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Global Banks as Global Sustainability Regulators?: The Equator Principles

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Banks might now seem odd candidates for the role of global sustainability regulator. Nonetheless, in limited areas of their operation, where global banks kept risk on their balance sheets and were financially exposed to many types of risk often otherwise treated as "externalities," banks began to enact policies to encourage what they construe as "sustainable" banking. A small number of these banks have started to extend these principles of responsible action more broadly, across many of their business lines, as conditions of lending to their corporate clients. To this extent, it is possible to talk about (some) global banks as global sustainability regulators. The "law of unintended consequences" as used in the legal literature almost always refers to the unintended negative consequences of a regulation or policy. In this article, however, we discuss a potentially positive unintended consequence of the deregulatory and privatization trend of the 1980s and 1990s that was fueled by neoliberal political commitments: some private banks have taken a leadership role in regulating development. Specifically, these banks are enacting policies that attempt to mitigate the potentially negative social and environmental consequences of infrastructure development in politically unstable or environmentally fragile landscapes. The vehicle for doing this is a voluntary agreement called the Equator Principles (EPs). The article describes and analyzes the EPs and reports the initial results from an interview-based study of the various EPs stakeholders, including bankers, government officials, lawyers, consultants, and critics from nongovernmental organizations. We address—from the perspective of these stakeholders—such questions as why the participating banks decided to join the EPs, what effects, if any, the EPs are having on development practice, and whether the EPs will ultimately prove to be more than a public relations exercise.

INTRODUCTION

This is an ironic time to be writing about banks as possible global sustainability regulators, three years into a serious financial contraction and economic recession resulting from untenable banking practices. Banks have caused enormous damage to millions of people who did not buy houses they could not afford, did not trade financial instruments they did not understand,

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and did not distribute risk in ways that were opaque to all involved, including the banks. Locked into ubiquitous yet unrealistic models of risk management that assumed that no individual institution could affect the market (Financial Services Authority 2009), a small number of large global banks and their enablers created a Gordian knot of interconnected systemic risk that is yet to be fully unraveled. How, then, can we be serious in titling this article "Global Banks as Global Sustainability Regulators?"

The answer is that in one limited area of their operations, project finance, where global banks kept risk on their own balance sheets and were actually exposed to many types of risk usually dismissed as "externalities," many joined an initiative whereby they agreed to act in ways that can be labeled both responsible and sustainable. A small number of these banks have started to extend these principles of responsible action more broadly, as conditions of lending to their corporate clients (Spitzeck 2009). In this way, it is possible, albeit ironic, to talk about at least some global banks as global sustainability regulators (Shamir 2008).

This article rests on another ironic substrate. The "law of unintended consequences" as used in the legal literature almost always refers to the unintended *negative* consequences of a regulation or policy. In this article, however, we discuss a potentially *positive* unintended consequence of the deregulatory and privatization trend of the 1980s and 1990s: some private banks have taken a leadership role in regulating development. Specifically, these banks are attempting to manage the potentially negative social and environmental consequences of infrastructure development in politically unstable or environmentally fragile landscapes. The vehicle for doing this is a voluntary agreement called the Equator Principles (EPs).[1] The article describes and analyzes the EPs and reports the initial results from an interview-based study of the various EPs "stakeholders," including bankers, government officials, lawyers, consultants, and critics from nongovernmental organizations (NGOs).

A number of developments have contributed to the trend that has culminated in the EPs. In the 1980s and 1990s, structural adjustments demanded by the World Bank and International Monetary Fund (IMF) led to the increasing privatization of public and state-owned services such as energy, water, resource extraction, and basic industries. Simultaneously, effective activism by environmental NGOs helped to persuade the World Bank Group and other multilateral public development banks to begin to withdraw from large, high-profile infrastructure projects such as the Three Gorges Dam project in China and the Narmada Valley dams in India (Amalric 2005). This set the stage for private banks to play a much larger role in infrastructure investment than they had previously.

These developments were viewed with dismay by those same NGOs. One reason for their dismay was that NGOs had worked throughout the late 1980s and early- to mid-1990s to require public funding agencies such as the World Bank (the World Bank Group branch that makes loans to countries) and the

International Finance Corporation (IFC, the World Bank Group branch that finances private sector investment), regional development banks, and export-import credit agencies to impose explicit social and environmental standards on projects that they supported. Now, with the entrance of Wall Street and City of London banks into the development market, the NGOs feared that work would need to be done again, this time without the public-regarding official mandate of the World Bank and the IFC to use as leverage.

But this same privatization that the NGOs so feared has had an unintended—indeed, wholly unanticipated—consequence: private banks with global reach have begun to play a quasi-regulatory role by introducing developed-country social and environmental sensibilities, procedures, and standards across the entire range of the world's industries and development activities. The mechanism for this has been the EPs, first promulgated in 2003 and then revised in 2006. This voluntary agreement sets financial industry-wide standards for assessing and managing environmental and social risk that were taken directly from IFC performance standards on social and environmental sustainability and on the World Bank Group's Environmental, Health and Safety general guidelines. Indeed, the IFC has played a leading role in promoting the EPs standards and communicating best practices throughout the banking industry by holding "community of learning" meetings on an annual basis (Haack, Schoeneborn, and Wickert 2010, 20) and working with the banking sector in individual countries, such as China (Aizawa and Yang 2010).

The EPs apply only to *project finance*, which is the method used to provide private capital for large, privately sponsored infrastructure projects such as dams, oil and gas pipelines, mines, electrical power plants, and telecommunications facilities. Project finance loans are nonrecourse, meaning that lenders are repaid only through the revenues generated by the project. So even if the project sponsor (the borrower) is consistently one of the world's most profitable companies, the lending banks face particularized financial risks from anything that might slow down or derail the project. As a result, the banks have become concerned about human rights and labor issues, community relationships, indigenous people's rights, environmental issues, and political turmoil generally. The EPs emerged in part as a way to manage these concerns.

Unlike some other voluntary sustainability initiatives, there are no agreed-upon methods for certifying that a project meets EPs standards (cf. Bartley 2007), and thus there are no organizations licensed to certify compliance. Rather, the EPs rely on self-enforcement by the participating banks. Each institution that adopts the EPs declares that it has or will put in place internal policies and processes that are consistent with the EPs. Those processes include using a common framework to identify infrastructure investments as posing high-, medium-, or low-environmental and social risk, on the basis of an Environmental and Social Impact Assessment that is typically done by outside consultants. For projects in developed countries, an environmental impact assessment will probably already have been required by law, but in many developing countries that assessment will be performed only because the lending bank requires it pursuant to its agreement to participate in the EPs. Where a project is identified as medium- or high-risk, participating banks must require their clients to have a management plan designed to mitigate the risk and loan covenants that require clients to comply with the management plan or be declared in default.

Forty-one international financial institutions eventually agreed to implement the first EPs in 2003, including such global banks as ABN AMRO, Barclays, Citibank, Credit Suisse, Dresdner Bank, HSBC, ING Group, JP Morgan/Chase, Royal Bank of Scotland, and Wells Fargo.[2] In 2006, the EPs were revised, based on revisions to the underlying IFC standards, to include stricter requirements for social issues, including expanded protections for labor, community health, safety, and security; enhanced requirements for community consultation prior to a project's initiation (but no power for communities to consent or not); requirements to implement dispute resolution mechanisms; and some requirements for public reporting on implementation (Sevastopulo 2006). By early 2011, seventy international financial institutions had signed on to the revised EPs, and, as a result of this broad adoption, the EPs cover more than 85 percent of project finance in emerging markets (Bergius 2008).

As a consequence of its market penetration, the EPs have the potential to import rule-of-law and developed-country business norms into the world's emerging economies, at least with respect to large development projects. As Robert Lawrence and William Thomas (2004) have noted, "[b]ecause project financing is often used outside of the world's developed economies and legal systems, it is not uncommon for the project documentation to form the principal legal framework for the transaction" (21). Thus, it is that we can begin to think of EPs banks as global sustainability regulators (Shamir 2008) and the EPs themselves concrete examples of the proliferating forms of global regulation that collectively are known as "new governance." More specifically, the EPs illustrate the new governance phenomenon of "transnational private regulation" by "coalitions of nonstate actors" (Bartley 2007, 298). According to new governance theory, the democratic state is in the midst of a shift to a *post-regulatory* model characterized by a weakening of top-down governmental regulation in favor of a diffusion of rights and responsibilities among governments, private companies, NGOs, and other interested parties (Scott 2004; Slaughter 2003)—what Cynthia Estlund (2010) has recently called "regulated self-regulation." The essence of the post-regulatory state, captured in the linguistic shift from *government* to *governance*, is the diffusion of regulatory power among networks of state and non-state actors that transcend national boundaries and that often, as with the EPs, use market forces to advance social and environmental goals (Cashore 2002).

The potential future significance of the EPs goes beyond regulation of project finance, important as that might ultimately turn out to be. Even if 85 percent of project financing in emerging markets is now subject to the EPs standards, project finance is only about 5 percent of a typical bank's book of business. What is particularly intriguing is that in some banks, such as Barclays, HSBC, and Citibank, the process of signing onto the EPs may be both evidence of and a catalyst for cultural change within the bank (Rupp, Williams, and Aguilera 2010; Spitzeck 2009). There is some evidence that those banks have begun to apply the EPs social and environmental standards for sustainable banking across product categories, including underwriting, commercial lending, and retail banking, and across industries.[3] Moreover, revisions to the underlying IFC Social and Environmental Performance Standard announced in May 2011 expand the scope of that standard to financial advisory products (discussed below), suggesting that the potential ambit of the EPs may soon be expanded as well.

Moreover, bank financing for many kinds of large projects must be syndicated, with a lead lender joining with a number of others. Even where non-EPs banks are in the lead on a project, the EPs are becoming the standard applied to social and environmental risk management. So what began as a change in lending procedures by a number of global banks in an important but limited arena—project finance—is spreading throughout the industry, and, in some cases, may be starting to transform the values and business practices of banks across a wide spectrum of lending and underwriting activities. We may thus be seeing not only self-regulation by banks, but also the beginnings of social and environmental regulation of global business by the leading EPs banks (Shamir 2008).

The potential importance of this development—and we stress the word "potential"—is profound. Academics and policymakers concerned with corporate social responsibility (of which the EPs are an instance) have given their primary attention to changing companies' behavior through equity market interventions such as reforming disclosure requirements and shareholder voting procedures, as well as shareholder activism in the form of engagement, investment, and divestment (Hebb 2008; Williams 1999; Schwab and Thomas 1998). Yet changes in credit market behavior could ultimately be a much more powerful mechanism for changing companies' social behavior, even though those changes have received far less attention. Throughout most of the developed world (with Canada as the major exception), bank finance exceeds stock market capitalization (Scholtens 2006). In most of the rapidly emerging markets (with China a notable exception), stock market capitalization roughly equals domestic bank finance. And for developing countries, bank lending is a significantly more important source of external finance than equity. The importance of bank finance generally has been underscored by the credit crisis of 2007 through 2009, and so it should hardly be surprising to note that the conditions upon which credit is extended can have operational effects within borrowing companies.

Thus, in assessing banks' potential to promote sustainability, one should take note of the regulatory functions that they already perform. On the positive side, banks exercise a significant and generally salutary influence on corporate governance—an influence that has been underappreciated in the American context (but cf. Baird and Rasmussen 2006; Armour, Cheffins, and Skeel 2002), in contrast to Europe and Japan (Aguilera and Jackson 2003). Deciding to whom to extend credit and on what terms can also be understood as a regulatory function. The financial community's recent spectacular failures in this area do not augur well for the success of the EPs, which represent a specialized instance of the same credit extension function. Nonetheless, there is at least preliminary evidence that the EPs are yielding a more open and responsible approach to the specific risks posed by large infrastructure loans, in contrast to their mortgage-backed "originate to distribute" model of risk management that created the global financial crisis.

These developments provoke many questions. Why have so many banks signed onto the EPs, including banks that were not particularly exposed to the kinds of reputational risk that motivated some of the early adopters? What predictions can we make about which banks will be vigorous implementers and which will not? How will regional patterns of adoption affect the efficacy of the EPs as global regulation? What implications are there for theories of corporate governance if industry-wide lending standards have effects within individual corporations? And why do some banks appear to be adopting the spirit of the EPs at a deeper level than others?

We are at the start of a broader investigation of these phenomena and have no definitive answers as yet. In particular, we emphasize that we have not evaluated any EP-funded projects on the ground, nor have we found other in-depth, academic studies that do so, a gap recognized by others as well (Macve and Chen 2010). Clearly, that is an important next step to add to this literature. We have developed a theoretical framework within which to do further work, however. The purpose of this article is to lay out that framework as we report on our findings to date. Ultimately, we hope to be able to address the questions of why the market has worked here to promote at least some degree of responsibility, yet has failed in other banking contexts, and what we can learn from those differences.

Section I analyzes in greater detail what the EPs require, both procedurally and substantively. Section II summarizes the two literatures that inform our exploration: the business literature that describes and evaluates the motives of participating banks; and the more theoretical social science and anthropological literature of globalization and governance. Section III examines those motivational theories and other issues through the lens of our interview-based research. Section IV concludes by developing some theoretical and practical connections between our findings and the relevant literatures.

I. REQUIREMENTS OF THE EPs

Adopters of the 2006 EPs (EPs2) pledge to apply a systematic environmental and social assessment framework to project loans with a total cost of at least \$10 million, reduced from a \$50 million trigger in the 2003 EPs (EPs1). The purpose is to "ensure that the projects the [EPs Financial Institutions, or EPFIs] finance are developed in a manner that is socially responsible and reflect sound environmental management practices."[4] The banks agree that they "will not provide loans to projects where the borrower will not or is unable to comply with our respective social and environmental policies."

Ten principles are included in the EPs2. Principle 1 commits the EPs Financial Institutions (EPFIs) to review and categorize new or expanded projects in accordance with the IFC's environmental and social screening criteria. The IFC's screening criteria consider "in an integrated manner the potential social and environmental (including labor, health, and safety) risks and impacts of the project" (IFC 2006, 1), considering the type of project, location, sensitivity of the environment, characteristics of the community, and the like. Under Principle 2, for all Category A (high-risk) and Category B (medium-risk) projects, the borrower must conduct a Social and Environmental Assessment (or have one conducted by specialists) as well as identify what measures can be taken to mitigate and/or manage the risks identified in the Assessment. Principle 3 requires that for all Category A and B projects in non-Organization of Economic Cooperation and Development (OECD) countries or non–high-income OECD countries, the Assessment must rely upon the "then applicable IFC Performance Standards for social and environmental assessment and management and the then applicable Industry Specific EHS [Environmental, Health and Safety] Guidelines." Principle 4 specifies that the borrower must develop a mitigation and management plan (the Action Plan) that incorporates ongoing monitoring of the risk factors. Principle 5 provides that, as part of the assessment process, the borrower must consult with all affected communities in a "structured and culturally appropriate manner." Specific requirements for the consultation include the following: affected communities must be provided with the assessment and action plan in their languages and in a culturally appropriate manner; community concerns must be "taken account of"; and there must be documentation of how communities' concerns were taken into account.

Principle 6 requires the borrower to establish a grievance mechanism for all Category A projects and, as appropriate, for category B projects in non-OECD and non–high-income OECD countries, "to ensure that consultation, disclosure and community engagement continues throughout construction and operation of the project." It also requires the borrower to inform the affected communities of the grievance mechanism and to ensure that the process resolves grievances promptly and transparently. Principle 7 requires (for Category A projects and, as appropriate, for Category B projects) an independent review of the Social and Environmental Assessment, Action Plan, and consultation process documentation in order to assist the EPFIs in their due diligence and assess EPs2 compliance.

The EPFIs believe that "an important strength of the Principles [to be] the incorporation of covenants linked to compliance in the financing documentation." Thus, Principle 8 details a number of specific covenants, or contractual promises by the borrower, that must be included in the loan documents. Among these are covenants to comply with the Action Plan, to provide periodic reports that document compliance with the Action Plan, and to decommission the project, where appropriate, in accordance with the Action Plan. If a borrower breaches these covenants, the EPFIs agree to work with it to bring it into compliance. If those efforts fail, the EPFIs reserve the right to exercise whatever other contractual remedies they consider appropriate. At least in theory, that could include declaring the borrower in default and demanding immediate repayment.

Finally, there are monitoring and reporting requirements. Principle 9 requires (for Category A projects and, as appropriate, for Category B projects) that the borrower appoint an independent environmental and social expert to evaluate its periodic reports to its EPFI lenders. Principle 10 commits each EPFI to report publicly on an annual basis about its EPs2 implementation, "taking into account appropriate confidentially considerations." The reporting should "at a minimum include the number of transactions screened by each Equator Principles Financial Institution, including the categorisation accorded to transactions (and may include a breakdown by sector or region), and information regarding implementation." The EPs2 end with a significant disclaimer stating that the EPFIs view the ten Principles "as a financial industry benchmark for developing individual, internal social and environmental policies, procedures and practices," and that the Principles therefore "do not create any rights in, or liabilities to, any person, public or private."

In late 2009, the IFC launched a new review and update of its Policy and Performance Standards on Social and Environmental Sustainability, which is the IFC's sustainability framework on which the EPs are based. That process was concluded in May 2011. The changes include more stringent attention to climate change, expanded coverage (to include advisory products as well as project finance, defined as technical, financial, and/or regulatory advice), and a shift to a requirement for free, prior, and informed consent in some affected indigenous communities prior to new project development, not just free, prior, and informed participation (IFC 2011). Since the EPs explicitly incorporate the IFC's Performance Standards, these changes will (presumably) soon be considered by the participating banks and may affect the EPs. Moreover, in 2010 the Equator Principles Association was formally established as the governance mechanism for the EPFIs, with Shawn Miller of Citibank (New York) in the chair. So what began in 2002 as discussions among four banks and the IFC (Wright 2007) is now, less than ten years later, a formal association of seventy banks with a potentially expanding remit for "sustainable finance." Given this rapid development, it is no surprise that the EPs have been a focus of much academic attention.

II. THE RELEVANT LITERATURES

The design and implementation of our project has been influenced by two broad literatures. The first is a largely pragmatic business literature that asks three related questions: why banks have chosen to join the EPs; whether they are likely to work, in the sense of having a material and beneficial impact; and, if so, why. Most of this literature has been devoted thus far to the framing of hypotheses, but some recent projects have begun to test them. As will become evident in Section III, our interview subjects talked at length about many of the same questions, offering a new body of evidence about these hypotheses.

The second literature is social scientific and largely anthropological. It has little to say about the EPs per se but addresses higher-order theoretical questions about globalization processes and the nature of global governance. This literature has helped to frame our general approach to the analysis of our interview data, and we have found repeatedly that the EPs provide a vivid illustration of many of the specific themes that anthropologists and other social scientists have identified.

A. BUSINESS HYPOTHESES ABOUT THE EPs

Questions concerning motives come rather quickly to mind when a majority of the world's largest banks commit themselves to taking take environmental and social factors into account in structuring lending, given that no government is requiring them to do so. A number of complementary ideas have been put forward to explain the banks' motives in developing or subsequently joining the EPs. Practicing attorneys Robert Lawrence and William Thomas (2004) take a pragmatic approach, suggesting that "one of the motivating factors for adopting the guidelines was a desire to level the playing field [between banks], and establish a minimum standard to which the major project financing lenders would adhere" (22). A number of academic assessments elaborate on the same theme, analyzing the participating banks' motivation in a way that is evocative of the prisoner's dilemma (Amalric 2005; Richardson 2005). Each bank faces reputational risk if it finances a project that leads to a social or environmental disaster, and each would presumably be better off avoiding such risk. But each bank also fears commercial disadvantage from acting alone to limit its lending. An agreement to level the playing field avoids this difficult choice by eliminating the commercial disadvantage (Aizawa and Yang 2010).

The importance of reputational risk is supported by the fact that the banks that were most active in developing the EPs—ABN AMRO, Barclays, Citigroup, Calyon, CSFB, HSBC, HBV Group, Rabobank Group, the Royal Bank of Scotland, West LB, and Westpac Banking Corporation—almost all have large retail businesses, and thus are particularly sensitive to NGO activism and its impact on their reputations.[5] Reputational risk from NGO activism is amplified in Europe and the United States, given the institutional interactions among civil society, media, and some investors, a factor that has been used to explain why banks in these countries predominate among EPFIs (Wright and Rwabizambuga 2006). The question then becomes, why would other banks without retail exposure also participate in the EPs? Swiss scholar Franck Amalric (2005) suggests that the answer lies in the structure of project finance, a point echoed by other analyses (Haack, Schoeneborn, and Wickert 2010; Wright 2007). These deals are all so large as to require loan syndication, and because they are large they offer attractive targets for NGO activism (Haack, Schoeneborn, and Wickert 2010; O'Sullivan and O'Dwyer 2009). The original group of EPs1 banks, with their strong retail presence, comprised about 30 percent of global project finance capacity. The nonretail banks may have found it too difficult to put full syndicates together without that 30 percent of capacity, so they signed on as well.

Reputational risk has financial implications, at least in the longer term. But the EPFIs may also have been motivated by more direct concerns about managing financial risk. The EPs are a systematic tool that allows banks to identify the social and environmental risks associated with their projects (Macve and Chen 2010). Presumably, this helps the banks to price those risks correctly (Wright 2007). As we report in Section III, the bankers we have interviewed have repeatedly reminded us that if a project is shut down by social unrest, labor problems, or environmental calamity, it will not generate the anticipated revenue, and the sponsor will be unable to repay the (nonrecourse) loan. The EPs provide—indeed, force upon the participating banks—what one banker we interviewed called "a good tool for categorizing and calculating risks that may be particularly salient given the long time-frame of infrastructure investment."

A number of other pragmatic motivations have been posited for the EPs. Global banks see value in the EPs, and in international sustainability practices generally, because they are useful management tools for negotiating differences in regulations and regulatory approaches between countries (Wotruba 1997). Countering the often-heard "race to the bottom" argument, many leading operating companies have imposed a common environmental policy on their subsidiaries and contract partners, thereby "transcending the limitations of nation-specific regulation" (Eisner 2004, 152). It would not be surprising if global banks also found utility in uniform standards for their personnel to use in making lending decisions, particularly given the need for global reputation management (Wright 2007). A commitment to "sustainable banking" may also be a differentiation-based strategy to achieve competitive advantage in the industry (Eisner 2004, 149–50). Ironically, that advantage diminishes as participation becomes more broad-based, and it is also undermined if some firms, as NGOs contend (BankTrack 2010), can engage in the form of free-riding that is often called "green-washing": as one of our informants put it, "committing by issuing a press release and doing nothing more."

Amalric (2005) advances two additional rationales. One is that as multilateral development banks and the World Bank Group began to withdraw from project finance in light of persistent NGO criticism (recall the "Battle of Seattle" and other violent demonstrations against the World Bank and the IMF as symbols of globalization), a due diligence vacuum was created. While formerly the international lending institutions did the social and environmental analysis demanded by IFC Performance Standards, when those institutions withdrew the private banks would need to take up that expensive task. The EPs were a convenient way to shift the costs of this process back to the borrowers, in a coordinated way that eliminated the borrowers' bargaining power. Amalric's second theory is that the EPs were a way to give commercial banks a place in the increasingly contentious debate over large-scale infrastructure development. In essence, the EPs permitted banks to counter critics of large development projects by asserting their ability to manage the risks created by those projects and simultaneously to resist further strengthening of the standards or the imposition of "hard law" (Sadler and Lloyd 2009).

Other self-interested motives have also been suggested. In an excellent analysis of the EPs, Benjamin Richardson (2005) suggests that the EPs1 standards may simply have represented business as usual. Under that view, there would be little cost from participating, but there would be considerable potential benefit in the form of the reputational and financial risk management factors just discussed. A number of readers of an early version this article, participating in the Vanderbilt Roundtable on Global Regulation of Financial Institutions in October 2007, suggested that the EPs might have an anticompetitive purpose and effect, permitting collusion among banks in a context that does not invite government scrutiny.

All of these motives are instrumental, in the sense that they are focused on means for the participating banks to advance their own interests (Aguilera, Ganapathi, Rupp, and Williams 2007). In one way or another, the creators of the EPs see them as good for business, even if, for any one bank in the near term, they increase the costs of evaluating potential loans and monitoring on-going compliance, and may even limit opportunities. That banks articulate instrumental motives should not surprise us, since we (and the law) expect business managers to make decisions that they perceive to be in the interests of their firm and its shareholders.

A further question that is important, but beyond the scope of the present research, is how these instrumentally driven commitments being introduced into the banks nonetheless, in some instances, leads to deeper engagement with the goals of social and environmental concern within the firm, as seen by expanding the application of the EPs to other departments (such as underwriting or commercial lending generally). One possibility is that any such engagement is nothing more than window-dressing on the ongoing discernment of self-interest, a possibility consistent with the growing frustration of the banking NGOs with the EPs banks (BankTrack 2010; O'Sullivan and O'Dwyer 2009). That is, bankers may come to realize that the minimal costs and substantial benefits of the EPs are available in other areas of their business. But it is also possible that experience with the EPs is leading to real change—in some cases, rapid change—in the culture of banking organizations. In fact, it could be the case that the moral and ethical sensibilities of employees and managers are being more deeply engaged by the reflective processes the EPs demand (Rupp, Williams, and Aguilera 2010).

B. THE SOCIAL SCIENCE OF GLOBALIZATION, GOVERNANCE, AND DEVELOPMENT

From a theoretical perspective, our work is informed by and builds on a growing body of research in the social sciences, especially anthropology and sociology, concerning various aspects of globalization and the global economy. At the highest level of abstraction, our work is rooted in economic anthropology. In reaction to the political and legal hegemony of neoclassical economics, contemporary anthropology characterizes Western economic thought as a case of "ethno-economics": a cultural practice, a modeling of material life (Bird-David 1997). If so, then the EPs can usefully be studied as an aspect of that practice, as discourse and behavior that model material life in a particular way. Even as the EPs promise to mitigate some of neoclassicism's harsher effects, they reaffirm its core values and thereby both reflect and help to reproduce its hegemony.

At a more specific level, a body of work that can be loosely grouped under the heading of development anthropology has posed a number of fundamental questions about neoclassicism's interaction with other cultural systems. Several of these questions are directly relevant to the EPs. Arturo Escobar (1997) asks, "In what ways was the 'Third World' constituted as a reality for modern expert knowledge?" (503). The EPs, with their requirements of studies, plans, and metrics, provide a case study in the operation of modern expert knowledge upon the economic and cultural Other (cf. Li 2005). Escobar (1997) also asks whether the entire concept of "development," including the currently ascendant "sustainable development," is an "invention, that is, a historically singular experience that was neither natural nor inevitable, but very much the product of identifiable historical processes" (503). Sustainable development is a taken-for-granted but poorly defined value that lies at the core of the EPs. Finally, Escobar questions development's "map," "a view of the apparatus of expert knowledge" that organizes "the simultaneous production of knowledge and power" (503). The EPs, with their detailed protocols for identification, classification, and remediation, would seem to comprise just such a "map."

Other anthropologists have focused specifically on the respective roles of the state and the corporation in the globalization process. In his already-classic *Seeing Like a State*, James Scott (1998) was among the first to observe that the multinational corporation was succeeding to many of the functions and powers that had previously been monopolized by nation-states. Later, James Ferguson and Akhil Gupta (2002) argued that globalization has been characterized by the transfer of traditional state functions to nonstate actors, including to multinational agencies "above" and to NGOs "below."

Following Scott in his own work on oil company enclaves in Africa, James Ferguson (2005) concludes that "global capitalism just does what the modernizing development state once did—only to a larger degree" (ibid., 377). "According to the mythology of neoliberal globalization," Ferguson contends, the result of these activities was supposed to have been a "structural adjustment" that would liberate "a newly vital 'civil society' " and ultimately bring about "a new sort of 'governance' that would be both more democratic and more efficient." Instead, Ferguson finds, the result has been an "outsourcing" of governmental functions to NGOs that has "decapitated" African governments (379).

Anthropology has elaborated on this "new sort of 'governance' " in a variety of ways, both theoretical and concrete. At a theoretical level, the outsourcing of state functions has been seen as an instance of "neoliberal governmentality" (Vannier 2010, 284).[6] Governmentality in general, a concept developed by Foucault (1991), "refers to the techniques and methods by which 'government' is accomplished," the set of practices through which people are governed. Neoliberal governmentality is defined in turn as "a shift in governance from a direct supervisory role [for the state] to an indirect role premised on the organizational norms of the free market" (Vannier 2010, 284)—a definition that captures the essence of the EPs.

This "new sort of 'governance' "—whether characterized as new governance or a shift toward governmentality—has also been a major theme in recent scholarship in law and political science (Estlund 2010; Scott 2004; Slaughter 2003). This work sees the democratic state as shifting to a post-regulatory model in which rights and responsibilities are diffused among a variety of governmental and private actors dispersed across networks that transcend national boundaries. Critics of this new dispensation question the processes—or lack thereof—for selecting those who will share this diffused power and ask how these people and institutions will be held accountable (e.g., Bendell 2005; Parker 2002). As we shall see in Section III, these turn out to be questions that EPs protagonists are asking of themselves, with no consensus about the answers. In many respects, then, understanding the realities of the EPs provides a unique opportunity to test new governance theory against practice.

Anthropologists studying development have also critically examined many aspects of neoliberal governmentality as it is practiced on the ground. Shever (2010), for example, has examined the efforts of a multinational oil company to practice corporate social responsibility in Argentina. She concludes that it has been nothing more than a charade that "shifts the terrain of struggle away from the formal judicial domain . . . to the more pliable field of public opinion" (41).

Others have taken Ferguson and Gupta's suggestion and looked "below" at the NGO component of the emerging governmentality network. On the basis of ethnographic work in Haiti, Mark Schuller (2009) sees NGOs as governance intermediaries between grassroots local and elite global interests. In his observation, NGOs "glue" globalization in multiple ways, in the process becoming "semielites" that help to reinforce neoliberal values. By thus interrogating the taken-for-granted category of "NGO," Schuller builds on his own earlier work (2007) that criticizes the concept of "civil society theorized in a zero-sum opposition against the state" (69). His notion of the NGO as a mid-level intermediary is also consistent with an emerging anthropological critique of the whole concept of "scale," work that treats conventionally fixed notions like "global" and "local" as contestable and ideologically laden constructs (Glick-Schiller, Caglan, and Gulbrandson 2006; Tsing 2000). All of these issues are implicated in the implementation of the EPs.

Also working in Haiti, Christian Vannier (2010) has studied the imposition of "audit culture," or "rituals of verification . . . [h]abituated in mundane bureaucratic processes and institutional expectations," on grassroots NGOs (283). He worries about the effects of the deceptively apolitical technology of audit, asking specifically about "the degree to which audit culture imports values that undermine local initiative and priorities" (299). Many of the people we interviewed share precisely these concerns with respect to the accountability aspects of the EPs.

A final and significant point about the governmentality and new governance scholarship is that it does not argue (let alone assume) that these emerging practices are "better" or "worse" or more or less effective than traditional modes of governance. The point of this body of work is, rather, to document these developments and critically assess their significance. Our perspective is the same.

Methodologically, the work that most directly parallels this project is that of the sociologist Ronen Shamir. He has analyzed corporate social responsibility generally as an exercise in new governance, a "conceptual space where various regulatory/disciplinary regimes are pursued and negotiated among a host of players" (Shamir 2004, 659), and has reported on an essentially ethnographic study (Shamir 2005) of corporate social responsibility activity in Israel that focuses on framing and the construction of meaning. We are pursuing many of the same themes with a particular emphasis on language, examining the EPs as an exercise in the construction of meaning.

III. WHAT DO THE PROTAGONISTS SAY?: EPs INTERVIEWS

A different set of perspectives on the EPs is emerging from an ongoing program of interviews and observation. To date (starting in early 2008), we have completed twenty-eight interviews specifically focused on the EPs, a subset of more than sixty-six interviews on the broader topic of corporate social responsibility that began in late 2003. The persons who provided the twenty-eight interviews directed specifically at the EPs have included fifteen bankers; two NGO representatives; two government officials, one of whom is a scientific advisor; another private-sector scientist who consults on EPs projects; four lawyers who practice in the field; one World Bank Group official; one consultant to the IFC on its environmental performance standards; and three investment advisors. All are highly knowledgeable about the EPs, having been involved with them since their inception from their respective perspectives, and all are recognized as such by others in the field. The interviews have averaged about one hour in length. The subjects have been located in various U.S. and Canadian cities, Europe, and, in one case, South Africa. About half of the interviews were done in person in London, six in person in Toronto, and the remainder by telephone.[7] We also participated in a two-day EPs conference in London in September 2007 ("The Sustainable Finance Summit 2007") that was sponsored by *Ethical Corporation* magazine and attended by several hundred people with the same range of backgrounds as our interview subjects. More than fifty of these people made substantial public comments,[8] and we quote a number of them. The fact that these individuals were asked to speak publicly at a major international gathering indicates that their expertise is recognized by the EPs community.

The interviews have varied substantially in content, depending on the background, work, and interests of the subjects. Our approach has been the one that Conley has used in a series of projects involving law and business (e.g., Broome, Conley, and Krawiec 2011; O'Barr and Conley 1992; Conley and O'Barr 1990), and that we have used in earlier work on the corporate social responsibility movement (e.g., Conley and Williams 2005). We have worked from a general and flexible topic outline that emphasizes two overarching questions: why the subject believes that the participating banks adopted the EPs and the extent to which the subject believes that the EPs are having a practical impact. Beyond covering these two major topics, we prompt our interlocutors to set the specific agenda, moving from topic to topic as they see fit, giving various topics such emphasis as they may choose, and commenting freely on outlook and practices. In analyzing the interviews and our participant observations of events, such as conferences, we have paid particular attention to the details of discourse, examining closely the ways in which people choose to express themselves.[9]

We are sometimes asked—usually by those of a quantitative bent—whether interview responses amount to anything more than "anecdotes," or "mere stories." We reject the anecdote label unequivocally. We accept the proposition that we are hearing stories, but we believe that they are far more substantial than "mere."

Linguists, anthropologists, and discourse analysts of various persuasions have long believed that, for a number of reasons, the stories (the terms *narratives* or *accounts* are used more or less synonymously in the literature) that people tell in varied contexts are worthy of close attention (Johnstone

2002; Bennett and Feldman 1981). Narrative (or storytelling) is ubiquitous and socially significant: it is "a conventional form of social interaction, among the ways we come to know each other, encounter the larger world, and learn about its organization" (Ewick and Silbey 1998, 242). Stories are the primary vehicle for communicating our understanding of social situations to others and for attempting to shape our audience's response (Goodwin and Goodwin 2004). We believe, therefore, that narratives are a source of bottom-up, "native" hypotheses for future testing. Researchers regularly test hypotheses driven by the theory of their respective disciplines; this is the history of empirical work in law and economics, for example. But it may be equally (if differently) illuminating to seek testable hypotheses among the people to be studied—what an anthropologist might call "folk theories" (Bohannan 1989, vii–xiv).

In addition, a researcher who collects and analyzes stories may begin to hear "master narratives": consistent accounts of particular phenomena that recur across a cultural community (Conley and Conley 2009). When one begins to hear the same account over and over again (and since this kind of analysis is interpretive, the precise count is not what matters), it may be that the various narrators may actually hold shared beliefs on the subject (Briggs 1996) or have reached a meeting of the minds—or at least fallen into consciously parallel behavior—on the nature of the account that is in some sense appropriate for them to give. Regardless of the ultimate explanation (or combination of explanations), discourse analysts believe that master narratives share another significant property. Most linguists agree that narrative patterns are inextricably intertwined with patterns of thought. Thus, to discover a master narrative about something is often to discover a dominant, taken-for-granted way of thinking about the subject. The direction of the cause-and-effect arrow is rarely clear; however, a pervasive way of talking about something can both reflect and help to shape the way it is thought about. For this reason, master narratives are sometimes said simultaneously to reflect and reproduce dominant (or *hegemonic*) patterns of thought (Conley and O'Barr 2005).

The accounts given by our interview subjects reflected master narratives pertaining to a few topics, particularly the question of why the EPs were first adopted, and the potential of Chinese and Russian banks to undermine the EPs project. But their accounts were strikingly divergent on most others, including the efficacy of the EPs. Their narratives often bear out the principal hypotheses and predictions set out in the business literature reviewed above in Section II.A, while at the same time revealing some of the complexities and contradictions that emerge from the anthropological and other social science literature reviewed in Section II.B. In the sections that immediately follow we review what we heard on several major topics, focusing in some detail on our subjects' actual words. Then, in Section IV, we relate these observations to the relevant literatures and speculate about the real-world significance of what we have heard.

A. WHY DID MAJOR BANKS ADOPT THE EPs?

1. *The NGO Factor*

One message here has been clear and consistent: NGO pressure shamed them into it. An official at the World Bank Group said unequivocally that the EPFIs were "all driven by NGO campaigns." Other factors are mentioned, but the role of NGO pressure has come up in a diverse sample of interviews. Almost every banker has mentioned it. According to an official of one of the original EPs banks, they met in 2002 and "swapped scare stories." They sought a "reputational risk protocol" to assess "the likelihood of a project attracting attention" and "to manage fallout." In the background was the need to have a "defensible position" so that "NGO mud didn't stick."

According to an executive from another founding bank, the original signatories all "had big NGO campaigns." A banker whose company was a later signatory described "engagement" with a major international NGO dating back to the early 1990s, with adoption of the EPs coming as a logical progression. Another international banker described a protester rappelling down the front of a European bank's high-rise headquarters to unfurl a banner accusing the bank of environmental malfeasance; he characterized the event as a turning point in the adoption of the EPs. Yet another said that the purpose of EPs reporting is "to avoid NGOs, regulation, and public criticism"; in other words, "don't be targeted." A European banker who dismissed the EPs as a mere codification of his company's longstanding practices acknowledged the influence of "one incident" of NGO pressure that he declined to specify. A banker whose employer does not do project finance said the bank signed the EPs anyway because of NGO pressure. We also heard of an exception that may prove the rule. A former international banker told us of how his employer had avoided NGO campaigns and gone directly into a cooperative social and environmental "contract" with a highly visible NGO, and then into the EPs, as a consequence of "marketing outreach"—an affiliation credit card deal with that NGO.

The NGOs themselves seem to be in agreement at least with the essential facts of this story. A bank specialist at a well-known international NGO gave a particularly detailed account of the evolution of the EPs. The NGO community had long targeted the World Bank and IFC for alleged inattention to social, environmental, and human rights issues (an official from another NGO called the World Bank "the big evil thing in Washington"). But starting in 1997, she said, project finance became a largely private enterprise. This created a problem for NGOs seeking to stop or control projects: "The groups on the ground saw a bulldozer coming in. They couldn't go to the World Bank [because the financing was private]. What do we do?" The answer was to engage in "capacity-building": that is, "we re-branded ourselves." The rebranded NGOs started complaining to banks about financing destructive, high-profile projects like the Three Gorges dam in China. The banks' initial response was that this was not their responsibility. But several of the world's largest banks—she mentioned Citibank, Barclays, ABN AMRO, and West Bank—had experienced NGO pressure before. The EPs presented an opportunity to avoid financial risk (a topic discussed below) and "mollify activists." In the end, she believed, the adoption of the EPs came from NGO pressure.

A final and particularly interesting—if somewhat cynical—perspective came from a lawyer who specializes in project finance with a large multinational firm. The starting point, he believes, is the NGOs' belief (incorrect, in his view) that project sponsors "do what they can get away with." NGOs see major infrastructure projects as fundraising opportunities: "Everyone wants to hang their cause on your project." Against this background, the EPs were conceived of as a "formal signal" to the NGO community that things were changing.

2. *Financial Risk Management*

Subjects across the occupational spectrum also mentioned banks' financial reasons for joining the EPs. This discussion overlapped with the talk about reputational risk, as many subjects recognized that loss of reputation can have financial implications, both direct and indirect. Much of the talk was negative, focusing on the avoidance of various kinds of risk. In the words of a European banker, "the EPs are risk management." Another described the ultimate question in any particular project as whether the bank "has an appetite for that kind of risk." A third banker called the EPs "a good tool for categorizing and calculating risks that may be particularly salient given the long time-frame of infrastructure investment." And a fourth made an analogy to the subprime mortgage crisis, characterizing that as a failure to take sufficient account of social risk. He also predicted the evolution of an "environmental subprime" borrower category whose members would be deemed bad credit risks.

According to an executive at one of the first signatory banks, an "original motivation" was avoiding lender liability for superfund-type disasters. A project finance lawyer called it "fear of liability for dirty projects." A scientist who assesses environmental risk for an investment bank expressed the same (and clearly self-interested) view: she called the environmental exposure faced by lenders "real," "hard," "economic," and "quantitative," adding that "we turn down deals" for environmental reasons. These particular comments have interesting implications for the analysis of the EPs as an exercise in new governance: they suggest that the new governance (at least in this instance) complements rather than supersedes the old, and that "soft" law may be motivated by the shadow of the "hard."[10]

Others stressed the risk to the lender of not getting repaid. Since project finance loans are nonrecourse, meaning that they are to be repaid out of the revenues from the project, the bank is at risk if social or environmental problems shut it down. An NGO official noted that social and environmental risks can "set back the payment schedule," creating a "close tie" between economic risk to the lender and social and environmental risk on the ground. A socially responsible investment advisor emphasized this tie by describing the "credit people as quality control." The lawyer quoted in the preceding paragraph pointed to the EPs as a way of spreading the repayment risk, because the EPs covenants in the loan documents would allow the lender to seek full recourse from the sponsor in the event of an "EP misrepresentation." (As detailed in Section III.B.1 below, however, we have not heard of any instances of actual EPs defaults).

One banker was particularly sanguine about the revised version of the EPs (the EPs2), with their increased emphasis on social risk. As he put it, "everyone is focused on environmental risk, but those kinds of risk eventuate over a much longer period of time than do social risks. If the workers in a field walk away with the product or burn it because they are being treated badly, or if there is a labor shut-down, it can have immediate, short-term, demonstrable effects on the ability of the project sponsors to make good on their financial commitments to the bank."

In light of all this, we were struck by a comment from an international banker that "banks have surprisingly small departments to manage risk assessment." Consequently, she said, project finance is characterized by "outsourcing" of this function to consultants.

3. *Financial Incentives and the Elusive "Business Case"*

The views of our informants have been mixed on the existence and robustness of the affirmative business case for joining the EPs. Stating the skeptical view, a "responsible investment" advisor said unequivocally that, from an investor perspective, the business case has not been made: there are "associations" between social responsibility and performance, but no "causation" has been shown. A manager at a large European pension fund dissented slightly from this investor skepticism, concluding that "there is no single business case," but rather what he characterized as "company-by-company cases." A deal-making corporate lawyer presented yet another view, concluding that it is "very easy" to make a business case for social and environmental responsibility if you characterize it as a "long-term risk management strategy."

Along similar lines, we have heard considerable talk about the value of "branding" a company as socially and environmentally responsible, and the potential risks to such a brand. In a very broad statement of the issue, an international development official with a Western government argued that formerly it was an advantage "if you had corporate social responsibility, but now it's a disadvantage if you don't." A lawyer spoke of the EPs as a form of "political risk mitigation." A pension fund manager who had previously been a risk management consultant stressed that there is a financial element to reputational or "brand" risk, "not necessarily to the bottom line, but certainly to the value of the company." This risk might be realized not only because of participating in some disaster, but simply because "your peers are doing it" and you are not. Moreover, the noncompliant lender risks litigation (especially in the United States, she added) over failure properly to report social and environmental risk. Interestingly, the pension fund manager emphasized that "the language of risk" provides a *lingua franca* for discussing the general topic of corporate social responsibility with corporations and investors.

Four informants independently—and without prompting from us—made the unexpected point that the business case is stronger in emerging markets than in the developed world. An investment consultant commented that the business case is "a lot more clear-cut" in emerging markets, perhaps because their growth is driven by "Northern pension funds." An official at the IFC, whose standards provided the model for the EPs, said that making the business case is easier in the developing than the developed world. A Brazilian banker stressed that Brazilian customers are interested in their banks' social and environmental performance. And an international lawyer made a complementary point when he contended that the EPs are "self-interested" and "good for banks' business" because "as countries get richer, they value social and environmental goods more."

The same lawyer also pointed out that, regardless of whether any financial benefit accrues from EPs membership, the cost is low. He saw "no material impact" on a bank's business or volume. He acknowledged that there is some cost in the compliance procedures, but it is minimal. His comment left us thinking, why not join? Even if the affirmative business case and the risk-avoidance argument are inconclusive, why would a bank not take a virtually cost-free step that offers at least the potential of gain?

4. *Other Motives: "Soft" Factors*

Two project finance specialists with international law firms introduced us to this class of motives for joining the EPs. One contended that the banks' original motive was a soft one: "I want to be a good citizen." EPs compliance offered "good PR," good corporate citizenship, and "protection against being on the wrong side of the wrong issue."Financial concerns evolved later, he concluded. Both lawyers characterized the EPs as part of a larger trend. The first spoke of a "groundswell," while the second spoke of a huge "cultural" change in the ways that companies analyze projects. The latter does not believe that the EPs are "making banks greener" but that they are a part of a "general greening of business." This lawyer talked at length about having grown up in an era of environmental consciousness, noting that the people making decisions now have a "different worldview than the guys sitting across the table twenty years ago." He stressed, however, that this consciousness also has a hard financial side, calling the EPs "self-interested" and "good for banks' business."

Others emphasized the role of "internal champions" at signatory banks, powerful and persuasive executives who believe in corporate social responsibility generally, and the EPs in particular. An NGO activist said that different EPs banks had different motives. In the case of two of the world's largest banks, it was a matter of "the right guy at the right time." As a project finance lawyer put it, "once management at the highest level is on board, the rank and file get on board."

An international banker had a somewhat different perspective on soft motives, focusing on the sponsors' (borrowers') perspective. She contended that sponsors "want to give something back" by investing in local communities. Contrasting this with the lending banks' risk management concerns, she reiterated, unprompted, that the sponsors "sincerely" want to do the right thing.

B. DO THE EPs MAKE ANY PRACTICAL DIFFERENCE?

This is the second topic that we have raised in every interview. Our informants have been sharply divided in their views of how much difference the EPs make on a practical level. Some see major, material impact, whereas others see mere window dressing or, in a few cases, more harm than good.

1. *The Optimistic View*

Not surprisingly, one of the most enthusiastic endorsements of the EPs' efficacy came from the head of the sustainability office at an international bank, whose career would be served by the success of the EPs; he described the previous five years as "a huge achievement." A European lawyer echoed these sentiments, calling the work of the EPs "quite remarkable" and "amazing," moving social and environmental issues "from the back room into the boardroom." And two scientists who do EPs evaluations for different organizations both used the same phrase to characterize the EPs' impact: "sea change."

Some optimists focused specifically on effects on the locales where EPs projects were conducted. A U.S.-based international lawyer said that adherence to the EPs "definitely raises the consciousness of local politicos"; these people "want to tell the populace it's good economically *and* not harmful to the environment long-term." An executive at a European bank said that she was "very, very pleasantly surprised" by local reactions, that "we haven't seen local opposition," and that such problems as there were "usually arose from lack of information." Those "communication problems," she observed, were sometimes overcome by expedients as simple as broadcasting information over the radio in places "where people didn't watch TV." This individual also believes that the EPs have been "both cause and effect" of changes in banks' sensitivities, but the EPs are "clearly the driving force" and have made a "big difference on the ground." Another international banker, echoing a theme we heard repeatedly, emphasized another aspect of information: the "biggest impact of the EPs is spreading knowledge" so that project "sponsors know what to expect."

A number of informants commented on the impact of the loan covenants that threaten default in the event of EPs noncompliance. No one could cite an instance of a loan going into default as a result of an EP's breach, but we heard repeated references to hard-nosed negotiations. A London-based international lawyer said that while the covenants can be "a bit glib," suspected breaches yield "grown-up discussions between lenders, sponsors, and NGOs." She also made the interesting point that the value of the covenants will become clearer when we have some "common law," or at least shared understandings, about just what particular language means in practice. A U.S.-based project finance lawyer believed that the covenants do have "teeth" because an "EP misrepresentation turns [a nonrecourse loan] into full recourse." He said this "*has* happened," though usually "behind-the-scenes negotiations play out." An IFC official stressed the importance of wanting to avoid becoming an "unclean bank" as a result of broken covenants; consequently, "you use the threat [of declaring a default] to negotiate."[11] But this same official said that it was "not clear" whether any projects end up not getting done because of social and environmental issues.

Even if no loan defaults have been declared, we did hear about banks "firing" recalcitrant sponsor-clients. The first response to a foot-dragging client, according to one international banker prominent in EPs circles, is to "engage, engage, engage." When that fails, the last resort is "ultimately and reluctantly to disengage" from further business with that client. The same banker told of a two-year effort to improve the sustainability of a Southeast Asian client; it failed, and bank and client are "parting company." Ominously, perhaps, the client has taken its business to a local bank.

2. *The Skeptical View*

The most vivid statement of the skeptical view that we have heard was made by the head of a sustainable investment organization, who characterized the EPs as "total B.S." He said that the EPs program "fails" because of its "compliance approach": "compliance is the enemy." His subsequent comments indicated that he was referring to the EPs' focus on following a process rather than meeting substantive standards; a banker referred to this as "process, not criteria." Others, especially in the banking community, identified problems with free-riding, with unidentified banks claiming credit for joining the EPs and then either doing no project finance or making lukewarm compliance efforts. An executive at a signatory bank acknowledged that there are "no sanctions against non-performers" (the context indicating that he meant free-riding signatory banks) but emphasized that "individual banks should be criticized, not the EPs."

NGOs, according to one environmental activist, have "never been crazy about the EPs." The NGO critique has consistently emphasized a few themes. Most prominent is the lack of "transparency" and "accountability." The most often-cited manifestation of this problem is that the EPs standards require only cumulative reports and nothing about individual projects. Instead, information about specific projects is cloaked in what another NGO representative derided as "famous client confidentiality." With no case-specific information in the public domain, according to this same source, it is very difficult to measure success. He also made the subtle but significant point that the EPs exist only in English, and in a "banking text" at that. (This person speaks fluent English as a second language.) Consequently, he believes, the EPs are not communicated to their presumed beneficiaries in a "structured, culturally appropriate way." Others affiliated with NGOs also criticized the EPs (at least EPs1) as focused almost exclusively on local environmental impact and thus weak on human rights, social effects, and climate change.

3. *The Agnostic View*

Many of our informants are unsure about the EPs' efficacy, at least for now. An NGO activist characterized them as "important" but saw only a "limited commitment" on the part of participating banks. An environmental activist was somewhat more generous, calling the banks "sincere but constrained" and seeing the emergence of "constructive forces." The first NGO informant saw the overall impact of the EPs as "doing things better" but "not stopping things." A number of subjects echoed the comments of the environmental activist who said that it is "too early to tell" whether the EPs are leading to better outcomes. A project finance lawyer from a large U.S. firm said that the future of the EPs "depends on the overall state of the global economy," since "environmentalism is a rich man's game." In his view, "the best thing for third world environmentalism is wealth creation," and the greatest enemies of environmental progress include "recession, protectionism, and a fight for capital"—not a hopeful message in the current economic climate. Finally, a prominent international banker introduced a theme we explore more in Section III.E below: the belief that "the next thing is to get major [credit] providers at the national and local levels into the EPs."

C. THE EPs AS NEW GOVERNANCE

We have regularly posed the issue of the EPs functioning as a form of regulation, and a few of our informants have done so on their own. We have been specifically interested in the notion of the EPs as a form of regulation by parties that are accustomed to being regulated, an exercise in new governance. We have wondered about whether such self-regulation has a preemptive effect on the development of "real" regulation as well as the broader question of whether reliance on the EPs might cause promising local institutions to atrophy.

Our interview subjects were in general agreement with the international banker who described the EPs as an appropriate substitute for "hard" regulation in places where "regulations are not robust," either on paper or in practice; he cited the example of Nigeria, which has "EPA-style regulations but doesn't enforce them." In response to a question about the impact of the EPs on the development of law in host countries, he pointed out that local groups in such countries often seek out EPs banks as "part of the process of education and engagement," which will aid in the development of standards. As an international lawyer put it, the EPs process does not preempt local government regulation, but rather "pulls you up to U.S. and EU standards." Another lawyer described the EPs' soft-law approach as a necessity: it "had to be an industrial [private-sector] initiative, because [developed world] governments can't impose rules on sovereign nations—government solutions wouldn't have worked."

Here, too, there was some agnosticism, if not outright skepticism. A representative of an environmental NGO acknowledged that hard standards are better but argued that they are "difficult in an international environment." She also said that "standards development is good" but could not say whether affected communities were better off as a result. An investment professional made a similar point somewhat more optimistically, seeing the possibility of the "development of harder norms through soft law." The most negative comments we heard came from the same international banker whose positive remarks introduced this section. Later in the interview, he expressed the concern that "regulatory floors become ceilings." He also made the striking point that when the developed world imposes standards on developing countries from which it sometimes exempts itself, there is a danger of the process "smacking of post-colonial imperialism."

D. INVESTORS AS REGULATORS?

The preceding section raised the issue of banks, a form of enterprise that has historically been highly regulated, emerging as de facto global regulators. A related topic that a few of our interview subjects raised was the potential "regulatory" role of investors. Our subjects have been sharply divided on whether investors, especially those of the institutional variety, have the willingness and ability to police banks' compliance with the EPs. This is a specific instance of a longstanding and more general debate over the role of investors in promoting corporate social responsibility by voting with their money.

As noted earlier, much of the potential for investor involvement derives from the risk-avoidance function of the EPs. Investors and bankers share "the language of risk as a *lingua franca*" for talking and thinking about the EPs. In the positive view, as expressed by an environmental risk manager at a large investment bank, investors eventually "will integrate extra-financial information (environmental, social, governance)" into the "realization of a risk-return profile." Presumably, this means that investors will view banks with fewer environmental and social threats to their loan portfolios—that is, EPs-compliant banks—as less risky and reward them with their capital. In addition, there is a belief that socially responsible investors (SRIs) will pay close attention to the details of banks' behavior because they may be disproportionately invested in banks; according to an environmental activist, SRIs "found themselves with bank stocks after screening everything else out."

But there is a contrary view, expressed most strongly by an international banker who focuses on sustainability issues: "Reality can't change because of investor pressure." In the more modest phrasing of a pension fund trustee, there is "a lot of work to be done" before investors will materially influence banks' behavior. Among the problems is what an SRI advisor to pension funds called "market failures," that is, "short-term incentives for fund managers"and therefore "no incentives for engagement." In other words, because socially and environmentally responsible behavior is likely to reap a financial award only in the long term, investment managers who are judged quarter by quarter have no reason to consider it as they evaluate companies. A representative of a "progressive" corporate think tank captured the problem most succinctly: "markets don't define 'success' correctly."

In addition, we heard repeatedly about the need for disclosure of social and environmental risk in a way that makes sense for investors: "disclosure in a standardized way," "quantification," and "metrics." Evidently, even if risk is a *lingua franca*, its social and environmental vocabulary is still impoverished. And others who are even more skeptical recognize this communication problem but doubt that solving it will change investor behavior. A sustainable investment consultant (speaking contrary to his apparent self-interest) described himself as "less sanguine about the market information solution." "Isn't this stuff known?" he asked rhetorically. Pointing to the example of the subprime crisis, he concluded that "investors are dumb."

E. THE CHINA/RUSSIA PROBLEM

The biggest threat to the EPs, according to our subjects, derives from the fungibility of money: a "dirty" bank's money will fund a project just as well as a "clean" bank's. On the dirty side, the chief culprits are Russian and Chinese banks, which were, and may be once again, awash in cash. Since they do not generally adhere to the EPs (one Chinese bank, Industrial Bank, has joined the EPs (Aizawa and Yang 2010)), they present a no-questions-asked alternative for both domestic and foreign projects that are likely to fail the EPs test.

Three different informants—two sustainability specialists at EPs banks and a representative of an environmental NGO—cited the Three Gorges Dam in China as a prime example of what they all called the "money is fungible" problem. One of the bankers emphasized that China and Russia "don't need international money anymore" and that "their projects get funded anyway." According to the other banker, Three Gorges was "financed entirely with China's internal reserves." The first banker pointed out that even when international money is needed, China can "strip money from schools" to fund a dirty project, then borrow for the schools; or, as the environmental activist pointed out, the China Development Bank can sell bonds and fund dirty projects with the proceeds.

None of our informants saw any prospect of Chinese and Russian banks becoming EPs-compliant. According to one of the bankers just quoted, "Chinese banks are *not* signing up"; he has "yet to see a social policy of a Chinese bank." In his view, China's "big banks are essentially policy lenders at the discretion of the government." While the Chinese government now "recognizes the huge cost of pollution," at least in economic terms, social and labor issues are "much harder to address." An official at a government export bank summed it up: there is "no evidence of Chinese and Russian banks moving toward the EPs." Chinese banks, as "policy lenders," may be becoming more active in sustainability initiatives, as discussed by Aizawa and Yang (2010), because the Chinese government is incorporating environmental targets in their most recent five-year plan and experimenting with market mechanisms to reach those targets. To date, however, whatever policy interests Chinese banks have in sustainable banking have not generally led to engagement with the EPs.

IV. CONCLUSIONS

The major themes that emerged from our interviews included the following: the related roles of NGO pressure and risk management, broadly defined, in motivating the EPFIs to form the EPS; the tangible efficacy of the EPs on the ground; the significance of the EPs as an exercise in devolved "soft law," or new governance; and the ultimate meaning of the EPs in light of the availability of dirty money in Russia and China. The interview data related to these themes shed light on questions already posed by the theoretical literature (and reviewed in Section II above) while also raising new and challenging practical questions. In these concluding remarks we comment on each of the major themes and then raise some issues for further research.

On the question of why banks participate in the EPs, the consistent answer has been in response to NGO pressure, real or threatened. This master narrative of responding to NGO pressure is supportive of the business literature's hypothesis that reputational risk management was a leading factor in the creation of the EPs. The explicit focus on NGOs as a—if not *the*—major agent of change is novel, although consistent with the anthropology literature's characterization of NGOs as significant intermediaries in global economic processes. If one is concerned about real-world impact, the NGO story is good news and bad: good, in the sense that banks do respond to NGOs; but bad, in that it suggests that the EPs may be a cynically calibrated public relations gesture on the part of the banks. Moreover, to the extent that NGOs are essential cogs—the critical "gluing" factor (Schuller 2009)—in the machinery of contemporary governmentality, our findings raise concerns about democratic accountability (cf. Vannier 2010).

The prominence of NGOs in our interviews also raises the related—indeed inseparable—issues of voice and transnational elites (Merry 2006). At almost every turn in corporate social responsibility practice, including the EPs project, someone else speaks for the local communities that are its presumed beneficiaries. These communities are extraordinarily diverse. They include resource sites in the developing world, emerging-economy locales to which manufacturing is outsourced, and places in the developed world that used to host the outsourced facilities. Most often, such communities are spoken for by NGOs. These NGOs may have local connections, but in most cases it is only the well-known transnational brands that can get the attention of multinational corporations.

The issue of voice is especially salient in the analysis of the EPs. EPFIs require companies seeking loans for major projects to commission environmental and social impact assessments. These are typically contracted out to consulting firms that employ a range of experts from engineering to anthropology. It is also common for major NGOs to be invited in as watchdogs. The voices of affected individuals, even if they are heard in the first instance, must survive several layers of interpretation and reporting by these representatives of transnational financial and knowledge elites (Li 2005).

As new governance critics point out, and as NGO representatives readily acknowledge, this reality raises profound questions of legitimacy and accountability (Parker 2002). Do particular NGOs get selected to "engage" with corporations because of their ability to give legitimate voice to otherwise powerless interests? Or is it because the corporations value their recognizable brands and trust them not to behave too badly? And if NGOs do become complicit in greenwashing, who will know? Who is watching the watchdogs? It may be that "authentic" mid-level institutions will emerge (compare Schuller 2009 and his notion of NGO intermediaries), local enough to "speak for culture" yet with enough transnational clout to be accepted by companies as engagement partners. But at this stage in the history of corporate social responsibility generally, and the EPs in particular, the practical answer may be that there are no obvious alternatives to the current state of affairs.

On the next theme, our informants believe that the "business case" for the EPs remains uncertain, a response that we have heard throughout our broader corporate social responsibility research. Most directly, some of our informants expressed fear of a "superfund"-type environmental disaster with attendant financial liabilities, which adherence to the EPs could help avoid. In addition, there does seem to be an emerging consensus that the EPs are significant to the banks as a strategy for minimizing a variety of potentially material risks—reputational, financial, or both. Specifically, many of the comments made in the interviews are consistent with the business literature's suggestion of the financial dimensions of reputational risk. As we heard, the reputation-finance connection can assume many forms: a valuable sustainable brand can be impaired or lost, a bank can lose ground to its competitors on a differentiating factor—social responsibility—that some market segments value, or socially conscious investors—allegedly a growing group—will go elsewhere. But it should be emphasized that despite the inherent plausibility of these claims, our informants were generally guarded in making them.

We have heard no consensus on whether the EPs are making a substantial tangible difference on the ground, in the local communities they are intended to benefit. The global NGO paying attention, BankTrack, states unequivocally that they are not making a difference (BankTrack 2010), and academics evaluating the NGOs' involvement with the EPFIs paint a picture of increasingly frustrated NGO expectations and a deteriorating relationship (O'Sullivan and O'Dwyer 2009). Bankers, when queried, see the development and dispersion of the EPs procedures throughout global banking and the attention to social and environmental issues within individual banks more favorably, even if—and as—projects go forward that NGOs would label unsustainable (Haack, Schoeneborn, and Wickert 2010; Macve and Chen 2010). There does seem to be agreement on the more modest proposition that they are doing no harm and may be doing some good by raising awareness of the impact of project finance. They may also have a longer-term impact by changing "cultures" within banks, although it is unclear which way the arrow of causation points. Our informants' ambivalence on these issues is consistent with the equivocal results of the modest quantitative research on the EPs' efficacy that is currently available. Taken in conjunction with our informants' views on EPFI motives, their ambivalence is also consistent with the specific finding that the apparent environmental benefits brought about by the EPs may be a byproduct of the participating banks' risk-management strategies (Macve and Chen 2010).

A third major issue is the EPs as an exercise in neoliberal governmentality, or new governance. As already noted, the role of NGOs as new governance agents is especially prominent and is both promising and problematic. Most other major themes in the new governance literature are illustrated in our interviews, including the assumption of state-like functions by private actors, often with the encouragement, or at least the acquiescence, of the post-regulatory state; the tensions between hard law and soft norms; and the importance of private transnational networks in the development and administration of soft law.

On a practical level, our informants generally see standard setting as good, especially in a transnational arena where hard law is difficult (if not impossible) to apply. But there is concern about soft-law floors becoming ceilings and about the impact on nascent local institutions. Our subjects have also discussed the regulatory role of investors, and here, too, the views are mixed. The corporate social responsibility movement has long held out enlightened institutional investors as important sources of pressure toward higher standards of corporate accountability. Some say that we need only more precise reporting, better social and environmental metrics. But one must give some credence to the skeptical informant who asked, "Isn't this stuff known?"

The final issue may be in a practical sense the most important: is the EPs project rendered largely moot by the availability of dirty money in China and Russia? Given the obvious salience of this question, it has become a high priority as we go forward to gather more data and solicit more views on this issue.

As we contemplate future work, by ourselves and others, we are especially interested in two major themes that blend the practical and the theoretical. What is the effect of the EPs on the ground, on the communities that are meant to benefit from its protection? And what is the effect of the EPs on government and governance? Another way of putting these questions is to ask: are the EPs doing more harm or good? In new governance terms, what is the impact of soft-law initiatives like the EPs on the nation-state? Even rich, stable, and powerful Western states seem to have limited ability to control the behavior of multinational corporations and, more generally, global capital—or, to be more precise, these states have not shown great willingness to attempt to control the extraterritorial activities of their firms. Nation-by-nation jurisdiction over corporations is diminished as tangible assets are sent offshore, and wealth derives increasingly from evanescent intellectual property. At the same time, treaties and international law not backed by the threat of force are no more effective than they have ever been.

The EPs project may be a perfect fit for this hard-law vacuum. To the extent that it is perceived to be a meaningful response to social and environmental problems, it dissuades governments from even the effort at regulation. As a devolution of regulatory power to the formerly regulated, it accords well with the currently ascendant theory of new governance. And to the extent that activities like the EPs are persuasive to consumers, they may also serve to head off market discipline of irresponsible banks, however unlikely that may be.

This skepticism is not to condemn the EPs out of hand, though. The project remains a work in progress. At its best, it promises a lending decision-making process in which managers think and talk openly about social and environmental issues and then tell the world what they did and why. Moreover, it may lead to the inculcation of worthwhile values across the banking system. Alternatively, the project could turn out to be more valuable to the banks as a public relations approach, in which banks perform certain prescribed rituals but continue to do business as usual. But if the effect of these rituals is to co-opt critics, preempt regulation, and mislead consumers, then it could be worse than business as usual (Sadler and Lloyd 2009).

We are at this point guardedly optimistic that the eventual outcome will fall at the positive end of this spectrum. Our cautious optimism is rooted less in theory than in hard-nosed market realities. When banks are profiting from other peoples' risk, they exacerbate the instabilities of modern financial markets. But when banks are operating with their own risk—when it is clear that they could be financially affected by future risk scenarios derived from social, environmental, human rights, or political sources—they can exercise a moderating effect on the most destructive aspects of unconstrained finance and development.

NOTES

1. According to a banker we interviewed who was involved in their creation, the name "Equator Principles" was chosen because the Equator circles the middle of the Earth, and these were viewed as moderate, middle-ground principles.
2. The EPs themselves and the list of signatories are available at http://www.equator-principles.com.
3. At this point HSBC—the winner of the *Financial Times*' first Sustainable Banking award in 2006—provides perhaps the clearest example of these developments. It issued its first Environmental Risk Standard to use in evaluating loans in 2002, before it joined the EPs in 2003. Since then, HSBC has taken such steps as extending the EPs assessment process across product groups. These developments can be tracked on HSBC's sustainability Web site, http://www.hsbc.com/1/2/sustainability/.
4. EPs textual material is quoted from the EPs Web site, http://www.equator-principles.com.
5. We tell the story of the German bank West LB, a German bank, an original EPs signatory that does not have a strong retail presence, in Section III.A.1 *infra*.
6. Many social scientists stress the difference between governance and governmentality (e.g., Sending and Neumann 2006), defining the latter as in the text and the former in a narrower and more concrete sense as the activity of governing. However, the sources quoted in the text (as the quotes indicate) tend to use the two terms in overlapping ways and to treat the emergence of a "new sort of governance" as an evolution in the direction of governmentality.
7. We say "about half" because in some instances we had a relatively brief in-person discussion as well as a lengthier telephone interview.
8. Once again we give a rough number because some people spoke publicly on multiple occasions and there were dozens of instances of brief—yet informative—comments from the floor following a panel presentation.
9. All quotations from interviews and events that we have attended are taken from the authors' field notes. Although we did not promise confidentiality or anonymity to our informants (a few of them requested anonymity or off-the-record treatment for certain topics, requests that we have honored), we have chosen not to name our sources unless (1) we are quoting comments made in a public venue such as a conference and (2) the speaker's identity is relevant to the interpretation of the statement.
10. But there is growing legal evidence that banks' concern about "hard" liability may be misplaced. Several recent decisions, most prominently that of the U.S. Court of Appeals for the Second Circuit in *Kiobel v. Royal Dutch Shell Petroleum Co.* (2010) made it more difficult for plaintiffs to use the U.S. federal courts to sue

corporations for human rights abuses abroad under the 1798 Alien Tort Statute (Gibeaut 2011).

11. Using potential defaults as an opportunity to renegotiate rather than as an opportunity to invoke contractual dispute resolution mechanisms is typical of commercial lending relationships generally, as a number of bankers emphasized.

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