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Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay

Vivian Lee*

I. INTRODUCTION

¶1 Traditionally, nation-states have played a central, if not exclusive, role in the human rights system.[1] Critical to the functioning of the human rights system has been the act of binding states through a network of treaty obligations to which only states could become parties.[2] This traditional model of human rights obligations has in recent years come under increased pressure from a changing, globalizing world. Greater attention is now being paid to the role and responsibilities of non-state actors, such as individuals and corporations, vis-à-vis human rights.[3]

¶2 A new, modernized human rights system is developing in which the non-state actor has abandoned its marginal role and is growing in prominence. Moreover, one of the newer concepts in this modernized system is the notion of corporate human rights responsibility for both state and non-state actors. In recent years, state actors have been found to have violated articles of human rights conventions for failing to stop the activities of non-state corporate actors. For example, in the case of *López Ostra v. Spain*, the European Court of Human Rights ("ECHR") found that Spain had violated Article 8 of the European Convention of Human Rights because the state failed to stop the activities of a waste-treatment plant whose operations caused nuisance and health problems for nearby inhabitants.[4] In its decision, the court formally recognized that environmental degradation can obstruct one's enjoyment of human rights.[5] The decision demonstrated the court's willingness to address corporate human rights violations, even if it must do so through a state actor.

¶3 Another feature of this new, modernized human rights system has to do with the recognition that the reach of human rights continues to expand to encompass social and environmental rights, making a discussion of such rights particularly relevant in the area of corporate human rights responsibility. The decision in *López Ostra v. Spain*[6]

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* J.D. Candidate 2009, Northwestern University School of Law. B.A. *cum laude* in History, Yale College, 2003. Sincere thanks to the current Board members of the Journal of International Human Rights here at Northwestern who were instrumental in shaping the final stages of this work and to my 3L advisor who did the same for the earlier ones. I would also like to thank my parents, my sister, my brother-in-law, and my friends for their love and support.

[1] INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1385 (Henry J. Steiner et al. eds., Oxford University Press 3d ed. 2008)(1996)[hereinafter HUMAN RIGHTS IN CONTEXT].

[2] *Id*.

[3] *Id*.

[4] López Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) 16-17 (1994).

[5] Judith Hippler Bello & Richard Desgagne, *Lopez Ostra v. Spain*, 89 AM. J. INT'L L. 788, 789 (1995).

[6] López Ostra, *supra* note 4.

exemplifies the expanded reach of human rights through the recognition that social and environmental conditions such as noise and pollution are within the ambit of a person's rights protected by Article 8 of the European Convention.[7] The *López Ostra* opinion clearly recognized the connection between environmental conditions and human rights in stating that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[8] The court's later decisions confirmed the position that the court considers the creation of certain social and environmental conditions as possible human rights violations.[9]

¶4 Within the non-state actor world, the winds of change have led private entities such as corporations and financial institutions to begin expressing a sense of responsibility for sustainable development and responsible lending practices. To this end, private actors have chosen to engage mainly in voluntary, non-enforceable commitments such as guidelines and principles.[10] Such non-enforceable commitments and guidelines have the advantage of sending a strong, public message to the world of a corporation's policy concerning responsible development, while stopping short of providing enforceable legal liability. Concurrently, individuals and NGOs have led attempts to hold such private entities accountable for violations of environmental laws and human rights based on their voluntary commitments.[11]

¶5 Voluntary commitments allow individuals and NGOs to try to affect change in two main ways. First, individuals and NGOs can publicly pressure private actors to comply with their own voluntarily, publicly-expressed commitments to human rights, sustainable development or environmental responsibility. Second, if the voluntary commitments themselves provide such recourse, individuals and NGOs can file a complaint with a formal adjudicatory venue. Pressuring private entities to enforce the voluntary commitments allows individuals and NGOs to circumvent the sometimes difficult issues of standing and justiciability which typically restrict the range of actors and subject matters that can be adjudicated in both domestic and international courts. Moreover,

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[7] The Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1980, 213 U.N.T.S. 222.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

[8] López Ostra, *supra* note 4.

[9] Hatton v. United Kingdom, 36022/97 Eur. Ct. H.R. § 107 (2001) (holding that the United Kingdom violated Article 8 in failing to strike a fair balance between the state's regulation of Heathrow Airport aircraft noise levels and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives); *see also* Hatton v. United Kingdom, 36022/97 Eur. Ct. H.R. § 96 (2003) (reversing the 2001 decision, but nonetheless recognizing that "where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8."); *see also* Guerra v. Italy, 1998-I Eur. Ct. H.R. § 57 (1998) (observing that "[t]he direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable.").

[10] *See generally* HUMAN RIGHTS IN CONTEXT, *supra* note 1, at 1396-98, 1402-03.

[11] Michael K. Lee, *The Uruguay Paper Pulp Mill Dispute: Highlighting the Growing Importance of NGOs and Public Protest in the Enforcement of International Environmental Law*, 7 SUSTAINABLE DEV. L. & POL'Y 71, 71 (2006).

avoiding the court system allows individuals and NGOs to effectuate change while avoiding the often lengthy and time-consuming court procedures. As opportunities for enforcing voluntary commitments grow, individuals' and NGOs' efforts to hold private entities accountable will play an increasingly important role in enforcing human rights law.[12]

¶6 The story of an Argentine NGO that failed to stop the financing of a paper pulp mill in Uruguay identifies the avenues open to individuals and NGOs to hold Equator Principles signatories accountable. The Equator Principles are a set of voluntary commitments that ten private financial institutions adopted on June 4, 2003.[13] The Principles reflect a commitment to, and increasing preoccupation with, responsible lending practices, with particular regard to social and environmental issues.[14] The ten pioneering financial institutions have called themselves the Equator Principles Financial Institutions ("EPFI").[15] After only three years, the original ten EPFIs were joined by another thirty who, together, are responsible for over 80% of the world's project finance.[16]

¶7 This note will focus on the Center for Human Rights and Environment's ("CEDHA")[17] efforts to use the Equator Principles to stop the financing and construction of the Orion paper-pulp mill by the Finnish company Metsa-Botnia[18] in neighboring Uruguay. The Equator Principles were only one basis for a larger campaign to impute corporate human rights responsibility and to stop the construction of the pulp mill. CEDHA alleged violations of international human rights and international environmental law, violations of international bilateral law, violations of the International Finance Corporation Environmental and Social Safeguard Policies ("IFC Safeguards"),[19]

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[12] *Id*. at 73.

[13] The "Equator Principles": A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing (July 2006), *available at* http://www.equator-principles.com/documents/Equator_Principles.pdf [hereinafter The Equator Principles].

[14] *Id*.

[15] *Id*.

[16] Paul Q. Watchman, *Banking on Responsibility*, A.L.I. 385, 398 (2006).

[17] The Centro de Derechos Humanos y Ambiente, CEDHA, is an Argentinean non-profit organization that aims to build a more harmonious relationship between the environment and people. Its work centers on promoting greater access to justice and guaranteeing human rights for victims of environmental degradation, non-sustainable management of natural resources. *See* CEDHA, General Information about CEDHA, http://www.cedha.org.ar/en/general_information/ (last visited Apr. 16, 2008).

[18] The forest industry company Oy Metsä-Botnia Ab - marketing name Botnia - was founded in 1973. It manufactures high quality bleached pulp grades under the name Botnia. Botnia is owned by M-real Oyj, Metsäliitto Osuuskunta, and UPM-Kymmene Oyj. *See* Metsa-Botnia, Our Company, http://www.botnia.com/en/default.asp?path=204,208 (last visited Apr. 16, 2008).

[19] The International Finance Corporation is a member of the World Bank Group. It provides loans, equity, structured finance and risk management products, and advisory services to build the private sector in developing countries. *See* International Finance Corporation, About IFC, http://www.ifc.org/about (last visited Apr. 16, 2008). The IFC Environmental and Social Safeguard Policies contain three prongs: first, a Policy on Social and Environmental Sustainability which defines the IFC's role and responsibility in supporting project performance in partnership with client; second, a Disclosure Policy which defines the IFC's obligations to disclose information about itself as an institution and its activities; third, an Environmental and Social Review Procedure which gives direction to IFC officers in implementing the Policy on Social and Environmental Sustainability and reviewing compliance and implementation by private sector projects. *See* International Finance Corporation, Environmental and Social Standards, http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards (last visited Apr. 16, 2008).

violations of IFC Disclosure Policy, violations of national and regional laws in Uruguay and Argentina, and finally, violations of the Equator Principles.[20]

¶8 Although the Orion project's financing institution was an EPFI, CEDHA found nothing in the text of the Equator Principles to hold the EPFI liable for a violation of the Principles.[21] The Principles do not establish a mechanism for self-enforcement, as they were conceived as a set of voluntary guidelines.[22] Instead, their adoption is seen as a commitment to the development of *internal* policies and practices.[23] As discussed *infra*, Principle 6 establishes a Grievance Mechanism through which an NGO can reach the borrower, but not the EPFI.[24] The Disclaimer section of the Principles also makes clear that the Principles do not create any rights or liabilities.[25]

¶9 Nevertheless, the voluntary principles did play an important role in CEDHA's campaign. First, it allowed the NGO to shame and expose the EPFIs to public scrutiny. Crucial to this campaign were charges of non-compliance with the Equator Principles sent directly to the EPFIs. CEDHA's public shaming campaign was instrumental in forcing the withdrawal of the first EPFI, ING Group, from the project. The campaign, however, did not persuade the second EPFI, Calyon, to withdraw. Second, since the Principles tie the EPFIs to compliance with IFC Safeguards, the voluntary commitment gave CEDHA the opportunity to challenge the project's compliance with IFC Safeguards through a formal complaint with the Compliance Advisory Ombudsman ("CAO"), the independent recourse mechanism for the IFC. In response to the CEDHA complaint, the CAO reviewed the compliance of the Orion project with IFC Safeguards and issued a report which focused on and found several procedural deficiencies, which the IFC remedied easily.[26] Once the IFC concluded that the project conformed to its own environmental and social policies, Calyon, the second EPFI involved in the project, was assured that the project did not violate the provisions of the Equator Principles.[27] The end result of this formal complaint was mere procedural compliance with the disclosure schedules established by the IFC Safeguards. This outcome shows that while the Principles offer NGOs access to a formal adjudicatory venue, the findings of this venue may not help the NGO achieve its final goal of stopping the construction of the paper pulp mill.

¶10 The story of the Orion project makes clear that individuals and NGOs cannot rely entirely on the Equator Principles to impose liability on EPFIs. The voluntary nature of the Principles itself effectively means that the reach of the Principles depends on a given EPFI's conscience, unless those trying to force compliance are able to mount a public shaming campaign of such magnitude as to force the EPFI to comply. Moreover, if the

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[20] Letter from CEDHA to Calyon, Compliance Complaint Regarding Proposed Pulp Paper Mill Investment in Fray Bentos Uruguay (May 18, 2006), *available at* http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/compliance-complaint-calyon.pdf.
[21] *Id.*; *see also* The Equator Principles, *supra* note 13, at 5.
[22] *See* The Equator Principles, *supra* note 13, at 5.
[23] *Id.*
[24] *Id.* at 4.
[25] *Id.* at 5.
[26] COMPLIANCE ADVISOR OMBUDSMAN, PRELIMINARY ASSESSMENT REPORT : COMPLAINT REGARDING IFC'S PROPOSED INVESTMENT IN CELULOSAS DE M'BOPICUÁ AND ORION PROJECTS, URUGUAY (2005), *available at* http://www.cao-ombudsman.org/html -english/documents/preliminary_assessmentFINAL.pdf [hereinafter CAO, PRELIMINARY REPORT].
[27] *Id*.

EPFI claims and the IFC finds that the project does comply with IFC Safeguards, procedural compliance alone may still be insufficient to ensure that private financial institutions are financing projects less likely to cause social and environmental harm. Where, as here, procedural compliance was insufficient, the Principles nevertheless remain a stepping-stone to a future mechanism of more substantial, if not binding, commitments by financial non-state actors to responsible investing.

¶11 Despite their shortcomings, voluntary commitments create a forum in which interested non-state actors -- individuals, NGOs and corporations -- may participate actively in the development of corporate human rights responsibilities. CEDHA's campaign was a strong testament to the crucial role NGOs play and will continue to play in the area of corporate human rights responsibility, especially in ensuring that non-state actors abide by their voluntary commitments and guidelines. Created as a result of voluntary commitments, the Equator Principles also invite corporations to develop and improve their own position on sustainable development. It is in this sense that the development and continued existence of voluntary commitments are not only crucial for the potential of NGO public shaming campaigns and access to formal adjudicatory venues, but are also an invaluable contribution to the corporate responsibility movement.

II. THE EQUATOR PRINCIPLES

¶12 Ten private financial institutions adopted the Equator Principles on June 4, 2003, committing themselves to sustainable development and responsible investment.[28] For projects whose costs exceed $50 million, and are thus more likely to affect social and environmental conditions, the financial institutions have agreed to invest only in those projects that comply with IFC Safeguards.[29] The Preamble notes that the purpose of the Principles is "to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices."[30] Sixty signatories are currently committed to the Principles.[31] Also, it is noteworthy that the project finance threshold has recently been lowered from $50 million to $10 million.[32] This threshold shift means that the Principles can reach a greater number of projects that can potentially cause social and environmental damage.[33]

¶13 The Equator Principles' Preamble establishes that the nine principles are intended to serve as a common baseline and framework for the implementation by the EPFI of its own internal social and environmental policies.[34] The EPFI pledges not to "provide loans to projects where the borrower will not or is unable to comply with our respective social and environmental policies and procedures that implement the Equator Principles."[35] The Preamble recognizes the pivotal role that project finance plays in financing development

[28] The Equator Principles, *supra* note 13, at 2.
[29] *Id*.
[30] *Id.* at 1.
[31] The Equator Principles, The Equator Principles, *available at* http://www.equator-principles.com (last visited Apr. 16, 2008).
[32] The Equator Principles, *supra* note 13, at 2. The lower threshold "ensure[s] that all significant and sensitive projects [are] covered by the Equator Principles." The Equator Principles, Frequently Asked Questions, FAQ n. 7, *available at* http://www.equator-principles.com/faq.shtml (last visited Apr. 16, 2008).
[33] The Equator Principles, *supra* note 13, at 2.
[34] *Id.* at 1.
[35] *Id.*

throughout the world and the potential that project financiers will encounter complex social and environmental issues, especially in projects in emerging markets.[36]

¶14 Despite their stated goals, there is disagreement as to the real impact of the Equator Principles. The critics emphasize the shortcomings that remain in the substance of the Principles.[37] They point to the fact that the Principles are pegged to the IFC Standards, but not to the broader sustainability policies underlying these standards.[38] Many argue that the Principles should be pegged to a set of standards that reflects a more effective or more far-reaching sustainability policy. Proponents of the current Principles, however, stand firmly behind the proposition that independent of the motivation driving the decision to join, the Equator Principles have committed prominent private sector entities to an active role in the area of responsible and sustainable development and have arguably strengthened the public's ability to hold the financial sector accountable for its actions.[39] More importantly, there are claims that the Equator Principles have created a "virtuous circle" where mature sponsors are designing more robust projects to comply with the Principles. EPFIs have also required non-Equator banks to comply with the Principles in the administration of the project financing as a pre-condition for a facility arranged by the EPFI.[40] A survey of the Equator Principles, conducted by a partner at the law firm of Freshfields Bruckhaus Deringer ("Freshfields"), suggests that the Principles have contributed to the creation of a common framework and language for the project finance industry based on an external and respected benchmark, the IFC Safeguards.[41] The common framework and language are hailed as a step forward in providing the momentum to propel "other areas of environmental and social responsibility in the financial industry."[42]

III. THE ORION PROJECT CONTROVERSY

¶15 In 2005, the Uruguayan government enthusiastically welcomed the Orion paper pulp mill project as part of the largest capital investment in Uruguay's history.[43] Not only was the size of the investment unprecedented, it also followed a deep economic recession that ensued from the collapse of Argentina's economy in 2001.[44] The investment sought the construction of two paper pulp mills -- the Orion pulp mill and a second mill to be built by Spain's ENCE -- whose total investment was valued at ten percent of the

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[36] *Id*.
[37] *Bracken: Few Signs of Equator Principles' Success – The Equator Principles Have Been Improved But Successful Implementation Remains the True Litmus Test, Say Andrea Durbin and Johan Frijns*, THE BANKER, Aug. 1, 2006.
[38] *Id.* Examples of more effective or more far-reaching sustainability policies include requirements of the IFC that fall outside the IFC performance standards such as the requirement on revenue and contract transparency for extractive industries, as well as international standards and best practice in areas such as human rights and climate change.
[39] Andrew Hardenbrook, *The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility*, 40 VAND. J. TRANSNAT'L L. 197, 197 (2007).
[40] Watchman, *supra* note 16, at 389.
[41] *Id.*; *see also* Watchman, *supra* note 16.
[42] The Equator Principles, Frequently Asked Questions, FAQ n. 3, *supra* note 32.
[43] Monte Reel, *An Economic Boon in Uruguay Becomes a Bane to Argentina: Planned Paper Mills Bring Promise of Jobs, but Also Fears of Pollution*, WASH. POST, Nov. 13, 2005, at A22.
[44] *Id*.

country's gross domestic product.[45] The investment was expected to have a significant impact on Uruguay by increasing its GDP by $350 million (two percent) per year.[46] The plant would provide direct employment for 300 people and indirect employment for another 2,200 people.[47]

¶16 Neighboring Argentina, on the other hand, was less enthusiastic about a project that would potentially pollute the River Uruguay that both countries share and that would bring no financial benefits to Argentina.[48] As Argentina mounted its objections, some commentators in the media viewed the issue as a political objection reflecting another regional row between Argentina and Uruguay.[49] Others saw it as organized resistance to the wave of European corporations shifting their operations to poorer nations after tougher European environmental controls over pulp production took hold.[50] Jorge Pedro Busti, Governor of Entre Ríos, the city in Uruguay which expected to be most affected by the pulp mill, expressed the view that European corporations were taking advantage of laxer regulations and politicians who are more easily intimidated.[51] He said, "[t]hese companies that nobody wants in Europe just want to come to the Third World and use us as their guinea pig."[52] Jorge Daniel Taillant of CEDHA echoed the sentiment: "This is something that's been going on for several decades now – the idea of transferring paper mill industries to the global south. They are moving these companies south to places like Uruguay where they have less strict environmental laws."[53]

¶17 While Argentina took on its own fight in the international human rights arena as a state actor, CEDHA tried to stop the financing and construction of the Orion paper pulp mill in neighboring Uruguay through the Equator Principles.[54] Specifically, CEDHA sought to hold two EPFIs, ING Group and Calyon, accountable for violations of the Equator Principles.[55] The NGO sent compliance complaints directly to the EPFIs to test the reach of the Principles.[56] The complaints denounced the EPFIs for having violated the Principles by agreeing to finance a project that did not comply with the Principles' guidelines.[57] Among other things, the complaint focused on the project's deficient Environmental Assessment and a lack of measurements of cumulative impacts the project would have on the environment surrounding the site of the mill.[58] According to the complaint, the site chosen for the construction of the mill was extremely rich in natural

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[45] *Id*.
[46] *US Votes in Favor of International Loan for Uruguay Pulpmill Project*, US FED. NEWS, Nov. 21, 2006.
[47] *Id*.
[48] Ian Black, *Unity Proves Paper Thin*, GUARDIAN, Mar. 17, 2006, http://www.guardian.co.uk/business/2006/mar/17/businesscomment.worlddispatch.
[49] *Id*.
[50] Emad Mekay, *ARGENTINA/URUGUAY: Paper Plant Row Extends to French Bank*, http://ipsnews.net/news.asp?idnews=33324.
[51] *Id*.
[52] *Id.*
[53] *Id.*
[54] Letter from CEDHA to ING Group, Compliance Complaint Regarding Proposed Pulp Paper Mill Investment in Fray Bentos Uruguay (Apr. 12, 2006), *available at* http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/complaint-letter-to-ing-eng.pdf.
[55] *Id*; s*ee also* Letter from CEDHA to Calyon, *supra* note 20.
[56] Letter from CEDHA to ING Group, *supra* note 54; s*ee also* Letter from CEDHA to Calyon, *supra* note 20.
[57] Letter from CEDHA to ING Group, *supra* note 54.
[58] *Id*.

resources and heavily reliant on tourism and fisheries for local livelihood.[59] Not only would the pulp mill harm such industries, but it would also present "a serious risk to the health of local communities."[60] Further, the complaint stated that the site was "immediately above the potable water intake for the local community of Fray Bentos" and in "very close proximity to important tourist locations."[61]

¶18 CEDHA's, and to a certain extent Argentina's, main objection to the construction and operation of the pulp mills was based on environmental damage to the River Uruguay and the surrounding areas.[62] Both CEDHA and the Argentine government faced the main challenge of determining ways to use enforceability mechanisms to address these environmental concerns. Since voluntary principles like the Equator Principles do not create an enforcement mechanism, CEDHA relied mainly on a public shaming campaign -- conducted through compliance letters sent directly to the EPFIs -- and on recourse to a formal adjudicatory venue through the World Bank's IFC's dispute resolution mechanism, the CAO.[63] However, the CAO proceeding, while more formal than the compliance complaints sent to the EPFIs, resulted in mere procedural compliance.[64] Despite their efforts to enforce the Equator Principles, CEDHA was unable to stop the construction of the mill.[65] Mesa-Botnia completed the construction and installation of Orion on schedule and the mill has been in operation since September 11, 2007.[66]

IV. THE EQUATOR PRINCIPLES' GRIEVANCE MECHANISM

¶19 The Equator Principles provide a grievance mechanism for individuals or groups from project-affected communities to hold borrowers accountable. However, the Equator Principles do not contain a provision that directly connects the financial institution to those who were or will be directly harmed by the environmental implications of a project. Principle 6 establishes a Grievance Mechanism[67] that gives people from among project-

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[59] Letter from CEDHA to Calyon, *supra* note 20.
[60] *Id.*
[61] *Id.*
[62] Mekay, *supra* note 50. In particular, there was concern about toxic runoffs and the chemical stench of rotten eggs which could affect both the agricultural and tourist industries in the region. There was also concern that potentially carcinogenic chemicals in the runoff would be a public health hazard for those living along the riverbanks. *See* Reel, *supra* note 48.
[63] COMPLIANCE ADVISOR OMBUDSMAN, FINAL REPORT : CAO AUDIT OF IFC'S AND MIGA'S DUE DILIGENCE FOR TWO PULP MILLS IN URUGUAY (2006), *available at* http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/cao-final-audit-report-eng.pdf [hereinafter CAO, FINAL REPORT].
[64] CAO, PRELIMINARY REPORT , *supra* note 26.
[65] Press Release, Metsa-Botnia, The start-up process of Botnia in Fray Bentos begins today (Nov. 12, 2007), http://www.botnia.com/en/default.asp?path=204;210;211;1606;1927.
[66] *Id*.
[67] The Equator Principles, *supra* note 13, at 4.

Principle 6: Grievance Mechanism. For all Category A and, as appropriate, Category B projects located in non-OECD countries, and those located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database, to ensure that consultation, disclosure and community engagement continues throughout construction and operation of the project, the borrower will, scaled to the risks and adverse impacts of the project, establish a grievance mechanism as part of the management system. This will allow the borrower to receive and facilitate resolution of concerns and grievances about the project's social and environmental performance raised by individuals or groups from among project-affected communities. The borrower will inform the affected communities about the mechanism in the course of its community engagement process and ensure that the mechanism addresses concerns promptly and transparently, in a culturally appropriate manner, and is readily accessible to all segments of the

affected communities and NGOs access only to the borrower (in this case, Finnish Metsa-Botnia), for "concerns and grievances about the project's social and environmental performance."[68] Even in the event that an individual or group reached out to the borrower, the borrower is not bound by the Equator Principles. In short, the text of the Equator Principles does not create a mechanism for enforcement of the Principles either in the form of self-enforcement by the EPFIs themselves or by a supervisory body. The Principles are, after all, a set of voluntary guidelines and as the Disclaimer section of the Principles makes clear, the adoption of the Principles benefits the development of individual, internal social and environmental policies and practices of the EFPI.[69] The Principles "do not create any rights in, or liability to, any person, public or private. Institutions are adopting and implementing these Principles voluntarily and independently, without reliance on or recourse to the IFC or the World Bank."[70] However, as the case of the Orion pulp mill will demonstrate, exposure of an EPFI to public scrutiny and shaming can nevertheless be a powerful and effective tool in holding corporations to their voluntary commitments.

V. THE COMPLIANCE COMPLAINT TO THE ORION PULP MILL EPFIS

¶20 The absence of rights or liabilities does not preclude the ability of individuals and groups to hold the signatory financial institutions publicly accountable for their voluntary commitments to responsible lending. An NGO can use the leverage of public ridicule to shame a financial institution into complying with its own voluntarily adopted commitments.

¶21 CEDHA sent compliance letters to the ING Group and Calyon in 2006 in an effort to hold the EPFIs involved in the financing of Orion accountable to their voluntarily adopted commitments.[71] Both were early signatories to the Principles and both took pride in their commitment to responsible financing.[72] Dutch ING committed to the Principles on June 23, 2003 and was the eleventh financial institution to do so.[73] Moreover, since 2003, ING has become known as a leading advocate of the Equator Principles.[74] Calyon, the finance arm of Crédit Agricole, also has publicly taken pride in its voluntary commitment. Calyon claims to be one of the more socially responsible French banks and boasts that it was one of the first banks to adhere to the Equator Principles.[75] Nevertheless, these compliance complaint letters achieved mixed results: ING, the first EPFI committed to financing the Orion pulp mill withdrew from the project only to have

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affected communities.
[68] *Id.*
[69] *Id.* at 2.
[70] *Id.* at 5.
[71] Letter from CEDHA to ING Group, *supra* note 54; *see also* Letter from CEDHA to Calyon, *supra* note 20.
[72] The Equator Principles, *supra* note 31.
[73] *Id.*
[74] Bretton Woods Project, *Bank Stumped on Uruguayan Paper Mills*, June 19, 2006, http://brettonwoodsproject.org/art.shtml?x=538502.
[75] Press Release, CEDHA, CEDHA Press Release May 18th (May 18, 2006), http://www.sophieprize.org/Articles/148.html; *see also* Press Release, Calyon, Calyon, the leading Equator Principles bank in the second half of 2006 (Feb. 2007), *at* http://www.calyon.com/news/corporate-investment-bank/league-tables-200720.

its spot taken by Calyon, another EPFI, which ultimately financed the construction of the project.[76]

A. The Compliance Complaint to the ING Group

¶22 In February 2006, CEDHA addressed a complaint of non-compliance with the Equator Principles to the ING, which had been retained in an advisory and coordinating role by Metsa-Botnia for the financing of Orion.[77] CEDHA was acting on behalf of 40,000 stakeholders, including the Environmental Citizen's Assembly of Gualeguaychu, civil society organizations in both Argentina and Uruguay, and the Argentine province of Entre Ríos.[78] The complaint identified compliance violations of the IFC Environmental and Social Policy as well as violations of the Equator Principles themselves.[79]

¶23 In its complaint, CEDHA identified violations of Principles 1, 2, 3, 4 and 5.[80] Pertaining to Principle 1, CEDHA claimed deficient "environmental and social screening" and supported its assertion with the CAO Preliminary Assessment Report which was released as a result of CEDHA's complaint filed with the CAO in September 2005.[81] Further, CEDHA claimed a violation of Principle 2 based on an inadequate Environmental Impact Assessment ("EIA") where the borrower had not sufficiently addressed cumulative environmental impacts and impacts on local livelihoods of affected stakeholders.[82] Concerning Principle 3, which determines the applicable social and environmental standards and the items the EIA should address,[83] CEDHA identified numerous deficiencies of the EIA report, such as inadequate consideration of the hazards, pollutants, carcinogens and toxins associated with the operation of the pulp mill.[84] With respect to Principle 4, which establishes that the borrower will prepare an Environmental Management Plan (EMP) drawing on the conclusions of the EIA report,[85] CEDHA

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[76] Press Release, CEDHA, ING Group of Netherlands Pulls Out of Controversial Papermill while World Bank Postpones Loans Following Critical Review of Environmental Impact Studies (Apr. 12, 2006), http://www.cedha.org.ar/en/more_information/ing-postpones-loans.php; s*ee also* Press Release, CEDHA, Papermills: Crédit Agricole of France Steps in for Botnia (May 10, 2006), http://www.cedha.org.ar/en/more_information/credit-agricole-botnia.php.

[77] Letter from CEDHA to ING Group, *supra* note 54.

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] Letter from CEDHA to ING Group, *supra* note 54. Principle 1 determines that an EPFI will categorize a project based on the magnitude of its potential impacts and risks in accordance with the environmental and social screening criteria of the IFC. *See* The Equator Principles, *supra* note 13, at 2.

[82] *See* Letter from CEDHA to ING Group, *supra* note 54. Principle 2 establishes that for projects assessed within Category A or Category B, the borrower must have conducted a Social and Environmental Assessment process to address the relevant impacts and risks of the project. *See* The Equator Principles, *supra* note 13, at 2. The Equator Principles use a system of social and environmental categorization, based on IFC's environmental and social screening criteria, to reflect the magnitude of impacts understood as a result of assessment. Category A refers to projects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented. Category B refers to projects with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures. Category C refers to projects with minimal or no social or environmental impacts. *See* The Equator Principles, *supra* note 13, at 6.

[83] The Equator Principles, *supra* note 13, at 2.

[84] Letter from CEDHA to ING Group, *supra* note 54.

[85] The Equator Principles, *supra* note 13, at 3.

argued that the borrower failed to prepare an EMP.[86] Finally, CEDHA claimed a violation of Principle 5 based on the absolute lack of consultation between the borrowers and the community, particularly Argentine stakeholders.[87]

¶24 Following CEDHA's complaint, ING stunned the project finance world when it announced that it would withdraw from the $480 million project.[88] ING's withdrawal was particularly stunning because Equator Principles violations do not create enforceable obligations. Although submitted following the CEDHA complaint, the withdrawal letter stated that the decision "was not based on the assessment of the project's compliance with Equator Principles."[89] ING declined to explain the rationale for the decision on grounds of client confidentiality.[90] According to Paul de Clerk of the Netherlands branch of Friends of the Earth,[91] banks never mention an environmental-related reason for stepping out of a project,[92] though he believed that the Equator Principles were an important reason for ING's withdrawal from the project.[93]

¶25 On April 18, 2006, CEDHA responded with a letter expressing its enthusiasm for ING's decision.[94] It also stated that it understood why ING might have stated that the Equator Principles played no role in ING's decision to withdraw, but that it nevertheless "appreciated the energy and effort ING Group has contributed to helping evolve the Equator Principles."[95] Despite ING Group's pronouncements otherwise, the media was quick to link ING's withdrawal to "negative publicity"[96] and frequently mentioned ING as a leading advocate for the Equator Principles.[97]

B. The Compliance Complaint to Calyon

¶26 Once ING Group withdrew from the Orion Project, Calyon, the private arm of the French bank Crédit Agricole, stepped in.[98] On May 18, 2006, CEDHA sent a complaint letter to Calyon modeled after the letter it had sent to ING.[99] This second complaint not only heralded ING Group's withdrawal from the Orion project as a "critical victory of the Equator Principles initiative," but also went even further in asserting that "any support

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[86] Letter from CEDHA to ING Group, *supra* note 54.
[87] *Id.* Principle 5 dictates that the borrower should consult "in a structured and culturally appropriate way with project affected groups, including indigenous peoples and local NGOs." The Equator Principles, *supra* note 13, at 3.
[88] Letter from A. Cohen Stuart, ING, to J.D. Taillant, CEDHA, *ING's involvement in Botnia's pulp mill project in Uruguay* (Apr. 12, 2006), *at* http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/ing-pullout-letter-april-12-2006.pdf.
[89] *Id*.
[90] Oliver Balch, *Sustainable Banking: Uruguay Mills Act as Test Case*, FINANCIAL TIMES, June 12, 2006.
[91] Friends of the Earth is an environmental NGO founded in 1969 that forms an international network of environmental organizations in seventy countries. Its mission is to protect the rights of all people to live in a safe and healthy environment, both at home or in countries around the world. *See* Friends of the Earth International, http://www.foei.org (last visited Apr. 17, 2008).
[92] Balch, *supra* note 90.
[93] *Id*.
[94] Letter from CEDHA to ING Group, *supra* note 54.
[95] *Id.*
[96] *"With or without IFC support", Botnia's mill goes ahead*, MERCOPRESS, June 14, 2006, http://www.mercopress.com/vernoticia.do?id=8137&formato=pdf.
[97] Mekay, *supra* note 50; s*ee also* Bretton Woods Project, *supra* note 74.
[98] Mekay, *supra* note 50.
[99] Letter from CEDHA to Calyon, *supra* note 20.

from Calyon to Botnia for this investment would imply Calyon's knowing complicity in the many violations cited and a violation of its commitments to uphold the Equator Principles."[100] The violations cited in the complaint were identical to the ones mentioned in the ING complaint letter.[101] The letter urged Calyon to "follow in the steps of its Equator Bank colleague, ING Group, and cease any and all consideration of financing Botnia."[102]

¶27 Also unique to this second complaint was a section entitled "Growing International Press Coverage to the Case," in which CEDHA listed instances of intense media coverage and growing media sympathy for the Argentine position as Botnia continued construction of its plant and refused to cooperate in the international bilateral negotiations processes.[103] The letter also provided further insight into why ING Group was explicit in mentioning that the Equator Principles were not a critical consideration in their decision to withdraw from the Orion project. The letter states that:

> [w]hile ING Group will not *and surely cannot* publicly recognize that their withdrawal is due to IFC policy violations of the Botnia project, or to the Equator Principles Compliance Complaint, as this would surely result in potential lawsuits against ING by Botnia, we are clear that the extensive evidence provided by the CAO, as well as by independent reviews of the EIAs, and by the Equator Principles Compliance Complaint shows beyond a doubt that these projects are in direct violations of IFC policy, and as a consequence, violate the Equator Principles.[104]

¶28 Calyon responded to the CEDHA complaint by saying it would only withdraw if it was determined that the Orion project did not comply with IFC Safeguards.[105] Calyon was referring to the fact that the World Bank and the IFC itself, who also agree to only finance projects that comply with IFC Safeguards, were also under investigation for compliance based on their interest in financing the Orion project.[106] Because the extent of Calyon's voluntary commitment under the Principles was tied to whether or not the project complied with IFC Safeguards,[107] if the investigation resulted in a finding that the World Bank and the IFC could finance the Orion project, Calyon would thus feel free to go forward in doing the same.

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[100] *Id*.
[101] The violations were of international human rights and environmental law, violations of international bilateral law, violations of IFC Environmental and Social Safeguard Policies, violations of IFC Disclosure Policy, violations of national and regional laws in Uruguay and Argentina, and finally, violations of the Equator Principles. *See id.*
[102] *Id*.
[103] *Id.* Argentina and Uruguay had engaged in diplomatic efforts to reach an amicable solution to Argentina's unwillingness and Uruguay's willingness to have the Orion paper pulp mill built.
[104] *Id*.
[105] MERCOPRESS, *supra* note 96.
[106] Letter from CEDHA to the CAO, Letter of complaint re: IFC Orion Project no. 23817 and Celulosas de M'Bopicua, IFC Project no. 23681, *available at* http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/; *see also* CAO, PRELIMINARY REPORT , *supra* note 26, at 3.
[107] The Equator Principles, *supra* note 13, at 2. Principle 3 states that "[f]or projects located in non-OECD countries . . . the Assessment will refer to the then applicable IFC Performance Standards and the then applicable Industry Specific EHS Guidelines." *Id.*

VI. THE COMPLIANCE ADVISOR OMBUDSMAN

¶29 As the conflict surrounding the financing and construction of the Orion project developed, the World Bank and the IFC expressed an interest in investing in the Orion project.[108] In an effort to cease the IFC's consideration of funding the Orion project and to force Calyon to back down, CEDHA needed a finding that the Orion project did not comply with the IFC Safeguards. Such a finding would need to come from the CAO, an independent office that reports directly to the President of the World Bank group regarding IFC financing of projects.[109] A formal complaint to the CAO leads to an internal audit evaluating whether the project complies with IFC Safeguards.[110] It does not intervene in Board or Project processes but has the independence to make recommendations that will be helpful in resolving disputes.[111] It is also committed to addressing external complaints in a fair, objective and constructive manner while fostering a higher level of accountability.[112] While reports and recommendations of the CAO are public, it is the Office of the President of the World Bank Group that is ultimately responsible for their implementation.[113]

¶30 Even before it sent out the compliance complaint letters to ING and Calyon, CEDHA filed a detailed complaint with the CAO in September 2005.[114] The complaint was directed at the World Bank Board, the body that approves IFC financing of projects, and was grounded, *inter alia*, on the violation of IFC policy that would result from investment in the Orion project. Particularly, the complaint addressed non-compliance with IFC Operational Policy OP7.50 on Projects on International Waterways[115], IFC Operational Policy OP 4.01 on Environmental Assessment[116] and the IFC Disclosure

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[108] CAO, PRELIMINARY REPORT , *supra* note 26, at 3.
[109] *Id*.
[110] CAO, Welcome to Compliance Advisor Ombudsman, *at* http://www.cao-ombudsman.org/ (last visited Apr. 17, 2008).
[111] Press Release, CAO, CAO Urges Parties to Review Cumulative Impact Study on Uruguayan Pulp Mills: CAO Internal Audit Continues (Dec. 20, 2005), http://www.cao-ombudsman.org/pdfs/CAO%20Media%20Advisory%20English%20(12-20-05)1.pdf.
[112] *Id*.
[113] *Id*.
[114] Letter from CEDHA to the CAO, *supra* note 106.
[115] *Id*. at 19. OP7.50 dictates that there be goodwill between riparian states. The policy establishes the obligation of the borrower to notify the other riparian states of the proposed project, to identify existing agreements and their significance concerning the anticipated impacts of the project, and to create a Project Appraisal Document dealing with the international aspects of the project. *See* The World Bank Operational Manual, OP 7.50, *available at* http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/whatnewvirt/5F511C57E7F3A3DD8525672C007D07A2?OpenDocument. The main alleged violation under OP7.50 was the failure of the IFC to identify riparian state agreements and their significance with respect to the anticipated environmental impacts of the proposed project. *See* Letter from CEDHA to the CAO, *supra* note 106, at 19.
[116] OP 4.01 requires that the IFC review the borrower's Environmental Impact Assessment and, if adequate, disclose them. The disclosure triggers a sixty-day window of public scrutiny. Only after the disclosure period is concluded can the IFC submit the project to the World Bank Board for approval. OP 4.01 also requires a meaningful and culturally appropriate consultation with the affected parties. *See* The World Bank Operational Manual, *supra* note 115. CEDHA alleged the following violations of OP 4.01: (1) that the Project did not properly consider its "area of influence," therefore ignoring aspects of trans-boundary environmental contamination on Argentine territory; (2) that the Project disregarded country obligations under international law and the Rio Uruguay Treaty with Argentina; (3) that the Project did not contemplate feasible alternatives and did not provide an environmental action plan; and (4) that the Project did not sufficiently consult with the Argentine communities involved. *See* Letter from CEDHA to the CAO,

Policy.[117] In addition, the CEDHA complaint also identified violations to the IFC Disclosure Policy. CEDHA alleged that the project sponsor and the IFC failed to foster real public consultation of stakeholders in Argentine territories; failed to ensure public access to information about likely environmental, economic, and social impacts; and failed to publish environmental and social information about the project's impact on the locality and on affected stakeholders in Argentina.[118]

A. The CAO Preliminary Assessment Report

¶31 In response to the CEDHA complaint, the CAO released a Preliminary Assessment Report in November 2005.[119] The CAO Report was the result of a five-day field assessment in which the CAO reviewed relevant IFC documentation and visited the communities in Gualeguaychu and Fray Bentos.[120] The CAO addressed two main procedural deficiencies in the processes that resulted in the approval of the financing for the Orion Project. First, the CAO determined that the Environmental Impact Assessment (EIA) for the pulp mill did not adequately address the concerns of potentially affected local people.[121] In particular, the CAO found that the EIA did not provide sufficient evidence that concerns related to potential impacts on tourism and agriculture had been addressed.[122] For instance, the CAO found that there was little evidence presented in the EIA that potentially-impacted enterprises or individuals (such as tourism operators and fishermen), particularly from Argentina, were consulted.[123] The CAO pointed out that the EIA also failed to consider broader cumulative impact beyond environmental emissions, such as the social and environmental consequences to land-holding and social equity as a result of both mills developing large eucalyptus plantations in Uruguay.[124]

¶32 Second, the CAO determined that the IFC failed to conduct a Cumulative Impact Study (CIS) and to require a comprehensive assessment of the impact of having two paper pulp mills (Orion and the one ENCE sought to build) operating in close proximity as part of its review.[125] The Preliminary Assessment outlines the IFC appraisal policy that dictates a consultation period, including the creation of a CIS, the preparation of EIAs, and other documentation containing relevant information to impacted people.[126] Following this consultation period is the 60-day disclosure period prior to consideration by the World Bank Board which decides whether or not the IFC will finance a project.[127] The disclosure period allows for any formal objections to be made before the Board decides whether or not to finance a project.[128] This means that the disclosure period and the consultation period, where the CIS and other documentation are created, should be

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supra note 106, at 17-18.
[117] Letter from CEDHA to the CAO, *supra* note 106, at 17-18.
[118] *Id*. at 20.
[119] CAO, PRELIMINARY REPORT , *supra* note 26.
[120] *Id*. at 2.
[121] *Id*. at 9.
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *Id*. at 7.
[126] *Id.* at 11.
[127] *Id*.
[128] *Id*.

kept strictly separate. The CAO pointed out that while the IFC recognized the need to undertake a CIS when it was resolving initial concerns brought up in the early phases of consultation, the IFC did so only after the public disclosure of the project documentation on the World Bank InfoShop.[129] The CAO further concluded that the consultation and disclosure processes related to approvals for the Orion project "give[s] the impression of being rushed, and presented as a *fait accompli* to those being consulted."[130]

¶33 The CAO Preliminary Report included four recommendations to the IFC. First, the CAO recommended that the consultation and disclosure periods be kept separate and not confused.[131] As will be seen shortly, this was easily remediable. Second, the CAO recommended a series of specific "process steps" to be taken in the creation of the CIS.[132] This provided the IFC with a compact guideline of how to satisfy the procedural requirements for the creation of the CIS. The recommendation also included the factual matters that should be addressed in the CIS, including, among others, the potential impacts of water emissions on water quality, as well as local and tourist fishing communities; potential impacts of air emissions on agricultural productivity; potential impacts of eucalyptus plantations on landholder equity; and water availability.[133] Third, the CAO asked the IFC to clarify the interpretation of OP 4.01 paragraph 3 which refers to EIAs taking into account "the country's overall policy framework and national legislation . . . and obligations of the country pertaining to project activities, under relevant international environmental treaties and agreements."[134] Fourth, the CAO asked for greater clarity in the application of the social and environmental appraisal procedures by the IFC.[135] The Preliminary Report's obvious focus was on the procedural aspects surrounding the consideration of financing approval for the Orion project.

¶34 Once the World Bank released the CIS in December 2005, thereby correcting the procedural errors highlighted in the November Preliminary Report, the CAO role in the dispute effectively came to an end. On December 20, 2005, the CAO sent letters to all parties involved urging them to review the CIS that the World Bank had just released.[136] The CAO informed the parties that the sixty-day consultative phase had been initiated and that it would issue a final report of its audit in January.[137] The CAO made clear that the purpose of the Final Report was to "identify lessons learned and corrective actions for the institution but [would] not be a factor in any decision whether or not the bank invests in either of the two pulp mills."[138] Practically, the CEDHA complaint to the CAO

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[129] *Id.* at 9. The World Bank Infoshop is a development bookstore and an information and resource center which provides access to information and services to the public. It is located in Washington, DC and is part of the network of the Public Information Centers (PICs) around the world. Through it, any person can access World Bank reports and data, request customized presentations about the Bank's disclosure policy, among others. *See* The World Bank, About InfoShop, http://web.worldbank.org/WBSITE/EXTERNAL/PUBLICATION/INFOSHOP1/0,,contentMDK:20121778~hlPK:348863~menuPK:323749~pagePK:162350~piPK:165575~theSitePK:225714,00.html (last visited Apr. 17, 2008).
[130] CAO, PRELIMINARY REPORT , *supra* note 26, at 10.
[131] *Id.* at 11.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] Press Release, CAO, *supra* note 110.
[137] *Id.*
[138] *Id.*

resulted in an opportunity for the IFC to correct the procedural errors in its compliance with its own Disclosure Policy. Moreover, as for IFC OP 4.01 on Environmental Assessment, the IFC would merely have to clarify the manner in which it applied social and environmental appraisal procedures.

¶35 As outlined in the Final Report released on February 22, 2006, the scope of the CAO audit was thus limited to providing greater clarity in relation to the application of social and environmental appraisal procedures by the IFC.[139] The three main goals of the audit were: (1) to review IFC's due diligence of the Orion project to satisfy itself that the EIAs were complete in all material respects prior to disclosure; (2) to review if the actual practice of requiring additional information after public disclosure of the EIA is consistent with applicable policies; and (3) to understand how the application and interpretation of IFC Environmental and Social Review Procedures can result in such differing outcomes between the IFC and the Multilateral Investment Guarantee Agency[140]("MIGA").[141] In short, this gave the IFC an opportunity to correct procedural deficiencies but it did not help CEDHA achieve its goal of stopping the construction of the paper pulp mill in Uruguay.

¶36 Indeed, on October 12, 2006, the IFC released reports concluding that the Orion project would not harm the environment in the border region.[142] These reports supported the building of both paper pulp mills and were a definitive blow to CEDHA's efforts to interrupt the financing for the construction of the mills.[143] Environmental activists from Gualeguaychu and Colon, two Argentine cities, reacted with outrage, protests and blockaded roads.[144] On November 21, 2006, the board of directors of the IFC and MIGA approved a $170 million investment by the IFC and a guarantee of up to $350 million from MIGA for the Orion project.[145] The IFC claimed that this decision came after an extensive due diligence process which reached the conclusion that the mill would generate significant economic benefits for Uruguay and cause no environmental harm.[146] Once the IFC concluded that the project conformed to its own environmental and social policies, Calyon, the EPFI involved in the project at the time, was assured that it was providing financing for a project that fell within the good graces of the Equator Principles.

¶37 CEDHA thus failed to stop the construction of the pulp mill through the CAO. While the function of the CAO is to determine whether or not the project complies with IFC Safeguards, its reach in this case was merely procedural. The Final Report focused on the procedural timeline of the consultation, disclosure and consideration periods. Furthermore, the CAO limited its own scope to providing greater clarity in relation to the

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[139] CAO, FINAL REPORT, *supra* note 63.
[140] The Multilateral Investment Guarantee Agency is a member of the World Bank which promotes foreign direct investment in developing countries. It provides three services: political risk insurance, technical assistance to improve investment climates and promote investment opportunities in developing countries, and dispute mediation services. *See* MIGA, About MIGA, http://www.miga.org/quickref/index_sv.cfm?stid=1588 (last visited Apr. 17, 2008).
[141] *Id*.
[142] *Uruguay/Argentina politics: Pulp plant dispute reignites*, EIU VIEWSWIRE Argentina, Oct. 17, 2006.
[143] *Id*.
[144] *Id*.
[145] IFC, IFC Latin American & the Caribbean – Orion Pulp Mill - Uruguay, http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Pulp_Mills (last visited Apr. 17, 2008).
[146] *Id*.

application of social and environmental appraisal procedures by the IFC. Although Calyon's voluntary commitment to finance only projects that abide by the IFC Safeguards provided CEDHA with the opportunity to allege in a formal adjudicatory venue that the Orion project did not abide by IFC Safeguards, in the end, the CAO unfortunately only focused on procedural compliance with the IFC Safeguards.

VII. EVOLVING PRINCIPLES

¶38 In July 2006, the Equator Principles were revised so that the World Bank Group Environmental, Health and Safety Guidelines ("EHS") replaced the IFC Safeguards as the standard by which projects must abide.[147] The new Guidelines contain performance levels and measures that are normally acceptable to the IFC and are generally considered to be achievable in new facilities at reasonable costs while retaining existing technology.[148] A new feature contained in the EHS is that the environmental assessment may recommend alternative levels or measures which, if acceptable to the IFC, become project or site-specific requirements.[149] The new standards would require clients to pay closer attention to social impacts, to consult affected communities more effectively, and to recognize the special rights of indigenous peoples in international law.[150] The new standards will probably result in a heightened assessment by the CAO of procedural compliance with the EHS. However, it remains to be seen if these new standards are sufficiently rigorous to protect communities from the construction of projects that will likely cause social and environmental harm.

A. Developing the Equator Principles

¶39 In spite of these new standards and the lowering of the $50 million threshold to $10 million, there remains a lot to be done for the Equator Principles. The failure of CEDHA to hold Calyon accountable stemmed in large part from the voluntary, non-binding nature of the Principles themselves and also from the limited, mainly procedural, reach of the CAO in reviewing project compliance with IFC Safeguards. If the Principles are to result in more responsible lending practices, EPFIs should consider higher standards of review, perhaps going above and beyond the IFC Safeguards, and an internal mechanism to ensure EPFI compliance. A higher standard of review would require EPFIs and corporations to pay even closer attention to the environmental and social impacts of future projects. As higher standards become more acceptable in the finance world, one may hope that in the near future controversial projects such as the Baku-Tbilisi-Ceyhan oil pipeline[151] and the Sakhalin II oil project[152] will not be built without significant safeguards for impacted peoples and regions.

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[147] The Equator Principles, *supra* note 13; s*ee also* The Equator Principles, Frequently Asked Questions, FAQ n. 4, *supra* note 32.
[148] *Id*.
[149] *Id*.
[150] THE BANKER, *supra* note 37.
[151] The Baku-Tblisi-Ceyhan oil pipeline runs through Azerbaijan, Georgia and Turkey. Like the Orion project, the pipeline was built among heated controversy and claims of environmental and human rights violations; the main environmental concern was the destruction of viable fishing in the port of Ceyhan in Turkey. *See* Baku-Ceyhan Campaign,Environmental risks in the BTC pipeline, http://www.bakuceyhan.org.uk/more_info/impacts.htm (last visited Apr. 17, 2008). Nine EPFIs financed

¶40 In assessing what improvements could be made to the Equator Principles, the 2005 Freshfields survey is instructive. While the survey pre-dated the revised 2006 Principles, many of its recommendations remain pertinent to the future of the Equator Principles.[153] The survey stressed the need for EPFIs to continue their efforts to work together and to maintain their open-door policy[154] in spite of the danger of attracting signatories that are not truly committed to the Principles.[155] The survey also called for greater transparency, both in terms of disclosure of certain details of projects considered and accepted, and for greater communication with NGOs and other stakeholders in the course of each EPFI implementation of the Principles.[156] The survey also pointed to EPFI dissatisfaction with the IFC consultation process and suggested a further round of consultation to be added to the process.[157] EPFIs would then conduct their own screening process so as to satisfy themselves as to the adequacy of all material social and environmental reports produced or commissioned by the borrower.[158] Since the Principles were first created, EPFIs have not shied away from tailoring the Principles to inch closer to their ultimate goal.[159] Since the survey appears to allude to a general sense that the Principles should continue to extend its influence, it would not be surprising if the EPFIs engaged in another reassessment of the reach and scope of the Principles.[160]

¶41 There also remains considerable debate focusing on whether voluntary or regulatory initiatives are the best method to affect corporate social behavior.[161] Certainly, the voluntary nature of the Principles contributed to its quick membership expansion and popularity.[162] Voluntary principles can also be instrumental in changing corporate social behavior by providing a system of norms where legislation is absent and supplementing legislation where it is in place.[163] Voluntariness, however, only goes so far, and firmer steps need to be taken so that the goals of the Principles can be fulfilled. Calls have also been made for the establishment of an independent complaints mechanism that deals with alleged violations of the Principles, a development that would impose liability on EPFIs

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the Baku-Tblisi-Ceyhan oil pipeline under the first set of Principles. *See* THE BANKER, *supra* note 42.

[152] The Sakhalin II oil project, currently under construction in Russia, poses a direct threat to the last remaining western Pacific grey whales. *See* THE BANKER, *supra* note 42.

[153] Watchman, *supra* note 16, at 390-391.

[154] All financial institutions are invited to become EPFIs. *See* The Equator Principles, Become an Adopting Institution, http://www.equator-principles.com/join.shtml (last visited Apr. 17, 2008).

[155] *Id*.

[156] *Id*.

[157] Watchman, *supra* note 16, at 395. The added consultation round would come after the IFC consultation process and give another opportunity for review of the impacts of proposed projects so that the EPFI could be assured that the project reflects the ideals of sustainable and responsible development.

[158] *Id*. at 392.

[159] Between March and May of 2006, the EPFIs engaged in a substantive revision of the Principles which led to the revised July 2006 Principles. *See* Press Release, The Equator Principles, Update: EPFI Review of Equator Principles (June 8, 2006), http://www.equator-principles.com/index.html (last visited Apr. 17, 2008). In May 2007, EPFIs met again to discuss more specific aspects of the Principles. Press Release, The Equator Principles, EPFIs Meet After Nearly One Year of EPII Implementation (May 12-14, 2007), http://www.equator-principles.com/index.html (last visited Apr. 17, 2008). In December 2007, EPFIs met again to discuss ongoing developments of the Principles, in particular governance, transparency, and grievance mechanisms at the project level. Press Release, The Equator Principles, EPFI Meetings (Dec. 3-5, 2007), http://www.equator-principles.com/ index.html (last visited Apr. 17, 2008).

[160] Watchman, *supra* note 16, at 392.

[161] Paul Watchman, *Banks, Business and Human Rights*, A.L.I. 396, 397 (2006).

[162] Watchman, *supra* note 14.

[163] Watchman, *supra* note 161, at 397.

and fundamentally change the non-binding nature of the Principles.[164] One should expect that such a critical change would not occur without protest from EPFIs and possible withdrawal from unwilling EPFIs from the Principles altogether.

¶42 Nevertheless, if EPFIs are truly committed to sustainable development and responsible lending practices, they must take steps to keep the Equator Principles current, effective and relevant. Such efforts would result in the continued development of the Principles and would be instrumental in continuing to set standards for the finance industry.

VIII. BEYOND THE EQUATOR PRINCIPLES

¶43 While the Equator Principles continue to evolve and the area of voluntary principles and guidelines seeks firmer ground within the area of corporate human rights responsibility, individuals, NGOs and states should go beyond the Principles and continue to rely on the more traditional modes of enforcing treaties, agreements, international human rights and environmental laws. Such modes of enforcement also played a part in trying to stop the construction of the paper pulp mill in Uruguay. For instance, CEDHA filed a complaint with the Inter-American Commission on Human Rights ("Commission") against the World Bank in September 2005.[165] The complaint denounced the World Bank's proposed financing of the Orion project and directly implicated a World Bank-financed development project for the first time.[166] It was an unprecedented reach to a human rights tribunal to force non-state actor compliance.[167] To this date, however, the Commission has not reached a decision on the complaint. If this attempt at expanding the court's jurisdiction is successful, it will pave the way for future accountability of non-state actors.

¶44 Also, in May 2006, Argentina instituted proceedings against Uruguay in the International Court of Justice ("ICJ") for violating the 1975 Statute of the River Uruguay which determined rights to the use of natural resources along the River Uruguay.[168] In July 2006, the ICJ denied, without prejudice on the merits, the Argentine request of an injunctive order to Uruguay to suspend construction.[169] The court found that Argentina failed to meet the burden of imminent threat of irreparable damage and denied the demand for an injunction.[170] The ICJ decision on whether Uruguay is violating the Treaty is not expected until later in 2008,[171] well after the plant begins its operations. Arguably, the ICJ mechanism could be more effective than any NGO campaign to force non-state actors to comply with voluntary commitments, or any recourse to a formal

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[164] Balch, *supra* note 90.
[165] Jorge Daniel Taillant, *Using human rights tribunal to force Bank compliance: Uruguayan paper mill*, Jan. 23, 2006, http://www.brettonwoodsproject.org/art-507742.
[166] *Id*.
[167] *Id*.
[168] Lee, *supra* note 11, at 71.
[169] *Id*.
[170] *Id*.
[171] The ICJ's last published Order on the case fixed time-limits for the filings of Argentina's Reply for January 29, 2008 and for the Uruguayan Rejoinder for July 29, 2008. *See* Press release, ICJ, The Court authorizes the submission of a Reply by Argentina and a Rejoinder by Uruguay and fixes time-limits for the filing of these pleadings (Sept. 17, 2007), *available at* http://www.icj-cij.org/docket/files/135/14037.pdf.

adjudicatory venue such as the CAO. ICJ jurisdiction for contentious issues, however, exists only for state members of the United Nations[172] on the basis of state consent over "matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force."[173] This necessarily excludes individuals and NGOs from reaching the ICJ unless a member state espouses a claim on their behalf. Furthermore, while an ICJ decision finding a violation of the Treaty could result in anything from a formal reprimand to fines and sanctions, or even the dismantling of the mill, in many instances, such reparation would come only after considerable delay and damage to the environment and surrounding areas has already been done.

IX. CONCLUSION

¶45 CEDHA was unable to stop the construction of a foreign-owned paper pulp mill to prevent environmental and social damage to the communities of fishermen and tourist industry of the Entre Ríos area. Unfortunately, the Equator Principles did not have enough bite to compel Calyon's compliance with its voluntary commitment. However, for the project finance world, CEDHA's efforts did not go unnoticed. CEDHA's efforts were instrumental in guaranteeing procedural compliance with IFC Safeguards, in demanding clarification of IFC Operational Policies regarding Environmental Assessment, in showing the world that EPFIs need to consolidate their approach to the Principles, and in revealing that one can rely on the Principles to expose EPFIs to public shaming in an effort to compel compliance with their commitment. CEDHA's efforts demonstrated that an NGO should not shy away from trying to hold a non-state actor accountable to voluntary, non-binding commitments. ING's withdrawal from the Orion project suggests that some EPFIs do care about public opinion and will take such non-binding commitments seriously. Voluntary commitments can be instrumental for NGOs as leverage to reach desired goals and to prompt change, without having to resort to state intervention, international human rights courts and other more formal, costly and time-consuming adjudicatory venues.

[172] U.N. CHARTER art. 93, ¶ 1.
[173] Statute of the International Court of Justice art. 36, ¶ 1.