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**THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
AND THE EQUATOR PRINCIPLES –
SIMILARITIES, DIFFERENCES AND SYNERGIES**

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Delegates are invited to provide comments under the written procedure by Thursday, 23rd August 2007. The revised version is intended to be included in the OECD publication "2007 Annual Report on the OECD Guidelines for Multinational Enterprises", in the section devoted to the Roundtable.

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**THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
AND THE EQUATOR PRINCIPLES –
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By Paul Q. Watchman and Angela Delfino²

Adoption and Parties

1. The Equator Principles (EP) form two sets of principles. The first set of the EP (EP1), signed by ten equator banks (EB) in 2003, was conceived with the help of the International Finance Corporation (IFC) in 2002. The EP1 were based on the IFC's Environmental and Social Safeguard Policies and Guidelines. In large part, due to the IFC's review of these policies and their replacement with the new IFC Performance Standards, the EP1 were also revised. The updated set of the EP (EP2) has been open for adoption from July 2006 by the Equator Principles Financial Institutions (together with the EB, the EPFI). Currently, 51 EPFIs are signatories of the EP2.

2. The OECD Guidelines for Multinational Enterprises (the Guidelines) were adopted in 1976 and revised in 2000. The 2000 Review led to a substantial update of the Guidelines and the adoption of detailed implementing procedures. The Guidelines are part of a quartet of instruments falling collectively under the umbrella of the OECD Declaration on International Investment and Multinational Enterprises, a broad political commitment adopted by the OECD Governments in 1976 to facilitate direct investment among OECD Members. The Guidelines have been described as “the only multilaterally endorsed and comprehensive code that governments are committed to promoting”. The Guidelines express the shared values of the governments of countries that are the source of most of the world’s direct investment flows and home to most multinational enterprises. The Guidelines have been signed by the 30 OECD member countries and ten non-members – Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia, collectively referred to as “adhering countries”.

Scope

3. The first difference between the EP and the Guidelines relates to the scope of these instruments.

4. The EP are applicable to project finance transactions and to projects only. Under the EP, the EPFI undertake not to provide loans to a project unless sponsors can demonstrate that the project will be constructed and operated in accordance with sound social and environmental management practices.

1. This paper is the result of a broader presentation to the Annual OECD Roundtable on Corporate Responsibility (18 June 2007) entitled “The OECD Guidelines for Multinational Enterprises and the Financial Sector and the Equator Principles. This paper solely addresses the environmental and the social aspects of the OECD Guidelines.

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5. The Guidelines are recommendations addressed by Governments to multinational enterprises. The Guidelines, – covering areas such as disclosure, employment, environment, combating bribery, consumer interests, science and technology, competition and taxation, – aim to ensure that the operations of multinational enterprises are in harmony with government policies. The scope of the Guidelines is broader than the EP, since they comprise the whole range of corporate behaviour and day to day operations.

Aim

6. Although the aims of the EP and the Guidelines are different, a parallel between both instruments can be established. The Guidelines aim to ensure not only that the operations of multinational enterprises are in harmony with government policies but also to strengthen the basis of mutual confidence between enterprises and the societies in which they operate as well to help improve the climate for foreign investment and to enhance the contribution to sustainable development made by multinational enterprises. Although not expressly stated in the Equator Principles, the same considerations in fact apply to the project finance activities of banks and other financial institutions.

7. Moreover, as stated in the EP Preamble, the aim is that projects (and in the case of the Guidelines, businesses) are developed in a manner that is socially responsible and reflect sound environmental management practices.

8. Equally, both the EP and the Guidelines provide similar advantages for multinational enterprises and banks in terms of organization and management, internal and external accountability, and harmonization of practices with competitors.

9. Finally, the two texts are landmarks in terms of business ethics and social responsibility.

Nature

10. In their legal nature, the EP and the Guidelines are similar instruments. Both the EP and the Guidelines are not a detailed set of enforceable legal norms but a general, voluntary framework of principles and standards.

11. A major difference distinguishes the EP and the Guidelines. The EP are of a purely private nature, endorsed by banks and other financial institutions, while the Guidelines are signed by States and comprise recommendations to multinational enterprises operating in and from their territories.

Specific Provisions

Categorisation of Projects

12. An important difference between the EP and the OECD Guidelines is the streamlining of the environmental and social assessment process for high-income OECD countries.

13. While the Guidelines apply equally to all businesses regardless of location, in the EP, in the case of high-income OECD countries, the baseline requirement for a Social and Environmental Assessment (SEA) differs from non-OECD or non-high-income OECD countries on the basis that the local laws in high-income OECD countries regarding environmental and social assessment are likely to be more exacting than in non-OECD countries or non-high-income OECD countries. The baseline standard for a non-OECD country or a non-high-income OECD country is the IFC Performance Standards plus any applicable industry IFC standards and guidelines. In the case of high-income OECD countries the baseline for the SEA is the local or national law on the grounds that in high-income OECD countries the laws

relating to environmental protection and the safeguarding of social matters, such as human rights and property rights, tend to be more stringent and robust than the IFC Performance Standards and Guidelines.

14. The EP division between high- and low-income OECD countries and non-OECD countries, for example, represents a simplification of a complex situation. First, it does not show an appreciation of the very different OECD high-income country environmental, social and governance standards and their different enforcement regimes and practices. Second, the division also fails to recognise the importance of public international law in that not all high-income OECD countries have ratified key environmental and social protection treaties and protocols or do not properly enforce them. Third, insufficient guidance is given as to how to assess trans-boundary projects which may pass through high-income OECD countries, non high-income OECD countries and non-OECD countries.

15. Certainly, EPFIs' practice will clarify critics' apprehensions, but uniformity of practices across countries at different stages of development that characterises the approach followed by the Guidelines may be more adequate in a globalised world.

Social and Environmental Standards

16. As a result of the above categorization, under the EP, a Social and Environmental Assessment (SEA) to be performed by EPFIs distinguishes between non-OECD, non-high-income, and high-income OECD countries. The SEA is based specifically on and in accordance with Principle 3, and Exhibits III and IV of the EP, which follow the IFC Performance Standards and applicable Industry Specific Environmental Health Safety Guidelines.

17. In comparison with the EP, the environment chapter of the Guidelines is narrower since it provides only for an environmental impact assessment. However, the Guidelines still provide for the need to address in a decision-making process relating to a business, foreseeable environmental, health and safety-related impacts associated with the processes, goods and services of the enterprise.

18. In the EP, a similar obligation is the Action Plan (AP) which is required for some types of projects. The AP describes and prioritises actions needed to implement mitigation measures, corrective actions and monitoring measures necessary to manage social and environmental risks identified by the SEA. The AP does not need to closely follow the SEA, but draws on its conclusions.

19. In addition to the AP, borrowers are to build on and develop Social and Environmental Management Systems (SEMS) which address those identified impacts, risks and actions required to comply with host country social and environmental laws and regulations and the requirements of the applicable IFC Performance Standards and industry specific Environmental Health and Safety Guidelines.

20. The Guidelines are particularly comprehensive in respect to environmental management systems (EMS), which should include the collection and evaluation of information on the environmental, health and safety impacts of enterprises; the establishment of quantifiable objectives and targets for improved environmental performance; and the regular monitoring of progress in reaching environmental, health and safety objectives. Unlike the EP SEMS, the Guidelines EMS are not based on uniform standards nor benchmarked. However, there is a growing consensus that an EMS should normally encompass key elements the so called, "Plan-Do-Check-Improve". These are: the undertaking of an initial environmental review, definition of an environmental policy, development of an environmental action plan and definition of environmental responsibilities, development of internal information and training courses, auditing of the EMS and performance of an environmental management review. Also, different models of EMS are generally followed: externally certified EMS, like ISO 14001; European Union's Eco-Management and

Audit Scheme (EMAS); performance-based EMS and sector-specific EMS, e.g. for the chemical and the financial sectors.

Consultation

21. Another common feature between the EP and the Guidelines is consultation with affected communities. This is an extremely important provision. For example, under the EP, for certain projects, there is an obligation on the borrower or third-party expert to consult with 'project affected communities' in a "structured and culturally appropriate manner".

22. This requirement stipulates that the consultation must be in a manner which is appropriate to the location of the project and the local communities. The objectives of the consultation are to ensure public participation and that project-affected communities have the opportunity to express their views on project risks, impacts and mitigation measures and that the sponsor may consider and respond to them.

23. The building or operation of a project may result in displacement of indigenous people or irrevocable, adverse environmental or social change. It is only appropriate, therefore, that affected communities have an opportunity to make their views known through effective consultation.

24. The need for consultation rests on disclosure to the public of the Assessment documentation, Action Plan, and non-technical summaries. Equally, these should be made available for a reasonable period of time in the relevant local language and again in a 'culturally appropriate manner'.

25. The emphasis on disclosure is even greater in the case of the Guidelines which dedicate an entire chapter to the matter. Following the case of the Guidelines, more specific guidance on disclosure should be provided in the EP.

EP Grievance Mechanism

26. In light of several high profile, demanding and complex ventures under the EP, there has been a call for sponsors and the EPFI to become more transparent and accountable to both the communities affected directly by such projects and to civil society generally. This criticism has resulted in the obligation for EPFIs to create grievance mechanisms for certain projects as part of their management mechanisms. According to the EP the aim is to facilitate resolution of concerns and grievances on the project's social and environmental performance by affected individual or groups.

Independent Review and Reporting

27. For certain types of projects, the EPFI can require an independent review by a social or environmental expert not directly associated with the borrower. The scope of the review which the independent expert may be requested to carry out includes the Social and Environmental Assessment, Action Plan and consultation process documentation. The purpose of the review is to assist the EPFIs in their due diligence of the development and operation of the project and in respect of compliance with the EP.

28. The EP also requires the EPFI to provide periodic public reports at least annually. The report is to cover implementation of the EP processes and the experience of the EPFI, subject to the requirements of client confidentiality. At a minimum, it is stated that the report should address the number of transactions screened by the EPFI and the categorisation of each transaction and information on the implementation of the EP. In addition, the EPFI report may include a breakdown of transactions and categorisations by sector or region.

29. Independent review and reporting has not been provided for in the Guidelines, presumably on the account of National Contact Points' and the OECD Investment Committee's role in their applicability. The definition and monitoring of the Guidelines by these entities is therefore of extreme importance.

Synergies

30. What then is the relation to and what lessons can be learned from the analysis of the Equator Principles and the OECD Guidelines for Multinational Enterprises and from how these instruments have been implemented? Although, the EP and the Guidelines in respect of social and environmental issues address similar topics, these stem from different perspectives: in the case of the EP, project finance and in the case of the Guidelines, multinational enterprises businesses and their day to day operations. The EP and the Guidelines are therefore complementary instruments.

31. This conclusion, however, does not mean that they represent perfect coexisting instruments. Both, like all legal instruments, constantly require update and improvement.

32. Therefore, the EP and the Guidelines (as well as other international standards) would benefit immensely from a thorough comparison and harmonization. The harmonization of provisions and standards would promote compliance, a better connection between the financing and the development of projects and the operation of multinational enterprises and even the creation of common institutional mechanisms.

33. The EP and directly related stakeholders could also benefit from the inclusion of principles on bribery and corruption. The precautionary principle, of extreme relevance in the case of projects, is also a missing reference within the EP. Another major provision of the Guidelines, not provided for in the EP, relates to capacity building and training.

34. Finally, a very important missing element in the EP is a robust enforcement mechanism. However, in this connection, EP subscribers may seek the advice of the Guidelines' mediation and conciliation facility in the resolution of issues arising from their operations. An enforcement mechanism would benefit both legal instruments and the accountability of the actors therein regulated and would enhance the robustness of the rules provided.