

Sustainability-Environmental risks and legal liabilities of South African banks

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Abstract

In the environmental context banks face direct, indirect and reputational risks from their internal operations and their external business activities. The current specific focus on the protection of the environment makes it essential for banks and their directors to be aware and stay on top of potential risks and liabilities. This is especially so because banks' directors can be criminally prosecuted for environmental crimes. The application and effect of the *Prevention of Organised Crime Act* 121 of 1998 (POCA) on persons convicted of an environmental crime or crimes has been identified as a possible new or added risk for banks and their directors. Banks in addition to their normal environmental risk and liabilities also need to contend with the possibility of lender liability. Existing legislation pertinent to lender liability does not expressly or specifically deal with lender liability. Absence of judgements on lender liability further exacerbates the risks and the uncertainty for banks in South Africa. Therefore, banks remain subject to legal uncertainty and associated risks. The issue of lender liability specifically with regard to the implication of "the person in control" requires clarification. Hence, it is recommended that legislation relevant to lender liability (*National Environmental Management Act* 107 of 1998; *National Water Act* 36 of 1998 and the *National Environmental Management: Waste Act* 59 of 2008) be revised to specifically accommodate and protect lenders (lending banks) in certain distinct circumstances.

The role of banks is that of an intermediary between borrowers and lenders of money. Therefore, it influences the direction and pace of economic development and by default steers and promotes either sustainable or non-sustainable development. Currently, mainstream banks are in effect financing a brown economy and hence subscribe to a weak form of sustainability. It would seem that mainstream banks are more concerned with managing the impact that environmental risk may have on bank lending than the impact of bank lending on the environment. The evolving nature of sustainability (from weak to strong and from a brown to green economy) demands a fundamental policy change for banks. It is expected that mainstream banks will be put under even greater pressure than before to make the transition from weak to strong sustainability. Hence, banks' current environmental risk management systems will not be sufficient to cater for new environmental risks and liabilities that the move to stronger sustainability (in the form of the green economy) will present.

Banks should adopt the stronger version of sustainability; formulate environmental principles that the bank will adhere to; incorporate these environmental principles into all aspects of its lending cycle, develop an environmental risk management system that should include as a minimum the identification of all the applicable legislation pertaining to the specific financing or lending of capital, risk identification, assessment of the specific risk, implementation of risk control measures, mitigation of the risk, risk monitoring and auditing.

Keywords: Sustainable banking, South African banks, sustainability, sustainable development, reputational risk, environmental risks and liabilities, criminal liability of directors, the green economy, strong sustainability, lender liability, the Equator Principles.

Abstrak

Binne die omgewingskonteks staar banke direkte-, indirekte- en reputasierisiko's in die gesig op grond van hulle interne en eksterne besigheidsaktiwiteite. Die huidige fokus op die beskerming van die omgewing dwing banke en hulle direkteure on bewus te wees en om op hoogte te bly van potensiële risikos en verpligtinge. Dit is uiters belangrik aangesien bankdirekteure krimineel vervolgbaar is met betrekking tot omgewingsmisdade. Die toepassing en die gevolge van die toepassing van die *Wet op die Voorkoming van Georganiseerde Misdaad* 121 of 1998 (Prevention of Organised Crime Act) op persone wat skuldig bevind is in terme van die bepalinge van die *Wet*, is in die bankwêreld geïdentifiseer as 'n nuwe en/of bykomende risiko vir banke en die direkteure daarvan. Benewens banke se normale omgewingsrisikos en omgewingsverpligtinge moet hulle ook in staat wees om verantwoordelikheid te aanvaar met betrekking tot hul uitleenverpligtinge. Die bestaande wetgewing met betrekking tot uitleenverpligtinge is nie spesifiek m.b.t. dié saak nie. Daar is 'n afwesigheid aan regsuitsprake t.o.v. uitleenverpligtinge so ver dit die omgewing raak en dit verhoog die risikos en die onsekerhede van banke m.b.t. hulle leen van kapitaal wat die omgewing raak of kan raak. Daar is dus nie regsriglyne op dié stadium wat 'n vaste en veilige koers aandui nie. Die gevolg hiervan is dat banke onderworpe is aan regsonsekekerheid en verwante risikos. Dis ook nodig dat verdere opheldering bekom word m.b.t. lener-verpligtinge, en veral m.b.t. die implikasie(s) van die "persoon in beheer". Daar word aanbeveel dat wetgewing wat betrekking het op die leenverpligtinge van banke (die *Wet op Nasionale Omgewingsbestuur* 107 van 1998, *Nasionale Water Wet* 36 van 1998 en die *Wet op Nasionale Omgewingsbestuur: Afval 59 van 2008*) hersien word sodat daar spesifieke voorsiening gemaak word om leners (uitleen-banke) te akkommodeer en te beskerm in spesifieke toepaslike omstandighede.

Die tradisionele rol van banke is dié van tussengangers tussen leners en uitleners van kapitaal. Gevolglik beïnvloed die uitleen van kapitaal die rigting en die tempo van ekonomiese ontwikkeling en by verstek bevorder dit òf volhoubare of nie-volhoubare ontwikkeling. Tans finansier hoofstroombanke (oor die algemeen) 'n "bruin ekonomie" en daardeur onderskryf hulle eintlik 'n lae-gradse vorm van volhoubaarheid. Dit wil voorkom of hoofstroombanke meer begaan is oor die bestuur van die impak wat omgewingsrisikos op die uitleen-bank mag hê as wat die impak van die lenings op die

ongewing mag hê. Die ontwikkeling van die aard van volhoubaarheid (van swak na sterk en van 'n bruin na 'n groen ekonomie) vereis 'n fundamentele beleidsverskuiwing by banke. Daar word verwag dat hoofstroombanke onder baie groter druk as vantevore geplaas gaan word om 'n oorgang te maak vanaf swak na sterk volhoubaarheid. Dit beteken dat dié banke se huidige risikobestuurstelsels nie voldoende sal wees om aan die eise van die beweging na 'n sterker volhoubaarheid (in die vorm van 'n groen ekonomie) te voldoen nie.

Banke behoort die sterker vorm van volhoubaarheid te aanvaar; hulle behoort omgewigsbeginsels te formuleer waaraan banke gebonde sal wees; hierdie beginsels behoort geïnkorporeer te wees by alle vorme van uitleensiklusse; banke behoort 'n risiko-omgewingsbestuurstelsel te ontwikkel wat, op die minste, alle toepaslike wetgewing met betrekking tot die spesifieke finansiering van en/of uitleen van kapitaal, risiko-identifisering, die assessering van 'n spesifieke toepaslike risiko, die implimentering van risiko-beheermaatreëls, die afskaling of versagting van die risiko, en die monitering en ouditering daarvan, behoort in te sluit.

Sleutelwoorde:

Volhoubaarheid en banke, Suid-Afrikaanse banke, volhoubaarheid, volhoubare ontwikkeling, reputasie-risiko, omgewingsrisikos en -verpligtinge, kriminele verpligtinge van direkteure, die groen ekonomie, sterk volhoubaarheid, leen-verpligtinge / uitlener verpligtinge, die Ekwatorbeginsels

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List of Abbreviations

| | |
|--------|------------------------------------------------------------------------------------|
| AFDB | African Development Bank |
| ATF | African Task Force |
| ASISA | Association for Savings and Investment South Africa |
| BSR | Business of a Better World |
| CER | Centre for Environmental Rights |
| CERCLA | <i>Comprehensive Environmental Response Compensation and Liability Act of 1980</i> |
| CERES | Centre for Renewable and Sustainable Energy Studies |
| CERES | Coalition for Responsible Economies |
| CFCs | Chlorofluorocarbons |
| CMA | Carbon Markets and Investors Association |
| CRISA | Code for Responsible Investing in South Africa |
| CSD | Commission on Sustainable Development |
| DEA | Department of Environmental Affairs |
| EBRD | European Bank for Reconstruction and Development |
| EMI | Environmental Management Inspectorate |
| EMS | Environmental Management System |
| EP | Equator Principles |
| EPFIs | Equator Principle Financial Institutions |
| ESG | Environmental, Social and Governance factors |
| ESIA | Environmental and Social Impact Assessment |
| ESMS | Environmental and Social Management System |
| EU | European Union |
| FSB | Financial Services Board |

| | |
|----------|--------------------------------------------------------------------------|
| GHG | Green House Gas |
| GRI | Global Reporting Initiative |
| IAP | Industrial Action Plan |
| ICC | International Chamber of Commerce |
| ICGN | International Corporate Governance Network |
| ICJ | International Court of Justice |
| IFC | International Finance Corporation |
| IISD | International Institute for Sustainable Development |
| IMF | International Monetary Fund |
| IoDSA | Institute of Directors of Southern Africa |
| ISO | International Organisation for Standardisation |
| JSE | Johannesburg Stock Exchange |
| King III | King Committee 3rd report by Institute of Directors |
| MDB | Multilateral Development Bank |
| MDG | Millennium Development Goals |
| NDP | National Development Plan |
| NEMA | <i>National Environmental Management Act 107 of 1998</i> |
| NEMAQA | <i>National Environmental Management: Air Quality Act 39 of 2004</i> |
| NEMBA | <i>National Environmental Management: Biodiversity Act 10 of 2004</i> |
| NEMPAA | <i>National Environmental Management: Protected Areas Act 57 of 2003</i> |
| NEMWA | <i>National Environmental Management: Waste Act 59 of 2008</i> |
| NEPA | <i>National Environmental Policy Act 42 USC Section 4321</i> |
| NGP | New Growth Path |
| NHRA | <i>National Heritage Resources Act 25 of 1999</i> |
| NSSD | National Strategy for Sustainable Development and Action Plan |

| | |
|--------|----------------------------------------------------------|
| NWA | <i>National Water Act 36 of 1998</i> |
| OECD | Organisation for Economic Co-operation and Development |
| PELJ | Potchefstroom Electronic Law Journal |
| POCA | <i>Prevention of Organised Crime Act 121 of 1998</i> |
| PRI | Principles of Responsible Investment |
| S | Section |
| SADC | Southern Africa Development Community |
| SAGEM | South African Green Economy Modelling |
| SAICA | South African Institute of Chartered Accountants |
| SAJEH | South African Journal of Economic History |
| SAJELP | South African Journal of Environmental Law and Policy |
| SAJHR | South African Journal of Human Rights |
| SALJ | South African Law Journal |
| SAML | South African Mercantile Law |
| SAPL | South African Public Law |
| SEMA | Specific Environmental Management Acts |
| SRI | Social Responsible Investment |
| SALJ | South African Law Journal |
| UN | United Nations |
| UNCED | United Nations Conference on Environment and Development |
| UNEP | United Nations Environmental Programme |
| UNEPFI | United Nations Environment Programme Finance Initiative |
| UNFCCC | United Nations Framework Climate Change Convention |
| UNGCP | United Nations Global Compact Policy Initiative |
| USA | United States of America |
| WBCSD | World Business Council for Sustainable Development |

WSSD

World Summit on Sustainable Development

1 Introduction

Human activities, and especially that of economic development activities, have had an impact on the functioning of the Earth to such an extent that the well-being of current and future generations including their capability to survive is currently put at risk by phenomena such as the degradation of water supplies, the loss of fertile soils, climate change, deforestation and the accelerating destruction of natural habitats, species and biological diversity.¹ The present way and system in which development activities take place is not sustainable,² hence the current global drive towards sustainability, which has been identified as the balancing of economic, social and environmental issues within any development decision-making process.³ As environmental conditions worsen, public pressure on corporations to act in an environmentally responsible manner is ever-increasing.⁴ This pressure (on companies to prevent further environmental damage and to restore damaged ecosystems) surfaces, among others, via a call for wide-ranging changes to corporate law and the legal nature, structure, rights and duties of corporations.⁵ Because banks play an intermediary role in the economy, they act as a vehicle in contributing towards especially the environmental leg of sustainability.⁶ Consequently, the banking industry in South Africa and internationally is subject to increasing pressure to subscribe to sustainable banking practices which include (among other) the drive towards a green economy.⁷

1 This is documented in a number of reports of international and other organisations, including that of the *Fifth Global Environmental Outlook Report* (GEO-5) published by the United Nations Environmental Agency on 6 June 2012 and the *Millennium Ecosystem Assessment* conducted between 2001 and 2005. Cullinan "Corporate Environmental Governance" 204-205. See also Esty and Winston *Green to Gold* 31; Carmen *Environmental Science & Pollution Research* 2448-2455.

2 For discussion of sustainability see paragraph 2.

3 At the global level the meaning of the concept of sustainable development is still greatly debated. For example scholars such as Kotzé *Global Environmental Governance* 5 on the meaning of the concept of sustainable development indicated that: "The term sustainable development is often abused by some to legitimize socio-economic development and because of this forced linkage with development (which usually implies socio-economic development), sustainable development reflects only limited ecological considerations. The term sustainable development is therefore not adequately representative of ecological interests and is much narrower in focus than the term sustainability, which at least in theory could better accommodate ecological interests." See also Richardson and Woods *Environmental Law for Sustainability* 13; Bosselmann *The Principle of Sustainability*; Robinson 2004 *Ecological Economics* 369-384; Humby 2006 *SALJ* 411.

4 Cullinan "Corporate Environmental Governance" 205

5 See Sjøfjell 2010 *Wakeforest Law Review* 122.

6 Jeucken *Sustainability in Finance* 59; Jeucken *Sustainable Finance and Banking* 52; Richardson *Regulating the Unseen Polluters* 5.

7 Jeucken and Bouma "The Changing Environment of Banks" 25; Richardson *Regulating the Unseen Polluters* 3-7. The South African Green Economy Modelling (SAGEM) Report – available at

Driving forces of environmental sustainability in banks include *inter alia* the changing expectations of the media, suppliers, other financial institutions (such as the World Bank), employees and board of directors, shareholders, government policy and legislation, and the Equator Principles.⁸ The International Institute for Sustainable Development has identified two main directions of integration of sustainability into the banking sector namely:⁹

The pursuit of environmental and social responsibility in a bank's operations through environmental initiatives (such as recycling programmes or improvements in energy efficiency) and socially responsible initiatives (such as support for cultural events, improved human resources practises and charitable donations); and the integration of sustainability into a bank's core business through the integration of environmental and social considerations into product design, mission policy and strategies.

Banks themselves do generally not have a significant impact on the environment in terms of emissions and pollution.¹⁰ It is their clients, who through their business activities have an impact on the environment.¹¹ Given the potential exposure of banks to environmental risk, they have worldwide been slow to examine the environmental impacts of their clients.¹²

Section 24(a) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) provides for a right to an environment that is not harmful to people's health or well-being. In addition the third report by the Institute of Directors in South Africa known as the *King Committee on Governance* (hereafter the King III report)¹³ indicates that directors of banks have very specific responsibilities in terms of the *National*

<http://bit.ly/1b1wbRG>. The Green Economy – United Nations Division of Sustainable Development 2012 – available at <http://bit.ly/1dNcHW2>; The World Bank 2012 Inclusive Green Growth – available at <http://bit.ly/1cHpD19> For a discussion of the green economy see paragraph 2.1.

8 Jeucken and Bouma *The Changing Environment of Banks* 28. The Equator Principles is a voluntary set of social and environmental guidelines for project finance lending which are used by about 80% of project finance worldwide. It further serves as a framework for banks to manage social and environmental issues related to finance projects on all industry sectors and its principles are based on the International Finance Corporation's standards and procedures and pressure from various non-governmental environmental organisations.

9 Available at <http://bit.ly/1hM9zwW>.

10 Richardson *Regulating the Unseen Polluters* 5.

11 Richardson *Regulating the Unseen Polluters* 5.

12 Jeucken *Sustainability in Finance* 15.

13 Available at <http://bit.ly/1bvfoWm>.

Environmental Management Act 107 of 1998 (hereafter NEMA) and may be found personally liable if a bank commits an environmental offence.¹⁴ Section 28 of NEMA provides, for example, for a general duty of care and remediation for environmental damage (also past pollution and degradation) and criminalises pollution. This section is so widely worded that banks, as subsequent owners or holders of land may be held liable for their client's pollution – either criminally or civilly.¹⁵ Section 34 of NEMA indicates that directors may be personally liable for damages or compensation. Section 34(7) and (8) provides specifically for the personal liability of directors of a company. The *Prevention of Organised Crime Act* 121 of 1998 (hereafter POCA) may also be applicable, to an individual, who, having gained financially by, for example, failing to obtain an environmental authorisation (not spending money on an environmental impact assessment) and then proceed to acquire assets with those proceeds (of crime). In terms of POCA such person's assets could be seized.¹⁶

Possible mechanisms for banks to manage and or limit their environmental liabilities include the use of legal audits and or screening of its (banks) clients' businesses, and the use of environmental impact assessments on a client's business (development) activities.¹⁷ Voluntary environmental risk management systems such as the Equator Principles III (hereafter the Equator Principles) are widely subscribed to by banks. The EPs scope, however, remains limited. It seems that there is a need for research on this topic as South African banks and their directors do not always realise the importance of environmental risk management and the potential direct, indirect and reputational risk and liabilities for both the bank and its directors.¹⁸

The aim of this study is therefore to ascertain what the environmental risks and legal liabilities are for South African banks within the bigger context of sustainability. This

14 S 34 of NEMA.

15 S 28 of NEMA; s 19 of the *National Water Act* 36 of 1998.

16 S 18(1) and (2) of POCA. See also chapter 5 of POCA; *National Director of Public Prosecutions v York Timbers Ltd* SH 865/10.

17 Jeucken *Sustainability in Finance* 180; Hugenschmidt *et al* "Sustainable Banking" 47-48; International Finance Corporation - Banking on Sustainability. Available at <http://bit.ly/18B5LpQ>. International Finance Corporation: Environmental Risk Management in Lending and Investment. Available at <http://bit.ly/1iVJKw3>.

18 Jeucken *Sustainability in Finance* 158-159.

study is based on a literature study of relevant textbooks, law journals,¹⁹ legislation,²⁰ case law,²¹ industry reports and articles from international, regional and national instruments. It reflects the legal position as at 31 October 2013.

In attempting to answer the main research question a number of sub questions need to be answered. The sub questions then are: what is sustainable banking or what does it entail specifically in the new drive towards a green economy; what drives banks towards sustainability, what are the role and impact²² of banks on the environment, and what can banks do to manage environmental risk and liabilities. Therefore, in this study the development of the concepts of sustainable development, the green economy and sustainability will be discussed with the intention to arrive at a theoretical understanding of sustainable banking.²³ The drivers of sustainability for banks will be alluded to;²⁴ as well as the role of banks as possible agents of change.²⁵ Further focus will be on the identification of potential environmental risks and liabilities of South African banks²⁶ with a discussion of possible legal and other mechanisms to manage those liabilities and risks.²⁷ Lastly, a conclusion with some recommendations will follow.²⁸

2 Sustainable development and sustainability in the international context

The concept of sustainable development²⁹ was established in an attempt to bridge the gap between environmental concerns about the growing evidence of ecological consequences of human activities and socio-economic trepidations about human development issues.³⁰ The purpose of the notion of sustainable development was the establishing of a new development model that could guarantee a better balancing of

19 International and national law journals.

20 Mainly South African legislation unless indicated otherwise.

21 Mainly South African case law unless indicated otherwise.

22 Both actual and potential impact.

23 See paragraph 4.

24 See paragraph 3.

25 See paragraph 5.

26 See paragraph 6.

27 See paragraph 7.

28 See paragraph 8.

29 Not to be confused with "sustainability". See paragraph 2 for discussion.

30 Robinson 2004 *Ecological Economics* 370; Shoop "Corporate Social Responsibility and the Environment" 177.

development and environmental conflicts.³¹ Although sustainable development as a concept is well established in international, regional and national law and policy, its precise meaning continues to be disputed.³² Arguably the most widely known and accepted formulation of sustainable development is that of the so-called *Brundtland Report: Our Common Future* by the World Commission on Environment and Development, 1987 (hereafter the Brundtland Report).³³ The Brundtland Report characterised the concept of sustainable development³⁴ as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” The Brundtland Report unalterably linked the environment and development by stating that:³⁵

...economics and ecology must be completely integrated in decision-making and law-making processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind. Industry extracts materials from the natural resources base and inserts both products and pollution into the human environment. It has the power to enhance or degrade the environment; it invariably does both.

In other words, the report (i) recognized that altering the course of environmental deterioration could not be successfully attained in isolation from economic development and social concerns and called for (ii) environmental considerations to be taken into account whenever developmental issues were considered and (iii) for the transformation of environmental law and policy to meet the requirements of sustainable development. Thus sustainable development calls for the realising of a balance between environmental protection and long-term growth and welfare that would benefit present

31 Shoop “Corporate Social Responsibility and the Environment” 177.

32 Harsant 2004 *Journal for Contemporary History* 69. Richardson *Regulating the Unseen Polluters* 296; Beyerlin and Marauhn *International Environmental Law* 15; Kotzé *Global Environmental Governance* 5; Richardson and Woods *Environmental Law for Sustainability* 13; Bosselmann *The Principle of Sustainability* 9-78; Birnie and Boyle *International Law and the Environment* 123; Robinson 2004 *Ecological Economics* 369-384; Verschuuren 2006 *PELJ* 209-261; Du Plessis and Rautenbach 2010 *PELJ* 27-71; Pearce *et al* *Blueprint for a Green Economy* 28-47. Robinson indicated that sustainable development means many different things to many different people and organisations. See Robinson 2004 *Ecological Economics* 373.

33 Available at <http://bit.ly/1bvebz1>.

34 Beyerlin and Marauhn *International Environmental Law* 26 and 74. The UN General Assembly approved the Brundtland Report in 1987.

35 Report of the World Commission on Environment and Development: *Our Common Future* (Brundtland Report) available at <http://bit.ly/18Bqyto>.

and future generations.³⁶ What it means in economic terms is that the improved economic well-being of people today should not lessen the well-being of those in the future.³⁷

The Brundtland Report was the catalyst for the 1992 Earth Summit, the United Nations Conference on Environmental and Development (UNCED) which took place in Rio de Janeiro, which had as its objective to: “elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of increased national and international efforts to promote sustainable and environmentally sound development in all countries.” This concept of sustainable development was taken up in both Rio outcome documents, namely the *Rio Declaration on Environment and Development*, 1992³⁸ (hereafter the Rio Declaration) and Agenda 21.³⁹ Agenda 21 being a broad plan of action for a worldwide partnership for achieving sustainable development endeavoured to address social and economic dimensions, conservation and resource management, roles of key groups and the means to implement the Agenda.⁴⁰ Of specific environmental significance at the earth summit was the agreement or consensus reached on biological diversity. This accord culminated in the *Convention*

36 Bray 1998 *SAJELP* 1.

37 Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 211.

38 Available at <http://bit.ly/1goeZOe>. The Rio Declaration is one of five agreements appearing from the UN Conference on Environment and Development (also known as the “Earth Summit”) in Rio de Janeiro during June 1992.

39 Agenda 21 available at <http://bit.ly/1bwNwWb>. Beyerlin and Marauhn *International Environmental Law* 74. Principle 1 of the Rio Declaration (UN Conference on Environment and Development took place in Rio de Janeiro, 3-14 June 1992) states: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life and harmony with nature.” Principle 3 states: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” In addition Principle 4 of the Rio Declaration states: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” Agenda 21 developed a (i) broad directory of recommendations without further specification of the concept of sustainable development (in other words it stayed away from specific behaviour outlines) and (ii) endorsed sustainable development by suggesting the establishment of the Commission on Sustainable Development (CSD) to ensure effective follow up of the UNCED. See Beyerlin and Marauhn *International Environmental Law* 74. The CSD was established in 1993 and developed into a platform for high-level policy information and discussion regarding environmental protection and development. See Beyerlin and Marauhn *International Environmental Law* 74. At the UN Conference on Sustainable Development (Rio+20) member states agreed to establish a high level political forum that will subsequently replace the Commission on Sustainable Development. The Rio Declaration although being non-binding, or a soft law instrument, set forth “sustainable development” as an important principle of international environmental law. The Rio Declaration reflected an authentic accord in the international community on fundamental principles of environmental protection and sustainable development.

40 Shoop “Corporate Social Responsibility and the Environment” 180.

on *Biological Diversity*, 1992⁴¹ (hereafter the Convention on Biological Diversity) which “links traditional conservation efforts to the economic goal of using biological resources sustainably and equitably.”⁴² Agenda 21 noted environmental responsibility for business as:⁴³

...the responsible and ethical management of products and processes from the point of view of health, safety and the environmental aspects. Towards this end, business and industry should increase self-regulation, guided by appropriate codes, charters and initiatives integrated into all elements of business planning and decision-making, and fostering openness and dialogue with employees and the public.

In the same year both the *United Nations Framework Climate Change Convention*, 1992⁴⁴ (hereafter the UNFCCC), and the *Kyoto Protocol to the UNFCCC*, 1997⁴⁵ (hereafter the Kyoto Protocol) referred to sustainable development as an integral objective of combating climate change.⁴⁶ The Millennium Declaration⁴⁷ in 2000 saw the

41 Secretariat of the Convention on Biological Diversity, *How the Convention on Biological Diversity Promotes Nature and Human Well-Being* 1999. Available at <http://bit.ly/1bvegmt>.

42 Secretariat of the Convention on Biological Diversity, *How the Convention on Biological Diversity Promotes Nature and Human Well-Being* 1999. Available at <http://bit.ly/1bvegmt>.

43 Clearly, Agenda 21 indicates that the shift towards sustainability and greater environmental responsibility depend on proactive environmental stewardship and self-regulation. This is a departure from the traditional command and control tactic. See Agenda 21 Chapter 3. Available at <http://bit.ly/1dpu0dP>. Also see Shoop “Corporate Social Responsibility and the Environment” 183-184.

44 See Article 2 of UNFCCC – available at <http://bit.ly/1gZm5WT>.

45 See Article 2(1) of the Kyoto Protocol – available at <http://bit.ly/1jN5WpX>.

46 Beyerlin and Maruhn *International Environmental Law* 74. In 1997 *The International Court of Justice* (ICJ) in its ruling of the case between Hungary and Czechoslovakia (now Slovakia) on the *Gabcikovo-Nagymaros Project* (ICJ Reports *Hungary v Slovakia* (1997) 78 [140] available at <http://bit.ly/19h9j16> recognised the concept of sustainable development by referring to the need to balance economic development with the protection of the environment (ICJ Reports *Hungary v Slovakia* (1997) 78 [140] <http://www.icj-cij.org/docket/files/92/7375.pdf> Also see Beyerlin and Maruhn *International Environmental Law* 93). States of the world repeatedly confirmed their commitment to the concept of sustainable development at different international meetings of states such as: The UN General Assembly, in September 2000 took on board the Millennium Declaration (UNGA Resolution 55/2 (8 September 2000) which specified eight millennium development goals to be accomplished by 2015. See also Beyerlin and Maruhn *International Environmental Law* 74. Referring to development goal IV (protecting our common environment) heads of states confirmed their support for the principles of sustainable development, including those set out in Agenda 21, agreed upon at the United Nations Conference on Environment and Development in 1992. In 2002 the World Summit on Sustainable Development (WSSD), which took place in Johannesburg (also known as the Johannesburg Summit 26 August - 4 September 2002), referred to the United Nations Millennium Declaration, namely: “that development is a central goal in itself and that sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of the United Nations activities.” The concept of sustainable development can also be found in instruments such as article 24 of the African Charter on Human and People’s Rights, 1981, the Convention on International Trade on Endangered Species of Wild Fauna and Flora, 1971 and the Convention on Biodiversity, 1992.

setting of “concrete and measurable development objectives known as the Millennium Development Goals.” Specifically Goal 7 of the MDGs has as its goal environmental sustainability, which is to be reached by way of a number of set targets, among others that of reducing environmental losses via (among others) lessening or diminishing the loss of biodiversity.⁴⁸ The Organisation for Economic Co-operation and Development (OECD)⁴⁹ in 2001 stated: “economic growth is a fundamental driver of human welfare, and a key component of sustainable development.” In 2002 the World Summit on Sustainable Development (WSSD),⁵⁰ which took place in Johannesburg, reaffirmed the pledge to sustainable development via the Johannesburg Plan of Implementation which commits to concrete actions and methods to: “promote the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars.”

Twenty years on, the follow up to the 1992 Earth Summit again took place in Rio de Janeiro (known as Rio+20)⁵¹ during which governments and states at the *United Nations Conference on Sustainable Development, 2012* (hereafter Rio+20) adopted a declaration entitled *The Future We Want*,⁵² whereby their commitment to the concept of sustainable development was reaffirmed.⁵³ The principal themes of the 2012 conference were (i) the Institutional Framework for Sustainable Development, emerging issues and

47 Report of the Secretary-General on Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields follow-up to the outcomes of the Millennium Summit: “Keeping the Promise: a forward looking review to promote and an agreed action agenda to achieve the Millennium Development Goals by 2015 – available at <http://bit.ly/1kyxMDT>.

48 The Millennium Development Goals, 2000 – other targets include: reducing deforestation and to halve the proportion of the population without access to safe drinking water and basic sanitation. Also see Shoop “Corporate Social Responsibility and the Environment” 181.

49 OECD 2001 Sustainable Development: Critical Issues – available at <http://bit.ly/IPhABV>.

50 World Summit on Sustainable Development - Plan of Implementation, Chapter I, paragraph 2 (2002) available at <http://bit.ly/1e5b4Wt>. Also known as the Johannesburg Summit or Rio+10 (10 years following the Summit).

51 United Nations Conference on Sustainable Development is a global environmental meeting that took place in Rio de Janeiro in June 2012 – available at <http://bit.ly/1kyE5Yb>.

52 Available at <http://bit.ly/1kyE5Yb>.

53 Available at <http://bit.ly/1kyE5Yb>. Annex I (1) states: “We, the Heads of State and Government and high-level representatives, having met at Rio de Janeiro, Brazil, from 20 to 22 June 2012, with the full participation of civil society, renew our commitment to sustainable development and to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations. Annex II (B) (40) states: “We call for holistic and integrated approaches to sustainable development that will guide humanity to live in harmony with nature and lead to efforts to restore the health and integrity of the Earth’s ecosystem.” See also Kotzé *Global Environmental Governance* 5.

a review of existing commitments and (ii) the Green Economy in the context of sustainable development.⁵⁴

Because sustainable development is a broad concept that includes multiple definitions and possibilities, agreement on the precise meaning of sustainable development is still very much debated.⁵⁵ Scholars such as Férone *et al*⁵⁶ stress that different cultures, nations and regional groupings have very different ways of defining sustainable development – one such notable example is that the Nordic countries place more emphasis on the environmental aspect of sustainability while southern European countries focus more on the human capital and social aspects.⁵⁷ Sands⁵⁸ describes sustainable development via four key principles namely: (i) integration that necessitates that a trade-off should occur between socio-economic development and environmental protection; (ii) the use of resources in a sustainable manner; (iii) intra-generational and (iv) inter-generational equity. Intra- and inter-generational equity is the notion that resources should be distributed among members of the present generation while at the same time preserving resources for the use of future generations.⁵⁹ By requiring just distribution of the benefits and burdens of environmental policy the principles of inter- and intra-generational equity directly refer to the principle of social justice.⁶⁰ Other principles that underpin and reinforce the notion of sustainable development are: (i) the “polluter pays” principle which entails that polluters bear the expenses of pollution prevention and remediation⁶¹ and (ii) the precautionary principle⁶² which requires that in instances where a course of action may cause damage to the environment, due to a

54 Available at <http://bit.ly/1fjyB39>. For a further discussion of the Green Economy see paragraph 2.

55 See among others Kotzé *Global Environmental Governance* 5; Richardson and Woods *Environmental law for Sustainability* 13; Bosselmann *The Principle of Sustainability* 9-11; Robinson 2004 *Ecological Economics* 369-384; Jeucken *Sustainability in Finance* 78; Humby 2006 *SALJ* 410.

56 Férone *et al* *Le Développement Durable* 87-125.

57 Férone *et al* *Le Développement Durable* 179-188.

58 Sands *Principles of International Environmental Law* 253.

59 Feris 2010 *PELJ* 80. See also Richardson and Wood *Environmental Law for Sustainability* 15.

60 Richardson *Regulating the Unseen Polluters* 296.

61 Richardson *Regulating the Unseen Polluters* 295.

See Principle 16 of the Rio Declaration– available at <http://bit.ly/1bx7XCd>. See paragraph 6.1.2 for a discussion of the polluter pays principle.

62 See Principle 15 of the Rio Declaration– available at <http://bit.ly/1bx7XCd>. See paragraph 6.1.1 for a discussion on the precautionary principle.

situation of scientific uncertainty, then preventative measures should be applied to prevent any possible harm to the environment.⁶³

Diesendorf⁶⁴ provides another definition, namely: “sustainable development comprises types of economic and social development which protect and enhance the natural environment and social equity.” There is no agreement on what is meant by development within the concept of sustainable development – some interpret it to refer to progressively increasing economic activity, while others interpret it as the progressively enhancement of human well-being in the broadest sense.⁶⁵ Due to the general non-consensus on the precise meaning of sustainable development, alternative terminology - such as the term sustainability - has been developed to express the linkage between environmental and social issues.⁶⁶ Kotzé⁶⁷ in explaining some of the differences between sustainable development and sustainability refers to a number of authors⁶⁸ when stating:

Whilst sustainable development requires a long-term approach for the establishment of an equilibrium between development and the environment, sustainability refers to activities or conditions that can be maintained in future without constant external inputs. Put differently, sustainability is the ability to maintain a desired condition over time without eroding natural, social and financial resource bases.

The main objective of sustainability then, with respect to the principal of inter-generational equity found therein, is to maintain resources for future generations.⁶⁹ To this effect Diesendorf⁷⁰ argues that the end result of sustainable development is that of sustainability. Richardson and Wood⁷¹ indicate that sustainable development and sustainability are not identical by stating: “Sustainability is a higher-order social goal or a fundamental property of natural or human systems, whereas sustainable development

63 Kidd *Environmental Law* 9; Richardson *Regulating the Unseen Polluters* 296.

64 Diesendorf “Sustainability and Sustainable Development” 3.

65 Cullinan “Corporate Environmental Governance” 211.

66 Robinson 2004 *Ecological Economics* 370.

67 Kotzé *A Legal Framework for Integrated Environmental Governance* 18-19.

68 See Nel “EMS Potential as a Tool for Urban Environmental Issues” 3; Urquhart and Atkinson *Pathway to Sustainability* 19; Birnie and Boyle *International Law and the Environment* 89-92.

69 Kotzé *A Legal Framework for Integrated Environmental Governance* 19.

70 Diesendorf “Sustainability and Sustainable Development” 3.

71 Richardson and Wood *Environmental Law for Sustainability* 13.

is the variable (and contestable) policy manifestation of society's attempts to address that goal and enhance that property."⁷²

In order to circumvent the possible manipulative association in the uncritical use of the word "development", some choose to use the term sustainability rather than sustainable development.⁷³ Governments and private sector organisations generally seem to prefer the term sustainable development, while academic and NGO sources prefer to work with the term sustainability.⁷⁴ It is not surprising that the more managerial and incremental attitude to sustainable development used in the Brundtland Report is more appealing to governments and the private sector (business) than a more radical approach.⁷⁵ NGOs and academic environmentalists are worried that development is seen as tantamount to growth, and hence that sustainable development means upgrading, but not challenging, continued economic growth.⁷⁶ Kotzé⁷⁷ confirms this view by stating:

The term sustainable development is often abused by some to legitimize socio-economic development and because of this forced linkage with development (which usually implies socio-economic development); sustainable development reflects only limited ecological considerations. The term sustainable development is therefore not adequately representative of ecological interests and is much narrower in focus than the term sustainability, which at least in theory could better accommodate ecological interests.

A further distinction is made between weak and strong sustainability.⁷⁸ This distinction turns particularly on the view of whether or not all development must be ecologically sustainable. In other words the question is whether development is capable of being maintained indefinitely without considerably damaging the integrity and working of the ecological systems that support life.⁷⁹ Weak sustainability refers to the belief that all

72 Also see Kotzé *A Legal Framework for Integrated Environmental Governance* 19.

73 Richardson and Wood *Environmental Law for Sustainability* 14.

74 Robinson 2004 *Ecological Economics* 370.

75 Robinson 2004 *Ecological Economics* 370.

76 Robinson 2004 *Ecological Economics* 370. See also Kotzé *Global Environmental Governance* 5.

77 Kotzé *Global Environmental Governance* 5.

78 This distinction was coined by Pearce *et al* 1989 *Blueprint for a Green Economy* 28-47. Richardson and Wood *Environmental Law for Sustainability* 14; Neumayer *Weak versus Strong Sustainability* 21-27; Arnspenger "Social and Sustainable Banking and the Green Economy 1-30. See also Cullinan "Corporate Environmental Governance" 211.

79 Cullinan "Corporate Environmental Governance" 211.

forms of natural capital are measurable by a common standard with and which can be substituted for by human-made capital, consequently the aim should be to maintain capital stocks.⁸⁰ Strong sustainability, on the other hand, refers to the view that some natural capital stocks are not measurable by a common standard and are non-substitutable and therefore should be maintained independently of the growth of other forms of capital.⁸¹ In effect weak sustainability purposes largely to make political and economic systems more environmentally sensitive, but minus any fundamental institutional adjustment.⁸² The opposite, being strong sustainability, is described by Richardson and Wood⁸³ as:

...demands radical institutional and policy changes in order to maintain the total stock of natural capital including biological diversity, as well as ethical and cultural change as against mere technological and managerial solutions.

Scholtz⁸⁴ points out that because the components of sustainability (being socio-economic development and environmental protection) stand in direct contrast to one another, no definite and precise definition of sustainability can be formulated. Scholars such as Du Plessis and Rautenbach⁸⁵ argue that because cultural considerations regularly play a role in, or at least, influence decisions and behaviour on social, economic and environmental issues, sustainability in effect has cultural considerations as a fourth pillar.⁸⁶ Richardson and Wood⁸⁷ opine that sustainability very much remains a disputed conversation. Thus, the controversy or uneasiness surrounding the concept of sustainable development and sustainability is a direct result of trying to marry two opposed notions namely that of development and sustainability.⁸⁸ Some might argue

80 Robinson *Ecological Economics* 375. Also see Richardson and Wood *Environmental Law for Sustainability* 14; Cullinan "Corporate Environmental Governance" 211; Arnspenger "Social and Sustainable Banking and the Green Economy" 2; Bosselmann *The Principle of Sustainability* 9-11.

81 Robinson *Ecological Economics* 375. Also see Richardson and Wood *Environmental Law for Sustainability* 14; Cullinan "Corporate Environmental Governance" 211; Arnspenger "Social and Sustainable Banking and the Green Economy" 5.

82 Richardson and Wood *Environmental Law for Sustainability* 14.

83 Richardson and Wood *Environmental Law for Sustainability* 14.

84 Scholtz 2005 *SALJ* 76-77.

85 Du Plessis and Rautenbach 2010 *PELJ* 27-71.

86 The other three pillars being social, economic and environmental. Also see Du Plessis and Brits 2007 *SALJ* 263; Du Plessis and Feris 2009 *SAJELP* 162.

87 Richardson and Wood *Environmental Law for Sustainability* 13.

88 Murombo 2008 *SALJ* 503. The sustainability discourse is suggestive of George Orwell's "Newspeak" with its inherent assumptions and inflexibilities. Don't you see that the whole aim of Newspeak is to narrow the range of thought? Every concept that can ever be needed will be expressed by exactly

that exactly because the terms sustainable development and sustainability are so vague, it actually enhances the inclusivity of global role players in working towards a sustainable future. Viederman⁸⁹ indicates that in order to transform (not reform) the finance and banking industry it is necessary that the language of sustainability be used more precisely. In other words a better understanding and conceptualisation of sustainable development and sustainability is needed. Others, however, might indicate that exactly because the term development within the sustainability discourse is very much a highly loaded term it is very unlikely that one will ever get to the point where the role players “use the language of sustainability more precisely.”

2.1 The green economy

A further direct result stemmed from the sustainability discourse, namely that because sustainability or sustainable development’s prominence on balancing economic, social and environmental growth has proven very challenging to transform into actual policy objectives - in other words a disconnect between discourse and practice existed - economic growth appeared to have remained the principal object of economic policy and hence a move or a discourse started on an alternative system to give sustainability a clear policy and economic focus.⁹⁰ After the global financial crisis of 2008 the agreed resolve⁹¹ was that economic recovery demands investment.⁹² One view held (at the time) to attain economic recovery was the need to stimulate consumption growth – in other words the restoring of consumer confidence and stimulation of high-street spending (consumerism).⁹³ This view, in effect, refers to the dynamics that ultimately drive unsustainable output, namely that of consumerism.⁹⁴ Another view formed was that if investment (in its many forms) was in any case needed to stimulate the economy,

one word, with its meaning rigidly defined and all its subsidiary meanings rubbed out and forgotten...” See Orwell *Nineteen Eighty-Four* 55.

89 Viederman refers to Rabbi Heschel in Viederman “Can Financial Institutions Contribute to Sustainability?” 432.

90 Jackson *Prosperity without Growth* 103-108. Also see Vazquez-Brust and Sarkis *Green Growth* 7.

91 A call for mechanisms that would get the economy growing again was made by (among others) the International Monetary Fund, the United Nations Environmental Programme, political parties across the political spectrum, and from within both liberal and coordinated (see Hall and Soskice *Varieties of Capitalism*) market economies. Jackson *Prosperity Without Growth* 103.

92 Jackson *Prosperity without Growth* 103-104.

93 Jackson *Prosperity without Growth* 103-104.

94 Jackson *Prosperity without Growth* 103. For a discussion of the notion of “consumerism” see Jackson *Prosperity without Growth* 87-102.

then such investment might just as well be in the new technologies that would be needed to tackle the environmental and resource challenges of the future, which includes the impact of global climate change.⁹⁵ The basic idea for the Green Economy project is the putting in place of a stimulus package of an estimated US\$ 1.3 trillion per year⁹⁶ centring on ecological investment so as to neutralise or at least stabilise the depletion of the earth's natural resources.⁹⁷ Support for this green stimulus towards energy security,⁹⁸ low-carbon infrastructures and ecological protection became known as green growth, green economy or the green new deal.⁹⁹ The notion is that these new environmental industries will be the foundation of low-carbon, socially inclusive growth, confronting climate change actions and activating both high and low skill intensive employment (the former being research and development in clean energy technologies and the latter in cases such as forest planting and organic sculpture).¹⁰⁰ This was confirmed at Rio+20¹⁰¹ where the issue of the green economy/green new deal, as a new and emerging challenge came to the fore as of central importance.¹⁰²

95 Jackson *Prosperity without Growth* 107. See also Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 209.

96 It amounts to about 2% of global GDP. See Ansberger "Social and Sustainable Banking and the Green Economy Project" 7.

97 Ansberger "Social and Sustainable Banking and the Green Economy Project" 7.

98 Meaning renewable energy, low carbon/clean technologies, and energy efficiency.

99 Vazquez-Brust and Sarkis *Green Growth* 7. Also see Jackson *Prosperity without Growth* 107. In South Africa, for example, the Banking Association of South Africa refers to the following state-funded development finance institutions, programmes and centres of excellence on the green economy: The Development Bank of Southern Africa Green Fund (available at <http://bit.ly/1bVOopX>); The National Cleaner Production Centre of South Africa (available at <http://bit.ly/18TMaae>); The Climate Innovation Centre (available at <http://bit.ly/1cArKSi>) and the Industrial Development Corporate (IDC) Green Energy Efficiency Fund (available at <http://bit.ly/1gYXAc0>).

100 *Journal of Social Economics*, 37(6), 466–471. The International Finance Corporation indicates that new investments for clean energy technology and infrastructure; resource efficient industry; and green building projects will between 2012 and 2030 reach at least \$700 billion annually. Available at <http://bit.ly/1QYFqy>

101 During the Conference six key multilateral development banks (hereafter MDBs) namely, the European Bank for Reconstruction and Development; the African Development Bank; the Asian Development Bank; the European Investment Bank; the Inter-American Development Bank and the World Bank Group committed to supporting the transition to green growth.

102 Rio+20 United Nations Conference on Sustainable Development outcome document: The Future We Want (available at <http://bit.ly/1kyE5Yb>). Also see Kotzé *Global Environmental Governance* 5. International Institute for Sustainable Development (IISD) 2012 available at <http://bit.ly/1aUfvLX>. The joint statement titled "Delivering on the promise of sustainable development: Our commitment to the Rio+20 agenda for inclusive green growth" by the six MDBs came to be on the side-lines of the UN Conference on Sustainable Development. In addition the MDBs acknowledged that the depletion of natural resources threatens the long-term sustainability of growth and social welfare.

The concept of green growth is endorsed (in inter government negotiation level) by the EU, Japan and other developed countries and progressively supported by transitional economies such as South Korea, India, Brazil and South Africa (such as the South African Green Economy Modelling Report).¹⁰³ The transition to green growth/green economy can also be seen in the OECD's promotion of policy perspectives such as those of the Asian Green Growth¹⁰⁴ and the European Green Economy.¹⁰⁵

Put differently, green growth is seen as a policy offshoot of sustainability – in other words it (green growth) is trying to answer the operational uncertainties of sustainability by providing practical solutions via new policy.¹⁰⁶ It would seem that the attention on the green economy is an effort to “unite under a single banner, the entire suite of economic policies and modes of economic analysis” that could link economic activity to support sustainable development goals.¹⁰⁷ Hence the green economy is seen as the manner to both protect the environment and stimulate global economic recovery.¹⁰⁸ A number of

103 This was produced by the Department of Environmental Affairs (DEA) in partnership with the United Nations Development Programme (UNEP) and with support from United Nations Development Programme (UNDP) with technical assistance from the Millennium Institute and the Sustainable Institute in collaboration with Centre for Renewable and Sustainable Energy Studies (CERES) of Stellenbosch University. Available at <http://bit.ly/JdNgSG>. See Hamdoch and Depret *Journal of Environmental Planning and Management*, 53(4), 473–490 and Berkhout *et al Environmental Science & Policy*, 13, 261–271. As examples see the political agendas of these countries: the EU's “Green Economy Deal” (available at <http://bit.ly/J9sqTU>), Japan's “New National Energy Strategy” (available at <http://bit.ly/J9sHGn>) and Korea's “National Green Growth Strategies and Environmental Policy” (available at <http://bit.ly/18WcVeb>).

104 UNEP defines “Green Growth” as a policy focus for East Asia that stresses environmentally sustainable economic progress to promote low-carbon, socially all-encompassing development.

105 OECD 2009 Interim report on the OECD innovation strategy: An agenda for policy action on innovation. Available at <http://bit.ly/1fj4cBS>. See also OECD 2009 Green growth: Overcoming the crisis and beyond. In Europe policy makers prefer the term “Green Economy” to support similar policy ideas to that of “Green Growth” in East Asia. Available at <http://bit.ly/J4VFHh>. The “Green Economy” is defined by the UNEP's Green Economy Initiative as: “...one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities. In its simplest expression, a green economy can be thought of as one, which is low carbon, resource efficient and socially inclusive.”

106 OECD 2009 Green Growth: Overcoming the crisis and beyond. Available at <http://bit.ly/J4VFHh>. Vazquez-Brust and Sarkis state: “The question is no longer whether the current capitalist model should be replaced by “Green Growth” but by if the structural conditions required for economic growth can be compatible with environmental sustainability and how the transitions to the new economy should be managed.”

107 Report of the Secretary-General for the Preparatory Committee for the UN Conference on Sustainable Development 17-19 May 2010 – Progress to Date and Remaining Gaps in the Implementation of the Outcomes of the Major Summits in the Area of Sustainable Development and Analysis of the Themes for the Conference – available at <http://bit.ly/1e4R2el>.

108 Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 209.

reports from leading global organisations¹⁰⁹ stress that the green economy is not a substitute for sustainable development but rather that of a subset of, or pathway to sustainability.¹¹⁰ Borel-Saladin and Turok¹¹¹ indicate that the core assumption of the green economy is that environmental improvement cannot be detached from economic growth and development and therefore arrive at the conclusion that sustainability can only be achieved by altering the economy and the way investment decisions are made.¹¹²

Arnsperger¹¹³ argues that the current sustainable banking model is very much that of weak sustainability¹¹⁴ due to conventional mainstream banks reluctance to invest 100% in green products and developments. Arnsperger¹¹⁵ posits that the mainstream banks¹¹⁶ invest only around 10% into green products and developments – the remaining 90% is invested in grey or brown products and developments. In other words the current sustainable banking model allows mainstream banks to investing in a grey-brown economy and not a green economy. This financing of grey and brown products and development allows these banks to have better profit margins¹¹⁷ and these profits are used to cross-subsidise their small “green” departments. Arnsperger¹¹⁸ states that these banks:

...are championing a deeply incoherent social model in which the financing of green economic activities is carried out by piggy-backing on the continued financing of grey

109 Organisation for Economic Co-operation and Development 2011 *Towards Green Growth* – available at <http://bit.ly/1jSmgZc>; United Nations Environmental Programme 2011 *Towards a Green Economy* – available at <http://bit.ly/1eKKxhn>; and World Bank 2012 *Inclusive Green Growth* – available at <http://bit.ly/1cHpD19>. While all three reports refer to the three pillars of sustainability (economic, social and the environment) they have different focus markers in terms of which aspects of sustainability are underlined. See Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 211.

110 Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 211.

111 Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 212.

112 This turns on the valuation of natural resources and true reflection of that value in economic activity and development - In other words better environmental valuation will counter unaccounted environmental and social externalities by the integration of these externalities in economic development policy and strategy. See Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 212-213.

113 Arnsperger “Social and Sustainable Banking and the Green Economy” 14.

114 See paragraph 1 earlier for discussion of weak and strong sustainability.

115 Arnsperger “Social and Sustainable Banking and the Green Economy” 14.

116 In contrast with smaller alternative banks that follow strong sustainability and are willing to invest only in green products and developments. See Arnsperger “Social and Sustainable Banking and the Green Economy” 2.

117 Versus that of the smaller alternative banks that invest only in green products and developments.

118 Arnsperger “Social and Sustainable Banking and the Green Economy” 14.

and brown economic activities whose content and long-run effects totally contradict the Green Economy project itself.

It is likely that this action of the mainstream banks could lead to smaller alternative green banks,¹¹⁹ in future, being priced out of the green market segment – even though mainstream banks themselves are only in a limited way involved in the green market segment.¹²⁰ Hence, it is time for mainstream banks to commit to strong sustainability.¹²¹ Thompson and Cowton¹²² argue that the consideration of environmental issues in bank lending operations is prompted mainly by a concern to manage risk rather than to exploit lending opportunities or as a means of fulfilling their responsibilities. It could be argued that banks are not so much interested in the impact of bank lending upon the environment as the impact of the environment (as filtered by regulators, etc) upon bank lending.¹²³ Arnspurger¹²⁴ eloquently discusses the possible implications that the implementation of strong sustainability may have for banks in the short, medium and long term. It is rather interesting as a possible future study. Suffice to say that it is likely that once green growth has been attained, the notion of sustainable banking (strong or weak) will be replaced by different concepts such as sufficiency and stationary.¹²⁵

2.2 Sustainable development and sustainability in the local context

The concept of sustainable development¹²⁶ and to a lesser extent that of sustainability¹²⁷ has also been adopted locally and is to be found (among others) in (a) the Constitution¹²⁸ and (b) national policy, namely the South African National Framework for

119 Being supporters of strong sustainability.

120 Arnspurger "Social and Sustainable Banking and the Green Economy" 14.

121 Although it is unlikely that these mainstream banks will in the short term be able to change to 100% green investments (a number of reasons exist), these banks will need to do more to move towards strong sustainability.

122 Thompson and Cowton 2004 *The British Accounting Review* 215.

123 Thompson and Cowton 2004 *The British Accounting Review* 215.

124 Arnspurger "Social and Sustainable Banking and the Green Economy" 1-30.

125 Arnspurger "Social and Sustainable Banking and the Green Economy" 25.

126 Appears in over 40 statutes and countless policy documents.

127 For a discussion see paragraph 2.

128 Section 24 of the Constitution states that: Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

Sustainable Development (hereafter the NFSD),¹²⁹ (c) legislation such as NEMA;¹³⁰ (d) the judiciary such as the case of *Fuel Retailers Association of South Africa v Director-General Environmental Management* (hereafter the Fuel Retailers case),¹³¹ and (e) corporate governance requirements such as the King III Report.¹³²

The Constitution explicitly incorporates the concept of sustainable development via section 24(b)(iii).¹³³ This is in recognition of the critical role that sustainable development can play in guiding development in South Africa.¹³⁴ Section 24(b)¹³⁵ thus imposes a positive duty on the state to take legislative and other measures to achieve sustainable development. What is meant by reasonable legislative and other measures as per section 24(b) is problematic because no definition exists either in the 1996 Constitution, the NEMA or SEMAs. One opinion is that of Glazewski¹³⁶ who suggests that reasonable legislative and other measures can only be provided by Parliament and organs of state. Another opinion is that of Kotzé¹³⁷ who proposes a literal meaning by stating that reasonable legislative and other measures include policies, legislation and regulations that should be reasonable and subject to the provisions, principles and values of the 1996 Constitution and other SEMAs. Kotzé¹³⁸ additionally opines that “other measures” be given a wide meaning so as to identify other options as a suitable measure to achieve sustainable development. It can hence be argued that corporate governance requirements, such as the King III Report, may function as such a measure.¹³⁹ For a discussion see paragraph 2.1.

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

129 Available at <http://bit.ly/1bC82om>.

130 See both the preamble and section 2 principles of the NEMA.

131 *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 CC.

132 King Committee on Corporate Governance in South Africa (King I, III and III), Institute of Directors in Southern Africa. Available at <http://bit.ly/1bvg12Q>.

133 “...secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

134 Murombo 2008 SALJ 494.

135 Constitution. “...to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures...”

136 Glazewski *Environment* 413.

137 Kotzé *A Legal Framework for Integrated Environmental Governance* 22.

138 Kotzé *A Legal Framework for Integrated Environmental Governance* 22.

139 For a discussion of the King III Principles see later in paragraph 2.1. The same argument (the wide interpretation of other measures) could thus in general be held for other soft law instruments,

Notably, section 24(b)(iii)¹⁴⁰ refers to ecologically sustainable development, which implies that the environment and the protection thereof must be placed at the forefront.¹⁴¹ This points to a strong version of sustainable development be applied in South Africa.¹⁴² On the other hand, section 24(a)¹⁴³ seems to imply an anthropocentric approach to sustainable development, which indicates the protecting of the environment for the sake of humans and not because of any (environmental) intrinsic value.¹⁴⁴ Scholtz¹⁴⁵ indicates that the anthropocentric approach found in section 24 is not surprising given South Africa's developing needs (being a developing country). Scholtz¹⁴⁶ however, points out that the anthropocentric approach is tempered because of (i) the link created in section 24 between quality of life and nature, and (ii) the reference in section 24 to well-being. The former turns on the understanding that quality of life presupposes quality of nature, hence quality of nature is also guaranteed while the latter indicates a broad notion possibly that of nature's aesthetic qualities and hence protection of the environment for its intrinsic value.¹⁴⁷ Be that as it may, some scholars¹⁴⁸ have indicated that there seems to be (i) an even greater anthropocentric urge to development and the consumption of natural resources; and (ii) an economic growth-centred version of sustainable development which has overtaken the environmental imperatives underpinning the concept of sustainable development.

An example of a legislative measure to achieve sustainable development is that of the NEMA; which is the overarching framework legislation on which a number of sectoral

industry guidelines, best practices etc. In the financial and banking sector numerous guidelines, best practices exists. For a discussion see paragraph 3.

140 Constitution.

141 Le Roux *Environmental Governance, Fragmentation and Sustainability in the Mining Industry* 20. See also Cullinan "Corporate Environmental Governance" 211. See also Humby 2006 *SALJ* 409.

142 Le Roux *Environmental Governance, Fragmentation and Sustainability in the Mining Industry* 20. See also Cullinan "Corporate Environmental Governance" 211.

143 Constitution.

144 Lumby 2005 *SAJEH* 75.

145 Scholtz 2005 *SALJ* 73.

146 Scholtz 2005 *SALJ* 74.

147 Scholtz 2005 *SALJ* 74. Tladi argues that an apt understanding of the principle of intergenerational equity being an anthropocentric concept calls for the protection of the environment and not its destruction as ecocentrists tend to opine. See Tladi 2002 *SAJELP* 177.

148 Murombo 2008 *SALJ* 503; Tladi *Sustainable Development in International Law* 245-248.

environmental legislation is constructed.¹⁴⁹ Section 1 of NEMA provides that economic, social and environmental factors are taken into account in all planning, implementation and decision-making processes to guarantee the protection of resources for the benefit of present and future generations.¹⁵⁰ Section 2(3) of NEMA additionally states: “development must be socially, environmentally and economically sustainable.”¹⁵¹ The definition of sustainable development as per NEMA very clearly refers to the integration of social, environmental and economic concerns in planning, development and decision-making.¹⁵² In other words it (sustainable development as per NEMA) demands all developments to be socially, economically and environmentally sustainable.¹⁵³ NEMA thus recognises two essential principles that form part of the notion of sustainable development, namely (i) the integration of the three different pillars¹⁵⁴ on which the concept of environmental management is founded; and (ii) inter-generational equity which acknowledges the need of safeguarding natural resources for the use of future generations.¹⁵⁵ NEMA gives substance to the notion of sustainable development by stipulating national environmental management principles that must be applied by organs of state when making decisions that may significantly affect the environment.¹⁵⁶

149 For example: the *National Environmental Management: Protected Areas Act* 57 of 2003; the *National Environmental Management: Biodiversity Act* 10 of 2004; the *National Environmental Management: Air Quality Act* 39 of 2004. See Murombo 2008 *SALJ* 494.

150 Section 1 of NEMA: “Sustainable development means the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations”.

151 The definition of sustainable development in NEMA is more comprehensive than that of s 24 of the Constitution. See Kotzé 2003 *PELJ* 87.

152 Kotzé 2003 *PELJ* 87.

153 S 2(3) of NEMA. See also *Fuel Retailers* [60] 34 and Kotzé 2003 *PELJ* 87.

154 Namely: Economic, social and environmental. In paragraph 2 it was indicated that scholars such as Du Plessis and Rautenbach opine that because cultural considerations regularly play a role in, or at least, influence decisions and behaviour on social, economic and environmental issues, sustainable development in effect has cultural considerations as a fourth pillar. See also Murombo 2008 *SALJ* 494.

155 Kidd *Environmental Law* 16: Murombo 2008 *SALJ* 494; *Fuel Retailers Association of South Africa v Director-General Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 6 SA 4 (CC).

156 S 2 of NEMA. Additional principles to be found in s (2)(4)(a)(i-viii) and elegantly summarised by Kotzé 2003 *PELJ* 87 include: that “the disturbance of ecosystems and loss of biological diversity be avoided or minimized and remedied; that environmental pollution and degradation should be avoided or minimized and remedied; that the disturbance of landscapes and sites that constitute cultural heritage be avoided or minimized and remedied; that waste should be avoided or minimized, reused or recycled in a responsible manner, that the use and exploitation of non-renewable and renewable resources should be responsible and equitable; that a risk averse and cautious approach should be applied during the environmental management process and that negative impacts on the environment and on people’s environmental rights be anticipated and prevented.”

Although no explicit provision exists in either the Constitution or the NEMA for sustainability, Kotzé argues that the concept is implied by (i) the values enshrined in the Constitution,¹⁵⁷ which indirectly relate to sustainability and (ii) section 2 of NEMA, which provides for some of the principles of sustainability.¹⁵⁸ A reading of most of the local specific environmental management acts (hereafter SEMAs) indicates that sustainability is not comprehensively provided for nor properly explained¹⁵⁹ – however, it is apparent that some of its foundations are present in local environmental law.¹⁶⁰

The National Strategy for Sustainable Development and Action Plan¹⁶¹ (NSSD 1) which builds on the 2008 South African National Framework for Sustainable Development¹⁶² (NFSD) states that sustainable development is a commitment that combines environmental protection, social equity and economic efficiency.¹⁶³ The NSSD 1 have the following objectives: (i) the sustaining of ecosystems and the efficient use of natural resources; (ii) growing towards a green economy; (iii) building sustainable communities; (iv) effectively responding to climate change and (v) improving systems for integrated planning and implementation.¹⁶⁴ The South African Green Economy Modelling (SAGEM) Report¹⁶⁵ was launched on 23 August 2013 and its move towards a green economy is linked to policies, strategies and plans, such as the National Development Plan,¹⁶⁶ the

157 See the founding provisions in chapter 1 and the Bill of Rights in chapter 2 of the 1996 Constitution especially ss 10 on human dignity, ss 9 on the achievement of equality and ss 1 on the advancement of human rights and freedoms, ss 1 on the supremacy of the Constitution and the rule of law, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

158 Kotzé *A Legal Framework for Integrated Environmental Governance* 21. For a discussion on these principles see Nel and Du Plessis 2001 *SAJELP* 6-7.

159 Kotzé refers to s 1 of the *National Environmental Management Act: Biodiversity Act* 10 of 2004 as the only SEMA that defines sustainability. See Kotzé *A Legal Framework for Integrated Environmental Governance* 21.

160 Kotzé *A Legal Framework for Integrated Environmental Governance* 21. See the *National Environmental Management: Biodiversity Act* 10 of 2004; the preamble of the *National Water Act* 36 of 1998, chapter 2 and s 25 of the *Water Services Act* 108 of 1997, and section 74(2)(e) of the *Local Government: Municipal Systems Act* 32 of 2000.

161 Referred to as NSSD 1 (2011 – 2014) was approved by the South African Cabinet on 23 November 2011. Available at <http://bit.ly/1crq624>.

162 Available at <http://bit.ly/1bC82om>.

163 Available at <http://bit.ly/1crq624>.

164 Available at <http://bit.ly/1crq624>.

165 This was produced by the Department of Environmental Affairs (DEA) in partnership with the United Nations Development Programme (UNEP) and with support from United Nations Development Programme (UNDP) with technical assistance from the Millennium Institute and the Sustainable Institute in collaboration with Centre for Renewable and Sustainable Energy Studies (CERES) of Stellenbosch University. Available at <http://bit.ly/1b1wbRG>.

166 Available at <http://bit.ly/1e9CDOg>.

New Growth Path,¹⁶⁷ the National Climate Change Response Policy¹⁶⁸ and the Industrial Action Plan.¹⁶⁹ In terms of the SAGEM South Africa regards a green economy as a sustainable development route that is based on the interdependence between economic growth, social protection and natural ecosystems.¹⁷⁰

With regard to the judiciary, the court in *Fuel Retailers Association of South Africa v Director-General Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*¹⁷¹ delved into the meaning and application of sustainable development by stating in its majority decision:

What is immediately apparent from s 24 is the explicit recognition of the obligation to promote justifiable “economic and social development”...but development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked...¹⁷²

The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from s 24(b)(iii) which provides that the environment will be protected by securing “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.¹⁷³

The court acknowledged that development and environmental protection are inextricably linked.¹⁷⁴ What is also evident is that the court recognised that the principle

167 Available at <http://bit.ly/JlqXud>.

168 Available at <http://bit.ly/1hQvSSj>.

169 Available at <http://bit.ly/1crrm57>.

170 Available at <http://bit.ly/1b1wbRG>. The main objective of SAGEM is to investigate the ability to meet low carbon growth, resource efficiency and pro-job development goals.

171 *Fuel Retailers Association of South Africa v Director-General Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 6 SA 4 (CC).

172 Paragraph [44] of the *Fuel Retailers* case.

173 Paragraph [45] of the *Fuel Retailers* case.

174 Paragraph [71] of the *Fuel Retailers* case.

of integration¹⁷⁵ – which requires the reconciling of development and environmental protection – is central to the concept of sustainable development.¹⁷⁶ In other words the court confirmed that a balance needs to be achieved between development and environmental protection. The court viewed sustainable development as the concept through which this balance can be attained – in other words a framework for reconciling socio-economic development and environmental protection is provided via sustainable development.¹⁷⁷ Du Plessis and Feris¹⁷⁸ argue that it is the dissenting judgement of Sachs J¹⁷⁹ which makes for a better breakdown of sustainable development. By using the *NEMA* as his legal base, Sachs J posits that the central aim of the *NEMA* is the protection and conservation of the environment.¹⁸⁰ Hence socio-economic factors should not be observed as a separate component in the context of *NEMA*, but only as a component that comes into consideration once it alludes or implicates the environment – in other words it only becomes pertinent when economic and social development establishes a threat to the environment.¹⁸¹ The court also acknowledged that the lack of a globally accepted definition of sustainable development does not make it useless as a legal concept – neither internationally nor locally.¹⁸² The court has in effect, for the first time, acknowledged that the notion of sustainable development fortifies the environmental rights enshrined in section 24 of the Constitution.¹⁸³ The implication for banks then is that the financing of their developments will be measured and scrutinized against the acknowledgement that environmental protection and development are inextricably linked. Banks need to follow and implement the concept of sustainable development in their lending and financing decisions which entail the balancing of development needs and environmental protection. Banks are in effect (for the first time)

175 Economic, social and environmental.

176 Paragraph [50] of the *Fuel Retailers* case. Murombo 2008 *SALJ* 492.

177 Murombo 2008 *SALJ* 493.

178 Du Plessis and Feris 2009 *SAJELP* 164-168; Feris 2008 *Constitutional Court Review* 236.

179 *Fuel Retailers* case.

180 Paragraph [92] of the *Fuel Retailers* case.

181 Kotzé et al *Environmental Law through the Cases* 197; Du Plessis and Feris 2008 *SAJELP* 161.

182 Paragraph [47] of the *Fuel Retailers* case. See also Murombo 2008 *SALJ* 493.

183 Murombo 2008 *SALJ* 503. Section 24 of the Constitution states that: Everyone has the right –
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

barred from the traditional crude form of uncontrolled capital investments where the only motivation was for that of profits for banks' investors and shareholders. Banks, when finance is considered for projects that may harm the environment, must take environmental as well as economic factors into account.¹⁸⁴

Corporate governance requirements – such as those referred to in the King III Report¹⁸⁵ and the judgement in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*¹⁸⁶ stress the importance of sustainability by indicating it to be the principal moral and economic imperative for the 21st Century.¹⁸⁷ The philosophy behind the King III report is based on three key principles – one of which is sustainability.¹⁸⁸ Principle 2.1 of the King III report alludes to the balancing of economic, social and environmental values as the “triple bottom line approach.”¹⁸⁹ This approach (triple bottom line) safeguards that the economic, social and environmental resources used by companies and businesses are treated responsibly.¹⁹⁰ Principle 2.2 in the King III report states: “the board should appreciate that strategy, risk, performance and sustainability are inseparable.” In other words the importance of sustainability (being the triple bottom line approach) is acknowledged in the King III Report. On the matter of reporting requirements, King III indicates that due to the ecological and biodiversity crisis on planet earth, it is necessary that companies, which include banks, report on both their financial and sustainability performance.¹⁹¹ This type of reporting is described as integrated reporting – in other words a holistic and integrated representation of companies or banks' real impact and

184 Muller *Die Aanspreeklikheid van Banke as Geldskieters vir Skade aan die Omgewing* i.

185 King Committee on Corporate Governance in South Africa (King I, III and III), Institute of Directors in Southern Africa. Available at <http://bit.ly/1bvg12Q>.

186 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* [2006] 5 SA 333 (W) 351E-352H.

187 King Committee on Corporate Governance in South Africa (King I, III and III), Institute of Directors in Southern Africa 12. Available at <http://bit.ly/1bvg12Q>

188 King Committee on Corporate Governance in South Africa (King I, III and III), Institute of Directors in Southern Africa 12. Available at <http://bit.ly/1bvg12Q>. The other principles being corporate citizenship and leadership.

189 King Committee on Corporate Governance in South Africa (King I, III and III), Institute of Directors in Southern Africa 52. Available at <http://bit.ly/1bvg12Q>.

190 King Committee on Corporate Governance in South Africa (King I, III and III), Institute of Directors in Southern Africa 52. Available at <http://bit.ly/1bvg12Q>. Also see Jeucken's description of the triple bottom line namely that it consists of: (i) people (social value); (ii) the Planet (ecological value); and (iii) profit (financial value). See Jeucken *Sustainability in Finance* 79.

191 King “Synergies and Interaction between King III and the Companies Act” 446.

performance (both positive and negative).¹⁹² The Johannesburg Stock Exchange (JSE) also has an influence on sustainability reporting by requiring listed companies (the major banks in South Africa are listed) to comply with the King III Report on Corporate Governance, which in turn requires adherence to the Global Reporting Initiative (GRI) guidelines for integrated sustainability reporting.¹⁹³ King III also acknowledges that sustainability issues need to be incorporated into companies' general risk management systems.¹⁹⁴ Still, the question whether the bottom line of each of the three elements (economic, social and environmental values) can be attained or be balanced, remains doubtful.¹⁹⁵ A specific investment may either be ecologically positive, but detrimental in socio-economic terms or it may be socially and economically valuable, but not ecologically so.¹⁹⁶ Hence, in the current reality there will have to be some compromise between the three elements.¹⁹⁷

A brief summary of paragraphs 2.1 and 2.2 follows. Sustainable development and sustainability (with its many interpretations) have become the universal *leitmotif* for determining environmental and development relations both internationally, regionally and locally.¹⁹⁸ Sustainability is a higher-order or ultimate social goal to be achieved via the poorly defined process of sustainable development.¹⁹⁹ Both concepts have been provided for and are endorsed by the South African legal order – sustainable development in a direct and sustainability in an indirect manner.²⁰⁰ All aspects or

192 King "Synergies and Interaction between King III and the Companies Act" 446. A holistic report with forward looking information enabling stakeholders to make a better informed assessment on the economic value of the company.

193 There has, however, been a lot of criticism levelled against the JSE's criteria on its Socially Responsible Investment (SRI) Index. It would seem that companies to that are non-compliant with environmental laws (criminal) are still included in the JSE's SRI index. For example see the Centre for Environmental Rights' comments and communication on this topic – available at <http://bit.ly/1czmOO0>.

194 King "Synergies and Interaction between King III and the Companies Act" 446.

195 Jeucken *Sustainability in Finance* 80.

196 Jeucken *Sustainability in Finance* 80.

197 Jeucken *Sustainability in Finance* 80. As indicated earlier it is agreed by some scholars that a fourth aspect namely that of "culture" need to be added to the notion of sustainable development and sustainability.

198 Beyerlin and Maruhn *International Environmental Law* 76; Murombo 2008 *SALJ* 494. In a 2010 survey by the UN Global Compact of more than 800 companies from six continents, 93% of the surveyed CEO's indicated that sustainability is important to their company's future success. See UN Global Compact and Accenture 2010. Available at <http://bit.ly/1df4JCz>.

199 Kotzé *A Legal Framework for Integrated Environmental Governance* 19; Diesendorf "Sustainability and Sustainable Development" 3; Richardson and Wood *Environmental Law for Sustainability* 13.

200 See discussion in paragraph 2.2.

elements of sustainability (economic, social, environmental and cultural) are interdependent and hence should be made to apply in every type of development activity or thought process on a global scale. This is also applicable to banks and their business' – especially with regard to the financing of developments by banks. The Green Economy, Green Growth or Green Deal being a monetary reform is seen as a way of moving from a brown economy to a green economy. Banks, especially, are under pressure to play their role in the transition towards a green economy.²⁰¹ This entails moving from weak to strong sustainability. It can hence be deduced that the notion of sustainable banking is ever evolving.

In the attempt to formulate a definition of sustainable banking the major drivers for sustainability for banks need to be discussed; however, it is necessary firstly to describe the link between the financial sector and sustainability.

2.3 The link between the financial/economic services sector and sustainable development

The financial sector encompasses a wide-ranging set of institutions, which include, among others, investment companies, collective investment schemes, investment banks, commercial banks, asset managers, venture capitalists, multilateral development banks, pension funds, insurance companies, credit unions, and rating agencies.²⁰² Economic services provided by the financial sector have been recognised to have a considerable impact on the direction and course of sustainable development.²⁰³ Its significance stems primarily from its loans to and investments in other businesses including among others energy producers, mining firms, industrial manufactories, retails

201 See paragraph 2.1 for discussion.

202 Jeucken and Bouma "The Changing Environment of Banks" 23; Richardson *Regulating the Unseen Polluters* 62-73.

203 Richardson 2005 *European Environmental Law Review* 280.

businesses and so forth.²⁰⁴ An example of one such acknowledgement came from the European Commission stating in its Sixth Environmental Action Programme²⁰⁵ that:

The financial sector's lending and investment activities have significant indirect environmental impacts by determining which companies and activities have access to finance and the conditions attached.

Historically the link between financial services and sustainability was followed on the level of public development finance - especially multilateral development bank lending from the World Bank and its equivalent organisations.²⁰⁶ Lately this direction has changed course to also include recognition of the role and importance played by private capital markets.²⁰⁷ It came to be recognised that private financiers (i) possess larger capital resources (and larger influence over corresponding capital distribution) than governments and (ii) that within the perspective of the globalisation of financial markets their grip over capital funds was increasing.²⁰⁸

Most, if not all development depends on some form of finance or funds from the financial services sector.²⁰⁹ Hence, Richardson²¹⁰ states that the financial sector (for the most part consisting largely of lenders and investors) "is environmentally significant not so much because of its own, direct ecological footprint, but rather due to its indirect environmental effects through its loans to and investments in other businesses."

204 Richardson 2005 *European Environmental Law Review* 280. Its importance stems mainly from indirect environmental effects (through its loans and investments) and not so much due to its own direct ecological impact. See Richardson 2005 *European Environmental Law Review* 280.

205 Available at <http://bit.ly/IXvjGX> The 6th Environment Action Plan was the framework for the European Union's environmental policy making for the period 2002-2012.

206 Richardson 2005 *European Environmental Law Review* 280. The importance of multilateral development banks was noticed due to (i) the conditions it assigned to project based development loans; and (ii) its effect on the general economic policy of borrower countries via conditional structural adjustment and sector policy loans. See Richardson 2005 *European Environmental Law Review* 280.

207 Richardson 2005 *European Environmental Law Review* 280.

208 Richardson 2005 *European Environmental Law Review* 280.

209 Richardson 2005 *European Environmental Law Review* 280. Some 51 multinational companies make up more than half of the world's 100 largest economies (when viewed by gross revenue) – the remaining 49 being governments. It is clear that these multinational companies' impact on the earth is enormous. See King "The Synergies and Interaction between King III and the Companies Act" 449.

210 Richardson 2005 *European Environmental Law Review* 280; Richardson *Regulating the Unseen Polluters* 5.

Richardson and Wood²¹¹ indicate that corporations, which include banks, are seen as partners in the pursuit for a sustainable future:

...it is not only possible but desirable and profitable for business firms to take responsibility for their social and environmental impacts, respond to the interests and demands of a wide range of internal and external stakeholders and pursue the triple bottom line of economic, social and environmental performance. Rather than being (only) a part of the problem of environmental degradation, business is now seen by many governments, intergovernmental organisations and environmental non-governmental organisations as a part of the solution, a crucial partner whose participation, resources, knowledge and innovation are essential to achieve ecological and social sustainability.

3 Drivers of sustainability for banks

Businesses in general, including banks, are recognising that natural resources²¹² are declining at a rate, extent and magnitude that have never been observed before.²¹³ Hardin²¹⁴ described environmental issues by the metaphor of the “tragedy of the commons”, namely that an inadequate appreciation of the scarcity of resources points to soil exhaustion, erosion and meddling with the ability of nature to regenerate itself. This loss of natural resources is pertinent for nearly the entire global economy and hence all companies are affected. Additionally, the effects of climate change²¹⁵ hold devastating consequences for the planet.²¹⁶ The result being that companies are fundamentally changing the way in which they operate to create lasting value – both for themselves and for their shareholders.²¹⁷ Traditionally, business strategy rode on the principal aspects of customers, capital and competition. An entirely new aspect for banks to consider is that of the security of the value chain – meaning that a natural

211 Richardson and Wood *Environmental Law for Sustainability* 11 - 12.

212 Be it water, soil, a stable climate, nutrition, social equity etc.

213 Esty and Winston *Green to Gold* 8; Lazlo and Zhexembayeva *Embedded Sustainability* 9. Business is faced with the reality of natural resources that are used at a faster rate than they can be replenished – also see Ramalho “Insights into King III and the code for Responsible investing in South Africa” 241; Borel-Saladin and Turok 2013 *Environmental Policy and Governance* 216.

214 Hardin 1968 *Science* 1244.

215 Human-driven climate change.

216 Ramalho “Insights into King III and the code for Responsible investing in South Africa” 241.

217 Lazlo and Zhexembayeva *Embedded Sustainability* 10; Ramalho “Insights into King III and the Code for Responsible investing in South Africa” 241;

resource crisis upstream in the value chain could annihilate all profits, if not the whole industry, including that of the banks industry.²¹⁸

The new movement of radical transparency in general also impacts banks and corporate business.²¹⁹ The notion of transparency originated from the unparalleled growth of the civil sector and is further assisted by the swift progress in the field of information technology, which has led to it becoming a self-motivated, direct and substantive force.²²⁰ The number of voluntary social and non-profit organisations committed to environmental and societal trepidation is estimated to be one million plus and hence the role performed by civil society is immense.²²¹ To this effect Hawken²²² has described civil society's collective action as "the largest movement on earth." Thus, banks and their business are not exempt from the large number of minds (civil society) dedicated to measuring, recording, and making visible banks environmental and social impacts.²²³

Modern, low cost communications technologies provide stakeholders instant access to previously unattainable or restricted information (including bank operations and business). Popular social media solutions have produced a level of connectivity never encountered before.²²⁴ A culture then of connectivity exists – due particularly to the marriage of the internet and mobile (cellular) phone technologies.²²⁵ In addition to this, open online resources exist that function as a one-stop shop for trustworthy data on a wide range of environmental and social issues.²²⁶ These online resources combine good data with easy to follow technology and design – in other words literally anyone can (at least theoretically) access and correctly interpret data of any bank regarding

218 Esty and Winston *Green to Gold* 8; Lazlo and Zhexembayeva *Embedded Sustainability* 10.

219 Lazlo and Zhexembayeva *Embedded Sustainability* 10.

220 Lazlo and Zhexembayeva *Embedded Sustainability* 10.

221 Lazlo and Zhexembayeva *Embedded Sustainability* 10.

222 Hawken *Blessed Unrest* 24.

223 See for example Banktrack. Available at <http://bit.ly/IP3mAU>. Lazlo and Zhexembayeva *Embedded Sustainability* 11; Esty and Winston *Green to Gold* 8.

224 Lazlo and Zhexembayeva *Embedded Sustainability* 11; Ramalho "Insights into King III and the code for Responsible investing in South Africa" 176.

225 Lazlo and Zhexembayeva *Embedded Sustainability* 11. Increased awareness of environmental issues due to people being, in general better educated, higher level of prosperity and accessibility of communication and information technologies. See Jeucken *Sustainability in Finance* 120.

226 See for example Gapminder. Available at <http://bit.ly/1bH6Ts6>.

environmental and social issues.²²⁷ A further element is that the major news providers are as of late reporting more and more on a growing number of environmental and social issues. This used not to be the case – previously, information on the topic of pollution was only available from specialised or niche outlets. Lazlo²²⁸ indicates that “the combination of civic activism and low cost global communications, along with widespread media support,” directs that no bank’s environmental and social impacts would go unnoticed.

Stakeholder pressure, being a significant driver of sustainable development, derives from (among others) shareholders, investors, activists, the media, government policy, suppliers, other financial institutions (such as the World Bank), employees, and board of directors.²²⁹ In the context of banks and their business, driving forces of sustainability are classified as either internal or external.²³⁰ Internal driving forces stem from shareholders;²³¹ the board of directors, employees and management of business units while external driving forces derive from national and local governments, international governmental organisations, the judiciary, suppliers, customers, competitors, other financial institutions, NGOs,²³² the media and society at large.²³³ These stakeholders call for responsible business activities and operations by insisting on socially equitable and or environmentally friendly products and services.²³⁴ Because of growing tension between emerging social values²³⁵ and traditional forms of value creation²³⁶ the public started to demand increased transparency and accountability of banks.²³⁷ Additionally this has led to the concept of “enlightened shareholder value” which implies that while it is recognised that a board of directors is accountable only to the specific bank or

227 Lazlo and Zhexembayeva *Embedded Sustainability* 11.

228 Lazlo and Zhexembayeva *Embedded Sustainability* 11.

229 Ramalho “Insights into King III and the code for Responsible investing in South Africa” 175; Esty and Winston *Green to Gold* 8.

230 Jeucken and Bouma *The Changing Environment of Banks* 28.

231 Its position (being internal or external) depends on whether it is viewed from an economic or ecological perspective.

232 Such as Greenpeace and the World Business Council for Sustainable Development.

233 Jeucken and Bouma *The Changing Environment of Banks* 28. The changing expectations of society, media, suppliers and other financial institutions (such as the World Bank and rating agencies).

234 Ramalho “Insights into King III and the Code for Responsible Investing in South Africa” 175; Jeucken *Sustainability in Finance* 128; Lazlo and Zhexembayeva *Embedded Sustainability* 15.

235 Understood to be pro-sustainability. In other words at least the balancing of economic, environmental and social issues.

236 Economic growth and interest reigned supreme at the expense of the environment and the social element.

237 Elkington *The Chrysalis Economy* xi.

company, the board in its decision-making needs to take account of the reasonable expectations and interests of the stakeholders linked to the company.²³⁸

Banks are gradually judging the concept of sustainable banking, or more specifically that of sustainable performance, to be a success factor – success can be achieved via product differentiation, price premiums, eco-efficiency or new market opportunities.²³⁹ Hence, opportunities for banks exist in the form of lending to companies who are or will be investing in environmentally friendly technologies.²⁴⁰ Some of the most prominent business opportunities in four fast-growing areas include: sustainable energy, cleaner production, biodiversity conservation, and banking services to low-income, underserved groups.²⁴¹ The demand for new products and services such as recycled material or components associated with energy efficient products²⁴² create an environmental market niche that banks can tap into as a new line of business.²⁴³ Large infrastructure projects that are typically linked with clean water supply, wastewater management and or solid waste disposal require particular knowledge and financial expertise – a service that banks typically provide (and make profit from).²⁴⁴ Additionally banks have been provided an opportunity, in a sense undeservedly, to benefit from those investors who wish to act as a responsible or good global citizen via the clout of their investments.²⁴⁵ This is so because these investors want to invest in “new” socially responsible, eco and or green investment funds. A further opportunity is that of so called “on-lending.” On-lending entails the provision of bulk loans from multilateral banks to “local” banks for use in specific sectors such as oil, gas, agriculture etc. whereby local banks could possibly access bulk loans from foreign banks (typical multilateral development banks).²⁴⁶ Banks have easy access to these new markets and can generate revenue by providing

238 King “Synergies and Interaction between King III and the Companies Act” 448. See also De Lacy “What is the Purpose of a Company?” 43.

239 Case *Environmental Risk Management* xii.

240 Thompson and Cowton 2004 *The British Accounting Review* 199; Hanks “The Business Case for Sustainability” 6.

241 Available at <http://bit.ly/18B5LpQ>.

242 Such as photovoltaic cells, geothermal and fuel cell technologies.

243 Environmental Bankers’ Association 2003. Available at <http://bit.ly/J4SPIQ>. Nedbank Capital, for example, recently underwrote debt funding to the tune of R6.8-billion on projects of the Renewable Energy Independent Power Producer Procurement Programme (REIPPP3). The Minister of Energy indicated that the total number of projects total R44-billion. See Kolver 2013 *Engineering News*. Available at <http://bit.ly/IP21Kp>.

244 Environmental Bankers’ Association 2003. Available at <http://bit.ly/J4SPIQ>.

245 Environmental Bankers’ Association 2003. Available at <http://bit.ly/J4SPIQ>.

246 UNEPFI and ATF 2007 Report: Banking on Value. Available at <http://bit.ly/1bwlyIT>.

sustainable investment choices to its clients and customers.²⁴⁷ In other words banks can bolster their portfolio by developing new business in sustainability-driven segments, getting entree to new markets, offering loans for environmental projects, and providing loans and advisory services for eco-efficiency and cleaner production.²⁴⁸

There has been both (i) an increase in and (ii) changes in global, regional and domestic regulatory²⁴⁹ framework relating to environmental protection in both developed and emerging countries.²⁵⁰ This is mainly due to new scientific discoveries of environmental and health risks associated with pollution, which in turn led to an equivalent rise in public demand for environmental value.²⁵¹ Case²⁵² indicates that environmental legislation and regulation had, initially, a limited scope by only aiming to reduce emissions from industrial processes.²⁵³ This has changed as environmental legislation clearly follows a more holistic, integrated approach.²⁵⁴ The consumption of natural resources and environmental pollution (in all its forms such as water and air pollution) are identified as main concerns.²⁵⁵ Changes in environmental legislation, for example, have driven the development of green products – such as the banning of chlorofluorocarbons (CFCs) in aerosol cans,²⁵⁶ which in turn led to premium prices

247 Environmental Bankers' Association 2003. Available at <http://bit.ly/J4SPIQ>.

248 Tsele *et al Sustainable Banking: Opportunities and Challenges* 8.

249 On the matter of bank regulation a general distinction is made between regulation of structure and regulation of conduct. The former refer to which type of firm is qualified to participate in a specific type of activity while the latter refer to which behaviour is permitted in the chosen activity. See Jeucken *Sustainability in Finance* 45.

250 Case *Environmental Risk Management* 1; 163. Legislation on sustainability issues is typically to be found within a number of different statutes (typically per sector) – that is to say generally no single “sustainability” statute can encompass all sustainability issues – as an example see par on statutes dealing with sustainable development and or sustainability issues. For example see framework and sector specific environmental legislation in South Africa such as NEMA and the *National Water Act* 36 of 1998; international and local best practices, guidelines and voluntary codes such as the King Code of Corporate Governance (King III), the Equator Principles, etc. The evolvement of local (national), regional and international environmental policy is described by Jeucken – see *Sustainability in Finance* 80-86.

251 IISD. Available at <http://bit.ly/1hM9zwW>. Also see Jeucken *Sustainability in Finance* 76-77 where the author describes the evolvement of environmental consciousness to the notion of sustainable development.

252 Case *Environmental Risk Management* 1.

253 Known as so-called “end of pipe” solutions. See Case *Environmental Risk Management* 1; Jeucken *Sustainability in Finance* 74.

254 Case *Environmental Risk Management* 1.

255 Jeucken *Sustainability in Finance* 74.

256 Article 2A of the Montreal Protocol on Substances that Deplete the Ozone Layer – available at <http://bit.ly/1bYAYJO>.

(reflection of the added value of new designs) and thus ultimately adding to shareholder value.²⁵⁷

A major driver of sustainability is the potential reputational benefits for banks. Banks could employ sustainability as an opportunity to make a stance central to their activities or brand, thereby increasing its credibility, which in turn could lead to improved goodwill, new business, new clients, and greater access to financing.²⁵⁸ Hence, banks could improve their financial performance, which in turn enhances shareholder value.²⁵⁹ The flip side to this coin is of course that of reputational damage, which could be immense for a bank.²⁶⁰ Banks have also realised that sustainable banking has a positive impact on cost savings, typically by good environmental management banks are saving costs through lessening of water consumption; reducing the mass of wastes requiring costly disposal (via reuse or recycling) and reducing the amount of energy used among others.²⁶¹

Globalisation and competitive edge entail that in order for banks to be competitive with other local, regional and international banks, banks need to adopt similar environmental and social standards and policies as those of other banks.²⁶² The alternative is that a bank could be left behind and might find it difficult to recover. As an example, a number of banks,²⁶³ especially with regard to the financing of projects, have signed up to the Equator Principles,²⁶⁴ which although being a voluntary set of principles, has become

257 Case *Environmental Risk Management 2*.

258 Thompson and Cowton 2004 *The British Accounting Review* 199; Tsele *et al Sustainable Banking: Opportunities and Challenges* 8; Case *Environmental Risk Management 3*. For example the environmental stance of the Co-operative Bank in the United Kingdom has led to successful market share and profitability.

259 Case *Environmental Risk Management xi*.

260 For the opposite reasons as those indicated as reputational benefits. In short stakeholder (which includes customer/client) loyalty could be lost etc. See chapter 4 for a discussion.

261 Case *Environmental Risk Management 2*.

262 Tsele *et al Sustainable Banking: Opportunities and Challenges* 8. This is due to banks competing for the same business.

263 As at end of October 2013, 78 international financial institutions are members of the Equator Principles. Available at <http://bit.ly/JnjQ47>.

264 It aims to ensure that the financing of projects are (i) socially responsible and (ii) that sound environmentally management practices are applied. Available at <http://bit.ly/1dD3U77>. For a discussion of the Equator Principles and its legal status see paragraph 7.2.1.

the *de facto* prerequisite for market entrance or as a way of retaining a social licence to trade.²⁶⁵

Continuing global calls for banks and financial institutions to contribute to sustainable development issues²⁶⁶ include the following institutions, awareness documents, guidelines, codes of conduct etc: (i) the United Nation's Global Compact Policy Initiative,²⁶⁷ which incorporates environmental, social and governance (ESG) factors to evaluate corporate behaviour; (ii) the Principles for Responsible Investment;²⁶⁸ (iii) the European Union's Green Paper for Corporate Social Responsibility (CSR);²⁶⁹ (iv) the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Companies;²⁷⁰ (v) the Global Reporting Initiative's (GRI) guidelines on Sustainability Reporting;²⁷¹ (vi) the Sigma Project guidelines;²⁷² (vii) Social Sustainability Codes of conduct on Social Responsible Investment (SRI) such as the Equator

265 Hanks "The Business Case for Sustainability" Green II 16.

266 There is strong evidence that the nature of the social contract between business (which includes banks) and society is changing, due to the inter-connectedness of the world, coupled with raised expectations from stakeholders. See Fourie "Responsible leadership and the changing social contract" 72. Where this changing social contract is most visible is the societal response to the profit driven motives of banks that contributed to the international debt crisis, and also society's response to the BP oil spill. The uprising related to the so-called "Arab Spring" and the social inequality riots in the United Kingdom, as well as service delivery protests in South Africa, are further reminders of the changing expectations of stakeholders.

267 It is a policy initiative for businesses that are committed to ten universal principles in the areas of the environment, human rights, labour and anti-corruption. It is a practical framework for the development, implementation and disclosure of sustainability policies and practices being the largest voluntary corporate responsibility initiative in the world with over 10,000 corporate participants and other stakeholders from over 130 countries.

268 Launched in 2006 and are a set of aspirational and voluntary guidelines for investors wishing to address environmental, social and corporate governance (ESG) issues within mainstream investment decisions. Available at <http://bit.ly/1bCMHvX>.

269 Available at <http://bit.ly/1b7Dkju>.

270 It is a global framework for responsible business conduct that covers all areas of business ethics including that of the environment.

271 It is a sustainability reporting framework which enables organizations (including banks) to measure and report their economic, environmental and governance performance (via reporting and sector guidelines). The GRI is a network-based organisation that produces guidelines for sustainable reporting. It was formed in 1997 in the United States of America by the Coalition for Environmentally Responsible Economies (CERES) and the Tellus Institute. It has the backing of the United Nations Environmental Programme (UNEP). In 2002, the GRI became a permanent, independent body. Its vision is stated as: "A sustainable global economy where organisations manage their economic, environmental, social and governance performance and impacts responsibly, and report transparently."

272 It consists of integrated guidelines, which help organisations to manage their social, environmental and economic impacts. Available at <http://bit.ly/1fmHPf1>.

Principles²⁷³ and the Collevocchio Declaration;²⁷⁴ (viii) the ISO 14000 standards,²⁷⁵ such as an ISO 14001 Environmental Management System;²⁷⁶ (ix) environmental standards from multilateral development banks such as the World Bank,²⁷⁷ the International Finance Corporation's (IFC) Sustainability Framework,²⁷⁸ the African Development Bank (AFDB)²⁷⁹ and the European Bank for Reconstruction and Development (EBRD);²⁸⁰ (x) the United Nations Environmental Program Finance Initiative²⁸¹ (xi) sustainability indexes such as the Dow Jones Sustainability Index²⁸² and the FTSE4GOOD Index Series,²⁸³ (xii) the World Business Council for Sustainable Development (WBCSD)²⁸⁴

273 It is a framework for determining, assessing and managing environmental and social risk in project finance transactions by financial institutions. Devised largely by the banking industry under the auspices of the World Bank's International Finance Corporation (IFC). Available at <http://bit.ly/1iVPSnO>.

274 Being an alternative for financiers to the Equator Principles, the Collevocchio Declaration calls for seemingly a stricter set of environmental standards. This is due to the fact that groups outside of the financial sector were responsible for the drafting of the code. Available at <http://bit.ly/1bHII5C>.

275 It consists of practical tools for companies and organisations looking to identify and control their environmental impact and additionally looking to improve their environmental performance. ISO 14000 looks at various aspects of environmental management via a range of standards. Available at <http://bit.ly/IP1FDM>.

276 An ISO 14001 Environmental Management System consists of practical tools for companies and organisations looking to identify and control their environmental impact and additionally looking to improve their environmental performance. Available at <http://bit.ly/JdMEMK>.

277 Available at <http://bit.ly/1k41WBA>.

278 Under the auspices of the World Bank – The sustainability framework consists of (i) policy on environmental and social sustainability (IFC commitments), (ii) performance standards (client's responsibilities for managing their environmental and social risks – which include among others performance standards that of assessment and management of environmental and social risks and impacts; biodiversity conservation and sustainable management of living natural resources; indigenous peoples and cultural heritage) and (iii) access to information policy (IFC's commitment to transparency).

279 Available at <http://bit.ly/19MKtX5>.

280 Available at <http://bit.ly/IP3IHN>.

281 Available at <http://bit.ly/1b7EDPf>. It is an international partnership between UNEP and the financial sector (including banks) whereby institutions work with UNEP to apprehend the impacts of environmental and social considerations on financial performance. The UNEP FI in its guide to banking and sustainability refer to a number of non-government and international organisations which banks should take note of. NGO's consist of: Banktrack (<http://bit.ly/IP3mAU>); Human Rights Watch (<http://bit.ly/1bCOL6X>); International Union for Conservation of Nature (<http://bit.ly/1jMstDr>); and the Rainforest Action Network (<http://bit.ly/1e4TfXD>). International organisations consist of: Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (<http://bit.ly/1bCJhcv>); Rotterdam Convention – International trade of hazardous chemicals (<http://bit.ly/1co4wvb>); Stockholm Convention on Persistent Organic Pollutants (<http://bit.ly/19gPxWI>); United Convention on Biological Diversity (<http://bit.ly/1bvh5nw>); United Nations Environmental Program (<http://bit.ly/1co6VpJ>); United Nations Framework Convention on Climate Change (<http://bit.ly/1e4QG7H>); United Nations Human Rights Council (<http://bit.ly/1hM8dCi>) and the World Health Organization (<http://bit.ly/1e4Tu4S>).

282 Available at <http://www.djindexes.com/sustainability/>.

283 Available at <http://bit.ly/1cAtD1v>.

284 It is an association of more than 160 international companies dedicated to sustainable development by way of the three pillars of economic growth, ecological balance and social progress. The WBCSD is a member-led organization and is governed by a Council consisting of the Chief Executive Officers

and (xiii) a number of additional sustainability networks such as the International Chamber of Commerce (ICC);²⁸⁵ the International Corporate Governance Network (ICGN);²⁸⁶ the Business of a Better World (BSR);²⁸⁷ to account for and report on greenhouse gas emissions the Carbon Markets and Investors Association (CMA);²⁸⁸ the Carbon Principles;²⁸⁹ the Green House Gas Protocol Initiative (GHG);²⁹⁰ the Climate Group;²⁹¹ and a number of rating agencies such as the Global 100 Most Sustainable Corporations in the World;²⁹² the MSCI ESG Indices Rankings;²⁹³ Oekom;²⁹⁴ Vigeo;²⁹⁵ and Asset4Good²⁹⁶ and the civil society group BankTrack²⁹⁷ which follow and make public the operations and investments of banks. This list is not exhaustive.

In addition, local self-regulation for responsible investment is to be found in the Code for Responsible Investing in South Africa (CRISA) and having being endorsed by the Institute of Directors of Southern Africa (IoDSA), the Principal Officers Association (POA), and the Association for Savings and Investment South Africa (ASISA). In addition the Financial Services Board (FSB) and the Johannesburg Stock Exchange (JSE) support the principles of CRISA.²⁹⁸ Akin to King III, CRISA looks to provide best practice recommendations to institutional investors such as banks to be followed on an “apply” or “explain” basis.

Drivers of sustainability for banks – which include environmental issues – hence consist of opportunities and risks. These opportunities and risks are a direct result of both statutory and non-statutory pressure. Statutory pressure – which consists of an increase

of its members companies, or other top-level executives of equal rank. The WBCSD aims to show that businesses which make efforts to endorse sustainable development experience enhanced competitiveness. See the Environmental Bankers' Association 2003 (<http://bit.ly/J4SPIQ>).

285 Available at <http://bit.ly/IP37WD>.

286 Available at <http://bit.ly/1bvgdiM>.

287 Available at <http://bit.ly/1bCOpxp>.

288 Available at <http://bit.ly/19gRK4t>.

289 Available at <http://bit.ly/1bCOyRn>.

290 Available at <http://bit.ly/1f6pbHs>.

291 Available at <http://bit.ly/18C9uqy>.

292 Available at <http://bit.ly/1f6ovSx>.

293 Available at <http://bit.ly/JdJ19A>.

294 Available at <http://bit.ly/1co6ifS>.

295 Available at <http://bit.ly/1hM7CAK>.

296 Available at <http://bit.ly/1bCOaCo>.

297 Available at <http://bit.ly/IP3mAU>.

298 Le Roux “Perspectives on Responsible Investment” 97.

in general framework²⁹⁹ and specific environmental legislation,³⁰⁰ create both legal liabilities and reputational risk for banks.³⁰¹ Non-statutory pressure derives from components from the public in general and a number of institutions³⁰² and seems to be equally an important driver because of the major role and impact of possible reputational risk to banks. These non-statutory features³⁰³ have become the *de facto* prerequisite for market entrance or as a way of retaining a social licence to engage in business – including that of banking businesses such as lending.³⁰⁴

4 Banks, sustainability and sustainable development

Acknowledgement of the significance of sustainable development (which includes the environment) for banks came when a large number of international banks in 1992 signed the United Nations Environment Programme's (UNEP) Statement by Banks on the Environment and Sustainable Development.³⁰⁵ In May 1997 the UNEP drafted a further broad Statement by Financial Institutions Initiative on the Environment and Sustainable Development pledging participants to develop environmentally sound management practices.³⁰⁶ The UNEP statement acknowledged that sustainable development³⁰⁷ needed to have its standing amid the greatest importance of banks; that

299 Such as NEMA in South Africa.

300 Examples of specific environmental legislation (SEMAs) in South Africa are among others: the *National Water Act* 36 of 1998; NEMWA; NHRA; NEMPAA; NEMBA; and the *National Environmental Management: Air Quality Act* 39 of 2004.

301 Companies – such as banks - and their directors can be held personally liable for environmental crimes. In South Africa s 34(7) of NEMA provides for the personal liability of directors for offences committed by the company during the period of any director's appointment.

302 Includes awareness documents, guidelines, voluntary principles, corporate governance codes of conduct; listing requirements; best practise recommendations etc.

303 Both local and international guides, principles, codes of conduct etc on sustainability (which includes environmental issues) are applicable to South African banks. For a list and description see paragraph 3 earlier.

304 Hanks "The Business Case for Sustainability" Green II 16.

305 Thompson and Cowton 2004 *The British Accounting Review* 199. Also see Richardson 2005 *European Environmental Law Review* 282. This was precluded by a number of events in the banking sector namely (i) the coming into existence of the *Comprehensive Environmental Response Compensation and Liability Act* (CERCLA) in 1980 in the US; (ii) the European Union's directive on civil liability for damage caused by waste in 1989; (iii) the 1990 Fleet Factors case in the US whereby lender banks were considered liable for environmental damage by its clients; and (iv) the 1992 UNEP Financial Institutions Initiative "to promote the integration of environmental considerations into all aspects of the financial sector's operations and services."

306 Richardson 2005 *European Environmental Law Review* 283.

307 Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

banks are a vital contributor towards the realisation of sustainable development; and therefore that the participant banks will undertake to guarantee that their policies and business actions support it.³⁰⁸ More particularly, the statement obliged participant banks to develop thorough environmental management practices.³⁰⁹ Participant banks undertook to practice every day principles of environmental protection by making use of environmental management best practices in their internal operations and integrating environmental risks into their checklists for risk assessment and management.³¹⁰ The International Financial Corporation (IFC) in its 2007 report, *Banking on Sustainability*,³¹¹ indicates that sustainability (in the financial institution context) consists of two components:

One component is managing social and environmental risks in strategic decision-making and lending...the other component is identifying opportunities for innovative product development in new areas related to sustainability.

In other words it involves creation of products and services that maintain development of products or activities with environmental and social benefits.³¹² UNEP, in its African Task Force Report on Banking Value³¹³ defines sustainable banking as:

Sustainable banking can be interpreted to mean the process whereby banks consider the impacts of their operations, products and services on the ability of current or future generations to meet their needs. Viewed in this way, banks can be deemed to have direct and indirect impacts.

The report further describes sustainable banking by indicating that banks have direct and indirect impacts. The former refer to the operation³¹⁴ of a bank while the latter refer to the bank's products and services.³¹⁵ Another definition of sustainable banking is provided by Giuseppe,³¹⁶ namely:

308 Thompson and Cowton 2004 *The British Accounting Review* 199.

309 Richardson 2005 *European Environmental Law Review* 283.

310 Thompson and Cowton 2004 *The British Accounting Review* 199.

311 IFC *Banking on Sustainability* 8. Available at <http://bit.ly/18B5LpQ>.

312 Tsele *et al Sustainable Banking: Opportunities and Challenges* 6.

313 Available at <http://bit.ly/1bwlyIT>.

314 This would include issues such as energy efficiency, waste recycling, ecological footprint and employment conditions.

315 Available at <http://bit.ly/1bwlyIT>. Typically associated with the finance and investment activities of banks.

316 Giuseppe "Assessing the Triple Bottom Line" 101.

By definition the term sustainable development means meeting the needs of today's generation without compromising the ability of future generations to meet theirs. Sustainable banking therefore should be interpreted as the decision by banks to provide products and services only to customers who take into consideration the environmental and social impact of their actions.

Another definition of sustainable banking is offered by the *Inter-American Development Bank*:³¹⁷

...is understood as the quality of a social and economic development model that is capable of satisfying the needs of the present generation without injuring or compromising the capabilities of future generations to satisfy their own needs, by adopting social, environmental, and governance practises that use resources rationally and protect the environment effectively.

Bouma and Jeucken³¹⁸ indicate that banks need to go through a number of stages to get close to and or reach sustainable banking namely defensive, preventative, offensive and sustainable banking. The final stage,³¹⁹ being that of sustainable banking, is described as: "the bank does not look for the highest financial rate of return, but for the highest sustainable rate of return, while being profitable in the long run." By not defining clear boundaries Bouma and Jeucken³²⁰ seem to define sustainable banking in a broad sense namely: "because its definition changes over time; also, it has no clear borders..."

Van Gelder³²¹ links sustainable banking with a seemingly (compared to most, if not all other definitions of sustainable banking provided) wider notion of sustainability by indicating that sustainable banking is essentially about contributing to making this (sustainability) happen.³²² This entails that in order to be a truly sustainable bank; banks

317 Moreno 2011 *Development in the Americas*.

318 Bouma and Jeucken "The Changing Environment of Banks" 33-34.

319 The other stages being defensive, preventative and offensive banking. See Bouma and Jeucken "The Changing Environment of Banks" 33-34.

320 Bouma and Jeucken "The Changing Environment of Banks" 33-34.

321 Van Gelder 2009 *The Do's and Don'ts of Sustainable Banking* – available at <http://bit.ly/JhD8bj>.

322 Van Gelder's definition of sustainable banking seemingly only refers to sustainability namely: ...about meeting the needs of the present without compromising the ability of future generations to meet their needs. It is about preserving the environment and biodiversity for future generations, and about being cautious with our natural resources and climate. But sustainability is also about guaranteeing human rights and a life in dignity, free from want and poverty for all people living today. Available at <http://bit.ly/JhD8bj>.

in certain instances will have to turn down tempting business opportunities.³²³ Van Gelder³²⁴ is of the opinion that banks need to put more effort into questioning the norms on which their existing business strategies are based – in other words to strive towards sustainability, banks must make an effort for actual better performance and results on the ground in affected communities and environments. Good intentions or strong policy on paper itself is not enough to attain sustainable banking.³²⁵

As indicated earlier,³²⁶ no general consensus exists on the meaning of the notion of sustainable development and sustainability.³²⁷ Within the banking context this is no different. Banks (being a business) might perceive the concept of sustainable development as being intended at making “development” sustainable and not to achieve integrated sustainability in the essential sense of examining business activities that are not sustainable socially, economically, environmentally and culturally.³²⁸ However, some common themes which relate to the consideration given to environmental and social issues, within the banking context, are evident from (i) the drivers of sustainability for banks³²⁹ and (ii) the definitions of sustainability and sustainable banking described. How and to what extent these considerations on environmental and social issues are implemented, differ between regions, countries and institutions.³³⁰ By comparing sustainability statements by different banks one tends to realise (i) that most, if not all banks, do acknowledge the existence of sustainability; (ii) that although those banks use the same terminology describing sustainable banking, (iii) the physical implementation and extent of implementation in banks’ daily operations, services and products differ from bank to bank.³³¹ Sustainable banking then seems to be a concept that is dynamic and hence will evolve over time.³³² Presently it does call for the

323 Van Gelder 2009 *The Do's and Don'ts of Sustainable Banking* – available at <http://bit.ly/JhD8bj>.

324 Van Gelder 2009 *The Do's and Don'ts of Sustainable Banking* – available at <http://bit.ly/JhD8bj>.

325 Van Gelder 2009 *The Do's and Don'ts of Sustainable Banking* – available at <http://bit.ly/JhD8bj>.

326 See paragraph 2.

327 See also Case *Environmental Risk Management* 1.

328 Murombo 2008 *SALJ* 503.

329 See paragraph 3.

330 Depending on specific regional and national policy, legislation, voluntary initiatives, guidelines, codes etc.

331 Locally the Development Bank of Southern Africa has as one of its five pronged strategies the bringing about of sustainability (both externally and internally). Available at <http://bit.ly/1bVOopX>.

332 Responding to global developments and experiences gained. See Van Gelder 2009 *The Do's and Don'ts of Sustainable Banking* – available at <http://bit.ly/JhD8bj>. Also see Arnspenger “Social and Sustainable Banking and the Green Economy” 25.

questioning of all current banking business strategies – especially on investment decision processes.

Common themes resulting from the definitions of sustainable banking include: responding to the global effects of climate change by adapting and reducing banks' direct and indirect carbon footprints; sustainable finance – namely the financing of products, projects and businesses that promote or do not harm the environment and society; environmental and social justice; effective environmental and social risk management; long term views and planning of environmental and social policy, ambitious environmental and social policy frameworks, brave leadership, innovative product and process development, effective implementation of sustainability policy across all banks' organisations; and clear transparency and accountable procedures. Hence the author proposes the following definition of sustainable banking:

The process whereby banks consider the impacts of their operations, products and services on the ability of current and future generations to meet their needs via the effective implementation of environmental, social and governance policies and practises that are integrated across all banks' operations to ensure (i) the prevention and minimising of environmental, social and cultural harm; (ii) transparency and accountability to stakeholders; and (iii) the financing of products, projects and businesses that promote sustainable green markets.

5 The role of banks

The role of banks³³³ is significant due to its position as a halfway between people and or institutions with shortages and surpluses of capital.³³⁴ As per Jeucken³³⁵ the role of banks is an intermediary one, transferring money by size (denomination intermediation), term (maturity intermediation), place and or time³³⁶ and between generations (intergenerational transfers). This function accordingly affects the development and direction of the economy.³³⁷ Because banks play an intermediary role between borrowers and lenders of money, they are well suited to influence the direction and pace of a country's economic development and by default steer and promote sustainable

333 Reasons for the existence of banks is well described - see Jeucken *Sustainability in Finance* 58-60.

334 Jeucken and Bouma *The Changing Environment of Banks* 23; Jeucken *Sustainability in Finance* 55.

335 Jeucken *Sustainability in Finance* 59; Jeucken *Sustainable Finance and Banking* 52; Richardson *Regulating the Unseen Polluters* 5.

336 A lender typically could be situated in one country while the borrower is in another country.

337 Richardson *Regulating the Unseen Polluters* 67.

development – this is also true in the local context.³³⁸ Governments, in general, have realised the potential that banks can play in contributing toward sustainable development – specifically due to the intermediary role that banks fulfil within the economy.³³⁹ South Africa is known to have a major poverty issue and hence government policy acknowledges the importance of development as a way of alleviating poverty.³⁴⁰ Pressure then exists on South African banks to on the one hand, support development via lending businesses and, on the other hand, to stay within the parameters of sustainability – specifically the environmental protection of natural resources. By allocating money across sectors of industry, banks indirectly influence the nature of economic growth.³⁴¹ This stems from the advantage³⁴² that banks have on information about market trends and economic and political factors, and which in turn, (at least theoretically) enable banks to assess environmental and financial risk.³⁴³ The primary products of banks include (among others) lending, savings, investment, cash management, deposit services, mediation and advice, mergers and acquisitions, guarantees, foreign exchange and ownership and trust of real estate.³⁴⁴ These products and services are found within different banking divisions such as investment banking,³⁴⁵ corporate banking, commercial banking,³⁴⁶ private banking, electronic banking, trade finance, financing and loans, securities, savings and so forth.³⁴⁷ Some banking products such as investment banking and securitisation are of significance to sustainability

338 Jeucken and Bouma “The Changing Environment of Banks” 25; UNEPFI and ATF Banking on Value – available at <http://bit.ly/1bwlyIT>.

339 Jeucken and Bouma “The Changing Environment of Banks” 25; Richardson 2005 *European Environmental Law Review* 280.

340 See the South African National Framework for Sustainable Development (NFSD) – available at Available at <http://bit.ly/1bC82om>.

341 Jeucken *Sustainability in Finance* 55. Banks’ influence on sustainability include (among other) that of financing of “green product investments”; the lowering of business (risk) costs for clients who use “green” products; providing special mortgage rates for sustainable buildings and or homes; providing of “green” investment funds at special rates (such as project restoration of brownfields); preferential banking packages to clients whom have committed to “green” strategies and by issuing “green” credit cards part of the profits are donated to NGOs committed to sustainability. See Hawken *The Blessed Unrest* 212.

342 Being a relative advantage. See Jeucken and Bouma “The Changing Environment of Banks” 25.

343 Jeucken and Bouma “The Changing Environment of Banks” 28. Banks relative advantage includes that of legislation and sector-specific knowledge.

344 Jeucken and Bouma “The Changing Environment of Banks” 23; Richardson *Regulating the Unseen Polluters* 67.

345 Provides long term capital financing (mainly via underwriting securities newly issued by companies or governments). See Richardson *Regulating the Unseen Polluters* 67.

346 Make available (offer) credit for financing production and the distribution of consumable goods (such as temporary bridging loans, seasonal loans and long-term capital asset loans). See Richardson *Regulating the Unseen Polluters* 67.

347 Jeucken and Bouma “The Changing Environment of Banks” 23.

because it comprises the direct influence of clients on the investments that banks make.³⁴⁸

The traditional split within the banking industry is that of commercial and investment banking.³⁴⁹ The former make available (offer) credit for the financing of production and the distribution of consumable goods (such as temporary bridging loans,³⁵⁰ seasonal loans³⁵¹ and long-term capital asset loans).³⁵² The latter provides long-term capital financing,³⁵³ the facilitation of corporate mergers, acquisitions and restructuring.³⁵⁴ However, due to market deregulation there has been an ever-increasing merging between the activities of investment³⁵⁵ and commercial³⁵⁶ banks.³⁵⁷ In addition, greater business diversification has been a result of the modern banking industry – a number of banks in the industrialised world have entered into the business of portfolio management, investments, underwriting of securities, and insurance.³⁵⁸ Jeucken and Bouma³⁵⁹ describe the classic cyclical course of a macro-economic system as consisting of (i) companies which produce, invest and export goods and receiving investments; (ii) households which pay taxes, consume goods and import goods and save money; (iii) governments which receive taxes, pay subsidies and invest; (iv) goods are traded through the international markets (imports and exports); and (v) surpluses and

348 Jeucken and Bouma “The “Changing Environment of Banks” 24.

349 Richardson *Regulating the Unseen Polluters* 67. Within the banking context a general distinction can be made between depository and non-depository financial institutions. A depository institution would typically include commercial banks; savings institutions and cooperative banks and credit unions while non-depository institutions encompass securities market institutions; investment institutions; contractual savings institutions and multilateral and government financial institutions. See Jeucken *Sustainability in Finance* 50-51.

350 For specific transactions. See Richardson *Regulating the Unseen Polluters* 67.

351 Generally to manage cash flow.

352 For example, the purchase of new equipment. Commercial banks hence provide the apparatus for the transfer of government monetary policy decisions (such as interest rate changes). See Richardson *Regulating the Unseen Polluters* 67. Typical other services of commercial banking are that of deposit services, cash management and foreign exchange.

353 Mainly via the underwriting of securities newly issued by companies or governments.

354 Richardson *Regulating the Unseen Polluters* 67. In other words investment banks do not hold deposits from or issue loans to individuals.

355 Banking that includes an array of services from asset securitization, mergers, acquisitions, restructuring, securities underwriting, equity private placements and the placement of debt securities (with institutional investors). Available at <http://bit.ly/1hbM0uJ>.

356 Banking that includes services such as credit services (asset-based financing, lines of credits, commercial loans or commercial real estate loans), cash management (money transfers and payroll services), deposit services (savings account services) and foreign exchange. Available at <http://bit.ly/1hbM0uJ>.

357 Richardson *Regulating the Unseen Polluters* 67-68.

358 Richardson *Regulating the Unseen Polluters* 67-68.

359 Jeucken and Bouma “The Changing Environment of Banks” 23-24.

shortages of governments, the international markets, companies and households are dealt with by financial transactions through the financial markets.³⁶⁰

Banks' capacity and influence cut across economies, geographies, and cultures.³⁶¹ Banks are cost-effective channels reaching end-borrowers, who function along the supply chain and in high impact sectors like infrastructure, clean energy, housing, education and enterprises of all sizes.³⁶² Banks' business principles and practises – such as their lending criteria – have a ripple effect economy wide. Therefore, banks can be seen as powerful agents of change.³⁶³

5.1 The environmental impacts of banks

The pure volume and intricacy of the banking sector makes it unavoidable that the business activities of banks will affect or be affected (in one way or the other) by certain aspects of the environment.³⁶⁴ To comprehend the impacts that banks have on the environment, a general distinction is made between internal and external issues.³⁶⁵ Internal environmental issues refer to the processes within banks that have an impact on the environment, while external issues tend to refer to the bank's products.³⁶⁶ The environmental impact of banks within its business processes (i.e. internally) - in the form of their consumption of resource use such as power and heat (electricity), water and paper, and general business travel – is generally perceived as good (i.e. not having a major impact) compared to other sectors in the economy.³⁶⁷ Nevertheless, the overall size of the banking sector is such that its environmental impact is substantial - its number of offices (buildings and office space) are great; an immense amount of paper is still consumed by banks (even in its drive towards a paperless environment, banks find

360 Jeucken and Bouma "The Changing Environment of Banks" 23-24.

361 Inter-American Development Bank 2011 *Banking on Sustainable Development* – available at <http://bit.ly/1buqrA5>.

362 Inter-American Development Bank 2011 *Banking on Sustainable Development* – available at <http://bit.ly/1buqrA5>.

363 Van Gelder 2009 *The Do's and Don'ts of Sustainable Banking* – available at <http://bit.ly/JhD8bj>.

364 Environmental Bankers' Association 2003. Available at <http://bit.ly/J4SPIQ>.

365 Jeucken and Bouma "The Changing Environment of Banks" 26.

366 Jeucken and Bouma "The Changing Environment of Banks" 26; UNEPFI and ATF Banking on Value. Available at <http://bit.ly/1bwlyIT>.

367 Richardson *Regulating the Unseen Polluters* 5; Jeucken and Bouma "The Changing Environment of Banks" 26; Giuseppi "Assessing the Triple Bottom Line" 101.

it difficult to do without paperwork) and on top of the many national, regional and international travel undertaken, banks have thousands of vehicles in the company fleet (in other words the use of fuel and corresponding emission into the atmosphere).³⁶⁸ Bank's products (external issues) on the other hand, do not per se pollute the environment.³⁶⁹ It is the users of these products (i.e. the bank's clients) that impact on the environment.³⁷⁰ It has been progressively acknowledged that through their lending practices banks are inseparably connected to business-related activity that damages the environment.³⁷¹

The external business related activities of banks which are generally categorised as high environmental risk sectors consist of among others: agriculture,³⁷² mining and quarrying,³⁷³ manufacture of food products and beverages,³⁷⁴ textiles and textile products,³⁷⁵ clothing (namely fur dressing)³⁷⁶, leather and leather products,³⁷⁷ wood and wood products,³⁷⁸ pulp, paper and paper products,³⁷⁹ publishing and printing,³⁸⁰ coke, refined petroleum products and nuclear fuel,³⁸¹ chemicals, chemical products and man-

368 Jeucken and Bouma "The Changing Environment of Banks" 26; Case *Environmental Risk Management* x-xi; Giuseppi "Assessing the Triple Bottom Line" 101.

369 Thompson and Cowton 2004 *The British Accounting Review* 199; Jeucken and Bouma "The Changing Environment of Banks" 27; UNEPFI and ATF Banking on Value. Available at <http://bit.ly/1bwlyIT>.

370 Richardson *Regulating the Unseen Polluters* 4; Jeucken and Bouma "The Changing Environment of Banks" 27.

371 Thompson and Cowton 2004 *The British Accounting Review* 199; Richardson *Regulating the Unseen Polluters* 3-5.

372 Pig, poultry, dairy and other farming.

373 Mining of coal, lignite, uranium, thorium ores, chemical and fertilizer minerals, other mining, and the extraction of peat, crude petroleum, natural gas, bituminous shale and sand, stone (limestone, gypsum, chalk and slate), sand and clay, and the operation of sand and gravel pits.

374 Animal slaughter and basic processing of meat, poultry meat processing, poultry and meat products, processing and preserving of fish and fish products, processing of fruit and vegetables, vegetable and animal oils and fats (margarine and similar products), manufacture of starches and starch products, pet foods, manufacture of tobacco products.

375 Preparation of cotton (spinning and weaving), woollen and worsted, manufacture of sewing threads, other natural fibres (silk), textile finishing, carpets and rugs, other textile manufacturing (such as rope).

376 Processing of fur and manufacture of fur articles.

377 Leather tanning and dressing.

378 Sawmilling, planing and impregnation, veneer sheets, plywood and other panels and boards.

379 Pulp, commodity grade paper, paperboard, paper packaging products, other paper products.

380 Printing of newspapers and other printing, bookbinding and finishing, composition and platemaking, reproduction of recorder media such as DVD's and CD's.

381 Manufacture of coke oven products, oil and petroleum refining, other treatment of petroleum products, processing of nuclear fuel.

made fibres,³⁸² rubber and plastic products,³⁸³ other non-metallic mineral products,³⁸⁴ basic metals,³⁸⁵ fabricated metal products (excluding machinery and equipment),³⁸⁶ other machinery and equipment such as weapons and ammunition, electrical and optical equipment,³⁸⁷ motor vehicles,³⁸⁸ other transport equipment,³⁸⁹ recycling,³⁹⁰ electricity, gas and water supply,³⁹¹ construction,³⁹² wholesale and retail trade of motor vehicles and motor cycles,³⁹³ wholesale trade and commission trade (excluding motor vehicles and motor cycles),³⁹⁴ transport, storage and communication,³⁹⁵ sewage and refuse disposal, sanitation and like activities, other service activities such as laundries and dry cleaning.³⁹⁶

Richardson³⁹⁷ states “the biggest environmental impact of financiers is not their own direct ecological footprint, but indirect effects of allocating capital to the corporate sector.” Banks can thus be seen as facilitators of industrial activity and development

382 Industrial gases, dyes, pigments, other inorganic basic chemicals, petrochemicals, other organic based chemicals, fertilisers, plastics (in primary forms), synthetic rubber (in primary forms), pesticides and other agrochemical products, paints, varnishes, printing inks, mastics and sealants, pharmaceuticals, soaps and detergents, perfumes and toiletries, other chemical products such as glues, gelatins and explosives, man-made fibres.

383 Rubber tyres and tubes (also rethreads), other rubber products, plastic plates, plastic tubes, plastic sheets and profiles, plastic packaging goods, plastic building products and other plastic products.

384 Flat glass manufacture, other glass and glass products, tableware and other ceramics, ceramic building products, refractory products, clay bricks and tiles, cement, lime and plaster manufacture, concrete, cement and plaster products, other non-metallic mineral products such as abrasives and asbestos.

385 Iron, steel and ferroalloys, iron and steel processing (rolling and drawing), precious and non-ferrous metals, metal casting or foundries.

386 Construction steelwork, metal structures and building materials, metal tanks, reservoirs, containers, central heating radiators and boilers, steam generators, metal forging, pressing, stamping, treatment and coating of metals, cutlery, hand tools and hardware, metal packaging, metal fasteners, chain and springs, other fabricated metal and wire products.

387 Office machinery and computers, electric motors, generators and transformers, insulated wire and cable, batteries, accumulators and primary cells.

388 General manufacture of motor vehicles, including bodies, parts and accessories.

389 Building and repairing of ships (includes pleasure and sporting boats), railway and tramway engines and rolling stock, aerospace, manufacture of motorcycles.

390 Recycling of metal and scrap metal waste and non-metal waste and scrap.

391 Production and distribution of electricity, manufacturing and distribution of gas.

392 Site preparation and demolition, property development.

393 The sale, maintenance and repair of motor vehicles and motor cycle parts and accessories, retail sale of automotive fuel.

394 Non-agriculture intermediate products: waste and scrap.

395 Such as railways, buses and coaches, road haulage, pipelines, sea and coastal water transport, inland water transport, scheduled and non-scheduled air transport, space transport, cargo handling and transport support.

396 Case *Environmental Risk Management* 171-176; Standard Industrial Classification Code Listings. Available at <http://bit.ly/19BgMb7>.

397 Richardson *Regulating the Unseen Polluters* 5.

that produce environmental harm.³⁹⁸ By way of project finance loans to, for example, high-emitting sectors such as coal-fired and nuclear power plants and in several economic areas such as mining, manufacturing and farming, the banks as financiers do add to the degradation of the environment.³⁹⁹

6 Environmental risks and liabilities of South African banks

By attempting to describe the environmental risks and liabilities of South African banks, the same general distinction between banks' internal⁴⁰⁰ and external⁴⁰¹ environmental issues (as per paragraph 4) will be followed. It should be noted that the same set of environmental criteria⁴⁰² is generally applicable to banks' internal and external processes and products. After centring on banks' internal environmental risks and liabilities – which will include a description of applicable broad general principles to banks such as the precautionary principle, the polluter pays principle and the duty of care; and aspects including that of the enforcement of South African environmental legislation, other risks and liabilities, and criminal and civil liability of banks and their directors, the focus will be shifted to banks' external environmental risks and liabilities via the grouping of direct, indirect and reputational risk. These groupings or arrangements (both the internal-external arrangement and the direct-indirect-reputational arrangement) of environmental risks for banks are artificial and consequently not fixed – overlapping and duplication is a common feature not only within but also between the groupings/arrangements.

While banks' internal environmental risks and liabilities are certainly important – it is the external risks and liabilities of banks that that are of particular significance due to banks'

398 Thompson and Cowton 2004 *The British Accounting Review* 199.

399 Oduro-Kwateng *Evaluation of Environmental Reporting by Publicly Listed South African Banks* 52.

400 Internal environmental issues refer to the processes within (in-house) banks that have an impact on the environment – in the form of consumption of resource use such as power and heat (electricity), water and paper, general business travel and waste (paper, electronic equipment etc).

401 Refers to banks' products such as financing, whereby the users of these products (the banks' borrowing clients) have an impact on the environment.

402 That is the same framework (NEMA) and specific environmental legislation; and the same principles such as "the polluter pays" and "the duty of care". Having indicated that the same environmental criteria are generally applicable, a couple of exceptions exist with regard to banks' own internal processes. Specifically the *Companies Act* 71 of 2008; the *Prevention of Organised Crime Act* 121 of 1998 (both being statutory requirements); the JSE listing requirements and the IoD's King III Report (being non-statutory) are such examples – see par for discussion.

“indirect” impact and role via the financing of all types of industrial activity and products that harm or pollute the environment (in other words an impact on a bigger scale).⁴⁰³

6.1 Internal environmental risks and liabilities

Within the environmental context the following broad or general principles are applicable to banks,⁴⁰⁴ especially in so far as NEMA and some SEMAs specifically make provision for among others: the precautionary principle, the polluter pays principle and the duty of care.

6.1.1 The precautionary principle and the principle of preventive action

What the precautionary principle and the principle of preventive action entail is that where a course of action may cause damage to the environment, due to a situation of scientific uncertainty, then preventative measures should be applied to prevent any possible harm to the environment.⁴⁰⁵ It stems from the understanding that harm to the environment can be irreversible and hence an attempt should in the first instance be made to avoid any possible harm rather than reverting to an attempt to rectify the harm done (*ex post facto*).⁴⁰⁶ In certain instances a specific type of harm to the environment could be impossible to rectify because either the cost of rectifying the damage is too excessive or it is plainly impossible to reverse the harm done (such as where a species

403 As indicated in paragraph 4.1 Richardson stated “the biggest environmental impact of financiers is not their own direct ecological footprint, but indirect effects of allocating capital to the corporate sector.” See Richardson *Regulating the Unseen Polluters* 5.

404 S 34(9)(a) of NEMA which follows the s 34(8) description of conviction and sentencing of an employer or firm in addition to a manager, agent, employee or director; describes a firm as “a body incorporated by or in terms of any law as well as a partnership.” Banks hence fall within the definition of “employer” and “firm.”

405 Kidd *Environmental Law* 9. The precautionary principle and the principle of preventive action have its international status in principle 15 of the Rio Declaration on Environment and Development (additionally also in the Maastricht Treaty of the European Union. For a discussion of its international applicability, meaning, normative status quality and status see Beyerlin and Maruhn *International Environmental Law* 52-56. Rio Principle 15 states “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

406 Kidd *Environmental Law* 9.

has been made extinct).⁴⁰⁷ NEMA refers in its environmental management principles that “a risk averse and cautious approach be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.”⁴⁰⁸ The (precautionary principle) is also mirrored in NEMA’s principles on the avoiding of (i) the disturbance of ecosystems and loss of biodiversity;⁴⁰⁹ (ii) pollution and degradation of the environment;⁴¹⁰ (iii) the disturbing of landscape and cultural heritage sites;⁴¹¹ (iv) waste generation;⁴¹² and (v) negative impacts on the environment and people’s environmental rights.⁴¹³ Banks are expected, just like any other business or person, to commit to do no harm by preventing and minimising environmentally detrimental impacts of its products and operations.⁴¹⁴

6.1.2 *The polluter pays principle*

What the polluter pays principle entails is that the polluter should pay for the costs that take place from its polluting activities, instead of passing the costs on to somebody else.⁴¹⁵ This includes the costs of dealing with the consequences of pollution already caused and the costs of any prevention measures taken.⁴¹⁶ The polluter pays principle⁴¹⁷

407 Kidd *Environmental Law* 9.

408 S 2(4)(a)(vii) of NEMA.

409 S 2(4)(a)(i).

410 S 2(4)(a)(ii).

411 S 2(4)(a)(iii).

412 S 2(4)(a)(iv).

413 S 2(4)(a)(viii). Cullinan “Corporate Environmental Governance” 215.

414 Van Gelder 2009 *The Do’s and Don’ts of Sustainable Banking* – available at <http://bit.ly/JhD8bj>.

415 Kidd *Environmental Law* 8. See also Cullinan “Corporate Environmental Governance” 214; Field 2007 *SAJELP* 105-123; Field 2004 *SALJ* 772-784.

416 Kidd *Environmental Law* 8. Kidd indicates that the principle has both a proactive (preventative) and a reactive (compensatory) feature in that costs are not only costs incurred by humans, but also costs to the environment itself. In *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department Water Affairs and Forestry and others* (unreported judgement in case no. 68161/2008, North Gauteng High Court delivered by Makgoka J on 29 June 2012), the court confirmed the existence and applicability of the polluter pays principle when it found that a directive issued under section 19(3) of the *National Water Act* 36 of 1998 against the then owner of a mine (Harmony Gold) continued to be valid and enforceable against Harmony Gold after Harmony Gold had sold the mine to another company (that afterwards became insolvent). Also see Cullinan “Corporate Environmental Governance” 214-215. Other recent examples where the polluter was made to pay includes: *S v Nkomati Anthracite (Pty) Ltd* SH 412/13 Nelspruit Regional Court; *S v Anker Coal & Mineral Holdings S.A. (Pty) Ltd* ESH 8/11 Ermelo Regional Court Sheepmoor CAS 26/06/2009; *S v David Pierre Acker* ECH 100/05 Regional Environmental Court for Cape Region Hermanus; *S v Vunene Mining (Pty) Ltd* Ermelo Regional Court CAS 94/11/2010 and *S v Golfview Mining (Pty) Ltd* ESH 82/11 Ermelo Regional Court 462/07/2009.

417 The polluter pays principle is well recognised in international law via especially principle 16 of the Rio Declaration on Environment and Development. Principle 16 states: “National authorities should

is embedded in several provisions of both the NEMA and in some of the SEMAs. It includes the environmental management principles in section 2(4)(p)⁴¹⁸ of the NEMA and the provisions allowing for the recuperation of remedying environmental damage (the costs of cleaning up) from a variety of potentially responsible parties – including corporate entities such as banks⁴¹⁹ – per section 28(8)⁴²⁰ of NEMA and section 19(5)⁴²¹ and 19(6) of the *National Water Act* 36 of 1998 (hereafter NWA). Banks can (just like any other business or entity) be liable via framework environmental legislation - such as NEMA and also via sectoral or specific environmental legislation - such (as among others) the *National Environmental Management: Waste Act* 59 of 2008 (hereafter NEMWA) and the NWA - for any environmental offence. By illegally dumping waste material a bank could be liable as per NEMA and NEMWA. Examples of typical waste material present within a banking operation include that of paper, used stationary; electrical equipment such as personal computers, laptops, tablets, mobile (cellular) phones and waste from an in-house canteen or restaurant. Additionally a bank could fall foul of legislation (NEMA) by commencing with a listed activity – such as the construction of its own new building or office - without the relevant environmental authorisation(s) or by falling foul of the *National Environmental Management: Protected Areas Act* (hereafter NEMPA),⁴²² the *National Environmental Management: Biodiversity*

endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interests and without distorting international trade and investment.”

418 “The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.” Additionally the *White Paper on Environmental Management Policy for South Africa* GN R749 in GG 18894 of 15 May 1998 states: “Those responsible for environmental damage must pay the repair costs both to the environment and human health, and the costs of preventive measures to reduce or prevent further pollution and environmental damage.”

419 S 34(9)(a) of NEMA which follows the s 34(8) description of conviction and sentencing of an employer or firm in addition to a manager, agent, employee or director; describes a firm as “a body incorporated by or in terms of any law as well as a partnership.” Banks hence fall within the definition of “employer” and “firm”.

420 “...may recover costs for reasonable remedial measures to be undertaken...before such measures are taken and all costs incurred as a result of acting...”

421 “...may recover all costs incurred as a result of it...jointly and severally from...”

422 Generally, development is not permitted within a protected area (at least not without special authorisation from the authorities). A bank could transgress the act by either being naive (not aware of the protected area) or by deliberately ignoring it. The physical location of any proposed development need to be checked against the boundaries of national parks and relevant buffer zones.

Act (hereafter NEMBA),⁴²³ and the *National Heritage Resources Act 25 of 1999* (hereafter NHRA).⁴²⁴ This type of liability or risk generally refers to a bank's own business and or physical business premises. In other words the polluter pays principle is locally applicable in respect of specific types of pollution or effects on specific parts of the environment.⁴²⁵

6.1.3 *The duty of care*

NEMA via section 28 imposes a “duty of care” on every person who has caused, or may cause, significant pollution or degradation of the environment to take reasonable measures⁴²⁶ to prevent that pollution or degradation from occurring, continuing or recurring.⁴²⁷ A failure by a bank and or its director to take reasonable steps could, for example, include the act of omitting to implement due diligence measures in the bank's lending process or omitting to provide appropriate education and training to its employees. Banks regularly engage in activities that could potentially cause pollution or other detrimental effects on the environment. Examples include that of commencing with a listed activity – such as the construction of its (bank) own new buildings or offices – without the relevant environmental authorisation(s). Banks also potentially occupy or own sites and or properties, which contain toxic material (historically) and run the risk of causing pollution by disturbing the concealed toxic waste. In instances where environmental harm cannot be evaded or has been authorised (where a permit has been issued permitting pollutants to be emitted), the duty of care still entails reasonable

423 Banks need to be aware that by not checking the biodiversity provisions of the act when undertaking a development, it could transgress this act. Of specific importance are the provisions on the protection of threatened species and ecosystems.

424 A bank could fall foul of the NHRA when a proposed development infringes on any place or object of cultural significance. An environmental authorisation is required before certain activities can be undertaken – these activities are listed in GN R543 and GN R385 in GG 33306 of 18 June 2010 respectively.

425 Kidd *Environmental Law* 8.

426 The “duty of care” is limited to the lender taking “reasonable measures”. What represents “reasonable measures” depend on the circumstances (it may differ from the measures that would reasonably be required to be taken by the borrower or by the entity undertaking the polluting activity). In the context of section 19 of NWA the court in *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* [20060 SCA 65 (RSA)] stated: Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution (or degradation in the case of NEMA) or the potential pollution (or degradation). The legislature intended by the term “reasonable measures” to lay down a flexible test dependent on the circumstances of each case. See Vermaak and Tucker “Avoiding the Green Eyed Monster”.

427 A comparable duty of care in relation to water resources is imposed by section 19 of the NWA.

measures to be taken to minimise and rectify any pollution or degradation.⁴²⁸ Section 28(14)⁴²⁹ states that any person who (i) unlawfully and intentionally or negligently commits any act or omission which causes, or is likely to cause, significant pollution or degradation of the environment, or (ii) detrimentally affects, or is likely to affect, the environment in a significant manner is guilty of an offence. A person convicted of such an offence is liable to a fine of up to R1 million or imprisonment for up to one year, or both.⁴³⁰ Although breaching the duty of care is not a criminal offence, NEMA makes it a criminal offence to: (i) refuse to comply with any directive⁴³¹ or compliance notice⁴³² issued by the authorities (typically issued to ensure that an offender takes reasonable measures to address actual or potential pollution or degradation of the environment). The duty of care also applies to pollution that occurred before NEMA commenced; to pollution that might arise at a different time from the actual activity that caused the contamination; and to pollution that may arise following an action that changes pre-existing contamination.⁴³³ Any person or firm – such as a bank – will consequently not be able to rely on a defence of historic, indirect or underlying pollution.

6.1.4 Enforcement

The Department of Environmental Affairs⁴³⁴ via its enforcement officials, the Environmental Management Inspectors (EMIs) – also known as the “Green Scorpions” – enforces South African environmental laws. Recent statistics⁴³⁵ show an increase in the number of compliance inspections, criminal enforcement and number of appointed

428 Cullinan “Corporate Environmental Governance” 217.

429 NEMA

430 S 28(15) of NEMA.

431 A directive can be issued by the Director-General or by a provincial head of a department – see S 28(4) and S 28(15).

432 Can be issued by an environmental management inspector - see S 31. Such a person is liable to a fine not exceeding five million rand or imprisonment for a period not exceeding 10 years or both such fine and imprisonment.

433 S 28(1a) NEMA.

434 Being a national department (the Department of Environmental Affairs). Available at <http://bit.ly/19BgUY1>.

435 There has been a 22% increase in the number of designated EMIs to a total of 1705; an increase of 14% in reported incidents to 4479; a 60% increase in compliance inspections totalling a number of 2766; a 122% increase in the detection of violations to total 2482; and a 38% increase in criminal enforcement. See the National Environmental Compliance and Enforcement Report 2012-2013. Available at <http://bit.ly/1doXIF3>.

EMIs.⁴³⁶ The EMIs have the same powers of search and seizure as normal police officers, as well as the powers of arrest and inspection.⁴³⁷ They can enter any facility (including that of a bank), inspect all documents, interview people and take measures⁴³⁸ that they deem appropriate to protect the environment. Interference with the investigation of an EMI is an offence under NEMA.⁴³⁹ As of late an increase is seen in the number of companies and individuals that are criminally prosecuted for a range of environmental crimes. The EMIs especially seem to have companies and individuals, who are responsible for environmental damage, in their sights.⁴⁴⁰ The recent criminal prosecution of *Golfview Mining (Pty) Ltd*⁴⁴¹ is important for a number of reasons: firstly because it shows that non-governmental authorities and other private persons are prepared to institute criminal proceedings in instances where the environmental authorities are slow or reluctant to do so,⁴⁴² secondly because it shows that the prosecuting authority is pursuing criminal prosecutions of companies and directors (in other words a move away from the usual administrative penalties traditionally imposed by the DEA);⁴⁴³ thirdly because it shows that the prosecuting authority is not hesitant to impose large fines,⁴⁴⁴ and fourthly it shows that a rehabilitation order (in terms of a court order) could have major financial implications.⁴⁴⁵ A second case of importance is that of *S v Coal & Mineral Holdings S.A. (Pty) Ltd*, because this was the (i) first time that a mining company has been held criminally liable for the contravention of environmental legislation and (ii) also the first time that a director of a mining company has been held criminally liable. The significance for banks is simply the confirmation that the environmental authorities are going after industries – such as the mining industry – that

436 The EMIs have varying mandates and powers in enforcing environmental laws.

437 S 31G-L of NEMA.

438 Includes the power to issue compliance notices. See s 31L of NEMA.

439 S 34A of NEMA. Such a person is liable to a fine or imprisonment for a period not exceeding one year or both to a fine and such imprisonment. The Department of Water Affairs enforces water related legislation via its officials known as the “Blue Scorpions”.

440 See the National Environmental Compliance and Enforcement Report 2012-2013; Cullinan “Corporate Environmental Governance” 223.

441 See *S v Golfview Mining (Pty) Ltd* ESH 82/11 Ermelo Regional Court 462/07/2009 ESH 8/11 Ermelo Regional Court Sheepmoor CAS 26/06/2009.

442 On the legal standing to enforce environmental laws, see s 32 of NEMA. On private prosecution see s 33 of NEMA.

443 For an idea of the relative increase in number of prosecutions see either the National Environmental Compliance and Enforcement Report 2012-2013 (Available at <http://bit.ly/1doXIF3>) or the Centre for Environmental Rights (South Africa) – available at <http://bit.ly/1h1cEck>.

444 In this instance a fine of R4 million plus an additional R1 million conditionally suspended for five years with a rehabilitation order.

445 In the *Golfview* case the potential cost of the ordered rehabilitation has been estimated at between R50 million and R100 million.

were, at least historically, viewed as “politically” protected from environmental prosecution. It shows a shift towards or a possible appetite for other industries, which could very well include the banking industry, especially on possible lender liability issues.⁴⁴⁶ Although to date no banks have been prosecuted, the risks for non-compliant banks are rising.⁴⁴⁷

6.1.5 Criminal and civil liability of banks and their directors

With regard to statute, banks and their directors face: (i) direct statutory liability via exposure to the “duty of care” requirement,⁴⁴⁸ (ii) administrative liability namely clean-up directives and cost recovery exposure⁴⁴⁹ (the polluter pays principle) and (iii) criminal liability namely fines and criminal “damages” claims.⁴⁵⁰ The liability of banks and their directors⁴⁵¹ with regard to environmental crimes, are subject to statutory regulation, namely in the form of section 34 of NEMA.⁴⁵² Banks’ directors, can in terms of section 34(7) be held liable, in their personal capacities, for environmental crimes. The definition given to “director” is so wide that it includes both a company director and a member of an executive committee or other managing corporate body, a member of a close corporation or a partner in a partnership.⁴⁵³ In other words personal liability is also applicable to bank managers, agents or employees who have done or omitted to do an assigned task, while acting on behalf of their employer (bank). In terms of section 34(6),⁴⁵⁴ managers, agents and employees of a firm (bank) can be held criminally liable and their sentence could include a fine, the cost of rehabilitating the environment or preventing damage, damages or compensation in the amount of any monetary benefit

446 See paragraph 6.2.1 for discussion on “lender liability”.

447 Both direct and indirect (lender liability) liability.

448 Both in terms of framework environmental legislation such as s 28(1) of NEMA and SEMAS (such as s 16 of the NEMWA and s 19 of the NWA).

449 S 28(8) of NEMA.

450 S 34 of NEMA. See also Vermaak and Tucker “Avoiding the Green Eyed Monster”.

451 S 34(9): “director shall mean a member of the board, executive committee, or other managing body of a corporate body and, in the case of a close corporation, a member of the close corporation or in the case of a partnership, a member of that partnership.”

452 See also Farisani “Corporate Criminal Liability” 266; Cullinan “Corporate Environmental Governance” 219.

453 S 34(9) NEMA.

454 S 34(6) of NEMA states: “Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or refrain from doing on behalf of the employer and which would be an offence for the employer to do or omit to do, he or she shall be liable to be convicted and sentenced in respect thereof as if he or she were the employer.”

gained by the individual in consequence of the offence, as well as the costs of the investigation and prosecution.⁴⁵⁵ In instances where a firm (such as a bank) is convicted of contravening a provision listed in Schedule 3 in NEMA,⁴⁵⁶ section 34(7)⁴⁵⁷ makes past or current directors liable for any offence committed by that firm (which could include a bank)⁴⁵⁸ if the offence resulted from the failure of the banks' director(s) to take all reasonable steps that were necessary in the circumstances to prevent the commission of the offence.⁴⁵⁹ Schedule 3 of NEMA lists as one of the offences the contravention of section 28(14) of the same Act – in other words section 28(14) is listed as a Schedule 3 offence.⁴⁶⁰ Section 34(7)⁴⁶¹ additionally indicates that proof of the commission of the offence by the firm (bank) is *prima facie* evidence of the director's guilt – in other words proof that the firm (bank) committed the offence is *prima facie* evidence that the bank's director is personally guilty of the same offence and hence can be convicted in addition to the firm (bank).⁴⁶² This entails that lest it be shown or proved that all reasonable steps required to prevent the crime were taken, even an unintended (but negligent) unlawful act or omission that caused significant pollution or degradation of the environment, a director may then be held personally liable.⁴⁶³ Schedule 3 lists a wide array of offences – outside and in addition to that found in section 28(14). These consist of, among others, offences for flouting legislation regulating heritage resources NHRA,⁴⁶⁴ biological

455 S 34(6) of NEMA. See also Van der Linden 2008 *SAMLJ* 458.

456 Schedule 3 contains specified provisions in both national and provincial enactments, for example s 151 (1) (i) and (j) of the NWA; s 24F (1) and (2), 24G (3), 28 (14), 30 (11), 31N (1) and 34A (a), (b) and (c) of the NEMA.

457 S 34(7) pertains to prosecution of any of the offences listed in schedule 3 of the NEMA and provides: "Any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in Schedule 3 shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law,...if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute *prima facie* evidence that the director is guilty under this subsection."

458 S 34(9): "firm shall mean a body incorporated by or in terms of any law as well as a partnership".

459 Van der Linden 2008 *SAMLJ* 457. See also Cullinan "Corporate Environmental Governance" 219.

460 S 28(14) of NEMA states: "No person may (a) unlawfully and intentionally or negligently commit any act or omission which causes significant or is likely to cause significant pollution or degradation of the environment; (b) unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect the environment in a significant manner; or (c) refuse to comply with a directive issued under this section."

461 S 34(7) of NEMA.

462 S 23 (7) and (8) of NEMA. Van der Linden 2008 *SAMLJ* 457. See also Cullinan "Corporate Environmental Governance" 219.

463 Cullinan "Corporate Environmental Governance" 219.

464 A bank could fall foul of the NHRA when a proposed development infringes on any place or object of cultural significance. An environmental authorisation is required before certain activities can be undertaken.

diversity NEMBA, the water (NWA); air quality (the *National Environmental Management: Air Quality Act* 39 of 2004); protected areas (NEMPA);⁴⁶⁵ and forests (the *National Forest Act* 84 of 1998).⁴⁶⁶ Penalties for these offences are severe and a bank that is not well-managed will not be aware of its possible environmental liabilities and hence could easily contravene especially section 28(14) of NEMA – which critically is a Schedule 3 offence. Such a bank, and any of its directors that failed to take reasonable steps to prevent the occurrence of harm to the environment, can be found negligent and be convicted of a section 28(14) offence (to a fine of up to R1 million or to imprisonment for a period of up to 1 year or both such a fine and imprisonment),⁴⁶⁷ and a Schedule 3 offence such as that of the NEMBA (which carries a fine of five to ten million Rand coupled with imprisonment). Concurrent civil liability is applicable to banks via section 34(2) of NEMA and or their directors in instances where any person or government agency suffered loss or damage, and includes the cost of rehabilitation and preventing damage to the environment. In addition to a fine or imprisonment (as per section 28(14) and Schedule 3 offences)), the court in terms of section 34(3)⁴⁶⁸ may award compensation or punitive damages where the convicted (bank) director gained or stood to gain financially from the warrant of the offence. The recovery of investigation and prosecution costs from the convicted person (being a director) or convicted firm (potentially a bank) is provided for by section 34(4).⁴⁶⁹ In other words a court can

465 NEMPA. Generally, development is not permitted within a protected area (at least not without special authorisation from the authorities). A bank could transgress the act by either being naive (not aware of the protected area) or by deliberately ignoring it. The physical location of any proposed development need to be checked against the boundaries of national parks and relevant buffer zones.

466 As at date of completion of this research 30 November 2013, offences under the NEMWA - which regulates contaminated land in South Africa, have not yet been listed in Schedule 3. From the NEMWA amendment bill it seems that land which is contaminated can be declared an “investigation area” and if found to be significantly contaminated, be declared a “remediation site.” S 38 of NEMWA indicates that it will apply retrospectively (in other words it includes land that became contaminated before commencement of the Act). An order to remediate the site may be directed at the landowner or the person who undertook the activity which caused the contamination – in other words it could also be applicable to hence be issued to banks and their directors. Examples of typical waste material present within a banking operation include that of paper, used stationary; electrical equipment such as personal computers, laptops, tablets, mobile (cellular) phones and waste from an in-house canteen or restaurant.

467 As per section 28(15) of NEMA. See also Cullinan “Corporate Environmental Governance” 219.

468 NEMA states: “Whenever a person is convicted of an offence under any provision listed in Schedule 3 the court...may in addition to any other punishment imposed, order (i) an award of damages or compensation or a fine equal to the amount so assessed; or (ii) such remedial measures as the court may determine must be undertaken by convicted person”.

469 NEMA states: “Whenever a person is convicted of an offence under any provision listed in Schedule 3 the court may...order such person to pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence”.

considerably increase the criminal sanctions⁴⁷⁰ by increasing the fine by an amount comparable to the monetary benefit gained by committing the offence, ordering the person convicted to take remedial action,⁴⁷¹ and to compensate the state or third parties for loss of damage suffered⁴⁷² and to compensate the authorities for the reasonable costs of investigating and prosecuting the case.⁴⁷³

South Africa does not have legislation on the impact of bank lending decisions on the environment. At best South African banks may or may not follow voluntary codes and guidelines such as the Equator Principles when making lending decisions. A recent case in the United States of America (hereafter USA) was that of the *Export-Import Bank of the USA*,⁴⁷⁴ where the bank, by omitting to compile an environmental impact statement (EIS), and an environmental assessment (EA) before approving a loan guarantee of \$90 million to a coal delivery supplier (Xcoal) was deemed to have fallen foul of the *National Environmental Policy Act* (hereafter NEPA).⁴⁷⁵ This stemmed from evidence that the different types and stages of transport and delivery (rail, unloading, storing, loading into ships, and shipping) of the coal exporting process used by Xcoal (federally funded coal export company) potentially could have a detrimental impact on the environment in the form of the carbon dioxide emissions. Export-Import Bank was directed by the court to (among other orders) take carbon-dioxide emissions into account when evaluating fossil fuel projects.⁴⁷⁶ South African banks may want to take note of the possibility of future environmental legislative developments on lending decisions, such as the NEPA in the USA. This is definitely an additional topic for research that could be explored at a later stage.

470 S 28(14) of NEMA and Schedule 3 offences.

471 For example the clean-up of a contaminated site.

472 As a consequence of the offence.

473 S 34(3) and s 34(4) of NEMA. See also Cullinan "Corporate Environmental Governance" 218; Nel 2007 available at <http://bit.ly/190b42w>.

474 *Chesapeake Climate Action Network, Friends of the Earth, Sierra Club, West Virginia Highland Conservancy, Center for International Environmental Law and Pacific Environment v Export-Import Bank of the United States and Fred P. Hochberg (in his official capacity as Chairman of the Export-Import Bank of the United States)* United States District Court for the Northern District of California San Francisco Division.

475 Due to the scope of this study the focus will remain on South Africa - it is not a comparative study. *National Environmental Policy Act* 42 USC section 4321.

476 See Bollman Center for Climate Change Law – Columbia Law School. Available at <http://bit.ly/18OfY7L>. See settlement agreement available on <http://bit.ly/19mlzfo>.

6.1.6 Other risks and liabilities for banks

Other seemingly non-environmental statutes such as POCA and the *Companies Act 71 of 2008* (hereafter the Companies Act) create additional risk to banks and their directors – both in terms of financial and reputational impact. For the first time an application in South Africa was made and granted – in a case where an environmental crime has been committed – for a confiscation order in terms of the POCA.⁴⁷⁷ In *The National Director of Public Prosecutions v York Timbers Ltd* SH 865/10, York Timbers as a company was found guilty of the illegal commencement of a listed activity⁴⁷⁸ – in other words it commenced with a listed activity without obtaining the necessary environmental authorisation from the authorities. After pleading guilty to the charge, a fine of R180,000 was awarded against York Timbers Ltd. What followed was an application for a confiscation order in terms of POCA.⁴⁷⁹ POCA, which deals with the proceeds of unlawful activities⁴⁸⁰ – has as its main objective the seizure of the criminal's proceeds and or assets that he/she derived from the criminal activity – grants the criminal courts⁴⁸¹ with discretion to make a confiscation order⁴⁸² against anybody convicted of any crime(s) that benefited from it, as well as related to criminal activity.⁴⁸³ The court granted the confiscation order for the amount of R450,000 plus interest – on the basis that it (the confiscation order) equals the value of the criminal benefit received by York Timbers Ltd.⁴⁸⁴ The benefit⁴⁸⁵ received was identified as the economic value of (i) the failure to

477 The case has since been taken on appeal.

478 The widening (construction) of a road.

479 POCA has both a backward-looking and forward-looking justification. The former refers to the ridding of the proceeds of crime from criminals while the latter seeks to lower the levels of crime by deterring people from engaging in it.

480 Section 1(1) of POCA define the proceeds of unlawful activities as “any property or any service advantage, benefit or reward which was derived, received or retained directly or indirectly in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as result of any unlawful activity carried on by any person, and includes any property representing property so derived.” In addition the definition of “property” in s 1(1) include “money or any other movable, immovable, corporeal or incorporeal thing and...any rights, privileges, claims and securities and any interest therein and all proceeds thereof.”

481 It is important to note that s 13 of POCA clearly indicates that civil rules of evidence and civil burden of proof (balance of probabilities) are applicable.

482 It is important to note that an application for a confiscation order under chapter 5 of POCA differs from the forfeiture mechanism under chapter 6 of the Act – the former follows a criminal conviction as an add-on to the criminal proceedings while the latter provides for forfeiture by a civil process which is separate from any criminal proceedings (and may be commenced even in the want of any criminal proceedings).

483 S 18(1) and (2) of POCA.

484 A court may make a confiscation order for payment of any amount it considers appropriate in terms of Section 18(1) subject to the lesser of two limitations imposed by s 18(2) namely (i) the value of the

employ the services of an environmental expert to conduct and produce a required EIA (before commencing with the listed activity); (ii) the failure to submit a compulsory application for rectification in terms of section 24G of NEMA and (iii) the avoidance of a fine in terms of section 24G of NEMA (due to the evading of ii). Banks routinely conduct activities that could potentially cause pollution or other detrimental effects on the environment, for example, if a permit has expired or the conditions in a permit are not being fulfilled.⁴⁸⁶ The issuing of confiscation orders in terms of POCA then could have major financial and reputational impact on banks.

The Companies Act via sections 29(6) and 214 makes any director of a bank personally liable if he or she signed, consented or authorised the publication of any financial statements⁴⁸⁷ that are false or misleading in a material respect; or incomplete.⁴⁸⁸ Because possible environmental risks and liabilities lead to general risk for banks, banks need to also report on those potential environmental risks and liabilities via their annual and or quarterly financial statements. Whoever is involved with the environmental reporting side of a bank's financial statements needs to take cognisance of liability for any false or misleading statements. A bank will obviously also run the risk of reputational damage should it be found that its reporting on environmental issues were incorrect.

Internal liability or risk generally refers to a bank's own business and or physical business activities or processes such as the development of its own building or buildings; the management of its own waste etc. Internal liability is less of an issue or

defendant's proceeds of the offences or related criminal activity and (ii) the amount which might be realised – namely the sum of the two amounts (a) the value of the defendant's own realizable property less certain secured and preferent claims against his/her estate plus (b) the value of the "affected gifts" he/she made to others. This limit only comes into play if the court is satisfied that it is less than the amount of the first limit. See s 20 (1)(a) and (b) read with ss 14 and (20)(4) and 12(1).

485 The concepts of "benefit" and "proceeds" are interrelated - in short, if any proceeds were derived from the crime, then there was for all purposes of the act "benefit" received.

486 Another example is that of banks' occupation of land or sites where toxic material exists.

487 Chapter 1 of the Companies Act states that "financial statements include annual financial statements and provisional annual financial statements; interim or preliminary reports; group and consolidated financial statements in the case of a group of companies; and financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective creditor or holder of the company's securities, or the Commission, Panel or other regulatory authority, may reasonably rely on".

488 S 29 of the Companies Act. Also see King "Synergies and Interaction between King III and the Companies Act" 450.

problem for banks because the operating of an office or building for banking purposes generally does not have that big an impact on the environment. A much bigger issue is the possible liabilities of a bank due to its lending businesses and or activities – in other words banks’ external products.⁴⁸⁹

6.2 External environmental risks and liabilities

For banks it is especially the financial implications relating to a number of external risks, which are of great importance. Generally, any risk on the part of the bank’s client (to be referred to as borrower business) is also that of the bank.⁴⁹⁰ Banks, generally, face three main types of environmental risks namely: (i) direct, (ii) indirect, and (iii) reputational risk.⁴⁹¹ Again, it should be noted that this grouping or arrangement of environmental risks for banks is an artificial one and hence not fixed – overlapping and duplication is a common feature of this grouping. For purposes of this study so-called “project finance” which are financing deals on a big scale (and therefore having a major global impact on sustainability issues) will be deemed to be included under the general discussion of a bank’s external risks and liabilities because it generally creates the same risks as other types of financing deals and could lead to the same direct, lender liability, indirect and reputational risk.⁴⁹²

6.2.1 Direct risk and lender liability

Direct risk or lender liability exists where with the granting or extending of a loan, an environmental liability of a client becomes that of the bank.⁴⁹³ This type of direct risk to a bank is also known as “lender” liability. Lender liability typically occurs when a bank

489 See paragraph 6.2 for a discussion.

490 Jeucken *Sustainability in Finance* 147.

491 Case *Environmental Risk Management* 9-13; Jeucken *Sustainability in Finance* 158.

492 Project finance deals tend to be big – hence financing for the project might need to come from more than one institution (bank). The involvement of other “blue-chip” financiers or lender banks may seem to imply a strong credit base, however, this is misleading because project finance deals are usually structured on either a non-recourse or limited-recourse basis. This means that a lender bank when relying on repayment will rely on the “economics” of the project, and should this not be viable, what remains as collateral is the project assets (The financing of a power station project is an example where the collateral carries a direct risk to lender bank.). This could be a concern to the lender bank because of possible direct risk. See Case *Environmental Risk Management* 143.

493 Available at <http://bit.ly/1hM9zwW>.

takes possession of land or property held as collateral for a loan.⁴⁹⁴ By taking such possession a bank could be deemed to have an element of control over the incident of pollution or other environmental damage and hence be liable for both the cost of the clean-up of the site and for obtaining and or maintaining necessary licences.⁴⁹⁵ A bank could suffer environmental liability where authorities believe it sufficiently close to the operations or business management of a borrowing business client, or where a bank has control over the borrower's assets – in other words it can lead to lender liability.⁴⁹⁶ This could potentially include instances where the bank has a high degree of oversight over a client's operations as in structured project-finance deals.⁴⁹⁷ It could also include instances where the bank requested and received regular reports and audits that included EIA studies, or where the bank took equity in the client's business, or a seat on the client's business board.⁴⁹⁸ Additionally, if any pollution took place on the property, the value of that property could fall considerably in the market.⁴⁹⁹ Remediation costs can be considerable, even to the point of surpassing the loan principal or the original security value.⁵⁰⁰ In other words such costs bear no relationship to the amount of the loan or the original value of the security and hence could have a major impact on a bank's financial position.⁵⁰¹ South African environmental legislation (like international and other foreign environmental legislation) places responsibility and liability for environmental damage and or the cleaning up of environmental pollution on those deemed to have an element of control over the incident (pollution or other environmental damage).⁵⁰² Both NEMA and the NWA allow clean-up cost recovery from those deemed to have an element of control over the incident via either being deemed

494 Case *Environmental Risk Management* 9; Jeucken *Sustainability in Finance* 167.

495 Case *Environmental Risk Management* 9. This is also the position in South Africa – see discussion below paragraph 6.2.1. Available at <http://bit.ly/1hM9zwW>.

496 Lipton 1996 *Journal of International Banking Law* 7; Vermaak and Tucker "Avoiding the Green Eyed Monster"; Richardson *Regulating the Unseen Polluters* 347. Some jurisdictions, notably New Zealand, Australia and the United Kingdom have or had at some point and in certain situations referred to creditors (being banks) as "shadow directors" – "such as when asserting influence by offering advice and giving instructions for the management of a business as an alternative to appointing an administrative receiver..." Banks, if deemed a shadow director, could in those situations be held liable.

497 Tucker 2012 <http://bit.ly/1hsQ78v>.

498 Tucker 2012 <http://bit.ly/1hsQ78v>.

499 Thompson and Cowton 2004 *The British Accounting Review* 200; UNEPFI and ATF Banking on Value. Available at <http://bit.ly/1bwlylT>.

500 Thompson and Cowton 2004 *The British Accounting Review* 200. Available at <http://bit.ly/1hM9zwW>.

501 UNEPFI and ATF Banking on Value – available at <http://bit.ly/1bwlylT>. Also see Case *Environmental Risk Management* 57.

502 Stander 2012 *SAMLJ* 150-164.

to be sufficiently close to the operations of the borrower, or having control over the borrower's assets.⁵⁰³ Sectoral environmental legislation such as the NWA⁵⁰⁴ which is limited to pollution of water resources refers to almost the exact same parties namely: "an owner of land, a person in control of land or a person who occupies or uses the land."⁵⁰⁵ Under the NWA the targeted persons are jointly and severally liable.⁵⁰⁶ Joint and several liability under the NWA could mean that the authorities focus its targeting on the (one) party with the perceived deepest pockets – typically such as a bank.⁵⁰⁷ The bank will then have to try and recoup from the other parties.⁵⁰⁸ Vermaak and Tucker⁵⁰⁹ argue that clean-up and cost recovery are seldom pursued in practice by the authorities themselves. This is due to a number of factors: (i) no funding is available from parliament for clean-ups; (ii) authorities typically seek to compel parties to undertake and fund remediation costs via directives and other forms of pressure or, (iii) use criminal charges to pursue "criminal damage" provisions of NEMA as a mechanism to recover clean-up costs. Hence parties which cause or are responsible for the pollution will be directed or pressured into cleaning up. If no directly responsible party is available, the authorities will look wider to find a target. This could very well be a bank.

Another piece of environmental legislation which has the potential to create future "lender liability" issue for banks is the *National Environmental Management: Waste Act* 59 of 2008 (hereafter NEMWA). NEMWA regulates contaminated land in South Africa. Draft regulation GN R467 in GG 36447 of 10 May 2013 states that contaminated land can be declared an "investigation area" and if found to be significantly contaminated, be

503 Case *Environmental Risk Management* 9; Richardson *Regulating the Unseen Polluters* 347.

504 An owner of land, a person in control of land or a person who occupies or uses the land on which...any activity or process is or was performed or undertaken; or...any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

505 It differs from section 28 of NEMA which arguably has no direct remediation obligation on any person "in control of land" if that person is not also a person who caused the pollution. Vermaak and Tucker "Avoiding the Green Eyed Monster".

506 Vermaak and Tucker argue that clean-up and cost recovery are seldom pursued in practice by the authorities themselves. This is due to a number of factors: (i) no funding is available from parliament for clean-ups; (ii) authorities typically seek to compel parties to undertake and fund remediation costs via directives and other forms of pressure or, (iii) use criminal charges to pursue "criminal damages" provisions of NEMA as a mechanism to re-cover clean-up costs. See Vermaak and Tucker "Avoiding the Green Eyed Monster".

507 Banks will regularly be perceived as having deep pockets.

508 Vermaak and Tucker "Avoiding the Green Eyed Monster".

509 See Vermaak and Tucker "Avoiding the Green Eyed Monster".

declared a “remediation site” by the authorities.⁵¹⁰ The status of such a remediation site will also be formally noted on the deeds of register. Section 38 of NEMWA specifies that the Act will apply retrospectively (in other words it includes land that became contaminated before the commencement of the Act). The authorities may issue an order to remediate the site, directed at the landowner or the person who undertook the activity which caused the contamination.⁵¹¹ Clearly, statutory restrictions placed on the transferring of such a remediation site will have an adverse impact on the value of the land.⁵¹² The remoteness of a party such as a lender in relation to the harm or loss suffered in the circumstances would also always be relevant to the issue of lender liability.

The major risk in a lending context for banks then depends on what exactly constitutes control. The following instances could positively be interpreted to have established an element of control, namely where: (i) the lender bank has a high degree of oversight over operations (for example in a project finance lending context, this could transpire from or be motivated to include the receiving of regular reports, audits etc); (ii) the lender bank exercises step in rights in respect of a project (typically within a project finance context where the project company is not performing the lender takes the project company’s position via step in rights); (iii) the lender bank has foreclosed a securitised asset (the lender bank in an attempt to create liquidity and transfer risk in instances where the borrower defaults on repayment will disclose the outstanding debt and sell the property or stock via a repackage as a different instrument)⁵¹³ and (iv) the lender bank has either taken equity in the business as part of the finance package or has taken a seat on the board.⁵¹⁴

Banks then can, under certain circumstances, be considered to be the owner, person in control, or even the person who has the right to use land or premises. Concurrently,

510 See GN R467 in GG 36447 of 10 May 2013.

511 See GN R467 in GG 36447 of 10 May 2013.

512 Vermaak and Tucker “Avoiding the Green Eyed Monster”.

513 An example would be where a bank takes title to polluted land before foreclosure proceedings commences

514 Richardson *Regulating the Unseen Polluters 11*; Vermaak and Tucker “Avoiding the Green Eyed Monster”.

nothing in NEMA (unlike efforts in other jurisdictions)⁵¹⁵ indicates that any protection for banks exist in instances where banks became owner of land by virtue of their security interest in a property. Lender liability is thus potentially a much bigger risk than that of a bank's own internal environmental risk because (i) there is uncertainty over when exactly a bank becomes liable (the issue of control); (ii) the lack of relationship between damage and the value of the loan makes it almost impossible to put a true price on this type of risk; and (iii) it has solvency issues for banks in terms of Basel III operational requirements.⁵¹⁶ Banks and their directors therefore need to be cautious when looking at lending deals.

6.2.2 Indirect risk

Environmental risks tend to create indirect credit risks in the form of either (a) a drop in value of collateral assured to the bank by the borrower, and or (b) endangering the borrowers business' continuity.⁵¹⁷ The former type of indirect (credit) risk refers to collateral pledged (by borrower to lending bank) and could typically consist of registered property (buildings or land), stock items, production facilities, machinery etc. Whatever the type of collateral, the risk exists that that value of the collateral could drop due to environmental aspects.⁵¹⁸ For example soil pollution will have an impact on the value of any land and or structure on that land – it could even lead to a negative value.⁵¹⁹ In short, any item that could be viewed as an environmental issue or as being environmentally unsound could lose its value. Hence the credit risk to lending banks.

The latter type of indirect risk is the weakening or diminishing of a borrower's ability to meet his/her financial obligation(s) due to environmental risks – specifically its obligation

515 See the USA; UK and the Netherlands where lenders were in part excluded from environmental "lender liability". However, even in those jurisdictions lenders fear that they could still be liable via legal precedent (viz that of the letter of the law). See Richardson *Regulating the Unseen Polluters* 170.

516 Jeucken *Sustainability in Finance* 167-171; Case *Environmental Risk Management* 9.

517 Jeucken *Sustainability in Finance* 158-159.

518 Case *Environmental Risk Management* 10-11; Jeucken *Sustainability in Finance* 159.

519 Banks will be wary to collect especially any collateral such as land which has been polluted and which value is negative. In such instances of borrower bankruptcy, banks will be better off by seeking compensation in other ways – such as reduction in credit limit, increasing its rates and demanding financial security. See Jeucken *Sustainability in Finance* 166.

to repay a loan to the lender bank.⁵²⁰ Environmental risks have the potential to put major pressure on the borrower's business continuity.⁵²¹ Jeucken⁵²² indicates that this pressure generally consists of a number of elements including changing government requirements; changes in market conditions; changes in external environmental conditions; private liability and government sanctions in the form of either administrative sanctions or criminal prosecution. When certain activities⁵²³ are undertaken, authorisation in the form of licences or permits are either granted or denied by the applicable government departments – in other words changing government requirements.⁵²⁴ Even in instances where a permit or licence has been granted, any change or expansion of the activity tend to trigger a new permit or licence application. Not only that, but because permits or licences are periodically updated by the authorities, a company or business could have its permits or licences retracted (possibly in instances of existing or new requirements). The risk for banks then is whether the borrower (being a business) has the financial capacity to bear the possible additional costs of (i) applying for the necessary permits; (ii) maintaining or renewing of those permits; and or (iii) preventative environmental measures to satisfy regulations.⁵²⁵ These potential costs could severely impact the borrower's business continuity and hence its ability to repay a loan to the lender bank.⁵²⁶ A borrowing company could then either lose market value or be forced to close its doors (out of business) because it cannot afford to meet the expenses of conforming to progressively burdensome environmental regulations.⁵²⁷

A changing market environment refers to a change in market conditions and could be driven by (i) consumers who change their appetite from existing products to more environmentally responsible products or (ii) where other businesses (competitors) are

520 Available at <http://bit.ly/1hM9zwW>.

521 Jeucken *Sustainability in Finance* 159; Case *Environmental Risk Management* 10-11.

522 Jeucken *Sustainability in Finance* 159-164.

523 NEMA, in its listing notices, lists all activities that need authorisation – see GN R543; GN R385 in GG 33306 of 18 June 2010.

524 Case *Environmental Risk Management* 144.

525 Thompson and Cowton 2004 *The British Accounting Review* 200; Case *Environmental Risk Management* 10; Jeucken *Sustainability in Finance* 160-161.

526 Case *Environmental Risk Management* 10; Jeucken *Sustainability in Finance* 160-161.

527 Thompson and Cowton 2004 *The British Accounting Review* 200; Richardson *Regulating the Unseen Polluters* 347.

bringing more environmentally responsible products to the market.⁵²⁸ By not being able to compete with the “new environmentally responsible” products, a borrower company could face (a) the risk of a drop in its stock sales, (b) the value of its stock could diminish (c) the elimination of one or more of its products and (d) additional costs when making the change to new environmentally responsible products.⁵²⁹ Supply chain pressure and changes in consumer patterns can lead to risk for the lender bank (being the funder).⁵³⁰

Changing external environmental conditions are environmental risks which although not derived from the borrowing company, nevertheless exist as a risk to the borrowing company and hence also to the lending bank.⁵³¹ A typical example of an external environmental risk is that of climate change.⁵³² The potential effects of climate change are numerous and its impact reaches most industries.⁵³³ Banks then run the risk of non-repayment of its loan(s). Lender banks obviously run the risk that the borrowing client, due to no fault of itself, could become bankrupt because of external environmental conditions.⁵³⁴

A borrower could also be held privately liable if the conditions of an environmental permit/licence are violated; or are deemed to be responsible for environmental damage such as pollution;⁵³⁵ and or its product(s) are deemed to create environmental damage (product liability).⁵³⁶ The borrower might not have the financial capacity to settle or face possible damage claims and hence the lending bank will also be at risk.

528 Thompson and Cowton 2004 *The British Accounting Review* 200; Jeucken *Sustainability in Finance* 159; Case *Environmental Risk Management* 10; 144-145.

529 Could entail a new process, new machinery etc. Also known as “chain risk” arising from supply chain pressure - the borrowing company is a supplier and the buyer demands a change in product (more environmentally responsible). See Jeucken *Sustainability in Finance* 162; Case *Environmental Risk Management* 11; Thompson and Cowton 2004 *The British Accounting Review* 200.

530 Case *Environmental Risk Management* 11.

531 Jeucken *Sustainability in Finance* 163.

532 The increase of greenhouse gases in the atmosphere (which are for the most part man-made) are causing global warming (an increase in temperature). Scientists indicate that changes in the climate could have a severe impact on the existence of human life on earth. See Case *Environmental Risk Management* 11; Jeucken *Sustainability in Finance* 159; Beyerlin and Marauhn *International Environmental Law*; Rumsey and King *Climate Change* 1048-1077.

533 See the National Climate Change Response Policy. Available at <http://bit.ly/1hQvSSj>.

534 Case *Environmental Risk Management* 165-166; Jeucken *Sustainability in Finance* 162-163.

535 The polluter pays principle – see paragraph 6.1.2.

536 Jeucken *Sustainability in Finance* 163-164.

A borrower could face government sanctions in instances of non-compliance with environmental regulations – examples include the borrower not having the necessary permits and or licences. By the issuing of a fine to a non-compliant borrower, the authorities usually attempt to steer the borrower to take the necessary environmental measures to ensure compliance. The borrower business involved, however, might not have the financial resources to settle the fine and or implement the necessary environmental measures. If the borrower still has not made an effort after the issuing of the fine, the authorities tend to move to the use of different sanctions – typically that of the retracting of permit(s)/licences and or stopping the business activity via the issuing of a closure order.⁵³⁷ The lender bank will hence also face major risk in such an instance of business stop. The same is applicable in instances where government for one reason or another does the clean-up and rehabilitation of a borrowing business' polluted site itself – government can claim the costs of clean-up and rehabilitation from the borrowing business.⁵³⁸ Again, the borrowing business might not have the financial capability to settle those costs. Hence the lender bank is exposed to additional credit risk.

6.2.3 Reputational risk

Banks also face reputational risk when their direct, indirect or perceived participation in environmental degradation makes them prone to public reproach and unfavourable customer reaction.⁵³⁹ Reputational risk is the threat to earnings or capital that resulted from negative public opinion and is defined by the Financial Services Authority⁵⁴⁰ as:

The task that the firm may be exposed to negative publicity about its business practices or internal controls, which could have an impact on the liquidity or capital of the firm or cause a change in its credit ratings.

The Environmental Bankers Association⁵⁴¹ indicates that a bank's reputation is usually judged by using standards such as (i) credit, specifically a bank's involvement in financing environmentally controversial projects and the level to which the projects are

537 Jeucken *Sustainability in Finance* 164.

538 See s 28(8) of NEMA. Jeucken *Sustainability in Finance* 164.

539 Thompson and Cowton 2004 *The British Accounting Review* 200.

540 As quoted by ABSA Group Sustainability Report 2005. Available at <http://bit.ly/19BgYH6>.

541 Available at <http://bit.ly/J4SPIQ>.

subjected to some sort of screening; (ii) investment, namely the incorporation of environmental aspects in the bank's investment advice and the availability of environmentally responsible investment products and (iii) internal operation, namely the level of environmental management practices, such as waste prevention, recycling and energy conservation.⁵⁴² A plethora of organisations and NGOs are keeping a close eye on especially project finance activities of banks and hence may potentially have a major impact on the reputation of banks.⁵⁴³ Additionally, any incorrect or substandard reporting of environmental matters by banks – whether in terms of its annual financial statements or on any other platform such as the Johannesburg Stock Exchange (JSE) Listing Requirements⁵⁴⁴ – will lead to reputational damage. It is difficult to estimate a bank's reputation risk in financial terms because reputational risk (i) tends to be long term; (ii) leads to the bank missing out on gaining new clients and having its existing clients leave to competitor banks; and (iii) extends through the bank's entire line of business.⁵⁴⁵ In other words the entire bank, encompassing its lending portfolio and even entrusted funds and other activities are affected in an instance of reputational damage due to environmental issues.⁵⁴⁶

Although environmental risks and liabilities are to be found both within banks' internal operations and external products it seems that it is especially direct lender liability which creates the most reason for concern and uncertainty for South African banks. Environmental legislation such as NEMA and NWA came into operation nearly 15 years ago, but remain unsophisticated in the lender liability context. These acts still do not expressly or specifically deal with lender liability.⁵⁴⁷ Provisions have never been tested in

542 Available at <http://bit.ly/J4SPIQ>.

543 The International Rivers Network (IRN) (available at <http://bit.ly/1fj3lkA>) an NGO which works on water management sends its newsletter (BankCheck Quarterly) out to thousands of other global NGO's. Organisations such as the OECD, have also implied that they will report or make public any bank whom they deem does not adhere to the ICC or UNEP declaration on sustainability or on the OECD guidelines for investment in developing countries.

544 Available at <http://bit.ly/1co74tl>. In terms of the JSE listing requirements, those listed companies (banks) need to comply with the Institute of Directors in Southern Africa's (IOD 2009) King III Report on Corporate Governance which in turn demands obedience to the Global Reporting Initiative's (GRI) (available at <http://bit.ly/18CahaK>) guidelines for integrated sustainability reporting. Additionally the Basel III Accord (available at <http://bit.ly/1jMpGdb>) suggests that banks make known their operational risk by taking into account the management of environmental, social and governance risk as part of its operational risk management.

545 Investment, corporate, retail banking and asset management.

546 Jeucken *Sustainability in Finance* 171-172; Case *Environmental Risk Management* 11-13 & 146-148.

547 Vermaak and Tucker "Avoiding the Green Eyed Monster"; Tucker 2012 <http://bit.ly/1hsQ78v>.

lender liability context in the South African courts. Banks in South Africa, therefore, remain subject to legal uncertainty and associated risks, for example (i) if and when to step in and take control; (ii) when to avoid stepping in and taking control; and (iii) how much control to have.⁵⁴⁸ In addition, there are anecdotal indications⁵⁴⁹ that while authorities generally have followed a conservative approach to targeting indirectly “contributing” parties to date, that this may be changing.⁵⁵⁰ This goes hand in hand with indications that more resources are employed to ensure effective enforcement of environmental legislation in South Africa.⁵⁵¹

7 Legal and other mechanisms to manage environmental risk and liabilities

Almost every business activity has some intrinsic environmental risks and liabilities. As indicated in paragraph 5, environmental issues or risks for banks, range from simple issues to complex challenges and subtle interactions – typically in the form of direct, indirect and reputational risk. Environmental risks and liabilities of banks can manifest in two general classifications, namely that of (i) its (banks) own internal operations and activities and (ii) its external business activities.⁵⁵² The former typically consists of physical on site activities such as when erecting or extending its own building or offices and specific activities such as banks’ waste management, water pollution, general impact from the use of energy, material and resources (such as paper, plastic, electronic equipment, etc). The latter refers to banks’ business activities (which typically imply lender liability and indirect risk), which potentially include project and general finance, acquisitions and mergers, asset management, advice, indirect ownership of land or property (polluted) etc.

There are no statutory obligations (at least not yet) on South African banks to report their environmental impacts. Banks are in effect pressured to report because of the need to retain a social licence to do business. Reputational damage in turn will have the effect of the lapse or expiring of such a social licence. The pressure for banks to report

548 Vermaak and Tucker “Avoiding the Green Eyed Monster”; Tucker 2012 <http://bit.ly/1hsQ78v>.

549 Vermaak and Tucker “Avoiding the Green Eyed Monster”.

550 Vermaak and Tucker “Avoiding the Green Eyed Monster”. Authorities are bolder in selecting clean-up targets (e.g. shareholders of polluting companies).

551 See paragraph 6.1.4.

552 See paragraphs 6.1 and 6.2.

and to actually do something about their environmental impact are reflected in the numerous guidelines that exist and includes awareness documents, guidelines, voluntary principles, corporate governance codes of conduct, listing requirements, best practise recommendations etc. What banks can do (and a lot of banks are already doing it) is to physically measure and report its environmental impact on ecosystems, communities and the climate by tracking their emissions (CO₂ and other GHG gases); energy consumption, water consumption, paper consumption, waste, environmentally or socially certified procurement etc.⁵⁵³ Once its impacts have been measured a bank needs to find ways to mitigate those impacts. Some of the strategies which could be used by banks to ensure resource efficiency include (i) emissions management (such as tele-/video conferencing, green commuting and other ways to reduce business travel); (ii) energy consumption reduction strategies (such as energy efficient equipment, motion sensitive lightning and optimized use of daylight); (iii) water consumption reduction and recycling programmes; (iv) green printing (by the use of recycled/chlorine-free paper, double-sided printing, soy-based inks) and (v) proper waste management (recycling and appropriate disposal).⁵⁵⁴ Banks also look at responsible or green procurement namely the purchase of environmentally friendly products and equipment (such as recycled materials and paper from sustainable managed forests) and by considering the environmental performance of suppliers, distributors and subcontractors.⁵⁵⁵

Banks need to identify all relevant and applicable environmental legislation that could have a direct or indirect relevance to the type of activity or business of a bank – typically this would entail a legal registry pertaining to environmental liability. To be able to identify whether the national environmental framework or specific environmental legislation is applicable, a bank needs to understand the type of business or activities it engages in.⁵⁵⁶ A bank can utilise a number of systems to manage its environmental risks and liabilities. Generally, such a system to maintain compliance with environmental laws and managing the associated environmental risks is known as an environmental

553 Available at <http://bit.ly/1efGSrC>.

554 Available at <http://bit.ly/1efGSrC>.

555 Available at <http://bit.ly/1efGSrC>.

556 As indicated banks' business activities potentially include project and general finance, acquisitions and mergers, asset management, advice, etc. Also see International Finance Corporation: Environmental Risk Management in Lending and Investment. Available at <http://bit.ly/1iVJKw3>

management system (EMS). Whichever system a bank decides on, that specific system needs to be tweaked to ensure it encapsulates all types of environmental risks and liabilities. Some of these EMS' are based on international recognised standards such as ISO 14000 group and specifically that of ISO 14001.⁵⁵⁷ Generally this implies that a bank's EMS must: (i) identify each aspect of the bank's business units that potentially create environmental risks and impacts; (ii) identify the requirements of the applicable environmental legislation (such as NEMA and specific environmental legislation) and other international and national standards and guidelines (such as the Equator Principles, King III Code of Conduct, etc.) concerning each business unit activity; (iii) ensure that the necessary training and support are given to employees engaging in those identified business units.

Because environmental risk can appear throughout the broad range of risks⁵⁵⁸ intrinsic in a bank's business activities, banks need to design and implement procedures and tools for their identification, management and control.⁵⁵⁹ To be able to assess environmental risk, banks should ensure environmental principles are incorporated into all aspects of the lending cycle. According to Jeucken⁵⁶⁰ basic components of an EMS should include: an environmental policy statement; an environmental programme; integration of environmental care into a bank's processes; the allocation of responsibilities and tasks to specific employees; measurements and registrations according to internal and external rules (permits); internal information and education; internal and external reporting; and examination of the environmental audit. Nearly all of the environmental credit risk management programmes used by banks include the basic building blocks of risk management namely (i) risk identification; (ii) assessment of specific risk; (iii) implementation of risk control measures (by considering legal, technical and business tools available to minimize the risk); (iv) mitigation of the risk (via risk

557 Proof of ISO 14001 certification, however does not necessarily imply compliance with environmental laws. Available at <http://bit.ly/JdMEMK>. ISO 14001:2004 sets out criteria for an EMS by mapping a framework that can be used for an effective EMS. ISO 14004:2004 sets out guidance on the establishment, implementation, maintenance and improvement of an EMS including its coordination with alternative management systems. ISO 14006:2011 sets out guidelines for incorporating eco-design as part of a company's EMS. ISO 14064-1:2006 sets out specifications with guidance for quantification and reporting of greenhouse gas emissions and removals – indicates requirements for the design, development, management, reporting and verification of a company's GHG inventory.

558 Such as credit, liability and reputational risks – see paragraph 6.

559 Oduro-Kwateng *Evaluation of Environmental Reporting by Publicly Listed South African Banks* 34.

560 Jeucken *Sustainability in Finance* 89.

financing techniques through the use of environmental indemnifications, holdbacks/escrows, or letters of credit etc.); and (v) risk monitoring (through the lending lifecycle).⁵⁶¹ A typical environmental review process will consist of deal identification and screened against an exclusion list; the categorisation of the deal by project type and value; an environmental risk assessment informing in-house opinion; assessment of the credit application; an action plan and covenants defined with the client in line with legal documentation; and ongoing monitoring and evaluation against covenants and legal documents.⁵⁶²

7.1 The lending cycle

The lending cycle within the environmental risk assessment context consists of a number of general stages namely: (i) the stage or period before a loan is granted – also known as the initial due diligence stage; (ii) followed by document preparation and negotiation; (iii) followed by the period during the term of the loan – also known as portfolio management (this could include financial workout with a defaulting borrower); and (iv) the stage of closure and or decommission.⁵⁶³

7.2 Sources of information applicable to lending decisions

When banks make a lending decision where environmental factors are significant, they should identify the different sources of information and scrutinise that information. Thompson and Cowton⁵⁶⁴ list the following as possible sources of information: (i) published annual company reports and accounts; (ii) information obtained on company visits; (iii) information from personal interviews with company representatives; (iv) bank's internal records from its own past experience of loans to the company – or of other banks with regard to certain companies or group of companies; (v) three and six monthly company financial reports; (vi) press reports; (vii) industry data and reports;

561 Environmental Bankers' Association 2003. Available at <http://bit.ly/J4SPIQ> See also Barannik *Environmental Risk Management* 261; Stander 2012 *SAMERCLJ* 164.

562 Firststrand - Environmental and social risks in banking and Equator Principles report 2013. Available at <http://bit.ly/1doVoqK>.

563 Jeucken *Sustainability in Finance* 146; Vermaak and Tucker "Avoiding the Green Eyed Monster".

564 Thompson and Cowton 2004 *The British Accounting Review* 207.

(viii) independent asset valuations; (ix) credit assessments from credit ratings agencies; (x) company filings with the stock exchange; (xi) on-line data sources, (xii) business and trade directories and journals; and (xiii) environmental interest and pressure groups. Information or disclosures banks would typically want/need from the borrower when making a lending decision where environmental factors are present include: (i) the provision for clean-up costs; (ii) details of breaches of environmental standards; (iii) contingent liability data; (iv) statement of assurance from management of compliance with external standards; (v) management forecast of impact of environmental expenditure on future results; (vi) prospective environmental expenditure; (vii) summary of results of environmental audits; (viii) corporate environmental policy statement; (ix) external verifier's report on the environmental audit; (x) environmental impact assessments and site level reports; (xi) a statement of intent with regard to environmental audits; (xii) specific accounting policies for environmental issues; (xiii) statement by management of company's positioning regarding expected developments in environmental legislation; (xiv) narrative environmental disclosures; (xv) statement of progress on environmental performance against quantified targets; (xvi) historical environmental expenditures; (xvii) management's responsibilities for monitoring environmental performance; and (xviii) fully integrated environmental financial statements.⁵⁶⁵

7.2.1 Equator Principles III at the due diligence stage

At the due diligence stage banks ought to adopt and apply the Equator Principles.⁵⁶⁶ The Equator Principles⁵⁶⁷ (EP) is a specific voluntary code of conduct and which is subscribed to by 78 financial institutions (from 35 countries) and which covers over 70% of international project finance debt in emerging markets.⁵⁶⁸ Its significance lies in the large number of global banks subscribing to its principles. It aims to ensure that the

565 Thompson and Cowton 2004 *The British Accounting Review* 212. See also Jeucken *Sustainability in Finance* 180.

566 Being perceived as the benchmark for the financial sector to manage social and environmental issues in project financing.

567 The Principles (devised largely by the banking industry under the auspices of the World Bank's International Finance Corporation) were released in June 2003, revised in July 2006 (known as EP II), and revised for a second time in 2013 EP III (effective 4 June 2013 including a transition time to 31 December 2013).

568 <http://bit.ly/1iVPSnO>.

financing of projects are (i) socially responsible and (ii) that sound environmental management practices are applied.⁵⁶⁹ Financial institutions⁵⁷⁰ that subscribe to the Equator Principles are known as Equator Principle Financial Institutions (EPFIs) and they use the principles as a risk management framework for determining, assessing and managing environmental and social risk within the project finance sector.⁵⁷¹ EPFIs undertake not to provide any financing to projects where the client will not or is unable to conform to the principles.⁵⁷² The EPs apply to four financial products globally and to all industry sectors.⁵⁷³ The particular financial products are (i) project finance advisory services⁵⁷⁴ (where the total project capital costs are US\$10 million or more); (ii) project finance⁵⁷⁵ (where the total project capital costs are US\$10 million or more); (iii) project-related corporate loans⁵⁷⁶ (where the majority of the loan is related to a single project over which the client has effective operational control, the total aggregate loan amount is at least US\$100 million, the EPFIs individual commitment⁵⁷⁷ is at least US\$50 million and the loan tenor is at least two years⁵⁷⁸ and (iv) bridge loans⁵⁷⁹ (with a tenor of less

569 Available at <http://bit.ly/1iVPSnO>.

570 As at August 2013 the number of adopting financial institutions are 79 (from 35 countries) covering over 70% of international project finance debt in emerging markets. Available at <http://bit.ly/1iVPSnO>.

571 Available at <http://bit.ly/1iVPSnO>.

572 Available at <http://bit.ly/1iVPSnO> There are 10 principles in number. The EPFI's in effect acknowledge the possible adverse effects that large-scale infrastructure and industrial projects can have on people and on the environment – in other words EPFI's recognises the importance of climate change, biodiversity and human rights.

573 Available at <http://bit.ly/1iVPSnO>.

574 It "is the provision of advice on the potential financing of a development where one of the options may be project finance." See <http://bit.ly/1iVPSnO>.

575 It "is a method of financing in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure – usually when large, complex and expensive installations such as mines, transportation infrastructure, telecommunications infrastructure, power plants, and chemical processing plants." Available at <http://bit.ly/1iVPSnO>.

576 "Are corporate loans, made to business entities (either privately, publicly, or state-owned or controlled) related to a single project, either a new development or expansion, where the known use of proceeds is related to a single project in one of the following ways: (i) the lender looks primarily to the revenues generated by the project as the source of repayment (as project finance) and where security exists in the form of a corporate or parent company guarantee; and (ii) documentation for the loan indicates that the majority of the proceeds of the total loan are directed to the project. It includes export finance in the form of buyer credit, but it excludes export finance in the form of supplier credit (as client has no effective operational control). It also excludes other financial instruments that do not finance an underlying project, such as asset finance, acquisition finance, hedging, leasing, letters of credit, general corporate purposes loans and general working capital expenditures loans used to maintain a company's operations." Available at <http://bit.ly/1iVPSnO>.

577 Before syndication or sell down.

578 Either direct or indirect.

579 It "is an interim loan given to a business until the longer-term stage of financing can be obtained." Available at <http://bit.ly/1iVPSnO>.

than two years that are intended to be refinanced by project finance or a project-related corporate loan as per criteria).⁵⁸⁰

In South Africa, at least four banks are signatories, namely Standard Bank of South Africa Limited, Nedbank Limited, First Rand Limited and Absa Bank Limited (through Barclays plc).⁵⁸¹ Although the EPs III are a voluntary set of principles and applicable only to certain products and within certain parameters (cost or loan amount above the applicable threshold-levels) banks can use it as a blueprint for an environmental risk management framework. Version III of the EPs has recently expanded the scope of its applicability to include other products (not only project finance).⁵⁸² Some banks have already been moving in that direction - before the latest EP revision – by making the EP III applicable to some of their other products and by lowering the threshold-levels.⁵⁸³

Richardson⁵⁸⁴ in his discussion of the earlier versions of the EPs⁵⁸⁵ indicates that although the EPs are a move in the right direction its (then) current standards are too weak for a commitment to sustainable banking – mainly due to the lack of publicly accountable and transparent environmental goals or benchmarks. Although changes for the better were implemented in the subsequent versions of the EPs⁵⁸⁶ (namely the inclusion of previously excluded financial products and some lowering of the capital threshold requirements) the same underlying issue of the lack of publicly accountable and transparent environmental goals remain. Numerous instances of high profile project finance have shown that the EPs are routinely ignored when convenient.⁵⁸⁷ The

580 <http://bit.ly/1iVPSnO>.

581 Available at <http://bit.ly/1iVPSnO>.

582 Got revised for a second time in 2013 and led to EP III (effective 4 June 2013 including a transition time to 31 December 2013). Available at <http://bit.ly/1iVPSnO>.

583 Murray *Financial Times* 15 June 2011 Equator Principles: Signatories consider a wider use of Rules However, it needs to be stressed that the EP III principles will probably not be a success when blindly applied to all types of products. Certain products need a different structure or model of environmental risk management.

584 Richardson 2005 *European Environmental Law Review* 289.

585 The third version of EPs is currently in effect – known as EP III.

586 The third version of the EPs is currently in place – known as EP III.

587 Richardson *Regulating the Unseen Polluters* 411-420. Also see Kearins and O' Mally "International Financial Institutions and the Three Gorges Hydroelectric Power Scheme" 349-359.

underlying issue of the EPs remains the voluntary nature thereof. This translates to the EPs becoming a means to disguise business as usual.⁵⁸⁸

7.2.1.1 Aspects of the Equator Principles III for banks

Principle 1 deals with the review and categorisation process. It obliges lenders such as banks to rate projects that they plan to finance based on the potential impacts and risks in accordance with the screening criteria of the International Finance Corporation (IFC).⁵⁸⁹ These criteria categorise projects as A, B or C depending on their potential environmental and social impacts - A being possible substantial adverse environmental and or social risks and or impacts that are varied, irreversible or unparalleled, B being projects with likely limited adverse environmental and social risks and or impacts that are few in number, tend to be site-specific, mostly reversible and easily attended via mitigation measures and C being projects with negligible or no unfavourable environmental and social risks and or impacts.⁵⁹⁰

According to Principle 2⁵⁹¹ all category A and B projects are required to undergo an assessment and review process to address relevant environmental and social risks and impacts. This is to be achieved via noted measures in the assessment documentation to minimise, mitigate, and offset adverse impacts.⁵⁹² The assessment documentation includes an Environmental and Social Impact Assessment (ESIA). Depending on the level of risk of a proposed project, additional specialised studies might need to be undertaken by banks.⁵⁹³

588 Richardson 2005 *European Environmental Law Review* 289. This leads to the bigger question of whether voluntary mechanisms per se are an effective tool for the promotion of sustainable banking and finance. A need for further research then.

589 <http://bit.ly/1iVPSnO>. See also Benjamin, Richardson and Wood *Environmental Law for Sustainability* 279.

590 <http://bit.ly/1iVPSnO>. See also Benjamin, Richardson and Wood *Environmental Law for Sustainability* 279.

591 Environmental and social assessment.

592 The assessment documentation needs to be adequate, accurate and objective whether prepared by the client, consultants or external experts. Available at <http://bit.ly/1iVPSnO>.

593 <http://bit.ly/1iVPSnO>.

Principle 3⁵⁹⁴ indicates that the assessment process should first and foremost comply with relevant host country laws, regulations and permits that concern the environmental and social issues.⁵⁹⁵ A distinction is made between non-designated countries (countries without robust environmental and social governance and legislation systems) and designated countries (countries perceived to have robust environmental and social governance and legislation systems). Projects within former countries are assessed in compliance with IFC⁵⁹⁶ and World Bank standards⁵⁹⁷ while projects within latter countries are assessed via compliance with relevant host country laws, regulations and permits.⁵⁹⁸

Principle 4⁵⁹⁹ posits that category A and B projects are required to have an Environmental and Social Management System (ESMS) developed for and maintained by the client. If the particular ESMS do not meet the applicable standards (as raised in the assessment process) the client and the EPFI bank will agree on an Equator Principle Action Plan (AP) to bring the ESMS in line with the applicable standards.⁶⁰⁰

As per Principle 5,⁶⁰¹ effective stakeholder engagement (as an on-going process) is required of all category A and B projects. This implies the formal documenting of the stakeholder engagement process to commence early in the assessment process.⁶⁰² Principle 6 confirms that all category A and as appropriate, category B projects require the client to have established a grievance mechanism. The grievance mechanism has affected communities as its principal user – its object being the receiving and facilitation of concerns and grievances about the project's environmental and social performance.⁶⁰³ Principle 7 states that all category A and, as appropriate category B projects will have its ESMPs, ESMS and stakeholder engagement process documentation reviewed by an independent environmental and social consultant.⁶⁰⁴ The

594 Applicable environmental and social standards.

595 Available at <http://bit.ly/1iVPSnO>.

596 IFC Performance Standards on Environmental and Social Sustainability.

597 World Bank Group Environmental Health and Safety Guidelines (EHS Guidelines).

598 Available at <http://bit.ly/1iVPSnO>. Host or local country laws meet the requirements environmental and or social assessments (Principle 2), management systems and plans (Principle 4), Stakeholder Engagement (Principle 5) and grievance mechanisms (Principle 6).

599 Environmental and social management system and EP action plan.

600 Available at <http://bit.ly/1iVPSnO>.

601 Dealing with stakeholder engagement.

602 Available at <http://bit.ly/1iVPSnO>.

603 Available at <http://bit.ly/1iVPSnO>.

604 Available at <http://bit.ly/1iVPSnO>.

same applies for the Equator Principles Action Plan. Project-related corporate loans, where projects with potential high-risk impact exist, also need to be reviewed by an independent environmental and social consultant.⁶⁰⁵

According to Principle 8⁶⁰⁶ the client is required in all projects (category A, B and C) to pledge in the financing documentation to comply with all relevant host country environmental and social laws, regulations and permits.⁶⁰⁷ In addition for all category A and B projects the client is required to pledge (in the financial documentation) to (i) comply with the ESMPs and Equator Principle Action Plan (where applicable); (ii) to provide periodic reports which document compliance with the ESMPs, EP Action Plan (where applicable), and host country environmental and social laws, regulations and permits.⁶⁰⁸ In instances where there is non-compliance, the EPFI will engage with the client to remedy the situation via remedial action.⁶⁰⁹

To warrant on-going monitoring and reporting on project finance after financial closure and over the life of the loan, Principle 9, states that all category A, and as appropriate, category B projects require the appointment of either an independent environmental and social consultant, or the retaining of qualified and experienced external experts.⁶¹⁰ On project-related corporate loans where a project is required to have an independent review as per Principle 7, the appointment after financial close of either an independent environmental and social consultant, or the retaining of qualified and experienced external experts is needed.⁶¹¹ On client reporting and transparency requirements, Principle 10 added a few additional requirements (to the discloser requirements in Principle 5) for all category A and, as appropriate, category B projects namely that the client will (i) warrant that a summary of the ESIA is accessible and available online and (ii) will report (publicly) GHG emission levels throughout the operational phase for

605 Available at <http://bit.ly/1iVPSnO>. High-risk impacts include but are not limited to any of: adverse impacts on indigenous people, critical habitat impacts, significant cultural heritage impacts and large-scale resettlement. Available at <http://bit.ly/1iVPSnO>.

606 Dealing with covenants.

607 Available at <http://bit.ly/1iVPSnO>.

608 Available at <http://bit.ly/1iVPSnO>.

609 If client fails to re-establish compliance within an agreed period, the EPFI reserves the right to exercise remedies, as considered appropriate. See <http://bit.ly/1iVPSnO>.

610 Available at <http://bit.ly/1iVPSnO>.

611 Available at <http://bit.ly/1iVPSnO>.

projects emitting more than 100,000 tonnes of CO₂ equivalent annually.⁶¹² A distinction is made between scope 1 emissions (direct GHG emissions from the facilities owned or controlled within the physical project border) and scope 2 emissions (indirect GHG emissions connected with the off-site production of energy used by the project). For scope one emissions an evaluation of possible alternative fuel and or energy sources is required – this is to identify ways of reducing GHG emissions during the design, construction and operation of the project.⁶¹³

The EPs III was designed for project finance and its classifications are designed on the same big project capital costs and hence its application is very limited in contributing to the green economy and or the move to strong sustainability. However, South African banks can use it and some are using it as a blueprint for an environmental risk management framework on all lending decisions by simply lowering or doing away with the capital cost classifications.

Banks, when funding an existing facility, should exercise special precaution and diligence. Specifically, funding which is expressly directed to deal with prevailing pollution or any loan or funds in a hazardous industry should particularly be examined and analysed.⁶¹⁴ Because banks normally rely in the first place on environmental due diligence from the borrower, that information should be investigated or analysed by internal and, if necessary, external independent qualified professionals.⁶¹⁵ Lender banks being the lender should check and consider: (i) whether all necessary licences and permits are in place; (ii) the state of present contamination and potential pollution; (iii) benchmarking investigations where necessary; (iv) the existence of prior directives or compliance notices; (v) any historical “Green or Blue Scorpion” site investigations; and

612 Available at <http://bit.ly/1iVPSnO>.

613 Available at <http://bit.ly/1iVPSnO>. In project instances where high carbon intensity sectors exist, the analysis will include comparisons to other viable technologies. The World Bank Group EHS Guidelines has identified the following as high carbon intensity sectors: base smelting and refining, cement and lime manufacturing, thermal power, integrated steel mills, and foundries.

614 Jeucken *Sustainability in Finance* 159; Vermaak and Tucker “Avoiding the Green Eyed Monster”.

615 Jeucken *Sustainability in Finance* 159; Vermaak and Tucker “Avoiding the Green Eyed Monster”.

(vi) ascertaining of neighbouring land uses.⁶¹⁶ Banks should refuse and or decline the loan if necessary.⁶¹⁷

7.2.2 Document preparation and negotiation

Lender banks should carefully consider the risks associated with control provisions and having an equity stake in the borrowers business.⁶¹⁸ Banks should require the client to be in compliance with environmental laws and design specific contractual terms to cater for known risks identified in the due diligence phase.⁶¹⁹ During the document preparation phase the lending bank should carefully consider the wording and process for step in rights where there is a known environmental risk. If environmental information is to be provided on an ongoing basis banks should ensure that there is portfolio management back up⁶²⁰ to consider this and react appropriately to it. Lender banks should consider using appropriate warranties and indemnities, especially from parent companies where feasible.⁶²¹ Banks should implement the suspension and ultimately the withdrawal of funding if environmental provisions are not complied with.⁶²²

7.2.3 Portfolio management

Banks should deal promptly and appropriately with all environmental information gathered or received. Banks should deal appropriately and promptly with compliance notices and directives.⁶²³ Banks need to understand the legal duties that exist in the national framework legislation (NEMA) and SEMAs (such as NWA), especially insofar as the bank may be the person in control of land and hence be liable for previous and existing pollution.⁶²⁴ Sooner rather than later consult appropriate technical and legal external consultants if necessary. Banks should act in a reasonable manner in promptly

616 Jeucken *Sustainability in Finance* 159; Vermaak and Tucker "Avoiding the Green Eyed Monster"; Environmental Bankers' Association 2003. Available at <http://bit.ly/J4SPIQ>.

617 Environmental Bankers' Association 2003. Available at <http://bit.ly/J4SPIQ>.

618 Barannik *Environmental Risk Management* 261-262; Case *Environmental Risk Management* 15; 143-144.

619 Case *Environmental Risk Management* 96

620 See paragraph 7.2.3.

621 Vermaak and Tucker "Avoiding the Green Eyed Monster"

622 Vermaak and Tucker "Avoiding the Green Eyed Monster"; Environmental Bankers' Association 2003. Available at <http://bit.ly/J4SPIQ>.

623 Vermaak and Tucker "Avoiding the Green Eyed Monster".

624 See paragraph 6 for discussion.

putting in place short term measures to prevent, assess, mitigate and remediate immediately occurring or continuing pollution. Banks need to negotiate promptly with the authorities if necessary. Banks also need to understand all the decommissioning triggers in NEMA (if the intention is to break up and sell off). A bank should sell, re-lease or otherwise divest itself of the facility at the earliest practicable commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirement.⁶²⁵

7.2.4 Closure and decommission stage

Closure or post-closure and or decommissioning of a lending client's business should be considered and catered for during the early stages of the credit application. Typically, during the document and negotiation stage the bank needs to ascertain whether the client has an appropriate closure or decommissioning plan. This may also necessitate the inclusion of a rehabilitation plan. The point being that pollution may occur during the closure or decommissioning phase which could lead to direct liability for the lender bank. Furthermore, the bank should include the necessary criteria with regard to closure or decommissioning in the loan agreement.

Some development outcomes are easier to predict than others. A typical method which banks use (or at least tweak) to analyse potential outcomes of uncertain developments in environmental issues, is that of Repetto and Austin.⁶²⁶ The method is based on the fundamentals of financial analysis and is applicable to any sector and the individual companies within that sector.⁶²⁷ It consists of a number of steps namely: (i) define the sector; (ii) identify relevant future environmental issues for the particular sector; (iii) build scenarios around each issue; (iv) allocate probabilities to the scenarios; (v) evaluate individual company exposures; (vi) estimate financial impacts depending on the scenarios; and (vii) build or construct overall measures of expected impact and risk.⁶²⁸

625 Vermaak and Tucker "Avoiding the Green Eyed Monster".

626 Repetto and Austin "Estimating the Financial Effects of Companies Environmental Performance and Exposure" 281.

627 Jeucken *Sustainability in Finance* 181; Repetto and Austin "Estimating the Financial Effects of Companies Environmental Performance and Exposure" 281.

628 Jeucken *Sustainability in Finance* 181; Repetto and Austin "Estimating the Financial Effects of Companies Environmental Performance and Exposure" 281. High environmental risk sectors include

In the environmental context banks face direct, indirect and reputational risks from its internal operations and its external business activities. Managing of these environmental risks and liabilities necessitates the implementation of a robust risk management system or systems. Such an environmental risk management system should include the rudimentary elements of general risk management, namely risk identification; assessment of specific risk; implementation of risk control measures; mitigation of the risk and risk monitoring.

8 Conclusion and recommendations

The aim of this study was to ascertain the environmental risks and legal liabilities for South African banks within the bigger context of sustainability. Sustainable development for purposes of this study was defined as the establishment of a balance between long term development and environmental protection that would be to the benefit of present and future generations. This balance revolves around the acknowledgement or understanding that economic, social, environmental and cultural aspects are inextricably linked and therefore necessitates integration. Sustainability is defined as the current and future maintaining of conditions without the continuous eroding of natural, environmental, social and cultural resources. The tool used to attain the (ultimate) goal of sustainability is the process of sustainable development. A subcategory of sustainable development is that of the green economy, green growth or green deal whereby practical economic solutions are offered to attain sustainability. Its goal is the transition from a grey or brown economy to a green economy. It was indicated that mainstream banks are in effect financing a grey or brown economy and hence subscribe to a weak form of sustainability. The green economy, however, calls for a strong form of sustainability. It would seem then that mainstream banks are more concerned with managing the impact that environmental risk may have on bank lending

among others: agriculture; dry cleaning; production and supply of electricity; electro-plating and metal finishing; general engineering; mining and quarrying; petrol stations and the bulk storage of fuel; property development; radioactivity; and waste management. The following processes are also of an environmental high-risk nature and include among others the manufacturing of: basic metals and metal products; rubber, plastic and derived products; textiles; wood products; bulk storage of chemicals; electrical and optical equipment; food, beverages and tobacco products; leather and tanneries; mineral products (glass, bricks, ceramics and concrete). See Case *Environmental Risk Management* 178-179.

than the impact of bank lending on the environment. The evolving nature of sustainability (from weak to strong) demands a fundamental policy change for banks. Mainstream banks will be put under even greater pressure than before to make the transition from weak to strong sustainability.

There are certain main drivers for banks to be sustainable namely: reputational benefits and reputational harm (two sides of the same sword); an increase in regulatory framework (statutory and non-statutory) relating to environmental protection; stakeholder pressure (internal, external, and includes civil society); the effect of globalisation; and new business opportunities. It was indicated that reputational benefit (or harm) remains an important driver for banks, especially insofar as the features of civil society's assessment of banks has become the *de facto* requirement for banks' social right or license to engage in business. Taking these drivers into account sustainable banking can be defined as the process whereby banks consider the impacts of their operations, products and services on the ability of current and future generations to meet their needs via the effective implementation of environmental, social and governance policies and practises that are integrated across all banks' operations to ensure (i) the prevention and minimising of environmental, social and cultural harm; (ii) transparency and accountability to stakeholders; and (iii) the financing of products, projects and businesses that promote sustainable green markets.

The role of banks is that of an intermediary between borrowers and lenders of money. Hence, it influences the direction and pace of economic development and by default steers and promotes either sustainable or non-sustainable development. This is also true of South African banks. As a result banks are seen as powerful agents of change especially with regard to their environmental impacts. Banks' environmental impacts are both direct and indirect in scope. Direct impacts refer to banks' own ecological footprint (such as their energy use etc) and when compared to other industries are generally seen or judged as good – in other words not having a major impact on the environment. However, it is the indirect effects of allocating capital to the commercial sector (via loans and financing) that have the biggest environmental impact. In the environmental context banks face direct, indirect and reputational risks from their internal operations and their external business activities.

Although general duties of care and other legal obligations are imposed on South African banks to limit the risk of causing harm to the environment, no positive obligation by law exists on banks to warrant that all their operations are environmentally sustainable. This does not imply that a bank's obligations and legal rights are not affected and shaped by the concept of sustainability. On the contrary, it is evident that the interpretation of a bank's environmental obligations depend very much on the degree to which a bank's acts or omissions could be seen as being in line with the advancement of sustainability. The current specific new focus on the protection of the environment (new legislation, penalties, instruments and better enforcement) makes it essential for banks and their directors (both direct and indirect operations) to be aware and stay on top of potential risks and liabilities on environmental degradation. This is especially so because banks' directors can be criminally prosecuted for environmental crimes. The application and effect of the POCA on persons convicted of an environmental crime or crimes has been identified as a possible new or additional risk for banks and their directors. Banks in addition to their normal environmental risk and liabilities also need to contend with the possibility of lender liability. Existing legislation pertinent to lender liability does not expressly or specifically deal with lender liability for environmental transgressions or environmental impacts of a borrower. Absence of judgements on lender liability exacerbates the risks and the uncertainty for banks in South Africa. Hence, banks remain subject to legal uncertainty and associated risks. The issue of lender liability specifically with regard to the implication of "the person in control" requires clarification. Thus it is recommended that legislation relevant to lender liability⁶²⁹ be revised to specifically accommodate and protect lending banks in certain distinct circumstances.

To be able to assess environmental risks banks should ensure that environmental principles are incorporated into all aspects of its lending cycle. Such an environmental risk management system should include the rudimentary elements of general risk management, namely risk identification; assessment of specific risk; implementation of risk control measures; mitigation of the risk and risk monitoring. Banks tend to use the

629 Namely NEMA and NWA. Although the lender liability provisions of NEMWA are not yet in effect, it will need to be part of the proposed revision.

popular but limited Equator Principles as an environmental risk management system on their lending processes. It is submitted that the Equator Principles, in its current form, is not only falling short of promoting the green economy, but in fact supports and feeds the grey and brown economy. It is further submitted that banks can expect new pressure to make the transition from weak to strong sustainability. Consequently banks' current environmental risk management systems will not be sufficient to cater for new environmental risks and liabilities that the move to stronger sustainability (in the form of the green economy and by implication the inclusion of all bank-products and services) will present. It is recommended that banks take note of this new development and start planning accordingly. This could (at least in the short to medium term) include the expansion of banks' environmental and social risk departments.

It is therefore recommended that the managing of banks' environmental risks and liabilities necessitates the implementation of a robust risk management system or systems. To be able to assess the environmental risks, banks should adopt the stronger version of sustainability; formulate environmental principles that the bank will adhere to; incorporate these environmental principles into all aspects of its lending cycle, develop an environmental risk management system that should include as a minimum the identification of all the applicable legislation pertaining to the specific financing or lending of capital, risk identification, assessment of the specific risk, implementation of risk control measures, mitigation of the risk, risk monitoring and auditing.

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