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Global Adversarial Legalism: The Private Regulation of FDI as a Species of Global Administrative Law

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ABSTRACT

This paper argues that the fractured nature of the governance of foreign direct investment ("FDI") has given rise to a two-faceted "global adversarial legalism." One facet of this global adversarial legalism, already much debated, is the concern that investment arbitration tribunals exercise an overly broad and perhaps illegitimate form of "global administrative review" of State measures. This paper focuses on the other side of this global adversarial legalism that has not received sufficient scholarly attention: the advent of FDI-impacted individuals and communities alleging violations of voluntary transnational norms espoused by corporate actors involved in regimes of global private regulation. The primary example of this more recent phenomenon is the emergence of the Equator Principles, a regime of private global governance created by investment banks. The EPs standardize the banks' environmental and social risk management of their investments in large infrastructure projects developed in host states whose weak regulatory capacities fail to prevent or mitigate project impacts.

Just as arbitral clauses in public contracts can internationalize a dispute for resolution by a transnational arbitral tribunal, the EPs' application to a project loan expands the substantive criteria applicable to project review and creates additional layers of review of corporate compliance with national and international norms. This interaction also creates a complicated dynamic with regard to State sovereignty and decision making related to national development agendas. By creating a global standard, the private regime empowers civil society actors and others not party to the underlying contracts to intervene in national debates and inter-governmental branch dialogue concerning project review and approval, thereby instantiating a quasi-administrative review that has powerful effects in the court of public opinion, even though—unlike traditional treaty-based transnational legal processes—the States have not themselves consented either to the substantive norms nor to the 'jurisdiction' of these processes. The paper also addresses the challenging normative implications of such adversarial legalism: how the protection of marginalized communities and ecosystems can impose broader societal transaction costs on national economic development.

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I. INTRODUCTION

Unlike cross-border trade in goods and services (regulated by the World Trade Organization), foreign direct investment ("FDI") has never been subject to a comprehensive multilateral governance regime, despite efforts to establish one by the United Nations, the Organization for Economic Cooperation and Development, and the WTO.[1] This absence has been increasingly felt as the flow of capital across borders came to outpace that of goods.[2] The rise of an extensive network of

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[1] Gus van Harten, *Investment Treaty Arbitration and Public Law* (2007) 18-23; Eric Neumayer, *Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD-negotiations*, 46 Wirtschaftspolitische Blätter 618 (1999).

[2] In 1990, for every dollar of Official Development Assistance from multilateral development banks and the International Monetary Fund there was less than one dollar of long-term private capital flows

multilateral and bilateral investment treaties ("BITs") and attendant dispute resolution mechanisms has largely answered investors' prayers over this governance gap,[3] but as others have long since pointed out, the other side of the equation has not yet been balanced: few substantive or procedural protections have been extended by transnational instruments or processes to those impacted by investments in host countries.[4]

This is a distinct question from whether investment agreements leave sufficient "policy space" for host states to regulate for the public good, in areas such as human rights, the environment and sustainable development.[5] Rather the question concerns whether investors can curtail the negative impacts of their investments[6] and the recourse available to investment-affected communities for redress of these impacts, particularly in contexts in which the host state, regardless of the "policy space" available to it, is unable to effectively regulate investment-related impacts.

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of FDI. However, already as of 2003, FDI had eclipsed ODA four times over. Herwig Peeters, *Sustainable Development and the Role of the Financial World*, 5 Environment, Development and Sustainability 197–230, 203 (2003).

[3] *See generally* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 65-106 (2009).

[4] To clarify, the imbalance to which I am referring is not the debate over whether investors or States are the real "winners" and "losers" of the current regime of investment treaty arbitration. For those debates, see generally Susan Franck *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L. REV. 435 (2009) and Gus Van Harten, *Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's 'Development and Outcomes of Investment Treaty Arbitration'* (December 1, 2011), *at* SSRN: http://ssrn.com/abstract=1740031.

[5] *See* Stephan W. Schill, *W(h)ither fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 895-96 (2011) (noting states' reevaulation of their investment agreements in light of perceived restrictions imposed by BITs); Suszanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1043-45 (2010) (discussing states, including the U.S., Norway and South Africa, conducting official reviews of their current agreements to determine "whether they now strike an appropriate balance between principles of investment protection and host states' need for regulatory discretion," and other states who have issued "joint interpretations" of existing agreements or entered into new agreements with language that seeks to "address the tension between these competing principles"), 1051-52 (discussing the same regarding the tensions between bona fide regulation and the interpretation of indirect expropriation in BITs) and 1067-1071 (discussing the same with regard to states' efforts to place issues such as public health, safety, the environment, labor rights and sustainable development on the "same normative plane as investment policy objectives" in preambular provisions of investment agreements and the treatment of the same by tribunals); *see also* Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (February 2008) (noting only two post-1990 references in BITs regarding human rights).

[6] An interesting development in this regard are a couple of Austrian BITs that emphasize in their preambles the need "for all governments and civil actors [such as investors] to adhere to the UN and OECD anti-corruption efforts…." Austria–Tajikistan BIT, pmbl. (signed Dec. 15, 2010); Austria–Kosovo BIT, pmbl. (signed Jan. 22, 2010). These agreements also mention the benefit of companies behaving responsibly in accordance with the OECD Guidelines for Multinational Enterprises, a global soft law agreement between all OECD Member States.

This imbalance is most painfully obvious in the context of the regulation of investment in large-scale infrastructure projects such as roads, hydroelectric dams, mines, and oil and natural gas extractive projects and oil pipelines, but particularly so in the extractive industries.[7] In addition to the widely documented negative effects on human and economic development produced by the "resource curse," the incapacity of the regulatory systems in many of the host countries in which these projects are built[8] has resulted in "problem projects" developed in an unsustainable fashion, causing unnecessary harm to local populations and ecosystems by forcefully dislocating people from their homes, ancestral lands and way of life, and in some instances threatening to destroy irreplaceable cultural sites, unique habitats or species.[9] According to United Nations High Commissioner for Human Rights Navi Pillay, "many of the estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands, territories and natural resources because of unfair and unjust exploitation for the sake of 'development.'"[10] Problem projects can be found at the epicenters of national and international conflicts throughout the world, some of them violent.

As this article will argue, one of the ramifications of the resulting fractured governance over FDI is a "*global* adversarial legalism." "Adversarial legalism" has been used to describe the United States' unique legal culture[11] and has also been explained as a governance strategy deployed by the relatively weak central governance institutions of the European Union as a means of spreading EU law.[12]

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[7] Nearly half of all existing complaints registered with National Contact Points under the OECD Guidelines by individuals against corporate actors have involved the extractive sector. *See* Institute for Human Rights and Business, OECD NCP Norway Workshop Report: OECD National Contact Points and the Extractive Sector (23 March 2012), *available at* http://www.ihrb.org/pdf/IHRB-NNCP-OECD-National-Contact-Points-and-the-Extractive-Sector-FINAL.pdf (last visited 8 July 2012).

[8] Miles Scott-Brown and Marcello Iocca, *Environmental Governance in Oil-Producing Developing Countries: Findings from a Survey of 32 Countries* (Washington, D.C.: World Bank 2010); Robert Wade, *Greening the Bank: The Struggle Over the Environment, 1970-1995*, in THE WORLD BANK: ITS FIRST HALF CENTURY 619 (Davesh Kapur, John P. Lewis and Richard Webb eds., 1997).

[9] Natalie Bridgeman and David Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*, 20 GEO. INT'L ENVN'T. L. REV. 187 (2008).

[10] Statement by the United Nations High Commissioner for Human Rights Navi Pillay on 9 August 2011, the International Day of the World's Indigenous People, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.a spx?NewsID=11284&LangID=E (last visited 27 October 2011).

[11] *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM (CAMBRIDGE MA: HARVARD UNIVERSITY PRESS 2001).

[12] *See generally* DANIEL R. KELEMEN, EUROLEGALISM: THE RISE OF ADVERSARIAL LEGALISM IN THE EUROPEAN UNION (CAMBRIDGE, MA: HARVARD UNIVERSITY PRESS 2010); See Daniel R. Kelemen, *The Rise of Adversarial Legalism in Europe*, APSA 2009 Toronto Meeting Paper, *available at* SSRN: http://ssrn.com/abstract=1450857, at 8-9; Daniel R. Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101 (2006).

Unlike polities where political authority is highly concentrated, in which political leaders can utilize various forms of control to keep their bureaucratic agents in line,[13] in these contexts political authority is fragmented and hierarchical control is relatively weak[14]—just as in the global governance, or lack thereof, of FDI.

One side of the FDI-related global adversarial legalism has been much discussed in the investment law and global administrative law literature, although it has not been described as "adversarial legalism" as such. I am referring to the debate initiated by Gus Van Harten and others about the role of investment treaty arbitration as a "species of global administrative law" in which investment arbitration tribunals are said to exercise a particularly intrusive, overly-broad and perhaps illegitimate form of judicial review of State measures supposedly enacted to promote public welfare (but, in investors' eyes, possibly overstepping the limits of legitimate State regulation).[15] The threat of the kinds of cases that could give rise to this kind of review thus far has been largely more theoretical than actual, but of the hundreds of investment arbitrations now concluded and currently underway, a handful or two of cases have raised more eyebrows than others.[16]

This article will focus on the other side of this global adversarial legalism, a much more recent phenomenon that has not received hardly any scholarly attention: the advent of FDI-impacted individuals and communities alleging investor violations of *voluntary* norms espoused by *corporate* actors involved in regimes of global *private* regulation. The primary, and perhaps only, example of this phenomenon is the Equator Principles – a global private regulatory regime created in 2003 by

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[13] Kelemen (2010) at 8-9 (collecting sources).

[14] Kagan, *supra* note 11, at 9.

[15] Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006); Van Harten, *supra* note 1; DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (2009), *available at* http://lsr.nellco.org/cgi/ viewcontent.cgi?article=1146&context=nyu_plltwp; Stephan W. Schill, *International Investment Law and Comparative Public Law: An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3 (STEPHAN W. SCHILL ED., 2010); SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009); *see also* Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 67 (2011); Alex Mills, *Antinomies of Public and Private at the Foundation of International Investment Law and Arbitration*, 14 J. INT'L ECON. L. 469 (2011); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. (forthcoming 2012).

[16] *See* Schill, *supra* note 5, at n 105 (collecting cases); Spears, *supra* note 5, at 1038 n 3-5 (collecting cases); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 106 AJIL __ (forthcoming 2012) at n 5 (collecting cases).

multinational banks to standardize their environmental and social risk assessment and management practices relating to investments in large-scale infrastructure projects.[17]

This article will discuss the ways in which public contracts for the development of infrastructure—the domestic legal frameworks governing the project—are "internationalized" by the participation of Equator Principles Financial Institutions ("EPFIs") in the loan syndicates financing the projects. This internationalization instantiates a new form of global administrative law. Just as arbitral clauses in public contracts can internationalize a contractual dispute for resolution by an transnational arbitral tribunal, the EPs' application to a project loan also creates additional layers of review not only of corporate compliance with national and international norms, but also a de facto layer of review of state actors' regulatory frameworks and decision making related to their development agendas. There are three distinct ways in which this internationalization occurs.

First, the normative obligations accepted by regime participants, in this case banks financing project sponsors, can expand the substantive criteria used in project risk assessment if the regime's standards or those applied by the individual participant exclude types of projects that are not otherwise prohibited by national law.[18] In this subtler mode of influence, the EPs set standards that are made applicable to projects built by developers in privity with State and sub-State entities. This is no small feat since some of these standards may even derive from norms of sustainable development enshrined in treaties or conventions to which the host State itself is not signatory. Indeed, the whole concept behind the Equator Principles was to "level the playing field" and make more rigorous project risk review applicable on *both* sides of the Equator – that is, in both developed and developing countries. Now that over seventy percent of all project finance transactions in emerging markets are covered by EPFIs, if developers hope to one day get project financing for their risky investments, they will have to develop their projects with an eye towards satisfying EP-standards, regardless of the stringency of host State laws.

Second, the procedural processes required by EP signatories may go beyond that applied by host State law with respect to both project review and assessment and with respect to offering grievance mechanisms related to project impacts. As with the substantive norms, these procedural norms can expand the law applicable to the project agreement beyond pure municipal regulations and procedures.[19]

Third, by creating a global standard, private regimes empower civil society actors and others not party to the underlying contracts to intervene in national debates and inter-governmental branch dialogue concerning project review and approval. Although this obviously is not the same as judicial or administrative review, it

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17 "About the Equator Principles" at http://www.equator-principles.com, (last visited 29 October 2011).

18 *See infra* section V.A.

19 *See infra* section V.B.

nonetheless has powerful effects in the court of public opinion and can have real impacts on States and their development plans.[20] The Equator Principles apply to project loans as little as $10 million, but in the case of truly large projects, which states could not possibly finance on their own, the participation of global financiers is the difference between a project being constructed or remaining in the file drawers of the national planning agency.

Of course, transnational activism of this kind has a rich history stretching back a long time,[21] and it is fair to question what distinguishes the current forms in this most advanced stage of globalization from previous manifestations.[22] Similarly, protests against corporate actors are not brand new, either, nor are campaigns by project-affected populations and transnational activists working in concert against multilateral development banks, which date back at least to the 1970s.[23] Indeed, the Equator Principles grew out of these very struggles against the "mega development" projects favored for several decades by multilateral lending institutions such as the World Bank Group,[24] which eventually was joined in this lending activity by commercial lenders whose total share of the market has grown dramatically between

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20 *See infra* Part VI.

21 *See* SIDNEY TARROW, THE NEW TRANSNATIONAL ACTIVISM (CAMBRIDGE UNIVERSITY PRESS, 2005) 3-4 (summarizing literature on transnational activism or collective action covering (a) the "diffusion of movements across borders" from the Protestant Reformation and abolitionist movements to Ghandian nonviolence and (b) "international mobilization" evident already in the international labor movement and currently manifest in the spread of political Islam through Europe); see also MARGARET KECK AND KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (CORNELL UNIVERSITY PRESS, 1998).

22 *See* TARROW, *supra* note 21, at 4-11. While conceding that it suffices to observe that there is now more transnational activism involving a "broader spectrum of ordinary people and elites," extending to a wider range of international and domestic concerns," Tarrow argues that what is "striking" about the new transnational activism is both "its connection to the current wave of globalization," which "provides incentives and causes of resistance for many (although not all) transnational activists" and "its relation to the changing structure of international politics," which "offers activists focal points for collective action, providing them with expanded resources and opportunities, and brings them together in transnational coalitions and campaigns." *Id.* at 4-5.

23 *See generally* SANJEEV KHAGRAM, DAMS AND DEVELOPMENT: TRANSNATIONAL STRUGGLES FOR WATER AND POWER (2004).

24 *See generally* World Bank, *Infrastructure: Lessons from the Last Two Decades of World Bank Engagement* (Washington, D.C., 2006). NGOs first successfully pressured the World Bank Group to enhance its environmental and social policies and procedures related to large project financing. MARC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW (2003); *see also* Galit Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AJIL 647-83 (2009). NGOs then turned to address the resulting governance gap with respect to the environmental and social risk management (ESRM) deployed by commercial banks, which had been increasing their role in financing projects since the 1990s.

the mid-1990s and today.[25] To address the disparity between World Bank policies and practices and those of commercial lenders, NGOs launched a series of public advocacy campaigns directed at the leading commercial lending institutions, all of which were invested to varying degrees in problem projects.[26] It was in responding to this pressure, that these and other market-leading institutions created the EPs in 2003.

What arguably is new, however, is the modality by which the Equator Principles allow corporate actors to be held accountable: through contract. The commitments made by the banks that have adopted the EPs are written explicitly into loan agreements arranged to fund projects. In the case of public-private partnerships, these loans are granted on the basis of the contractual relationships between State and sub-state entities on the one hand and private investors on the other. In this way, civil society claims against corporate actors based on the Equator Principles are unique even from similar efforts to hold corporate actors to task for violations of the OECD Guidelines for Multinational Enterprises through their network of National Contact points.[27] Such claims are alleged on the basis of an international soft law that binds the OECD Member States to uphold the Guidelines' normative principles, and thus, the normative basis for these clams is international soft law, not norms held applicable to corporate actors by voluntary agreement.

The rest of this article will explore the unique aspects of this new form of global administrative law as well the implications of the global adversarial legalism that it facilitates. Part II will describe "problem projects" and raise, without answering, some of the complicated issues they evoke through several vignettes. Part III will provide an historical overview of the norms of sustainable development that came to inform the Equator Principles. Part IV will then describe the Equator Principles' origins in the policy and institutional reform of the World Bank Group's International Bank for Reconstruction and Development and International Financial Corporation, and also explore how the EPs work. Part V will then discuss the various ways the EPs "internationalize" public contracts, focusing in particular on two of the vignettes demonstrating how the Equator Principles came to play a role in global project contestations.

II. "PROBLEM PROJECTS" AS A PARADIGM OF GLOBALIZATION

Large-scale infrastructure has been big business and the dominant economic development strategy of multilateral development institutions for over half a century,

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[25] Overall, since the global loan and bond markets for infrastructure were first tracked in 1993, they have grown from US $18 billion annually to a peak of over US $251 billion in 2008. *See* Project Finance International – League Leaders issues 1994-2010.

[26] *See generally* Niamh O'Sullivan, and Brendan O'Dwyer, *Stakeholder Perspectives on a Financial Sector Legitimation Process: The Case of NGOs and the Equator Principles*, 22 ACCOUNTING, AUDITING & ACCOUNTABILITY JOURNAL 553 (2009).

[27] *See generally* National Contact Points for the OECD Guidelines for Multinational Enterprises, at http://www.oecd.org/document/60/0,3746,en_2649_34889_1933116_1_1_1_1,00.html.

although it dipped in popularity along with global financial crises in the 1990s and in 2007-08.[28] It remains particularly popular in emerging markets: in the aftermath of the financial crisis, India developed a $475 billion infrastructure stimulus plan and Brazil has plans to build 24 dams in the Amazon this decade at a cost of roughly $100 billion (the nation already gets 80% of its power from dams but wants to boost its capacity by 60% by 2019 to keep-up with its economy, which is growing nearly as fast as China's).[29] The United States and European Union also turned to infrastructure development in the wake of the financial crisis to spur their economies.[30] But infrastructure development has always been vexed with complicated problems, even before the current fascination took hold in mid-20th century on the basis of Robert Solow's economic theories.[31]

The most challenging aspect of large-scale infrastructure development is that it is often undertaken as part of national growth strategies for the supposed benefit of an entire region or country, but the project must be located somewhere, and inevitably, that somewhere is in someone's backyard. This problem is not new: during the eighteenth century, the central governments of both France and England sought to increase agricultural production to keep pace with population growth. Both countries pursued the same strategy of extending the amount of land under cultivation through the draining and reclaiming of low-lying areas, but the regulatory frameworks governing these processes could not have been more different.[32] In contrast to the England, where property rights and legal rules for compensating dispossessed landowners were relatively clear and were enforced fairly consistently by the King's Bench (judges trained centrally in London and financed by the monarchy), the situation in France was nothing short of an administrative disaster, with local opponents of the royal (i.e., federal) chartered irrigation and reclamation projects repeatedly ensnaring the project developers in years of litigation and appeals and opposing federal efforts at streamlining the process (progress was only finally

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[28] *See generally* World Bank, note 24.

[29] Amazon is Getting a New Dam, WALL STREET JOURNAL, A1,A20, October 7, 2010. The dams will likely spur Brazil's economy in other ways: canals included in their designs will open previously impassable rapids to barge traffic, enabling soybean farmers and loggers to bring their good to market. *Id.*

[30] *See* Bent Flyvbjerg, *Survival of the unfittest: why the worst infrastructure gets built—and what we can do about it*, 25 OXFORD REV. OF ECON. POL'Y. 344-67 (2009); *see also* European Commission, A European Economic Recovery Plan (November 28, 2006), Comm 800 (2008), *at* http://ec.europa.eu/economy_finance/publications/publication13504_en.pdf (last visited December 18, 2010); The Council of the European Union, Presidency Conclusions (February 13, 2009) (announcing approval of Recovery Plan on 11 and 12 December 2008), *at* http://register.consilium.europa.eu/pdf/en/08/st17/st17271-re01.en08.pdf (last visited December 18, 2010).

[31] *See generally* Robert Solow, *A Contribution to the Theory of Economic Growth*, 70 QUART. J. ECON. 65-94 (1956).

[32] KAGAN, note at 207-08.

achieved after the French Revolution centralized power in the National Assembly, which created a hierarchical bureaucracy and funded the centralized judiciary).[33]

Unfortunately, in many if not most developing countries that have the highest demand for infrastructure to meet population growth needs in the coming decades,[34] effective project-level impact assessment remains a distant dream. Indeed, a recent World Bank survey of thirty-two oil-producing developing countries[35] found that most of the countries surveyed had a "sufficiently appropriate, but largely theoretical, environmental policy and legal framework" in place for managing impacts of the oil and gas industry, which in most instances were transposed into their national legislation from the regulatory systems in more developed countries. Furthermore, the survey found that most of the countries had dedicated institutions in place for managing the environmental and social impacts of the oil and gas industry, such as a ministry of environment. However, these systems existed primarily "on paper," and the institutions on the whole were found to be "empty boxes" whose regulatory effectiveness are "compromised by the lack of a sufficiently organized administrative structure that enables efficient regulatory compliance and enforcement," and are further undermined by "the lack of the human and financial resources needed for effective environmental governance." In 89 percent of the countries responding, the responsible institutions for environmental management have little (74 percent) or insufficient (15 percent) resources (budget, staff, training, technology, information systems, and so forth) to effectively implement their strategies and fulfill their regulatory mandate."[36] Indeed, the survey found that in many countries, much of the emphasis of any impact assessment process "appears to be directed toward regulatory approval of oil and gas projects rather than toward developing a life-cycle approach for minimizing environmental and social impacts across the entire project life."[37]

This article is concerned foremost with the question of where accountability should lie for the trials and errors, oversights or abuses that occur in large-scale infrastructure development developed with foreign investment. Who has a say in the vindication of a project-affected population's property rights, right to development, clean environment, adequate working conditions while working on projects, or the right to be consulted on the very authorization for development plans to move

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33 *Id.* at 207.

34 Ryan J. Orr and Jeremy R. Kennedy, *Highlights of Recent Trends in Global Infrastructure: New Players and Revised Game Rules,* 17 TRANSN'L CORP. 99 (2008).

35 The countries surveyed were assessed in comparison to "ideal" governance benchmarks synthesized from the practices of Brazil, Canada, Italy, Malaysia, and Norway. The surveyed countries included: Argentina, Algeria, Angola, Afghanistan, Colombia, Egypt, Arab Rep. Cameroon, Azerbaijan, Ecuador, Syrian Arab Republic, Congo, Rep. Cambodia, Mexico, Yemen, Rep. Gabon, China, Peru, Mauritania, Indonesia, Trinidad and Tobago, Nigeria, Kazakhstan, Venezuela, R.B. de São Tomé and Principe, Papua New Guinea, Philippines, and Thailand. *See* Iocca, supra note .

36 *Id.*

37 *Id.*

forward? While in most instances, particularly in the developing world, it seems as if accountability is completely absent, in some instances national institutions in emerging markets make an effort to contain and manage these immense conflicts. Sometimes problem projects test the stress points of even democratic governments by calling into question who has the final say over the development of national resources: executive planning authorities, environmental protection agencies, regional governments, local zoning boards, national or international courts, quasi-adjudicative processes (e.g., OECD Guidelines National Contact Points established in company countries of origin), or the court of national or global public opinion? When do a country's growth strategies trump minority property rights or environmentally sensitive areas? When is a resource so precious and vital to the local ecosystem—or even the global ecosystem—that its vitality trumps the imperatives of economic growth and poverty alleviation?[38]

As the royal irrigation and reclamation project fiasco in pre-Revolutionary France demonstrates, development projects are not always "unmitigated boons"; rather, local impacts can give rise to local opposition which can insist (often through the courts or administrative processes) that proposed projects be subjected to "rational justification." This process of adversarial legalism can at times lead to sober reflection that might lead to better projects (or different plans entirely), but this is not always the case: such heightened scrutiny, Kagan argues, can also make planning "less rational." According to Kagan, "trying to ensure governmental accountability through adversarial legalism is an inherently clumsy method of striking a sensible balance between environmental and economic development concerns, for it often results in outcomes that are shaped less by rational dialogue than by agonizing, lengthy wars of legal attrition."[39]

Thus, problem projects have never solely been pathologies of countries at the periphery of the world's economy besieged by poor governance and weak regulatory structures. Even today the world's most advanced economies and regulatory states, including the United States and Canada, are not immune from the conflagrations of problem projects, although the problem in the Global North is more one of "too much law" and not "too little," as is the case in the Global South. In fact, one such conflict is brewing in pristine Bristol Bay, Alaska, where a conglomerate of mining companies is facing opposition from local residents, including indigenous peoples, to its plans to develop a 2-mile wide-open pit copper and gold mine that locals claim

[38] These challenging questions are at the forefront of the long-standing tug-of-war over the Belo Monte dam planned for the Amazon, a project intended to respond to Brazil's tremendous projected energy needs in the next decade. *See infra* notes 129-137 and accompanying text. The Brazilian Amazon is home to 60 percent of the world's largest forest and 20 percent of the Earth's oxygen. *See* Tiffany Hagler-Geared, *Brazil's Belo Monte Dam to Displace Thousands in Amazon*, ABC News (18 June 2012), at http://abcnews.go.com/blogs/headlines/2012/06/brazils-belo-monte-dam-to-displace-thousands-in-amazon/ (last visited 12 July 2012).

[39] *Id*. at 209.

will ruin their salmon fisheries industry.[40] The Bristol Bay controversy aptly demonstrates that problem projects are not always generated by a breakdown in regulatory oversight or enforcement; they are, however, always controversial projects with large footprints and dramatic consequences, and thus, something about which people with differing value systems and material interests can easily differ. Canada, too, despite its relatively progressive policy stances on sustainability in extractive investments abroad,[41] struggles with its own homegrown problem projects, such as ecologically destructive tar sands on the lands of its indigenous peoples.[42]

These examples point to the fundamental logic of adversarial legalism, namely, that it is the result of fragmented and decentralized structures of political power – whether they are found across district, county, state, federal or national borders.[43] The legal regime put into place following the American Revolution by federal and state constitutions—which granted a significant degree of power to democratically elected local governments by guaranteeing individual property rights and other individual protections against governmental power and by fortifying judicial power to enforce these rights—created a governance structure not unlike pre-Revolutionary France with fragmented governmental power leading to drawn-out administrative and adjudicatory processes to resolve conflicts over and opposition to large projects.[44] As a result, Kagan points out, whole or part of industries in the United States (logging on federal land in the Pacific Northwest in the 1980s and 1990s, construction of nuclear

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[40] *See* Edwin Dobb, *Alaska's Choice: Salmon or Gold*, NATIONAL GEOGRAPHIC (December 2010), 101-125. As some have formulated it, the project pits two kinds of wealth against one another: the gains of "finite wealth" (including the US $100-500 billion estimated total value of the Pebble mineral deposit and the estimated 2,000 mine-construction jobs and 800-1000 operational jobs it would produce) versus the loss of "sustainable wealth" (the US $120 million estimated annual value of the Bristol Bay salmon fishery and the 11,572 resident and nonresident workers in the fish harvesting and processing industry who depend on the fishery for their livelihood).

[41] For example, Canada, along with the United States and several other countries, participates in the Voluntary Principles for Security and Human Rights and supports the Extractive Industries Transparency Initiative (EITI).

[42] Incidentally, the tar sands controversy demonstrates that problem projects are also not solely the product of companies from emerging economies operating in developing states with weak regulatory capacity (so-called "South-South investment"). In fact, the tar sands projects' greatest financial support comes from the Royal Bank of Scotland (RBS), one of the largest banks in the world which is also headquartered in London, arguably the global capital of the sustainability and corporate social responsibility industries. RBS has provided $7.5 billion to companies involved in tar sands mining in Canada, a practice that has been criticized for its negative impact on climate change (it is three times more carbon intensive than obtaining conventional oil), Canadian ecosystems and the indigenous communities living in project areas, who are blaming it for the abnormal rates of cancers they are developing. *See* Cashing in on Tar Sands – RBS, UK Banks and Canada's 'Blood Oil', at http://www.banktrack.org/download/cashing_in_on_tar_sands_rbs_uk_banks_and_canada_s_blood_oil_ (last visited December 15, 2010).

[43] *See* note and accompanying text.

[44] *Id*.

power plants in the 1970s and 1980s) have ground to a halt either because projects were tied-up in lengthy litigation over environmental and other concerns or because developers "often simply gave up," which has at times given rise to business counter-reactions to obstruct environmental measures.[45]

Most recently, the Keystone pipeline proposed to funnel vast oil reserves in Alberta, Canada to the U.S. refineries on the Gulf of Mexico, also became a national political soccer ball in both countries,[46] demonstrating again that the relative contentiousness and complexity of the planning (and oppositional) processes of such projects is not solely a product of purely rational cost-benefit analysis or risk assessments, but also a function of the relative fragmentation of the political power at play and the diverse interests and value of the affected stakeholders. This fragmentation naturally is exacerbated in cross-border transactions between public and private entities, which have increased with the acceleration of the globalization of the economy. In short, problem projects, in all of their complexity, go to the heart of the conflict between competing visions of human development in the age of economic globalization and all the ancillary questions related to that debate: who gets to develop themselves or be developed (and by whom and how), and how, ultimately, is progress measured?[47]

To be sure, many countries have struck upon ex ante political bargains to solve these conflicts by empowering federal government entities at various levels with some form of the power of eminent domain. However, if this power is wielded inequitably; if national institutions fail to address citizens' concerns about a lack of "free, prior and informed consent" at all, or only nominally address insufficiencies in

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[45] *Id*. at 213.

[46] *See* Joe Nocera, *Poisoned Politics of Keystone XL*, N.Y. Times, Feb. 6, 2012), *at http://www.nytimes.com/2012/02/07/opinion/nocera-the-poisoned-politics-of-keystone-xl.html?_r=1* (last visited April 22, 2012) (describing President Obama's decision in the context of election year politics as being forced upon him by Republicans as a political stunt, forcing Obama to reject the project so as not to upset environmentalists, who form a key part of his political base, and the Canadian Prime Minister's subsequent instruction to all of his ministers to no longer discuss the project so as not to be seen as interfering in the U.S. presidential election).

[47] The Vedanta mining project in India is a perfect case in point: the Indian government had supported the project—the largest foreign investment in the country at the time—because the mineral resources in the east of the country were under-developed and Vedanta's proposed giant aluminum refinery would provide over 20,000 jobs for locals. Local farmers in Orissa (one of Indian's poorest states) who are members of federally protected tribes see things differently: they were concerned foremost with losing not only a sacred site (the mountain near the proposed mine site) but their way of life and traditional tribal values. As one tribe member among the 800 facing forcible displacement to allow room for the project, remarked, "We will not allow the company to mine our land, our sacred place. Any compensation they offer is worthless to us." *See* BBC News, *India court okays mining projects*, September 29, 2008. India's Supreme Court ruled in favor of the controversial mining projects (one sponsored by Sterlite Industries, the Indian fully-owned subsidiary of UK-based Vedanta and another by South Korean Posco) in August 2008, ordering Sterlite to invest US $2.5 million, or ten percent of the profit earned from the project, for the development of the tribes.

project approval processes with some loose approximation of the rule of law; or even if "justice" is said to be done, but local and transnational activists are dissatisfied with the results of such processes, the last strategic option increasingly resorted to by activists is to "internationalize" the struggle[48] by seeking accountability from transnational regimes and courts,[49] foreign courts (e.g., Alien Tort Claims Act suits), directly from private actors,[50] or in the global court of public opinion with the aid of celebrity spokesmen and through reputation-based market forces, such as shareholder activism or public advocacy campaigns. As discussed in further detail below, the Equator Principles have emerged as yet another normative and procedural basis for such efforts at internationalization.

III. THE EVOLUTION OF SUSTAINABILITY AND ACCOUNTABILITY IN DEVELOPMENT FINANCE (1972 – 2002)

A. The Emergence of Sustainable Development

Perhaps not coincidentally, it was not long after the era when large-scale projects became so prominent in developing economies (the early and mid-1970s) that developing countries began to re-fashion their collective bargaining power in the United Nations, and talk of a "New International Economic Order" ("NIEO") first emerged.[51] In addition to aspiring to re-balance what were perceived as inequalities endemic to the international legal order, the developing states' demands focused on

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[48] *See generally* TARROW, note 21.

[49] Recently activists have sought interim measures related to projects directly from the Inter-American Commission on Human Rights. *See* Jarrod Hepburn, *Analysis: Interim Measures Granted by Inter-American Commission Have Featured in Several Recent Investment Controversies*, International Arbitration Reporter, March 13, 2012, *at* http://www.iareporter.com/articles/20120314_1 (last visited March 15, 2012).

[50] In July 2012, residents living near Sakhalin II, one of the largest integrated oil and gas projects in the world, filed a complaint for alleged environmental harms against Royal Dutch Shell, the Royal Bank of Scotland and Standard Chartered with the National Contact Points of England and the Netherlands for the OECD Guidelines for Multinational Enterprises. *See NGOs seek Sakhalin compensation from Shell, UK banks*, ENVIRONMENTALFINANCE.COM (August 1, 2012), at http://www.environmental-finance.com/news/view/2677 (last visited August 15, 2012). This followed an earlier report years before that identified the deficiency of the project plans in light of the EPs. *See* Platform, *Principal objections: Analysis of the Sakhalin II oil and gas project's compliance with the Equator Principles* (2004), at bankwatch.org/documents/analysis_equatorp_05_04.pdf (last visited August 15, 2012).

[51] *See*, e.g., Declaration on the Establishment of a New International Economic Order, UN Doc. GA res. 3201 (S-VI) (1 May 1974); Programme of Action on the Establishment of a New International Economic Order, UN Doc. GA res 3202 (S-VI) (1 May 1974). Both were adopted at a Special Session of the United Nations General Assembly following a proposal of 95 developing countries.

re-emphasizing under international law their unfettered sovereignty over their own natural resources.[52]

The momentum from the NIEO led eventually to the birth pangs of the international articulation of the concept of sustainable development, [53]which was "officially" first defined in 1987, by the World Commission on Environment and Development (The Brundtland Commission) in its report, *Our Common Future*. The Bruntland Commission famously defined sustainable development as "development that meets the needs of the present without comprising the ability of future generations to meet their own needs."[54] This simplistic definition is clear enough, but it obscures and oversimplifies the complicated history and internal contradictions of the concept of sustainable development. What is perhaps often overlooked is the central tension between the need of developing countries for economic growth and the simultaneous advancement of increasingly progressive approaches (through the development of developed countries national environmental laws and international environmental law) to constraining the negative impacts of industrial development on the environment and society.[55] These tensions continue to today, as countries struggle to create economic growth without diminishing all of their human and natural capital beyond repair.

It is beyond the scope of this article to recount the complete historical development of the norms of sustainable development, but it is useful to focus on some of the core enduring principles from the 1992 Rio Conference (the "Earth Summit"), which was attended by all of the then-176 UN Member States and more than fifty intergovernmental organizations. Four of the Rio Declaration's principles—Principle 10 on public participation in decision making processes, Principle 15 on the precautionary approach,[56] and Principle 11[57] and 13[58] on good

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[52] *See generally* Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, Report of the Secretary-General, UN Doc. A/39/504/Add.1, 23 October 1984.

[53] N. SCHRIJVER, THE EVOLUTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: INCEPTION, MEANING AND STATUS (LEIDEN, MARTINUS NIJHOFF PUBLISHERS 2008).

[54] Available at http://www.worldinbalance.net/agreements/1987-brundtland.php

[55] *See* SCHRIJVER (2008).

[56] Principle 15:

> [i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreparable damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

As Schrijver observes, while it is unclear whether the precautionary principle/approach has matured into a norm of customary international law, there can be no doubt that the "basic ingredients" of the principle have "become part of the corpus of environmental treaty law, as attested to in the wide inclusion of the principle in various international agreements." (2008, 194-195). Indeed, in the *Paper Pulp Mills case*, the International Court of Justice held that the practice of EIA "has gained so much governance and the development of national capacity to regulate environmental harms—are particularly worthy of attention because these later become the most meaningful for grass roots opposition to large-scale development projects sponsored by the World Bank and other financial institutions.

Arguably the most important Rio Principle from the standpoint of the global adversarial legalism described here is that of public participation in decision making processes (Rio Principle 10), which states:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Rio Principle 10 has its intellectual foundations in the concept of self-determination found in earlier international legal instruments, such as the International Labor

acceptance among states that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource," although it observed that general international law does not specify the scope and content of an EIA. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, ¶ 204 (Judgment of Apr. 20, 2010), available at http://www.icj-cij.org/docket/files/135/15877.pdf (last visited June 10, 2010), ¶ 205. Indeed, there is wide variation in the capacity of developing countries and countries in transition to implement EIA regulations or guidelines even if they have adopted them, leading to uneven application or no application at all. JOHN GLASSON ET AL, INTRODUCTION TO ENVIRONMENTAL IMPACT ASSESSMENT 292-296 (LONDON AND NEW YORK: ROUTLEDGE, 2005). Even in the United States, implementation of NEPA has been patchy. *See* FRANK VANCLAY AND DANIEL BRONSTEIN (EDS.) ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT (CHICHESTER: JOHN WILEY & SONS, 1995).

[57] Principle 11 calls on states to "enact effective environmental legislation." However, consistent with the above tension between global environmental concerns and the agenda of developing states not to be thwarted in their efforts for economic growth by overly restrictive environmental regulation, Principle 11 qualifies that "[e]nvironmental standards, management objectives and priorities should *reflect the environmental and development context to which they apply*. Standards applied by some countries *may be inappropriate and of unwarranted economic and social cost* to other countries, *in particular developing countries*."

[58] Principle 13 calls on states to "develop national law regarding liability and compensation for the victims of pollution and other environmental damage" and to "cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." It is in the implementation of Principle 13 that the international community and individual states have effectively abdicated responsibility, creating a vacuum of law and authority.

Organization's Convention No. 169 On Indigenous and Tribal Peoples of 1989,[59] and is closely related to the concept of "free, prior and informed consent" (FPIC), which has been recognized in numerous international treaties and affirmed by their interpretive bodies, including the 1976 International Covenants on Human Rights and the International Covenant on Economic, Social and Cultural Rights,[60] the 1969 International Convention on the Elimination of Racial Discrimination,[61] the Inter-American Declaration on the Rights of Indigenous Peoples. Following the Rio Declaration, numerous other treaties and declarations also recognized the importance of participation by individuals and indigenous peoples in particular.[62] Subsequently,

[59] Article 16, Convention on Indigenous and Tribal Peoples, at http://www.ilo.org/ilolex/english/convdisp1.htm (last visited December 15, 2010) ("Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."). The Convention has been ratified by 22 countries. *See* http://www.ilo.org/ilolex/english/convdisp1.htm (last visited December 15, 2010).

[60] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights are binding treaties that acknowledge indigenous peoples' right to self-determination and to freely determine their political status, freely pursue their economic, social and cultural development, and freely dispose of their natural wealth and resources through opportunities to engage in consultations and to agree or reject proposals for development. In the submission regarding Poma Poma v Peru, the Human Rights Committee of the ICCPR held that Article 27 requires free, prior and informed consent for any minority group, including non-indigenous peoples, when the State acts in a way that that substantially compromises or interferes with a group's culturally significant economic activities. Human Rights Committee, para. 7.6-7.7. April 2009.

[61] The United Nations (UN) Committee on the Elimination of Racial Discrimination, which interprets the Convention, recommends that to fulfill their obligations under the Convention, States should "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent." Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (Aug. 18, 1997), *available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument* (last visited 8 July 2012).

[62] *See generally* Rodolfo Stavenhagen, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, ¶ 66, submitted in accordance with Commission resolution 2001/65, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003) (providing that "[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects"); *see generally* Melanie Nakagawa, *Overview of Prior Informed Consent from an International Perspective*, 4 J. SUSTAINABLE DEV. L. & POL'Y. 4 (2004) (collecting treaties and conventions endorsing FPIC, such as the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, the 1989 Lomé Convention, the 1994 United Nations Convention to Combat Desertification, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the 1998 Aarhaus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, to which a compliance procedure was added in 2002).

the World Commission on Dams made FPIC a foundation of its Strategic Priorities, and its importance was affirmed by the independent World Bank's Extractive Industries Review. Numerous international court decisions have also reaffirmed the importance of FPIC.[63] In addition, FPIC has been integrated into national legislation or recognized in national jurisprudence in numerous countries throughout the world. Most recently, the United Nations Declaration on the Rights of Indigenous Peoples (2007) has explicitly affirmed this and related rights.[64] It should be clear that the concept enshrined in Principle 10 of the Rio Declaration – public participation – has grown to be a backbone of sustainable development policies and procedures.

Indeed, if there has been one principle upon which local and transnational advocates have seized as a normative basis for their claims, it is FPIC. And yet, it remains an open question whether the norm of FPIC has achieved the status of customary international law,[65] because national practice remains sporadic and inconsistent. The World Bank survey of extractive industry country policies referenced above found most governments lacking in their implementation of principles of public disclosure and consultation. Typically, little is disclosed to the general public and affected communities, and what "consultation" occurs is more often than not simply a top-down dissemination of information about proposed projects that have already been approved. Furthermore, in most countries there is a lack of clarity about the potential impact on decision-making that could be had by consultation, thus depleting public confidence in the value of engaging in what little process exists. The survey also found that while governments "appear to recognize the need to consult early on in the oil and gas development phase," consultation focuses "more on the amount to be negotiated as compensation than on establishing communication links for managing environmental impacts throughout the project

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[63] The Inter-American Court on Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human Peoples Rights have developed considerable jurisprudence on FPIC, with several decisions stating that indigenous peoples' informed consent is required in relation to activities that affect their traditional territories. *See* Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in Inter-American Human Rights System*, 4 J. SUSTAINABLE DEV. L. & POL'Y. 4 (2004).

[64] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at art. 32, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), Preamble, available at http://www.un-documents.net/a61r295.htm (last visited December 15, 2010); Six articles in the Declaration make explicit reference to FPIC, although only two, Articles 10 (on forced relocation) and 29 (on hazardous waste storage), clearly prohibit any government action without the consent of the affected indigenous community.

[65] *See* IFC Performance Standard 7 (1 Jan 2012), at http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability+framework/2012+edition/performancestandard7 ("There is no universally accepted definition of FPIC."). For a general discussion of the issues involved in applying FPIC, see (Lehr 2010); see also (Morgera 2007).

cycle," as if operating under the assumption that project approval is a foregone conclusion.[66]

Moreover, the interpretation of what FPIC entails remains very much open to debate and further evolution, particularly between civil society, the World Bank, and the commercial banks. Indeed, the most recent version of the IFC's Performance Standards recognizes three different levels of consultation and consent, depending on the specific context, i.e., whether indigenous peoples are among the project-affected populations and the potential severity of the project's risks and impacts.[67] It remains to be seen how these different levels of consultation will work in practice.

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[66] *Id.* In addition, the governments surveyed claim to recognize the need to consider diversity and linguistic and cultural differences during the consultation process, but "less than half" of those surveyed have ratified ILO Convention 169 and its provisions regarding indigenous peoples and extractive industry projects. Consequently, few of the governments surveyed have implemented specific laws and regulations detailing the practical aspects of involving indigenous peoples in the review and approval of projects, which often are situated on the frontiers of the indigenous communities' lands (and this despite the signing in September 2007 of the United Nations Declaration on the Rights of Indigenous Peoples by 144 States). The policies surveyed also generally lacked means of communicating with stakeholders. This means that the results of project review processes—and what impact, if any, consultation had on the processes—are poorly communicated, and are communicated following substantial delay if at all, thereby missing a further opportunity to build public confidence in engaging in the process. Despite these shortcomings, according to the survey "most governments" had not developed a commitment to establish centralized information systems that might ameliorate some of these problems.

[67] *See* Performance Standard 7, paras. 30 ("When Affected Communities are subject to identified risks and adverse impacts from a project, the client will undertake a process of consultation in a manner that provides the Affected Communities with opportunities to express their views on project risks, impacts and mitigation measures, and allows the client to consider and respond to them. The extent and degree of engagement required by the consultation process should be commensurate with the project's risks and adverse impacts and with the concerns raised by the Affected Communities."), 31 ("For projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation (ICP) process that will build upon the steps outlined above in Consultation and will result in the Affected Communities' informed participation. ICP involves a more in-depth exchange of views and information, and an organized and iterative consultation, leading to the client's incorporating into their decision-making process the views of the Affected Communities on matters that affect them directly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues.").

A coalition of NGOs, while pleased to see some improvement to FPIC in the Performance Standards, nevertheless finds inadequacies in the update. *See* Bretton Woods Project, *IFC updated performance standards: weak on human rights, other shortcomings*, Update 77 (14 September 2011), *at http://www.brettonwoodsproject.org/art-568878* (last visited April 22, 2012) (noting that FPIC will only be required under "tightly restricted" circumstances, does not meet the consent requirements under the UN Declaration on the Rights of Indigenous Peoples, and "suffers in places from weakened language, notably in reference to critical cultural heritage (where adverse impacts must be judged significant before protections are granted), hazy requirements for individually titled indigenous territories and from a lack of independent verification of consent."). As the NGOs point out, it is also unclear the different consultation or consent requirement will be triggered or what processes will be used to fulfill them.

B. Progress within the World Bank's International Bank for Reconstruction and Development

As noted above, the transnational norm of sustainable development began to coalesce in the early 1970s. The first true focus on the issue from a global governance perspective came at the United Nations Conference on the Human Environment at Stockholm in 1972. In advance of the conference, the World Bank felt compelled to formulate a position, particularly, as economist Robert Wade notes, because "many in the environmental movement were saying that economic growth should be stopped, an idea fundamentally opposed to the Bank's mission."[68]

Immediately following Stockholm, the Bank created an Office of Environmental Affairs, though this remained under-staffed throughout the decade and had little practical impact since its environmental specialists were engaged too late in the development cycle, well past the stage where environmental concerns could influence project design, and the unit was focused on occupational health and safety related to large factories as opposed to the large-scale human and ecological effects resulting from the kinds of large projects the bank had been financing as a cornerstone of its development work.[69] This slowly began to change, however, with the increased pressure applied by various indigenous peoples in opposition to Bank-financed projects from the mid-1970s onward. The Chico dam in the Philippines was the first project to face sustained opposition, compelling then-Bank President Robert McNamara to announce that "no funding of projects would take place in the face of continued opposition from the people."[70]

Although this principle had been announced, it has taken decades for it to become operationalized in policies, procedures and accountability mechanisms, and very imperfectly at that.[71] The core element of these reforms was the Operational Policy on Environmental Assessment (OP 4.01), which created a detailed process for project assessment, review and implementation, environmental screening, public consultation, information disclosure and implementation requirements. In addition, different thematic Operational Policies addressed different areas of potential project impact.

By 1993, the IBRD had created the Inspection Panel, which for the first time provided individuals in communities affected by Bank projects the opportunity to

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68 Wade, *supra* note 8.

69 SANJEEV KHAGRAM, DAMS AND DEVELOPMENT: TRANSNATIONAL STRUGGLES FOR WATER AND POWER (2004).

70 *Id.*

71 Others have documented the slow evolution of environmental and social issues within the bank. *See generally* Galit Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AJIL 647-83 (2009); MARC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW (2003).

initiate complaints about the manner in which projects were created and any adverse effects they may have engendered.[72] A complaint before the Inspection Panel requires the Bank to review the extent to which the Bank followed its own Operational Policies during the project's development – not whether the Bank has violated international human rights or environmental law. As others have pointed out, the Inspection Panel is far from perfect,[73] but its creation must nonetheless be seen as one step in an evolution of accountability within development finance institutions. The banks Operational Policies eventually became formally known as the Environmental and Social Safeguard Policies in 1997, and as in the previous incarnation, the central component of the Safeguard Policies is the environmental screening process that foremost categorizes projects according to their environmental and social impacts—into Categories A, B, C—which then dictates the scope of environmental assessment and the level of public engagement required as part of the project planning process. It should be noted that not all stakeholders viewed the "conversion process" undertaken by the Bank in a positive light.[74]

C. The International Financial Corporation Develops a New Global Standard

Just as some progress was being made in incorporating sustainable development concerns into development finance institutions' loans to sovereigns, loans to private sector entities began to supplant public development financing. The IBRD's

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[72] *See* I. F. I. SHIHATA, THE WORLD BANK INSPECTION PANEL: IN PRACTICE (2000).

[73] Bridgeman & Hunter, *supra* note 9. As of November 2010, the Inspection Panel had received seventy complaints, 7 of which it did not register because they were outside the scope of its mandate, fourteen of which it found ineligible for an investigation, ten of which it withheld ruling on whether to recommend an investigation for a variety of reasons, and twenty-two of which it investigated (the eligibility for review of the last four complaints, all filed after May 2010, is still pending). *See* Summary of Inspection Panel Cases (November 8, 2010), available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Panel_Cases_2010_Nov_8.pdf (last visited November 15, 2010). As Bridgeman & Hunter note, a substantial difficulty with the operation of the Panel is that those found in non-compliance (the Bank's management) are the same persons charged with implementing the Panel's recommendations. Nevertheless, it is argued that "pressure can build to implement the recommendations because of the costs to the institution' credibility and legitimacy when high-profile recommendations are not implemented." *Id*. at 210.

[74] According to the Environmental Defense Fund, the so-called "conversion process" was initiated "largely as a reaction to the Inspection Panel's work" and entailed converting "detailed directives with clear requirements to which Bank staff could be held accountable" to "vague, shorter, and more 'Panel proof' policies." Practically speaking, the conversion process divided the existing Operational Directives into mandatory Operational Policies (OP) and voluntary Bank Procedures (BP) ("best practice statements that 'would be nice to have'"). EDF notes that civil society groups were largely disappointed by the policy revisions, which they claimed ignored their recommendations and, with the exception of the Information Disclosure Policy, "dropped key requirements, contained vague language that left much to the interpretation and sole discretion of Bank staff, and effectively weakened social and environmental protections for World Bank project lending." *See* http://www.edf.org/documents/4279_RetreatSafeguardPolicies_0105.pdf (last visited December 15, 2010).

departure from the scene was mirrored by a drastic decline in other official sources of aid to governments, which dropped forty-percent between 1991 and 1997. In 1990, for every dollar of Official Development Assistance from multilateral development banks and the International Monetary Fund there was less than one dollar of long-term private capital flows of FDI. However, already as of 2003, FDI had eclipsed ODA four times over.[75]

The IBRD's slight retreat from infrastructure lending was in part a result of the substantial reputational costs that these investments had imposed on the institution due to the very public and vocal protests to which the adverse impacts of project development had given rise. But the real reason for this retreat was likely the emergence of a global market for private investment in infrastructure spurred by privatization and deregulation of many industrial sectors all over the world and the continued globalization of financial markets through the harmonization of tax regimes, the lowering of restrictions on foreign capital, and the conclusion of bilateral investment treaties.[76] Multinational corporations and their financiers, large multinational banks from OECD countries responded to the new favorable investment environment by increasing the financing of infrastructure in developing countries by nine-fold between 1990 and 1997, with annual project finance volumes multiplying tenfold.[77]

At the same time, the World Bank Group's private lending arm, the International Financial Corporation, picked-up the IBRD's increasing slack in this area, often lending to private entities as part of syndicates in concert with commercial banks.[78] Indeed, multilateral and bilateral financing of private entities in developing countries nearly tripled in the early part of this period,[79] with the IFC accounting for nearly

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[75] Herwig Peeters, *Sustainable Development and the Role of the Financial World*, 5 ENVIRONMENT, DEVELOPMENT AND SUSTAINABILITY 197, 203 (2003).

[76] Marco Sorge, *The Nature of Credit Risk in Project Finance,* BIS Quarterly Review (2004); B. &. Sesia Esty A., *An Overview of Project Finance & Infrastructure Finance - 2006 Update,* Havard Business School (2007); World Bank, *Infrastructure: Lessons from the Last Two Decades of World Bank Engagement* (Washington, D.C.: World Bank Group, 2006); *see also* Andrew Guzman*, Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

[77] From less than \$5 billion to over \$50 billion. World Bank (2006). During this period, nearly three-quarters of all commercial infrastructure financing in developing countries came from the United States, France, the United Kingdom, Germany, the Netherlands and Japan.

[78] Christopher Wright, *Setting Standards for Responsible Banking: Examining the Role of the International Finance Corporation in the Emergence of the Equator Principles, in* F. BIERMANN, B. SIEBENHÜNER AND A. SCHREYROGG (EDS.), INTERNATIONAL ORGANIZATIONS AND GLOBAL ENVIRONMENTAL GOVERNANCE (2007).

[79] From US\$ 9 billion to US\$25 billion. IFC (2002), *The Environmental and Social Challenges of Private Sector Projects*, International Finance Corporation, Washington D.C, 2002.

one-quarter of all of the multilateral and bilateral financing, which increased further in the ensuing years.[80]

With an increase in project investments came an increase in attention from civil society, and eventually, the internal reforms initiated at the IBRD began to bleed over to the IFC. Trailing the IBRD by over fifteen years, the IFC hired its first environmental specialist in the late 1980s. Before that time, the IFC had relied on the World Bank's policies and staff for any environmental impact assessments, although it seems that this model was under-resourced and ineffective; indeed, until this time, the IFC had been satisfied to allow the World Bank to lend to large development projects.[81] Over time, however, the ranks of the IFC's specialists expanded to over 100 due to the continued pressure exerted by the NGO community, advances in environmental science, regulatory developments in the United States and the European Union, and a shifting ethos towards "sustainability."[82]

The biggest institutional reform for the IFC during this period came in 1995 when environmental NGOs alleged in an Inspection Panel claim that the IFC violated World Bank environmental and social policies in its development of the Pangue dam project in Chile.[83] The ensuing controversy led to an independent report that harshly criticized the IFC's conduct, which then instigated further internal reflection and re-examination of its own policies and procedures.[84] As a result, the IFC formally incorporated nine of the World Bank's ten Environmental and Social Safeguard Policies into its own operational procedures and identified the World Bank's Pollution Prevention and Abatement Handbook and Occupational Health and Safety Guidelines as benchmarks for IFC's private sector projects. Furthermore, it introduced the Procedures for Environmental and Social Review, which outlined the internal procedures by which environmental specialists would assess environmental assessments provided by borrowers.

It was at this moment, then, that the standards applied in evaluating loans to projects built by sovereign borrowers were being applied to the evaluation of loans to private borrowers. This set the stage for NGOs to later demand that commercial lenders apply these standards as well. With policies now in place, the IFC needed a mechanism, similar to the IBRD's Inspection Panel, through which to hold itself

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[80] By 1998, the IFC had committed more than $23.9 billion of its funds and had arranged $17 billion in syndications and underwriting for 2,067 companies in 134 developing countries (IFC 1998).

[81] Wright, *supra* note at 78.

[82] Wright, *supra* note 78.

[83] S. Parks, *Becoming Green: The World Bank Group, Norm Diffusion and Transnational Environmental Advocacy Networks*, in D. STONE AND C. WRIGHT (EDS.), THE WORLD BANK AND GOVERNANCE : A DECADE OF REFORM AND REACTION (London: Routledge, 2007); International Financial Corporation, *Banking on Sustainability: Financing Environmental and Social Opportunities in Emerging Markets* (Washington, D.C.: International Financial Corporation, 2007).

[84] Parks, *supra* note 84.

accountable in instances of non-compliance. In 1999, the Compliance/Advisor Ombudsman (CAO) was established in the IFC to oversee its work and that of the Multilateral Guarantee Investment Agency (MIGA), the World Bank's investment insurance agency.[85]

The IFC continually reviewed its application of the Safeguard Policies, publishing reviews in 2003 and 2005.[86] The 2003 review concluded that the system supporting the implementation of the Safeguard Policies was weak, lacked proper monitoring and was poorly integrated into IFC's core business processes.[87] Following these reviews, the IFC completely overhauled its assessment policies from pre-appraisal to the supervision stages of the investment cycle,[88] converting the Safeguard Policies into the Performance Standards.

The Performance Standards have themselves undergone subsequent reviews, most recently completing an update in August 2011. The IFC also invested heavily in training investment and advisory staff to deal with environmental and social issues and instituted a new information tracking system to organize comments from internal and external stakeholders.[89] Commentators note that the move to the Performance Standards represented a key shift "from minimum compliance to secure the loan, in which the client typically outsourced the task of demonstrating compliance to a consultant; to working with the client throughout the life of the loan, where the client has greater ownership of the process and greater commitment to positive outcomes."[90]

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85 Daniel D. Bradlow, *Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403 (2005). Since 2000, the CAO has found 67 of the 100 complaints submitted to it eligible for review. *See* International Financial Corporation, *The Office of the Compliance Advisor/Ombudsman, 2008–9 Annual Report* (Washington, D.C., The World Bank 2010).

86 International Financial Corporation, *Safeguard Policy Review Revisited: Has IFC addressed the recommendations of the CAO Safeguard Policy Review?* (Washington, D.C., The World Bank 2005); International Financial Corporation, *A Review of IFC's Safeguard Polices: Core Business: Achieving Consistent and Excellent Environmental and Social Outcomes* (Washington, D.C., The World Bank 2003).

87 *See* International Financial Corporation (2003).

88 Emily Simms, *The promotion of respect for workers' rights in the banking sector: current practice and future prospects*, *in* OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT VII (2008).

89 *Id.*

90 *Id.* The IFC subsequently undertook an evaluation of its application of its new policy framework to 250 projects, which found that despite concerns about increased costs, the direct costs had been modest and spread over three fiscal years and that in general, costs of projects—with the exception of Category B projects—did not increase significantly (and Category B project costs associated with more stringent review did not increase beyond proportion to the overall rise in costs of processing such projects). Furthermore, seventy-two percent of clients surveyed felt that the cost in meeting the Performance Standards' requirements would not impact their decision to seek financing from the IFC in the future. *Id.*

The Inspection Panel and the CAO have contributed to the architecture of accountability at the World Bank Group, but they remain imperfect mechanisms for achieving true accountability for project-affected populations.[91]

IV. THE EXTENSION OF SUSTAINABILITY TO COMMERCIAL LENDERS: THE EMERGENCE OF THE EQUATOR PRINCIPLES

It was in the same period that the "anti-" or "alter-" globalization" movement (also known as the "global justice movement") reached its apex at the "Battle of Seattle" in November 1999, with activists violently protesting against the perceived harms threatened by what activists describe as the neoliberal agenda of the World Trade Organization and other international organizations' policies.[92] The global justice movement upgraded its organizational capacity by founding the World Social Forum in Brazil in January 2001 as a counter to the World Economic Forum held annually in Davos, Switzerland, which is emblematic, in the eyes of the global justice movement, of all that is wrong about global governance: its an exclusive and top-down process driven by elites. It was also during this same period that the negotiations for a Draft Multilateral Investment Agreement fell apart due to civil

[91] *See* Enrique R. Carrasco & Alison K. Guernsey, *The World Bank's Inspection Panel: Promoting True Accountability Through Arbitration*, 41 CORNELL INT'L L. J. 577, 594-601 (2008) (canvassing criticisms of the Word Bank Inspection Panel); Bridgeman & Hunter, *supra* note 9 ; Bradlow, *supra* note 85 (comparative review of the strengths and weaknesses of accountability mechanisms).

[92] Another development worth noting in this period is the work of the World Commission on Dams, which), which was brokered between the World Bank and the World Conservation Union (IUCN). Following its two-year comprehensive global review, the WCD published its final report, *Dams and development: a new framework for decision-making*, in 2000. The WCD's principal conclusion was that while "dams have made an important and significant contribution to human development . . . in too many cases, an unacceptable and often unnecessary price has been paid to secure those benefits, especially in social and environmental terms, by people displaced, by communities downstream, by taxpayers and by the natural environment." http://www.unep.org/dams/WCD /report/WCD _DAMS %20report.pdf The report found dams often fell short of their productivity targets, and worse, they had led to the irreversible loss of species and ecosystems and the displacement of 40–80 million people worldwide had been displaced by dams. In most cases, such forced displacement robbed people of former livelihoods and left them even poorer than before because resettlement programs focused on physical relocation but did not pay enough attention to economic and social development.

Taking these findings into mind, the Report articulated seven "strategic priorities" to guide decision making around dams and introduced "criteria checklists"—a step-by-step process for decision making at various stages of project development. Finally, it offered twenty-six "guidelines for good practice" explaining in greater depth the implementation of the "strategic priorities." The broader contribution of the WCD, some have argued, was its role as an agent of normative change, as it proposed that infrastructure decision making should be a procedurally dense process imbued with "a "[human] rights and risks" perspective organized around "disclosure, consultation, and dialogue." *See* Navroz K. Dubash, *Viewpoint – Reflections on the WCD as a Mechanism of Global Governance*, 3 WATER ALTERNATIVES 416 (2010). Notably, the International Carbon Investors & Services, a group of international banks and other bodies involved in carbon trading, also require WCD compliance for large hydropower projects. *Id.*

society opposition (as well as resistance from national Parliaments,[93] and the OECD first substantially updated its Guidelines on Multinational Enterprises (in 2000). At the turn of the new millennium, the entire world, it seemed, was increasingly focused on the role of international institutions and the private sector in facilitating global injustice and inequality.

In-step with this shift and recognizing that a gap remained between the level of scrutiny applied to project finance transactions by development banks and the processes (or lack thereof) for environmental and social risk review deployed by commercial banks, even though the commercial banks often participated directly in project finance alongside the World Bank Group's private lending arm – the International Financial Corporation (IFC). With this gap in mind, civil society groups sought to build on their accomplishments vis-à-vis multilateral development banks and focus on private financiers of large development projects by launching several very public advocacy campaigns against the leading project finance lending institutions. In response, in late 2002, a core group of four banks – ABN Amro, Barclays, Citi (then Citigroup) and West LB – formed a working group to explore the creation of an industry standard for ESRM procedures for commercial banks relying for technical guidance on the IFC. The group decided to base their new framework on the IFC's Performance Standards because of the utility of having one global standard applicable throughout the entire project finance industry. After further refinement, on June 4, 2003, the senior executives of ten commercial banks met at the IFC in Washington, D.C and formally adopted the Equator Principles.

A. Evolution of the Equator Principles

From the start there were concerns that the EP regime did not go far enough in meeting the ideals expressed in the Collevecchio Declaration, a manifesto announced by 100 NGOs at the World Economic Forum in 2003, which called for financial institutions to recognize their role and responsibility for financing unsustainable projects and other global social problems, from global warming to armed conflicts. In the months following the creation of the EPs, a new coalition of NGOs—Banktrack—formed to monitor sustainability practices in the financial sector. Banktrack quickly designated itself as a watchdog of the EPFIs, releasing report after report analyzing the banks' implementation and apparent commitment levels.[94] Banktrack later devoted a special section of its website to featuring "dodgy deals," serving as a clearinghouse for information on controversial projects, including NGO

[93] *See generally* Eric Neumayer, *Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD-negotiations*, 46 WIRTSCHAFTSPOLITISCHE BLÄTTER 618 (1999); The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 18: Multilateral Agreement on Investment (March 1999); UNCTAD, *Lessons from the MAI* (1999).

[94] *See* Banktrack, *The Outside Job: Turning the Equator Principles towards people and planet* (Banktrack submission to the Equator Principles update process) (October 2011); [34-36].

activities and complaints, as well as an opportunity for banks to respond to concerns.[95]

Unrelenting pressure from the NGO community[96] and the linkage between the EPs' normative content and the IFC's Performance Standards caused the regime to spread beyond its initial Western European core group of banks and "ratchet-up" its requirements. By its first anniversary in June 2004, twenty-five financial institutions had adopted the EPs, including Unibanco, the first emerging market (and South American) bank to adopt. A little over a year later, in November 2005, the first African bank—South Africa's Nedbank—adopted. Between 2004 and 2006, the EPFIs participated in the IFC's review and update of its Performance Standards. When in February 2006 the IFC adopted its new Performance Standards (effective April 30, 2006), the EPFIs conducted a further consultation from March to May 2006 with NGOs, clients, industry associations, and export credit agencies which led to the substantially revised Equator Principles II (EPII), which was to be based on the IFC's updated Performance Standards.

EPII launched on July 6, 2006, at which time forty institutions re-adopted the EPs. The most important revisions in EPII were the lowering of the project cost threshold from fifty to ten million; the extension of the EPs to advisory activities; the inclusion under coverage of upgrades and expansions of existing projects (over those not built under EP review); and perhaps most importantly, the EPs' first set of "teeth": Equator Principle 10 – the requirement to report annually on progress and performance—and more robust public consultation standards. When the World Bank later updated its Environmental Health and Safety Guidelines in April 2007, the EPFIs incorporated this revision into the EPs as well. Following the IFC Performance Standards' 2011 update, the EP Association announced that it would incorporate the update into the EPs while it continued the process of its own update[97] – EP IIIs, which came due out in draft form in August 2012 and, after a sixty-day public comment and engagement period and a finalization and launch period, is due out in final form in January 2013.[98]

In the EPs' sixth year, in September 2008, Bank Itau-Unibanco S/A, a Brazilian bank that is one of the largest emerging market banks in the world, took the role of Steering Committee Chair. The following month, the first domestic Chinese institution (Industrial Bank) adopted the EPs.

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95 *See* Banktrack, *Dodgy deals* (2010), available at http://www.banktrack.org/show/pages/home (last visited November 12, 2010).

96 *See* Banktrack (2010), supra note 94, for a detailed timeline of interactions.

97 The incorporation became effective on 1 January, 2012. *See http://www.equator-principles.com/index.php/all-ep-association-news/ep-association-news-by-year/83-ep-association-news-2011/254-revised-ps* (last visited April 14, 2012).

98 *See Public Release: The Equator Principles (EPIII) Draft*, Equator-Principles.com, at http://www.equator-principles.com/index.php/process-and-timeline (last visited August 16, 2012).

When they were first introduced, the original ten EPFIs represented over 30% of the 2002 project finance market share.[99] The EPFIs have tried to continually expand their reach through sponsoring conferences in geographic areas not known for heightened attention to sustainability, including India, Russia, China and the Middle East.[100] In fact, the EPs, while conducting their own outreach efforts, simultaneously "coordinate closely" with the IFC on outreach activities in the emerging markets,[101] which according to an IFC staffer, allows the IFC to extend its reach with commercial banks in those regions more easily.

The number of adopting institutions has steadily grown over the years and now totals 74 institutions from over 30 countries all over the world that lend to projects in over 100 countries. Their ranks include commercial banks, export credit agencies, and development finance institutions. Currently, the EP website claims that the EPFIs finance over 70 percent of project finance in *emerging markets*, which is, after all, the area of greatest importance in terms of the Principles' intended effects of raising global standards of project regulatory review on both sides of the Equator. In 2009, 26 of the top 50 League Leaders, ranked by the total amount financed globally by market share were EPFIs, and there were 40 of the top 224 League Leaders were EPFIs, accounting for over 50% of the market; in 2010, there were 42 Equator Banks in the 233 League Leaders, covering 40% of the global project loan market.

As much as the EPs have grown to become an industry standard, they have thus far not successfully penetrated key emerging markets where a tremendous amount of project finance and some of the largest individual deals—have been done in recent years, namely, India, China and Russia. In the first quarter of 2011, the top 25 lending banks were split almost evenly between the EPs and Indian and Chinese institutions: Indian and Chinese banks covered 38.6 percent of the market and EPFIs covered 33.9 percent.[102] Moreover, the very largest individual projects sponsored in the first quarter of 2011 were nearly all in either India, China or Russia, with the exception of one project in the United Kingdom, Australia and Singapore, respectively.[103] Thus, while the EPs have expanded tremendously in their eight years of existence, the global playing field still has some uneven patches on it, and those patches are where much of the development is taking place and where some of the most vulnerable populations reside.

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99 *See* Wall Street Journal (June 4, 2003).

100 A superficial look by a Malaysian commentator noted that in April 2010, a "quick review of ten established Islamic banks in various countries" shows that only one in ten mentioned sustainability in their annual reports. *See* Nik Sharihzal Sulaiman, Sustainability and Equator Principles in Islamic Banking, The Edge – Malaysia, April 19, 2019.

101 Motoko and Yang Aizawa Chaofei, Green Credit, Green Stimulus, Green Revolution? China's Mobilization of Banks for Environmental Cleanup, 19 JOURNAL OF ENVIRONMENT AND DEVELOPMENT 119 (2010).

102 *See* Project Finance International – League Leaders, January 2011 (First Quarter 2011).

103 *Id.*

B. How do the EPs Work?

The Equator Principles' Preamble states that they were adopted "in order to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices." Accordingly, the Preamble declares that "negative impacts on project affected ecosystems and communities should be avoided where possible, and if these impacts are unavoidable, they should be reduced, mitigated and/or compensated for appropriately." The Preamble then hints at the potential for such regimes: "[w]e therefore recognise that our role as financiers affords us opportunities to promote responsible environmental stewardship and socially responsible development." Finally, the banks make an important qualification about what adopting the EPs means for each institution:

> 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. 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.

The ten Equator Principles correspond loosely to the various phases of the project finance lending cycle, which also relate to the banks' project development cycle. The first phase is the lender's due diligence (EPs 1, 2, 3, & 7), which occurs during the pre-construction activities of project design and permitting. The second phase is loan negotiation and documentation (Principles 4 & 8). The third phase is portfolio management (Principle 9), which correlates with project implementation. The disclosure, consultation, and grievance mechanism requirements (Principle 5 and 6) may apply throughout the lending cycle, depending on the anticipated extent of impacts on local communities.

All requirements flow from the first Principle 1, EP1 on the categorization of projects, which dictates that borrowers categorize projects as either Category A (projects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented), Category B (projects with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures), or Category C (projects with minimal or no social or environmental impacts). The relative rigor and applicable law of further risk assessment and mitigation flows from the project's categorization.

When developing projects in high-income OECD countries, borrowers' environmental and social risk assessment must comply only with national law. When as the applicable environmental and social standards governing the project. However, as the examples in the introduction suggest, the national law even in high-income countries is not necessarily an ironclad guarantee against problem projects. Regardless, when a project is being developed in an emerging market context, i.e., a non-OECD country or low-income OECD country, the EPs insist that project sponsors also take into account the International Financial Corporation's Performance

Standards on Social and Environmental Sustainability, which include detailed environmental and social assessment policies and procedures related to specific thematic areas: (1) Social and Environmental Assessment and Management systems; (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. Each of these Performance Standards are interpreted by Guidance Notes. In addition, the EPs also reference the World Bank's Environmental, Health and Safety (EHS) Guidelines, which identify specific performance levels and technical guidance for 63 sectors. The effect of categorization on project review requirements are summarized in Table A below.

Table A – Summary of EP Requirements

Category	EP Requirement
A - Projects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented	1. Categorization by EPFI [EP 1] 2. Borrower conducts a Social and Environmental Assessment process [EP 2] 3. Social and environmental covenants in financing documentation [EP 8] 4. In addition, for projects in non OECD-countries and non High-Income OECD countries: - Assessments conform to IFC Performance Standards and EHS Guidelines - The borrower prepares an Action Plan, and implements it through its Social and Environmental Management System - Borrower, government or third party carries out consultation with affected communities [EP 5] - Disclosure of project information for a reasonable minimum period [EP 5] - Grievance mechanism [EP 6] - Independent review of Assessment [EP 7] - Independent monitoring and reporting [EP 9]
B - Projects with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures	1. Assessment, Action Plan and Management System requirements are same as Category A projects 2. Social and environmental covenants in financing documentation readily addressed through mitigation measures [EP 8]. 3. In addition, for projects in non OECD-countries and non High-Income OECD countries: - Consultation and disclosure of information as appropriate [EP 5] - Grievance mechanism as appropriate [EP 6] - Independent review of Assessment as appropriate [EP 7] - Independent monitoring and reporting as appropriate [EP 9]
C – Projects with minimal or no social or environmental impacts	No specific requirements

V. EXPANDING SOVEREIGN ENVIRONMENTAL AND SOCIAL RISK REVIEW: SUBSTANTIVE AND PROCEDURAL ASPECTS

As may be surmised by the above review of the EPs' requirements and substantive underpinnings, they address both substantive and procedural aspects of project review, particularly when EP signatories are evaluating project investments in Category A or B projects planned for construction in non-OECD or low-income OECD countries [EP 3] – the very situations in which regulatory incapacity will facilitate the development of problem projects. These extra requirements are imposed to supplement what is perceived to be weak or non-existent requirements by national authorities in the project approval process, effectively expanding the law applicable to the contracts governing projects in terms of both substance and procedure.

A. Substantive Enhancements to Project Review

Regarding substance, when applied to low-income or non-OECD host environments, EP 3 incorporates the specific requirements of the IFC Performance Standards, which are in turn elaborated by their own Guidance Notes, as well as the World Bank Environmental Health and Safety Guidelines, which are industry-specific benchmarks for projects review.[104] When the Performance Standards were revised in August 2011 (with the new version to be effective from January 1, 2012), the EP Association incorporated these changes in to the Principles. What this means in practical terms is that standards to which a sovereign has not agreed by treaty or other agreement may be applied to project review by the lenders and the independent consultant reviewing the project under EP 7. So, for example, if a project is being built in a country that has entered into very few environmental treaties, the application of the EPs to a project will mean enhanced requirements regarding dozens of environmental standards across over sixty different industry-specific contexts, including climate change, an area in which national governments have thus far impressively failed to reach agreement and arrive at any useful binding mechanisms.

Equally if not more important to the enhanced substance is the effect of the EPs on the law applicable to projects with regard to procedural requirements, which after all are the heart of environmental impact assessment. Of course, assessment will only be as good as the standards being applied, but if the process is never engaged, then there is no opportunity to apply the substance.

[104] EP 3 states:

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

B. Procedural Enhancements to Project Review

The specific procedural enhancements to project review imposed by the EPs are substantial, and include categorization of projects in terms of likely environmental and social harms (EP 1), enhanced environmental and social risk due diligence (EP 3 and 4), the requirement of creating environmental action and management plans (EP 4), disclosure of non-technical project summaries to affected communities and community consultation by "the government, borrower or third party expert" in a "structured and culturally appropriate manner" (EP 5), independent review of borrower compliance with the EPs (EP 7), and the creation of grievance mechanisms (EP 6).

It must be borne in mind, however, that credit decisions – that is, the question of whether to finance a project – are rarely if ever made on the basis of one aspect of project review. My survey research discovered the complexity of these issues by asking whether banks had ever rejected financing a project *primarily* due to environmental and social risk management concerns. On this issue banks were split 50-50, and several banks offered further illuminating commentary:

- We will only finance projects where our clients agree and show commitment to comply with the Equator Principles.
- If a project doesn't comply with [environmental and social risk management] it never reaches [the] Credit Committee. Transactors do work with willing clients to reach compliance.
- Equator Principles compliance is negotiated and indicated to clients at the upfront engagement stage, therefore it is a non-negotiable in the financing of a project of that nature.
- it has never been that clear cut - but possibly yes
- not EP is the main reason. Project and their sponsors unable or unwilling to implement EP standards usually have many more issues than just EP.[105]

These comments demonstrate the interrelationship between ESRM and credit decisions. A complicated, overly-risky project whose project sponsor evidences a lack of preparedness to plan for and address the myriad environmental and social risk issues presented by a particular project creates considerable doubt among potential funders as to the likelihood that the project will be built without costly delays, if not arrested completely in its development, or otherwise targeted, either by civil society groups or by government regulators for non-compliance with environmental laws.

As one financial expert noted in an earlier report, "an absolute no would be unlikely based on the principles alone," whereas another commented that getting to a "no" stage strictly on ESRM issues is pretty unlikely because few banks would let

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[105] Survey responses on file with author.

negotiations progress to that point.[106] Most such projects get weeded out through the marketing stage, the very earliest process when a project is 'brought to market', that is showcased to financial institutions to tempt them to get involved. Thus, by the time final credit decisions are being made, banks have already invested considerable resources into reviewing the project and figuring out how they will finance it. Thus, it is rare that at the credit stage projects are considered *solely* on an absolute yes or no basis on ESRM issues; rather, "[o]nce the assessment has been done, if there are elements of a project that breach the standards, the response is not to refuse the project but to put processes in place to manage it so it does become compliant."[107] Here too, however, the EPs offer considerable leverage to the banks and facilitate their project review process by calling on borrowers to stipulate to certain environmental and social representations and warranties in the loan documentation itself, which is discussed below.

C. Enforcement Issues

Perhaps the most important aspect of the Equator Principles that distinguishes them from other voluntary regimes is that EP 8 requires that the obligations imposed by the project lenders upon the project developers get formalized as covenants in the loan documentation between the bank syndicate and the project developer. By making these requirements covenants, the bank lenders can condition project financing upon their adequate fulfillment and can use their non-fulfillment or violation as conditions of material default, that is, a basis for calling for repayment of the loan. An event of default is defined in loan agreements as one of several occurrences that allow the lenders to assert greater control over the project by being involved with the borrower and other project sponsors to solve any problems or to demand repayment, depending on what stage a project is in. Thus, if a project is still under construction, this may also lead to a lender calling for a freeze on the lending of further funds (a "drawstop"), and if it is already in operation, it may lead a lender to demand that all net cash flow go directly to the payment of debt or be put into escrow under the lender's control. A lender may also elect 'waiver', that is, to ignore the event of default. Such a tool to ensure compliance is particularly important after financial close of the deal and subsequent drawdowns of capital.[108]

1. Covenants

Although the EPs have not mandated particular language for inclusion in loan covenants, they have produced a highly detailed Guidance Note on loan covenants.[109]

[106] *See* Kimberley Gaskin, *A Question of Principles,* INFRASTRUCTURE MAGAZINE (2007).

[107] *Id.*

[108] *See Guidance to EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation*, at 1 ("An important strength of the Principles is the incorporation of covenants linked to compliance as outlined in Principle 8.").

[109] *Id.*

Some of these covenants, such as “(a)” below, are typical in project finance; other covenants, however, for all Category A and B projects, go above and beyond what is normally required in loan documentation: the borrower covenants

> a) to comply with all relevant host country social and environmental laws, regulations and permits in all material respects;
>
> b) to comply with the Action Plan (where applicable) during the construction and operation of the project in all material respects;
>
> c) to provide periodic reports in a format agreed with EPFIs (with the frequency of these reports proportionate to the severity of impacts, or as required by law, but not less than annually), prepared by in-house staff or third party experts, that i) document compliance with the Action Plan (where applicable), and ii) provide representation of compliance with relevant local, state and host country social and environmental laws, regulations and permits; and
>
> d) to decommission the facilities, where applicable and appropriate, in accordance with an agreed decommissioning plan.[110]

2. Conditions Precedent

The Guidance Note also provides precise “conditions precedent” to the disbursement of funds, including normal provisions requiring the borrower to provide certified copies of all government or administrative approvals, i.e., environmental and social permits required at that time for the project, legal opinions that the borrower has obtained or will obtain all necessary permits and approvals necessary for ownership, construction and operation of the project, and the delivery to the lender of certified copies of any environmental and social impact reports.[111] There are also extra requirements imposed by the EPs, such as the requirement for a report from an independent consultant evaluating and confirming that the environmental and social Management Plan for the construction phase of the project is operational and complies with all necessary requirements, and an environmental and social Action Plan responding to or addressing arrangements and recommendations of project or Lender consultants to the extent necessary to achieve compliance with environmental and social requirements.

Additional conditions precedent to disbursement include stipulations regarding the implementation of the monitoring requirement, such as (i) the retention of the independent consultant who will be responsible for the filing of monitoring reports, and (ii) declarations of the “absence of threat,” including the borrower’s certification

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[110] *Id.*

[111] The Guidance Note advises loan documentation to state: “When the ESIA does not meet international standards, taking into account all relevant issues identified in the IFC Performance Standards, it should be supplemented by additional studies to meet international standards.”

that "it has no reason to believe that any [Environmental and Social Permits] could reasonably be expected to be revoked," and that "[n]o environmental or social risks or events shall have occurred that would result in an Event of Default or Potential Event of Default."

3. Representations and Warranties

The Guidance Note also inserts several representations and warranties by the borrower with respect to environmental and social issues, which substantially amount to testaments that the EPs have already been followed:

> There is no [Environmental or Social Claim] outstanding, pending or likely to occur in respect of, or in connection with the Project, which [Environmental or Social Claim] has or is reasonably likely to have a Material Adverse Effect on the implementation or operation of the Project in accordance with the [IFC Standards].
>
> The Project has at all time complied and currently complies with and will continue during all phases of construction and operation, to comply with all applicable [Environmental and Social Requirements], and has obtained and complies with all necessary environmental licenses and conditions therein.
>
> The Borrower has produced to the Lenders all relevant reports and information on social and environmental issues.
>
> The Borrower has appointed an [Independent Environmental (or Social) Consultant] who will provide to the Lenders relevant monitoring reports satisfactory to the Agent[112] on the implementation of the [Environmental and Social Management Plan] and [Environmental and Social Action Plan] on a semi-annual basis[113] during construction and on an annual basis during operation. These reports should be received within 3 months of the reporting period

4. Events of Default

According to the EP Guidance Note, when a borrower is not in compliance with its environmental and social covenants, EPFIs "will work with the Borrower to bring it back into compliance to the extent feasible, and if the Borrower fails to re-establish compliance within an agreed grace period, EPFIs reserve the right to seek repayment, as they consider appropriate"[114]:

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112 *The Agent will be acting on behalf of all Lenders. In some situations, an EPFI may be appointed as an "Environmental Agent" to ensure that all Equator Principles requirements are met.*

113 *Monitoring frequency will depend on the nature and scale of the project, and may be more frequent for Category A projects (e.g., quarterly monitoring during construction periods).*

114 *Id.* at 2.

> Events of Default
>
> An [Environmental or Social Claim] is brought against the Borrower which individually or in the aggregate could reasonably be expected to result in a Material Adverse Effect on the implementation or operation of the Project in accordance with the [IFC Standards].
>
> Non-compliance with or breach of any environmental or social covenants of Borrower in the Agreement. Borrower typically has a right to cure breaches of affirmative covenants within a fixed amount of time (e.g., 30 days) but no right to cure breaches of negative covenants.
>
> Truth of environmental or social representations and warranties in all material respects.

In my research, I enquired about EPFIs' recourse to calling events of default and refusing to finance a project on the basis of insufficiencies discovered following ESRM review. My survey asked: "Have you ever had to threaten to call an event of default because of a borrower's failure to comply with the Equator Principles?" Of the reporting institutions, 83 percent (twenty banks) replied that they had never had to threaten an event of default, while 16.7 percent (four banks) responded that their threat to call an event of default prompted the borrower to get the project into EP-compliance, and only 4.2 percent (one bank) reported that the borrower did not respond proactively to the threat, that default was called and that the borrower then sought financing from another source.[115]

This survey data largely confirms that calling an event of default is a significant step and that lenders prefer to work with borrowers to get them back into compliance rather than take the drastic measure of calling the loan. Indeed, although banks have several sanctions at their disposal to enforce the EPs once a loan has been partially or completely disbursed (charging default interest rates, preventing further drawdowns of funds, or asking for repayment), one financial analyst noted a lurking Catch-22 within this proposed enforcement mechanism: "Once a project is up and running the impact of withdrawing financial support could be huge. The other problem is that the environmental and social impact of a project collapsing may well be as drastic as carrying on."[116]

VI. TENSIONS BETWEEN PRIVATE GLOBAL GOVERNANCE AND SOVEREIGNTY: TWO VIGNETTES

In the following section, I briefly explore how the "internationalization" of public contracts through the application of the EPs actually works in practice and consider the ramifications of these developments.

[115] Survey results on file with author.

[116] Quoted in Gaskin, *supra* note 106.

A. The Paper Pulp Mills Case

The proposed construction of a paper pulp mill project outside of the Uruguayan town of Fray Bentos along the Uruguay River in the heart of one of Argentina and Uruguay's most prominent tourist regions has fueled a several year long conflict between the otherwise friendly neighbors. Though many on the Uruguayan side of the river saw the pulp mills as a source of jobs and economic development (together, the mills represented an investment of $1.7 billion, the largest in Uruguay's history), to those on the Argentine side the mills represented only a threat to agriculture and tourism from the feared polluting effects of the mills' effluents. The combined production of the two pulp mills, one sponsored by Botnia [of Finland] and one by ENCE [of Spain] would be the world's largest production of Kraft System paper pulp, utilizing Elemental Chlorine Free technology, which environmental groups claim is a second-rate technology that both the European Union and World Bank policies recommend should be replaced by a Total Chlorine Free process. The plants are expected to employ 3,000 workers during construction and 300 low-paying long-term wage workers in a region that is extremely rich in natural resources and heavily reliant on tourism and fisheries for local livelihoods.[117]

Although the actual environmental impact of the plants remains a matter of heated controversy, the residents of nearby Gualeguaychú, Argentina, have been convinced of the mills' harmful effects from the start. Indeed, shortly after Botnia and ENCE announced their plans to build the mills, a local and transnational social movement formed to oppose the projects.[118] These opponents have pressed their views through mass protests and a transnational advocacy campaign against every sponsor and funder associated with the projects, including the private financiers, as well as the World Bank's International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA).[119] The principal complaint of the movement was about the inadequacy of the due diligence conducted before funding and construction began, which the activists claimed had failed to account for and properly mitigate severe potential environmental and social impacts that would pose grave threats to the local communities of Gualeguaychú and Fray Bentos, among others. The movement made an initial very dramatic presentation of its views on April 30, 2005, when a large group of 10,000-20,000 people blocked the international Libertador General San Martín Bridge (between Gualeguaychú and Fray Bentos) to protest the mills' construction.

[117] *See generally* CEDHA, Paper Pulp Mills, at http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/ (last visited December 18, 2010).

[118] *See generally* Pia Lotila, *Corporate Responsiveness to Social Pressure: An Interaction-Based Model* 94 J. Bus. Ethics 395-409 (2010).

[119] The IFC is the division of the World Bank Group that finances private sector investment, facilitating access to capital in international financial markets and advising businesses and governments. *See* International Finance Corporation, http://www.ifc.org.; MIGA is the World Bank's loan guarantee agency, offering political risk insurance and other guarantees on loans.

The movement's transnational advocacy has been spearheaded by the Argentina-based Center for Human Rights and Environment (CEDHA), which first directed its complaints to the IFC's Compliance Advisory Ombudsman (CAO) of the World Bank[120] in August 2005 with a complaint supported by the governor and vice-governor of Entre Rios province in Argentina, several civil society organizations, and close to 40,000 individual signatures.[121] The complaint alleged, among other things, that the IFC failed to properly consult the local communities before approving the project for funding, and that the impacts of the project would affect the lives of over 110,000 residents of Fray Bentos and Gualeguaychu, as well as hundreds of others dependent on the river's water. In response to the Complaint, the CAO eventually released a Preliminary Report and an Audit, which criticized the procedures the IFC followed pertaining to the project.[122] But later assessments found that the technical safety requirements of the mills had in fact been fulfilled and the quality of the water and the air in the region would not be jeopardized by their construction, although final approval would be subject to further consultations. As they had in response to many other project developments over several years, the residents of Gualeguaychú responded to this news by blocking Route 136 and the General San Martín Bridge with rubble, logs and vehicles. In addition to interrupting construction activities, the blockade forcibly detoured large traffic flows of Argentinians who typically vacation in Uruguay during that time of year, diverting them to the next bridge (which later was also blockaded).

These complaints against the multilateral institutions' support of the projects was only the start of the advocacy campaign's global efforts to create chains of accountability binding the foreign and transnational institutions and interests supporting the projects to the local communities who would be affected by them. Indeed, what is significant about the Paper Pulp Mills controversy is the exhaustive list of legal and quasi-legal mechanisms the opponents of the projects utilized in their attempts to create this accountability: national courts in Argentina and Uruguay, the

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[120] The Compliance Advisor Ombudsman is an independent recourse mechanism for the IFC, reporting directly to the President of the World Bank Group. It can use mediation, audits of social and environmental project performance, and advice to the President to address complaints from affected communities. *See* Compliance Advisor Ombudsman, at http://www.cao-ombudsman.org/ (last visited November 18, 2010).

[121] *See* CAO Complaint, September 2005, at http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/cao-complaint-letter.doc (alleging numerous violation of IFC Policies with respect to "Category A" projects (those deemed to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented).

[122] *See* CAO, Audit of IFC's and MIGA's Due Diligence for two Pulp Mills in Uruguay (22 February 2006) at 1, http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/cao-final-audit-report-eng.pdf (finding that "IFC's due diligence to satisfy itself that the EAs were complete in all material respects prior to disclosure was inadequate and not in compliance with the organization's Disclosure Policy, resulting in disclosure of EAs that were not complete.")

Inter-American Commission on Human Rights, the International Court of Justice,[123] and the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises' National Contact Points in Finland, Sweden and Norway, among others.[124]

Most relevant to this discussion, CEDHA also reached out directly to ING, a Dutch bank that was in the process of extending funding to the project and which had long been at the forefront of the effort to create the Equator Principles and to foster their growth.[125] Although there was no formal procedure for filing a complaint against an EPFI for failing to live up to its commitments vis-à-vis a project, CEDHA saw no reason why it could not invent one, and so it sent a comprehensive "Equator Principles Compliance Complaint" based on the findings of World Bank's CAO.

What is a matter of public record is that ING subsequently pulled $480 million out of the project just two weeks before its annual shareholders' meeting in April 2006. As others have noted, however, the reason behind this decision is shrouded by client confidentiality concerns. Although ING declined to explain the rationale behind its decision, in a letter to the campaign groups, the bank stated that its decision was made jointly with the project developer and was not related to the project's compliance with the EP.[126] CEDHA's director and the main advocate against the project, Daniel Taillant has speculated that the cause was the reputational risk generated by their Compliance Complaint and persistent activism.[127]

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[123] On 20 April 2010, the International Court of Justice handed down its opinion in Pulp Mills on the River Uruguay, a dispute between Argentina and Uruguay over the latter country's 2005 authorization of the construction of one of the largest paper pulp mill projects in the world on the banks of the Uruguay River bordering Argentina.[123] *Paper Pulp Mills on the River Uruguay (Arg. v. Uru.)* (Judgment), Apr. 20, 2010, *available at* http://www.icj-cij.org/docket/files/135/15877.pdf. The World Court's judgment dealt with Argentina's complaints that in authorizing the construction of the pulp mills over Argentina's strenuous objections, Uruguay breached its obligation under the 1975 Statute of the River Uruguay. The bilateral treaty binds each country to notify and consult with the other before authorizing construction that might potentially affect their shared water resource. Statute of the River Uruguay, Uru.-Arg. art. 60, para. 1, Feb. 26, 1975, 1982 U.N.T.S. 339 (entered into force Sept. 18, 1976). The Administrative Commission of the River Uruguay (CARU) is a bilateral mechanism established by the 1975 treaty to provide joint management of the river, but it has not been able to prevent or resolve this conflict.

[124] *See generally*, CEDHA, Paper Pulp Mills, available at http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/ (last visited November 18, 2010).

[125] *See* Annie Duffey, *The Orion and CMB Pulp Plants in Uruguay, in Global Project Finance, Human Rights and Sustainable Development*, in SHELDON LEADER AND DAVID M. ONG (EDS.), GLOBAL PROJECT FINANCE, HUMAN RIGHTS, AND SUSTAINABLE DEVELOPMENT 451-454 (CAMBRIDGE, CAMBRIDGE UNIVERSITY PRESS, 2011).

[126] *See id.*

[127] *See id.* at 453 n. 102 (citing personal communication of July 2006); *see* also http://casopasteras.cedha.net/?page_id=356&lang=en (noting "We cannot be sure it was because of our complaint, but the reality is they back[ed] out of the investment, probably to avoid risk.").

The paper pulp mills case presents one of the ancillary effects of global private regulation like the Equator Principles: by extending a set of norms directly to private actors, they provide additional grounds for complaint that would not otherwise sound in national or even international adjudicatory review.[128]

B. The Belo Monte Dam in the Brazilian Amazon

Sometimes problem projects test the stress points of democratic governments by calling into question who has the final say over development of national resources: executive planning authorities, environmental protection agencies, regional governments, local zoning boards, national courts or international courts and adjudicative processes? Other questions are also implicated: when do a country's growth needs trump minority property rights or environmentally sensitive areas? When is a resource so precious and vital to the ecosystem that its vitality trumps national economic progress?

These challenging questions are at the forefront of the long-standing tug-of-war over the Belo Monte dam planned for the Amazon, a project intended to respond to Brazil's tremendous projected energy needs in the next decade. Once completed, the dam will be the third largest in the world. Activists argue that the dam threatens grave environmental degradation and social upheaval: building the dam would involve diverting water to an artificial reservoir by digging two huge canals that would involve "moving more earth than was dug for the Panama Canal." It is projected that diversion of the river and flooding effects combined would affect the livelihood of approximately 45,000 people. To meet the project's generating capacity, additional dams would need to be constructed further up the Xingu River, endangering tropical rainforest lands home to twenty-four indigenous groups.[129] On

[128] Indeed, it is unclear what basis Argentina would have had to bring the case to the ICJ but for the specialized bilateral treaty governing the relations between it and Uruguay that provided for ICJ jurisdiction.

[129] *See* International Rivers and Amazon Watch, Press Release: Belo Monte auction goes forward after court overrules second injunction; Massive Protests Underway Today in Nine Cities in Brazil (Brasilia, Brazil), April 20, 2010, at http://www.internationalrivers.org/node/5296 (last visited December 18, 2010). Similarly, in Ecuador, national regulatory processes and legal checks appeared to operate properly with respect to the Baba dam project, but were ultimately undermined by the political will of the national government. The Ecuadorian Ministry of the Environment granted a permit for the project in November 2006, but environmental groups swiftly challenged this with an amparo lawsuit alleging that the environmental and social impact assessments were incomplete and inaccurate. In December 2008, the Constitutional Tribunal of Ecuador ruled that the manner in which the Baba project had been authorized and implemented constituted a violation of human rights, including the rights to a healthy environment, to consultation, and to citizen participation and ordered the Ministry of the Environment to revise the Baba dam project's environmental and social impact studies and ordered the government to conduct an audit of the project and to closely monitor its development. Subsequently, however, the Ecuadorian government has pushed ahead with project development even though most of the court-ordered revisions have not been completed and the Ecuadorian Comptroller Office's official audit criticized the project's design, concluding that the plans for the entire project were incomplete and lacked proper environmental mitigation measures related to

top of this, NGOs argue that that the project is not the most energy efficient solution for Brazil's needs and is too financially risky for the country.

This opposition has led to a stalemate lasting several years. Brazil's environmental protection agency, IBAMA, initially issued a preliminary license to Norte Energia S.A., the project consortium consisting of 75% state-owned entities, for preparatory work for the project to begin, but Federal Judge Antonio Carlos de Almeida Campelo issued an injunction to suspend the preliminary license for the dam and cancel the auction because it violated Brazil's constitution. As it turned out, IBAMA and state electric utility Eletrobras, the largest holder in NESA, only began studying the project's impacts on tribes in 2008, three years after the Brazilian Congress had approved the project, but the Brazilian Constitution mandates that developers must hold proper consultations *before* a development project that impacts indigenous people is approved by the Brazilian Congress. Almeida's decision, however, was overturned by a regional appellate court several days later.

After a few more days, opponents got a second injunction against the project issued, but this too was subsequently overturned by the appellate court prompting concerns of political interference by the federal government. However, a few weeks later, on April 1, 2011, the Inter-American Commission on Human Rights (IACHR), part of the Organization of American States, issued precautionary measures in response to a November 2010 complaint against the project. In the decision, the IACHR announced that the Brazilian government had to comply with its obligations to undertake a consultation process that is "free, prior, informed, of good faith and culturally appropriate" with the indigenous peoples potentially threatened by the project.[130] In addition to the IACHR's decision, further attention was brought to the Belo Monte dispute by James Cameron, the Hollywood director, who compared the situation of the indigenous Juruna and Arara peoples of the region to the plight of the fictional tribe in his blockbuster movie, *Avatar*.

Subsequently, on September 28 2011, federal judge Carlos Castro Martins ruled separately in favor of local fishers and prohibited Norte Energia from "building a port, using explosives, installing dikes, building canals and any other infrastructure work that would interfere with the natural flow of the Xingu river, thereby affecting local fish stocks."[131] Judge Martins subsequently reversed his order because Norte Energia S.A. had subsequently shown its work would not harm local fishing.[132]

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sediment accumulation. *See* AIDA Press Release, Constitutional Court Orders Change in Environmental License for Baba Dam, Ecuador, January 8, 2009, at http://www.aida-americas.org/sites/default/files/Baba_PR_01_2009_en_0.pdf (last visited December 15, 2010).

[130] *See* Amazon Watch, Press Release: Organization of American States Requests Immediate Suspension of Belo Monte Dam in the Brazilian Amazon (April 5, 2011), at http://amazonwatch.org/news/2011/0405-oas-requests-immediate-suspension-of-belo-monte-dam (last visited April 14, 2011).

[131] *See* http://www.bbc.co.uk/news/world-latin-america-15102520

[132] *See* http://www.bbc.co.uk/news/world-latin-america-16228680

On November 8, 2011, a letter sent by 150 Brazilian social and environmental organizations warned Banco Itaú, Banco do Brasil, Bradesco, Santander, and Caixa Econômica Federal – all EPFIs –that the project consortium, NESA, had not complied with the Equator Principles, and as a result, the institutions would need to ensure that NESA had complied with the EPs before they could agree to co-finance the project. The Brazilian government had mentioned these five banks as possible co-financiers of the Belo Monte Dam, and Banco do Brasil had been mentioned as the leading candidate to co-finance nearly $20 billion reais that would be disbursed by the Brazilian National Development Bank (BNDES) to NESA.

More specifically, the letter alleged that NESA had not complied with EP 5, which requires borrowers to "consult with project affected communities in a structured and culturally appropriate manner," and to "ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish whether a project has adequately incorporated affected communities' concerns." According to the letter, recent evidence indicated that NESA had not held free, prior, and informed consultations with affected indigenous communities. This was the finding of Judge Selene Maria de Almeida of Brazil's Regional Federal Tribunal with respect to three tribes—the Juruna, the Arara, and the Xikrín Kayapó—who live on a 100 km stretch of the Xingu River.

The letter also argued that NESA had not complied with EP 4, which requires the borrower to create an Action Plan that "implements mitigation measures, corrective actions and monitoring measures to manage the impacts and risks" in compliance with host country social and environmental regulations. The letter pointed to the injunction by Carlos Castro Martins at the end of September, which barred NESA from beginning any work that would interfere with the natural flow of the Xingu river because it was determined that no assessment of the risks to local fish stocks had been made, nor had NESA planned a program to mitigate the impacts on families who make a living from fishing. In addition, citing EP 6, the letter argued that NESA had not created a grievance mechanism for local populations.

As of this writing, none of these EPFIs have participated in the project, and it appears that the 18 partners of the NESA consortium will fund the 20% of the project not funded by BNDES.[133] This 80% stake by Brazil's national bank is quite unprecedented.

On November 9, 2011 overall construction was allowed to continue after a different federal judge, Maria do Carmo Cardoso, ruled that although the law required the indigenous communities to be consulted, it does not require such consultation to take place before the work was approved. According to Judge do Carmo, "the consultations are not binding, they are merely informative."[134] Officials from Pará,

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[133] *See* "Belo Monte" at http://www.banktrack.org/show/dodgydeals/belo_monte_dam_project#tab_dodgydeals_finance

[134] AFP "Brazil court refuses to stop work on Amazon dam," http://www.google.com/hostednews/afp/article/ALeqM5gvuxZfyZs0sBsBi8FyWEVisO2I7A?docId=CNG.209ec9a2ad059c4ffb6b615044e67c53.b51 (November 9, 2011).

where the indigenous live, support suspending the work until after consultations and announced that the court ruling would be appealed in the federal Supreme Court.[135] When 134 world leaders convened in Rio de Janeiro in Jun 2012 for the Rio+20 Earth Summit, one of the indigenous people affected by Belo Monte, the Xingu, initiated Xingu+23, a series of activities marking their twenty-three years of protest against Belo Monte. In addition to positioning their bodies to spell out the words "Pare Belo Monte" ("Stop Belo Monte"), the collection of indigenous peoples, farmers, fisherfolk activists and local residents used pick axes and shovels to open a channel in a temporary earthen dam constructed to block the Xingu river's flow. They also erected 200 crosses on the river's bank to honor the lives of those lost defending the Amazon and planted 500 acai trees to stabilize sections of the riverbank that had been erode by initial construction.[136]

Shortly after Rio+20, in August 2012, a Regional Federal Tribunal upheld an earlier decision that declared the Brazilian Congress's authorization of Belo Monte in 2005 to be illegal because Article 231 of the Brazilian Constitution and International Labor Organization Convention Article 169 require direct consultations with affected indigenous peoples and an independent assessment of environmental impacts to occur *before* the use of water resources for hydroelectric projects is authorized.[137] The Brazilian Congress will now have to conduct consultations with the affected indigenous peoples and Congress will then need to reevaluate whether to re-authorize Belo Monte.

In contrast to the Uruguay Paper Pulp Mills project, here the national and transnational activists have used the Equator Principles in a proactive fashion, reaching out to several potential funders – all of whom are EPFIs –and warning them of the project's anticipated failure to meet EP requirements. Arguably, this is just as effective or even more effective than engaging the banks after they have already started engaging with the project sponsor in the marketing phase of a deal because banks will not have sunken costs weighing down its decision. In this particular case, given the pressing national agenda for energy production as well as the overall tremendous growth of Brazil's economy, the unavailability of *international* finance has thus far not been sufficient to completely halt "progress" on the Belo Monte dams.

VII. CONCLUSION

The application of the Equator Principles to large-scale infrastructure projects creates a whole new globalized arena of adversarial legalism that may one day be as

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135 *Id.*

136 *See* Environmental News Service, *Hundreds Occupy Brazil's Belo Monte Dam Construction Site*, at http://www.ensnewswire.com/ens/jun2012/2012-06-17-01.html (last visited 8 July 2012).

137 *See* Zachary Hurwitz, *Belo Monte Dam Suspended by High Brazilian Court*, International Rivers (Aug. 14, 2012), available at http://www.internationalrivers.org/blogs/258/belo-monte-dam-suspended-by-high-brazilian-court (last visited August 15, 2012).

formalized and professionalized as the investment arbitration regime. The enhanced legalism comes in the form not only of actual controversies brought to the doorsteps of global banks and their borrowers, but also in the enhanced process of project review imposed by EPFIs on projects seeking their financing. Project permits and permissions that in the past may have been acquired through an illicit rubber-stamp by a corrupt official must now be backed-up with actual risk assessment documentation that is evaluated by independent consultants. Depending on the particular national context, this kind of thoroughness might be resented, particularly if a revenue sharing agreement gives the government a portion of the proceeds of the project. In those cases, all delays towards project completion then become delays in receiving project revenues.

More important, however, is the new frontier of advocacy that the Equator Principles help to open, particularly in situations where there likely are not really any other potentially useful modes of recourse for project-affected communities. Thus, the EPs empower civil society organizations domestically and internationally to intervene in debates about project review and approval, creating additional tension around national legal and political dialogue and processes. Suddenly, what had been a national debate about national resources becomes an international one, carried out in the court of public opinion. This interjection of international voices into national development planning of course already happens through consultation with development institutions and U.N.-agencies, but such discussions are done on a policy planning level, often behind closed doors, not on the cover of the New York Times.

Significantly, this direct approach to private actors by appealing to their reputations and threatening their market shares appears to have some efficiencies over the traditional transnational activism and adjudication modalities wherein success is dependent initially upon State consent to jurisdiction and ultimately upon State compliance with the injunctions or judgments of an international court, prospects which are far from certain. There is a certain built-in weakness to the traditional processes, which exhibits itself particularly when courts hand down difficult decisions that might go against core State interests.[138]

This then leads to yet another important element of this global adversarial legalism: the potential clash of commercial banks' market-driven objectives and the development agenda of the host state. It must be recalled that the banks are only

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[138] *See generally* Yuval Shany, *Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-Based Analysis* (October 24, 2010), Hebrew University of Jerusalem Faculty of Law Research Paper No. 04-10, *available at* SSRN: http://ssrn.com/abstract=1697488 or http://dx.doi.org/10.2139/ssrn.1697488 (last visited Aug 16, 2012) (discussing the literature on State compliance with international court decisions); *see also id. at* n 13-14 and accompanying text (citing D Hawkins and W Jacoby*, Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights* (2008), at 4 http://www.stevendroper.com/ECHR%20Hawkins%20and%20Jacoby%20APSA%202008.pdf (finding some evidence that compliance is "higher when it is easy")) and Beth Simmons, *Capacity, Commitment, and Compliance*, 46 J. CONFLICT RES. 829, 843 (2002) (suggesting the need for stronger ex ante enforcement mechanisms to stimulate compliance with 'high cost' judgments)).

involved because projects of this magnitude cannot be achieved without their help. If a government has—whether by democratic or less-than-democratic means—decided upon a development agenda that includes a certain project, these plans can be suddenly frustrated—in a sense, 'vetoed'—by the commercial banks' reputation concerns if those particular institutions have a low tolerance for a heated public battle about the merits of that particular project or its approval process. Because the "truth" as to project compliance with sustainable development norms is often caught between highly technical expert opinions and subjective biases about the merits of "development" in general, not to mention other country-specific political power struggles between elites and non-elites or between the "center" and the "periphery," banks cannot always rely even on science to ultimately vindicate them, even if they have paid scrupulous attention to what the EPs require and have assured themselves that they have complied with them.

But to question the utility of regimes like the Equator Principles because they may have complicated, lengthened or introduced uncertainty into the project review process or because they may frustrate the national development designs of democratically elected governments would be a mistake. The long-term benefits of the EPs do not lie only in their creation of a new normative basis upon which project-affected communities can assert their rights and new procedural avenues, that is, new complaint boxes (i.e., the banks) in which to register their grievances. Rather, the real contribution will likely be shown to be more subtle and very worthwhile, albeit if it proceeds at a glacial pace: the proliferation of the EPs is gradually reshaping borrowers' understandings of what a "bankable" project looks like while simultaneously teaching banks how to better evaluate such projects and screen out the ones that should never get built. Over time, this should transfer the costs of regulation in weak regulatory states from incapacitated regulators to the project borrowers, who will eventually internalize that, regardless of the host State's ability to police their project's compliance with national standards, the project simply will not be built without satisfying the higher 'authority' of the Equator Principles financiers.