

INFRASTRUCTURE:

Doing What Matters

*Third in a series of papers, the first titled
'Infrastructure: Defining Matters' and the second titled
'Infrastructure: Deciding Matters'.*

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ABBREVIATIONS

Asian Development Bank (AsDB)
Broad Community Support (BCS)
Development Finance Institution (DFI)
Civil society organization (CSO)
Economic Rate of Return (ERR)
Environmental & Social (E&S)
Environmental, Social, and Governance (ESG)
Environmental and Social Impact Assessment (ESIA)
Environmental and Social Assessment Documentation (Assessment Documentation)
Environmental and Social Management Plan (ESMP)
Environmental and Social Management System (ESMS)
Environmental and Social Risk Management (ESRM)
Equator Principles (EP)
Equator Principles Action Plan (AP)
Equator Principles Association (EPA)
Equator Principles Financial Institution (EPFI)
European Bank for Reconstruction and Development (EBRD)
E&S due diligence (ESDD)
Financial Intermediary (FI)
Financial Rate of Return (FRR)
Free Prior Informed Consent (FPIC)
Independent Evaluation Group (IEG)
Infrastructure-Related Enterprise (IRE)
International Finance Corporation (IFC)

- Asset Management Company (AMC)
- Development Outcome Tracking System (DOTS)
- Environmental and Social Action Plan (ESAP)
- Environment, Social and Governance Department (CES)
- Environment, Social and Governance Department Sector Leader (SL)
- Environment, Social and Governance Department Regional Leader (RTL)
- Environmental and Social Annual Monitoring Report (AMR)
- Environmental and Social Review Procedures Manual (Manual)
- Guidance Notes on Performance Standards on Environmental and Social Sustainability (Guidance Notes)
- Interpretation Note on Financial Intermediaries (FI Note)
- Investment Review Meeting (IRM)
- Investment Support Group of CES (CESI)
- Lead Environmental and Social Specialist (LESS)
- Policy on Environmental and Social Sustainability (Policy)
- Social and Environmental Performance Report (SEPR)
- Summary Investment Information (SII)
- Support Environmental and Social Specialist (SESS)
- Performance Standards on Environmental and Social Sustainability (PS)

Informed Consultation and Participation (ICP)
Inter-American Investment Corporation (IIC)
International Labor Organization (ILO)
Multilateral Investment Guarantee Agency (MIGA)
Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V. (FMO)

Non-governmental organization (NGO)
OECD Guidelines for Multinational Enterprises (OECD Guidelines)
Overseas Private Investment Corporation (OPIC)
Social and Environmental Management System (SEMS)
Stichting Pensioenfonds ABP (ABP)
United States Treasury (Treasury)
World Bank Group (WBG)

INTRODUCTION

At the core of our paper *Infrastructure: Defining Matters* was the notion that a proper understanding of what “infrastructure” means is critical not only for those who make decisions as to whether, on what terms, and in what ways investments in infrastructure might be made but also for those whose lives and livelihoods – on an individual and collective basis – are affected or intertwined with those decisions. The definition we offered was one which focused on people; their individual and collective needs with a central concern with their ability to thrive in the society in which they live and as they would have that society be; the diverse ways in which it “looms large”; and with an eye less to the structures and facilities typically associated with infrastructure and more to the (infrastructure-related) enterprises, the human undertakings organized in diverse ways to meet those needs. Given our ultimate interest in providing a resource for pension fund investors we formulated what we viewed as a useful narrative (informed by that understanding) by which “any potential investment in an [infrastructure-related] enterprise and its calculus of financial risk and reward are ultimately linked through a chain of factors to the particular infrastructure-related goods and services that are produced and the means for doing so.”¹ Not surprisingly that chain included both considerations relating not only to staff at the enterprise level as well other key suppliers and providers of highly inter-related services to that enterprise but also those individuals or groups who might be viewed as non-enterprise stakeholders.

In our next paper, *Infrastructure: Deciding Matters*, our aim was to translate the foregoing formulation into more practical terms as it related to pension fund investment decision-making. More particularly it sought to offer a critical though constructive analysis of that process as defined by a leading U.S. public sector pension fund both in terms of the chain of factors discussed in *Defining Matters* and of the actual investments which that fund made, with an emphasis on the infrastructure-related enterprises which were represented in its portfolio. Among that fund’s statement of strategic objectives for its infrastructure investments was a commitment to “responsible investment.” Although it was articulated there in terms of responsible labor and environmental practices, the overall parameters the fund set for its decision-making encompassed the wider range of considerations referred to at the end of the preceding paragraph.

In this paper our goal is to press the conversation about such considerations further. That is, not only in the case of that pension fund but also more generally, pension funds and other investors with similar commitments frame them in relatively general terms, not infrequently with references to broad-gauge formulations of organizations in which they participate which seek in certain ways to aid one another in the advance of those commitments. However, despite such efforts there has been, in our view, a lack of relevant and useful literature which explores in a serious and thorough-going way what are the relatively “hands-on” tasks which must be performed well (enough) which offer a realistic prospect of meeting those obligations. It is the goal of this paper to contribute to that literature, building on the ideas and narratives of our preceding two ones.

In particular, this paper has three main parts. The first, shorter segment considers whether pension funds’ decisions to invest in and their relationship to infrastructure-related enterprises should be made in light of their consequences not only for the lives and livelihoods of those who are users or customers but also for those who might otherwise be affected by their operation. In this paper our focus is on those consequences which are frequently framed in “environmental and social” terms. Not surprisingly, we survey the arguments grounded in what is understood to be fiduciary duty. However, we will look not only to other contentions which might be grounded in law but also those within the shadow or penumbra of law as well as still others that derive from the real-world social, political, and other environment in which pension funds may operate.

The second, longer part of this essay presupposes that for one or more of the reasons articulated in the first section, pension funds have concluded that their decision-making process must take account of the kind of impact of enterprises' behavior referred to above. Assuming so, in the remainder, we turn to how pension funds might proceed in those terms. One aspect of that concerns standards or criteria according to which pension funds characterize and assess the consequences and the general nature of the actions to which they are committed and the enterprises in which they make investments are committed to addressing those consequences.

However, that pension funds (or other investors) might have settled on standards, criteria, etc. of which to take account or apply does not imply that they are necessarily in a position to do so successfully. In some measure that is a matter of the nature and strength of the fund's commitment to the task. But is also especially one of the systems, processes, capacities, resources, etc. which they have in place to ensure fulfillment of that commitment, an aspect to which we give considerable attention. Moreover, the reality is that pension funds frequently delegate the execution of significant responsibilities to others. So there are important questions we explore as to the capabilities of delegates to fulfill that commitment *and* the means by which the fund is informed about and holds them accountable for performance of the duties they have assumed.

For the most part the subject matter of the second part of this paper is relatively uncharted territory for many pension funds, especially ones in the United States. However, there are other institutions for whom financial considerations not unlike those of pension funds loom large (or even very large) which are already well-traveled on that landscape. We have in mind particularly, international development finance institutions (DFIs), for example, the International Finance Corporation (IFC) and somewhat similar national ones like the U.S Overseas Private Investment Corporation (OPIC) as well that of the financial institution signatories (EPFIs) to what are termed the so-called Equator Principles (EP).² We believe there is much to be learned from that experience. However, we draw on it aware that these and similar institutions have different organizational goals and legal and other constraints within which they operate and that such commitment as they have to attending to the kinds of impacts referred to above and what they can bring to bear in pursuing it are informed by those goals and shaped by those constraints.

With the foregoing in mind, with respect to the second part we first explore in some depth the standards which the IFC and EPFIs (through the EP) have embraced with an eye not only to the formal articulation of them but also to the organizational goals and values or concerns which they embody and possible tensions between or among them which are ultimately manifest in practice. We follow with an exploration of a large pension fund which adopted a particular understanding of being responsible for infrastructure, among other of its investments. We then turn to a detailed review of the policies, procedures, and practices over each major stage of the project investment cycle in terms both of how they are described "on paper" and of what we have been able to learn about how they have been translated into practice. In the latter regard we offer a cautionary note: that for a variety of reasons, a number of which might well be warranted, transparency on the part of such organizations or institutions comes at a premium so in some respects our observations or findings might best be viewed as suggestive. However, we nonetheless believe that they can establish a basis for further inquiry and even better-grounded understanding.

These sections are followed by a review of some of what we term as important "cross-cutting issues", ones which play out cross investors, for example, the matter of the relationship between how environmental and social considerations are addressed in investments and the financial performance of those investments. There then follow three sections, each with a special focus. One pertains to a vehicle for infrastructure investment recently created by the IFC to afford

pension funds a means to invest in a way which piggy backs on the ostensible capabilities of the IFC as an investor with extensive experience in taking account of environmental and social considerations. Another takes an in-depth look at practice relating to implementation of one aspect of standards involving social considerations, namely, labor-related standard. Third, drawing on the relatively greater transparency of the large Dutch pension fund referred to below we offer some insights into how it goes about translating its commitment into action.³

The last part of this essay represents our effort to distill from the preceding, a series of “lessons learned.” That is, it offers recommendations or suggestions to pension funds as to what they might need or want to think and then, what they might need or want to do should they choose to adopt standards relating to environmental and social considerations and, in turn, pursue a serious-minded effort to assure that those standards are met. We emphasize “serious-minded” because, as we think the following pages will suggest, achieving sufficient success in those terms is no mean task. That being said, though, the task well enough done can offer great benefits to both pension funds and those whose interests the standards ostensibly recognize and in some measure aim to protect and advance.

In principle the narrative of this essay pertains to all countries because in every one of them there are inevitably challenges with import in environmental and social terms, to be addressed. That being said, in certain ways and for a variety of reasons those challenges may be more complex and demanding in what are termed developing countries, some of which have more recently been labeled as emerging market (or perhaps frontier market) countries. The very fact that the IFC (and other DFIs) and EPFIs have the experience they do on environmental and social standards is an artifact of the investments they have made in those countries; conversely, pension funds’ involvement with such countries has on the whole at this stage been rather modest, so we hope that this essay will be of help to those funds should they choose to expand their investments there.

Taking account of environmental and social considerations: why?

This paper is informed by the premise – and contention – that it is legitimate and important for pension funds seriously to consider whether they should take account of environmental and social considerations (among other ostensibly extra-financial ones) in their investment-related decisions. Here we will in some measure detail the grounds for that premise and contention. However, as we briefly describe below, a good number of pension funds and other institutional investors have already come to concur with that contention. For them, the next practical and crucial task is how, in fact, they should go about making investment decisions consistent with it. That will be the primary focus of this essay.

The *universal owner rationale* starts from the proposition that many institutional investors, especially pension funds, are “universal investors.” That is, they “are so highly diversified, often explicitly or implicitly relying on indexing as an investment strategy, their returns and consequently their ability to meet their fiduciary obligations to their beneficiaries depend to a critically large extent on the performance of the economy as a whole.”⁴ In addition, “because these institutional investors hold a portfolio that represents the entire market, their portfolio will internalise both positive and negative externalities. Therefore they should have a natural and compelling economic interest in the performance of the economy as a whole. In principle, this should make them strong supporters of systemic reforms that improve the functioning of the economy at large.”⁵

This kind of argument has been linked to another one, a *long term investor rationale*.⁶ One version of this view is that “[t]he long-term nature of pension liabilities and tendency of environmental,

social and governance (ESG) factors to play their greatest role in the performance of businesses represented in pension fund portfolios over the same period creates a strong link between them.”⁷

A somewhat related yet distinct claim embodies an *intergenerational equity rationale*. Here, the assertion is that “[t]he [fiduciary] duty of impartiality assumes competence with respect to long-term value creation and risk mitigation.” That is “a deliberate balance should be struck between mission and risk-adjusted returns, including related opportunity costs. Fiduciaries must ensure that their decision-making processes balance allocation of capital between near-term needs and future wealth creation and consider the potential transfer of risks between participant generations. Intergenerational wealth maximization requires active consideration of a range of factors beyond narrow financial criteria.”⁸

A somewhat different contention might be termed the *more rational investor rationale* which operates more at the enterprise or transactional level (as compared to the economy-wide level). That is if we understand the rational investor as being as one pursuing the maximum risk-adjusted return in ways in accord with the narrative in which the Efficient Markets Hypothesis, Modern Portfolio Theory, and the Capital Asset Pricing Model are typically embedded, the more rational one is simply doing a better job of it. In other words, the notion is that “it `doesn’t pay” to harm others and it does pay to consider positive environmental and social impacts. Sustainable and responsible practices can help portfolio performance because doing harm hurts companies’ reputations, incurs legal liabilities, and proves short-sighted in the long run and conversely because positives enhance customer loyalty, attract quality employees and help ensure long-term viability.”⁹

Other kinds of assertions implicate what might be termed a *social license rationale*. One variant pertains to a *reputational risk rationale*. Here the concern would be that an enterprise in which the pension fund has a stake is associated with or has been involved with behavior widely viewed by members, some broader public, or key governmental or other players as so abusive, wrongful, or otherwise highly problematic on ethical or legal grounds as to warrant condemnation and at the extreme, to justify challenge from within and/or adverse action against the fund from without.¹⁰

This kind of rationale has a negative character insofar as the justification for action typically arises from the occurrence injury or harm to individuals, groups, or communities. A related but arguably more positively framed one might cast as the *norm example rationale*. Here, for a variety of reasons, private organizations or entities have through voluntary action formulated standards of conduct for enterprises or perhaps even certain kinds of investors which have secured the attention and approval of significant segments of the larger community. Alternatively, governments or quasi-governmental agencies have endorsed these or other such standards or perhaps even further encouraged compliance with them by enterprises (and/or investors). The example of enterprises (and/or investors) in accepting and being willing to act in accord with those standards helps create expectations for or legitimacy for others to follow suit. We discuss examples of the foregoing below. In APPENDIX A (CASE IN POINT: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND THEIR RELEVANCE FOR INVESTORS IN GENERAL AND PENSION FUNDS IN PARTICULAR) we illustrate in detail one recent and potentially significance case.

A different variant – what one might call a *functionality rationale* – is focused on the functional role of pension funds within the larger social context, often involving economic considerations. It arises from the impact on the enterprises of decisions to invest or not in those enterprises or the exercise such incidents of ownership as the fund may have by virtue of being an investor.

For example, there may be beliefs that pension funds are unwarrantedly short-term investors who directly – or through intermediaries – put pressure on or set expectations for senior executives (or perhaps board directors) which spurs them to make unproductive, wasteful, etc. or otherwise short-sighted decisions. Correspondingly there may be (and has been) action to change such pension fund behaviors not only just by transforming fiduciary duty from within – for example, by reinterpretation of what fiduciary duty means, requires, or allows – but also by imposition of additional or different duties on pension funds by law or regulation.

An illustration of this form of assessment is the so-called Kay Review which was commissioned by the UK Secretary of State for Business, Innovation and Skills “to review whether equity markets in the UK gave sufficient support these key objectives.”¹¹ The review was informed by the philosophy that “equity investment will serve the long-term interests of promoting economic growth in the UK, and the interests of beneficiaries taken as a whole. This can be achieved only if the dominant purpose is the location of the most rewarding source of long-term return, rather than the selection of the intermediaries who are most likely successfully to outwit other intermediaries.”¹²

That review found “that short-termism is a problem in UK equity markets, and that the principal causes are the decline of trust and the misalignment of incentives throughout the equity investment chain.”¹³ In that connection it observed that “[a]sset managers are mostly hired by other intermediaries – asset holders such as pension fund trustees and insurance companies, by other asset managers, or on the recommendation of investment consultants or independent financial advisers. The time horizons used for decisions to hire or review investment managers are generally significantly shorter than the time horizon over which the saver, or the corporate sponsor of a pension scheme, is looking to maximise a return.”¹⁴ Among other things, it concluded that there was a need to “[e]stablish high level Statements of Good Practice for key players in the investment chain – Asset Holders, Asset Managers and Company Directors” and “[i]mprove the quality of engagement by investors with companies, emphasising and broadening the existing concept of stewardship.”¹⁵

While the report found “wide agreement as to what the appropriate behaviour of trustees ought to be,...there was no such agreement on what the current legal standard of fiduciary duty is.”¹⁶ As a result it declared “a need to clarify how these duties should be applied in the context of investment, given the widespread concerns about how these standards are interpreted.”¹⁷ That subsequent inquiry, by the UK Law Commission, is now in process.¹⁸

Other approaches toward a different understanding of fiduciary duty might be seen as involving a *relationship* and *voice rationales*, that is, it must be understood in light of the distinctive character of the relationships in which the establishment and operation of the pension fund are embedded and in view of judgments as to the extent of the voice plan members might or should have in setting the standards according to which investment decisions are made.¹⁹

Relevance of the experience of other investors

We assume, in the following, that for one or more of the reasons detailed above, pension funds have concluded that they want to take into account in their investment-related decisions, considerations which may be associated with what may variously be referred to as extra-financial, non-financial, ESG, responsible investment, or sustainable investment (among other) ones. Although such a conclusion will likely have been reached with regard to any and all of their portfolio investments, our focus here is just on those investments in infrastructure. Further, while there are a range of extra-financial considerations which might come into play we largely consider

only those factors typically characterized as environmental and social (E&S) ones. Although many but not all considerations pertaining to labor and human rights might fall under what are termed social ones, we include them within the scope of our analysis.

Assuming the above, two issues are posed for pension funds. First, they must determine the particular standards or requirements for the conduct or behavior of the infrastructure-related enterprises which are the means by which those considerations are to be fully addressed. Second, they must settle upon what they will ask from enterprises to evidence and validate their commitment to meeting those standards or fulfilling those requirements and their capacity to do so.

In this regard pension funds need not start with a blank slate. As a general matter, there have been a wide range of financial institutions (among them some pension funds) which have taken up the task informed by one or another of the rationales or motivations described above. According to a recent survey such institutions include ones engaged in asset-based finance, capital markets (debt and equity transactions), corporate lending, insurance, and investment (listed and private equity, fixed income and other non-listed assets) who have seen the necessity for and engage in what has been termed “environmental and social risk due diligence.”²⁰

For the purposes of that survey their actions were characterized as an aspect of risk- based due diligence” as it “generally refers to the review and analysis of E&S risks undertaken prior to making a decision relating to lending, investing or the provision of other financial services to a client. However, this does not exclude per se processes in place to address adverse impacts, which arise after a decision has been approved to provide specific products or services.”²¹ “E&S issues as they have been defined for the purposes of this report (i.e. any potential or actual impact to the physical, natural or cultural environment, or on the surrounding community and/or e.g. workers) vary in the degree of severity, as defined for example, in the categorisation approach under the Equator Principles.”²² It is interesting to note that the reasons offered by these different institutions for engaging in such due diligence were because they had found one or more of the rationales discussed above convincing or the clients they served had.²³

The practical tasks of achieving goals and fulfilling commitments

Assuming that a pension fund (or any other investor) determines that it is legitimate and important to take appropriate account of environmental and social considerations in their investment-related decisions, the question is then how it should proceed. Broadly stated, there is a need to:

- Articulate a commitment to take account of environmental and social considerations as a statement policy;
- Commit to action commensurate with that policy;
- Define the commitment by reference to environmental and social standards to be met and develop the organizational, policies, and practices and allocate the resources necessary to meeting that commitment;
- Engage in due diligence on investment proposals which includes gaining a clear understanding of the potential impact in environmental and social terms of the proposed investment in (a) project(s), the possibilities for averting or mitigating such impacts, what is required to realize those possibilities, and the implications of the foregoing for the success of the project in other terms. In connection with this due diligence process, appropriately categorize projects to establish priorities with respect to the application of standards;

- Make decisions to invest in light, among other things, of the ability to meet environmental and social standards as such with appropriate attentiveness to the tradeoffs, if any, between doing so and achieving other desired outcomes, financial and otherwise;
- Monitor and supervise investments made to track compliance with meeting of the standards, spur and support efforts where compliance falls short, and use available more dramatic measures where the achievement of compliance is not a realistic prospect; and
- In the foregoing connection, attend to important related issues such as engagement with the general public and interested and/or affected parties; maintenance of accountability for and critically assessment of actions and outcomes; and appropriate use of incentives to spur and ensure compliance.

First step: Articulating the commitment to take account of environmental and social considerations as a statement policy

While as noted, a range of financial institutions have committed themselves systematically to take account of environmental and social considerations in their investment-related decisions the most extensive experience relevant here is that of development finance institutions (DFIs).

According to one definition, DFIs “are financial institutions, which provide finance to the private sector for investments that promote development. They focus on developing countries and regions where access to private sector funding is limited. They are usually owned or backed by the governments of one or more developed countries.”²⁴ In the former case they have been referred to as bilateral DFIs; in the latter, multilateral ones.²⁵ They provide finance “to financial institutions that provide long-term capital and know-how to local small and medium size businesses”; “to private sector intermediaries (such as funds of funds) which invest in underlying private enterprises involved in development projects”; and “directly to underlying private enterprises.”²⁶ In addition, they “often act in co-operation with governments and other organisations in providing, (or financially contributing to/supporting), management consultancy and technical assistance. This assistance can be project specific, or general.”²⁷ Their mission is characterized as “strongly associated with economic growth, through the creation of profits, jobs, government tax revenues as well as other benefits to society.”²⁸ Their role is portrayed as “fill[ing] a gap in the financial market” in which [m]ost low income countries do not have sovereign credit ratings that are up to investment grade.”²⁹ Hence, “DFIs invest in areas where, typically, commercial investors/banks would not,” for example in sectors or projects which are higher risk.”³⁰

While much can be learned by pension funds from the experience of these DFIs it needs to be understood in light of the distinctive set of goals which they pursue and in certain respects the methods available to them for advancing them.

The International Finance Corporation: Institutional goals and environmental and social commitments

To gain that understanding we largely focus on the International Finance Corporation (IFC) a multilateral DFI which is that arm of the World Bank Group which “focuse[s] exclusively on the private sector” by “financing investment, mobilizing capital in international financial markets, and providing advisory services to businesses and governments.”³¹ We do so because of its engagement with the private sector, the significant scale of its operations, and the extensive reporting on its practices relating to environmental and social factors. Moreover, according to the survey referred to above, although that there were a modest number of frameworks and principles on which respondent financial institutions had drawn, nearly three-quarters of those replying cited the IFC’s Performance Standards (PS) (discussed at greater length below) as the standards and

guidelines most commonly embedded in policies and/or implemented in E&S due diligence processes.³²

The IFC articulates its “vision” as being that “people should have the opportunity to escape poverty and improve their lives.”³³ Its stated purposes are to create such opportunity by:

1. “Mobilizing other sources of finance for private enterprise development”;
2. “Promoting open and competitive markets in developing countries”;
3. “Supporting companies and other private sector partners where there is a gap”; and
4. “Helping generate productive jobs and deliver essential services to the poor and the vulnerable.”³⁴

It is interesting that the expression of purpose in the first of the IFC’s Articles of Agreement does not directly refer to poverty and the poor. Rather it is said to be “to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas.” However, broadly speaking, the means which the Article lists for carrying out that purposes reflect the first three numbered activities referred to above.³⁵

The IFC has an official “Policy on Environmental and Social Sustainability” (Policy) which focuses on the environmental and social impacts of its investments. At the outset the Policy refers to the vision described above, asserting that the organization’s “mission is to fight poverty...for lasting results; to help people help themselves and their environment by providing resources, sharing knowledge, building capacity, and forging partnerships in the public and private sectors.”³⁶ It then implicitly acknowledges that care must be taken in the choice of means by which it pursues that endeavor. Certain ones might not only cause harms which should be avoided but also, arguably, do injury to the very persons who are ostensibly to be served. More particularly, it states that “[c]entral to IFC’s development mission are its efforts to carry out investment and advisory activities with the intent to ‘do no harm’ to people and the environment, to enhance the sustainability of private sector operations and the markets they work in, and to achieve positive development outcomes.”³⁷

The IFC then explains that the Policy is the instrument for “put[ting] into practice its commitments to environmental and social sustainability,” commitments which “are based on IFC’s mission and mandate” as just described. Somewhat more specifically it asserts its belief “that an important component of achieving positive development outcomes is the environmental and social sustainability” of activities in support in developing countries.³⁸ In the text there is no definition of what makes for “sustainable” private investment or environmental and social “sustainability.” Arguably, in terms of outcomes the latter is synonymous with not degrading the environment and managing renewable natural resources sustainably and the latter with not placing disproportionate burdens on the poor or vulnerable. Broadly speaking with respect to intent the formulation would appear to be consistent with the above-quoted generic references to doing no harm to environment and people. However the reference to sustainable private investments seems to have a different connotation, discussed below.

Before proceeding further along these lines it is important to take note of a contrasting discussion of “human development” as the goal of the United Nations Development Programme (UNDP). The UNDP defines it as “the expansion of people’s freedoms and capabilities to lead lives that they value and have reason to value. It is about expanding choices. Freedoms and capabilities are a more expansive notion than basic needs. Many ends are necessary for a “good life,” ends

that can be intrinsically as well as instrumentally valuable – we may value biodiversity, for example, or natural beauty, independently of its contribution to our living standards.”³⁹ In turn, “[s]ustainable human development is the expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations.”⁴⁰

At first blush, sustainable human development is in considerable measure broader (and in certain ways simply different) from development as expressed by passages from the Policy quoted above. To what extent they in fact are requires a closer look at the Policy and how it is to be supposed to be implemented.

For example, the Policy itself goes beyond generic characterization of the IFC mission and commitments in three particular areas. First, it “recognizes that climate change is a serious global challenge and that climate-related impacts may impede economic and social well-being and development efforts.” Yet more specifically, it “support[s]...low-carbon economic development” as “one dimension of a balanced approach to development, including supporting access to modern, clean, and reliable energy services.” Second, it “recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfill human rights.” Meeting this responsibility entails requires a business to “avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to.”⁴¹ Third, the IFC expresses its belief “that women have a crucial role in achieving sound economic growth and poverty reduction,” stating its expectation that its clients “will minimize gender-related risks from business activities and unintended gender differentiated impacts” so that women are not “prevented from realizing their economic potential because of gender inequity.”⁴²

It is the IFC’s Performance Standards on Environmental and Social Sustainability (PS) which define substantive requirements – which if clients meet, as they are ostensibly required to do – are the means by which the IFC fulfills the commitments described above.⁴³ At the outset, in its general introduction to the PS the IFC makes clear that “[c]entral to these requirements is the application of a mitigation hierarchy to anticipate and avoid adverse impacts on workers, communities, and the environment, or where avoidance is not possible, to minimize, and where residual impacts remain, compensate/offset for the risks and impacts, as appropriate.”⁴⁴ This approach is, on its face, consistent with fulfillment of the IFC’s noted commitment to pursue “activities with the intent to ‘do no harm’ to people and the environment.”⁴⁵ That intent seems to presuppose in the first instance, that the achievement of the goals through those activities necessarily entails the desired poverty reducing outcome. That is, of course, not necessarily the case.⁴⁶ Importantly, at the same time the IFC expresses its belief that its clients might do well by doing such ostensible good. That is, clients’ adherence to the PS “provide[s] a solid base on which clients may increase the overall sustainability of their operations, identify new opportunities to grow their business, and build their competitive advantage in the marketplace.”⁴⁷ This statement, too, is consistent with the other of the dual commitments referred to above that appear to inform IFC activities, namely “the sustainability of private sector operations.”⁴⁸

Following its statement and explication of its goals and reasons for establishing the PS, the IFC then details eight specific sets of standards to be followed. In a number of cases the explanations for those standards reflect the two-fold nature of the outcomes to be achieved: namely positive outcomes for both affected communities and IFC clients.

Consider the informing rationale for the second standard, that for labor and working conditions. At the outset the IFC proffers a somewhat normatively tinged, worker oriented “recogni[tion] that the pursuit of economic growth through employment creation and income generation should be

accompanied by protection of the fundamental rights of workers.”⁴⁹ The text states, more broadly, that “[t]he requirements set out in this Performance Standard have been in part guided by a number of international conventions and instruments, including those of the International Labour Organization (ILO) and the United Nations (UN).”⁵⁰

However, the document then immediately shifts to a client oriented argument that “the workforce is a valuable asset, and a sound worker-management relationship is a key ingredient in the sustainability of a company.” In particular it contends that “[f]ailure to establish and foster a sound worker-management relationship can undermine worker commitment and retention, and can jeopardize a project.” In turn, it asserts that “through a constructive worker-management relationship, and by treating the workers fairly and providing them with safe and healthy working conditions, clients may create tangible benefits, such as enhancement of the efficiency and productivity of their operations”⁵¹

Similarly, the informing rationale for the third performance standard, that for resource efficiency and pollution prevention is first expressed in terms of the needs of relevant stakeholder communities: a “recogni[tion] that increased economic activity and urbanization often generate increased levels of pollution to air, water, and land, and consume finite resources in a manner that may threaten people and the environment at the local, regional, and global levels.”⁵² It also cites “a growing global consensus that the current and projected atmospheric concentration of greenhouse gases (GHG) threatens the public health and welfare of current and future generations.”⁵³ But then there is also the client oriented observation that “more efficient and effective resource use and pollution prevention and GHG emission avoidance and mitigation technologies and practices have become more accessible and achievable in virtually all parts of the world. These are often implemented through continuous improvement methodologies similar to those used to enhance quality or productivity, which are generally well known to most industrial, agricultural, and service sector companies.”⁵⁴ Thus, the rationales or objectives are parallel: namely “[t]o avoid or minimize adverse impacts on human health and the environment by avoiding or minimizing pollution from project activities”; “[t]o promote more sustainable use of resources, including energy and water”; and “[t]o reduce project-related GHG emissions.”⁵⁵

For several other standards there is much more of an explicit focus on the positive impact on stakeholders of client compliance with the PS and arguably only implicitly on what might otherwise be in the client’s interests.⁵⁶

There is a rough parallel between these characterizations and the IFC’s Guidance Notes on Performance Standards on Environmental and Social Sustainability (Guidance Notes) which in a very detailed way informs claims as to how compliance with the PS in each of the eight substantive areas might be attained.⁵⁷ For example, PS 2, the guidance note for labor and working conditions makes reference to the business case for action, namely that “[t]he nature of the relationship between management and workers affects costs, quality, efficiency, productivity, and customer service, in addition to shaping a client’s reputation. The note with respect to Performance Standard 2 recognizes that a good relationship between management and workers is an important ingredient in determining the overall success of the client and the project.”⁵⁸ Somewhat more generally and with diffuse reference to the dual mandate, it remarks that the prescribed process of risk and impact assessment and follow-on action “will allow the client to design or update its human resources (HR), employment, contracting and purchasing policies and procedures in ways that enhance the long-term viability and success of the business while safeguarding the rights of workers.”⁵⁹

By contrast, the note for PS 3 explicitly restates the arguably dual goals articulated of resource efficiency and pollution prevention though in the accompanying narrative there is no particular reference to the quality and productivity gains which might well be associated with such prevention.⁶⁰

In sum, it is clear from the foregoing that the IFC has multiple goals. As noted there is a generic development goal of affording people the “opportunity to escape poverty and improve their lives.” At the individual level the goal is manifest (at least) in “the poor and vulnerable” having access to “productive jobs” and “essential services.” For the IFC, a primary means or instrument for achieving the goal – for affording the opportunity – is support for private enterprises operating in “open and competitive markets.” So, of necessity, that means providing finance to them calculated not only to their engaging within a market context in the provision of goods and services in ways which advance achievement of the goal but also to their doing so in a manner consistent with those enterprises being ongoing and viable ones. Also as noted, the IFC has “sustainability” goals which are framed in terms of environmental and social outcomes. As we have seen, fulfillment of these goals is in some measure intertwined with pursuit of ones for development. Indeed, certain (or perhaps all) of them might be viewed as necessary conditions for successful development outcomes. Since private enterprises are the engine which drives achievement of the sought-for outcomes, it is they who are required – through the PS – to manage their enterprises in certain ways consonant with that task. But here, again, what is asked or demanded of them must comport with their operations being ongoing and viable. As discussed above, the numerous references – direct and indirect – in the PS and Guidance Notes to sustainability *of the enterprise* is witness to that fact.

Clearly, though, IFC concern that financed enterprises are or become viable extends beyond that being an element critical to the successful pursuit of development and sustainability goals. That is, just like any pension fund investor, IFC decisions with respect to any individual investment and its overall portfolio of investments must be made with a close eye to their import for the ability of the IFC to persist in its endeavor and effectively so. In the case of the IFC, the financial calculus within which it operates is one which, on the funding side, it can draw upon nation member capital contributions and potentially borrow from a range of lenders and on the expenditure side, make discretionary decisions for finance informed by their import in development and sustainability as well as financial terms. In this respect the calculus is rather different from that for pension funds. Nonetheless, the kinds of considerations which would be attended to by lenders to the IFC would not be unlike those factors given attention when other borrowers are involved.⁶¹ And clearly the IFC has set up elaborate machinery for managing a host of conventional financial considerations for itself as an enterprise.⁶²

That being said, though, insofar as the pension funds might act consonant with PS-like commitments in mind then how the IFC (and other DFIs with similar roles and commitments) make decisions at the individual project or transaction level in light of both conventional and PS-like considerations is most relevant.

Other development finance institutions

While, as noted, we will almost exclusively focus on the IFC other DFIs articulate commitments with respect to “sustainable development” and seek to advance it in compliance with environmental and social requirements” similar if not identical to those of the IFC.⁶³ Among the multilateral DFIs are the Asian Development Bank (ADB)⁶⁴; the African Development Bank (AfDB)⁶⁵; the Inter-American Development Bank (IAD)⁶⁶; the Inter-American Investment Corporation (IIC)⁶⁷; The Multilateral Fund (MIF)⁶⁸; the European Bank for Reconstruction and

Development (BRD)⁶⁹; and the European Investment Bank (EIB).⁷⁰ The bilateral DFIs include FMO, Netherlands Development Finance Company⁷¹; AFD, Agence Française de Développement;⁷² CDC Group;⁷³ KfW Bankengruppe (Banking Group);⁷⁴ DEG, Deutsche Investitions- und Entwicklungsgesellschaft mbH;⁷⁵ OPIC, Overseas Private Investment Corporation;⁷⁶ PROPARCO, Société de Promotion et de Participation pour la Coopération Economique;⁷⁷ Norfund, Norwegian Investment Fund for Developing Countries;⁷⁸ and Swedfund.⁷⁹ At various points we will in some instances refer to certain differences between the commitments of these other institutions and those of the IFC or as to how each goes about fulfilling them.

Equator Principles signatory banks/financial institutions (EPFIs) goals and environmental and social commitments

The Policy, PS, and Guidance Notes are among the conditions which would-be clients seeking capital for investment from the IFC must satisfy in order to qualify for receiving those monies. By contrast, the EP relate ostensibly to voluntary commitments on the part of other providers of capital – banks – to abide by similar standards lending in certain ways to (or advising) a narrower range of enterprises.⁸⁰ More particularly, the EP had their origin and have had their principal, though now no longer exclusive, focus on project finance, the form of finance usually used for “large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure.”⁸¹ Precisely what the EP deem to be infrastructure “installations” is not specified. However, there would appear to be a common concern which informs the EP’s focus on the non-financial, namely social and environmental implications, of constructing and operating these installations: the tremendous impact of doing so on the communities in which they are located and perhaps others located at some distance away which are affected. This approach is not to say that the product of what might be understood to be other than infrastructure installations – for example, chemical manufacturing plants or mines – might not be of an order of magnitude closer to that of infrastructure ones. In certain respects the distinction appears to relate to where the product (or service) is situated relative to final products which individuals are likely to use directly to meet individual needs.⁸²

The Equator Principles describe the nature of the principles articulated, the reasons for signatories (referred to as EPFIs hereafter) embracing them, and the practical commitments which signatories assume upon subscribing to the principles. The latest (the third) revision of the Equator Principles (Equator Principles III) became effective in mid-June 2013.⁸³

As described in that document, the EP start from EPFIs’ stated recognition that “[l]arge infrastructure and industrial projects can have adverse impacts on people and on the environment.”⁸⁴ Informed by that recognition, signatories assert that if they and their clients “identify, assess and manage environmental and social risks and impacts in a structured way, and on an ongoing basis” they can “promote[] sound and sustainable environmental and social performance” and “improve[] financial, environmental and social outcomes” to “ensure that the Projects we finance are developed in a manner that is socially responsible and reflects sound environmental management practices.”⁸⁵ As a practical matter, it “recognize[s] the importance of climate change, biodiversity, and human rights” and acknowledges that “negative impacts on project-affected ecosystems, communities, and the climate should be avoided where possible”; further that “[i]f these impacts are unavoidable they should be minimised, mitigated, and/or offset.”⁸⁶ In addition the EP specifically acknowledge the import of the United Nations Human Rights Council endorsed “Guiding Principles for Business and Human Rights” (Guiding Principles)

which set a global standard for [businesses in] preventing and addressing the risk of adverse impacts on human rights linked to business activity.”⁸⁷

More particularly, signatories “recognise that [their] role as financiers affords [them] *opportunities* to promote responsible environmental stewardship and socially responsible development, including fulfilling our responsibility to respect human rights” which can be realized “by undertaking due diligence in accordance with the Equator Principles.”⁸⁸ (With respect to human rights the EP specifically reference the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.”⁸⁹) Note the italicized word which would appear to reflect the voluntary/non-mandatory character of the commitment being made.

It is worthy of observation that in all of the foregoing, apart from a generic reference to adoption of and adherence to the EP as “offer[ing] significant benefits to us” (as well as to “our clients, and local stakeholders through our clients’ engagement with locally Affected Communities”), there is no mention as such of any aspect of what might be termed the “business case” for making the commitment.⁹⁰ Recall, that by contrast the IFC specifically refers to adherence to the Standards as “provid[ing] a solid base on which clients may increase the overall sustainability of their operations, identify new opportunities to grow their business, and build their competitive advantage in the marketplace.”⁹¹ However, the EP provide that for certain projects – namely those “located in Non-Designated Countries” – the project assessment process evaluates “compliance with the then applicable IFC Performance Standards on Environmental and Social Sustainability (Performance Standards) and the World Bank Group Environmental, Health and Safety Guidelines.”⁹² Of necessity then, at minimum in those cases the dual mandate implicit in the PS would appear to be imported into the EP context. However EPFIs do not adopt the Guidance Notes but rather just treat them as “points of reference.” At first blush there is nothing to suggest that the kinds of considerations – among them ones of a dual mandate – which come into play in the IFC context are not equally relevant to the EP context.⁹³ Moreover, signatories’ more specific practical commitments as articulated in EP Principle 2 provide for project risk and impact assessments (and actions commensurate with those assessments) on their face closely aligned with those provided for by the IFC.⁹⁴ However all of the foregoing does not determine how as a general matter EPFIs go about meeting their environmental and social commitments as compared to the IFC (or other DFIs). Neither does it specify what are the tradeoffs which might be posed in fulfilling those obligations and judgments as to what is needed for the sustainability of a project, for example, operational or financial term concerns. The practical realities of such tradeoffs are important to the subject of this paper for, as we shall see, the degree of transparency as to particular projects is such as to gain meaningful insights into those tradeoffs is challenging.

Pension Fund Example: PGGM/PFZW

PGGM, an investment arm of the second largest Dutch pension fund, Stichting Pensioenfonds Zorg en Welzijn (PFZW), has a responsible investment policy for infrastructure as part of a broader set of policies for all of its investments.⁹⁵ The latter, as described at the outset in its annual responsible investment report on implementation of the overall policy, states the commitment in terms of “five key points”:

- (1) “We act on the basis of a conviction that financial and social returns can go hand in hand”;
- (2) “We make responsible choices based on our identity and that of our clients”;
- (3) “We contribute to the quality and continuity of companies and financial markets”;
- (4) “We encourage partners in the financial sector to invest responsibly”;
- (5) “We report on targets, activities and results in the field of responsible investment.”⁹⁶

One reported gloss on the results of a recent extensive re-assessment of PFZW's investment principles and beliefs (presumably which would be reflected in PGGM's work) was that they are "based on the idea that PFZW assumes a responsibility for contributing tangibly to a sustainable world and that, at the same time, a sustainable world is a necessary condition for generating adequate returns over the long investment horizons."⁹⁷ That is, "taking the long view, PFZWE cannot afford to see a sustainable world as an externality."

The infrastructure policy itself is referred to as "address[ing] PGGM's guidelines on and management of environmental, social and governance (ESG) issues with regard to the infrastructure investments."⁹⁸ Environmental considerations include a "stable climate" ("[b]y reducing greenhouse gas emissions"); a "responsible use of scarce resources, for example, "efficient water use, conservation of biodiversity"; and a "clean and healthy environment, for instance, "reducing waste and pollution, recycling". Social factors include "[r]espect for human rights" ("incl. labour rights") and empowerment," for example, "no child labor, freedom of association"; "[a]dequate access to basic needs," among other things, "health care, nutrition"; and "[l]ocal socio-economic development," for instance, "creating local employment, transferring knowledge."⁹⁹

More specifically it is grounded on the "belie[f] that ESG factors can have a material impact on the financial performance of the infrastructure investments."¹⁰⁰ Thus, PGGM "sees it as its responsibility to capture the value and mitigate the material risks related to ESG factors. PGGM defines 'material ESG factors' as factors which have a significant financial impact on the underlying investment."¹⁰¹ It adds that "[r]eputational risks for PGGM, [its] clients and infrastructure assets resulting from ESG factors should also be considered."¹⁰² Although the primary focus or emphasis is on the materiality of ESG factors to financial performance other considerations come into play in some measure. For example, the policy states that PGGM will, where possible, and encourages the executive management of its assets and infrastructure funds to "identify opportunities for investing in infrastructure assets that can positively contribute to solving societal challenges, such as climate change, loss of biodiversity and social inequity. (Product sustainability)" and "ensure that the invested assets create financial returns which at the same time create societal benefits. (Shared value)."¹⁰³

In addition to the central focus on materiality and attention to societal challenges, in accordance with (2) above, PGGM, "[i]n some cases...decides not to invest in specific companies or government bonds of certain countries because they do not fit in with our identity or that of our clients."¹⁰⁴ For example, PGGM "exclude[s] companies involved in the production or trading of controversial weapons. PGGM can also exclude companies from the investment portfolio if they engage in socially irresponsible behavior and are unwilling to discuss improvements or fail to show any improvement after engagement activities."¹⁰⁵ Correspondingly, the infrastructure policy states that "PGGM Infrastructure invests in a diverse range of assets including toll roads, renewable energy and social infrastructure (except those sectors/products listed in the PGGM Investments Exclusion Policy)."¹⁰⁶

Note though, as discussed further below, in the context of implementing its above-described commitment, PGGM states that it looks to "[i]nternational best practice [which] include[s] among others the IFC Performance Standards."¹⁰⁷ Recall, the IFC PS are embedded in the kinds of commitments articulated by the IFC which in many respects overlap those commitments just described for PGGM. Moreover, PGGM speaks of environmental and social considerations in terms similar to that the IFC uses.

Second step: The commitment to action pursuant to that policy: generally

The next step is broadly to characterize the kinds of actions the investor is committed to taking as the means for implementing or applying its policy.

International Finance Corporation (IFC)

In the case of the IFC, it asserts that it “endeavors to collaborate with clients who identify and manage environmental and social risks and who pursue environmental and social opportunities and outcomes in their business activities with a view to continually improving their sustainability performance.”¹⁰⁸ It further commits itself to “consider[] the risks and impacts of [its activities]..., and whether and how [they]...can be expected to contribute to the development of the host country and to broadly benefit its relevant stakeholders in economic, social, and/or environmental terms.”¹⁰⁹ Some activities are of such a nature as not to permit any IFC support; these being “set out in the IFC Exclusion List.”¹¹⁰ With respect to all other, potentially permissible activities the IFC sets forth what it terms as its “environmental and social due diligence.” Again as a general matter the IFC asserts that it will “only finance investment activities that are expected to meet the requirements of the Performance Standards [PS] within a reasonable period of time,” while stressing that “[p]ersistent delays in meeting these requirements can lead to loss of financial support from IFC.”¹¹¹

The IFC then describes in detail its own roles and responsibilities in connection with its various finance-related activities as they pertain to environmental and social due diligence, the categorization (in environmental and social terms) of projects which in turn bears in more specific terms on clients’ and its obligations with respect to them, its supervision, including monitoring, of the various business activities in its portfolio.¹¹² It makes sector-specific commitments regarding public disclosure of business-activity related information. In a concluding section it describes formal independent means by which it can be held accountable for complying with its own policy through its Compliance Advisor/Ombudsman (CAO). In many other publicly available documents that IFC offers extensive information on the rules and procedures according to which it obliges itself to proceed in pursuing the tasks just outlined. Among them is its Environmental and Social Review Procedures Manual (Manual), which delineates the roles and tasks of relevant staff in that regard.¹¹³

Equator Principles Financial Institutions (EPFIs)

The EP simply state that with respect to project finance and project-related corporate loans (which are the focus here) EPFIs “will not provide Project Finance or Project-Related Corporate Loans to Projects where the client will not, or is unable to, comply with the Equator Principles.”¹¹⁴ The EP then commit EPFIs and their clients to take certain actions with regard to ensuring that projects are executed in accord with the standards: EPFI review and categorization of projects which define EPFI and client responsibilities (Principle 1); environmental and social assessments of them (Principle 2); application of the environmental and social standards the meeting of which informs those actions (Principle 3); the systems and plans required to ensure that the needed actions are taken (Principle 4); how stakeholders must be engaged by clients in relation to the foregoing (Principle 5); mechanisms which must be made available to aggrieved parties to communicate their concerns (Principle 6); the need for an independent review of certain key actions to be taken by clients (Principles 7 and 9); covenants clients must enter into with the EPFI in connection with ensuring the standards are met (Principle 8); and certain requirements for reporting and transparency on the part of EPFIs and their clients (Principle 10). As can be seen, the EP themselves offer very little in terms of how the EPFIs must or ought to proceed with regard

to implementation of the EP. Beyond that, there would appear to be no other publicly available materials available at the EP web-site which offer enlightenment in that regard.¹¹⁵

PGGM/PFZW

According to PGGM, infrastructure assets in which it directly or indirectly invests must

- (a) “comply with PGGM’s Exclusion Policy and List. (Exclusion)”;
- (b) “comply with all applicable environmental and social (such as health, safety, labor) law and regulation. (Legal compliance)”;
- (c) “where relevant, assess material environmental and social risks of their operations and implement or work over time towards implementing relevant international best practice standards in their company/asset management to mitigate environmental and social risks with targets and timelines for improvement...(voluntary Standards)”¹¹⁶

The reference to “over time” means that “PGGM may invest in infrastructure assets with weak ESG practices as long as ESG shortcomings are addressed and resolved during the investment period.”¹¹⁷

Third step: Defining the commitment by reference to environmental and social standards to be met

Obviously, central to any policy are the particular environmental and social standards which an investor has embraced.

International Finance Corporation (IFC)

With regard to the IFC’s PS, they are, as a general matter, framed at the outset in terms which reflect in a broad gauge way the animating concerns and goals expressed in the Policy, namely, of clients carrying out projects in a “sustainable way” which is at minimum consonant with and ostensibly advances development. Thus, the PS are referred to as being intended to “provid[e] guidance on how to identify risks and impacts, and ...designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way.” Further the IFC requires its clients to apply the PS “to manage environmental and social risks and impacts so that development opportunities are enhanced.”¹¹⁸

The PS then set forth specific prescriptions for clients’ conduct. One major group of them – embodied in “Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts” – addresses the systems, processes, resources, etc. deemed necessary to clients carrying out the needed tasks.¹¹⁹ There then follow seven clusters of provisions detailing what is expected with regard to how different kinds of important environmental and social concerns are to be met. They are:

”Performance Standard 2: Labor and Working Conditions
Performance Standard 3: Resource Efficiency and Pollution Prevention
Performance Standard 4: Community Health, Safety, and Security
Performance Standard 5: Land Acquisition and Involuntary Resettlement
Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources
Performance Standard 7: Indigenous Peoples
Performance Standard 8: Cultural Heritage.”¹²⁰

The PS document runs to some 50 pages so in and of itself it gives a fairly detailed prescription for what each performance standard entails or requires. However, the IFC goes further, providing a set of Guidance Notes (Notes) – which run to some 273 pages – each of which corresponds to a particular performance standard.¹²¹ According to the IFC, the Notes “offer helpful guidance on the requirements contained in the Performance Standards, including reference materials, and on good sustainability practices to improve project performance. These Guidance Notes are not intended to establish policy by themselves; instead, they explain the requirements in the Performance Standards.”¹²² In so stating this position, the IFC is clear that what compliance with any standard requires is project and situation specific. It is also evident that considerations of costs and benefits bear upon what is understood to be compliance:

“In assisting the client to meet the Performance Standards, IFC will take into account variables such as host country context, the scale and complexity of project impacts, and the associated cost-benefit considerations, as well as those of project performance beyond the level required in the Performance Standards.”¹²³

The IFC goes beyond that by offering a broad range of resources which bear upon the means and methods by which clients might execute projects in accord with the PS. For example, with respect to PS2 (relating to labor and work standards), one publication is said by the IFC to be “intended to be a practical reference book” with the “aim[of]...provid[ing] an understanding of the management systems and internal staff capabilities required for improving the labor standards performance in a company and its supply chain” and “a step-by-step guide to assist company management in developing or improving labor standards management systems.”¹²⁴ Interestingly, in that publication there is a strong emphasis on the business case for meeting the standards. Indeed, the first chapter is entitled “Building the Business Case,” stating in closing that

“Over the past decade, companies have focused on corporate social responsibility as a risk-management tool. They wanted to avoid the pain and damage of an incident. Companies tended to view labor standards performance as a cost, not an investment.

“The next decade will see more mainstream companies start to proactively use their corporate social responsibility as a core element of their value and as a competitive advantage in the marketplace. We will see companies view labor standards performance as an investment. It will be an investment that generates a measurable return, both through preventing damage to a company’s reputation or through improving productivity and sales.”¹²⁵

There are, in addition, World Bank Group Environmental, Health, and Safety Guidelines (EHS Guidelines). The EHS guidelines are described as having two parts. One is general in nature, that is, it “contain[s] information on cross-cutting environmental, health, and safety issues potentially applicable to all industry sectors. They are divided into sections entitled: Environmental; Occupational Health and Safety; Community Health and Safety; Construction; and Decommissioning.” The other is specific, setting forth “industry guidelines with information on industry-specific impacts and performance indicators, plus a general description of industry activities.”¹²⁶ The IFC refers to them as “technical reference documents with general and industry-specific examples of Good International Industry Practice (GIIP), as defined in IFC’s Performance Standard 3: Resource Efficiency and Pollution Prevention. IFC uses the EHS Guidelines as a technical source of information during project appraisal activities, as described in IFC’s Environmental and Social Review Procedures Manual.”¹²⁷ More particularly, these guidelines “contain the performance levels and measures that are normally acceptable to IFC, and that are generally considered to be achievable in new facilities at reasonable costs by existing technology.” For IFC-financed projects, application of the EHS Guidelines to existing facilities may

involve the establishment of site-specific targets with an appropriate timetable for achieving them. The environmental assessment process may recommend alternative (higher or lower) levels or measures, which, if acceptable to IFC, become project- or site-specific requirements.”¹²⁸

Equator Principles Financial Institutions (EPFIs)

In the Equator Principles, in Principle 3, EPFIs agree that their clients with projects in “Non-Designated Countries” must comply with the IFC’s Performance Standards and the EHS Guidelines.¹²⁹ “Designated Countries” are “those countries deemed to have robust environmental and social governance, legislation systems and institutional capacity designed to protect their people and the natural environment.”¹³⁰ These countries are listed at the EP web-site. Because of such robust systems and capacity, client projects in Designated Countries must only demonstrate “compliance with relevant host country laws, regulations and permits that pertain to environmental and social issues. Host country laws meet the requirements of environmental and/or social assessments (Principle 2), management systems and plans (Principle 4), Stakeholder Engagement (Principle 5) and, grievance mechanisms (Principle 6).”¹³¹

However, they “do not formally adopt the Guidance Notes however EPFIs and clients may find them useful points of reference when seeking further guidance on or interpreting [them].”¹³² There is no reference as such to other IFC materials related to the PS.

PGGM/PFZW

As noted, PGGM’s responsible investment policy for infrastructure briefly states that the infrastructure projects in which it directly or indirectly invests must “where relevant, assess material environmental and social risks of their operations and implement or work over time towards implementing relevant international best practice standards in their company/asset management to mitigate environmental and social risks.” It refers to “[i]nternational best practice [as] includ[ing] among others the IFC Performance Standards.”¹³³ It does not add anything further as to how best practice might be defined or examples of what it might be.

Fourth step: Categorizing projects to establish priorities with respect to the application of standards

Clearly, there are an immense range of projects which might be of interest to a pension fund (or the IFC or any other DFI, or for that matter any other investor). For each there needs to be some initial rough evaluation of investment proposals to winnow out the relatively small fraction which would be the subject of serious due diligence with regard to conventional as well as social and environmental considerations. Thus, for the latter (and the former in different ways) there would be a corresponding range of possible environmental and social risks and impacts and possibilities for their being avoided, mitigated, or managed. So depending upon where an investment lies – or might lie – within that range, the tasks required in assuring that it comports with the PS or other relevant standards may be very modest or challenging ones. Carrying out those tasks would, correspondingly, require few or many of what are necessarily finite resources on the part of both the client and in corresponding ways, the investor. In turn, that means setting priorities with regard to whether and how the undertakings required by the PS or those other relevant standards must be pursued.

The way in which the IFC (and other DFIs and EPFIs) have gone about setting priorities has been to categorize projects in terms of anticipated or estimated risks and impacts. As a practical matter their methods of categorization have loomed quite large because they have determined what the IFC or others have asked of themselves and their clients and arguably what the results of their

efforts have been. Moreover, as we shall see, for the IFC at least, categorization has served a third, very important function. It has determined the timing and extent of required transparency with respect to stakeholders and the general public about the prospect of a project being financed. This categorization, in turn, provides critical opportunities for those stakeholders potentially impacted by the project to weigh in on the matter of whether and under what terms resources should be provided to the project. Any corresponding effort on the part of pension funds would almost certainly entail some method of categorization for that purpose however differently it might work. For those reasons it is important to take a close look at what the IFC has done in this regard.

(Individual) Project Categorization

As noted, we think pension funds, in the context of the issues raised in this paper, are more likely to invest in projects through FIs than directly. (Generally speaking in this paper we will refer to the projects in which FIs directly invest as “subprojects.”) So, in principle, how FIs might be categorized would be most important. However, the method for doing so is closely linked to how projects – in connection with direct investment – are categorized. Hence we first discuss the approaches to that at length.

International Finance Corporation (IFC): Methodology

The categorization process proves more or less challenging depending upon what is known about the infrastructure-related enterprises (IREs) which in fact are the ultimately the object of investment, and when.

In turn, what information is available depends in part of the timing of the categorization decision in relation to the project cycle for the IRE. For example, it has been suggested that the World Bank “frequently engages in a very early stage of project concept and makes initial determinations of categorization based on ‘potential’ impacts for a project that is still at a conceptual level.”¹³⁴ By contrast, “the IFC and [Multilateral Investment Guarantee Agency (MIGA)] most frequently find themselves becoming involved with a potential client either in a clearly defined project or an existing operation, where risks and impacts may be well defined and mitigation measures already built into project design or operations.”¹³⁵

The preceding is not necessarily in conflict with the observation that “[t]he initial decision about project categorization occurs at a very early stage in IFC’s project cycle,”¹³⁶ namely during its internal process of project screening.¹³⁷ Even where a project as such is well defined, categorization of that project can occur at different stages of the assessment of it.

Of course, the initial decision is not the final one. There is provision for re-categorization during project appraisal or at a later stage although the reference to it in the IFC’s Manual is cryptic at best.¹³⁸ The IFC’s information disclosure process (discussed in great detail below) provides for publication of project summaries and Environmental and Social Reviews – which reflect the risk characterization by staff – prior to consideration of a proposed investment by the Board of Directors”.¹³⁹ In turn, reactions by interested parties to what has been disclosed may provide the occasion or basis for revision of the categorization.

Before we proceed to discuss how the IFC approaches the categorization of individual projects we take note of some general considerations which set a context for any approach. The decision-making process with regard to any particular project might attend to (1) the nature, extent, seriousness, etc., of the possible (adverse) impacts of the project *as proposed*; (2) the risk – in the sense of likelihood – of the project as proposed causing those adverse impacts¹⁴⁰; (3) the extent to which the impacts can be averted or mitigated if certain actions are successfully taken;

and (4) the client's current ability, e.g., in terms of commitment, capacity, resources, etc., successfully to take such actions. In addition or alternatively the process can address (5) how the project might be revised or changed to reduce the prospect for adverse impacts and/or increase the prospect for averting or ameliorating them (or at the extreme, if not, to whether a different project should be considered) and (6) whether and how the client's ability can be enhanced to change such prospects.

The IFC's categories are follows:

Category A: projects "with potential significant adverse social or environmental impacts that are diverse, irreversible, or unprecedented."¹⁴¹

Category B: projects with "potential limited adverse social or environmental impacts that are few in number, site-specific, largely reversible, and readily addressed through mitigation measures."¹⁴²

Category C: projects that are "expected to have minimal or no adverse impacts, including certain financial intermediary projects."¹⁴³

Before analyzing this particular method of categorization method it is important to take note of the practical import of a project being categorized one way or another. Strictly speaking what that import is for those projects labeled as A or B is not clearly stated by the IFC. The IFC's Guidance Note for PS1 states that "[t]his Performance Standard applies to business activities with environmental and/or social risks and/or impacts" with presumable implicit reference to at least Category A or B projects.¹⁴⁴ Arguably it would have no application to a project with "minimal" adverse impacts. In turn, the Guidance Note states that "each user of the Performance Standards should define the business activity to which the Performance Standards should apply, and build its approach to assessment and management of environmental and social risks and impacts consistent with this Performance Standard and in accordance with the level of environmental and social risk that is expected to require management."¹⁴⁵ What is required in the assessment and management of those risks – in the form of an Environmental and Social Management System (ESMS) – is described in some detail.¹⁴⁶ An important related IFC procedural requirement is the preparation by the IFC – for category A and B projects only – of an Environmental and Social Review Summary (ESRS). It is important because, as discussed further below, it must be publicly disclosed (in connection with other Category A and Category B project-related materials) before final IFC consideration of the project for approval.¹⁴⁷

Further, the Guidance Note refers as a general matter to the process required of a client "for identifying the environmental and social risks and impacts of the project."¹⁴⁸ That process "m[ight] comprise a full-scale environmental and social impact assessment, a limited or focused environmental and social assessment, or straightforward application of environmental siting, pollution standards, design criteria, or construction standards."¹⁴⁹ Arguably with implicit reference to (at least some among) Category A and Category B projects, the IFC explains that "[f]or greenfield developments or large expansions with specifically identified physical elements, aspects, and facilities that are likely to generate potential significant environmental or social impacts, the client will conduct a comprehensive Environmental and Social Impact Assessment, including an examination of alternatives, where appropriate."¹⁵⁰ Again, as a general matter the Guidance Note refers to the process "consider[ing] all relevant environmental and social risks and impacts of the project, including the issues identified in Performance Standards 2 through 8, and those who are likely to be affected by such risks and impacts."¹⁵¹ And, again with implicit reference to (at least some) Category A and Category B projects, it mentions "limited high risk circumstances

[in which]... it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.”¹⁵²

By comparison, the Guidance Note seems to suggest, with implicit reference to what appear to be certain kinds of Category B projects, a less than full-scale Environmental and Social Impact Assessment (ESIA) (discussed below) is required. That is, “[t]he projects to be financed may consist of specific activities with potential limited adverse environmental and social risks and/or impacts, for which the development of a full-scale ESIA is not required by the host country’s environmental assessment laws and regulations.”¹⁵³ In all events, there are critical questions relating to the meaning and relevance of terms such as “impacts” and “risks” and with which of considerations (1) through (5) just noted above should be taken into account in categorization at one or another stage.

- **Impact, Risk, and Mitigation**

Among the issues posed in that connection are ones as to the meaning and import of references to (1) impact and risk and (2) mitigation (or perhaps more aptly avoidance or mitigation).

Impact and Risk: For example, with regard to (1) the definitions for Categories A and B make no mention at all of risk as such, that is, the *likelihood* that the adverse impacts being characterized might occur. (The word “potential” used in those two categories certainly suggests that the impact could occur but there is an absence of language as to the *probability* of that occurrence.) Only for Category C is there a mention of an expectation of that sort. Even there it seems to be concerned with the *extent* of harm to be anticipated not the *chance* that the harm will occur. In other words, at first blush, the categories seem to start from a judgment only as to the number, kind, and severity of the adverse impacts which it might be thought that projects as proposed could cause. However, clearly such a judgment has to rest on some conclusion as to the prospects for the occurrence of the impact. On one reading the absence of reference to risk in Categories A and B might be read as implicitly assuming that the impacts in question are very likely or perhaps virtually certain to occur. An extensive review of published IFC materials does not yield much clarity on this issue. That is, in some categorization-related contexts the word risk alone may be used, in others (as here) just the word impact, and in still others, sometimes both. And even then it would appear that risk might be used in more than one sense.

For example, in the Guidance Notes, the IFC refers to “[e]nvironmental and social impacts” as “refer[ring] to any change, potential or actual, to (i) the physical, natural, or cultural environment, and (ii) impacts on surrounding community and workers, resulting from the business activity to be supported.”¹⁵⁴ By contrast “[e]nvironmental and social risk” is termed as “a combination of the probability of certain hazard[ous] occurrences and the severity of impacts resulting from such an occurrence.”¹⁵⁵ “Inherent environmental and social risk” is seen as “the environmental and social risk related to generic aspects of an industrial sector or commercial activity without consideration of management or mitigation measures.”¹⁵⁶

There are other definitional issues as well.

Diverse: For example, arguably *diverse* impacts might be thought to be ones felt across a range of activities – as a matter of geography or nature – sought to be protected from harm.¹⁵⁷ In that sense, then, the issue is one of the breadth of the injury not its depth. For example, that Category B projects are ones for which the impacts are “site-specific” suggests that a basis for labeling a

project as a Category A insofar is that its impacts are diverse in the sense of being felt not only at but distant from the project site.

Unprecedented: Again, that an impact is *unprecedented* – that is, it was previously “never done or known before” – would not necessarily imply that it is especially great or harmful.¹⁵⁸ The connotation would seem to be that the impact is unusual in a way which makes it worthy of serious attention. But by whom and for what reasons?

Reversibility: Another set of issues relates to the reversibility of adverse impacts: with regard to Category B projects, the U.S. Treasury (the Treasury) recommended “[c]larify[ing] that the phrase ‘largely reversible’...requires time frames for reversing the impacts that would not result in significant interim impacts.”¹⁵⁹ (Note, by federal statute, Treasury has an important role in informing the exercise of power by the U.S. as a member or otherwise of DFIs’ decision-making process.¹⁶⁰ In that connection the Treasury has, at various times, commented on the IFC’s approach to categorization as well as other matters).

Although characterizations of risk and/or impact – as reflected in categorizations – are obviously important, standing alone they are only part of the story. As described above, the IFC (and other DFIs) have multiple missions or commitments or imperatives which almost certainly entail tradeoffs. So, for example, one issue is the perceived nature and level of environmental and social risk. Another is the *acceptability* of the project in light of one or more other grounds given that risk. According to the EBRD, “[a] transaction has an acceptable level of environmental and social risk where environmental liabilities do not present a significant threat to company viability, ability to repay loans or value of security, and where the bank would not be unduly exposed to risk arising from direct liability or reputational damage.”¹⁶¹

Significance: In its 2010 comments the Treasury urged that the IFC “[b]roaden the scope of the environmental/social risk and impact assessment process to explicitly include: indirect impacts, a “no project” alternative, post-closure considerations, broader definitions of associated facilities and cumulative impacts, and supply chains where they might have significant risks/impacts” and to “[i]nclude *all* social and environmental risks potentially requiring mitigation, not only (as suggested for some issues) the *significant* risks and impacts.”¹⁶² It contended that “categorization and significance decisions/assessments” should be “based on potential pre-mitigation risks and impacts, not on post-mitigation risks and impacts” and on “on the highest risk impact in the area of influence, and take indirect impacts into account.”¹⁶³

The foregoing are among the challenges for a coherent and meaningful method of categorization.

Mitigation: Similarly, with reference to (2) the definitions afford a somewhat confusing picture as to mitigation of adverse impacts. As noted, the definitions for Category B explicitly refer to it, alluding to the extent (“largely reversible”) and ease (“readily addressed”) with which the anticipated adverse effects might be mitigated. There is no such reference in Category A, arguably because the projected adverse effects are thought to be irreversible. However, the literal language would require that categorization even if the adverse impacts were reversible insofar if they are sufficiently diverse and/or unprecedented. There is no reference in Category C because either there are no such impacts or they are so small, mitigation is not an issue. Thus, in light of these references to mitigation, the categories could be read to be informed by a judgment as to what the residual impacts of the projects as proposed could be if certain imagined possible mitigation measures were successfully taken. The question, though, is whether the decision as to categorization rests only on a proposed project’s impacts/risks in the absence of such measures being taken. We have actually not been able to find much of an explicit answer to that question,

though as noted below our canvas of IFC materials suggests that the answer is yes. Of course, it follows that the post-categorization analysis – the due diligence/project appraisal stage – of a proposal is aimed at determining whether in fact there are acceptable means for and outcomes from mitigation and that the client is sufficiently prepared successfully to take those measures.

TEXT BOX 1. IFC Illustrative List (Reorganized) of Typical Category A, B, and C projects

Typical Category A Projects

Parties affected by enterprise

- Projects affecting indigenous peoples
- Projects involving resettlement of communities/families
- All projects which pose serious socioeconomic concerns
- Projects associated with induced development (e.g. inward migration)
- Projects which pose serious occupational or health risks

Physical environment affected by enterprise

- Projects which impact on cultural property (e.g. religious and archeological sites)
- Impacts on protected natural habitats or areas of high biological diversity including wetlands, coral reefs and mangroves

Type of enterprise

- Large infrastructure projects, including development of ports and harbors, airports, road, rail and mass transit systems
- Forestry operations
- Metal smelting, refining and foundry operations
- Mining (opencast and pit)
- Large thermal and hydropower developments
- Oil and gas developments, including pipeline construction
- Major irrigation projects or other projects affecting water supply in a given region
- Construction of dams and reservoirs
- Pesticides and herbicides: production or commercial use
- Domestic or hazardous waste disposal operations
- Hazardous chemicals: manufacture, storage or transportation above a threshold volume

Typical Category B Projects

- Breweries
- Hotel/tourism developments
- Cement manufacture
- Mining (small scale)
- Dairy operations
- Metal plating
- Food Processing
- Modernization of existing plants
- General manufacturing plants
- Pulp and paper mills
- Hospitals
- Textile Plants

Typical Category C Projects

- Software development
- Factoring Companies
- Consulting firms
- Share registries
- Service industries
- Stockbroking
- Technical assistance

*Risk Categorization Table” at “Understanding Environmental and Social Risk/Environmental and Social Risk Management/Environmental and Social Risk Management/ FIRST for Sustainability” <http://firstforsustainability.org/risk-management/risk-categorization-table/>

- **Objectivity and Consistency of Categorization**

In sum, project categorization by the IFC as portrayed does not seem to be especially coherent, clear, or consistent. It uses the language of risks and impacts but does not appear to delineate what it means by the terms or the relationship between the two. The problem is ameliorated to a modest degree by an illustrative list of categorized projects we have reorganized in show in Text Box 2 (IFC Illustrative List (Reorganized) of Typical Category A, B, and C Projects). Strictly speaking, the list is offered by the IFC to guide or inform financial intermediaries in their process of assessing and dealing with the environmental and social consequences of the subprojects in which they might invest.

Regardless of the particular method for characterization, to the extent possible it should enable as objective and consistent as possible application of the criteria employed.

The problem of consistency in decision-making in this regard has been highlighted, among others, by the Independent Evaluation Group (IEG) which is charged with evaluation of the activities of the IFC (among other arms of the World Bank).¹⁶⁴

In a 2010 report the IEG took note of two “key challenges” with respect to “establishing consistent approaches to categorization between the Bank, IFC, and MIGA.”¹⁶⁵ One concerned the definitions used, emphasizing the issue which we have noted above as to the absence of clarity as to the role of risk in the categorization of projects.

For example, acknowledged that “current definitions of Category A and C” were “relatively clear to most project teams when projects occur at the far ‘ends’ of the bell curve that characterizes the distribution of projects at various levels of project risks and impacts” and that “[t]he definition of Category A has been particularly useful in focusing attention on the relatively small number of high risk projects.”¹⁶⁶ However, it viewed “[t]he current definition, and interpretation, of Category B covers a wide spectrum of risk levels, however, with no clear distinction regarding the location or width of the “threshold” between Category A and B or Category B and C.”¹⁶⁷

Similarly, according to another IEG report in 2011, “[c]ategorization of projects based on environmental and social risks differs across the World Bank Group and is not based on objective criteria to assess risks.”¹⁶⁸ For example, several-high risk category B projects (substantial impact) financed by IFC would have likely been categorized as category-A (very high impact) projects using the Bank’s screening system.”¹⁶⁹ It contended that even projects categorized by the IFC as C “may have large environmental impacts, as illustrated by some IFC projects that are under Compliance Advisor and Ombudsman review.”¹⁷⁰ That is, in the eyes of certain interested parties the impacts were so harmful as to warrant the IFC’s reconsideration of its approving actions with regard to the project.

As alternative or perhaps complementary approach to the purely verbal and qualitative approach to categorizing projects was proposed by the IEG, one focused on an outcome of critical concern. For example, in order to better “examine the consistency between objective environmental and social risk criteria and safeguard categorizations in Bank projects,” the IEG developed a “risks and benefits model.”¹⁷¹ This particular model “rate[d] the environmental and social risks of each project on a four-point scale along four parameters – magnitude, intensity, duration, and sensitivity of expected impacts.”¹⁷² The IEG findings from a risk analysis using these parameters “indicate[d] that [the IFC’s] categorization is not always determined by the riskiness of a project; neither is it based on use of objective criteria to assess environmental and social risks.”¹⁷³ The IEG reported “both errors of exclusion caused by underclassification of category-B projects that should have

been category-A and errors of inclusion form over-classification of category-A projects that should have been category-B.”¹⁷⁴

In certain respects, these concerns were highlighted a number of years earlier by the United States Treasury (Treasury). More particularly, in 2005, during the first phase of IFC’s consultation process for revision of its safeguards and information disclosure policy, Treasury stated that “PS 1 needs to include principles for [project] categorization, whereas the interpretation notes can elaborate with sector-specific criteria and examples.”¹⁷⁵ In related comments later that year, the Treasury again observed, that the policy proposed did “not indicate IFC’s process or criteria for determining a project’s category, nor for disclosing how that determination is made. The current incentive to under-categorize a project is not fixed by the proposed policy.”¹⁷⁶ With respect to the foregoing there needs to be care with reference to “interpretation notes.” The Treasury would appear to be referring to the IFC’s Guidance Notes. As discussed above, each of the Performance Standards runs to many pages. Insofar as they are strongly suggestive of specific actions clients might or should take to avert or mitigate adverse impacts they, in principle, offer insight as to what those impacts are (and perhaps the risk of causing them). Whether as a practical matter they could be “reverse-engineered” to make specific connections that bear on categorization is another matter.

The Treasury returned to the subject in 2010, during its review of the draft for the then new 2012 IFC Sustainability Framework. Its recommendations included strengthening the categorization process. It proposed “[d]etermin[ing] the categorization decision based on an assessment of pre-mitigation impacts and on the most significant (highest) risks/impacts.”¹⁷⁷ More specifically it argued that the IFC should “[d]evelop and make publicly available a categorization/significance-evaluation framework or guidance, articulating the connection between the category rating and the types of projects and factors that the IFC considers, along the lines of the [International Bank for Reconstruction and Development’s] IRBD’s 1993 Environmental Sourcebook Update No. 2 (April 1993) or the [European Bank for Reconstruction and Development’s] ERBD’s indicative list of Category A projects” and “[e]stablish quantitative thresholds as part of that framework, where possible, that can be used to help determine the category of a project, along the lines of what the EBRD has integrated into its indicative list of Category A projects.”¹⁷⁸ We discuss this issue below.

However, it appears in response to the discussions in 2010 the IFC, in describing its intent to strengthen its internal capacity committed itself to developing “an interpretation note on categorization.”¹⁷⁹ Such a note appears to have been formulated because the Manual states that “[i]n making a categorization decision [the Investment Support Group for the IFC’s Environment, Social and Governance Department] shall take into consideration the guidance provided in *Interpretation Note on Categorization* (Rules and Tools: Early Review, Guidance & Sustainability Framework, and Interpretation Notes).”¹⁸⁰ Presumably that note articulates relevant principles and objective criteria. Unfortunately it is not publicly available. Moreover, although the IFC’s sustainability policies have changed since that time – most recently in 2012 – it is not evident that the issues posed here have been adequately addressed.

Indeed, the challenges persist. For example, leading NGOs recently wrote to the IFC asserting that “there needs to be ex-ante involvement of E&S staff at project inception stages, including the internal due diligence assessments. The IFC should develop new internal guidance notes for staff which better standardise the risk categorisation process, including outlining additional thematic areas where a project could have exposure to higher risk areas such land, agribusiness, or based on size of the portfolio of the client.”¹⁸¹ Although the reference here was to categorization as it pertains to investment through FIs the basic concern is the same as that raised with regard to direct investment in projects.

Even in the absence of principles for categorization some objectivity and consistency in decision-making might be achieved in other ways.

With the foregoing in mind we briefly consider other approaches: one by the European Bank for Reconstruction & Development (EBRD), just referenced above and one by the Overseas Private Investment Corporation (OPIC).¹⁸²

European Bank for Reconstruction and Development (EBRD): Some Comparisons in Methodology

The EBRD uses the same letters – A, B, C – as the IFC to designate projects according to categories “based on environmental and social criteria.”¹⁸³ As a general matter the EBRD states (from the outset using terminology partially the same and partially different from that of the IFC) that its categories “reflect the level of potential environmental and social *impacts and issues* associated with the proposed project”¹⁸⁴ More particularly, the categories are defined as follows:

- Category A: a project which “could result in potentially significant and diverse adverse future environmental and/or social impacts and issues which, at the time of categorisation, cannot readily be identified or assessed and which require a formalised and participatory assessment process carried out by independent third party specialists in accordance with the [Performance Requirement (PR)] 1.”¹⁸⁵
- Category B: a project for which “the potential adverse environmental and/or social impacts that it may give rise to are typically site-specific, and/or readily identified and addressed through mitigation measures. These impacts could be from past, current or future activities.”¹⁸⁶
- Category C: a project “likely to result in minimal or no adverse environmental or social impacts.”¹⁸⁷

There are several points with respect to the EBRD designations of which to take note.

First, with respect to Category A, it touches upon some of the same attributes by which the IFC labels a project as Category A. That is, it refers to “potential impacts” – though “issues” as well but not “risks” – ones which are “significant and diverse.” Note that the definitions for Category B and Category C make reference only to “impacts,” not “impacts and issues.” However, there is also another ostensible lack of parallel to the IFC formulation because there is no mention of impacts being “irreversible” or “significant and unprecedented.”¹⁸⁸

Second, the prescription is curious because it seems to be concerned not only with potential adverse consequences but also with the difficulty in gaining the information needed to ascertain those consequences. Such wording is consistent with the language for Category B that is, by its reference to impacts being “readily identified.” The IFC categorization does not touch on that as such. Clearly choosing the right categorization depends upon the amount of information available about the project; the less the information, the more uncertainty in the judgment being made. However, it does not change the nature of the judgment. It could be argued that insofar as there is more uncertainty the judgment should err in favor of a more stringent (toward Category A) categorization.

Third, in this connection, as observed in the discussion above about the IFC categorization, there is the notion of “risk” in the sense of the likelihood of occurrence of impacts which seems to lie behind the use of the word “potential.” But there is no literal mention in either the IFC or the EBRD definitions of “risks” in that sense. Recall in this connection our suggestion that the IFC seems to presuppose a clear conclusion – already arrived at – that the impacts will in fact occur

(rather than that they will be, say, very likely to occur) and that available mitigation methods will or will not avert or remedy those impacts.¹⁸⁹

Fourth, in the context of offering its formulation, the EBRD does provide what it terms as “an indicative list of Category A projects” which applies to “‘greenfield’ or major extension or transformation-conversion projects in the categories [on the list].”¹⁹⁰ It states that the list is indicative because of the “types of projects it contains [as] examples.”¹⁹¹ However it emphasizes that the “categorisation of each project..., depend[s] on the nature and extent of any actual or potential adverse environmental or social impacts, as determined by the specifics of its design, operation, and location,” language which is broadly similar to that employed by the IFC.¹⁹²

The EBRD’s indicative list is not dramatically different on its face from the illustrative one offered by the IFC as shown in Text Box 1 (IFC ILLUSTRATIVE LIST (REORGANIZED) OF TYPICAL CATEGORY A, B, and C PROJECTS). However, elsewhere the EBRD appears to go further. That is, it provides a 14-page “checklist” to “guide” judgments as “to the typical level of *inherent* environmental and social risk related to a particular business activity.”¹⁹³ Strictly speaking the checklist is for “credit officers within Financial Institutions (FIs).”¹⁹⁴ Presumably, though, it is consistent with the EBRD’s practice for its own direct investments. For each activity, the checklist delineates what the EBRD terms to be “high”, “medium”, or “low” risk. These three designations are delineated as follows:

- High Risk activities: Activities which “due to *inherent* characteristics, such as for example complex industrial process, use of scarce or hazardous resources or scale of operations have the potential to cause significant and/or long term environmental and/or social impacts or have significant environmental liabilities associated with them, the magnitude of which is difficult to determine at the loan application stage.”¹⁹⁵
- Medium Risk activities: Activities “for which the environmental and social impacts can be readily predicted, prevented and/or mitigated given appropriate levels of a borrower’s financial and technical/ managerial capabilities.”¹⁹⁶
- Low Risk activities: Activities which “have little environmental impact and require a minimum of Environmental and Social Due Diligence”¹⁹⁷

The High Risk language is similar to that of EBRD Category A in that it refers to the potential to cause “significant... impacts,” the magnitude of which is hard to determine,” (Compare the latter with “cannot readily be identified or assessed.”) However it also includes impacts which are not necessarily “significant” but might only be “long term.” The meaning of “long term” is not explained. Also the High Risk language appears to distinguish between projects with the potential for “significant and/or long term environmental...impacts” and ones which have associated “significant environmental liabilities.” The reference to liabilities and the importance of the distinction is not explained. At first blush it would seem to refer to financial or legal liabilities but however important those liabilities are to the overall decision to make an investment they are matters different from the adverse environmental and social consequences - which might give rise to those liabilities – which are the sole subject of categorization. In this regard, though, see the discussion below of such considerations in the context of investment through FIs.

The Medium Risk language is somewhat similar to that of EBRD Category B. Whatever the differences in phrasing, they share a focus on the projects being of such a nature that potential impacts can be readily identified and prevented or remedied. However, the Medium Risk category has as a distinct basis for categorization that the impacts “are typically site-specific,” an attribute which goes to the nature or extent of the potential impact rather than to how easily it can be identified and remediated. This former attribute is one echoed in the IFC’s definition for its

Category B projects which are ones whose impacts may only be “site-specific.” Curiously, though, the High and Low Risk Categories refer to “significant” and “little” impact, respectively, but the Medium Risk one does not otherwise refer to the extent of the impact. (Compare IFC Categories A, B, and C references to “significant,” “limited,” and “minimal or no” impacts.)

As noted, the Low Risk language simply refers to there being “little environmental impact.” By contrast ERBD’s Category C uses the “minimal or no adverse...impacts” language of the IFC formulation.

The source of the differences between ERBD’s High, Medium, and Low Risk and A, B, and C categories is uncertain. It may have to do with the fact that the checklist makes mention of only Category A projects. There is no reference to Category B or C projects as such. Moreover while Category A projects have the same color coding on the web-pages at which they appear as those of High Risk ones, they are placed on the list in relation to one another in a way which makes it difficult to determine whether Category A projects are a subset of High Risk ones or a distinct classification.

In all events, the EBRD, in turn, directs readers to “[r]efer to EBRD’s industry sub-sectoral guidance documents which provide a summary of the environmental, health & safety, labour and social issues and risks associated with the industry concerned.”¹⁹⁸ These documents are detailed in a way not dissimilar from the IFC Guidance Notes. However, they are different in that the EBRD guidance notes focus squarely on the kinds of *risks* that might be incurred and what gives rise to them. By contrast, as noted, the IFC Guidance Notes center on the kinds of *client actions* which could or would avert or mitigate the harms which can occur if one or another risk is realized, that is, adverse impacts. In this regard, the EBRD guidance notes are more closely connected to a categorization process based on the risk – in the sense of likelihood – of impacts occurring by virtue of client project activities.

Overseas Private Investment Corporation: Some Comparisons in Methodology

In a number respects the approach of the Overseas Investment Corporation (OPIC) In the United States is similar to that of the IFC and EBRD.¹⁹⁹ Like the IFC and EBRD, it uses the letters A, B, and C to designate projects according to categories “based on environmental and social criteria” as the IFC; and the language is essentially identical.²⁰⁰

However, OPIC offers additional guidance with respect to categorization in several ways. First, in a separate APPENDIX it provides what amounts to an indicative list comparable in size and detail to that given by the EBRD of projects that OPIC would deem to fall under Category A.²⁰¹ Second, in a Glossary it includes what are sometimes detailed definitions of terms which relate to the process or method for taking into account the risks and impacts associated with projects in categorization.²⁰²

In addition OPIC, in introducing each category, offers a gloss on what they encompass. For example, it briefly describes a few kinds of projects which are “considered” or “generally considered” by it to be “high risk” or “pose a higher risk.”²⁰³ These projects include ones “that discharge high levels of contaminants into the environment in the absence of adequate pollution controls,” have a “greater potential to impact large geographic areas outside of a project boundary or a large number of people living in nearby communities,” which “could result in the diminishment of ecosystem services or social values at a particular site,” or “are in locations, industries, and sectors with a clear history of Labor Rights...issues.”²⁰⁴ Note, though, that the word “risk” concerns the seriousness of adverse impacts not the likelihood of the occurrence of those impacts.

All this being said, insight into the details of OPIC's categorization process is largely as limited as it is for the IFC. OPIC's implementation of a revised Environmental and Social Policy Statement in 2010 was "supplement[ed] with new policy implementing procedures and a risk characterization matrix for risk identification."²⁰⁵ It reports that the matrix "is used internally to assist in identification of project risks based on various factors including sector, size and project location."²⁰⁶ However the matrix is not publicly available.

One more cautionary and important methodological observation should be made. OPIC, in describing what is required of its analysts in carrying out an initial project review, states broadly that the aim is to understand "key environmental and social risks and impacts, including the defined area of influence and project affected people."²⁰⁷ Equally as generally it reports that analysts make a provisional project categorization "based on environmental and social factors."²⁰⁸ However, elsewhere and by contrast with the IFC, OPIC asserts that its categorization as such is based on its "preliminary assessment of (1) the potential environmental and social risks and impacts of a project in the absence of any required mitigation, (2) the Applicant's commitment and capacity to effectively manage the environmental and social risks and impacts, including the ability to implement any required mitigation and (3) the potential role of third parties in achievement of successful outcomes."²⁰⁹ Ultimately, the IFC – or for that matter other DFIs or other investors concerned with these issues – would attend to all these considerations in making a decision to invest in a particular project, as described above. However, categorization by the IFC as such seems fairly clearly to be based only on potential impacts. Yet the just quoted passage related to OPIC does not readily square with the solely impact focused language OPIC uses in explaining how it goes about categorizing projects.

Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V. (FMO)

In the case of the Nederlandse Financierings-Maatschappij voor *Ontwikkelingslanden N.V. ("FMO"), the Dutch national development finance institution, the categorization is built on that of the IFC but an additional category is added.

"(1) Risk Categorization of Clients

All new and existing clients are subject to a Risk Categorization of their (potential) Environmental and Social impacts. There are four risk categories A, B+, B and C:

- A = high risk: Projects / clients with potential significant adverse social or environmental impacts which are diverse, irreversible or unprecedented.
- B+ = medium high risk: Clients with potential adverse social or environmental impacts that are generally beyond the site boundaries, largely reversible and can be addressed through relevant mitigation measures.
- B = medium risk: Clients with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures.
- C = low risk: Projects with minimal or no adverse social or environmental Impacts.

The categorization of clients into the A, B+, B, or C category is largely based on an assessment against the applicable IFC Environmental and Social Performance Standards."²¹⁰

Equator Principles Financial Institutions (EPFIs): Some Comparisons in Methodology

According to EP 1, EPFIs "categorise [a Project] based on the magnitude of its potential environmental and social risks and impacts...based on the [IFC]...categorisation process."²¹¹ And indeed, the definitions of the categories are identical to those of the IFC except that without further

explanation they use words “risks and impacts” in the place of just “impacts.”²¹² Beyond that there is essentially nothing publicly available in print as to how EPFIs understand or interpret what categorization in those terms entails. Moreover, neither the EP as such nor (as far as we can determine) do any EPFIs offer, as do the OPIC and the ERBD, an indicative list of the *kinds of projects* illustrative of what might be encompassed under each of the three categories. Rather, in a somewhat backhanded way, the EP provide what is termed to be an “Illustrative List of Potential Environmental and Social *Issues* to be Addressed in the Environmental and Social Assessment Documentation,” that is matters which clients “might...address[]” in conducting an obligatory “Assessment [of]...the relevant environmental and social risks and impacts of the proposed Project.”²¹³

The only other clues with regard to what kinds of projects particular categories might encompass arise from comments about an Environmental and Social Impact Assessment (ESIA). At one point, the EP state that “[f]or Category A, and as appropriate, Category B Projects, the Assessment Documentation includes an ESIA.” Later, it refers rather generically to an ESIA “usually [being] prepared for greenfield developments or large expansions with specifically identified physical elements, aspects, and facilities that are likely to generate significant environmental or social impacts.”²¹⁴ (Note that there is no reference to risks *and* impacts here.)

The EP do mention – though without further comment – “limited high risk circumstances” in connection with the need for a client to “complement its Assessment Documentation with specific human rights due diligence.”²¹⁵ It also remarks on the required review by an independent environmental and social consultant for “Projects with potential high risk impacts.”²¹⁶ Here it does proffer some examples (in a manner vaguely similar to what OPIC does), asserting that projects of that character include “adverse impacts on indigenous peoples”; “[c]ritical Habitat impacts”; “significant cultural heritage impacts”; and “large-scale resettlement.”²¹⁷

Apart from the above, there is virtually no literature about the actual practice of EPFIs with regard to categorization (other than descriptions and analysis of the actual categories assigned by EPFIs to projects). Even the two most extensive studies (and another somewhat more modest scale one) concerned with the origins of the EP and how they have evolved are not illuminating in this regard. One does remark the following:

“To reiterate, what we do *not* have here is evidence that banks made certain funding decisions related to particular categorizations of projects; what we do have here, and which arguably is significant, is evidence that they engaged in the process of categorization, which is the first – and essential – step in environmental and social risk management.”²¹⁸

However, the import of this statement goes more to the role or relevance of such categorizations as are made to the overall decision-making process rather than a determination as to what the categories are.

At least with regard to project finance, the fact that “almost all loans for such projects are syndicated among a group of banks and arranged collectively into one large loan to the borrower, typically managed by a lead arranger” has some bearing on categorization.²¹⁹ Insofar as at least one member of the syndicate is an EPFI, then the transaction must comport with the EP. In turn, at least all EP members of the syndicate must agree on the categorization though presumably any non-EPFI syndicate member would have to concur. Arguably the process of reaching a conclusion would draw on the experience and insights of many if not all of the syndicate members and potentially even provide a check on overly lax categorizations.²²⁰ (Of course, the need to reach a consensus may cut the other way.²²¹)

Something along these lines is suggested by a reported comment by “NGOs, such as Friends of the Earth,” namely,

“...the only accountability mechanism from the banks’ point of view, that they pointed to, was the fact that —well if there are going to be four Equator banks and they’re all involved in one deal, right, all of us will actually have to agree on how the deal is categorized. And that is our accountability because we’re going to have to sit down and say ‘do you agree this is a B?’ ‘Yes, it’s a B’, ‘okay, alright’. See now we’re keeping each other accountable.’ That was the extent to which they did accountability.”²²²

A process of this sort was arguably consistent with what one EP reported to us, namely, that different EP banks (presumably part of syndicate) might have different categorizations for a particular project. Given the discussion above it is not necessarily surprising that categorizations cannot be made precisely so conclusions might well vary. However, since little is known about how EP banks go about the task it is hard to say whether there is too much play for judgment.

Moreover, a somewhat similar picture was painted by a study done relatively early in the EP experience, namely that “project categorisation is a matter of discussion, sometimes heated, and even negotiation between the arranging bank and the bank charged with social and environmental risk assessment, not only among the Equator Banks themselves, but also between Equator Banks and the sponsors.”²²³ It cited one EP bank to the effect that a dispute about categorisation or the investment decision “was referred to the board of the bank or a standing committee or to a special committee set up to deal with such disputes.”²²⁴

Interestingly it cited but rejected concern about “‘categorisation creep’ where banks, given the scope for subjectivity in characterisation may be tempted to place projects in lower risk categories.”²²⁵ At the same time it acknowledged the challenge of the boundary drawing which categorization presupposes especially as it implicates social issues. That is, “the categorization of projects can rely on false distinctions and...there is evidence of a need for specialist knowledge especially for categorizing social risk or impact. Where social risk is overlooked, some projects with relatively low environmental impact but high social impact are being categorised as ‘B’ or ‘C’ ones even though the social impacts of such projects mean that it would be more appropriate to class them as Category A projects.”²²⁶ Moreover, it was “wrong to view social issues in isolation from environmental considerations, as environmental effects that lead to social impacts are sometimes even more problematic (eg land and resource use effects that can change local economies and emissions or waste that can have short- and long-term health effects.”)²²⁷ The basic difficulty with assessing non-environmental impacts arose from “the comparatively ‘soft’ nature of the issues being assessed, the absence of agreed standards or unified approach to assessment of these issues, as well as a lack of established recognised experts working in the area.”²²⁸

It would appear that there the private sector has developed categorization methodologies which are used by one or another EPFI (and perhaps others.) For example, at EP signatory BNP Paribas it is the project finance team (PF) which in the first instance designates the category. The Bank states that “[i]n order to ensure a consistent categorisation, all PF teams must use the Sustainable Assessment Tool (SAT), a categorisation tool licensed from the consulting company Sustainable Finance Limited, a subsidiary of PwC. Such tool has been customised for BNP Paribas. PF teams are requested to identify and assess the potential risks and associated impacts of a project as well as the client performance / track-record using information available to them. The SAT will then suggest a classification of the transaction among the three categories A, B and C defined in the EPs.”²²⁹

Note that there seem to be other elements of the process which would apparently spur both reconsideration of and consistency of categorization. More particularly, the document generated by the SAT is added to the credit proposal.²³⁰ However, “[i]n case of a disagreement on a project’s categorisation proposed by the [Project Finance (PF)] team, [Corporate and Investment Banking (CIB) Corporate Responsibility CSR] has the right to escalate the category to a more sensitive level (e.g. from B to A), leading to increased due diligence and scrutiny.”²³¹ BNP Paribas suggests that such a procedure “enables the early detection of sensitive projects so that they can be brought to the attention of senior management prior to any firm commitment, and allows the PF team to engage with the client as early as possible to put mitigation measures in place.”²³² Moreover, “[t]he evaluation of [environmental and social] risks may evolve between mandate signing (or any form of commitment by BNP Paribas) and the credit committee (for lending mandates), as a result of additional information on E&S risks arising during the due diligence phase. However, once a transaction is approved internally (e.g. green light from the credit committee), the initial categorisation is not modified further.”²³³

Carbonell in his early study of three EPFIs reports that ABN AMRO had developed an “Equator Principles tool” for project finance specialists to guide [project finance specialists] in categorising project proposals and mitigating major sources of risk.²³⁴ That tool “overlap[ped] with the existing ‘Client Diagnostic Tool’ and ‘Environmental, Social and Ethical Risk Filter’ for all new business.”²³⁵ The specialists’ analysis was reviewed by the bank’s special Sustainable Business Advisory (SBA) unit “for quality control” and approval of project categorization, among other things.²³⁶ The SBA also had to also approve “[Environmental Assessment (EA)] design, EA results, and the [Environmental Management Plan (EMP)] for a project proposal to go forward.”²³⁷ The SBA’s final approval was “also required for all Category A and B projects.”²³⁸ As a further check, the SBA’s decisions were “occasionally audited externally as a further control on quality.”²³⁹

Categories: missing the point?

We have emphasized the great importance of categorization. Nonetheless, however valuable it is to setting standards to be met by particular projects and spurring compliance with them, too mechanical an application of them (to which some might refer in critical terms as mere “procedural compliance”) can pose problems. For example, according to a study by a DFI consortium – the Evaluation Study Group (ESG) – of “the nexus between infrastructure and environment” in relation to DFI projects, argues that “compliance with [DFI] safeguard policies is most often focused on environmental factors during project preparation and appraisal. They have increasingly become seen as a checklist that narrows the focus on environmental issues to those explicitly listed in the safeguards.”²⁴⁰ In turn the report cites a World Bank review which found “that [Environmental Assessments (EAs)] are often not used to help identify projects in terms of alternate sites or means of achieving the project’s goals since they are incorporated into the project cycle beyond the point where such questions are most relevant.”²⁴¹ Further, it cites ECG “evaluations [which] have found that most of their infrastructure projects focus primarily on issues ‘within the fence’ of the project.”²⁴² Moreover, it suggests that “[t]he potential environmental impacts of infrastructure projects are likely to be more extensive than project-specific safeguard policies are designed to handle.”²⁴³

The study suggests that “[t]his type of procedural compliance undermines the spirit of safeguard policies. The costs associated with environmental assessments may lead [International Finance Institution (IFI)] staff not to undertake some valuable projects or to misclassify Type A projects as Type B projects.”²⁴⁴ A comparison of road rehabilitation projects funded by the WBG and the AsDB found projects with similar environmental impacts were likely to have different environmental categories at the two institutions. In both the World Bank and the AsDB, the rigor with which the

environmental safeguards are applied varies across regions. The AfDB has reported instances where projects were misclassified as well. The AsDB has noted that some projects are specifically designed to exclude components that would get an A rating. With different safeguard requirements for different categorizations, the implications for environmental degradation are clear. Projects with Type A environmental impacts, if misclassified as Type B, would be subject to the less-stringent safeguard policies of Type B projects, placing the environment at risk.”²⁴⁵

Categories: objectivity and the need to exercise judgment

However clear and objective criteria are there is generally play for judgment and discretion which is for the most part appropriate. However, insofar as the roles played by those involved in making a judgment implicate incentives they have to play such a role, those inducements may be problematic. For example, the IEG reported that “[i]nterviews and focus group discussions with IFC staff revealed selection bias and pressure from investment departments to prefer category B instead of category A in order to speed up appraisal and implementation. Several high-risk, category-B cases would have likely been categorized as category-A projects using the Bank’s screening system. In the evaluation’s judgment, this difference affects 27 percent (10/37) of the category-B projects in the sample. In 5 cases that involved the construction of new infrastructure or greenfield facilities, the scale of the impacts would have led IBRD to classify them as category A. In six additional cases, the sensitive nature of the impacts – associated as they were with hazardous waste, indigenous peoples, natural habitats, or cultural resources – would have likely led IBRD to classify them as category A. Categorization, in principle, would be a major determinant of the eventual environmental and social outcomes. While the categorization of these projects appears to have been in compliance with IFC’s procedures, IBRD would likely have classified them otherwise, pointing to a lack of consistency of safeguards implementation across the WBG.”²⁴⁶

For example, based on both a portfolio review and a survey of the IFC, the IEG “confirmed a tendency of risk avoidance through overcategorization” during the period from (fiscal years) 1999 to 2008.²⁴⁷ More particularly, according to the portfolio review, “[t]he proportion of category-B projects increased steadily by a third, while category C dropped to less than half its fiscal 1999 figure in the same interval. When assessed against current norms, 15 projects were found by IEG to be overcategorized, having overestimated the safeguards category – 11 from C to B and 4 from B to A. One project in Africa had underestimated a category-A project as B. Projects miscategorized as A had relatively limited, site-specific impacts that were not sensitive or irreversible, or no impacts in this phase of the project.”²⁴⁸

Similarly, according to the survey, “[e]leven percent of task team leaders and 8 percent of safeguards specialists reported that their projects were misclassified, mostly but not exclusively due to overcategorization.”²⁴⁹ While there was some warrant for “the increase in category B,” there was “a fairly widespread perception among task team leaders that the upward classification is driven by risk aversion rather than an empirical assessment of environmental and social risks. Among the B projects with category deficiencies, task team leaders felt that 15 percent should have been category A, while 77 percent should have been category C, because they had no, or low, environmental and social impact.”²⁵⁰ To anticipate the discussion below, the IEG also found “found some lack of clarity in use of the FI category. Five projects were affected by this – 4 out of 16 projects in category FI were not being administered by financial intermediaries and should have been classified as category-B projects, while 1 project that was reported as category B was in fact being administered by a financial intermediary and should have been category FI.”²⁵¹

In the foregoing context, the matter of staff incentives can be crucial. According to the ESG study cited above, “[t]here are few positive incentives built into the safeguard policies or project evaluations to encourage staff to take on environmentally complex projects. On the contrary, IFIs and task managers have incentives to avoid projects which require an intensive environmental impact assessment (EIA), as they are costly to undertake. When there is strong external pressure to do so, thorough environmental assessments and management of projects are undertaken, as with the Chad pipeline project or the Laos Nam Theun 2 dam project. However, task managers often perceive that the rewards for success in undertaking environmentally risky projects are outweighed by the detrimental effects of failure on career advancement. These perverse incentives created by the safeguard policies result in ‘rational’ decisions by IFI staff and executing agencies for the IFIs to not be involved in some challenging projects. However, it is possible that alternative financing sources would apply less-stringent environmental standards and oversight than the IFIs.”²⁵²

Financial Intermediary (FI) Categorization

International Finance Corporation (IFC)

As we have seen, the matter of categorizing projects for the purpose of direct investment poses a number of complex and difficult issues which are bound up with particular understandings of an investor’s goals and how they are to be achieved.

Another layer of complication and challenges is added to the task when investments are not made directly but rather through a financial intermediary (FI). In turn, the consequences of mis-categorization can be great. For example, according to a critique by NGOs, “FI cases brought to the CAO almost always fail in categorization as one of the initial root causes, especially in that FIs application of standards are applied commensurate of risk.”²⁵³ Moreover, they observed that “the fundamental problem with IFC risk categorisation is that it is ultimately a discretionary process, left to the subjectivity of the staff who make the determination. For example, we have seen projects deemed FI-2 on the presumption of there being lower risk because the projects were micro- finance or trade finance loans, despite there being evidence of an exposure to land issues.”²⁵⁴

This scenario is that which we have suggested is more likely to be similar to the one in which most pension funds are to be involved. We explore the issues raised in this context by turning, again, first to the experience of the IFC.

Note: In these and subsequent sections we review IFC practices with regard to FIs which, as we will see, have been the subject of criticism by the CAO and NGOs, among others. We will touch upon some of the IFC responses to that criticism. Just as we were completing this paper the IFC modified the sections of the Manual relating to FIs. In APPENDIX H (SOME IMPORTANT CHANGES IN 2014 TO IFC ENVIRONMENTAL AND SOCIAL REVIEW PROCEDURES RELATING TO FINANCIAL INTERMEDIARY INVESTMENTS) we reprise what appear to be relatively important changes which reflect the institutionalization of the IFC’s response with respect to key issues we canvas in this paper.

More particularly, the IFC has a separate category – FI – for “business activities involving investments in FIs or through delivery mechanisms involving financial intermediation.”²⁵⁵ For the IFC, FIs include “[t]hird-party financial entities such as banks, insurance companies, leasing companies, microfinance institutions, and private equity funds.”²⁵⁶ In relation to activities of this

kind as they bear upon environmental and social concerns FIs are grouped in the following three ways:

Category FI-1: “When an FI’s existing or proposed portfolio includes, or is expected to include, substantial financial exposure to business activities with potential significant adverse environmental or social risks or impacts that are diverse, irreversible, or unprecedented.”²⁵⁷

Category FI-2: “When an FI’s existing or proposed portfolio is comprised of, or is expected to be comprised of, business activities that have potential limited adverse environmental or social risks or impacts that are few in number, generally site specific, largely reversible, and readily addressed through mitigation measures; or includes a very limited number of business activities with potential significant adverse environmental or social risks or impacts that are diverse, irreversible, or unprecedented.”²⁵⁸

Category FI-3: “When an FI’s existing or proposed portfolio includes financial exposure to business activities that predominantly have minimal or no adverse environmental or social impacts.”²⁵⁹

The IFC remarks that in making these designations, it seeks to capture the E&S risk profile of the existing or proposed portfolio of investments/financing activities. IFC considers “the tenor, type, size, and sector exposure of the FI’s existing or proposed portfolio in determining the categorization.”²⁶⁰

For the purpose of the analysis the IFC’s categorization that follows, it is useful to restate the text above substituting, where relevant, the exact language from the definitions for *direct investment* categories. Apart from unimportant considerations the definitions look as follows:

Category FI-1: ones for which “an FI’s existing or proposed portfolio includes, or is expected to include substantial financial exposure to [Category A activities].”²⁶¹

Category FI-2: ones for which “an FI’s existing or proposed portfolio is comprised of, or is expected to be comprised of [Category B activities] or... includes a very limited number of [Category A activities].”²⁶²

Category FI-3: ones for which “FI’s existing or proposed portfolio includes financial exposure to predominantly [Category C activities].”²⁶³

A number of issues rise to the fore but before we canvas them we briefly consider the ostensible practical import of the IFC’s categorization in these terms.

Some requirements, a number stated broadly, apply to all FIs. For example, all “are expected to manage the E&S risks associated with the lending/investment activities associated with IFC finance. ...FI[s are]...required to undertake lending/investment-level actions commensurate with the level of E&S risk related to the FI activities supported by IFC, ranging from a simple review against IFC’s Exclusion List^{IN7} to application of the Performance Standards.”²⁶⁴

However, an FI-1 or FI-2 client must apply *all* of the PS “to transactions involving project finance and long-term corporate finance”²⁶⁵ That is, it must “assess E&S risks of transactions according to Performance Standards 1 through 8” and “require its borrowers/investees to comply with these Performance Standards in their operations.”²⁶⁶ The IFC offers three overlapping reasons why. First, it is because “[p]roject and corporate finance activities are more likely to involve some E&S

risk for the FI, as they are typically medium-/long-term transactions and will typically have negotiated transaction documents that incorporate relevant covenants.”²⁶⁷ Second, because “[t]ypically, project finance and long-term corporate finance transactions carry increased E&S risk compared to microfinance, mortgage finance, insurance and short-term finance products.”²⁶⁸ Third, making a link to the direct project categorization, the IFC contends that “[u]nder [its] Sustainability Policy, higher risk FI subprojects must apply the Performance Standards when they are receiving project finance or long-term corporate finance from an FI. In effect, these higher risk subprojects are those that would be considered Category A or B projects if financed directly by IFC.”²⁶⁹

Even though all FI clients must comply with PS 1 which “requires the development of an [Environmental and Social Management System (ESMS)] to identify and manage the E&S risks associated with their portfolio on an ongoing basis,”²⁷⁰ the import of that requirement varies.²⁷¹ “The complexity of the ESMS will vary according to the risk exposure that the FI is expected to manage; for instance for FI categorized as FI-3, which constitute the majority of IFC’s investments through FIs, the ESMS will consist of a simple review mechanism.”²⁷²

As a means for giving the above requirements effect, an FI-1 and FI-2 client must “develop a categorization system based on the level of E&S risk of the transaction to guide them on the scope of the [E&S due diligence (ESDD)] processes/procedures to identify risks and impacts of borrowers/investees.”²⁷³ As *part* of that due diligence it “must review proposed transactions against the IFC Exclusion List and national E&S laws and regulations where they exist and are applicable, requiring at a minimum that [it] check if borrowers/investees have all necessary permits where required and that their operations are not unlawful.”²⁷⁴ By contrast, for an FI-3 client, that “review process represents the only ESDD requirement.”²⁷⁵ The more elaborate demands on other FIs are described in the following terms:

“For transactions within the scope of category FI-1 and FI-2 institutions, the ESDD process^{IN27} typically consists of (i) reviewing all relevant documents and information provided by the borrower/investee, including information on risks related to the particular industry^{IN28} sector and technical aspects of the borrower’s/investee’s operation; (ii) reviewing against pre-determined criteria such as the IFC Exclusion List, national E&S laws and regulations, and where applicable, the Performance Standards; (iii) conducting site visits to facilities and meetings/interviews with relevant stakeholders; and (iv) reviewing the borrower’s/investee’s track record on E&S issues in terms of potential non-compliance with national regulations or negative publicity. As part of an FI’s ESMS, responsibilities for conducting the ESDD are integrated at various stages of the FI’s lending/investment cycle.”²⁷⁶

We now turn to the rationale for the FI categorizations which are curious in several respects.

1. Direct focus on financial exposure; derivative focus on impacts. The definitions for Categories FI-1 and FI-3, unlike those for Categories A, B, and C ultimately do not directly hinge on the *impacts* associated with the subprojects indirectly funded by the IFC through FIs but rather to the financial exposure which arises from such impacts. Oddly, the language for Category FI-2 does not mention financial exposure, only impacts. We can find no basis for it not being phrased in the same kind of way other than a failure in drafting language. (Interestingly the MIGA in its “Policy on Environmental and Social Sustainability,” uses exactly the same definitions for the FI categories *except* that it makes reference just to “business activities” and *no reference* to “financial exposure.”²⁷⁷) Indeed, materials already cited above – distinguishing project finance and long-term finance transactions from others – point to different category-related treatment of FIs based at least in part on the import in financial terms of different forms of investment in subprojects by

FIs for the FIs themselves (and arguably the IFC as well). From the words used it would appear that for *transactions* to be deemed to demand high scrutiny of and greater demands on FIs, they must be associated with not only with *subprojects* thought to be especially problematic in terms of their environmental and social impacts but also involve *particular forms of finance* for the FIs.

This approach is also suggested by the IFC's characterization of E&S risk in this context. That is, it states that "[t]he E&S risk associated with an FI's lending/investment activities depends on factors such as the specific E&S circumstances associated with a borrower's/investee's^{IN5} sector, and the operations, the geographic context, among others. How an FI addresses these risks will depend on the level of perceived risk, the type of financing undertaken and the amount of leverage that the FI has in obtaining mitigation measures from its borrowers/investees." So for example, "[w]hen an FI provides project or long-term corporate finance, it is more exposed to the underlying E&S risks of the borrowers'/investees' operations but also has the opportunity to manage these risks at the transaction level."²⁷⁸ The CAO appears to have the same view of IFC categorization of FIs: in a 2010 report it "found that IFC's current guidance⁴⁹ on E&S risk categorization of corporate investments advises E&S specialists to consider IFC's own sphere of influence in the categorization decision alongside the investment's inherent E&S risk profile. While both factors are relevant in determining the overall risk of the investment, this mixing of E&S risk with IFC leverage is problematic, as it may lead to a corporate loan being assigned a lower risk category on the basis of IFC's limited influence over the company, rather than strictly on the basis of the investment's underlying risks. As a result, this makes the actual risk carried by IFC less visible to IFC."²⁷⁹

In other words, there are at least two major considerations in terming these transactions as more "risky." One is that they likely entail active involvement of the FI with its subproject client over a fairly extended period of time. The second is that the transactions likely or perhaps even definitely will involve a detailing of perhaps fairly extensive obligations of the client to the FI as a condition of the funding. Neither on their face concerns the impacts of the projects out of which the transactions arise. However it may be implicit that projects financed in the way typically have a large footprint – among other things, in duration, space, and need for resources (financial and otherwise). In turn, they may be correspondingly complex. That might necessitate negotiation of a wide range of key elements and demand the active attention of the financier of the subproject to those elements being effectively and successfully addressed over the extended period over which the project is executed. Clearly, project finance, which is typically concerned with long-term financing of infrastructure and industrial projects, is apposite with that description. Presumably, long-term corporate finance might well involve funding of a broadly similar character. The same could be true of private equity funds.

The foregoing two points largely focus on the financial "exposure" of *an FI* to the consequences which might result from certain kinds of subprojects in its portfolio which are challenging in terms of their environmental and social impacts. This approach is somewhat odd: categorization is presumably in aid of *the IFC* achieving its objectives ostensibly out of a concern about those impacts but those impacts have import as well for the IFC (in categorization) by virtue of their consequences in financial terms (exposure) for an FI in which the IFC invests. Arguably, though, there may be implicit in the IFC materials attention to the matter of the responsibility or culpability of the financier – here the FI, but ultimately for the IFC – for those impacts. That is, where the relationship of the financier to its client is of a long term nature that might be thought to implicate it in the behavior of its client over that time period. Similarly, the need and occasion for the financier to give special attention to and negotiate special to covenants to be incorporated in the transaction suggests that it is in a position to influence or shape the behavior of its clients by virtue of those covenants. That might be seen to warrant a financier's responsibility to exercise its

influence in appropriate ways. A recent case illustrating the need or even obligation to use such influence to ensure compliance with the OECD Guidelines which involved the large Dutch pension APG and Norges Bank Investment Management (NBIM), the asset management arm of the Norwegian central bank (with respect to investments of the Government Pension Fund – Global) is detailed in Textbox 2 (THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND PENSION FUND STAKES, LEVERAGE, AND RESPONSIBILITY).

This culpability-related approach is consonant with the way the IFC differentiates among the modes of financing FIs in terms of what it expects of them.

Consider first market instruments, which the IFC describes as follows: “A financial instrument where the instrument holder has limited or no influence over the operations of the issuer of the instrument. This may include listed equity, commercial paper, bonds, and other debt or equity instruments that are traded in the market.”²⁸⁰ It restates the point somewhat differently, namely asserting that for such instruments “where the FI has little or no leverage or no capacity to carry out a reasonable review of the project’s risk,” the IFC’s Exclusion List is applied along with “a reputation risk screen in addition to any other Applicable Performance Requirements as can be reasonably implemented in the scope of the transaction.”²⁸¹ It would appear that insofar as there would be “any unaddressed E&S risks that would remain on account of the limited leverage” those considerations are left to the IFC management and board.²⁸² Elsewhere, for IFC investments in these instruments there is a generic reference to the “underlying FI portfolio” being “expected to meet the Applicable Performance Requirements.”²⁸³ This mechanism suggests some broad gauge screening process.²⁸⁴ It is consistent with the IFC’s description of the post-investment process (though nominally) with respect to direct investments. That is for such market instruments (and publicly traded equity investments), “where limited IFC influence or access to information exists because IFC cannot be a preferential shareholder,” the means for monitoring the investment might include “Corporate Sustainability or Social Responsibility Reports, etc. to monitor if the Company’s Environmental Management System is consistent with IFC’s PSS.”²⁸⁵

Next, where an FI is engaged in and expects to engage only in retail operations – that is, financing or financial services “only to individuals, such as credit cards, personal loans, home loans, and vehicle leasing” – or the financing is only for retail operations, then project is deemed to be a Category C Investment.”²⁸⁶

Similarly, where the IFC supports a *trade finance transaction* (through its Trade Unit) – which include “guarantees to support import and export transactions that extend to political and commercial payment risks the project is classified as Category C.”²⁸⁷

In the case of support for *microfinance* or for an FI’s investments in that area, the focus is on ensuring the application of the IFC’s *Microfinance Exclusion List*.²⁸⁸

Where the FI provides “*equity, loans, leasing, guarantee products, or other financing to corporate or legal entities other than individuals*” or “for other activities that are expected to have potential E&S impacts” the goal is to “ensure application of the FI Exclusion List, applicable national E&S regulations, and possibly IFC’s PS.”²⁸⁹

TEXT BOX 2. THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND PENSION FUND STAKES, LEVERAGE, AND RESPONSIBILITY

A recent case involving a pension fund (and another, somewhat similar kind of) investor in connection with the OECD Guidelines illustrates some of the issues just discussed. More particularly, a complaint was filed with the OECD against a South Korean steel company, POSCO, for alleged (human rights and other) violations of the OECD guidelines for Multinational Enterprises in connection with the firm's construction of an integrated steel plant, captive port, and iron mines in the Indian state of Odisha. The complaint also implicated, as minority shareholders in POSCO, the Dutch Pension fund APG and its captive asset manager APB and Norges Bank Investment Management (NBIM), the asset management arm of the Norwegian central bank ([Bank), which manages the Norwegian Government Pension Fund Global. The South Korean, Norwegian, and Dutch National Contact Points asserted that "[t]he OECD Guidelines apply to the financial, sector, as they do to all sectors" and that the Guidelines "do not make any exception for sub-groups of investors, nor do they exempt minority shareholders." More particularly, it was contended that although APG held only 17 million € in POSCO shares it was "leading a coalition of other shareholders and acknowledges to have sufficient leverage to effect change in the practices of POSCO" so that there was a sufficient link between APG's activities and the issues raised in the complaint APG did not contest the applicability of the Guidelines in this particular instance (though raised questions about their reach more generally) and agreed to take certain steps in relation to POSCO. It stated as follows:

- APG "is committed to continue to use its influence bringing POSCO's business practices in line with international principles and standards, under the expectation that POSCO publicly agrees to adopt these standards for all its operations including those in India and publicly reports on their implementation."
- "This engagement is focused on: establishing a meaningful stakeholder consultation process in India; to identify, prevent and mitigate any negative impacts related to POSCO's operations and investments in Odisha; and to ensure that effective local grievance procedures are developed."
- "APG has expressed a desire to further collaborate with international NGOs, the relevant NCPs and other investors to address the issues mentioned in this Specific Instance and other issues of concern." "SOMO, BOTH ENDS, ABP and APG."^e

By contrast, NBIM denied the applicability of the Guidelines to it as a minority shareholder because it had no "business relationship with POSCO" within the meaning of the phrase under the Guidelines and there was no "direct link between a minority shareholder and any negative impact caused by companies [such as POSCO] or their subsidiaries in which [it] invest[s]."^f Note that the preceding discussion implicitly assumes that pension funds are best understood as private enterprises. But clearly, government may play a greater or lesser role in the establishment of pension funds. In turn, that role may bear significantly on whether funds have mandated or ostensibly voluntary responsibilities with respect to human rights or other issues. This issue has come up, among other things, with regard to the applicability of the UN Guiding Principles on Human Rights.^g

^a For material related to the complaint see http://oecdwatch.org/cases/Case_260 For a characterization of the alleged violations see "The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project," The International Human Rights Clinic (IHRC) at New York University School of Law and The International Network for Economic, Social and Cultural Rights, 2013. [http://www.escr-net.org/sites/default/files/11271400/The%20Price%20Of%20Steel%20-%20Full%20\(English\).pdf](http://www.escr-net.org/sites/default/files/11271400/The%20Price%20Of%20Steel%20-%20Full%20(English).pdf)

^b Note that according to NBIM, "[t]he fund was called the Petroleum Fund until 2006 when it was renamed the Government Pension Fund Global. The change highlighted the fund's role in saving government revenue to finance an expected increase in future public pension costs. Despite its name, the fund has no formal pension liabilities. No political decision has been made as to when the fund may be used to cover future pension costs." "Government Pension Fund Global," NGIM.

<http://www.nbim.no/en/About-us/Government-Pension-Fund-Global/>

^c FINAL STATEMENT: COMPLAINT FROM LOK SHAKTI ABHIYAN, KOREA, N TRANSNATIONAL CORPORATIONS WATCH, FAIR GREEN AND GLOBAL ALLIANCE AND FORUM FOR ENVIRONMENT AND DEVELOPMENT VS. POSCO (SOUTH KOREA), ABP/APG (NETHERLANDS) AND NBIM (NORWAY)," The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, May 27, 2013, p. 7. http://www.regjeringen.no/pages/38341402/nbim_final.pdf

^d "INITIAL ASSESSMENT, Notification and request for mediation to the South Korean, Norwegian and Netherlands National Contact Points for the OECD Guidelines for Multinational Enterprises," Netherlands National Contact Point, January 10, 2013. http://www.oesorichtlijnen.nl/wp-content/uploads/ncp_specific_instance_posco_abp_initial_assessment.pdf

^e "PUBLIC JOINT STATEMENT," Netherlands National Contact Point, OECD Guidelines for Multinational Enterprises, March 6, 2013. http://www.oesorichtlijnen.nl/wp-content/uploads/somo_bothends_abp_apg_public_joint_statement_06_03_2013incl.pdf

^f "Complaint regarding investment in the South Korean steel company POSCO," NBIM, May 24, 2013. <http://www.nbim.no/en/press-and-publications/News-List/2013/complaint-regarding-investment-in-the-south-korean-steel-company-posco/>

^g For an exploration of responsibilities of the Swedish AP funds' (except AP6) responsibilities to address human rights issues, either by virtue of their being state affiliated (pillar 1) or their private corporate enterprises (pillar 2), see "Human Rights Considerations in the Swedish AP-funds' Investments, A case study in the Business and Human rights field," by Caroline Peterson, Graduate Thesis, Master of Laws programme, Faculty of Law, Lund University, 2012. <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=3359551&fileId=3411053>

Lastly, and harking back to the point noted above, in the case of FIs which finance large infrastructure or extractive sector projects – which for the IFC presumptively pose “potential significant E&S risks” – or for the operations of private equity funds, the IFC see its itself “more directly exposed to the E&S risks” the need for heightened IFC scrutiny and engagement is evidenced by its requiring “the Fund Manager...to provide the ESDD and Corrective Action Plans developed for the first three investments and all high risk sub projects for review and comments, prior to taking any proposed investment for approval by its Investment committee, to ensure ESMS is robust.”²⁹⁰

The arguably distinctive character of project finance as it relates to its financial import and in some measure notions of responsibility echoed in discussions which led up to the promulgation of the Equator Principles. In essence, NGOs had repeatedly harshly criticized lender banks for project finance deals; banks had detailed knowledge as to how the loan proceeds were being used in the identified individual road, power, or other project, and banks potentially had considerable leverage in declaring a default for failure to comply with the terms of the loan which could include covenants relating to the project’s environmental and social impacts. Thus,”[c]ognisant of this, the greater integration of E&S issues into project finance activities made sense to the EP leaders: it legitimated or rationalised it from the beginning. Project finance therefore made E&S issues more “tangible” and easily approachable than, for example, a normal commercial loan to a client where the use of proceeds may not always be known and where FIs may have less leverage to call in a loan on E&S grounds alone.”²⁹¹ Of course, as noted, the role of NGOs challenging what were to be EP signatory banks forced “the issue of responsibility. In part, their ability to do so was an artifact of the cited characteristics of project finance.”²⁹²

Thus, it would seem that the references in general to financial exposure in the definition of the FI categories and what in some measure amount to references in the Manual to the financial relationship of the IFC to its clients in relation to categorization conjoins one arguably important set of issues with another.²⁹³ As reflected in the direct project categorization, a driving concern is the potential occurrence of and possible avoidance of or mitigation of adverse environmental and social impacts of activities associated with projects funded directly or through an FI. A related but different set of issues pertains to what in view of those possible outcomes the IFC might do and how given the nature and extent of its financial stake in the FI. The reference to financial exposure seems to be connected with the second set of issues. Certainly, the IFC, or for that matter any other investor, may see it as important, critical, or even essential to attend to it. That is, it might well consider the nature and extent of its financial involvement with the activities and given that involvement, its ability to influence those activities to avert or mitigate the identified impacts. Presumably such consideration would be spurred by purely financial concerns, that is, the financial risks of a project which goes awry as result of potential or actual social or environmental impacts. However, there are what could be termed reputational considerations in play as well. That is, the more things have gone awry in those terms the more the IFC’s (or other investor’s) strong and public commitment to averting or mitigating adverse environmental and social impacts is placed in question. In turn, though, in some measure, the degree or extent of culpability attributed to or acknowledged could plausibly depend on both how important the IFC (or other) investment is to the FI in relation other sources of investment and the degree of power or influence which the IFC has given the legal (or other) nature of its financial stake. The particular examples given by the IFC and detailed above would seem to reflect thinking in those terms.

Certainly at some stage for the IFC (or other investor) decisions must be made in light at least of potential adverse impacts/the risk of occurrence of those impacts as well as the associated financial fallout from them. However, we believe that the IFC categorization method appears to be portrayed and is generally understood to be concerned only with social and environmental

impacts. Given that the method for categorization of direct investments and its lack of reference to financial exposure, it is not appropriate for the method for categorization of FIs to make reference to it. A 2010 review by the CAO of IFC practices would seem to have raised the same issue. It found that the IFC's "current guidance" on E&S risk categorization of corporate investments "advises E&S specialists to consider IFC's own sphere of influence in the categorization decision alongside the investment's inherent E&S risk profile. While both factors are relevant in determining the overall risk of the investment, this mixing of E&S risk with IFC leverage is problematic, as it may lead to a corporate loan being assigned a lower risk category on the basis of IFC's limited influence over the company, rather than strictly on the basis of the investment's underlying risks. As a result, this makes the actual risk carried by IFC less visible to IFC."²⁹⁴

These issues were echoed in a recent letter by leading NGOs sent to the IFC. As a general matter they contended that "FI cases brought to the CAO almost always fail in categorisation as one of the initial root causes, especially in that FIs application of standards are applied commensurate of risk."²⁹⁵ They suggested that "[a]rguably the fundamental problem with IFC risk categorisation is that it is ultimately a discretionary process, left to the subjectivity of the staff who make the determination. For example, we have seen projects deemed FI-2 on the presumption of there being lower risk because the projects were micro-finance or trade finance loans, despite there being evidence of an exposure to land issues."²⁹⁶ Moreover, there was "a concerning disconnect between investment teams and E&S teams in making this determination, as they having differing interpretations of the types of risk and engagement in identifying project risks. For example, there is a rigorous and robust assessment of credit risk by the investment staff, and a limited, almost secondary consideration made on E&S risks."²⁹⁷ In their view, achieving consistency required "ex-ante involvement of E&S staff at project inception stages, including the internal due diligence assessments." Moreover there should be "new internal guidance notes for staff which better standardise the risk categorisation process, including outlining additional thematic areas where a project could have exposure to higher risk areas such [as] land, agribusiness, or based on size of the portfolio of the client."²⁹⁸ Finally, the IFC needed to "incentivise staff to improve the robustness of risk categorization."²⁹⁹

The NGOs also referred to the need for other criteria on which to base categorization. Some related client's "commitment to shared goals" largely in development related sense. Others, though, included the client's "past track record, willingness to learn, subclient portfolio riskiness, openness and transparency to the public, and governance of the institution...Ratings on new metrics for choosing clients should be provided in standardised formats and published publicly, for example in the reviews disclosed before investment decisions take place"³⁰⁰ Yet others issues which relate more broadly to categorization, e.g., the IFC being "explicit and transparent about how it measures proposed client's baseline capacity," "[s]etting up new metrics for client choice...[i]n consultation with all stakeholders" and providing "[r]atings [based] on new metrics ... being provided in standardised formats and published publicly, for example in the E&S review disclosed before a board decision."³⁰¹

Another important issue is the nature of categorizations by FI-1 and FI-2 firms of their subprojects and their relationship to what the IFC might otherwise label them if they were IFC projects.³⁰² According to the IFC "[a] typical system includes three E&S risk categories, designated as high, medium, and low risk (or other categories such as 1, 2, and 3, or A, B, and C) reflecting different risk levels."³⁰³ How the IFC describes the high, medium, and low risk categories almost exactly follows the language which defines Category A, B, and C projects respectively.³⁰⁴ The only difference is the latter refers to "impacts" whereas the former mentions "risks and/or impacts." Arguably, then, the IFC and FI categorizations are nominally perfectly aligned. As a practical

matter, though, that alignment needs be spurred in advance by adequate guidance by the IFC to FIs as to how they should go about categorization of subprojects and after the fact, critical assessment by the IFC of a sufficient fraction of the categorizations of subprojects to verify the decision.³⁰⁵ Another check on the merits of such decisions can be supplied by affected communities if they are well and timely enough alerted to the existence and nature of the subproject and the FI who is investing in it, a point we address below in the context of more general questions about transparency and disclosure. Note that in the foregoing connection in a 2010 review which touched on the subject, IFC CAO “confirmed the ongoing existence of significant implementation challenges in IFC’s FI portfolio, such as...FI client mistakes in categorization of, and application of the Performance Standards to, relevant sub-projects.”³⁰⁶

2. Focus on impacts and risks rather than just impacts. The category definitions are also odd in that in the categorization of direct projects the reference is only to the *impacts* of activities. For categories FI-1 and FI-2 (though not FI-3) the concern is ostensibly with both *impacts and risks* of activities. As noted above in connection with categorization of the IFC’s direct investments, lurking behind the reference to potential impacts might be concern about risk in the sense of the likelihood of the occurrence of impacts.³⁰⁷ Something similar seems to be suggested by the following characterization of the categorization of FIs:

“In accordance with IFC’s Sustainability Policy, IFC categorizes investments using a system based on the relative magnitude of E&S risks and impacts. Investments involving FIs or delivery mechanisms involving financial intermediation are classified as Category FI. This category is further divided into FI-1, FI-2, and FI-3 to capture the E&S risk profile of the existing or proposed portfolio of investments/financing activities. IFC considers the tenor, type, size, and sector exposure of the FI’s existing or proposed portfolio in determining the categorization.”³⁰⁸

But if so, at first blush it is not evident why the definitions for both kinds of categorization would incorporate identical language in this regard. The use of different words suggests that risk might be understood in a different way, one associated with the risks for an FI itself by virtue of potential adverse impacts being realized or the aggregate risk posed by that FI for the IFC.

As noted above in the context of IFC direct project categorization, despite use of the adjective “potential” (in “potential impact”) it may not refer to the risk of the impact, in the sense of the probability of its occurrence; rather there seems to be the presupposition that certain impacts will occur if the project is carried out as proposed but might be averted or averted/mitigated if the project were modified or certain actions were taken in connection with its execution. The same issue plays out with the use of the word “risks” in the FI categorization. That is, it arguably would encompass both the potential damage in environmental and social terms and/or the financial harm and the likelihood that it would be realized. (It might be associated with uncertainty as to whether one or another adverse outcome might occur because the project proposal is not well-defined enough or there is insufficient information about what the project will entail to gauge whether it might result in certain adverse consequences.)

3. The relation of the FI portfolio to the FI categorization. The distinct challenge for categorization of FIs is that it requires an overall judgment made in light of individual judgments as to each of the activities which are or which it is anticipated will be encompassed by the FI portfolio, which might have adverse impacts ranging from the-non-existent to ones which could be quite serious. By contrast, categorization of direct investments of course just requires a considered assessment with respect to a single activity. As noted, the IFC’s overall judgments are described for FI-1s as being based on the extent (*substantial*) of “financial exposure” to Category A “activities” and for FI-3s, on the extent of “financial exposure” to “predominantly” Category C “activities.” Also as

noted the language for FI-2 is rather different, e.g., makes no references to “financial exposure”. However, if that was the result of faulty drafting, then for FI-2s the assessment is based on the extent of “financial exposure” (substantial?) to Category B “activities” and perhaps a *limited number* of Category A “activities.”

So stated, the categorization method is murky at best, in terms of questions of quantity and quality. The U.S. Treasury, in its 2010 comments on proposed changes to the IFC’s environmental and social standards, took note of issues of this sort and suggested a different approach. First, it recommended that “the cutoff between category FI-1 and FI-2 be that FI-1 include where *any* business activities with diverse, irreversible or unprecedented social or environmental risks and/or potential impacts are anticipated.”³⁰⁹ Indeed, the Treasury urged that the then proposed “High-Medium-Low ratings [be] based on the riskiest elements of the portfolio, not on a portfolio average”, and that “high” risk is defined as an FI where “one or more Category A subproject(s) are likely.”³¹⁰ Note that in the preceding sentence the Treasury uses the word “risk” in the sense of likelihood or probability of occurrence. By contrast the suggested language for a sharp distinction between FI-1s and FI-2s retains the dual and confusing reference to risks and/or impacts.

There has also been sharp and ongoing criticism by NGOs of IFC categorization of FIs. In recent exchange of letters with the Vice President of the IFC, a group of NGOs remarked that “[t]here is acknowledgement within IFC that FI-2 is too broad of a catch-all, and some have proposed a four tier categorisation scale to better distinguish high and low risk FIs. The EBRD has an indicative list of Category A investments, and the IFC could usefully produce similar lists for FI-1 and FI-2. This could be part of both an interpretation note and/or an internal guidance note.”³¹¹ Interesting they add that the latter “should also break the strict segregation of credit risk and E&S risk by highlighting the examples of projects where poor E&S outcomes led to poor development results and reduced profitability.”³¹²

European Bank for Reconstruction & Development (EBRD)

The EBRD has only a single category for financial intermediaries, although the EBRD’s description of its decision-making process suggests that it in effect has the equivalent of the IFC’s FI-3 category.³¹³ Thus formal categorization is not a tool used to parse projects for subsequent decision-making and post-decision actions. Rather, the EBRD points in rather general terms to decisions and actions being made in light of “environmental and social risks.” There is no reference to “impacts” as such and the explicit focus is on certain attributes of FIs, including how they are financed by the EBRD:

“The very nature of intermediated financing means that the EBRD will delegate to the FI responsibility for transaction appraisal and monitoring as well as overall portfolio management. Environmental and social risk management are part of the responsibilities delegated to the FI. Nevertheless, by virtue of its relationship with the FI, the EBRD continues to have an interest in assessing and monitoring whether the environmental and social risks associated with the FI’s business activities are adequately addressed by the FI. The exact modalities of delegation and EBRD oversight will depend on a number of factors, including the nature of the FI and its business activities, the type of finance provided and the business environment in the country.”³¹⁴

The inclusion of the type of finance provided echoes what the IFC appears to do, among things, as part of its FI categorization process discussed above. The same point made there applies here: while the type of finance is important to the IFC (or EBRD) as an institution as it decides what to do in view of the import in environmental and social terms of FI subprojects; however, failing to

separate analysis of the potential environmental and social impacts of those subprojects from other considerations is, we think, not productive.

Overseas Private Investment Corporation (OPIC)

OPIC has only one category – Category D – for FIs, presumably because of its rather different treatment of them as compared with the IFC. That is, OPIC states that its “support of the Financial Intermediary’s activities is conditional and that Subprojects will be screened and subject to the full scope of OPIC’s environmental and social assessment process including, but not limited to, public disclosure and consultation, Greenhouse Gas emission accounting, and conditions and monitoring requirements as warranted by the nature and scope of the Subproject. OPIC screens, reviews and provides prior written consent to all Subprojects on the basis of potential environmental and social risks.”³¹⁵ In turn, “OPIC’s review of Subprojects involves the same screening, assessment, disclosure, compliance and monitoring procedures as all other direct Applicants to OPIC, including but not limited to Category A disclosure and Greenhouse Gas policy requirements (See Section 8).”³¹⁶ As discussed further below, the IFC does not engage in such universal screening.

OPIC’s description of its decision-making process suggests that it in effect has the equivalent of the IFC’s FI-3 category.³¹⁷ Although beyond that the decision with respect to an FI is not tied to any further categorization as such, the formulation for it makes quite clear the interplay of adverse environmental and social impacts and how the FI is financed and finances subprojects:

“A Financial Intermediary’s proposed investment or lending strategy is taken into account in OPIC’s assessment of the risk of adverse environmental and social impacts associated with the Financial Intermediary’s Subprojects at the time the Financial Intermediary’s structure is approved by OPIC. Factors taken into consideration include the size and nature of the prospective investments, the prospective use of proceeds from the investment, the term of the investment, and the targeted investment sectors.”³¹⁸

Inter-American Investment Corporation (IIC)

For the Inter-American Investment Corporation (IIC), a member of the Inter-American Development Bank (IDB), although its categories for FIs explicitly reference Categories A, B, and C, because they are rather broadly or generally stated, offer even less insight as to the practice of FI categorization than that of the IFC:

“17. FI-1 operations are those where the risk potential is high: the FI’s current or future portfolio financed as part of the IIC investment includes or is expected to include Category A sub-projects as defined in Direct Investments above.

18. FI-2 operations are those where the risk potential is considered medium: the FI’s current or future portfolio is limited to Category B sub-projects.

19. FI-3 operations are those where the risk potential is considered low: the FI’s current or future portfolio is dominated by Category C and lower risk Category B sub-projects.”³¹⁹

Equator Principles Financial Institutions (EPFIs)

The EP are limited to project finance, project-related corporate loans, bridge loans where “[t]he majority of the loan is related to a single Project over which the client has Effective Operational Control (either direct or indirect),” and project finance advisory services.³²⁰ As such they have no

occasion to make reference to financial intermediaries in general and its approach to categorization does not mention them. Of course EP signatories are themselves FIs, so what expectations the EPFIs set for themselves are best compared with the expectations which the IFC and other DFIs set for financial intermediaries.

Fifth Step: The Decision to Invest

The nature of the decision, generally

Pension funds and other institutional investors already have elaborate machinery for making investment decisions in light of what are more conventionally understood to be considerations appropriate and relevant to the financial outcomes they seek to achieve. Our concern here is with ways in which the decision making process might be different should pension funds – and others – conclude for one or another set of reasons that taking account of environmental and social factors needs to be part of that process.

As we know from the preceding pages, certain investors have already proceeded along those lines. So, on one hand there is experience upon which pension funds can draw in that regard. However, on the other hand, insofar as there is transparency on the part of those investors it pertains far more to the post-investment decision stage and far less to the actual process by which and basis upon which they make decisions to invest. Hence, in the following we can offer only suggestive insights for pension funds in that respect.

Fiduciary duty, environmental and social factors, and the decision to invest

Before turning to that experience we think it is important to keep in mind the interplay of fiduciary duty and consideration of environmental and social factors with the decision to invest because such an approach informs the nature of the due diligence process leading up to that decision and how it is made.

In that regard recall that earlier in this paper, we canvassed whether and how the decision-making process might address those factors.³²¹ Discussion in that context concerned the degree to which different rationales – what we termed universal owner, long term investor, more rational investor, reputational risk, norm example, functionality, and relationship and voice rationales – might be relied upon to justify pension funds doing so. Insofar as here we strive to compare other investors' experience with such considerations we need to be alert to the rationales relevant or appropriate to them.

As discussed above with respect to the IFC mission – and arguably that of other DFIs – investment decisions must be made consistent with the affirmative pursuit of what is understood to be a development agenda. In turn, as that discussion seemed to suggest, how the relation between taking account of environmental and social considerations is viewed in relation to a development agenda varies. It may be thought to reflect a richer understanding of what development entails; alternatively, it may be thought that failure to attend to those considerations may be in tension with/antithetical to what development is intended to achieve. Again, human rights considerations as such have recently been “folded in” to the PS³²²; they have also been reflected in the OECD Guidelines for Multinational Enterprises³²³; and are referenced in the EP for EPFIs.³²⁴ This action can be thought to manifest a yet enhanced view of what development should or must mean or that failure to address matters of human rights considerations is in conflict with or in opposition to what the IFC (or any other DFI) is otherwise constituted to achieve.

At the same time, of necessity, in order to survive as an ongoing enterprise the IFC must necessarily operate in a way alert to its overall financial condition and how its investment policy and strategy, its investment choices, and the outcomes of those investment choices bear on that condition. Further, by definition the IFC mission – and in whole or part that of some other DFIs – is to enable, support, and facilitate the creation and ongoing operation of private enterprises which means that it must be aware of the significance of its investment decisions in general – and application of the PS (among other things) for the profitability of those enterprises. Although the World Bank and other DFIs also play major roles with regard to investment in relation to governments the fact that the latter are ostensibly not-for-profit does not mean that the import of that investment for the financial condition of governments is not a serious matter, but rather that the manner of attending to the financial implications for government is different from that for private enterprises.

The story for EPFIs is different though not in all respects. Of course, insofar as the vast majority of them are for-profit enterprises, their decision-making must be done consistent with the ostensible imperatives in those terms.³²⁵ To be sure, here precisely what are those imperatives has been and remains contested, even hotly so. That is, some assert that almost by definition the pursuit of profit is not merely the paramount but the exclusive mission of corporations³²⁶; others contend that while it is extremely important it can give way to other goals; yet others argue that it must do so.³²⁷

To the above, at this point, we add only a few general observations in light of the practical fact that certain pension funds (among other institutional investors) have invested in and through the IFC. Its Global Infrastructure Fund (GIF) (discussed below at greater length) is a relatively recent example of their doing so.³²⁸ Because the GIF chooses projects in which to invest directly which are among ones selected in accordance with IFC goals, priorities, and standards (evidenced by the IFC co-investing alongside the GIF), then at first blush pension funds investing through the GIF would seem to be problematic for pension funds. Why?

In the direct investment context the IFC explicitly bars investment in certain kinds of projects as set forth in its Exclusion List. One category involves projects involving “any product or activity deemed illegal under host country laws or regulations or international conventions and agreements, or subject to international bans on such things as pharmaceuticals, pesticides/herbicides, ozone depleting substances, PCB, wildlife or products regulated under CITES,” so arguably there would be legal warrant for exclusion.³²⁹ Arguably, pension funds, EPFIs, and the vast majority of institutional investors would not knowingly invest in enterprises the conduct of which would violate the law, certainly for fear of legal repercussions and perhaps on reputational grounds. However, for others an (at least implicit) basis for exclusion is on moral or normative grounds.³³⁰ Nominally, a pension fund informed by the conventional understanding – or at least an Anglo-American one – of fiduciary duty, an EPFI, and any corporation guided by the conventional view – or at least an Anglo-American one – of its obligations to its shareholders would accept any such exclusion or bar unless it could argue that it would be warranted by reason of the reputational harm it would incur by complying with it. And, of course, the IFC and other DFIs are committed to the achievement of development goals (however defined they are more specifically). Again, a conventional view of their duties would not allow pension funds or EPFIs to make investment decisions driven in the first instance in part or whole on the achievement of development outcomes. Justification for doing so based on reputational enhancements would in this connection seem to be a slender reed upon which to rest. (However, the practice of PGGM/PFZW is arguably to the contrary.³³¹) The above being said, insofar as decisions spurred by the kinds of considerations noted above might be defended on the basis of their enhancing the calculus of financial risk and reward that might be a different matter.

In practical terms, within the context of the kinds of investments which are the subject of this paper, it may be unlikely that the matter of sacrificing financial reward or assuming greater financial risks by virtue of taking account of the kinds of considerations referred to above will even be posed. The question presupposes that there are two investments otherwise similar enough in character to warrant comparison but different enough in terms of those considerations to allow the needed comparison. But it would seem that in the vast majority of circumstances the putatively problematic project is unique, that is, there is in prospect no other project available for investment which could be the basis of comparison. The issue would simply be one as to the financial virtues of investment in that project in light of the investor's financial circumstances, overall portfolio, tolerance for risk, etc. That is why the GIF, notwithstanding that it has limited the universe of possible investments to ones in accord with IFC's mission, priorities, and standards, can offer a convincing case for investment to pension funds (among others): standing alone each project in which the GIF might invest is attractive enough in comparison or relation to others which might be open to pension funds. The argument along these lines is made even easier because the GIF does not offer opportunities for pension funds to invest in particular projects but rather to invest in a cluster or group of projects chosen by the GIF. It is the overall prospective financial and reward of all of them which is the basis for setting investment expectations for the fund and such comparison as might be made with respect to them.

The decision-making process

Although the IFC offers on paper some detail as to the formal steps in its decision making process (and subsequent project-related stages), there is actually not very much provided otherwise which yields much meaningful insight as to the actual practice. The situation is little different for other arms of the World Bank Group and for other DFIs. By contrast, the EPA as an organization and individual EPFIs have made available very little information about EPFIs' formal steps. However much attention has been given to the EP as a high profile and potentially very significant exercise in the establishment and implementation of voluntary standards by large multinational banks (ones which, not surprisingly) have quite obviously been much in the public eye. For that reason researchers have been motivated to obtain and have gained some useful insights into the actual decision-making process. For those reasons we first focus our attention primarily on EPFIs' practice, attending in relevant ways to what is reported in terms both of the formal steps taken by the IFC (and other DFIs) and of what we have been able to learn about the actual practice in light of them.

Equator Principles Financial Institutions (EPFIs)

It is important to recognize from the outset that decision-making with regard to environmental and social considerations is not a simple, straightforward, mechanical, check-the-box exercise. First and most important, as in other contexts, they are among a much broader range of factors which bear upon the ultimate decision.³³² Moreover, although certain criteria articulated are relative broad gauge in nature, they are meant to be applied to an immensely wide variety of situations and circumstances. In many, the information needed to support decision-making may be difficult for those involved in the process to get. Even where it is available it may not necessarily be easily interpreted or a consensus reached on an interpretation. And it would seem it may be more of a matter of making judgment calls of various sorts rather arriving at crisp conclusions.³³³ Further, as suggested above, the overall decision-making process entails what might well be conflicts among the asserted goals – for example, depending upon the context, ones concerning financial considerations, others relating to development objectives, environmental and social considerations, and still others pertaining to human rights (insofar as they are in whole or part not

encompassed by what are termed social issues) – which might result in tradeoffs which must be made.³³⁴

For these and other reasons, other than in extreme situations, it would appear that for EPFIs, definitive statements about their rejection of projects (or not) on strictly PS-related grounds are not necessarily to be expected.³³⁵ In some measure, the factors which raise doubts about would-be clients' financial condition or business practices may, at the same time, pose questions about their ability to manage environmental and social risks.³³⁶ Insofar as a decision is spurred by concern about reputational risk discerning what to do in that regard might be driven by the subtle but unstated interplay of a variety of factors.³³⁷ And judgments as to what is thought to rise to the level of serious reputational risk may vary widely across banks.³³⁸

Further, EP banks' business models have considerable import for how they approach the decision-making process. They typically do not see a proposal as giving rise to a one-off transaction. Generally speaking they would appear to be concerned with maintaining existing or opening up ongoing relationships with clients. Doing so operates against their not being too quick to turn down a proposal – particularly one which is important to a current or would-be client. The approach is not one of determining “yes” or “no” as to whether a transaction as proffered is acceptable (or not). Indeed there appears to be reluctance to having to make a decision of that kind.³³⁹ According to O'Sullivan, “the general attitude is that rejecting a project is the very last thing that the bank would like to do. Instead they prefer to engage with the client to bring the project up to the best, accepted standards possible – including E&S (thereby meeting all of the EP) – to ensure that the potential impacts and risks associated with the project are mitigated/minimised or avoided outright.”³⁴⁰ So the task is to explore whether there are ways to make a transaction “work.”³⁴¹ However, in some measure extra efforts to craft a viable transaction may reflect as well a belief that failure to do so will result in funding by others less attentive to PS-like concerns.³⁴²

- **The roles of key players in the decision-making process**

For the most part, understanding the decision-making process is best achieved by identifying the players in that process and the roles they play. Note that the analysis here focuses on direct lending in projects because that is characteristic of the EP experience. Later we will turn to the import of that analysis for investments in FIs (and equity investments as well).

In the EP context there are multiple such players who provide information, assess or evaluate it, and provide input to, significantly influence, and/or make judgments as to whether an investment in a project should go forward and, if so, on what terms – and perhaps review ones already made – based on that information. In the following we canvas the roles a number of them play.

Clients/project sponsors: Clearly, would-be borrowers either at their own initiative or in response to marketing efforts will be alert to would-be lenders (among them one or perhaps many EPFIs) of their desire for funding. They will have prepared materials about the proposed project attentive to the multifarious conventional considerations which will bear on the feasibility of the project from their and prospective lenders' perspective. Insofar as they might look to one or more EPFIs, then in some measure, at their own initiative, they will in relevant ways characterize the project in terms of the environmental and social considerations they might reasonably anticipate will come into play in the EPFI decision-making process. Much documentation may well be available because proposals not infrequently may relate to projects which are already far into the project cycle or might involve a follow-on project.³⁴³

Notwithstanding whatever they might otherwise elect to do in those terms, clients must in any event meet certain specific requirements the EP establish for providing information to EPFIs from whom they seek loans. More particularly those requirements include the following:

- 1) For *all* Category A and Category B Projects, clients are required to “to conduct an Assessment process to address, to the EPFI’s satisfaction, the relevant environmental and social risks and impacts of the proposed Project.” The report – the “Assessment Documentation” – must contain an “adequate, accurate and objective evaluation and presentation of the environmental and social risks and impacts” and “propose measures to minimise, mitigate, and offset adverse impacts in a manner relevant and appropriate to the nature and scale of the proposed Project.”³⁴⁴
- 2) For all Category A and “*as appropriate*,” Category B Projects, the client must “include[] an Environmental and Social Impact Assessment (ESIA).” It may need to incorporate “[o]ne or more specialised studies” and “in limited high risk circumstances” it may have to be complemented “with specific human rights due diligence.”³⁴⁵
- 3) Further, for *all* Category A and Category B Projects, clients must “develop or maintain an Environmental and Social Management System (ESMS).”³⁴⁶
- 4) Moreover the client must prepare an Environmental and Social Management Plan (ESMP) “to address issues raised in the Assessment process and incorporate actions required to comply with the applicable standards.”³⁴⁷
- 5) For *all* Category A and Category B Projects, the client must first, “demonstrate effective Stakeholder Engagement as an ongoing process in a structured and culturally appropriate manner with Affected Communities and, where relevant, Other Stakeholders”; and second, “take account of, and [then] document, the results of the Stakeholder Engagement process, including any actions agreed resulting from such process.”³⁴⁸

Commensurate with the foregoing, the EP refer to Environmental and Social Assessment Documentation (Assessment Documentation), “documents prepared for a Project as part of the Assessment process” which may include “an Environmental and Social Impact Assessment (ESIA) Environmental and Social Management Plan (ESMP) or documents more limited in scale (such as an audit, risk assessment, hazard assessment and relevant project-specific environmental permits).”³⁴⁹ The Assessment Documentation might contain “[n]on-technical environmental summaries” which have been disclosed to the public as part a broader Stakeholder Engagement process.³⁵⁰ What ultimately is required of clients, initially in terms of information and later (in terms of execution of the project) of course depends on their course of engagement and negotiation with the EPFI as to the terms and conditions which define the transaction, and, should the project be approved, its subsequent course.

“Relationship managers”/“Project financiers”: These individuals are the EPFI personnel who have direct relationships with clients.³⁵¹ Quite understandably, their primary responsibility and motivation is “making deals” which requires “satisfy[ing] their clients’ demands.”³⁵² O’ Sullivan suggests that while there may be a “deal team” with diverse EPFI staff being involved starting with the due diligence stage, “[u]ltimately, it is the project financiers that manage the deal moving forward should final credit approval be granted for the project.”³⁵³ Project financiers learn of potential transactions from clients or from their knowledge of the project finance market.³⁵⁴ Early on they may be in position to make a judgment as to the applicability of the EP and initially categorize a project based on what is described or prescribed in a manual which an EPFI has prepared which sets guidelines for such assessment; or they may need to obtain review and approval by those individuals who are frequently referred to as environmental and social risk management (ESRM) staff.³⁵⁵ In principle, of course, over time, having engaged in more and more transactions to which the EP are applicable project financiers will have acquired considerable

experience which serves as a gloss on what is set forth in any manual. Indeed that experience might be richer than what is formally in the manual.³⁵⁶

Although, at first blush, it might seem that they might want to minimize their involvement with EP-related issues, project financiers apparently (have come to) recognize that it is important to address such concerns at the outset. Indeed it would appear that over time many have understood the need for taking “ownership” of what EP responsibilities entail.³⁵⁷ More specifically, there is an awareness that if serious problems are not flagged until later in the project cycle, resolving them may be more expensive in terms of time, effort, and project costs, and perhaps may even prevent closing a transaction.³⁵⁸ In this regard, it is not merely a matter of the relationship with ESRM staff and the latter’s impact on the overall decision-making process. It is also a question of a client’s realistic understanding of what it will take – in EP-related (as well as other) terms – for the decision to be an affirmative one and what will be asked of a client leading up to and after project approval. Moreover, while a project financier might have some hesitation about bringing up what might be thought to be negative news, if a client is not alerted in a timely manner to potential difficulties it may not look well on the project financier.³⁵⁹ In this regard, the head of a bank’s EP team stressed that “E&S risks originate early in the project life-cycle but may not manifest themselves until operational phases” and “[c]lients not understanding extra financial risks may go down the f[o]od chain over the next 5-10 years).”³⁶⁰

ESRM staff: Clearly fulfillment of EP commitments necessarily entails having sufficient knowledge and expertise within the bank with respect to the often challenging environmental and social issues to which major projects, for example, ones involving infrastructure, are subjected.³⁶¹ The models and responsibilities of such ESRM staff in project review and decision-making vary widely.³⁶² For example, some banks may see it “most efficient for ESRM to be taken into account by front office project finance teams and credit risk approval committees,” believing “that it is [not] necessary to have specially-designated personnel working on ESRM review.”³⁶³ For this model, “implementation of the EP is managed by lending officers, with support from centralized risk management teams for higher-risk projects.”³⁶⁴ By contrast, environmental and social risk management may be more centralized. That is, “[c]entralized risk management teams may specialize only in environmental and social risk issues, or be staffed by generalist credit risk management personnel.”³⁶⁵ Some may have “advisory centres that provide technical support to front-line business managers or lending officers who are ultimately responsible for EP compliance.”³⁶⁶

In all events, on the whole, research by Meyerstein points to ESRM staff playing an important role in decision-making.³⁶⁷ The most prominent practice appears to be that their signoff is required prior to submission of a proposal to the credit committee.³⁶⁸ Almost as frequently their influence is felt early on, that is, their judgment about a proposal may be dispositive at the marketing stage.³⁶⁹ For a modest fraction of cases, members of the ESRM staff “participate directly in the credit decision-making process and must agree with all credit decisions.”³⁷⁰ In a few instances their input might be sought only in difficult cases.³⁷¹ But even when ESRM personnel ostensibly “perform an advisory or trouble-shooting role” it is essential that project financiers (or their equivalent) seriously listen to, hear, and act on what they are advised.³⁷² The following examples relating to particular EPFIs are illustrative of the range of possible functions.

CitiGroup. In the case of CitiGroup, the bank has described the ESRM Unit – which “sits within the Independent Risk Management function” – as supporting business units by “advising on and reviewing transactions covered by the ESRM Policy, the Equator Principles, and the Carbon Principles, as well as monitoring these transactions over time”; “providing training on the ESRM Policy to relevant Citi employees; “acting as the primary point of contact between stakeholder

groups and Citi for issues related to the Equator Principles”; “working with other Equator Principles Financial Institutions to develop Equator Principles best practices” and “revising the ESRM Policy as necessary.”³⁷³ With regard to the first point, in its most recent “Global Citizenship Report” CitiGroup states that the unit “supports bankers across the firm by reviewing transactions with potential environmental and social risk, and defining appropriate mitigation measures. In addition to identifying and mitigating the risks and impacts of specific client activities, these reviews include an assessment of the client’s broader commitment, capacity, and track record on environmental and social issues.”³⁷⁴

Yet more specifically, according to an illustrative diagram of the CitiGroup decision-making process, after a “business opportunity” has been “identified for internal review and discussion,” there follows the “Greenlight Memo and Marketing Stage.” Before any marketing letter is sent to the prospective client there must be (1) approvals from “appropriate business heads, control units” which include “appropriate Independent Risk heads”; (2) an “Independent Risk representative [is] assigned to the deal team”; (4) an ESRM category is “proposed along with potential ESRM Policy or Equator requirements”; (5) the ESRM team is “notified and consulted; and (6) where a Category A project is involved, “ESRM Approver approval is required in consultation with [the] ESRM team.”³⁷⁵ “ESRM Approvers” are described as being “[c]ertain senior credit officers [who] are appointed...by the Chief Risk Officer” and “have review and approval responsibilities for transactions with sensitive environmental and social risks.”³⁷⁶

Post project approval, “Citi portfolio managers conduct annual credit reviews of all transactions, ensuring client compliance with covenants, including those on environmental and social matters.”³⁷⁷ Also, Citi’s Market & Banking Independent and Audit Risk Review group, “[i]n consultation with the ESRM unit,...reviews whether affected business units have complied with internal ESRM requirements under covered credit policy credit programs.”³⁷⁸ (This auditing appears to be different from that which concerns the bank’s EP reporting.³⁷⁹)

HypoVereinsbank. With respect to the HypoVereinsbank (a commercial bank based in Germany and an arm of UniCredit in Italy), as Bergset details it, the assessment process is an extensive one.³⁸⁰ It includes “researching external (clients, responsible authorities, pertinent law and regulations etc.) and internal (checklists, sector risk classification, sector reports) sources of information in order to establish risks that may apply to the company in question” and then applying a tool which “supplies targeted information from all accessible market sources and filters this according to company or project” with a “focus [that] is on negative public attention in the past” with the goal of gauging its location on a “reputation index.”³⁸¹ Location on the index appears important to if not determinative of whether a client is acceptable. This reputational risk information is merged with other data on the risk of loan default and liability risk as the basis the credit manager’s appraisal of the company.³⁸² However, in “high profile” cases the opinion of the market department (business /unit, credit unit and back office)” must be sought.³⁸³ In turn if that department sees a “potential reputation risk, they hand the matter over to the [Corporate Social Responsibility (CSR)] department and the reputational risk council, which then decides on a recommendation.”³⁸⁴ For large loans – above € 50 million – or where there is large uncertainty as to what to do, the matter is referred to the central company credit committee.³⁸⁵

Several-fold recommendations are possible. One is to continue the transaction if no substantial risk is perceived. Another is to do the same even when a risk is identified, but the project can be defended on the basis that the project or company is worthy of support. Third, it can be to pass on the matter to the central decision-making authority without a clear recommendation when the transaction is thought to be sensible, but the element of uncertainty about it is large. In some cases, the recommendation is not to go through with the transaction. In all events, all credit

applications above € 50 million are decided upon by the central credit committee. “In these cases, the reputation risk council in Germany delivers a recommendation for or against granting a loan, when there are considerable sustainability impacts involved, which is then considered by, but is not binding for the Italian credit committee.”³⁸⁶

Rabobank Group. While as a general matter for the Rabobank Group, “a credit analyst has to give [his or her] opinion on the quality of the [sustainability] assessment.” “[I]n cases where the client is involved in designated ‘sensitive’ sectors, the assessment and its conclusions must also be controlled by the department manager” followed by an “assess[ment] by the credit committee at the end of the process.”³⁸⁷ Where a relationship manager “indicates that a credit application is for project finance, the CSR department is notified in order to assist the relationship manager in the application of the Equator Principles and the additional assessment that this [application] implies. Also when the relationship manager indicates that a (potential) client is involved in any of the so-called sensitive sectors, the CSR department is directly informed.”³⁸⁸ “In terms of client observation, Rabobank International has some employees who are occupied full time with monitoring the clients’ CSR performance.”³⁸⁹

ABN AMRO Bank. ABN AMRO was one of the original signatories to the EP. According to an early study of EPFI’s experience (that is, based on interviews in mid-2005), a Sustainable Development Department was created within the AMBRO’s Group Risk Management unit and within that department, “a Sustainable Business Advisory (SBA) unit charged with developing the bank’s environmental and social due diligence policies and serving as the “ultimate gatekeeper” for sensitive project proposals.”³⁹⁰ The Department and Unit were said to “operate independently of the bank’s commercial activities.”³⁹¹ Although project finance specialists were said to “deal directly with clients regarding compliance with the Equator Principles, much responsibility for compliance rest[ed] with SBA.”³⁹² More particularly, the SBA reviewed and approved “project categorisation, EA design, EA results, and the EMP for a project proposal to go forward.”³⁹³ Its final approval was “also required for all Category A and B projects.”³⁹⁴ SBA decisions were occasionally audited externally as a further control on quality.”³⁹⁵

It is not clear how characteristic such practice is today because in the intervening time the bank has experienced great changes, e.g., it was acquired by two other banks and was delisted from stock exchanges, one of the two owner banks was nationalized in the wake of the financial crisis of 2008 which entailed reconfiguration of ABN AMRO, etc.

Bergset studied the bank’s sustainability practices in lending up through early 2010. She reports – seemingly with reference to the bank in the period leading up to the noted changes – on the bank having a sustainability department “responsible for the strategy of the group and developed it in cooperation with the individual business units (BU), which would then carry out the implementation of it.”³⁹⁶ As Bergset recounts what the bank reported in 2007, across all of its activities it considered environmental, social and ethical risks, ones which were “detected by an ‘early warning system’.”³⁹⁷ More particularly, an “‘ESE risk filter’...guide[d] staff through questions that [we]re particularly relevant to the client’s sector.”³⁹⁸ A “‘sustainable risk advisory team’” “developed a framework of policies, approaches and supply of information required” and trained employees.”³⁹⁹ Review included a “general sustainability risk assessment...conducted of new potential clients” with particular policies “for 24 sectors and ‘sensitive issues’ (amongst others defence, oil and gas, mining and metals, forestry and tree plantations, dams, gambling, tobacco and animal testing).”⁴⁰⁰

Bergset suggests that thereafter a “new strategy” was pursued. Although it was to preserve the “‘philosophy’” of the bank...to integrate sustainability ‘as much as possible’ in [its] core business,”

in addition to the central department, there was, among other things, established with respect to “the lending process, ...[a] *sustainable risk advisory* desk [which was] embedded in the risk department.”⁴⁰¹ That desk’s “primary task [was] to ensure that the bank’s financing activities are compliant with the policies.” That is, it had “the role of controlling and monitoring the assessment, which is carried out by the *account manager*.”⁴⁰² “In cases of higher complexity [which would be typical of infrastructure lending], assessment [was] transferred directly to the sustainable risk advisory” with the credit application also being “assessed for sustainability relevance centrally.”⁴⁰³ Approval by the sustainable risk advisory desk was required of “all sustainability assessments in credit applications.” In the event of submission of “sustainability related information on the client...[being] deemed [to be] unsatisfactory or incomplete, the credit application [wa]s returned to the account manager for revision.”⁴⁰⁴

Currently at its web-site ABN AMRO offers little insight as to current practices. It refers generally to implementing its “Sustainability Risk Policy and underlying policies” according to a three-tier system.⁴⁰⁵ The second tier, the Central Sustainability Department is “responsible for initiating, developing, reviewing, and updating the Sustainability Risk Framework.”⁴⁰⁶ It also “supports and supervises the business (first [tier]) in its application of the policy and ensures alignment and consistency of the sustainability standards throughout [the bank].” In its “coordinating role” it “actively liaises with the other departments within the bank (business management, corporate governance, legal, compliance), as well as with peer banks and external stakeholders.”⁴⁰⁷ It offers no more detail in its Equator Principles Policy other than to remark that “the business presents to the Central Sustainability Department a report on ABN AMRO’s compliance with the Equator Principles over the past year.”⁴⁰⁸ That report is in turn “included in the annual reporting of the Central Sustainability Department to the Credit Committee.”⁴⁰⁹

Credit Committee/Credit Review Committee/Credit Risk Department: Ultimately, in one fashion or another, review of E&S risks is “integrated into the main credit risk approval process of a project”⁴¹⁰ and a credit committee is the body constituted to make the decision. As Bergset has described them, “[c]redit committees are the principal instance for the control of the sustainability assessments at the interviewed banks. In addition, the quality of the assessment is partially ensured by the “four-eyes principle” within the department or monitoring through separate organs outside the assessing department. In cases of large loan sums, the assessment is often controlled at central level.”⁴¹¹ According to Meyerstein, frequently that committee must reach a consensus for a decision to be made. About as often, the lack of such consensus triggers submission of the matter to senior management.⁴¹² For example, according to EP signatory BNP Paribas, the procedure is to “systematically subject [Category A projects] to a TAC (Transaction Approval Committee) due to their high sensitivity. The TAC is an existing internal process which usually takes place well in advance of the credit committee and focuses on some particular and exceptional risks associated [with] a transaction which have to be validated by [Corporate and Investment Banking (CIB)] senior management. For [project finance (PF)] transactions, it is chaired by a senior executive of the regional Corporate Banking division, involves relevant PF officers as well as representatives of Global Risk Management, CIB CSR, Compliance, Legal, and Communication, and focuses on the E&S risks of the project.”⁴¹³ Bergset states that for EP signatory DnB NOR, “the most important control mechanism is carried by the credit committees. Their function is to evaluate not only the company that is applying for a loan, but also the quality of the sustainability assessment carried out by the credit managers. If the quality is not considered high enough, the application is returned to the responsible credit manager who will have to redo it. Their mandate is, however, not very explicit, and it is largely up to them to decide on what is considered significant [corporate social responsibility] risks in the loan assessment.”⁴¹⁴

The foregoing is consistent with what Meyerstein describes with respect to decisions involving controversial or high profile issues – ones likely to bear upon reputation. They may be part of an overall process managed by a single body, e.g., the credit committee, which may resolve the matter by consensus or failing that submit it to senior management for a decision.⁴¹⁵ Alternatively, there may be a separate entity responsible for addressing them (“reputational risk committee” or more generally “risk committee”). If so that body may serve more of an appellate review type role, especially for contentious or difficult cases.⁴¹⁶ The prevalence of special treatment of reputational issues may be seen as testimony to their importance to EP banks.⁴¹⁷ If the project is also a controversial or high profile project, then the Communications Department or a special Reputational Committee may also be involved to advise on the potential reputational risks associated with it.⁴¹⁸ For example, EP signatory Barclays states that it has a “Reputational Council”, which is “a senior management committee reporting to the Group Executive Committee.”⁴¹⁹ Its purpose “is to manage the reputational implications of transactions and business relationships undertaken by the bank. The Council supports the Board Citizenship Committee in fulfilling the Board’s objective to protect and enhance Barclays reputation.”⁴²⁰ As Barclays describes its process, “[i]nitially, the lending manager will liaise with the credit teams and, if a proposed transaction is judged to have material environmental or social sensitivities, guidance can be obtained from the central Environmental and Social Risk Management Team. Further escalation to the Reputation Council is recommended in cases where the sensitivities are likely to remain significant.”⁴²¹

At the time of Carbonell’s analysis (2005), “[l]ike ABN AMRO, Barclays ha[d] a central environmental unit known as the Environmental and Social Risk Policy Team (ESRP) charged with developing due diligence policies and procedures and giving advice to front-line credit and risk officers.” However, the then and current head environmental and social risk policy at the latter, Chris Bray, described the unit as having “far fewer formal powers than ABN AMRO’s [Sustainable Business Advisory (SBA) unit].” That is, he was “drawn into projects ‘by exception,’ principally to offer ‘handholding’ and advice to project teams dealing with unfamiliar issues. ESRP’s approval [wa]s not required for projects to go forward (Bray 2005).”⁴²² In this model responsibility was placed on “Barclays’ front-line officers, in particular the risk management staff who [we]re expected to cooperate with business development officers to ensure the bank [wa]s properly managing environmental and social risks.”⁴²³ This model is taken up to “defuse tensions between the ESRP and business development officers over compliance requirements.”⁴²⁴ All of the above being said, the matter of reputation risk might be thought as involving relatively broad and relatively subjective judgments with the context of the specific operations of particular EP banks.⁴²⁵

Senior Management

On one hand, the foregoing strongly suggests that senior managers’ commitment to “sustainability” and willingness to implement it is critical.⁴²⁶ At the same time, it appears equally essential that they set the right tone formally and informally for employees below them “who learn not only from what their superiors say, but also from what they do.”⁴²⁷

From the above it is also clear that senior management and the board of directors play varied and in some cases specific and critical roles in assuring fulfillment of EP commitments. As the head of the EP team and extra-financial risk management at UniCredit (parent of RaboBank) described it, who is involved with decision-making making varies with the risks associated with the investment and the risks associated with the client. Where the risks of either are low oversight is delegated to the deal/investment team. If the risks of the latter are high, the sustainability team is consulted. As the risks of both increase there is a shift toward consulting the credit risk team as

well as the sustainability risk team and at the extreme, senior management as well.⁴²⁸ At the extreme, final decisions may be made by particular individual senior executives or even the CEO. Alternatively, senior management may sit on credit committees or just on the reputational risk or risk committees.⁴²⁹

As Carbonell details it, within the first couple of years of signing on to the EP, CitiGroup “appointed an ESRM Director within the corporate and investment bank’s Independent Credit Risk Management Group, who in turn overs[aw] 20 senior credit officers.” The ESRM unit “conduct[ed] training and awareness programs on the Principles and environmental/social risk generally, support[ed] credit officers tasked with implementing the Principles, and advise[d] the bank’s Global Commitment Committee on “sensitive” bond transactions where use of the proceeds is known.”⁴³⁰ He suggests that control over due diligence at Citigroup was more centralized than at Barclay’s but less so than what it had been at ABN AMRO. That is, “[w]hile Citigroup’s credit teams [we]re responsible for the screening and categorization of proposals, tracking and approval of Equator documentation including the EA and EMP, and liaison with the project sponsors..., the ESRM unit exert[ed] influence through two staff channels. First, credit teams dealing with Category A projects are assigned a senior credit officer “supported by the ESRM Director” who must give approval for the transaction to proceed.”⁴³¹ These officers were “independent, and d[id] not report to the management of Citigroup’s corporate and investment banking division (which houses project finance). Second, all credit teams involved in project finance ha[d] embedded staff specifically charged with implementing the ESRM Policy (about 70 individuals total), although they do not report to the ESRM Director.”⁴³²

According to a more recent description of senior management at CitiGroup, “[t]he Citigroup Board of Directors Nomination, Governance and Public Affairs Committee oversees Citi’s environmental policies and initiatives,”⁴³³ The company’s performance on these issues “is reported to the Board by the Director of Corporate Citizenship.”⁴³⁴ The Environmental and Social Policy Review Committee (ESPRC), chaired by the Director of Corporate Citizenship, “is a management committee composed of senior bankers and managers from across Citi’s businesses and functions and provides review and guidance on Citi’s environmental sustainability and human rights policies and initiatives.”⁴³⁵ It “meets approximately once per quarter to discuss emerging issues and compliance with Citi’s environmental policies and initiatives.”⁴³⁶ However, this approach seems to be a characterization of how EP commitments are addressed at the policy level, not the individual transaction level.

Again, the above is consonant with what Meyerstein reports with regard to matters which cannot be resolved at, say, a credit committee level: senior management make the final decisions either individually or as part of reputational risk or risk committees.⁴³⁷ Alternatively (or perhaps in addition depending upon their status) senior management may sit on the credit committee.⁴³⁸ (Note that “[a]t the extreme representatives of senior management may conduct site visits” to “see for themselves.”⁴³⁹) As noted, CitiGroup’s ESRM Approvers – who might sign off on both the project categorization and credit approval and commitment stage for Category A projects – are senior credit officers.⁴⁴⁰

Other EPFI internal units/staff: Sometimes other EPFI internal units may come into play. As suggested, there may be a reputational risk or more specific group or regional reputation risk units.⁴⁴¹ As discussed below, the need for (project) local knowledge and expertise may loom large. Where investors like EPFI banks have operations and offices scattered world-wide they are in a position to provide knowledge and expertise – not available from the head office – relating to local conditions which bear upon risk.⁴⁴² For example, in addition to the ESRM core management team at Citigroup – which has an ESRM Director and an Assistant VP and team members based in the

New York Headquarters – there are also so-called ESRM “Champions,” “based in London, Hong Kong, Sao Paulo, Mexico City”⁴⁴³ who are “high-level senior credit officers located in different countries around the world with various ESRM review, approval and advisory roles.”⁴⁴⁴

Along somewhat similar lines, Barclays reports that it has an Environmental and Social Risk Management Team “dedicated [to] advising on complex transactions where there are environmental and/or social sensitivities.” While that team is based at Barclay’s headquarters in London, “it is supported by a network of Environmental Champions across the world tasked with the dissemination of information, raising environmental and social risk awareness, providing guidance, as well as acting as a referral point in their regions.”⁴⁴⁵

To some degree this regional capacity affords a response to an important point raised by both Meyerstein and O’Sullivan: that the decision for EPFIs ostensibly depends upon the results of a rigorous social and environmental impact assessment which is contingent on many local factors.⁴⁴⁶ This local knowledge means that whatever the expertise in the home or head office it might well be people in countries who really know what is going on and whose advice and support might be sought.⁴⁴⁷

There may also be other internal units which have relevant expertise to bring to bear on environmental and social issues.⁴⁴⁸

Legal counsel: Somewhere in the mix there needs to be an appropriate role for legal staff given the specific EP-related contractual commitments of clients to their lender EPFIs, the need to assess and comply with national and local statutory (or perhaps even constitutional) and regulatory requirements as well as the meaning and reach of international law and standards.⁴⁴⁹ Thus, at EP banks, “[l]egal compliance officers may have dotted-line oversight of this process.”⁴⁵⁰ Certainly legal counsel have very important functions to perform. Although in certain other contexts, counsel having too dominant a role to play may be problematic it might not be a problem seriously posed here.⁴⁵¹ (There are other important legal issues not of immediate relevance here concerning the extent to which the EP give rise to legal liabilities on the part of EPFIs.⁴⁵²)

Syndicates and syndicate members: Reference is made throughout this paper to individual EPFIs. However, the reality is that, at minimum for risk-sharing reasons, the finance of projects has typically been carried out by syndicates of banks.⁴⁵³ For example, according to O’Sullivan, “[a]n average project finance deal may have 10-15 banks.”⁴⁵⁴ (Moreover, there may be other, non-commercial bank co-lenders as well as equity investors.⁴⁵⁵) Syndicate members may play diverse roles. One is as a lead arranger (or “Technical Agent”) who “agrees with the client to underwrite the loan, that is, to retain a portion of it on its own books and to sell the remaining amount to other FIs, with the guarantee to the borrower that it will retain the entire loan if it cannot find buyers.”⁴⁵⁶ It is also “normally responsible for monitoring borrower EP compliance over the life of the loan i.e. from construction to ‘steady state’/operation when the bank receives remuneration from the project.”⁴⁵⁷ Others may be concerned with the work of technical consultants and engineers as part of managing the technical performance of the project while still others are involved with financial and contract management issues.⁴⁵⁸

Clearly the interplay of different EPFIs in the syndicate (and those non-EPFIs which may be among its members) can have a significant bearing on whether and how the EP are applied. Nominally, it is the lead arranger which ostensibly sets the terms of the deal.⁴⁵⁹ But presumably those terms have to be crafted to be acceptable to prospective syndicate members. During the life of the project there are issues about client compliance with what is deemed to be required of it according to the EP, so if there are one or more lead arrangers they have to agree on a common

approach.⁴⁶⁰ But it would seem that non-lead arrangers would only enter into the syndicate if they could anticipate a lead arranger's handling of potential issues and/or have a means for having concerns addressed during the life of the syndicate.⁴⁶¹ (Interestingly, according to Meyerstein's survey, 14 of 24 EFPIs termed disagreements within a syndicate as an infrequent, mild source of challenge and only one as persistent and most challenging.)⁴⁶²

Consultants: Consultants play many important roles at various stages of the project cycle including during the investment decision-making process.

In part that is because the EP prescribe a role for them.

EP 7 requires for project finance, prior to project approval – for all Category A projects and “as appropriate,” for Category B projects – that “an Independent Environmental and Social Consultant, not directly associated with the client,” be retained to “carry out an Independent Review of the Assessment Documentation including the ESMPs, the ESMS, and the Stakeholder Engagement process documentation in order to assist the EPFI's due diligence, and assess Equator Principles compliance.”⁴⁶³ The consultant is also supposed to “propose or opine on a suitable Equator Principles [Action Plan (AP)] capable of bringing the Project into compliance with the Equator Principles, or indicate when compliance is not possible.”⁴⁶⁴ For project-related corporate loans, such a consultant must be hired for what are termed “potential high risk impacts.”⁴⁶⁵

Second, Equator Principle 9, in the context of ongoing monitoring and reporting after financial close of the transaction and over the life of the loan, EPFIs must, for all Category A and, as appropriate, Category B Projects, require the appointment of an Independent Environmental and Social Consultant, or require that the client retain qualified and experienced external experts to verify its monitoring information which would be shared with the EPFI.⁴⁶⁶

(Note that at least provided for by IFC's PS 1, a similar requirement is somewhat less prescriptive: “For projects posing potentially significant adverse impacts or where technically complex issues are involved, clients may be required to involve external experts to assist in the risks and impacts identification process.”⁴⁶⁷ Similarly, “[f]or projects with significant impacts, the client will retain external experts to verify its monitoring information.”⁴⁶⁸)

But more generally, the use of consultants is a reflection of the need for specialized knowledge and expertise which EFPIs – perhaps because, as discussed below many do not have it.⁴⁶⁹ This absence of specialized knowledge appears to be especially true with respect to social issues.⁴⁷⁰ According to a survey early on in the EP experience, a “[f]ew Equator Banks have panels of experts or strong relationships with leaders in environmental and social impact risk assessment...There are a number of Equator Banks with adequate in-house expertise in some of the areas covered by the Equator Principles, but few suggested that they presently had sufficient expertise to provide complete coverage of all Equator Principles issues.”⁴⁷¹

For the preceding reasons alone, the role of the consultants both as a formal and as a practical matter would seem to be important.⁴⁷² In the face of difficult decisions as to whether to approve a project the consultant's view may settle the matter.⁴⁷³ However, in other cases, EPFIs may retain a second consultant to assess the work of the first one.⁴⁷⁴

Note that the “first” consultant might be one retained by the client, the work of which would presumably be available to the EPFI for review, perhaps by a second consulted hired by the EPFI.⁴⁷⁵ For example, O'Sullivan states that “independent consultants/experts, often referred to

as Independent Technical Engineers (ITE), are formally employed by the [EP]FIs to review both the technical aspects of the project as well as the borrowers' ESIA and feasibility study.⁴⁷⁶ Citing an EPFI interviewee she adds that "[t]his acts as a 'third party' audit of the project. In certain cases where the social impact of a project is very high for example, if a resettlement programme has been proposed, then a separate consultant with more specific social expertise may also be employed to evaluate the project."⁴⁷⁷ More specifically, Barclays reports that it "requires an ESIA to be undertaken for all transactions that fall within the scope of our ESIA Policy. This must comply with Barclays minimum requirements for an ESIA and be undertaken by an independent consultant that appears on our preferred panel. If an ESIA has already been undertaken in connection with the relevant project, but does not meet the above requirements, then Barclays may require a second opinion of the ESIA be commissioned and undertaken by an independent consultant that appears on our preferred panel, in accordance with our minimum requirements for a second opinion of an ESIA."⁴⁷⁸

Although the foregoing discussion has primarily referenced the due diligence stage of the project cycle, reliance on consultants may well extend into the monitoring phase and over the life of the loan.⁴⁷⁹ Indeed there may be significant reliance on them in that regard in ensuring client compliance in connection with Category A and some Category B projects.⁴⁸⁰ Reports may be as frequent as quarterly during the construction phase – at the extreme perhaps even monthly – and shift to an annual basis after the completion of construction. Such reports "contribute[] to the annual review undertaken by risk managers in consultation with other banks. So in terms of gathering information and checking against Action Plans and goals achieved, or things which are not compliant, that's a process that relies very heavily on the external consultant which is appointed [by the client] in agreement with the lender."⁴⁸¹ The importance of such reports is highlighted by the suggestion that in the absence of special circumstances there is no other client reporting on EP compliance.⁴⁸²

Clearly, given the importance of consultants at this and subsequent stages of the project cycle it is essential that the tasks are performed well. For example, O'Sullivan, referring to the EP 7 requirement for independent review, refers to "some interviewee evidence [which] suggests that the 'independence' of the consultant (from the project sponsor) carrying out the review may be questionable at times."⁴⁸³ In some cases realities "on the ground" may make it difficult for even a consultant to fairly characterize local conditions and issues.⁴⁸⁴ In all events, EFPIs must and in practice may in various ways critically evaluate consultants' work, for example, engage environmental and social risk management technical staff to "work through the assessment" and perhaps "ask [the consultant] for additional work"; "review the competence of the consultant, and compare the reports to international best standards for such reports, as well as use the IFC environmental, health and safety guidelines to ensure all risks have been covered by the report"; "establish secondary grievance mechanisms and channels of communication to make sure the consultant is not missing anything and the borrower's processes are working"⁴⁸⁵; or even (as noted above with respect to Barclays) "hire a second consultant to double-check the primary consultant's work."⁴⁸⁶

In this connection, Meyerstein remarks that determinations as to risks and harms "often are judgment calls (made with heavy reliance on the analysis of independent consultants) both with respect to their eventuality and scope of impact 'on the ground' as well as to their potential ramifications for bank reputation."⁴⁸⁷ He stresses, in turn, the importance of EPFIs being equipped to make those important judgments: "[T]he reports filed by consultants are lengthy and contain highly specialized scientific and other analyses that bankers are not trained to understand. Without in-house personnel knowledgeable about these issues, an institution is not equipped to properly understand the non-financial risks of a project. Thus, the development of in-house

expertise is crucial to any bank successfully implementing the EPs and demonstrates an upgrade of their capacity to engage in the highly technical environmental and social risk analysis necessary to properly evaluate large-scale projects beyond financial and credit risk dimensions.”⁴⁸⁸

Certainly, in light of the above, it is important for EPFIs (and, of course others in a similar position) to be able to identify needed consultants. According to an early assessment of the EPFI practice, there were “a number of national and international engineering and environmental consultants and law firms which have worked closely with sponsors and banks on project design and construction over a number of years and have established a good track record as advisors of choice on major project work. Some banks are very aware which advisers are the best experts to engage with engineering, environmental and legal matters.”⁴⁸⁹ For example, Barclays reports that it “has a panel of preferred independent consultants for undertaking ESIA reviews. The panel consists of consultants who have been selected on a global basis for their environmental and social risk expertise, industry and geographical strengths and experience of working with financial institutions. The consultants’ ongoing suitability is assessed on a regular basis.”⁴⁹⁰ At least by 2005 Citigroup had “maintain[ed] a list of ‘preferred’ consultants which the ESRM Director and project teams review to screen out conflicts of interest.”⁴⁹¹ It may be that as a result of involvement in syndicates and more years of experience with the EP, other EPFIs are now in a similar position.

Stakeholders: Reflecting in some measure the critical importance of stakeholders’ role in decision-making, (as described in somewhat greater detail below) the EP specifically mandate engagement of certain of them. For example, for all Category A and Category B Projects, clients must “demonstrate effective Stakeholder Engagement as an ongoing process in a structured and culturally appropriate manner with Affected Communities and, where relevant, Other Stakeholders.”⁴⁹² Affected Communities are “local communities, within the Project’s area of influence, directly affected by the Project.”⁴⁹³ Other Stakeholders are “those not directly affected by the Project but have an interest in it. They could include national and local authorities, neighbouring Projects, and/or non-governmental organisations.”⁴⁹⁴ Where Affected Communities might potentially suffer “significant adverse impacts,” clients must engage in “an Informed Consultation and Participation process.”⁴⁹⁵

Presumably, reports as to the results of such engagement are part of decision-makers’ due diligence because the EP require that clients must “document, the results of the Stakeholder Engagement process, including any actions agreed resulting from such process.”⁴⁹⁶ The EP emphasize that “[f]or Projects with environmental or social risks and adverse impacts, disclosure should occur early in the [Environmental and Social] Assessment process, in any event before the Project construction commences, and on an ongoing basis.”⁴⁹⁷

Non-governmental organizations (NGOs): It seems pretty clear that NGOs were a significant factor in occasioning the promulgation of the EP in general and the role of certain banks in formulating and others later in embracing them.⁴⁹⁸ Moreover, in some not inconsiderable measure they have played an important role – often an adversarial one but also a constructive or perhaps even collaborative though critical one to spur the reformulation of the EP and practices in their implementation. And, of course, NGOs continue on an ongoing basis to review, critique, and engage EPFIs (as well as their borrowers) on what they deem to be failures meaningfully or effectively to apply the EP in particular instances. Indeed, according to Meyerstein, “fifty-eight percent of [his EPFI] respondents (14 banks) reported an *increase in contact or pressure following adoption* of the EPs, while only twenty-nine percent (7 banks) reported that the level of pressure remained the same and only 1 bank reported that the pressure abated.”⁴⁹⁹ Not surprisingly, EPFIs and others may be critical (publicly or otherwise) of NGOs not only or merely as being wrong on the “facts” of particular cases but also of being biased in that they may give

only certain kinds of projects attention, focus only or too much on the negative aspects of projects as compared to the positive ones, base their action on political rather than social or environmental considerations, or having agendas which may not necessarily be aligned with those of local stakeholders.⁵⁰⁰ With regard to the last cited point, Meyerstein cites contentions that “NGOs do not necessarily represent the public or common interests as much as their own private interests and sometimes in contradictory ways, and even when they do have overlapping interests or claim to represent those of others”; that NGOs “are institutions with organizational prerogatives of survival and thus, fundraising, which can come into tension with their missions, and more broadly, as organizations they can develop pathologies”; and that “some NGOs, like unions, have direct material interests in the issues in which they engage.”⁵⁰¹

However much one might credit (or not) these assertions, the fact is that NGOs have not only posed a challenge to but also offered an opportunity for EPFIs (and the IFC and other DFIs for that matter). They have presented a challenge because they have raised serious and legitimate concerns both at the institutional level and at the project level. With respect to the former, they can contest the adequacy of the reach of the standards to which such organizations ostensibly commit themselves and question the practical import of how those standards are explicated. They can question the sufficiency and timeliness of provisions for disclosure at all stages from the assessment of project proposals through the investment decision-making process to project monitoring and supervision and beyond. NGOs can raise doubts about the adequacy of the resources these organizations bring to the task, the efficacy of the tools and methods which they employ to carry out the necessary tasks and the means and mechanisms by which they characterize and evaluate claims as to what the organizations have, in fact, achieved. At the project level, NGOs may point out gaps or mistakes in knowledge and/or understanding of the on-the-ground realities of projects which, if proper account were taken of them, might dramatically change whether and how EPFIs or DFIs might invest in those projects. This situation may be particularly so when NGOs might be seen to give voice to the aspirations, concerns, frustrations, etc. of constituencies, communities, etc. who believe that proper account has not been taken of their legitimate and important interests. NGOs are in a position to call attention at various stages of the project cycle when what “on paper” might otherwise be adequate or appropriate methods, actions, behaviors, etc., have fallen seriously short in practice in application to a particular project.

- **Other, related Issues**

Training. What kind of training has been provided and to whom has varied widely. Clearly training includes that which affords an understanding of the general nature of the organizational commitment of an EPFI to the EP – and the importance of that commitment to the organization. It also involves an appreciation of the meaning of specific EP requirements and their significance in terms of expectations on the part of the organization. It entails an awareness of the policies and procedures the organization has established as the means for meeting those expectations, how they fit within the broader range of policies and procedures, and their import for the roles and responsibilities of diverse members of the organization.⁵⁰² And it could well encompass gaining a detailed knowledge of the environmental and social issues which need to be addressed and familiarity with the methods, tools, resources, etc. for assessing them and devising effective means for dealing with them. (Although the needed in-house expertise might be gained through recruitment insofar as there is a desire and need to develop it internally, there needs to be training for those individuals already on staff who will take on an ESRM-related role.)

It appears that early on in the EP experience training began “with senior people such as specialists and frontline bankers, reflecting how the Equator Principles [we]re being driven from the top.”⁵⁰³ Certainly, given their central role in the consideration and possible making of deals, project

financiers (or their equivalent) need to understand the importance of and be familiar enough with environmental and social issues in decision-making with regard to effectively engaging in relevant, though different ways, clients, ESRM staff, consultants, and senior managers and understanding the concerns and roles of affected parties, NGOs, etc. Though at first some EPFIs trained only a few staff others, some like Citigroup apparently went much further, e.g., not only educating 100 project financiers but also “375 risk management and marketing personnel, and new analysts and associates.”⁵⁰⁴

According to Citi’s most recent report it uses “remote and in-person training to familiarize employees with the ESRM Standard and procedures.”⁵⁰⁵ As for content it seems to be broad-gauge in character. That is, Citi had “fully integrated environmental and social topics into [its] week-long Essential Risk Skills course, which educates employees on the full spectrum of risk in the financial sector.”⁵⁰⁶ In addition, it stated that it held “targeted, in-person ESRM training sessions for relevant bankers and risk managers (those working in project finance, export and agency finance, and other sectors exposed to significant ESRM risk).”⁵⁰⁷

Other recent inquiries of EPFIs suggest a continued range of efforts with regard to training. For example, at the time of Bergset’s interviews, although ABN AMRO Bank had previously conducted staff training, “aimed at raising awareness and increasing knowledge needed for the sustainability assessment,” it was not then doing so, though planned to resume it in the “near future.”⁵⁰⁸ By contrast, DnB NOR had held “some seminars...focused particularly on the implementation of the Equator Principles in project finance,” with some of the training outsourced to a major consultant.⁵⁰⁹ In addition, it held “[r]egular internal meetings...for the most affected departments (corporate clients and the international department)” as well as “regular interbank seminars for employees at different levels (credit managers, senior managers) who deal with business customers, which involve a module that focuses on ethics or corporate sustainability and where real-life cases, guidelines or policies are presented and discussed.”⁵¹⁰ This training was provided on a “needs and interest” rather than a mandatory basis.⁵¹¹ For HypoVereinsbank, staff training related to sustainability integration in lending was “at both unit level and credit manager level” with an emphasis on credit managers gaining an “awareness for the type of questions that need to be asked in dialogue with the clients.”⁵¹² Finally, at Rabobank International sustainability assessment was “part of the general credit application training.”⁵¹³

All the above being said, while clearly one or another kind or level of formal training is essential, the capabilities of an EPFI likely depend in not inconsiderable measure on developing knowledge and expertise through experience. As Meyerstein has remarked, “education, theoretical classroom sessions or printed materials can only go so far in conveying practical knowledge,” citing one banker-interviewee as “emphasiz[ing that] the real learning happens every day on the job as you encounter new projects with different problems.”⁵¹⁴

Organizational culture: Clearly, training is important, but the organizational culture within which staff roles are defined and expectations of them are set is critical. For example, as a general matter, Bergset suggests that there is “widespread agreement that employee knowledge, awareness of and, to some extent, *acceptance* of sustainability issues are of utmost importance for the success of the implementation of policies and guidelines in practice.”⁵¹⁵ In this connection, the IFC CAO recently observed that bank financial intermediaries were, by virtue of their long histories, more likely to be trapped or enmeshed in historical ways of transacting business – that is to pay modest or no attention to environmental or social factors – as contrasted with newer and potentially more flexible or malleable intermediaries, for example, private equity funds.⁵¹⁶ Thus, how various staff see themselves and think of how others see them is important. For example, Bergset cites an NGO’s belief that “the sustainability department officers within the banks often

see themselves ‘as being on an island’ or as outsiders within the bank, because they are considered to be ‘soft’ compared to the ‘hard’ bankers.” However, she does contrast that view with that of the person responsible for sustainable lending and risk management at HypoVereinsbank who “points to the close cooperation at all levels at the bank and argues that the policies are not written on the quiet.”⁵¹⁷ Rather, they were “discussed with different NGOs...[and] developed with input and feedback from the sales and risk units.”⁵¹⁸ Similarly, she cites the director of sustainability at ABN AMRO to the effect “that the relationship managers must become more “comfortable” with putting sustainability concerns on the agenda with the client,” stressing that “[n]othing is more important than the mindset of people and the culture of the bank. Nothing is more difficult to change.”⁵¹⁹

Again, Bergset emphasizes that “[t]he implementation also depends on the employees’ level of awareness. The credit manager must not only be able to, but also be willing and ready to comprehensively assess the client.” For example, the person responsible for sustainable lending and reputation risk management at HypoVereinsbank’s CSR Department “considers a sense of responsibility to be of importance (it need[s] to be ‘internalised’) and he has observed an increase in awareness: ‘Employees over time develop an understanding through their occupational experience for the fact that the sustainability impacts that arise can seriously damage the bank’s reputation.’”⁵²⁰ Similar views were expressed by others with comparable responsibilities.⁵²¹

O’Sullivan highlights remarks from one of her EPFI interviews to illustrate the challenge of moving people from the way that their investment-related tasks are conventionally framed, especially insofar as they are characterized by seemingly definitive and quantifiable methods for making decisions. For those individuals who have operated in that framework EP implementation is “very difficult especially because it’s not a tangible subject. People here, especially within Risk Management, are very much focused on models, figures, numbers...everything that can be counted.” By contrast, people “struggle” with what seem to be “almost moral judgement[s] or issue[s] that might lead to a risk, that can’t be measured.”⁵²² Overcoming that resistance requires “show[ing] them examples of how things go wrong if you don’t manage things; start implementing and applying the Equator Principles and then later on show them how it has worked within [Name of unidentified interviewee organization] and that it isn’t so bad.”⁵²³

Incentives: As suggested by the discussion above, especially with regard to project financiers or their equivalent, at the core of their view of their organizational role might, the most part quite understandably, be seen as “getting deals done.” This view is likely true regardless of whether there are specific links to success and financial incentives for them succeeding in that endeavor. Clearly the existence or absence of incentives – positive or negative – especially financial ones may be of considerable relevance to whether and how EPFI commitments are kept. That being said financial incentives in themselves may be problematic or even a two-edged sword.⁵²⁴ According to Meyerstein, “ESRM personnel largely operate fairly independently from bonus structures related to project approval.”⁵²⁵ More specifically he reports that 14 of 23 EP banks surveyed “reported that their ESRM personnel function outside of the project finance team’s bonus structures” while for three “their bonus structures are not project-dependent but rather are shared in a more aggregate manner across the project finance department.”⁵²⁶

Bergset, in her more limited survey of six banks, also describes varied experience. For example, she recounts the director of sustainability at ABN AMRO stressing that “bonuses are what provide noticeable incentives to bank employees” and, in turn, noted that as of 2010 the bank had established a new bonus structure which would “incorporate sustainability indicators for the first time – initially for the top and senior management in addition to the board of directors,” with other levels of the organization to be added later.⁵²⁷ At HypoVereinsbank bonuses for top managers are

determined in a different way, that is, they depend upon “an assessment of external stakeholders’ perception of the bank’s implementation of its sustainability strategy” the results of which are “compared to the last assessment that was carried out.”⁵²⁸ It should be noted, though, from Bergset’s further characterization of the bonuses is part of a larger framework for spurring staff to help the bank meet sustainability commitments. The bonus system at RaboBank extended to all levels of employees but with implementation done on a decentralized, departmental basis and, hence, reflecting department managers’ “awareness and perception.”⁵²⁹ By contrast at the time of the survey, implementation with respect to sustainability played no role in DnB NOR’s incentive structure. However, an overall reputation score which was to be part of top and other managers’ scorecards and include “ethical aspects” was to have been put into effect in 2010.⁵³⁰

According to one more sobering characterization of current experience “[e]very single investment project of an FI that signed up to IFC PS is unique and generally a fight between the bank’s E&S department on one side and the investment manager of the bank [and] the client/project sponsor on the other side.” Although “[o]ne should think that the investment manager will follow the bank’s policy but he is probably more interested in his bonus.” By contrast, “[t]op management is sometimes in between, as they can be held responsible for not respecting their policies. Therefore, the ‘standing’ of the E&S department of a bank is crucial.” The practical question is “[c]an they stop a project, can they enforce IFC PS or are they just a ‘paper tiger’.”⁵³¹

International Finance Corporation (IFC)

Among DFIs, there is in certain terms a large amount of material published by the IFC about the procedures and processes it employs in making and implementing investment decisions.⁵³² (By contrast there is very little published by individual EPFIs of a similar nature or by the EPA.) The Manual is a major case in point. However, even then, it is difficult to get a sense of how those procedures and processes work in practice. There are innumerable references in the Manual to documents which might offer considerable insights in that regard however, as with the one related to categorization noted above, but they are not publicly available.⁵³³ In addition we have been able to identify only a very limited academic literature analogous to the already modest one pertaining to the EP in that connection. However, additional sources of insight have been derived from reports from the CAO and the IEG.

We approach the discussion by first reviewing the overall organization of the IFC’s efforts relevant to this paper as they pertain, first, to direct investments and then to investments in financial intermediaries. We then turn to such deeper understanding of the foregoing as has been gained from other sources.

• Direct Investment in Projects

Overall outline of process and procedures: In APPENDIX F (SCHEMATIC OF IFC PROCEDURES THROUGH THE APPROVAL OF INVESTMENT STAGE) we provide a fairly detailed picture, largely drawn from the Manual, of IFC procedures and policies up through the decision to invest stage. We abstract from it the following:

The organizational locus of the IFC’s efforts with regard to environmental and social (and it would appear governance) issues is the Environment, Social and Governance Department (CES). Within the CES is the Investment Support Group of CES (CESI) which does E&S due diligence and supervision of IFC’s investment projects. CESI has two Managers whose responsibilities include providing clearance on critical decisions about projects. Much of the “on –the-ground work” – at its core assessing E&S risks and impacts and working with clients to develop E&S management plans – is performed by a Lead Environmental and Social Specialist (LESS).

The LESS has the assistance of a support E&S Specialist (SESS). Most immediately it would appear the LESS reports to a CESI Sector Lead (SL) and a CESI Regional Team Leader (RTL) who generally have leading roles with respect to the project supervision and appraisal phases respectively and who provide guidance on technical issues and operational performance. That is, for direct investments, in the first instance the LESS analyzes the project scope and potential risks, suggests a provisional categorization of the project, plans appraisal activities – including proposing an agenda for any site visit and doing it (and possible meetings with project stakeholders) – recommends which of the PS should apply to the project, advises on what performance gaps there are and what mitigation actions are required to address them, (ultimately embodied in an Environmental and Social Action Plan (ESAP)), presses for any recategorization etc. (See Text Box 3 for a brief characterization of which PS have, in fact, been triggered.)

Multiple appraisal missions may be required “due to the complexity and dispersion of assets.”⁵³⁴ Also, an appraisal may be contingent on a client “undertak[ing] additional assessments or studies needed to assess any number of issues” and being required to “engage an external expert to support, for example, specific [Environmental Assessments] of certain significant impacts.”⁵³⁵

However, it is the RTL and/or SL who after initial information gathering defines the conceptual approach for the eventual E&S scope of review. Early on the CESI Manager might mandate a Peer Review Meeting (PRM) for Category A projects and Category B projects that have unique or more difficult attributes to help ensure shared learning and consistency in decision-making. The LESS’s draft of the Environmental and Social Review Summary (ESRS) and draft Environmental and Social Action Plan (ESAP) are reviewed by the SL (and perhaps the RTL as well) before their submission to clients. A CESI Manager clears them for all Category A projects. After appraisal the Director or a manager of an IFC Investment Department or a regional Director chairs a meeting (the Investment Review Meeting (IRM)), which is the basis for IFC management approval of the project. The full project team attends the IRM, as appropriate. The Manual suggests that the LESS should participate in the project IRM and be prepared to discuss key issues of the project. It is the investment department which prepares a Board Paper as a resource for the Board in its consideration of the investment for approval. That document has a section which, among other things, describes significant environmental risks and impacts and mitigations. According to the Manual the LESS provides the language for that section subject to clearance by the SL.

The picture which emerges from the foregoing is one in which the CES overall and the CESI in particular has considerable responsibility from the outset of a project being brought to its attention to ultimate consideration by the Board of that project. Those responsibilities range from gathering information about the project, assessing risks and impacts associated with it, categorizing the project and determining which of the PS should be applied in light of them; determining what actions should be required of a client to ensure that projects comport with those PS; and formulating materials which will inform or ground the Board’s decision. Much of the leg work to meet those responsibilities is done by the LESS but subject to the guidance and immediate oversight by the RTL and SL and ultimate oversight by a CES Manager.⁵³⁶

What does not leap from these pages are the explicit (or surface) and more implicit (and perhaps below the surface) relationships between the CES and CES staff and those representatives of the IFC Investment Department and how they bear on how things work in practice. In this connection, one consultant has remarked on how the combination of the available leverage and time and resource-intensive staff efforts bear on the ability to set terms and conditions likely to produce significant PS-related outcomes.⁵³⁷

Some insights are available from other sources.

TEXT BOX 3. PERFORMANCE STANDARDS TRIGGERED FOR DIRECT PROJECTS

According to a 2010 study of the application of the Performance Standards (PS) for direct projects (non-FI projects), “representing 290 category A and B projects approved [over a] three-year period,” PS1, 2, 3, and 4 were triggered for 100% of Category A projects; for Category B projects the figures were 100% (PS1), 99% (PS2), 95% (PS3), and 86% (PS4). PS5, PS6, and PS8 were not triggered as much but still frequently for Category A projects, 82% (PS5), 82% (PS6), and 73% (PS8); for Category B projects, much less so, 42% (PS5), 25% (PS6), and 14% (PS8). Triggering of PS7 was modest in both cases: 18% for Category A projects and 4% for Category B projects.

Performance Standards 5-8 are more specialized, and their application depends on specific project circumstances.

PS1 (Social and Environmental Assessment and Management Systems) and PS2 (Labor and Working Conditions) were “triggered in practically every project.” “The numbers drop[ped] slightly for PS3 (Pollution Prevention and Abatement) and PS4 (Community Health, Safety and Security) for category B projects. PS7 (Indigenous Peoples) is the least triggered of the Performance Standards.” “Performance Standards 5-8 are more specialized, and their application depends on specific project circumstances.”

More specifically, it observed that the application of PS 2 has “been a challenge for some clients, particularly in countries where enforcement of national laws is weak or where such laws do not exist.”

See “IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Report on the First Three Years of Application,” July 29, 2011, pp. 2, 11, and 13. <http://ifcext.ifc.org/IFCExt/SafeGuardDocs.nsf/Comments2?OpenView&Count=1000&ResortDescending=1> The report states that “[t]hese results are consistent with findings from the 18-month progress report.” Id. at 11.

Practice beyond formal process and procedures: According to an academic case study (the Lenners study) on the early stages of the project cycle, “investment officers at the local offices identify suitable projects and create[] a two page concept note. Projects are identified either by investment officers actively searching for projects, by professional investment brokers coming to IFC or by the client seeking IFC financing directly.”⁵³⁸ (Note, as a general matter as the IFC recruits them “Investment Officers are the project leaders of multidisciplinary teams of IFC professionals who have expertise in the regions or sectors in which [the IFC does] business, including legal, environmental, social, industry and product specialists. IFC recruits Investment Officers to identify business opportunities, execute transactions, actively manage portfolio projects and build relationships with clients, global and regional private businesses, banking and multilateral partners and government officials.”⁵³⁹)

The first step is then “a low-level conversation to understand the client’s needs and to make a first assessment of the company as a potential investment.”⁵⁴⁰ Arguably, some proposals are rejected almost immediately as being inconsistent with IFC strategic goals.⁵⁴¹ A “two-page concept note” – which “is written by the investment officer and communicates the client’s background and how the project fits IFC’s strategy” – is “distributed to decision makers” in advance of a Concept Review Meeting (CRM).⁵⁴² The Manual states that “the RTL or SL (or their designee) participates in the CRM and provides input based upon the initial risk and impact identification.”⁵⁴³ The aim is, among other things, to “discuss the provisional categorization and

E&S tier, the conceptual approach to the E&S scope of review should the project be approved for appraisal, and any potentially significant E&S issues.”⁵⁴⁴

A local investment officer is said to have “estimate[d] that out of 100 projects that he screens every year, he rejects 80, and only takes 20 to the *Concept Review Meeting*.”⁵⁴⁵ The meeting “takes place at the local office with the country manager and investment team” with “[t]he regional director, credit managers and industry specialists from Washington are also participating on the phone.”⁵⁴⁶ The meeting is reported to “take[] around 20 minutes,” with “the local investment officer estimate[ing] that half the projects are approved.”⁵⁴⁷

If a proposal survives the Concept Review Meeting, “the local investment officer, together with one or two assistan[ts], prepares an 8-12 page document which “contains a detailed description of the project that explains IFC’s role, the anticipated contribution to development and benefits to stakeholders and any potential deal-breakers.”⁵⁴⁸ It appears that in the period around 2008 that document was termed the *Project Data Sheet Early Review (PDSEER)*.⁵⁴⁹ The current Manual refers generally to a Project Data Sheet (PDS) which it describes as one “prepared by the project team that contains a project description, and details of the potential investment, highlights any policy issues and potential deal-breakers, reviews IFC’s role in the project and development impact, and outlines issues and policy concerns (including provisional project categorization). The PDS is continually updated during project appraisal.”⁵⁵⁰ (The Manual also refers to a “Project Data Sheet – Concept” which it characterizes as a “formal document presenting the investment concept” which “is the starting point for moving investments through the IFC.”⁵⁵¹ This “Concept” document would seem to relate to the document referred to above as being prepared for the Concept Review Meeting.)

If more information is deemed necessary prior to project appraisal “the CESI participant, the relevant RTL/SL/Manager, and the investment department” determine the scope and timing of the visit and the RTL and SL “designate the CESI specialist(s) responsible for conducting the pre-appraisal mission.”⁵⁵²

According to the Lenners study, the decision to authorize project appraisal or not is done in two ways. “If the project is controversial, a Corporate Investment Committee (CIC) in Washington has a meeting to make the decision. The CIC consists of vice presidents for different areas; risk, advisory, financial, the region, infrastructure, environmental and social as well as the CEO.”⁵⁵³ Alternatively, “approval is by regional delegated authority, which means that industry director, regional managers and chief credit officer approves the projects.” They cite a “local investment officer” as “anticipat[ing] that out of the 10 projects he brings through PDSEER each year, about five of the projects are approved.”⁵⁵⁴

In all events, if the project moves to the appraisal stage, then the ultimate result as depicted by the Lenners is that the “local investment team...review[s] relevant materials and prepare[s] a multihundred[] [p]ages investment review binder (Decision Book).”⁵⁵⁵ The book “consist[s] of client background check, project description, financial projections, audit report, industry expert report and environmental report.”⁵⁵⁶ The Manual refers to “[t]he Decision Book and financial models [as the]...key decision documents for the Investment Review Meeting.”⁵⁵⁷

As the Lenners describe it, “[t]he meeting also takes place in the head quarters chaired by the Industry Director, with the investment team, country and industry managers, credit officer, equity department, legal advisors, environmental and social advisors.”⁵⁵⁸ At the meeting, “which usually lasts for three hours, all details regarding the proposed investment are presented.”⁵⁵⁹ More particularly, “the project team presents the project to IFC’s management” which “decide[s]

whether to approve the project or not based on the information presented in the project binder.”⁵⁶⁰ That decision will include “[f]inal equity and loan term sheets [which] are agreed upon.”⁵⁶¹ “If the client lack[s] some of the things specified in the agreements, the investment team goes back to the client with compliance steps that the client has to fulfill.”⁵⁶² Given the suggestion noted below of a high Board approval rate of projects brought to it by managers, this is a “key stage in the investment cycle” for managers. According to one investment manager four of five projects considered at the IRM are endorsed.⁵⁶³

Overall, it would seem, only a small fraction of projects which are tendered to the IFC at the outset receive funding.

Although the foregoing characterizations of the processes and procedures does not quite directly or explicitly attend to the point, it appears that they are oriented to achieving consistency and coherence in decision-making with regard to how account is taken of social and environmental considerations. Ehresman’s description of them is apposite with such a view. For example, he remarks on continued involvement of project specialists through the various phases of the project cycle.⁵⁶⁴ He also points to efforts (alluded to above) at various forms of peer review and review across the CES Department.⁵⁶⁵ In his view, then, “it is a collective judgment of the CES Department whether a particular project is sustainable from an environmental and social point of view (IFC Interview).”⁵⁶⁶ Another opportunity for spurring coherence and consistency in decision-making appears to be afforded by Corporate Risk Committee review of CES reports on project risks.⁵⁶⁷

Insofar as the following characterization by the Lenners’ study of the Board process itself is to be credited, it entails an ostensibly rigorous/extensive winnowing effort by effort with deference to/respect for senior staff judgments, one which results in limited Board review of many projects submitted to it and approval in the vast majority of cases:

“The project summary report is submitted to IFC Board of Directors and approved by either circulation among board members or by full board approval. The full board approval by voting is for projects that are controversial or politically sensitive... Few projects are put to vote, the majority approved by circulation. The legal advisor says that he “*is not aware of projects not getting approved*”..., although changes sometimes are made to the terms of the project. Also, the *Investment Review Meeting* is more crucial and the Board usually follows that recommendation of senior management. All in all he concludes that out of the 100 projects he screens every year, only two or three receive funding.”⁵⁶⁸ As suggested above, it would appear that for many projects consideration by the Board of projects takes the form of a review of a project summary report circulated among members. It seems that “full board approval by voting is for projects that are controversial or politically sensitive.” So “[f]ew projects are put to [a] vote [and] the majority [are] approved by circulation.”⁵⁶⁹

This approach appears consistent with a brief description at IFC web-site of its project cycle: “The project is submitted to IFC’s Board of Directors for consideration and approval through regular or streamlined procedures. ‘Streamlined’ means that the members of the Board review the documents but don’t meet to discuss the project. This option is available to low-risk projects of a small enough size. Certain small projects can be approved by IFC management under delegated authority.”⁵⁷⁰ Moreover one of the officials at the U.S. Treasury responsible for monitoring the U.S. role with respect to decision-making at multilateral banks has suggested that the statement reported by the Lenners study “seems basically correct” with perhaps “a couple clarifications.”⁵⁷¹ That is, “[b]oard discussion can also occur because of the overall dollar amount committed to a project, even if it has no controversy surrounding it. Board discussion may also occur if there is

something novel about the investment – like a new or bizarre financial structure, or if it is in [an] area of development we don't typically see."⁵⁷² Also, "while the legal advisor is correct that everything or very nearly everything gets approved," the U.S. Treasury strives "to prevent objectionable projects from ever reaching the Board."⁵⁷³

At first blush this characterization does not square with Ehresman's suggestion based on his interviews of IFC personnel that "rejection of projects primarily for social and environmental reasons occurs 'a lot' and 'quite often' (IFC Consultation, Washington D.C., March 2011)"⁵⁷⁴ However, it likely concerns not projects presented to the Board but rather projects which were submitted to the IFC early on if not at the beginning of the decision-making process and received some minimum level of consideration. It is difficult to assess these figures further because the IFC does not make available information about the particular reasons for specific projects being rejected.⁵⁷⁵ In this respect the situation might be similar to that of EP banks with respect to which it is hard to identify whether projects were rejected for reasons which related at all to environmental and social related concerns.⁵⁷⁶

Culture, Incentives, Evaluation, and Accountability:

The messages with respect to these issues are mixed. On one hand, according to one of the Lenners study interviewees, "the general opinion among IFC employees is that the corporation lacks a system to hold people accountable for decisions."⁵⁷⁷ More specifically, that interviewee suggested that the indicators of a major IFC system for tracking project outcomes, the Development Outcome Tracking System (DOTS) (discussed below) "are not connected to the evaluation of individual performance."⁵⁷⁸

However, the IEG, in a recent evaluation suggests that some changes have been made in that respect. That is, the IFC was using "DOTS ratings as the indicator for project development performance in the Corporate Scorecard." Starting its fiscal year 2002 it "introduced Department Scorecard Awards in FY02 to reward staff for contributing to scorecard objectives" and then extended it in fiscal year 2010 across the Corporation in the form of the Corporate Scorecard.⁵⁷⁹ Although the awards were "based on development impacts (measured by projects' development results ratings), client satisfaction, profitability, productivity, and growth" it is not clear where PS-related outcomes fit within this framework.⁵⁸⁰ (If a recent report by the CAO is any guide there is little such relationship.⁵⁸¹) In addition a Long-Term Performance Awards Program was established "for investment staff...in 2004 to recognize development and financial results of projects that staff brought into the portfolio five to eight years earlier."⁵⁸² It takes the form of an annual comparison of "the development outcome of each investment staff member's 'portfolio' based on IEG-validated [Expanded Project Supervision Reports (XPSRs)] or DOTS ratings or proxies based on credit risk ratings."⁵⁸³ But again, it is not clear what roles PS-related outcomes play in this system.⁵⁸⁴

A related but somewhat different incentive issue involving DOTS involves their formulation in the first place. As the Lenners study describes it, subsequent to an investment review meeting, the "project team" negotiates the term sheets with the client for IFC's participation in the project."⁵⁸⁵ The negotiation is done in view of the "investment team[]"s close contact with the client and [frequent] visits [to] the company."⁵⁸⁶ The noted importance of DOTS for tracking client performance with regard to a wide range of outcomes, including environmental and social ones, is reflected in the report that in formatting the DOTS "the local investment team" is supported by a lawyer, an environmental and industry specialist and an engineer" and that "[i]ndustry and market specialists are consulted and technical specialists from Washington are called in to give their opinion on issues in areas not covered by local officers."⁵⁸⁷ At the same time, it is recounted

that “[t]he regional director is aware...that DOTS is easy to manipulate and hard to measure due to the fact[] that DOTS is based on a subjective evaluation. (*Regional Manager*). However, the regional investment officer claims that credibility is achieved through accuracy. ‘It is possible to manipulate DOTS to show strong developmental impact but you don’t want to be too far off in your predictions since it shows when the project is evaluated later on. At IFC you are rewarded by credibility and not financial benefit – Reputation counts for a lot.’”⁵⁸⁸

Another interviewee contends that “[n]o one has ever been fired due to poor performance.” (*Environmental Advisor*)⁵⁸⁹ It would appear that only a small portion of investment managers’ compensation is incentive based and even then is only loosely linked to measures of project performance.⁵⁹⁰ A related and potentially important observation is the bearing of financial incentives and the IFC’s ability to attract and retain investment staff though it seems to have no distinctive relation to environmental and social issues.⁵⁹¹ In all events, the need for such incentives is linked in not inconsiderable measure to how the IFC’s (or any other investor’s) organizational commitments and priorities are defined in general and how they are communicated. So, for example, other interviewees stress the non-financial objectives as the motivating factors.⁵⁹² It should be noted, though, that a number of NGOs which closely and critically track IFC (other DFI) activities) have offered a rather different view about incentives. A group of them in a recent letter to the IFC’s Executive Vice president asserted that “[i]ncentives in the IFC’s current systems can generate conflicts of interest and are not well geared towards finding and minimising risk, let alone promoting positive development outcome.”²⁰ DOTS indicators and project reviews are completed by IFC investment teams, who have a stake in the project’s success and an incentive to cover up or remain ignorant of breaches of the performance standards.⁵⁹³ In this regard they cite “the CAO audit of investment in Wilmar Corp noted several instances of disagreement between environmental & social teams and investment teams, and found that the investment department’s opinion always prevailed.”⁵⁹⁴

Some of these issues were echoed in other NGOs’ criticism. They have argued that “[t]here is a concerning disconnect between investment teams and E&S teams in making this determination [of ‘risk categorization’], as the[ir] having differing interpretations of the types of risk and engagement in identifying project risks. For example, there is a rigorous and robust assessment of credit risk by the investment staff, and a limited, almost secondary consideration made on E&S risks.”⁵⁹⁵ They add that “[w]hile an FI client’s improved E&S risk management features in practically all IFC Board Reports as a core reason and benefit of IFC’s proposed investment, many investment staff working with FIs appear to consider E&S requirements as only one of many institutional ‘add-ons’ that IFC’s FI clients have to deal with. These issues are often relegated to be discussed only once the deal has already advanced and the relationship with the client FI has been built.”⁵⁹⁶

Concern about incentives for investment staff were highlighted in a 2010 CAO study. It states that “[i]nvestment staff incentives are aligned with investment department scorecards that set out indicators against which the department’s performance will be judged.”⁵⁹⁷ However, even though the Knowledge Gap is an indicator “which captures gaps in IFC’s information about the E&S performance of its portfolio” that indicator is used just for the Environmental and Social Development Department [(CES)] only, and is not reflected in investment department scorecards or portfolio manager incentives.⁵⁹⁸ It also suggests that although DOTS scores – which indirectly reflect E&S performance as one factor – are one basis for judgment investment department performance, they “do[] not appear to be sufficient to incentivize consistently sound support for strong E&S performance among investment staff and managers.”⁵⁹⁹

With regard to CES (as contrasted with investment) staff, at least according to Ehresman's study, the focus of assessment (and implicitly the issue of incentives) is on environmental and social rather than financial or related considerations: "CES staff are evaluated by CES managers, not by investment group managers who may be more focused on the financial dimension of projects"⁶⁰⁰ The "content [of specific performance criteria for the evaluation of CES staff]...is centered on the CES mission, not on project approval rates."⁶⁰¹

Apart from the matter of incentives and accountability, there are issues about the organizational culture – which was discussed above in the EP context – especially as it bears upon the relationship between investment department and CES staff.⁶⁰²

So, on one hand, according to the 2010 CAO report, it had "identified numerous examples of specialists receiving good investment department support" ranging from "early engagement of specialists in the project life; assisting specialists to address difficult E&S challenges rather than questioning the need to address them; ensuring specialists' involvement in the drafting of investment agreements; facilitating specialist access to client company staff; and providing support during discussions with client companies."⁶⁰³ On the other hand it found "significant differences in the level of support that specialists receive in different investment departments."⁶⁰⁴ For example, there were "numerous accounts of investment officers questioning the need to implement specific E&S requirements proposed by specialists, or limiting specialists' direct access to IFC's client companies, rather than finding ways to address concerns in a mutually acceptable way."⁶⁰⁵

A recent CAO investigation pertaining to a highly controversial project – one not concerning infrastructure, but rather the production of palm oil – which identified other issues, some of which if present, would be particularly troubling. A few were simply concerned with the adequacy of resources which are important but can arguably be addressed relatively easily.⁶⁰⁶ More disturbing was the suggestion of an atmosphere in which staff were discouraged from speaking out. That is, the CAO "noted a characterization of the E&S department (CES) as one in which there was a lack of 'intellectual space' and one in which staff were not encouraged to raise concerns about a client or project unless solutions can also be readily identified. In relation to land issues specifically, an approach to historical conflict was described in which 'you look a few years back on land issues – but not too far' lest you open a 'Pandora's Box' – ie. a process that, if started, will cause many problems that cannot be solved."⁶⁰⁷ In fact, in this case itself E&S management replaced the LESS working on the project in the wake of "tensions within the team" between E&S staff and investment personnel which the CAO characterized as resulting from "push back" by the IFC portfolio manager.⁶⁰⁸

In some measure these sorts of issues may have a connection to ones associated with the kind of incentive problems which were posed above: the CAO cited "[c]oncerns around incentives for E&S staff [which] were also raised; in particular concern was raised by E&S staff that the views of investment staff play a significant role in the annual performance appraisals of E&S staff and thus that E&S staff who 'make waves' are disadvantaged when it comes to decisions around promotions and pay increases. On the contrary it was argued that investment staff are minimally accountable for either the E&S performance of their projects or the quality of their relationships with E&S staff."⁶⁰⁹ In turn, it seemed that the foregoing might be linked to the broader issue of organizational priorities. The CAO wrote that "a number of IFC staff [it] interviewed...in the course of [its] audit explained the difficulties with IFC's handling of the E&S issues around [the project] as a product of the relative dominance of investment department staff and interests in IFC's organizational structure and culture. In this context it was explained to CAO that the E&S department sees itself as a 'service department' which is focused on meeting the needs of

investment department clients.”⁶¹⁰ Indeed the CAO remarked on the results of “critical reflections” of current and previous IFC staff as to the connection between the difficulties in the later stages of the project cycle and the “IFC’s E&S performance during the appraisal phase of the project.” It cited “[o]ne of these interviewees [as] observ[ing] that there was pressure to grow the agribusiness portfolio at the time the [project] investment was processed and that the investment department was thus highly motivated to “get money out of the door” with little regard for E&S concerns. The same interviewee noted that this was leading to investments in clients who were very weak from an E&S perspective.”⁶¹¹

The foregoing observations and findings were set within a broader one to the effect that “[t]he combination of client relationship, operational and compliance functions within project teams can generate conflicts of interest and conflicting incentives for staff and management.”⁶¹² A recent survey of all staff at the World Bank Group, including those at the IFC, suggested that in addition to these issues there may be other, related troubling ones.⁶¹³ For our purposes how definitive they are is less important than that they point to the kinds of challenges that must be addressed in organizing efforts to spur and ensure compliance with environmental and social standards.⁶¹⁴

An aside about the experience of another DFI

The experience of the Dutch DFI, FMO, offers an interesting illustration of how, in the context of direct investments, creatively to grapple with some of the foregoing issues as to the organizational relationship between ESRM and investment staff. More particularly, Vacarciuc’s study of that experience illustrates the importance of appropriately linking the work of ESRM staff with project financiers (or their equivalent). Some years back ESRM staff at FMO “were not involved directly in client negotiations and got to analyze a proposed deal after an Investment Officer – working in one of the front-office departments (i.e. investment teams) – had already made a financial analysis of the client.”⁶¹⁵ From the outset, then, sustainability issues were seen as only the concern of ESRM, not investment staff. Moreover, by virtue of their role in raising issues with respect to E&S criteria, ESRM staff action was associated with delays or postponements. To remedy these problems, E&S specialists were included “in investment teams and therefore placed...in front-office departments as well.”⁶¹⁶ This inclusion in investment teams enabled them to work closely with investment staff throughout the project cycle and better assess potential risks. Their new role became a weightier one because “a negotiation could now be turned down if clients failed to meet the appropriate E&S criteria or if a potential deal involved too high E&S risks.”⁶¹⁷ Moreover E&S screening was done before the financial analysis, using “a screening tool (i.e. the Rapid Risk Screen Template), which allowed...classific[ation of] a deal into various risk categories that later imposed specific E&S actions.”⁶¹⁸

Further, in addition to E&S specialists who were placed in front-office departments (i.e. Financial Institutions Investment Team, Energy Sector Investment Team): there was also a “separate team of E&S analysts [located in]...the [Investment & Mission Review (IMR)] department,” to enable cross-checking of activity. The role of E&S Analysts extended to “provid[ing] advice to the investment committee.”⁶¹⁹ Indeed, FMO’s Sustainability Manager “was also included as a member of the investment committee, which again speaks about giving an equal importance to ESG and financial issues.”⁶²⁰ Importantly, these changes to internal structures were linked to having “a significant influence on the organizational culture and perception on the importance of sustainability for FMO.”⁶²¹ Moreover they were associated with a decision to “give ESG issues an equal weighting in the investment decision making process as financial issues, while procedural updates followed soon after this decision (FMO Interview 12, 2012).”⁶²²

Finally, the effort at integration of sustainability issues into decision-making was enhanced by a shift from a centralized “command-and-control” approach to a decentralized one. That is, the sustainability team “bec[ame] a coordinator of an organization-wide commitment. For example, to maintain a sense of ownership and proactiveness, the sustainability team encourages other departments to individually prepare and manage sustainability policies that relate to their activity (i.e. the Sustainable Energy Policy is maintained by the energy lending team). This approach allows having a greater level of engagement towards sustainability and developing a sustainability culture within the organization. Thus, the sustainability team only monitors the specific processes or provides advice where necessary, which facilitates a decentralized approach to sustainability enforcement and stimulates bottom-up initiatives.”⁶²³

- **Investment in Financial Intermediaries**

As far as we have been able to determine there is very little publicly available information as to how the initial review of FIs and appraisal of them leading to a decision to invest in (or through) them works in practice. At best there is a schematic characterization of the process on paper (from the Manual) and what can be discerned or inferred from critical evaluations done by the CAO and offered by NGOs which include some references to these phases of the project cycle. In some measure the lack of information reflects the reliance of the IFC on FIs as an instrument for achieving IFC goals and the IFC’s corresponding distance – in some measure by its choice – from the “on the ground” activities of the FI by which these goals are ostensibly achieved. Insofar as the IFC, for whatever reasons, stands at a remove from those activities the less likely that certain kinds of information will be collected. Moreover, because in many cases, what an FI’s actual subprojects are to be is a matter for action on its part after approval of an investment by the IFC, there is simply little material relating to them. As a consequence, for categorization the emphasis is almost of necessity on FI capabilities rather than anticipated FI subproject outcomes.

Overall outline of process and procedures: More particularly, abstracting from the more detailed outline in APPENDIX F (SCHEMATIC OF IFC PROCEDURES THROUGH THE APPROVAL OF INVESTMENT STAGE), on paper, the processes and procedures leading up to the decision to invest in or through an FI look like the following:

There is a Transaction Leader (TRL), who is the representative of IFC’s Investment Department and is responsible for management of the overall transaction for an investment or advisory project and for the provision of all required client information about the client’s business.⁶²⁴ However it appears that it is the LESS who analyzes portfolio and ESMS data; determines in the first instance the significance of business activities that have a potential E&S impact and what are the Applicable Performance requirements (that is “[a]ll IFC Performance Standards (PSs)...applicable to projects as stated by investment contract covenants”⁶²⁵); the need for an appraisal visit to the FI; the adequacy of the client’s SEMS and the actions required of the client to ensure compliance with the Applicable Performance Requirements; the need to retain an external expert; reporting and supervision requirements; and the categorization. Any tentative determination of limited E&S impact is peer reviewed. In addition there may be a Peer Review Meeting to consider projects with complex or unusual issues and to help ensure a common approach for quality assurance. All determinations by the LESS are subject to review by the Team Leader (TL).⁶²⁶ However, it would seem that the CESI Manager has ultimate authority over key decisions including approval of any waiver request for any part of the Applicable Performance Requirements and ESMS Action Plan. The LESS prepares the E&S language for the Board paper, provides such support as he or she is asked to furnish to the project team for presentations to the Board and such technical briefings as the LESS may be requested to give to members of the

IFC's Board of Directors. Finally, the LESS provides input for the drafting of the investment contract.

Whatever the process on paper, as we have seen in connection with the discussion of the EP, how it plays out in practice depends on how organizational priorities are set and communicated. For example, the CAO has stressed that the task at the senior management level is several-fold. It needs to communicate "before the fact" both to investment staff and to clients in decision meetings the importance of managing E&S risks. Otherwise, the former may "consider E&S requirements as only one of many institutional 'add-ons' that IFC's FI clients have to deal with" and "relegat[e them] to be discussed only once the deal has already advanced and the relationship with the client FI has been built."⁶²⁷ It should be noted that in response to the foregoing concerns the IFC committed itself to having "[g]reater involvement of CES specialists earlier in [the] appraisal process" and "[t]raining for Investment Officers on E&S requirements and E&S specialists on financial products."⁶²⁸

In all events, at the core of the foregoing is a determination as to which of those measures among the PS with which FI portfolio subprojects must comply and the kind of ESMS which the FI must have to afford the required confidence that those PS will, in fact be met. In principle the categorization process yields the former determination. That is, according to the FI Note, FIs categorized as FI-1 and FI-2 must "apply [all of] the Performance Standards to transactions involving project finance and long-term corporate finance." Such activities are seen as "more likely to involve some E&S risk for the FI, as they are typically medium-/long-term transactions and will typically have negotiated transaction documents that incorporate relevant covenants."⁶²⁹ Thus, in these cases, the FI must "assess E&S risks of transactions according to Performance Standards 1 through 8 and...require its borrowers/investees to comply with these Performance Standards in their operations."⁶³⁰ In the first instance and in greater or lesser measure depending upon what is known about subprojects at the outset, the nature and extent of such risks have been anticipated by the categorization process.⁶³¹

On its face, the ESMS required of an FI is ostensibly driven by considerations of "E&S risk"; that is, to ensure that FI subprojects conform to the relevant PS requirements the FI must "develop and operate an Environmental and Social Management System (ESMS) commensurate with the level of E&S risk in their portfolio and prospective business activities."⁶³² Every ESMS must "incorporate relevant principles of Performance Standard 1 on Assessment and Management of Environmental and Social Risks and Impacts."⁶³³ In the case of an FI-3, "which constitute the majority of IFC's investments through FIs, the ESMS...consist[s] of a simple review mechanism."⁶³⁴

In APPENDIX D (KEY ELEMENTS OF ENVIRONMENTAL AND SOCIAL MANAGEMENT SYSTEM (AS SPECIFIED BY THE IFC "INTERPRETATION NOTE ON FINANCIAL INTERMEDIARIES")) we provide a detailed outline of the main elements of an FI's ESMS. Summarized briefly they are as follows:

- An environmental and social policy which states the applicable E&S requirements and standards; the policy is endorsed by senior management which commits to having the internal capacity and structure to implement it; and they actively communicate it to employees and to the public as well.
- The internal organizational capacity and competency to implement the policy which includes establishing a suitable organizational structure which defines roles and responsibilities, and authority; and designating staff with the requisite understanding of

the foregoing and the knowledge to fulfill their roles and providing them with resources needed for the task.

- An E&S due diligence (ESDD) process and procedures to identify risks and impacts of its borrowers or investees and to develop an Environmental and Social Action Plan (ESAP) which details measures by which those risks and impacts can be mitigated.
- Monitoring procedures to track the borrower's/investee's environmental and social performance against the FI's environmental and social policy, the ESDD findings, and the ESAP (if required).
- Procedures for external communications which include publication of an annual E&S performance report and a grievance mechanism to receive external complaints from the public regarding any aspects of operations.⁶³⁵

It would appear that establishment of a satisfactory ESMS is no mean task in itself, one which requires not only having the will to meet it and develop the requisite capabilities, but also marshalling the needed resources.⁶³⁶ Not surprisingly, in a number of cases an ESMS is more likely to be a “work in progress” rather than an “off-the-shelf” system.⁶³⁷ The IFC, citing the recent CAO audit of its experience with FIs has stressed that “FI clients with complex portfolios need more capacity support and oversight from IFC.”⁶³⁸ As a result the IFC's action plan aimed “to improve risk management procedures and IFC support to FI clients.”⁶³⁹ This action plan included “[i]mproving support and guidance for clients on E&S risk management.”⁶⁴⁰ Toward that end, the IFC aimed to make “[g]reater use of [its] Advisory Services [arm] to build client and market capacity.”⁶⁴¹ In addition it made reference to “[o]ngoing [Civil Society Organization (CSO)] and stakeholder engagement, including partnering with EPFIs on capacity building.”⁶⁴²

At the same time, it has recognized that “[t]here is a time lag between the implementation of a policy/ESMS and the results on the ground.”⁶⁴³ That places a heavy premium on follow-up during the monitoring and supervision stage to ensure that plans for the appropriate ESMS are in fact realized if they are not already in place at the time of the investment.

Of course, critical for what needs to be done with respect to the ESMS is the nature of the impacts/risks posed by its current existing or anticipated portfolio. As a general matter, the IFC has acknowledged the need for better “[c]onnecting [of] the dots”, that is, “greater screening of risks across an FI client's portfolio”⁶⁴⁴ In this regard the IFC has identified certain changes in its own operations in relation to FIs which were required. For example, they include (presumably better) “[t]raining for Investment Officers on E&S requirements and E&S specialists on financial products”⁶⁴⁵; “[g]reater involvement of CES specialists in [the] appraisal process”⁶⁴⁶; as well as “[d]evelopment of risk screening tools (G-MAP) and exposure review.”⁶⁴⁷

Recently, the Inter-American Development Bank published a “roadmap” for national development banks (NDBs) in Latin American and the Caribbean about managing environmental and social risks. Although written as an informative narrative for such banks about why they should be concerned about “sustainability” and how to establish, apply, and develop ESMSs commensurate with their portfolios, it has some relevance for pension funds which can learn from it as well.⁶⁴⁸ Some of the key points raised in the report are summarized in APPENDIX E (MEETING THE CHALLENGES OF ESTABLISHING AND IMPLEMENTING AN ESMS: SOME EXPERIENCE ON THE PART OF NATIONAL DEVELOPMENT BANKS).

Sixth Step: Monitoring and Supervision of Investments Made

International Finance Corporation (IFC)

- **Direct Investment in Projects**

Key elements of the supervision process

As broadly characterized by the IFC, the goal of the supervision process “is to obtain information to assess the status of project’s compliance with the PS and other specific E&S requirements agreed at commitment; to assess the current level of E&S risk; to provide advice to clients on how to address critical E&S issues; and to identify opportunities for improvement and good practices that could be applied to similar projects.”⁶⁴⁹ Most of the important tasks in that connection are carried out by a LESS. These tasks include determining the project’s performance against the applicable PS and other standards, the requirements of the Environmental and Social Action Plan (ESAP); “[t]he implementation degree and effectiveness of the project’s [ESMS]”; “[t]he effectiveness of the client’s grievance mechanism and community engagement”; and compliance with all reporting requirements.⁶⁵⁰ Based on the foregoing, the LESS updates the ESRR_(S) (described in the following section).⁶⁵¹ S/he also updates the core DOT indicators.⁶⁵² Others “are the responsibility of the Portfolio Officer.”⁶⁵³

However the LESS appears to report to a Portfolio Officer.⁶⁵⁴ Although the LESS communicates with the client about his or her findings, the Portfolio Officer seems to have the dominant role of engaging the client about the nature and import of the LESS’s review for what the client may need to do.⁶⁵⁵ Others, such as a Regional Team Leader, a CESI Sector Lead, and the CESI Manager appear to intervene in special circumstances, e.g., high risk or otherwise problematic projects, the possibility of waivers of requirements, etc.⁶⁵⁶

Information gathering: reporting of information

Clients are required to submit on annual basis an Environmental and Social Annual Monitoring Report (AMR) whose “scope and content are agreed between IFC and the client, and may in some cases be included in the investment contract.” It serves as a basis upon which the IFC can “assess on a yearly basis the E&S risk of the project and revise and update the [Environmental and Social Risk Rating (ESRR)] score.”⁶⁵⁷ The term AMR concerns reporting relevant to direct projects; a different one, discussed below, is used with regard to FIs. The ESRR is the ostensible basis for prioritization of supervision efforts. There is an ESRR_(A) which is a baseline characterization of the client’s compliance at the time of the setting of an Action Plan and an ESRR_(S) which reflects the client’s compliance with that plan and other requirements on an ongoing basis. ESRRs are scored on a scale of 1 to 4. (For details see APPENDIX G. IFC: TRACKING PROJECT/FI OUTCOMES AND PERFORMANCE.)

There appear to have been issues about the timing and content of AMRs and related ones pertaining to what is termed the Knowledge Gap. Knowledge Gap projects, are projects (not including Category C projects) “that were disbursed 15 or more months previously that do not yet have an ESRR_(S) score; and, projects with an ESRR_(S) score older than two years.”⁶⁵⁸ The absence of such a score is associated with a failure in required client reporting.

The Independent Evaluation Group in 2010 reported on the results of research in the foregoing connection. It found that “[o]f the 28 random sample projects, including all pre-Performance Standard and post-Performance Standard real sector projects older than two years, only 50 percent (14/28) provided IFC with satisfactory AMRs. In most such cases, IFC identified the deficient information in the AMR for correction in the following year, but in many cases the

deficiencies continued despite IFC corrective actions.” Moreover, not only had half the sample of projects provided satisfactory AMRs but also even though the IFC had identified deficient information for subsequent correction “in many cases the deficiencies continued, an estimated 50% of reports sampled by the IEG were found to be inadequate reflecting insufficient communication and frequency of IFC feedback, and poor client intake of corrective requirements.”⁶⁵⁹ The IFC itself has asserted that it has had a measure of success in at least the timing of reporting. This success is reflected in the Annual Monitoring Report Capture Rate (AMR-CR), the “% of IFC active portfolio clients with reporting covenants in the investment contract whose most recent AMR was received within the last 15 months.”⁶⁶⁰ For the IFC, success is defined as achieving a 90% capture rate.⁶⁶¹ The capture rate in fiscal year 2011 was somewhat shy of that mark, 84%, though the IFC reported that it had risen from 72-73% the previous two years.⁶⁶² It is not clear how the foregoing squares with a different report with respect to IFC’s 2011 fiscal year stating that the Knowledge Gap had by that point declined to just 3.1% since a client’s ESRR(s) would be based on in part on information from its AMR.⁶⁶³

Information gathering: site visits

Site visits are mandatory for so-called Knowledge Gap projects as well as for projects with an ESRR of 3 or 4 unless there is a justification for otherwise not doing so. In addition, site visits might be made based on the fact that projects are Category A or high risk, have “complex” Environmental and Social Action Plans, are under construction, or within the first year of disbursement.⁶⁶⁴ In addition, other special circumstances also may spur a visit, including “major E&S incidents, non-governmental organization (NGO) complaint, [and action by the CAO].”⁶⁶⁵ Somewhat more generically the Manual refers to site visits occasioned by “[a]ny E&S specialist activity that results in an updated understanding of a portfolio project’s E&S performance.”⁶⁶⁶

Among the site visit activities might be inspections of “[o]ne or more project locations and/or operating facilities; “[a]ssociated facilities, and/or supply chain operations;” and “[t]hird-party operations and activities;” and “[i]nterviews with company and contractors’ staff, representatives of affected communities, key stakeholders, and local authorities.”⁶⁶⁷ Advance notice is given for all site visits.⁶⁶⁸ The IFC provides a description of how site visits should be conducted, detailing how preparations should be made in anticipation of them, the kinds of questions that need to be asked and documents requested, key matters to focus on during the visit and red flag type signs of possible environmental and social concerns which might be seen at that time.⁶⁶⁹ Although it is nominally offered as a guide for FIs in carrying out site visits of their subprojects it is suggestive of what the IFC itself sees as necessary to do with respect to its own direct investments.

• **Investment in Financial Intermediaries**

Key elements of the supervision process

The Manual’s description of the supervision of FI projects is relatively short. Important elements of it are as follows:

A LESS is assigned to supervise the project. He or she reports to a Portfolio Officer (or perhaps a Transaction Leader (TRL)).⁶⁷⁰ However, it is a LESS who reviews the Social and Environmental Performance Reports (SEPRs) submitted by the FI (discussed below) for adequacy including (1) “[t]he client’s performance against the Applicable Performance Requirements”; (2) “[t]he status of the client’s implementation of the [ESMS]”; (3) the client’s performance “against the performance indicators”; (4) “[k]ey performance or information gaps with respect to (2) and (3);” and (5) “[k]ey steps the client may need to take to improve performance.”⁶⁷¹ In the course of doing so s/he determines whether “[t]he nature of the client’s business has changed significantly to indicate

different performance requirements from the IFC.⁶⁷² In addition he or she assigns the DOTS E&S Rating. Further, for those projects for which the IFC has reserved the right to review the first few sub-projects, the LESS “reviews the E&S due diligence received from the client on such projects” and may “consult with other specialists, as needed.”⁶⁷³ However, it is the Portfolio Officer who is responsible for ensuring that SEPR reporting obligations are fulfilled.⁶⁷⁴

Moreover, the LESS may determine if it is necessary to “carry out a supervision visit to the FI project and/or its sub-projects in coordination with the Portfolio Officer.”⁶⁷⁵ Priority in this regard is “given to FI projects with high potential risks or poor ESRRs or issues that are common to a number of projects.”⁶⁷⁶

Information gathering: reporting of information

For the IFC, supervision of FI investments requires gaining relevant information about both the actions of the FI as such and the FI’s subprojects. At the core of information gathering is what the Manual refers to as Social and Environmental Performance Reports (SEPRs) being required of FIs so presumably it has these reports in mind.⁶⁷⁷ Such reports are said to include:

- “Portfolio breakdown by industry sector, high-risk transactions and [Environmental and Social Due Diligence] process prior to transaction approval where relevant;
- Cases of non-compliance and significant E&S accidents or incidents related to a transaction;
- Information on the implementation of and changes to the FI’s ESMS; and
- Information on DOTS indicators as agreed with the client.”⁶⁷⁸

What appear to be identical but differently named requirements are detailed at an IFC-created web-site which is supposed to serve as a resource for FIs, namely FIRST (Financial Institutions: Resources, Solutions and Tools).⁶⁷⁹ That is, FIRST speaks to FIs being “required to report to the IFC on an annual basis their environmental and social performance, from disbursement until the project is closed as an IFC investment.”⁶⁸⁰ More specifically it refers to Annual Environmental Performance Reports (AEPRs) from FIs which must “include portfolio information broken down by industry sector and transaction type; implementation of the financial institution’s ESMS; and any significant environmental and social issues or non-compliances associated with individual transactions.”⁶⁸¹

Insofar as the formats for these various reports are detailed at the FIRST web-site, they vary depending upon the FI.⁶⁸² For example, with reference to “Equity Funds” it provides a form entitled “Annual Environmental and Social Report for Financial Intermediary Clients”⁶⁸³ (This form seems to correspond to the SEPR, rather than AEPR.⁶⁸⁴) The report is almost exclusively concerned with the FI’s ESMS. There is just a very, very short section which asks about “new and existing [environmental] exposures” and requests information about any changes since the last report.⁶⁸⁵ The form for “Banking Institutions With Corporate Projects” is very similar except that it asks FIs “engaged in...large corporate/project finance” to “provide information as requested of all loan assets” which are “[l]onger than 12 months tenor” and “[l]arger than US\$ 1 million outstanding exposure,” whether there have been “[a]ny environmental and social risks and measures taken to mitigate the risks.”⁶⁸⁶ Beyond that, in both reports, questions are grouped under the categories of policies and processes, monitoring, and reporting. Thus, some are concerned with the ESMS and focused on what the FI has done to oversee, make inquiry of, investigate, etc. subproject client sponsors. Others relate to what the FI has to report with respect to particular subprojects.

Among the latter, project specific information is elicited by the following questions (for Equity Funds):

Policies & Processes
Give details of any transactions rejected on environmental, health, safety or social grounds
State any difficulties and/or constraints related to the implementation of the environmental procedures
Please describe how you ensure that your clients and their projects are operated in compliance with the National laws and regulations and (if applicable) the IFC Performance Standards
Please provide two sample internal E&S review reports conducted for projects considered last year. (Only if following IFC's PS is an Applicable Requirement)
Please give details of any material Environmental and Social issues associated with investees during the reporting period in particular
Monitoring
Please describe how you monitor investee environmental performance. Please provide the following information
<ul style="list-style-type: none"> - Number of projects in portfolio classified as category A or B - Number providing annual reports - Number of projects where a field visit was conducted by a bank staff to review aspects include Environmental and Social issues
Please provide details of any accidents / litigation / complaints /regulatory notices and fines:
<ul style="list-style-type: none"> - Any incidents of non-compliance with Applicable Requirements - Covenants/ conditionality imposed by the Bank as a result of any non-compliance

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It is not clear how information of this kind and obtained in this way relates to that which the FI Note requires be supplied: namely, it states that private equity funds must “provide names, locations and sectors of high-risk subprojects that have been supported with IFC funding, subject to regulatory constraints and market sensitivities.”⁶⁸⁸

At first blush the cited requirements do not suggest intensive direct scrutiny of FI's categorization of subprojects (one important task to be fulfilled by the ESMS). There is no specific request for the categorization of any subproject classified during the reporting period; rather only the numbers of subprojects categorized A or B. Insight is gained indirectly from (a) responses to questions about environmental issues at the time of subproject approval and changes in environmental status and (b) the two internal E&S reports conducted for subprojects. Given, in our view, the critical importance of categorization, if the foregoing were all the sources of information about subproject categorization that would fall short of what is needed. Indeed in its 2010 report the CAO said that it had, in its portfolio review “confirmed the ongoing existence of significant implementation challenges in IFC's FI portfolio, such as E&S management systems that exist on paper but are not adequately implemented, and FI client mistakes in categorization of, and application of the Performance Standards to, relevant sub-projects.”⁶⁸⁹ And in reply to the 2013 CAO audit of FI investments, the IFC acknowledged the “[n]eed for enhanced...supervision of FIs and sub-projects, including review of sampled sub-projects in higher risk investments.”⁶⁹⁰

Recall that, according to the Manual, in addition to the IFC receiving such reports, “[f]or FIs where there are potential significant E&S risks associated with their financing activities (e.g., large infrastructure or extractive sector projects) or where IFC is more directly exposed to the E&S risks of their financing activities (e.g., private equity fund operations),” the IFC could exercise the right “to review the FI's first few financing activities in such areas to ensure the FI's [ESMS] implementation is robust, in addition to other applicable performance requirements.”⁶⁹¹ Insofar as it is exercised this approach affords a means early on to assess the efficacy of the FI's ESMS, including processes related to categorization. Note that in its response to the critical letter from

NGOs cited above in the spring of 2013, the IFC largely repeated the response just cited, that is, as a matter of practice, “[w]here we believe that E&S risks could be material (high and medium risk FIs), we also take a random sample of the client’s portfolio to test the efficacy of how E&S standards are being applied and enforced by the FI.”⁶⁹² Later, in September, 2013, as part of a proposed course of action that was described the IFC’s Committee on Development Effectiveness the IFC referred to “[s]ub-client validation” which would “cover all FI-1s and higher risk FI-2s as per sub-client review protocol to be document and shared.”⁶⁹³ (Sub-client validation includes “loan file review or a combination of loan file reviews and field visits to sub-client sites.”⁶⁹⁴)

Information gathering: site visits

According to a 2008 Independent Evaluation Group (IEG) report on the (then) current practice of the IFC for FIs – though it concerned micro, small, and medium enterprises – it was “to visit the projects, as needed, on the basis of the EHS risk profile of an intermediary’s subborrower portfolio, and deficiencies in the intermediary’s environmental management system, as identified through the intermediary’s annual EHS reports.”⁶⁹⁵ Even here, the IEG criticized this practice as “weak because the [environmental, health, and safety (EHS)] risk profile of the subborrower portfolio can change, and many intermediaries either do not submit annual EHS reports to IFC, or they submit deficient reports.”⁶⁹⁶ In its 2010 study of on FIs the CAO stated that it had been advised that “clients are visited on-site at least every two years, but that clients with the two weakest categories of [ESRR] scores are visited at least annually.”⁶⁹⁷ In all events, it described the purpose of the visit as being to “validate implementation of the [ESMS].”⁶⁹⁸ Based on its desk review and interviews the CAO found that 30 of the 47 financial intermediaries “to be fully consistent with IFC’s policy and procedural requirements...A further 10 percent of the sample investments were regarded as noncompliant.”⁶⁹⁹ For the approximately 25 percent of FIs whose actions which were not fully consistent with policy and procedure it is not clear how far they fell below the mark.

The Manual itself says very little about site visits especially as they pertain to subprojects. It states somewhat generically that “[s]upervision priority should be given to FI projects with high potential risks or poor ESRRs or issues that are common to a number of projects.”⁷⁰⁰ There are only two other provisions in the Manual with regard to the timing of visits, only one of which relates to FIs. It provides that those projects “with a reporting requirement but no [Social and Environmental Performance Report (SEPR)] provided to IFC and no E&S site visit undertaken for over two years,” should be “flag[ged] as “as an E&S Knowledge Gap project.”⁷⁰¹ Note that “[f]or Category FI projects with a reporting requirement but no SEPR provided to IFC and no E&S site visit undertaken for over two years,” the LESS must “flag” the project “as an E&S Knowledge Gap project and notify the Portfolio Officers of the same for immediate follow-up.”⁷⁰²

As pointed out above, the IFC may reserve the right to review the first few sub-projects but precisely what that in fact entails is not delineated.⁷⁰³ With regard to site visits to the FI or its sub-projects there is a reference to the possibility of a supervision visit to one and/or the other to in order to “review the client’s performance and verify its compliance with the Applicable Performance Requirements.”⁷⁰⁴

Leading NGOs have been rather critical of the IFC’s efforts concerning subproject site visits. In a recent communication to the IFC they argued that “all FI-1 subclient validation must include at least one site visit annually. The IFC should also apply it[s] at least once every three year FI client site visit requirement to all subclients above a certain threshold in size.”⁷⁰⁵ Moreover, they contended that “[t]he IFC needs to significantly increase subclient supervision in a way that looks at the development, environmental and social impact, with clearer implication of these visits on the ESRR and DOTS ratings of the project. This will imply higher intensity of engagement on site

visits.”⁷⁰⁶ In addition they “insist[ed] on disclosure of the results of supervision visits to both clients and subclients, otherwise they do not increase public accountability” and provision of “annual data on FI risk in the active portfolio, E&S staff capacity, and aggregate information on client and subclient visits.”⁷⁰⁷

In its response the IFC stated that it had “conducted over 150 sub-client field visits for sub-projects since the 2006 Policy framework to validate the work of our FIs, following a risk-based approach”.⁷⁰⁸ However, in a briefing to the IFC Board in 2014 about environmental and social lessons learned with regard to its practice it acknowledged the CAO’s recent critique and finding of a “[n]eed for enhanced IFC supervision of FIs and subprojects, including review of sampled sub-projects in higher risk categories.”⁷⁰⁹ In turn, it stressed “what we are doing,” stating that there would be “[e]nhanced supervision of high-risk FIs including review of sub-projects” and that a “Guidance Note for sub-project review” was “being developed”.⁷¹⁰ In addition it stressed the need for “[i]ncreased attention from senior management on high risk transactions, use of ‘High-Risk List’ to prioritize supervision and brief IFC management.”⁷¹¹ In its proposed course of action in 2013, the IFC contended that it would continue to make FI level field visits annually for FI-1 clients but increase the visits to annual ones with respect to FI-2 clients with PS requirements and at least every 3 years for other FI-2 clients.⁷¹²

Resources (internal)

However well-defined and well-crafted are the kinds of processes and procedures delineated above, in the absence of an organization like the IFC (or a pension fund for that matter) having internal staffing and support resources suitable to the task, effective implementation of them will be a serious problem. This issue of resources appears to have been evident especially in connection with investment in or through FIs. The trajectory of efforts by the IFC in this regard is illuminating.

For example, the IFC CAO noted in 2010 that “[i]n reality, E&S specialists working with IFC’s Funds and Global Financial Markets departments carry out their work under significant constraints. For example, in IFC’s fiscal year 2009, five E&S specialists (supported by consultants which were the equivalent to three full time staff) oversaw a portfolio of 432 financial intermediary projects, 125 of which were visited. A further 85 projects were appraised for investment.”⁷¹³ More generally it observed that “[d]ue to both resource constraints and a lack of internal support, the systematic implementation of good practice suggestions, such as systematically participating in investment appraisal visits, visiting select sub-projects financed by IFC client FIs, and spending sufficient time assisting FIs in establishing E&S management systems, is not feasible under the current framework.”⁷¹⁴

In this connection, the Independent Evaluation Group (IEG) took note of a “deterioration of appraisal quality for FI projects evaluated 2004–09.”⁷¹⁵ Over this time (and continuing through the present) there has been a significant increase in the number of FI projects funded by the IFC. In a presentation to the IFC’s Committee on Development Effectiveness in the fall of 2013, the “[s]upervision universe” was said to be 409 in fiscal year 2013. While 140 of them were the subject of “[a]nnual supervision missions,” that represented a substantially lower fraction than in fiscal year 2009.⁷¹⁶ The extent to which this change was an artifact of a shifting mix of FI clients is not clear. According to the IEG, during that time frame, “there were only one or two E&S specialists in IFC’s Environmental, Social and Governance Department (CES) to both appraise and supervise the increasing number of financial intermediary projects.”⁷¹⁷ IFC’s supervision of nonfinancial intermediary Projects was “satisfactory or better in about 80 percent of the projects [after] 2006, but the understaffed financial intermediary sector supervision before 2006 has

resulted in below satisfactory ratings in nearly half of the projects.”⁷¹⁸ By the time of the report staff for the financial intermediary sector had ‘increased to eight E&S specialists and eight consultants.”⁷¹⁹ The upshot may be that at minimum, until such time as pension funds have significant experience and capabilities in this area that they work with only relatively experienced FIs with some history of success with respect to their subprojects meeting E&S PS.

Equator Principles Financial Institutions (EPFIs)

There is very little publicly available information about the actual practice of EPFIs in monitoring projects. In terms of formally stated procedures, EP 9 requires in connection with project finance that in order for an EPFI to “assess Project compliance with the Equator Principles and ensure ongoing monitoring and reporting after Financial Close and over the life of the loan, [it] will, for all Category A and, as appropriate, Category B Projects, require the appointment of an Independent Environmental and Social Consultant, or require that the client retain qualified and experienced external experts to verify its monitoring information which would be shared with the EPFI.”⁷²⁰ This current requirement is consistent with the results of Carbonell’s interviews of the practice of three EPFIs relatively early on in the EP experience, showing annual (or possibly more frequent) monitoring carried out by consultants.⁷²¹

Carbonell characterizes the monitoring process of one EPFI – ABN AMRO – a bit further. In that case, the role of consultants extended to “rare instances of non-compliance on a three-tiered scale according to the nature and degree of non-compliance.”⁷²² Then, such project sponsor and consultant provided information was “reviewed on an annual basis using the client tool and risk filter,” the review being carried out by “a group-wide monitoring team that coordinates with [the ABN AMRO Sustainable Business Advisory (SBA)] unit.”⁷²³

Carbonell does not remark on the above experience within the larger context of the role that ABN AMRO might have played in any syndicate. However, Meyerstein does briefly describe the monitoring phase of the project cycle in terms of heavy reliance on one member of the syndicate: “[I]n addition to the role of the independent consultant, one bank within each syndicate serves as the syndicate’s — agent also known as the — environmental bank, and is responsible for all of the paperwork and ensuring that all of the loan covenants in the project contracts are fulfilled.”⁷²⁴ That agent is paid a “flat fee...by the project sponsor on a monthly or annual basis.”⁷²⁵ Any impulse to “assume the role of agent to make sure all goes well...is balanced against the fact that the role of the agent is a relatively thankless job because the fee is not that high relative to other fees, at least in exchange for the amount of work required to earn the fee.”⁷²⁶ The responsibilities of the agent “include constant monitoring of information from the project sponsors, checking this information against the loan covenants for compliance, and reporting on compliance to all members of the syndicate.”⁷²⁷ Quite understandably, “if anything goes wrong, it is the agent who bears significant responsibility. This again points to the role played by reputation *among banks*...as a significant check on individual bank behavior.”⁷²⁸

Whether the above characterization squares with current experience is unclear. For example, according to one characterization thereof, “many banks tend to stop their engagement after contract has been signed or maybe the first disbursement has happened and put relatively little effort[] on the monitoring of the E&S requirements.” This decrease in or absence of engagement is particularly unfortunate because this is the stage “where most of the impact could be created (guiding clients through the implementation of the ESAP).” In some measure the absence of such effort reflects a “[I]ack of resources in the E&S departments.”⁷²⁹ There may be related staffing problems with respect to the due diligence stage. That is, “[f]or an average risk infrastructure project, banks[] E&S specialists (who are sector specialists only in larger banks like IFC) typically

go 2-3 days on due diligence mission, which is by no means enough to fully assess all related risks. Therefore, the action plan they develop very often remains vague (e.g. ‘assure that H&S meets IFC PS requirements’).⁷³⁰

Cross-cutting issues: engagement – disclosure, consultation, grievance mechanisms, negotiation, and consent – by investors and clients with the general public and interested and/or affected parties

The need for and importance of engagement

The critical importance of engagement with interested and/or affected parties, especially in connection with infrastructure projects (among others) was highlighted by the CAO in its 10th annual report. Not only are these projects “[a]s a general matter...large-scale, complex, and resource intensive,” but also “when the intent is to employ private finance and operation” to what “have traditionally been seen as public services, such as water supply, power generation, and major transportation infrastructure” they, not surprisingly, can “invoke strong reactions when there is concern that the privatization can create a monopoly, especially if it affects basic human needs such as water or energy.”⁷³¹ Thus, “there is significant potential for conflict between civil society, developers, and the government.”⁷³² For example, “[a]ccess to clean water lies at the heart of poverty reduction; the lack of access is a key factor in the spread of disease. “While development can improve the availability of clean water, it can also put water resources at risk” through competing demand or harms to their quality. “For example, agricultural communities need clean, sustainable water sources to grow crops.”⁷³³ In this context, “compliance with the many local, national, and international regulations to which [a] project must adhere” may be an abstract matter for “some community members...[concerned primarily with] the reality of performance on the ground.”⁷³⁴ Moreover, “[p]eople want external verification of everything that interests them – from how benefits are distributed in sustainable development programs to the quality of water in a farmer’s canal – and they want to participate in the process and understand the implications of what the experts find.”⁷³⁵

The prevalence of “substantial and repeated conflicts over land acquisition, resettlement, and adequate compensation” is the result of needs and demands which arise from the “more complex communal relationship with land” which people in target countries” and the “significant quantities of land” infrastructure (along with agribusiness, oil, gas, and mining) projects may require for their development.⁷³⁶ Moreover, in the absence of national institutions which “appropriately reflect or respect this complexity, the allocation of development rights to a private sector operator can result in deep, intractable conflict between the private operator and the community.”⁷³⁷ Hence there is a critical need for “systems and approaches for resolving these interests in a constructive and culturally appropriate way.”⁷³⁸ For example, “dispute resolution techniques, including the implementation of participatory grievance mechanisms, can provide the tools necessary to manage the complexity and sensitivity of relationships that tie host communities to their land.”⁷³⁹ Thus, such conflicts should be anticipated and structured approaches to resolving them – grievance mechanisms, problem solving processes, etc. – might well be “integrated upfront in project design.”⁷⁴⁰ Nonetheless, process is not enough: attention and commitment to providing “a flow of tangible benefits [that] are timely, appropriate, and have value to communities and other stakeholders involved” is required.⁷⁴¹

More generally the CAO remarks that “[a]t the core of many disputes is how communities have experienced projects’ ostensible benefits and costs” such as “loss of livelihood, impact to local assets, and increases in the cost of services,” especially the first of the three.⁷⁴² Moreover, how those costs and benefits fall “is varied – but ultimately manifests in divisions within the community,

such as power imbalances among local leaders, conflict with migrant workers, protests against the company, and strained relationships with other local stakeholders.”⁷⁴³

A significant fraction of complaints received by the CAO with respect to a wide range of issues – whether “concerning land, water, labor, community health, indigenous rights, or social benefits” – asserted failure of due diligence and of disclosure and consultation.⁷⁴⁴ The former focused especially on the “processes for the review [and] appraisal,” though may also address “implementation, supervision, and exit of projects.”⁷⁴⁵ The latter related to the “disclosure of information to and consultation with communities”⁷⁴⁶ which “enables affected communities to gain access to and take part in, decisions that affect them.”⁷⁴⁷ In turn, “[e]ffective local engagement should help companies identify and address local stakeholder concerns early, and before they become cause for conflict.”⁷⁴⁸ But to be effective, engagement must take place early enough to enable stakeholders not only to be aware of problems which may be posed but also to afford enough time to have them addressed by project developers. Otherwise “perception among affected stakeholders [and NGOs in aid of them may be] that the project is already a ‘done deal.’”⁷⁴⁹ In a different report, the CAO stressed that meaningfully understanding the concerns of and engaging stakeholders requires drawing on local expertise. For example, she noted that initial successes were achieved in Africa region investments as a result of “the [early] availability of a dedicated E&S specialist in the region, and from the support of IFC’s regional management.”⁷⁵⁰

In the context of the EPFI experience Meyerstein remarks that “complaint mechanisms or secondary lines of communication [may be established] that would serve to compensate for any breakdowns in information-flow in borrowers’ complaint procedures.”⁷⁵¹ However, “[t]here may not be the resources made available to do this or it may be too complicated to do.”⁷⁵² What exactly is required is context specific. As O’Sullivan describes it, this context includes the relevant relationship with any local regulator, who may have requirements relating to local consultation.⁷⁵³ Such consultation can be quite controversial and costly “in terms of the cost, in terms of the unpredictability, particularly when you want to consult people who usually don’t have a voice, who aren’t particularly empowered and therefore have nothing to lose but have real concerns about the project.”⁷⁵⁴ Among other things, her interviewees took note of the lack of guidance by the EP as to how grievance mechanisms should work, how context specific they are, and the need for alerting stakeholders throughout the project cycle, and the difficulties of running them effectively.⁷⁵⁵ Overall, she suggests that “despite the existence of certain EP criteria on project consultation, disclosure and grievance mechanisms, at EP organisational field and intra-organisational level, what occurs in practice is very much dependent on a raft of project-specific variables, as well as numerous EP actors’ interpretation, rationalisation and control of the Principles.”⁷⁵⁶

The Distinctive Challenges Posed by the Need for Engagement

Even where the importance of engagement is understood, as the discussion above might have already suggested, carrying it out effectively may well pose distinctive challenges. Some insights in this regard are offered by a paper which focused on the extractive industry (in connection with the OECD Guidelines) but which would appear to be equally relevant to infrastructure and the PS and related standards. First, it identified six “persistent” challenges to stakeholder engagement:

- Failure to adapt stakeholder engagement to the operational context.
- Failure to identify the right stakeholders.
- Failure to choose the right engagement activities.
- Lack of effective stakeholder engagement at early stages of exploration and project development.
- Lack of a strategic approach to stakeholder engagement across the project lifecycle.

- Lack of capacity and support for effective stakeholder engagement.⁷⁵⁷

With regard to the first point, companies fail to understand (and do so early enough) “the lives, interests and perspectives” of relevant parties (and in turn, their implications for project risk) and involve them in crafting the mechanisms for engagement.⁷⁵⁸ As suggested by the second point, although there are a range of parties which have an interest in and perhaps influence with respect to a project, the focus needs to be on “affected stakeholders” who “are at risk of adverse risk of adverse impacts” from the project.⁷⁵⁹ Stated simply, the third suggests that companies focus on but one mode for shareholder engagement, the *pitch*, a one-way form of communication. But there needs to be *disclosure* sufficient to inform affected parties of the risks posed for them; *consultation* with them to share information; *collaboration* on assessing actions to be taken; and *agreement* – a form of shared decision-making – on the appropriate course of action.⁷⁶⁰ Fourth, the pressures to get deals done (with respect to conventional issues), concern about raising expectations, fears relating to secrecy and confidentiality, and sometimes limits on resources result in serious engagement starting too late and creating problems in their wake which might have been avoided.⁷⁶¹ (A reluctance to allow other parties to have leverage as to how a project plays out may also be in the mix.⁷⁶²) Fifth, there is a focus on “the minimum requirements for initial permitting or formal impact review processes” and a corresponding neglect of processes by which additional concerns or additional affected parties emerge are identified and engagement done with respect to them and/or to address the need for revision of plans and engagement.⁷⁶³ Lastly, the kinds of skills needed to “design, construct and operate” a project are rather different from those needed for engagement. Providing the former are a matter of course, but there may not be the required “internal support in terms of coherent policies, operational procedures and management systems” essential to the latter.⁷⁶⁴ (There may be related issues concerning the roles played by different staff/staff departments. For example, if resolution of a grievance is sought through a company’s legal department, it might approach the task in an adversarial manner; other staff might be more likely to work through dialogue and dispute resolution.)⁷⁶⁵

International Finance Corporation (IFC)

The IFC, to varying degrees, requires that its clients engage – in the form of disclosure, consultation, and or negotiation – with the general public and/or one or another party interested in or affected by the project/subprojects associated with the IFC’s investment in that client. The IFC also mandates a certain level and means of disclosure as to its own actions with regard to proposed investments and decisions it has made. Its policies also reflect how it engages its clients on their obligations and (if only implicitly) how it engages with the general public and those interested parties.

• Direct Investment in Projects

With respect to *direct project investments* the core elements are as follows

Client engagement with the general public and affected and/or interested parties: What is mandated for clients in terms of stakeholder engagement is generally linked to the level of risk/impact of a project. With respect to all investment activities, the client must have a procedure to “to receive, register, screen and address communications from the public, document responses, and adjust management program.”⁷⁶⁶ “Consultation” with adversely affected communities and stakeholders” is obligatory for projects with at least moderate risks/impacts. This method of approach entails disclosure and a two-way dialogue with them, a grievance mechanism, and ongoing reporting to the communities about the client’s Action Plans.⁷⁶⁷ The following requirements apply when significant risks/impacts are involved:

- Informed Consultation and Participation (ICP) is mandated for “[a]dversely affected indigenous peoples” and “[p]otentially significantly affected communities.”⁷⁶⁸ ICP entails “a more in-depth process” than Consultation, “leading to incorporating views of Affected Communities into [the] decision-making and documenting process.”⁷⁶⁹
- If there are impacts on critical cultural heritage, Good Faith Negotiation which “result[s] in a documented outcome” must supplement the ICP⁷⁷⁰; and
- If there is an impact on the lands/natural resources and/or cultural heritage of or resettlement would result for Indigenous Peoples, the client must secure their Free, Prior and Informed Consent (FPIC) as the outcome of a “mutually accepted process” and as manifest in an agreement documented by the client.⁷⁷¹

Informed Consultation and Participation: Where an ICP is needed, the IFC “make[s] an assessment of the scope and quality of client’s engagement with affected communities...For projects where the client must institute a Free, Prior and Informed Consent process, then [the] IFC...verif[ies] this process. In each of these cases, the LESS...plan[s] these processes in consultation with the [Environment, Social and Governance Department Sector Leader (SL)] and CESI Manager.”⁷⁷²

Broad Community Support (BCS): In the event that a client is required to engage in an ICP process, the IFC “determines whether there is...BCS...for the business activity by Affected Communities.” As the IFC describes it, BCS is “a collection of expressions by Affected Communities, through individuals or their recognized representatives, in support of the proposed business activity. There may be BCS even if some individuals or groups object to the business activity.”⁷⁷³ The LESS “verif[ies] that the client has implemented an ICP process.”⁷⁷⁴

The importance of the BCS process is reflected in the fact that the Director CES must clear its outcome.⁷⁷⁵

Free, Prior and Informed Consent (FPIC): As the IFC describes it, “FPIC builds on and expands the process of ICP and will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples.”⁷⁷⁶ The E&S Section of the Board paper includes “the outcome of the status of BCS/FPIC verification for cases where BCS/FPIC is required and can be conducted at that time.”⁷⁷⁷ “When a BCS is required but the project is not defined enough to conduct the process pre-Board,” the Board paper must “describe this situation and discuss how future supervision will review the clients ICP process and the level of support that the project enjoys from the community.”⁷⁷⁸

Note that more generally in the case of “corporate finance of unidentified future projects” the LESS is supposed to request and review information about, among other things, the client’s corporate management system relating to “[p]rocesses for ongoing stakeholder engagement including engagement with communities affected by individual project developments and operations and on-going disclosure of information.”⁷⁷⁹

Whatever the merits or sufficiency of requirements such as these as described on paper, there can be serious challenges in meeting them. For example, the recent technical review given by staff to the IFC Board on lessons learned echoed the foregoing issues. It took note of a “[l]ack of adequate communication and consultation [which] can lead to or exacerbate community conflicts”⁷⁸⁰; “[c]lients still struggl[ing] with concept of ‘meaningful’ and ‘ongoing’ engagement and need[ing] more capacity and guidance”⁷⁸¹; and “[i]neffective grievance mechanisms leav[ing] communities without means to seek redress, particularly when governance is weak.”⁷⁸² These points were reiterated at a meeting with civil society organizations (CSOs) not long thereafter at

which the IFC presenter acknowledged that “[j]ust having a Grievance Mechanism is not enough.”⁷⁸³ In turn, the IFC stated its commitment to (presumably more) intensive efforts at “[v]erification of Broad Community Support [and]...Free Prior & Informed Consent”; (presumably more) “[t]echnical training & guidance for staff and clients” with respect to these requirements; and (presumably in the service of a greater understanding of what needs to be done) “[p]ortfolio review, tools, [and] lessons on Stakeholder Engagement.”⁷⁸⁴ With regard to the latter point the plan was apparently to do an “[i]nternal review of 50 projects to identify gaps and good practice [with]...lessons learned communicated to staff and senior management.”⁷⁸⁵ That being said, a group of NGOs, in a commentary on lessons learned, took note of an IFC commitment based on a 2010 recommendation by the IEG that the IFC “[m]ake use of independent/third-party or community monitoring for its projects, particularly for projects with involuntary resettlement and higher-risk financial intermediary and agribusiness projects” contending that the IFC was “still failing to ensure communities’ engagement and incorporate their feedback into its project monitoring.”⁷⁸⁶

IFC disclosure and engagement with clients, the general public, and/or affected and/or interested parties: But for certain exceptions, what is termed the Summary Investment Information (SII) along with the Environmental and Social Review Summary (ESRS), the Environmental and Social Action Plan (ESAP), and supporting documents must be disclosed at the IFC website prior to IFC’s Board of Directors/Management consideration of the investment as follows:

- Sixty (60) days for Category A projects; and
- Thirty (30) days for Category B and C projects.”⁷⁸⁷

As posted on the IFC web-site the SIIs include a project description; the project sponsors and the major shareholders of the project company, and the total project costs and the amount and nature of the IFC’s investment; the anticipated development impact of the project, the IFC’s expected development contribution, and the environmental and social issues; and IFC and project contacts (with relevant documents attached). The Manual mandates that the E&S text inserted into the SII must “indicate the categorization rationale and the key E&S issues which will need to be managed by the client.”⁷⁸⁸

As the IFC describes it, the ESRS “is the document through which IFC publicly discloses how the E&S aspects of a project were reviewed and the rationale for categorization. It includes a description of the main E&S risks and impacts of the project, and the key measures identified to mitigate those risks and impacts, specifying any actions needed to undertake the project in a manner consistent with the PS and that will be included in the client’s Action Plan. The ESRS is written for a general public audience.”⁷⁸⁹ No ESRS is required for category C projects.⁷⁹⁰ Moreover, Category C projects “do not require in general any subsequent project disclosures, unless there is any major incident that IFC has to inform to the public by updating the SII.”⁷⁹¹ In cases where the “assets are known,” the IFC also “disclose[s] a summary of how it made its BCS determination with the ESRS,” but only if “project development timing permits.”⁷⁹² Note, however, the IFC does “not routinely update ESRSs to summarise BCS in transactions that are corporate in nature with multiple sub-projects.”⁷⁹³

There may be client documents among those to be disclosed.”⁷⁹⁴

There are exceptions to disclosure related to delayed, earlier, enhanced, and supplemental disclosure. With regard to a delay the IFC notes that there is provision for it – perhaps to a time after the Board approves the investment – in public disclosure of any or all of the documents or certain client identifying information, but offers little information as to the criteria for or

circumstances under which that might be done.⁷⁹⁵ It does state that “[i]deally the assessment of Broad Community Support should take place before disclosure, however because of the complexity of such assessment it happens often after the disclosure date.”⁷⁹⁶ Second, a project is not thought ready for disclosure “until there is enough information to understand the key risks and impacts and enough information for the LESS and other decision makers to feel comfortable that these key risks and impacts are manageable and/or acceptable.”⁷⁹⁷

However, the disclosure duration must be restarted prior to Board consideration “[w]here new relevant project information that could substantially change (i) the adverse risks or impacts described in the ESRS or (ii) the mitigation measures described in the ESAP is received after release of disclosure documents but before Board approval.”⁷⁹⁸

The disclosure enhancing provision is reflected in the IFC assertion of its “prerogative to disclose information in the public interest in the event that information provided by the client or other sources indicates that the disclosure of non-public information would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts to the environment.”⁷⁹⁹ “Supplemental information (for example framework management plans, client’s specific policy documents, monitoring plans, etc) may be reviewed by IFC during the disclosure period. Projects where IFC will conduct a process to determine if Broad Community Support exists may require engagement with local communities close to the Board date as BCS is a point in time that helps to inform decision making.”⁸⁰⁰

Disclosure early in the environmental and social due diligence process is mandated “for projects or investments with potential significant adverse environmental or social risks and/or impacts.”⁸⁰¹ In some cases, the IFC “provides early access to the client’s draft ESIA document(s), so as to enhance transparency of the proposed project...before IFC has completed, or in some cases even started the appraisal. Whenever possible early disclosure of Category A projects takes place 120 days before Board to allow all IFC’s shareholders to vote.”

Further, in some cases, even though the appraisal might not be completed, there may be disclosure where “the LESS is confident that there is enough information to understand the risks and enough information for the LESS and for other decision makers to feel comfortable that these risks are manageable and/or acceptable[,] the disclosure can proceed while some supplemental appraisal activities continue during the disclosure period and before Board approval.”⁸⁰²

Final signoffs as to disclosure depend upon the project category. All E&S disclosure documents must be “reviewed and cleared as drafts by the Sector Lead [(SL)] before the drafts are discussed with the Sponsor [that is, the client].” For Category B projects, the CESI Sector Lead (CESI SL) determines what the documents are to be released based on the LESS’s recommendation and suggestions from the Sponsor. For Category A projects, the CESI Manager makes that decision as to whether there should be early disclosure.⁸⁰³ After final approval by the CESI Manager or Sector Lead (SL), as the case may be, disclosure documents are “forwarded to Corporate Relations” which “then disclose[s] the ESRS, the Action Plan and the SII...on IFC’s Web site.”⁸⁰⁴

Inquiries or comments with respect to the disclosed documents during the IFC disclosure period are addressed in accordance with a detailed protocol set forth in the Manual.⁸⁰⁵

Subsequent to approval of an investment, “except for those projects with minimal or no E&S risk and/or impacts, the LESS...update[s] the content of project disclosed relevant E&S information as it becomes available through the life of the investment. In particular, disclosing the status of the implementation of the ESAP and any additional ESIA or third-party monitoring reports as

applicable.”⁸⁰⁶ The IFC also states that it “*encourages* clients to make publicly available periodic reports on their environment and social sustainability performance.”⁸⁰⁷ During the supervision phase, “when the status of each ESAP task has been updated and then approved, these data will flow to the IFC Disclosure Website to disclose completion status of each task.”⁸⁰⁸

- **Investment in Financial Intermediaries**

The IFC Manual has very little to say with respect to disclosure (and engagement) in connection with financial intermediary investments.

It refers to a “Summary of Proposed Investment” which it refers to as “a document prepared by the Investment Department and publicly disclosed in accordance with IFC’s Disclosure Policy.”⁸⁰⁹ E&S language for it is prepared by the LESS.⁸¹⁰ The Transaction Leader (TRL) “obtain[s] the client’s written acceptance based on factual accuracy and approval for public release to the InfoShop no later than 30 days prior to the IFC Board’s consideration of the investment.”⁸¹¹ (The World Bank InfoShop “allows interested parties to request and obtain publicly available information about IFC’s investments.”⁸¹² It “deals only with requests for specific documents (including ESRs, SPIs and E&S reports), not with blanket requests for information related to the World Bank Group.”⁸¹³) The 30 day requirement may be waived by the “Relevant Cluster Vice President (VP)...in circumstances where the minimum time period cannot be met (such as market timing requirements, e.g., participation in an Initial Public Offering).”⁸¹⁴

In the event of inquiries or complaints raised during the disclosure period it is Communications Officers – with support from “the iDesk, CES, and Investment Department Communications Officers” – who are “responsible for preparing the response to the request for information, but may seek detailed information from the TRL and LESS to resolve the issues associated with inquiries, complaints, or matters associated with IFC’s Disclosure Policy.”⁸¹⁵

In addition, “[i]n exceptional circumstances, [a] review [of a] Social and Environmental Performance Report (SEPR)] or supervision visit, or information provided from other sources, indicates that the disclosure of certain non-public information would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment,” the LESS must “immediately inform the client to take suitable action. In the event that the client is unable to address the matter, the matter is one for the Director CES and the Director Investment Department (and, where applicable, the Regional Director) – with support from the LESS, the Portfolio Officer, and the Manager CESI” – in accordance with IFC’s Disclosure Policy.”⁸¹⁶

Whatever the reach and nature of the formal procedures outlined above, there are serious concerns about their falling short in practice.

Clearly, how particular parties might be affected by a project is determined is critical since it will be closely linked to the what are thought to be potential environmental and social impacts and in turn, how a project is categorized, what is demanded of the project sponsor, the extent of disclosure about the project, the degree of scrutiny it is given over the project cycle and the like.⁸¹⁷

There are also serious issues as to whether notice about a would-be project to potentially affected parties is meaningful.⁸¹⁸ Posting materials on the web would seem to be a rather slender reed on which to rely since doing so would likely draw the attention of only a modest few with the incentive and capacity to access them and an interest in alerting relevant parties. Indeed, the CAO reports that a large fraction of potentially affected parties learn nothing about what is posted.⁸¹⁹ In fact,

few such parties affected by a company's project were found to be even aware of the IFC PS or the corresponding obligation of the company to meeting the PS.⁸²⁰ Focusing on the particularly difficult problems with respect to FI subprojects, the NGOs in the letter cited above contended that the IFC should "ensure that all FI-1 and FI-2 sub-projects should be disclosed, in a manner and language accessible to affected communities, as a mandatory part of IFC investment."⁸²¹ Moreover they argued that all FIs be "require[d]...to demonstrate that communities who will be affected by the activities of FI sub-projects are informed of IFC's involvement and the IFC's performance standards, and aware of the availability of the CAO in the event they experience harm."⁸²²

The problems are compounded because it appears that but for special circumstances the IFC (and the MIGA) "do not disclose any information about projects after Board approval."⁸²³

Some would argue that the basic thrust of the IFC disclosure policy is wrong from the outset. Although the policy is lengthy it largely defines what should be disclosed against a background assumption that in the absence of that definition, nothing need be disclosed. By contrast, the CAO (and others) have argued that the IFC – like the World Bank in its new Accession to Information Policy should "make[] all documents publicly available except those on a limited list of exceptions."⁸²⁴

In its September, 2013 report to the Committee on Development Effectiveness the IFC proposed additional steps with regard to disclosure in connection with FIs. They included the following:

- To expand the disclosure of investee companies by PE funds to cover all investments, and not just Category A investments.⁸²⁵
- Build on the current framework which "requires...FI clients to establish a communication mechanism to receive and register external communications and complaints from the public at large," that is, "to screen and assess any issues raised, track and document responses, and adjust the ESMS as appropriate." The IFC would have FI-1 and FI-2 clients "communicate the presence of this mechanism and the way the public can access the same in their annual reports, as their commitment to good corporate citizenship and openness to stakeholder engagement."⁸²⁶

Equator Principles Financial Institutions (EPFIs)

EPFI disclosure and engagement with clients, the general public, and/or affected and/or interested parties: Although disclosure requirements for EPFIs were slightly enhanced by Equator Principles III they are very, very modest and have been the subject of considerable criticism by NGOs.

For example, while project-related disclosure is before-the-fact for the IFC, it is after-the-fact for EPFIs. More particularly, the EPFI must "report publicly, at least annually", only "on transactions that have reached Financial Close and on its Equator Principles implementation processes and experience, taking into account appropriate confidentiality considerations."⁸²⁷

Even with respect to just the name of projects, the requirements are minimal.⁸²⁸ There is no obligation to publish any other kind of information about individual projects. Moreover what is mandated for projects in the aggregate is quite limited both generally and with respect to project finance and project-related corporate loans which are of most interest in this context: EPFIs must report "on the total number of Project Finance transactions and total number of Project-Related Corporate Loans that reached Financial Close during the reporting period."⁸²⁹ The totals for each product type must be "broken down by Category (A, B or C) and then by:

- Sector (i.e. Mining, Infrastructure, Oil and Gas, Power, Others)
- Region (i.e. Americas, Europe Middle East and Africa, Asia Pacific)
- Country Designation (i.e. Designated Country or Non-Designated Country)
- Whether an Independent Review has been carried out.”⁸³⁰

More generally, an EPFI must report annually – including by posting on its website – on its implementation of the EP, including:

- The mandate of the Equator Principles Reviewers (e.g. responsibilities and staffing);
- The respective roles of the Equator Principles Reviewers, business lines, and senior management in the transaction review process;
- The incorporation of the Equator Principles in its credit and risk management policies and procedures.”⁸³¹

Further, with respect to the first year of its adoption of the EP, the EFPI must also “provide details of its internal preparation and staff training” and thereafter “on ongoing training of staff if considered relevant.”⁸³²

Client engagement with the general public and affected and/or interested parties

The EP entail requirements for engagement and related disclosure by clients. Some relate to engagement with affected communities. That is, according to Principle 5, for all Category A and Category B Projects, clients must “demonstrate effective Stakeholder Engagement as an ongoing process in a structured and culturally appropriate manner with Affected Communities and, where relevant, Other Stakeholders.”⁸³³ Moreover, for projects “with potentially significant adverse impacts on Affected Communities,” the client must “conduct an Informed Consultation and Participation process.”⁸³⁴ In aid of engagement with them, the client must, in ways “commensurate to the Project’s risks and impacts, make the appropriate Assessment Documentation readily available to the Affected Communities, and where relevant Other Stakeholders, in the local language and in a culturally appropriate manner.”⁸³⁵ The client must “take account of, and document, the results of the Stakeholder Engagement process, including any actions agreed resulting from such process.”⁸³⁶ Further, “[f]or Projects with environmental or social risks and adverse impacts, disclosure should occur early in the Assessment process, in any event before the Project construction commences, and on an ongoing basis.”⁸³⁷

With respect to indigenous people among the Affected Communities the process must “comply with the rights and protections for indigenous peoples contained in relevant national law, including those laws implementing host country obligations under international law”. Consistent with the special circumstances described in IFC Performance Standard 7, when projects have “adverse impacts on indigenous people,” “their Free, Prior and Informed Consent (FPIC)” must be obtained.⁸³⁸

Principle 10 includes client reporting requirements to the general public, but, again, in a more limited way than mandated by the IFC. More particularly, for all Category A projects and, “as appropriate,” Category B Projects, *clients* must “ensure that, at a minimum, a summary of the ESIA is accessible and available online” unless they do not have internet access.⁸³⁹ This new provision in Equator Principles III represented backtracking from a draft proposal which required full website disclosure of the impact assessment as well as the ESMP.”⁸⁴⁰ Not surprisingly, NGOs have been highly critical of full website disclosure not being required.⁸⁴¹

It would seem that for EPFIs, giving practical meaning to the foregoing is hardly unproblematic. O'Sullivan has remarked on a "lack of EP guidance on how consultation processes could be designed and undertaken is largely reflective of the case-specific nature of most project finance deals." The upshot of that has been "the *variant* nature, efficiency and transparency surrounding these processes" which has been a source of sharp NGO criticism.⁸⁴² She cites one EP consultant to the effect that "public consultation" is that aspect of the EP "that the clients fear most in terms of the cost, in terms of the unpredictability, particularly when you want to consult people who usually don't have a voice, who aren't particularly empowered and therefore have nothing to lose but have real concerns about the project."⁸⁴³ Some of the specific issues highlighted by the consultant echo those detailed in the analysis of the engagement by the extractive industry described above.⁸⁴⁴ For example, the consultant remarks that "unfortunately a lot of clients and also some consultants think of the old fashioned way of public consultation where you just have two meetings, one at the beginning and one at the end of the process, very often with officials and then it's done and dusted. But I think if you have the time and the right approach it [free prior and informed consultation] does mean something; where you give people appropriate information in appropriate form and you make the information accessible to them so they can enquire and register concerns as well."⁸⁴⁵

Cross-Cutting issues: The Availability and Use of Incentives to Spur and Ensure Compliance

Whatever the formal commitment of the investor – the IFC or another DFI, an EPFI, or pension fund – to PS-like standards, the practical and challenging question is how to ensure that the client acts so as to enable fulfillment of that commitment. We have in the foregoing text canvassed a number of the critical steps geared to minimizing the prospect of failure to fulfill the obligation. However, falling short is, in fact, hardly unlikely. At the same time there are challenges which relate to defining what compliance might mean or require. As one consultant has described it, "[w]hen developing the IFC PS one needed to be as specific as possible and as flexible as necessary."⁸⁴⁶ At the same time, the IFC PS "leave a lot of room to manoeuvre. You will find many passages where the wording is 'the client should' and not 'the client must.'"⁸⁴⁷ As a result "these wordings are very often subject to discussions and various interpretations with the result that the client does not always feels bound to the requirement."⁸⁴⁸ Moreover he suggests, perhaps not surprisingly, that the strictness of interpretation may be linked to the extent of leverage the investor has over the client.⁸⁴⁹

So there are questions as to what might be done in anticipation of any such failure and in light of its occurrence. Of course, in part, that is in not inconsiderable measure a matter of explicitly and comprehensively enough delineating and emphasizing in advance what is required of the client. As the IFC experience especially highlights it may also be an issue of providing support and resources for clients with less experience or less well-tooled to do the job. Moreover, it is also question of putting in place incentives for clients to meet their responsibilities and using available leverage to spur them to do so. We explore some of the approaches or methods in this regard. Given the limits of the information available we will essentially focus on lending rather than equity investments.

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Certainly, contractual provisions which specify in a clear and consistent way a client's obligations as to content and timing and what might or will happen if they are not met are essential.⁸⁵⁰ Where FIs are involved the same holds true for their subproject clients.⁸⁵¹ (Indeed, a group of civil society organizations has urged upon the IFC the establishment of a separate performance standard for compliance.⁸⁵²) Clearly, clients need to be bound to meet the applicable PS-like standards.⁸⁵³

While this requirement might seem to be a straightforward matter with regard to direct investments, for FIs it appears to be more problematic in similarly binding subproject sponsors.⁸⁵⁴ Of course, any contract needs to incorporate project/client-specific requirements appropriately taking into account the kinds of impacts and risks posed by the project/subproject identified during the environment and social due diligence phase. The CAO in its 2010 general review pointed to some concerns in this regard. It found that “[t]he extent to which Action Plans created clarity around exact company requirements varied across investments [it had] reviewed...While all but two of these Action Plans provided clear company action requirements and prioritized them, 20 percent did not include clear timelines for implementation.”⁸⁵⁵ On a related point, in its later audit of investments in FIs, the CAO reported that there was “significant variation in how IFC E&S requirements were stated.”⁸⁵⁶ For example, “some clients are required to apply ‘reasonable’ efforts to implement the E&S requirements, while other clients are required to apply ‘commercially reasonable’ efforts.”⁸⁵⁷ In other cases “the intent of the legal requirements [was thought] to be somewhat opaque.”⁸⁵⁸

Obviously, lack of clarity can pose challenges when client performance falls short during the projection implementation stage. Some issues relate to acknowledging the occurrence of a failure. For example, according to the CAO, “[i]n relation to a project that one experienced IFC staff described as having ‘arguably the most serious E&S issues they had ever encountered’” it found “a notable difference between the way E&S and credit risk are handled. Thus, while IFC’s quarterly credit risk reviews identify a ‘material breach’ of the investment agreement in relation to [the client’s] debt to EBITDA ratio...thus require temporary waivers from IFC management, concerns regarding [it’s] E&S performance, while discussed [we]re not identified as constituting ‘material breach[es].’”⁸⁵⁹ Other issues pertain to what happens in light of recognized failures. For example, while the following conclusion by the CAO was derived from the context of what seemed to be a particular, egregious case, it seemed to have larger import: “CAO finds that IFC structures for project supervision lacking in relation to the critical question of when to exercise remedies for E&S breaches. As a result decisions on these questions are reached in ways that appear to be informal and lacking in rigor.”⁸⁶⁰

Moreover, the CAO has cited cases in which “failure to comply with E&S covenants in legal agreements did not cause IFC to refuse additional IFC financing, although IFC staff advised that it was not accepted practice to do this. Several portfolio managers voiced the opinion that exiting a facility based exclusively on a default on the legal provisions related to the E&S requirement could be challenging, based on the formulations used in the legal agreement.”⁸⁶¹ This view was consonant with “the fact that there were no examples in the CAO sample of IFC directly using the provisions to exit a facility, even though in a few cases, a client’s noncompliance had proved intractable.”⁸⁶² In this connection NGOs have urged (nominally with reference to FI projects) that IFC contracts “include language requiring suspension of IFC support and immediate refunding of investment, without prejudice or fee, and the imposition of sanctions (including financial), in the event of breach of environmental and social requirements.”⁸⁶³ Whatever the precise contractual terms there are good reasons for transparency about them to a broad public. Among other things, it allows for other forms of oversight and influence to spur compliance. So, for example, the NGOs in their 2014 letter to the IFC urged it to “publish all of its contracts, with appropriate redactions to handle commercial sensitivity, as a confidence building measure.”⁸⁶⁴

The preceding paragraphs take note of the possible use of leverage, especially in relation to negative and positive incentives. As a general matter, the IFC, in its response to NGOs’ critical comments (though ostensibly just with respect to FIs), pointed to the differences in the leverage it had particularly with regard to different kinds of investments. On one hand, “[t]he ESMS requirements, and the specific action plan, are incorporated as covenants in the loan agreements,

and their breach can trigger a default.” By contrast, “[i]n cases where [the IFC has] equity investments, [it] work[s] through the corporate governance process to improve standards, and ultimately, [its] only recourse is sale of [its] stake where feasible, should [its] agreements not be honoured.”⁸⁶⁵ Of course in that case as in the one involving lenders, the prospect of the IFC not lending to or investing in the client might be a source of effective pressure.⁸⁶⁶

In terms of incentives with respect to FIs, the CAO remarked on the lack of “positive incentives for [them] that enhance their E&S management systems.”⁸⁶⁷ It also said it had “identified very limited use of penalties for FI clients resulting from poor E&S performance, and no instances of IFC ultimately divesting in such circumstances.”⁸⁶⁸ Insofar as prospective FI clients are aware of such lack of use, and especially where their commitment to E&S objectives is not robust, that may weaken the hand of staff – for example, LESSs – in dealing with them. Conversely senior managers being clear about their willingness to support the use of leverage in the face of poor client performance will strengthen it.⁸⁶⁹

Positive and Negative Client Incentives and the FMO

Although it was not in response to the cited CAO remark in the last paragraph, but rather in reply to the NGO critique, the IFC acknowledged the importance of the mix of positive and negative incentives, noting that it was “exploring carrots and sticks (like [the DFI] FMO).”⁸⁷⁰ (Note that Bergset, based on her interviews with banks, suggested that they “do not integrate sustainability across the entire lending process.” This was evidenced, among other things, by “failure to adapt interest rates to sustainability risk” and “[a] lack of formalised monitoring of the consequences business clients’ sustainability impacts have for their ability to repay and on their general financial well-being is another example.”⁸⁷¹)

Although there was no specific reference by the IFC to particular practices on the part of FMO, the Vacarcuic study highlighted some which appear relevant in that respect. More particularly, as a means for making a business case for effectively taking account of PS-like standards, FMO “developed a special pricing mechanism (i.e. pricing incentive).”⁸⁷² (Note that in its 2012 annual EP report FM stated that “[a]s with Corporate Governance, FMO can support the E&S business case in structuring its financial products. From a risk-return perspective, FMO is able to support implementation of major milestones of the ESAP by offering pricing incentives and/or requiring pricing penalties (in case of non-compliance with the Environmental and Social Action Plan).”⁸⁷³) That is, effective integration of PS-standards in practice not only minimized the client’s risk exposure but also “allowed a client to have a clear financial gain by paying a lower interest rate upon meeting the requirements of the pricing incentive. In this regard, the pricing mechanism was an innovative approach to achieve the goal of spreading sustainable financing practices.”⁸⁷⁴ Moreover, the incentive also “allowed FMO itself to have a lower risk exposure by having ‘more sustainable’ clients in its portfolio, however at a financial cost equal to the total interest rate reductions offered within the pricing mechanism.”⁸⁷⁵

It should be observed that the incentive was not mandatory and varied in its terms according to the type of and specifics of the client based on a judgment as to how effective it might be in fact. Thus, “for financial institutions, the incentive would be linked to the implementation of an Environmental and Social Management System (ESMS), while corporate clients had their incentives linked to the implementation of key E&S action plan items (i.e. which most often were related to receiving specific certifications).”⁸⁷⁶ Moreover, although technical assistance has apparently been “an alternative tool” with “a much longer history of use by DFIs” to “encourage and aid the integration of ESG standards,” FMO has also used it as “a benchmark for determining the interest rate discount applicable to a deal.”⁸⁷⁷ An example of FMO practice along

these lines was recently cited as “[d]emonstrat[ing the] potential of an innovative financial product that other IFIs could emulate to promote sustainable investing.”⁸⁷⁸

Equator Principles Financial Institutions (EPFIs)

As a general matter, the ability of the EPFI to influence client behavior “depends, among other things, on the EPFI’s need for the client, the extent to which the client is a repeat player, the timing of the intervention in relation to planning process, the extent to which it is collaborating with other banks, the timing of the action in relation to the stage the project is in, and the impact of taking action.”⁸⁷⁹ More specifically in terms of negative, project-specific incentives the challenges for EPFI lenders have been well-detailed. Sarro casts them in the following (less than sanguine) terms:

“Lenders are likely unwilling to bear the short-term costs of extricating themselves from a project, especially after they have already committed financing or tentatively agreed to play a lead role in a project (e.g. as loan arranger). By negotiating its withdrawal from a project, a lender cedes any prospect of a return on any funds it has already invested in due diligence. It also cedes a share of the profits that will likely accrue from the project, profits that will likely flow to a less scrupulous competitor. More severe enforcement action would be even more costly: the declaration of a default event and the seeking of a civil remedy in court, for instance, would mean drawn-out litigation, where the lender’s success is far from guaranteed. Given financial institutions general tendency to emphasize short-term over long-term interests, a tendency that has become more salient with the advent of the most recent financial crisis, these short-term costs are likely to overwhelm any longer-term, more systemic concerns that may favor meaningful enforcement.”⁸⁸⁰

Meyerstein offers a mostly similar perspective: On one hand, he remarks that “it is indeed true that banks have financial sanctions at their disposal to enforce the EPs once a loan has been disbursed (charging default interest rates, preventing further drawdowns of funds, or asking for repayment).”⁸⁸¹ On the other he cites “one financial analysis [which] noted a lurking Catch-22 within this proposed enforcement mechanism: — Once a project is up and running the impact of withdrawing financial support could be huge. The other problem is that the environmental and social impact of a project collapsing may well be as drastic as carrying on.”⁸⁸²

The suggested strong reluctance to take dramatic action appears to have played out in practice. According to one report, “[a]s of September 2012, no EPFI has declared a default event on the basis of a breach of the Equator Principles. There are only a handful of cases where an EPFI has withdrawn from a project in the face of apparent breaches of the Equator Principles.”⁸⁸³ Again, one commentator reports that “[e]ven though in most cases it is agreed contractually that the non-compliance with IFC PS would lead to a ‘default situation’, I have not come across many projects where this was practiced, whereas I have come across many projects of severe non-[c]ompliance.”⁸⁸⁴

Being clear means not only setting out on paper the terms of the investment with sufficient clarity but also communicating otherwise to the client what is expected of it to ensure that the client appreciates the significance of the terms. For example the head of sustainability for an EPFI is reported as remarking that “[i]t is amazing how few clients realise that not following the Equator Principles could lead to an event of default and acceleration of the loan.”⁸⁸⁵

Moreover, Meyerstein notes that “whether a project does or does not meet the standards outlined in the EPs can be a highly subjective question” and as mentioned earlier, banks (and their clients) rely heavily on independent consultants to answer that question.⁸⁸⁶ Watchman makes the point

more broadly with reference to the covenants mandated by the EP as “not hav[ing] ‘hair’ trigger events of default,” remarking “that lenders and borrowers have sufficient scope to remedy breaches of covenants when they arise.”⁸⁸⁷ More particularly, “in addition to qualifying the breach of the legal and AP compliance covenants with a materiality threshold, the EP2 provide for intervention by the lender to take steps with the borrower to remedy events of default arising from non-compliance with these covenants. These covenants simply represent a basis upon which to add more complex and stringent obligations (if required by the EPFI) in due course, resulting in an agreement tailored to the particular project and the needs of its lenders.”⁸⁸⁸

A related issue concerns the multiplicity of factors which might bear upon whether and how compliance with loan covenants can be achieved. For example, according to one of O’Sullivan’s EP lawyer interviewees, where the legal or regulatory infrastructure is not strong and there is modest or limited familiarity with best practices and experience in applying them, “‘you inevitably have breaches’.”⁸⁸⁹ This situation means that even where mitigation actions have, in principle, been defined by an [Environmental and Social Impact Assessment (ESIA)], the bank and project sponsor have different views as to what is possible to do. The take-away for the lawyer was that “‘the emphasis should not be on the breach as the trigger of an event of default, but on the adequacy of the project sponsor’s response to the breach.’”⁸⁹⁰

It would appear that use by EPFIs of the kind of combined positive and negative incentives touched upon in the preceding section may be quite modest at best. Thus, at least according to Bergset while all of the banks she surveyed had “certain negative criteria (determined in policies or similar [documents]), which will exclude a potential customer from financing, if they do not comply with these” – only two stated that “they work with conditionalities (e.g. in action plans) in loan agreements, where needed.”⁸⁹¹ For none of them did the sustainability assessment have “a direct impact on the interest rates or other conditions.”⁸⁹²

Of course, whether a default (or other action) is triggered in the first place depends on the nature and extent of project monitoring and review. As O’Sullivan has noted, in principal, EP-related requirements should be part of the standard bank annual general credit review and annual audit. However, experience seemed to vary widely across EPFIs. She cites one case in which compliance with the EP was part of the review of a Risk Review group within Credit Risk Management in consultation with the E&S Risk Management team and as part of the independent audit function.⁸⁹³ By contrast she remarks on another in which the interaction with E&S specialists was more “informal,” that is, Group Environmental Risk reviews the last specialist team report (in this one for mining and metals) and meets within them but does not “audit” what they are doing as such.⁸⁹⁴

There is very little literature as to the details of how EPFIs deal with a client failure to meet its obligations. Carbonell in his study early on in the EP experience, namely 2005, offers a few observations in this regard. He describes ABN AMBRO’s response as involving a three-tiered scale defined by the nature and degree of compliance: “Level 1 incidents (the most serious) and persistent Level 2 problems require the engagement of the bank with the project sponsor.”⁸⁹⁵ At the time it was reported that the bank had “encountered a number of minor incidences of non-compliance with the EMP, but ha[d] yet to declare a loan in default for Equator Principles reasons.”⁸⁹⁶ The Head of Environmental Risk Policy at Barclays also remarked on having “faced very few instances of non-compliance with Equator requirements since 2003” and Barclays having not “yet...declare[d] loan in default for Equator violations.”⁸⁹⁷ Indeed he regarded such declarations “as an empty threat as it would harm the bank as well as he client.”⁸⁹⁸ By contrast, the bank had leverage in being able to “order clients to repay loans on an accelerated schedule or impose other penalties.”⁸⁹⁹ Similarly, the Director of Environmental & Social Risk Management

at Citigroup “‘d[id not] think’ the bank ha[d] had serious cases of non-compliance” and had “yet to call a loan for non-compliance with Equator requirements.”⁹⁰⁰ At least in the case of “minor cases of non-compliance” with what was referred to as the Environmental Management Plan, the bank’s response had been “to negotiate with the borrower to bring the project back into compliance.”⁹⁰¹

Even where an EFPI is otherwise attentive to problems with client performance its ability to respond effectively depends on how the terms of its investment are framed. For example, one law firm commenting on EP III observed that “[f]inancial institutions and sponsors can at times be ambivalent about the details of implementation of the Equator Principles after the loan has been funded, and such ambivalence can translate into provisions in the loan documentation that do not serve their intended purpose. For instance, having representations and covenants simply to the effect that the borrower must comply with the Equator Principles betrays a lack of understanding of the regime set up by the Equator Principles Association.”⁹⁰² After describing appropriate provisions to include the attorneys suggest that “[w]hile some lenders may insist on including events of default and Equator Principle compliance, such inclusions should not be required if the conditions precedent, representations and covenants outlined above have already been included. The loan documentation will already provide for lender rights of termination, subject to varying periods of remedy allowed to the borrower, upon the breach of such representations and covenants.”⁹⁰³ (Note that the EP Association has provided guidance to members as to what provisions might be included.⁹⁰⁴)

Cross-cutting Issues: Accountability and the Critical Assessment of Practices and Outcomes

Clearly, a central task for the IFC (or other DFI or other investor in relevant ways) is to design, establish, and operate a system in a way calculated to minimize the risk of occurrence of adverse environmental and social impacts and to maximize the extent to which such impacts are mitigated. But the reality is that there will inevitably be system flaws and system failures. So another important undertaking is to, at minimum, include within the system itself elements or aspects which ensure comparison of actual with sought-for outcomes, assessment of the reasons for efforts falling short, spurring accountability for those results, and as a means for formulating changes to the system in concept and practice to better ensure success in the future. Critical functions of this sort can be performed internally or externally with respect to the system which is responsible for producing the outcomes. Most information in this regard pertains to the IFC.

The Development Outcome Tracking System (DOTS), discussed briefly above, is, as the IFC describes it, a principal means by which it “monitor[s] the development results of [its] investment and advisory services,” that is “allows for real-time tracking of development results [of particular projects] throughout the project cycle.”⁹⁰⁵ (Recall that development results in principle include those pertaining to IFC-funded activities meeting the PS.) In turn, the “DOTS score is part of IFC’s corporate scorecard and cascades into department scorecards and incentives for individual staff members.”⁹⁰⁶ So this information and its use are an important “within the system” means for characterizing outcomes, in some measure assessing the reasons for those outcomes and assigning responsibility for them, and changing practices. It would seem that the IFC has a certain pride in DOTS though the system has hardly been without criticism.⁹⁰⁷ In all events, in practice, the very title for the system suggest what seems in practice to be true, that is focused more on what would conventionally be viewed as development outcomes and less on the related but distinct specific environmental and social results with which we are concerned here.

There are in our terms two forms of external (to the system) review associated with the IFC. One method involves evaluation of the IFC’s activities (and those of other arms of the World Bank) by

the Independent Evaluation Group (IEG) referred to previously. It “reports directly to the World Bank Group's Board of Directors.”⁹⁰⁸ The goals of its evaluations “are to provide an objective assessment of the results of the Bank Group's work and to identify and disseminate lessons learned from experience.”⁹⁰⁹ More specifically, the IEG “assess[es] outcomes against stated objectives, benchmarks, standards, and expectations, or assess[es] what might have happened in the absence of the project, program, or policy (counterfactual analysis).”⁹¹⁰ It does so by “conduct[ing] not only project-level evaluations, based on the review of self-evaluation reports prepared by Bank Group staff and supplemented by independent assessments, but also reviews of literature, analytical work, and project documentation; portfolio reviews; country case studies; structured interviews and surveys of staff and stakeholders; and impact evaluations.”⁹¹¹

The other mode for review – in the case of the IFC (and MIGA) – involves the work of the Compliance Advisor/Ombudsman (CAO) who “is independent of IFC [and MIGA] management and reports directly to the President of the World Bank Group.”⁹¹² The CAO does so in two different kinds of ways. First, complaints that “relate to any aspect of an IFC-financed project that is within the mandate of the CAO” “can be made by any individual, group, community, entity, or other party affected or likely to be affected by the social or environmental impacts of an IFC-financed project.”⁹¹³ The CAO responds to such complaints through its dispute resolution arm. Second, the CAO, through its compliance arm “audits how IFC and MIGA assure themselves of social and environmental performance at the project-level.”⁹¹⁴ These examinations “focus on IFC or MIGA - not the project sponsor - and examine compliance with relevant policies, standards, guidelines, procedures, and conditions.”⁹¹⁵ These audits “are independent of, but complementary to, IFC/MIGA's internal assurance efforts.”⁹¹⁶ They may be initiated “[a]t the request of the President of the World Bank Group or senior management of IFC/MIGA”; “[a]t the discretion of the CAO Vice-President”; or, by transfer from the disputed resolution arm “where resolution of the issues is not possible.”⁹¹⁷ While in the latter case they will focus at the individual project level, in the former they may assess policies, practices, etc., across the institution.

In the context of the CAO's complaints-related role, a total of 119 eligible cases were filed with it over the 13 fiscal years from 2000-2001 to 2012-2013. About half the complaints were signed by local civil society organizations; approximately a third by community members; roughly a quarter by national civil society organizations; and the remainder by international civil society organizations.⁹¹⁸ According to the CAO, the communities in which it works “often do not have the capacity to bring complaints to CAO directly and are frequently supported by local, national, and/or international NGOs, which may provide support and advice to the complainants.”⁹¹⁹ About one half of all the complaints related to oil, gas, mining, and chemicals with about one fifth pertaining to infrastructure.⁹²⁰ Almost all complaints (perhaps not surprisingly) pertained to Category A and Category B Projects, namely 57% and 34% of them, respectively.⁹²¹ Issues most cited in complaints were socio-economic (70%), due diligence and supervision (69%), and consultation and disclosure (61%).⁹²² In and of itself the CAO's handling of those complaints provides an invaluable project-level means for determining the nature and reach such failures – sometimes quite serious ones – of IFC clients to comply with the PS and taking or spurring actions to remedy them. At the same time, the scope and depth of the CAO's work in these terms is such that it also serves as an important source of insight as to how the particular shortcomings might well be the consequence of problematic policies and practices which should, as a consequence, be reviewed. The results in these terms are reflected in both the reports the CAO prepares in connection with the cases it takes but also its analysis of cases overall in its annual reports.

In its other role the CAO provides, as noted, more systemic assessment of policies, practices, etc., across the IFC (and MIGA). In doing so it has provided critical insights in those terms, ones which have been cited at various points in this paper. For example, most recently, its audit

concerning FIs (released in February 2013) found that the IFC had processed the majority of the investments in the sample of FIs reviewed in compliance with its procedures. However, the CAO concluded that the IFC “does not have a methodology for determining whether its principal requirement for clients – the implementation of an environmental and social management system – achieves the core objectives to ‘Do no harm’ or improve environmental and social outcomes at the subclient level.”⁹²³ That is the IFC had “no quantitative or qualitative basis on which to assert that its financial intermediation investments achieve such outcomes, which are a crucial part of its strategy and central to IFC’s Sustainability Framework.”⁹²⁴ Moreover, more generally, its approach was “not designed to support broader outcomes that are commensurate with IFC’s prominent leadership role in the financial sector as a champion of environmental and social responsibility.”⁹²⁵ While the IFC leadership has not agreed with all of the findings it seems pretty clear that it has recognized the merits of much of the critique and has described the steps it says it intends to take to address it.⁹²⁶

The World Bank as a whole as well as the IFC, as an arm thereof, are large institutions with significant resources to bring to bear to perform these valuable functions. Many EPFIs are likely to operate at roughly the same scale and so are arguably equipped to do the same as they would seem well advised to do. At this point there is not available information as to whether any of them, on their own, in fact do something of the equivalent, or perhaps aided by the Equator Principles Association through its Steering Committee or Working Groups or otherwise.⁹²⁷

Cross-cutting Issues: The Relation between Meeting E&S Performance Standards and Financial Performance

International Finance Corporation (IFC)

As discussed at some length above, while the IFC makes choices of investments and anticipated outcomes defined in terms of critical development and related sustainability goals, at the same time it must, of necessity, be concerned with the results in purely financial terms. As the IFC has described it, “[d]epending on the sector and project type, we assess a project’s Financial Rate of Return (FRR), its Return on Invested Capital (ROIC), or its Return On Equity (ROE). In all cases, we expect successful projects’ financial returns to exceed the company’s cost of capital.”⁹²⁸ In certain presentations the IFC has highlighted conventional financial outcomes in addition to development related ones. Indeed, for a variety of reasons it may tout the latter. For example, in speaking to the IFC’s equity investments, an IFC Vice President proclaimed that “[o]ver the last 10 years...[its] nearly 800 equity investments totaling US\$12 billion...[had] delivered a 24% IRR.”⁹²⁹

The IFC reports separately on FRRs, which measure returns from the point of view of the financiers, and what it refers to as economic rates of return (ERRs), which show returns from the point of view of society as a whole (including the financiers). The latter is more focused on outcomes seen from a broad social perspective; insofar as PS-related ones might be deemed to be an aspect of that, there seems to be little comment with respect to it. (See TEXT BOX 4. THE IFC AND ECONOMIC AND FINANCIAL RATES OF RETURN)

For example according to a 2011 fiscal year portfolio performance review, the IFC stated that “[t]he main reasons why financial performance may differ from development results are externalities or market distortions. IFC addresses both of these aspects in its screening and monitoring, for example by not supporting projects that depend for their financial viability on subsidies and protection. IFC also assesses and mitigates environmental and social risks ex-ante

and actively assists client companies in improving their environmental and social performance. IFC's clients mention this as being a key area of IFC's value addition."⁹³⁰

One way to assess tradeoffs is to compare FRRs with ERRs. An IEG evaluation of projects between 2005 and 2007 showed that what it termed the benefits for society as a whole clearly exceeded those for financiers in 90% of cases, compared to 6% where the reverse was true.⁹³¹ In its 2011 review, it cited IEG evaluated projects from between 2007-2009 which showed similar outcomes.⁹³²

While detailed results are not available, the IFC has in brief and modest ways reported on a relationship between performance with respect to environmental and social standards and financial performance.

Relationship overall between performance with respect to environmental and social standards and financial performance.

Most recently, the IFC's CEO of Asset Management, citing two "preliminary results from two internal studies" of its equity investments, wrote that they "suggest[ed] that [both listed and unlisted] companies with good environmental and social performance achieve financial returns dramatically better than those with low environmental and social performance."⁹³³ Emphasizing that "when evaluating a potential investment, we are assessing a company's current ESG performance (including its capacity to improve)," he asserted having "come to the conclusion that strong ESG capability today is a predictor of future financial performance."⁹³⁴ Acknowledging the question of the causal links between the two (as contrasted with just the correlation), he claimed to "have good anecdotal evidence from our portfolio that inadequate ESG capability can certainly cause poor financial performance by negatively affecting business operations."⁹³⁵ In turn, he argued that "[v]iewed from the portfolio level, the risk-return ratio is improved if these types of poor performers are excluded, thus enhancing overall returns as well as reducing risk."⁹³⁶

In 2011 in its annual portfolio review the IFC broadly stated that its experience "show[ed] that well managed companies tend to perform well on financial as well as on environmental and social matters; and that companies with financial problems also tend to apply inadequate resources (and attention) to environmental and social matters and vice versa,"⁹³⁷ That is "with particularly weak financial performance (i.e. unsatisfactory ratings), environmental and social performance was also weaker. Better environmental and social performance was associated with better financial performance."⁹³⁸ More particularly, projects which were rated "unsatisfactory" from a financial performance standpoint were rated high performers in environmental and social terms far less infrequently than ones termed only partly unsatisfactory, satisfactory, and excellent.⁹³⁹ In an earlier (2009) IFC document, it also reported a correlation between financial performance and environmental and social performance.⁹⁴⁰ That document added that Environmental and Social Risk Ratings (ESRRs) "also tend[ed] to be associated with financial performance as measured by credit risk ratings (CRRs), non-performing loans (NPLs) and equity performance. Better environmental and social performance was associated with better financial performance."⁹⁴¹ (However, as noted earlier it is not at all clear that ESRRs really capture the environmental and social outcomes which are the concern of this paper.) Related findings, although dating from 2003, correlating credit risk, investment rates of return, and IRRs positively with environmental risk were cited fairly recently by the IFC.⁹⁴²

The IFC has also offered a brief rejoinder to what it termed "[s]ome observers [who] believe there is a trade-off between a company's profitability and aspects of its development impact, such as its environmental and social performance."⁹⁴³ (That rejoinder has, in turn elicited critical comment.⁹⁴⁴) Somewhat broadly and generically the IFC has described its experience on the

positive side as “show[ing] that (i) well managed companies tend to perform well on financial as well as on environmental and social matters; and (ii) companies with financial problems may lack the resources to continue to address environmental concerns adequately. For many of our projects we have evidence that client investments in e&s performance improvements pay off and result in significant savings.”⁹⁴⁵ More particularly, it proffered the results of analysis “from all active IFC investments that were approved between 1998 and 2003, a total of 469 companies,” investments which it deemed to be “sufficiently mature to be adequately evaluated.”⁹⁴⁶

TEXT BOX 4. THE IFC AND ECONOMIC AND FINANCIAL RATES OF RETURN

“Financial Performance

To assess costs and benefits to project financiers, we look at measures of investment profitability. In the case of project finance, we calculate the project’s financial rate of return (FRR), typically ex ante and again at evaluation, and use annual proxies, such as return on assets, equity or invested capital to monitor ongoing performance. In the case of corporate loans and financial market investments, we use return on equity or return on invested capital. We compare these rates of return with our client’s weighted average cost of capital. Meeting the cost of capital is necessary for business to be sustainable. Profitable investments are also an essential signal to attract other investors: it shows that supporting developmentally sound projects can be good business.”^a

“Aggregating Stakeholder Impacts: the Economic Rate of Return (ERR)

The financial rate of return (FRR) assesses a project’s return from the point of view of its financiers. As a development institution, IFC also wants to know whether a project benefits society as a whole. To that end we calculate an economic rate of return (ERR), which is the internal rate of return on an investment after accounting for the costs and benefits a project entails for all stakeholders across society.

To estimate the economic rate of return, a good starting point is the FRR. The FRR is an overall measure of profitability from the viewpoint of the company and its financiers. It is the internal rate of return that makes the present value of the net project cash flows zero. A company should only invest if the FRR is greater than its weighted average cost of capital (WACC), otherwise returns are insufficient to pay lenders and adequately compensate equity investors. The FRR is solely based on financial cash flows, but does not capture the economic costs and benefits from the viewpoint of society. In order to integrate these effects into the ERR the impact on each of the stakeholders is analyzed separately as described above. All quantifiable impacts are then added or subtracted from the net financial cash flows in order to calculate an ERR. The ERR is used to inform a project’s economic performance rating.”^b

^a “IFC’s Evaluation Framework for Investments,” International Finance Corporation, p. 3.

http://www.gwu.edu/~iits/Sustainable_Tourism_Online_Learning/Faulkner/IFC_DE_Evaluation_Framework_FINAL.pdf

^b Id. at 5.

First it stated that “[t]he financial performance of IFC projects is positively correlated with their environmental and social (e&s) performance.”⁹⁴⁷ That is, “development outcome success rates” (which reflect all development outcomes) were correlated with financial performance ratings: the success rates were 5% for those which had unsatisfactory financial ratings, 42% for ones which were partly satisfactory, 97% for those which were satisfactory, and 99% for ones which were rated excellent.⁹⁴⁸ For just “environmental and social success rates” the figures the equivalent

figures were 66%, 77%, 78%, and 77%.⁹⁴⁹ As the IFC characterized the latter findings, “[p]rojects in some financial difficulty – rated partly unsatisfactory – still display solid environmental and social performance. But where financial performance is unsatisfactory – generally projects in severe financial distress – environmental and social performance has suffered.”⁹⁵⁰ Moreover, “th[e] relationship holds stronger when assessing different indicators of financial performance: credit risk ratings, non performing loans and equity performance are strongly correlated with environmental and social risk ratings (ESRRs).”⁹⁵¹ It added that “[a]n analysis of IFC portfolio companies with poor performance on both the financial and e&s dimension shows that IFC staff frequently attributed poor environmental and social performance to sub par financial performance. This correlation of poor financial and environmental & social performance holds across all industries. Reversely, as demonstrated by the case of the cement plant described above, proactive and effective management of environmental and social matters can positively impact financial performance.”⁹⁵² In sum, the IFC argued that “[p]rofits are not made at the expense of environmental and social performance.”⁹⁵³

An Independent Evaluation Group (IEG) analysis in 2009 and “based on 1996 – 2008 evaluations” seemed to point in the same direction, though the results are at best only suggestive.⁹⁵⁴ The IEG reported that a very high fraction of projects which were deemed to have “high development outcomes” had what was termed a high IFC investment return whereas well more than half of what were denominated “low development outcome” projects had what were characterized as low investment returns.⁹⁵⁵ However, environmental and social outcomes were only one of four among the development outcomes referred to in the report which did not analyze the separate impacts of each of those kinds of outcomes. And, of course, the figures reported point to a correlation but say nothing as such about causality.

In 2007 the Evaluation Cooperation Group, established by multilateral development banks (MDBs) to, among other things, spur more effective and consistent evaluation of projects (within and across MDBs) cited Asian Development Bank “experience with water projects” as having “demonstrated that successful projects can improve both economic conditions and the environment, while weak design and execution may result in immediate economic gain but lead to detrimental environmental effects which limit the sustainability of these gains or even lead to negative overall results.”⁹⁵⁶ It also referenced “[a] review of transport and power projects by the International Finance Corporation (IFC) [which] illustrates that projects which perform well environmentally also perform well financially.”⁹⁵⁷ That is, “[t]he mean rate of return for projects with satisfactory environmental assessment ratings [was] statistically indistinguishable from the mean for those with unsatisfactory ratings.”⁹⁵⁸ It suggested that the “simple tabulation” presented “illustrate[d] that successful application of safeguards can maintain or improve economic returns” and was “consistent with the hypothesis that well-designed and executed projects perform well on both environmental and financial measures.”⁹⁵⁹

Relationship between particular environmental and social policies and practices and outcomes associated with financial performance.

The foregoing references concern overall project performance. However, others pertain to the relationship between particular engagement in PS-related policies and practices to project success in conventional financial terms. For example, there is a fairly extensive and strongly suggestive literature regarding the consequences of not engaging stakeholders, most especially affected communities, in connection with projects which have similarities to what would be viewed as infrastructure projects.

Thus, according to a study of conflict with local communities in the extractives industry based on interviews and case studies, “[t]he most frequent costs identified by interviewees were the costs arising from lost productivity due to delay. The greatest costs were seen as the opportunity costs arising from the inability to pursue future projects and/or opportunities for expansion or for sale, as a result of company-community conflict. The costs cited by interviewees as the most often overlooked were those resulting from the additional staff time needed when conflicts arise or escalate.”⁹⁶⁰ In terms of lost productivity, “the interviews confirmed that a major, world-class mining project with capital expenditure of between US\$ 3–5 billion will suffer roughly US\$ 20 million per week of delayed production in Net Present Value (NPV) terms. Even at the exploration stage, costs can accrue. In the case of a serious exploration project for a new mine, around US\$ 10[,]000 will be lost every day of delay in terms of wages, idle machinery and so on.”⁹⁶¹ These findings were consistent with what was learned from case studies by the same authors.⁹⁶²

Another report cited in a presentation by a major consulting firm concerned 190 oil and gas projects which had been delayed. It found that in nearly three quarters of the cases the delays were attributable to “non-technical” risks, that is political or stakeholder-related ones.⁹⁶³ In addition, according to its report based on a survey of 42 oil and gas executives, 14 (one third) reported that non-technical risks cost their business billions of dollars and another 12 stated that the cost was of the order of a billion dollars.⁹⁶⁴

Recently released preliminary results from ongoing research on large, capital intensive projects – in mining, minerals, metals, oil and gas exploration and production, refining, and chemicals, among others – in both OECD and developing countries points to the impact of “sustainability practices” on the likelihood of project success.⁹⁶⁵ Data collection for the research was based on the International Finance Corporation’s Sustainability Program Quality Benchmark Matrix which focuses on what practices are effective (or not) in addressing issues of workforce development; local procurement; land acquisition, resettlement and livelihood restoration; health and safety; security; environmental management system; social investment and public infrastructure (including community/public health; public education; water; and electrification; and livelihoods); the management processes which are effective (or not) in relation to these and other issues, stakeholder engagement; grievance mechanisms; and monitoring & evaluation.⁹⁶⁶

The authors report that implementing four practices “in a comprehensive manner at the correct time” are especially important to reducing risk.⁹⁶⁷ They are:

- (1) Stakeholder identification: “Using formal stakeholder identification and mapping exercise as a tool to develop engagement strategy”⁹⁶⁸;
- (2) Baseline studies: “Formally incorporating cultural heritage issues in to early baseline studies”⁹⁶⁹;
- (3) Community engagement: “Formally incorporating a monitoring and evaluation plan for assessing community engagement”⁹⁷⁰; and
- (4) Communications mechanism: “Incorporating complaint and grievance process includes mechanism to report back to the community on how complaints and grievances are addressed.”⁹⁷¹

More particularly, they found that about 25 percent of the projects experienced problems which ranged (in increasing severity) from cost growth of more than 20% to one or more longer than a week production outages or construction delays, and shelving of the project.⁹⁷² Problem projects were substantially less likely than non-problem projects to implement stakeholder identification and baseline studies practices and very substantially less likely to implement community engagement and communications mechanism practices.⁹⁷³ The authors suggest that the severity

of the impact for problem projects increases with how many of the four practices which they have implemented.⁹⁷⁴ Importantly, they indicate that these issues were “not confined to non-OECD countries.”⁹⁷⁵ Note they also observe that even though projects “frequently [met]...local/national regulatory requirements,” they “still ran into significant difficulties”⁹⁷⁶ According to one of the authors, it is not enough to have a grievance process in place and a grievance specialist assigned. It is “especially critical” to have “reporting back to communities on how grievances are being addressed,” that is “no feedback loop in place to inform on the when?/how long?/what is being done? type questions.”⁹⁷⁷

Another study, this one of stakeholder engagement by gold mining companies “concluded that there was a powerful business case for making the effort to win the hearts and minds of external stakeholders.”⁹⁷⁸ It “estimated that the value of cooperative relationships with external shareholders was *worth twice as much* as the actual market value of the companies’ gold” (italics in original).⁹⁷⁹ The study stressed that the studies suggested that “it is possible to engage stakeholders with the same degree of analytic precision that companies use to model customer retention or supply chain management,” an approach [which] requires thinking of corporate social responsibility and government affairs as central to enterprise risk management and strategic planning, rather than just a cost center”; “insufficient investment in political and social capital can turn revenue-generating assets like a mine into a costly liability”; rejecting the contention that “pure profit maximization should be the only goal of a public company” because “maximiz[ing] profits *requires* a degree of stakeholder engagement”; and that these contentions “are widely applicable”, “not only to companies extracting resources but also to those building hotels or retail outlets, or indeed to politicians running for office.”⁹⁸⁰ A broader review of stakeholder issues related to mining industries “show[ed] that sustainability issues are implicated in 45% of project delays on the largest capital investment projects and result in them being more than 25% over budget.”⁹⁸¹ Mining projects are similar enough to many of what would be termed infrastructure projects in scale, scope, and impact to suggest the relevance of the foregoing to the latter.

The cited publications represent something of an eclectic sample of studies and reports which offer credible evidence positively linking project compliance with the IFC PS to better financial performance. At this point we have not been able to locate publicly available ones which are relatively comprehensive, systematic, and open about the data being used, the methodologies employed, etc. That is, of course, what is needed more seriously to test such relationships.

With the foregoing in mind, some additional cautionary notes are warranted. First, while in broad-gauge ways better E&S performance might be associated with better financial performance it simply is not the case on an individual project basis. One observer has characterized the landscape in the following terms:

“Sure there will be many investments that improve E&S performance and financial returns, but they are hardly ever the ones with the best payback period. And there may be also some that decrease returns (as simply too expensive) and those are only meaningful from a moral point of view.”⁹⁸² For example, resettlement in conformity with the IFC PS “for an hydro project in South East Asia costs 25 Mio. Euro. How does the company ever recover the money? Same project in the next gorge under a Chinese finance spends maybe 5 Mio Euro (minimum requirement).” He adds that even an ostensibly IFC Ps-conforming project might be “attacked by the NGOs, so even here we do not have intangible benefits.”⁹⁸³

A means for linking specific positive and negative financial outcomes to particular E&S-related practices: Financial Valuation Tool

One important effort related to testing the linkage has been one spurred by support from the IFC, namely, the Financial Valuation Tool. To reprise the discussion above as to the IFC's PS 1, "[w]ith regard to [the] risks and impacts" identified, clients are obliged by the IFC to act in accordance with a "mitigation hierarchy" which must "favor the avoidance of impacts over minimization, and, where residual impacts remain, compensation/offset, wherever technically and financially feasible."⁹⁸⁴ In turn, the essential core of clients' responsibilities is defined by what financial feasibility entails. According to the IFC, financial feasibility "is based on commercial considerations, including relative magnitude of the incremental cost of adopting such measures and actions compared to the project's investment, operating, and maintenance costs, and on whether this incremental cost could make the project nonviable to the client."⁹⁸⁵

Although this formulation clearly points to some sort of cost benefit tradeoff it offers no guidance as to how far clients must go in bearing mitigation costs in relation to other enterprise costs.

The Financial Valuation Tool – first developed for greenfield projects in the extractive sector in Sub-Saharan Africa, in part by the International Finance Corporation's Oil, Gas and Mining Sustainable Community Development Fund – was created with those issues in mind.⁹⁸⁶ More particularly, the goal was to fashion a method for "rigorously quantif[ying]" "the value derived from sustainability programs." The lack of such a method had "prevent[ed] managers from: a) maximizing the positive local impact of such investments, b) understanding the true business benefits of such investments, and c) being able to prioritize among those investments." In turn, "[a] lack of hard financial data on the return from social, environmental and other community investments...made it difficult for companies to assess their business benefits and hence to justify sustainability budgets that compete with other corporate priorities."⁹⁸⁷ For example, "[p]ositive relationships with communities, civil society and governments help ensure that, among other things, production schedules are met, access to labour, land and resources are maintained, and reputations are kept intact."⁹⁸⁸ In sum, the IFC and its partners "recognized that sound metrics can strengthen the business case for community investment and, as a result, enhance local development outcomes."⁹⁸⁹

More specifically, the FV Tool "articulates reasonable ranges for the expected net present value (NPV) of sustainability investment portfolios. That value is comprised of direct value (creation) and indirect value (protection):

- Direct value (creation) results from the direct cost-benefit analysis of the sustainability investments (e.g. savings, increased productivity, etc.). For example, the value creation can be from project savings or productivity gains from local workforce training that enables the substitution of expensive expatriates with local hires.
- Indirect value (protection) refers to the indirect risk mitigation potential of sustainability investments (e.g. reduced risk of delay, disruption, added costs expropriation, post-project litigation, etc.). This is the value companies can generate from sustainability investments by averting risks. The FV Tool simulates the cash-flow impact of risks before and after applying sustainability investments."⁹⁹⁰ Based on this approach, the FV Tool "calculates a probable range for the net present value (NPV) back to the company from a portfolio of sustainability investments, including value protected through risks mitigated and value created through productivity gains."⁹⁹¹

Two brief studies have reported on use of the tool by two companies which operated in Sub-Saharan Africa. In one case, based on the analysis, the company set up training programs to raise mining expertise and skills and “build a pool of local labour to run its operations in the future.” These programs, it was concluded, “would bring high benefits in the later phases of life of the asset particularly since the specific asset was in a very remote area where local jobs were limited and the company might be dependent on expensive expatriate workers.”⁹⁹² In the other, use of the tool led the company to establish a “community relations team” and “more inclusive stakeholder engagement” which led to speedier negotiations over compensation for land and savings in terms of compensation. The view was that the “trust” the team had built with the community which led to the company being seen as dealing fairly was key to these outcomes. A derivative benefit was the company spending “significantly less on security than other surrounding mines.”⁹⁹³ More recent reports on these projects and another one are available.⁹⁹⁴

Use of the FTV first requires a “stakeholder census” to identify those for whom there might be issues of concern and their opinions on those issues as both bear on views of the company and the project; a prioritization of stakeholders whose issues which need to be addressed in light of those who stakeholders are in a position to influence, the extent to which they care about those issues, and their effective power to influence the outcome; and what initiatives involve which issues and partners in coalition building should be given priority in light of how those initiatives might play out.⁹⁹⁵

A revised user guide for the FVT was recently issued. Even then, the FTV is still, not surprisingly, a work in progress.⁹⁹⁶

Cross-cutting Issues: Due Diligence Costs Associated with Applying Environmental and Social Standards

There is little publicly available data as to due diligence costs of the application of environmental and social standards (that is, apart from costs of specific actions to avert or mitigate adverse impacts).

International Finance Corporation (IFC)

IFC costs attributable to projects. In connection with an assessment of early implementation of the 2006 version of the PS (recall, the current version was put into effect in 2012), the IFC offered some information as to what it termed “[t]he cost of E&S due diligence (or CES processing cost)” which it described as “labor and non-labor costs borne by IFC to ensure that the projects it financed were developed in compliance with the requirements of IFC/World Bank Safeguards.”⁹⁹⁷ Here, labor cost referred to the “time of E&S specialists GE level and above dedicated to particular project and charged against BB budget” and non-labor cost as “travel of E&S specialists GE level and above related to due diligence work on particular projects and charged to BB budget.”⁹⁹⁸ More specifically, labor and non-labor costs “included CES support in the following stages of the project cycle: ‘pending appraisal’, ‘pending approval’, ‘pending commitment’, and ‘pending disbursement’.”⁹⁹⁹ However, “costs related to supervision were not included.”¹⁰⁰⁰

With respect to the 2006 and 2007 fiscal years (which bridged introduction of the 2006 version of the PS), processing costs “constitute[d] about 23-25 percent of the total IFC processing cost for category ‘A’ projects.” With respect to Category B projects, in fiscal year 2006, the average processing cost constituted 9.1 percent of the total IFC processing cost, while in [fiscal year 2007] this cost decreased to 8.2 percent.”¹⁰⁰¹ (The figures for Category C projects were 1 and 2 percent, respectively.¹⁰⁰²)

In 2010 the IEG reported results for the World Bank and the IFC about what it referred to as “Bank costs for preparation and supervision of safeguard elements” which included “direct staff costs of environmental and social specialists and travel costs for identification, appraisal, and supervision of safeguard aspects of projects.”¹⁰⁰³ It noted that the figures it provided were “based on the costs attributable to environmental and social specialists from the project’s Bank budget only, which therefore do not capture the full costs incurred on safeguards.”¹⁰⁰⁴ It added that the costs also did not include “costs incurred by Bank Management and the Legal Department on project preparation or costs incurred in addressing requests for investigation field with the Inspection Panel.”¹⁰⁰⁵ Although the language used in the foregoing concerned the “Bank” (in the sense of the World Bank) we assume that the scope of the costs covered was the same for the IFC.

With respect to the IFC, the IEG’s study – based on a review of 6 completed and 25 active Category B projects and 6 active Category A projects – found that average and median costs “for preparation and supervision of safeguard elements” for Category A projects were \$254,450 and \$60,264, respectively and for Category B projects, \$24,654 and \$12,195, respectively.¹⁰⁰⁶ The median cost for Category A projects “was 13 percent of total IFC cost.”¹⁰⁰⁷ For Category B projects it was 4 percent.¹⁰⁰⁸ The results from an additional sample of 30 projects in the IFC’s then current portfolio showed average and median costs for Category A projects of \$163,410 and \$129,583, respectively and for Category B projects, \$51,814 and \$36,450 respectively.¹⁰⁰⁹ The difference in the figures in the data for the two samples would seem to be an artifact of the relatively small sample sizes. This assessment suggests that it might be best viewed as giving a sense of the order of magnitude of costs, that is, for Category A projects, averages and medians in the low \$100,000s and for Category B projects, the low to middle \$10,000s.

Note, too, that the *median* percentage of total cost reported by the IEG study for IFC Category A and B projects – 13 percent and 4 percent, respectively – were roughly one half of the average percentage of total costs reported by the IFC – 23-25 percent and 8.2-9.1 percent, respectively. One might expect a median cost to be less than an average cost so perhaps the difference in the figures is less stark. But the variance could be attributable to different project samples, different categorization practices, among other factors.

We have found only one reference to any other costs being broken out: according to an IEG study in 2013, the IFC spent “\$14 million per year for core [monitoring and evaluation (M&E)] activities with about \$8,000 per Investment project” though those expenses were “a relatively low share of project processing costs.”¹⁰¹⁰ Such activities are concerned with the “process, method, and tools for collecting data, tracking progress on outcomes and assessing performance and results.”¹⁰¹¹ If the IFC context for investment operations, monitoring “focuses on measuring development results by gathering and processing information on indicators through DOTS.”¹⁰¹² Evaluation is “conducted through the annual XPSR program, which is the self-evaluation of IFC’s investment projects.”¹⁰¹³ As such there would appear to be very modest overlap of these costs with those referred to in the preceding paragraphs. Moreover monitoring and evaluation focus on far more than issues concerned with meeting the PS.

Client project-related costs. According to the 2010 IEG report, “[c]osts incurred by World Bank clients on safeguards” were “estimated at about 5 percent of World Bank financing and 3 percent of total project cost.” However, results “[could not] be established for IFC clients because IFC does not collect client cost data.”¹⁰¹⁴ The IEG elaborated on this point, stating that “[f]or proprietary reasons, IFC does not have access to data on client costs incurred on safeguards or Performance Standards” so that “IFC costs” “include costs incurred by IFC only,” adding that the latter were “likely to be a fraction of costs incurred by IFC clients.”¹⁰¹⁵ Based on a survey of 60 *World Bank*

clients – 22 Category A and 16 Category B completed projects and 15 Category A and 17 Category B active projects – the IEG reported average and median client costs for Category A projects were \$19.2 million and \$8.4 million, respectively; for Category B projects, the figures were \$5.2 million and \$4.0 million, respectively. Because, among other things, World Bank “Safeguards” are not identical to the IFC PS and the practice of categorization of projects is not the same, these figures can only be viewed as suggestive of what the numbers are for IFC projects.

In the above-cited report on early implementation of the 2006 version of the PS, the IFC offered some general observations with regard to client costs. It stated that on the basis of a client survey, it had found that costs were “broadly acceptable to real sector clients, even though 57% of respondents feel that the cost is higher than an average cost of meeting social and environmental requirements for their sector. For some of the returning clients, the costs are higher today than when they sought financing from IFC under the [previous] Safeguard Policies.”¹⁰¹⁶ Moreover, “72% of the clients indicated that the cost in meeting the Performance Standards would not impact their decision to return to IFC for financing. Among FI clients, although they felt that the additional costs of establishing an ESMS to them and their clients was the “main constraint,” almost 95 percent thought that “establishing a[n] ESMS[.]...in their institutions would help in better understanding risks in their portfolio; 83 percent consider [an ESMS] as a useful element that enables better access to international finance; and almost 70 percent see a positive impact on their brand as a result of having an [ESMS].”¹⁰¹⁷ The IFC indicated that these findings were consistent with the results of a separate CES survey of clients.”¹⁰¹⁸

Equator Principles Financial Institutions (EPFIs)

According to one EP bank’s analysis of EP project-related costs in connection with Category “A” deals, “[t]he additional time used by a project officer to screen and structure the extra-financial risks made up for 4% of the overall time dedicated to the deal”¹⁰¹⁹; adding that “[t]his relatively small amount is due to the fact that an internal - Extra-Financial Risk Management Desk has borne the bulk of workload for extra-financial risk structuring.”¹⁰²⁰ Also, “additional independent external advisory costs (environmental, social and legal) of less than 0.01 % of total project costs were incurred, which corresponded to an increase in technical due diligence costs of between 15 - 20 % per A rated deal.”¹⁰²¹ Arguably a not insubstantial part of those expenses might be required even if a transaction were ultimately to fall through. It also remarked that according to another characterization, with regard to needed “internal (or external) know how,” “[o]ne E&S expert can typically handle 5 new A projects (high risk) [and] 20 B projects (medium risk),” with the annual cost of that expert being on the order of \$100,000.¹⁰²²

Latin American and Caribbean National Development Banks

In an International Development Bank paper (discussed further below) on how national development banks might manage environmental and social risk, the authors offer some insights not into project-related costs as such, but rather the costs of setting up and ESMS. It acknowledges that “developing an ESMS will cost time and money,” but stresses that “the resources are relatively limited when compared to other systems development (e.g., IT systems development, credit policy revision, etc.).”¹⁰²³ The typical bank approach involved creating a project team “consisting of an E&S coordinator to develop the ESMS and a risk management and credit management representative, the latter two to ensure consistency with risk procedures and commercial operations, respectively” often supplemented by an external expert to assist the coordinator in the development of the ESMS.¹⁰²⁴ They estimate the cost of developing an ESMS to start “at approximately US\$15,000 for a relatively small FI with a limited number of banking activities” with most of the project work being “done internally with limited external expert

involvement.” However, for a case likely more similar to that involved with an infrastructure project – that of “a large bank with a complex organizational structure and various banking activities, where increased external technical support is require” – they estimate the “cost can rise to US\$100,000–US\$150,000.”¹⁰²⁵

They also offer some comments on what was required in terms of effort and expense of “ramping up” an ESMS. More particularly, the authors estimate that the “pilot phase can take up to three months.” The identify training staff as the final stage before implementation, suggesting that “[w]hile a half-day workshop is sufficient, more time is needed to organize it, depending on the nature and size of the organization” and two days “for centralized small sized [financial institutions,” more time is needed for larger FIs with an extensive branch network,” that is, “two to three months.”¹⁰²⁶ They report that “[t]he pilot phase and training period generally require a budget in addition to expert fees, estimated at less than US\$10,000–US\$20,000.”¹⁰²⁷

In the foregoing connection an illustrative job description for an ESMS Officer for Financial Institution provided by the IFC to its clients offers some insights on the nature of the tasks to be performed and outcomes to be achieved. (See TEXT BOX 5. SUGGESTED JOB DESCRIPTION OF THE ESMS OFFICER FOR FINANCIAL INSTITUTIONS)

An Illustrative Case: Pension Fund Investment through a Financial Intermediary, Namely the IFC

Pension fund interests in financial and perhaps other outcomes can overlap/intersect with IFC interests in achievement of development objectives consistent with addressing concerns about sustainability (however understood). That ostensible meeting of interests arises in connection with the IFC’s establishment of the Global Infrastructure Fund [(GIF)], to which the IFC was to contribute \$200 million and was to be managed by the IFC Asset Management Company (“AMC”).¹⁰²⁸ The fund completed fundraising in the fall of 2013 having raised \$1.2 billion. It was reported that it had “received capital commitments from 11 investors, comprising IFC and a Singapore sovereign wealth fund, GIC, as anchor investors, and 9 sovereign and pension fund investors from Asia, the Middle East, Europe and North America.”¹⁰²⁹ (Elsewhere it has stated that the investors in the GIF by type were as follows: IFC (17%), pension fund (37%), bank (6%), and sovereign wealth fund (40%)¹⁰³⁰)

The GIF is to “primarily invest in equity instruments and equity-like instruments in infrastructure projects/companies in emerging markets,” “including middle income and low income countries.”¹⁰³¹ The investment sectors include “power, transportation, utilities, telecoms, urban infrastructure and infrastructure service companies.”¹⁰³² From a development perspective the aim in part is to “introduc[e] large international investors to investing in infrastructure in the emerging markets in a sustainable manner.”¹⁰³³ More particularly, the notion is that the “IFC’s...proven excellent track record in investing in Emerging Market infrastructure projects and companies...should convince large institutional investors that are not comfortable with direct investments in Emerging Markets, particularly non-BRIC countries, to take on exposure to these markets.”¹⁰³⁴ Correspondingly, “[t]he successful implementation of the Fund should demonstrate that infrastructure investment in Emerging Markets, and particularly in non-BRIC countries, is commercially viable and attractive.”¹⁰³⁵ The expectation is that it would “then encourage increased private equity financing in frontier emerging markets.”¹⁰³⁶

Especially interesting for the purposes of this discussion is the IFC’s statement that the GIF “itself is a Category FI project. IFC-originated projects will be individually categorized and appraised according to IFC’s procedures for direct investments and consistent with the Policy and

Performance Standards on Social and Environmental Sustainability.”¹⁰³⁷ The reference to FI status is intriguing because in this case the FI is the AMC itself, a subsidiary of the IFC, rather than some independent financial intermediary with no association with the IFC. As described above, in the case of FIs, the IFC’s prime focus is on their having those systems, capacities, commitments, etc. in place designed or calculated to ensure that the sub projects the FIs finance meet IFC E&S Performance standards, rather than engaging directly with those subprojects to assess compliance. In principle, it would seem, because the FI here is an arm of the IFC, the latter would be the case; the quoted reference to “IFC-originated projects” would seem to suggest that as well.

Perhaps alluding to some concern about the private equity model for investment which the GIF represents, the IFC notes that “[i]nfrastructure investments in general have longer gestation periods which require longer investment horizon” so that it “has been structured to have a longer investment period and fund life than most private equity funds and it is expected to have a longer investments holding period.”¹⁰³⁸

The GIF is organized along lines similar to many other unlisted infrastructure funds. It is a closed end fund with a life of 12 years the investors in which are limited partners and AMC is the general partner.¹⁰³⁹ It would appear that the fee structure is also akin to that of such other funds.¹⁰⁴⁰ In keeping with IFC practice, the GIF will take only minority stakes in infrastructure-related enterprises.¹⁰⁴¹ A recent presentation about the GIF referenced “50% of every eligible IFC investment over \$30m [being] offered to GIF.”¹⁰⁴²

Thus, the enterprises in which the GIF invests are simply a subset of those enterprises in which the IFC makes investments with the GIF presumably making choices, among other things, consistent with how the investment policy and goals (for example in terms of anticipated IRR) are articulated to LPs.¹⁰⁴³

As previously discussed at length the IFC has multiple objectives it strives to achieve – and accommodate insofar as they might be in tension with one another – namely, primary ones relating to development, an overlay of sustainability goals, and, of necessity, aims pertaining to sought for and acceptable financial risks and rewards. In certain respects, though, insofar as GIF LPs, particularly pension fund LPs, are concerned with such tradeoffs as there might be, they would not appear immediately relevant in the following sense: it would seem that the basis upon which investment opportunities in the GIF are offered and accepted is the anticipated financial return (in light of presumably certain expectations about financial risks). This position is true ostensibly regardless of whatever tradeoffs are made by the GIF in its choices and actions being aligned with attaining development and sustainability goals.

At first blush this would not seem to square with what in the United States context, for example, fiduciary duty would require of pension funds. Namely, but for certain special situations, according to conventional understanding, it is not permissible to take into account other than the calculus of financial risk and reward.¹⁰⁴⁴ That is, “an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.”¹⁰⁴⁵ More specifically for example, “before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan.” They cannot “select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal.”¹⁰⁴⁶

We will not canvas here the merits, let alone the coherence of this formulation. Certainly, however, at this stage, given among other things, the distinctive and varied character of infrastructure-related enterprises, the potential associated distinctive and varied financial characteristics of possible investments in those enterprises, the typically illiquid character of many such investments, and the very modest amount of information about those financial characteristics, it would seem extremely difficult to identify alternative investments appropriate for comparison let alone compare would-be alternative investments. Only broader gauge comparisons with groups or clusters or sub-classes or classes of investments would be meaningful. At first blush, in such terms, assuming that the asserted claims about the financial risks and rewards of GIF investments were sufficiently creditable, the matter of fiduciary duty would appear to be no problem.¹⁰⁴⁷

TEXT BOX 5. SUGGESTED JOB DESCRIPTION OF THE ESMS OFFICER FOR FINANCIAL INSTITUTIONS

The ESMS (Environmental and Social Management System) Officer is expected to be someone from the FI's senior management, preferably from within the risk management line, and should have sufficient authority and organizational influence to ensure the ESMS is properly implemented organization-wide. He or she should have reasonable background in both environment and finance and be able to perform the following tasks:

- Oversee the FI's E&S risk management and implementation of ESMS
- Manage resources (budget and staff) for E&S risk management and training
- Ensure the coordination and integration of E&S risk management procedures with the FI's internal credit process
- Report any major E&S issues to senior management and secure the support for and approval of E&S risk management issues by senior management
- Review and approve the FI's annual E&S performance report to stakeholders, including IFC

Depending on the FI's organizational structure and business scope, the ESMS officer may be supported by one or more ESMS coordinators to review or coordinate the day-to-day E&S tasks performed by other staff (i.e., credit officers, environmental and social specialists, and consultants), according to the staff roles specified in the ESMS, including:

- Evaluate environmental compliance of a target client company with applicable requirements during due diligence, such as site visits, collection of necessary E&S documentation (e.g., certificates and authorizations), and preparation of E&S due diligence reports (or an E&S section of the credit application)
- Ensure that all investment decisions are supported by appropriate due diligence documentation, including, but not limited to, an E&S section in each final Investment Memorandum
- Ensure that appropriate environmental representations, warranties, and covenants are incorporated in each loan or investment agreement
- Supervise portfolio projects' on-going compliance with the applicable requirements on a regular basis, which may include:
 - Conducting site visits, monitoring the implementation of E&S action plan (if any) by the clients, reviewing clients' annual reports, and recording clients' E&S ongoing performance
 - Resolving E&S issues in case of non-compliance, and where needed, preparing a time-bound corrective action plan with specific follow-up procedures
- Prepare the FI's annual environmental performance report, based on the annual performance reports provided by its client companies
- Ensure that these procedures are implemented for each project, and that records of environmental reviews (i.e., appraisal and monitoring) are maintained

"Suggested Job Description of the ESMS Officer for Financial Institutions (FI)," FIRST for Sustainability > Environmental and Social Risk Management > Managing Environmental and Social Risk > Managing Environmental and Social Risk > Roles, Responsibilities and Decision-Making, <http://firstforsustainability.org/media/ESMS%20Officer%20Job%20Description.pdf>

A slightly different argument grounded in the above cited standard might pose a challenge based on the notion that taking into account ostensibly extra-financial considerations – development and sustainability considerations in this situation – poses the possibility that some measure of return is being sacrificed or some higher risk might be incurred than would otherwise be the case. However, the case of an otherwise identical investment excluding such considerations might be conceived of in the abstract, but in practice is not contemplated and might not even be possible to envision as a practical matter.

Moreover, the stronger point suggested by the discussion above is the contention (based on the IFC experience) that success in development and sustainability terms correlates with (and perhaps might be a cause) of better financial outcomes for investment in projects. In this regard, the noted recent presentation pointed to what was (arguably) the AMC's "strong investment track record," namely a "[m]ultiple of 2.1x across 151 investments in GIF focus sectors since 2002".¹⁰⁴⁸ In turn, the assertion is that the fund would have a "[t]arget gross IRR of 18-20%".¹⁰⁴⁹

It was recently reported that the GIF had made its first equity investment (alongside the IFC African, Latin American and Caribbean Fund (ALAC Fund)) providing "\$150 million for Pacific Infrastructure Ventures" to "improve the logistics of the Colombian oil and gas sector-and strengthen the country's infrastructure."¹⁰⁵⁰ More particularly, investment will be made in "a new liquid import-export terminal on the bay of Cartagena, one of the largest trade hubs in Latin America" and "a 130-kilometer crude oil pipeline which will connect Puerto Bahía's facilities with Colombia's principal crude export terminal."¹⁰⁵¹

According to the IFC's description of the project, "the existing SPPB and Olecar areas of influence are heavily modified and degraded due to the extensive industrial and domestic activity that has taken place in the Cartagena Bay for decades. Nonetheless, this is a Category A project because of the potentially significant and diverse environmental and social impacts and risks associated with Pacific Infrastructure's investment plan, including potential significant impacts on natural habitats and on Afro-Colombian and Indigenous Peoples (IPs) communities, as well as a potentially complex land acquisition process primarily associated with Olecar's right-of-way (ROW) easement."¹⁰⁵² Perhaps not surprisingly it has elicited sharp criticism from various stakeholders.¹⁰⁵³ Indeed, the United States Treasury observed that the project had been deemed to be Category A and stated its "wishes to be recorded as abstaining on the project for legislative mandated reasons and other environmental and social concerns."¹⁰⁵⁴ Nonetheless, the IFC Board approved the project on July 1, 2013.¹⁰⁵⁵

Given the ownership structure – as of the time of the investment, "other institutional investors" had a 29.4% stake in the company – it is no clear what role the GIF will have or what leverage it can exercise with regard to spurring conformity with the Performance Standards.¹⁰⁵⁶ The United States, in its comments on the project refers to "the inclusion of a put option for IFC's investment in case PI fails to comply with its obligations under the investment."¹⁰⁵⁷

We have found getting information about other GIF investments not to be a straightforward matter.

Late in 2013 there was a brief reference to an investment by the GIF, namely "a US\$20 million stake in a Brazilian telecommunications firm."¹⁰⁵⁸ We located a report that in March 2014 that "the International Finance Corporation and IFC GIF BRASIL – FUNDO DE INVESTIMENTO EM PARTICIPAÇÕES acquired shares on Internexa Participações S.A. for BRL 90 million [(US \$50 million)], representing a 32.76% interest in this company. These funds were used for the payment of debt acquired by INTERNEXA Participações with HSBC."¹⁰⁵⁹ Correspondingly, there would appear to have been on March 19, 2014, a \$25 million investment by the IFC in Internexa S.A.,

referred to as “a Colombian neutral carrier of carriers, [which] has targeted Brazil as its main source of growth for the next five years.”¹⁰⁶⁰ The project was deemed to be a Category C one.

In early 2014, we came across another short characterization of an additional investment, this time “in IHS Holding Ltd., Africa’s largest independent telecommunications infrastructure company by number of towers managed.” It was reported to have raised \$490 million in debt and equity with the GIF as one of the investors, though the precise nature and scope of the GIF’s investment is not clear.¹⁰⁶¹ We have not been able to find out any further information on this investment as it relates to the GIF. In its 2013 annual report, the IFC referred to a \$10 million “equity & quasi-equity commitment” to IHS Holding Ltd which was labeled as a Category B Investment.¹⁰⁶² The only IHS project we could locate in the IFC project data base involved an agreement with IHS Holding Ltd that was signed on May 31, 2014 for “a loan of up to US\$25 million for its new IHS Rwanda project, which has a total project cost of approximately US\$169 million.” The loan would “would finance IHS Rwanda’s acquisition of 556 towers initially and subsequently the construction or acquisition of an additional 488 towers in Rwanda.”¹⁰⁶³ The project was characterized as a Category B with the “key environmental and social (“E&S”) issues associated with the project” being identified as “the construction of towers; labor and working conditions (including employee and contractor occupational health and safety); and pollution prevention and abatement.”¹⁰⁶⁴

Last, the GIF reported an investment in Aegea Saneamento S.A. as part of its portfolio without further detail. There is a reference to Atlantic INVESTCO S.à.r.l having sold 2.32% of total Aegea company shares to each of the IFC (increasing the IFC’s own holdings to 3.21%) and the GIF, thereby reducing its own holding to 12.82%. (There was no reference to the value of the holdings in U.S. dollars or Brazilian reals.)¹⁰⁶⁵ A search of the IFC project data base showed a December 27, 2013 equity investment in that company which is referred to as “a leading private provider of water and sanitation services in Brazil” with the stake “intended to support AEGEA’s continued investment in brownfield municipal water concessions and acquisition of existing private concessions and sub- concessions throughout Brazil, including into “frontier” regions in the North and Northeast of Brazil.”¹⁰⁶⁶ The IFC had previously “committed a BRL100 million corporate loan in June 2012 and subsequently took a minor equity stake in December 2012.”¹⁰⁶⁷ The project was characterized as a Category B with PS 1 (Assessment and Management of Environmental and Social Risks and Impacts), PS 2 (Labor and working conditions) and PS 3 (Resource Efficiency and Pollution Prevention) being applicable.¹⁰⁶⁸

The Special Challenge of Social Issues: The Case of Labor-Related Standards

As discussed previously, the standards relating to social issues included in the PS appear to have been especially challenging ones. Among them are those concerning labor standards. What may be their increasing importance was recently suggested by the CAO. It said it had “observed a steady increase in complaints raising labor-related grievances. This rise coincided with the adoption of IFC’s Performance Standard on labor and working conditions (PS2) in 2006, which introduced a more comprehensive set of labor commitments into IFC’s policy framework. Since almost every IFC client is an employer, PS2 is relevant across the entire IFC portfolio.”¹⁰⁶⁹ Recently, the IFC in a presentation (apparently in connection with a meeting with civil society organizations) concerning environmental and social lessons learned expressed its view of labor issues as a source of “[i]ncreasing concern and source of complaints.” As a general matter, these complaints reflected “[w]eak implantation of national laws,” matters “[f]requently not under clients’ direct control,” and more specifically related to “[f]reedom of association & collective bargaining; supply chain; [and] working conditions.”¹⁰⁷⁰

Not surprisingly, the prevalence of labor cases has increased: “[l]abor grievances appeared in 29 percent of [its] cases [in fiscal year 2013].”¹⁰⁷¹ Moreover, as the number of these types of cases increased, the CAO “experience[d] greater diversity in the breadth and depth of issues they raise.”¹⁰⁷² The labor issues it needed to address “rang[ed] from individual employee claims to systemic workforce issues, including freedom of association, collective bargaining, occupational health and safety, and worker compensation, as well as respect and fairness in the workplace.”

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For example, among the cases filed in fiscal year 2013, the following posed ones pertaining to labor, a good number of which were associated with infrastructure-type projects:

- “unpaid salaries and expenses owed to employees of...an Africa-focused transport infrastructure development company” and withholding of “information regarding the liquidation of the company’s U.K. subsidiary.”¹⁰⁷⁴
- “inadequate compensation for injuries sustained during work on [an oil] pipeline” from the mainland to an off the coast facility in Africa.¹⁰⁷⁵
- “unfair treatment..., including discrimination and harassment, and demotion from a managerial position, which...jeopardized...livelihood and professional integrity” of a person employed at sub-Saharan Africa national electric utility distributing, transmitting, and generating electricity.¹⁰⁷⁶
- claims by a large number of employees involved in the construction and maintenance of a hydropower project in Africa who “had sustained injuries from work-related accidents for which they had not been properly compensated by the plant’s subcontractor” and “concerns about the transparency of the medical assessment and compensation process for injured workers, and...the use of intimidation against workers requesting benefits.”¹⁰⁷⁷
- a complaint by “[f]ormer [subcontractor] employees and members of the workers association claim[ing] that they are owed unpaid wages, allowances, national security, and terminal benefits” in connection with dam construction in Africa.¹⁰⁷⁸
- complaints in connection with the privatization of a public utility in Central Europe to the effect “that the removal of government subsidies in the energy sector would lead to tariff increases and job losses that would negatively impact local workers and communities.”¹⁰⁷⁹
- with respect to an airline in Latin America “concerns about the violation of labor rights...including limits to freedom of association and anti-union discrimination against employees” and the “IFC’s assessment and supervision of labor-related risks, as well as disclosure and consultation requirements in relation to its Performance Standard 2 (PS2) on labor and working conditions.”¹⁰⁸⁰
- with respect to schools in a Latin American country “concerns related to employment rights and the unfair treatment of the company’s employees, including inadequate wages, long working hours, health care, employee benefits, and other concerns related to compensation.”¹⁰⁸¹
- in connection with an agribusiness in Latin America concerns about “production activities and a high incidence of [a chronic kidney disease]...in its workforce.”¹⁰⁸²
- In South Asia “disputes between [a tea plantation owner]...and unions representing [its] workers” and the integrity of a “worker-shareholder” model the company had established.”¹⁰⁸³

Other closely related problems concerned the effect of projects on damaging or even destroying the livelihoods of those in affected communities and the lack or loss of job opportunities.

An example of the adverse implications of failure to effectively apply labor standards (here, in connection with an EP bank lender's need to the meeting IFC's PS2) is found in TEXT BOX 6 (CASE STUDY OF APPLICATION OF IFC PS2 TO TOLL ROAD IN INDIA).

Clearly labor issues related to construction – especially construction linked to infrastructure – loom large. For example according to the Building and Woodworkers International Union a few years ago, construction involved an annual investment of \$5,100 billion (= 10% GDP), provided “employment for 150 million workers,” 75% of whom were in developing countries, and that “100,000 fatal site accidents [occurred] every year” which involved “routine work” and “foreseeable, preventable hazards.”¹⁰⁸⁴ “[I]n many countries” the sector was in a “[r]udimentary state of development.”¹⁰⁸⁵ The industry was one “dominated by micro enterprises, with an “[e]xtremely fragmented employer base” – with “more than 90% of firms [being] micro enterprises, with less than ten workers”; and “[l]abour Laws largely [being] ignored in the construction industry due to lack of direct employment and chains of subcontracting, low Trade Union density (10%) and [collective bargaining agreements (CBAs)]”; and the limitations of “self-regulation and privatization of labour inspectorates.”¹⁰⁸⁶ Among the issues relating to construction highlighted in remarks by the senior environmental and social advisor in the Environment and Sustainability Department at the ERBD were occupational health and safety, contractor management, temporary/migrant workers and labor agents, and worker accommodations.¹⁰⁸⁷

Most recently, according to one specialist on labor issues, “[t]he continuing controversy around conditions for migrant workers employed in building venues and associated infrastructure for the 2022 FIFA World Cup in Qatar – including shocking levels of fatalities – for the Winter Olympics in Sochi and the completion of World Cup stadiums in Brazil has thrown a spotlight on labour rights in the construction sector.”¹⁰⁸⁸ More generally he suggested that “[i]n many emerging economies, in our experience, the management of labour standards during a construction project poses many challenges – from poor health and safety standards, through to late payment of wages, discrimination against migrants and inadequate temporary worker accommodation. There are also less direct issues to consider affecting surrounding communities such as dangers from heavy transport and dust.”¹⁰⁸⁹

There are challenges posed by tensions between the application of international standards in a local context, posing issues of demonstrating sufficient cultural sensitivity while avoiding “this-is-our-culture” excuses.¹⁰⁹⁰

Equator Principles Financial Institutions (EPFIs)

The Equator Principles do not explicitly make reference to labor issues as such. However, insofar as the EP require application of the IFC PS, namely for projects located in Non-Designated Countries, then the requirements as to labor and working conditions set forth in PS2 would have to be applied.¹⁰⁹¹

Little has been written about the practice of EPFIs in relation to labor issues and what there has been does not suggest a sharp focus on them as such. For example, according to a 2009 International Labor Organization (ILO) report, of 59 EPFIs analyzed, only 5 made a specific reference to them. Rather, they “generally use the terms ‘social issues’ and ‘social policy’ without specifically mentioning labour issues or specific tools to help them manage labour-related risks.”¹⁰⁹² The report’s summary of interviews with 13 of the banks identified several obstacles to their taking account of labor considerations in their investment decisions.

Given the seeming “low-profile” of labor issues, it has been suggested that an EPFI needs to “list labour rights as a distinct issue in its environmental and social policy, and commit adequate resources to implement the policy in their risk management, including developing systems and tools, providing staff with adequate training, and instituting a system for reporting on labour risks.”¹⁰⁹³ In view of the lack of capacity effectively to grapple with those issues, it has been proposed that the ILO take up a more active role in relation to EPFIs and DFIs.¹⁰⁹⁴ More particularly, it “could help contribute to a better understanding of workers’ rights among financial institutions by providing training and support to lending officers and lawyers drafting covenants; and providing more detailed technical support to social specialists. It could also help to boost the capacity of national experts dealing with labour issues.”¹⁰⁹⁵ The Better Work program, commenced, discussed briefly below, is such an initiative involving a partnership between the ILO and the IFC. However, we are unaware of a similar one involving the EP Association and EPFIs. Again (as discussed below) more involvement of unions with EPFIs similar to that of their work with the IFC could well be productive. Indeed, a number of years ago it was reported that the “EPFI group...[wa]s...discussing ways to strengthen their capacity on labour issues, including possibly establishing a labour working group within the EPFIs” but we do not know whether in fact it was.¹⁰⁹⁶ Although it was also suggested that “watchdog” NGOs might also have a valuable role to play it is not clear as to how focused they are on labor matters and even then, how well equipped they are to press them.¹⁰⁹⁷

International Finance Corporation (IFC)

With regard to the PS2 as such, the primary issues largely do not appear to be with the standards as such. For example, the World Bank safeguard policies (similar to but not the same as the IFC PS) have been the subject of an ongoing, critical review.¹⁰⁹⁸ According to a summary of feedback from extensive consultations last year on enhancing such policies, “[t]he IFC[']s Performance Standard Number 2, in general, is a good model when it comes to labor. It calls for respecting...the ILO fundamental conventions”¹⁰⁹⁹

More specifically, the summary of an expert focus group meeting on labor and occupational health and safety stated that “[t]he IFC PS2 is adaptable and covers crucial areas beyond the ILO core labor standards, including some issues of occupational health and safety and right to information for employees.”¹¹⁰⁰ (This summary was not to say that the PS2 were thought to be without flaws.¹¹⁰¹) Again, “[p]articipants argued that a World Bank labor safeguard should be similar to PS2 as labor risks can become project risk if they are not addressed. Such risk can result in strikes, deaths, shutdowns, exploitative labor practices, and reputational risk for the World Bank.”¹¹⁰² This trade union support for PS2 may reflect IFC outreach and engagement of unions in the formulation of the standard and follow-on work detailing what its requirements entail.¹¹⁰³

In its 2013 annual report, the CAO, based on its labor appraisals – and echoing points raised in the previous section – suggested that “PS2 poses particular challenges that differ somewhat from those encountered in other environmental and social work.”¹¹⁰⁴ Those challenges led it to “question[] whether IFC policies, procedures, and staffing structures provide a robust framework for the advancement of PS2 objectives with its clients.”¹¹⁰⁵ Among other things, it found that the IFC “generally lacks deep experience with regard to labor issues and lacks appropriate frameworks for categorizing PS2 risk” (which could be an artifact of the relative newness of the labor standards).¹¹⁰⁶ In its recent briefing of the IFC Committee on Development Effectiveness in light of, among other things, the challenge of labor issues, the IFC stated it would make “[g]reater use of external experts on appraisal and supervision”; provide “[i]nternal capacity training (labor training for CES specialists, regional focal points)”; provide “[n]ew good practice notes for staff and clients (e.g., employee grievance mechanisms, supply chains, contractor

management, child labor monitoring tool, etc.); and “increase[] engagement with Global unions and established mechanism[s] for communication of union concerns.”¹¹⁰⁷ Note in this regard, although labor issues (as others) in terms of their associated risks or impacts would ultimately be reflected in project categorization, we have come across only one specific reference to that (in the context of the FMO).¹¹⁰⁸ Note also that in a briefing to the IFC Board, senior staff acknowledged that “[l]abor issues are complex and often intersect with other contextual risks.”¹¹⁰⁹ In turn, “[w]eak implementation of national laws [might] present compliance challenges (e.g. freedom of association and collective bargaining).”¹¹¹⁰

There are other issues highlighted above which relate to possible tensions and perhaps tradeoffs between addressing labor issues (among others) and achieving development and “business sustainability goals.” For example, a leading union specialist on these matters has taken note of conflicts between the “[p]ro-labour standards approach of PS 2” and “high-profile [World Bank] publications, notably *Doing Business*, which gives top marks to egregious violators of [Core Labor Standards].”¹¹¹¹ Another concern, at least at the time and arguably one which has yet to be adequately addressed was the failure to “[r]equire reports from financial intermediaries on PS compliance (or develop specific PS for FIs’ compliance, as [the] EBRD has).”¹¹¹²

The CAO identified other challenges for both the IFC and its clients. They included “defining appropriate engagement with workers and their representatives, including unions; and a tendency to rely overly on employer-reported information in relation to PS2 compliance.”¹¹¹³ The latter comments jibed with a global trade union assessment. Among other things that assessment remarked on the “[l]imited access to information about investments” as a “serious impediment.”¹¹¹⁴ That is, because the “IFC posts notices about investments thirty days before the project goes to IFC’s board for approval (sixty days in advance for high-risk projects),” this scheduling “gives unions little time to learn about newly proposed investments that may be problematic, conduct an investigation and report to IFC in the early stages of the loan preparation during which the precise loan conditions are negotiated.”¹¹¹⁵ Moreover, there was a need for union input at an earlier stage, that is, as part of the IFC’s due diligence, it had to “more thoroughly assess risks that potential clients are not in compliance with PS2” and that assessment “should include consultation with relevant trade union organizations.”¹¹¹⁶ The International Trade Union Confederation (ITUC) has also remarked on the fact that “IFC relies largely on self-reporting by client companies rather than monitoring by its staff” and that investments in financial intermediaries “fall outside of the scope of direct supervision by IFC, since it does not monitor the application of the Performance Standards in the end-projects funded through financial intermediaries.”¹¹¹⁷ As a consequence, “trade unions or other civil society organizations play a vital role as the only independent source of information able to verify whether firms do indeed comply with PS2.”¹¹¹⁸ The difficulty, though, is that “many IFC investments are in countries where independent trade unions are severely restricted or even illegal. In these circumstances it is impossible for organizations to play the independent monitoring role.”¹¹¹⁹ In addition, “[e]ven in countries where unions face no such restrictions, they often lack the human or financial resources to engage in this kind of monitoring.”¹¹²⁰

In addition, the CAO noted that the labor cases which have come to it “raise[d] questions about the need for more robust social dialogue procedures or company grievance mechanisms to address workplace issues as they arise.”¹¹²¹ The CAO itself faced “challenges moving forward center[ing] around the types of labor grievances that can reasonably be addressed under CAO’s mandate, especially complaints regarding human resource issues and company-wide employment practices as they relate to domestic legislation versus the international standard of PS2.”¹¹²² In this connection the global trade union assessment stressed that “[g]rievance mechanisms need to be in place to make this safeguard efficient.”¹¹²³

TEXT BOX 6. CASE STUDY OF APPLICATION OF IFC PS2 TO TOLL ROAD IN INDIA

The internationally renowned ABC, an EP bank, invested 30 Mio US\$ in a 120 km toll road project in Southern India XYZ road Ltd. (XYZ). ABC received an XYZ commissioned in-depth E&S impact assessment study (ESIA). The assessment was particularly strong as far as involvement of local communities was concerned. ABC approved the report along with the necessary action and management plans and disbursed the loan.

Soon after construction commenced labor issues arose. More than 80% of the workforce was not directly employed by XYZ but among others through a subcontractor (123 Ltd.). The subcontractor was hiring migrant workers and paying them below minimum wage (that is, minimum wage minus contractor commission), if at all. These migrant workers were aware that their fellow direct XYZ workers earned almost twice as much as they did for the same kind of work and also received a series of employment benefits. As a result the migrant workers started to sabotage the construction work, first working much slower than planned, then engaging in a series of smaller strikes, and finally, stealing and selling of construction equipment. As a result, not only was the project delayed by 3 months (resulting into 300,000 US\$ penalty) but also into a considerable sum of equipment needed to be replaced (>20,000 US\$).

The delays caused by these actions required XYZ to hire even more staff through the same subcontractors as well as a costly security service to stop the theft. It took almost 9 months before the underlying problems were discovered and fully understood by XYZ. It was only after an external social audit – as part of its standard E&S covenants for business in India – which ABC had made as a condition to second disbursement that XYZ finally learned of the shortcomings (through simple worker interviews) and the changes needed, e.g., changing of sub-contractor, proper contracts with subcontractors, grievance mechanism for all workers, monitoring of subcontractors). The audit was timely, because XYZ may not have been in a position to pay further penalties when violations of which it was unaware were uncovered.

Failure to establish and foster a sound worker-management relationship can undermine worker commitment and retention, and can jeopardize a project. Conversely, through a constructive worker-management relationship, and by treating the workers fairly clients may create tangible benefits, such as enhancement of the efficiency and productivity of their operations.

Currently a keyword search of “India” and “social issues” in the “Reprisk” case study database” yields one case every 3 days on average. Many of these cases document an increasing power and self-confidence of project stakeholders in particular neighboring communities or workers.^b It is likely that this trend will increase, which suggests that a proper assessment and management of community/staff issues will become a key factor for business success.

^a Adapted from a case study (based on actual facts and events) prepared by *Innovativkonzept Ltd.*, a Germany based consultancy company that provides services related to environmental and social risk management – based on the IFC Performance Standards – and which has a particular focus on companies, investment projects, financial institutions, and investment funds in developing countries. <http://www.innovativkonzept.com/>

^b “RepRisk systematically collects and analyzes negative incidents, criticism, and controversies about companies and projects worldwide, and offers information on activities related to human rights violations, poor working conditions, corruption, and environmental destruction.” RepRisk. <http://www.reprisk.com>

The World Bank safeguard review did offer some praise for what it termed the “IFC’s experiment with the labor portal (a dedicated complaint mechanism for unions on issues related to PS2)”

which would help to “ensur[e] that the mechanisms respect basic criteria of transparency and accountability.”¹¹²⁴ The global trade union review had remarked that as a result of trade union concerns about full implementation of its then new Performance Standards, “IFC’s Social and Environmental Development department (CES) agreed to create a simplified multilingual online complaints mechanism.” In turn, the “IFC undertook investigations into many of these instances, requiring a full labour audit in cases of repeated serious incidents of PS2 non-compliance. Where violations were discovered, employers were asked to respond to the complaints and engage in corrective action.”¹¹²⁵ However, in a related trade union presentation it was noted that “[u]nless complaints filed about violations, IFC and EBRD rely on self-reporting by borrowers on applying PS 2 and PR 2; short window – 30 or 60 days – between project publication and loan decision.”¹¹²⁶

Even where there has been opportunity to file complaints, handling of them has not been unproblematic. Based on its review of cases brought to the IFC, the ITUC unions assessment found that “some cases have dragged on and led to unsatisfactory results, especially when employers have been less cooperative, and particularly so in national contexts where violation of workers’ rights is rampant.”¹¹²⁷ There were “some weaknesses in the CES [IFC Environment and Social Development Department] procedures, and some lapses in IFC’s due diligence procedures during project appraisal.”¹¹²⁸ Among the former were “not fully sharing all relevant information with the affected parties, not having clear timelines for corrective actions and overly relying on company information rather than seeking additional input from the complainant.”¹¹²⁹ The issue was not one of the skill and dedication of CES staff, but rather a lack of resources and institutional support.¹¹³⁰ Also, there were issues as to how forcefully the IFC was willing to act to insist on compliance: it was “apparent that the lack of real financial pressure -- that is, making it clear to client companies that PS2 compliance is obligatory and that the failure to comply can lead to loss of IFC financial support -- may have allowed some companies to believe that compliance was voluntary and could be ignored.”¹¹³¹

In part spurred by CAO audits of project implementation as it has related to labor (and other) issues, the IFC recently summarized “lessons learned” which echo a number of the points raised above. Among them were that “[l]abor issues are complex and often intersect with other contextual risks” and that “[w]eak implementation of national laws may present compliance challenges (e.g. freedom of association and collective bargaining).”¹¹³² In turn, it characterized its response as including “[i]nternal capacity building and training (labor training for CES specialists, regional focal points);” “[n]ew good practice notes for staff and clients (e.g. employee grievance mechanisms, supply chains, contractor management, child labor monitoring tool, etc.);” “[g]reater use of external labor experts for project appraisal and supervision”; “[i]ncreased engagement with Global Unions and established mechanism for communication of union concerns”; and [the] “Better Work Program collaboration with ILO.”¹¹³³

The Better Work program (referred to above) is a partnership between the IFC and the ILO which is described as “us[ing] market incentives – the interest of international firms in maintaining their reputation – to help garment-sector stakeholders improve compliance with labour standards, primarily in developing countries.”¹¹³⁴ Better Work programs in various countries “typically combine independent factory assessments with advisory and training services to support practical improvements through workplace cooperation.”¹¹³⁵ Apart from questions as to the program’s efficacy within the particular context of garment supply chains (relating in part to incentives for compliance), it is not clear whether and how such a program would have application to the arguably rather different issues canvassed here.¹¹³⁶

The most detailed description of a DFI approach to labor issues over the project cycle was offered a few years ago by the Senior Environmental & Social Adviser with the Environment and

Sustainability Department at EBRD. First, the EBRD integrated labor issues into the due diligence process, one which was “[r]isk-based” and “iterative”. It involved “risk assessment (country, sector, client record, employment impact); “[c]ollect[ion of] information on client[']s HR and [Occupational Health and Safety (OHS)] management (questionnaires, discussion with HR manager, desk research, site visit, existing studies)” which, in turn, was “[i]ntegrated in [a] third party environmental and social review/audit.”¹¹³⁷ Among the labor issues of which she took note were those involving construction, more particularly, OHS, contractor management, temporary/migrant workers; labor agents; and worker accommodation as issues.¹¹³⁸ With respect to those issues she remarked that project legal documents included the need for compliance with the PRs and the ESAP, provision relating to monitoring, namely, “[c]hange management,” “[c]lient reporting on PR/ESAP implementation,” “[a]ccident/incident notification,” a “periodic third party labour review/audit” in the event of “significant issues”; and “[p]ossibly conditions to disbursement.”¹¹³⁹

With regard to monitoring, she stressed that supervision with respect to “soft” issues was “more difficult than monitoring OHS standards or environmental performance.”¹¹⁴⁰ Relevant indicators of problems were derived from “[w]ritten policies/procedures;” “[s]ocial dialogue, [c]ollective [a]greement;” “[i]nspection/enforcement data;” “[g]rievances;” “[l]abour disputes, court cases;” and in the case of a site visit, “[s]ite visit/audit” and in that connection “[s]tatements from workers, [trade unions], management.”¹¹⁴¹ She emphasized the importance of the “[r]ole of enforcement agencies, [t]rade [u]nions, NGOs, [and the] media.”¹¹⁴²

Clearly such efforts required resources. She described the resources the EBRD was bringing to bear as including six Environmental and Sustainability Department (ESD) social and OHS specialists on staff; “labour expert consultants on retainer”; a ESD gender consultant on retainer and a “new EBRD gender unit”; training for all ESD environmental staff and for banker on labor issues; and “[c]ountry fact sheets, questionnaires, reporting templates, guidance notes for ESD and clients.”¹¹⁴³ At the same time she cautioned that prospects for improvement depended upon the role of “other stakeholders,” that is, “practical outcomes [were] likely to improve considerably with...`effective local enforcement agencies and judicial review processes” and a “Trade Union presence /collective bargaining” which were “largely outside EBRD”s influence.”¹¹⁴⁴

Some interesting work is in progress involving a multi-stakeholder initiative (the steering committee of which includes representatives of the United Steelworkers and the IndustriALL Global Union) to establish an “independently verifiable responsible mining assurance system that improves social and environmental performance.”¹¹⁴⁵ The Initiative has prepared a draft of a “Standard for Responsible Mining” which includes one relating to Fair Labor and Working Conditions (Section 2.1), Occupational Health and Safety (Section 2.2), and Human Rights Due Diligence and Compliance (Section 2.4), among others.¹¹⁴⁶

An Illustrative Case: Pension Fund “Responsible” Investment in Infrastructure (PFZW-PGGM)

Among the pension funds which have committed themselves to an ostensibly “responsible” investment policy in general, and for investment in infrastructure in particular, has been the second largest Dutch pension fund, Stichting Pensioenfondszorg en Welzijn (PFZW) whose members are in the health care and social work sectors. What it does in this (and other) respect(s) is carried out through PGGM N.V. (PGGM) which manages pensions and assets for PFZW and several other Dutch pension plans.¹¹⁴⁷

General nature of commitment to responsible investment

However, it is PFZW which is (ultimately) “responsible for the proper financial implementation of the pension scheme” and as such it states that it has a “social responsibility.” More particularly it asserts that “[r]esponsible investment[] has for many years been an important principle in determining the investment policy[,...]the aim is to achieve a good and responsible return.”¹¹⁴⁸ Specifically, in some of its material it refers to responsible investment as “mean[ing] consciously taking into account the impact of environmental and social factors and good corporate governance in all investment activities.” That policy requires the exclusion of certain kinds of investments, sets criteria for making investments that are otherwise permissible, and mandates engagement with enterprises in which investments have been made.¹¹⁴⁹

As noted, PGGM executes PGZW’s responsible investment policy. According to one description, “PFZW’s responsible investment policy covers all four elements of the UN Global Compact and details how it addresses some of the ten principles in its investment practices. PFZW agrees with PGGM on quantitative targets for the implementation and execution of the responsible investment policies in the Service Level Agreement between PFZW and PGGM every year. These policies cover the Global Compact principles, OECD Corporate Governance principles, ICGN principles and the Principles for Responsible Investment.”¹¹⁵⁰

Responsible investment policy for investment in infrastructure and rationale for it

PGGM invests in infrastructure and there is, correspondingly, a responsible investment policy specifically with reference to it.

The rationale for the policy primarily concerns financial materiality, namely that “ESG factors can have a material impact on the financial performance of the infrastructure investments.”¹¹⁵¹ However, PGGM remarks that “[r]eputational risks for PGGM, our clients and infrastructure assets resulting from ESG factors should also be considered.”¹¹⁵² In certain respects these risks appear to correspond to what PGGM refers to in its categorization of infrastructure investments as business integrity/governance issues. In addition although the categorization of activities is cast in terms of “risk,” PGGM refers at one point to “exert[ing] some influence on how ESG risks and opportunities are managed”¹¹⁵³; at another, to itself as having a “responsibility to capture the value [of] and mitigate the material risks related to ESG factors”¹¹⁵⁴ and later to “perform[ing] an assessment of ESG risks and opportunities”¹¹⁵⁵ PGGM in some measure explicates what it means in this regard, indicating that “where possible,” it would “encourage the executive management of its assets and infrastructure funds” to (1) “identify opportunities for investing in infrastructure assets that can positively contribute to solving societal challenges, such as climate change, loss of biodiversity and social inequity. (Product sustainability)” and (2) “ensure that the invested assets create financial returns which at the same time create societal benefits. (Shared value)”¹¹⁵⁶

Specific criteria for responsible investment in infrastructure

The infrastructure assets in which PGGM invests directly or indirectly must meet several requirements: They must:

- a. “comply with PGGM’s Exclusion Policy and List. (Exclusion)”;
- b. “comply with all applicable environmental and social (such as health, safety, labor) law and regulation. (Legal compliance)”;
- c. “where relevant, assess material environmental and social risks of their operations and implement or work over time towards implementing relevant international best practice standards in their company/asset management to mitigate environmental and social risks with targets and timelines for improvement. This can mean that PGGM may invest in

- infrastructure assets with weak ESG practices as long as ESG shortcomings are addressed and resolved during the investment period. International best practice include[s] among others the IFC Performance Standards. (Voluntary standards)”; and
- d. “where appropriate[, be committed] to work[ing] over time to realize potential value through improving ESG performance and operational efficiency, such as eco-efficiencies. (Process efficiency)”¹¹⁵⁷

PGGM characterizes its Exclusions Policy generally as “set[ting] a clear, ethical framework for its investments.”¹¹⁵⁸ Somewhat more specifically it says that “[t]he objective of the Exclusions Policy is to avoid investments by PGGM Investments on behalf of its clients in entities that are not consistent with its identity and the identity of its clients.”¹¹⁵⁹ Yet more specifically it states that it has “chosen to concentrate on two specific areas: weapons and human rights.”¹¹⁶⁰ By the latter it means “the rights referred to in the United Nations’ (UN) Universal Declaration of Human Rights, and labour rights as specified by the United Nations/International Labour Organisation (ILO).”¹¹⁶¹

Categorization of projects

On paper, the PGGM categorization closely tracks that of the IFC for *projects*. The only differences it (1) uses “high,” “medium” and “low” instead of A, B, and C for the labels; (2) refers to “activities” instead of “projects” and (3) adds an additional consideration (beyond environmental and social impacts), namely “risks for business integrity/governance issues.”¹¹⁶² (Recall that the IFC categorization for financial intermediaries refers to *activities* rather than *projects*.) It seems implicitly to embrace a partial categorization for intermediaries by statement that it “considers infrastructure funds that expect to have >15% of their portfolio companies in high risk sectors (according to the risk categorization for co-investments) as high risk infrastructure funds.”¹¹⁶³ Arguably such funds would correspond to what the IFC would term to be a Category FI-1 financial intermediary.

Practical implementation

Tim van der Weide is responsible for advising on ESG infrastructure issues to the PGGM Infrastructure team, “within a greater ESG team that look[s] after other asset classes and advising the pension fund on its ESG policy.”¹¹⁶⁴ He noted that while the IFC “has a separate policy on business integrity,” PGGM includes it along with environmental and social policies because it “wanted an integrated approach.”¹¹⁶⁵ He was co-writer of the responsible investment policy for infrastructure discussed above.¹¹⁶⁶ According to him, the vast majority of PGGM infrastructure investments are in developed countries so that its experience in applying performance standards in developing countries is quite modest.¹¹⁶⁷ For “risk categorization” PGGM’s basic approach is to “look at the type of project[, for example,] toll road or windpower, where the project is geographically located and in what stage the project is, operational, expanding or under construction.”¹¹⁶⁸ These “three categories...determin[e] the inherent risk in the project and whether more mitigants are needed and more due diligence is required.”¹¹⁶⁹ However, he confirmed that the categorization rests on potential impacts and the extent to which those impacts could be averted or mitigated. Determining whether there is a sufficient expectation that the project sponsor will avert or mitigate those impacts comes later, that is, as part of an assessment of the sponsor[’s] commitment, capacity, resources, etc. to do it comes later. He adds that “[t]here is always an amount of subjectivity towards this, but [for example,] for greenfield projects, reports such as environmental and social impact studies shed light on how much can be mitigated.”¹¹⁷⁰

Van der Weide works with the infrastructure investment teams, providing them with training (and related materials he has prepared, e.g. guidelines which identify sector issues, those peculiar to the asset class, project risks and opportunities, which are the big issues and how they are dealt

with) on how to integrate environment and social risks into decision-making.¹¹⁷¹ With respect to any given proposed project a team will write up a “quicksan” of it, flagging environmental and social risks and ranking it according to the three categories mentioned above.¹¹⁷² The ranking is reviewed by van der Weide. If it is “low risk” he is not further involved. For “medium risk” and “high risk” ones, working with the team, he does an independent assessment.¹¹⁷³ If after his review of the project he deems it to be unacceptable the matter is referred to the Head Investment Committee which makes a decision as to how to proceed.

To support van der Weide’s work, a consultant (whom PGGM hires) may be retained for direct project pre-investment due diligence, including the ESIA.¹¹⁷⁴ (By contrast, if the investment is through a financial intermediary,” then van der Weide and “the investment team...do the ESG [due diligence],” so “[n]o consultant is necessary.”¹¹⁷⁵) The consultant “look[s] onsite [to determine] if the project is compliant with relevant IFC performance standards and local law and, [for example,] if stakeholder management is adequate” and “to formulate any improvement points that may be required, including expected costs to improve.”¹¹⁷⁶ However, van de Weide has “only had to hire one a few times” only with respect to a developing country project because “often a lead investor has already done that work.”¹¹⁷⁷ As he describes it, “find[ing] the right consultant” “is a bit word of mouth.”¹¹⁷⁸ He notes that “[t]here are worldwide players like URS [Corporation] and ERM but there are also local consultants with good skills. DFIs use databases with consultants.”¹¹⁷⁹ Post-investment, PGGM “expect[s] the operating company to do the post monitoring. The consultant defines action points which the operating company implements.”¹¹⁸⁰ In the case of a co-investment, PGGM expects the lead investor to “monitor this and engage with the portfolio/operating company to implement these action items.”¹¹⁸¹ PGGM receives quarterly reports from the operators or fund managers it appoints to manage the assets in which they invest.¹¹⁸² These reports “help [PGGM]...understand the extent to which ESG policies are carried out by them and at the project level.”¹¹⁸³ Also, “PGGM investment professionals may [sit on FI advisory boards] and as such they can also be updated on ESG issues.”¹¹⁸⁴ PGGM discusses each investment “at least annually.”¹¹⁸⁵

LESSONS TO BE LEARNED

In the foregoing text we have reviewed and striven to reflect both key aspects of the experience of the IFC (and related entities like the CAO and IEG) and certain other DFIs and Equator Principles signatories (and a major pension fund) which have made a commitment to application of environmental and social standards to their investments, particularly those investments in what is typically viewed as infrastructure and as well as critical assessments of that experience, among which are those of academics, government agencies, and NGOs and others who have spoken to it ostensibly in the name or service of various stakeholders. We believe that those materials offer certain common or general lessons which can usefully inform whether and how pension funds might embrace a similar commitment. We canvas some important ones in this section.¹¹⁸⁶

Pension fund leaders need clearly to articulate – for themselves, plan participants, and others who believe or may come to believe they have stake or interest in what the fund does in this connection (among other things) – why they made a commitment to the application of environmental and social standards to their investments.

The explanation might well draw on one or another of the rationales we have discussed above. Such a statement is essential to guiding how funds go about fulfilling the commitment. It is critical to informing pension fund staff as to the nature of the obligation the organization has assumed and to engaging and motivating them to play the roles defined for them in fulfilling it. It is vital to ensuring, in the first instance, plan members’ understanding of why and how meeting that

responsibility is at minimum consistent with keeping pension fund promises and might well be in aid of keeping them. More generally it can serve as a basis for an important, ongoing conversation with members about the legitimacy and importance of the goals being pursued – and how – by plan fiduciaries in participants' name. Roughly speaking, it meets a different but relevant concern on the part of others thought to have an interest or stake in the outcome of the fund's actions. And quite importantly, it sends a clear message to those outside the organization who offer investment-related services that those services must be delivered in ways consistent with the letter and spirit of the stated priorities. In preparing that explanation pension fund leaders can draw upon ones already formulated by some pension funds as well as the other kinds of investors discussed here (though alert, among other things, to the perhaps different goals, the permissible means for achieving those goals, legal and other constraints, etc.). Insofar as any justification focuses on the materiality of meeting environmental and social requirements to the financial risk and reward of investments the foregoing text cites studies, reports, etc. concerning the outcomes from investments which are at minimum suggestive and in some cases, strongly supportive in those terms.

A pension fund which makes such a commitment must choose a particular set of standards which express with sufficient particularity the nature and extent of the obligation it has assumed. In the first instance, the standards should be the same or very closely aligned with standards of institutions which have a long and in some measure a successful track record of meeting such requirements.

As we have seen, the nature of the commitment may be variously understood in general terms and its fulfillment entails careful attention to a multiplicity of considerations which, in turn, may require specific expertise and resources. So clearly describing what the commitment means in principle and in action, will enable the fund to be clear about what it will be required to do in practical terms and, in turn, what it will ask or demand of others who have taken on a role in its implementation. Given the wealth of others' experience, the likely limited familiarity of pension funds with the subject matter, and the modest resources they might be able to bring to bear on the task, their starting from scratch to formulate a standard would be unwise. Rather, a better course would be to adopt a widely used and broadly accepted one. Doing so would allow a pension fund to initially devote far more of its energies to the task organizing itself in a way commensurate with meeting the commitment while having confidence that the standard it has chosen by which to characterize that commitment has sufficient legitimacy and acceptance.

Given the widespread use of the IFC PS – by the IFC, certain other DFIs, and EP signatories – it might be the best one from which to start. This approach does not mean that the PS – or for that matter any other particular available standard which a fund might choose – is unproblematic or would be uncontested. Indeed, that is unlikely as a general matter and in the preceding pages we have canvassed certain criticisms of the IFC PS. Certainly, whatever standard a fund might adopt, it should be aware of the critiques to which that standard has been subject. Insofar as one or another particular aspect or feature of it might appear to be challenging for a fund it could consider modifying it to address the problem insofar as to what changes would entail in implementation on the part of project sponsors, FIs, and others which would be practicable to effect. Of course, any effort to do so might well meet concerns or objections on the part of those parties which may have already committed considerable time, effort, and resources to an existing and especially a frequently used standard such as the IFC PS. (To be sure, as suggested above, in certain respects standards are of necessity broadly stated. Thus certain modest changes or modifications of expected practice would not require any alternation in the literal language of the standard and so perhaps might be somewhat easier to accept.) Moreover, the nature of a fund's investment might give it relatively little opportunity or leverage to spur such relevant parties to accept it, for

example, in cases other than direct investment. Even in the latter circumstance, insofar as it involves a co-investment which represents a modest percentage of the monies provided, a fund's influence might prove quite limited. Perhaps the prospects for success would be greater were pension funds to enter into a joint or collaborative effort in which the members would from the outset agree upon the standard to be applied to future investments.

Over the longer term, as suggested below, pension funds should assess the appropriateness and efficacy of the standard in light of their initial experience with it and take action themselves on an individual (and perhaps on a collaborative basis) and press others to alter the standard and how it is put into practice.

Because standards are just that – relatively general prescriptions as to goals and the means for achieving them – it is important for pension funds to define more in greater detail what exactly is expected of those individuals who, acting on its behalf, are ultimately responsible for the outcomes of the fund's investments being in accord with those standards.

The IFC's Guidance Notes, related industry specific guidelines, and other documents prepared by the IFC or others have been the means by which the IFC has sought to explicate what those standards require in practice. Recall, though, that while the EPFIs have by virtue of their adherence to the EP adopted the IFC PS, they have not "formally adopt[ed] the Guidance Notes," treating them only as "useful points of reference when seeking further guidance on or interpreting the Performance Standards."¹¹⁸⁷ This lack of adoption may simply be a reflection of EPFIs' desire not to be cabined in as to how they might best or most appropriately implement the IFC PS. It may arise from EPFIs having had different experience (pre- or post-EP) with the problems or challenges associated with putting standards like the PS into effect or having reached a different judgment as to the efficacy of one or another approach. With respect to the latter point, that judgment may involve the extent to which or manner in which trade-offs are made between achieving PS-related/type goals and attaining other, for example, financial goals. Those tradeoffs might be viewed differently given how different investors view their missions, the legal constraints under which they operate, etc.

Again, the above is not to say that the Guidance Notes (or those other documents) are the best or most appropriate way to implement the accepted standards. But they offer a valuable resource to ensure, at the outset, that they have been given meaning in application. Insofar as pension funds individually or collectively over the longer term – based on their own, increasing experience or awareness of that of others – with the application of the standards may be in a position to make some critical assessments of prescriptions provide by the Guidance Notes. If at any stage pension funds flag what seems to be a serious inadequacy in them, they can, at minimum, pose to project sponsors, FIs, and others the question of whether they agree, if not, why, and if so, what they would do in response, and why.

(Perhaps as an action implicit in the first point) trustees as a Board and at least the chief executive officer should officially and clearly communicate to staff, plan members, and a broader public, their personal commitment to the standard on behalf of the fund.

Adoption of standards (and means for implementing them) is important in and of itself. However, a high profile and clear statement of this sort from the top leadership sends a strong message to all fund staff as to the extent of leaders' expectations in terms of the nature and significance of the commitment having been made and especially to staff who will have a direct and not insubstantial role in helping to fulfill it. It emphasizes to plan members in a direct and transparent

way that leaders consider this policy – which perhaps might at the time be a novel one – to be important and that they stand behind it; and correspondingly, makes evident to those who might be retained to make and manage investments in accord with the standards that they can expect serious and sustained scrutiny of what they do in those terms.

Ideally, prior to the issuance of those commitments and statements, there should to the greatest extent practicable be a process which extends beyond the board of trustees and senior staff to other staff and in some measure to plan participants to inform them that such a policy is being considered, why it is important to do so, and perhaps engaging them with respect to that.

Ideally, the making of the commitment and articulation of it in the statement are the outcome of a broader effort to gain the attention and involvement of other staff that will strengthen their understanding of its nature and the rationales for it. That effort may well be critical in helping to prepare them for such different roles and responsibilities as they might have, occasioned by the need meaningfully to fulfill the commitment. As we have seen in the characterization of the experience of the IFC (and in some measure that of other DFIs) and EPFIs, their organizations were, not surprisingly, characterized by a culture, attitudes and expectations, and practice (and perhaps related incentives) for staff on an individual basis and in terms of relationships with one another individually as well as members of organizational units. All those factors were shaped (in certain cases profoundly so) by very important but traditional or conventional concerns about financial risk and reward. And, as we have seen, change in that regard has not necessarily come easy. For pension funds, too, what was been expected of and by staff has been quite understandably shaped by a legal, political, ideological, industry, and other narratives which have defined fiduciary duty as it concerns investment-related decisions exclusively or almost exclusively in terms of financial risk and reward. Indeed, even though one important rationale for adoption of environmental and social standards has been the materiality of adherence to them to desired financial outcomes conversation even in those terms may prove a challenge. Moreover, and again, not surprisingly, although the landscape is changing, it would seem likely that senior investment staff have moved to their positions with funds from investment-related roles elsewhere for which tasks were defined by the conventional calculus. To the extent that the foregoing is true it suggests that engagement of such staff in connection with the formulation and adoption of the policy will educate them to the need and reasons for doing so and spur “buy-in” during its implementation.

Quite obviously, plan members have a critical stake in what fund policies are and how they are implemented. It is likely that the vast majority may not have the time or occasion to learn about them except perhaps being attentive to reported financial returns. However, given the noted prevailing conventional narrative as to fiduciary duty it is more likely that members will be alert to – and in the case of public sector funds be alerted to (perhaps with alarm) – a policy which some might argue is at variance with that narrative. Insofar as pension fund leaders believe that a commitment to meet environmental and social standards is the appropriate/necessary thing to do, they must necessarily be in a position to articulate and communicate (as suggested above) to plan members (among others) the reasons for it. Leaders are in a much better position to argue in support of it if they have in some meaningful manner engaged plan members “along the way” to adopting a standard.

In addition, although this approach is likely contested terrain, a serious conversation is required about whether and how plan member voices should be heard with regard to fund policy choices (not only of the sort discussed here). In some measure, insofar as plan members directly or indirectly play a role in choosing plan trustees they have a general form of voice with respect to

how pension funds are managed. So, at minimum, their having as well certain defined opportunities a “forum” in which to express their views on particular policies is hardly without justification. (That there might be a chance to express their views does not need to imply that leaders are necessarily obliged to adopt those views; rather, perhaps, only to be aware of and give serious attention to them.) To the extent that the issue is a pertinent one, then the suggested engagement and education process followed prior to adoption of any commitment to environmental and social standards is commensurate with it.

The last point implicitly emphasizes the critical need to specify the particular staff members required to implement the standard in terms not only of their particular roles and responsibilities in doing so but also of their relationships with other staff members.

The kind of staff required and their roles, responsibilities, and authority must, first and foremost be those staff appropriate to the carrying out of the tasks required successfully to meet the commitment the fund has made. Precisely what they are will, of course, depend upon the interplay of many things, among them the overall size and composition of the fund’s investment portfolio (and the investment policy which heretofore informed construction of that portfolio), perhaps especially the extent which the fund has invested in other than publicly traded securities; the degree to which investments have or will be made directly or indirectly by or through financial intermediaries; the amount and kind of resources it can bring to bear in light of legal, budgetary, and other constraints; the scope and character of the commitments the fund has otherwise made with respect to environmental and social standards; the modalities for investment it already employs for which environmental and social considerations have already been deemed relevant; and the particular means by which the fund has made and might make investments in infrastructure.

As a pre-requisite to the foregoing, and especially if the statement of commitment is made at a relatively general level, a policy type document needs to be prepared (and provision made for updating it). Very roughly speaking it would be the analogue of the IFC’s “Policy on Environmental and Social Sustainability” but of a character more suitable for pensions funds.¹¹⁸⁸ As such, it would need to provide at least a further articulation of the nature of the commitment. In the case of a pension fund the emphasis would be more on what it states it will actually do to meet its obligation. Insofar as the fund is likely to align itself with a pre-existing standard, such as the IFC PS, that standard’s explication of what will be required of those enterprises in which the fund might invest might well suffice for most purposes. (Certainly, though, to the extent that the fund is in a position to settle upon and has chosen something different from a widely embraced standard an explanation of the nature of and reasons for any differences would be essential.) However, in this connection, an explication of the fund’s understanding of the meaning and import of critical terms and concepts like those terms used in the PS would be important especially insofar as they might not be familiar to many if not most (or perhaps even all) staff. While the document will have significance for other than staff in this context it is probably most important in enabling staff to gain a fuller or deeper appreciation in general of what the organization needs to accomplish in these terms (and why) and begin to make a closer connection between that and the particular role each of them plays within the organization in that regard.

Next, as a concomitant of the foregoing the fund requires something along the lines of the IFC “Environmental and Social Review Procedures Manual.”¹¹⁸⁹ That is, there needs to be a specification of the roles, responsibilities, and authority of staff members with regard to how standards-related issues must be addressed at each stage of the investment cycle – identification of prospective investments, initial review, due diligence, final investment review and decision, such post-investment supervision and/or monitoring as is relevant/appropriate/possible given the

nature of the investment, as well as other possible investment-specific issues, e.g., disclosure. Clearly, in some measure, there will be an emphasis on the tasks of those individuals whose primary roles are concerned with or targeted to those issues (to which we will refer, as above, to “ESRM staff”). (Note that presumably the fund would have procedures and practices for systematic review of the efficacy of its investment-related activities overall and segments thereof, for example, those concerning ESRM staff, so they might at least be referenced in the document being discussed here.) But, of course, standards-related issues are only some among a wide range of others which must be dealt with in the course of considering and acting with respect to any investment. And, in turn, of necessity that means settling upon the nature of the relationships between ESRM staff and those others with different and perhaps overlapping and even potentially conflicting roles, responsibilities, and authority. As our discussions of the experience of the IFC and EPFIs suggests, the matters of overlap and potential conflict may be not insubstantial. Clearly, then, the document would, in the procedures and practices it prescribes, incorporate means for successfully addressing them.

For a small fund or one which has a very modest infrastructure investment program or one early on, what has just been described might well seem to be overkill. But certainly insofar as ultimate responsibility for gathering information, analyzing it, and making at least preliminary judgments with respect to standards-related issues must be vested in at least one person, it is critical to map out what, how, and when he or she communicates to others involved in the process with respect to the foregoing. To the extent that a fund has already adopted PS-like standards for investments outside of infrastructure, which is likely, a number of these issues might have already been addressed. That is, it seems highly probable that insofar as a fund will have taken up certain standards-related issues it will have done so with respect to investment in publicly traded securities. Although certain aspects of addressing them in that context might be similar to those matters posed within the frame of this paper, the latter are likely to entail rather more detailed or complex versions of them. This position is particularly so, given the scale and scope of infrastructure projects and the possibly weightier and more pressing matters which could come to the fore. Moreover, insofar as the focus would be on an investment in a particular infrastructure project or a small group of them (in connection with investment through an intermediary) the attention and scrutiny demanded could be much higher.

In all events, regardless of precisely how the commitment is to be fulfilled, the locus of ultimate responsibility for ensuring that needs to be with the person who is in charge of overall management of the fund’s investment program, e.g., a Chief Investment Officer (or the senior staff person who would ultimately be accountable for success in these terms.) Clearly some minimum staffing is necessary to provide the knowledge, skills, and experience needed effectively to attend to what for the fund might be novel environmental and social considerations. At a very early stage and/or for funds with relatively small amounts of assets under management that might take the form of just an advisor or consultant working with the CIO. Perhaps it might include a staff person among whose duties would be ones relating to environmental and social considerations.

Even then, prevailing practice on the part of EPFIs, the IFC, and, it would appear, some other DFIs would seem to suggest that immediate responsibility for ensuring that those considerations are properly addressed in connection with a particular kind or class of investments should be placed on staff otherwise assigned the task of making investments and managing the relationships to which they give rise. (They are the rough equivalent of what have been termed project financiers.) Those individuals would, at minimum, look for support to the above-mentioned advisors or consultants and/or other staff with duties, in whole or part, relating to environmental and social-related considerations. Where the size of the investment and/or the anticipated

significance of environmental and social considerations associated with it is large, the infrastructure investment asset manager might be required to consult with the advisors, consultants, or designated staff people, perhaps obtain a recommendation from them to the appropriate course of action, and perhaps even secure some measure of concurrence in his or her proposed a course of action.

Beyond that there need to be protocols to be followed in the event of differences or conflicts between ESRM staff and project financiers or cases of highly uncertain situations or unusual circumstances, for example ones posing serious reputational risk. That protocol would, for example, specify who among the highest senior staff needs to be consulted (and the sign-off of which required) and on the basis of which information prepared and presented or supplied by whom. (These individuals could senior investment staff though others might be involved, for example, those staff with a defined role with respect to risk management across the portfolio and insofar as a fund might have such a person, one concerned with public relations.) That protocol might well extend to the pension fund board itself.

Of course, insofar as investments are made by a pension fund through a financial intermediary, e.g., infrastructure fund, the issues raised here are most relevant to the organization of governance and management of the fund. Arguably, insofar as an investment made by such an infrastructure fund would occasion the need for such extraordinary or exceptional review that would warrant a pension fund investor being alerted to that, preferably on a current rather than retrospective basis. That, in turn, would presumably trigger some special procedure for review and action, if any, by the pension fund.

The definition of roles and responsibilities in turn requires training commensurate with them.

Certainly, in connection with communicating to all staff a fund's commitments there could be educational materials provided to and perhaps even (an) educational session(s) organized for them to enhance/solidify/ground their understanding of the basic nature and importance (and import) of that commitment.¹¹⁹⁰ However, clearly, those individuals with specific roles and responsibilities need to be trained with respect to substantive standards to which they relate and how they should or might be applied. That would, of course, be in part a matter of gaining knowledge of key concepts and terminology and the essential operational content of the policies and procedures by which compliance with the adopted standards is to be achieved. However, the preceding discussion has suggested that there may be considerable room for interpretation insofar as standards and requirements are broadly stated and that making certain important decisions is not a tick-the-box exercise. Rather, it likely entails judgments which, though qualitative, must be very thoughtfully arrived at. The training must reflect that reality and offer guidance as to what responsible practice in those terms entails. It must also make people aware of the internal staff and material resources (and possible external resources) which are available to them to fulfill their roles and meet their responsibilities and how those resources can or should be accessed and effectively used.

Given the nature of infrastructure-related projects and the challenges posed by meeting a commitment to abide by environmental and social standards as detailed in the preceding pages, it seems pretty clear that training needs in some measure to be ongoing. In part this continuity is needed because there is a significant learning curve with respect to the issues posed. Also, that learning curve is likely to shift with time as standards are refined or enhanced and experience accumulates at the individual, organization, and field level and, in turn, occasions reassessment and reevaluation of practices.

In the first instance, the fund might look to such training look from the noted advisors or consultants and/or dedicated staff and where practicable, people from other pension funds, EPFIs, DFIs, or other institutions, including private non-profit or commercial providers with hands-on experience with the kinds of issues being addressed.

The specification of roles and responsibilities and the provision of training appropriate to them must be linked to establishment of an organizational culture which supports and encourages the desired action, and within which properly chosen incentives might be useful.

Although it may be difficult to gauge and challenging to create an organizational culture and engender a “state of mind” among staff with regard to the appropriate attentiveness to and action with respect to sustainability issues, successful efforts in that regard are important.¹¹⁹¹ Such a culture lies outside of what is formally on paper and formal pronouncements. But it may be critical as a general matter insofar as it encourages people to go beyond what are often limited formulaic prescriptions as to what they are to do and act creatively and proactively in “getting the job done” “right”. It may be especially useful in this context where there can be much play for interpretation and there is a need to exercise judgment in making decisions and engaging in actions in the spirit (properly understood) of the IFC PS or similar standards. That culture will be an artifact, among other things, of how staff experience the process by which standards are adopted, how the means for putting them into practice are formulated, and the timing and manner of their being trained to the task, so to say.

As the discussion above suggests, though, incentives have their place. In certain respects they may serve as a valuable tool for motivating staff in the right way and may work in tandem with the organizational culture. There may already be ones in place which relate to desired conventional results in terms of financial reward and risk. If so, they need to be rethought and reconfigured/realigned in light of the other kinds of outcomes which are the subject of this paper. And perhaps there could be ones fashioned which specifically relate to the achievement of sustainability goals. At the same time certain kinds of incentives might be in tension with the sought-for organizational culture, perhaps where they are excessively linked to individual success as contrasted with accomplishment of the organizational subunit or overall organization or rely excessively on financial rewards/penalties rather than ones which involve status, respect, recognition, etc. In addition, whatever the nature and extent of incentives precautions need to be taken to determine whether they have been abused.¹¹⁹²

We are not in a position here to offer a specific prescription in these terms. But we strongly encourage pension fund carefully to sort through these issues as they concern their own organizations and be attentive to them as they review the organizations of financial intermediaries through whom they might consider investing.¹¹⁹³

Beyond these somewhat general “lessons,” although there are a good number of others relating to particular aspects of the project cycle which we might address we focus on some which we believe loom larger.

Projects should be categorized in ways which bear upon their practical import for actions taken at different stages of the project cycle

We have seen that categorization has at least two important aspects. First, it reflects a particular understanding of the character and impact of projects in environmental and social terms which it is the goal of the IFC PS and similar standards to address. Second it typically is the basis upon

which actions are required of a project sponsor – or a FI and its subproject sponsors – and of investors in or through them, such as a pension funds, at various stages of the project cycle. Doing categorization “right” looms relatively large especially insofar as pension funds invest through intermediaries. In that context it is a particularly useful tool by which a pension fund can first critically assess whether those intermediaries choose subprojects in a way commensurate with the obligation they have assumed to meet environmental and social performance standards.

Key issues with regard to categorization include the following:

- The aspects of projects upon which the categorization is based;
- The available knowledge of those aspects upon which the categorization is made in those terms;
- Provisions for/what might occasion a reassessment of the categorization; and
- The actions on the part of the project sponsor/FI/subproject sponsor and investor which may be/are triggered by the categorization.

Obviously, a prime focus must be on *adverse social and environmental impacts*, among the relevant aspects of which are:

1. The *number and seriousness* of each of them standing alone;
2. The *likelihood* of their occurrence;
3. The *seriousness of them in combination*, should they occur;
4. Insofar as their occurrence would *aggravate the adverse effect of previously occurring impacts*, the seriousness of their combined effect, should they occur; and
5. The extent to which the occurrence of those impacts can be *averted or mitigated*.

Note that aspect 5 presupposes an understanding or beliefs about the means potentially available by which to avert or mitigate adverse impacts.

Where, as in the case of the IFC PS, impacts cannot be fully mitigated, it might be deemed acceptable for there to be compensation to relevant affected stakeholders in lieu of remedying certain kinds of residual or remaining impacts. If so, those considerations would be considered under 5. above.

However, a different but related set of issues or concerns include:

6. *The capacity of the project sponsor to avert or to mitigate* some or all of the adverse impacts (and perhaps as well the ability of the project sponsor to develop that capacity in a timely fashion);
7. *In light of the foregoing, the likelihood that the sponsor of the project can, in fact, avert or mitigate* any or all of the adverse impacts.

All of the foregoing pertains to the import of the project for the lives and livelihoods of those individuals or stakeholders who might otherwise be adversely affected by it in environmental and social terms. This position is quite understandable given the fact that the categorization in question is informed by the application of environmental and social standards. However, there are still other considerations, namely

8. *The financial and/or other expense and/or consequences, e.g., reputational ones, for the project sponsor/FI/subproject sponsor in striving to and succeeding (or failing) to avert or mitigate (or perhaps compensate for) any or all of the adverse impacts; and for the pension fund as a direct or indirect investor in the project*

In the light of the foregoing, we suggest the following:

With respect to direct investments

First, whatever the mode of categorization of projects for the purpose of direct investment, the same mode should be applied to categorization of the subprojects of an FI in or through which an investment is made.

As suggested above, appropriate categorization and their application are central to the task of meeting standards. FIs are the instrument through or by which the commitment of investors that the projects which they ultimately fund meet environmental and social standards. If so, then what FIs do with respect to categorization must be closely aligned with what investors might otherwise do if they were to invest directly.

Second, an initial categorization should be based at most only on aspects 1 through 5.

Those aspects define the goals for what ultimately needs to be achieved to ensure that the standards are met. They also broadly delineate the full extent of what a project/subproject sponsor must do to attain those goals (by implicit reference to a project/subproject sponsor which has not yet taken any steps to do so.) Further, it is consistent with our more general view that judgments about categorization should err on the “conservative side.” That is, in the absence of additional information to the contrary, something akin to a worst case scenario should be assumed in terms of the impacts which might be caused and the probability of their occurrence. Why? Arguably, the burden should be on the project/subproject sponsor to make the case as to the project’s acceptability in relevant environmental and social (as well as other) terms. If the information it offers at any stage is not sufficient to make that case, then the importance of the environmental and social (as well as other) outcomes being achieved in practice warrants a method of categorization which spurs the sponsor of the project/subproject to provide the needed information – and take needed action commensurate with it. Such a method correspondingly encourages the investor itself to scrutinize that much more critically such information about the project as is offered. Subsequent stages in the project cycle are taken up with what the fund and project sponsor/FI must learn about and, in turn, do in aid of ensuring that the project ultimately reaches the specified goal.

The preceding paragraph raises certain issues with respect to aspect 5. The ultimate objective is for projects to be chosen and executed so that certain kinds of environmental and social harms do not result. Thus, projects must be chosen alert not only to just the harms they might wreak but also to which of those harms, if any, might still result even *if* project/subproject sponsors successfully take all of the steps which might reasonably be required of them to prevent their occurrence. In effect, this approach combines a “best case” with the “worst” case analysis. But this method makes sense. On one hand, it communicates that the decision-making process should be alert to the worst case scenario for the environmental and social harms which proposed projects might be reasonably thought possible to cause. On the other, it sends a message about being open to consideration of those projects which it might reasonably be believed could be executed in a way which would cause only harms within what is acceptable under the standards. The task after initial categorization is to critically assess – and if need be, to reassess – both judgments.

Third, the approach to categorization should be fine textured enough to make distinctions among the range of overall projects sufficiently to guide conclusions as to which projects/subprojects warrant investment and those actions which are required to ensure compliance with the standards.

Tripartite project categorizations of the sort used by the IFC, EPFIs, and generally speaking, other DFIs have their virtues. For example, one is simplicity. It can rather starkly distinguish among potentially highly problematic projects at one end, others rather unlikely to be problematic even to a modest degree, and (sort of) everything else in-between. With regard to categorization's signaling effect it sends a clear and strong message with regard to the first and third categories: both funds and sponsors need to be very much concerned with whether and how the former proceed and need not lose too much sleep over how the latter might play out (in environmental and social terms). The implications of the middle category are much more blurry and uncertain.

In essence, the tripartite project categorization tell us both very much and very little. First, the categorization is essentially an all or nothing proposition. The minimal or non-existent requirements for Category C projects are obvious, since their impacts are by definition minimal or non-existent. In principle, the distinction between Category A and B projects is significant in terms of the degree or seriousness of the non-trivial impacts associated with each. However, as for the requirements delineated above, they are for the most part the same for Category A and Category B projects. To be sure, as discussed above, in some cases, the requirements for Category A projects apply only "as appropriate" to Category B ones. However, there is no explanation of what "as appropriate" means or when the words apply. The advantage of this essentially "all or nothing" categorization is that it highlights, albeit only in a generalized way, the seriousness of the challenges posed by projects in the "all" category and the corresponding associated requirements and the strength of the EP banks' commitment to their being successfully addressed. The disadvantage is that it offers little insight into the many individually significant and collectively important judgments which have to be made (and the actions based on them which must be taken) which lend practical meaning to project sponsors and funders fulfilling their commitments. So, for example, even some explanation of what "as appropriate" means and its importance would offer a bit of insight into how the various requirements might be applied in different situations involving fewer/more and/or greater/lesser serious impacts.

In sum, the categorizations fail to capture the diversity of projects and their impacts and the corresponding wide range of actions which they might entail. Awareness of that diversity and range is critical. It communicates in a more meaningful way to potentially affected parties and the larger community the nature of the concerns embodied in the standards and the commitment to addressing them. Also, if tied to a richer description of how the task of ensuring the standards being met is carried out, it affords a much better understanding of how the standards are being met and greater confidence they will be met. It conveys to project sponsors/subproject sponsors/FIs a more realistic awareness of how proposals for projects will be treated and what will be expected of them should proposals be accepted. In turn for relevant pension fund staff (or FI staff, as the case may be) responsible in different ways for enforcement of the standards it highlights and reinforces the nature and significance of the relationship between what their roles are and what is expected of project sponsors/subproject sponsors/FIs.¹¹⁹⁴

Even assuming the approach suggested above has merit there is very little (if any) publicly available material about the experience of the IFC (or EP banks or likely other DFIs) as to what they do in fact in terms of categorization. For example, recall that it appears that the IFC has a protocol which presumably reflects a matrix of aspects of projects and the account which is taken of them in categorization. But that protocol is not publicly available.¹¹⁹⁵ It may be that in connection with investing through or with the IFC or some other mutually acceptable arrangement, pension funds might gain the needed insights in that regard.

Failing that, there are available lists of the kinds of projects which are illustrative or indicative of the seriousness of their impacts.¹¹⁹⁶ Note that neither the EP nor (we think) any individual EP

banks offer any such list. The EP go only so far as to identify certain potential environmental and social *issues*, an exercise which is not especially useful with respect to the subject under discussion.¹¹⁹⁷ The lists would appear to be based on generic or relatively broad-based characteristics relating to the scale of the project, the industry and/or type of enterprise with which the project is associated, and of the communities and environments which may be placed in the way of certain kinds of harms. Certainly, in the absence of any other specific tool for categorization, a pension fund could use one of these lists or a synthesis of all of them as a means by which to categorize the projects in which they make direct investments or the subprojects in which the FIs through which they invest.¹¹⁹⁸ This approach would then create a situation in which the pension fund would have to ask itself or the intermediary would have to justify to the fund why a project/subproject which otherwise falls within or without the list should be included or excluded and why.

At least with respect to the IFC, it might be thought that some insights as to the protocol could be gleaned from Environmental & Social Review Summaries (ESRSs) described above to which the IFC commits itself to preparing for each project it deems to be in Category A or B. More particularly, recall that an ESRS is supposed to describe “how the E&S aspects of a project were reviewed and the rationale for categorization” and to do so through “a description of the main E&S risks and impacts of the project, and the key measures identified to mitigate those risks and impacts, specifying any actions needed to undertake the project in a manner consistent with the PS and that will be included in the client’s [Environmental and Social] Action Plan (ESAP)].”¹¹⁹⁹ In the abstract one could imagine “reverse-engineering” the ESRSs to ferret out the aspects of projects which underpin the nature and significance of relevant risks and impacts. In some measure doing the same with regard to key measures proposed to deal with those risks and impacts would offer insights with regard to identifying at the categorization stage which harms could *in principle* be averted or sufficiently mitigated; and during the due diligence of subsequent stages, could *actually* be averted or sufficiently mitigated if certain measures are taken. That being said, in practice such reverse-engineering would be modestly productive at best because the ESRSs do not appear to be written using cogent terminology in a consistent way.

Fourth, there needs to be more specific provision for recategorization of projects. Recall that the IFC and others say little or nothing about recategorization.

There is only a generic reference in the Manual to “[c]onfirming or modifying, as necessary, the provisional categorization” during the appraisal stage.¹²⁰⁰ How realistic or sensible the suggested approach to *initial* categorization is in practice depends in some measure upon what is known about a project at the time a proposal for it is received. Clearly, the meaningfulness of a particular judgment as to categorization depends upon what is known about a project (or perhaps better, what of that which is known about a project is taken into account). What is known about a project when it comes to the attention of an investor may vary widely. The project proposal may be submitted at an early stage and hence only a broad gauge or generic information about it may be available. At the other extreme, for one reason or another, an Environment and Social Impact Assessment (ESIA)(or something of an equivalent) may have already been done by the time the proposal is proffered for consideration. Presumably in situations closer to the latter one a more solid understanding as to impacts will be possible and categorization be done meaningfully. In all events, by the time any project/subproject proposal has reached the stage of approval (or not), the kind and quality of information associated with an ESIA (or a rough equivalent thereof) should be considerably greater. Insofar as it is much more detailed or different in relevant ways, it might warrant reevaluation of the project/subproject categorization.¹²⁰¹ Of course, depending upon the content and timing of disclosure of such information to affected parties and the larger public, potentially highly relevant information provided by them as a result.

Fifth, project aspects pertaining to 1 through 5 upon which categorization is based must be appropriately and meaningfully linked to aspects 6 and 7 for the purpose of project appraisal, approval (or not) of proposals, and subsequent supervision and monitoring.

For the purposes of reassessing the *initial* categorization, only that understanding as it concerns aspects 1 through 4 and 5 (in the sense referred to above) are relevant. The information gained with respect to 5 (other than in the sense referred to above) and 6 through 7 goes to the task of gauging the prospects of the project sponsor execution of the project so as to keep the harms within the bounds set by the standards. That with regard to 8 pertains to weighing those prospects against the risks and consequences for the plan sponsor and ultimately the investor of the sponsor's failing to do so. The former task is one which in descriptive terms should be amenable to being organized in a way consonant with the fine-textured characterization of project impacts suggested above. Presumably such Environmental and Social Action Plan (ESAP) (or equivalent), according to PS 1 (or other relevant standard), will necessarily detail "the actions necessary to implement the various sets of mitigation measures or corrective actions to be undertaken." Those actions must be commensurate with, in the case of the IFC, the Social and Environmental Due Diligence Report (SEDDR) for the project.¹²⁰² In other words, the ESAP must canvas and address all of the impact-related issues raised by the SEDDR which are ones which pertain to 1 through 4 and 5 (in the sense described) which are the basis for the categorization of the project. So the terms in which both are presented can and should be tailored in the same way. Arguably, the ESAP is concerned with aspect 5's focus on the means which could be employed to avert or mitigate impacts. In a sense it presupposes that the project sponsor has (or will have) the capability of (and prospect for) effectively employing those means. That pertains to aspects 6 and 7 which, presumably, are addressed in the sponsor's Environmental and Social Management System (ESMS).

Sixth, to the extent possible the fine-textured basis for project categorization should be employed to the extent practicable in framing analysis and decisions with respect to aspect 8.

As discussed above very little is reported or otherwise available about the interplay between (a) IFC (or other investor) judgments as to potential project impacts; the measures, if taken, which would sufficiently avert or mitigate those impacts; and the prospects for project sponsors successfully taking those measures and (b) judgments as to the acceptability of a project in other terms, especially as they concern the financial and/or other expense and/or consequences of (a). Understanding that interplay is no mean task; neither are fashioning tools or formulating methods to systematically analyze it and devising a decision-matrix/method for reaching an overall conclusion with regard to a project. One of the challenges is that there is a long history and extended practice for (b), which enables a number of aspects to be expressed in quantitative terms. That is hardly the case for matters encompassed by (a). In certain respects those among such questions as are concerned with environmental issues can be framed in quantitative terms which, in turn, may support relevant quantitative financial analysis. However, as the discussion above has suggested, doing so with respect to social issues poses a very serious challenge. There would appear to be little meaningful practice of that kind with respect to them. Thus, for social issues and some environmental ones the discourse will necessarily have a qualitative character. (Also, the reality may well be that even decisions as to the conventional aspects of financial risk and reward entail qualitative judgments.) Notwithstanding these limitations properly and effectively or sufficiently taking account of these factors requires means by which meaningfully to integrate them within the broader context of overall decision-making.

With respect to financial intermediaries

Much of the preceding section has concerned categorization of projects (or, in effect, subprojects insofar as FIs are obliged to categorize them in the same way as projects are characterized). Certainly it must be done with the same goal in mind: helping to ensure that (in this case) subprojects are chosen and executed consistent with the relevant environmental and social standards. The challenge, though, is the achievement of that goal through FIs entails judgments both with respect to both aspects of the subprojects which FIs might ultimately finance and of the FIs themselves which necessarily relate to how FIs choose subprojects and the steps they are obliged to and are anticipated to take to ensure compliance with the standards. In addition, as suggested above, it also involves judgments as to the financial implications for investors of what FIs do (or perhaps fail to do). In that regard, we suggest the following:

First, categorization of an FI should, in the first instance, be based solely on judgments with respect to the impacts of the subprojects that are or it is believed are most likely to be in its portfolio.

Recall from the discussion above that the IFC's categories can be read as relating to a client having a portfolio which includes substantial financial exposure to Category A activities; is comprised of Category B activities or includes a very limited number of Category A activities; and includes financial exposure to predominantly Category C activities. Recall further, however, that we have seen that categorization in fact depends not only on the potential adverse environmental and social impacts of subprojects in the would-be FI portfolio but also on how, given the nature of the transaction and relationship between the FIs and the subprojects, those risks are manifest for FIs (who, of course, experience them in financial, legal, reputational terms, not in environmental or social ones) and the ultimate import in financial terms for the IFC.¹²⁰³

But that approach is problematic. It is inconsistent with the way in which direct investments are categorized, or at least how we have argued they are and should be categorized, namely without reference to their financial and other implications (directly for the IFC in that case). Similarly, FI categories should be defined in terms of the "E&S risks" as such of the subprojects in the would-be FI portfolio. Just as in the direct investment situation, this method is not to ignore those other implications (for FIs and ultimately the IFC or any other investor). Rather, those factors come into play in a different way at a different stage. That is, one set of issues pertains to the IFC's (or other investors') interest in/commitment to subprojects being executed in a manner consistent with the environmental and social concerns those subprojects raise. Another set of issues involves the nature or extent of the IFC's commitment to ensuring that those concerns are sufficiently addressed by FIs. Conclusions as to the nature or strength of that commitment may well be thought to rest, as the cited material suggests, on the extent to which, by virtue of the IFC-FI and FI-subproject sponsor relationships (a) "E&S risks" "morph" into financial, legal, reputational, and other risks for the FI (and perhaps ultimately for the IFC); (b) otherwise justify IFC responsibility for what happens at the subproject level and (c) offer potential IFC leverage as to what happens at that level. It should be noted that the CAO has stressed the importance of separating out these different aspects of analysis of projects.¹²⁰⁴

Second, the categorization an FI should reflect an appropriate aggregation of the impacts of the subprojects in or anticipated to be in the FI's portfolio.

Third, the categorization of an FI should be more fine textured than a tri-partite one and be based on the method for aggregating project impacts.

Both issues must be addressed but as with the direct project categorization, if the very purpose of the PS is to ensure achievement of certain outcomes in environmental and social terms then the FIs should be categorized in *only* those terms. If so, then characterization of FIs would be done just in light of E&S risk/impacts and rest on an aggregation of the potential impacts of the various subprojects in the actual or would-be FI portfolio. (Per the recommendation above, those subprojects should be categorized in precisely the same terms as IFC direct projects.) It could be based on an average or perhaps a weighted average of the attributes which are the basis upon which individual project categories are assigned. In this connection the Note, in describing the requirement for FIs categorizing subprojects remarks that categorization would “also allow[] FIs to aggregate E&S risks of transactions at the portfolio level.”¹²⁰⁵ However, the IFC offers no further comment or insight as to how such aggregation might or should be done. The IFC’s own categorization presupposes some form of aggregation. Recall the operative language for distinguishing among the FI-1, FI-2, and FI-3 categories is a portfolio which “include[s] *substantial financial exposure* to [Category A activities]”; one which “is *comprised of*, or is expected to be comprised of [Category B activities] *or... includes a very limited number of* [Category A activities]”; and one which “includes financial exposure to *predominantly* [Category C activities].”¹²⁰⁶

Available IFC materials offer little insight with regard to what is actually done in this respect. The Manual, in describing the early review and appraisal stage for FIs, remarks only and rather generally that the LESS as a general matter is to “determine the significance of business activities that have potential E&S impact by reviewing the portfolio and sector information” and with respect to “determin[ing] the Applicable Performance Requirements,” “[r]eview the tenor, transaction sizes and the industrial sectors where the FI is investing” and determine whether “the FI’s investments are expected to have limited E&S impact” or “could have potentially significant E&S impact.”¹²⁰⁷

In all events, the IFC must do some form of aggregation with respect to projects it directly finances which have been categorized as A, B, or C in the manner discussed above. Thus, an FI’s categorization of its subprojects on the same basis would allow to its subprojects to be aggregated in light of such IFC experience and, in turn, assessed by it in light of both kinds of IFC experience (as well as perhaps draw on it).

Fourth, categories for FI subprojects should be defined in principle and implemented in practice in exactly the same manner as categories for direct projects

Clearly an FI’s system for due diligence in general and those aspects of it which concern E&S risks at the subproject level – which are ostensibly addressed by its SEMS/ESMS – are critical to accomplishment of the foregoing. As the Note describes it, categorization of subprojects is an important element of the ESMS due diligence process. As previously observed, the Note would have FIs categorize subprojects in a manner which “reflect[s their] different risk levels,” namely, “high,” “medium,” and “low.” The IFC defines those terms in the same language as is used for direct project categories A, B, and C. Certainly it would seem that an IFC review of an FI’s ESMS would, among other things, determine whether projects were being categorized properly. Arguably, the touchstone for that would be whether the categorization is aligned with what the IFC’s own categorization process would yield.

Fifth, there should be even more attention to recategorization of FIs than of direct projects.

Sixth, such a recategorization should be given operational meaning by being translated into corresponding changes to monitoring and oversight of FIs.

It would seem likely in many situations that there will be less of the information needed for a meaningful categorization at the time of initial or provisional categorization of FIs as compared to

direct projects. Obviously, for specific direct projects there would necessarily have to be information about their attributes. For FIs which have not yet constructed their portfolios there are, by definition, no particular projects to be considered. So for the most part, the characterizations will be quite general in nature. Certainly for certain project types even at that level of generality one might relatively readily identify likely kinds of impacts. But that takes one only so far insofar as argued above, a finer textured basis for categorization at the project level is required. Hence, there is a more pressing need for recategorization as the FI portfolio in fact is fleshed out.

Something somewhat along these lines may be suggested by post-IFC approval practice. For example, recall that the IFC reporting formats for Equity Funds and for Banking Institutions require clients to “provide two sample internal E&S review reports conducted for projects considered last year.”¹²⁰⁸ Moreover, it would appear from the Manual that in addition to the IFC receiving such reports, “[f]or FIs where there are potential significant E&S risks associated with their financing activities (e.g., large infrastructure or extractive sector projects) or where IFC is more directly exposed to the E&S risks of their financing activities (e.g., private equity fund operations), the LESS will apply the requirement that IFC will reserve the right to review the FI’s first few financing activities in such areas to ensure the FI’s [ESMS] implementation is robust, in addition to other applicable performance requirements.”¹²⁰⁹ Such proper implementation necessarily includes proper categorization.

So, in principle, the information about an FI’s actual portfolio of project gained by these means allows for assessment (among other things) of how FI’s have been characterizing subprojects and such warrant as there might be for recategorization of some subprojects.

Seventh, aspects 1 through 4 and in part aspect 5 of subprojects upon which categorization of an FI is based must be appropriately and meaningfully linked to relevant 5, 6 and 7 aspects for the purpose of assessing and FI’s appraisal and approval (or not) of proposed subprojects, and subsequent supervision and monitoring of approved subprojects.

Eighth, to the extent possible the fine-textured basis for project categorization should be employed for framing analysis and decisions with respect to aspect 8.

In this context as in that for direct investment, categorization sets the bar in terms of determining the individual and aggregate adverse impacts of potential subprojects in an FI’s portfolio which could be averted or sufficiently mitigated. Similarly, just as for direct investments, aspects of subprojects pertaining to 1 through 5 upon which categorization of them is based must be appropriately and meaningfully linked to aspects 6, 7, and 8 for the purpose of an FI appraising and approving (or not) of proposals, and subsequently supervising and monitoring subprojects. At first blush it would seem that an FI should do so in a way which is the same as or an equivalent to what the IFC (or other investor) would do with respect to projects.

In the Note, the IFC does not literally address this issue. Recall, the IFC views all FIs as being exposed to some level of “E&S risk”¹²¹⁰; hence, expects them to “manage” it.¹²¹¹ As the means by which to do that it must “hav[e] an ESMS commensurate with the level of E&S risk in their portfolio and prospective business activities.”¹²¹² Recall that an ESMS entails an FI “identifying the E&S risks and impacts associated with their lending/investment activities” based on the outcome of having “conduct[ed] an ESDD at the transaction level to identify the risks and impacts associated with environmental, social, labor, occupational health and safety, and security of the business operation considered for financing.”¹²¹³

That identification gives rise to the FI's categorization of subprojects discussed above, which as noted, relates to aspects 1 through 4 and in part aspects of 5. As an outcome of preparing its Social and Social and Environmental Due Diligence Report (SEDDR), the FI must "identify necessary mitigation or corrective measures...for borrower/investee operations."¹²¹⁴ This identification corresponds to taking account of aspects 6 and 7 and the other aspects of 5. The result – a delineation of what is to be done – is reflected in its Environmental and Social Action Plan (ESAP) formulated for that express purpose.¹²¹⁵

The corresponding activity by the IFC for direct projects appears in some measure to be reflected in the Environmental and Social Review Summary (ESRS) prepared in connection with project appraisal. That document – which "present[s] a succinct summary of the review and assessment of the E&S impacts associated with the project and how they are or will be mitigated by the project." – is written consonant with the IFC's "*ESRS Template with Guidelines* (see Rules and Tools – Document Formats) and *Formatting Guidelines for Disclosure Documents* (see Rules and Tools - Guidance) *ESRS Template with Guidelines* and *Formatting Guidelines for Disclosure Documents*."¹²¹⁶ In turn, "[w]here appropriate" a draft ESAP is developed drawing on the IFC's "Rules and Tools, *CES Apps*; or Appraisal/Appraisal Guidance/Action Plan Guidance Note."¹²¹⁷ Recall our suggestion about the possibility of reverse-engineering ESRSs for the purpose of fashioning a more finely textured mode of categorization. Arguably the documents to which we have just referred, if available, might aid in that process or indeed forward-engineering.

The matter of aspects 8 is a bit more complicated. As remarked above, the IFC's Note refers to FIs being "exposed to some level of E&S risk through the activities of their borrowers/investees, which can represent a financial, legal, and/or reputational risk to the FI."¹²¹⁸ As such the phrasing suggests that whatever the responsibilities or obligations the FI might have with respect to the potential adverse impacts of the subprojects in its portfolio, its principal, overriding, or perhaps only ultimate concerns (cast in terms of risk) are financial, legal, and reputational nature. For a for-profit FI that might seem to make sense. An FI which accepts investment from the IFC (or another investor) knows that it must select subprojects and manage relationships with subproject sponsors in ways consistent with the IFC PS. In turn, it must assess the ultimate benefits and costs in financial, legal, and reputational terms of being obliged to do so. Presumably it needs to determine the overall calculus of risk and reward – there are many considerations to take into account other than environmental and social ones – for each subproject and for the overall portfolio and deem it to be acceptable. Arguably, at the subproject level the exercise of taking into account aspects 8 would be quite similar to that which the IFC would engage in if it were one if its direct project investments and perhaps the same might apply to the analysis for a portfolio of such investments. To the extent that is true, then insofar as doing so involves linking aspects 8 to the other aspects, that would suggest that the IFC's practice in that regard would be the standard or benchmark for assessing what an FI would do in those terms. In saying so we recognize that relatively little information relating to that practice is publicly available from the IFC (or any other investors).

However, the applicability of IFC experience with direct project investments may be limited in certain ways. As discussed at length above, in principle, decisions with respect to these investments involve judgments about such tradeoffs as there might be between or among (a) IFC development goals, commitments relating to sustainability in general and environmental and social impacts in particular and (b) what are very important but more conventional concerns about their financial risks and rewards (as they pertain to an institution like the IFC). By contrast, although project sponsors and FIs may have received investments from the IFC in view of how those investments might advance the IFC's goals, not for project sponsors or FIs or their subproject sponsors are development goals an issue as such. However, in practice, projects and

FIs are chosen in light of their import in developmental terms for what they assert they intend to do so long as they are sufficiently likely to fulfill that intent. If so, then issues of development are not an issue in subsequent analysis as to financial outcomes for both the IFC and the FI (project sponsor) so the analysis in those terms might be largely the same.

The IFC arguably addresses the former in the Note stating that if FIs are applying PS 1 that “requires the development of an ESMS to identify and manage the E&S risks associated with their portfolio on an ongoing basis.”¹²¹⁹ The Note, in referring to what it terms the level of an ESMS’s “complexity,” asserts that the ESMS “will vary according to the risk exposure that the FI is expected to manage; for instance for FI categorized as FI-3...the ESMS will consist of a simple review mechanism.”¹²²⁰ (The word “rigor” might better capture the issue than “complexity.”) Although the ESMS as such is only concerned with subproject “E&S” risk it is recognized that the ESMS would at minimum mesh and might well or best be integrated with the FI’s “risk management systems for credit, operational risk, finance, legal, compliance, or any other relevant system operating within the FI, which may already consider some E&S risk.”¹²²¹ This language reflects the fact that an FI’s decision with respect to financing any proposed subproject must address several things. First it must incorporate the IFC requirements relating to environmental and social impacts of that particular subproject. Second, it must understand the E&S risks (defined at minimum as referenced or implicit in the PS) of the subproject and what it must require of the subproject sponsor (and itself) to fulfill those expectations. Third, the FI must determine whether it can spur the subproject sponsor to take the actions (and itself take the steps) necessary successfully to manage those E&S risks (so understood) and the other kinds of risks associated with that subproject within the context of other projects in or likely to be within the portfolio.

With regard the seventh point, in principle, FIs should be required to do with respect to the subproject sponsor what the IFC (or other investor) supporting it would do if it were financing the project itself.

ESRM staff roles and responsibilities (in and of themselves and in relation to others) over the project cycle need to be defined in a way which properly reflects the importance and priorities with respect to environmental and social issues in relation to overall priorities.

There are important issues as to the extent of the exercise of staff power or influence across the project cycle. Here we refer not only to ESRM staff as such but also those staff with special knowledge and/or responsibilities with regard to environmental and social issues largely regardless who has them and where they might be located within the organization. For example, at first blush, project intake would be solely a matter for project financiers. Arguably with a sufficient track record of experience in dealing with environmental and social issues perhaps in part reflected in a guidance manual on them project financiers they would be prepared at the outset to flag investments which might be problematic in those terms. In turn, their working relationship with ESRM staff might be such as to allow and justify some consultation on such cases. However, as suggested above, categorization is extremely important because so much hinges upon it. Consequently, ESRM staff should have relatively greater say in the categorization decision. That could range from ESRM staff doing the categorization subject to project financier objection or even veto to the reverse or in-between. With respect to the latter, it could involve ESRM staff review of a preliminary project financier categorization and, should staff disagree (or seriously disagree) entail a written response should the project financier insist on the proposed categorization, perhaps followed by third-party internal review by a superior.

During the appraisal and due diligence stage ESRM staff knowledge and expertise is critical: as to any basis for any re-categorization; for a deep understanding of potential adverse impacts; a

firm grasp on actions on the part of project sponsors – at the system and project-specific levels – required to avert or sufficiently mitigate such impacts; and awareness of the import of concerns of stakeholders and their actions in response to them.¹²²² On the whole it would seem that project financiers would not normally be situated to object to the analysis and recommendations of ESRM staff in this context. It might be a different story if a project financier were to have special experience with a particular type of project (and/or where it is geographically or otherwise located) or the project sponsor which might warrant giving more weight to his or her view. By contrast, in certain respects ESRM staff might have less to bring to the table with regard to the potential effectiveness of the project sponsor at the system level insofar as an assessment of that sort requires an understanding and ability to evaluate the organization and management of the enterprise as a whole. Arguably project financiers would be attentive to and become knowledgeable about that organization and management in connection with conventional financial analysis. Moreover, there are tricky or delicate issues (which we have not been able to canvas as much as we would have liked) as to the costs and complications of project specific efforts required of clients to meet PS-related standards and beyond that, the possible financial, legal, reputational and other challenges for clients who fall short in those efforts. In a number of respects the resolution of those issues might well be outside of the ken of ESRM staff. Arguably, then, reports and recommendations with respect to project approval would contain ESRM staff analysis as to impacts and the actions ostensibly necessary to averting or sufficiently mitigating them would be included in one section with commentary or responses, if any, by project financiers. Conversely, views as to the financial implications of meeting PS-standards would in the first instance be articulated by project financiers with possible commentary or responses insofar as any ESRM staff insights might be cogent. How such commentary and responses are afforded may be telling. It is one thing to offer them in writing and another to brief key-decision makers in person or being present at their meeting about the project/FI and either making a presentation or being available to answer questions. Clearly the mode of communication chosen would reflect not only the organization of decision-making overall but also issues of authority, status, and prestige within the enterprise and in turn send a signal as to the weight and import of what ESRM staff might have to say.

Certainly, if and when an investment in a project or an FI is approved and, correspondingly, the metes and bounds of obligations to meet environment and social standards are defined, the role of ESRM staff would loom large given their special knowledge and expertise. That is, in principle, their determinations as to whether standards have been met or sufficient progress has been made in conformity with them would have great weight. Realistically, though, the prime relationship with the client is almost certainly that with the project financier. Moreover, as suggested above, those determinations are likely to involve a good number of judgment calls (probably especially as they relate to social issues) as to what actions are possible and whether they are, in principle, practicable, but especially how the almost inevitable trade-offs between meeting environmental and social and other (more conventional) goals should be made. The latter involve matters within the special ken of ESRM staff and project financiers, respectively. Whatever the precise process for making such judgment calls, it must be one which is sufficiently respectful of the roles, responsibilities, and expertise of each and provide sufficient assurance that they as individuals and the organization as a whole can have confidence that over the long term the conclusions reached are consistent with the goals to which they are committed. This confidence may be particular of importance insofar as the judgments have great significance for either the client and/or the investor, e.g., in circumstances under which some version of “pulling the plug” (insofar as that is possible) is posed.

Given the realities in terms of the limits of pension fund and (likely even financial intermediary) expertise on environmental and social issues and the need to rely (often

heavily) on consultants, investors should be especially attentive to how they choose, use, and work with them.

It seems pretty clear that EFPIs – even given the relatively long track record of some of them in dealing with environmental and social issues (perhaps even extending before the establishment of the EP) – still rely heavily on consultants.¹²²³ That is in some measure a matter of necessity because of EP requirements and perhaps to some degree a “convenience” in the sense of it being thought not cost-effective to have certain on-staff capabilities; but it would appear to be largely a matter of a pressing need to secure the greatly desired knowledge and expertise. This need would seem to be especially great where the demand for “local knowledge” looms large, perhaps especially with respect to social issues.¹²²⁴ Even though the IFC as the largest DFI (for private sector investment) has a very large staff in general and a rather large ESRM staff in particular it would appear that it makes extensive use of consultants as well. Presumably consultants would for the reasons noted be at least as prominent in the work of smaller DFIs.

Moreover, consultants appear to play a wide range of roles, including motivating and advising top management; reviewing the current current portfolio with regard to environmental and social impacts/risks; suggesting environmental and social procedures, tools, and policies; integrating environmental and social procedures into credit and other investment-related procedures; coaching ESRM staff; making field visits to projects and FIs (and their subprojects as well); including field visits; providing training on environmental and social management practices (and the relevant standards which there designed to implement); and monitoring the success of the ESMS based on performance indicators.¹²²⁵ Indeed in some cases investors effectively outsource environmental and social risk management entirely.¹²²⁶ Moreover, it is very likely that the client itself retains, on a voluntary or mandatory basis, one or more consultants to help prepare some or all of the Assessment Documentation and possibly to provide assistance at subsequent stages¹²²⁷ Moreover, a consultant may be called upon to attest to the validity of the SEA and factually based information.¹²²⁸

Clearly suitable consultants need to be identified, so pension funds or financial intermediaries acting on their behalf need to aware, among other things, of which are available, the nature of their services, their track record, and, of course the costs incurred from retaining them. There are, perhaps not surprisingly, large/major players among consulting firms. For example, Bouteligier details the importance generally of the role of what she terms global environmental consulting firms (ECFs) both at the project level and at the policy level.¹²²⁹ (Although her comments focus on companies which deal with environmental issues they might well extend to social ones though since the latter are relatively new there may be room for new and different players¹²³⁰) So as a practical matter their influence may be quite substantial: they may be in a position to “limit their clients’ agency since they determine operational procedures, define what practices are seen as ‘best’, and what methodologies are used.”¹²³¹

There have been suggestions that these firms, as profit-driven enterprises, are not without problems. For example, “Global ECFs involved in eco-city development have been criticized for developing projects that are probably not achievable and that are designed with the sole purpose of economic replicability, ignoring social implications, and creating ‘ecological enclaves’ instead of real environmental solutions (Hodson and Marvin 2010).” They have “received most criticism for their services to clients in the oil and mining industry” with the suggestion that “some ECFs’ assessments are too ‘soft’, allowing for business to state that its practices do not harm the environment, when they actually do.”¹²³² Certainly clients might have a view of how the standards would be applied, the reach of information gathering, e.g., who is to be interviewed, etc., which might be at variance with the stance of a consultant.¹²³³ O’Sullivan, in the EP context, has noted

that there may be an issue as to how “independent” from the project sponsor consultants are who review the ESIA; also whether there have been conflicts of interest insofar as they have previously been involved in the initial E&S assessment.¹²³⁴ However, insofar as consultants, especially the larger firms, are “repeat players,” they have a reputation to uphold in the eyes of the industry across which they operate.¹²³⁵

As suggested above, use of consultants is not inexpensive so that account needs to be taken of the cost regardless of whether it is charged as part of any direct investments or implicitly in connection with investment through an FI. One investor reported to us that the expense of one such consultant ran up to as much as 30.000 euros (~\$40,000). One expert suggests that the kinds of services which are described in the opening sentence of the preceding paragraph might cost 30-40k euro (~\$40-\$50,000) for a year to fifteen months.¹²³⁶ According to one characterization (in the EP context), “[t]he hiring of such experts or the development of special departments also entail non-trivial costs for banks (among other costs of implementation, the costs of environmental impact assessments per project can be upwards of US\$600,000-800,000, shared among a syndicate), and accordingly, they are strong indicia of serious commitments.”¹²³⁷

Whatever the reason(s) for the use of consultants in lieu of staff, that does not relieve investors (or the FIs through whom they might invest) of responsibility for what they do. Investors need to make sure that those consultants whom they retain are “suited for/suitable” to the task. They must define clearly what tasks the consultants are to perform with clear view to the E&S related analysis, actions and outcomes.¹²³⁸ They need to be able to make effective use of what consultants provide. For example, in the EP context it has been noted that consultant reports may be of a length, complexity, and specialized nature “that bankers are not trained to understand,”¹²³⁹ Thus, “[w]ithout in-house personnel knowledgeable about these issues, an institution is not equipped to properly understand the non-financial risks of a project.”¹²⁴⁰ For example, the IFC has remarked that it was “working with clients to improve their capacity to implement an Environment and Social Management System. Some clients don’t have the expertise or capacity to interact with management consultants about the design of an ESMS. So now we’re engaging with advisory services to improve this.”¹²⁴¹ As noted, there may also be issues as to whether a consultant is being sufficiently upfront about the projects to those organizations who have retained them.¹²⁴² In turn, there appear to have been “[v]arying degrees of utilization of other verification methods to check the work of even the independent consultants.”¹²⁴³

Pension funds – and those FIs through whom they might invest – should draw/build upon existing for collaborations which allow for sharing of relevant knowledge and experience and/or where possible create them.

As should be obvious from the preceding pages, the knowledge, expertise, financial and other resources required to formulate, make, and implement a commitment to meeting environmental and social standards is likely to be not inconsiderable. Clearly, then, insofar as there are opportunities for sharing those resources serious attention should be given to taking them up. In some measure, the experience of EP bank syndicates and the EP Association are cases in point.

Quite obviously, as detailed above these syndicates have met the conventional but important need to make transactions possible in the first place and enable risk sharing with respect to them. But they have also allowed EPFIs to share knowledge and expertise, facilitate a division of labor among them in the performance of EP-related (and other transaction-related) tasks, and helped in some measure to share the burden of transaction and implementation costs. To some degree there may be spillover effects beyond the particular project. Of course the existence of such syndicates pre-dates and is/was independent of the existence of the EP. However, the

establishment of the EP almost of necessity required coordination and collaboration of signatories on an *ad hoc* basis. The EP Association is the more institutionalized means for doing so and is a reflection of the now roughly decade-long existence of the EP. On its face the EP Association has served to provide forums in which member EPFIs can be review and reformulate the EP, share experience with their implementation of the EP, and it would seem afford in some measure a venue for input of NGOs (and perhaps others). We say “on its face” because the EP Association is hardly transparent about its activities.¹²⁴⁴

Should pension funds choose to make direct investments, especially if they are relatively new to do so, then even in the case of modest scale ones it would seem very useful to co-invest with others. (For large ones, it would be almost a necessity.) In either case they might seek collaborators and collaborations which can afford the kinds of benefits associated with EPFI syndicates described above. To the extent that pension funds invest through financial intermediaries they will, almost by definition, have co-investors. So the question would be how the institutional arrangements afforded by those intermediaries allow for certain kinds of collaboration and the extent to which pension funds and co-investors can build upon or enhance it. For example, per the discussion of the IFC’s Global Infrastructure Fund, DFIs may afford appropriate opportunities to invest – ostensibly consistent with understandings of what fiduciary duty may require with the advantage – with or through organizations which have had for some extended period of time a formal commitment to taking into account environmental and social factors. Their corresponding experience and track record in so doing – however contested or challenged some of it may have been – serve not only as an important consideration in whether and how pension funds might invest with those factors in mind but also as a factor in the ability of pension funds to gain relevant knowledge and expertise.

Pension funds – and, indeed, those FIs or others through which they might invest – might have opportunities to draw on other already existing means for information sharing, for example, the United Nations Environment Programme Finance Initiative (UNEP FI)¹²⁴⁵, the United Nations Global Compact¹²⁴⁶, the Principles for Responsible Investment¹²⁴⁷, particularly its work stream relating to infrastructure,¹²⁴⁸ and Environmental and Social Training Courses and Sustainability Webinars (among other forums offered by the IFC).¹²⁴⁹ The foregoing might involve individual level and one-off participation. The possibilities for organizational and sustained/systemic participation/joint action are worth serious exploration.

Pension funds or the FIs through which they invest need to have available the means and methods needed to spur project sponsors to comply with relevant standards.

In situations in which project sponsors are thought already to have the capacity, will, incentive, etc. successfully to avert or mitigate adverse environmental and social impacts, the task is to ensure through monitoring and supervision that they are so employed in that regard. In other cases, although there is some gap between what the project sponsor is able to do and what it needs to do. In some of those circumstances the judgment might be that the project and project sponsor otherwise merit investment and that there is sufficient confidence that the sponsor can be spurred to make up the gap. As noted, EP banks strongly lean to working with prospective clients to spur and support them to meet environmental and social standards (a practice which seems to extend across bank products, at least for “mainstream” - as distinguished from “niche” banks.¹²⁵⁰) (Although it is less clear, the same may be true for the IFC (and perhaps other DFIs) for reasons some of which are problematic and others understandable.) So while on one hand the ability and willingness to reject outright proposals based on anticipated environmental and social impacts might be viewed as indicative of a strong commitment to environmental and social standards, in certain respects banks who have the capacity constructively to work with would-be

clients to enable them to succeed in meeting standards and employ it effectively may in effect have a better choice of deals. Correspondingly, the pension fund must be able to – or meaningfully gauge whether the FI through which it invests can provide the resources needed by project sponsors – or spur sponsors to access them – to make the necessary changes and successfully engage them to make effective use of those resources.

The above points notwithstanding, insofar as there are investments through FIs, the level of pension fund (or other investor) knowledge as to subprojects over the subproject cycle will almost of necessity be less than if they were direct investment projects. As a consequence there a premium should be placed on sufficient “upfront” scrutiny of FIs’ ability and willingness to “do the job” prior to any approval, concomitant post-approval scrutiny of the FI’s in those terms, and carefully targeted monitoring of subprojects the outcomes with respect to which are the ultimate measure of success in those terms. Certainly getting an accurate enough read as to a client’s “willingness to do the job” is no mean task and in some measure one with respect to which crisp conclusions can be reached. Nonetheless, there are indicia of it some of which have already, in effect, been suggested by some of the lessons to be learned canvassed above. They commitments to meet PS or similar standards; evidence – for example, from organization manuals, training materials, and past or scheduled meetings or events – that staff generally but especially staff with key ESRM-related responsibilities have understood those communications as they bear on their own roles within the organization, and are ready, willing and able to fulfill them; the role of incentives in their doing so; the specificity and relevance to the task at hand of the FI’s articulation of the means by which they assert they will fulfill their commitment in those terms; and the FI’s include the substance, visibility, and reach of senior level communications to as to their recognition of the extent to which the means it has are not up to the task; and evidence of a corresponding practicable plan (and timeline for implementing it) for “getting up to speed.” The CAO has noted and the IFC has acknowledged the importance of effecting “a broader and cultural *change* process.”¹²⁵¹ In turn, indicators which reflect these and other aspects of FI capacities, capabilities, and commitment across the project cycle need to be developed.¹²⁵²

Pension funds themselves and intermediaries through which they invest, should formulate the most constructive possible policy and practice in relation to NGOs, unions, and other civil society organization.

That is, they must have a policy and practice which, on one hand, affords NGOs, unions, and others the means and mechanisms to effectively communicate such challenges as they would pose to the way “business is being done” at the institutional and project/subproject level. At the same time pension funds (and intermediaries) should devise ways to make constructive use of what is proffered even if it is cast in terms of criticism (or perhaps even more so in that case).

For example they can offer a way by which NGOs and others – on an individual or a group basis – can share their views on such environmental and social performance standards as pension funds might adopt and on the best policies and practices for and the resources and capabilities requisite being effective in carrying them out. In this context, by “standards” we mean not only the criteria which characterize sought-for environmental and social outcomes but also the nature and attributes of the systems, processes, methods, capacities, resources, etc. which pension funds (and/or the financial intermediaries through which they invest) should have which are best calculated to achievement of those outcomes.

They can also offer mechanisms by which NGOs, unions, and others can become aware of the projects with respect to which investments are being considered, doing so in ways which can enable them to offer meaningful and timely input to the decision-making process and subsequent

monitoring, supervision, and evaluation insofar as it implicates the environmental and social impact or import of the project as contemplated, as it might be approved, and, if so, as it moves toward completion and ongoing operation.

As a practical matter, with regard to particular projects, the role of or for NGOs may best be intertwined with the extent to which and the manner by which those individuals or stakeholders who might be affected by and/or have a stake in the project give voice to their concerns and needs and how they should be addressed. That is, in some measure, the prescriptions in the IFC PS and the EP for clients' engagement with "affected communities" and "stakeholders" may well entail their calling upon NGOs, unions, or others to aid them in that effort – or accepting offers by them of such assistance.

Given the (likely increasing) importance of engagement with affected parties, special attention needs to be paid in advance to a pension fund's own capabilities (should it be part of a direct investment) or those capabilities of the financial intermediary (through which the pension fund invests) in terms of understanding what it requires – and having in place or ready access to means – to do it in a meaningful and an effective way.

It should be clear from the discussion above that engagement must, among other things, commence early in the project cycle, involve all adversely affected parties (whose identities may emerge throughout that cycle), seek fully to understand the adverse impacts of the project on those parties and, in turn, the risks they pose for the project, and must be "full-bodied" in terms of the range of forms it can take. It should also be evident that the kind of project sponsor focus, (perhaps) mind-set, skills, organization, priorities, policies, etc. which are suited for addressing the conventional and often technical matters associated with conventional issues are not those capabilities needed for effective engagement. In turn, then, special efforts must be made by a direct investor or the financial intermediary through which it invests to ensure that the project sponsor has what is needed for the task and employs those means in a timely and effective manner.

Although in the first instance there are fewer and less challenging issues in implementing PS-like standards in connection with investments in brownfield as compared to those which arise from the kinds of greenfield projects which have largely been the focus of the discussion here, nonetheless close attention to those issues is still required even when the former are the focus.

Much of the preceding discussion has – if only implicitly – mainly focused on would-be greenfield investments. To date it would appear that most pension funds have been more than hesitant about making greenfield investments, in part, by virtue of their appetite for taking on risk – especially as it pertains to designing, gaining approval for, constructing and completing projects, and putting them into operation – and their own knowledge, capacities, and resources in relation to the foregoing. At the same time, insofar as banks and perhaps among them many EP banks have been involved in project finance it appears that the fallout from the financial crisis of 2007-2008 has been to reduce – maybe even sharply reduce – banks' ability or willingness to provide long term finance.¹²⁵³ Hence there may be a confluence of interests in that banks may provide finance for the pre-operational stages of projects and pension funds (and others) offer it for the post-operational stages.

Insofar as that might be otherwise be a sensible proposition with respect to important but conventional considerations of financial risk and reward, there might remain questions as to whether and how environmental and social factors were taken into account (or not) during the

pre-operational phase and how the legacy of that bears on what might need to be done with respect to the operational phase.

In certain respects, the very fact that a project has made it to the operational phase might mean that as a practical matter it has been vetted for those factors. That is, insofar as failure properly to take into account those considerations would result in the project not being viable leading up to the operating stage, that it did survive is evidence that those elements had successfully been addressed. However, there might, for example, remain concerns on the part of and needs of affected communities or stakeholders which could have greater prominence at that stage and which have not been dealt with adequately or which might be quite expensive or otherwise highly problematic to remedy at the operating stage. If so, then the viability of the project on an ongoing basis might be threatened. As a result, there might be due diligence requirements to assess the extent to which problems associated with those factors might persist. Presumably, insofar as during the pre-operating phase the due diligence associated with a proper or acceptable practice of taking into account of those factors had been carried out and follow-on actions commensurate with it have been taken, the corresponding work with respect to the operating phase might be less demanding.

A Few Final Thoughts

This paper has, as have the preceding two, been informed by the obvious and significant interest of pension funds in investment in infrastructure, most typically in developed countries but increasingly in so-called developing countries. We have approached the subject with the view that a clear, proper, and a shared understanding of what infrastructure “is” is critical to thoughtful and responsible discussion about such investment. That is, investment in the pension fund (and other) contexts is, by conventional definition, certainly a matter of financial risk and reward, and quite understandably so. But ultimately, investments are in enterprises of one sort or another the ostensible purpose of which is to meet some human need. The larger society – and more particularly, the legal, political, social, economic, and other context – in which any such enterprises are embedded shape (often profoundly so) whether and how they operate to meet certain needs, the means or forms for investing in them (if at all), and the prospects for what those investments offer. Conversely, whether and how they operate has significance for that larger society, most immediately for those individuals or communities whose needs enterprises are constituted to meet, but beyond that, for those stakeholders whose lives and livelihoods are in greater or lesser measure intertwined with their operation. Our view has been that, at minimum, pension funds need to be alert to and knowledgeable about the import of their investments in both terms. We believe that view has special force when the needs are infrastructure-related ones.

What pension funds choose to do in view of that knowledge is another matter. Our discussion of some among the rationales for attending to both shows that they implicate both normative and instrumental justifications, justifications which some pension funds and other investors have taken up in whole or part. Whatever the ultimate conclusion in that regard, we think it behooves pension funds – indeed, that it is their responsibility – seriously to assess those justifications, as seriously as they might attend to extremely important, but otherwise conventional considerations of financial risk and reward.

All three papers, but particularly this third one, have been written not only to be of aid to pension funds in what they choose to do in those terms but also to be a resource in their giving practical meaning to any conclusion that certain kinds of considerations – here environmental and social ones – merit their attention. That pension funds might choose to do so does not necessarily mean that they are aware of precisely what is entailed in doing so, for them or those others with or

through whom they might invest. If there is, perhaps, an excuse for the length of this paper it is that “doing so” in a meaningful way – whether in the pursuit of instrumental or normative outcomes – is serious business, one which takes considerable care, time, and effort. In the foregoing we have sought to derive for pension funds some insights in those terms from the experience of other investors which have traveled the path, frequently spurred by motivations which overlap in certain ways those of pension funds (and others which do not). Given the nature, scope, and scale of the infrastructure (and broadly similar projects), their investments have not surprisingly been given an immense amount of attention. That attention has elicited, depending upon the quarters from which it has come, praise, mixed praise, and condemnation. It has not been our concern here to make judgments as such in that regard but rather share with pension funds important aspects of that experience in the service of their being better able to do in those terms what they have concluded is necessary to do.

APPENDIX A.

A CASE IN POINT:

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND THEIR RELEVANCE FOR INVESTORS IN GENERAL AND PENSION FUNDS IN PARTICULAR

The OECD Guidelines for Multinational Enterprises (Guidelines), as described by the Guidelines themselves, “are *recommendations* addressed by governments to multinational enterprises operating in or from adhering countries” which “provide *non-binding principles and standards* for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”¹²⁵⁴ In prefatory material, the Guidelines assert that their aim is “to promote positive contributions by enterprises to economic, environmental and social progress worldwide.”¹²⁵⁵ The text of Guidelines recite an “aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.”¹²⁵⁶ More specifically, government who adhere to the Guidelines declare, among other things “[t]hat international co-operation can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic, social and environmental progress, and minimise and resolve difficulties which may arise from their operations.”¹²⁵⁷ In turn, they “jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines.”¹²⁵⁸ In substantive terms the Guidelines address a wide range of issues, some of which include the environment, employment and industrial relations consumer interests, and most recently, human rights.” With regard to the first, It also has a chapter on employment and industrial relations and specific references to practices with regard to supplies chains.¹²⁵⁹ More particularly it references the International Labour Organisation (ILO) with regard to labour standards as “the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work).”¹²⁶⁰ With respect to the last, the most recent version of the Guidelines has a chapter on human rights which sets out the framework for and makes specific recommendations concerning “enterprises’ respect for human rights” which it states “draws upon the United Nations Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and is in line with the Guiding Principles for its Implementation.”¹²⁶¹

Countries which adhere to the Guidelines “set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance.”¹²⁶²

Although it is largely presupposed that the Guidelines reach to the vast majority of enterprises, the matter of the ways in which they extend to financial ones appears more uncertain; that is, in what ways might financial enterprises be asked to assume responsibilities under the Guidelines in relation to the size and nature of the financial interests in other companies which are involved especially as they might relate to the influence financial enterprises over those other companies. Judgments as to the foregoing bear, in turn, upon how pension funds are understood as enterprises under the Guidelines and the ways in which their financial decisions/actions fall within the scope of the Guidelines.

APPENDIX B.

ILLUSTRATIVE METHODS SCREENING AND CATEGORIZATION IN RELATION TO IMPACTS

A nuanced and detailed discussion of impacts in general as well as their relation to categorization is found in the World Bank's "Environmental Assessment in Operational Policy 4.01 promulgated to address implementation of its safeguards." "Environmental Assessment in Operational Policy 4.01."¹²⁶³ Among the materials is an "Environmental Assessment Sourcebook and Updates" which includes an early – 1993 – document on "Environmental Screening." The document briefly characterizes how projects might be categorized A, B, or C (for World Bank purposes).¹²⁶⁴ However, it quickly turns to an elaborated discussion of criteria and methodology for assessing and characterizing impacts noting at the outset that "[i]n practice, the significance of impacts, and the selection of screening category accordingly, depends on the *type* and *scale* of the project, the *location* and *sensitivity* of environmental issues, and the *nature* and *magnitude* of the potential impacts."¹²⁶⁵

While it offers an illustrative list of projects "assigned to each of the three categories based upon prior Bank and international experience," it proceeds to explain with some detail how and why projects might be classified in terms of type and scale¹²⁶⁶, location¹²⁶⁷ and sensitivity¹²⁶⁸, and nature¹²⁶⁹ and magnitude. With regard to the last it stress that "[t]here are a number of ways in which magnitude can be measured, such as the *absolute amount* of a resource or ecosystem affected, the *amount affected relative to the existing stock* of the resource or ecosystem, the *intensity* of the impact and its *timing* and *duration*. In addition, the *probability of occurrence* for a specific impact and the *cumulative impact* of the proposed action and other planned or ongoing actions may need to be considered."¹²⁷⁰ In a later (1996) document among those cited in the Sourcebook there is a detailed discussion of "impact identification" including the strengths standing alone and in combination of different methodologies, namely checklists, interaction matrices, networks, and overlay mapping and GIS.¹²⁷¹

And in turn, there is an elaborate discussion of impact prediction – *described as* "the technical 'heart' of EA and is an attempt to assist decision making by isolating and reducing uncertainty with respect to anticipated environmental changes" – including the techniques which might "be used to quantify the nature and extent of environmental changes:

- Mathematical models (such as noise propagation models, air or water dispersion models, income multipliers);
- physical models (such as wind tunnels and hydraulic models of, for example, estuaries);
- field experiments;
- structured or semi-structured approaches to produce a mix of qualitative and quantitative predictions (for example, landscape change and social impacts); and
- scientific experience and judgment."¹²⁷²

There are follow-on discussions of "[e]valuating impact significance" and "[c]omparative evaluation of alternatives."¹²⁷³

APPENDIX C.

ILLUSTRATIVE LISTS OF CATEGORY A PROJECTS

United States Export-Import Bank

Communities affected by the project

- Projects affecting indigenous peoples.
- Projects involving resettlement of communities/families.
- Projects associated with induced development (e.g. inward migration).

Physical environment affected by the project

- Impacts on protected natural habitats or areas of high biological diversity including wetlands, coral reefs and mangroves.

Nature of project

- Construction of dams and reservoirs.
- Major irrigation projects or other projects affecting water supply in a given region
- Domestic or hazardous waste disposal operations.
- Oil and gas developments, including pipeline construction.
- Large infrastructure projects, including development of ports and harbors, airports, road, rail and mass transit systems.
- Forestry operations.
- Metal smelting, refining and foundry operations.
- Mining (opencast and pit).
- Large thermal and hydropower developments.
- Hazardous chemicals: manufacture, storage or transportation above a threshold volume
- Pesticides and herbicides: production or commercial use.¹²⁷⁴

United States Overseas Private Investment Corporation

Communities affected by the project

- All projects that pose potentially serious occupational or health risks.
- All projects with potentially major impacts on people or which pose serious socio-economic risk, including but not limited to Physical and Economic Displacement, impacts on Indigenous Peoples and adverse impacts on Cultural Heritage.

Nature of project

- Large-scale industrial plants.
- Large-scale industrial estates.
- Crude oil refineries and installations for the gasification and liquefaction of 500 tons or more of coal or bituminous shale per day.
- Cement manufacturing with an annual production rate of greater than one million dry weight tons.
- Integrated works for the initial smelting of cast iron and steel; installations for the production of non-ferrous crude metals from ore, concentrates, or secondary raw materials by metallurgical, chemical or electrolytic processes.

- Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos; for asbestos-cement products with an annual production of more than 20,000 tonnes of finished product; for friction material with an annual production of more than 50 tonnes of finished product; and for other asbestos utilization of more than 200 tonnes per year.
- Integrated chemical installations, i.e. those installations that manufacture, on an industrial scale, substances using chemical conversion processes in which several units are juxtaposed and are functionally linked to one another and which produce: basic organic chemicals; basic inorganic chemicals; phosphorous, nitrogen or potassium based fertilizers (simple or compound fertilizers); basic plant health products and biocides; basic pharmaceutical products using a chemical or biological process; explosives.
- Construction of motorways, express roads, lines for long-distance railway traffic, and airports with a basic runway length of 2,100 meters or more. Construction of new roads with four or more lanes or realignment and/or widening of an existing road so as to provide four or more lanes where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.
- Pipelines, terminals, and associated facilities for the large-scale transport of gas, oil, and chemicals.
- Seaports and also inland waterways and ports for inland waterway traffic that permit the passage of vessels of over 1,350 tonnes; trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) that can take vessels of over 1,350 tonnes.
- Waste-processing and disposal installations for the incineration, chemical treatment or landfill of hazardous, toxic or dangerous wastes.
- Construction or significant expansion of dams and reservoirs not otherwise prohibited.
- Groundwater abstraction activities or artificial groundwater recharge schemes in cases where the annual volume of water to be abstracted or recharged amounts to 10 million cubic meters or more.
- Industrial plants for the (a) production of pulp from timber or similar fibrous materials; or (b) production of paper and board with a production capacity exceeding 200 air-dried metric tonnes per day.
- Peat extraction.
- Quarries, mining, or processing of metal ores or coal.
- Major exploration and development of on-shore oil and gas reserves.
- Exploration and development of off-shore oil and gas reserves.
- Installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tonnes or more.
- Large-scale logging.
- Large-scale power transmission.
- Municipal wastewater treatment plants servicing more than 150,000 people.
- Municipal solid waste-processing and disposal facilities.
- Large-scale tourism and retail development.
- Large-scale land reclamation.
- Large-scale primary agriculture/plantations involving intensification or conversion of previously undisturbed land.
- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tonnes of finished products per day.
- Installations for the intensive rearing of poultry or pigs with more than: 40,000 places for poultry; 2,000 places for production pigs (over 30 kg); or 750 places for sows.

- Greenfield housing developments that contain more than 2,500 residential units.

Physical environment affected by the project

- Major Greenhouse Gas emitting projects, defined as projects with Direct Greenhouse Gas Emissions of more than 100,000 (short) tons (91,000 metric tonnes) of CO₂eq per year.
- Projects that manufacture, store, transport or dispose hazardous or toxic materials.
- Projects, not categorically prohibited, but located in or sufficiently near sensitive locations of national or regional importance which may have apparent environmental impacts on:
 - Wetlands; Areas of archeological significance;
 - Areas prone to erosion and/or desertification;
 - Areas of importance to ethnic groups/indigenous peoples;
 - Primary temperate/boreal forests;
 - Coral reefs;
 - Mangrove swamps;
 - Nationally-designated seashore areas; and
 - Managed resource protected areas, protected landscape/seascape (International Union for the Conservation of Nature (IUCN) categories V and VI) as defined by IUCN's Guidelines for Protected Area Management Categories. Additionally, these projects must meet IUCN's management objectives and follow the spirit of IUCN definitions.¹²⁷⁵

Communities affected by the project

- Projects which are planned to be carried out in sensitive locations or are likely to have a perceptible impact on such locations, even if the project category does not appear in this list. Such sensitive locations include, *inter alia*, national parks and other protected areas identified by national or international law, and other sensitive locations of international, national or regional importance, such as wetlands, forests with high biodiversity value, areas of archaeological or cultural significance, and areas of importance for Indigenous Peoples or other vulnerable groups.
- Projects which may result in significant adverse social impacts to local communities or other project affected parties.
- Projects which may involve significant involuntary resettlement or economic displacement

Physical environment affected by the project

Nature of project (General)

- Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.
- Thermal power stations and other combustion installations with a heat output of 300 megawatts 1 or more and nuclear power stations and other nuclear reactors, including the dismantling or decommissioning of such power stations or reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).
- Installations designed for the production or enrichment of nuclear fuels, the reprocessing, storage or final disposal of irradiated nuclear fuels, or for the storage, disposal or processing of radioactive waste.

- Integrated works for the initial smelting of cast-iron and steel; installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes.
- Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos; for asbestos-cement products, with an annual production of more than 20,000 tonnes finished product; for friction material, with an annual production of more than 50 tonnes finished product; and for other asbestos utilisation of more than 200 tonnes per year.
- Integrated chemical installations, that is those installations for the manufacture on an industrial scale of substances using chemical conversion processes, in which several units are juxtaposed and are functionally linked to one another and which are for the production of: basic organic chemicals; basic inorganic chemicals; phosphorous, nitrogen or potassium-based fertilisers (simple or compound fertilisers); basic plant health products and biocides; basic pharmaceutical products using a chemical or biological process; and explosives.
- Construction of motorways, express roads and lines for long-distance railway traffic; airports with a basic runway length of 2,100 metres or more; new roads of four or more lanes, or realignment and/or widening of existing roads to provide four or more lanes, where such new roads, or realigned and/or widened sections of road would be 10 kilometres or more in a continuous length.
- Pipelines, terminals and associated facilities for the large-scale transport of gas, oil and chemicals.
- Sea ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes; trading ports, piers for loading and unloading connected to land, and outside ports (excluding ferry piers) which can take vessels of over 1,350 tonnes.
- Waste-processing and disposal installations for the incineration, chemical treatment or landfill of hazardous, toxic or dangerous wastes.
- Large dams and other impoundments designed for the holding back or permanent storage of water.
- Groundwater abstraction activities or artificial groundwater recharge schemes in cases where the annual volume of water to be abstracted or recharged amounts to 10 million cubic metres or more.
- Industrial plants for the: (a) production of pulp from timber or similar fibrous materials; or (b) production of paper and board with a production capacity exceeding 200 air-dried metric tonnes per day.
- Large-scale peat extraction, quarries and open-cast mining, and processing of metal ores or coal.
- Extraction of petroleum and natural gas for commercial purposes.
- Installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tonnes or more.
- Large-scale logging.
- Municipal wastewater treatment plants with a capacity exceeding 150,000 population equivalent.
- Municipal solid waste processing and disposal facilities.
- Large-scale tourism and retail development.
- Construction of high-voltage overhead electrical power lines.
- Large-scale land reclamation.

- Large-scale primary agriculture or forestation involving intensification or conversion of natural habitats.
- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tonnes of finished products per day.
- Installations for the intensive rearing of poultry or pigs with more than 40,000 places for poultry; 2,000 places for production pigs (over 30 kilogrammes); or 750 places for sows.¹²⁷⁶

APPENDIX D.

KEY ELEMENTS OF ENVIRONMENTAL AND SOCIAL MANAGEMENT SYSTEM (AS SPECIFIED BY THE IFC “INTERPRETATION NOTE ON FINANCIAL INTERMEDIARIES”)

- **An E&S policy** which states the applicable E&S requirements and standards relevant to the E&S risk associated with the FI’s portfolio of borrowers/investees¹²⁷⁷; that is senior management endorse that policy making “a commitment to develop and maintain the necessary internal capacity and structure to implement it”¹²⁷⁸; “actively communicate[]” it to employees at all levels and functions¹²⁷⁹ and, as a matter of good practice to the public as well through corporate statements and reports, and is website.”¹²⁸⁰
- The **internal organizational capacity and competency** to implement the policy which includes establishing an “organizational structure that defines roles, responsibilities, and authority to implement the ESMS”¹²⁸¹; “designating personnel with E&S responsibilities and ensuring that resources are available for the effective implementation of the ESMS across the organization”¹²⁸²; and “ensur[ing] that applicable staff has sufficient knowledge for managing the E&S risks, as well as implementing and maintaining the ESMS,” has “appropriate incentives for doing so” and has been trained to “understand their E&S responsibilities.”¹²⁸³
- **An E&S due diligence (ESDD) process** and procedures to identify risks and impacts of its borrowers or investees which include
 - “a process to identify the E&S risks and impacts of their operations”¹²⁸⁴ and development of an Environmental and Social Action Plan (ESAP) “which detail[s] mitigation and performance improvement measures that are necessary to address identified E&S risks and impacts.”¹²⁸⁵
 - at the transaction level, identification of “the risks and impacts associated with environmental, social, labor, occupational health and safety, and security of the business operation considered for financing”¹²⁸⁶ based on, among other things, borrower or investee documentation and information, “site visits to facilities and meet[]/interview[]...relevant stakeholders”¹²⁸⁷; and “review[] the borrower’s/investee’s track record on E&S issues in terms of potential non-compliance with national regulations or negative publicity.”¹²⁸⁸
 - a categorization system “based on the level of E&S risk of the transaction to ...the scope of the ESDD,” e.g. “high, medium, and low risk.”¹²⁸⁹
 - where E&S risks or potential impacts are identified, additional due diligence and identify corrective actions to be taken.
 - documentation of findings and recommendation and conditions for mitigation
 - formulation of an Environmental and Social Action Plan (ESAP) which outlines key E&S performance gaps and proposed mitigation measures and time line for eliminating them.
 - requirement of regular performance reports on progress with respect to the ESAP
 - incorporation of the E&S provisions and investment conditions in legal agreements
- **Monitoring procedures** to track the borrower’s/investee’s E&S performance against the FI’s E&S policy, the ESDD findings, and the ESAP (if required) which
 - in frequency and extent are “commensurate with the E&S risk and potential impacts of the transaction as identified through the ESDD”¹²⁹⁰;
 - focus on “key risks and impacts of the borrower’s/investee’s operations on their workers, communities, and the natural environment as identified during the FI’s ESDD process”¹²⁹¹;
 - “review progress with regard to implementing the agreed ESAP”¹²⁹²;

- include regular reports to senior management on the E&S risks “at the portfolio level and of individual borrowers/investees, if necessary”¹²⁹³;
- include period review of the ESMS to assess effectiveness and adjust or update.¹²⁹⁴
- **Procedures for external communications** which include publication of annual E&S performance report¹²⁹⁵ **and a grievance mechanism** to receive external complaints from the public regarding any aspects of operations” which includes
 - “a process for receiving and responding to concerns from third parties – or example, concerns related to the FI’s investment activities and/or a borrower/investee in its portfolio”¹²⁹⁶; and
 - a “publicly available and easily accessible channels to receive communications and requests from the public for information regarding E&S issues.”¹²⁹⁷

APPENDIX E.

MEETING THE CHALLENGES OF ESTABLISHING AND IMPLEMENTING AN ESMS: SOME EXPERIENCE ON THE PART OF NATIONAL DEVELOPMENT BANKS

Recently, the Inter-American Development Bank published a “roadmap” for national development banks (NDBs) in Latin American and the Caribbean about managing environmental and social risks. Although written as an informative narrative for such banks about why they should be concerned about “sustainability” and how to establish, apply, and develop ESMSs commensurate with their portfolios, it has some relevance for pension funds can learn from it as well.¹²⁹⁸ Among other things it remarked on the following issues:

Timeline for development: Although the time required to develop an ESMS depends “largely on the complexity of the system and the nature and size of the financial institution....in general, an ESMS can be developed within a year.”¹²⁹⁹ In the case of a “higher risk profile” – which would likely be that of an infrastructure project – “a more sophisticated [ESMS] and a broader range of supporting instruments [is needed]” and in turn “approximately eight to ten months to produce.”¹³⁰⁰

Organizational culture and attitudes: Because the quantified risk methods associated with traditional practice are not appropriate to the more “intangible environmental and social risk,” staff required time to get used to “this new way of working.” The result is a need for “an internal culture change” which might best be effected by “start[ing] modestly and generat[ing] small successes in implementation that keep momentum going than to ask for revolutionary change with the risk of losing people’s buy-in, when results are out of sight.”¹³⁰¹

Leadership, commitment and planning: As a general matter, “[t]he successful development of an ESMS relies on the [institution’s] level of ownership, dedication, commitment and planning.”¹³⁰² More specifically, “staff-buy on the ESMS” requires a “top management ... committed to the topic,” namely leaders who “clearly and strongly communicate this message and advocate the need for E&S management in order for staff to pick it up and to work accordingly.”¹³⁰³

Integration of the ESMS with overall operations: To be effective an ESMS must be “fully integrated in a bank’s operational procedures and documentation.”¹³⁰⁴ If it works only in parallel it is inefficient, creating delay in handling transaction. Rather, the ESMS procedure needs to be matched with the other aspects of the process, e.g., the credit process, “to ensure maximum synergy.”¹³⁰⁵ A well-integrated ESMS can lead to more streamlined procedures and, ultimately, to overall reductions in transactional costs, compared to E&S reviews undertaken on an ad hoc and uncoordinated basis.¹³⁰⁶

Timing of introduction of ESMS: A “strategic moment to incorporate the E&S elements in procedures and documentation” should be selected, for example, during a revision of the existing process, “a modification of IT systems and workflows, or during annual maintenance of procedures and documents.”¹³⁰⁷

Spurring client compliance: Where a client falls short on E&S issue performance, it is critical to “identify the most important items” – rather than “burden[] the client with a long list” – and to define for the client “practical and concrete key performance indicators with clear objectives and outputs.”¹³⁰⁸

APPENDIX F.

SCHEMATIC OF IFC PROCEDURES THROUGH THE APPROVAL OF INVESTMENT STAGE For Direct Investments

The IFCs' Environment, Social and Governance Department (referred to as "CES") is responsible for "the integration of environment, social and corporate governance (ESG) activities supporting IFC investment activities."¹³⁰⁹ The Investment Support Group of CES (referred to as "CESI") "is responsible for the E&S due diligence and supervision of IFC's investment projects."¹³¹⁰ There are two CES Managers for the CESI whose responsibilities include "providing clearance on critical decisions about projects."¹³¹¹ CESI staff include a Lead Environmental and Social Specialist (LESS) who is "the E&S specialist...supporting the project...team."¹³¹² More specifically the role of the LESSs is to "identify and assess projects' E&S risk and impacts in order to help clients to define adequate E&S management plans and to promote sustainable outcomes."¹³¹³ A CSI Regional Team Leader (RTL) is "responsible for supervision and assignment" of the LESS as well as a CESI Sector Lead (SL).¹³¹⁴ More generally both are referred to as having "an outstanding role on the quality and consistency of the project processing and on providing guidance on technical issues and operational performance."¹³¹⁵ Although their roles may overlap, "most of [the] SL ha[s] a leading role during the appraisal of projects while [the] RTL ha[s] the main role during the project supervision phase."¹³¹⁶ (Note: The SL is a "[s]enior staff person responsible for approval of disclosure documents prior to release to the IFC Disclosure Website."¹³¹⁷)

As described in the Manual "the CESI Regional Team Leader (... often in the case of regional projects) and/or the relevant CESI Sector Lead (...particularly for global projects),...request...information necessary to understand the extent of the business activity being considered for investment." Then, "[o]nce the use of proceeds, asset type/status, investment instrument and nature of asset control by the company are understood, the RTL and/or SL identifies the risks and impacts that might be associated with these types of activities" and then "articulate[s] the conceptual approach that will guide the eventual E&S scope of review should the project be approved for appraisal."¹³¹⁸ Then one or the other "determine[s] the provisional categorization for the project."¹³¹⁹ Note at one point in the Manual it states that "[t]he LESS analyzes the project scope and its potential E&S risks and when those are minimal or none assigns a provisional category C subject to clearance with the SL. The LESS has to provide a rationale for assigning a Category C to a project in the [Summary Investment Information (SII)]."¹³²⁰ However, authority with respect to categorization seems to rest with the RL or SL.¹³²¹

The LESS would appear to have a major role in project appraisal though subject to oversight and review. The LESS does "the planning of appraisal activities," works with the "investment team and client" in planning and developing a site visit agenda and then appears to "conduct[] site visits and meetings with project stakeholders."¹³²² Then, subject to "guidance as necessary from the SL and/or RTL," he or she then identifies what are the applicable PSs (and why), "[a]ny performance gaps associated" with any; "[t]he key actions that will be necessary to mitigate the identified gaps," and "confirm[s] or modif[ies], as necessary, the provisional categorization."¹³²³ The LESS, with similar guidance, "verif[ies]...[that] there is sufficient IFC understanding of how project E&S risks and impacts will be managed for IFC to proceed to Investment Review and institutional disclosure."¹³²⁴

Then, with respect to certain kinds of projects, the CESI Manager then determines whether there should be a Peer Review Meeting (PRM). A PRIM "is typically held during the early stages of appraisal for all Category A projects, and for Category B projects that have unique or difficult

issues.”¹³²⁵ Its purpose is “to achieve consistency in professional judgment and for CESI Specialists to learn from one another.”¹³²⁶

Where relevant, the LESS is supposed to prepare a draft “Environmental and Social Review Summary” (ESRS) (discussed in the main text) – by which the “IFC publicly discloses how the E&S aspects of a project were reviewed and the rationale for categorization” as well as a draft Environmental and Social Action Plan (ESAP).¹³²⁷ The SL (and the RTL upon request) review those documents before they are submitted to the client.¹³²⁸ The CESI manages “[c]lear[s] ESRS and ESAP for all Cat. A projects.”¹³²⁹

After the project is appraised “the Director or a manager of an IFC Investment Department or a regional Director chairs [a] meeting, [the Investment Review Meeting (IRM)], which is the basis for IFC management approval of the project. The full project team attends the IRM, as appropriate.”¹³³⁰ Note, in the Manual it is stated that “[t]he LESS should participate in the project IRM and be prepared to discuss key issues of the project.”¹³³¹

The Board is presented with a Board Paper “prepared by the investment department” the environmental and social section of which, among other things, “[d]escribe[s] significant risks and impacts and mitigations as well as anticipated key development outcomes of the project” and “include[s] E&S additionality language where warranted.”¹³³² Moreover, according to the Manual, the LESS “provide[s] the investment department with selected DOTS E&S indicators for entry in the DOTS system under the Monitorable Impact Section.”¹³³³ (Note that the LESS [p]rovides the E&S section language to the Board Paper” subject to clearance by the SL.¹³³⁴)

For Investments in Financial Intermediaries

In the case of FIs, the Transaction leader - “the representative of IFC’s Investment Department who is responsible for managing the overall transaction for an investment or advisory project”¹³³⁵ - “[p]roved[es] all required client information about the client’s business.”¹³³⁶ For investments that are of relevance here, the LESS “collect[s] portfolio and SEMS data for analysis”; “determine[s] the significance of business activities that have potential E&S impact by reviewing the portfolio and sector information” (after “[r]eview [of] the tenor, transaction sizes and the industrial sectors where the FI is investing); “the Applicable Performance requirements;”¹³³⁷ the need for an appraisal visit of the FI; the adequacy of the client’s SEMS; “any SEMS actions that the client would need to undertake to address gaps in these areas to ensure compliance with the Applicable Performance Requirements;” the “need to engage an External Expert to support IFC’s supervision” and “provide the scope of work where applicable”¹³³⁸; “the reporting and supervision requirements.”¹³³⁹ He or she “peer review[s] (with another colleague) the determination for limited E&S impact.”¹³⁴⁰ The LESS “[a]ssigns the E&S Category to the project.”¹³⁴¹ (The process may involve a Peer Review Meeting where “[t]here are project issues that are common to a number of projects and that need a common approach for quality assurance” or “[t]here is a complex project E&S issue that is uncommon or has not been encountered before.”¹³⁴²) All of these determinations by the LESS are subject to review by the Team Leader (TL) who is a person within CESI “responsible for the CES specialists working with specific Industry Departments.”¹³⁴³ However, it is the CESI Manager who decides whether there is a PRM and how it is run, whether an External Expert is used and the Terms of Reference and “[t]he waiver request for any part of the Applicable Performance Requirements and ESMS Action Plan.”¹³⁴⁴ Here, too, the LESS prepares the E&S language for the Board paper; “provide[s] support, as necessary, to the project team for presentations to the Board”¹³⁴⁵; and “[u]pon request, provide[s] technical briefings to members of the IFC’s Board of Director.”¹³⁴⁶ Finally, the LESS provides input for the drafting of the investment contract.”¹³⁴⁷

APPENDIX G.

IFC: TRACKING PROJECT/FI OUTCOMES AND PERFORMANCE

There are several different ways by which the IFC tracks project/FI outcomes and performance.

Environmental and Social Risk Ratings (ESRRs)

Environmental and Social Risk Ratings (ESRRs) which are the ostensible basis for prioritization of supervision efforts. According to the IFC, Category A, B and selected FI projects are scored at the end of appraisal and during supervision (see below). Category C projects and Category FI-3 projects are not scored. Calculated ESRR scores range from 1-4 with 1: Excellent; 2-Satisfactory; 3: Partly Unsatisfactory; and 4: Unsatisfactory.¹³⁴⁸ More particularly, the ESRR “summarizes IFC’s current assessment of a company’s project-management capacity, compliance with its contractual requirements (such as E&S reporting), and action-plan completion and the quality of communications with its stakeholders. Projects with ESRR of 3 or 4 are performing below IFC expectations.”¹³⁴⁹ Note that the ESRR “is attributed at a company level (i.e. a company with several projects in the portfolio will have one ESRR score, ranging from 1 – best to 4 - worst).”¹³⁵⁰

Actually although they are conceptually related there are two kinds of ESRRs. The **ESRR_(A)** – an “**Appraisal Environmental and Social Risk Rating**” – “considers Management Factors, Performance Factors, and Communication Factors once all data required for appraisal has been collected and analyzed.”¹³⁵¹ The **ESRR_(A)** “**establish[es] a baseline ESRR rating** to express the status of the client before IFC intervention and implementation of remedial measures contained in the Action Plan.”¹³⁵² The **ESRR_(S)** – **Supervision Environmental and Social Risk Rating** – considers the same factors but is “focused on the client’s performance, compliance with the Action Plan and other IFC requirements throughout the project life in IFC’s portfolio.”¹³⁵³

In all events, ESRRs are “assigned and updated, usually once a year, by our environmental and social specialists, and is based on reports provided by clients and on IFC’s site supervision visits.”¹³⁵⁴

For those of the IFC’s clients for whom ESRRs have been made, for a high proportion the outcomes appear to have been good: according to the 2011 fiscal year report, ESRR 3 and 4 projects were “only 13% of the current active portfolio,” though the figure varies with the region in which the project is located.¹³⁵⁵

Development Outcome Tracking System (DOT)

The IFC also has what it terms the Development Outcome Tracking System (DOT) by which it “tracks the overall development outcome of IFC projects by assessing the following components throughout the project life cycle: (i) financial performance; (ii) economic performance; (iii) E&S performance; and (iv) broader private-sector development impacts.”¹³⁵⁶

APPENDIX H.

SOME IMPORTANT CHANGES IN 2014 TO IFC ENVIRONMENTAL AND SOCIAL REVIEW PROCEDURES RELATING TO FINANCIAL INTERMEDIARY INVESTMENTS

Early Review and Appraisal

Role of LESS: Although not entirely clear it seems that the LESS is afforded a somewhat greater and perhaps more proactive role. With regard to the early review and appraisal stage, two passages in that connection from the current, new text, with deletions from (strikethroughs) and additions (italics) are as follows:

The LESS is responsible for reviewing available information *about the project concept, the financing product type offered to the client, the expected portfolio to be supported, and, where available, the Financial Institution's Environmental and Social Management System (ESMS) and E&S risk management approach, and its labor practices* ~~from~~ *in collaboration with the Transaction Leader (TRL)*¹³⁵⁷

The LESS will participate in the project's Concept Review Meeting, responding to E&S inquiries, *and flagging key E&S issues associated with the project, product and type of financing, the need for a field appraisal, appropriateness of the assigned project E&S Tier, and in the case of existing clients key performance gaps. Upon request the LESS will provide the TRL with the E&S input for the PDS-Concept/MOR, identifying the provisional category of the project, key portfolio risks, the anticipated E&S requirements, scope of E&S due diligence (ESDD) and for existing clients the ESRR and outstanding E&S issues.*"¹³⁵⁸

Also, although the Manual made only brief reference to the Investment Review Meeting (IRM)(in the context of investments in FIs) and simply provided that "if required, the LESS will participate in the IRM and respond to any queries,"¹³⁵⁹ the current version mandates that the LESS "prepare a summary of the key appraisal findings for the IRM book, provide this to the TRL, and participate in the IRM responding to any E&S related queries."¹³⁶⁰ The latter also goes into great detail about what the summary covers and also requires the LESS to "provide comments on the E&S requirements specified in the Term Sheet."¹³⁶¹

Categorization: While the new version adds a whole section on "Detailed Appraisal Guidance" it is not especially illuminating. It first simply restates the definitions for the FI categories, adding that "[o]nce the appraisal is completed, the LESS will categorize the investment as FI-1 (high), FI-2 (medium) or FI-3 (low)." Then suggestively but cryptically it adds the following: "The categorization will be commensurate with the E&S risk profile of the existing and/or proposed portfolio and will take into account the tenor, type, size and sector exposure of the portfolio, and be guided by the Tip Sheet Compendium³ [and those definitions]."¹³⁶² The Compendium is described as "entail[ing] a description of all products offered by IFC to FIs and the respective E&S requirements" and is said to "comprise[...four compendiums covering: (i) Short Term Finance programs, ii) Commercial Banks, iii) Non-Banking Financial Institutions, and iv) Investment Funds."¹³⁶³ It is described as "provid[ing] guidance to CESI Specialists on the key characteristics of each product, the typical E&S risks and resulting E&S requirements, the appraisal approach currently being followed, an indicative portfolio risk rating, and the likely categorization."¹³⁶⁴

Application of the PS: The sections relating the application of the PS (and related categorization issues) as they pertain to different forms of finance (with explicit or implicit reference to issues of leverage) are extensively rewritten. The subsequent material goes at the issues relating to the kinds of projects which are the focus of this paper in two different ways. First, it states that:

“[f]or FIs where the portfolio to be supported entails project finance and long-term corporate finance, the FI will be required to assess E&S risks against the PSs and require its borrowers/investees to comply with the PSs. Specifically, the FI will apply the PSs as follows:

- For project finance and corporate loans with tenor of not less than 36 months and funding-defined assets as part of a project amounting to at least \$10 million of total capital cost, compliance with all PSs is required;
- For other corporate loans provided to a single client exceeding \$5 million, on an aggregated basis over a period of 36 months, the FI should require the client’s ESMS and labor practices to be [/]consistent with PS1 and PS2, commensurate with the level of risk presented by the sub-client business activities; and
- In cases where the FI’s leverage is limited (e.g., secondary market transactions or syndicated loans where the FI’s participation is below 25% of the total loan value), the FI will be required to screen such transactions against key objectives of the PSs and make a go or no go decision based on the results of this screening.”¹³⁶⁵

Next, there follow passages of relevance here. One refers to “Commercial Banks and Non-Banking Financial Institutions” (whereas the reference in the prior document was to “Corporate and Legal Entities FI investments”).¹³⁶⁶ The other is a nominally new/distinct category of “Private Equity Funds.”¹³⁶⁷ Arguably correspondingly, the passage referring to “Large Infrastructure or Extractive Industry FI Investments” of the prior version is absent in the new one.¹³⁶⁸ The continued lack of clarity of the basis for categorization persists: in the current version the LESS to categorize “Commercial Banks and Non-Banking Financial Institution” FI investments based on “expected portfolio risk”¹³⁶⁹; by contrast the focus of the LESS for investments “Corporate and Legal Entities” in the prior version was on “potential E&S impacts” and for “Large Infrastructure or Extractive Industry” it seems to have been “potential significant E&S risks.”¹³⁷⁰

Scrutiny of sub-projects: With regard to Private Equity Funds a more directive approach to categorization and a somewhat greater level of post approval scrutiny of sub-projects is mandated as compared to that which was previously required for Large Infrastructure or Extractive Industry. For the former the LESS *must* “in most cases, categorize the project as FI-1 or FI-2 based on the expected portfolio risk, and require the FI to implement an ESMS to support application of the IFC Exclusion List, List of Restricted Activities, applicable national E&S regulations, and the IFC PSs.” Moreover, in such cases, “the Fund Manager will be required to provide to IFC the ESDD and Corrective Action Plans developed for the first three investments and all high risk sub-projects for review and comments, prior to taking any proposed investment for approval by its Investment Committee, to ensure ESMS implementation is robust.”¹³⁷¹ By contrast, for Large Infrastructure or Extractive Industry, there is no reference to categorization as such and there is a reference to *possible* exercise of “review [of] the FI’s first few financing activities...to ensure the FI’s [ESMS] implementation is robust.”¹³⁷²

Disclosure and Commitment

Perhaps most striking about the revised section of the Manual relating to IFC disclosure and commit are (a) the addition of extensive detail as to the issues which must be included in the E&S language prepared by the LESS to be included in the Board Paper and (b) that the TRL must “obtain[] clearance of the Board Paper from the LESS prior to its submission to the Board.”¹³⁷³

Supervision

Among the more important changes here are the following:

Waivers: A seeming stronger role of the LESS in any waiver of E&S conditions for disbursement [COD] of funds. That is, a waiver is granted only if the LESS concurs in a proposal by the TRL/Portfolio Officer to waive a COD and the SL and Manager CESI approve it.”¹³⁷⁴

Review of subprojects: The text reinforces the need for greater scrutiny of subprojects, that is: “For projects that require IFC review of the first three ESDDs and that of all high risk sub-projects, the LESS reviews the ESDD received from the client for such projects...and provides comments and recommendations to the client.”¹³⁷⁵ Interestingly it stresses the need for the LESS to “consult with other specialists including a specialist with sector-specific expertise relevant to the sub-project proposed, as needed.”¹³⁷⁶

AEPRs: Explicit reference is made to waivers of AEPR requirements “exclusively for extraordinary circumstances” which must be approved by the CESI Manager.¹³⁷⁷

Supervision site visits: Explicit language is included with regard to FI-1 and FI-2 projects namely:

- “Category FI-1 (high risk) projects”: “Mandatory SSV on annual basis”;
- “Category FI-2 (medium risk) projects”: Mandatory SSV on an annual basis “for all FI-2 projects with the PSs as applicable requirement” and “at least every 3 years for all other FI-2 projects.”¹³⁷⁸

ESDD Reviews and Sub-Project Site Visits: The text sets forth detailed criteria relating to when sub-project site visits are to be made. For example with regard to Private Equity Funds the LESS must “select 1–3 sub-projects to visit to assess the Fund Manager’s implementation of the ESMS and compliance of the sub-projects with the applicable requirements.” Priority is given to “high risk sub-projects, projects for which the ESDD prepared or monitoring by the Fund Manager appears inadequate, projects with inadequate Corrective Action Plan implementation, where accidents or incidents have occurred, and any sub-projects deemed relevant to assess performance.”¹³⁷⁹ Note that while the LESS engages the client as to the findings and recommendations and secure agreement with them it is the Portfolio Officer who “is responsible for following up with the client on non-technical issues identified during the supervision visit regarding the client’s compliance with the E&S requirements.”¹³⁸⁰

Disclosure of ESAP Status and Categorization of Sub-Projects: The revised text requires greater public disclosure “[f]or FI-1 and FI-2 projects to which the 2012 Access to Information Policy (AIP) applies,” the LESS must update “the implementation status of any ESAP items that were disclosed in the Summary of Investment Information prior to the project’s approval, after such information has become available [by way of the AEPR and/or a SSV.]”¹³⁸¹ Moreover, for the Private Equity Fund among the, the LESS must “review and verify the categorization of the fund’s sub-projects, prior to the disclosure of the relevant information pertaining to its high-risk sub-projects and any other sub-projects that may be disclosed on a best-efforts basis.”¹³⁸²

ENDNOTES

¹ “Infrastructure: Defining Matters,” by Larry W. Beeferman and Allan Wain, Pensions and Capital Stewardship Project, Labor and Worklife Program, Harvard Law School, December, 2013, p. 17.

http://www.law.harvard.edu/programs/lwp/LWPPensions_publications.html#other

² The EP are “a risk management framework, adopted by financial institutions [FIs], for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making.” “About the Equator Principles,” Equator Principles. <http://www.equator-principles.com/index.php/about-ep/about-ep>

³ See infra at p. 19.

⁴ “Universal Owners: challenges and opportunities,” by James Hawley and Andrew Williams, *Corporate Governance: An International Review*, Volume 15, Number 3, May 2007, 415-420, 415. The authors remark: “Even if some institutions are not largely indexed (or are shifting assets into so-called alternative asset classes, e.g. hedge funds, private equity, commodities, real estate) they remain broadly diversified across asset classes, broadly diversified across sectors and across geographic regions.” Id.

⁵ Id. at 415-416.

⁶ “[S]ince many of these institutions are pension funds, such as CalPERS, CalSTRS, USS, TIAA-CREF, Caisse de Dépôt et Placement du Québec, they naturally have (or should have) a long-term time horizon.” Id. at 416.

⁷ “Regulating pension fund disclosure of environmental, social and governance practices,” Submission to the Nova Scotia Pension Review Panel by Laura O’Neill, Director of Law and Policy, Shareholder Association for Research and Education, July 18, 2008, p. 4 <http://novascotia.ca/lae/pensionreview/docs/SHARESubmission.pdf>

⁸ “Reclaiming fiduciary duty balance,” by James Hawley, Keith Johnson, and Ed Waitzer, *Rotman International Journal of Pension Management*, Volume 4, No. 3, Fall, 2011, pp. 4-16, 13. <http://utpjournals.metapress.com/content/d78148gvh28678g3/fulltext.pdf>

⁹ “Reason, Rationality and Fiduciary Duty,” by Steve Lydenberg, *Journal of Business Ethics*, Published online February 4, 2013, p. 6. <http://irrcinstitute.org/pdf/FINAL-Lydenberg-Reason-Rationality-2012-Winner.pdf>

¹⁰ See, for example, “Schemes ‘risk damaging sponsor if they ignore ethical investing’”, Pension Funds Online.

<http://www.pensionfundsonline.co.uk/content/pension-funds-insider/schemes-39risk-damaging-sponsor-if-they-ignore-ethical-investing39/390>

¹¹ “The Kay Review of UK Equity Markets and Long-Term Decision Making,” Final Report, July 2012, p. 5.

<http://www.bis.gov.uk/assets/biscore/business-law/docs/k/12-917-kay-review-of-equity-markets-final-report.pdf>

¹² Id. at 68.

¹³ Id. at 9.

¹⁴ Id. at 41.

¹⁵ Id. at 9.

¹⁶ Id. at 70.

¹⁷ Id. at 71.

¹⁸ See “Fiduciary Duty of Investment Intermediaries,” UK Law Commission.

http://lawcommission.justice.gov.uk/areas/fiduciary_duties.htm

¹⁹ See “Paradigm Lost: employment-based defined benefit plans and the current understanding of fiduciary duty,” by Larry W. Beeferman, Chapter 9 in *Cambridge Handbook of Institutional Investment and Fiduciary Duty*, edited by James P. Hawley, Andreas G.F. Hopener, Keith L. Johnson, Joakim Sandberg, and Edward J. Waitzer, Cambridge University Press, 2014.

²⁰ “Environmental and Social Risk Due Diligence in the Financial Sector, current approaches and practices,” “The Sustainable Finance Advisory May, 2013, p. 11. http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/2013_WS1_1.pdf

²¹ Id. at 14.

²² Id.

²³ See id. at 26-28.

²⁴ “Development Finance Institutions,” by Rhianydd Griffith and Matthew Evans, Advocates for International Development, July 2012. http://a4id.org/sites/default/files/user/Development%20finance%20institutions_0.pdf

²⁵ For example, the IFC refers to multilateral development institutions as ones “owned by several different member countries” whereas bilateral ones are “owned by a single country.” “Approach of Other Development Finance Institutions,” “FIRST for Sustainability,” International Finance Corporation. <http://firstforsustainability.org/sustainability/development-finance-institutions/approach-of-other-development-finance-institutions/>

²⁶ “Development Finance Institutions,” by Rhianydd Griffith and Matthew Evans, Advocates for International Development, July 2012. http://a4id.org/sites/default/files/user/Development%20finance%20institutions_0.pdf “The finance is generally offered in the form of long-term loans (between 10 and 25 years), equity investment and credit risk guarantees.” Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ The World Bank Group consists of The International Bank for Reconstruction and Development (IBRD), which “lends to governments of middle-income and creditworthy low-income countries”; and the International Development Bank (IDA) which “provides interest-free loans – called credits – and grants to governments of the poorest countries”; The Multilateral Investment Guarantee Agency (MIGA) which “offer[s] political risk insurance (guarantees) to investors and lenders” as means “to promote foreign direct investment into developing countries”; and The International Centre for Settlement of Investment Disputes (ICSID) which “provides international facilities for conciliation and arbitration of investment disputes.” “About,” The World Bank. <http://www.worldbank.org/en/about> See also “Governance,” International Finance Corporation. http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc/organization/ifc_governance

³² “Environmental and Social Risk Due Diligence in the Financial Sector, current approaches and practices,” The Sustainable Finance Advisory, May, 2013, p. 24. http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/2013_WS1_1.pdf Perhaps not surprisingly, a roughly similar fraction drew upon either general or client’s/investee’s industry-specific environment, health and safety

guidelines. Id. The frameworks and principles to which FIs referred to the most in their E&S policies or position statements were: UNEP Finance Initiative (UNEP FI), United Nations Global Compact (UNGC), Universal Declaration of Human Rights (UNDHR), United Nations backed Principles for Responsible Investment (UNPRI), and United Nations Guiding Principles for Business and Human Rights (UNGPs).” Id. at 23.

Others include the Banking Environment Initiative, the Millennium Development Initiative, the OECD Guidelines for Multinational Enterprises, The UNEP FI Principles for Sustainable Performance (PSI), International standards and guidelines include Certification standards for commodities, e.g., Forest Stewardship Council (FSC), Roundtable on Sustainable Palm Oil (RSP).

³³ “IFC’s Vision, Values, & Purpose,” International Finance Corporation.

http://www1.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about-ifc/vision

³⁴ Id.

³⁵ Namely, they are to:

1. “assist in financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries”;
2. “seek to bring together investment opportunities, domestic and foreign private capital, and experienced management”;
- and
3. “seek to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries.

“ARTICLE I – Purpose (as amended through June 27, 2012),” International Finance Corporation.

http://www1.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about-ifc/articles+of+agreement/about-ifc+-+ifc+articles+of+agreement+-+article+i

³⁶ “International Finance Corporation’s Policy on Environmental and Social Sustainability,” IFC, January 1, 2012, p. 2. http://www1.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES (Referred to hereafter as the “Policy”).

³⁷ Id. More particularly, the IFC is “committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process, and that renewable natural resources are managed sustainably.” Id.

³⁸ Id. at 1.

³⁹ “Summary, Human Development Report 2011, Sustainability and Equity: A Better Future for All.” p. 1

http://www.undp.org/content/dam/undp/library/corporate/HDR/2011%20Global%20HDR/English/HDR_2011_EN_Summary.pdf

⁴⁰ Id. at 2. This definition is distinguished from others offered for sustainable development. More particularly, the latter “capture the precept that the possibilities open to people tomorrow should not differ from those open today, but generally do not adequately capture sustainable human development. They do not refer to the expansion of choice, freedoms and capabilities intrinsic to human development. They do not recognize that some dimensions of well-being are incommensurable. And they do not consider risk. Human development is the expansion of the freedoms and capabilities people have to lead lives they value and have reason to value. Freedoms and capabilities that enable us to lead meaningful lives go beyond satisfaction of essential needs. In recognizing that many ends are necessary for a good life and that these ends can be intrinsically valuable, freedoms and capabilities are also very different from living standards and consumption. We can respect other species, independent of their contribution to our living standards, just as we can value natural beauty, regardless of its direct contribution to our material standard of living. The human development approach recognizes that people have rights that are not affected by the arbitrariness of when they were born. Further, the rights in question refer not only to the capacity to sustain the same living standards but also to access the same opportunities. This limits the substitution that can occur across dimensions of well-being. Today’s generation cannot ask future generations to breathe polluted air in exchange for a greater capacity to produce goods and services. That would restrict the freedom of future generations to choose clean air over more goods and services.” “Why sustainability and equity?” Chapter 1 in “Human Development Report 2011,” UNDP, p. 17.

http://www.undp.org/content/dam/undp/library/corporate/HDR/2011%20Global%20HDR/English/HDR_2011_EN_Chapter1.pdf The text adds: “Equality is neither necessary nor sufficient for equity. Different individual abilities and references lead to different outcomes, even with identical opportunities and access to resources. Absolute levels of capabilities matter: inequality between millionaires and billionaires is less the focus than inequalities between the poor and the wealthy. And personal characteristics are also important: poor and disadvantaged groups, including people with mental or physical disabilities, need greater access to public goods and services to achieve equality of capabilities.” Id. at 18-19.

⁴¹ Policy at 3. Note that this approach to individual outcomes also requires businesses, among other things, “to creat[e] access to an effective grievance mechanism that can facilitate early indication of, and prompt remediation of various project-related grievances.” Id.

⁴² Id.

⁴³ “IFC Performance Standards on Environmental and Social Sustainability - Effective January 1, 2012,” International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps (Referred to hereafter as the “Performance Standards” or “PS”).

⁴⁴ Policy at 2.

⁴⁵ Performance Standards at 2.

⁴⁶ See for example “Development Banks and Social and Environmental Standards,” by Judith Pauritsch, OEB, Development Bank of Austria, presented at “In Introduction to the World of Development Banks,” Workshop, April 4-5, 2014, Vienna University of Economics and Business (observing that there are “[m]ore factors to consider in a project than E&S”; citing “trade offs” involving “high risk” projects with “large opportunities” and more specifically tensions between “potentially negative impacts on local level vs. positive effects on regional/national level”; and referring to the merits (presumably under certain circumstances) of non-renewable energy, labor intensive industries and extractive industries” and concerns country and society sovereignty), Slide 21. http://www.wu.ac.at/economics/vw-zentrum/events/ifi/vwz_social-environment.pdf

⁴⁷ Policy at 2.

⁴⁸ Id.

⁴⁹ “Performance Standard 2, Labor and Working Conditions,” IFC, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES

⁵⁰ Id. More specifically, “[t]hose conventions are:

ILO Convention 87 on Freedom of Association and Protection of the Right to Organize

ILO Convention 98 on the Right to Organize and Collective Bargaining

ILO Convention 29 on Forced Labor

ILO Convention 105 on the Abolition of Forced Labor

ILO Convention 138 on Minimum Age (of Employment)

ILO Convention 182 on the Worst Forms of Child Labor

ILO Convention 100 on Equal Remuneration

ILO Convention 111 on Discrimination (Employment and Occupation)

UN Convention on the Rights of the Child, Article 32.1

UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families” Id. at 1, Note 2.

⁵¹ Id.

⁵² “Performance Standard 3, Resource Efficiency and Pollution Prevention,” International Finance Corporation, January 1, 2012, p. 1 (footnotes omitted). http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ For example, the fourth performance standard, that for community health, safety, and security seems, on its face, to be concerned with the consequences of client behavior for potentially affected communities. It remarks on a somewhat generic “recogni[tion] that project activities, equipment, and infrastructure can increase community exposure to risks and impacts.” and that, “communities that are already subjected to impacts from climate change may also experience an acceleration and/or intensification of impacts due to project activities.” While it emphasizes “public authorities’ role in promoting the health, safety, and security of the public” it acknowledges the IFC client’s “responsibility to avoid or minimize the risks and impacts to community health, safety, and security that may arise from project related-activities, with particular attention to vulnerable groups.” “Performance Standard 4, Community Health, Safety, and Security,” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES. It notes that “[i]n conflict and post-conflict areas, the level of risks and impacts...may be greater” that those risks” “could exacerbate an already sensitive local situation and stress scarce local resources.” Id. However, perhaps because the consequences can be so severe and hence inflammatory, the serious challenges that would likely to follow on from them to clients’ operations might seem obvious and need not be stated.

The dual theme emerges a bit for the fifth performance standard, that for land acquisition and involuntary resettlement. There is a “[r]ecogni[tion] that project-related land acquisition and restrictions on land use can have adverse impacts on communities and persons that use this land. Involuntary resettlement, namely “both...physical displacement (relocation or loss of shelter) and...economic displacement (loss of assets or access to assets that leads to loss of income sources or other means of livelihood1) as a result of project-related land acquisition and/or restrictions on land use.” According to the text, “[u]nless properly managed, involuntary resettlement may result in long-term hardship and impoverishment for the Affected Communities and persons, as well as environmental damage and adverse socio-economic impacts in areas to which they have been displaced.” From the IFC client perspective it then adds that “the direct involvement of the client in resettlement activities can result in more cost-effective, efficient, and timely implementation of those activities, as well as in the introduction of innovative approaches to improving the livelihoods of those affected by resettlement.” “Performance Standard 5, land acquisition and involuntary resettlement,” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES

The focus of the sixth performance standard is on biodiversity conservation and sustainable management of living natural resources. It is based on the “recogni[tion] that protecting and conserving biodiversity, maintaining ecosystem services, and sustainably managing living natural resources are fundamental to sustainable development.” In describing what is meant by ecosystem services, the standard emphasizes their importance without and within the business sphere, namely they are “the benefits that people, including businesses, derive from ecosystems. The services include “(i) provisioning services, which are the products people obtain from ecosystems; (ii) regulating services, which are the benefits people obtain from the regulation of ecosystem processes; (iii) cultural services, which are the nonmaterial benefits people obtain from ecosystems; and (iv) supporting services, which are the natural processes that maintain the other services.” These services are, in turn “often underpinned by biodiversity”; hence “[i]mpacts on biodiversity can therefore often adversely affect the delivery of ecosystem services.” “Performance Standard 6, land acquisition and involuntary resettlement,” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES. Thus, the standard “addresses how clients can sustainably manage and mitigate impacts on biodiversity and ecosystem services throughout the project’s lifecycle.” Id.

The seventh and eighth performance standards do not reference business-specific interest as such, perhaps, as suggested above, because of the overarching concern about and importance of the standards for those individuals who or communities which might be affected by failure to conform to them. Thus, the seventh standard is based on the “recogni[tion] that Indigenous Peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population.” They may well have limited “capacity to defend their rights to, and interests in, lands and natural and cultural resources” and “ability to participate in and benefit from development.” They may be “particularly vulnerable if their

lands and resources are transformed, encroached upon, or significantly degraded. Their languages, cultures, religions, spiritual beliefs, and institutions may also come under threat.” Their vulnerability to project related impacts “may include loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases.” “Performance Standard 7, Indigenous Peoples,” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96bfdd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES

Similarly, the eighth performance standard which concerns cultural heritage is described as being established in “recogn[iti]on of the importance of cultural heritage for current and future generations” which is described in terms which suggest an overriding importance in the face of whatever project-related, business goals there might be. “Performance Standard 8, Cultural Heritage,” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96bfdd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES

⁵⁷ While, broadly speaking the IFC’s PS define clients’ responsibilities for managing their environmental and social risks, the Guidance Notes are described by the IFC as “offer[ing] helpful guidance on the requirements contained in the Performance Standards, including reference materials, and on good sustainability practices to improve project performance.” “Guidance Notes to Performance Standards on Environmental and Social Sustainability,” International Finance Corporation, January 1, 2012, p. ii. http://www1.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Documents.pdf?MOD=AJPERES (Hereafter referred to as the “Guidance Notes”). It adds that “[t]hese Guidance Notes are not intended to establish policy by themselves; instead, they explain the requirements in the Performance Standards” Id.

⁵⁸ “Guidance Note 2, Labor and Working Conditions,” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Documents.pdf?MOD=AJPERES

⁵⁹ Id. at 2.

http://www1.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Documents.pdf?MOD=AJPERES

In some measure the IFC treats matters of worker voice less as having value in and of itself and more as a means for identifying potential problems with the projects: “In the identification of labor risks and impacts, clients should engage with workers and with the representatives of workers’ organizations where they exist. In order to strengthen the process of identifying risks and impacts, engagement could also include workers’ organizations at a sector level and labor inspectorates.” Id.

⁶⁰ “Guidance Note 3, Resource Efficiency and Pollution” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Documents.pdf?MOD=AJPERES

The same is largely true for the fourth guidance note relating to community health, safety and security. However, the narrative does state that “Performance Standard 4 also recognizes that clients have a legitimate obligation and interest in safeguarding company personnel and property.” “Guidance Note 4 Community Health, Safety and Security,” International Finance Corporation, January 1, 2012, p. 1.

http://www1.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Documents.pdf?MOD=AJPERES

By contrast, the fifth guidance note, one for land acquisition and involuntary resettlement, does not refer overtly to the benefit of compliance with the requirements in the manner required to the client’s immediate interests. “Guidance Note 5 Land Acquisition and Involuntary Resettlement. Id. The same is true for the sixth guidance note, on biodiversity conservation and sustainable management of living natural resources; the seventh, on indigenous peoples; and the eighth on cultural heritage. “Guidance Note 6 Biodiversity Conservation and Sustainable Management of Living Natural Resources”; Guidance Note 7 Indigenous Peoples”; and “Guidance Note 8 Cultural Heritage.” Id.

⁶¹ See for example, “International Finance Corporation, Credit Analysis,” Moody’s Investors Service, November 19, 2013. <http://www1.ifc.org/wps/wcm/connect/e5aaba0042929868a63aae0dc33b630b/Moody%27s+IFC+credit+analysis+Nov2013.pdf?MOD=AJPERES>

⁶² In this connection see, for example, “Annual Report 2013,” Volume 2 (IFC Financial and Project Results), International Finance Corporation.

http://www1.ifc.org/wps/wcm/connect/4c355f8041154fbb10af7f9a502b026/AR2013_Volume2.pdf?MOD=AJPERES&AR2013%20Volume%202%20Financials.%20Projects.%20&%20Portfolio and “Annual Portfolio Performance Review - FY10,” International Finance Corporation, September 8, 2010.

http://www1.ifc.org/wps/wcm/connect/0513f98046b65556aa41abb254bfb7d4/APPR_FY10_IFC.pdf?MOD=AJPERES For certain critical commentary on the foregoing see “Producing Investment Space: The International Finance Corporation, Institution Building, and The Financialization of Development,” by Jayson J Funke, Ph.D. Dissertation, Clark University, October 2011. <http://gradworks.umi.com/34/86/3486397.html>, especially Chapter 4, pp. 76-96.

⁶³ See for example, “Approach of Other Development Finance Institutions,” FIRST for Sustainability, International Finance Corporation (“Multilateral and bilateral Development Finance Institutions operate across various world regions to promote sustainable development. As part of their mandate, these institutions require that their financing activities are conducted in compliance with certain environmental and social requirements.”) <http://firstforsustainability.org/sustainability/development-finance-institutions/approach-of-other-development-finance-institutions/>

⁶⁴ “The ADB focuses on Asia and all its financing activities are required to comply with the ADB Safeguard Policies.” Id.

⁶⁵ Id.

⁶⁶ “The IDB operates in Latin America and the Caribbean and requires all financing activities to comply with the IDB Sustainability Standards.” Id.

⁶⁷ “The IIC is part of the IDB Group and targets private sector and capital markets in Latin American and the Caribbean. All financing activities are required to comply with the IDB Sustainability Standards.” Id.

⁶⁸ “The MIF is part of the IDB Group and focuses on micro and small businesses in Latin America and the Caribbean. All of its financing activities are required to comply with the IDB Sustainability Standards.” Id.

⁶⁹ “The EBRD focuses on Central Europe, the Balkans and Central Asia. It requires all financing activities to comply with the EBRD Performance Requirements.” Id.

⁷⁰ “The EIB targets the member countries of the European Union and requires all financing activities to comply with the EIB Environmental and Social Principles and Standards.” Id.

⁷¹ “The FMO is the development agency for The Netherlands. It requires all its projects to comply with the FMO Environmental, Social and Corporate Governance Policy and the Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁷² “The AFD works on behalf of the French government. Its financing activities must comply with the AFD Environmental and Social Responsibility Policy.” Id.

⁷³ “The CDC Group is a development finance institution owned by the United Kingdom’s Department for International Development. Its financing activities are required to comply with the CDC Investment Code and the Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁷⁴ “KfW is owned by the German government. Its financing activities must comply with the Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁷⁵ “DEG is the German international development agency and a member of the KfW Banking Group. It requires its financing activities to comply with the Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁷⁶ “OPIC is a U.S.-government agency, which supports the U.S. private sector to foster development in developing countries. Its projects are required to comply with congressionally-mandated requirements summarized in the OPIC Environmental and Social Policies.” Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁷⁷ “PROPARCO is owned in part by the Agence Française de Développement (AFD) and requires that all of its financing activities comply with the AFD’s Environmental and Social Responsibility Policy and the Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁷⁸ “Norfund is the Norwegian development finance institution. It requires that all its financing activities comply with the IFC’s Environmental and Social Standards and the Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁷⁹ “Swedfund is owned by the Swedish government. It requires all its financing activities to comply with its Policy for Sustainable Development and the Principles for Responsible Financing of the Association of European Development Finance Institutions (EDFI).” Id.

⁸⁰ More specifically, the EP “apply to the four financial products described below when supporting a new Project:

1. Project Finance Advisory Services where total Project capital costs are US\$10 million or more.
2. Project Finance with total Project capital costs of US\$10 million or more.
3. Project-Related Corporate Loans (including Export Finance in the form of Buyer Credit) where all four of the following criteria are met:
 - i. The majority of the loan is related to a single Project over which the client has Effective Operational Control (either direct or indirect).
 - ii. The total aggregate loan amount is at least US\$100 million.
 - iii. The EPFI’s individual commitment (before syndication or sell down) is at least US\$50 million.
 - iv. The loan tenor is at least two years.
4. Bridge Loans with a tenor of less than two years that are intended to be refinanced by Project Finance or a Project-Related Corporate Loan that is anticipated to meet the relevant criteria described above. “

“The Equator Principles III – 2013,” Equator Principles, p. 3. <http://www.equator-principles.com/index.php/ep3/ep3>

⁸¹ “What is Project Finance?” Equator Principles. <http://www.equator-principles.com/index.php/all-faqs/42-about/frequently-asked-questions/18>

⁸² In this regard, insofar as there are tensions or trade-offs between the ultimate outcome of the process of providing another good or service and the means by which it is provided and the impacts of the process of provision, they might be somewhat different. That is, the different role(s) that different final goods or services play in people’s lives might well change the calculus.

⁸³ See “The Equator Principles III – 2013,” Equator Principles. <http://www.equator-principles.com/index.php/ep3/ep3> For the latest revised version, see “The Equator Principles,” Equator Principles, June 2013. http://www.equator-principles.com/resources/equator_principles_III.pdf “The EPs were launched in Washington D.C. on 4 June 2003 and were initially adopted by ten global financial institutions.” “History of the Equator Principles,” Equator Principles. <http://www.equator-principles.com/index.php/about-ep/about-ep/38-about/about/17>

⁸⁴ “The Equator Principles,” Equator Principles, June 2013, p. 2. http://www.equator-principles.com/resources/equator_principles_III.pdf

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ “New Guiding Principles on Business and human rights endorsed by the UN Human Rights Council.” <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf> See “Guiding Principles on Business and Human Rights, Implementing the United Nations ‘Protect, Respect, and Remedy’ Framework.” Office of the Higher Commissioner, United Nations, 2011. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁸⁸ “The Equator Principles,” Equator Principles, June 2013, p. 2. http://www.equator-principles.com/resources/equator_principles_III.pdf

⁸⁹ Id. at note 1, p. 2.

⁹⁰ Id. at 2.

⁹¹ Policy at 2.

⁹² http://www1.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES

⁹³ “The Equator Principles,” Equator Principles, June 2013, p. 6. http://www.equator-principles.com/resources/equator_principles_III.pdf

⁹⁴ “EPFIs do not formally adopt the Guidance Notes however EPFIs and clients may find them useful points of reference when seeking further guidance on or interpreting the Performance Standards.” Id. at 21.

⁹⁵ “When a Project is proposed for financing, the EPFI will, as part of its internal environmental and social review and due diligence, categorise such Project based on the magnitude of its potential risks and impacts. Such screening is based on the environmental and social categorisation scheme of the International Finance Corporation (IFC).” Id. at 2.

⁹⁶ PGGM states that “[t]he rationale for a separate responsible investment policy for infrastructure is that these investments are well suited to manage ESG opportunities and risks. “PGGM Responsible Investment policy for Infrastructure,” PGGM Vermogensbeheer BV, October 4, 2012, p.2. <https://www.pggm.nl/wat-doen-we/Documents/Responsible%20Investment%20policy%20for%20Infrastructure.pdf>

⁹⁷ “Responsible Investment Annual Report 2012,” PGGM, p. 8.

http://intranet.unpri.org/resources/files/PGGM_RI_Annual_Report_2012.pdf

⁹⁸ “PFZW reformulates investment principles,” posted by Amanda White, top1000funds.com, August 8, 2014.

<http://www.top1000funds.com/featured-homepage-posts/2014/08/08/pfzw-reformulates-investment-principles-incorporating-lessons-from-the-financial-crisis/>

⁹⁹ “PGGM Responsible Investment policy for Infrastructure,” PGGM Vermogensbeheer BV, October 4, 2012, p. 2.

<https://www.pggm.nl/wat-doen-we/Documents/Responsible%20Investment%20policy%20for%20Infrastructure.pdf>

High: “Activities with potential significant adverse environmental or social impacts which are diverse, irreversible or unprecedented, or with significant risks for business integrity/governance issues.” Id.

¹⁰⁰ Id. at 2.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id. at 3.

¹⁰⁵ “Responsible Investment Annual Report 2012, PGGM,” p.11.

http://intranet.unpri.org/resources/files/PGGM_RI_Annual_Report_2012.pdf More specifically, PGGM asserts that “[i]nvestments which do not fit in with our identity or that of our clients are excluded on the basis of various criteria. In the case of government bonds we do not invest in countries on which sanctions have been imposed by internationally recognised bodies such as the United Nations Security Council, the European Union and the International Labour Organisation (ILO).”

“We exclude companies if they are involved in the production of and trading in controversial weapons, including nuclear weapons and cluster munitions. Finally, we may exclude a company due to its involvement in human rights violations or, for example, corruption or serious environmental pollution. This is a question of behaviour, not a type of product.” Id. at 53.

¹⁰⁶ “Responsible Investment Annual Report 2012, PGGM,” p.11.

¹⁰⁷ “PGGM Responsible Investment policy for Infrastructure,” PGGM Vermogensbeheer BV, October 4, 2012, p.3.

<https://www.pggm.nl/wat-doen-we/Documents/Responsible%20Investment%20policy%20for%20Infrastructure.pdf>

¹⁰⁸ Id.

¹⁰⁹ Id. at 4.

¹¹⁰ Id.

¹¹¹ Id. See “IFC Exclusion List,” International Finance Corporation (detailing “the types of projects that IFC does not finance” and noting additional exclusions for financial intermediaries, microfinance activities, and trade finance projects).

http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/IFC+Exclusion+List/

¹¹² Policy at 4.

¹¹³ Id. at 4-8.

¹¹⁴ “Environmental and Social Review Procedures Manual,” Environmental Social and Governance Department, International Finance Corporation.

<http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES> (Hereafter referred to as the “Manual”).

¹¹⁵ “The Equator Principles,” Equator Principles, June 2013, pp. 4 and 5.

http://www.equator-principles.com/resources/equator_principles_III.pdf In the case of the provision of project finance advisory services or a bridge loan the EPFI commits to “mak[ing] the client aware of the content, application and benefits of applying the Equator Principles to the anticipated Project” and “request[ing] that the client communicates to the EPFI its intention to adhere to the requirements of the Equator Principles when subsequently seeking long term financing.” The EPFI will guide and support the client through the steps leading to the application of the Equator Principles. Where bridge loans are involved further steps relating to required environmental and social assessments and review of them are detailed. Id. at 5.

¹¹⁶ This position is not to say that an EPFI might not have, for example, a document comparable to the IFC’s Manual. It is just that even if so, it would appear not to be publicly available.

¹¹⁷ “PGGM Responsible Investment policy for Infrastructure,” PGGM Vermogensbeheer BV, October 4, 2012, p. 3.

<https://www.pggm.nl/wat-doen-we/Documents/Responsible%20Investment%20policy%20for%20Infrastructure.pdf>

¹¹⁸ Id.

¹¹⁹ Performance Standards at i.

¹²⁰ Id.

¹²¹ Id.

¹²² Guidance Notes at 2.

¹²² Id. at 1.

¹²³ Id. at 2.

¹²⁴ Id.

¹²⁵ “Measure & Improve Your Labor Standards Performance: Performance Standard 2, Handbook for Labor and Working Conditions,” International Finance Corporation and Social Accountability International, p. 7. http://www.ifc.org/wps/wcm/connect/177c370048865808b3def36a6515bb18/SAI_IFC_LaborHandbook.pdf?MOD=AJPERES&CACHEID=177c370048865808b3def36a6515bb18

¹²⁶ “The Equator Principles III – 2013, Principle 8,” Equator Principles, p. 22. <http://www.equator-principles.com/index.php/ep3/ep3>

¹²⁷ “Environmental, Health, and Safety Guidelines, IFC Sustainability,” International Finance Corporation. http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Environmental,+Health,+and+Safety+Guidelines/

¹²⁸ Id.

¹²⁹ “The Equator Principles III – 2013, Principle 8,” Equator Principles, p. 6. <http://www.equator-principles.com/index.php/ep3/ep3>

¹³⁰ Id. at 15.

¹³¹ Id. at 6.

¹³² Id. at 8.

¹³³ “PGGM Responsible Investment policy for Infrastructure,” PGGM Vermogensbeheer BV, October 4, 2012, p. 3. <https://www.pggm.nl/wat-doen-we/Documents/Responsible%20Investment%20policy%20for%20Infrastructure.pdf>

¹³⁴ “Revised Management Response,” Annex to “Valuation of Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience,” August 26, 2010, p. 31. http://www.ifc.org/wps/wcm/connect/20a21880498008bda3d7f3336b93d75f/Phase3_ANNEX_D_IEG_final26-Aug-2010.pdf?MOD=AJPERES

¹³⁵ Id. The MIGA is a member of the World Bank Group which “provid[es] political risk insurance guarantees to private sector investors and lenders.” It insures investments in “Countries eligible for assistance from the International Development Association (the world’s poorest countries)”

- Countries eligible for assistance from the International Development Association (the world’s poorest countries)
- Conflict-affected environments
- Complex deals in infrastructure and extractive industries, especially those involving project finance and environmental and social considerations
- Middle Income Countries where we can have impact.”

“Overview,” Multilateral Investment Guarantee Agency. <http://www.miga.org/whoweare/index.cfm>

¹³⁶ “CAO Audit of IFC’s Environmental and Social Categorization of the Amaggi Expansion Project Final Report,” Office of the Compliance Advisor/Ombudsman International Finance Corporation/Multilateral Investment Guarantee Agency, May 2005, p. 5. http://www.cao-ombudsman.org/cases/document-links/documents/AmaggiFinal_Editedversion_05-26-05.pdf Note that under previous IFC practice, categorization determined the extent of the review process whereas under the current system E&S due diligence determines the categorization. “Annex A. Review and Update of IFC’s Sustainability Framework: Overview of Key Issues,” International Finance Corporation, April 14, 2010, p. 27. http://www.ifc.org/wps/wcm/connect/11be73004980095ca656f6336b93d75f/CODE_Progress%2BReport_AnnexA.pdf?MOD=AJPERES

¹³⁷ “CAO Audit of IFC’s Environmental and Social Categorization of the Amaggi Expansion Project Final Report,” Office of the Compliance Advisor/Ombudsman International Finance Corporation/Multilateral Investment Guarantee Agency, May 2005, p. 5. http://www.cao-ombudsman.org/cases/document-links/documents/AmaggiFinal_Editedversion_05-26-05.pdf This particular characterization states that the purpose of the categorization “is to decide on the nature and extent of the environmental assessment (EA) needed for the project.” Id. However, it was written before the IFC formulation of a policy and standards similar to the current ones which largely placed the matter of environmental and social assessments on a par.

¹³⁸ The Manual has a segment entitled “2.3 Identifying PS Gaps, Finalizing Categorization, Peer Review, Complet[ing] Appraisal and Investment Review Meetings” but otherwise makes no mention of final categorization there. Later, it merely states that “3.4 The [Lead Environmental and Social Specialist (LESS)] is responsible for...assigning final E&S Category to the project.” “Direct Investments: Appraisal, Version 7, April 15, 2013,” Manual, p. 6.

However, a document prepared by the CAO offers a bit more detail, stating that there is “[a]n IFC internal procedure (*Quality System Instruction # 8*) [which] provid[e]s for projects to be re-categorized during appraisal (or at a later stage), in the event that project appraisal reveals a significant factor that was not available at the time of the initial categorization. The re-categorization process also provides for situations where projects may significantly change from the original proposed to IFC.” “CAO Audit of IFC’s Environmental and Social Categorization of the Amaggi Expansion Project Final Report,” Office of the Compliance Advisor/Ombudsman International Finance Corporation/Multilateral Investment Guarantee Agency, May 2005, p. 5. http://www.cao-ombudsman.org/cases/document-links/documents/AmaggiFinal_Editedversion_05-26-05.pdf

¹³⁹ “Annex A. Review and Update of IFC’s Sustainability Framework: Overview of Key Issues,” International Finance Corporation, April 14, 2010, p. 27. http://www.ifc.org/wps/wcm/connect/11be73004980095ca656f6336b93d75f/CODE_Progress%2BReport_AnnexA.pdf?MOD=AJPERES

¹⁴⁰ Arguably it is the risk that the establishment or operation of the project gives rise to one or another event which is directly or closely like to so harm (adverse impact). For example, there is a risk that the plant which will release effluents damaging to the environment or to people living in proximity to it, require occupation of land which will entail the displacement of people living on it, or require the destruction of habitats upon which people rely to earn a living.

¹⁴¹ “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual, p. 2.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ "Guidance Note 1," Guidance Notes, p. 4.

http://www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Documents.pdf?MOD=AJPERES

¹⁴⁵ Id.

¹⁴⁶ "The level of detail and complexity of the social and environment management system [SEMS] and the resources devoted to it should depend on the level of impacts and risks of the project to be financed, and the size and nature of the client's organization. A satisfactory management system appropriate to the nature and scale of the project and commensurate with the level of environmental and social risks and impacts is required...The design and implementation of such a system should, however, be singular in its intent. It should provide an organization with a structure, within which a sufficient level of understanding of the environmental and social risks and impacts associated with project activities can be gained, and a means to ensure these risks and impacts are identified and subsequently managed." Id. at 3. Also "[t]he client will establish and maintain a process for identifying the environmental and social risks and impacts of the project (see paragraph 18 for competency requirements). The type, scale, and location of the project guide the scope and level of effort devoted to the risks and impacts identification process. The scope of the risks and impacts identification process will be consistent with good international industry practice and will determine the appropriate and relevant methods and assessment tools. The process may comprise a full-scale environmental and social impact assessment, a limited or focused environmental and social assessment, or straightforward application of environmental siting, pollution standards, design criteria, or construction standards." Id. at 6

¹⁴⁷ The Environmental and Social Review Summary "is the document through which IFC publicly discloses how the E&S aspects of a project were reviewed and the rationale for categorization. It includes a description of the main E&S risks and impacts of the project, and the key measures identified to mitigate those risks and impacts, specifying any actions needed to undertake the project in a manner consistent with the PS and that will be included in the client's Action Plan. The ESRS is written for a general public audience."¹⁴⁷ Key Terms and Acronyms, Version 8, May 31, 2012," Manual, p. 6.

"For category A and B projects, the [relevant staff person] prepare[s] a draft ESRS summarizing IFC's E&S appraisal findings. No ESRS is required for category C projects. The ESRS should present a succinct summary of the review and assessment of the E&S impacts associated with the project and how they are or will be mitigated by the project." "Direct Investments: Appraisal, Version 7, April 15, 2013," Manual, p. 4.

¹⁴⁸ "Guidance Note 1," Guidance Notes, p. 6. This Note later largely repeats the same point:

"For certain projects, and particular[y] for greenfield investments and projects (including, but not limited to, major expansion or transformation-conversion activities) involving specifically identified physical elements, aspects and facilities that are likely to generate potentially significant adverse environmental and social risks and impacts, the client should conduct a comprehensive full-scale ESIA." Id. at 10.

The Note adds:

"The key process elements of an ESIA generally consist of (i) initial screening of the project and scoping of the assessment process; (ii) examination of alternatives; (iii) stakeholder identification (focusing on those directly affected) and gathering of environmental and social baseline data; (iv) impact identification, prediction, and analysis; (v) generation of mitigation or management measures and actions; (vi) significance of impacts and evaluation of residual impacts; and (vii) documentation of the assessment process (i.e., ESIA report). The breadth, depth and type of analysis should be proportionate to the nature and scale of the proposed project's potential impacts as identified during the course of the assessment process." Id.

¹⁴⁹ Id. at 6.

¹⁵⁰ Id. a note 11, p. 6.

¹⁵¹ Id. at 6.

¹⁵² Id. at note 12, p. 6.

¹⁵³ Id. at 11. More particularly, "[t]hese projects may include, for example, modernization and upgrade of existing production facilities, not involving major expansions or transformations; real estate projects in urban areas and/or developed areas with the needed infrastructure; development of social infrastructure such as health and education facilities, etc. For these projects, the clients should conduct limited or focused environmental and social assessments that are narrower in scope than a full-scale ESIA, and that are specific to potential environmental and social (including labor, health, safety, and security) risks and/or impacts identified as associated with the project. For certain of these projects, confirmation and documentation of the application of environmental siting, pollution standards, design criteria, or construction standards should be appropriate." Id.

¹⁵⁴ Guidance Notes, note 3, p. 1.

¹⁵⁵ Id. at note 2, p. 1.

¹⁵⁶ Id. at note 9, p. 9.

¹⁵⁷ See "Definition of diverse in English," Oxford Dictionaries ("Showing a great deal of variety; very different: *a culturally diverse population subjects as diverse as architecture, language teaching, and the physical sciences.*").

http://www.oxforddictionaries.com/us/definition/american_english/diverse

¹⁵⁸ "Definition of unprecedented in English," Oxford Dictionaries ("Never done or known before: *the government took the unprecedented step of releasing confidential correspondence.*").

http://www.oxforddictionaries.com/us/definition/american_english/unprecedented?q=unprecedented.

¹⁵⁹ "IFC Sustainability Framework U.S. Technical Recommendations/Comments," United States Treasury, August 2010, p. 4.

http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20Policy%20Review%20-%20Overview%20of%20second%20round%20USG%20comments_USED%20comments_clean%20%28post%29.pdf

¹⁶⁰ "The IFC is owned by 182 governments that provide and authorize capital, determine policies, and approve investments. The shares owned by each member government are based on the capital paid in to the IFC. The largest shareholder is the United States (24%), followed by Japan (6%), and Germany, France, and the United Kingdom (5%). The seven largest OECD governments control 51 percent of the capital shares." "The leadership structure consists of the board of governors, the board of executive directors, and the executive vice president. The board of governors meets once a year and includes one governor for each member country, generally the country's minister of finance." International Finance Corporation, by Jenny Ottenhoff, Center for Global Development Brief, 2011, p. 1. http://www.cgdev.org/sites/default/files/1425486_file_IFI_Briefs_IFC_FINAL_0.pdf

¹⁶¹ "Step 3: Environmental and Social Risk approval and control, Accepting or rejecting the environmental and social risk," Euro[ean Bank for Reconstruction and Development. <http://www.ebrd.com/environment/e-manual/p111proc.html#step2> It is noted that there might be upside or positive impacts which might weigh in the balance:

"Equally, a transaction may be made more attractive due to associated environmental and social opportunities. For example, a prospective customer or the bank or an environmental expert may have identified environment related opportunities to cut costs or increase sales, such as energy conservation, waste minimisation or development of environmentally superior products. This may be a lending opportunity in itself." *Id.*

¹⁶² "U.S. Comments on IFC Sustainability Framework Changes Proposed by IFC in April 2010," United States Treasury (italics in original), p. 2. http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20Policy%20Review%20-%20Overview%20of%20second%20round%20USG%20comments_USED%20comments_clean%20%28post%29.pdf The Treasury appears to have raised the same point in its 2005 comments: "Projects should be categorized according to their most environmentally-risky component." "IFC Safeguards and Information Disclosure Revisions: US Treasury consultation comments," March 9, 2005. It was only in 2006 that the performance standards addressed social in addition to environmental concerns.

¹⁶³ "IFC Sustainability Framework U.S. Technical Recommendations/Comments," United States Treasury, August 2010, p. 4. http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20Policy%20Review%20-%20Overview%20of%20second%20round%20USG%20comments_USED%20comments_clean%20%28post%29.pdf The Treasury appears to have raised the same point in its 2005 comments: "Projects should be categorized according to their most environmentally-risky component." "IFC Safeguards and Information Disclosure Revisions: US Treasury consultation comments," March 9, 2005. <http://ifcext.ifc.org/IFCExt/SafeGuardDocs.nsf/748bde9a37cd3a9285256e440073c9c7/ef5e9784251cc25985256fbf004f05fb?OpenDocument>

It also appears that it may have been the Treasury which spurred the choice of the current IFC language for Category A projects. Namely it recommended the addition of the words in italics to the original IFC formulation: "Category A Projects: Business activities with potential significant adverse social or environmental risks and/or impacts; *that is, with risks and/or impacts* that are diverse, irreversible or unprecedented." "IFC Sustainability Framework U.S. Technical Recommendations/Comments," United States Treasury, August 2010, p. 7. http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20Policy%20Review%20-%20Overview%20of%20second%20round%20USG%20comments_USED%20comments_clean%20%28post%29.pdf The final IFC version was very close but no identical to that: "potential significant adverse social or environmental impacts that are diverse, irreversible, or unprecedented." Observe that the latter refers only to impacts not risks and/or impacts.

¹⁶⁴ Its approaches to evaluation "include assessing outcomes against stated objectives, benchmarks, standards, and expectations, or assessing what might have happened in the absence of the project, program, or policy (counterfactual analysis)." "About IEG, Improving World Bank Group Development Results Through Excellence in Evaluation," Independent Evaluation Group. <http://ieg.worldbankgroup.org/about-us>

¹⁶⁵ "Revised Management Response," Annex to "Valuation of Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience," International Finance Corporation, August 26, 2010, p. 31. http://www.ifc.org/wps/wcm/connect/20a21880498008bda3d7f3336b93d75f/Phase3_ANNEX_D_IEG_final26-Aug-2010.pdf?MOD=AJPERES

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ "Evaluative Directions for the World Bank Group's Safeguards and Sustainability Policies," by Anis Dani, Ade Freeman, and Vinod Thomas, World Bank, Evaluation Brief 15, 2011, pp. 11-12. <https://openknowledge.worldbank.org/bitstream/handle/10986/2339/636830PUB00WB000Box0361524B0PUBLIC0.pdf?sequence=1>

¹⁶⁹ *Id.* at 12. "In the evaluation's judgment, this difference affects 27 percent (10 of 37) of the category B projects in the sample)." *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* For a detailed description of model and the indicators see *id.* at 13, Box 2 and Table 2.

¹⁷² *Id.* at 12.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ "IFC Safeguards and Information Disclosure Revisions: US Treasury consultation comments," United States Treasury, March 9, 2005.

¹⁷⁶ "U.S. Comments on the September 22 Draft of the IFC Safeguard and Disclosure Policies November 23, 2005 [http://ifcext.ifc.org/IFCExt/PolicyReviewDocs.nsf/0/ecda0e012163b77f852570cf007c600a/\\$FILE/US%20Treasury%20IFC%20safeguards%20nd%20comments11-23-05.pdf](http://ifcext.ifc.org/IFCExt/PolicyReviewDocs.nsf/0/ecda0e012163b77f852570cf007c600a/$FILE/US%20Treasury%20IFC%20safeguards%20nd%20comments11-23-05.pdf) As far as we can determine, the Treasury did not elaborate on its reference to undercategorization.

¹⁷⁷ *Id.* It also suggested "[e]stablish[ing] a publicly available framework for categorization and "[d]isclos[ing] preliminary categorization/significant decisions early in the project cycle." *Id.*

¹⁷⁸ *Id.* at 4.

¹⁷⁹ "Summary Implementation Action Plan," Annex D to "Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy", International Finance Corporation, April 14, 2011. http://www.ifc.org/wps/wcm/connect/fca42a0049800aaaaba2fb336b93d75f/Board-Paper-IFC_SustainabilityFramework-2012.pdf?MOD=AJPERES

¹⁸⁰ "Direct Investments: Pre-Mandate Initial Review, Concept Review Meeting, and E&S Specialist Assignment, Version 7, April 15, 2013," Manual at 4. The reference to a third party assessment does not really appear to belong in the definition. It is concerned with actions which are triggered by virtue of a project being categorized in a particular way.

¹⁸¹ "Recommendations for immediate changes in the IFC action plan on financial market lending," Attachment to "RE: IFC investment in the financial sector," Letter to Jin-Yong Cai, Executive Vice President, International Finance Corporation, From Jesse Griffiths, Director, Eurodad, et al, March 17, 2014, p.-2. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

¹⁸² As the EBRD describes itself, it is “an international financial institution that supports projects from central Europe to central Asia and southern and eastern Mediterranean. Investing primarily in private sector clients whose needs cannot be fully met by the market, the Bank fosters transition towards open and democratic market economies. In all our operations we follow the highest standards of corporate governance and sustainable development.” “Our Mission,” European Bank for Reconstruction and Development. <http://www.ebrd.com/pages/about/what/mission.shtml> It adds that it “aim[s] to promote market economies that function well – where businesses are competitive, innovation is encouraged, household incomes reflect rising employment and productivity, and where environmental and social conditions reflect peoples’ needs.” Id. With respect to OPIC see <http://www.opic.gov/>

¹⁸³ “Environmental and Social Policy,” European Bank for Reconstruction & Development, October 2008, p. 5. <http://www.ebrd.com/downloads/research/policies/2008policy.pdf> That is, the ERBD, unlike the IFC, does not refer to impacts that are “irreversible” or “unprecedented.” It is not possible to parse whether such considerations are implicit in the ERBD formulation or evident in practice.

¹⁸⁴ “Environmental and Social Policy,” European Bank for Reconstruction & Development, October 2008 (italics added) p. 5. <http://www.ebrd.com/downloads/research/policies/2008policy.pdf> And similarly to the IFC, the import of those categories is that they “determine the nature and level of environmental and social investigations, information disclosure and stakeholder engagement required for each project, taking into account the nature, location, sensitivity and scale of the project, and the nature and magnitude of its possible environmental and social impacts and issues.” Id.

¹⁸⁵ Id. at 6. .

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 2. The reference to a third party assessment does not really appear to belong in the definition. It is concerned with actions which are triggered by virtue of a project being categorized in a particular way.

¹⁸⁹ Recall that the IFC refers to impacts which are significant and “unprecedented.” Certainly the word could be interpreted to suggest concern about the uncertainty of the occurrence of the impact. If so, there might be somewhat more a link between the IFC and ERBD categorizations, but that interpretation seems rather of a reach.

¹⁹⁰ “Environmental and Social Policy,” European Bank for Reconstruction & Development, November 2008, p. 6. <http://www.ebrd.com/pages/research/publications/policies/environmental.shtml>

¹⁹¹ Id. at 12. See also at the ERBD website “Projects requiring an EIA under EBRD Environmental and Social Policy.”

<http://www.ebrd.com/environment/e-manual/r16eia.html>

¹⁹² “Projects requiring an EIA under EBRD Environmental and Social Policy.” European Bank for Reconstruction & Development. <http://www.ebrd.com/environment/e-manual/r16eia.html>

¹⁹³ “Environmental and Social Risk Categorisation - Revised 2009,” European Bank for Reconstruction & Development (italics added). <http://www.ebrd.com/environment/e-manual/r031risk.html>

¹⁹⁴ Id.

¹⁹⁵ Id. It adds that “[f]inancing of such activities may also entail significant reputational risk for the Financial Institution and for EBRD. Such activities will require more detailed environmental and social due diligence which may potentially involve the use of competent environmental and/or social specialists (those with appropriate skills and expertise).” Id.

¹⁹⁶ Id.

¹⁹⁷ Id. On its website, the EBRD phrases the characterization more briefly and somewhat differently:

- High risk activities: those activities which, due to their inherent complexities (diversity of raw materials, products and waste stream etc.) or processes have the potential to create significant environmental risks;
- Medium risk activities: those activities for which moderate environmental risks are inherent;
- Low risk activities: those activities with inherently low or minimal environmental risks.

“Initial Environmental and Social Risk Rating Guide” (emphasis added) <http://www.ebrd.com/environment/e-manual/r030ierr.html>

¹⁹⁸ Id. These guidelines are found at the EBRD website at <http://www.ebrd.com/pages/about/what/policies/guidelines.shtml>

¹⁹⁹ “OPIC is the U.S. Government’s development finance institution. It mobilizes private capital to help solve critical development challenges and in doing so, advances U.S. foreign policy. Because OPIC works with the U.S. private sector, it helps U.S. businesses gain footholds in emerging markets, catalyzing revenues, jobs and growth opportunities both at home and abroad. OPIC achieves its mission by providing investors with financing, guarantees, political risk insurance, and support for private equity investment funds.” “OPIC mobilizes private capital to help solve critical development challenges,” Overseas Private Investment Corporation. <http://www.opic.gov/who-we-are/overview>

²⁰⁰ See “OPIC – Environmental and Social Policy Statement,” Overseas Private Investment Corporation, October 15, 2010, p. 4.

http://www.opic.gov/sites/default/files/consolidated_esps.pdf

²⁰¹ See “APPENDIX A, Illustrative list of Category A Projects” in “OPIC – Environmental and Social Policy Statement,” Overseas Private Investment Corporation, October 15, 2010, p. 32-34. http://www.opic.gov/sites/default/files/consolidated_esps.pdf

²⁰² See “APPENDIX D, Glossary in “OPIC – Environmental and Social Policy Statement,” Overseas Private Investment Corporation, October 15, 2010, pp. 40-45. http://www.opic.gov/sites/default/files/consolidated_esps.pdf

²⁰³ “OPIC – Environmental and Social Policy Statement,” Overseas Private Investment Corporation, October 15, 2010, p. 3.

http://www.opic.gov/sites/default/files/consolidated_esps.pdf

²⁰⁴ Id. at 3-4.

²⁰⁵ “Annual Report, Office of Accountability, FY12,” Overseas Private Investment Corporation, p. 4.

<http://www.opic.gov/sites/default/files/files/021413-oea2012annualreport.pdf>

²⁰⁶ “Memorandum from Elizabeth L. Littlefield, President & CEO to Keith Kozloff, Director, Office of Accountability, Subject: Office of Accountability Cerro de Oro Hydroelectric Project Compliance Review Appraisal Report,” Overseas Private Investment Corporation, October 12, 2012.

<http://www.opic.gov/sites/default/files/docs/Management%20Response%20Cerro%20de%20Oro%2010122012.pdf>

²⁰⁷ “Procedures Manual, Office of Investment Policy’s Environmental and Social/Labor and Human Rights Groups, Ver. 1,” Overseas Private Investment Corporation, 2012, p. 8. <http://www.opic.gov/sites/default/files/files/opic-procedures-manual-2012.pdf>

²⁰⁸ Id. at 9.

²⁰⁹ "OPIC – Environmental and Social Policy Statement," Overseas Private Investment Corporation, October 15, 2010, p.3. http://www.opic.gov/sites/default/files/consolidated_esps.pdf

²¹⁰ "Environmental & Social Policy," Nederlandse Financierings-Maatschappij voor *Ontwikkelingslanden N.V. ("FMO"), <http://www.fmo.nl/esg-policy> The FMO adds that "[a]t the same time, we cooperate closely with the European Development Finance Institutions (EDFI's) with the purpose to harmonize our definitions and requirements." Id.

²¹¹ "The Equator Principles," Equator Principles, June, 2013, p. 6. http://www.equator-principles.com/resources/equator_principles_III.pdf

²¹² Id.

²¹³ Id. at 20.

²¹⁴ Id. at 17.

²¹⁵ Id. at 5.

²¹⁶ Id. at 8.

²¹⁷ Id. at 9.

²¹⁸ "On the Effectiveness of Global Private Regulation: The Implementation of the Equator Principles by Multinational Banks," by Ariel Meyerstein, a dissertation submitted in fulfillment of the requirements for the degree of Doctorate in Philosophy in Jurisprudence and Social Policy Program, University of California, Berkeley, Spring, 2011, p. 151. <http://search.proquest.com/docview/893009835/abstract> (Hereafter referred to as "*Meyerstein*").

²¹⁹ Id. at 40.

²²⁰ According to one presentation by an EPFI, "84% of all Project Debt in Emerging Economies followed the Equator Principles even if a Non-EP Bank was the Lead Arranger" and that "[t]he NON EP had to apply the Equator Principles in order to maintain the 'passport for successful[] syndication'." "The Financial Sector Response, The Equator Principles," DEG is a wholly-owned subsidiary of KfW Bankengruppe). <https://www.deginvest.de/DEG-deutsche-Dokumente/Unser-Angebot/F%C3%B6rderprogramme/EquatorPrinciples.pdf>

²²¹ With regard to the matter of lax categorization, one academic study which involved 20 semi-structured interviews with "representatives of the financial institutions (both adopting and non-adopting banks) and non-governmental organizations (NGOs) active in monitoring the sector of international project finance" cited the response of "one interviewee of a non-adopting bank." The interviewee referred to a "backdoor option for banks to define the project as a B or C class type as one of the most crucial condition[s] why it was easy for so many banks to adopt the standard in the first place." "Exploring the Constitutive Conditions for a Self-Energizing Effect of CSR Standards: The Case of the 'Equator Principles,'" by Patrick Haack, Dennis Schoeneborn and Christopher Wickert, November, 2010, pp. 5 and p. 20. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706267

²²² "Stakeholder perspectives on a financial sector legitimization process, The case of NGOs and the Equator Principles," by Niamh O'Sullivan and Brendan O'Dwyer, *Accounting, Auditing & Accountability Journal*, Vol. 22 No. 4, 2009, pp. 553-587, 564 (quoting from Friends of the Earth (FoE) England, Wales & Northern Ireland (EWNI) (2002), "Bank exposed at AGM", available at: www.foe.co.uk/resource/press_releases/20020425132827.html)

²²³ "Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks," July 2005, p. 90. http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

²²⁴ Id.

²²⁵ Id.

²²⁶ Id. at 91.

²²⁷ Id. at 95.

²²⁸ Id. at 96.

²²⁹ "Reporting on Equator Principles Implementation, For the year 2012," May, 2013, BNP Paribas, p. 3. http://www.bnpparibas.com/sites/default/files/ckeditor-upload/files/PDF/Nous%20Connaitre/Banque%20Responsable/EN_2012_Equator%20Principles%20Implementation.pdf

²³⁰ Id.

²³¹ Id. The CIB is one of the three core businesses of NP, hers being Investment Solutions and Retail Banking. Id. at 13.

²³² "Reporting on Equator Principles Implementation, For the year 2010," June, 2011, BNP Paribas, p. 3. <http://media-cms.bnpparibas.com/file/95/9/equator-principles-reporting-2009.12959.pdf>

²³³ Id.

²³⁴ "Banking on sustainability? The origins, implementation, and future of the Equator Principles" by Tomás Carbonell, Dissertation submitted in partial fulfillment of the requirements for the MSc in Environmental Change and Management University of Oxford, 2004/2005, p. 31. http://www.banktrack.org/manage/ems_files/download/banking_on_sustainability_the_origins_implementation_and_future_of_the_equator_principles/050601_banking_on_sustainability.pdf (Hereafter referred to as "*Carbonell*".)

²³⁵ Id.

²³⁶ Id.

²³⁷ Id. Note that the references to only the environment are outdated because since that time social consideration were included by virtue of changes to what became the current IFC PS upon which the EP rely.

²³⁸ Id.

²³⁹ Id.

²⁴⁰ "The Nexus Between Infrastructure and Environment," From the Independent Evaluation Offices of the International Financial Institutions, Evaluation Cooperation Group Paper 1 June 2007, p. 11. <https://wqr4.adb.org/LotusQuickr/ecg/Main.nsf/7e6e83714d63fac348257731002a960f/4779bec0e48acaa648257731002a961d?Opendocument>

²⁴¹ Id.

²⁴² Id. The study also contends that "[t]he EAs are carried out by the borrower and are often inadequate in addressing all the environmental issues" and that "project teams report rarely having adequate resources to properly address environmental issues during the implementation period." Id.

²⁴³ Id. (noting as an example, hydroelectric power projects). The study cites a World Dam Commission Report in 2000 to the effect that "the environmental impacts of hydro dams are minimized by optimal site selection. From an environmental viewpoint, dams should

not be located along major rivers but on their upper tributaries. Thus, applying safeguards after a site is chosen may be too late to minimize environmental impacts.” Id. at 12.

²⁴⁴ The ECG refers to international finance institutions, a term others use as well to refer to multilateral finance institutions (as contrasted with those institutions based on a single country).

²⁴⁵ “The Nexus Between Infrastructure and Environment,” From the Independent Evaluation Offices of the International Financial Institutions, Evaluation Cooperation Group Paper 1, June 2007, p. 12.

<https://wpgqr4.adb.org/LotusQuickr/ecg/Main.nsf/7e6e83714d63fac348257731002a960f/4779bec0e48acaa648257731002a961d/?OpenDocument>

²⁴⁶ “Safeguards and Sustainability Policies in a Changing World, An Independent Evaluation of World Bank Group Experience,” The World Bank, 2010, pp. 22-23

http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards_eval.pdf

²⁴⁷ Id. at xxii. The IEG noted that “[o]vercategorization results in additional preparation costs to the Bank and clients.” Id.

²⁴⁸ Id. “Five other projects had contradictions between policies triggered at appraisal and those reported on subsequently in the Implementation Status and Results reports (ISRs), indicating improper, often overly cautious triggering of safeguard policies when impacts were not known.” Id.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Id.

²⁵² “The Nexus Between Infrastructure and Environment,” From the Independent Evaluation Offices of the International Financial Institutions, Evaluation Cooperation Group Paper 1 June 2007, p. 12.

<https://wpgqr4.adb.org/LotusQuickr/ecg/Main.nsf/7e6e83714d63fac348257731002a960f/4779bec0e48acaa648257731002a961d/?OpenDocument>

²⁵³ “Recommendations for immediate changes in the IFC action plan on financial market lending,” Attachment to “RE: IFC investment in the financial sector,” Letter to Jin-Yong Cai, Executive Vice President, International Finance Corporation, From Jesse Griffiths, Director, Eurodad, et al, March 17, 2014, p. 2. <http://eurodad.org/files/pdf/5333fffb9971.pdf>

²⁵⁴ Id. at 1-2.

²⁵⁵ Policy at 9. As described by the IFC, “[e]xamples of investments in financial intermediaries include:

- Credit and equity lines to banks for on-lending to local companies. These investments help the banks to provide working capital and investment financing for their corporate customers.
- Private equity and investment funds, such as index funds and country funds. IFC also invests in venture capital funds which help channel flows to companies that generally are unlisted and do not receive the notice of large investors.
- Leasing companies, which are essential to the development of SMEs as smaller companies typically lease costly capital equipment. Leasing plays a critical role in financial sector development in countries with small economies or low per capita incomes. IFC has actively helped establish leasing industries in countries all over the world.” “Intermediary Services,” International Finance Corporation.” “Intermediary Services,” International Finance Corporation.” http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/what+we+do/investment+services/intermediary+services

²⁵⁶ “CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries, International Finance Corporation, October 10, 2012, p. 4. http://www.cao-ombudsman.org/documents/Audit_Report_C-I-R9-Y10-135.pdf The IFC “defines these third-party investments as being in its “financial sector” or “financial market” (FM),” Id. at 8.

²⁵⁷ Policy at 9.

²⁵⁸ Id.

²⁵⁹ Id.

²⁶⁰ Id. at 2.

²⁶¹ Id. at 9.

²⁶² Id. Note that the language of Category B relating to impacts is that they are “site specific” whereas the closely similar but not quite identical portion of language of Category FI-2 is “generally site specific.”

²⁶³ Id. Here we elided the otherwise seemingly circular reference to “certain financial intermediary projects” in the definition of Category C projects. However, according to the IFC “FI investments that support business activities without any material adverse E&S impact potential will be classified as Category C and no further review is required.” “Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009” Handbook, p. 1.

<http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES>

²⁶⁴ FI Note, p. 2. “All FI clients must also manage the working conditions of their workforce in accordance with relevant aspects of Performance Standard 2 on Labor and Working Conditions.” Id.

²⁶⁵ Id. at 3. Note, though, the IFC asserts generically but without further elaboration that it “may require the application of the Performance Standards to other transactions in accordance with the E&S risk management requirements determined at the time of IFC’s E&S review process.” Id., note 9.

²⁶⁶ Id.

²⁶⁷ Id., note 14, p. 4.

²⁶⁸ Id. at 3.

²⁶⁹ Id.

http://www.ifc.org/wps/wcm/connect/38d1a68049ddf966af3cbfda80c2ddf3/InterpretationNote_FIs_2012.pdf?MOD=AJPERES

²⁷⁰ See Id., “Figure 1. Overview of IFC Requirements for FI Clients,” p. 3.

²⁷¹ Id.

²⁷² Id. at 3.

²⁷³ Id. at 6.

²⁷⁴ Id. note 31, p. 6.

²⁷⁵ Id.

²⁷⁶ Id. Note 33, p. 7.

²⁷⁷ "Policy on Environmental and Social Sustainability," Multilateral Investment Guarantee Agency, October 1, 2013, p. vii. http://www.miga.org/documents/Policy_Environmental_Social_Sustainability.pdf

²⁷⁸ FI Note, note 6, p. 1.

²⁷⁹ "Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information," The Office of the Compliance Advisor /Ombudsman, May 2010, p. 24. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

²⁸⁰ "Key Terms and Acronyms, Version 8, May 31, 2012," Manual, p. 8.

²⁸¹ "Financial Intermediary Investments, Early Review and Appraisal, Version 4, August 14, 2009," Manual, p. 3.

²⁸² Id.

²⁸³ Id. at 2. The phrase "Applicable Performance Standards" simply means that "IFC Performance Standards (PSs) are applicable to projects as stated by investment contract covenants. In the case of Financial Intermediaries (FI), this may be the combination of an exclusion list, the national laws and regulations, and the IFC PSs in general, including specific elements of the IFC PSs that are identified during the review, and that are applicable to sub-projects supported by the FI and implemented through the FI's Environmental and Social Management System." "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 1-2.

²⁸⁴ "Financial Intermediary Investments, Early Review and Appraisal, Version 4, August 14, 2009," Manual at 2.

²⁸⁵ "Direct Investments: Disclosure and Commitment," Version 4, April 15, 2013," Manual at 6.

<http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES>

²⁸⁶ "Financial Intermediary Investments" Early Review and Appraisal, Version 4, August 14, 2009," Manual, p. 3 and "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 9.

²⁸⁷ "Financial Intermediary Investments" Early Review and Appraisal, Version 4, August 14, 2009," Manual, p. 2 and "Key Terms and Acronyms, Version 8, May 31, 2012," Manual (definition for Global Trade Finance Program (GTFP)), p. 6.

²⁸⁸ "Financial Intermediary Investments" Early Review and Appraisal, Version 4, August 14, 2009," Manual, p. 3 and "Key Terms and Acronyms, Version 8, May 31, 2012," Manual (definition for Global Trade Finance Program (GTFP)), p. 6.

²⁸⁹ Id.

²⁹⁰ Id.

²⁹¹ "Social accountability and the finance sector: the case of Equator Principles (EP) institutionalization," by Niamh A. O'Sullivan, 2010, pp. 123-124. <http://dare.uva.nl/document/185897> (Referred to hereafter *O'Sullivan*). For an extensive discussion of the nature and effectiveness of the use of leverage by financial institutions in the context of enforcing environmental and social standards see "Environmental and Social Risk Due Diligence in the Financial Sector, current approaches and practices," *The Sustainable Finance Advisory* May, 2013, pp. 53-74. 11. http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/2013_WS1_1.pdf

²⁹² The comments of an EPFI on this point, recounted by O'Sullivan, are particularly striking: "If you look at project finance by definition, if you look at you know, like a category A type project or a category B type project, if you're going to do or potentially do harm to the environment or society you're more likely to do it through a project finance type deal than you are through a normal corporate loan to a holding company that runs a brewery or whatever it is...[And] to actually incorporate covenants associated with EIAs [environmental impact assessments] into loan documentation, I mean that is revolutionary, absolutely *revolutionary* for a financial institution to do it of its own initiative. So I mean I think in terms of having an effect on E&S, project finance is the most visible, and therefore I think it's the most appropriate area that needed to be concentrated on first. They are the most controversial. And they're more identifiable you know, if you're doing a normal corporate loan it's much more difficult to identify exactly what you're doing. Very rarely when you lend to a corporate do you lend for a specific activity, it's usually for general purposes." (Australian EPFI, emphasis added)" *O'Sullivan* at 123-124.

²⁹³ Other than in the definitions of the various FI categories neither the ESRPM nor the IFC's Interpretation Note on Financial Intermediaries makes any literal reference to "financial exposure."

²⁹⁴ "CAO Advisory Note: Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information," CAO (citing IFC "Internal Interpretation Note #1, Working draft March 7, 2008, "Social and Environmental Categorization of IFC investments defined as 'corporate investment'"), p. 24. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

²⁹⁵ See "Recommendations for immediate changes in the IFC action plan on financial market lending," "attachment to Letter "RE: IFC investment in the financial sector" to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al., March 17, 2014, p. 1. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

²⁹⁶ Id. at 2.

²⁹⁷ Id.

²⁹⁸ See id.

²⁹⁹ Id.

³⁰⁰ "Follow the money, The World Bank Group and the use of financial intermediaries," Bretton Woods Project, April, 2014, p. 15. http://www.brettonwoodsproject.org/wp-content/uploads/2014/04/B_W_follow_the_money_report_WEB-VERSION.pdf They also argue that "[p]articipatory governance arrangements could be prioritised in order to increase the control that communities exercise over things that affect their livelihoods." Id.

³⁰¹ See "Recommendations for immediate changes in the IFC action plan on financial market lending." "attachment to Letter "RE: IFC investment in the financial sector" to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al. March 17, 2014, p. 1. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

³⁰² Recall, an FI-1 and FI-2 client must "develop a categorization system based on the level of E&S risk of the transaction to guide them on the scope of the [E&S due diligence (ESDD)] processes/procedures to identify risks and impacts of borrowers/investees." FI Note at 6.

³⁰³ Id. at 6-7.

³⁰⁴ FI Note, notes 24, 25, and 26, p. 6.

³⁰⁵ These points were made by the NGOs in the letter cited in the main text: "The IFC also needs to develop better guidance for IFC financial sector clients to use in their risk categorisation of subclients. Particularly for FI-1 and FI-2 subclients, the IFC should ensure that the client E&S management system includes an effective classification of subprojects that is equivalent to the IFC in all key respects (definition of significant impacts, exclusion list, independence review and clearance at concept stage of the project cycle,

and public signalling of categorisation decision to affected people). IFC must verify that this component of the ESMS is functioning by taking a random sample (minimum of 10 per major business line) of client subprojects to validate adequacy of risk classification at appraisal. Risk categorisation for a smaller random sample of subprojects (minimum of 5 per major sector) should be validated during each supervision visit." See "Recommendations for immediate changes in the IFC action plan on financial market lending," "attachment to Letter "RE: IFC investment in the financial sector" to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al. March 17, 2014, p. 2. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

³⁰⁶ "Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information," Office of the Compliance Advisor/Ombudsman, May 2010, pp. 20-21. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

³⁰⁷ On one hand, the IFC provides that "[w]here the use of proceeds of IFC financing and the associated E&S footprint of the business activity are known/largely known at the time of the decision to invest, such as in traditional project finance," "the business activity's provisional E&S category" is to be determined "based on its potential impacts." On the other, where "the use of proceeds of IFC financing and/or the E&S footprint of the business activity cannot be well enough understood/defined...the E&S category [is] based on risks inherent to the particular sector, as well as on the likelihood of a development taking place and on what can be reasonably ascertained about the environmental and social characteristics of the business activity's likely geographical setting." "Direct Investments: Pre-Mandate Initial Review, Concept Review Meeting, and E&S Specialist Assignment, Version 7, April 15, 2013," Manual at 4.

³⁰⁸ FI Note, p. 2.

³⁰⁹ "U.S. Comments on the IFC's Sustainability Framework, Suggested Changes to December 2010 Draft," United States Treasury, submitted March 4, 2011, p. 2. <http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20policy%20review%20comments%20Feb2011v3%20final%20posted.pdf> In light of the IFC's categorization of direct investments, the Treasury would be seen as recommending that "the cutoff between category FI-1 and FI-2 be that FI-1 include where any [Category A activities] are anticipated." Id.

³¹⁰ "U.S. Comments on IFC Sustainability Framework Changes Proposed by IFC in April 2010," United States Treasury, pp. 4-5 http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20Policy%20Review%20-%20Overview%20of%20second%20round%20USG%20comments_USED%20comments_clean%20%28post%29.pdf

³¹¹ "Recommendations for immediate changes in the IFC action plan on financial market lending," Attachment to "RE: IFC investment in the financial sector," Letter to Jin-Yong Cai, Executive Vice President, International Finance Corporation, From Jesse Griffiths, Director, Eurodad, et al, March 17, 2014, p. 2. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

³¹² Id.

³¹³ "Where an FI project is judged by the EBRD to have minimal or no adverse environmental or social risks, no specific requirements will apply and the FI will not need to adopt any environmental and social risk management procedures." "Environmental and Social Policy," European Bank for Reconstruction & Development, October 2008 (emphasis added) p. 62. <http://www.ebrd.com/downloads/research/policies/2008policy.pdf>

³¹⁴ Id.

³¹⁵ "OPIC – Environmental and Social Policy Statement," Overseas Private Investment Corporation, October 15, 2010, p. 4. http://www.opic.gov/sites/default/files/consolidated_esps.pdf

³¹⁶ Id. at 14. Moreover, "OPIC provides prior written consent to each of these Subprojects on the basis of potential environmental and social risks. OPIC does not delegate the environmental and social review of Subprojects to Financial Intermediaries unless consent is provided in advance based on criteria in Paragraph 3.31." Id.

³¹⁷ "If OPIC determines that all prospective Subprojects are likely to have minimal or no adverse environmental or social impacts OPIC may consent in advance to all prospective investments, provided that the OPIC Agreement contains exclusion lists prohibiting investments in entities engaged in categorically prohibited activities or activities likely to have significant adverse impact on the environment or local communities, or with heightened potential to violate Labor Rights." Id.

³¹⁸ Id.

³¹⁹ "IIC Environmental and Social Sustainability Policy," September, 2013, p. 7. <http://www.iic.org/environmental-and-social-sustainability-policy.pdf>

³²⁰ The Equator Principles III – 2013," Equator Principles, pp. 4 and 16-19. <http://www.equator-principles.com/index.php/ep3/ep3>

³²¹ See "Taking account of environmental and social Considerations: why?" supra, at pp. 11-13.

³²² "Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project." Performance Standards at 6.

³²³ See Chapter IV in "OECD Guidelines for Multinational Enterprises, 2011," OECD Publishing, p.31-34. <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

³²⁴ "We...recognise that our role as financiers affords us opportunities to promote responsible environmental stewardship and socially responsible development, including fulfilling our responsibility to respect human rights by undertaking due diligence in accordance with the Equator Principles." "Equator Principles III," Equator Principles, June 2013 (citing "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework), p. 3. http://www.equator-principles.com/resources/equator_principles_III.pdf

³²⁵ Among the signatories is FMO, a development finance institution. See "Members and Reporting," Equator Principles. <http://www.equator-principles.com/index.php/members-reporting>

³²⁶ "The Social Responsibility of Business is to Increase its Profits," by Milton Friedman, *The New York Times Magazine*, September 13, 1970. <http://www.colorado.edu/studentgroups/libertarianFs/issues/friedman-soc-resp-business.html>

³²⁷ Here we refer largely to corporate law concerning how corporations might be constituted, organized, governed, etc. There are, of course, other requirements of law or regulation which might trump whatever a corporation or for that matter any kind of enterprise might otherwise be free to do or not do.

³²⁸ See infra, pp. 116-120.

³²⁹ See "IFC Exclusion List," International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/IFC+Exclusion+List/

³³⁰ For direct projects the listed exclusions are

- "Production or trade in weapons and munitions";
- "Production or trade in alcoholic beverages (excluding beer and wine)";
- "Production or trade in tobacco";
- "Gambling, casinos and equivalent enterprises";
- "Production or trade in radioactive materials. This does not apply to the purchase of medical equipment, quality control (measurement) equipment and any equipment where IFC considers the radioactive source to be trivial and/or adequately shielded";
- "Production or trade in unbonded asbestos fibers. This does not apply to purchase and use of bonded asbestos cement sheeting where the asbestos content is less than 20%; and
- "Drift net fishing in the marine environment using nets in excess of 2.5 km. in length."

"IFC Exclusion List," International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/IFC+Exclusion+List/

CITES is the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

³³¹ See discussion relating to PFZW/PGGM supra at pp. 21-22 and infra at pp. 128-131.

³³² "For example: 1) project type, location, size, proposed capital expenditure verses revenues; 2) client creditworthiness and availability of necessary equity; 3) project sponsor partnerships to develop the special purpose entity (SPE); 4) project permits/licence, ESIA approval in host country; and 5) political risk." O'Sullivan, note 92, p. 200.

³³³ They "often are judgment calls (made with heavy reliance on the analysis of independent consultants) both with respect to their eventuality and scope of impact —on the ground as well as to their potential ramifications for bank reputation." Meyerstein at 144.

³³⁴ As Meyerstein has characterized the matter: "[s]ubjectivity is infused in the entire process of risk management. For example, the duty to consult populations to be affected by Category A projects (projects that carry 'potential significant adverse social or environmental impacts') introduces a gray area of interpretation that has and will likely lead to 'patchy application' in practice. But even aside from the standard's ambiguity, the very practice of environmental impact assessment has been described as a mix between 'science' and 'art': there are within the [EIA] process itself many key decisions to be made which will almost certainly not be based upon the rational principles of value free objectivity' (Wood 2003)." Id. at 159.

³³⁵ "[P]rojects can be rejected on any number of grounds, not just these related to environmental or social-risks. As one financial expert noted, —an absolute no would be unlikely based on the principles alone...In fact, data shows that the banks were split 50-50 on whether they had ever rejected a project primarily on ESRM issues." Id. at 150.

³³⁶ Id.

³³⁷ "[P]rojects are often problematic for a variety of reasons and figures on rejection of projects must be taken with a grain of salt." They most likely reflect 'banks' appreciation of a variety of risks, including reputational risk." Id. See also O' Sullivan (In the EP context "projects seem to be seldom rejected on the basis of E&S grounds alone, as there are a myriad of risks associated with projects that determine the final approval by the Credit Risk Department/Committees.") at 199-200.

³³⁸ "While the technical calculation of environmental and social impacts should be the same for each bank (as they are based on the independent expert's analysis), the reputational risk analysis might vary depending on the bank, its connection to the host country, the relative level of resulting civil society pressure, and even by the particular environmental or social issue implicated." Meyerstein at 144.

³³⁹ "[G]etting to a no stage is pretty unlikely because few banks would let negotiations progress to that point (Gaskin 2007)." Id at 150.

³⁴⁰ O' Sullivan at 199-2000. However, she cites one interviewee who "stated that E&S risks that were not surmountable would mean the end of their organisation's consideration of the project." Id.

³⁴¹ "[I]t is rare that projects are considered solely on an absolute yes or no basis; rather, —[o]nce the assessment has been done, if there are elements of a project that breach the standards, the response is not to refuse the project but to put processes in place to manage it so it does become compliant." Meyerstein at 150. See also O'Sullivan (The approach is to avoid rejecting a project and engage the enterprise on how the project can be brought up to the relevant standard, assuming it is thought that the problems are surmountable, that is, whether the risks can be sufficiently mitigated or minimised or avoided outright.") at 200.

³⁴² See O'Sullivan ("For us it is not the desired outcome to say 'no' to a transaction, for us the desired outcome is to make complex transactions in difficult countries possible: safer for the bank and safer for the stakeholders...If you say no nothing is helped, not the environment, not the client, not the people on the ground, not the economy on the ground. The financing will still come from somewhere but probably on a different level of involvement, so for us it is most important to make it doable. And if it is really a case where E&S Risk Management believes it is absolutely not doable, no matter what you have tried – look I'm not speaking for the Bank's Senior Credit Committee – but it's basically the end point of the project." (Dutch EPFI 1, Interviewee 4)) at 199-200.

³⁴³ See "Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks," July 2005 (noting that "[a] problem for some projects is that the lending Equator Banks may not become involved until too late in the development of a project to influence fundamentals" and remarking on "[c]omplications arise where the initial stages of the project have not been the subject of an Equator Principles review."), p. 86.

http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf See also id. at 11-2 (noting limitations on the ability of an EP bank "to influence a project because of the tendency of sponsors to involve banks a quite a late stage of the development of the project...especially evident in multi-staged projects, where the earlier phases have already been completed without any assessment under the Equator Principles.")

³⁴⁴ "The Equator Principles III – 2013, Principle 2," Equator Principles, p. 5. <http://www.equator-principles.com/index.php/ep3/ep3>

The term "limited high risk" is not defined in by EP.

³⁴⁵ Id. The term "limited high risk" is not defined in by EP.

³⁴⁶ Id. at 7.

³⁴⁷ Id. “The Equator Principles III – 2013, Principle 4,” Equator Principles, p. 7. <http://www.equator-principles.com/index.php/ep3/ep3> “Where the applicable standards are not met to the EPFI’s satisfaction, the client and the EPFI will agree an Equator Principles Action Plan (AP). The Equator Principles AP is intended to outline gaps and commitments to meet EPFI requirements in line with the applicable standards.” Id.

³⁴⁸ Id.

³⁴⁹ Id. at 16.

³⁵⁰ Id.

³⁵¹ In a 2007 report, CitiGroup refers to “Portfolio Banker[s]” who “[c]ontinue[] ESRM monitoring over life of loan, in consultation with ESRM Director, as needed.” “Citizenship Report 2007,” CitiGroup, p. 43. http://www.citigroup.com/citi/citizen/data/citizen07_en.pdf In a later description of the project finance review process, it refers at various points to “Transactor” actions. “Environmental Policy Framework,” CitiGroup, April, 2012, p. 10. In prior document about the ESRM there is a description of a Transactor who “screens transactions and complies with approval, analysis, documentation and process requirements” and a “portfolio Banker/Risk Officer” who “[c]ontinues monitoring over life of loan...., in consultation with ESRM Director, as needed”. “Citi’s Environmental and Social Risk Management Policy,” by Eliza Eubank, Assistant VP of Environmental and Social Risk Management at Citi Markets & Banking, November 20, 2007, Slide 4. http://www.sustainabilitypractice.net/downloads/SPN_Eubank_ppt_Nov20.pdf “Environmental Policy Framework,” CitiGroup, April 2012, p. 10.

³⁵² See *O’Sullivan* at 199.

³⁵³ See Id. (citing interview with an EPFI) at 198.

³⁵⁴ Id. at 193.

³⁵⁵ See id. at 199.

³⁵⁶ According to the director of sustainability at ABN AMRO Bank in Amsterdam, the Netherlands, “relationship managers’ knowledge of sustainability issues and awareness are considered more valuable than the actual tools chosen and a lack thereof is, therefore, considered the toughest challenge in the implementation of policies. She admits that not all account managers will use the information provided on the different sectors to assess the clients thoroughly, which is to some extent understandable, as they are not required to.” “The integration of sustainability in the lending process in European banks,” by Linda Bergset, Master’s thesis, Freie Universität, Berlin, March 2010, pp. 64-65. http://www.banktrack.org/manage/ems_files/download/the_integration_of_sustainability_in_the_lending_process_in_european_bank_s/100401the_integration_of_sustainability_in_the_lending_process_in_european_banks_linda_bergset.pdf (Hereafter referred to as *Bergset*.)

³⁵⁷ “Within the majority of EPFI interviewee organisations it is the project financiers that are encouraged to take ‘ownership’ of this project monitoring process, in association with the external consultants and/or relevant E&S risk managers within the bank.” “The Commercial guys, the Product guys, who do the transaction and who structure the deal...those people, they have to manage EP, it’s part of their package. It’s not in the ivory tower, it’s their daily business.” (Dutch EPFI 1, Interviewee 3).” *O’Sullivan* at 211.

³⁵⁸ Id. at 195.

³⁵⁹ See id. at 196.

³⁶⁰ “Applying CSR Principles to Project Investing,” by Karen Wendt, Head of Equator Principles Team CIB Division, UniCredit Group, December 12, 2012. Slides 15 and 22. http://www.veb.ru/common/upload/files/veb/kso/20121212_wendt.pdf

³⁶¹ “[T]he development of in-house expertise is crucial to any bank successfully implementing the EPs and demonstrates an upgrade of their capacity to engage in the highly technical environmental and social risk analysis necessary to properly evaluate large-scale projects beyond financial and credit risk dimensions.” *Meyerstein* at 139.

³⁶² Id. at 143.

³⁶³ Id. at 141.

³⁶⁴ “Equator Principles III is approved and launched – new trends and a strategy rethink,” by Michael Torrance, Norton Rose Fulbright, May 18 2013. <http://www.nortonrosefulbright.com/knowledge/publications/80287/equator-principles-iii-is-approved-and-launched-new-trends-and-a-strategy-rethink>

³⁶⁵ Id.

³⁶⁶ Id.

³⁶⁷ In an earlier report, CitiGroup refers to “ESRM Policy implementation [being] a shared responsibility across Citi, including Bankers, Independent Risk Managers and the ESRM Unit.” “Citizenship Report 2007,” CitiGroup, p. 43. http://www.citigroup.com/citi/citizen/data/citizen07_en.pdf

³⁶⁸ *Meyerstein* at 143.

³⁶⁹ Id. “On the Effectiveness of Global Private Regulation: The Implementation of the Equator Principles by Multinational Banks,” by Ariel

³⁷⁰ Id. at 142. In a relatively small proportion of the cases, there was no ESRM department or designated personnel or ESRM personnel only “offer[ed] their input on difficult issues when asked by front line project finance teams.” Id.

³⁷¹ Id. at 143.

³⁷² “[F]ront office bankers [need to] understand when [in light of input from ESRM staff] it is and is not necessary to escalate the level at which a particular project will be reviewed.” Id. at 148.

³⁷³ “Environmental Policy Framework,” CitiGroup, April 2012, p. 10.

www.citigroup.com/citi/environment/data/937986_Env_Policy_FrameWk_WPaper_v2.pdf The ESRM Unit is described in another publication by Citi as being part of Institutional Clients Risk Management and is pictured as having a role aligned or in parallel with its Corporate Sustainability Unit. “Managing our Environmental Performance,” CitiGroup, p. 35. http://www.citi.com/citi/citizen/data/cr08_ch10.pdf See also “Citi’s Environmental and Social Risk Management Policy,” by Eliza Eubank, Assistant VP of Environmental and Social Risk Management at Citi Markets & Banking, (“The ESRM Unit serves as a technical resource and counsel for the CMB.”), Slide 4, November 20, 2007.

http://www.sustainabilitypractice.net/downloads/SPN_Eubank_ppt_Nov20.pdf

³⁷⁴ “Global Citizenship Report 2013,” CitiGroup, 2014, p. 48.

http://www.citi.com/citi/about/data/corp_citizenship/global_2013_english.pdf Elsewhere in that report it is said that the ESRM unit “sets the firm’s environmental and social risk policies and procedures, reviews transactions subject to those policies and works closely with bankers to advise clients on meeting international best practices.” Id. at 43.

³⁷⁵ “Environmental Policy Framework,” CitiGroup, April 2012, p. 10.

http://www.citigroup.com/citi/environment/data/937986_Env_Policy_FrameWk_WPaper_v2.pdf. See also “Citi’s Environmental and Social Risk Management Policy” (“All Category A projects require elevated review by an ESRM Approver, in consultation with the ESRM Director, or designate.”), Slide 6. http://www.sustainabilitypractice.net/downloads/SPN_Eubank_ppt_Nov20.pdf. This last point is consistent with what O’Sullivan reports, that is, while as a general matter, there might be consultation with those in a Risk Department/Credit Risk Department or Committee at the Head Office, most EPFIs “mentioned [to her] that it was Category A (and in some cases Category B) projects, that would require consultation with E&S risk managers and final sign off by Credit Risk (Committees), at Head Office”; others would seek sign off the local level. O’Sullivan at 199.

³⁷⁶ “Citi’s Environmental and Social Risk Management Policy,” by Eliza Eubank, Assistant VP of Environmental and Social Risk Management at Citi Markets & Banking, November 20, 2007, Slide 4.

http://www.sustainabilitypractice.net/downloads/SPN_Eubank_ppt_Nov20.pdf. See also “Managing Risk, Creating Opportunity: Equator Principles & Citi’s Environmental & Social Risk Management Policy,” by Jennifer Karingi, Citi Kenya, September 23, 2011. All ESRM Covered Transactions are reviewed by Citi’s ESRM Unit and categorized according to the IFC screening criteria of A, B or C (high, medium or low risk). “Category A Transactions require elevated review by an ESRM Approver, in consultation with the ESRM Director, or designate.”), Slide 4. <http://www.unepfi.org/fileadmin/events/2011/nairobi/Karingi.pdf>

³⁷⁷ “2013 Global Citizenship Report,” Citi, p. 1. http://www.citigroup.com/citi/about/data/corp_citizenship/global_2013_english.pdf

³⁷⁸ “Environmental and Social Risk Management,” CitiGroup, p. 2. http://www.citibank.com/citi/citizen/data/cr07_ch12.pdf. “Our internal Audit team selectively audits transactions across the company to ensure due diligence and compliance with all Citi policies, including ESRM standards.” “2013 Global Citizenship Report,” CitiGroup, p. 1.

http://www.citigroup.com/citi/about/data/corp_citizenship/global_2013_english.pdf

³⁷⁹ Some banks “supplement[] their first-party auditing with external, third-party auditing.” “Generally, assurance auditors from large accounting firms read EPFIs’ corporate social responsibility (and other) reports to verify that the contents disclosed are accurate.” Meyerstein at 149-150.

³⁸⁰ Her report is based in considerable measure on interviews with the “department director and responsible for the issues sustainable lending and reputation risk management at HypoVereinsbank’s CSR department in Munich, Germany.” The integration of sustainability in the lending process in European banks,” Bergset at 34.

³⁸¹ Id. at 54.

³⁸² Id. at 54-55.

³⁸³ Id. at 55.

³⁸⁴ Id.

³⁸⁵ Id.

³⁸⁶ Id. According to the bank’s department director - responsible for the issues sustainable lending and reputation risk management – in Germany, with respect to project and export finance with respect to developing countries: a banker “should want to know where the money is going, what happens on-site, how the company is conducting business abroad and to what extent it is aware of the impact its business is having. The burden of proof then lies with the company and if it is unable to prove that its conduct is acceptable, then the CSR department will not vote in favour of financing the company.” Id.

³⁸⁷ Id. at 62. The report is based in part on material from interviews with “a representative of the Rabobank Group’s central CSR department at Rabobank Nederland” and “a representative of the CSR department at Rabobank International” in Utrecht, the Netherlands.” Id. at 34.

³⁸⁸ Id. at 63.

³⁸⁹ Id. “

³⁹⁰ Carbonell at 30.

³⁹¹ Id.

³⁹² Id.

³⁹³ Id. at 30-31.

³⁹⁴ Id.

³⁹⁵ Id.

³⁹⁶ Bergset at 46.

³⁹⁷ Id. at 37.

³⁹⁸ Id.

³⁹⁹ Id.

⁴⁰⁰ Id. at 37-38.

⁴⁰¹ Id. at 46.

⁴⁰² Id.

⁴⁰³ Id. at 46-47.

⁴⁰⁴ Id. at 61-62. The report is based in part on material from interviews with the “director of sustainability at ABN AMRO Bank in Amsterdam, the Netherlands.” Id. at 34.

http://www.banktrack.org/manage/ems_files/download/the_integration_of_sustainability_in_the_lending_process_in_european_bank_s/100401the_integration_of_sustainability_in_the_lending_process_in_european_banks_linda_bergset.pdf

⁴⁰⁵ “Sustainability Risk Policy,” ABN-AMRO, p. 4. <http://www.abnamro.com/en/Sustainability/risk-management/sustainability-risk-policy/index.html>

⁴⁰⁶ Id. at 5.

⁴⁰⁷ Id.

⁴⁰⁸ “Equator Principles Policy,” ABN-AMRO, p. 3. <http://www.abnamro.com/en/Sustainability/risk-management/project-specific-policies/equator-principles-policy/index.html>

⁴⁰⁹ Id.

⁴¹⁰ O’Sullivan at 199-200.

⁴¹¹ Bergset at 61.

⁴¹² Meyerstein at 143.

⁴¹³ “Reporting on Equator Principles Implementation, for the year 2010,” May, 2013, BNP Paribas, p. 3.

⁴¹⁴ http://www.bnpparibas.com/sites/default/files/ckeditor-upload/files/PDF/Nous%20Connaitre/Banque%20Responsable/EN_2012_Equator%20Principles%20Implementation.pdf

⁴¹⁵ *Bergset* at 62. The report is based on material from interviews with the “project manager (‘fagansvarlig’) for corporate social responsibility at the department external relations at DnB NOR in Oslo, Norway.” *Id.* at 34.

⁴¹⁶ *Meyerstein* at 143.

⁴¹⁷ See *Meyerstein* (“Representatives of senior management (either heads of particular divisions, e.g., the commercial lending division, or members of the Board of Directors) may sit on credit committees in some banks but not in others. Such representatives from senior management might alternatively sit on —reputational risk or — risk committees, which my interviews and these responses indicate serve as quasi-appellate review bodies that offer a second layer of consideration when credit committee discussions result in gridlock, ambiguous or conflicted recommendations, or when there is resistance from ESRM committees or personnel either heading into credit committee discussions or in the face of credit committee recommendations. Generally, these secondary levels of review are by default reserved for the most challenging projects with the greatest potential reputational risks.”) at 144. See also *O’Sullivan* at 200.

⁴¹⁸ See *Meyerstein* (“The creation of these heightened review mechanisms suggests that banks take very seriously potential reputational risks arising out of risky transactions.”) at 144.

⁴¹⁹ *O’Sullivan*, 2010 at 199.

⁴²⁰ “Environmental and Social Risk Assessment in Lending,” Barclays.

⁴²¹ <http://group.barclays.com/Satellite?blobcol=urldata&blobheader=application/pdf&blobheadername1=Content-Disposition&blobheadername2=MDT-Type&blobheadervalue1=inline;+filename%3DEnvironmental-and-Social-Risk-Assesment-in-Lending.pdf&blobheadervalue2=abinary;+charset%3DUTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1330699491530&ssbinary=true>

⁴²² *Id.*

⁴²³ *Id.* In the same document it restates the point in the following way: “Barclays businesses are required to escalate any material reputational issues encountered to the Council for their consideration.” *Id.*

⁴²⁴ *Carbonell* at 32.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ For example, *Meyerstein* observes with respect to the EP: “While the technical calculation of environmental and social impacts should be the same for each bank (as they are based on the independent expert’s analysis), the reputational risk analysis might vary depending on the bank, its connection to the host country, the relative level of resulting civil society pressure, and even by the particular environmental or social issue implicated.” *Meyerstein* at 144.

⁴²⁸ Indeed, in a statement by what is termed “The Thun Group of Banks” in discussing “the meaning of the UN’s ‘Protect, Respect and Remedy’ Framework” and the Guiding Principles for the activities of banks,” stressed that “[i]t is critical to seek senior management buy-in at the outset. ‘Tone from the top’ is important in gaining buy-in from other parts of the organization, especially when making explicit reference to human rights in a range of policies and integrating a human rights ‘perspective’ on decisions and processes. Colleagues may lack confidence in interpreting the policy and guidance and need to know they are supported in considering the issues.” “UN Guiding Principles on Business and Human Rights, Discussion paper for Banks on Implications of Principles 16-21,” The Thun Group of Banks, October 2013, p. 7.

⁴²⁹ http://www.skmr.ch/cms/upload/pdf/131002_Thun_Group_Discussion_Paper_Final.pdf The initial statement issued by the Group was signed by Barclays, Credit Suisse, UBS, and UniCredit, all EPFIs. “The Thun Group statement,” UBS.

⁴³⁰ https://www.ubs.com/global/en/about_ubs/corporate_responsibility/commitment_strategy/external/un_global/thungroup.html They were later joined by BBVA, ING Bank N.V. and RBS Group in signing on to the cited Discussion Paper.

⁴³¹ *Bergset* at p. 23. “This may be rather important in the highly institutionalised organisations that internationally operating mainstream banks are, as the employees of such organisations tend to, surprisingly, follow more informal and culturally defined rules.” In this connection, the recent Thun Group Discussion Paper remarked that one “challenge, from a policy perspective is to ensure employees are comfortable talking about human rights and can make the necessary linkages to ensure they have an accurate overview of the impacts and related risks.” “UN Guiding Principles on Business and Human Rights, Discussion paper for Banks on Implications of Principles 16-21,” The Thun Group of Banks, October 2013, p. 7.

⁴³² http://www.skmr.ch/cms/upload/pdf/131002_Thun_Group_Discussion_Paper_Final.pdf

⁴³³ “Extra-Financial Risks – Experience within UniCredit,” by Karen Wendt, Head of Equator Principles Team and Extra-Financial Risk Management Desk, UniCredit Group, October 2010, Slide 14.

⁴³⁴ http://www.unepfi.org/fileadmin/events/2010/istanbul_training/KarenWendtRiskManagementUnicredit.pdf

⁴³⁵ *Meyerstein* at 144.

⁴³⁶ *Carbonell* at 32.

⁴³⁷ *Id.* at 34-35.

⁴³⁸ *Id.* at 35.

⁴³⁹ “Environmental Policy Framework,” CitiGroup, April 2012, p. 10.

⁴⁴⁰ http://www.citigroup.com/citi/environment/data/937986_Env_Policy_FrameWk_WPaper_v2.pdf

⁴⁴¹ *Id.*

⁴⁴² *Id.* In a more recent report it is described as being co-chaired by “The Director of Corporate Governance and Citi’s Managing Director of Business Development” and as “provid[ing] guidance on ESRM issues and related environmental issues.” “Global Citizenship Report 2013,” CitiGroup, 2014, p. 71. http://www.citi.com/citi/about/data/corp_citizenship/global_2013_english.pdf

⁴⁴³ “Environmental Policy Framework,” CitiGroup, April 2012, p. 10.

⁴⁴⁴ http://www.citigroup.com/citi/environment/data/937986_Env_Policy_FrameWk_WPaper_v2.pdf

⁴⁴⁵ *Meyerstein* at 144.

⁴⁴⁶ *Id.* at 143. Such representatives may be “heads of particular divisions, e.g., the commercial lending division, or members of the Board of Directors”. *Id.* at 144.

⁴⁴⁷ *Id.* at 145. “Representatives of senior management (either heads of particular divisions, e.g., the commercial lending division, or members of the Board of Directors) may sit on credit committees in some banks but not in others. Such representatives from senior

management might alternatively sit on 'reputational risk' or 'risk' committees, which...serve as quasi-appellate review bodies that offer a second layer of consideration when credit committee discussions result in gridlock, ambiguous or conflicted recommendations, or when there is resistance from ESRM committees or personnel either heading into credit committee discussions or in the face of credit committee recommendations." Id. at 144.

⁴⁴⁰ See Environmental Policy Framework," CitiGroup, April 2012, p. 10.

http://www.citigroup.com/citi/environment/data/937986_Env_Policy_FrameWk_WPaper_v2.pdf

⁴⁴⁰ Id.

⁴⁴¹ Meyerstein at 143 and 144.

⁴⁴² See O'Sullivan (quoting an EPFI to the effect sustainability risk officers based in various countries "are fantastic in helping us to manage the issues because we feel that we can't and don't want to manage everything from Head Office as we don't really know what's going on in some of these countries half as well as the local people...And if they need to they'll refer up to us for more advice or send the transaction up to us for clearance.") at 199-200.

⁴⁴³ "Citi's Environmental and Social Risk Management Policy," Slide 4.

http://www.sustainabilitypractice.net/downloads/SPN_Eubank_ppt_Nov20.pdf

⁴⁴⁴ "Managing our Environmental Performance," CitiGroup, p. 37. http://www.citi.com/citi/citizen/data/cr08_ch10.pdf

⁴⁴⁵ "Environmental and Social Risk Assessment in Lending," Barclays.

<http://group.barclays.com/Satellite?blobcol=urldata&blobheader=application/pdf&blobheadname1=Content-Disposition&blobheadname2=MDT-Type&blobheadvalue1=inline;+filename%3DEnvironmental-and-Social-Risk-Assesment-in-Lending.pdf&blobheadvalue2=abinary;+charset%3DUTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1330699491530&ssbinary=true>

These "Champions" are described elsewhere as regional "credit risk officers with additional ESRM review and advisory responsibilities." Global Citizenship Report 2013," CitiGroup, 2014, p. 48. http://www.citi.com/citi/about/data/corp_citizenship/global_2013_english.pdf

⁴⁴⁶ Meyerstein at 159.

⁴⁴⁷ O'Sullivan (quoting an EPFI to the effect sustainability risk officers based in various countries "are fantastic in helping us to manage the issues because we feel that we can't and don't want to manage everything from Head Office as we don't really know what's going on in some of these countries half as well as the local people...And if they need to they'll refer up to us for more advice or send the transaction up to us for clearance.") at 199.

⁴⁴⁸ See "Environmental Policy Framework," CitiGroup (stating that in addition to the ESRM Unit there were "[a] number of other corporate and business units, including Global Banking, Global Transaction Services, Operations & Technology, and Public Affairs, also have sustainability experts embedded in their units to develop and promote sustainable products, services and initiatives at the line-of-business level.") April 2012, p. 10.

http://www.citigroup.com/citi/environment/data/937986_Env_Policy_FrameWk_WPaper_v2.pdf

⁴⁴⁹ For discussion of some of these points, see "Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks," July 2005, pp. 84 and 126-129.

http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

⁴⁵⁰ "Equator Principles III is approved and launched – new trends and a strategy rethink," by Michael Torrance, Norton Rose Fulbright, May 18 2013. <http://www.nortonrosefulbright.com/knowledge/publications/80287/equator-principles-iii-is-approved-and-launched-new-trends-and-a-strategy-rethink>

⁴⁵¹ For example, we have been given to understand that where major brands have made major and public commitments to codes relating to their supply chains, the locus of responsibility for fulfilling those commitments might be located in law or law-related departments rather than, say, ones exclusively dedicated to code-related issues. It is possible that under such arrangements actions might have an excessively legal and defensively oriented character as contrasted with ones more alert to a broader considerations.

⁴⁵² See, for example, Making the "Sustainability Case: The Convergence of Independent Reviews and Legal Risk Management in Equator Principles Implementation," by Michael Torrance, February 18, 2013.

<http://lexsustineo.blogspot.com/2013/02/making-sustainability-case-convergence.html>

⁴⁵³ Insofar as we are speaking of project finance, "the loan sum...is usually very high; about 50 percent of financed projects cost more than US\$1 billion." "The Equator Principles: The Teenage Years of Implementation and a Search for Outcome," by Olaf Weber and Emmanuel Acheeta, CIGI, CIGI Papers, No. 24, January, 2014, p. 7. http://www.cigionline.org/sites/default/files/no24_0.pdf See also Meyerstein ("Significantly, because of the size and uncertainty of large infrastructure development, banks always spread the high risks of project finance lending among a cohort or syndicate of banks, this particular financing practice is a highly 'social' activity. Perhaps more than typical markets where competitors may be in close competition with each other, here the competitors are almost always also collaborators who need the trust and good faith of other institutions to do deals because no one can bear the risk involved in 'going it alone.'") at 136.

⁴⁵⁴ See O'Sullivan (citing interview with an EPFI) at 99.

⁴⁵⁵ "Project finance deals are financed by both debt and equity, with an average ratio of 70% debt to 30% equity. Depending on the project, more than one type of debt provider may be involved, for example, a bank syndicate, multilateral agencies (e.g. World Bank, International Finance Corporation and regional development banks), bilateral agencies (development agencies and export-import financing agencies) and/or Export Credit Agencies (ECAs)." O'Sullivan (citing interview with an EPFI) at 98-99.

<http://dare.uva.nl/document/185897>

⁴⁵⁶ Id. (citing interview with an EPFI) at 100. On occasion there may be more than one lead arranger. See id. at 202.

⁴⁵⁷ Id. at 100. See also id. at 201. See also Meyerstein ("[O]ne bank within each syndicate serves as the syndicate's 'agent,' also known as the 'environmental bank, and is responsible for all of the paperwork and ensuring that all of the loan covenants in the project contracts are fulfilled. The agent's fee is a flat fee paid by the project sponsor on a monthly or annual basis...However, the role of the agent is a relatively thankless job because the fee is not that high relative to other fees, at least in exchange for the amount of work required to earn the fee. The agent's responsibilities include constant monitoring of information from the project sponsors, checking this information against the loan covenants for compliance, and reporting on compliance to all members of the syndicate. Of course, if anything goes wrong, it is the agent who bears significant responsibility.") at 146. See also "Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks," July 2005 (referring to the appointment of a Technical or Environmental Bank which "advise[s] the other banks whether the Equator Principles have been complied with in all pre-financial close matters" and "monitors compliance with the EMP during the construction and operational phases of the project and assesses the

information provided by the sponsors and consultant about the project.”), p. 86. http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

⁴⁵⁸ O’Sullivan (citing interview with an EPFI) at 100. See also id. at 201. “In some cases one FI will take the role of ‘environmental bank’ being in charge of ensuring the project meets with environmental requirements such as EP. The environmental bank will act as repository of all environmental related information.” “The Reality of the Equator Principles – Reporting and Assurance,” by Esther Rodriguez, Carbon Smart. <http://www.carbonsmart.co.uk/wp-content/uploads/2011/02/Article-The-Reality-of-the-EP-v45-Assurance-andEP.pdf>

⁴⁵⁹ O’Sullivan (citing interview with an EPFI) at 201. Indeed, “banks may be encouraged to subscribe to syndicated deals based on the strength of the Environment Bank.” “Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks,” July 2005, p. 89 http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

⁴⁶⁰ O’Sullivan (citing interview with an EPFI) at 201-202.

⁴⁶¹ Apparently non-EPFI members of the syndicate simply (have to) accept what the lead arrangers set for the terms of client-related commitments and its handling of compliance with them. O’Sullivan (citing interview with an EPFI) at 201 and 203.

⁴⁶² Meyerstein, Table 8.9, p. 155.

⁴⁶³ “The Equator Principles III – 2013,” Equator Principles, p. 8. <http://www.equator-principles.com/index.php/ep3/ep3>

⁴⁶⁴ Id.

⁴⁶⁵ Id. Such projects are referred to as including but being limited to ones involving “adverse impacts on indigenous peoples”; “[c]ritical Habitat impacts”; “significant cultural heritage impacts”; and “large-scale resettlement?” Id. at 9. Just as with project finance, there is a post-project approval requirement for a consultant role post-project approval. Id.

⁴⁶⁶ Id. at 10.

⁴⁶⁷ Performance Standards at 6.

⁴⁶⁸ Id. “The extent of monitoring should be commensurate with the project’s environmental and social risks and impacts and with compliance requirements.” Id.

⁴⁶⁹ An attorney active on EP-practice related issues has observed that in the EP context, “banks often rely on so-called technical experts to provide *ad hoc* advice on EP implementation.” He suggests that “[t]his is likely due to a perception that the risks of EP implementation are not a sufficiently major risk category on project financing deals as to warrant assignment to a single responsibility centre.” Equator Principles III is approved and launched – new trends and a strategy rethink,” by Michael Torrance, Norton Rose Fulbright, May 18 2013. <http://www.nortonrosefulbright.com/knowledge/publications/80287/equator-principles-iii-is-approved-and-launched-new-trends-and-a-strategy-rethink>

⁴⁷⁰ See O’Sullivan (“[I]nterviewees did explain that EPFIs’ reliance on external consultants, for both the initial review and ongoing client monitoring, was quite simply based on their own lack of in-house E&S expertise. In addition, addressing the social dimension of projects, and finding suitable consultants to assist with this, appeared to be most challenging for EPFIs.”) at 210.

⁴⁷¹ “Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks,” July 2005, p. 83. http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

⁴⁷² A presentation by what appears to have been the Managing Director, Corporate Banking with Citi India with regard to a toll road project in India was illustrative of that role. The environmental and social risks included “[i]nvoluntary resettlement of 1,600 households (covered under IFC Performance Standard 5); “[i]mpacts to scheduled tribes / castes, and indigenous peoples”; “[r]elocation of temples & mosques, and sacred groves”; and “[i]mpacts to biodiversity.” Equator Principles & Citi’s Environmental & Social Risk Management,” by K. Balasubramanian March 1, 2011, Slide 15. http://portal.asria.org/LCIA/briefing/mumbai/post/2%20-%20Citi%20Asria%20Presentation_v2.pdf Given the “potential sensitive issues, such as resettlement” it was classified as a Category A project and the “Citi India-based Transactors immediately contacted the ESRM Unit for advice and clearance.” Id. The ESRM Unit “required hiring of [an] Independent Consultant to conduct and Equator Principles Compliance Review.” Id. at 16. A member of that unit accompanied the consultant on a due diligence visit. That consultant “helped facilitate discussions between client and government agencies responsible for resettlement implementation” and “wrote [the] E&S Due Diligence Report for Citi, and identified certain gaps that needed to be filled.” Id.

⁴⁷³ Meyerstein at 145.

⁴⁷⁴ Id. “For large and complicated projects wide ranging consultant services may be recorded. One assessment of early EP practice remarked as follows in that regard: “[W]hereas it is sometimes possible to have a one-stop shop consultancy, major projects tend to require a number of discrete and diverse skills. Best practice is to have a team of consultants reporting to a project manager who has a proven record running teams of experts who can make an overview of trade-offs between economic, environmental and social benefits and disadvantages and decide whether any such trade-off is justifiable or supportable.” “Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks,” July 2005, pp. 82-83. http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

⁴⁷⁵ Meyerstein at 146.

⁴⁷⁶ See O’Sullivan at 198.

⁴⁷⁷ Meyerstein at 146.

⁴⁷⁸ Id. at 140.

⁴⁷⁹ “The consultant role extends well beyond the due diligence/decision-to-invest-or-no stage. “Typically, consultants do periodic site visits, which are more frequent at the start of construction and operation (quarterly, perhaps), but drop in frequency (to an annual or bi-annual basis) once the project reaches construction completion and begins operation.” Id. at 147.

⁴⁸⁰ See remarks of Dutch/Belgian EPFI, Interviewee 2 in O’Sullivan at 209.

⁴⁸¹ Id.

⁴⁸² See id. (remarks of UK EPFI 1, Interviewee 2) at 211.

⁴⁸³ Id. at 209. O’Sullivan cites the EP consultant to the effect that the consultants employed to prepare the ESIA were not supposed to conduct the independent review of it, even though clients would in some cases prefer that. Id. at 209-210.

⁴⁸⁴ For example, according to an environmental consultant interviewed and quoted by Meyerstein, not only are there issues of “‘host government cooperation and transparency, attention/professionalism of civil society actors and involvement (or lack thereof . . .) of potential lenders,’ but primary consultants may not be able to secure local ones” or ones “‘who understand the local context and the international requirements’.” Meyerstein at 159 and 160. Presumably, the consultant was referring to environmental issues. If social

issues were in play, the kinds of problems described might be more severe. In this regard O'Sullivan offers an illustration of problems which can arise when local expertise is not drawn upon. See *O' Sullivan* (citing a EPFI borrower company's description of how a UK EPFI insisted on an assessment of a South African mining project's impact on AIDS entailed retention of a UK company at an expense of \$68,000 and view that it would have been better to have a local consultant do the work subject to peer review) at 209.

On an overarching and more cautionary note the consultant added: "The basic point is that in order to fully integrate the principles of environmental and social responsibility in large investments, there are a lot of variables beyond just the quality of the consultant and the intentions of the company. It isn't just a question of black/white." *Id.* at 160

⁴⁸⁵ *Meyerstein* at 145.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 144. In this connection, he reports that about one fifth of EFPIs surveyed treat the independent consultant's as dispositive of a "difficult decision on a sensitive project with challenging environmental and social risks." *Id.* at 145.

⁴⁸⁸ *Id.* at 140.

⁴⁸⁹ "Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks," July 2005, p. 82.

⁴⁹⁰ http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

⁴⁹¹ *Meyerstein* at 140. See also *Carbonell* (The bank "maintains a list of 19 'preferred' consulting firms, reviewed regularly, which must conduct all environmental assessments for proposed projects.") at 35.

⁴⁹² *Id.*

⁴⁹³ The Equator Principles III – 2013, Equator Principles, p. 7. <http://www.equator-principles.com/index.php/ep3/ep3> "

⁴⁹⁴ *Id.* at 15.

⁴⁹⁵ *Id.* at 18.

⁴⁹⁶ *Id.* at 7. Informed Consultation and Participation is "an in-depth exchange of views and information and an organised and iterative consultation that leads the client to incorporate the views of Affected Communities, on issues that affect them directly (such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues), into their decision-making process." *Id.* at 17. Where indigenous peoples are part of project-affected communities the process must "comply with the rights and protections for indigenous peoples contained in relevant national law, including those laws implementing host country obligations under international law" and (citing IFC PS7 and Principle 3, "[p]rojects with adverse impacts on indigenous people will require their Free, Prior and Informed Consent (FPIC)." *Id.* at 7-8.

⁴⁹⁷ *Id.* at 7. <http://www.equator-principles.com/index.php/ep3/ep3> "

⁴⁹⁸ *Id.*

⁴⁹⁹ See for example, *Meyerstein* at 38-55 and *O'Sullivan* at 107-135.

⁵⁰⁰ *Meyerstein* at 127.

⁵⁰¹ See for example *Meyerstein* ("[C]ertain projects tend to receive far more attention than others, perhaps due in part to the fact that NGOs tend to get involved in certain cases – and not others – because they have been requested to do so by movements and other organisations on the ground. This highly biased selection process means that many projects which perhaps ought to receive stakeholder attention avoid the spotlight whilst others remain permanently under its glare as coverage about it increases...The focus of BankTrack, Greenpeace, Friends of the Earth, WWF, Human Rights Watch and the army of NGOs, often is the negative rather than the positive aspects of such projects, on bad news rather than good. In reality, one finds NGO opposition is often based upon political rather than social or environmental grounds (for instance, to developments such as dams and nuclear power stations). Consequently, it is therefore often difficult for the EPFI to satisfy such NGOs by adopting a particular social or environmental objective, given this underlying political agenda.") at 30.

⁵⁰² *Id.* note 202, p. 173

⁵⁰³ See for example "Banking on responsibility, Part 1 of Freshfields Deringer Equator Principles Survey 2005: The Banks," July 2005 (distinguishing between "general awareness raising, and training"), p. 81.

⁵⁰⁴ http://www.banktrack.org/manage/ems_files/download/banking_on_responsibility/050701_banking_on_responsibility.pdf

⁵⁰⁵ *Id.* (distinguishing between "general awareness raising and training") at 80.

⁵⁰⁶ *Id.* at 81.

⁵⁰⁷ "2013 Global Citizenship Report," Citi, p. 1. http://www.citigroup.com/citi/about/data/corp_citizenship/global_2013_english.pdf *Id.* at 52. It added that "[o]ver the course of 2013, 504 Citi employees received ESRM training, including in-person training sessions in Indonesia, Japan, Malaysia, Mexico, Nigeria, the United Kingdom and the United States." *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Bergset* at 60.

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.* at 60-61.

⁵¹⁵ *Meyerstein* at 148.

⁵¹⁶ *Bergset* at 64.

⁵¹⁷ "CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries," Office of the Compliance Advisor Ombudsman, p. 29. http://www.cao-ombudsman.org/documents/Audit_Report_C-I-R9-Y10-135.pdf

⁵¹⁸ *Bergset* at 65.

⁵¹⁹ *Id.* at 65-66.

⁵²⁰ *Id.* at 65. Interestingly, though, the interviewee "links the lack of comfortableness to the lack of knowledge." *Id.*

⁵²¹ *Id.* at 64.

⁵²² For example, "relationship managers' knowledge of sustainability issues and awareness are considered more valuable than the actual tools chosen and a lack thereof is, therefore, considered the toughest challenge in the implementation of policies." (citing person from ABN AMRO Bank). *Id.* at 64.65.

⁵²³ *O'Sullivan* at 150.

⁵²³ O'Sullivan at 150.

⁵²⁴ See, for example, "Killing Conscience: The Unintended Behavioral Consequences of 'Pay For Performance'", by Lynn Stout, Cornell Legal Studies Research Paper No. 14-06, March 10, 2014. (Forthcoming) *Journal of Corporation Law*, Vol. 39, Issue 1. <http://ssrn.com/abstract=2407096>

⁵²⁵ Meyerstein at 133.

⁵²⁶ Id. at 141. Another "said that their ESRM[s] are not outside of the bonus structures" and the remaining 3 reported that "their bonus structures are not project-dependent but rather are shared in a more aggregate manner across the project finance department." Id.

⁵²⁷ Bergset at 61.

⁵²⁸ Id.

⁵²⁹ Id.

⁵³⁰ Id.

⁵³¹ Email from sustainable finance specialist. January 28, 2014.

⁵³² The DFI Swedfund offers a brief description of its process: "When an investment is deemed interesting for Swedfund, it is prepared for "Concept Clearance" (CC). The appointed investment manager (IM) writes a brief memo, which is then discussed in an informal credit committee made up of the managing director, the director of investments and the director of business development. If the decision is made to continue processing the investment, a process of due diligence (DD) is initiated. This process involves analysing the company and the intended investment from all relevant perspectives (financial, commercial, legal, partners, development effects, and ESG issues). This due diligence process continues throughout the entire investment process, until the transaction has been made (disbursement of our investment). Analyses of different areas are sometimes done in parallel, sometimes they intertwine, and thorough analyses are made when necessary. When an investment has received concept clearance, a preliminary notification is sent to the board of directors."

"Following the notification to the board of directors, the investment preparation process moves on to the screening phase. Normally an analyst and a lawyer participate in this phase together with the investment manager. During the screening, the investment is analysed and discussed in an internal peer review group on the basis of the earlier documentation. The screening group gives their opinions and recommendations for the continued evaluation. These recommendations include guidelines for what the continued due diligence process should focus on. If the outcome of the continued process is positive, a decision guidance document is drawn up for the board or the managing director.

"The environmental and social due diligence process is carried out with the participation of ESG experts. If the investment is rated A or B+ in terms of environmental and social performance, an external ESG expert is also called in. Regardless of the risk rating, the memorandum to the board of directors always includes a summary of environmental and social risks." "Development and Results, Swedfunds Annual Sustainability and Financial Report 2011," August 6, 2012, pp. 12-13. <http://www.swedfund.se/en/press-and-publications/publications/annual-reports/>

⁵³³ See discussion of IFC *Interpretation Note on Categorization*, supra at p. 312

⁵³⁴ "Direct Investments: Appraisal, Version 7, April 15, 2013," Manual at 3.

⁵³⁵ Id. at 2-3. The impacts might be related to "threats to critical habitat, natural resources, or legally protected areas (PS6); indigenous peoples (PS7) or unusual cultural heritage issues (PS8)." Id.

⁵³⁶ According to the Manual, CES Managers have "the responsibility for the overall performance of their management units; on the management of personnel and resources; and on providing clearance on critical decisions about projects." "ESRP 1. Environmental and Social Review Procedures Manual, Version 7, April 15, 2013," Manual at 3.

⁵³⁷ That is, "[i]f the leverage is good, there can be beautiful investment projects where the application of IFC PS dramatically improves the situation of the target group / environment. However, these projects typically demand many weeks of tough negotiations between E&S experts of IFC PS banks and the client which can be quite costly (involving field trips by banks E&S experts, 'gap analysis studies' between IFC PS and planned performance by external consultants) resulting in long and demanding action plans (ESAPs) and contracts." E-mail from sustainability finance expert. January 18, 2014.

⁵³⁸ "Developing and Investment Process for the Process of Investing in Development – A Case Study of the International Finance Corporation (IFC)," by Edvard Lenner and Paulina Lenner, Master Thesis, Stockholm School of Economics, Department of Accounting, Academic Year 2008/2009," p. 20. <http://arc.hhs.se/download.aspx?MediumId=742> (Hereafter referred to as *Lenners*.)

⁵³⁹ "Investment Officer, IFC Careers," International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/careers_ext_content/ifc_external_corporate_site/ifc+careers/typesofrolesin/investmentofficer

"Investment Officers are driven by their commitment to contribute to private sector development in our countries of operation by executing innovative, developmental, and profitable investments for IFC." Id.

⁵⁴⁰ *Lenners* at 20.

⁵⁴¹ Id. ("It is at this stage important that the investment team is aware of the IFC strategic goals to reject bad projects early on. (*Credit Risk Advisor*)")

⁵⁴² Id. "

⁵⁴³ "ESRP 2. Direct Investments: Pre-Mandate initial Review, Concept Review Meeting, and E&S Specialist Assignment, Version 7, April 15, 2013," Manual at 5.

⁵⁴⁴ Id.

⁵⁴⁵ *Lenners* at 20.

⁵⁴⁶ Id.

⁵⁴⁷ Id.

⁵⁴⁸ Id.

⁵⁴⁹ Id.

⁵⁵⁰ "Social and Environmental Performance Report, the E&S Performance Report provided by an FI client." Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 9. According to the IFC Interpretation Note relating to FIs, "[m]ost FI clients will be required to submit annual E&S performance reports to IFC." FI Note at 9. It adds that "[a]n FI may have additional reporting requirements to additional stakeholders (internal and external) regarding E&S risks and impacts associated with its activities." Id.

⁵⁵¹ “Social and Environmental Performance Report, the E&S Performance Report provided by an FI client.” Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 8.

⁵⁵² “ESRP 2. Direct Investments: Pre-Mandate initial Review, Concept Review Meeting, and E&S Specialist Assignment, Version 7, April 15, 2013,” Manual at 5.

⁵⁵³ See *Lenners* at 21.

⁵⁵⁴ See *id.*

⁵⁵⁵ See *id.* at 22.

⁵⁵⁶ See *id.* at 21. The term sheets “[i]nclude conditions of disbursement and covenants, performance and monitoring requirements, agreement of action plans and resolution of any outstanding issues.” The Book “consist[s] of client background check, project description, financial projections, audit report, industry expert report and environmental report.” *Id.* at 21-22.

⁵⁵⁷ “Key Terms and Acronyms, Version 8, May 31, 2012” Manual at 9. According to the FI Note, “[m]ost FI clients will be required to submit annual E&S performance reports to IFC.” FI Note at 9.

⁵⁵⁸ See *Lenners* at 22.

⁵⁵⁹ See *id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ “CES project specialists are involved from the earliest stages of the project application and due diligence process (IFC Interview, Piotr Mazurkiewicz, May 2010; IFC 2009a, p. 7; see also IFC internal project screening procedure document, IFC 2009b).” “Dissertation: Liberal International Environmental Justice and Foreign Direct Investment at the International Finance Corporation,” Submitted by Timothy G. Ehresman, Department of Political Science In partial fulfillment of the requirements For the Degree of Doctor of Philosophy Colorado State University, Fort Collins, Colorado, Summer 2012, p. 103. http://digitool.library.colostate.edu/view/action/singleViewer.do?dvs=1398355757191~10&locale=en_US&VIEWER_URL=/view/action/singleViewer.do?&DELIVERY_RULE_ID=10&adjacency=N&application=DIGITool-3&frameId=1&usePid1=true&usePid2=true (Hereafter referred to as *Ehresman*.) Further, “in most cases CES staff assigned to a project at the application/approval stage remain with the project for monitoring and enforcement purposes until the IFC has been repaid and the project is closed (IFC Interview).” *Id.*

⁵⁶⁵ “To maximize the standardization of the application of the Performance Standards across projects, sectors and regions, the CES Department employs a peer review process whereby CES teams meet regularly to discuss individual projects and the specific application of the Performance Standards in different contexts.” *Id.* at 106-107. Further, it also “organizes Departmental group meetings to discuss issues...While individual staff may have differing views on precisely what sustainability means, these differences are discussed openly.” *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ Ehresman takes note of the creation by the IFC Management Group in 2009 of a Corporate Risk Committee, to which the CES Department must submit quarterly reports “on environmental and social performance and risks associated with IFC operations” (IFC 2009a, p. 5). He suggests that this has “strengthen[ed]...CES social and environmental performance accountability” while “elevat[ing]...the visibility of the CES Department within IFC management.” *Id.* at 106.

The overall risk governance structure of the IFC is described in the following terms:

“Centralized risk management is provided by IFC’s Management Committees and Senior Management. IFC’s Management Team, under the direction of the Executive Vice President and CEO, is responsible for the Corporation’s day-to-day operations, including oversight and management of existing and potential risks. The Risk Management and Portfolio Vice Presidency is responsible for managing IFC’s financial and operational risks. Project-specific environmental, social and corporate governance issues which arise out of IFC’s activities are overseen by the Business Advisory Services Vice Presidency; legal issues are overseen by the General Counsel Vice Presidency. There is common and shared accountability for strategic and stakeholder risk management at the IFC Management Team level.” “How We Manage Risk,” International Finance Corporation. <http://www.ifc.org/wps/wcm/connect/e34bef004156629e96d2b79e78015671/ERM.pdf?MOD=AJPERES>

⁵⁶⁸ See *Lenners* at 22-23.

⁵⁶⁹ See *id.* at 22. According to the reported view of a legal advisor at the IFC, “out of the 100 projects he screens every year, only two or three receive funding” *Id.* at 23.

⁵⁷⁰ “IFC Project Cycle,” International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/ifc+projects+database/projects/aips+added+value/project+cycle

⁵⁷¹ E-mail from Stephen R. Gooch, CFA, Multilateral Development Banks, U.S. Treasury Department, June 20, 2014.

⁵⁷² *Id.*

⁵⁷³ *Id.*

⁵⁷⁴ *Ehresman* at 104. More specifically, “[s]ince the adoption of the Performance Standards in 2006, the IFC has screened over 1,300 projects, only 560 of which were ultimately approved by the IFC Board of Directors.” *Id.*

⁵⁷⁵ As Ehresman notes, “[t]he precise number of these rejected for social and environmental reasons is not disclosed by the IFC, and the identification of the specific projects subject to such disapprovals is considered confidential.” *Id.*

⁵⁷⁶ See for example, *Meyerstein* at 143.

⁵⁷⁷ See *Lenners* at 23 “The IFC consider [itself] to be] a bank, but the environmental specialist believes [the] IFC does not act like a bank. Commercial banks have goals to maximize shareholder value and bonuses are paid out related to financial performance of the investments they were accountable for. (*Environmental Advisor*)” *Id.*

<http://arc.hhs.se/download.aspx?MediumId=74>”

⁵⁷⁸ See *id.* The credit manager concludes: “Today, no one bears the responsibility over an investment. No one can be held accountable for a decision. More formal policies and tighter control have to be established.” *Id.*

⁵⁷⁹ “Assessing the Monitoring and Evaluation Systems of IFC and MIGA Biennial Report on Operations Evaluation,” Independent Evaluation Group, 2013, p. 63. <http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-9918-7>

⁵⁸⁰ *Id.*

⁵⁸¹ According to the CAO, while “[t]here are 10 E&S indicators used for FM projects, including financing underserved markets and community development, as well as product-specific indicators such as energy-efficiency components and projects designed to address gender issues.” “[t]he only F[I] DOTS indicator related to E&S requirements more broadly concerns improvements in environmental/social management, which are measured on a Yes/No basis. DOTS does not measure the impact of E&S requirements more broadly, including the impact on subclients.” “CAO Audit of a Sample of IFC Investments of a Sample of IFC Investments in Third-Party Financial Intermediaries, Office of the Compliance Advisor Ombudsman for the International Finance Corporation, Multilateral Investment Guarantee Agency, October 10, 2012, p. 21. http://www.cao-ombudsman.org/documents/Audit_Report_C-I-R9-Y10-135.pdf

⁵⁸² “Assessing the Monitoring and Evaluation Systems of IFC and MIGA Biennial Report on Operations Evaluation,” Independent Evaluation Group, 2013, p. 63. <http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-9918-7>

⁵⁸³ Id. For a detailed explanation and discussion of XPSRs (for FIs), see “Preparing an Expanded Project Supervision Report, Instructions for Financial Markets Projects,” International Finance Corporations, April 2010. <http://www.ifc.org/wps/wcm/connect/a5296e8049b1daa29a0bdaa8c6a8312a/FM%2BXPSR%2BInstruction%2BManual%2BApril2010%2Bfinal%2Bclean-external.pdf?MOD=AJPERES>

⁵⁸⁴ “Assessing the Monitoring and Evaluation Systems of IFC and MIGA Biennial Report on Operations Evaluation,” Independent Evaluation Group, 2013, p. 63. <http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-9918-7> The IEG states that “[s]taff that score above average are then compared in terms of financial returns to IFC. This system, based on development outcomes, is unique among MDBs. The IDGs will become part of the Scorecard, and directors’ and managers’ performances are assessed on new projects’ contributions to the IDGs. This is balanced with other Scorecard elements, such as projects in IDA countries, to reduce perverse incentives. IDGs are not used directly in annual staff performance ratings.” Id.

⁵⁸⁵ See *Lenner* at 21. The term sheets “[i]nclude conditions of disbursement and covenants, performance and monitoring requirements, agreement of action plans and resolution of any outstanding issues.” Id. <http://arc.hhs.se/download.aspx?MediumId=742> The Book “consist[s] of client background check, project description, financial projections, audit report, industry expert report and environmental report.” Id. at 21-22.

⁵⁸⁶ See id. at 22.

⁵⁸⁷ Id.

⁵⁸⁸ Id. Note, the person referred to as “Regional Manager” appears to be the as the one termed “regional investment manager” and she or he is to be distinguished from the regional team leader (RTL) who has responsibilities on the E&S side of the equation.

⁵⁸⁹ See id. at 23.

⁵⁹⁰ “Today, only a small amount of flexible monetary compensation is paid to investment officers and manager. The small bonus is however something investment officers seems to be reluctant and a little embarrassed to talk. (*Special Investment Advisor; IO, HK; IO A, BJ; Regional Manager*) The compensation is based on a “Deal Sheet”, which is a list of all projects the investment officer has been involved with. (*Special Investment Advisor*) The compensation is linked to performance 4-5 years after closing and vaguely connected to level of participation within the project. (*Regional Manager; Environmental Advisor*).” Id.

⁵⁹¹ “The Environmental specialist says IFC investment staff have little incentive to work hard since there is no flexible salary related to performance of past investments. Consequently, since IFC compete with high-bonus investment and private-equity player, IFC are not likely to attract the best investment staff. Over the last booming years many investment staff have left IFC for better-paid jobs in the private financial sector. (*Environmental Advisor*)” According to a legal advisor at the IFC, “out of the 100 projects he screens every year, only two or three receive funding” Id.

⁵⁹² “[T]he investment officer in Beijing stresses that the main motivation and evaluation basis should be the developmental impact. He says, “if monetary reward is the main reward, you should be working somewhere else.” (*Special Investment Advisor*) The general conclusion is that the credibility that come from the reputation of a manager’s investment is what determines rewards at the IFC. (*IO B, BJ; Credit Risk Advisor; IO, HK*) The Environmental specialist claims that “IFC need to figure out how to use DOTS more efficiently” but he conclude that it probably would be hard to change the IFC to established bonus programs like the private bank. (*Environmental Advisor*)” Id.

⁵⁹³ See “Recommendations for immediate changes in the IFC action plan on financial market lending,” attachment to Letter “RE: IFC investment in the financial sector” to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al., March 17, 2014, p. 6. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

⁵⁹⁴ Id. at 6, note 20.(citing CAO audit C-I-R6-Y08-F096, June 19, June 2009, pp. 22-23). .

⁵⁹⁵ Id. at 2.

⁵⁹⁶ “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” The Office of the Compliance Advisor /Ombudsman, May 2010, p. 21. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁵⁹⁷ Id. at 25. To be fair that observation was set against the finding that “‘mainstreaming’ efforts by IFC have helped the integration of E&S concerns into investment decision-making in many instances.” That is, there were “numerous examples of specialists receiving good investment department support, for example: early engagement of specialists in the project life; assisting specialists to address difficult E&S challenges rather than questioning the need to address them; ensuring specialists’ involvement in the drafting of investment agreements; facilitating specialist access to client company staff; and providing support during discussions with client companies.” Id. at 24.

⁵⁹⁸ See “Recommendations for immediate changes in the IFC action plan on financial market lending,” attachment to Letter “RE: IFC investment in the financial sector” to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al. March 17, 2014 (citing ‘CAO audit C-I-R6-Y08-F096, 19 June 2009,” pp 22-23), p. 6. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

⁵⁹⁹ Id.

⁶⁰⁰ *Ehresman* at 103.

⁶⁰¹ Id.

⁶⁰² The following characterization, though written some years back with reference to MDBs more generally is suggestive in these terms:

“Staff members of the MDBs are, by and large, serious professionals. Most of them have a genuine commitment to see developing nations achieve higher standards of living for borrowing countries, particularly the poorest. But they are human beings,

and they are working within the incentive structures created by bureaucratic organizations with an unusually complex system of governance. Hiring and promotions are influenced by considerations of nationality. Changes in evaluation procedures and lending policies may take years to come about.

"Historically, the elite of the banks were considered to be the lending officers, particularly those in charge of large lending programs. Winning approval for a large, complex loan was considered the best measure of a rising staff member's prospects. This led to the volume of lending as a key criteria in measuring a MDB's 'success.' Such a criteria was supported by the belief that the key to economic development was ensuring [/]that a sufficiently large volume of resources were transferred for investment in the developing world."

"Understanding the Multilateral Development Banks," by James B. Burnham," Paper prepared for the Adam Smith Institute's Co-ordinated Reform Agenda Management Program, London, paper prepared for the Adam Smith Institute's Co-ordinated Reform Agenda Management Programme, London, October 2-5, 2000, pp. 10-11.

⁶⁰³ "Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information," Office of the Compliance Advisor/Ombudsman, May 2010, p. 24. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁶⁰⁴ Id. at 25.

⁶⁰⁵ Id. To be fair, that observation was set against the finding that "'mainstreaming' efforts by IFC have helped the integration of E&S concerns into investment decision-making in many instances. That is, there were "numerous examples of specialists receiving good investment department support, for example: early engagement of specialists in the project life; assisting specialists to address difficult E&S challenges rather than questioning the need to address them; ensuring specialists' involvement in the drafting of investment agreements; facilitating specialist access to client company staff; and providing support during discussions with client companies." Id. at 24.

⁶⁰⁶ "The staffing situation of the E&S department was also described as being stretched in terms of skills, time and resources (despite recent resource increases). A key member of the E&S team portrayed himself as "overloaded;" another noted that resource constraints meant that a "very junior" member of staff was sent to the field for the E&S appraisal/review mission." "CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras," CAO Audit of IFC, CAO Compliance, CAO Ref: C-I-R9-Y12-F161, December 20, 2013, p. 57. http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf

⁶⁰⁷ Id.

⁶⁰⁸ At the time of its report the CAO recounted the following: "In August there are internal IFC discussions about revising Dinant's ESAP deadlines. This was considered by the E&S team to represent an unacceptable precedent, considering that most ESAP actions remained overdue. Differences also emerged within the IFC team as to whether the reasons for the client's poor E&S performance related more to bad faith or lack of capacity, with members of the investment team raising concerns that E&S staff were taking a passive, and compliance oriented approach to supervision which was not delivering results. These discussions lead to tensions within the team, in the wake of which E&S management decide to replace the lead E&S specialist working on the project." Later it concluded that "[i]n the course of 2012, CAO finds that some members of the E&S team working on supervision reached the view that the investment had serious E&S compliance issues which it had proven unable to address over a period of years. When a more "compliance based" approach to the supervision of the Dinant investment was thus raised, CAO finds that this elicited push back from the IFC portfolio manager as a result of which the lead environmental specialist working on the project was replaced." Id. at 50-51.

⁶⁰⁹ Id. at 57.

⁶¹⁰ Id.

⁶¹¹ Id. at 26.

⁶¹² "CSO response to the CAO investigation into IFC investment in Corporación Dinant, Honduras," Bretton Woods Project, January 16, 2014, p. 25.

<http://www.brettonwoodsproject.org/2014/01/cso-response-cao-investigation-ifc-investment-corporacion-dinant-honduras-2/>

⁶¹³ See "Declining performance" at World Bank as strategy moves forward," Bretton Woods Project, March 31, 2014 (citing findings from "World Bank Group, 2013 Employee Engagement Survey, Summary of Results," World Bank Group). http://www.brettonwoodsproject.org/wp-content/uploads/2014/03/EES2013_WBG_SummaryReport-staff-survey.pdf, to the effect that "less than half of respondents agreed that the Bank 'prioritises development results over the number and volume of transactions'; '[n]early half did not think that the Bank "makes institutional decisions in a timely manner', including a lack of trust in the ability of senior managers to lead and empower staff"; "[l]ess than half felt they 'can report unethical behaviour without fear of reprisal'; and that "less than half felt confident that the Bank 'will take action' on the survey." <http://www.brettonwoodsproject.org/2014/03/declining-performance-world-bank-strategy-moves-forward/> A separate statement from the Bretton Woods Project contended that "according to a recent World Bank staff survey, only 30 percent of IFC staff said they consider development as their main objective, and read loan volume as more valued by the institution." "IFC statements welcome but concrete action needed," Bretton Woods Project, August 23, 2014. <http://www.brettonwoodsproject.org/2014/08/ifc-statements-welcome-concrete-action-needed/> We have not been able to locate documentation which supports that contention.

⁶¹⁴ We do not believe that in its responses to the CAO's reports the IFC specifically addressed the contentions cited in the main text though arguably it had a different view as to whether the characterization of this particular project was indicative of IFC work more generally. In this regard note the following observation by another academic study based on some IFC interviews: "That is, common expectations that the CES Department can use veto power to ensure the best possible environmental and social practices in applicant projects, or assumptions that approved projects will fully employ the Performance Standards at the earliest stages of project operation, do not comport with reality." Ehresman at 105.

⁶¹⁵ "How sustainability commitments affect a firm's value chain and main stakeholders in the financial sector? The business case study of FMO," Master's Thesis by Artur Vacarciuc, Maastricht University, School of Business and Economics, August 24, 2012, p. 28. (Hereafter referred to as *Vacarciuc*.)

⁶¹⁶ Id.

⁶¹⁷ Id.

⁶¹⁸ Id. at 28-29.

⁶¹⁹ Id. at 29.

⁶²⁰ Id. at 30.

⁶²¹ Id. at 29.

⁶²² Id. “A reflection of the equal weighting given to ESG and financial issues is seen in the full credit process presented in Figure 11. This figure shows the collaboration with a client, from initial assessment and deal proposal to contracting and monitoring. As observed, ESG elements are integrated on all stages of the process. When selecting a client the Rapid Risk Screening Template is used to assess the proposed investment. This includes the application of an ESG exclusion list – should an activity be on the list, the deal is stopped. The template then allows for an assessment and categorization of the client into different risk categories (based on IFC Performance Standards), which later (depending on the defined risk category) require varying degrees of E&S personnel involvement and varying E&S actions to be implemented by the client to reduce their E&S risk exposure. Should a client be found willing to introduce or improve their E&S procedures, a more detailed analysis is initiated. During the full appraisal process a joint due diligence is conducted by the investment officers and E&S specialists (E&S specialists travel to clients depending on the E&S risk classification). The financing proposal is then submitted for cross-checking to IMR and later an investment committee makes a decision on the proposed deal, ESG issues being taken into account (FMO interview 1, 2012).” Id.

⁶²³ Id. at 31.

⁶²⁴ We have not been able to determine who in this case is responsible for the *collection* of the information, so assume that it is the TL.

⁶²⁵ “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 1.

⁶²⁶ The passage in the text of the Manual relating to this point is to “Team Leader.” In the definitions section of the Manual mention is made of various kinds of “Team Leaders.” I would seem that here the reference is to the Regional Team Leader (RTL).

⁶²⁷ “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” Office of the Compliance Advisor/Ombudsman, May 2010, p. 21. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁶²⁸ “IFC’s Environmental & Social Lessons Learned,” Technical Briefing for the Board, April 4, 2014, Slide 30. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

⁶²⁹ FI Note at 4. The IFC expands on this point as follows: “Under IFC’s Sustainability Policy, higher risk FI subprojects must apply the Performance Standards when they are receiving project finance or long-term corporate finance from an FI. In effect, these higher risk subprojects are those that would be considered Category A or B projects if financed directly by IFC.” Id. at 3.

⁶³⁰ Id. at 4.

⁶³¹ Recall that what exactly the IFC expects of FIs in terms of setting (during the appraisal process) the standards to be met and actions to be taken – and correspondingly, what the IFC needs to do to see that expectations are fulfilled – depends on how they are categorized by the IFC “using a system based on the relative magnitude of E&S risks and impacts.” FI Note at 2.

⁶³² Id.

⁶³³ Id. at 3.

⁶³⁴ Id. at 4.

⁶³⁵ Id. at 9.

⁶³⁶ With regard to the EP it has been suggested that the due diligence focus of a bank’s “E&S expert would probably be on IFC PS 1, Management. Is the client willing and capable of handling E&S risks plus does he provide the necessary resources. Very helpful are management standards (ISO 14001, OHSAS 18001, SA 8000, etc.) and international production or product standards. For some banks the successful certification of such standards becomes ‘condition precedent for disbursement’, which makes a lot of sense.” E-mail from sustainable finance expert. January 28, 2014

⁶³⁷ Insofar as the focus is on FIs in developing countries a recent survey of the experience of 123 of them in Bangladesh, Brazil, Colombia, Indonesia, Nigeria, Peru, Philippines, Thailand, and Vietnam found that “the top three barriers to the adoption of ESRM” were “[t]he absence of enforcement of Environmental and Social (E&S) legislation,” “[t]he absence of sector-specific guidelines on ESRM” and “[t]he need for senior bank management support for ESRM.” “The perceived absence of a business case for ESRM and a lack of FI capacity and qualified staff were also deemed significant barriers, although to a lesser extent.” “Moving Forward with Environmental and Social Risk Management, Findings from IFC Country Baseline Surveys,” International Finance Corporation, 2014, p. 11. <http://www.ifc.org/wps/wcm/connect/3a1098804316ae1fb602fe384c61d9f7/ESRM-Report-Final.pdf?MOD=AJPERES>

⁶³⁸ “IFC’s Environmental & Social Lessons Learned,” Technical Briefing for the Board, April 4, 2014, Slide 28. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

⁶³⁹ Id., Slide 30.

⁶⁴⁰ Id., Slide 33.

⁶⁴¹ Id., Slide 31.

⁶⁴² Id.

⁶⁴³ Id., Slide 28.

⁶⁴⁴ Id.

⁶⁴⁵ Id., Slide 30.

⁶⁴⁶ Id.

⁶⁴⁷ Id. Apparently the IFC has developed a tool of the sort for certain kinds of investments. See “Global Map of Environmental and Social Risks in Agro-Commodity Production (GMAP) Pilot.” International Finance Corporation. http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Risk+Management/gmap

⁶⁴⁸ “Managing Environmental and Social Risks, A Roadmap for National Development Banks in Latin America and the Caribbean,” by Gijs Nolet, Willem Vosmer, Matthijs de Bruijn, and Isabelle Braly-Cartillierm, Inter-American Development Bank, 2014. <http://publications.iadb.org/handle/11319/6437?locale-attribute=en>

⁶⁴⁹ “ESRP 5 Direct Investments: Supervision,” Version 7, April 15, 2013,” Manual at 1.

⁶⁵⁰ Id.

⁶⁵¹ Id. at 3.

⁶⁵² “Some business lines have chosen to distinguish between core (“C”) and supplementary (“S”) indicators; core indicators are mandatory when relevant, and supplementary indicators are purely optional.” “Standard Indicators, IFC Development Results and Impact,” International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/idg_home/monitoring_tracking_results/dots_advisory/standard+indicators

⁶⁵³ “ESRP 5 Direct Investments: Supervision, Version 7, April 15, 2013,” Manual at 8.

⁶⁵⁴ Id. at 1.

⁶⁵⁵ Id. at 9.

⁶⁵⁶ Id. at 1. For example, the Regional Team Leader, with the concurrence of the CESI Sector Leader, is responsible for identifying high risk projects based on information from Lead Specialists. “High E&S risk may be attributed to projects due to significantly adverse E&S impacts, reputational risks to IFC and/or Compliance Advisor Ombudsman (CAO) cases.” Id. at 9. Also, “[w]hen the ESRR_(S) is A/B-3, Partly Unsatisfactory, or A/B-4, Unsatisfactory,” the Investment Department Portfolio Manager and Manager CESI are notified. Id. at 3.

⁶⁵⁷ “Key Terms and Acronyms,” Version 8, May 31, 2012,” Manual at 1.

⁶⁵⁸ Id. at 8.

⁶⁵⁹ “Of the 28 random sample projects, including all pre-Performance Standard and post-Performance Standard real sector projects older than two years, only 50 percent (14/28) provided IFC with satisfactory AMRs. In most such cases, IFC identified the deficient information in the AMR for correction in the following year, but in many cases the deficiencies continued despite IFC corrective actions, reflecting insufficient communication and frequency of IFC feedback, and poor client intake of corrective requirements.” “Safeguards and Sustainability Policies in a Changing World,” Independent Evaluation Group, 2010, p. 33. http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards_eval.pdf “The IEG noted that “[s]ince clients’ first AMR is only due six months following the first year of project approval, the post-Performance Standard portfolio review focused on projects that had been approved at least two years earlier.” Id. at 32.

⁶⁶⁰ “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 1. Note that some clients are not required to report, for example, those who “have received supervision waivers” and those who had “received their disbursement less than 15 months previously.” Id.

⁶⁶¹ “In order to ensure that the corporation maintains a quality E&S portfolio, the CRC (Corporate Risk Committee) has approved a capture rate of 90% for Annual Monitoring Reports (AMR).” Id.

⁶⁶² “IFC Annual Portfolio Review, FY 11 Development Results,” International Finance Corporation, Figure 2-13, p. 16.

http://www.ifc.org/wps/wcm/connect/100e28804a9567c8ace3fe9e0dc67fc6/web_APR2011.pdf?MOD=AJPERES

⁶⁶³ Id. at 15-16. “The Knowledge Gap for FY 2011 was 3.1 % (well below the FY11 target set as 6%) As of July 2011 IFC’s portfolio included 1,609 companies, of which 1152 companies are potentially subject to regular environmental and social supervision activities. This includes companies with and without reporting requirement and companies for which first reporting is not yet due. It does not include projects or companies that are Category C, in special operations, or litigation/liquidation, and have received supervision waivers. In FY11, a total of 981 clients were expected to either submit an AMR or be supervised through site visit; as of year-end, 585 clients submitted AMRs to IFC and 396 companies that were supervised through site visit.” “2011 COMPAS REPORT, Multilateral Development Banks’ Common Performance Assessment System,” p.59. http://www.mfdr.org/COMPAS/documents/2011_COMPAS-Report.pdf

⁶⁶⁴ “Direct Investments: Supervision, Version 7, April 15, 2013,” Manual at 1. For example, “[w]hen the ESRR_(S) is A/B-3, Partly Unsatisfactory, or A/B-4, Unsatisfactory,” the Investment Department Portfolio Manager and Manager CESI are notified. Id. at 3.

⁶⁶⁵ Id. at 5.

⁶⁶⁶ Id. at 4 and definition for Recordable Supervision Activity (RSA), “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 9.

⁶⁶⁷ “Direct Investments: Appraisal, Version 7, April 15, 2013,” Manual at 2.

⁶⁶⁸ “The [Lead Specialist] should ensure that the [Team Regional leader] or Portfolio Manager advises the client in advance of the proposed [site visit].” “Direct Investments: Supervision, Version 7, April 15, 2013,” Manual at 5. For example, “[w]hen the ESRR_(S) is A/B-3, Partly Unsatisfactory, or A/B-4, Unsatisfactory,” the Investment Department Portfolio Manager and Manager CESI are notified. Id. at 3.

⁶⁶⁹ “Home > Environmental and Social Risk Management > Site Visit,” *FIRST for Sustainability*. <http://firstforsustainability.org/risk-management/site-visit/>

⁶⁷⁰ “Financial Intermediary Investments: Supervision, Version 4, August 14, 2009,” Manual at 1 and 5. In job descriptions at its web site, the IFC refers to a Portfolio Officer but it does not give a description of the role he or she plays. By contrast it refers to an investment Officer whose job it is “to identify business opportunities, execute transactions, actively manage portfolio projects and build relationships with clients, global and regional private businesses, banking and multilateral partners and government officials.” See “Investment Officer,” International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/careers_ext_content/ifc_external_corporate_site/ifc-careers/typesofroles/investmentofficer

The Transaction Leader “is the representative of IFC’s Investment Department who is responsible for managing the overall transaction for an investment or advisory project.” “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 11.

⁶⁷¹ “Financial Intermediary Investments: Supervision, Version 4, August 14, 2009,” Manual at 2.

⁶⁷² Id.

⁶⁷³ Id. at 1.

⁶⁷⁴ Id.

⁶⁷⁵ Id. at 3.

⁶⁷⁶ Id. at 1.

⁶⁷⁷ “Social and Environmental Performance Report, the E&S Performance Report provided by an FI client.” “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 10. According to the FI Note “[m]ost FI clients will be required to submit annual E&S performance reports to IFC.” FI Note at 9. It adds that “[a]n FI may have additional reporting requirements to additional stakeholders (internal and external) regarding E&S risks and impacts associated with its activities.” Id.

⁶⁷⁸ Id.

⁶⁷⁹ See <http://firstforsustainability.org/>

⁶⁸⁰ “Environmental and Social Risk Management > Implementing IFC Environmental and Social Requirements >Report Annually,” International Finance Corporation. <http://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/report-annually/>

⁶⁸¹ Id.

⁶⁸² Id.

⁶⁸³ Referred to as “IFC Reporting for Equity Funds” but document entitled “Annual Environmental and Social Report for Financial Intermediary Clients,” “Environmental and Social Risk Management > Implementing IFC Environmental and Social Requirements >Report Annually,” International Finance Corporation. <http://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/report-annually/>

⁶⁸⁴ Note that prior to changes to the financial intermediaries sections of the Manual in June and July, 2014 there was no reference to an “Annual Environmental Performance Report”; there was mention of only a Social and Environmental Performance Report (SEPR).

⁶⁸⁵ Referred to as “IFC Reporting for Equity Funds” but document entitled “Annual Environmental and Social Report for Financial Intermediary Clients,” “Environmental and Social Risk Management > Implementing IFC Environmental and Social Requirements >Report Annually,” International Finance Corporation. <http://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/report-annually/>

⁶⁸⁶ “Environmental and Social Risk Management > Implementing IFC Environmental and Social Requirements >Report Annually,” International Finance Corporation. <http://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/report-annually/>

⁶⁸⁷ Referred to as “IFC Reporting for Equity Funds” but document entitled “Annual Environmental and Social Report for Financial Intermediary Clients,” “Environmental and Social Risk Management > Implementing IFC Environmental and Social Requirements >Report Annually,” International Finance Corporation. <http://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/report-annually/>

⁶⁸⁸ FI Note, note 38, p. 9.

⁶⁸⁹ “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” The Office of the Compliance Advisor /Ombudsman, May 2010, p. 21. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁶⁹⁰ “IFC’s Environmental and Social Lessons Learned,” Technical Briefing for the Board, International Finance Corporation, April 4, 2014, Slide 28. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

⁶⁹¹ “Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009,” Manual at 3.

⁶⁹² “Response letter from James Scriven, Director, Global Markets Department and William Butler, Director, Environmental, Social and Governance Department, IFC to NGOs’ letter of March 12, 2013 IFC on investment in the financial sector,” April 18, 2013. <http://www.brettonwoodsproject.org/2013/05/art-572516/>

⁶⁹³ “E&S Risk Management of Financial Institutions at the IFC, Presentation to the Committee on Development Effectiveness September 4th 2013,” International Finance Corporation. <http://www.cao-ombudsman.org/documents/IFCpresentationforCODE-ESRMforFIs-final.pdf>

⁶⁹⁴ Id.

⁶⁹⁵ “Financing Micro, Small, and Medium Enterprises An Independent Evaluation of IFC’s Experience with Financial Intermediaries in Frontier Countries.” International Finance Corporation, 2008, p. 51. http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2008/07/30/000333038_20080730050421/Rendered/PDF/448160PUB0Box327413B01official0use0only1.pdf

⁶⁹⁶ Id. at 51-52. It added that “[t]he Global Financial Markets Department and the Environment and Social Development Department have jointly taken steps to address the poor EHS compliance record of financial intermediary projects and to improve IFC’s EHS supervision of financial market projects.” Id. at 52.

⁶⁹⁷ “CAO Audit of a Sample of IFC Investments of a Sample of IFC Investments in Third-Party Financial Intermediaries, Office of the Compliance Advisor Ombudsman for the International Finance Corporation, Multilateral Investment Guarantee Agency, October 10, 2012, p. 21. http://www.cao-ombudsman.org/documents/Audit_Report_C-I-R9-Y10-135.pdf

⁶⁹⁸ “Financing Micro, Small, and Medium Enterprises An Independent Evaluation of IFC’s Experience with Financial Intermediaries in Frontier Countries.” International Finance Corporation, 2008, p. 25. http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2008/07/30/000333038_20080730050421/Rendered/PDF/448160PUB0Box327413B01official0use0only1.pdf

⁶⁹⁹ Id. at 22.

⁷⁰⁰ “Financial Intermediary Investments: Supervision, Version 4, August 14, 2009,” Manual at 3. The text states, in a not especially illuminating way that “[w]here it is considered necessary to further review the client’s performance and verify its compliance with the Applicable Performance Requirements, the [relevant staff person] will communicate with the client or carry out a supervision visit to the FI project and/or its sub-projects in coordination with the Portfolio Officer.” Id.

⁷⁰¹ Id.

⁷⁰² Id.

⁷⁰³ Id. at 1.

⁷⁰⁴ Id. at 3. Whether a site visit is made would appear to require the approval of the Portfolio Officer. Id.

⁷⁰⁵ See “Recommendations for immediate changes in the IFC action plan on financial market lending,” “attachment to Letter ‘RE: IFC investment in the financial sector’ to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al., March 17, 2014, p.5. <http://eurodad.org/files/pdf/5333fffb9971.pdf>

⁷⁰⁶ Id. at 6.

⁷⁰⁷ Id.

⁷⁰⁸ Response letter from James Scriven, Director, Global Markets Department and William Butler, Director, Environmental, Social and Governance Department, IFC to NGOs’ letter of March 12, 2013 IFC on investment in the financial sector, April 18, 2013. <http://www.brettonwoodsproject.org/2013/05/art-572516/>

⁷⁰⁹ “IFC’s Environmental & Social Lessons Learned, Technical Briefing for the Board,” International Finance Corporation, April 4, 2014, Slide 28. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

⁷¹⁰ Id., Slide 31.

⁷¹¹ Id., Slide 33.

⁷¹² “E&S Risk Management of Financial Institutions at the IFC, Presentation to the Committee on Development Effectiveness September 4th 2013,” International Finance Corporation. <http://www.cao-ombudsman.org/documents/IFCpresentationforCODE-ESRMforFIs-final.pdf>

⁷¹³ “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” Office of the Compliance Advisor/Ombudsman, May 2010, p. 21. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁷¹⁴ Id.

⁷¹⁵ “Biennial Report on Operations Evaluation Assessing the Monitoring and Evaluation Systems of IFC and MIGA,” Independent Evaluation Group, 2013, p.62. http://ieg.worldbankgroup.org/Data/reports/broe_eval.pdf Because there was then a “five-year lag between appraisal and evaluation” this meant that the sample reflected practices during the period between 1999 and 2004. In 2011 the success rate of IFC’s appraisal quality for FI projects was 84 percent. Id.

⁷¹⁶ As noted earlier in the main text, during that fiscal year there were 125 annual supervision missions with respect to an overall universe of 294. “E&S Risk Management of Financial Institutions at the IFC, Presentation to the Committee on Development Effectiveness September 4th 2013,” International Finance Corporation. <http://www.cao-ombudsman.org/documents/IFCpresentationforCODE-ESRMforFIs-final.pdf> It is also not clear how to reconcile the CAO’s 2010 reference to 432 FI projects that year with the just-cited number.

⁷¹⁷ “Biennial Report on Operations Evaluation Assessing the Monitoring and Evaluation Systems of IFC and MIGA,” Independent Evaluation Group, 2013, p.62. http://ieg.worldbankgroup.org/Data/reports/broe_eval.pdf

⁷¹⁸ Id.

⁷¹⁹ Id. at 57-58.

⁷²⁰ The Equator Principles,” Equator Principles, June 2013, p.7. http://www.equator-principles.com/resources/equator_principles_III.pdf

⁷²¹ With respect to ABN AMBRO, “the responsibility...lies with a group-wide monitoring team that coordinates with SBA (although monitoring itself is usually done by consultants).” *Carbonell* at 31. “For Barclay’s “[p]referred consultants must also be used to carry out project monitoring, which can take place on a biannual or even quarterly basis if the consultant deems it necessary (Bray 2005).” Id. at 33. With regard to CitiGroup, “[i]ndependent consultants also customarily carry out monitoring on at least an annual basis for Category A and B projects (Miller 2005). Id. at 35.

⁷²² Id. at 31.

⁷²³ Id.

⁷²⁴ *Meyerstein* at 147. O’Sullivan refers to the “lead arranger [who] acts as a Technical Agent and/or Documentation Agent for projects, depending on, for example, the number of lead arrangers involved” who is “normally responsible for monitoring borrower EP compliance over the life of the loan i.e. from construction to ‘steady state’ operation when the bank receives remuneration from the project.” *O’Sullivan* at 202.

⁷²⁵ *Meyerstein* at 147. One of O’Sullivan’s interviewees emphasized the importance of the consultant: “‘So in terms of gathering information and checking against Action Plans and goals achieved, or things which are not compliant, that’s a process that relies very heavily on the external consultant which is appointed [by the client] in agreement with the lender.’” (Dutch/Belgian EPFI, Interviewee 2).” *O’Sullivan* at 226. She also notes the need to rely on a consultant at this and earlier stages is driven by EPFI’s lack of expertise. Id. at 210. Carbonell’s earlier interviews with three EPFIs also reflected this reliance. *Carbonell* (monitoring usually being done by consultants (ABN AMBRO); independent consultants carrying out monitoring (Citigroup); preferred consultants used to carry out project monitoring (Barclay’s)), at 32, 35, and 33, respectively.

⁷²⁶ *Meyerstein* at 147.

⁷²⁷ Id.

⁷²⁸ Id. (italics in the original).

⁷²⁹ E-mail from sustainability finance expert. January 18, 2014.

⁷³⁰ Id.

⁷³¹ “The CAO at 10: Annual Report FY2010 and Review FY2000-10,” Compliance Advisor/Ombudsman, 2010, p. 52. http://www.cao-ombudsman.org/publications/documents/CAO_10Year_AR_web.pdf

⁷³² Id.

⁷³³ Id. at 53.

⁷³⁴ Id.

⁷³⁵ Id.

⁷³⁶ Id. at 50.

⁷³⁷ Id.

⁷³⁸ Id.

⁷³⁹ Id. at 51.

⁷⁴⁰ Id. at *O’Sullivan* at 202. 52.

⁷⁴¹ “The CAO at 10: Annual Report FY2010 and Review FY2000-10,” Compliance Advisor/Ombudsman, 2010, p. 52. http://www.cao-ombudsman.org/publications/documents/CAO_10Year_AR_web.pdf “The reality is that small changes – whether in project planning and implementation, or the business fundamentals themselves – can have profound impacts on affected communities, especially for the most marginalized and poor. They can also provide the key to addressing concerns and ultimately resolving a conflict.” Id. at 56. Hence, “continuous communication to those affected by development projects about both the downside risks and upside benefits unfolding during the life of a project is crucial to avoiding conflict, and improving outcomes on the ground.” Id.

⁷⁴² Id. at 55

⁷⁴³Id. at 56 “Common to many complaints has been the perception that project benefits have not flowed to the community hosting the project—whether because valuable commodities (minerals, oil) have been extracted and removed from the locality; the ultimate benefits have been delivered downstream, such as electricity from hydropower; or costs of basic services (energy, water) that stem from efficiency improvements have risen, especially concerning privatization projects...Often, these problems have been compounded by a lack of, or poor awareness of, a company grievance mechanism, or systemic lack of information about the project and its anticipated impacts and benefits.” Id.

⁷⁴⁴Id. at 60.

⁷⁴⁵Id.

⁷⁴⁶Id.

⁷⁴⁷Id. at 61.

⁷⁴⁸Id. at 62.

⁷⁴⁹Id.

⁷⁵⁰“Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” Office of the Compliance Advisor/Ombudsman, May 2010, p. 21. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁷⁵¹*Meyerstein* at 147.

⁷⁵²Id.

⁷⁵³*O’Sullivan* at 207.

⁷⁵⁴Id.

⁷⁵⁵Id. at 207-208.

⁷⁵⁶Id. at 209.

⁷⁵⁷“Discussion Paper, Stakeholder Engagement and the Extractive Industry Under the OECD Guidelines for Multinational Enterprises,” Shift, June 2013, pp. 9-10. <http://www.shiftproject.org/publication/discussion-paper-stakeholder-engagement-and-extractive-industry-under-oecd-guidelines-mu>

⁷⁵⁸See id. at 10-11.

⁷⁵⁹See id. at 11-12.

⁷⁶⁰See id. at 14-15.

⁷⁶¹See id. at 15-16.

⁷⁶²In the context of the EP, Meyerstein states that “[t]he EPFIs were also critical of the incorporation of the concept of free, prior and informed *consent* into Bank policies because of the leverage this would give to project-affected communities over project sponsors’ (and often government) plans.” *Meyerstein* at 94-95.

⁷⁶³See “Discussion Paper, Stakeholder Engagement and the Extractive Industry Under the OECD Guidelines for Multinational Enterprises,” Shift, June 2013, pp.16-18. <http://www.shiftproject.org/publication/discussion-paper-stakeholder-engagement-and-extractive-industry-under-oecd-guidelines-mu>

⁷⁶⁴See id. at 18-20.

⁷⁶⁵See id. at 17.

⁷⁶⁶“Direct Investments: Appraisal, Version 7, April 15, 2013,” Manual at 2.

⁷⁶⁷Id.

⁷⁶⁸Id.

⁷⁶⁹Id.

⁷⁷⁰Id.

⁷⁷¹Id.

⁷⁷²Id. at 4.

⁷⁷³Id. at 2.

⁷⁷⁴Id.

⁷⁷⁵Id.

⁷⁷⁶Id.

⁷⁷⁷Id. at 4.

⁷⁷⁸Id. at 5. However, “[f]or corporate and equity projects, it is not intended that IFC will conduct BCS on all future activities but on those that were described in the Board paper as being key to IFC supporting the transaction.” Id.

⁷⁷⁹Id. at 2.

⁷⁸⁰“IFC’s Environmental & Social Lessons Learned,” Technical Briefing for the Board, April 4, 2014, Slide 17. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

⁷⁸¹Id.

⁷⁸²Id.

⁷⁸³“IFC’s Environmental and Social Lessons Learned, CSO Session,” Presentation by Morgan Landy, Director, Environment, Social and Governance Department, April 9, 2014, International Finance Corporation.

http://www.google.com/url?url=http://www.brettonwoodsproject.org/wp-content/uploads/2014/04/IFC_Presentation_CSOSession-April-9-FINAL.pptx&rct=j&frm=1&q=&esrc=s&sa=U&ei=4F_iU_DSKpahyATbqYHwAQ&ved=0CBQQFjAA&usq=AFQjCNEOp_W_gyMCcTSnVONUZW6mjCjCHQ

⁷⁸⁴Id.

⁷⁸⁵“IFC’s Environmental & Social Lessons Learned, Technical Briefing for the Board,” International Finance Corporation, April 4, 2014, Slide 17.

http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

⁷⁸⁶ “Civil society letter re: the IFC and lessons learned,” Letter to Yong Cai IFC Executive Vice-President and CEO International Finance Corporation from Coalition of the Flemish North-South Movement, et al, June 13, 2014. <http://www.brettonwoodsproject.org/2014/06/civil-society-letter-re-ifc-lessons-learned/>

⁷⁸⁷ “Levels of Stakeholder Engagement in IFC’s Sustainability Framework,” “Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013,” Manual at 7.

⁷⁸⁸ “Direct Investments: Appraisal, Version 7, April 15, 2013,” “Environmental and Social Review Procedures Manual,” p. 5. <http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES>

⁷⁸⁹ “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 6. “The ESRS should present a succinct summary of the review and assessment of the E&S impacts associated with the project and how they are or will be mitigated by the project.” “Id. For category A and B projects, the LESS “prepare[s] a draft ESRS summarizing IFC’s E&S appraisal findings.” Id.

⁷⁹⁰ “Direct Investments: Appraisal, Version 7, April 15, 2013,” Manual at 4.

⁷⁹¹ “Direct Investments: Pre-Mandate Initial Review, Concept Review Meeting, and E&S Specialist Assignment, Version 7, April 15, 2013,” Manual at 5.

⁷⁹² “Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013,” Manual at 2. Where a BCS summary is not available prior to Board approval, the ESRS will be updated with this summary when available. Id.

⁷⁹³ Id.

⁷⁹⁴ “Direct Investments: Appraisal, Version 7, April 15, 2013,” Manual at 5. “The LESS in consultation with the [Sector leader] as appropriate will analyze and decide which client documents will be disclosed in addition to the ESRS and the ESAP.” Id. There will have been discussions with and concurrence on the part of client with such disclosure. Id.

⁷⁹⁵ “Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013,” Manual at 2.

⁷⁹⁶ “Direct Investments: Appraisal, Version 7, April 15, 2013,” Manual at 4.

⁷⁹⁷ Id. at 3.

⁷⁹⁸ “Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013,” Manual at 2.

⁷⁹⁹ “Managing Eventualities in Investment Projects, Version 7, April 15, 2013,” Manual at 2.

⁸⁰⁰ “Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013,” Manual at 3.

⁸⁰¹ Id. at 1.

⁸⁰² Id. at 3.

⁸⁰³ “Direct Investments: Appraisal, Version 7, April 15, 2013,” Manual at 5.

⁸⁰⁴ “Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013,” Manual at 1.

⁸⁰⁵ Id. (referring to the section entitled “Environmental and Social Review Procedures (ESRP) 5: Managing Non-Routine Events in Investment Projects”) at 2.

⁸⁰⁶ “Direct Investments: Supervision, Version 7, April 15, 2013,” Manual at 7.

⁸⁰⁷ Id. (italics added)

⁸⁰⁸ “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 1.

⁸⁰⁹ Id. at 10.

⁸¹⁰ “Financial Intermediary Investments: IFC Disclosure and Commitment, Version 4, August 14, 2009,” Manual at 1. . <http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES>

⁸¹¹ Id.

⁸¹² “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 7.

⁸¹³ “Financial Intermediary Investments: IFC Disclosure and Commitment, Version 4, August 14, 2009,” Manual at 1.

⁸¹⁴ Id.

⁸¹⁵ Id. The iDesk is “an internal platform that requires task managers to provide details of project design and implementation progress.” “Capacity Development in the World Bank Group: A Review of Nonlending approaches,” by Nansia Constantinou, Capacity Development Briefs, Number 13, World Bank Institute, June, 2007, p. 3. <http://documents.worldbank.org/curated/en/2007/06/8058473/capacity-development-world-bank-group-review-nonlending-approaches>

⁸¹⁶ “Financial Intermediary Investments: Supervision, Version 4, August 14, 2009,” Manual at 3.

⁸¹⁷ See “The CAO at 10: Annual Report FY2010 and Review FY2000-10,” Compliance Advisor/Ombudsman, 2010, p. 62. http://www.cao-ombudsman.org/publications/documents/CAO_10Year_AR_web.pdf

⁸¹⁸ Also, “social and environmental project impacts may not be solely local, underlining the importance of wider information disclosure and consultation.” Id. at 69.

⁸¹⁹ “IFC and MIGA’s role, activities, and policies are not well known by civil society in the countries where IFC/MIGA do business. Findings from an independent assessment conducted as part of the CAO’s civil society outreach program revealed that two-thirds of respondents had no knowledge of IFC/MIGA and their projects in their country before attending a CAO outreach event.” See id. at 78-81. Nearly 75 percent said they were unaware of the existence of IFC’s policies and standards before meeting with the CAO.” Id. at 69.

⁸²⁰ “[T]his lack of awareness also extends to many project-affected stakeholders. Across five select projects, the CAO found that very few community stakeholders knew of the existence of IFC and knew even less about the policies and standards committed to by IFC’s client companies. In one project, of 31 stakeholders interviewed, only IFC and the company representatives were aware of IFC’s involvement in the particular project. In addition, our surveys and interviews told us that language is a major barrier to accessing information and systemic improvements can be made to update public information about IFC/MIGA projects routinely on the Web.” Id.

⁸²¹ “We understand that the IFC believes banking regulations in some markets would preclude these disclosures for commercial banking clients. However commercial banks already have exceptions to the duty of confidentiality related to public interest.¹⁰ further exceptions can be made with customer consent, emphasising the importance of new IFC requirements for contractual provisions between clients and subclients. In loan documentation client-subclient contracts can include express consent for the IFC client to disclose the existence of the financial relationship, while still maintaining confidentiality over the entire scope of the relationship, its commercial terms, and some of the subclient’s private information.” “Recommendations for immediate changes in the IFC action plan on financial market lending,” “attachment to Letter RE: IFC investment in the financial sector” to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al., March 17, 2014, p. 4. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

⁸²² See id.

⁸²³ “While some development impact information is being collected by IFC, this is reported only in aggregate, and not at the project level. This makes it almost impossible for interested parties to follow up on whether IFC/MIGA fulfilled their commitments.” “The CAO at 10: Annual Report FY2010 and Review FY2000-10.” Compliance Advisor/Ombudsman, 2010, p. 62. http://www.cao-ombudsman.org/publications/documents/CAO_10Year_AR_web.pdf

⁸²⁴ Id. at 70.

⁸²⁵ “E&S Risk Management of Financial Institutions at the IFC, Presentation to the Committee on Development Effectiveness September 4th 2013,” International Finance Corporation. <http://www.cao-ombudsman.org/documents/IFCpresentationforCODE-ESRMforFIs-final.pdf>

⁸²⁶ Id.

⁸²⁷ “Equator Principles III,” Equator Principles, pp. 10-11. http://www.equator-principles.com/resources/equator_principles_III.pdf

⁸²⁸ “The EPFI will submit project name data directly to the Equator Principles Association Secretariat for publication on the Equator Principles Association website.”

“Project name reporting is:

- applicable only to Project Finance transactions that have reached Financial Close,
- subject to obtaining client consent,
- subject to applicable local laws and regulations, and
- subject to no additional liability for the EPFI as a result of reporting in certain identified jurisdictions.”

“Annex B - Minimum Reporting Requirements,” “The Equator Principles,” Equator Principles, June 2013, p. 13. http://www.equator-principles.com/resources/equator_principles_III.pdf

Also, project name information encompasses only the following:

- Project name (as per the loan agreement and/or as publicly recognised),
- Calendar year in which the transaction reached Financial Close,
- Sector (i.e. Mining, Infrastructure, Oil and Gas, Power, Others),
- Host country name.” Id.

⁸²⁹ “Annex B - Minimum Reporting Requirements,” “The Equator Principles,” Equator Principles, June 2013, p. 13. http://www.equator-principles.com/resources/equator_principles_III.pdf

⁸³⁰ Id. “Data for Project Finance transactions and Project-Related Corporate Loans should be shown separately.” Id.

⁸³¹ “Equator Principles III,” Equator Principles, p.14. http://www.equator-principles.com/resources/equator_principles_III.pdf

⁸³² Id.

⁸³³ Id. at 7.

⁸³⁴ Id. The client must “tailor its consultation process to: the risks and impacts of the Project; the Project’s phase of development; the language preferences of the Affected Communities; their decision-making processes; and the needs of disadvantaged and vulnerable groups. This process should be free from external manipulation, interference, coercion and intimidation.” Id.

⁸³⁵ Id. Recall that Assessment Documentation consists of “documents prepared for a Project as part of the Assessment process,” the “extent and detail of [which] is commensurate with the Project’s potential environmental and social risks and impacts.” Examples of such documents are “an Environmental and Social Impact Assessment (ESIA), Environmental and Social Management Plan (ESMP), or documents more limited in scale (such as an audit, risk assessment, hazard assessment and relevant project-specific environmental permits).” Id. at 17.

⁸³⁶ Id. at 7.

⁸³⁷ Id.

⁸³⁸ Id. at 8.

⁸³⁹ “Annex B - Minimum Reporting Requirements,” id. at 13. They must also “report publicly and specifically on [greenhouse gas] emission levels.” Id.

⁸⁴⁰ “Equator Principles III Enters Into Force This June,” Shearman & Sterling, LLP, May 28, 2013, p. 3.

⁸⁴¹ For an earlier critique on this point which is still relevant, see “The Silence of the Banks,” Bankwatch, 2007, p. 8. http://www.banktrack.org/download/the_silence_of_the_banks_1/0_0_071203_silence_of_the_banks.pdf

⁸⁴² O’Sullivan at 207.

⁸⁴³ Id.

⁸⁴⁴ See discussion of points raised by “Discussion Paper, Stakeholder Engagement and the Extractive Industry Under the OECD Guidelines for Multinational Enterprises,” Shift, June 2013, p.17. <http://www.shiftproject.org/publication/discussion-paper-stakeholder-engagement-and-extractive-industry-under-oecd-guidelines-mu>

⁸⁴⁵ O’Sullivan at 207.

⁸⁴⁶ E-mail from Sustainability finance expert. January 18, 2014

⁸⁴⁷ Id.

⁸⁴⁸ Id.

⁸⁴⁹ “If an investment project has alternative sources of finance (e.g. Chinese money), it is highly unlikely that IFC PS can be successfully introduced into a project, as costs are perceived to be (and probably are) higher. Short term thinking. The lower the leverage, the less strict will be the interpretation of the IFC PS.” E-mail from Sustainability finance expert. January 18, 2014

⁸⁵⁰ “Since Action Plans constitute the principal agreement between IFC and its client companies about required E&S actions, clarity of language and expectations is crucial from a legal perspective. Precise language helps provide leverage for IFC to enforce client company requirements in the case of poor performance, particularly if IFC has already disbursed a significant share of its investment.” “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” Office of the Compliance Advisor/Ombudsman, May 2010, p. 15. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁸⁵¹ “Financial institution staff can incorporate environmental and social clauses into legal agreements with clients/investees to require clients/investees to comply with the financial institution’s environmental and social requirements. Doing so helps a financial institution

reduce its exposure to the environmental and social risks associated with a client's/investee's operations throughout the lifetime of a transaction and gives the financial institution legal recourse in the case of non-compliance.

"A financial institution's Environmental and Social Management System should state the circumstances under which specific environmental and social conditions such as the need for a corrective action plan should be inserted into the legal agreement for a proposed transaction.

"The Legal Department should be involved in developing and inserting the necessary clauses on environmental and social matters into legal agreements. The specific language will depend on the type of transaction and potential environmental and social risks identified during the due diligence process but generally addresses the following areas:

- "Positive Covenants: Measures or actions to be taken by the client/investee. These may include the requirement for compliance with national environmental and social regulations and international standards, and periodic reporting on environmental and social performance. In the event of significant accidents and incidents, with potentially adverse environmental and social effects such as spills or workplace accidents resulting in death, serious or multiple injuries or major pollution, the client/investee is required to notify the financial institution in a timely manner, such as within 3 days.
- Negative Covenants: Actions that the client/investee should refrain from undertaking. These include the financial institution's environmental and social requirements.
- Conditions Precedent: Conditions and requirements that the client/investee has to fulfill prior to disbursement of funds by the financial institution. These may include proof of valid permits and licenses, preparation of government-requested reports and delivery of completion of mitigation actions stipulated in the corrective action plan.
- Event of Default: An event that entitles the financial institution to cancel a transaction and declare all amounts owed by the client/investee to become immediately due and payable. For transactions that involve complex environmental and social issues, this may include specifying a time period such as 30 days during which the client/investee can resolve the issue after notification by the financial institution.
- Corrective Action Plan: The Plan is typically included as an annex to the legal agreement, outlining the specific mitigation actions to be taken by the client/investee according to an agreed timeframe for implementation.

"To assess compliance with the environmental and social clauses stipulated in the legal agreement, financial institution staff should periodically monitor clients/investees and, as necessary, require the preparation of a periodic environmental and social performance report for review by the financial institution. The financial institution should consider material non-compliances with the environmental and social clauses as a breach of contract, which constitutes an Event of Default under the terms of the legal agreement."

In case of such an event, financial institution staff needs to work with clients/investees to resolve non-compliance issues in order to ensure that any potential exposure of the financial institution to the client's/investee's environmental and social risks is mitigated. Where resolving the non-compliance issue is not possible, the financial institution may be required to take legal action against the client/investee to reduce its exposure to the environmental and social risks associated with the transaction." "Environmental and Social Covenants in Legal Agreements," Home > Environmental and Social Risk Management > Managing Environmental and Social Risk > Components of an ESMS, FIRST for Sustainability. <http://firstforsustainability.org/risk-management/managing-environmental-and-social-risk-2/2/components-of-an-esms/environmental-and-social-covenants-in-legal-agreements/>

⁸⁵² "There should be a separate Performance Standard for Compliance. Such a PS could ensure compliance with the IFC standards through the planning, decision making, appraisal, construction, operation and decommissioning stages of any project, and take course correction where the client fails to comply with the norms. In an event of continued non-compliance, necessary corrective steps would apply, including cancellation of assistance to the project. Today there is general acceptance about need to ensure compliance, but since there are no clearly defined performance standards, there is little confidence inspiring improvement. Without compliance the most well defined performance standards remain meaningless. Hence there is a need for separate performance standard for ensuring compliance." "Open Statement by CSOs from South Asia on IFC Policy and Performance Standards on Social and Environmental Sustainability, July, 2010," South Asia Citizens Web, August 11, 2010. <http://www.sacw.net/article1566.html>

⁸⁵³ As noted in the main text, the focus of available literature with regard to such provisions has been with respect to lending. For a brief discussion of some covenants in connection with an equity investment by the IFC in a mining company see "The IFC Performance Standards Review – Implications for Exploration-Stage Company Clients," by Jim Crew, April 6, 2011. <http://www.rmmlf.org/rio/Cress-%20IFC-PPT.pdf> For example, "[a]s long as IFC owns shares or warrants, company will:

- Not deal with 'Shell Banks,' UN-Sanctioned or World Bank-ineligible firms
- Permit IFC to approve appointment of Environmental and Social Corporate Manager
- Inform IFC within 3 days if 'Category A' activities are proposed
- Not change its Environmental and Social Management System (SEMS) without IFC consent. Id. a 24.

⁸⁵⁴ This position is suggested by NGOs' letter urging that "IFC financial sector clients should also be contractually required to include IFC's Performance Standards on Environmental and Social Sustainability in their contracts with all sub-clients." See "Recommendations for immediate changes in the IFC action plan on financial market lending." "attachment to Letter "RE: IFC investment in the financial sector" to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al., March 17, 2014, p. 3. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

⁸⁵⁵ "Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information," Office of the Compliance Advisor/Ombudsman, May 2010, p. 15. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf "Although the panel was advised that IFC's legal department considers these different formulations equally demanding and enforceable, it was not clear to the panel why there was a need for so many different types of formulations, even acknowledging the changing requirements over time." Id.

⁸⁵⁶ "CAO Audit of a Sample of IFC Investments of a Sample of IFC Investments in Third-Party Financial Intermediaries," Office of the Compliance Advisor Ombudsman for the International Finance Corporation, Multilateral Investment Guarantee Agency, October 10, 2012, p. 31. http://www.cao-ombudsman.org/documents/Audit_Report_C-I-R9-Y10-135.pdf

⁸⁵⁷ Id.

⁸⁵⁸ Id. “Although the [CAO’s advisory] panel was advised that IFC’s legal department considers these different formulations equally demanding and enforceable, it was not clear to the panel why there was a need for so many different types of formulations, even acknowledging the changing requirements over time.” Id.

⁸⁵⁹ “CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras,” CAO, CAO Ref: C-I-R9-Y12-F161, December 20, 2013, p. 54. http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf

⁸⁶⁰ Id. at 26.

⁸⁶¹ “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” Office of the Compliance Advisor/Ombudsman, May 2010, p. 31. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf.

⁸⁶² Id.

⁸⁶³ “Recommendations for immediate changes in the IFC action plan on financial market lending.” “attachment to Letter RE: IFC investment in the financial sector” to Jin-Yong Cai, Executive Vice President, International Finance Corporation from Jesse Griffiths, Director, Eurodad, et al., March 17, 2014, p. 3. <http://eurodad.org/files/pdf/5333ffffb9971.pdf>

⁸⁶⁴ Id. They add that “[t]he IFC must include enforceable provisions with clear time-bound triggers open to public scrutiny.” Id.

⁸⁶⁵ “Response letter from James Scriven, Director, Global Markets Department and William Butler, Director, Environmental, Social and Governance Department, IFC to NGOs’ letter of March 12, 2013 IFC on investment in the financial sector,” April 18, 2013. <http://www.brettonwoodsproject.org/2013/05/art-572516/>

⁸⁶⁶ “Notes of IFC-CSO discussion of CAO financial markets audit, Notes of a meeting from 19 April 2013,” Bretton Woods Project, (quoting IFC official to the effect that with reference to a particular client bank, “[i]t transformed when IFC threatened not to go ahead with a new transaction.”) May 17, 2013. <http://www.brettonwoodsproject.org/2013/05/art-572515/>

⁸⁶⁷ “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” Office of the Compliance Advisor/Ombudsman, May 2010, p. 21. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

⁸⁶⁸ Id.

⁸⁶⁹ Id.

⁸⁷⁰ “Notes of IFC-CSO discussion of CAO financial markets audit, Notes of a meeting from 19 April 2013,” Bretton Woods Project, May 17, 2013. <http://www.brettonwoodsproject.org/2013/05/art-572515/>

⁸⁷¹ See *Bergset* at 83.

⁸⁷² *Vacarciuc* at 31.

⁸⁷³ “Equator Principles Reporting 2012,” FMO.

⁸⁷⁴ *Vacarciuc* at 31

⁸⁷⁵ Id.

⁸⁷⁶ Id. at 31-32.

⁸⁷⁷ Id. at 38-39. The use of technical assistance in this way is detailed as follows:

“[A] budget is estimated for the total costs of consulting efforts necessary for the implementation of an ESG deliverable. This TA funding (i.e. according to its policies FMO funds 50% of technical assistance projects) is then provided upfront, with the actual implementation of ESG items being carried out during the loan period (i.e. usually with the involvement of sub-contracted third-party consulting companies). On the other hand, the pricing incentive is only offered upon witnessing the implementation of agreed ESG items. Thus a client carries the burden of consulting (or implementation) costs on its own and is rewarded as part of the incentive agreement at a later time. Thus, the saved loan amount due to a decreased interest rate is estimated to be similar to the cost of the consulting services, in case of TA agreements.” Id. at 39.

⁸⁷⁸ See “International Finance Institutions and Development Through the Private Sector” (describing how Armenia’s second-largest bank” received a margin reduction from FMO after completing the development and implementation of an environmental and social management plan” and suggesting that this outcome “[d]emonstrates the potential of an innovative financial product that other IFI could emulate to promote sustainable investing.”) “International Finance Institutions and Development Through the Private Sector, a joint report of 31 multilateral and bilateral development finance institutions,” International Finance Corporation, 2011, p. 25. http://www.developmentandtheprivatesector.org/report/files/assets/downloads/IFI_and_Development_Trough_the_Private_Sector.pdf

⁸⁷⁹ O’Sullivan at 193-194. According to Meyerstein’s report on the comments of one of his EP bank interviewees, “after the credit phase, bankers’ interests in ESRM compliance might dwindle significantly, even though it is during actual construction and project operation that most of the social and environmental impacts take their toll on local populations, potentially creating the most problems for project developers.” Meyerstein at 146-147. Note, though, that the interviewee added that the EP bank “takes its role very seriously, and compliance with the increasingly-detailed loan covenants related to the environmental management plan are rigorously enforced by the —agent bank responsible for checking implementation with loan covenants.” Id.

⁸⁸⁰ “Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance,” by Douglas Sarro, *German Law Journal*, Vol. 13 No. 12, 1525-1558, 1550. http://www.germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1522-1558_Articles_Sarro.pdf See also O’Sullivan (“On one hand, on a project is up and running the impact of withdrawing financial support could be huge. On the other, the environmental and social impact of a project collapsing may well be as drastic as continuing to carry on the projects.”) at 193-194.

⁸⁸¹ Meyerstein at 158.

⁸⁸² Id.

⁸⁸³ “Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance,” by Douglas Sarro, *German Law Journal*, Vol. 13 No. 12, 1525-1558, 1551. As the text which follows notes, such drastic action has to otherwise be warranted and whether it is justified is not infrequently a contentious matter, especially if affected communities and/or NGOs are actively involved.

⁸⁸⁴ Email from sustainable finance expert. January 28, 2014.

⁸⁸⁵ “The Equator Principles, The World Bank is Not Enough,” by Paul Q. Watchman (quoting Andre Abadie, Head of Sustainable Business Advisory, ABN Amro), November 22, 2010, Slide 3. <http://www.slideserve.com/ostinmannual/the-world-bank-is-not-enough-by-paul-q-watchman-visiting-fellow-lse-lse-sustainable-finance-project-11-22-10>

⁸⁸⁶ Meyerstein at 159.

⁸⁸⁷ “EP 2: The Revised Equator Principles: Why hard-nosed bankers are embracing soft law Principles,” by Paul Q. Watchman, Angela Delfino and Juliette Addison (also titled “The Equator Principles, Part Deux: The World Bank is not Enough”), p. 17. http://www.banktrack.org/manage/ems_files/download/epii_why_hard_nosed_bankers_are_embracing_soft_law_principles/the_revised_equator_principles_why_hard_nosed_bankers.pdf

⁸⁸⁸ Id. at 17-18.

⁸⁸⁹ O’Sullivan at 204.

⁸⁹⁰ Id.

⁸⁹¹ Bergset at 63.

⁸⁹² Id. As recounted by Bergset, the person responsible for sustainable lending and reputation risk management issues at HypoVereinsbank “mention[ed] that although interest rates depend primarily on the financial situation of the borrowing company, loans can become “more expensive” for the client, when they receive a bad rating due to e.g. negative environmental impacts in the past. Such a sustainability rating is, however, not explicitly conducted in a standardised manner and the results of the sustainability assessment..., do not flow directly into the financial pricing.” That is, the company might not get a better rating, but what it does get more easily is access to finance, due to proving more stability in sustainability matters.” Apparently “[t]he local Rabobanks’ sustainability assessment of their clients [had been]...incorporated into a credit rating engine...impl[y]ing that it is possible to weight the assessment so that it also influences the interest rate,” but that was “not [then] current practice.” Id.

⁸⁹³ O’Sullivan (citing from interview with a Dutch EPFI) at 212.

⁸⁹⁴ Id. at 213.

⁸⁹⁵ Carbonell at 31.

⁸⁹⁶ Id. The unidentified ABN AMBRO interviewee described “these sorts of incidents as inevitable: ‘Real life occasionally gets in the way’ of elaborate EMPs, he explained.” Id.

⁸⁹⁷ Id. at 53.

⁸⁹⁸ Id.

⁸⁹⁹ Id. at 33.

⁹⁰⁰ Id. at 35.

⁹⁰¹ Id.

⁹⁰² “Ensuring That Loan Documents Address Equator Principles and Trade Sanctions,” by Yasser Yaqub, Gaurav Sharma, and Richard Oliver, Project Finance NewsWire, Chadbourne and Parke, LLP, April 2014, p. 37.

<http://www.lexology.com/library/detail.aspx?q=6e75eff9-1450-4b10-960e-d4e6210f23da>

⁹⁰³ Id. at 38.

⁹⁰⁴ “Guidance to EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation,” Equator Principles, March, 2014. http://www.equator-principles.com/resources/ep_guidance_for_epfis_on_loan_documentation_march_2014.pdf

⁹⁰⁵ “IFC Annual Report 2013,” International Finance Corporation, p. 82.

http://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/Annual+Report/2013_Online_Report/2013_Printed_Report/

⁹⁰⁶ Id.

⁹⁰⁷ For criticism by NGOs, see, for example, “The IFC’s development outcome tracking system,” Bretton Woods Project (suggesting that the IFC has “a limited understanding of the impact of its investments because the indicators only track outputs and outcomes of IFC client companies”; “that the evidence that is used to judge development impact is inconclusive and does not reflect the context-specific nature of investments, i.e. that the planned effect might be caused by something else”; that “there is insufficient transparency on how the IFC chooses how it invests based on predicted development impact because the DOTS system only tries to evaluate impact once the decision to invest has already been made”; and that “DOTs ratings are initially given by the same investment team that agrees the project, creating conflicts of interest and potential bias in the ratings.”) January 23, 2014. <http://www.brettonwoodsproject.org/2014/01/ifcs-dots/> One commentator has offered a different kind of, but a sharper critique, suggesting that at certain DFIs the focus of whole departments is on “proving that their investment[s] make sense, thereby using indicators that are not always meaningful,” for example, reporting as highly positive, the number of jobs created, but failing to attend to the pay or treatment of the workers or rating E&S performance high based on the use of normal industrial practice rather than best available techniques. Email from sustainable finance expert. January 29, 2014.

⁹⁰⁸ “About IEG, Improving World Bank Group Development Results Through Excellence in Evaluation,” Independent Evaluation Group. <http://ieg.worldbankgroup.org/about-us>

⁹⁰⁹ Id.

⁹¹⁰ Id. For example, private sector investment projects and advisory services are mainly assessed against absolute economic and financial performance criteria and the extent to which they contribute to private sector development. Public sector projects are assessed in relation to their relevance and the efficacy and efficiency with which they achieve their development objectives.” Id.

⁹¹¹ Id.

⁹¹² Policy at 12.

⁹¹³ Id.

⁹¹⁴ “How We Work, CAO Compliance,” Compliance Advisor Ombudsman. <http://www.cao-ombudsman.org/howwework/compliance/>

⁹¹⁵ Id. Note, the CAO “is not mandated to address complaints related to fraud and corruption. These types of complaints are handled by the World Bank Group’s Integrity Vice Presidency.” “2013 Annual Report,” Compliance Advisor Ombudsman,” p.8. http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf A large number of complaints deemed ineligible for consideration by the CAO “raised concerns about fraud and corruption.” Id. at 96.

⁹¹⁶ “How We Work, “CAO Compliance,” Compliance Advisor Ombudsman, <http://www.cao-ombudsman.org/howwework/compliance/>

⁹¹⁷ Id.

⁹¹⁸ “2013 Annual Report,” Compliance Advisor Ombudsman,” p.97. http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf

⁹¹⁹ Id. at 26.

⁹²⁰ Id. at 97.

⁹²¹ Id.

⁹²² Id. at 98. “Socio-economic” effects include “the distribution of project benefits and how this affects community livelihoods.” Id. at 96. In significant fraction of cases there were issues of land (56%), pollution (46%), community health and safety (44%), and water (41%). Id.

⁹²³ Id. at 77.

⁹²⁴ Id.

⁹²⁵ Id.

⁹²⁶ See, for example, “IFC’s Environmental and Social Lessons Learned, CSO Session,” Presentation by Morgan Landy, Director, Environment, Social and Governance Department, April 9, 2014, International Finance Corporation.

http://www.google.com/url?url=http://www.brettonwoodsproject.org/wp-content/uploads/2014/04/IFC_Presentation_CS0-Session-April-9-FINAL.pptx&rct=j&frm=1&q=&esrc=s&sa=U&ei=4F_iU_DSKpahyATbqYHwAQ&ved=0CBQQFjAA&usq=AFQjCNEOp_W_gyMCcTSnVONUZW6mjCjCHQ

⁹²⁷ See “The Equator Principles, Governance Rules,” Equator Principles. <http://www.equator-principles.com/index.php/about-ep/governance-and-management>

⁹²⁸ “Are Profits Made at the Expense of Development Impact?” “Monitor,” International Finance Corporation. http://www.norfund.no/getfile.php/Documents/Homepage/Reports%20and%20presentations/External%20reports_flyers/IFC_DE_Monitor_Sheets_2v31.pdf “In order to be considered a development success, an IFC project must:

- Be profitable (its financial return exceeds the average cost of capital),
- Generate benefits to society above and beyond those to its financiers (usually, the economic rate of return is expected to exceed 10%), and
- Be socially and environmentally sustainable (meet or exceed our performance standards).

We also assess a project’s broader private sector development impact (e.g. a project’s demonstration effects.)” Id.

⁹²⁹ “Investment, Innovation, and Impact, Partnering with the Private Sector to Deliver Results,” Karin Finkleston, IFC Vice President, Asia Pacific, August 21, 2012. Slide 6

⁹³⁰ “IFC Annual Portfolio Review, FY11, Development Results,” International Finance Corporation, p. 4.

⁹³¹ “International Finance Corporation Annual Portfolio Performance Review FY09,” From the Acting Corporate Secretary, International Finance Corporation, August 25, 2009, p. 49. <https://publicintelligence.net/international-finance-corporation-annual-portfolio-performance-review-fy09/> “We estimate that these 63 projects generated \$9.2 billion in value-added over and above their project costs of \$8.7 billion (of which IFC financed \$1.2 billion and mobilized \$770 million from B-lenders), and these benefits were about evenly split between financiers (53%) and other stakeholders (47%). The median economic rate of return was 15%, and the median financial rate of return was 10% (both in real, i.e. inflation adjusted terms).” Id.

⁹³² The IFC cited the study as showing “that benefits for society as a whole clearly exceeded those for financiers alone in about 90% of cases, compared to 10% where the reverse was true.” We estimate that these 76 projects generated \$11.6 billion in value-added over and above their project costs of \$9.8 billion (of which IFC financed \$1.8 billion and mobilized \$1.3 billion from B-lenders). The financiers of these projects captured some 65% of these benefits, and other stakeholders about 35%. The median economic rate of return was 16%, and the median financial rate of return was 11% (both in real, i.e. inflation adjusted terms). “IFC Annual Portfolio Review FY11,” International Finance Corporation, p. 3.

http://www.ifc.org/wps/wcm/connect/100e28804a9567c8ace3fe9e0dc67fc6/web_APR2011.pdf?MOD=AJPERES

⁹³³ “Enhancing Financial Returns by Targeting Social Impact,” by Gavin E.R., Wilson Stanford, *Social Innovation Review*, January 13, 2014. http://www.ssiireview.org/blog/entry/enhancing_financial_returns_by_targeting_social_impact

⁹³⁴ Id. “[I]n other words, to predict a company’s financial performance, pay attention to its current ESG capability.” Id.

⁹³⁵ Id. “For example, a mining company that loses its licence due to environmental infringements or social issues is not doing much good for the local economy or is investor.” Id.

⁹³⁶ Id.

⁹³⁷ “IFC Annual Portfolio Review, FY 11 Development Results,” International Finance Corporation, pp. 5-6. http://www.ifc.org/wps/wcm/connect/100e28804a9567c8ace3fe9e0dc67fc6/web_APR2011.pdf?MOD=AJPERES

⁹³⁸ Id. at 6. More particularly, 94% of those projects with an excellent financial performance rating had a high PSD performance rating compared with 37% with an unsatisfactory financial performance rating. Id. at 5, Figure 2-4. With respect to FY 10, the IFC report figures of 73% and 58%, respectively. “Annual Portfolio Performance Review – FY 10,” International Finance Corporation, September, 2010, p. 14, Figure 2-3.

http://www.ifc.org/wps/wcm/connect/0513f98046b65556aa41abb254bfb7d4/APPR_FY10_IFC.pdf?MOD=AJPERES The report states that according to “DOTS data, which show that, with particularly weak financial performance (i.e. unsatisfactory ratings), environmental and social performance was also weaker. Better environmental and social performance was associated with better financial performance.” Id. at 14.

⁹³⁹ “IFC Annual Portfolio Review, FY 11 Development Results,” International Finance Corporation, p. 5. http://www.ifc.org/wps/wcm/connect/100e28804a9567c8ace3fe9e0dc67fc6/web_APR2011.pdf?MOD=AJPERES The figures were 56% as compared to 64%, 77%, and 72%, respectively. Id.

⁹⁴⁰ “Annual Portfolio Performance Review – FY09,” International Finance Corporation, August 25, 2009, p. 51. http://info.publicintelligence.net/APPR_09_IFC.pdf For this year the differences were a bit larger than in 2009: the figures were 46%, 66%, 71%, and 69%. Id.

⁹⁴¹ Id.

⁹⁴² “[O]ver 75 percent of all loan investments with an ESRR of 4 also carry credit risk ratings of 5 or above.” “Credit risk positively correlated with environmental risk,” Vittorio Di Bello, Chief Credit Officer, IFC World Bank Group, International Banking Forum, June 16-17, 2011 Slide 14. (Credit ratings were based on a scale of 7 with 7 being the highest.) For equity investments, “over 97 percent of investments with an ESRR of 4 are rated at 6 or above on credit risk rating.”⁹⁴² Moreover, it stated that “[i]nvestment rates of return for equity investments also show a strong correlation to ESRR scores.” Id. at 19 More particularly, the IRR (equity investments) for projects with ESRR scores of 1 (very low risk) was 8% whereas that for ones with scores of 4 (very high risk) was 31%. Id.

⁹⁴³ “Are Profits Made at the Expense of Development Impact?” “Monitor,” International Finance Corporation. http://www.norfund.no/getfile.php/Documents/Homepage/Reports%20and%20presentations/External%20reports_flyers/IFC_DE_Monitor_Sheets_2v31.pdf

⁹⁴⁴ See, for example, “Development funds for the private interest? 10 Frequently Asked Questions,” Eurodad briefing, March 2011 (“NGOs are critical of [IFC] research and on the existing institutional mechanisms intended to track the development impact of these funds. The methodology used in the IFC research suffers from grave circularities, as financial performance is a key component of how the IFC measures development outcomes (given that financial performance is a criteria to determine whether a project had positive development impacts, it is unsurprising that projects with positive financial performances also had high development outcomes ratings).”), p. 4.

⁹⁴⁵ “Are Profits Made at the Expense of Development Impact?” “Monitor,” International Finance Corporation. http://www.norfund.no/getfile.php/Documents/Homepage/Reports%20and%20presentations/External%20reports_flyers/IFC_DE_Monitor_Sheets_2v31.pdf

⁹⁴⁶ Id. In addition, it also “drew on a recent study by IFC’s Independent Evaluation Group (IEG), which analyzed 63 projects evaluated between 2004 and 2006 (and approved between 1999 and 2001). In addition, we draw on a 2006 analysis of financial and environmental and social performance indicators (relating credit risk ratings, non performing loans, and equity performance with environmental and social risk ratings).” Id.

⁹⁴⁷ Id.

⁹⁴⁸ Id., figure 1.

⁹⁴⁹ Id., figure 2.

⁹⁵⁰ Id., figure 1.

⁹⁵¹ Id.

⁹⁵² Id.

⁹⁵³ Id. Indeed, the IFC somewhat cautiously suggested the development benefits associated with higher profit projects: “For IFC projects we often observe that where the FRR is particularly high, the magnitude of society’s benefits is many times larger, as can be observed in the graph above. The reverse does not hold true however: projects with low returns for their financiers can still provide significant societal benefits.” Id.

⁹⁵⁴ See “Independent Evaluation Group. 2009. Independent Evaluation of IFC’s Development Results: Knowledge for Private Sector Development” World Bank, 2009, p. 20. <https://openknowledge.worldbank.org/handle/10986/2674>

⁹⁵⁵ Id. at 19-20.

⁹⁵⁶ “The Nexus Between Infrastructure and Environment,” From the Independent Evaluation Offices of the International Financial Institutions, Evaluation Cooperation Group Paper 1 June 2007, p. 12

<https://wqr4.adb.org/LotusQuickr/ecg/Main.nsf/7e6e83714d63fac348257731002a960f/4779bec0e48acaa648257731002a961d/?OpenDocument>

⁹⁵⁷ Id. at 13. We have not been able to locate the cited IFC report.

⁹⁵⁸ Id.

⁹⁵⁹ Id.

⁹⁶⁰ “The costs of conflict with local communities in the extractive industry,” by Rachel Davis and Daniel M. Franks, pp. 3-4. http://shiftproject.org/sites/default/files/Davis%20%20Franks_Costs%20of%20Conflict_SRM.pdf

⁹⁶¹ Id.

⁹⁶² “The findings of the case analysis concerning the types of costs experienced by the companies involved are generally in accordance with the interview data. The most frequent costs identified were staff time spent on risk and conflict management (21) and disruption to production (14; see Figure 3). Approximately one third of the cases involved the loss of the value of the property (in part or full; 9). A number of cases also involved damage to private property (9), the discontinuation of the operations or development (6), and, in a few instances, injuries and/or deaths of staff (5).” “The costs of conflict with local communities in the extractive industry,” by Rachel Davis and Daniel M. Franks, p. 8. http://shiftproject.org/sites/default/files/Davis%20%20Franks_Costs%20of%20Conflict_SRM.pdf

⁹⁶³ “Industrial Value of ‘Business Sustainability,’” by Carlo Alberto Marcoaldi, ERM. <http://www.speitaly.org/pages/events/omc2009/28Marcoaldi.pdf> In 63% of the cases there was a commercial (e.g., cost or contract-related) delay and in 21%, a “technical” one, Id.

⁹⁶⁴ Id.

⁹⁶⁵ “How Sustainability Practices Influence Project Outcomes & Manage Risk,” by Paul Stanchfield and Fred Biery, 7th Annual Sustainability Exchange, International Finance Corporation, June 20, 2013.

http://www.commdev.org/userfiles/IPA%20Presentation_%20IFC%20Sustainability%20Exchange%202013_final.pdf Average project costs of the 78 projects (involving 43 companies) ranged from \$27 million to \$5.7 billion and averaged \$1.4 billion. Id.

⁹⁶⁶ See “Sustainability Program Quality Benchmark Matrix, Draft,” International Finance Corporation, June, 2011, p. 3. <http://www.fvtool.com/files/Benchmark%20Matrix.pdf>

⁹⁶⁷ “How Sustainability Practices Influence Project Outcomes & Manage Risk,” by Paul Stanchfield and Fred Biry, 7th Annual Sustainability Exchange, International Finance Corporation, June 20, 2013.

http://www.commdev.org/userfiles/IPA%20Presentation_%20IFC%20Sustainability%20Exchange%202013_final.pdf The figures for stakeholder identification and baseline studies were 96% as compared to 67% and 90% as compared to 71%, respectively; for community engagement and communications mechanism they were 62% and 17% and 82% and 17%. Id.

⁹⁶⁸ Id.

⁹⁶⁹ Id.

⁹⁷⁰ Id.

⁹⁷¹ Id.

⁹⁷² Id. More specifically, the authors are concerned with an increase in the “sustainability budget” which refers to “the sum of resources spent on sustainability activities associated with the project (often a few % of the total project budget). This would include costs associated with community development activities, community compensation for land and resettlement, crop replacement, workforce training, and so forth.” E-mail from Paul Stanchfield, September 18 and 23, 2013. That is, “the ‘sustainability cost growth’ is specifically related to cost growth/deviations of this category from estimated (planned costs at full-funds authorization) to actual costs.” That is,

“failure to recognize/anticipate sustainability issues (and their attendant cost) results in an underestimation of immediate project costs apart from the costs associated with expensive impacts on operations for that failure.” Id.

⁹⁷³ “How Sustainability Practices Influence Project Outcomes & Manage Risk,” by Paul Stanchfield and Fred Biry, 7th Annual Sustainability Exchange, International Finance Corporation, June 20, 2013.

http://www.commdev.org/userfiles/IPA%20Presentation_%20IFC%20Sustainability%20Exchange%202013_final.pdf The figures for stakeholder identification and baseline studies were 96% as compared to 67% and 90% as compared to 71%, respectively; for community engagement and communications mechanism they were 62% and 17% and 82% and 17%, respectively, Id.

⁹⁷⁴ Id.

⁹⁷⁵ Id.

⁹⁷⁶ Id.

⁹⁷⁷ Email from Paul Stanchfield, Associate Project Analyst, IPA North America, The IPA Institute, September 18, 2013.

⁹⁷⁸ “Stakeholders Drive Stock value,” by Witold J. Henisz, *Brunswick Review*, Issue Number Five, Winter 2011, pp. 55-58, 55.

<http://www.brunswickgroup.com/files/html/brunswickreviewIssue5/assets/pdf/stakeholders-drive-stock-values.pdf>

⁹⁷⁹ “Stakeholders Drive Stock value,” by Witold J. Henisz, *Brunswick Review*, Issue Number Five, Winter 2011, pp. 55-58, 55 (describing his paper, “Spinning Gold: The Financial Returns to External Stakeholder Engagement,” which “studied data between 1993 and 2008 from 26 gold mines owned by 19 companies listed on the Toronto Stock Exchange”).

<http://www.brunswickgroup.com/files/html/brunswickreviewIssue5/assets/pdf/stakeholders-drive-stock-values.pdf>

⁹⁸⁰ Id.

⁹⁸¹ “Stakeholder Analysis for Planning & Financial Valuation of Sustainability,” by Alex Burger and Bennet Zelner, AngloGold Ashanti, “IFC Sustainability Summit: Dealing with Uncertainty: Addressing Sustainability Challenges in Fragile Situations.”

<http://www.commdev.org/userfiles/IFC%20FVT%20AGA%20presentation%20July%202013.pdf>

⁹⁸² Email from sustainable finance expert. February 4, 2014.

⁹⁸³ Id.

⁹⁸⁴ “Performance Standard 1, Assessment and Management of Environmental and Social Risks and Impacts,” International Finance Corporation, January 1, 2012, p. 5.

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96bfdd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES

⁹⁸⁵ Id. note 21, p. 5. Note that technical feasibility only implicitly references financial considerations, that is, it “is based on whether the proposed measures and actions can be implemented with commercially available skills, equipment, and materials, taking into consideration prevailing local factors such as climate, geography, demography, infrastructure, security, governance, capacity, and operational reliability.” Id. note 20, p. 5.

⁹⁸⁶ “History, Financial Valuation Tool for Sustainability Investments,” International Finance Corporation. <http://www.fvtool.com/page.php?node=aWQ9Mw>. Other partners included “Rio Tinto Alcan, Deloitte and the Multilateral Investment Guarantee Agency (MIGA), with support from the Government of Norway.” The IFC and Deloitte then “partnered with Newmont Mining Corporation (Newmont) and Cairn Energy India (Cairn) to field test, refine and demonstrate a proof of concept for the FV Tool in diverse contexts.” Id.

⁹⁸⁷ Id.

⁹⁸⁸ “User Guide: Financial Valuation Tool for Sustainability Investments, Preliminary Draft ” The International Finance Corporation (IFC), Deloitte, Rio Tinto and the Multilateral Investment Guarantee Agency (MIGA), January 2012,” p. 4. <http://www.fvtool.com/page.php?node=aWQ9MTQ> (registration required).

⁹⁸⁹ “History, Financial Valuation Tool for Sustainability Investments,” International Finance Corporation. <http://www.fvtool.com/page.php?node=aWQ9Mw>

⁹⁹⁰ “User Guide: Financial Valuation Tool for Sustainability Investments, Preliminary Draft ” The International Finance Corporation (IFC), Deloitte, Rio Tinto and the Multilateral Investment Guarantee Agency (MIGA), January 2012,” p. 7. <http://www.fvtool.com/page.php?node=aWQ9MTQ> (registration required). The text states that “[v]alue creation and value protection are two sides of the same coin. Unlike value creation, value protection is not readily calculated. It requires thinking through how to put a dollar value on investments that contribute to social risk mitigation and increase trust, social cohesion, reputation and good will, among other things. The hypothesis is that such trust and goodwill reduces the likelihood and/or severity of costly events that lead to project risks.” Id.

⁹⁹¹ “About the FV Tool,” International Finance Corporation. <http://www.fvtool.com/page.php?node=aWQ9Mg>

⁹⁹² “Measuring returns on community investments in mining,” by Veronica Nyhan Jones, Jelena Lukic, Arjun Bhalla, Dafna Tapiero, International Finance Corporation, p. 6, <http://www.fvtool.com/files/SRMining%20Veronica%20Nyhan%20Jones,%20Jelena%20Lukic,%20Arjun%20Bhalla,%20Dafna%20Tapiero%20-%20July%202015.pdf>

⁹⁹³ Id. at 6-7.

⁹⁹⁴ See for example, “Ahafo Pilot Experience, Financial Valuation Tool,” Newmont, IFC Sustainability Exchange, June 2011. http://www.commdev.org/files/2753_file_Newmont_IFC_FVT_June_2011_v_30_6_11.pdf; “Stakeholder Analysis for Planning & Financial Valuation of Sustainability,” by Alex Burger & Bennet Zelner, AngloGold Ashanti. <http://www.commdev.org/userfiles/IFC%20FVT%20AGA%20presentation%20July%202013.pdf>; and ‘Planning & Financial Valuation Model for Sustainability Investments, Oyu Tolgoi,’ by James Arthur, INFC Sustainability Exchange, June 2011. http://www.commdev.org/files/2754_file_OT_FV_Tool_Sustainability_Exchange.pdf A detailed case study of the Ahafo experience is available. “Calculating the Net Present Value of Sustainability Initiatives at Newmont’s Ahafo Mine in Ghana (A),” The Wharton School of the University of Pennsylvania. https://www.fvtool.com/files/Ahafo_Case.pdf See also, “Importance of timing of attention to issue. See “Planning & Financial Valuation Model for Sustainability Investments,” by James Arthur, “IFC 2011 Sustainability Exchange: Community Investment Tools to Drive Business Performance,” June 30, 2011. http://www.commdev.org/userfiles/files/2754_file_OT_FV_Tool_Sustainability_Exchange.pdf

⁹⁹⁵ “Stakeholder Mapping and Analysis, Political Risk Identification and Management (RIA),” Boutilier & Associates, “IFC Sustainability Summit: Dealing with Uncertainty: Addressing Sustainability Challenges in Fragile Situations,” June 20, 2013 (using such an approach in an illustrative exercise on stakeholder mapping and analysis to calculate a “social license to operate” score). <http://commdev.org/userfiles/ifc%20slides%202013-06-20.pdf> For a more detailed discussion of this approach see “Modelling and

Measuring the Social License to Operate: Fruits of a Dialogue Between Theory and Practice,” by Robert G. Boutilier and Ian Thomson. <http://sociallicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf> For a brief illustration of the method with regard to a hydroelectric project, see “Chacayes, The Power of Sharing Value,” PacifiHydro, “IFC Sustainability Summit: Dealing with Uncertainty: Addressing Sustainability Challenges in Fragile Situations,” International Finance Corporation, June 20, 2013. <http://commdev.org/userfiles/Presentacion%20IFC%20formato%2020%20Years%20VER%20FINAL.pdf>

⁹⁹⁶ Early in 2014 the IFC issued an RFP for its Financial Valuation Tool Phase 2. The goal was “to make natural resource and infrastructure clients more competitive and sustainable by supporting company strategies based on IFC’s unique financial valuation methodology. This will be achieved by developing the Financial Valuation Tool for Sustainability Strategies for the agribusiness, forestry and infrastructure sectors, and refining the existing extractives tool.” Toward that end the aim was to “increas[e] the number of entities with improved access to quantitative information to: develop effective strategies for local engagement and sustainable operations integrating social and political issues into capital investment decisions; to develop effective strategies for local engagement and sustainable operations; and have an overall stronger environment supporting sustainability and company-community cooperation.” “Financial Valuation Tool Phase 2, Summary of Advisory Services Project,” International Finance Corporation, March 5, 2014. <http://ifcext.ifc.org/IFCExt/spiwebsite1.nsf/DocsByUNIDForPrint/DAE783B0AC5C637585257C92007DEC61?opendocument>

⁹⁹⁷ “IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy: Progress Report on the First 18 Months of Application International Finance Corporation,” December 13, 2007, p. 13. <http://documents.worldbank.org/curated/en/2007/12/8804207/ifcs-policy-performance-standards-social-environment-sustainability-disclosure-policy-progress-report-first-18-months-application>

⁹⁹⁸ Id. note 3. The IFC 2013 annual report refers to a staff person at a grade level of “GE” as an “Analyst.” “IFC Annual Report 2013,” International Finance Corporation, p. 89. http://www.ifc.org/wps/wcm/connect/d020aa004112357a8975fffe5679ec46/AR2013_Full_Report.pdf?MOD=AJPERES BB budget appears to refer to “the administrative budget for [the World] Bank.” See “World Bank Program Budget,” World Bank Group Finances. <https://finances.worldbank.org/browse?category=Budget&q=bb&sortBy=relevance&utf8=%E2%9C%93>

⁹⁹⁹ “IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy: Progress Report on the First 18 Months of Application International Finance Corporation,” December 13, 2007, p. 13, note 3. <http://documents.worldbank.org/curated/en/2007/12/8804207/ifcs-policy-performance-standards-social-environment-sustainability-disclosure-policy-progress-report-first-18-months-application>

¹⁰⁰⁰ Id.

¹⁰⁰¹ Id. at 17. However, the study noted that “in real terms the cost of CES due diligence increased by almost 35 percent” both because of the extension of certain performance standards from Category A to Category B projects, but also the implementation of the then new “new quality assurance system (Q&A) and Environmental and Social Review Document (ESRD)” as well as “a general increase in cost of travel and includes specialists’ salaries adjustments.” Id. at 17-18.

¹⁰⁰² Id. at 18.

¹⁰⁰³ “Safeguards and Sustainability Policies in a Changing World, An Independent Evaluation of World Bank Group Experience,” Independent Evaluation Group, 2010, p. 74. http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards_eval.pdf

¹⁰⁰⁴ Id.

¹⁰⁰⁵ Id., note 5.

¹⁰⁰⁶ Id. Table 4.4, p. 75.

¹⁰⁰⁷ Id. at 75.

¹⁰⁰⁸ Id.

¹⁰⁰⁹ Id.

¹⁰¹⁰ “Biennial Report on Operations Evaluation, Assessing the Monitoring and Evaluation Systems of IFC and MIGA,” Independent Evaluation Group, 2013, p. 88. http://ieg.worldbank.org/Data/reports/broe_eval.pdf

¹⁰¹¹ Id.

¹⁰¹² Id. at 7.

¹⁰¹³ Id.

¹⁰¹⁴ “Safeguards and Sustainability Policies in a Changing World, An Independent Evaluation of World Bank Group Experience,” Independent Evaluation Group, 2010, p. xviii. http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards_eval.pdf

¹⁰¹⁵ Id. at 66.

¹⁰¹⁶ “IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy: Progress Report on the First 18 Months of Application,” International Finance Corporation, December 13, 2007, p. 14. <http://documents.worldbank.org/curated/en/2007/12/8804207/ifcs-policy-performance-standards-social-environment-sustainability-disclosure-policy-progress-report-first-18-months-application>

¹⁰¹⁷ Id. “

¹⁰¹⁸ Id. (reporting that “76% of clients indicated that IFC’s environmental and social expertise and inputs are primarily helpful, whereas 26% see these primarily as a requirement”; that the response “represented an improvement over the pre-PS survey; and that “[t]hese indications lead us to believe that the impacts on client costs are not and will not be detrimental to IFC’s business.”)

¹⁰¹⁹ “The Financial Sector Response, The Equator Principles,” DEG (citing the experience of HypoVereinsBank). <https://www.deginvest.de/DEG-deutsche-Dokumente/Unser-Angebot/F%C3%B6rderprogramme/EquatorPrinciples.pdf>

¹⁰²⁰ Id.

¹⁰²¹ Id. Of course, the cost would depend upon the precise nature and extent of the due diligence. It has been suggested that “[w]hile DFIs may have their developmental goals in mind (hence more easily willing to subscribe to and defend IFC PS), the main motivation for EP banks for strict E&S management is probably “reputation” (caused by projects like Rebecca hair products [which involved claims as to the use of forced prison labor] and the general tend[en]cy that banks are being attacked increasingly for their investments through NGOs like Banktrack). This means that their E&S due diligence rather focuses on reputational risks only and are less strict on other IFC PS issues.” Email from sustainable finance expert, January 28, 2014.

¹⁰²² Id.

¹⁰²³ “Managing Environmental and Social Risks, A Roadmap for National Development Banks in Latin America and the Caribbean,” by Gijs Nolet, Willem Vosmer, Matthijs de Bruijn, and Isabelle Braly-Cartillierm, Inter-American Development Bank, 2014, p.33. <http://publications.iadb.org/handle/11319/6437?locale-attribute=en>

¹⁰²⁴ Id.

¹⁰²⁵ Id.

¹⁰²⁶ Id.

¹⁰²⁷ Id. The financial institution “should ensure sufficient resources are available for training, an essential component of the system. A Tier 2 [institution] may allocate resources to the half-day training sessions of its Tier 1 intermediaries, covering logistics, material, travel, and per diem allowances. A Tier 1 [institution] may also need to allocate a travel and per diem budget.” Id.

Note, according to one description “Tier 1 loans are direct loans with some or all of the project obligor’s credit risk assumed by the NDB. In this case, the NDB acts like a commercial bank, extending credit directly to a project or a company. The long-term financing can be senior debt, that is, *pari passu* with other lenders, or subordinated debt, putting the NDB in a role of secondary creditor.” By contrast, “Tier 2 loans are loans by NDBs to LFI – typically commercial banks or other financial intermediaries – for on-lending. The NDBs take the credit risk of the [local LFI] directly, and the LFI assumes the credit risk of the project.” “The Role of National Development Banks in Catalyzing International Climate Finance,” by Diana Smallridge, et al, Inter-American Development Bank, March, 2013, p. 17. <http://publications.iadb.org/handle/11319/3478?locale-attribute=en>

¹⁰²⁸ “IFC proposes to establish the IFC Global Infrastructure Fund (the “GIF”), a \$1 billion private equity fund.” “IFC Global Infrastructure Fund, Summary of Proposed Investment, Project description,” “Project sponsor and major shareholders of project company,” and “Total project cost and amount and nature of IFC’s investment,” International Finance Corporation. <http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/0/b7c028cf106348b08525784f005b5299?OpenDocument&Click=>

¹⁰²⁹ “IFC Global Infrastructure Fund Completes \$1.2 Billion Fundraising,” International Finance Corporation,” October 8, 2013. <http://ifcext.ifc.org/IFCExt/pressroom/IFCPressRoom.nsf/0/0D9C0CD919A1B09F85257BFE00801AEC?OpenDocument>. There were European and Asian, but no United States pension funds who made investments. Telephone conversation with Viktor Kats, Deputy Head, Global infrastructure fund, November 12, 2013. According to an early report the GIF had “raised US\$500 million at first closing, of which US\$150 million has been committed by SOFAZ,” “Azerbaijan State Oil Fund commits US\$150 million to IFC Global Infrastructure Fund,” *InfraPPP*, April 2, 2013. <http://infraPPPworld.com/2013/04/azerbaijan-state-oil-fund-commits-us150-million-to-ifc-global-infrastructure-fund.html>

¹⁰³⁰ “Session 6 – Investments in Practice: From Broad Investment Styles to Practical Infrastructure Projects” 6th Global Pension & Savings Conference, April 2014, Slide 13.

http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Session6_KirstineDamkjaer_Pension2014.pdf

¹⁰³¹ “IFC Global Infrastructure Fund, Summary of Proposed Investment, Overview,” International Finance Corporation. <http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/0/b7c028cf106348b08525784f005b5299?OpenDocument&Click> According to one description, the GIF “will participate in infrastructure investments in sectors that comprise power, transportation, utilities, telecommunications, urban infrastructure and infrastructure services companies.” “Azerbaijan State Oil Fund commits US\$150 million to IFC Global Infrastructure Fund,” *InfraPPP*, April 2, 2013. <http://infraPPPworld.com/2013/04/azerbaijan-state-oil-fund-commits-us150-million-to-ifc-global-infrastructure-fund.html>

¹⁰³² “Session 6 – Investments in Practice: From Broad Investment Styles to Practical Infrastructure Projects,” 6th Global Pension & Savings Conference, April 2014, Slide 12.

http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Session6_KirstineDamkjaer_Pension2014.pdf

¹⁰³³ “IFC Global Infrastructure Fund, Summary of Proposed Investment, Anticipated Development Impact,” International Finance Corporation. <http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/0/b7c028cf106348b08525784f005b5299?OpenDocument&Click=>

¹⁰³⁴ “IFC Global Infrastructure Fund, Summary of Proposed Investment, IFC’s expected development contribution,” IFC. <http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/0/b7c028cf106348b08525784f005b5299?OpenDocument&Click=>

¹⁰³⁵ Id.

¹⁰³⁶ Id.

¹⁰³⁷ Id.

¹⁰³⁸ Id. In this regard note that new World Bank CEO, Ji-Yong Cai, a former partner at the investment bank Goldman Sachs, has stated that “The IFC should act more like an investment bank ‘in bringing solutions to our clients.’” “IFC Chief Intensifies infrastructure drive, court SWFs,” *LatinFinance*, April 23, 2013. <http://www.latinfinance.com/Article/3195969/IFC-chief-intensifies-infrastructure-drive-courts-SWFs.html#commentsBegin>

¹⁰³⁹ Telephone conversation with Viktor Kats, Deputy Head, Global infrastructure Fund, November 12, 2013.

¹⁰⁴⁰ Id.

¹⁰⁴¹ Id.

¹⁰⁴² “Session 6 – Investments in Practice: From Broad Investment Styles to Practical Infrastructure Projects” 6th Global Pension & Savings Conference, April 2014, Slide 11.

http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Session6_KirstineDamkjaer_Pension2014.pdf

¹⁰⁴³ Telephone conversation with Viktor Kats, Deputy Head, Global infrastructure Fund, November 12, 2013.

¹⁰⁴⁴ “Supplemental guidance relating to fiduciary responsibility in considering economically targeted investments,” 29 CFR 2509.08-1 (“[B]ecause every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.”) <http://www.law.cornell.edu/cfr/text/29/2509.08-1>

¹⁰⁴⁵ Id.

¹⁰⁴⁶ Id.

¹⁰⁴⁷ Arguably the GIF might “cherry-pick” among projects just those which are most expected to yield “market” returns commensurate with the needs of GIF investors. That would seem to presuppose in some measure that some among all projects might well produce such returns notwithstanding (and perhaps, in some, cases, by virtue of) need to for the projects being chosen to achieve development goals and satisfy the PS.

¹⁰⁴⁸ “Session 6 – Investments in Practice: From Broad Investment Styles to Practical Infrastructure Projects,” by Kirstine Damkjaer, Global Infrastructure Fund, IFC, 6th Global Pension & Savings Conference, April 2014, Slide 12. http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Session6_KirstineDamkjaer_Pension2014.pdf

¹⁰⁴⁹ Id., Slide 11.

¹⁰⁵⁰ "IFC Asset Management Company to Invest \$150 Million to Strengthen Colombia's Infrastructure," 4-Traders, August 5, 2013. [http://www.4-traders.com/news/IFC-International-Finance-Corporation-IFC-IFC-Asset-Management-Company-to-Invest-\\$150-Million-t-17165521/](http://www.4-traders.com/news/IFC-International-Finance-Corporation-IFC-IFC-Asset-Management-Company-to-Invest-$150-Million-t-17165521/) According to an IFC description of the project, "IFC will provide funding...using a flexible quasi-equity instrument that will provide better flexibility to the sponsors and debt holders." "Pacific Infrastructure, Summary of Investment Information, IFC's Expected Role and Additionality," International Finance Corporation. <https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/6b17f0c8861f3e2f85257af200568b49?opendocument>

¹⁰⁵¹ "IFC Asset Management Company to Invest \$150 Million to Strengthen Colombia's Infrastructure," 4-Traders, August 5, 2013. [http://www.4-traders.com/news/IFC-International-Finance-Corporation-IFC-IFC-Asset-Management-Company-to-Invest-\\$150-Million-t-17165521/](http://www.4-traders.com/news/IFC-International-Finance-Corporation-IFC-IFC-Asset-Management-Company-to-Invest-$150-Million-t-17165521/)

¹⁰⁵² "Pacific Infrastructure, Summary of Investment Information. Environmental & Social Categorization Rationale," IFC. <https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/6b17f0c8861f3e2f85257af200568b49?opendocument>

¹⁰⁵³ Pacific Rubiales Energy's conduct has been the subject of strong and ongoing criticism by some for numerous alleged human rights violations. See, for example, "Report: Hearing on the Canadian oil company Pacific Rubiales Energy," Projet Accompagnement Solidarité Colombie, August 2013. http://www.pasc.ca/sites/pasc.ca/files/u72/Colombia_Delegation_Report_Summer2013.pdf It is interesting (and perhaps even curious), though, that the previous summer Sustainalytics added Pacific Rubiales Energy to its Jantzi Social Index on the basis of its ranking "among the top 10 percent of the oil, gas, coal and consumable fuels peer group." "Jantzi Social Index Removes Enbridge Inc.; Adds Pacific Rubiales Energy Corp.," Sustainalytics, September 14, 2012. <http://www.sustainalytics.com/jantzi-social-index-removes-enbridge-inc-adds-pacific-rubiales-energy-corp>

¹⁰⁵⁴ "United States Position, IFC Proposed Investment - Pacific Infrastructure Ventures, Inc. (Colombia)," United States Treasury, May 8, 2013. <http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20-%20Colombia%20-%20Pacific%20Infrastructure%20Ventures%20-%20May%208%202013%20-%20Board%20Statement%20doc.pdf>

More particularly, the U.S. stated that :

"The United States agrees that because of the potentially significant environmental and social impacts of this investment, the project's Category A rating is appropriate. The United States welcomes the frank discussion of risks in the project document, including environmental and social risks connected with the construction of the terminal and pipeline, as well as the steps taken and proposed to mitigate these risks. In particular, the United States notes the steps taken by PI to ensure consent from the communities located near the terminal, consistent with IFC Performance Standard 7. The United States is also pleased to see the measures required by the IFC to strengthen PI's environmental and social risk management systems, PI's hiring of an Environmental and Social Advisory Consulting firm to monitor company compliance with the IFC Performance Standards, and the inclusion of a put option for IFC's investment in case PI fails to comply with its obligations under the investment.

Despite these mitigating measures, however, *the United States remains concerned about the substantial risks which are magnified because of the lack of an Environmental and Social Impact Assessment (ESIA) for the pipeline project*, the importance of the pipeline to deliver crude to the terminal, and the pipeline's routing across a key biodiversity area. While the United States understands that an alternative analysis for the pipeline's route has been completed and disclosed, that the drafting of the ESIA is underway, and that preliminary consultations with affected communities have been conducted, *there still appears to be a significant amount of uncertainty around the environmental and social risks involved with the pipeline and the work needed to properly address those risks*. Given these risks and pressures, the United States believes the IFC should have considered awaiting completion of the ESIA to ascertain a more complete understanding of risks prior to investment. The United States strongly agrees that it will be critical that IFC staff closely monitor the development of the pipeline to ensure compliance with IFC's Performance Standards going forward. The United States is particularly interested in seeing a robust, and timely, process for engaging the communities affected by the pipeline." Id. (italics added)

¹⁰⁵⁵ "Pacific Infrastructure, Summary of Investment Information," IFC. <https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/6b17f0c8861f3e2f85257af200568b49?opendocument>

¹⁰⁵⁶ According to the IFC, "[s]ponsors of the project are Blue Pacific Assets (BPA) and Pacific Rubiales Energy (PRE). The current shareholding structure of Pacific Infrastructure is: BPA (21.2%), PRE (49.4%) and other institutional investors (29.4%). Pacific Rubiales Energy is the largest independent oil and gas exploration and production company in Colombia. PRE is a public company listed on the Toronto, Colombian and Brazilian stock exchanges, with an average market cap above \$8 billion. Blue Pacific Assets is a privately owned investment vehicle." "Pacific Infrastructure, Summary of Investment Information. Project Sponsor and Major Shareholders of Project Company," International Finance Corporation.

<https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/6b17f0c8861f3e2f85257af200568b49?opendocument> Note that Pacific Infrastructure "is a newly formed Holding company which will own several companies in Colombia dedicated to logistics and infrastructure for the Oil & Gas Sector. The two initial project companies are: Puerto Bahia S.A. ...and Olecar" which will build the terminal and construct the pipeline, respectively. "Pacific Infrastructure, Summary of Investment Information. Project Description," International Finance Corporation.

<https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/6b17f0c8861f3e2f85257af200568b49?opendocument> Note further that "Pacific Infrastructure is expected to own 100% of Puerto Bahia and 50% of Olecar. Ecopetrol has been invited to participate as shareholder of the remaining 50% in Olecar. The company was created with the specific purpose of developing these projects, and invest in any other infrastructure projects which can be developed by the Group." Id.

¹⁰⁵⁷ "United States Position, IFC Proposed Investment - Pacific Infrastructure Ventures, Inc. (Colombia)," United States Treasury, May 8, 2013. <http://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20-%20Colombia%20-%20Pacific%20Infrastructure%20Ventures%20-%20May%208%202013%20-%20Board%20Statement%20doc.pdf>

¹⁰⁵⁸ "IFC global fund poised to invest in Brazilian telco," *Infrastructure Journal and Project Finance Magazine*, October 22, 2013. <http://www.ijonline.com/Articles/89747/Preview>

¹⁰⁵⁹ “Crece juego de ISA en Brasil,” Empresas, October 22, 2013 (English translation from the Portuguese). <http://www.dinero.com/empresas/articulo/golpe-bajo-para-isa-brasil/159990>

¹⁰⁶⁰ “Project sponsor and major shareholders of project company, Internexa Brazil, Summary of Proposed Investment,” International Finance Corporation.

<http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/DocsByUNIDForPrint/7DA2012AF7C14CB685257B59005F9750?opendocument> “ITX is a connectivity infrastructure and telecommunication solution company in the region. With over 22,000kms, ITX manages the largest terrestrial telecommunications network in South America, providing connectivity to Venezuela, Colombia, Ecuador, Peru, Chile, Argentina, Brazil and soon, Central America. Its infrastructure is mainly supported on electricity transmission networks, providing high service availability, strength and reliability. Aside from the terrestrial networks, which are complemented by access to 7 heads of submarine cables, ITX is also a partner and landing-party with the ARCOS I-CFX cable.” Id.

¹⁰⁶¹ See “IHS Holding Ltd. secures US\$490 million to fund continued expansion across Africa,” HIS, press release, March 3, 2014 (referring to the company having “secured US\$490 million of equity and debt” with “[s]olid support from existing investors was combined with strong participation from Goldman Sachs, the IFC Global Infrastructure Fund and African Infrastructure Investment Managers.”) http://www.ihstowers.com/media/160038/ihf_fundraising_press_release_03032014.pdf However, the press release does refer to “senior debt...being provided by Standard Chartered Bank for expansion of IHS’ business in Zambia” with “[f]unding [to] be used for a Private Equity-backed IHS Holding Secures US\$490 Million in Equity and Debt Financing (Sub-Saharan Africa),” acquisitions and investment in new telecommunications infrastructure.” Id. According to another report, “[i]nvestors include existing shareholders pan-African fund manager Emerging Capital Partners, International Finance Corporation and Euronext Paris-listed telecom company Wendel. Also participating in the transaction were new investors: the IFC Global Infrastructure Fund (managed by IFC Asset Management Company), Goldman Sachs, and African Infrastructure Investment Managers (a joint venture between Macquarie Group and Old Mutual Investment Group). Senior debt is being provided by Standard Chartered Bank.” “Private Equity-backed IHS Holding Secures US\$490 Million in Equity and Debt Financing (Sub-Saharan Africa), Emerging Markets,” Private Equity Association, Mar 4, 2014. <http://empea.org/newsroom/industry-news/private-equity-backed-ihf-holding-secures-us490-million-in-equity-and-debt/>

¹⁰⁶² “Annual Report 2013,” International Finance Corporation.

http://www.ifc.org/wps/wcm/connect/cfad1700414936dab4cdb79e78015671/AR2013_Full_Report_Both_Volumes.pdf?MOD=AJPE&RES

¹⁰⁶³ “IHS Rwanda, Environmental & Social Review Summary,” International Finance Corporation.

<http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/3b5ce815cb9dd1fd85257c9f004f8ea3?opendocument>

¹⁰⁶⁴ “Environmental and Social Categorization and Rationale, IHS Rwanda, Environmental & Social Review Summary,” International Finance Corporation.

<http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/3b5ce815cb9dd1fd85257c9f004f8ea3?opendocument>

¹⁰⁶⁵ Empresarial, DOSP, March 19, 2014 (English translation from the Portuguese), p. 51.

<http://www.jusbrasil.com.br/diarios/67801886/dosp-empresarial-19-03-2014-pg-51>

¹⁰⁶⁶ “AEAGA Equity, Environmental & Social Review Summary,” International Finance Corporation.

<http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/c9aba76ed1df1938852571c400727d66/90b8903a0656becb85257c3000685e47?opendocument>

¹⁰⁶⁷ Id.

¹⁰⁶⁸ Id.

¹⁰⁶⁹ “2013 Annual Report,” Compliance Advisor Ombudsman,” p. 27. http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf

¹⁰⁷⁰ “IFC’s Environmental and Social Lessons Learned, CSO Session,” Presentation by Morgan Landy, Director, Environment, Social and Governance Department, April 9, 2014, International Finance Corporation.

http://www.google.com/url?url=http://www.brettonwoodsproject.org/wp-content/uploads/2014/04/IFC_Presentation_CS0-Session-April-9-FINAL.pptx&rct=j&frm=1&q=&esrc=s&sa=U&ei=4F_iU_DSKpahYATbqYHwAQ&ved=0CBQQFjAA&usq=AFQjCNEOp_W_gyMcCtSnVONUZW6mjCjCHQ

¹⁰⁷¹ “2013 Annual Report,” Compliance Advisor Ombudsman, p. 27. http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf

¹⁰⁷² Id.

¹⁰⁷³ Id.

¹⁰⁷⁴ Id. at 31

¹⁰⁷⁵ Id. at 32.

¹⁰⁷⁶ Id. at 33.

¹⁰⁷⁷ Id. at 38.

¹⁰⁷⁸ Id. at 40.

¹⁰⁷⁹ Id. at 53.

¹⁰⁸⁰ Id. at 56.

¹⁰⁸¹ Id. at 59

¹⁰⁸² Id. at 60.

¹⁰⁸³ Id. at 70 and 71.

¹⁰⁸⁴ “Our Rights On Site, Promoting Decent Work Through Procurement, Building and Woodworkers International,” by Fiona Murie, Decent Work & Labour Standards Forum, March 17, 2010, Slide 3. <http://www.decentwork.org.uk/wp-content/uploads/Building-Wood-Workers-International-presentation.pdf>

¹⁰⁸⁵ Id.

¹⁰⁸⁶ Id. Slide 5.

¹⁰⁸⁷ “Decent work and development finance: The case of the ERBD,” by Aike Schmidt, Decent Work & Labour Standards Forum, March 17, 2010, Slide 10. <http://www.decentwork.org.uk/wp-content/uploads/European-Bank-of-Reconstruction-and-Development-presentation.pdf>

¹⁰⁸⁸ “Building standards for workers,” by Stuart Bell, Ergon, Posted on February 18, 2014.

http://www.ergonassociates.net/?p=900&option=com_wordpress&Itemid=161

¹⁰⁸⁹ Id. He adds that “the most common on-site challenge is usually how to cascade the standards signed up to by clients or main contractors down to the sub-contractors that are actually doing the jobs. Not only are they at one or two steps removed from the main contractors, but often they have fewer resources to allocate to maintaining basic standards such for training or the provision of personal protective equipment or health and safety awareness. They may be up against strict deadlines and face penalties for late completion. In many emerging countries, continuity and reliability of labour is a problem as sub-contractors rely on unskilled labourers.” Id.

¹⁰⁹⁰ “Applying Labour Standards in the Workplace,” by Abfer Frugte, FMO, “Labour Standards in Development Finance” Conference, Washington DC, April 18.2006, Slide 5. <http://carnegieendowment.org/2006/04/18/labor-standards-in-development-finance-recent-breakthroughs/1uij>

¹⁰⁹¹ “Equator Principles III,” Equator Principles, p. 7. <http://www.equator-principles.com/index.php/ep3/ep3>

¹⁰⁹² The promotion of respect for workers’ rights in the banking sector: Current practice and future prospects,” by Emily Sims, International Labor Organization, Employment Working Paper No. 26, 2009, p. 22. http://www.ilo.org/employment/Whatwedo/Publications/working-papers/WCMS_125545/lang--en/index.htm

¹⁰⁹³ “The Promotion of Respect for Workers’ Rights in the Banking Sector: Current Practice and Future Prospects,” by Emily Sims, OECD Global Forum on International Investment, March 27-28, 2008, p.19. <http://www.oecd.org/investment/globalforum/40728919.pdf> In addition, it could help to provide reliable information on labour issues by “making available in simplified form the assessments of the Committee of Experts on the Application of Ratified Conventions and Recommendations of law and practice in countries which have ratified international labour conventions, and the information it has concerning labour legislation.” Id.

¹⁰⁹⁴ Id. at 18-19. Indeed, at that time “[t]he International Labour Conference, the highest decision-making body of the ILO, has called on the Office to work more closely with international and regional financial institutions to help promote sustainable enterprise development.” Id.

¹⁰⁹⁵ Id.

¹⁰⁹⁶ Id.

¹⁰⁹⁷ “Watchdogs have emerged such as Bank Track which could help prod EPFIs to become more active on labour issues” Id.

¹⁰⁹⁸ Note as well that only some DFIs have adopted the equivalent of PS2. See, for example, “The African Development Bank’s new labour safeguard, by Peter Bakvis, *Equal Times*, January 10, 2014. <http://www.equaltimes.org/the-african-development-bank-s-new#.U5XOeHbnfTo>

¹⁰⁹⁹ “Safeguard Policies Review and Update: Consultation Phase 1, Feedback Summary, CONSULTATIONS PHASE 1 – Oct 2012-May 2013,” p. 30.

¹¹⁰⁰ “World Bank’s Safeguard Policies Review and Update,” Expert Focus Group on the Emerging Area, Labor and Occupational Health and Safety, Jakarta, Indonesia, March 23, 2013, p. 3. http://umacau-datacenter.com:4998/worldbank/20130711/web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0_cotentMDK:23275156~pagePK:64168445~piPK:64168309~theSitePK:584435_00.htm

¹¹⁰¹ For example, they remarked that “[o]ccupational health and safety need to be addressed more comprehensively than it currently is in PS2. At this time, PS2 focuses on employers and does not allow room for participation and the concept of voice of workers through health and safety committees. PS2 also does not include the good HIV/AIDS prevention language of the Bank’s standard bidding document. Safety and health assessments should be mandated (though the timing of such an assessment is different from environmental assessments, which also do not promote worker participation). Occupational safety and health issues should be addressed throughout the entire duration of any project.” Id. at 3. For other comments of this sort see, for example, “Safeguard Policies Review and Update: Consultation Phase 1 Feedback Summary, Meetings, Expert Focus Groups, Paper Submissions, Dialogue with Indigenous Peoples, and Consultations with Project-Affected Communities,” World Bank, March 2014, pp. 30, 106, 119, and 155-60. <https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> Also, it was noted that “Global Unions had recommended scope of application to contract workers; first revised version actually included additional restrictions, which were removed in final version,” “Status of multilateral development banks’ labour standards requirements,” by Peter Bakvis and Francesca Ricciardone, “Workshop on Labour Standards in MDB Lending, Geneva, 2 May 2012, Slide 11. See also “Report of Meeting on Multilateral Banks and Core Labour Standards, Including Campaign for a Labour Safeguard,” CGU General Secretaries Meeting, June 8, June 2012 (citing “[s]uggestions for future improvements to the PS2 language that Global Unions should seek could include stronger language on contract workers, definition of “workers organizations” as primarily unions (ILO Convention 135) and clarification that IFC’s incorporation of ILO CLS does not excuse countries from their obligations to uphold CLS in their national legal framework), p. 2 http://www.global-unions.org/IMG/pdf/06-multilateral_banks_cls.pdf

¹¹⁰² “World Bank’s Safeguard Policies Review and Update,” Expert Focus Group on the Emerging Area, Labor and Occupational Health and Safety, Jakarta, Indonesia, March 23, 2013, p. 2. http://umacau-datacenter.com:4998/worldbank/20130711/web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0_cotentMDK:23275156~pagePK:64168445~piPK:64168309~theSitePK:584435_00.htm

¹¹⁰³ For example, in the case of the IFC, “[a]fter the adoption of PS 2 in 2006, the IFC hired labour experts, created a Labour Advisory Group, trained its staff and prepared a number of guides and good practice notes to advise both IFC staff and client companies on implementing its labour standards requirements. Global Unions and other interested parties were consulted on the content of these instruments, as they were during the design of PS 2 and its accompanying guidance notes.” “Core Labour Standards And International Organizations: What Inroads Has Labour Made?” by Peter Bakvis and Molly McCoy, Friedrich-Ebert-Stiftung, Briefing Papers No. 6, 2008, p. 6. http://isslerhall.org/drupal/sites/default/files/C5_Bakvis_McCoy_Core%20Labour%20Standards%20fes-2008.pdf

¹¹⁰⁴ “2013 Annual Report,” Compliance Advisor Ombudsman,” pp. 27-28. http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf

¹¹⁰⁵ Id.

¹¹⁰⁶ Id.

¹¹⁰⁷ “IFC’s Environmental & Social Lessons Learned,” Technical Briefing for the Board, April 4, 2014, Slide 28. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

¹¹⁰⁸ In a presentation several years ago a Social Specialist for FMO referred to “labor risk categories” for Category A and B+ projects as follows:

- “Large infrastructure works or ‘Greenfield’ [projects]
 - *construction phase/legal relationship with contractors*
- “Primary sector (agriculture, extractive industries), with large numbers of unskilled/temporary migrant workers
- “Labor-intensive industries, especially those situated in export processing zones or high risk sectors/countries
- Hazardous working conditions (physically demanding or risky work, handling of toxins, chemicals etc.)
- “large-scale retrenchment, e.g. due to privatization.”

“FMO Social Policy & Management System,” Aime Frugte, FMO, “Labor Standards in Development Finance Conference,” Washington, DC, April 18, 2006, Slide 20. <http://carnegieendowment.org/2006/04/18/labor-standards-in-development-finance-recent-breakthroughs/1ujq> In a number of respects these examples are similar to some of the instances cited by the CAO and described in the main text.

¹¹⁰⁹ “IFC’s Environmental & Social Lessons Learned, Technical Briefing for the Board,” International Finance Corporation, April 4, 2014, Slide 26. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

¹¹¹⁰ Id.

¹¹¹¹ “Workers’ rights in development loans: Experience with IFC’s labour standards requirements,” by Peter Bakvis, Director, ITUC/Global Unions -Washington Office, Decent Work & Labour Standards Forum, London, March 17, 2010, Slide 18. <http://www.decentwork.org.uk/wp-content/uploads/ITUC-Global-Unions-presentation.pdf>

¹¹¹² Id. Slide 16.

¹¹¹³ “2013 Annual Report,” Compliance Advisor Ombudsman,” pp. 27-28. http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf

¹¹¹⁴ “Status of multilateral development banks’ labour standards requirements,” by Peter Bakvis and Francesca Ricciardone, “Workshop on Labour Standards in MDB Lending, Geneva, 2 May 2012, Slide 18.

¹¹¹⁵ Id.

¹¹¹⁶ “Labour Standards in World Bank Group Lending Lessons Learned and Next Steps,” International Trade Union Confederation, November, 2011 p. 30. <http://www.ituc-csi.org/labour-standards-in-world-bank>

¹¹¹⁷ “Status of multilateral development banks’ labour standards requirements,” by Peter Bakvis and Francesca Ricciardone, “Workshop on Labour Standards in MDB Lending,” Geneva, May 2, 2012, Slide 18. That is, the IFC does not directly monitor subprojects though as discussed in this paper there has been pressure for something closer to that and some modest steps by the IFC in that general direction.

¹¹¹⁸ “Labour Standards in World Bank Group Lending Lessons Learned and Next Steps,” International Trade Union Confederation, November, 2011 p. 13. <http://www.ituc-csi.org/labour-standards-in-world-bank>

¹¹¹⁹ Id.

¹¹²⁰ Id.

¹¹²¹ “2013 Annual Report,” Compliance Advisor Ombudsman,” p. 27. http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf

¹¹²² Id. at 27-28.

¹¹²³ “Summary Note, World Bank’s Safeguard Policies Review and Update, Expert Focus Group on the Emerging Area, Labor and Occupational Health and Safety,” Jakarta, Indonesia, March 23, 2013, p. 2. <http://umacau-datacenter.com:4998/worldbank/20130711/web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,contentMDK:23275156~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>

¹¹²⁴ Id.

¹¹²⁵ “Labour Standards in World Bank Group Lending Lessons Learned and Next Steps,” International Trade Union Confederation, 2011, pp. 12-13. http://www.ituc-csi.org/IMG/pdf/Labour_StandardsEN_2011_web.pdf This report, in discussing specific examples of such complaints, stated that “[t]hey show that while some complaints were responded to quickly and actions were taken towards resolving the problems identified, in other cases responses were unduly long and no substantive actions were taken to correct serious problems. The latter situations seemed to occur more frequently with recalcitrant employers operating in national contexts of recurrent violations of workers’ rights.” Id.

¹¹²⁶ “Status of multilateral development banks’ labour standards requirements,” by Peter Bakvis and Francesca Ricciardone, Workshop on Labour Standards in MDB Lending, Geneva, 2 May 2012, Slide 18.

¹¹²⁷ “Labour Standards in World Bank Group Lending Lessons Learned and Next Steps,” International Trade Union Confederation, November, 2011 p. 29. <http://www.ituc-csi.org/labour-standards-in-world-bank> For some early experience with application of PS2, see “Promoting Core Labour Standards through the Performance Standards of the IFC: The Case of Turkey,” International Labor Organization, 2009. <http://www.gurn.info/en/discussion-papers/no8-09-promoting-core-labour-standards-through-the-performance-standards-of-the-ifc-the-case-of-turkey>

¹¹²⁸ “Labour Standards in World Bank Group, Lending Lessons Learned and Next Steps,” International Trade Union Confederation, November, 2011 p. 29. <http://www.ituc-csi.org/labour-standards-in-world-bank>

¹¹²⁹ Id. With regard to the sharing of information it was recommended that (1) “Investigations of complaints from trade unions and others must include direct communication with the complainant and the results of the investigation must be shared with the complainant”; (2) “Action plans for resolving cases of non-compliance should be shared with the complainant (via direct communication from IFC, the IFC website, and the client company) and include explicit timelines for specific measures to be taken”; and (3) “Where reports on dialogue with the union are required, these should be shared with the union for verification.” Id. at 30.

¹¹³⁰ Id.

¹¹³¹ Id. "Information-gathering and monitoring by IFC on fulfilment of PS 2 was initially weak; improvements made on monitoring but reluctance to confront recalcitrant employers." "Status of multilateral development banks' labour standards requirements," by Peter Bakvis and Francesca Ricciardone, "Workshop on Labour Standards in MDB Lending, Geneva, 2 May 2012, Slide 18. See also "Summary Note, World Bank's Safeguard Policies Review and Update, Expert Focus Group on the Emerging Area, Labor and Occupational Health and Safety," Jakarta, Indonesia, March 23, 2013 ("Directions for implementation and strategies to ensure compliance need to be in place,"), p. 2. <http://umacau-datacenter.com:4998/worldbank/20130711/web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0..contentMDK:23275156~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>

¹¹³² "IFC's Environmental & Social Lessons Learned," Technical Briefing for the Board, April 4, 2014, Slide 26. http://www.ifc.org/wps/wcm/connect/557c4180438e1ed48f72bf869243d457/IFC_EnvironmentalSocialLessonsLearned-042014.pdf?MOD=AJPERES

¹¹³³ Id., Slide 27.

¹¹³⁴ "Better Work Services," Better Work. http://betterwork.com/global/?page_id=331 "Stronger compliance with labour standards improves workers' livelihoods, promotes decent work and unlocks business opportunities to facilitate job creation, while strengthening a country's industry competitiveness in the global supply chain." Id.

¹¹³⁵ Id. In the second half of 2012, Better Work was to offer "an alternative assessment/advisory model, which will be available to a small group of higher-achieving factories. Following a year of traditional Better Work assessment and advisory services, factories that demonstrate relatively high compliance, a focus on management systems and effective worker-management communications may transition to the next generation of Better Work services, which focus on capacity building for credible self-assessments, sharing good practices with other factories and accountability for compliance improvements." Id.

¹¹³⁶ See for example, "Better Work or 'Ethical Fix'? Lessons from Cambodia's Apparel Industry," by David Arnold, global Labour Column, Edited by Corporate Strategy and Industrial Development, School of Economics and Business Sciences (SEBS), WITS University, South Africa. <http://column.global-labour-university.org/2013/11/better-work-or-ethical-fix-lessons-from.html>

¹¹³⁷ "Decent work and development finance: The case of the ERBD," by Aike Schmidt, Decent Work & Labour Standards Forum, March 17, 2010, Slide 9. <http://www.decentwork.org.uk/wp-content/uploads/European-Bank-of-Reconstruction-and-Development-presentation.pdf>

¹¹³⁸ Id. Slide 10.

¹¹³⁹ Id. Slide 12.

¹¹⁴⁰ Id. Slide 13.

¹¹⁴¹ Id.

¹¹⁴² Id.

¹¹⁴³ Id.

¹¹⁴⁴ Id. Slide 17.

¹¹⁴⁵ See "Initiative for Responsible Mining Assurance," <http://www.responsiblemining.net/>

¹¹⁴⁶ "Standard for Responsible Mining," Initiative for Responsible Mining Assurance. <http://www.responsiblemining.net/irma-standard/>

¹¹⁴⁷ "PGGM is a cooperative that is responsible for managing pension schemes. PGGM is founded by employers and employees in the different sectors in health care and social services; the cooperative board consists of paritarian representatives. Coming from this history PGGM's largest client is the Dutch Pension Fund for the Healthcare and Welfare sector (PFZW). As a pension services provider, PGGM is responsible for pension administration and asset management for 5 Dutch pension funds. Furthermore PGGM Provides managerial and policy support for the Board of Trustees of the pension funds. On behalf of its clients PGGM takes care of the day-to-day affairs for the pensions of about 2.5 million people and have over €136 billion assets under management." "European Commission Green Paper Long-Term Financing of the European Economy," PGGM and PFZW, p. 2. http://ec.europa.eu/internal_market/consultations/2013/long-term-financing/docs/contributions/registered-organisations/pfzw-and-pggm_en.pdf "Who We Are, Our clients," PGGM. <http://www.pggm.nl/english/who-we-are/Pages/Our-clients.aspx>

¹¹⁴⁸ "An INSIGHT into Pensioenfondsen Zorg en Welzijn," PZWF. <https://www.pfzw.nl/Documents/About-us/an-insight-into-pensioenfondsen-zorg-en-welzijn.pdf>

¹¹⁴⁹ "Since 1985 the pension fund has applied criteria whereby it does not invest in certain companies. Government bonds of countries on which United Nations sanctions have been imposed are also excluded." "Responsible Investments," PFZW. <https://www.pfzw.nl/about-us/Investments/Paginas/Responsible-investments.aspx>

¹¹⁵⁰ "VBDO Profile 2012: Pensioenfondsen Zorg en Welzijn," Vereniging van Beleggers voor Duurzame Ontwikkeling (Dutch Association of Investors for Sustainable Development).

¹¹⁵¹ "PGGM Responsible Investment policy for Infrastructure," PGGM Vermogensbeheer BV, October 4, 2012, p. 2. <https://www.pggm.nl/wat-doen-we/Documents/Responsible%20Investment%20policy%20for%20Infrastructure.pdf>

¹¹⁵² Id.

¹¹⁵³ Id.

¹¹⁵⁴ Id.

¹¹⁵⁵ Id. at 4.

¹¹⁵⁶ Id. (italics added) at 3.

¹¹⁵⁷ "PGGM Responsible Investment policy for Infrastructure," PGGM Vermogensbeheer BV, October 4, 2012 (italics added), p. 3. <https://www.pggm.nl/wat-doen-we/Documents/Responsible%20Investment%20policy%20for%20Infrastructure.pdf>

¹¹⁵⁸ "PGGM Investments Exclusions Policy, Revised version 2010," Adopted by CIO PGGM Investments B.V., January 14, 2010, p. 1. <https://pggm.nl/english/what-we-do/Documents/Exclusions%20Policy.pdf> PFZW states that "since 1985 the pension fund has applied criteria whereby it does not invest in certain companies. For example, companies producing controversial weapons are excluded. "These are weapons of mass destruction, such as nuclear weapons, cluster bombs and landmines. Companies are also excluded if they infringe human rights and do not change their behaviour. "Government bonds of countries on which United Nations sanctions have been imposed are also excluded. These cases concern particularly human rights issues and weapons." "Exclusion of companies and government bonds," PFZW. <https://www.pfzw.nl/about-us/Investments/Paginas/Exclusion-of-companies-and-government-bonds.aspx>

¹¹⁵⁹ "PGGM Investments Exclusions Policy, Revised version 2010," Adopted by CIO PGGM Investments B.V., January 14, 2010, p. 1. <https://pggm.nl/english/what-we-do/Documents/Exclusions%20Policy.pdf>

¹¹⁶⁰ Id.

¹¹⁶¹ Id. at 3.

¹¹⁶² Id. at 4. More specifically PGGM refers to three risk categories:

High: “Activities with potential significant adverse environmental or social impacts which are diverse, irreversible or unprecedented, or with significant risks for business integrity/governance issues.”

Medium: “Activities with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures, or with risks for business integrity/governance issues that are of concern.”

Low: “Activities with minimal or no adverse environmental or social impacts, e.g. professional service companies, education or health projects with no construction, technical assistance, institutional development, human resource projects, or with low risks for business integrity/governance issues.” Id.

¹¹⁶³ Id.

¹¹⁶⁴ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 24, 2014.

¹¹⁶⁵ Id.

¹¹⁶⁶ Telephone call with Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 5, 2014

¹¹⁶⁷ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 24, 2014 (“The far majority are in developed markets. I would say 95%.”)

¹¹⁶⁸ Id.

¹¹⁶⁹ Id.

¹¹⁷⁰ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 28, 2014.

¹¹⁷¹ Telephone call with Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 5, 2014. He emphasized the important training is “on the job.” Id.

¹¹⁷² Id.

¹¹⁷³ Id.

¹¹⁷⁴ Emails from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 24 and March 27, 2014 and telephone call with Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 5, 2014

¹¹⁷⁵ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 27, 2014. “We haven’t done any in developed countries, so not sure if those would be cheaper.” Id.

¹¹⁷⁶ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 24, 2014.

¹¹⁷⁷ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 27, 2014. “We haven’t done any in developed countries, so not sure if those would be cheaper.” Id.

¹¹⁷⁸ Id. “We haven’t done any in developed countries, so not sure if those would be cheaper.” Id.

¹¹⁷⁹ Id.

¹¹⁸⁰ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 28, 2014.

¹¹⁸¹ Id.

¹¹⁸² Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, July 8, 2014

¹¹⁸³ Id.

¹¹⁸⁴ Id.

¹¹⁸⁵ Email from Tim van der Weide, Advisor Responsible Investment, Responsible Investment, PGGM, March 28, 2014.

¹¹⁸⁶ There are others which are important for which we have neither space nor time. For example, the main text suggests that the matter of the need for engagement is intertwined with important but often difficult issues of disclosure which pension funds need to have addressed. In our view, the default approach to those issues should be one of timely transparency.

Almost by definition taking cognizance of environmental and social considerations implicates the import for the lives and/or livelihoods of people working at, living in communities near, or residing in communities linked in other ways to the infrastructure-related enterprises which are the subject of proposed projects/subprojects. As such and at first blush, it would stand to reason that people should be alerted to the adverse (as well as such positive) consequences the project/subproject might have for them. In certain countries substantial means and mechanisms for meaningfully and effectively doing so are a matter of law; in others they may be strong on paper but weak in practice; in yet others, perhaps non-existent. In the latter cases the IFC PS (or similar standards) and the practices for implementing them in some measure stand their stead. It is in precisely such cases that the need for timely and meaningful disclosure is great.

In part that rationale for such disclosure is normative in character: it is in itself what is “right” or proper to do. Such a stand would be at least for certain funds in certain ways not be “off limits”: the exclusion lists adopted by IFC and others DFIs (and PGGM/PFW among pension funds) and others would seem to be normative in character. But even absent that rationale there is warrant, as we have seen, for meaningful disclosure for instrumental reasons: in many circumstances the voices of those individuals or communities (adversely) affected are likely to be heard at some point in the project cycle, and the later in that cycle that they are heard the more problematic they may be for the project/sub-project. And to some degree, the engagement to which disclosure gives rise may not only avert problems but also perhaps as well result in more positive project outcomes, financial and otherwise.

On this view, then, the default approach to disclosure should be that it be full and early/timely disclosure. This would suggest that pension funds make/require client disclosure beyond what the IFC currently does (and certainly not limit themselves to the minimal disclosure requirements of the EP). But what precisely the metes and bounds of such disclosure in light of pension fund norms and constraints (as compared to those of the IFC and other DFIs and EPFIs) needs to be the subject of another discussion.

¹¹⁸⁷ “Equator Principles III,” Equator Principles, p. 21. http://www.equator-principles.com/resources/equator_principles_III.pdf

¹¹⁸⁸ See Policy.

¹¹⁸⁹ See Manual.

¹¹⁹⁰ Certain of the materials might be adapted for trustees and perhaps even pension members.

¹¹⁹¹ See *Bergset* (taking note of bank employees who “reject clients due to unsustainable business practice, but state financial insufficiencies as the official reason to colleagues” and attributing that to “the perception that the consideration of sustainability issues in the credit decision, resulting in serious consequences for the (potential) clients, is less legitimate than the consideration of the client’s financial situation.”) at 81.

¹¹⁹² “For example, as discussed above, given the importance of categorization to whether a project (or FI) arranged by a project financier is approved and on terms makes designations loom large. BNP Paribas reports that its CIB Corporate Responsibility Team, independent of project finance teams, provides, among other things “a second pair of eyes to review [any] proposed categorization.” More generally it is said to have “the ability to challenge or review the EP implementation of any project.” Reporting on Equator Principles Implementation, for the year 2010,” June, 2011, MBP Paribas, p. 3. <http://media-cms.bnpparibas.com/file/95/9/equator-principles-reporting-2009.12959.pdf>

¹¹⁹³ In this connection see *Bergset* at 81-82.

¹¹⁹⁴ One straightforward way to give more texture to the categorization would be to have project ranked numerically, say 1 to 30, with those in the groups 1 through 10, 11 through 20, and 21 through 30 being associated with what are labeled Categories A, B, and C, respectively. The numerical scale would reflect the reality that there projects understood in terms of potential adverse impacts and the possibilities for averting or mitigating are situated on a continuum. More particularly, the number associated with a project would reflect a numerical translation in aggregate terms of the aspects of the project captured by 1 through 5. At the same time, linking a project’s location within a segment of that continuum with one or another of the categories as currently used would allow for the same kind (if not the identical) connection between the (letter) category and different requirements for the execution of projects by sponsors.

¹¹⁹⁵ See *supra* p. 33 with regard to the IFC *Interpretation Note on Categorization* and p. 36-37 with regard to the OPIC risk characterization matrix.

¹¹⁹⁶ See APPENDIX C. ILLUSTRATIVE LISTS OF CATEGORY A PROJECTS, pp. 159-163.

¹¹⁹⁷ “The Equator Principles,” Equator Principles, June 2013, p. 5. http://www.equator-principles.com/resources/equator_principles_III.pdf See “Exhibit II: Illustrative List of Potential Environmental and Social Issues to be Addressed in the Environmental and Social Assessment Documentation.” *Id.* at 20.

¹¹⁹⁸ However, this function would need to be done in way which is consistent with the kind of protocol referred to above which would be employed to assess projects *after* initial categorization.

¹¹⁹⁹ “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 6.

¹²⁰⁰ “Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009,” Manual at 3.

¹²⁰¹ In this in connection, note that there is a kind of circularity implicit in the approach to categorization by the IFC and others we have described. Under that approach, the project /subproject category is tied to the amount and kind of information about the project’s environmental and social impacts) which must reported and the scrutiny with which it is assessed. Certainly, if the information as assessed yields a very different view as to project impacts, a different categorization would be required and going forward there would need to be requirements for sponsors/FIs commensurate with that.

¹²⁰² “Key Terms and Acronyms, Version 8, May 31, 2012,” Manual at 1 and 10.

¹²⁰³ For example, in the Note, the IFC distinguishes between impacts framed in terms of “E&S risk” and the other than environmental and social import of a subproject: “All FIs are exposed to some level of E&S risk through the activities of their borrowers/investees, which can represent a financial, legal, and/or reputational risk to the FI.” FI Note at 1. “The E&S risks associated with the internal operations of an FI are typically limited to managing aspects related to labor and working conditions of employees, as well as ensuring the safety of employees and visitors within its premises.” *Id.* It adds that “[t]he E&S risk associated with an FI’s lending/investment activities depends on factors such as the specific E&S circumstances associated with a borrower’s/investee’s operations, the sector, and the geographic context, among others. How an FI addresses these risks will depend on the level of perceived risk, the type of financing undertaken and the amount of leverage that the FI has in obtaining mitigation measures from its borrowers/investees. When an FI provides project or long-term corporate finance, it is more exposed to the underlying E&S risks of the borrowers/investees’ operations but also has the opportunity to manage these risks at the transaction level.” *Id.* at 1-2.

¹²⁰⁴ “IFC’s analysis and ongoing performance tracking needs to separate clearly an investment’s underlying E&S risk factors; the company’s commitment, its capacity, and IFC’s influence and leverage. For each investment, the underlying operational E&S risk should be evaluated against the assessed commitment and capacity of the client company, as well as against IFC’s leverage to ensure adequate risk mitigation is implemented in practice. Where IFC’s leverage is limited, such as can often be the case in equity investments or indirect investments, factors such as client company commitment and capacity need to be evaluated carefully.” “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information,” The Office of the Compliance Advisor /Ombudsman, May 2010, p. 24. http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

¹²⁰⁵ FI Note at 6-7.

¹²⁰⁶ Policy at 9. Here we elided the otherwise seemingly circular reference to “certain financial intermediary projects” in the definition of Category C projects. However, according to the IFC “FI investments that support business activities without any material adverse E&S impact potential will be classified as Category C and no further review is required.” “Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009,” Manual at 1.

¹²⁰⁷ “Financial Intermediary Investments: Early Review and Appraisal,” Version 4, August 14, 2009, Manual at 5. The Manual states that “[f]or all FI investments other than those defined as involving market instruments with no leverage, the LESS will collect portfolio and SEMS data for analysis. Refer to *CGF FI and CFN Funds SEMS Questionnaires* (see Rules and Tools - Guidance).” *Id.* at 4. (Note that with respect to the latter case, it is stated that “the FI will ensure that its sub-projects meet the relevant elements of IFC’s PSs in addition to applicable national E&S laws and regulations.” *Id.* at 5.

¹²⁰⁸ See *supra* at p. 85 for sample form.

¹²⁰⁹ “Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009,” Manual at 3.

¹²¹⁰ “All FIs are exposed to some level of E&S risk through the activities of their borrowers/investees, which can represent a financial, legal, and/or reputational risk to the FI.” FI Note at 1.

¹²¹¹ “IFC requires all FI clients to develop and operate an Environmental and Social Management System (ESMS) commensurate with the level of E&S risk in their portfolio and prospective business activities.” *Id.* at 2.

¹²¹² *Id.* at 3.

¹²¹³ *Id.* at 6.

¹²¹⁴ Id.

¹²¹⁵ Id.

¹²¹⁶ “Direct investments: Appraisal, Version 6, April 15, 2013,” Manual at 4.

¹²¹⁷ Id.

¹²¹⁸ FI Note at 1 and 2.

¹²¹⁹ Id. at 4. “Recall that while the PS *must* be applied by FI-1s and FI-2s involved in project finance and long-term finance transactions the IFC states that they *may* apply to other transactions in light of the outcome of the IFC’s E&S review process.” Id. note 9, p.4.

¹²²⁰ Id. at 4.

¹²²¹ Id.

¹²²² By “system level” we mean, for example, the enterprise’s environmental and social risk management system as a whole and more generally as it is embedded within the overall management system.

¹²²³ Meyerstein remarks, in the EP context, that he was “overwhelmed by the extent to which the banks rely on independent consultants.” *Meyerstein* at 149.

¹²²⁴ See, for example, *Meyerstein* (citing a consultant who “note[d] that his company almost always relies on local consultants because it is often very hard to find people who understand the local context and the international requirements, but that even finding quality consultants and local support is not sufficient.”) at 160.

¹²²⁵ Email from Jörg Janischewski, Managing Director, Innovativkonzept Ltd. September 11, 2014.

¹²²⁶ Id.

¹²²⁷ Id.

¹²²⁸ O’Sullivan at 209-210.

¹²²⁹ On one hand these firms’ extensive technical knowledge “of the latest developments in voluntary and compulsory environmental norms, standards, and legislation” and the measurement tools they provide enable them to “develop[] new insights into environmental problems and solutions,...identify[]...priorities, and [create] norm[s].” “Exploring the agency of global environmental consultancy firms in earth system governance,” by Sofie Bouteligier, *Int. Environ. Agreements*, Vol. 11, February 2011, 43-61, 50. On the other (as noted), they are “are involved in the assessment of compliance, projects’ impacts and performance and policies’ feasibility.” Id. at 49.

¹²³⁰ Id. at 49.

¹²³¹ Id. at 54.

¹²³² Id. at 53.

¹²³³ Id.

¹²³⁴ O’Sullivan at 209-210. With regard to the question of the need for independent review and the role of consultant, one attorney active on EP issues has remarks that “while it may have been ambiguous in the EP II, in EP III it is quite clear that an independent review is not consistent with a review conducted by an internal department of the EPFI, even though they are arguably not ‘directly associated with the borrower’,” “Independent Review Requirements in Equator Principles III,” by Michael Torrance,, February 13, 2013. <http://lexsustineo.blogspot.com/2013/02/independent-review-requirements-in.html> He adds that “[c]onsultants should be external and independent from both the borrower and EPFI. ‘Independent Environmental and Social Consultant’ is also defined distinctly from ‘Equator Principles Reviewers’ which is an internal EPFI role, implying that the former is not the equivalent of an internal reviewer.” Id. He remarks further that “[t]here are a plethora of consultants out there claiming qualification to conduct independent reviews. In considering whether they are indeed qualified, it’s useful to consider what it is that independent reviewers must do. There are 14 references to ‘compliance’ in the EP III. ‘Compliance’ means acting in accordance with environmental and social laws and regulations in all cases. In some cases (based on the application of Principle 3), it may also mean complying with the requirements of the IFC Performance Standards in addition to legal compliance. So, the task of EP III implementation is to ensure compliance with law and possibly the IFC Performance Standards. Any external reviewer should therefore be competent and qualified to advise on questions of legal and regulatory compliance as well as the requirements of the IFC Performance Standards.” Id.

¹²³⁵ “Exploring the agency of global environmental consultancy firms in earth system governance,” by Sofie Bouteligier, *Int. Environ. Agreements*, Vol. 11, February 2011, 43-61, 53.

¹²³⁶ Email from sustainable finance expert. January 30, 2014.

¹²³⁷ *Meyerstein* at 139-140. According to another observer, “independent consultants...often charge between US \$600,000-800,000 for an environmental impact assessment or ‘gap analysis’ to check the project borrower’s EIA.” Id. at 146.

¹²³⁸ See, for example, “Guidelines: Selection and Employment of Consultants under IBRD Loans and IDA Credits and Grants by World Bank Borrowers,” The International Bank for Reconstruction and Development/World Bank, January, 2011 http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Consultant_GLs_English_Final_Jan2011.pdf See also, “Consultant Terms of Reference – Environmental and Social Due Diligence and Supervision,” First for Sustainability, International Finance Corporation. <http://firstforsustainability.org/media/ESMS%20Consultant%20Terms%20of%20Reference.pdf>

¹²³⁹ *Meyerstein* at 139.

¹²⁴⁰ Id. at 148.

¹²⁴¹ “Notes of IFC-CSO discussion of CAO financial markets audit, Notes of a meeting from 19 April 2013,” Bretton Woods Project, May 17, 2013. <http://www.brettonwoodsproject.org/2013/05/art-572515/>

¹²⁴² “There was also some evidence of interviewees questioning the “quality” of consultants more generally, with, for example, one interviewee remarking: “we sometimes feel that we might have perhaps a better consultant to be frank” (Dutch/Belgian EPFI, Interviewee 1).” O’Sullivan at 210.

¹²⁴³ *Meyerstein* at 159. Not only might there need to be check on potential conflicts of interest on the part of consultants, but also precautionary action might be needed from an independent consultant in the face of the noted “possible conflicts of interest on internal staff insofar as they might have incentives not to review projects carefully or report on them candidly and fully.” Id.

¹²⁴⁴ Of course, among those more critical and/or cynical about the intentions of EPFIs, the EP Association may be viewed as more a means for “rounding up the wagons” in response to NGO and other criticisms.

¹²⁴⁵ United Nations Environment Programme Finance Initiative. <http://www.unepfi.org/>

¹²⁴⁶ United Nations Global Compact. <http://www.unglobalcompact.org/>

¹²⁴⁷ Principles for Responsible Investment. <http://www.unpri.org/>

¹²⁴⁸ “Infrastructure,” Principles for Responsible Investment. <http://www.unpri.org/areas-of-work/implementation-support/infrastructure/>

¹²⁴⁹ “Training Resources,” International Finance Corporation.

¹²⁵⁰ http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Training+Resources/

See *Bergset* (suggesting that mainstream banks “engag[e] in dialogue in order to help the clients change, rather than immediately excluding them, when they do not comply with policies etc.” and that “[t]he strategy of leaving clients behind only when they are completely unwilling to mitigate their own impacts by changing or adapting, thus, makes sense.”) at 82.

¹²⁵¹ “E&S Risk Management of Financial Institutions at the IFC, Presentation to the Committee on Development Effectiveness September 4th 2013,” International Finance Corporation. <http://www.cao-ombudsman.org/documents/IFCPresentationforCODE-ESRMforFIs-final.pdf>

¹²⁵² In this connection note that the CAO found that “IFC staff assesses client company commitment in a majority of projects, however, there are no established indicators to formalize this assessment, and the results are not tracked separately over time, or explicitly and systematically used in IFC decisions around resource and staff allocation, incentives etc.” “Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information.” CAO, May 2010, p. 19.

http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

¹²⁵³ “Banks have undertaken the bulk of infrastructure financing, particularly in emerging markets where corporate bond and securitization markets are relatively undeveloped. From 1999 to 2009, commercial banks provided an estimated 90% of all private debt, with large banks in developed countries acting as a major source of financing to emerging markets. However, the financial crisis and the regulations that ensued have been changing the banking system’s role in infrastructure finance.”

“Impending Basel III regulations will increase the capital charges against long-term infrastructure loans, decreasing their profitability; bank executives are increasingly wary of funding long-term, illiquid assets.³ These challenges have caused banks to scale back infrastructure loans, raise lending rates and – perhaps most critically for project finance – shift to shorter maturities. Globally, project finance loans are estimated to have fallen by between 10% and 30% in 2012, compared with 2011. Long-term bank debt is now harder to come by, ²⁷ and the associated refinancing risk has led to greater caution from equity investors and governments.

“Banks are still expected to provide the majority of infrastructure debt finance in the near- to medium-term. But it is clear that supplementary sources need to be cultivated, particularly those with the capability to provide long-dated loans.” “Infrastructure Investment Policy Blueprint,” World Economic Forum, February 2014, pp. 12-13 http://www3.weforum.org/docs/WEF_IL_InfrastructureInvestmentPolicyBlueprint_Report_2014.pdf

¹²⁵⁴ “OECD Guidelines for Multinational Enterprises, 2011,” OECD Publishing, p. 3 (italics added). <http://www.oecd.org/daf/inv/mne/48004323.pdf> As at May 25, 2011 adhering governments were “those of all OECD members, as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.” Id. at 7. In the Guidelines it is stated as follows: “Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable. Nevertheless, some matters covered by the *Guidelines* may also be regulated by national law or international commitments.” Id. at 17.

¹²⁵⁵ “OECD Guidelines for Multinational Enterprises, 2011,” OECD Publishing, p. 3. <http://www.oecd.org/daf/inv/mne/48004323.pdf>

¹²⁵⁶ Id. at 13.

¹²⁵⁷ “Declaration on International Investment and Multinational Enterprises,” dated May 11, 2011, as included in “OECD Guidelines for Multinational Enterprises, 2011,” OECD Publishing, p. 7. <http://www.oecd.org/daf/inv/mne/48004323.pdf>

¹²⁵⁸ Id. at 8.

¹²⁵⁹ See “OECD Guidelines for Multinational Enterprises, 2011,” OECD Publishing, p. 35-41 and, for example, p. 23. <http://www.oecd.org/daf/inv/mne/48004323.pdf>

¹²⁶⁰ Id. at 37.

¹²⁶¹ Id. at 31-35.

¹²⁶² Id. at 67.

¹²⁶³ “Environmental Assessment in Operational Policy 4.01,” World Bank.

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTENVASS/0,,menuPK:407994~pagePK:149018~piPK:149093~theSitePK:407988,00.html>

¹²⁶⁴ Projects are classified into Category A if they are “likely to have significant adverse impacts that are sensitive, diverse, or unprecedented, or that affect an area broader than the sites or facilities subject to physical works.” The impacts of Category B projects are “site-specific in nature and do not significantly affect human populations or alter environmentally important areas, including wetlands, native forests, grasslands, and other major natural habitats. Few if any of the impacts are irreversible, and in most cases mitigatory measures can be designed more readily than for Category A projects.” In order for a project to be classified into Category C, it must be considered likely to have no adverse impacts at all, or the impacts would be negligible.” “Environmental Screening,” Environmental Assessment Sourcebook Update”, World Bank, Number 2, April 1993, p. 2. <http://siteresources.worldbank.org/INTSAFEPOL/1142947-1116495579739/20507375/Update2EnvironmentalScreeningApril1993.pdf>

¹²⁶⁵ Id.

¹²⁶⁶ For example, “[c]ategory A includes projects which have one or more of the following attributes that make the potential impacts “significant”: direct pollutant discharges that are large enough to cause degradation of air, water or soil; large-scale physical disturbance of the site and/or surroundings; extraction, consumption, or conversion of substantial amounts of forest and other natural resources; measurable modification of hydrologic cycle; hazardous materials in more than incidental quantities; and involuntary displacement of people and other significant social disturbances.” Id.

¹²⁶⁷ For example, “[t]he selection of a screening category often depends substantially on the project setting, while the “significance” of potential impacts is partly a function of the natural and sociocultural surroundings. There are a number of locations which should cause the TM to seriously consider an “A” classification:

- In or near sensitive and valuable ecosystems — wetlands, wildlands, coral reefs and habitat of endangered species;
- in or near areas with archaeological and/or historical sites or existing cultural and social institutions;
- in densely populated areas, where resettlement may be required or potential pollution impacts and other disturbances may significantly affect communities;
- in regions subject to heavy development activities or where there are conflicts in natural resource allocation;

- along watercourses, in aquifer recharge areas or in reservoir catchments used for potable water supply; and
 - on lands or waters containing valuable resources (such as fisheries, minerals, medicinal plants, prime agricultural soils).” Id. at 3.
- ¹²⁶⁸ For example, “[e]nvironmental issues that are sensitive within the Bank or the borrowing country require special attention during the EA process. The project may involve activities or environmental features that are always of particular concern to the Bank as well as to many borrowers. These issues may include (but are not limited to) disturbance of tropical forests, conversion of wetlands, potential adverse effects on protected areas or sites, encroachment on lands or rights of indigenous peoples or other vulnerable minorities, involuntary resettlement, impacts on international waterways and other transboundary issues, and toxic waste disposal. The best way to ensure proper treatment of such issues is to classify the project as Category A, so that the level of effort will be adequate in terms of analytical expertise, decision-making, interagency coordination, and public involvement.” Id. at 3-4.
- ¹²⁶⁹ For example, while “[i]t is difficult to describe the nature of impacts without having some overlap with the concepts of sensitivity and project type[.]... consideration [should be given to] the following examples of impacts that warrant Category A attention:
- Irreversible destruction or degradation of natural habitat and loss of biodiversity or environmental services provided by a natural system;
 - risk to human health or safety (for example, from generation, storage or disposal of hazardous wastes, or violation of ambient air quality standards); and
 - absence of effective mitigatory or compensatory measures,” Id. at 4.
- ¹²⁷⁰ Id. “For example, the resettlement of 5,000 families is a large impact, in absolute terms. Conversion of 50 hectares of wetland, however, differs markedly in significance depending on its size relative to the total area of wetlands in the country or region. An average decrease in dissolved oxygen concentration of 0.05 mg/l in a receiving water is unlikely to have serious biological or chemical implications, while a decrease of 3.0 mg/l will in many circumstances.” Id.
- ¹²⁷¹ “Challenges of Managing the EA Process,” “Environmental Assessment Sourcebook Update,” World Bank, Number 16, December 1996, pp. 2-3. <http://siteresources.worldbank.org/INTSAFEPOL/1142947-1116495579739/20507386/Update16ChallengesOfManagingTheEAProcessDecember1996.pdf>
- ¹²⁷² Id. at 2-3. The document notes that “[m]ost EAs use a mix of these techniques with many relying heavily on the latter two. EA team members must determine the range and type of baseline data needed to make defensible and robust impact predictions. These requirements dictate the technique to be used and not the reverse—a common misconception in predictive modeling. A risk-based approach can be useful in determining the appropriate degree of detail for data collection. In general terms, where uncertainties regarding the occurrence of potential impacts are large, and the consequences of the impact occurring are significant (for example, deteriorating air quality affecting the health of people or crops), detailed data collection is appropriate. If the potential consequences are not significant, detailed data collection is inappropriate regardless of the level of uncertainty. Given the lack of standardized guidance it is unsurprising that the quality of impact predictions is a common technical weakness in EA work.” Id. at 3-4.
- ¹²⁷³ Id. at 5-7.
- ¹²⁷⁴ “ANNEX D, ILLUSTRATIVE LIST OF CATEGORY A PROJECTS,” United States Export-Import Bank. <http://www.exim.gov/generalbankpolicies/environment/illustrative-list-of-Categor-A-Projects.cfm>
- ¹²⁷⁵ “APPENDIX A. Illustrative list of Category A Projects,” “Procedures Manual, Office of Investment Policy’s Environmental and Social/Labor and Human Rights Groups, Ver. 1,” Overseas Private Investment Corporation, 2010, pp. 32-34. <http://www.opic.gov/sites/default/files/files/opic-procedures-manual-2012.pdf>
- ¹²⁷⁶ “APPENDIX 1: Category A projects,” “Environmental and Social Policy,” European Bank for Reconstruction & Development, October 2008 (emphasis added), pp. 12-13. <http://www.ebrd.com/downloads/research/policies/2008policy.pdf>
- ¹²⁷⁷ FI Note at 5.
- ¹²⁷⁸ Id.
- ¹²⁷⁹ Id.
- ¹²⁸⁰ Id.
- ¹²⁸¹ Id.
- ¹²⁸² Id.
- ¹²⁸³ Id.
- ¹²⁸⁴ Id. at 6.
- ¹²⁸⁵ Id.
- ¹²⁸⁶ Id.
- ¹²⁸⁷ Id.
- ¹²⁸⁸ Id.
- ¹²⁸⁹ Id.
- ¹²⁹⁰ Id. at 8.
- ¹²⁹¹ Id.
- ¹²⁹² Id.
- ¹²⁹³ Id. at 9.
- ¹²⁹⁴ Id.
- ¹²⁹⁵ Id.
- ¹²⁹⁶ Id.
- ¹²⁹⁷ Id.
- ¹²⁹⁸ “Managing Environmental and Social Risks, A Roadmap for National Development Banks in Latin America and the Caribbean,” by Gijs Nolet, Willem Vosmer, Matthijs de Bruijn, and Isabelle Braly-Cartillierm, Inter-American Development Bank, 2014. <http://publications.iadb.org/handle/11319/6437?locale-attribute=en>
- ¹²⁹⁹ Id. at 32.
- ¹³⁰⁰ Id. at 32-44. “To develop a basic ESMS is often sufficient for FIs with a low risk profile (e.g., those operating in micro finance, trade finance, and SME lending), taking approximately six to eight months to build.” Id.
- ¹³⁰¹ Id. at 40-41.
- ¹³⁰² Id. at 40.
- ¹³⁰³ Id.
- ¹³⁰⁴ Id.

1305 Id.

1306 Id. at 14.

1307 Id. at 40.

1308 Id.

1309 "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 3.

1310 Id. According to the IFC Interpretation Note relating to FIs, "[m]ost FI clients will be required to submit annual E&S performance reports to IFC." FI Note at 9.

1311 "Environmental and Social Review Procedures Manual, Version 7, April 15, 2013," Manual at 3.

1312 "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 3. There is also a support E&S Specialist (SESS) who is "the proxy for the LESS and responsible for assisting and contributing to the E&S review of a proposed investment in collaboration with as needed other E&S environmental specialist(s) on the project team." Id. at 10.

1313 "Environmental and Social Review Procedures Manual, Version 7, April 15, 2013," Manual at 2.

1314 "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 3.

1315 "Environmental and Social Review Procedures Manual, Version 7, April 15, 2013," Manual at 3.

1316 Id. at 2.

1317 "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 3.

1318 "Direct Investments: Pre-Mandate Initial Review, Concept Review Meeting, and E&S Specialist Assignment, Version 7, April 15, 2013," Manual at 1.

1319 Id. at 4. It is remarked that "[t]he RTL/SL shall also agree with the investment department as to the E&S Tiering classification (Tier I, II, or III) in accordance with Guidelines for Early Risk Assessment for Project Tiering (see Rules and Tools - Guidance)." Id. at 5. But the Manual offers no further insights as to this process.

1320 Id.

1321 At one point in delineating responsibilities, the Manual refers to either the RTL or the SL being deemed responsible for "[d]etermining provisional Category and providing input for defining Project Tier" but shortly thereafter states that the LESS "is responsible for...[a]ssigning a provisional E&S Category to the project in iDesk." Id. at 6.

1322 "Direct Investments: Appraisal, Version 7, April 15, 2013," Manual at 1-2.

1323 Id. at 3.

1324 Id.

1325 Arguably more generally, according to the manual a PRM should be considered for the following type of projects:

- "High-Risk Projects...";
- "Projects with actual or potentially significant, adverse E&S impacts that are diverse, irreversible, or unprecedented, and that can be only partially addressed through mitigation measures";
- "Complex projects with E&S issues that are uncommon or have not been encountered before." "ESRP 3. Direct Investments: Appraisal, Version 7." Id.

1326 "Key Terms and Acronyms, Version 8, May 31, 2012, Manual at 3.

1327 Id. at 6. and "Direct Investments: Appraisal, Version 7, April 15, 2013," Manual at 4, The ESAP, required by PS1 is supposed to "(i) describe the actions necessary to implement the various sets of mitigation measures or corrective actions to be undertaken; (ii) prioritize these actions; (iii) include the timeline for their implementation; (iv) be disclosed to the affected communities; and (v) describe the schedule and mechanism for external reporting on the client's implementation of the Action Plan." "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 1.

1328 "Direct Investments: Appraisal, Version 7, April 15, 2013," Manual at 5.

1329 Id.

1330 "Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013," Manual at 4.

1331 "Direct Investments: Appraisal, Version 7, April 15, 2013," Manual at 1.

1332 "Direct Investments: Disclosure and Commitment, Version 7, April 15, 2013," Manual at 4.

1333 Id.

1334 Id. at 5. On a previous page it says that "[t]he LESS should also review any commentary in the Board Paper on E&S Risks and Impacts." Id. at 4.

1335 "Financial Intermediary Investments: Early Review and Appraisal, Version 4, April 14, 2009," Manual at 4-5. and "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 11.

1336 Id. at 2.

1337 Id.

1338 Id. at 6.

1339 "Financial Intermediary Investments: IFC Disclosure and Commitment, Version 4, April 14, 2009," Manual at 2.

1340 Id.

1341 "Financial Intermediary Investments: Early Review and Appraisal, Version 4, April 14, 2009," Manual at 6.

1342 Id. at 5.

1343 "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 11. The passage cited refers to "Team Leader."

1344 "Financial Intermediary Investments: Early Review and Appraisal, Version 4, April 14, 2009," Manual at 7.

1345 "Financial Intermediary Investments: IFC Disclosure and Commitment, Version 4, April 14, 2009," Manual at 1.

1346 Id.

1347 Id. at 2.

1348 "Key Terms and Acronyms, Version 8, May 31, 2012," Manual at 5-6.

1349 "IFC Annual Portfolio Review, FY 11 Development Results," International Finance Corporation, p. 15. http://www.ifc.org/wps/wcm/connect/100e28804a9567c8ace3fe9e0dc67fc6/web_APR2011.pdf?MOD=AJPERES

1350 "2011 COMPAS REPORT, Multilateral Development Banks' Common Performance Assessment System," p.59. http://www.mfdr.org/COMPAS/documents/2011_COMPAS-Report.pdf

1351 "Key Terms and Acronyms, Version 8, May 21, 2012," Manual at 6.

1352 Id.

¹³⁵³ Id.

¹³⁵⁴ "2011 COMPAS REPORT, Multilateral Development Banks' Common Performance Assessment System," p.59. http://www.mfdr.org/COMPAS/documents/2011_COMPAS-Report.pdf

¹³⁵⁵ "IFC Annual Portfolio Review, FY 11 Development Results," International Finance Corporation, p. 15. http://www.ifc.org/wps/wcm/connect/100e28804a9567c8ace3fe9e0dc67fc6/web_APR2011.pdf?MOD=AJPERES Note the calculation of the percentage "(exclud[es] SOU, litigation, liquidation and zero balance projects)." Id. At the extreme, ESRR ratings 3 and 4 are 17% and 1% of projects, respectively, in the Sub Saharan Africa region. Id., Figure 2-12.

¹³⁵⁶ "Key Terms and Acronyms, Version 8, May 31, 2012" Manual at 4.

¹³⁵⁷ Wording from the new "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual at 1 showing changes (strikethrough – deletions; italics –additions). from previous "Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009," Manual at 1 <http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES>

¹³⁵⁸ Wording from new "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual at 1 showing changes (strikethrough – deletions; italics –additions). from previous "Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009," Manual at 1

¹³⁵⁹ Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009," Manual (underlining added) at 6.

¹³⁶⁰ "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual (underlining added) at 2.

¹³⁶¹ Id. at 2 and 2-3.

¹³⁶² "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual at 3. Note 3 states that "[t]he Tip Sheet Compendium was previously known as Product Book." Id.

¹³⁶³ "Id. at 4.

¹³⁶⁴ Id.

¹³⁶⁵ Id. at 3-4.

¹³⁶⁶ Compare "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual at 5 with "Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 1, 2009," Manual at 3.

¹³⁶⁷ "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual at 5.

¹³⁶⁸ "Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 1, 2009," Manual at 3.

¹³⁶⁹ "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual at 5.

¹³⁷⁰ "Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 1, 2009," Manual at 3.

¹³⁷¹ "Financial Intermediary Investments: Early Review and Appraisal, Version 5, July 11, 2014," Manual at 5.

¹³⁷² "Financial Intermediary Investments: Early Review and Appraisal, Version 4, August 14, 2009," Manual at 3.

¹³⁷³ "Financial Intermediary Investments: IFC Disclosure and Commitment," Version 4, June 3, 2014, "Manual at 1. The Board Paper contribution will be a succinct summary of the portfolio assessment, including categorization of the project, key E&S risks and impacts, high risk exposures and E&S reputational risk deriving from the existing or expected portfolio, exposure to Excluded and Restricted Activities; the client's E&S risk management practices, level of existing E&S capacity and training required; and the key E&S requirements for the project as well as the client's commitment to implement these. Any deviations from standard E&S requirements and the residual risk deriving from these will be clearly flagged for decision by the Board. The LESS will also review and comment on the E&S-related aspects prepared by the TRL in the IFC additionality section, DOTS indicators, and Risk and Issue section of the Board Paper." Id.

¹³⁷⁴ "Financial Intermediary Investments: Supervision," Version 5, June 3, 2014," Manual at 1.

¹³⁷⁵ Id. at 2.

¹³⁷⁶ Id.

¹³⁷⁷ Id. at 3. Note the text refers to AEPRs rather than SEPRs, the term used in the previous version.

¹³⁷⁸ Id. at 4.

¹³⁷⁹ Id. See Table 2, id. at 5 for the priorities for non-PE Fund investments.

¹³⁸⁰ Id. at 5.

¹³⁸¹ Id. at 4.

¹³⁸² Id.