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THE NEW PROTECTORS OF RIO: GLOBAL FINANCE AND THE SUSTAINABLE DEVELOPMENT AGENDA

by Ariel Meyerstein*

INTRODUCTION

In this twentieth anniversary year of the Rio Earth Summit of 1992, the United Nations is hosting a Conference on Sustainable Development (“Rio +20”). As a supplement to Rio+20, the U.N. Global Compact will organize the Rio+20 Corporate Sustainability Forum in cooperation with the Rio+20 Secretariat, the UN System, and the Global Compact Local Network Brazil. The Corporate Sustainability Forum is a prime example of contemporary global governance — what some have termed transnational “new governance” — in that it will be a multi-stakeholder affair sponsored by international organizations, transnational corporations, and NGOs. As such, the Corporate Sustainability Forum is a fitting addition to Rio+20, since much of the sustainability agenda since the 1992 Earth Summit has been driven by interactions with the private sector and, as this Article will describe, much of its future rests in the hands of the private sector — particularly with global financial institutions.

AFTER RIO: THE REVOLT AGAINST “BIG DEVELOPMENT” AND THE RISE OF PRIVATE DEVELOPMENT FINANCE

Since its earliest formulations, a tension has resided at the heart of the concept of sustainable development between the need of developing countries for economic growth and the simultaneous advancement of increasingly progressive approaches (through the development of international environmental law) to constraining the negative impacts of industrial development on the environment and society. When the United Nations’ General Assembly called for what would become the Rio Earth Summit, it described it as a conference on the “environment and development.” The Earth Summit was intended to advance “international environmental law, taking into account the Declaration of the UN Conference on the Human Environment, as well as the special needs and concerns of the developing countries.” These special needs and concerns were the worries that newly established international environmental law and policy would create trade restrictions that would be prioritized over poverty reduction efforts.

For decades before the Earth Summit, development policy was dominated by exogenous growth theory, which led the World Bank Group’s International Bank for Reconstruction and Development (“IBRD”) to focus nearly forty percent of its lending activity on large infrastructure projects. Since at least the 1970’s, however, local and transnational civil society groups have protested the adverse impacts some large projects have had on local populations and ecosystems, including the forceful dislocation of politically marginalized, often indigenous people from their homes, ancestral lands and way of life, and in some instances threatening to destroy irreplaceable cultural sites, unique habitats or species. Such “problem projects” often result from the incapacity of the regulatory systems in project host countries to properly assess environmental and social impacts and enforce compliance with national and international laws.

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.’” Problem projects can also be found at the epicenters of many national and international conflicts throughout the world, some of them violent.

The IBRD’s fetish for large project financing continued with intensity until a few years after the Earth Summit, when such lending declined sharply to less than thirty percent of the IBRD’s total lending. This departure from the scene was mirrored by a drastic decline in other official sources of aid to governments, which dropped 40% between 1991 and 1997. The decline in public development finance has been attributed to the emergence of a global market for private investment in infrastructure spurred by the privatization and deregulation of many industrial sectors, as well as the continued globalization of financial markets through the harmonization of tax regimes and the lowering of restrictions on foreign capital. Although these changes to global markets were likely the main force behind the IBRD’s partial (and temporary) retreat from infrastructure lending, another significant contributing factor was the substantial reputational costs that had been imposed on the bank by its history of developing infrastructure projects in an unsustainable fashion.

By the mid-1990s, civil society demands led to the creation of accountability mechanisms and continually evolving social and environmental risk review policies within the multilateral development banks, specifically the World Bank’s Inspection Panel. As the World Bank’s private lending arm, the International Financial Corporation (“IFC”), picked-up the IBRD’s slack in financing large projects (often in syndicates along with commercial lenders), it too saw a backlash of civil society protest that gave way to an accountability mechanism.

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the Compliance Advisor Ombudsman — and a host of continually updated environmental and social policies. These mechanisms have provided some limited means for affected communities to have project approval processes reviewed, but the mechanisms have been criticized for not truly protecting project-affected populations from undue harm.

Despite these advancements at multilateral development institutions, at the turn of the new millennium there remained a gap 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. 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. 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.

At the World Economic Forum in Davos in January 2003, a coalition of NGOs launched the Collevecchio Declaration on Financial Institutions and Sustainability. The Collevecchio Declaration recognized the “role and responsibility” of financial institutions (“FIs”) in globalization, stating that FIs are “channeling financial flows, creating financial markets and influencing international policies in ways that are too often unaccountable to citizens, and harmful to the environment, human rights, and social equity,” and called on them to “promote the restoration and protection of the environment, and promote universal human rights and social justice,” which principles “should be inherent in the way that they offer financial products and services, and conduct their businesses.” The Collevecchio Declaration remains the benchmark against which civil society actors measure multilateral and private financial activity.

A core group of four banks who had been subject to aggressive public advocacy campaigns before the Collevecchio Declaration already formed a working group in late 2002 to explore the creation of an industry standard for environmental and social risk management procedures. 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” (“EPs”). The goal, as the name suggests, was to “level the playing field” by establishing one standard of project review that would apply globally, i.e., on both sides of the Equator.

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.” Significantly, the banks were never coy about the mutual benefits of this approach, i.e., their faith in the “business case” for sustainability, noting further in the Preamble that “[w]e believe that adoption of and adherence to these Principles offers significant benefits to ourselves, our borrowers and local stakeholders through our borrowers’ engagement with locally affected communities.”

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.”

The regime has grown from ten initial founding members with about thirty percent of the global market share to seventy-six institutions from over thirty countries. The EPFs claim that over seventy percent of all emerging market project finance transactions are covered by the EPs. The EPFs’ ranks include commercial banks, export credit agencies, and development finance institutions. As much as the EPs have grown to become an industry standard, they have thus far not deeply penetrated institutions in key emerging markets where a tremendous amount of project finance and some of the largest individual deals. Thus, while the EPs have expanded tremendously in eight years of existence, the global playing field still has some uneven patches on it, and those patches are where a significant amount of development is taking place and where some of the most vulnerable populations reside. Although the global spread of the EPs is a significant measure of their utility as a regime, others have theorized about what specific attributes of a regime are necessary conditions for effective governance, which this article explores below.

**The Equator Principles as a “Transnational ‘New Governance’”**

**Defining Transnational “New Governance”**

The transnational civil society movement that encouraged institutional change at the World Bank simultaneously led to the creation of the World Commission on Dams (“WCD”), which was brokered between the World Bank and the World Conservation Union (“IUCN”). The WCD is perhaps underappreciated now for what it was: among the very first examples of multi-stakeholder global governance, a transnational merging of the governmental, civil society, and private sectors, though a decade later it had already become more commonplace. 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.” These concepts have informed the development of the development finance institutions’ approaches to project review and risk mitigation and are at the core of the EPs, although not yet as robustly as they could be, in the views of the EPs’ key NGO interlocutors.

Twenty years later, the phenomenon that began with the WCD has gone “viral.” The diverse regulatory phenomena that have emerged in response to global regulatory gaps have been typologized as transnational “new governance” and “civil
regulation” or “private regulation.” They are direct public and private responses to a series of missed opportunities by State actors to collectively create effective regimes of global international business regulation. For example, the Forest Stewardship Council emerged directly out of the frustration by environmental groups at what they considered to be the complete failure of governments at the 1992 Rio Earth Summit to conclude a binding international treaty on forestry issues.42

What has resulted, however, is a “new global public domain” that does not “replace states” so much as “embed systems of governance in broader global frameworks of social capacity and agency that did not previously exist.”43 As political scientists Kenneth Abbott44 and Duncan Snidal45 have argued, these new arrangements of regulatory power constitute the emergence of a complex “governance triangle,”46 in which international standards are now created, implemented, monitored, and enforced by varying combinations of states, firms, and NGOs seeking to transform whole supply chains and global networks of operations spanning multiple jurisdictions.47 There are now over 300 such initiatives attempting to introduce governance into nearly every major global economic sector, including energy, the extractive industries, forestry, chemicals, textiles, apparel, sporting goods, coffee, and cocoa.48

Governance Effectiveness and Competencies

But how are we to measure the effectiveness of such diffuse regulatory regimes? Abbott and Snidal propose that regulatory processes occur in roughly five stages (although they do not always occur in an orderly fashion): Agenda-setting, Negotiation, Implementation, Monitoring, and Enforcement (a process they short-hand as “ANIME”).49 Truly effective regulatory schemes, they argue, must address all five stages.50 In addition, they explain that throughout these stages, the actors involved (states, firms, and NGOs) can exhibit four competencies to varying degrees at different stages: independence, representativeness, expertise, and operational capacity.51 All of these competencies — which vary in their importance depending on the stage of the ANIME process — are necessary, though not necessarily sufficient, for a regime to be effective.52

In transnational settings, however, Abbott and Snidal argue that no single actor — even an advanced democracy — has the competencies required for effective regulation at all stages of the regulatory process.53 While different actors may develop additional competencies over time through hiring experts, employees or consultants, certain capacities are beyond both firms’ and NGOs’ reaches; for example, firms cannot be truly independent, but they can improve the perception and fact of their independence by hiring separate monitoring departments or enlisting external monitors.54 Given these limitations, Abbott and Snidal conclude that “single-actor schemes, whose competencies are primarily derived from their sponsors, are implausible as transnational regulators.”55 Accordingly, they argue that the “most promising strategy may be collaboration,” i.e., “assembling the needed competencies by bringing together actors of different types.”56

In this regard, even when states do not regulate directly, they can nonetheless play substantial roles indirectly by shaping the bargaining among different actor groups that leads to the formation and shaping of transnational governance regimes.57 A primary example of such indirect influence is in standard-setting by states and international organizations; standards “shape the expectations and normative understandings that guide other actors engaged in [regulatory standard setting].”58 They create levers by which NGOs hold firms accountable and focal points that simplify bargaining over the content of standards and reduce its cost.”59 Indeed, states and international organizations can even play an “entrepreneurial role[]” in “enhancing the competencies and bargaining power of other actors and modifying the situational factors” relevant to the bargaining among actors.60

Despite the efforts by NGO-and-firm-based schemes to innovate and create their own standards, they often root these standards in state-generated norms or eventually return to international norms as benchmarks.61 This is primarily due to the legitimacy conferred by norms developed through state or inter-state processes. These actors’ representativeness almost certainly encompass a broader range of interest and preferences than do the narrow missions of either NGOs or firms, and thus, state-generated norms carry more legitimacy and by referring to or relying upon them, NGOs and firms can confer greater legitimacy on their regulatory schemes.62 The use of legitimate public standards also helps to shift the balance of power between firms and NGOs in the creation of regulatory schemes: by relying on the more legitimate state-based standards, NGOs make it harder for firms to resist their demands. This is clearly what has occurred with respect to the relationships among the IFC, the Equator Principle Financial Institutions (“EPFIs”), and NGOs, although in complex ways.

The Equator Principles’ Effectiveness

Agenda-setting, Negotiation and Implementation

All of the relevant actor groups — the Equator Principle banks, the IFC and the NGO community have been instrumental in agenda-setting, negotiation of the applicable standards and implementation of more sustainable practices by private actors. Between 2004 and 2006, the EPFIs and NGOs participated in the IFC’s review and update of its Performance Standards.63 When in February 2006 the IFC adopted its new Performance Standards, 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”), also based on the IFC’s updated Performance Standards.64 EPII launched on July 6, 2006, at which time forty institutions re-adopted the EPs. The most important revisions in EPII arguably made them much more effective than they were previously. These changes included lowering the project cost threshold from fifty to ten million;65 the extension of the EPs to banks’ advisory activities,66 and the inclusion of upgrades and expansions of existing projects (including those not built under EP review) under the regime’s coverage.67 Perhaps the most important change was the EPs’
first set of “teeth,” Equator Principle 10, which established the requirement to report annually on progress and performance and more robust public consultation standards. When the IFC later updated its Environmental and Safety Guidelines in April 2007, the EPFIs incorporated this revision into the EPs as well.

The resulting 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).

According to Equator Principles 3, the choice of the standards or law applicable to project risk review and mitigation depends on the categorization of the project: when developing projects in high-income Organization for Economic Co-operation and Development (“OECD”) countries, borrowers’ environmental and social risk assessment policies and procedures related to specific thematic areas, each of which is interpreted by Guidance Notes. In addition to the Performance Standards, the EPs also reference the World Bank’s Environmental, Health and Safety (“EHS”) Guidelines, which identify specific performance levels and technical guidance for sixty-three sectors.

Shortly after the launch of the EP Association in June 2010, the EPs underwent a seven-month-long Strategic Review led by external consultants that overlapped in time with the IFC’s comprehensive overhaul of its Performance Standards. The EP Association offered a response to the Strategic Review, but now that the 2011 revision of the IFC Performance Standards has been finalized, the EP Association has incorporated the revised Performance Standards and has launched a further complete update — towards Equator Principles III — to be completed by late-2012.

Thus, in the two substantial updates of the IFC Performance Standards, the EPFIs — as the most common end-users of the Performance Standards (“PS”), played an unusually large role in shaping their evolution. Furthermore, any changes to the PS will almost certainly have to be accepted and incorporated writ large by the EPFIs now that they have relied on the PS for their normative content for over seven years. Arguably the linkage to the IFC’s Performance Standards caused the EPs to “ratchet-up” their requirements more quickly than they might otherwise have done if the banks were only facing-off against their NGO interlocutors, which could have led to more of an entrenched stalemate than already has emerged at times. From this perspective, the first few EPFIs certainly achieved one of their purported goals in forming the EPs, namely, to have a seat at the table when discussion of standards occur in the project finance sector. The EPs have also taken on the role of global standard-bearer in ways that complement the IFC’s own efforts: the EP banks “coordinate closely” with the IFC on outreach activities in the emerging markets, which according to an IFC staffer, allows the IFC to extend its reach with commercial banks in those regions more easily. This collaboration has at times been read in different ways as well by the NGOs: according to Banktrack, the EPFIs had used the ongoing PS review as a justification for inaction on certain issues. Nevertheless, it cannot be denied that the triangulated efforts of these actors has contributed to the formation and proliferation of the EPs.

**Monitoring and Enforcement**

Although the EPs have dramatically changed the regulatory landscape of global project investment and development, like any regulatory regime, they are far from perfect. From the start there were concerns that the EP regime did not go far enough in meeting the ideals expressed in the Collevecchio Declaration. In the months following the creation of the EPs (January 2004), 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. Banktrack later devoted a special section of its website to featuring “dodgy deals,” serving as a clearinghouse for information on controversial projects, including NGO activities and complaints as well as an opportunity for banks to respond to concerns. It must be emphasized, however, that the NGOs’ ability to perform this function — which some suggest they do only reluctantly — is impeded by the EPFIs’ unwillingness thus far to do more extensive project-level disclosure.

The NGOs’ complaints about the Equator Principles have remained fairly constant from the start, although some of them have been addressed partially or completely by the EPFIs, leading the perceived legitimacy of the regime to wax and wane over time — at least in the eyes of their NGO interlocutors. Indeed,
the long-standing relations between the EPFIs and the Banktrack network of NGOs reached its lowest point in early 2010 when the NGOs announced a boycott of the EPFIs’ large annual meetings at which the NGOs had become regular participants.92 Banktrack stated that they no longer believed these large annual meetings to be productive fora for advancing their objectives and announced that they would not participate in them until real progress was made by the EPFIs.93

The major persistent criticisms in the NGOs’ eyes are the EPs’ insufficient transparency on the project, institution, and regime levels;94 and the related lack of an independent monitoring, verification, or enforcement mechanism.95 NGOs are also dissatisfied with the EP’s insufficient project level grievance mechanisms,96 particularly their limited scope of application only to project finance transactions as opposed to all project-related transactions regardless of financing structure97 and their failure to proactively address climate change.98 It is beyond the scope of this Article to address these complaints in depth, but it suffices to note that whether the NGO community likes it or not,99 they have assumed the role of policemen and in the process, have created a kind of uneasy alliance — a quasi hybrid governance scheme, demonstrating the wisdom of Abbott and Snidal’s insight that to achieve effective governance the best strategy might be collaboration and “assembling” the various competencies of different actors.

INDEPENDENCE, REPRESENTATIVENESS, EXPERTISE, AND OPERATIONAL CAPACITY.

Looking more closely at the four competencies described by Abbott and Snidal, we see that if we broadly construe the activities of governance related to project finance in the private sector, the EPs do have most of the competencies covered, particularly if its supporting governance actors — the NGOs and the IFC — are included as part of the “governance” structure, or “triangle.”100

Representativeness. Though both NGOs’ and banks’ representativeness would ordinarily be subject to some criticism,101 this is offset somewhat by the inclusion of the IFC — a multilateral institution with over 140 Member States — and its significant influence on both standard-setting and ongoing assistance in technical advisory services and outreach.102 Although true representativeness, one that would include the views of impacted populations, is far from being achieved, the most recent revision of the Performance Standards took considerable steps in this direction, and the EPs may very well follow suit.

Operational Capacity and Expertise. The EPFIs provide sufficient operational capacity individually and are continually ramping-up their collective capacity and resources. Originally the “Management Structure” consisted of the Steering Committee members (about a dozen banks) and a modest secretariat staff (of one person) that divided-up the work of administering, strengthening, and growing the EP regime.103 This governance structure includes subcommittees known as Working Groups that focus on various substantive aspects of maintaining and enhancing the EP regime, including Working Groups on (a) adoption, (b) best practice, (c) climate change, (d) outreach (divided again by region), (e) scope review — corporate loans, (f) scope review — export finance, (g) social risks, (h) stakeholders — NGOs, (i) stakeholders — socially responsible investment, and (j) stakeholders — industry outreach.104

Responding once more to NGO concerns, in July 2010 the EPFIs launched the “Equator Principles Association,” a legally binding governance structure complete with bylaws, voting mechanisms, membership dues.105 This enhanced formalization also responded in part to another of the NGOs’ concerns, as it introduced a de-listing procedure for removing EPFIs who are not compliant with the annual reporting requirement in EP 10.106 With the launch of the Association, the EPs have drastically improved their operational capacity, as they now collect membership dues and have formal rules to govern their relations with one another.107 Nevertheless, there remains much room for improvement.

Independence. While the independence of the EP Association from its individual members remains an open question, this, along with the issues of monitoring and enforcement, are being counter-balanced by persistent NGO monitoring, engagement and activism (and, on project-specific issues, independence is increased by EP 7’s requirement that on Category A and B projects the banks must hire an external independent consultant).108

In sum, when viewed in isolation, the EPs can be characterized as fitting Abbott and Snidal’s positive model predicting that single-actor governance schemes will provide only modest self-regulation; the newly-formed EP Association has some of the competencies described as necessary by Abbott and Snidal (expertise, operational capacity, and some representativeness), while primarily lacking demonstrated independence.109 Arguably, however, this is to take too myopic a view of the overall “governance triangle” operating with respect to the project finance sector. When the combined effects of the IFC and NGOs are included a different picture emerges with the various actor groups collectively providing all four competencies, albeit imperfectly and in an ever-evolving schema of hesitant collaboration.

CONCLUSION: FINANCIERS AS SETTING THE SUSTAINABILITY AGENDA

Perhaps the most interesting aspect of the EPs’ growth and development is the way in which they have made themselves an indispensable party to future debates on sustainable development and the specific articulation of standards key to economic growth — the IFC’s Performance Standards. Such developments are not limited to the EPs, however. In fact, there have been signs that the financial sector is assuming a considerably more active role in directing the global governance of their own activities, and by extension, much of the global economy. For example, leading into renewed climate negotiations in Cancun in late 2010, 259 investors from Asia, Africa, Australia, Europe Latin America and North America with collective assets under management totaling over $15 trillion110 called for governments to take action
on climate change. These investors were not necessarily united by their passion for the environment, but more likely by their realization of the financial risks related to climate change, which they claimed could amount to GDP losses of up to 20 percent by 2050, as well as the economic benefits of shifting to low-carbon and resource-efficient economies.111

Similarly, in 2005 U.N. Secretary-General Kofi Annan helped launch the Principles for Responsible Investment.112 Not unlike the EPs, the PRI provide guidance to investors in how to integrate issues of environmental and social governance into their investment policies. As of April 2012 over 1000 investment institutions from over 45 countries have become signatories, with assets under management equaling approximately US$ 30 trillion.113 A particularly active group of PRI signatories have in fact turned-up the pressure on the largest but also most criticized114 U.N.-sponsored initiative — the Global Compact, which has more than 10,000 participants, including over 7,000 businesses in 140 countries, although over 3,100 companies have already been expelled for noncompliance and 750 are expected to be expelled in the second half of 2012.115 In January of 2008, a coalition of 38 investors worth over US$ 3 trillion wrote letters to the CEOs of 130 major listed companies that are signatories of the UN Global Compact.116 In their letters the investors praised twenty-five Global Compact signatories for meeting their obligations under the Compact to produce an annual “Communication on Progress,” but simultaneously identified over 100 other companies as “laggards,” who were mainly based in emerging markets, and demanding them to comply with their obligations.117 The investors pointed out that they represented a “critical mass of institutional investors who believe management of corporate responsibility or [Environmental, Social and Governance] issues is highly relevant to the long-term financial success of their investments” and that the Compact’s reporting system provided an important measure of companies’ performance on these issues.118

The NGOs’ ‘nudges’ continue to have some impact, even if the progress is slower than they might wish. In the absence of coordinated multilateral action from governments on climate change, the NGOs and the EP Strategic Review called upon the EPs to adopt policies addressing the issue.119 A few banks have responded by separately creating the Carbon Principles, which aim “to provide a consistent approach for banks and their U.S. power clients to evaluate and address carbon risks in the financing of electric power projects” and in the process have articulated a set of Principles and an “Enhanced Environmental Due Diligence Process” to help create industry best practice in the energy sector in the United States.120 In addition, the EPFIs, in collaboration with the World Wildlife Fund and the Business and Biodiversity Offsets Program, has launched “B4B” — the Biodiversity for Banks program — which is “designed to help financial institutions overcome the challenges of incorporating risks associated with biodiversity and ecosystem services — all of the valuable resources provided by nature including safe drinking water — into their lending decisions.”121

The initiation of these conversations among financiers on climate change and biodiversity — and the demands on companies from investors for real improvement, not just lip service on these issues — offer a glimpse of what we might see at Rio+20’s Corporate Sustainability Forum.122 Unlike the first Rio Earth Summit, which was driven principally by government negotiation and attended by NGOs,123 the Corporate Sustainability Forum provides a unique opportunity for the private sector — and financiers and investors in particular — to set the sustainability agenda for the next twenty years.


6 Id.
9 See generally Sanjeev Khagram, Daas and Development: Transnational Struggles for Water and Power (2004); Marc Darrow, Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law (2003).

12 See, e.g., Salween Dam, INTERNATIONAL REVER, http://www.internationalrivers.org/south-east-asia/burma/salween-dams (last visited Dec.Dec. 18, 2010) (reporting that ethnic minority groups, who are already marginalized and repressed by the Burmese military junta, are “not only being systematically and forcibly moved from their homes, but also robbed, tortured, raped or executed” to clear way for the Salween dams and warning that local ethnic groups, particularly in regions that are not ethnically Burmese and typically enjoy considerable autonomy over their own affairs, could lash back in resentment at what are perceived to be deals that do not provide any local benefits and worse, trample on their rights in the process.); Ben Blanchard, China Risks Backlash with Myanmar Investments, REUTER Dec. 9, 2010, http:// af.reuters.com/article/energyOilNews/idAFTOE6804H20100709?sp=true

13 See INFRASTRUCTURE NETWORK, supra note 8, at 2.

14 Id.; Wright, supra note 8, at 56.

15 See Herwig Peeters, Sustainable Development and the Role of the Financial World, 5 ENV'T YR., DEV. & SUSTAINABILITY 197, 203 (2003) (finding that between 1990 and 1997, annual project finance volumes grew nine-fold from less than $5 billion to over $50 billion and 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). See generally Benjamin C. Esty, Carin-Isabel Knoop, and Aldo Sesia, Jr, The Equator Principles: An Industry Approach to Managing Environmental and Social Risks, HARVARD BUSINESS SCHOOL PUBLISHING CASE NO. 9-205-114 (2005); INFRASTRUCTURE NETWORK, supra note 8; Marco Sorge, The Nature of Credit Risk in Project Finance, BIS Q. REV. (2004).

16 INFRASTRUCTURE NETWORK, supra note 8, at vii (affirming that since 2003, the Bank’s infrastructure lending has been gradually recovering and approaching the level of the 1987-98 period, driven in part by a return to financing hydroelectric dams, such as the Bujagali dam in Uganda, Bumbuna in Sierra Leone, Feilou in Senegal, Nam Theun 2 in Laos, and Rampur in India). See Leslie Berliant, World Bank Puts Hydropower Back Into Favor, NGOs Do Not, INSIDE CLIMATE NEWS (July 31, 2009), http://insideclimatenews.org/blog/20090731/ world-bank-puts-hydropower-back-favor-ngos-do-not; see also World Bank, Directions in Hydropower: Scaling up for Development, 21 WATER WORKING NOTES iX (June 2009); World Bank Clings to Fossil Fuels, Stumbles on Clean Energy, 71 BRENTWOOD PROJECT (June 17, 2010), http://www. brentwoodproject.org/art-566579 (claiming that the Bank’s financing of fossil fuel projects has also reached all-time highs, noting that apparent commitments to limit investment in fossil fuels are belied by other statements suggesting that coal will remain in the mix of the Bank’s portfolio for some time into the future, and that these trends may potentially undermine the Bank’s attempts to transform its energy portfolio, half of which, according to the SFDCF’s projected targets, would go to “low carbon” investments by 2011). See generally Galit Sarfaty, Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank, 103 AM. J. INT’L L. 647 (2009); Ibrahim F. I. ShihaTa, The World Bank Inspection Panel: In Practice (2000); DARROW, supra note 9, at 58.

17 Wright, supra note 8, at 66.


20 See generally, id.


22 Id. at 1-2.

23 BANKTRACK, Going ‘Round in Circles: An Overview of BankTrack-EPEFI Engagement on Equator Principles, 3 (Jan. 2010) (describing Collevecchio as “the first ever NGOs position on what sustainable banking should look like, asking banks to make six commitments to sustainability, do no harm, responsibility, accountability, transparency and good governance” that “[ou]tline[d]... basic requirements on all these areas.”).

24 Wright, supra note 8, at 57.

25 Id.


27 Id. at 1.

28 Id.

29 Id.

30 Id.

31 Id.


34 Id.

35 Id.

36 World Comm’n on Dams, Dams and Development: A New Framework for Decision-Making, International Institute on Environment and Development, 108 DRYSDALE PROGRAMME 6 (2001) (giving an overview of the WCD, which consisted of twelve members chosen from a cross-section of interests, views and institutions, who relied in their work on four regional public consultations, and a permanent Forum of sixty-eight members from thirty-six countries and pioneered a new funding model: fifty-four public, private and civil society organizations contributed to its operations); see generally Navroz K. Dubash, Viewpoint — Reflections on the WCD as a Mechanism of Global Governance, 3 WATER ALTERNATIVES 416 (2010).


38 See Daniel Bradlow, The World Commission on Dams’ Contribution to the Broader Debate on Development Decision-Making, 16 AMER. U. INT’L L. 1531, 1546 (2001) (arguing that the WCD contributed to an ongoing shift in development decision-making that blurs the line between political and technical approaches through a procedural approach).


40 Abbott & Snidal, supra note 3, at 520.

41 Vogel, supra note 3, at 262

42 Id. at 267; see also Tim Bartley, Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Product Field, 31 POL. & SOC’y 433, 452 (2003).

43 John G. Ruggie, Reconstituting the Global Public Domain — Issues, Actors, and Practices, 10 EUR. J. INT’L REL. 499, 519 (2004) (explaining that a few of the more well-known initiatives were created in close collaboration with state actors, including the Fair Labor Association — originally the Apparel Industry Partnership promoted by the Clinton Administration — the Extractive Industries Transparency Initiative and Ethical Trading Initiative, and the Principles on Security and Human Rights, started with cooperation of the United States and several other governments other initiatives were created under the auspices of multilateral international organizations, such as the Organization for Economic Cooperation and Development’s Guidelines for Multinational Enterprises and the United Nation’s Global Compact).

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49 Abbott and Snidal, supra note 3, at 46.

50 Id., at 43.

51 Id., at 63.

52 Id., at 48.

53 Id., at 70.

54 Id., at 46.

55 Id., at 75, 86.

56 Id., at 75.

57 Id., at 83.

58 Id., at 64.

59 Id., at 85.


61 Id., at 7-9.

62 Id., at 8.

63 Id., at 10-12.

64 Id., at 13-14.

65 See O’Sullivan, supra note 91, at 533-87 (noting one banker stated EPFIs were “already regulated by the fact that they operate in the glare of the NGO scrutiny,” a sentiment echoed by IFC Director of Environmental and Social Development) (explaining resentment of statements saying it is up to “NGOs to keep the pressure on, to make sure things are implemented”).


67 See Ottaway, supra note 37 (noting that NGOs do not necessarily represent the public or common interests as much as their own private interests and sometimes in contradictory ways, and even when they do have overlapping interests or claim to represent those of others (i.e., globally Northern NGOs representing disenfranchised groups in the global South), this is not without concerns, either about accountability or paternalism; moreover, they note NGOs’ are institutions with organizational prerogatives of survival and thus, fundraising, which can come into tension with their missions, and more broadly, as organizations they can develop pathologies. In addition, some NGOs, like unions, have direct material interests in the issues in which they engage themselves).


76 See The Outside Job., supra note 84, at 34-36.

77 See id.

78 See The Outside Job, supra note 84, at 8; Johan Frijns, Follow up on Washington Meeting, BANKTRACK, 3 (June 23, 2009), http://www.banktrack.org/download/follow_up_letter_on_washington Ngo_epfi_meeting/090623_follow_up_letter_to_epfis_on_washington.pdf.


81 Id., at 7.

82 Id., at 5-7, 10-11.

83 Id., at 8.

84 Id., at 10-12.

85 Id., at 13-14.

86 See O’Sullivan, supra note 91, at 533-87 (noting one banker stated EPFIs were “already regulated by the fact that they operate in the glare of the NGO scrutiny,” a sentiment echoed by IFC Director of Environmental and Social Development) (explaining resentment of statements saying it is up to “NGOs to keep the pressure on, to make sure things are implemented”).

87 See id.


89 See The Equator Principles, supra note 67 at 2-3, 7.

90 Id., at 3, 5.

91 Id., at 5.

92 Id., at 4.

93 Id., at 2, 7.

94 Id., at 3.

95 Id., at 6.

96 Id., at 7.


98 WORLD BANK, ENVIRONMENTAL, HEALTH, AND SAFETY (EHS) GUIDELINES (2007), http://www.ifc.org/wps/wcm/connect/55e8d80488656e4b76fa76a6515b5b8b/Final%2b%2bGeneral%2bEHS%2bGUIDELINES.pdf?MOD=AJPERES.

Compulsory Licensing in TRIPS: Chinese and Indian Comparative Advantage in the Manufacture and Exportation of Green Technologies

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Information and technology transfer to China and India through compulsory licensing offers a unique opportunity to exploit the benefits of international trade to promote an environmentally sustainable future. However, international cooperation at the Rio+20 conference will be crucial in promoting this opportunity by finally dealing with the issue of how to maintain intellectual property rights while disseminating the benefits of these technologies. While methods to mitigate short-term economic costs should be considered, Rio+20 must recognize the promise that compulsory licensing holds for reducing emissions in the long run and acknowledge the urgent need to make green technology available to the developing world at an affordable price.

Endnotes: Compulsory Licensing in TRIPS: Chinese and Indian Comparative Advantage in the Manufacture and Exportation of Green Technologies

1 See Robert Fair, Does Climate Change Justify Compulsory Licensing of Green Technologies?, 6 INTERNATIONAL LAW & MANAGEMENT REVIEW 21, 23 (2009) (referencing a joint resolution issued by Brazil, China, and India).


4 BERNICE LEE ET AL., CHATHAM HOUSE REPORT, WHO OWNS OUR LOW CARBON FUTURE? INTELLECTUAL PROPERTY AND ENERGY TECHNOLOGIES 23, 27, 30, 34, 40 (2009) (providing data that of the entire world’s green energy patents the U.S. based companies hold 27.2% of wind patents, 40.4% of solar photovoltaic patents, 40.4% of biomass-to-electricity patents, 37.8% of concentrated solar power patents, and 68.4% of carbon capture patents).

5 See Kate Nuehring, Our Generation’s Sputnik Moment: Comparing the United States’ Green Technology Pilot Program to Green Patent Programs Abroad, 9 NORTHWESTERN JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY 609, 616 (2011).

6 See generally Michael Hasper, Note, Green Technology in Developing Countries: Creating Accessibility through a Global Exchange Forum, 1 DUKE