims are examined further in Part III below.

violations of international law related to the Bhopal disaster and attached claims for damages and remediation of groundwater contamination under New York trespass and nuisance law. Although the court eventually dismissed the action because the claimants lacked standing, it determined "New York law applies in cases in which the harm occurs abroad, and where there is no conflict with the law of the foreign jurisdiction."[93] Despite the daunting prospect of defending environmental claims in multiple international forums, the severity of an EPFI's tortious liability can typically be mitigated by showing it acted reasonably in the circumstances, with strict liability confined to unusually dangerous or hazardous activities. That should come as a relief to EPFIs, for however much an unpaid creditor may lament its losses, the lending of money is unlikely to qualify as a hazardous activity.

Even if EPFIs are prepared to admit that they bear some measure of responsibility for preventing their borrowers from damaging the environment, they may believe that so long as the borrower or project sponsor remains solvent there is very little risk of anyone heading after the bank. Perhaps. Yet the appeal of strict, joint and several liability systems is that they remove the burden on innocent parties to pursue remediation costs from multiple PRPs whose precise culpability may be impossible to determine and who may be defunct, insolvent or otherwise judgment-proof. Instead, they can recover remediation costs from the most accessible "deep pocket" PRP, leaving it to that party to pursue others for contribution.[94] Needless to say, if an EPFI is among the list of PRPs, the claimant may have little incentive to seek recovery elsewhere, regardless of whether the EPFI's degree of culpability for the environmental harm is proportionately miniscule.

In sum, EPFI liability for public or private environmental damage revolves around questions of control and concomitant notions of responsibility. Where liability attaches EPFIs may be required to pay the full costs of environmental damage or an amount proportional to its fault. Ownership provides the clearest basis for

---

[93] *Bano* v *Union Carbide Corp.*, No. 99 Civ.11329 JFK, 2003 WL 1344884, at *3 (S.D.N.Y. March 18, 2003); *see also Bano* v *Bi,* No. 05-6082, 2006 WL 2336428, at *1 (2d. Cir. August 8, 2006) (affirming dismissal of nuisance and trespass claims under New York law because claimant resided illegally on property owned by the Indian government and hadn't asserted any special injury beyond that suffered by the public at large).

[94] Thomas W. Church and Robert T. Nakamura, *Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States*, 7 Geo. Int'l Envtl. L. Rev. 15, 24-29 (1994).

imposing liability, though in a fault-based regime not always a sufficient one. In practically every system, however, the EPFI that exercises control over the management, policies, or daily operations of a borrower will likely finds itself subject to liability.[95] Determining whether a lender's control over a project is sufficient to warrant liability in a given case, however, is an intensely factual inquiry that will vary greatly with the circumstances and which, without discounting the precise content of the loan documents, will focus more on the broader lending relationship.[96]

In the typical commercial lending relationship, the lender's role in a borrower's affairs is predominantly passive, confined to taking security over assets and imposing financial ratio covenants to ensure a steady flow of debt service payments. Non-financial covenants and other transactional means of influence will rarely grant lenders active control over a borrower's business. Furthermore, statutory exceptions for secured lenders are common, allowing lenders to engage in traditional workout practices, foreclose on property, and administer bankrupt estates with little fear of environmental liability.

What then makes the environmental liability landscape for EPFI's more precarious? To better understand how an EPFI might be held liable for a project's environmental harms under any of the above mentioned theories, it is useful to review the types of activity that past tribunals have considered material to a finding of lender liability. With these prior liability factors as guideposts, we can then see how those factors might resonate in the context of the EPFI's relationship with its project finance borrower, reserving our keenest scrutiny for the various ways in which EPFIs might be said to exercise either direct or indirect control over the project's operations.

C. Lender Liability in the 1990s: Expanding Judicial Notions of Lender Control and Responsibility and the Legislative Efforts to Suppress Them

Although commercial lenders today are relatively untroubled by the prospect of direct environmental liability, the position was far different in the 1990s, as shockwaves of anxiety rippled through the lending community in the wake of the notorious *Fleet Factors* decision. In *Fleet Factors*, a CERCLA case, the United

[95] Maninno and Kaye, supra note 73, at § 6.01; Hooley, supra note 76, at 411-412; Saxe, supra note 77, at 138; Mullerat, supra note 75, at 265.

[96] Maninno and Kaye, supra note 73, at § 6.01.

States Court of Appeals for the Eleventh Circuit held that even if a secured creditor plays no role in the borrower's day-to-day operations or does not partake in hazardous waste decisions, it may be liable as an "owner or operator" if it participates in the financial management of a facility "to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[97] Liability would follow in the event the lender's involvement was "sufficiently broad to support the inference that it could affect hazardous waste decisions if it so chose."[98] The ruling dramatically raised the risk profile of environmentally sensitive borrowers and sent lenders scrambling for answers. How much leverage, financial or otherwise, could they exert on a borrower without triggering liability for having a "capacity to influence"? Despite the case being confined to the application of a particular statute in the United States, there was genuine anxiety in the international lending community over whether the expansive liability principles of the ruling would influence developments across the globe.

In Canada, the *Panamericana De Bienes Y Servicios* v *Northern Badger Oil & Gas Ltd*[99] decision stoked lender liability fears further by holding that the costs of government-mandated environmental cleanup take precedence over distributions to secured lenders from the debtor's bankruptcy estate. Although in *Panamericana* the estate had sufficient assets to cover the cleanup costs, lenders serving as bankruptcy trustees worried they might be held personally responsible for any shortfall. Shortly after *Panamericana*, however, *Re Lamford Forest Products Ltd* allowed banks to breath a little easier, holding that a trustee would not be personally liable for environmental compliance costs attributable to the bankrupt before the trustee was appointed.[100] Changes in 1992 to the Canadian Bankruptcy and Insolvency Act ("BIA") codified the *Lamford* personal liability shield, while still leaving trustees liable for negligent breaches of environmental laws committed during the administration of the estate.[101] The position of receivers administering a bankrupt

---

[97] *United States* v *Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991).

[98] *Id.* at 1558.

[99] *Panamericana De Bienes Y Servicios* v *Northern Badge Oil & Gas Ltd* (1991) 81 DLR (4th) 280.

[100] *Re Lamford Forest Products Ltd.* (1991) 10 C.B.R. (3d) 137.

[101] Saxe, supra note 77, at 138.

estate in Canada remained unprotected, however, until 1997, when further amendments to the BIA extended receivers the same personal liability protections then afforded to trustees and lowered the liability standard for activities undertaken during the bankruptcy administration from negligence to gross negligence or willful misconduct.[102]

Lender concerns in the United States were assuaged when Congress passed the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996[103] in response to the turmoil created by *Fleet Factors*.[104] The law exempts lenders from CERCLA "owner or operator" liability provided they do not actively participate in facility waste management.[105] "Participation in management" is in turn defined to exclude "merely having the capacity to influence, or the unexercised right to control, facility operations."[106] Additional protection exists for lenders that foreclose on contaminated property if they did not participate in management and seek to sell the property at the earliest practicable time for reasonable commercial value. Lastly, lenders acting as fiduciaries[107] are given safe harbor for traditional fiduciary activities and a liability limit equal to the value of the assets held in the fiduciary capacity;[108] this protection disappears, however, if the fiduciary negligently "causes or contributes to"[109] the release of hazardous substances or "acts in a capacity other than that of a fiduciary or in a beneficiary capacity . . . and in that capacity, directly or indirectly

---

[102] *Id. See also Strathcona (County)* v. *PriceWaterhouseCoopers Inc.* [2005] 13 C.B.R. (5th) 145, 256 DLR (4th) 536.

[103] Pub. L. No. 104-208, 2501-2505; 42 U.S.C. §§ 9601(20)(E)-(G), 9607(n).

[104] *Monarch Tile, Inc.* v *City of Florence,* 212 F.3d 1219, 1222 n. 2 (11th Cir. 2000).

[105] 42 U.S.C. § 9601(20)(E).

[106] *Id.* at § 9601(20)(F)(i).

[107] Fiduciary is defined broadly in § 9607(n)(5)(A)(i) as a person acting for the benefit of another party as a bona fide: trustee; executor; administrator; custodian; guardian; receiver; conservator; personal representative; trustee over a form of indebtedness in which it is not, in its capacity as trustee, the lender; and other similar fiduciary roles.

[108] 42 U.S.C. § 9607(n)(4) (safe harbor) and § 9607(n)(1) (liability limitation).

[109] *Id.* at § 9607(n)(3) (safe harbor and limitation excluded where fiduciary is negligent); *see also Canadyne-Georgia Corp.* v *NationsBank, N.A. (South)*, 183 F.3d 1269, 1274-1275 (11th Cir. 1999); *Canadyne-Georgia Corp.* v *Bank of America*, 174 F. Supp. 2d 1360, 1365 (M.D. Ga. 2001) (applying the exclusions).

benefits from a trust or fiduciary relationship[.]"[110] Despite the danger the latter exclusion might pose for a bank serving in a dual role as lender and fiduciary, courts have held that a lender may act as fiduciary of assets in which it holds a security interest without losing its protected status.[111]

The push to shield lenders from liability has not been confined to North America; England's contaminated land regime excludes lenders from liability for "causing or knowingly permitting" pollution if their liability would hinge solely on their providing finance to a polluter.[112] With *Fleet Factors*, *Panamericana* and subsequent transatlantic legislative reforms having drawn attention to the dangers lender liability poses to financial sector stability,[113] it appears that the direct environmental liability fears that plagued lenders in the 1990s have largely dissipated. Lenders have so far averted any deluge of claims to pay the costs of their borrowers' environmental mishaps—and any rulings to validate them.

From this review of recent developments we can discern some clear outposts of safety for EPFIs. First, EPFIs will likely avoid "operator" liability so long as they do not take an active, participatory role in managing, directing, or conducting environmental aspects of a project;[114] merely having the unexercised right under the loan documents to take action is insufficient. Second, a lender that forecloses on project assets is unlikely to fall afoul of "owner" liability unless it holds them for

---

[110] 42 U.S.C. § 9607(n)(7)(A)(i)-(ii). The safe harbor provision also excludes any "person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit[.]" *Id.* at § 9607(n)(5)(A)(ii)(I).

[111] *Canadyne-Georgia Corp*., 183 F.3d at 1274 n 9.

[112] Hooley, supra note 76, at 410; *See also* Department of the Environment, Transport and the Regions ("DETR"), Circular 01/2006, *Environmental Protection Act 1990: Part 2A Contaminated Land*, Annex 2, para. 9.11, and Annex 3, Chapter D, para. 48(a)(ii) (September 2006) *at* http://www.defra.gov.uk/environment/land/contaminated/pdf/circular01-2006.pdf (accessed 18 August 2006) (excluding banks from liability for "causing or knowingly permitting" pollution solely based on making a loan).

[113] Marcel Boyer and Jean-Jacques Laffont, *Environmental Protection, Producer Insolvency and Lender Liability* 29-30 (CIRANO Scientific Series, 95s-50, December 1995) *at* http://www.cirano.qc.ca/pdf/publication/95s-50.pdf (accessed 12 August 2006).

[114] CERCLA's definition of "owner or operator", for instance, does not "include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A). "To sharpen the definition . . . an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States* v *Bestfoods*, 524 U.S. 51, 66-67 (1998).

longer than is commercially reasonable to realize its security. Third, where a lender holds project assets in a fiduciary capacity, it will be shielded from liability unless it uses them for its own ends or negligently causes environmental damage.

Despite these islands of apparent safety, the tides of direct lender environmental liability continue to rise. After all, it was only through sustained lobbying efforts that lenders were able to hold back the most recent liability surge.[115] Today's NGOs are themselves skilled lobbyists, with their sights set on improving developing world environmental legislation and capacity, and they are supported by intergovernmental organizations like the UNEP devoted to enhancing the environmental protection capabilities of developing states.[116] Law tracks society's shifting values and expectations, and as the London think tank SustainAbility notes in its 2004 report *The Changing Landscape of Liability*, today's technical legal arguments and precedents are "increasingly unacceptable in a society which expects real world performance and behaviour standards."[117] With the demand for meaningful CSR growing louder, can lenders plausibly expect to avert environmental liability for long?

As the title of this essay implies, the answer for EPFIs is a resounding no. Indeed, they face very real risks of direct environmental liability today. Given project finance's highly leveraged structure and abundant risks, a borrower could easily fail to meet its obligations under the loan agreement, prompting EPFIs to carry on the project, at least for a time, as owner or operator. Furthermore, if EPFIs decide to waive or ignore a borrower's material breach of environmental covenants, the EPFIs intensive monitoring activities and remedial powers make liability for knowingly permitting, participating in, or failing to prevent pollution a serious threat. It is to these risks we now turn. To see how they might arise in practice, however, we must first understand the fundamentals of EPFI project control.

---

[115] This was not lost on the United States Court of Appeals for the Eleventh Circuit, which remarked of the 1996 CERCLA amendments that "what little legislative history exists makes clear the Act was passed in response to lobbying efforts by banks to protect them from liability under CERCLA." *Canadyne-Georgia Corp.*, note 139 above, 183 F.3d at 1274 n 9.

[116] *See, e.g.*, UNEP et al., Partnership for the Development of Environmental Laws and Institutions in Africa ("PADELIA"), *at* http://www.unep.org/padelia/ (accessed 14 August, 2006).

[117] SustainAbility, *The Changing Landscape of Liability: A Director's Guide to Trends in Corporate Environmental, Social and Economic Liability* 5 (London: SustainAbility, 2004) *available at* http://www.sustainability.com/insight/liability-article.asp?id=180 (accessed 19 August 2006).

D. The Road to EPFI Environmental Liability—Perils of Security

In project finance, "banks provide finance for a single project and take a large part of the risk of the success or failure of that project."[118] The high stakes flow in large part from the limited recourse nature of the loan; the lenders look primarily to the project's revenue for security.[119] So while the EPFIs are technically a project's creditors, "in commercial substance the banks take equity risks"[120] and thus have a great deal of "ownership" invested in the project's operations.

Labeling considerations aside, the EPFIs' role is to provide finance to get the project up and running. This is done in one of two ways. One way is to lend the funds directly to the project sponsor or sponsors, with the EPFIs' recourse generally limited by contract to the project assets.[121] The more typical approach, however, is to form a special purpose entity ("SPE") to build and manage the project. The EPFIs' then loan to that company, shares in which are owned by the project sponsors.[122] The host government may require the formation of a local SPE in some contexts, such as where the government is to be part owner or where it will take over the project's operations in the future, such as in a BOT (build, operate, transfer) or BOOT (build, own, operate, transfer) infrastructure project.[123]

The SPE model carries a number of perceived advantages.[124] The principal consideration is it keeps project assets and liabilities structurally isolated and legally

---

[118] Wood, supra note 58, at 3.

[119] Basel Committee, supra note 2.

[120] Wood, supra note 58, at 27.

[121] *Id.* at 23.

[122] *Id.* at 3-4, 23; Dinesh D. Banani, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, 26 B.C. Int'l & Comp. L. Rev. 355, 358-360 (Spring 2003).

[123] Wood, supra note 58, at 10; Duong, supra note 59, at 92-93. Projects with broad public benefits and those subject to greater demand uncertainty are most likely to be structured as BOT or BOOT projects. Rajan A. Thillai, 'Observations on Project Structures for Privately Funded Infrastructure Projects' (Spring 2004) 10(1) *The Journal of Structured and Project Finance* 39, 41-43.

[124] In addition to separating the project from the risks and liabilities of the sponsor, SPEs facilitate the vesting of project assets, introduction and divestment of sponsors, consolidation and simplification of security arrangements, and shareholder avoidance of direct personal jurisdiction in the local courts. Wood, supra note 58, at 9.

separate from the assets and liabilities of the sponsors. This removes the risk that a sponsor's insolvency will jeopardize the project.[125] By the same token, as SPE shareholders the sponsors limit their liability for project losses to the value of their equity investment. Because the bulk of the project finance is provided by the EPFIs secured loans, the sponsors are effectively insulated from the project's liabilities.[126]

Where the loan is structured so that the EPFI can look only to the project assets for repayment, the financing is considered non-recourse, i.e. the EPFI has no recourse to the assets of the sponsor to service the project debt. Sponsors prefer non-recourse financing because it allows them to maintain their general creditworthiness by keeping the project's liabilities off their corporate balance sheet.[127] Yet because projects are susceptible to so many unpredictable disruptions—political upheaval, resource inadequacy, construction overruns, price fluctuations, technological obsolescence, and of course environmental liability—lenders rarely agree to finance projects on a non-recourse basis. Instead, EPFIs will require the project sponsor to undertake limited obligations and responsibilities at a level commensurate with the project's unique risks.[128] This recourse may include sponsor guarantees, indemnities, insurance, liquidated damages, collateral warranties, or a Standby Letter of Credit.[129] EPFIs are also unlikely to take on the project's construction and completion risks, and will demand sponsor support arrangements to lay risks off to parties better positioned to deal with them.[130]

---

[125] Carl S. Bjerre, *Project Finance, Securitization and Consensuality*, 12 Duke J. of Comp. & Int'l L. 411, 414, 419 (2002), *available at* http://www.law.duke.edu/journals/djcil/articles/djcil12p411.htm (accessed 12 September 2006).

[126] Lynn M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1, 14-23 (Ocotber 1996) (showing how a parent corporation immunizes itself from claims against its subsidiaries through a combination of secured debt financing and separate corporate structure).

[127] Duong, supra note 59, at 75; Banani, supra note 122, at 359.

[128] Hoffman, supra note 2, at 8.

[129] Wood, supra note 58, at 19-22, 32-34; Duong, supra note 59, at 76-77, 83-84.

[130] IFC, *Lessons of Experience 4: Financing Private Infrastructure* 68-70 (Washington, D.C.: The World Bank, 1996).

Of course, EPFIs will also seek sponsor guarantees that cover environmental damage.[131] In the project finance setting, however, the unpredictable and potentially unlimited nature of such costs may lead to a cap on recovery or be commercially unfeasible. Even where EPFIs have enough commercial leverage to obtain environmental guarantees, they may be severely limited in duration and scope, or may prove to be unrecoverable.[132] If the guarantor becomes insolvent or, if it's a foreign government or central bank, invokes sovereign immunity,[133] the EPFI could be left holding the project's environmental tab. Insurance would normally provide an answer, but "even where environmental liability insurance is available, its coverage is deficient, exemptions abundant and premiums affordable to few."[134] In any event, an EPFI's contractual shifting of environmental risk will not insulate it from public or private claims for environmental damages,[135] which can generate costly "moral liability" even when legally unsuccessful.[136]

Regardless of the level of recourse provided, EPFIs will ultimately base their lending decision on the size of the project's projected revenues.[137] But again, the EPFIs are taking on the majority of the project risk and so will also demand security over the project assets to the full extent possible under the applicable law. This will include tangible assets such as land and equipment, and intangible assets such as the project company shares, subordinated debt, host government concessions, construction agreement, supplier and off-take contracts, intellectual property, and the

---

[131] Michael P. Vandenbergh, *The Private Life of Public Law*, 105 Colum. L. Rev. 2029, 2046-2047, 2053 (November 2005) (noting that creditor agreements routinely require borrowers to assume environmental risks).

[132] Wood, supra note 58, at 23.

[133] *See AIG Capital Partners Inc.* v *ABN Amro Mellon Global Securities Services BV* [2005] EWHC 2239 (Comm) (holding that s 14(4) of the State Immunity Act 1978 grants foreign central bank property full immunity enforcement processes in the English courts).

[134] Mullerat, supra note 75, at 268.

[135] *See, e.g.,* 42 U.S.C. § 9607(e)(2) (providing that no indemnification agreement can transfer liability under CERCLA).

[136] SustainAbility, supra note 117, at 10-12, 14-15, 17 (describing the experiences of Merrill Lynch, Ford, McDonalds and others who have suffered huge "moral liability" costs without incurring legal liability).

[137] Bjerre, supra note 125, at 414.

like.[138] In common law countries EPFI participants in a syndicated loan will typically wish to appoint a trustee to hold the security for their mutual benefit. By consolidating the security in a single legal entity the EPFIs ensure a uniformity of security terms and facilitate the introduction and withdrawal of syndicate participants.[139]

One of the main objects of security is to give the EPFIs control of the project if the borrower defaults on the loan agreement.[140] A common way to do so is to give the EPFIs step-in rights to appoint a receiver to run the project company on their behalf until they can sell it.[141] Step-in rights in direct agreements with third parties such as the builder, the project operator or the government in a public-private partnership ("PPP") project will also be needed and will typically be held by a security trustee with the EPFIs as third-party beneficiaries.[142] In a syndicated loan, the trustee holding the step-in rights may itself be a participating EPFI, and the intercreditor agreement will dictate how it will discharge its duties on the syndicate's behalf. Where step-in rights are unavailable, EPFIs may wish to register the SPE

---

[138] Wood, supra note 58, at 30-34.

[139] *Id.* at 32.

[140] *Id.* at 30.

[141] In England the Enterprise Act 2002 amended the Insolvency Act 1986 to generally prohibit the appointment of administrative receivers, but it contained exceptions for public-private partnership ("PPP") projects and project finance ventures where the lenders hold step-in rights, i.e. a conditional entitlement to assume responsibility for carrying out the project or to make arrangements to that effect. The general project finance exception applies only to projects with at lest £50 million in debt financing. Enterprise Act 2002, s 250; Insolvency Act 1986, ss 72C (PPP) and 72E (project finance). The application of the project finance exception is described in *Feetum* v *Levy* [2005] EWHC 349 (Ch), [2005] 1 WLR 2576.

[142] Bruce Johnston and Amanda Jennings, LeBoef, Lamb, Greene & MacRae LLP, *The Effect of the Enterprise Act 2002 on PFI Projects* 2-3 (17 December 2002) *at* http://www.llgm.com/files/Publication/f91d1e6c-e7d1-46e9-8560-ad05fb0d9d5f/Presentation/PublicationAttachment/2020e714-34a7-4bc4-b0bb-bd4379bfff05/article_448.pdf (accessed 19 August 2006). These third parties are likely to be the biggest unsecured creditors of the project and could threaten EPFIs' security under English insolvency law, as a receiver or administrator must grant them priority rights in up to £600,000 of a project company's property. Insolvency Act 1986, s 176A; Insolvency Act 1986 (Prescribed Part) Order 2003, s 3 (setting aside 50 percent of the first £10,000 of company property for unsecured creditors, and 20 percent of any excess up to £600,000). To avoid having to sell essential project assets such as government concessions to satisfy unsecured creditors, EPFIs will wish to have these parties agree to forgo their rights to project property until EPFIs are fully paid. Johnston and Jennings, supra note 142, at 2.

shares in a security trustee's name and take a legal mortgage over them so they can appoint directors to run the company on default.[143]

The essential concern for the EPFI structuring a security package that traverses international borders is to ensure it can legally enforce its interests.[144] Host country laws will invariably govern the validity of security over the land and concessions and the scope of their respective ownership rights. In contrast, the laws that determine a lender's rights in the project's moveable and intangible assets can be established contractually or else will be fixed by the security's location.[145] In the case of the SPE shares, for example, the corporate law of the jurisdiction where the SPE is incorporated will govern questions regarding shareholders rights.[146]

The scope of an EPFI's ownership rights under the applicable law is of paramount importance. If the law grants broad powers of possessory control over security, by enforcing its rights an EPFI may unwittingly take on owner or operator liability. As noted earlier, even in jurisdictions where creditors are shielded from liability when foreclosing on a debtor, they must still seek to quickly sell the acquired assets; holding out for a more advantageous market while actively controlling a project's daily operations is a sure-fire way for EPFIs to incur owner or operator liability.

The liability implications of ownership may require reference to multiple legal systems. For example, if a project SPE is incorporated in England, EPFIs may have step-in rights that would not be available under the law of the country where the project is located. Assuming it follows standard conflict of law rules, a foreign court attempting to discern whether the EPFI qualifies as a project "owner or operator" under its environmental laws would look first to English law to determine the nature of EPFI step-in powers. The scope of shareholder control over a foreign SPE would be determined in the same fashion. In becoming shareholders of the project company,

---

[143] Johnston and Jennings, supra note 142, at 3; Wood, supra note 58, at 30.

[144] Steven L. Schwarcz, *The Universal Language of Cross-Border Finance*, 8 Duke J. of Comp. & Int'l L. 235, 244 (Spring 2002), *available at* http://www.law.duke.edu/journals/djcil/articles/djcil12p285.htm (accessed 12 September 2006).

[145] *Macmillan Inc* v *Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 424-435, CA.

[146] *Id.*; Badge, supra note 87, at 33.

EPFIs face the risk that tribunals will consider the company an EPFI subsidiary;[147] tribunals in host countries may be particularly amenable to an environmental claimant's pleas to "pierce the corporate veil" and impose liability on the EPFIs based on their close control over the project operations.[148] Where control of the company is spread amongst EPFIs in a syndicate, tribunals may impose liability on the participants on a joint venture or network enterprise basis,[149] regardless of any express disavowal of common purpose in the loan agreement.[150]

As this review of project finance security structures illustrates, if the borrower defaults, the EPFIs ownership and control of the project will become in effect universal, ushering in all the risks of owner or operator liability. This is not surprising; because it is the EPFIs who foot the bill, until the loan is paid off the project and its risks essentially belong to them. The EPFIs' extensive security, if not carefully arranged and prudently executed, could transform into a serious environmental liability hazard.

Of course, all project finance lenders face the risk of owner or operator environmental liability upon the borrower's default. The added risks for EPFIs come not from any increase in their level of project security, but from the expansion of environmental covenants as default triggers and the heightened public pressure EPFIs will face to pull them upon occurrence of even the slightest breach. It is in this sense that EPFIs may find themselves trapped: if they declare a borrower to be in default, they risk owner or operator liability; if they instead attempt to steer the borrower back

---

[147] Wood, supra note 58, at 31.

[148] English law is generally hostile to attempts to disregard separate legal entities for liability purposes. *Adams* v. *Cape Industries* [1990] 1 Ch 433; *Salomon* v *Salomon & Co. Ltd.* [1897] AC 22 (HL). Other jurisdictions, notably the US and India, have been more flexible in allowing claimants harmed by a subsidiary company to recover damages from the parent. Muchlinski, supra note 90, at 323-333, 336-338. In the Bhopal tragedy, for example, the Indian court held Union Carbide liable for environmental damage and victims' compensation caused by the gas leak at its Indian subsidiary. *Id.* at 325-326 (citing *Union of India* v *Union Carbide Corporation* Civil Revision No. 26 of 1988 4 April 1988, Seth J.). *See also* SustainAbility, supra note 117, at 35-40 (detailing the history of the disaster and the liability issues it has created for Dow Chemical, which purchased Union Carbide in 2001).

[149] Muchlinski, supra note 90, at 327-333 (discussing emerging approaches to multinational group liability).

[150] Parties to a syndicated loan typically purport to have separate and independent rights and obligations. *See, e.g.,* Loan Market Association, *Single Currency Term Facility Agreement* s 2, para. 2.2 (July 2005) *available at* http://www.loan-market-assoc.com/Public/framemain.asp?Main=DocumentList (accessed 21 August 2006) (personal copy on hand with the author).

into compliance and are ultimately unsuccessful, they may be liable for knowingly permitting or failing to prevent environmental damage. Given those two unsatisfactory options, an EPFI may be forced to simply pull out of a project altogether, preferring to write-off dispersed funds and risk liability for breach of contract rather than sacrifice its sustainability credentials and court potential environmental liability. Indeed, ING decided on this course in April 2006 when it withdrew its support of a controversial paper pulp mill in Fray Bentos, Uruguay after NGOs presented it with a complaint detailing the project's alleged Principles violations.[151] Calyon, another EPFI project participant, is being pressured to do the same.[152] These events show how NGOs can use the Principles to threaten EPFIs with lawsuits and public boycotts unless their social and environmental concerns are addressed.

The trap the Principles set works like this. Recall that for all Category A and appropriate Category B projects, Principle 5 requires the borrower to disclose its AP detailing its measures to comply with host country environmental laws and the applicable IFC Performance Standards and EHS Guidelines. Under Principle 8, borrowers covenant to comply with the AP in all material respects. Now, NGOs and public interest groups are apt to take a broader view than EPFIs regarding which breaches of the AP qualify as material. If the groups spy a material breach—bingo—the pressure campaign to force the EPFIs to declare the environmentally reckless borrower in default kicks off. If the breach (material or not) is confirmed by independent experts appointed in accordance with Principle 9, the pressure to declare default increases, as do the grounds for finding EPFIs liable for knowingly permitting or failing to prevent environmental damage. The Principles' increased monitoring

---

[151] BankTrack et al., *Equator Principles Compliance Complaint Regarding Proposed Pulp Paper Mill Investment in Fray Bentos Uruguay to Calyon* 13 (16 March 2006) *at* http://www.banktrack.org/doc/File/Other%20documents%20/-outside%20categories-/060518%20compliance-complaint-calyon.pdf#search=%22CEDHA%20compliance%20complaint%20equator%20principles%22 (accessed 21 August 2006); Centro de Derechos Humanos y Ambiente ("CEDHA"), *Equator Principles Compliance Complaint Regarding Proposed Pulp Paper Mill Investment in Fray Bentos Uruguay to ING* (9 December 2005) *at* http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/complaint-letter-to-ing-eng.pdf#search=%22CEDHA%20compliance%20complaint%20equator%20principles%22 (accessed 21 August 2006).

[152] BankTrack et al., supra note 151.

and control powers thus cease to be the liability shield EPFIs' intended and instead become a sword for potential environmental claimants.

Part III: Lender Liability for Violations of Social or Economic Rights

The increased liability risks EPFIs face for violations of the social or economic rights of project-affected individuals arise in much the same fashion as in the environmental sphere: the visibility of EPFI commitments and their extensive project monitoring and control powers tempt claimants to hold EPFIs responsible for wrongs committed by their borrowers and associated project participants. The principal difference between lender liability risks in the two spheres relates to a claimant's probability of success. Whereas in the past there have been at least a few instances where lenders have been held liable for environmental damage, when it comes to social and economic claims lenders have yet to incur liability.

The most obvious factor contributing to lender safety thus far has already been touched on—lenders' typically passive influence on their borrower's activities. Claims against lenders tend to rely on theories of indirect liability such as agency. The difficulty for claimants is that under traditional agency law the agent must act on the principal's behalf, and even then the principal is only liable for acts it has expressly or impliedly authorized, or subsequently ratified.[153] To succeed on such a basis the claimant would have to prove that the borrower acted on the lender's behalf rather than its own—a difficult task in a parent-subsidiary relationship, and a nearly impossible one where the relationship is based on an arms-length commercial loan.

Further obstacles confront even the most enterprising claimant that targets EPFIs for social or economic liability. Let's begin where a claimant is likely to—by lodging a complaint against the borrower via the grievance mechanism required by Principle 6. The claimant may attempt to assert violations of the applicable IFC or World Bank standards, or perhaps claims arising under national law that are unlikely to be effectively remedied in the host country courts. After all, the Principles' grievance mechanism is provided primarily to afford project-affected individuals a remedy in developing countries where the legal system may function imperfectly

[153] Badge, supra note 87, at 25-26.

because of insufficient resources, corruption, political interference or a combination of all three.[154]

Claims initiated through the grievance mechanism might invoke laws or standards regulating employment relations, including worker wages, benefits and safety rules, rules prohibiting discrimination, protecting freedom of association and collective bargaining, due process and fair compensation, prohibitions on bribery or corruption, and countless others. Tort claims for personal injuries, including, in extreme cases, torture and forced labor by project employees or government security officials, may also be pursued. If the claimant is unhappy with the remedy provided by the grievance mechanism, they might complain to the EPFI about the borrower; if that doesn't work they will need to look to the national courts for assistance.

Assuming the courts are functioning, the claimant is likely to be stymied by the kinds of obstacles well known to those familiar with litigation: the high cost of pursuing a claim; the need for standing to assert that claim; delays in the machinery of justice; poor access to information and a high burden of proof; a well financed defendant or, conversely, a judgment-proof one; and the risk of social stigma or government harassment.[155] Last but not least, unless the EPFI has declared the borrower in default and is now running the project, to recover damages from the EPFI the claimant will need to show that it is somehow responsible for the harm. If the claim involves an economic injury such as insufficient wages, the claimant would have to show that the EPFI controlled the borrower to such a degree that it effectively became his employer or otherwise owed him a duty to ensure he was fairly paid—both of which would be exceedingly difficult to prove. If the claimant had been physically or emotionally harmed by an intentional tort, he would also find it practically impossible to impute the requisite intention to the EPFI.[156] In short, so long as the borrower retains control of the project operations, the EPFI is unlikely to face direct liability for the social or economic harms suffered by project-affected parties.

[154] International Council on Human Rights Policy ("ICHRP"), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* 81-82 (Versoix: International Council on Human Rights Policy, 2002).

[155] *Id.* at 77-82.

[156] Badge, supra note 87, at 23-29 (discussing the elements necessary to prove various claims of associate liability).

How then do EPFIs face added social and economic liability risks? After all, even lenders that have profited from loans to the most morally odious of borrowers have escaped liability. Perhaps the most notable was Karl Rasche, the Chairman of Deutsche Bank tried by the United States Military Tribunal ("USMT") under the Nuremberg Charter on charges of facilitating and profiting from slave labor via loans to the Third Reich. The USMT declined to convict Rasche for financing the Nazi atrocities, reasoning: "We cannot go so far as to enunciate the proposition that the official of a loaning bank is charged with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrowers."[157] Recently Swiss banks relied on the case to defend against claims by Holocaust survivors and their heirs for the proceeds from dormant bank accounts seized by the Nazis and deposited in the banks during World War II.[158] Nevertheless, the Swiss bank case raises questions whether the USMT's justification for denying liability in Rasche's criminal case retains any contemporary vitality in a civil setting, as the banks eventually settled the claims for $1.2 billion.[159]

What is clear is that the Rasche case hasn't deterred claimants from suing Barclays and Citigroup under the ATS for profiting from high interest loans extended to the South African apartheid regime.[160] The apartheid claimants seek to hold lenders liable for what has been termed corporate complicity.[161] Complicity may take the form of (1) direct assistance given to a host government or third party that engages in oppressive practices; (2) indirect or "beneficiary" complicity, implicated where a company benefits from such practices without actively assisting in their commission; or (3) silence or inaction in the face of such practices.[162] The claims against the apartheid banks fall into the latter two categories, and the district court judge

[157] *United States v Von Weizsaecker* (Ministries Case) XIV Trials of War Criminals Before the Nuremburg Military Tribunals 621-22 (1952), at 824 (cited in Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int.'l. L. 91, 113 (2002)).

[158] Ramasastry, supra note 157, at 113.

[159] BBC News, *Swiss Nazi Row Ends in US Court* (26 July 2000) *at* http://news.bbc.co.uk/1/hi/world/europe/852759.stm (accessed 23 August 2006).

[160] *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

[161] Ramasastry, supra note 157, at 91-92.

[162] *Id.* at 101-104.

dismissed them on the basis that neither aiding and abetting international law violations nor doing business in apartheid South Africa were themselves violations of international law sufficient to state a claim under the ATS.[163] Nevertheless, the case is currently on appeal, and more recent appellate court rulings have recognized vicarious liability ATS claims for violations of *jus cogens* norms.[164] Perhaps most troubling for EPFIs are indications that the apartheid claimants targeted Barclays and Citibank because of their adoption of another CSR initiative called the Sullivan Principles.[165]

Cases like Rasche and the apartheid litigation illustrate the reluctance of tribunals to hold lenders liable for passive investments or for simply doing business with an oppressive government. It is doubtful, however, whether they truly offer EPFIs much comfort. As this paper has attempted to show, project finance lenders exert a high degree of control over their borrowers, with EPFIs promising to extend their influence even further to shape a project's social and economic impacts. In recognition of that control, society's clamor for the law to impose on lenders an obligation to exercise it responsibly is growing. Against this backdrop the ATS has emerged as the principal tool for claimants to sue companies for their alleged complicity in human rights violations, and although no claimant has yet recovered a successful damages award, the litigation costs and harm to a target company's reputation nonetheless impose a steep price.

EPFIs whose borrowers engage in PPPs with governments in developing countries where civil unrest simmers are at greatest risk of being sued for complicity. In a BOT or BOOT project, for example, the government may demand that its troops guard the project infrastructure to ensure it remains free from sabotage or unruly labor strife. If EPFIs fail to use their financial leverage to, in essence, police the police, they could well find themselves facing liability in an ATS action for complicity in any

[163] *In re South African Apartheid Litigation*, 346 F. Supp. 2d at 549-550.

[164] *Sarei v Rio Tinto, Plc.*, Nos. 02-56256, 02-56390, 2006 WL 2242146, at *5 (9th Cir. August 7, 2006). *See also Presbyterian Church of Sudan* v *Talisman*, 374 F. Supp. 2d 331, 337-341 (S.D.N.Y. 2005) (recognizing vicarious ATS liability for violations of *jus cogens* norms). *Jus cogens* norms "are peremptory norms, and their violation constitutes an offense of 'universal concern.' . . . *Jus cogens* norms include the prohibition on genocide, torture, slavery, crimes against humanity, and extrajudicial killing." *Id.* at 333 n 2.

[165] Gary C. Hufbauer and Nicholas K. Mitrokostas, 'International Implications of the Alien Tort Statute' (June 2004) J. Int'l Econ. L. 245, 260; Global Sullivan Principles of Social Responsibility ("Sullivan Principles") *at* http://www.thesullivanfoundation.org/gsp/default.asp (accessed 20 August 2006).

killings, torture or other human rights violations committed by government troops protecting their investment.

Despite the abysmal success rate of ATS claims—or perhaps because of it—courts appear increasingly willing to entertain claims against companies that profit from alleged explicit or implicit encouragement of such abuses. Where a company fails to persuade a court to dismiss the case or grant summary judgment in the company's favor, a hefty settlement is often preferred to protracted litigation and the prospect of a costlier scarlet letter trial loss. In 2005, for example, Unocal paid $30 million to settle ATS claims that it aided and abetted the Myanmar military's torture, murder, use of forced labor, and other atrocities committed while it guarded Unocal's oil pipeline.[166] The settlement followed an earlier US appellate court ruling in the case that allowed claimants to proceed on the theory that international law acknowledges aiding and abetting liability "for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime."[167] Again, EPFIs that allow their borrowers to rely on government personnel to protect or administer aspects of a project must remain vigilant if they hope to avoid ATS litigation.

The US is not the only forum where such claims area pursued: a pair of unsuccessful ATS claimants took their claims to France and Belgium, respectively.[168] Although the French case arose under a criminal statute that prohibits kidnapping, the Belgian case sought damages for human rights violations under a law that allows Belgian courts to adjudicate such claims regardless of the victim's nationality or the location where the harm occurred.[169] Other signs that Europe may be the next outpost for ATS-style litigation are emerging. In March 2005 the European Court of Justice ruled that the Brussels Convention prevents a Member State from declining jurisdiction conferred on it under the Convention on the grounds that another state

---

[166] Daniel Diskin, *The Historical and Modern Foundations For Aiding and Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809-810 (Fall 2005).

[167] *Doe* v *Unocal Corp.,* 395 F.3d 932, 951 (9th Cir. 2002)*, vacated and reh'g en banc,* 403 F.3d 708 (9th Cir. 2005).

[168] SustainAbility, supra note 117, at 29-30.

[169] *Id.*

provides a more appropriate judicial forum.[170] The ruling paves the way for claimants to join foreign parties with no connection to an EU Member State as defendants in proceedings so long as they are also able to garner jurisdiction over one potential defendant.[171]

Courts in England have recently begun to assert extraterritorial jurisdiction over negligence claims against parent companies for harms committed by their overseas subsidiaries. In *Lubbe* v *Cape Plc* employees of an English company's South African subsidiary brought claims for asbestos-related illnesses against the English parent on the basis that it exercised de facto control over the subsidiary and thus failed to uphold their duty of care to protect the claimants' health.[172] The claim settled for £10.6 million before the House of Lords was able to rule on whether English or South African law would govern the claim.[173] In Australia and Canada as well, cases have been brought that seek to hold domestic companies liable for harms committed abroad, either by them or subsidiaries within their sphere of influence.[174]

As these examples show, the avenues available to hold lenders to account for the human costs of their projects have expanded beyond host country borders. While no court has yet renounced the reasoning that animated the USMT's acquittal of Rasche, they are certainly willing to listen to claimant's arguments as to why they should. Perhaps they are simply waiting for the right case, the right confluence of lender control and common purpose, to impose liability. If so, EPFIs will be at the top of the list of liability candidates. Indeed, the apartheid litigation reinforces the idea that EPFIs' public commitment to the Principles will make them targets for lawsuits seeking compensation for individuals whose lives and livelihoods have been negatively affected by EPFI-funded projects. For EPFIs, at least, it would appear that the walls that have long protected lenders from liability for the human costs inflicted by their borrowers are beginning to crumble.

---

[170] Case No. C-281/02 *Owusu* v *Jackson* [2005] 2 WLR 942 (ECJ), para. 46 (examined in Badge, supra note 87, at 36).

[171] Badge, supra note 87, at 37.

[172] *Lubbe* v *Cape Plc.* [2000] 1 WLR 1545 (examined in Badge, supra note 87, at 32-33).

[173] SustainAbility, supra note 117, at 29; Badge, supra note 87, at 33.

[174] ICHRP, supra note 154, at 105.

Conclusion

As the preceding discussion illustrates, EPFIs' public commitments to social and environmental responsibility make them prime targets for campaigners seeking to halt controversial projects and recover compensation for the land and people the projects have harmed. As pressure groups tirelessly document a project's alleged violations of the Principles and build their case in the court of public opinion, EPFIs are left with three options, all of which threaten them with financial losses: First, if the project is not yet operational, they can withdraw their support, possibly incurring losses for funds already dispersed as well as damages for breach of contract. Second, EPFIs can pressure the borrower to remedy Principles breaches and hope any lack of success will not later translate to liability for permitting or failing to prevent pollution, or some form of accomplice liability for personal harms to project stakeholders. Lastly, EPFIs can declare a default, take control over the project assets, and seek to distance themselves from the project as far and as fast as possible to avoid owner or operator liability.

Of course, an EPFI can hardly be held liable for a project's environmental or social damage based on its proclaimed intent to leverage its role as financier "to promote responsible environmental stewardship and socially responsible development";[175] the law will require some nexus of accountability to justify imposing legal as opposed to moral liability. But in defining the limits of who qualifies under such nebulous terms as "owner or operator" or "party responsible", tribunals will be guided not simply by considerations of wrongdoing but also by their commitment to sustainable development and the broader policy implications that flow from extending liability to an EPFI in a given circumstance.[176] It is in this latter regard that shifting perceptions of the crucial role EPFIs play in development are likely to lead tribunals to extend the traditional limits of liability to cover EPFI activities. For despite the Principles' disclaimer that they are merely internal policies incapable of creating external liability, they are nevertheless an implicit acknowledgment that civil society views EPFIs as having a duty to police their

---

[175] Principles, Preamble.

[176] Jarvis and Fordham, supra note 71, at 80-82.

borrowers. There is every reason to expect tribunals to recognize this duty as well, particularly in a developing world setting where EPFIs may be the only effective instruments for securing their borrower's compliance with the law. By publicly touting their devotion to responsible project development and constructing elaborate mechanisms to ensure they remain abreast of and in a position of power over their borrowers' social and environmental affairs, EPFIs help justify the imposition of liability on them for the damages that flow from the projects they fund.

In highlighting the additional liability risks EPFIs confront as they implement the Principles, this paper may be seen as a warning—and it is. The warning, however, should not deter banks from adopting the kinds of socially and environmentally responsible mechanisms the Principles promote. Indeed, that would be the far riskier approach. Rather, the warning in these pages should serve to impress further upon banks the vital role that responsible social and environmental practices play in mitigating project liability risks, as well as the catastrophic consequences that can be expected to befall the inattentive lender that fails to uphold them.

Appendix: List of Abbreviations

AP	Action Plan
ATS	Alien Tort Statute
CAO	Compliance Advisor Ombudsman
CEDHA	Centro de Derechos Humanos y Ambiente
CEO	Chief Executive Officer
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act of 1980
CSR	Corporate Social Responsibility
DID	Development Indicators Database
EA	Environmental Assessment
EC	European Communities
ECA	Export Credit Agency
EHS	Environmental, Health and Safety
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
EMS	Environmental Management System
EPFIs	Equator Principles Financial Institutions
EU	European Union
Ex-Im	Export-Import
GRI	Global Reporting Initiative
ICHRP	International Council on Human Rights Policy
IFC	International Finance Corporation
MIGA	Multilateral Investment Guarantee Agency
MLA	Multilateral Lending Agency
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
PADELIA	Partnership for the Development of Environmental Laws and Institutions in Africa
PCDP	Public Consultation and Disclosure Plan
PPAH	Pollution Prevention and Abatement Handbook
Principles	Equator Principles

PRP	Potentially Responsible Party
SEA	Social and Environmental Assessment
SEMS	Social and Environmental Management System
SPE	Special Purpose Entity
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNEP FI	United Nations Environment Programme Finance Initiative
UN	United Nations

BIBLIOGRAPHY

Articles and Books

F. Amalric, Center for Corporate Responsibility and Sustainability, 'The Equator Principles: A Step Towards Sustainability?' (University of Zurich, CCRS Working Paper No. 01/05, January 2005) *at* http://www.banktrack.org/doc/File/Policies%20and%20processes/Equator%20Principles/050101%20The%20Equator%20Principles;%20a%20step%20towards%20sustainability.pdf (accessed 4 August 2006).

M. Badge, 'Transboundary Accountability for Transnational Corporations: Using Private Civil Claims' (Chatham House, Working Paper, March 2006) *at* http://www.chathamhouse.org.uk/pdf/research/il/ILP_TNC.pdf (accessed 17 August 2006).

R. Bailey, T. Ryan and N. Hodges, 'Building Sustainability Into Syndication' (July/August 2006) *Environmental Finance* 30.

D.D. Banani, 'International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction' (Spring 2003) 26 B.C. Int'l & Comp. L. Rev. 355.

BankTrack et al., 'Equator Principles Compliance Complaint Regarding Proposed Pulp Paper Mill Investment in Fray Bentos Uruguay to Calyon' (16 March 2006) *at* http://www.banktrack.org/doc/File/Other%20documents%20/-outside%20categories-/060518%20compliance-complaint-calyon.pdf#search=%22CEDHA%20compliance%20complaint%20equator%20principles%22 (accessed 21 August 2006).

BankTrack, *Equator Principles II: NGO Comments on the Proposed Revision of the Equator Principles* (26 April 2006) *at* http://www.banktrack.org/doc/File/Our%20Publications/BankTrack%20publications/060428%20EPII%20NGO%20position%20paper%20Public%20version%20final.pdf (accessed 31 July 2006).

BankTrack, *Transparency and the Equator Principles: Proposals for EP Bank Disclosure* (28 November 2004) *at* http://www.banktrack.org/doc/File/Our%20Publications/BankTrack%20publications/041128%20Transparency%20for%20the%20Equator%20banks.pdf (accessed 16 August 2006).

BankTrack and World Wildlife Fund UK, *Shaping the Future of Sustainable Finance: Moving From Paper Promises to Performance* (January 2006) *at* http://www.banktrack.org/doc/File/Our%20Publications/BankTrack%20publications/0_060126%20Sustainable%20finance%20full%20report.pdf (accessed 26 July 2006).

Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards* ("Basel II") (November 2005) *at* http://www.bis.org/publ/bcbs118.pdf (accessed 27 July 2006).

Centro de Derechos Humanos y Ambiente ("CEDHA"), 'Equator Principles Compliance Complaint Regarding Proposed Pulp Paper Mill Investment in Fray Bentos Uruguay to ING' (9 December 2005) *at* http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/complaint-letter-to-ing-eng.pdf#search=%22CEDHA%20compliance%20complaint%20equator%20principles%22 (accessed 21 August 2006).

C.S. Bjerre, 'Project Finance, Securitization and Consensuality' (2002) 12 Duke J. of Comp. & Int'l L. 411.

J. Boeving, 'Half Full . . . Or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain' (Fall 2005) 18 Geo. Int'l Envtl. L. Rev. 109.

M. Boyer and J.J. Laffont, 'Environmental Protection, Producer Insolvency and Lender Liability' (CIRANO Scientific Series, 95s-50, December 1995) *at* http://www.cirano.qc.ca/pdf/publication/95s-50.pdf (accessed 12 August 2006).

British Bankers' Association, *Business Banking Code* (March 2005) *at* http://www.bba.org.uk/content/1/c4/52/26/BusinessBankingCode2005.pdf (accessed 9 August 2006).

R. Bulleid, 'Putting Principles into Practice' (June 2004) *Environmental Finance*, *available at* http://www.equator-principles.com/ef2.shtml (accessed 31 July 2006).

T. Church and R. Nakamura, 'Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States' (1994) 7 Geo. Int'l Envtl. L. Rev. 15.

J. Coleman, 'Theories of Tort Law' in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy (Winter 2003 Edition)*, *at* http://plato.stanford.edu/archives/win2003/entries/tort-theories/ (accessed 17 August 2006).

Corporation of London and Department of Environment, Food and Rural Affairs ("DEFRA"), *Financing the Future: The London Principles—The Role of UK Financial Services in Sustainable Development* (London: DEFRA, August 2002) 7 *at* http://www.cityoflondon.gov.uk/NR/rdonlyres/13F2434D-2209-4836-AEE3-D5C2E6A5F75E/0/SUS_financingfuture.pdf (accessed 30 July 2006).

D. Diskin, 'The Historical and Modern Foundations For Aiding and Abetting Liability Under the Alien Tort Statute' (Fall 2005) 47 Ariz. L. Rev. 805.

A.M. Dugdale (ed), *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 19th ed, 2005).

W.N. Duong, 'Partnerships with Monarchs—Two Case Studies: Case Two: "Partnerships with Monarchs in the Development of Energy Resources: Dissecting an

Independent Power Project and Re-evaluating the role of Multilateral and Project Financing in the Energy Sector"' (Spring 2005) 26 U. Pa. J. Int'l Econ. L. 69

D.C. Esty, 'Environmental Protection in the Information Age' (April 2004) 79 N.Y.U. L. Rev. 115.

R.D. Feldman and S.L. Hoffman, 'Basic Concepts of Project Finance Documentation: Risk Allocation, Drafting, and Regulatory Considerations for Power Sales and Fuel Supply Contracts' in *Project Financing 1987: Power Generation, Waste Recovery, and Other Industrial Facilities* (Practicing Law Institute, Real Estate Law and Practice Course Handbook Series, PLI Order No. N4-4478, 1 September 1987) 297 PLI/Real 399.

M. Forster, P. Watchman and C. July, 'The Equator Principles—Making a Difference? Part 2' (2005) 07 JIBFL 255.

Freshfields Bruckhaus Deringer, *Banking on Responsibility: Part 1 of Freshfields Bruckhaus Deringer Equator Principles Survey 2005: the Banks* (July 2005) *at* http://www.freshfields.com/practice/environment/publications/pdfs/12057.pdf (accessed 25 July 2006).

R. Goode, 'Abstract Payment Undertakings in International Transactions' (1996) 22 Brook. J. Int'l. L 1.

H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2d ed, 1994).

A. Hawser, 'A Matter of Principles' (January 2005) *Global Finance Magazine, available at* http://www.equator-principles.com/gfm2.shtml (accessed 31 July 2006).

N. Hildyard, The Corner House, 'Holding Funders and Companies to Account—Litigation and Standards' (Paper Presented to American Anthropological Association Annual Meeting, Washington DC, 3 December 2005) *at* http://www.thecornerhouse.org.uk/pdf/document/IFIaccnt.pdf (accessed 8 August 2006).

S.L. Hoffman, *The Law and Business of International Project Finance: A Resource for Governments, Sponsors, Lenders, Lawyers, and Project Participants* (Ardsley, NY: Transnational Publishers, 2nd ed, 2001).

R. Hooley, 'Lender Liability for Environmental Damage' (2001) 60(2) CLJ 405.

HSBC, *HSBC Corporate Social Responsibility Report 2005 at* http://www.hsbc.com/hsbc/csr/csr-reports-and-updates (accessed 1 August 2006).

G.C. Hufbauer and N.K. Mitrokostas, 'International Implications of the Alien Tort Statute' (June 2004) J. Int'l Econ. L. 245.

International Council on Human Rights Policy ("ICHRP"), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Versoix: International Council on Human Rights Policy, 2002).

International Finance Corporation (“IFC”), *Lessons of Experience 4: Financing Private Infrastructure* (Washington, DC: The World Bank, 1996) (“IFC Lessons”).

J. Jarvis and M. Fordham, *Lender Liability: Environmental Risk and Debt* (London: Cameron May, 1993).

B. Johnston and A. Jennings, LeBoef, Lamb, Greene & MacRae LLP, ‘The Effect of the Enterprise Act 2002 on PFI Projects’ (17 December 2002) *at* http://www.llgm.com/files/Publication/f91d1e6c-e7d1-46e9-8560-ad05fb0d9d5f/Presentation/PublicationAttachment/2020e714-34a7-4bc4-b0bb-bd4379bfff05/article_448.pdf (accessed 19 August 2006).

E.T. Larson, ‘Why Environmental Liability Regimes in the United States, The European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle’ (March 2005) 38 Vand. J. Transnat'l L. 541.

R. Lawrence and W. Thomas, ‘The Equator Principles and Project Finance: Sustainability in Practice?’ (2004) 19-FALL Nat. Resources & Env’t 20.

J.D. Lipton, ‘Project Financing and the Environment: Lender Liability for Environmental Damage in Australia’ (1996) 11(1) JIBL 7.

Loan Market Association (“LMA”), *Single Currency Term Facility Agreement* (July 2005) *at* http://www.loan-market-assoc.com/Public/framemain.asp?Main=DocumentList (accessed 21 August 2006) (personal copy on hand with the author).

L.M. Lopucki, ‘The Death of Liability’ (Ocotber 1996) 106 Yale L.J. 1,

A. MacNaughton and J. Stephens, ‘Improving Infrastructure Project Results in Sensitive Areas, U.S. and Abroad’ (American Bar Association, Section of Environment, Energy and Resources (SEER), Presentation Materials from the SEER Annual Fall Meeting, 10 October 2003) *at* http://www.abanet.org/environ/committees/adr/infrastructuremacnaughton.pdf (accessed 8 August 2006).

O. McIntyre, ‘The All Consuming Definition of “Waste” and the End of the “Contaminated Land” Debate?’ (2005) 17 J. Envtl. L. 109.

G. McKenzie and S. Wolfe, ‘The Impact of Environmental Risk on the UK Banking Sector’ (2004) 14 *Applied Financial Economics* 1005.

E.F. Mannino and R.E. Kaye (eds), *Lender Liability and Banking Litigation* (New York: American Lawyer Media, 2005).

J. Marks, “Domestic Environmental Liability” in W. Blair (ed), *Banks, Liability and Risk* (London: LLP, 3d ed, 2001) 146-152.

J. Monahan, ‘Principles in Question’ (7 March 2005) *The Banker* 60 *at* http://www.equator-principles.com/documents/Principles_in_question.pdf (accessed 31 July 2006).

P.T. Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell Publishing, 2004).

B. Mullerat, ‘European Environmental Liability: One Step Forward’ (2005) 16(6) ICCLR 263-268.

T. Nelthorpe, ‘Principled Finance?’ (June 2003) *Project Finance Magazine* Cover Story *at* http://www.equator-principles.com/pfm.shtml (accessed 31 July 2006).

P.K. Nevitt and F.J. Fabozzi, *Project Finance* (London: Euromoney, 7th ed, 2000).

D. Nolan, ‘The Distinctiveness of *Rylands* v *Fletcher*’ (2005) 121(Jul) LQR 421-451.

J.J. Norton, R.M. Auerback, and J.M. Gaba (eds), *Environmental Liability for Banks* (London: LLP, 1995).

A. Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations’ (2002) 20 Berkeley J. Int.'l. L. 91,

B.J. Richardson, ‘The Equator Principles: The Voluntary Approach To Environmentally Sustainable Finance’ (2005) 14(11) EELR. 280.

D. Saxe, ‘Trustees’ and Receivers’ Environmental Law Update’ (1998) 49 C.B.R. (3d) 138.

S. Schwarcz, ‘The Universal Language of Cross-Border Finance’ (Spring 2002) 8 Duke J. of Comp. & Int'l L. 235.

W. Shakespeare, *The Merchant of Venice*, *available at* http://www.bartleby.com/70/1913.html (accessed 24 July 2006).

SustainAbility, *The Changing Landscape of Liability: A Director’s Guide to Trends in Corporate Environmental, Social and Economic Liability* (London: SustainAbility, 2004) *at* http://www.sustainability.com/insight/liability-article.asp?id=180 (accessed 19 August 2006).

R.A. Thillai, ‘Observations on Project Structures for Privately Funded Infrastructure Projects’ (Spring 2004) *The Journal of Structured and Project Finance* 39.

W. Thomas, ‘Equator-Risk and Sustainability’ in *Project Finance International Yearbook 2004* (Essex: Euromoney Yearbooks, 14th ed, 2004) 16.

United Nations Environment Programme (“UNEP”) et al., *Compendium of Judicial Decisions on Matters Related to the Environment: National Decisions Vol 1* (December 1998), *available at* http://www.unep.org/padelia/publications/Jud.Dec.Nat.pre.pdf (accessed 15 August 2006).

M.P. Vandenbergh, 'The Private Life of Public Law' (November 2005) 105 Colum. L. Rev. 2029.

W. van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International, Tort Law* (Oxford: Hart Publishing, 2000).

G.D. Vintner, *Project Finance: A Legal Guide* (London: Sweet & Maxwell, 2nd ed, 2001).

P. Watchman and C. July, 'A New Environment' (2 February 2006) *Legal Week* 24.

P. Watchman, 'Banks, Business and Human Rights' (2006) 02 JIBFL 46.

P. Watchman, 'Beyond the Equator' (June 2005) *Environmental Finance* 17.

P.R. Wood, *Project Finance, Subordinated Debt, and State Loans* (London: Sweet & Maxwell, 1995).

Cases:

United States

United States v *Bestfoods*, 524 U.S. 51 (1998).

Bano v *Bi,* No. 05-6082, 2006 WL 2336428 (2d. Cir. August 8, 2006).

Canadyne-Georgia Corp. v *NationsBank, N.A. (South)*, 183 F.3d 1269 (11th Cir. 1999).

Monarch Tile, Inc. v *City of Florence,* 212 F.3d 1219 (11th Cir. 2000).

Pakootas v *Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006).

Sarei v *Rio Tinto, Plc.* Nos. 02-56256, 02-56390, 2006 WL 2242146 (9th Cir. August 7, 2006).

United States v *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991).

Doe v *Unocal Corp.,* 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part,* 395 F.3d 932 (9th Cir. 2002)*, vacated and reh'g en banc,* 403 F.3d 708 (9th Cir. 2005).

Bano v *Union Carbide Corp.*, No. 99 Civ.11329 JFK, 2003 WL 1344884 (S.D.N.Y. March 18, 2003).

Canadyne-Georgia Corp. v *Bank of America*, 174 F. Supp. 2d 1360 (M.D. Ga. 2001).

In re South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

Presbyterian Church of Sudan v *Talisman*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005).

Canada

Panamericana De Bienes Y Servicios v *Northern Badger Oil & Gas Ltd* (1991) 81 DLR (4th) 280.

R. v. Sault Ste. Marie (City) [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30.

Re Lamford Forest Products Ltd. (1991) 10 C.B.R. (3d) 137.

Strathcona (County) v. *PriceWaterhouseCoopers Inc.* [2005] 13 C.B.R. (5th) 145, 256 DLR (4th) 536.

EU

Case No. C-281/02 *Owusu* v *Jackson* [2005] 2 WLR 942 (ECJ).

Case No. C-1/03 *Van de Walle & Ors* v *Texaco Belgium SA* [2005] 1 CMLR 8 ECJ.

England

Adams v. *Cape Industries* [1990] 1 Ch 433.

AIG Capital Partners Inc. v *ABN Amro Mellon Global Securities Services BV* [2005] EWHC 2239 (Comm).

Feetum v *Levy* [2005] EWHC 349 (Ch), [2005] 1 WLR 2576.

Lubbe v *Cape Plc.* [2000] 1 WLR 1545.

Macmillan Inc v *Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, CA.

Rylands v *Fletcher* (1866) LR 1 Ex 265.

Salomon v *Salomon & Co. Ltd.* [1897] AC 22 (HL).

Transco Plc v *Stockport MBC* [2004] 2 AC 1.

Turner v *Royal Bank of Scotland plc* [1999] 2 All E.R. [Comm] 664.

India

Indian Council for Enviro-Legal Action v *Union of India & Others* (1996) 3 SCC 212.

Mehta v *Union of India*, [1987] AIR, SC 965, 1086.

Union of India v *Union Carbide Corporation* Civil Revision No. 26 of 1988 4 April 1988, Seth J.

<u>Laws, Regulations and Guidelines:</u>

<u>Brazil</u>
Law No. 9.605 of 12 February 1998, Regulates Criminal and Administrative Penalties Relating to Behavior and Activities Harmful to the Environment, and Sets Forth Other Provisions, art. 2. (Westlaw database: Brazil Environmental, Health and Safety Laws and Regulations.)

<u>Canada</u>
Ontario Water Resources Act, R.S.O. 1990, c. O.40, s. 30 (1).

<u>England</u>
Department of the Environment, Transport and the Regions ("DETR"), Circular 01/2006, *Environmental Protection Act 1990: Part 2A Contaminated Land* (September 2006) *at* http://www.defra.gov.uk/environment/land/contaminated/pdf/circular01-2006.pdf (accessed 18 August 2006).

Enterprise Act 2002, s 250.

Environmental Protection Act 1990, s 30(1).

Insolvency Act 1986, ss 72C, 72E and 176A.

Insolvency Act 1986 (Prescribed Part) Order 2003, s 3.

State Immunity Act 1978, s 14(4).

<u>EU</u>
Directive 2004/35/EC on environmental liability with regard to the prevention of and remedying of environmental damage, (2004) OJ L143/56.

<u>France</u>
French National Assembly, Law n° 2001-420 of 15 May 2001 relevant to the new economic regulations, J.O n° 113 du 16 mai 2001 page 7776, *at* http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOX0000021L (accessed 6 August 2006).

<u>Indonesia</u>
Law No. 23/1997, The Law on Environmental Management, art. 35 (Westlaw database: Indonesia Environmental, Health & Safety Laws and Regulations).

<u>United States</u>
Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 2501-2505.

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-75 (1980).

The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (Sept. 24, 1789).

Alien Tort Statute, 28 U.S.C. § 1350 (2000).

International Treaties, Agreements, Documents and Organizations

Collevecchio Declaration on Financial Institutions and Sustainability, *at* http://www.foe.org/camps/intl/declaration.html (accessed 23 July 2006).

European Commission, Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final (July 2002) 5 *at* http://ec.europa.eu/employment_social/soc-dial/csr/csr2002_en.pdf (accessed 31 July 2006).

International Finance Corporation, *Environmental, Health and Safety Guidelines, at* http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/EnvironmentalGuidelines/ (accessed 24 July 2006).

International Finance Corporation, *Guidance Notes: Performance Standards on Social and Environmental Sustainability* (30 April 2006) *at* http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_GuidanceNote_full/$FILE/GuidanceNote_full.pdf (accessed 4 August 2006).

International Finance Corporation, *Performance Standards on Social and Environmental Sustainability* (30 April 2006) *at* http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf (accessed 4 August 2006).

Organization for Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises* (OECD: 2000) *at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (accessed 24 July 2006).

Report of the United Nations Conference on Environment and Development, 3-14 June 1992, Rio Declaration on Environment and Development, Annex I, U.N. Doc A/CONF.151/26/Rev.1 (1992), 31 I.L.M. 874, 877, *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163 (accessed 16 August 2006) ("Rio Declaration").

United Nations, UN Global Compact, *at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (accessed 24 July 2006).

United Nations, Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003) *at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument (accessed 24 July 2006).

UNCITRAL Secretariat, Explanatory Note, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 30th Sess., U.N. Doc. A/CN.9/431 (1996) *available at* http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf (accessed 10 August 2006)

United Nations Conference on Environment and Development, 3-14 June 1992, Agenda 21 Programme of Action for Sustainable Development, U.N. Doc. A/CONF.151/26 (1992) ("Agenda 21").

United Nations Environment Programme et al., Partnership for the Development of Environmental Laws and Institutions in Africa ("PADELIA"), *at* http://www.unep.org/padelia/ (accessed 14 August, 2006).

United Nations Environment Programme Financial Initiative, Principles of Responsible Investment, *at* http://www.unpri.org/files/pri.pdf (accessed 24 July 2006) ("UNEP FI").

United Nations Environment Programme Financial Initiative, Statement by Financial Institutions on the Environment and Sustainable Development (May 1997) *at* http://www.unepfi.org/signatories/statements/fi/ (accessed 23 July 2006) ("UNEP FI Statement").

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts—Consolidated Version of the Treaty Establishing the European Union, Oct. 2, 1997 O.J. (C 340) ("EC Treaty").

The World Bank Group, *Data and Statistics: Country Classification* (2006) *at* http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (accessed 24 July 2006) ("World Bank DID").

The World Bank Group, *Pollution Prevention and Abatement Handbook 1998: Toward Cleaner Production, Volume 1* (April 1999) *at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/1999/06/03/000094946_99040905052283/Rendered/PDF/multi0page.pdf (accessed 24 July 2006) ("World Bank PPAH").

Online Resources:

BBC News, 'Swiss Nazi Row Ends in US Court' (26 July 2000) *at* http://news.bbc.co.uk/1/hi/world/europe/852759.stm (accessed 23 August 2006).

BP, 'Baku-Tbilisi-Ceyhan Pipeline' *at* http://www.bp.com/subsection.do?categoryId=9006630&contentId=7013422 (accessed 8 August 2006).

Business and Human Rights Resource Center, 'Lawsuits and Regulatory Action' *at* http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases (accessed 17 August 2006).

Center for Corporate Citizenship at Boston College ("BCCCC"), 'Mandated and Voluntary Corporate Disclosure of Social, Environmental, and Governance Data: Changes and Trends' *at* http://www.bcccc.net/index.cfm?fuseaction=Page.viewPage&pageId=1184&nodeID=3&parentID=1013&grandparentID=886 (accessed 6 August 2006).

Global Sullivan Principles of Social Responsibility ("Sullivan Principles") *at* http://www.thesullivanfoundation.org/gsp/default.asp (accessed 20 August 2006).

Office of the CAO *at* http://www.cao-ombudsman.org/ (accessed 26 July 2006).

Office of the Compliance Advisor Ombudsman ("CAO"), 'Georgia and Turkey, Azerbaijan: Baku-Tbilisi-Ceyhan (BTC) Main Export Pipeline' *at* http://www.cao-ombudsman.org/html-english/complaint_btc.htm (accessed 8 August 2006).

The Equator Principles (6 July 2006) *at* http://www.equator-principles.com/documents/Equator_Principles.pdf (accessed 30 July 2006) ("Principles").

Equator Principles Financial Institutions, 'Frequently Asked Questions About the Equator Principles' (2006) *at* http://www.equator-principles.com/faq.shtml (accessed 29 July 2006).

HSBC, 'Equator Principles' *at* http://www.hsbc.com:80/hsbc/csr/our-sustainable-approach-to-banking/equator-principles (accessed 16 August 2006).

International Finance Corporation, 'BTC Oil Pipeline Project—Project Documents' *at* http://www.ifc.org/ifcext/btc.nsf/Content/Project_Documents (accessed 8 August 2006).

International Finance Corporation, 'External Training on IFC's New Performance Standards on Social and Environmental Sustainability' *at* http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards_Training (accessed 4 August 2006).

International Finance Corporation, 'Policies and Guidelines Update' *at* http://www.ifc.org/EHSGuidelinesUpdate (accessed 28 July 2006).