Articles

Public Participation in Global Environmental Governance and the Equator Principles: Potential and Pitfalls

By Kirsten Mikadze[*]

Despite the increasing urgency of global environmental issues, international environmental law continues to struggle for relevancy and effectiveness. Even as legal efforts have intensified, the global environment has continued to deteriorate. In particular, state-centric, multilateral "hard law" instruments have proven an increasingly ineffectual means of regulating the global environment.

The increasing ineffectiveness of multilateral treaties is contrasted, accompanied—and perhaps reinforced—by a simultaneous experimentation with different forms of indirect or "soft" regulation, as illustrated in the rise in influence of transnational corporate actors. As these actors continue to play a role of increasing importance, they have begun to regulate their own activities in response to the pressure to do so (e.g., from non-governmental organizations (NGOs)) and so as to avoid more formalized, state-led attempts that would restrict their activities. Historically, they have vigorously resisted such state led attempts.[1] As the scope of this self-regulatory activity has expanded, it has spilled over into the realm of global environmental regulation.

The self-regulatory instruments created by transnational actors in this context (which I will refer to as "voluntary codes"[2]) do not necessarily replace existing state-centric instruments. Rather, they tend to operate alongside, atop of, against, or between them. This intricate overlap has resulted in an increasingly complex and multi-faceted global regulatory landscape that sees the influence of transnational actors—and voluntary means of regulation—on the rise and the role of the state in norm-creation and enforcement on the decline.

Meanwhile, as legal mechanisms central to the protection and regulation of the global environment move progressively into the private sphere—and the state

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[1] John Conley & Cynthia Williams, *Global Banks as Global Sustainability Regulators?: The Equator Principles* 33 LAW & POL'Y 1 (2011).

[2] There are, of course, numerous other ways to label instruments of private governance. For a few relevant examples, *see* Ong, *infra* note 50, and Richardson, *infra* note 51.

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contemporaneously recedes into the background[3]—the public continues to struggle to find reliable and effective channels through which to participate in the process of environmental regulation. The experience for public participation in the international legal context has seen mixed success; the situation is even less certain in a transnational legal context, where the interests of the dominant private actors often sits in direct tension with those of the public.

Early examples of public participation's experience with voluntary codes in a transnational context include the Responsible Care program in the global chemical industry[4] and the International Chamber of Commerce's Business Charter for Sustainable Development,[5] both of which encourage signatories to adhere to a sustainability agenda in their global business activities and both of which emphasize public participation within their respective frameworks. The effectiveness of these and similar instruments in engendering public participation or contributing positively to environmental regulation remains dubious.[6] The questionable outcomes arising from these and other voluntary codes has led some commentators to question whether such self regulatory activities are more an exercise in "greenwashing" than an honest attempt to establish environmental responsible standards of conduct.[7]

The Equator Principles (EPs)—a voluntary code designed by global banks as a means of regulating their project finance activities—emerged into this complex regulatory landscape in 2003. They offered a potential means of environmental regulation that reconciles some of these tensions. In this paper, I will explore some of the ways in which the EPs constitute a unique lens both for understanding the evolution of public participation in international environmental law within this context and for mapping the transnational space of global environmental regulations in which voluntary codes are playing an increasingly central role.

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[3] For a discussion of how this phenomenon has been (and continues to be) characterized—and some of the issues around this—*see e.g.* Stepan Wood, *Green Revolution or Greenwash? Voluntary Standards, Public Law, and Private Authority in Canada, in* NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE 139 (Law Commission of Canada ed., 2003).

[4] International Council of Chemical Associations, *Responsible Care*, available at: http://www.icca-chem.org/en/Home/Responsible-care/ (last accessed: 1 December 2012).

[5] International Chamber of Commerce, *Business Charter for Sustainable Development* (1991).

[6] STEPHEN CLARKSON & STEPAN WOOD, A PERILOUS IMBALANCE: THE GLOBALIZATION OF CANADIAN LAW AND GOVERNANCE 231 *ff*. (2010); Aseem Prakash, *Responsible Care: An Assessment* 39 BUS. AND SOC. 183 (2000).

[7] Wood, *supra* note 3; Oren Perez, *The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance, in* RESPONSIBLE BUSINESS: SELF-GOVERNANCES AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 151, 155 (Olaf Dilling, Martin Herberg & Gerd Winter eds., 2008).

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When the EPs were first launched, they were generally greeted with (albeit somewhat cautious) optimism and enthusiasm from the global project finance and NGO communities.[8] The EPs appeared to offer a means of mitigating some of the negative environmental impacts[9] resulting from unregulated project finance activities in the developing world.[10] Through their inclusion of a variety of participatory mechanisms, the EPs seemed to invite the public to participate in these mitigation efforts. Enthusiasm has since waned. The EPs were never realistically thought to be—or ever held out to be—a panacea for all the problems perceived to plague project finance activities in the developing world. However, it became evident that even the modest promise the EPs held for improving civil society participation and environmental outcomes in project finance was not materializing as anticipated.

Changes to the EPs are currently being negotiated. A draft of the third iteration was released for public comment on 13 August 2012.[11] Concerns over participation and disclosure have remained high on the agenda, and, as will be discussed below, enhanced transparency and reporting requirements comprise a central theme of the revisions.[12] This moment of transition provides an ideal juncture at which to take stock of the EPs and to understand their significance to public participation in global environmental regulation better.

In this paper, I will examine how public participation in environmental regulation is affected by the current complex, multi-dimensional, and transnational regulatory landscape. I will focus specifically on the implications arising from the experience thus far with the EPs. Ultimately, I conclude that there is potential for the EPs to enhance the role for public participation in global environmental regulation. However, there are currently serious gaps in how this potential is being realized. As a result, the role for public

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[8] Niamh O'Sullivan & Brendan O'Dwyer, *Stakeholder Perspectives on a Financial Sector Legitimization Process: The Case of NGOs and the Equator Principles* 22 ACCOUNTING AUDITING & ACCOUNTABILITY J. 553, 565 (2009).

[9] Although NGOs also raised (and continue to raise) concerns over the social impacts of project finance, in this paper I will focus exclusively on the environmental element.

[10] Some details surrounding these NGO concerns are captured in the 2003 *Collevecchio Declaration*, which was created by a group of NGOs. The *Collevecchio Declaration* suggests six principles that should be embraced by the financial services sector in their activities. *See Collevecchio Declaration,* available at: http://www.banktrack.org/download/collevechio_declaration/030401_collevecchio_declaration_with_signatories.pdf (last accessed: 1 December 2012).

[11] Equator Principles, *Official First Draft of EP III for Public Consultation*, available at: http://www.equator-principles.com/resources/EPIII_PACKAGE.pdf (last accessed: 1 December 2012) [hereinafter "EPs III Draft"].

[12] Christopher Cundy, *Equator Principles Begin Drafting Third Iteration*, Environ. Fin. (2011), available at: http://www.environmental-finance.com/news/view/2105 (last accessed: 1 December 2012). *See also* Equator Principles, *Public Release—The Equator Principles (EP III) Draf*t, available at: http://www.equator-principles.com/index.php/about-ep3 (last accessed: 1 December 2012).

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participation in global environmental regulation under the EPs remains in flux and unrealized.

The analysis will proceed in four sections. In section A, I will provide context and background about the development and operation of the EPs and about public participation in global environmental regulation. I will then move on to provide support for the proposition that the EPs offer potential for public participation but that this potential is not being realized.

In section B, I will explore the potential that the EPs offer for enhancing public participation in the context of public participation as a norm in international law. I argue that the EPs are normatively capable of contributing to the "hardening" (and therefore strengthening) of this principle in international law and that they are, in fact, doing so. With respect to the first element of my argument, the manner in which the EPs, as practices established by and for non-state actors, can in fact contribute to the formation of international environmental norms is not immediately apparent. As corporate non-state actors continue to move into regulatory spaces, the case for their contribution to the development of international law grows stronger. Ong has argued that the EPs have an important role to play in the normative development of a variety principles of international environmental law. I will examine and evaluate the theoretical basis for this position. My second focus in this section is not on the nature of the norms themselves but, rather, on the process by which they are generated. In that respect, I uncover evidence that the EPs are, in fact, contributing to the hardening of the principle of public participation in international law by assessing how the constituent elements of the principle (the right to participate, the right to access environmental information, and the right to access justice—all of which will be outlined below) have been incorporated into the EPs text. I establish further proof of this hardening by examining the way in which the EPs have been adopted.

Finally, in section C, I highlight, from an institutional perspective, some of the deficiencies in the way that the EPs are actually putting public participation into practice. I focus on one aspect of public participation—access to information. I establish that despite the potential enhancement of public participation offered by the EPs, the EPs do not engender the appropriate mechanisms to actually realize public participation in global environmental regulation. There is evidence that they are failing to do so in practice. In this section, I focus on access to information/ transparency both because it is crucial to public participation and because it is, in many ways, the most straightforward aspect of public participation to implement. In my examination, I first articulate the content of this element of public participation. I then map out the mechanisms for access to information embedded in the EPs text. Drawing from both NGO and bank perspectives, I discuss whether these mechanisms are capable of and are in fact engendering public participation on the ground. While focusing primarily on the current version of the EPs, I will also examine the improvements to transparency/access to information offered by the recently released draft of the EPs' third iteration (EP III).

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In the fourth and final section, I will conclude by briefly discussing future directions and implications.

A. Context and Background

I. The Equator Principles: Environmental Risk Management Tool for Project Finance

The EPs are a voluntary code initially launched in 2003 by several large international banks and revised in 2006 (with a further revised version, after numerous delays, on track for finalization and release in October 2012).[13] Adopters of the EPs—all large, globally facing financial institutions—pledge to adhere to a framework of environmental and social assessment in their project financing activities.[14] They build upon the Performance Standards for Social and Environmental Sustainability created by the International Finance Corporation (IFC) and upon the World Bank's Environmental, Health, and Safety Guidelines.[15] The EPs apply to projects of $10 million or more.[16] The adopters—referred to as Equator Principles Financial Institutions (EPFI)—commit to providing finance only when the conditions embodied in ten principles are met.

Under Principle 1, EPFI commit to categorizing prospective projects into three categories using the IFC's screening criteria: Category A (which are potentially high-risk projects), Category B (which are medium-risk), and Category C (which are anticipated to be low- or no-risk projects). Various obligations are imposed upon borrowers for Category A and, in some instances, Category B projects. These entail: the performance of a Social and Environmental Assessment (Assessment) (Principle 2);[17] application of certain social and

[13] The Equator Principles, available at: http://www.equator-principles.com/ (last accessed: 1 December 2012) [hereinafter "EPs Website"].

[14] The EPs take their definition of project finance from the Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards, which describe it as "a method of funding in which the lender looks primarily to the revenues generated by single project, both as the source of repayment and as security for the exposure. …" *see* the Equator Principles, *Preamble*, available at: http://www.equator-principles.com/resources/equator_principles.pdf (last accessed: 1 December 2012) [hereinafter "Equator Principles"]. All references here are made to the current version unless otherwise stated.

[15] EPs Website, *supra* note 13.

[16] Equator Principles, *supra* note 14, *Scope*. The EPs III Draft would widen this scope so as to include project-related corporate loans amounting in aggregate to at least $100 million and bridge loans of less than 2 years that are to be refinanced by a project finance or project-related corporate loan. EPs III Draft, *supra* note 11.

[17] Principle 2 of the current draft of the EPs III Draft would, in addition, require an evaluation of less GHG-intensive alternatives to projects that are anticipated to emit more than 100,000 tons of CO_2 per year. Certain additional obligations would also be imposed upon EPFI that are providing a Bridge Loan or Project Finance Advisory services. EPs III Draft, *supra* note 11.

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environmental standards to a project in light of the outcome of Assessment (Principle 3); preparation of an Action Plan (AP) to outline how the risks identified in the Assessment will be addressed by the standards identified (Principle 4); establishment of a Social and Environmental Management System (Principle 4); fulfillment of consultation and disclosure requirements (Principle 5); establishment of a grievance mechanism (Principle 6); performance of independent review of the AP, Assessment, and public consultation documentation (Principle 7);[18] fulfillment of covenants to comply with host laws, to comply with the AP, and to provide reports to the EPFI (Principle 8); and verification of monitoring information by an independent expert (Principle 9). Several of these principles will be explored in greater depth below. In most instances, these obligations are imposed solely upon projects "located in non-OECD countries and those located in OECD countries not designated as High-Income by the World Bank Development Indicators Database." Finally, the EPs further stipulate reporting requirements for EPFI (Principle 10).[19]

II. Public Participation in Global Environmental Regulation

There are a number of discourses that embrace and promulgate a (generally quite similar) vision for public participation in environmental regulation. Examples include global administrative law,[20] global environmental law,[21] and good governance principles.[22] However, I will focus on the notion of public participation as it is embodied in international environmental law to draw out the content of, underlying rationale for, and importance of public participation.

The principle of public participation is central to international environmental law. Its normative evolution is rooted in various binding and non-binding instruments of international, regional, and domestic origin. [23] The Rio Declaration[24] provided the first—

[18] The revised EPs draft allows for some EPFI discretion in determining whether or not an independent assessment is required for project-related corporate loans under certain circumstances. EPs III Draft, *supra* note 11.

[19] EPs Website, *supra* note 13. For a more detailed overview see Conley & Williams, *supra* note 1.

[20] Nico Krisch, *The Pluralism of Global Administrative Law* 17 E.J.I.L. 247 (2006); Francisco Javier Sanz Larruga, *Environmental Law and its Relationship with Global Administrative Law, in* GLOBAL ADMINISTRATIVE LAW: TOWARDS A *LEX ADMINISTRATIVA* 277 (Javier Robalino-Orellana & Jaime Rodriguez-Arana Munoz eds., 2010).

[21] Tseming Yang & Robert Percival, *The Emergence of Global Environmental Law* 36 ECOL. L. QTL'Y. 615 (2009).

[22] ELENA PETKOVA *ET. AL.*, CLOSING THE GAP: INFORMATION, PARTICIPATION, AND JUSTICE IN DECISION-MAKING FOR THE ENVIRONMENT 13-15 (2002).

[23] Jona Razzaque, *Human Rights to a Clean Environment: Procedural Rights, in* RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 284, 289-92 (Malgosia Fitzmaurice, David Ong & Panos Merkouris eds., 2010).

[24] Rio Declaration on the Environment and Development, 12 Aug. 1992, UN GA, A/CONF.151/26 [Rio Declaration].

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and most significant—international articulation of the principle.[25] As it emerged in the Rio Declaration, the principle of public participation is supported by three interlocking elements: the right to participation, the right to information, and the right to access to justice. Each of these is captured in Rio Principle 10:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[26]

Rio Principle 10 has been instrumental in the development of a number of subsequent binding and non-binding multilateral environmental instruments.[27] Its influence can also be seen in a variety of regional agreements, most notably in the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[28] The Aarhus Convention explicitly recognizes many of the rationales underlying public participation in environmental decision-making, including increased accountability, transparency, and improved quality of decisions.[29] It gives effect to all three pillars of Rio Principle 10 by mandating public participation in the process of decision making in certain environmental activities, plans, and programs[30]; in guaranteeing the public access to environmental information upon request and compelling the dissemination of certain environmental information[31]; and in compelling state parties to

[25] For more details on this evolution—including some of the pre-1992 developments for this principle—*see* Razzaque, *supra* note 23.

[26] Rio Declaration, *supra* note 24.

[27] For details see Razzaque, *supra* note 23, at 286-87.

[28] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001, 45 parties) [hereinafter "Aarhus Convention"].

[29] Aarhus Convention, *supra* note 28, *Preamble*.

[30] *Id.* at Arts. 6-8.

[31] *Id.* at Arts. 4-5.

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ensure members of the public have access to a review procedure if they feel their right to environmental information under the Convention has been violated.[32]

Insofar as the term specifically relates to the international environmental context, there is no firm agreement as to the rationale underpinning public participation. Razzaque and Richardson identify three main schools of thought. : 1. the rational elitism (which sees environmental policy decision making best done by experts and, thus, offers a limited role for the general public in this process), 2. the liberal democratic (which emphasizes procedural rights for the public to be heard and consulted in the decision making process), and 3. the deliberative democratic (which goes beyond the liberal democratic model by envisioning a wider, more active, and empowered role for the public in decision making).[33] While these three models can interact and overlap, the liberal democratic model is predominant in international environmental law and, as such, shall provide the foundation for my analysis.

From a procedural perspective, public participation can enhance the democratic legitimacy of decisions related to the environment. Increased involvement by the public leads to greater legitimacy in the environmental regulation process, which in turn helps with the implementation and enforcement of laws and policies.[34] Strengthened public participation also works to integrate those who have become alienated from what is often perceived as a continuously repeating series of international environmental protection treaties. These treaties' lack of tangible results is often the result of governmental non-commitment. Beyond reintegrating disenchanted protestors, enhanced public participation can provide a means of managing social conflict and can minimize the frequency and magnitude of conflicts that arise over the course of a project.[35] Further, it can lead to greater accountability and effectiveness in governmental decision-making.[36] Finally, given the predominantly soft nature of norms in this area, public participation can also play an important role in strengthening the "softer" aspects of the regime and in facilitating its implementation and enforcement.

Although public participation is traditionally understood as providing rights to individuals *vis-à-vis* the state, it easily maps onto a more transnational legal structure in which private

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[32] *Id.* at Art 9.

[33] Benjamin Richardson & Jona Razzaque, *Public Participation in Environmental Decision-making, in* ENVIRONMENTAL LAW FOR SUSTAINABILITY 165, at 170-74 (Benjamin J Richardson & Stepan Wood eds., 2006).

[34] Donna Craig & Michael Jeffery, *Non-lawyers and legal regimes: Public participation for ecologically sustainable development, in* THE FUTURE OF INTERNATIONAL ENVIRONMENTAL LAW 103, 110 (David Leary & Balakrishna Pisupati eds., 2010).

[35] PETKOVA *ET. AL.*, *supra* note 22, at 66.

[36] Razzaque, *supra* note 23, at 284.

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actors have as much (if not more of) a role in regulation. In the next section, I will explore this phenomenon in closer detail.

B. Enhancing Public Participation as a Norm in International Law

Despite the centrality and importance of the principle of public participation to international environmental law, and although it can be located in numerous international and domestic legal instruments, its normative status in international law is still undergoing development. One way in which the EPs offer potential for an enhanced role for public participation in global environmental regulation is through their possible capacity to contribute to the hardening the principle of public participation in international environmental law.

I begin this section by addressing how norms in international law are conventionally hardened. I explore and ultimately find support for Ong's notion that voluntary codes—such as the EPs—can in fact contribute to the hardening of international environmental norms. I then move on to examine the process by which the EPs are contributing to the hardening of the principle of public participation. I find evidence of this hardening predominately by reference to the fact that the three elements of the principle (participation in decision making, access to information, access to judicial/administrative proceedings) have been incorporated into the EPs text itself. The way in which the EPs have been adopted further confirms that this hardening is, to some extent, actually occurring.

I. Can the EPs Contribute to the Hardening of this Norm?

It is not immediately evident that the EPs, as a voluntary code, can contribute in any way to the development of a principle in international law, because in the conventional sense, rules of international law are created through the actions of state actors. The classical sources of international law are captured in Article 38 of the Statute of the ICJ.[37] Article 38 confirms that international treaties, international custom, and the "general principles of law recognized by civilized nations" are the primary sources of international law.[38] It further provides that judicial decisions and the work of preeminent scholars are "subsidiary means" of determining the law.[39]

[37] Statute of the International Court of Justice, appendix to Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 [hereinafter "ICJ"].

[38] *Id.* at Art. 38 (a)-(c).

[39] *Id.* at Art. 38(d).

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The potential contribution of voluntary codes such as the EPs lies in their influence—as an instrument of soft law—upon the development of customary rules. Rules of customary international law, unlike rules found in treaties, must undergo a process of ripening into binding hard law. This process of hardening or "crystallization" takes place over time and receives its impetus from established general state practice and *opinio juris*—the belief by states that they must not only follow but also are bound by a particular norm. Both hard and soft law instruments contribute to this process of crystallization by establishing both general practice and *opinio juris*. Stated simply, the more often a principle appears in international and national legal instruments, the more evidence there is it is crystallizing and thus gaining normative force that would make it binding on the international community at large.[40]

Soft law instruments—which can take a variety of forms, including multilateral declarations and codes—are increasingly important instruments in the crystallization of rules of customary international law and, as such, have become vital sources of international law. While not entirely different, soft law is distinct from hard law in the degree to which it binds a party. This arises from the source of its authority. Hard law institutions encompass legally binding norms that are typically grounded in the authority of the state (with its attendant coercive capacity). Soft law norms are less binding, located as they are "in the twilight between law and politics."[41] As Boyle points out, while they may "lack the supposedly harder edge of a 'rule' or 'obligation," soft law rules should not be understood to be non-binding *per se*.[42] Nor should the distinction between hard and soft law be overemphasized. Rather, soft and hard law can be viewed as both forming parts of a single regulatory space, where they can blend, overlap, complement, work separately, or oppose one another.[43]

The importance and influence of soft law instruments in the development of norms of international law is particularly evident in the realm of international environmental law. It has proven difficult to establish international environmental values through traditional,

[40] For more detail, *see* HUGH KINDRED *ET. AL.*, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 7TH ED. at ch. 3 (2006).

[41] Daniel Thürer, *Soft Law, in* ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 4, 452 (Rudolf Bernhardt ed., 2000).

[42] David Ong, *From 'International' to 'Transnational' Environmental Law? A Legal Assessment of the Contribution of the 'Equator Principles' to International Environmental Law* 79 NORD. J. INT'L. L. 35, 46 (2010), citing Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law* 48 INT'L. & COMP. L.Q. 901, 907 (1999).

[43] *See* John Kirton & Michael Trebilcock, *Hard Choices and Soft Law in Sustainable Global Governance, in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 3, 11-12 (John Kirton & Michael Trebilcock eds., 2004).

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consensus-dependant hard law instruments. Rather, less binding soft law mechanisms have provided most of the impetus for the development of many environmental norms.[44]

It is clear, then, that state-generated soft law is playing an ever more important role in the crystallization of environmental values into binding norms in international law. But what about soft law instruments created by and for *non-state* actors?

As discussed above in the Introduction, transnational, non-governmental actors have been gradually assuming many of the regulatory functions that previously lay within the exclusive purview of the state. This has largely been the result of two interrelated phenomena: the rise of transnational actors and the decline of the state. Both of these events can be linked to the spread of globalization. Globalization has seen both the proliferation of increasingly powerful transnational corporations (whose activities influence an ever wider array of people), and the increasing inability or reluctance of the state to regulate the global conduct of these actors.[45] As a result, the line between state and non-state has blurred, rendering the notion that the two are fundamentally different essentially obsolete.[46] This is particularly observable in the environmental law sphere, where, as Wood notes, the distinctions between non-state and state, between public and private, and between voluntary and compulsory are not particularly helpful in understanding environmental regulation.[47]

The inability or unwillingness of states to impose standards to mitigate the social and environmental effects of the activities of transnational actors has left a gap to be filled both in terms of who is to do the regulation as well as how it is to be done. This "regulatory vacuum"[48] has created a space in which transnational actors are left to operate unconstrained by state-based mechanisms of control. Fuelled by concerns over the effects that this unregulated activity has been having on the environment, civil society actors

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[44] This phenomenon is illustrated by the history of the principle of transboundary harm. This principle—arguably the most universally recognized customary rule in international environmental law—is generally associated with Principle 21 of the Stockholm Declaration on the Human Environment, which is a non-binding soft law instrument. *See* Yang & Percival, *supra* note 21.

[45] Wesley Cragg *Multinational Corporations, Globalisation, and the Challenge of Self-Regulation, in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 213, 213 (John Kirton & Michael Trebilcock eds., 2004).

[46] *See* BAS ARTS, MATH NOORTMANN & BOB REINALDA, NON-STATE ACTORS IN INTERNATIONAL RELATIONS 70-71 (2001). Of course, countless others have made this observation, albeit characterizing it in other ways. *See* Wood, *supra* note 3.

[47] Wood, *supra* note 3*,* at 126. Although he is referring to environmental regulation in a domestic context, his observations can apply equally to the international plane.

[48] Cragg, *supra* note 45, at 213.

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(whose rise comprises another byproduct of globalization) have begun to exert pressure on governments and transnational actors to regulate.

Self-regulation through voluntary codes has emerged as an option to address this vacuum and to provide sufficient response to civil society concerns (while simultaneously keeping the specter of state-based regulation at bay).[49] The EPs, whether more specifically characterized as a form of "transnational agreement,"[50] "process standard,"[51] or voluntary code (the term I employ here), are emblematic of this phenomenon.

As noted above, the legal effect and normative contribution of corporate voluntary codes such as the EPs to international law is not immediately apparent. Article 38 of the ICJ does not contemplate instruments derived from non-state actors as sources of law. However, given the context sketched out above, it becomes difficult to dismiss the normative influence of these kinds of instruments in international law—despite their voluntary nature and non-state origin. But how precisely can voluntary codes contribute to the body of soft law that contributes to the evolution of customary international law?

Ong argues that the EPs and similar instruments can be characterized as sources of "transnational soft law" that can add to the hardening of principles of international environmental law in essentially the same kind of way that traditional ("international") soft law does.[52] Non-state transnational actors (such as globally facing financial institutions) have taken over the international law-making role that was once the exclusive domain of the state—a process to which states have apparently acquiesced, if not outright consented. He argues that this indicates that the self-regulatory practice of private transnational actors, expressed through voluntary codes such as the EPs, can be said to contribute to the process of norm formation in the way that state practice does.[53]

He clarifies that voluntary codes, while perhaps not part of international soft law as such, at least can "enhance [its] normative reach … by adding a further 'transnational' dimension to its application."[54] Muchlinski makes a similar case, arguing that the fact that the body of non-binding instruments such as codes in a given area is growing itself "suggests a growing interest among important groups and organizations—corporations, industry associations

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[49] *Id.* at 221-22.

[50] Ong, *supra* note 42, at 44.

[51] Benjamin Richardson, *Financing Sustainability: The New Transnational Governance of Socially Responsible Investment* 17 YRBK. INT'L. ENVTL. L. 73, 75 (2008).

[52] Ong, *supra* note 42.

[53] *Id.* at 48.

[54] *Id.* at 74.

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NGOs, governments and intergovernmental organizations—and [leads] to the establishment of a rich set of sources from which new binding standards can emerge."[55]

This is a logical conclusion, and it appears to accord with the realities that emerge from the regulatory landscape sketched out above. Although not entirely insignificant, states are no longer the only relevant actors involved in international regulation. Rather, it appears that regulation is increasingly a product of a mingling of transnational and international sources of law. At their points of intersection, they can both influence and draw influence from one another in such a way that the difference between them becomes blurred. In this paradigm, all sources of soft law—whether transnational (such as voluntary codes) or international—can contribute to the hardening of rules in customary international law. By hardening the principle of public participation in international law, the EPs can strengthen the practice of public participation. As the norm crystallizes into custom—bolstered along the way by the normative force that the EPs lend it—it transforms into a more compelling right for the public to participate in environmental governance in an international, national, and transnational context.

If we accept the premise that it is theoretically possible for the EPs to contribute to the hardening of this principle, it follows that we can look for evidence that this is actually occurring. It seems reasonable that we can approach this in a similar way to the approach we would take if we were attempting to establish that an international soft law instrument is incorporating a principle and contributing to its crystallization. As such, next I look to both the text of the EPs (for evidence that they have incorporated the principle of public participation) and the degree to which they have been adopted (for evidence that this principle is being "practiced" and transmitted).

II. Evidence of Incorporation and Adoption

Having established support for the notion that voluntary codes can provide a normative boost to the hardening of principles located in international law, it becomes possible to take this premise to the next level. Is there evidence that the EPs are actually hardening the principle of public participation? Looking to several factors, it becomes clear that the EPs are in fact contributing to the hardening of the principle of public participation. As will be explored below, this is evident, first, in the degree to which the EPs text incorporates the principle of public participation and, second, in the manner in which the EPs have been adopted. This evidence provides further proof of the potential of the EPs to enhance the role of public participation in global environmental regulation.

[55] Peter Muchlinski, *Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by International Governmental Organisations* 3 NON-STATE ACTORS AND INT'L. L. 123, 129-30 (2003).

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On its face, the EPs text clearly embraces the principle of public participation. All three of the elements of public participation discussed above—the right to participate in environmental decision making, the right of access to information, and the right to access justice—are clearly reflected in the text.

The first element—the right to participate—is most explicitly captured in Principle 5, which requires (for all Category A and, "as appropriate," Category B projects) that the borrower to consult with "project affected communities" in a manner that is "structured and culturally appropriate." Further, where necessary, the EPFI "may" compel the borrower to draft a Public Consultation and Disclosure Plan.[56] Principle 5 goes on to specify that for projects "with significant adverse impacts," this consultation must be "free, prior and informed" and that borrowers are to facilitate the "informed participation" of these communities. These specifications are intended to satisfy EPFI that "a project has adequately incorporated affected communities' concerns."[57]

This element also echoes in the Social and Environmental Management System (SEMS) and Action Plan (AP) requirements mandated in Principle 4. Both of these mechanisms are intended to operationalize the identification and management of social and environmental risks inherent to the planned project. The latter accomplishes this by sketching out the borrower's plan for implementing the recommendations and addressing the concerns contained within the initial social and environmental assessment of the project (mandated in Principle 2), and the former does this by supporting the integration of these elements both with each other and with local laws and regulations.[58] Specifically, the SEMS is required to address the management of the risks and impacts identified in the AP and the actions required to bring about compliance with the applicable IFC Performance Standards, Guidelines, and host laws. "Community engagement" is among the seven elements it must incorporate.[59] The EPs III draft text would go some distance in enhancing these aspects of the EPs.[60]

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[56] Equator Principles, *supra* note 14, Principle 5, at n.4.

[57] *Id*.

[58] *Id.* at Principle 4.

[59] *Id.* at Principle 4, at n.3.

[60] Draft Principle 6 is concerned entirely with "stakeholder engagement" and provides some additional detail. A (rather vague) definition of "affected communities" is now provided for in Exhibit I, and the Principle's protections would be extended to "Other Stakeholders" (also defined—also vaguely—in Exhibit I) "where appropriate." Especial reference is made to indigenous groups, from whom "prior informed consent" would now be required for projects expected to adversely impact them. *See* EPs III Draft, *supra* note 11.

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Aspects of the right to access information—the second pillar of the principle of public participation—also appear in the EPs text. In support of the consultation obligations contained in Principle 5, the borrower must make the AP and assessment available to the public "for a reasonable minimum period in the relevant local language and in a culturally appropriate manner." This disclosure "should" occur early in the process of assessment, before the project actually begins, and "on an ongoing basis" thenceforth.[61] Additionally, the borrower "will" provide details about the grievance mechanism (required under Principle 6 and discussed below) to the affected communities.[62] As will be discussed at greater length below, the EPs III would make some enhancements and provide some clarifications around these requirements.[63]

The EPs also incorporate the third pillar (access to justice) through the grievance mechanism requirement in Principle 6. This obligation is triggered for all Category A projects and for Category B projects "as appropriate." Its purpose is to support the community consultation and disclosure obligations under Principle 5. It "will allow" the borrower to become informed of and to resolve environmental or social concerns raised by the public. The borrower is to ensure that the mechanism "addresses" the concerns brought before it "promptly and transparently, in a culturally appropriate manner." Further, the mechanism is to be "readily accessible" to all parts of affected communities.[64] The grievance mechanism requirement would be preserved in the EPs III.[65]

By imbedding the principle of public participation within its text, the EPs reflect the influence that international law can exert upon transnational regulation. This incorporation, in turn, strengthens the normative influence of the principle, therefore making it more likely that it will be incorporated in future transnational soft law instruments.

Having established that the three elements of the principle of public participation are clearly located in text of the EPs, I turn to a brief overview of the adoption of the EPs. My aim here is to shed some light (in a way that reflects the manner in which norms harden in international law) on the degree to which the principle of public participation is being "practiced" and the extent to which actors view the EPs—and, by extension, the principle

[61] Equator Principles, *supra* note 14, Principle 5.

[62] *Id.* at Principle 6.

[63] EPs III Draft, *supra* note 11, Principle 10. *See also* section C., below.

[64] Equator Principles, *supra* note 14, Principle 6.

[65] The revised Principle 6 modifies slightly substance of this requirement, by providing, for example, that the grievance mechanism "should not impede access to judicial or administrative remedies" and that it "will seek to *resolve*" concerns presented to it (in contrast to the current formulation, in which borrowers "*will* … *ensure* that the mechanism *addresses*" concerns). *Id.*; EPs III Draft, *supra* note 11, Principle 6.

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of public participation embedded within it—as binding. As such, there are two dimensions to the adoption of the EPs that are relevant: how widely the EPs have been adopted and who has adopted them.

The EPs have seen a fairly rapid and widespread rate of adoption in recent years, and this is reflected in both the rise and diversification in its membership.[66] The number of signatories to the EPs has grown from an initial handful of banks to its current stock of 77 banks.[67] Its membership base has also broadened over the course of its development, and it currently includes banks located in 32 countries in Africa, Asia, Europe, the Middle East, North America, and South America.[68]

The EPs have been adopted by what are arguably the largest and most important banks that are currently engaging in global project finance, including Barclays plc, Citigroup, Credite Suisse, Royal Bank of Scotland, Mizuho Corporate Bank, BNP Paribas, and ING.[69] As of 2006, for example, 60 per cent of the top twenty international project finance arrangers had signed onto the EP[70] and 70 per cent of the top ten.[71] Haack, Schoeneborn, and Wickert have argued that a "critical mass" of adoptions occurred in 2008 when two French banks acceded to the EPs.[72] This tipping point, they argue, radically re-characterized the nature of the EPs development into a process that is "driven by the convergence of interests and identities within the field of international project finance" and that "successively institutionalizes a new way of doing project finance."[73] In other words, they argue that EPs have successfully redefined the way in which project finance is being conducted.

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[66] Patrick Haack, Dennis Schoeneborn & Christopher Wickert, *Exploring the Constitutive Conditions for a Self-Energizing Effect of CSR Standards: The Case of at the 'Equator Principles'* 5 SSRN (2010), available at: http://ssrn.com/abstract=1706267 (last accessed: 1 December 2012).

[67] EPs Website, *supra* note 13. The number of signatories is current as of 25 August 2012.

[68] EPs Website, *supra* note 13.

[69] BankTrack, *Project Finance Trends: Key players, regions and sectors* 7-8, available at: http://www.banktrack.org/download/project_finance_trends_key_players_regions_and_sectors/0_1_031001_project_finance_trends_key_players_regions_and_sectors.pdf (last accessed: 1 December 2012); EPs Website, *supra* note 13.

[70] Richardson, *supra* note 51, at 108.

[71] Jane Andrew, *Responsible Financing?: The Equator Principles and Bank Disclosures* ACCOUNTING & FINANCE WORKING PAPER 08/01, SCHOOL OF ACCOUNTING & FINANCE, UNIVERSITY OF WOLLONGONG 6 (2008).

[72] Haack, Schoeneborn & Wickert, *supra* note 66, at 26-27.

[73] *Id.*

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As a consequence of who has signed onto the EPs, a large proportion of project financing is now conducted under the auspices of the EPs. By way of illustration, in 2007 more than 85 per cent of global project financing was conducted in accordance with the EPs.[74] This has led UNCTAD to state that "[n]o major project is likely to be financed today without the application of the Equator Principles."[75]

However, the refusal of both Russian and Chinese banks[76] to sign onto the EPs weakens the breadth of EPs' diffusion and the strength of their adoption. This has been identified as a stumbling block for the EPs by numerous commentators.[77] As long as powerful Russian and Chinese banks are willing to finance projects whose environmental risk preclude EPFI from financing them under the EPs, the effectiveness—and, by extension, normative influence—of the EPs, remains somewhat diminished.

Nevertheless, the text and the degree of adoption of the EPs provide evidence that the EPs have been contributing to the hardening of the principle of public participation in international law.

C. Operationalizing the Institutions of Public Participation

It is clear based on the above argument that the EPs are strengthening the principle of public participation as it appears in international law. The effectuation of this potential is dependent upon the EPs' capacity to actually institutionalize public participation on the ground. Focusing on one element of public participation—the right to access information—I argue that the EPs neither contain the appropriate mechanisms to properly institutionalize public participation rights, nor are they doing so in practice.

I begin by sketching out in greater detail what the right to access to information should entail. I then look more closely to some of the provisions of the EP text identified in the preceding section to locate and assess the adequacy of the mechanisms for public disclosure. I review both those that affect state actors (the borrowers) and those that affect transnational private actors (the lender banks). I will bolster this assessment by drawing from the observations and experiences of stakeholders.

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[74] *Id.* at 5.

[75] *Id.* at 66.

[76] As of 25 August 2012, only one Chinese Bank—the Industrial Bank Co.—and no Russian banks have adopted the EPs. *See* EPs Website, *supra* note 13.

[77] Conley & Williams, *supra* note 1.

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I. The Right to Access Information: an essential element of public participation

Public access to environmental information has been characterized as "the foundation of all effective public participation."[78] Along with the correlating requirement of transparency (or disclosure, terms which I use interchangeably here), access is crucially important to the realization of public participation as a whole. Without access to information about activities with potential negative impact upon the environment, affected individuals will be unable to engage in the decision-making process. Either they will be unaware of environmental decisions under consideration or they will not have all the information available to respond effectively or to contribute meaningfully to a discussion of a proposed project.[79]

Ideally, the right to access information empowers citizens to seek out information from public authorities. These public authorities bear the correlating burden of collecting and disseminating information.[80] The manner and degree to which information is collected and disseminated are relevant. Both will impact upon the breadth of participant involved in decision-making.[81] Widely shared and usable information will empower stakeholders that otherwise may be excluded from the decision making process to become active participants.[82]

In practice, this right tends to translate into public disclosure provisions relating to public inventories and uses of toxic chemicals, environmental auditing of business activities, and eco-labeling programs.[83] Information can be made available through a variety of media, including the maintenance of publicly accessible inventories and websites.[84] Information can be made available at the aggregate level (e.g., date about air or water quality or state of the environment reporting) or at the facility level (e.g., reporting from or about the performance of a specific mine or factory).[85] As Petkova notes, obtaining information at

[78] Craig & Jeffrey, *supra* note 34, at 116.

[79] *See generally* PETKOVA *ET. AL.*, *supra* note 22; Razzaque, *supra* note 23.

[80] Razzaque, *supra* note 23, at 284.

[81] PETKOVA *ET. AL., supra* note 22, at 35.

[82] *Id.*

[83] Richardson & Razzaque, *supra* note 33, at 182.

[84] PETKOVA *ET. AL.*, *supra* note 22, at 51-52.

[85] *Id.* at ch. 3.

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the latter level, while vital to supporting a right to access information, often proves particularly challenging.[86]

When conceived of as part of the principle of public participation in international law, the right to access information is generally applicable only to states—meaning that private actors would not necessarily be subject to disclosure requirements under the principle (unless compelled by national legislation). The Aarhus Convention, for example, deals with this by providing that state parties "shall encourage operators whose activities have a significant impact on the environment" to disclose details of these impacts by way of voluntary means such as eco-labeling or eco-auditing.[87]

More broadly conceived, however, the right to access environmental information could include some role for non-state actors. Particularly in the transnational regulatory landscape in which the EPs operate, there may be a case for extending state obligations to disclose information to non-state actors. Having willingly taken on a greater role in regulation, it makes sense that non-state actors be expected to take on some of the attendant responsibilities. Although an in-depth discussion is beyond the scope of this paper, it bears noting that public disclosure can be crucial to legitimacy in non-state regulation, where legitimacy is not derived from democratic accountability or coercive powers as it is for the state.[88]

Even if no responsibility exists for non-state actors to disclose environmental information, arguably, in the context of the EPs, public disclosure *cannot* be realized in any meaningful way without commitment and delivery from non-state actors. The state is not the only actor involved in making decisions about whether and how projects should go forward in light of their environmental risks. Access that is limited to information possessed by the state is, in essence, access to only part of the information needed to fully and meaningfully participate.

II. Right to Access Information and the EPs: is it occurring?

Transparency has been at the heart of NGO concerns over the EPs. In their qualitative study conducted in 2009, Conley and Williams found that NGO officials from their interview sample complained consistently about the lack of transparency they have

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[86] *Id.* at 63.

[87] Aarhus Convention, *supra* note 28, Art. 5(6).

[88] *See* Julia Black & David Rouch, *The Development of the Global Markets as Rule-makers: Engagement and Legitimacy* L. & FIN. MKTS. REV. 218 (2008); Steven Berstein & Benjamin Cashore, *Non-state Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?, in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE, 33 (John Kirton & Michael Trebilcock eds., 2004).

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experienced with respect to EP-funded projects.[89] This sentiment is reflected in NGO literature, which reiterates concern over a perceived lack of transparency from both borrowers and EPFI.[90] In its 2010 report, BankTrack went so far as to describe the EPs as "an inward looking initiative that continues to operate in secrecy."[91]

Others, of course, are less pessimistic. An extensive report published by Freshfields Bruckhaus Deringer underplayed the issue, for example. While acknowledging that information was, on occasion, withheld by sponsor banks, it attributed this to confusion over what information was relevant for disclosure and a lack of appreciation of the importance of the timeliness of disclosure.[92]

The EP provisions on disclosure, as touched upon above, are located mainly within Principle 5. The disclosure requirement imposed upon borrowers is fairly specific in its scope: borrowers are to make both the assessment documentation and the Action Plan (AP) available to the public. The text further provides that a Public Consultation Disclosure Plan may be required in some instances to facilitate this.[93] On its face, then, Principle 5 seems to impose specific disclosure requirements upon borrowers.

However, there are some significant limitations to these requirements. Firstly, it does not appear that any disclosure obligation extends to borrowers' compliance obligations under the EPs. Specifically, borrowers are not compelled to disclose the "periodic reports" they covenant to provide to EPFI with respect to AP compliance and compliance with relevant local environmental and social laws and regulations.[94] Secondly, although this compliance information is to be verified by an independent expert, the results of this independent verification also escape public disclosure obligations.[95] These limitations cast doubt on the degree to which the EPs are able to actually realize a right to access environmental information.

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[89] Conley & Williams, *supra* note 1, at 23.

[90] *See* BANKTRACK, BOLD STEPS FORWARD: TOWARDS EQUATOR PRINCIPLES THAT DELIVER TO PEOPLE AND THE PLANET (2010); ANDREA DURBIN *ET. AL.*, SHAPING THE FUTURE OF SUSTAINABLE FINANCE: MOVING FROM PAPER PROMISES TO PERFORMANCE 66 *ff*. (2006); Vivian Lee, *Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Mill in Uruguay* 6 NW. J. INT'L. HUM. RTS. 254 (2008).

[91] BANKTRACK, *supra* note 90, at 2.

[92] FRESHFIELDS BRUCKHAUS DERINGER BANKING ON RESPONSIBILITY 93-96 (2005).

[93] Equator Principles, *supra* note 14, Principle 5, n.4.

[94] As required by Principle 8. *See* Equator Principles, *supra* note 14.

[95] As required by Principle 9. *Id.*

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The reason the EPs fail to fully realize access to information as part of their public participation framework involves the limited ways in which the EPFI themselves commit to publicly disclosing information. This is evident from the lack of disclosure requirements around the categorization of a project (a requirement imposed in Principle 1 upon EPFI). In essence, this means that the text's access to information guarantee is limited to elements in the decision-making process that occur *after* the project has already been categorized as high (Category A), medium (Category B), or low risk (Category C).

This detracts from the wholeness of the EPs' public disclosure requirements generally. In addition, this exclusion is particularly problematic because it shields this aspect of a project's assessment from public disclosure requirements. It excludes the public from participating in a crucial step in a project's assessment life cycle. As noted above, the way a project is categorized ultimately determines the degree to which (if at all) it is subject to the other exigencies of the EPs. As revealed by a qualitative study conducted by Haack, Schoeneborn, and Wickert, various actors on the ground have observed that the EPs' more rigorous requirements are in fact sometimes circumvented by EPFI who classify projects that should fall into Category A as Category B or Category C.[96]

Further disclosure concerns can be found in Principle 10, which commits the EPFI to certain reporting requirements. This Principle seems to go some distance in imposing disclosure requirements upon EPFI. However, there are several ways in which this provision is problematic.

First, the language of Principle 10 appears more declaratory than compulsory. It provides that "[e]ach EPFI … *commits* to report public publicly at least annually about its Equator Principles implementation processes and experience…" [emphasis added]. This stands in contrast to the more imperative language used in other Principles.[97]

A further issue emerges from the fact that this public reporting is to be dispatched in light of "appropriate confidentiality considerations." NGOs have complained that this caveat is a hindrance to disclosure and transparency. They have found that banks are characterizing many relevant issues as "commercially sensitive" and, as such, exempt from disclosure for

[96] Haack, Schoeneborn & Wickert, *supra* note 66, at 21.

[97] For example, "…the EPFI *will*…categorize…project[s]" [emphasis added] (Principle 1); "… the borrower *will* … establish a grievance mechanism" [emphasis added] (Principle 6); "…the borrower *will* covenant in financing documentation" [emphasis added] (Principle 8). See Equator Principles, *supra* note 14.

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reasons of confidentiality.[98] This observation has been generally confirmed in a qualitative study by Kass and McCarroll[99] and in Freshfields Bruckhaus Deringer's 2005 report.[100]

Moreover, while Principle 10 specifies that Banks' reporting "should" include at least the number of transactions screened by the EPFI, a breakdown of how the transactions were categorized, and "information" about implementation,[101] there is no requirement to disclose information about the degree to which the EPFI has adopted the EPs.[102] This is significant because for most EPFI, project finance comprises only one aspect of the bank's portfolio. On occasion, the project finance arm of an EPFI will refuse funding to a project only for one of the bank's other branches to engage in another form of financial transaction with the same players on the same project.[103]

The highly conditional nature of Principle 10's commitment is a major hindrance to effective implementation of access to information rights. This right is intended to mitigate the information imbalance that inevitably exists between parties. In the context of the EPs, the EPFI hold most of the cards. It is impossible for the public to meaningfully participate—and therefore provide the effective counterbalance and feedback required for effective regulation in a transnational landscape—without knowing details around the risks and benefits of projects being considered.

Shortcomings in disclosure were acknowledged in research conducted by the Equator Principles Association (EPA). In a series of stakeholder interviews conducted as part of its 2011 Strategic Review, the EPA noted widespread transparency concerns around EPFI reporting, a reality that frustrates efforts to evaluate EPFI performance.[104] Its findings revealed several systemic shortcomings that are inhibiting the EPs' public disclosure capacity. Firstly, a lack of reporting standard is leading to inconsistent and limited reporting on the implementation of the EPs. Secondly, any reporting data that is made is available is not verifiable unless the EPFI has had it audited. Thirdly, reporting data is

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[98] International Institute for Environment and Development, *Just Economics, Investing for Sustainable development?* 44 (2011), available at: http://pubs.iied.org/pdfs/16505IIED.pdf (last accessed: 1 December 2012) [hereinafter "Just Economics"].

[99] Stephen Kass & Jean McCarroll, *The Revised Equator Principles* 236 N. Y. L. J. 3 (2006), available at: http://www.clm.com/publication.cfm?ID=73 (last accessed: 1 December 2012).

[100] FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 92, at 107.

[101] Equator Principles, *supra* note 14, Principle 10, n.6.

[102] JUST ECONOMICS, *supra* note 98, at 34.

[103] *Id.* at 43.

[104] SUELLEN LAZARUS & ALAN FELDBAUM, EQUATOR PRINCIPLES STRATEGIC REVIEW FINAL REPORT iii (2011).

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difficult to track down and impossible to aggregate. Finally, it is essentially not possible to determine whether an EPFI is fulfilling its commitments under the EPs.[105]

In essence, this means that the public is unable to accurately assess what (if anything) the EPs are achieving—which renders it extremely difficult for civil society actors to effectively critique and make suggestions for improvement. Ultimately, the EPA's Review underlined the importance of improved transparency as a key requirement for the success of the EPs.[106] However, it also made note of the fact that EPFI remain hesitant to open themselves up to more stringent transparency obligations.[107]

NGOs have also voiced concern over the lack of full transparency at the project level. BankTrack notes that local stakeholders need to be made aware "that a proposed project that is about to change their lives is 'under Equator' and that the Principles grant them rights to information, consultation and influence."[108] There are some examples of information being made accessible about specific projects. Often, these disclosure requirements are made available by way of a website that is maintained by project financers, that may make the project's environmental assessment and other documents available, and that may invite comment from the public. This has been offered both as positive evidence of public disclosure occurring[109] as well as evidence of deficient public disclosure.[110] Of course, if disclosure is made in a way that it is culturally or technologically inaccessible to the potentially affected communities then it may be rendered meaningless. This is a very real possibility when projects occur in rural, developing areas or where aboriginal communities are affected.

While it is too early to provide a comprehensive assessment, it is worth noting that it appears as though the proposed revisions to the EPs (EP III) would go only some distance in addressing some of these inadequacies. Changes to reporting and "transparency" requirements would be found largely in Principle 10. For example, borrowers would need to make the Assessment documentation and management plan available "online" unless the borrower does not have a website. Interestingly, while the current version places this requirement upon the shoulders of the borrower ("the Assessment documentation and AP,

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[105] LAZARUS*, supra* note 104, at 7*.*

[106] *Id*.

[107] *Id*. at 7.

[108] BANKTRACK, *supra* note 90, at 3.

[109] Richardson, *supra* note 51, at 93, who points to the Baku-Tbilisi-Ceyhan Pipeline website, which was maintained throughout the project's construction.

[110] BANKTRACK, PRINCIPLES, PROFITS OR JUST PR? TRIPLE P INVESTMENTS UNDER THE EQUATOR PRINCIPLES 31 (2004). This report points to the Nam Thuen 2 hydropower project in Laos as an example.

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or non-technical summaries thereof, will be made available to the public *by the borrower*"[111]), the revised draft implies that the EPFI would have a role in ensuring this occurs ("*the EPFI will require the borrower* to disclose the Assessment documentation and the ESMP online"[112]). The revised Principle 10 would also extend the EPFI reporting requirements beyond EP implementation processes and experiences to formally compel reporting of "transactions screened and closed" by EPFI.[113] It would offer, further, greater clarity around the EPFI reporting requirements that are rather vaguely outlined in the original Principle by way of the "Minimum Reporting Requirements" outlined in Annex B (a new feature).

On a positive note, in addition to providing some (albeit limited) much-needed clarity, Annex B's minimum reporting requirements for EPFI would also include project-specific data reporting. Additionally, some of the proposed minimum requirements would likely result in easier access for stakeholders (for example, requiring data be reported in one location). The language of the revised provision would also be more compulsory in nature (EPFI "*will* report publicly"[114] as opposed to EPs "*commit*[] to report publicly"[115]). An additional requirement that borrowers report greenhouse gas emission levels for projects that emit over 100,000 tons of CO_2 or equivalent per year would be introduced.

These improvements, however, would not go far enough in addressing the concerns outlined above. Significantly, for example, reporting requirements for EPFI would continue to lack. EPFI project-specific reporting—while comprising a welcome addition to the current regime—would be highly contingent and would require only a scant minimum of data to be reported (project date, sector, global region, and year in which the project loan reached financial close). It would also be subject to obtaining client consent. Principle 10 also would not dispense with the condition that EPFI dispatch their reporting obligations with an eye to "appropriate confidentiality considerations." As discussed above, this requirement has the potential to render virtually impotent any transparency requirements (particularly as pertaining to the reporting of project-specific data), and the determination of what exactly constitutes an appropriate consideration appears to be left entirely to the discretion of the EPFI.

[111] Equator Principles, *supra* note 14, at Principle 5 [emphasis added].

[112] EPs III Draft, *supra* note 11, at Principle 5 [emphasis added].

[113] The current version of the text provides, in a footnote, that reporting "should" include at minimum the number of transactions screened. Equator Principles, *supra* note 14, Principle 10, n.6. *See also* above discussion.

[114] EPs III Draft, *supra* note 11, at Principle 10.

[115] Equator Principles, *supra* note 14, at Principle 10.

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Examining the EPs' institutional implications for the right to access environmental information, then, it is clear, unfortunately, that there are significant shortcomings in how the EPs are putting public participation into practice. The EPs neither contain the appropriate mechanisms to properly institutionalize public participation rights, nor are they actually doing so in practice. Unfortunately, many of these flaws would not appear to be well remedied by the proposed EPs III Draft.

D. Conclusion

In the current, uncertain and complex global environmental regulatory landscape, public participation has a crucial role to play. The unclear normative and institutional status of public participation in global environmental regulation constrains the ability of public non-state actors to meaningfully contribute to this process.

The EPs are uniquely positioned to facilitate an enhanced role for public participation. In addition to the obvious potential to foster greater on-the-ground inclusion and participation in environmental decision- making, and despite their voluntary and non-state origins, the EPs also have the potential to harden the norm of public participation in international law. However, this potential is currently vitiated by the EPs' failure to operationalize the institutions required for public participation meaningfully. This is particularly evident with respect to their inability to properly realize disclosure and access to information rights.

In the next few years, as global environmental problems likely worsen and the influence of transnational corporate actors continues to increase, voluntary codes such as the EPs will be leaned upon even more as a means of regulation. The ability for the EPs to bear positively upon public participation in this landscape in future remains, unfortunately, dubious.

The next version of the EPs is poised to respond to some NGO concerns around transparency and participation and thus may prove more effective than the current version in engendering meaningful public participation. The EPFI have remained hesitant in expanding disclosure requirements, however, a fact that is reflected in the EPs most recent iteration. The draft text of the new EPs reveals that doubts remain as to whether significant improvements to the institutional failings that currently plague the EPs will be rectified. Despite their flaws, however, the EPs remain a step in the right direction.

Moreover, the process of drafting and revising the EPs reveals, at the very least, an attempt to engage and respond to the interests of concerned groups. These efforts include a formal stakeholder consultation and public comment period via online submission of

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comments, meetings, webinars, and distribution of the current draft.[116] While the revised draft may not entirely provide an adequate vehicle for public participation in projects impacting the environment, the existence of the EPs illustrates that it is increasingly impossible for transnational private actors to completely ignore the public interest. The EPs demonstrate how voluntary codes can potentially create space for dialogue and negotiation between the public and transnational actors when interests clash.

Additionally, there is potential that as additional norms and actors emerge and gain strength in this amorphous regulatory landscape, they will exert pressure on the EPs and other instruments to more fully embrace public participation. Perhaps as this landscape changes, the right conditions will emerge so that the EPs realize the full potential of a participatory paradigm for global environmental regulation, thereby creating the conditions to allow all actors to make a contribution to more effective environmental regulation.

[116] EPs Website, *supra* note 13.

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