Author:
Tengaumnuay, Thitinant

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The impacts of the equator principles as private self-regulation in environmental development in a developing country

The Impacts of the Equator Principles as Private Self-Regulation in Environmental Development in a Developing Country

Thitinant Tengaumnuay

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Abstract

This thesis explores the Equator Principles (EP) framework as an alternative measure to raise environmental standards in developing countries where state regulation fails to handle environmental problems effectively. The EP framework requires private financial institutions to incorporate environmental and social consideration into their business decisions, assigning them the role of regulators in terms of rejecting loans for projects which fail to meet the EP environmental and social standards. As private regulation, the EP regime has some advantages in addressing transnational environmental problems which state regulation generally fails to do due to their national boundary limits. However, the issues of legitimacy, accountability and transparency challenge the implication of the EP framework in promoting sustainable development. The thesis focuses on EP regulation by applying the concept of reflexive governance as an academic framework to discuss the implication and effectiveness EP regulation. The thesis examines European Union (EU) environmental governance as a model of environmental regulation which adopts the idea of reflexive governance. In order to investigate whether and how the EP regime can raise environmental standards in a developing country, the thesis applies Thailand as a case study. On account of political instability and the national policies which prioritise economic growth, environmental development in Thailand has not been the area that receives much attention from the government. The thesis explores particular conditions of Thailand in terms of political backgrounds, culture and social values, and then discusses how the EP framework can apply to raise environmental standards under such conditions. In the end, the thesis makes suggestion for the EP institutional design to ensure that the EP's learning-based approach can achieve its goal in encouraging sustainability and preventing environmentally harmful projects, as well as to address the concerns on its legitimacy, accountability and transparency of the regime.

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Taking a PhD course has been a long, tiring journey. I would not have made it to the end without great support from a lot of people around me. Their kindness, encouragement, and friendship are highly valuable for me. First and foremost, I would like to express my deepest gratitude to my brilliant supervisors, Professor Tony Prosser and Dr Clair Gammage, for their guidance, valuable advice, encouragement and huge support throughout my study. I consider it a high privilege for being their supervisee.

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To my friends and family, I owe you so much for all your support and encouragement throughout the PhD process. Thank you for understanding how fragile a PhD student, like me, is and for always encouraging me, surrounding me with positivity, and believing in me when I doubted my own ability or became discouraged. Thank you for always being there for me.

COVID-19 Statement

This thesis has been interrupted by the COVID-19 pandemic. The researcher had to return to her home country in Thailand promptly and did not bring back all materials required for her study. The researcher could get access to some e-books provided by the University of Bristol library, but some books are limited to printed copies, which means she could not get access to them. The researcher planned to conduct interviews to obtain information for her thesis. However, the COVID-19 situation did not allow all her interviews to be in person as she initially planned. Some interviews had to be by phone or via Zoom.

Author's declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: Thitinant Tengaumnuay DATE: 20 April 2022

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List of Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
BAT	Best Available Techniques
BAU	Business-As-Usual
BREF	BAT Reference documents
CAO	Compliance Advisory Ombudsman
CBD	Convention on Biological Diversity
CEDHA	Centre for Human Rights and Environment
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
EAP	Environmental Action Programme
EBRD	European Bank for Reconstruction and Development
ECHA	European Chemicals Agency
EGDIP	European Green Deal Investment Plan
EIA	Environmental Impact Assessment
EIB	European Investment Bank
EP	Equator Principles
EPAP	Equator Principles Action Plan
EPFI	Equator Principles Financial Institution
ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plan
ESMS	Environmental and Social Management System
ESR	Environmental and Social Responsibility
EU	European Union
FSC	Forest Stewardship Council
GAL	Global Administrative Law
IADB	Inter-American Development Bank
ICJ	International Court of Justice

IED	Industrial Emission Directive
IFC	International Financial Corporation
IMF	International Monetary Fund
INDC	Intended Nationally Determined Contribution
MDGs	Millennium Development Goals
NEQA	Promotion and Conservation of National Environmental Quality Act
NGO	Non-Governmental Organisation
OMC	Open Method of Co-ordination
ONEP	Office of Natural Resources and Environmental Policy and Planning
RAN	Rainforest Action Networks
REACH	Registration, Evaluation, Authorisation and Restriction of Chemicals
SAPs	Structural Adjustment Programmes
SCB	Siam Commercial Bank
SDGs	Sustainable Development Goals
SEA	Strategic Environmental Assessment
SEIP	Sustainable Europe Investment Plan
SIEF	Substance Information Exchange Forum
TCFD	Task Force on Climate-related Financial Disclosure
TEC	Treaty Establishing the European Community
TEU	Treaty of the European Union
TWGs	Technical Working Groups
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles on Business and Human Rights
WFD	Water Framework Directive

INTRODUCTION

Environmental regulation is conventionally understood to fall within the field of public law and the overall responsibility for environmental management is traditionally assigned to the state. However, the role of regulator is not limited to the state; this thesis argues that private regulation has some advantages in overcoming the limits of state regulation in environmental development. The thesis focuses on the study of the Equator Principles (EP) framework which is a form of private regulation with private financial institutions as regulators.

Environmental standards vary widely between states, which can lead to the creation of 'pollution havens' whereto the construction of polluting industries is relocated in order to avoid more stringent environmental regulations in another country.[1] To date, there has not been a successful international agreement to address such differentiated standards or to create global commitments to prevent the creation of pollution havens, which have harmful effects on local communities. The thesis analyses the EP framework and explores whether it offers an alternative regulatory framework that can redress the limits of state regulation and raise environmental standards in a country where domestic environmental regulation is lax or in effective. With a focus on Thailand, this thesis demonstrates that voluntary private regulation, like the EP, can complement state actors in environmental governance and help in raising domestic environmental standards. However, this thesis also highlights regulatory gaps in this framework and suggest ways that the EP can be improved.

The background of the thesis is explained in Section I and the clarification of the research aims, questions and hypotheses of this thesis will be presented in Section II. While there is some literature on the EP framework, as illustrated in Section III, there are still some academic gaps which this thesis aims to fill in order to find out whether and to what extent EP regulation can complement and/or supplement the role of the state in environmental governance. The research methodology and methods of data collection are enumerated in Section IV, and then the thesis outline is provided in Section V.

[1] Brian R. Copeland, 'The Pollution Haven Hypothesis' in Kevin P. Gallagher (ed.*), Handbook on Trade and the Environment* (Edward Edgar Publishing 2008).

I. Background of the Thesis: *Differentiated environmental standards, the limits of state regulation and the potential of private actors as alternative regulators in environmental governance*

Environmental management is conventionally a matter for public authorities, and it is the responsibility of state agencies to launch and implement public policies and measures for addressing environmental problems. However, and while a state typically has regulatory powers only in its own jurisdiction, most environmental problems are transnational or, at least, have transnational effects. The levels of the environmental standards vary among different states, and there is often a significant distinction between developing countries and developed countries. A number of developed countries recognise the severe situation of environmental problems and collaborate to solve or mitigate such problems, as could be seen from the environmental policies of the European Union (EU)[2]. On the contrary, most developing countries, despite being to some extent aware of the environmental crisis, still have only lax or inadequate environmental regulation due to their prioritisation of economic growth and considering stringent environmental standards a discouragement of investment.[3]

The differing approaches to environmental regulation are in large part a product of colonialism. In the era of colonialism, the Industrial Revolution in Europe led to the exploitation of natural resources and environmental degradation; environmental consumption was extended by the colonial powers over natural resources of their colonies.[4] Post-colonisation and the different levels of industrial development has led to the so-called 'North-South' divide. Developing countries are referred to as the 'Global South' ('the South') with no specific relevance to geographic positions of such countries but as being symbolically opposed to the Global North ('the North') which are developed countries.[5]

[2] See Chapter 2 of the thesis for further explanation and discussion.

[3] The issues in relation to developing countries and their prioritisation of economic growth over environmental development will be further discussed in Chapter 3.

[4] See M. Rafiqul Islam, 'History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination' in Shawkat Alm, Sumudu Atapattu, Carmen G. Gonzalez, and Jona Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015).

[5] Please be noted that the 'North' and the 'South' referred to in this thesis are the Global North and the Global South respectively.

Ideologies of the North have played an influential role in in shaping international law, norms and principles and international paradigms including international environmental law.[6] In the late 1980s, European countries began to take environmental issues more seriously, especially after the Chernobyl incident.[7] The rising awareness of environmental problems in the North and the transboundary nature of environmental pollution elevated environmental issues to the international stage. A turning point came in 1972 – a remarkable year for international environmentalism – which marked the first time that environmental problems were explicitly recognised as global concerns at the United Nations Conference on the Human Environment, in Stockholm.

However, with the unavoidable interrelation between economic development and environmental management, it is unsurprising that some developing countries are unable or unwilling to adopt the concept of environmentalism advanced by the United Nations (UN). As the North was considered the key contributor to global pollution and massive natural consumption but gained benefits from their industrialisation, developing countries argued for 'economic justice' and against the same obligations for 'all states'. [8] International environmental conferences have provided a space in which both developed and developing countries can share ideas and observations in managing the global environmental situation as well as developing environmental principles.[9] In order to bridge the North-South divide, some international environmental concepts have been introduced to enable economic growth along with environmental development and to engage developing countries in designing environmental agreements, such as the concepts of 'Sustainable Development', 'Common but Differentiated Responsibilities' and 'Equitable Participation in International Decision-Making'. [10] Although such principles are primarily introduced in non-legally binding Declarations and their legal status as a customary principle of international law has not yet been

[6] Ruth Gordon, 'Unsustainable Development' in Shawkat Alm, Sumudu Atapattu, Carmen G. Gonzalez, and Jona Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 58.
[7] ibid 56-57.
[8] Gordon (n 6) 59; Carmen G. Gonzalez, 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32 Pace Environmental Law Review 407, 409.
[9] Stuart Bell and Donald McGillivray, *Environmental Law* (7th edn, Oxford University Press 2008) 134.
[10] See Ulrich Beyerlin, 'Bridging the North-South Divide in International Environmental Law' (2006) 66 Heidelberg Journal of International Law (ZaöRV) 259. The idea of 'Sustainable Development' will be further examined along with the discussion of environmental regulation in a developing country in Chapter 3 of this thesis.

formally recognised, they have considerable influences over later international agreements and national policies in environmental development.[11]

However, international environmental law relies on being adopted and, normally, can be implemented in domestic legislation of the state parties. With respect to state sovereignty, one state cannot interfere in the environmental regulation of another state. Although there has been some regional regulation as part of environmental management, notably among the EU members, there is still no institutional system of global environmental regulation. The recent COP26 which aimed to reach the global cooperation in limiting the increase of temperature still failed to gain national commitments from participating nations to reach such cooperation.[12]

As abovementioned about the North-South divide, poverty reduction and economic development are usually primary concerns in national government policies of developing countries.[13] Strict environmental laws or high environmental standards would increase operational costs for business and appear unappealing for investors. Some governments might decide to lower the level of their environmental standards or abandon certain environmental requirements in order to encourage increasing investments or megaprojects.[14] The situation of a 'race to the bottom' where a country makes its environmental regulations less stringent than other countries to attract foreign investments is therefore a great challenge which signifies the limits of state regulation in raising global environmental quality. While environmental problems are transboundary, state authority has boundaries.

The starting point for this thesis is the proposition that other actors can have authority over environmental management development and can serve as an alternative form of regulator when the state, especially in a developing country, fails to address environmental problems.

In view of the expanding process of privatisation and globalisation, which have facilitated the transnational flow of financial services, the state's controlling power over certain development

[11] ibid.

[12] See Dave Reay, 'Was COP26 a Success?' (*Edinburgh Impact*, 26 November 2021) <www.ed.ac.uk/impact/opinion/was-cop26-a-success> accessed 1 April 2022.

[13] Since the precise definition of a 'developing country' remains unclear, please note that any reference to a developing country throughout this thesis generally means a country of which the levels of industrial advancement and economic development are far behind the countries with a high income or which have already been fully developed.

[14] Thailand is an example of a country where the government decided to lower environmental standards to attract investment. After the military coup in 2014, the military government tried to boost national economic growth and address the problem of economic stagnation after political disorders by exempting the application of some environmental regulations. This issue will be explored in Chapter 4 of the thesis.

projects or business has been partially reduced since the main financial sources of a project have been shifted from the government or public funds to private financing.[15] It must be noted that 'globalisation' can be generally defined as the process which overcomes 'the constraints of geography', allowing 'intensification of economic, political, social and cultural relations across borders.'[16] 'Globalisation' in this context – facilitating the flow of services across borders – is 'market globalisation' where national barriers to trade and services are reduced. Transnational services can transfer some concepts and ideas with them to other countries. However, market globalisation does not always occur along with 'regulatory globalisation' which refers to the situation where countries apply the same 'regulatory standards or principles.'[17] Various private forms of self-regulation in environmental management have recently emerged, such as in a form of voluntary codes or standards-setting associations, suggesting the changing role of the private sector in environmental development from regulated and passive to being more proactive, as well as challenging the traditional concept of state-centred laws. The increasing role of private actors in environmental development suggests that private actors have the potential to perform an important role in environmental regulation nationally and internationally.

In the past, the companies whose business operations pollute the environment or exploit natural resources have been the subject of public condemnation and the target of environmental laws.[18] Meanwhile, financial institutions, despite not directly damaging the environment on their own, contribute considerably to environmental degradation as their financial support allows hazardous activities or environmentally devastating projects to be initiated and operated. The term 'unseen polluters' has therefore been applied to the financiers, since their own carbon footprint does not actually reflect the environmental impacts involved in their business.[19] However, the growing attention paid by non-governmental organisations (NGOs) to the

[15] Douglas Sarro, 'Do Lender Make Effective Regulators? An Assessment of the Equator Principles on Project Finance' (2012) 13 German Law Journal 1525, 1528.

[16] Hans-Henrik and Georg Sorensen, 'Introduction: What has Changed?' in Hans-Henrik and Georg Sorensen (eds.), *Whose World Order: Uneven Globalization and the End of the Cold War* (Westview 1995); Malcolm Waters, *Globalization* (Routledge 1995).

[17] Peter Drahos and John Braithwaite, 'The Globalisation of Regulation' (2001) 9 The Journal of Political Philosophy 103. See further discussion in Peter Drahos, 'Regulatory Globalisation' in Peter Drahos (ed.), *Regulatory Theory: Foundations and Application* (Australian National University Press 2017).

[18] Banjamin J Richardson, 'Financing Sustainability: The New Transnational Governance of Socially Responsible Investment' (2007) 17 Yearbook of International Environmental Law 73.

[19] ibid 75.

responsibility of financial institutions in environment-damaging projects does not let the financial institutions simply escape from their environmental responsibility.

In 1998, the World Bank published the guidelines for assessing environmental risks of World Bank projects, which were adopted by the International Financial Corporations (IFC) – a lending institution in the World Bank Group.[20] However, such environmental requirements do not impose any obligations to *private* financial institutions. It is not until 2003 when the idea of sustainable finance has been formally recognised by the community of private financial institutions. In 2003, the Equator Principles (EP) framework was initiated by a group of commercial banks to provide guidelines for environmental and social risk management.[21] The EP framework incorporates environmental and social consideration into financing decisions. Any private financial institutions which adopt the EP regime, known as the Equator Principles Financial Institutions or 'EPFIs', should make their lending decisions with reference to the environmental and social standards provided in the EP. A project that does not satisfy the EP standards would be denied finance.

The functions of the EP regime assign to the EPFIs, which are private entities, the role of regulators in environmental management. The EPFI's client will try to find the best approach to manage the potential risks or mitigate the adverse effects of its project to be compliant with the environmental and social standards required by the EP framework in order to obtain financial support from an EPFI. As project finance is the main source for most business projects, especially in developing countries[22], the EPFIs' refusal to finance a project with high environmental risks could prevent the construction or operation of potentially hazardous projects. This private regulatory regime appears to offer an interesting alternative for environmental management in cases where state regulation fails to address environmental problems. As financial support providers, private financial institutions gain considerable power over their clients to require the incorporation of environmental and social consideration into their project development. While the state has national boundary limits, financial business does

[20] Robert F Lawrence and William L Thomas, 'The Equator Principles and Project Finance: Sustainability in Practice?' (2004) 19 Natural Resources and Environment 20.
[21] The Equator Principles Association, 'The Equator Principles' <equator-principles.com/about/> accessed 10 March 2019.
[22] Adebola Adeyemi, 'Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation' (2014) 16 Environmental Law Review 91, 99.

not have such limits. The implementation of EP standards can, in principle, raise environmental standards in a country where national environmental laws are lax, insufficient or ineffective.

The thesis presents an analysis of the EP regulatory regime and discusses the capacities of EP regulation as alternative measures when state regulation fails to address environmental problems effectively. Thailand is taken as a case study because the national government has overlooked the importance of environmental regulation and in some cases has even lowered the level of existing environmental standards simply to facilitate investment in development projects.[23] This thesis considers the EP framework as a form of private regulation in environmental governance, supplementing state regulation, especially when the state does not effectively perform its normative role in regulating environmental management.

However, as a private regulatory regime, EP adoption is voluntary and the EP framework does not confer any rights or establish any liabilities on the lenders or beneficiaries. Instead, compliance with framework relies on public pressures and the oversight of watchdog organisations to monitor the EPFIs' adherence to the EP standards. This has led to critiques relating to the lack of accountability mechanisms as well as an enforcement authority; also, scholars and practitioners in different disciplines have raised concerns that the EP framework might become a mere disguise for (falsely) improving business reputation.[24] To interrogate the legitimacy of these claims, this thesis explores the institutional design of EP regulation in order to find out what is needed to ensure that EP regulation is not simply a marketing tool for promoting corporate social responsibility with no effective mechanism for preventing the financing of potentially hazardous projects.

II. Research Aims, Questions, and Hypotheses

The emergence of the EP framework suggests a new regulatory approach to address environmental problems. The emphasis on the role of private actors in regulation, which challenges the traditional concept of state-centred laws, could cast doubts on its actual impact in raising environmental standards and also leads to questions concerning the interaction between private regulators and the state.

[23] See Order of the National Council of Peace and Order Numbers 3/2559, 4/2559, and 9/2559.
[24] Adeyemi (n 22) 103.

The thesis aims to answer two main questions. First, to what extent can the Equator Principles (EP), which are a form of private self-regulation, promote environmental improvement in a developing country where the domestic environmental laws are lax or inadequate? Second, are there any further revision or developments required for improving the EP institutional design in order to ensure its practical success in environmental development and to address the critiques of the EP as a mere marketing tool to enhance business reputations?

The study of the functions of EP regulation will significantly contribute to greater understanding of private environmental regulation and suggestions for improvement to the institutional design of the EP regime to encourage sustainable development will be put in forward in this thesis. Overall, this thesis argues that private governance, like the EP, can provide an effective supplement to state governance in the sphere of environmental regulation and management.

The hypothesis of the thesis is that the EP framework can improve environmental management and raise environmental standards in a developing country where state regulation is weak, lax or ineffective in environmental development. The thesis will highlight that there are parts of the EP's institutional design that need further scrutiny to improve its effectiveness in ensuring sustainable finance and to obtain public acceptance as a legitimate form of environmental regulation. There is an important caveat, however, that this thesis neither suggests that the EP as private regulation will completely replace the role of the state nor that there will be a sharp boundary between the state and private actors. On the contrary, there will be an interaction between the state and private actors in environmental governance, which will shape the role of the state from the conventional commanding regulator to the facilitator in the background.

III. Overview of the Literature

The EP introduction in 2003 received considerable attention from environmental law scholars. The EP conception indicates the movement of private financial institutions towards sustainable investment and their efforts to incorporate environmental and social aspects into business consideration. Andrew Hardenbrook[25] reflects on the EP framework after its first revision in 2006 and concludes that the emergence of the EP standards might raise environmental

[25] Andrew Hardenbrook, 'The Equator Principles: The Private Financial Sectors' Attempt at Environmental Responsibility' (2007) 40 Vanderbilt Journal pf Transnational Law 197.

standards in developing countries. At the time that this paper was published, the impacts of EP implementation were in their infancy and had not been properly measured, but the author nevertheless concluded that at least the EP regime marks a proactive role by private actors in environmental regulation. Most papers on the EP regulation, not only that of Hardenbrook, support the EP conception that private financial institutions do indeed show their environmental and social responsibilities. Benjamin J. Richardson[26] includes the EP as one method of private mechanisms for encouraging socially responsible investment. His arguments that there are still some areas requiring investigation, notably the enforcement and accountability mechanisms of such private environmental regulation. Richardson generally emphasises the role of government in collaboration with private sectors to promote socially responsible investment such as offering tax benefits for institutions that adopt private codes of conduct.

Although most papers support the idea of the EP framework that private financial institutions take a proactive role in encouraging environmentally and socially responsible investments, they all see some flaws or points that need further development. For example, Adebola Adeyemi[27] and Vivian Lee[28] highlight the cases where the EPFIs still provide financial support even where their clients are accused of failure to meet the EP requirements. The concerns that the EP framework might be used as a tool for private financial institutions to maintain their reputation are also raised among scholars and NGOs, especially by BankTrack which is a watchdog for sustainable finance.[29] While Adeyemi casts doubts on how the EP regime can ensure compliance when the regulation imposes no liability for non-compliance and has no enforcement power, Nigel Clayton[30] raises concerns about monitoring and transparency, and proposes that there should exist an outside body to investigate EP compliance. Douglas Sarro[31] discusses whether the EP can make private financial institutions an effective regulator while recognising the lack of enforcement power in the EP regime. These scholars offer important observations about some problems of the EP framework, yet comprehensive studies of the EP

[26] Richardson (n 18).
[27] Adeyemi (n 22).
[28] Vivian Lee, 'Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay' (2008) 6 Northwestern University Journal of International Human Rights 354.
[29] See BankTrack, 'About BankTrack' <www.banktrack.org/page/about_banktrack> accessed 23 October 2021.
[30] Nigel Clayton, 'The Equator Principles and Social Rights: Incomplete Protection in a Self-Regulatory World' (2009) 11 Environmental Law Review 173.
[31] Sarro (n 15).

institutional design are still missing. The overall picture of the EP regulatory regime needs further investigation in order to assess whether this form of private regulation can address environmental problems which the state fails to handle.

There is a large amount of literature on private regulation as well as on the significance of private entities in governance, which will be examined in the next chapter. The outstanding conception related to diffusion of regulatory power is the idea of reflexive regulation which emphasises a learning-based approach rather than conventional 'command-and-control' governance.[32] The role of non-state actors in this approach is essential for the achievement of mutual learning and better understanding among various entities in a regulatory regime. However, the reflexive characteristics of the EP framework are still not fully studied. To date, the assessments of the effectiveness of the EP have been based on the discussion on the EP functions that assigns the role of environmental regulator to private financial institutions, such as how this form of voluntary-based regulation can incentivise adoption and how this transnational regulation can raise environmental standards without the help from the state. The success or the potential of EP regulation as an alternative form of environmental regulation has not been properly discussed on the basis of reflexive governance theory. This thesis therefore aims to fill this academic gap.

Further, the implementation of private environmental regulation in a developing country, such as Thailand, has not been the subject of rigorous inquiry. While the EP standards are designed to have global application, it is still debatable how the 'western-conceptualised' reflexive governance can apply in the context of Thai culture, social and political conditions. This issue will be examined in Chapter 4 of the thesis and offers one of the original contributions to the scholarship. The discussion of the EP's implications in Thailand will contribute to academic knowledge on whether transnational private regulation can work in an Asian developing country and whether the EP framework can work on its own to raise environmental standards without requiring direct support from the state. It should be noted here that the direct support in this regard means the role of the state as a commander in forcing EP adoption or enforcing the EP standards, not a facilitating role as establishing rights which support private regulation.

[32] The concept of reflexive regulation will be explored in Chapter 1 of the thesis.

IV. Thesis Structure and Contribution

The thesis focuses on the EP regulatory regime and proposes that this form of private regulation can raise environmental standards and address certain environmental problems in a developing country where the state fails to perform the role of regulator effectively. To prove this hypothesis, the thesis applies the theories of reflexive regulation as the ground for supporting the potential achievement of the EP framework in environmental regulation and examines whether private actors like financial institutions can become regulators in an environmental regulatory regime.

The next part of the study will analyse whether the EP regulation can apply in a country where the state does not undertake any collaboration with private regulators, as in Thailand. The context of a developed country is different from a developing country. With political situations and cultures in many developed countries that reflect democratisation, a developing country where a military coup occurs quite often, and the political situation is unstable and unreliable, such as Thailand, is in a significantly different position. The thesis studies the culture and political context of Thailand for further discussion of whether EP regulation can succeed in environmental development under such conditions. The discussion then leads to the question of how the institutional design of the EP should be developed to ensure its effectiveness as an alternative approach to environmental regulation, and what the interaction between the state and the EP framework can be, in terms of the potential that EP regulation can raise the standards of state environmental governance.

The thesis starts from exploring theories for the emergence of non-state regulatory regimes and distribution of regulatory power, focusing on the theory of reflexive regulation and experimentalism, which suggest a changed form of governance, from the model of control with the state as a hierarchical regulator to the model of interdependence which embraces the role of non-state actors in regulation set in a heterarchical framework. The thesis then illustrates how environmental problems could be effectively addressed by the application of the learning-based approach under the theory of reflexive law.

EU environmental governance is then presented as an example of how the idea of reflexive governance has been adopted into an existing environmental regulatory regime. Since the EU always portrays itself as the leader in promoting sustainable development[33] and is generally

[33] European Economic and Social Committee, 'Europe must become a global leader in sustainable development' Press Release Number 19/2019 (23 March 2019).

known for its strength in the command-and-control environmental governance, the study of how the EU has later incorporated the learning-based approach into its governance can support the advantages of adopting the idea of reflexive regulation in environmental governance. However, with different conditions from EP regulation, the EU's regulatory approach might not be able to be applied directly to the EP regime, but it provides meaningful knowledge to support the role of private entities in regulation as well as the significance of information and learning-based regulation. Lessons learnt from the study of EU environmental governance can also inform the discussions in later chapters of the thesis which focus on what an appropriate institutional design of the EP regime might look like in the future.

The functions of the EP framework are then explored to indicate its coherence with the conception of reflexive regulation, particularly in terms of an experimentalist approach. If experimentalism is considered a potentially effective means to tackle environmental problems and the EP regime applies such an approach, it could be inferred that the EP framework has, at least to some extent, the ability to promote environmental development. The critiques or concerns on the effectiveness of EP regulation will also be examined in order to discuss further on suggestions for developing its institutional design.

Next, as already the concept of reflexive regulation has western origins, the thesis will study the capacities of EP regulation in implementing under the conditions of a developing country which are much different from most developed countries. Thailand serves as a case study of this thesis. Environmental laws in Thailand as well as Thai culture and political context will be explored in light of the potential achievement of the learning-based EP framework in functioning as environmental governance in Thailand. After ascertaining EU environmental governance, the EP framework and Thailand's context, the thesis finally puts forward suggestions for the institutional design of the EP regime and discusses how it might be improved to raise environmental standards in a developing country.

Overall, this thesis will contribute to the literature on private regulation as a new form of governance in the public sphere, namely in environmental management. The investigation of the benefits and potential success of the EP framework could suggest the application of the EP regulatory regime as an approach to address environmental problems and raise environmental standards in cases where the state laws could not be relied on, particularly in a developing country such as Thailand. The research on institutional design and the changed form of the state would further improve the EP model to be more effective and, at the same time, still

preserve certain substantive values to relieve the public concerns that the EP framework would be nothing more than a mere gimmick for greenwashing.

V. Research Methodology and Methods of Data Collection

The thesis is principally theory-based, taking Thailand as a case study of developing countries where state environmental regulation is lax or ineffective. However, in order to gain a comprehensive overview of EP performance in practice, the study requires empirical information obtained through qualitative interviews with a small group of stakeholders from different areas of practice. The interviews conducted for this thesis do not constitute representative samples but provide useful information for reinforcing the theory as well as supporting discussion and arguments of the thesis. The objectives of the interviews are to help in understanding problems and challenges of state environmental regulation in a developing country, namely Thailand, and to obtain useful information for discussing the effectiveness of EP regulation in raising environmental and social standards.

The interviews were semi-structured, since this approach could frame the conversion to remain focused on the main arguments of the thesis but still allows participants to provide any insightful commentary as long as it is relevant to the questions. The interviews were designed to cover different groups of participants and stakeholders that are concerned with EP regulation. The selection of participants applied a purposive sampling method, which means that the interviewees were selected based on their representation of different roles in regulation, so that the study could gain information and viewpoints from various angles. The interviewees can be categorised into four groups: (1) the regulated, (2) the regulators, (3) academics and civil society and (4) the state agencies.

There are two notable limitations to the empirical study. First, the sample of interviewees is small and cannot be taken to be a representative sample. Nevertheless, the qualitative data obtained in the interviews has played an important role in shaping the analytical framing of this thesis. The numbers of interviews were initially set at two for each group; however, not all targeted interviewees could participate. The numbers for the regulated and the state agencies were changed to be one interview per each group, but this fact did not significantly affect the study as will be explained below. Second, the interviews took place during the peak of the global COVID-19 pandemic. It was the original intention of the researcher to conduct the

interviews in person, but some interviews had to be conducted by phone calls or Zoom as it was not considered safe to meet in person, while some targeted groups were not comfortable with providing an interview.

The interviews in this thesis have been approved by the Law School's research ethics committee. All participants in the interviews granted their informed consent before the interviews were conducted and some of the participants agreed to the recording of their interviews. When a participant did not provide consent to a recorded interview, the researcher took notes of the interview instead. Some information has been provided on an 'off the record' basis and has not been directly replicated in the text of the thesis. Nevertheless, the participation of all interviewees has been valuable for engendering a better understanding of the context and application of the EP in Thailand. The data collected has been securely stored in computer files with password protection, allowing only the researcher to get access, in accordance with best ethical practices. A list of interviews and a copy of interviewing questions are included in the Appendix of this thesis with identification of which group of interviewees that the questions belong to.[34] Each participant was invited to have an interview for approximately one hour but the length of interviews was flexible and could be longer that one hour if such an interviewee had a lot of information to share.

- *Group 1: The Regulated*

The first group of interviewees, as regulated under the EP regulatory regime, is that of the clients of the EP financial institutions, namely the investors that applied for financial support from the EP financiers. The interviewees for this group were selected from the names found as clients of EPFIs in Thailand by linking from the names of EPFIs published on the EP website. The aim of these interviews was to gain viewpoints on the EP requirements from the aspect of the investors; namely to obtain information on any difficulties or problems concerned with the EP conditions as well as to ask for their opinions on the role of the state required in this regime. The interview questions include the benefits or the reasons that they chose to be the clients of the EP financial institutions, rather than going to other banks that do not have environmental requirements. Such information will be useful for analysing how much the EP financial institutions could be attractive in the eyes of clients. The researcher has tried to reach some corporate entities in Thailand, but they could not set aside the time for interviews. However, the researcher was able to get information from the client's aspect from a lawyer

[34] See Appendix of this thesis: 'List of Interviews'.

who works as a legal counsellor for the EP clients instead. All the clients' names were not disclosed but this does not affect the purpose of the interview which focuses on clients' views on the EP regime.

- *Group 2: The Regulator*

The second group of interviewees was Thai commercial banks that incorporate environmental considerations in their assessment process before financing a project, or in other words, the potential Thai EP banks. The aim of the interview is to understand the practice and institutional structure for incorporating environmental and social responsibilities in their business, and to obtain their viewpoints and preparation for adopting the EP framework. Some interview questions are not much different from the questions for the first group, but their answers will provide opinions from different angles. Participants were selected from big Thai commercial banks which usually promote corporate social responsibilities in their policies.

- *Group 3: Academics and Civil Society*

A Thai scholar and an environmental activist for sustainable development represents the third group of targeted interviewees. A scholar and an activist who is working in the field of private environmental regulation in Thailand was able to provide updated information on the status of the EP acceptance and preparation in Thailand. An activist also provided information on current problems of environmental regulation in Thailand which is useful when assessing the potential of the EP regulation as an alternative approach to raising environmental standards in cases where state regulation cannot effectively prevent hazardous activities. The interviewees were selected from an active scholar and an activist whose works are well known for promoting sustainable development.

- *Group 4: The State Agencies*

The last group to be interviewed was that of environmental government agencies in Thailand. The purpose of this interview was to gain an insight into the opinions of state officers on the impacts of the EP framework and their viewpoints on whether there would be any difficulties in working on environmental management when there is the EP adoption. Their opinions informed my analysis of state environmental regulation in Thailand and the role of the state in the EP framework. The study initially aimed to conduct interviews with representatives from two governmental agencies of which their responsibilities are concerned with national environmental governance. However, one governmental agency could not set the

date for interview due to the COVID restriction while the other could still give an interview via a phone call. Anyway, the information obtained from one governmental agency can provide sufficient ideas for the overview of state environmental regulation in Thailand as well as its bureaucratic problems and challenges.

VI. Thesis Outline

The thesis has seven chapters: Chapter 1 on reflexive regulation, Chapter 2 on the EU environmental governance, Chapter 3 on the EP regulation, Chapter 4 on Thailand's context, Chapters 5 and 6 on the EP institutional design and the Conclusion of the thesis in the last chapter.

- *Chapter 1: Reflexive regulation and environmental development*

Chapter 1 explores the theories relevant to the emergence of private regulation, namely theories of autopoiesis and governmentality, which explain certain weaknesses of state regulation and support the ideas of regulatory diffusion. The chapter focuses on the theories of reflexive law and experimentalism, in which private actors play a significant role in regulation while the role of the state is shifted to steer the private self-regulation rather than to exercise a top-down control as before. The chapter suggests the application of learning-based governance in the context of environmental management. Literature on reflexive governance which emphasises the significant role of private actors in regulation will be the main resources for this chapter. This chapter also studies the benefits and the limits of reflexive governance and experimentalism, as well as the changed role of the state. The study in this chapter provides theoretical ground for discussion on the EP mechanisms in environmental development throughout the thesis.

- *Chapter 2: EU environmental governance*

Chapter 2 explores the evolution of EU environmental governance, which, at the beginning, applied the conventional model of command-and-control regulation before realising the limits of the sole use of such approach and embracing the idea of reflexive governance as well as encouraging collaboration between the state and non-state actors. The introduction of the 'best available techniques (BAT)' standards in the Industrial Emission Directive (IED) provides an example of the increasing application of collaborative governance in addressing

environmental problems, as the process of drafting the BAT reference documents includes both public and private actors to exchange information and knowledge. The IED is a good example of a command-and-control approach that has been developed to be more flexible and encourage information sharing and learning, suggesting the adoption of the theories of reflexive regulation. The significance of information in regulation is also distinctive in the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) framework. The growing role of non-state actors in EU environmental governance could imply that, even in the regulatory regime of which the states are strong, collaboration with private actors is still required for the success of such regulation. This chapter refers to the BAT standards under the IED and the REACH framework as case studies for the increasing role of private actors. The weaknesses and remaining problems of certain EU environmental regulation will also be investigated in order to suggest an institutional design for further development of EP regulation.

- *Chapter 3: The Equator Principles framework as environmental regulation*

Chapter 3 studies the functions of the EP framework and examines how private financial institutions could perform the role of regulators. This chapter will explore the learning process and the experimentalist functions of the EP regime with reference to the theories in chapter 1. Despite the advantages of the EP regime, a number of scholars have questioned its actual effectiveness. Since EP adoption is voluntary and, as in most private regulation, the EP framework does not constitute any formal enforcement mechanisms; EP adherence basically relies on the benefits to be gained and on public pressure. This chapter examines criticisms of the EP regulatory regime, including the issues of its legitimacy and accountability. Such study will provide useful knowledge for discussing the institutional design of EP regulation in Chapters 5 and 6.

- *Chapter 4: Environmental governance in a developing country: the case of Thailand*

As a developing country, government policies in Thailand prioritise economic development, and environmental regulation is regarded as an obstruction and discouragement to investment since requirements under several environmental regulations usually increase costs for investors or delay the project. Government policies and campaigns have been launched to encourage investment in order to increase jobs and to stimulate national economic growth, and that includes the exemption of certain environmental requirements and the amendment of environmental regulations to be less stringent. Thailand therefore serves a good

example of a developing country where governmental action in relation to environmental protection is insufficient or could not be relied on.

Moreover, the political instability in Thailand affects the application of environmental regulation, leading to the idea that private regulation could be a solution when the government cannot effectively perform its role in environmental governance. However, the context of Thailand, notably the culture of Thai society which to some extent displays paternalism and does not much support an active role for public participation, can challenge the success of private regulation by the EP framework in addressing environmental problems. This chapter therefore explores the political situation, social and cultures of Thailand, in terms of influences on environmental policies and environmental governance in Thailand.

- *Chapters 5 and 6: Institutional design for the EP regime*

With reference to the study in previous chapters on the relevant theories, EU environmental governance, and the functions of the EP mechanisms, the institutional design for the EP regime is discussed in two chapters – Chapter 5 and Chapter 6. To ensure the successful learning process in the EP regulatory regime, Chapter 5 analyses how to organise inclusive and engaging deliberation by basing on the ideas of proceduralisation, as primarily explored in Chapter 1. Establishment of transparency and legitimacy which are the issues related to the policy design of EP regulation will also be discussed in Chapter 5. Chapter 6 continues the discussion of institutional design but, in lights of justification, checking and enforcing EP regulation, this chapter focuses on accountability and enforcement of the EP framework. The interview on entities related to EP implementation in Thailand, including stakeholders, provides viewpoints or information which is useful for developing the suggested EP institutional design.

- *Chapter 7: Conclusion*

This chapter is the conclusion of the research, providing answers to the research questions on whether the EP framework can help in raising environmental standards in a developing country, by reference to the theories of reflexive regulation and developing lessons from the studies of EU environmental governance and the context of Thailand. The conclusion also suggests how the institutional design of the EP regime should be developed to enhance its effectiveness. The interaction between EP regulation and the state in environmental governance in the context of a developing country will also be analysed and assessed.

CHAPTER 1:

Reflexive Regulation and Environmental Development

Traditionally, the state has been perceived as a regulator to preserve the public order and security of the nation. The obligations to maintain public policy and enforce the law are conventionally assigned to the government. However, there have been many situations where the state fails to perform its regulatory role or lacks capacities in solving the problems efficiently. With the pluralistic nature of certain problems, the engagement of non-state actors is increasingly required for a successful regulatory scheme. Environmental management is one public issue that usually has expansive impacts and concerns diverse stakeholders. The role of private actors is therefore important for addressing environmental problems and their involvement in regulation, namely as a regulator, could pave the way for a new approach in environmental governance. The first chapter of the thesis will explore the theories relevant to the research question on private regulation and the shifting role of the state, focusing on the theories of reflexive governance applied in the context of environmental management. To begin with, Section I discusses the limits of state regulation, which applies the conventional model of command and control, in the present world where regulatory power is diffused to other actors apart from the state. The concept of reflexive governance is then explored in Section II, before moving to discussion on applying reflexive governance to address environmental problems in Section III. However, private regulation which adopts the idea of reflexive governance still faces some critiques of and challenges to its actual effectiveness. Section IV investigates such critiques, and then Section V considers the role of the state in reflexive regulation.

I. Limits of State Regulation and the Diffusion of Regulatory Power

As private citizens subordinate their power to the state under theories of constitutionalism[1], the role of the state is conventionally considered to be that of a controller, a commander, or a 'rule maker'[2], emphasising hierarchical control and the conception of state sovereignty. However,

[1] See Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in Petra Dobner and Martin Loughlin, eds., *The Twilight of Constitutionalism?* (Oxford University Press 2010) 3.
[2] The 'rule maker' term is applied to distinguish the contrasting role of the state as a 'rule taker.' See John Braithwaite, *Regulatory Capitalism* (Edward Elgar Publishing 2008).

expanding globalisation challenges such a traditional concept of state autonomy. With respect to state sovereignty, a state normally imposes legislation as appropriate for its national conditions and policies. However, some problems are transnational and require coherent standards across nations. Differentiated state legislation results in regulatory fragmentation. Transnational private regulation, of which the application is not limited by national boundaries, has then emerged to address the problems which state regulation does not have capacities to tackle, namely creating uniform standards across nations.[3] Although the success of private regulation requires further study, its emergence suggests an alternative regulatory approach which does not have boundaries limited by the nation state.

Another significant challenge of state regulation is 'information asymmetries.' The problem of information asymmetries generally occurs in regulatory regimes where the information required for policy design or for monitoring compliance is held by non-state actors, not the state regulator. The potential for information manipulation or insufficient information provision to the state regulator, especially in cases where the information holder is the regulated entity, can hinder the achievement of such state regulation. The lack of information can therefore set limits on the state capacity to make an appropriate policy[4] or to monitor compliance accurately.

The proliferation of private regulation to overcome the weaknesses of state regulation, along with the growing role of private actors and other non-state institutions, challenges the 'prerogative' of the governance powers of the state and implies the 'diffusion of governance power'.[5] Abbott and Snidal introduce the term 'governance triangle' to explain the phenomenon where a form of governance does not merely rely on the state but also involves interested business actors and non-governmental organisations.[6] The failure of state regulation results to some extent from its conventional regime of control which might not fit in a pluralistic society composed of various subsystems. The theoretical explanation for the limits of control

[3] Fabrizo Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 Journal of Law and Society 20, 25.

[4] Colin Scott, 'Reflexive Governance, Regulation and Meta-Regulation: Control or Learning?' in Olivier De Schutter and Jacques Lenoble, *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Hart Publishing 2010) 43, 58.

[5] Colin Scott, Fabrizio Cafaggi and Linda Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 Journal of Law and Society 1.

[6] Kenneth Abbot and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in Walter Mattli and Ngaire Woods, *The Politics of Global Regulation* (Princeton University Press 2009).

is based on 'the theory of autopoiesis', which emphasises a problem of communication among differentiated subsystems.

'Autopoiesis' is a biological term applied in the legal theory to explain the conception that law could be self-producing with self-reference to its own norms.[7] The theory of autopoiesis, developed by Luhmann, suggests that our society is composed of various subsystems such as the political, the legal, and the economic[8]; each subsystem has a capacity for reproduction through its own rationality.[9] Legislation has been traditionally used as an instrument of communication between subsystems; namely, between the legal and the political, law is a tool for implementing political policies and enforcing an expected outcome of such policies through a court.[10] Problems of differentiation among subsystems would not occur if subsystems are 'well aligned with each other in particular domain', or in other words, when there is 'structural coupling' between subsystems.[11] Luhmann applies the term 'structural coupling' to describe the relationship by which different subsystems can co-exist and co-evolve, since the structure of such systems can get along with others' environment without destroying their autopoietic characteristics.[12]

However, Teubner argues that, in certain cases, state regulation might fail to achieve its expected goals due to its incompatibility with the rationales of different subsystems.[13] The differentiation among subsystems would not let the state act easily as 'a coherent unit of control'[14] as no system can imposes its view over another[15] for a 'monopoly on knowledge' does not exist in a pluralistic society.[16] Structural coupling could be established but then the dynamics of a subsystem might destroy such alignment and cause regulatory failure. Persistent efforts to impose legal norms on a subsystem that has its own norms and rationales could result

[7] Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in Jacint Jordana and David Levi-Faur, *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing 2004) 151.
[8] Niklas Luhmann, 'The Coding of the Legal System' (1992) European Yearbook in the Society of law 145, cited in Colin Scott (n 7).
[9] Scott (n 7); Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 Modern Law Review 24, 55.
[10] Scott (n 7).
[11] ibid 152.
[12] Marleen Brans and Stefan Rossbach, 'The Autopoiesis of Administrative Systems: Niklas Luhmann on Public Administration and Public Policy' (1997) 75 Public Administration 417.
[13] Black (n 9) 45.
[14] Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 Oxford Journal of Legal Studies 597, 600.
[15] Black (n 9) 45.
[16] Black (n 14) 599.

in destroying the integrity of such a subsystem. This 'juridification' or 'creeping legalism' is one form of the three situations Teubner described as a 'regulatory trilemma.'[17] Teubner identifies three possible problems that could occur if regulation does not satisfy the conditions of structural coupling. The first problem is the 'incongruence' of law and other subsystems. It is the situation when law has no significant interaction with other subsystems, such as politics and society; namely, it does not create any behavioural changes and, at the same time, is not influenced by other subsystems. The second problem is 'over-legalisation of society', or also recognised as 'juridification' and 'creeping legalism', occurring when the law interferes so much in the functions of other subsystems that it damages the autonomy and integrity of such subsystems. Meanwhile, the third problem is the opposite of the second one. The problem of 'over-socialisation of law' formalises when the law is 'captured' or manipulated by other subsystems, losing its autonomy for reproduction.[18] With regards to the theory of autopoiesis, the direct imposition of substantive outcome on other subsystems without proper consideration of their autonomy and self-referential natures would lead to regulatory failure in terms of over-legalisation of society.

The traditional model of state regulation views the state as a controller, equipped with authority to impose legislation. To address the problem of state control in terms of difficulties in communication among subsystems, the role of state regulation has to be reconceptualised to recognise the characteristics of an autonomous system. As Teubner describes the nature of a system to be 'normatively closed but cognitively open'[19], the theory of autopoiesis emphasises the important of internal order, since each system is aware of the environment and external facts but still relies on its own rationales and cultures to construct its norms[20]. The imposition of law on differentiated systems could, therefore, fail if the content or the function of that law is incompatible with the norms of such regulated systems. The role of state law should be shifted 'to induce actions' rather than 'to command' in order to achieve the regulatory goals.[21] The pluralistic nature of a society would not allow the monopoly of decision-making power and therefore challenges the role of state regulator as a hierarchical controller.

[17] See Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Robert Baldwin, Colin Scott, and Christopher Hood, *A Reader on Regulation* (Oxford University Press 1998).
[18] See ibid; Gunther Teubner, *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1986).
[19] Gunther Teubner, *Autopoietic Law - A New Approach to Law and Society* (Walter de Gruyter 1988).
[20] Black (n 14) 602.
[21] Black (n 9) 46.

There is extensive literature recognising the limited capacity of the state to directly control in certain sectors and, at the same time, observing the diffusion of regulatory capacity to non-state organisations, referred to as 'the rise of post-regulatory state'[22]. The idea of 'regulatory pluralism' has been introduced to support the redistribution of regulatory capabilities among other non-state actors apart from the state agencies and to acknowledge other forms of regulatory mechanisms apart from state legislation.[23] The state is not therefore the centre of the governance power as traditionally considered. Certain private regulatory regimes even emerge as a response to the failure of state government, especially at the transnational level. An example is the Forest Stewardship Council[24], which was initiated by a group of private actors to develop global standards to govern forest industries by the application of labelling 'forest certification' and relying on the market to pressure compliance.[25] Socio-legal research indicates the diversion from the regulatory model of control due to the ineffectiveness of the state in monitoring or different understanding of regulatory rules between regulators and regulatees.[26]

The key characteristic of a successful 'post-regulatory state' is thus the harmonised relationship between the state or the public and the private. The collaboration between state and private actors could create a more effective regulatory regime, solving the problems of state inability such as the problem of information asymmetry as mentioned above. The acknowledgment of the important role of non-state actors as well as their regulatory capacities shifts the traditionally hierarchical model in which the state performs as a controller to a model of 'interdependence' between the state and the private, and introduces a more complex form of regulatory regime and institutions.[27] Cafaggi has described various forms of transformed relationship between the public and private entities, which are hybridisation, collaboration, coordination, and competition,[28] indicating the increasing role of non-state actors in regulation. All these theories and ideas indicate the recognition that non-state actors can play significant roles in regulation, and further that, in some cases, especially when it is a transboundary

[22] Scott (n 7).
[23] Scott (n 4) 47.
[24] Scott, Cafaggi and Senden (n 5) 8.
[25] See Benjamin Cashore et al, 'Can Non-state Governance 'Ratchet Up' Global Environmental Standards? Lessons from the Forest Sector' (2007) 16 Review of European, Comparative & International Environmental Law 158.
[26] Scott (n 7) 147.
[27] Scott (n 4) 46-47.
[28] Cafaggi (n 3) 44.

problem, private actor have more advantages than the state government, which normally has national boundary limits. This fact supports this thesis's argument that the Equator Principles (EP) framework which is private regulation can serve as an effective regulatory measure to address environmental problems which state regulation fail to solve. The discussion of the idea of posing private financial institutions as regulators in environmental governance will be further discussed in Chapter 3 with reference to these theories. EP regulation can serve a tangible example of how the autopoietic character of private regulation can supplement the role of state in environmental governance.

II. Reflexive Regulation and Experimentalism as an Alternative Form of Governance

The failure of state regulation to respond to the dynamic nature of pluralistic societies has been clearly observed from the decline of the welfare state during 1970s and 1980s, together with the world financial crisis in 2008 and 2009.[29] The conventional application of formalistic regulation with the strategy of command-and-control or top-down is highly inflexible and overlooks the diverse positions of different actors in pluralistic societies.[30] The reason that such regulatory regimes failed to handle the crisis went beyond the simple conclusion that there were errors in regulatory models; it was due to the mistaken belief that the models were correct.[31]

When the model of control turns to be unsuccessful in achieving the desired goals of certain public policies, the shifting of regulatory models from 'control' to 'learning' has been suggested as an alternative. The idea of 'reflexive governance' has been introduced as a new form of governance, with the application of a learning-based approach instead of control and the significance of non-state actors to be included in the regulatory process.

According to Lenoble and Maesschalck, 'reflexive governance' does not precisely specify a regulatory model; it focuses on the idea of learning in terms of reconstructing institutions and

[29] Olivier De Schutter and Jacques Lenoble, 'Introduction Institutions Equipped to Learn' in Olivier De Schutter and Jacques Lenoble, *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Hart Publishing 2010) xv.
[30] ibid xvii.
[31] ibid xv.

regulatory processes to support mutual learning among actors.[32] Exchange of information and knowledge among associated actors can provide a wide array of viewpoints from different angles for understanding the issues, enabling proper responses to the problems and letting the participating actors review their behaviour or finding out new solutions to the problems. The form of 'learning' in reflexive law does not simply mean providing a forum for exchanging policies; participating actors must engage in deliberation. Mere adaptation or implementation does not satisfy the concept of reflexivity; actors are also required to review further their 'accustomed competencies and behaviours' as well as to alter flexibly their representation and position in the deliberation as appropriate.[33]

Reflexive governance is an interesting alternative to a control model as its learning process could lead to innovative solutions, and its flexible process without any fixed answers would enable regulation to respond easily to changing situations in dynamic societies. To achieve such learning goals, Scott suggests the procedure to be inclusive with no predetermined setting of answers.[34] Non-state actors, either as regulatees, stakeholders, or related entities, would not be left outside the process but included in the deliberation to exchange their viewpoints and knowledge. This mechanism reconceptualises non-state actors from regulatees under the traditionally hierarchical governance to be regarded as 'horizontal intermediators.' Such a term is applied also by Black as she claims that the engagement of non-state actors in the deliberative process would harmonise the differentiation among subsystems in polyarchic societies to find a better solution for all concerned actors rather than the top-down approach that the state conventionally applied.[35]

The theory of reflexive governance could be regarded as developing from the theory of autopoiesis. According to Teubner, the lack of harmoniousness of rationales and norms among different subsystems is considered the major reason for regulatory failure, indicating the impossibility of direct regulation in the form of hierarchical control.[36] Reflexive regulation would include non-state actors to play an important role in communicating between these differentiated subsystems. This new form of regulation, unlike the sovereign state law, respects

[32] Jacques Lenoble and Marc Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in Olivier De Schutter and Jacques Lenoble, *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Hart Publishing 2010) 5 – 6.
[33] ibid 6.
[34] Scott (n 4).
[35] See Black (n 9) 43-44.
[36] ibid 46.

the autonomy of each subsystem. The conventional model of control has been replaced by the model of interdependence, embedding the learning approach in a non-hierarchical relationship between state and non-state actors. Regulation is, therefore, not a mere imposition of command on regulated parties.[37] The regulatory strategies are to be shifted from direct control to indirect control in a form of 'procedural regulation', structuring the processes without directly command any substantive outcomes.[38]

The concept of 'learning' in reflexive governance is linked with the term 'deliberation' which is different from the term 'consultation' in the sense that a deliberative model requires more engagement of participants with 'equal and uncoerced' setting throughout the process[39], constituting a complex form of learning which Black refers to as 'thick proceduralisation', in which the goal is to reach consensus and mutual understanding among participants, rather than to simply achieve a bargain or a compromise as in 'thin proceduralisation'.[40] Some regulatory schemes, despite including non-state participants and encouraging exchange of viewpoints and information, do not go beyond consultation mechanisms and do not lead to changing perceptions or behaviours of participating actors. 'Fire alarm oversight' and 'better regulation' regimes are examples of thin proceduralisation. 'Fire alarm oversight' is a congressional oversight mechanism, analogous to the functions of fire alarms. As opposite to the 'police-patrol' oversight which emphasises the active role of members of Congress to investigate and monitor the bureaucracy by themselves, this form of mechanisms is less centralised, allowing citizens and non-state entities to gain access to information, check the administrative process, and bring claims to members of Congress to start the process of investigation[41]. The 'better regulation' framework is the programme which includes consultation with citizens and stakeholders in order to gain information for designing and improving better policies and regulations.[42] These two models allow participants to express their preferences and provide useful information for the state but participants remain external from the whole process, forming only thin proceduralisation.[43]

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[37] Scott (n 4) 47.
[38] Black (n 9) 46.
[39] Scott (n 4) 58-59.
[40] Black (n 14) 607.
[41] See Mathew D. McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms' (1984) 28 American Journal of Political Science 165.
[42] See European Commission, 'Better Regulation: Why and How' <ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en> accessed 30 July 2018.
[43] See Scott (n 4) 58.

According to Lenoble and Maesschalck, reflexive regulation could be structured with various approaches; namely the neo-institutionalist approach, the deliberative or collaborative-rational approach, the pragmatic approach, and the genetic approach; these approaches do not invalidate one another but supplement each.[44] The neo-institutionalist approach reflects external perspectives on learning, as it applies external factors to support learning, such as providing choices as potential solutions or expanding 'local actors' representations'.[45] Meanwhile, the deliberative, pragmatic, and genetic approaches further focus on the internal conditions of the system that could encourage the achievement of learning goals. Lenoble and Maesschalk explore such various forms of learning operation and their progressive development in ensuring the achievement of the learning goals. The deliberative approach empowers participating actors by establishing the processes that allow maximised input of knowledge. The pragmatic approach further develops the deliberative approach so that it goes beyond constructing deliberative fora; Sabel et al introduce 'democratic experimentalism' as one form of pragmatic approach, emphasising a process of 'joint inquiry' in which actors engage in the deliberation in an 'experimentalist manner.'[46] This approach requires organising the process which allows participants to explore the problems and solutions mutually with no pre-defined answers. Finally, the genetic approach notes the problem that an actor's capacities might be inadequate to engage fully in the deliberation, which might cause ineffectiveness or failure in the learning process. This approach therefore focuses on organising the processes that support self-capacitation of participating actors.[47]

As mentioned earlier, the learning-based model of reflexive governance could address the problems of pluralistic, fragmented societies, which the formalistic regulation of state governance fails to solve, and allows flexible adaptation to dynamic reality. 'Democratic experimentalism' introduced by Dorf and Sabel[48] as a pragmatic approach of reflexive governance, has the key characteristic of framing the problem and solution in 'an open-ended way.'[49] This learning-based approach can directly respond to cases where there is a high degree of uncertainty in making a decision or where there are significantly divergent views on the

[44] See Lenoble and Maesschalck (n 32) 10.
[45] Schutter and Lenoble (n 29) xvii and ibid 12.
[46] ibid 16.
[47] ibid 19.
[48] See Michael C. Dorf and Charles F. Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267.
[49] Grainne De Burca, Robert O Keohane and Charles Sabel, 'Global Experimentalist Governance' (2014) 44 British Journal of Political Science 477.

appropriateness of policies.[50] The requirement for participation of stakeholders, local entities, and relevant actors in a non-hierarchical form of deliberative procedures would also encourage exchange of viewpoints and knowledge from various aspects, leading to actual, complex form of learning, rather than a usual top-down command.[51]

De Burca, Keohane, and Sabel describe four conditions under which experimentalism would be a suitable form of governance. The first condition is when the problems concern uncertainty and polyarchic society, making it impossible for a central government to impose one form of regulation that could address the problems and formulate implementation as expected. The second condition implies that there must be a balance between the autonomy of actors and the role of the government. Third, the required factor for experimentalist governance is the co-operation of private actors in the regulatory regime, since the roles of non-state actors, either in policy-making, monitoring, or implementation, are indispensable for certain regulatory mechanisms. The last condition that will render experimentalism effective is that the participating actors must be willing to co-operate, since the experimentalist governance does not have formal sanctions. It must be noted that, as the model of experimentalism does not establish any hierarchical controllers, this regulatory approach is highly vulnerable to manipulation.[52] However, it does not mean that there are no mechanisms or procedural setting for solving such problems of experimentalism. The European Union (EU) has long positioned itself as the world leader in environmental development and EU environmental governance has adopted the idea of experimentalism. The next chapter will explore how reflexive theory including experimentalism has been implemented in EU environmental governance, which will be the building block for discussion of the institutional design of the EP regime. At this stage, the weaknesses of experimentalism will be examined in the following section. So far, it can be inferred that successful experimentalism requires the establishment of incentives or mechanisms for participants' alignment as well as the formation of transparency to prevent manipulation.

[50] Scott points out that such conditions usually cause the emergence of reflexive governance. See Scott (n 4) 50.

[51] As could be seen in the EU architecture, which is defined as 'multi-level' governance, interactions among different national administrative entities and the EU itself occur in a non-hierarchical setting. Their decisions can influence each other, including even the decision at 'superior level.' See Charles Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 European Law Journal 271.

[52] De Burca, Keohane, and Sabel (n 49) 483-484.

III. Environmental Problems and Experimentalism

In 1972, environmental problems became explicitly recognised in an international forum for the first time. The United Nations Conference on the Human Environment was organised in Stockholm, leading to the conclusion of the Declaration of the United Nations Conference on the Human Environment or the Stockholm Declaration.[53] A call for global collaboration to address environmental problems indicates the growing recognition that solving environmental problems requires collective action from every nation. An evident example that could explain the transboundary nature of environmental problems is that of climate change; no matter how much one country has decreased its carbon emissions, as long as other countries produce greenhouse gas without consideration of its impact on global climate systems, such a country would still have to bear the effects from climate change.

A state government does not have the overreaching capability to control actions outside its jurisdiction. Environmental policies and regulations are differentiated among countries due to their different viewpoints regarding appropriate environmental management. Due to the limited capacities of a state as a regulator over such plurality, private institutions which could operate across nations receive attention as an alternative to state regulators. Although various international environmental agreements have been successfully concluded and implemented, there are still a number of environmental conventions that failed to reach an agreement due to diverse viewpoints of participating states, such as the failure to agree upon an international forest convention in the United Nations Conference on Environment and Development 1992, causing the non-state entities to create their own governance, namely the Forest Stewardship Council (FSC).[54]

Environmental impacts are not expansive only in terms of nation-crossing but also in terms of their potential effects on various entities and other systems such as the market. To illustrate, pollution could cause a negative externality or raise the costs of production by requiring the manufacturer to include the abatement costs. Usually, environmental pollution concerns a number of entities, not limited to regulated parties but also outside stakeholders such as local communities which are affected by environmental degradation. In order to address environmental problems, all affected parties should be involved in the process of designing

[53] Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14, 11 I.L.M. 1461 (1972).
[54] Cashore et al (n 25).

solutions. Local entities, which are the closest to the problems, could provide useful information and knowledge for developing a measure to effectively manage the environment; therefore, the inclusion of local entities in environmental decision-making processes is particularly required. The idea of consulting affected parties is reflected in the proliferation of requirements for Environmental Impact Assessment (EIA) in most national laws and policies. The significance of including public participation in environmental decision-making process was formally acknowledged in an international forum in 1992 at the United Nations Rio Conference on Environment and Development, followed by the specific convention on public participation, namely the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters or the Aarhus Convention in 1998.[55]

Apart from the pluralistic nature of governance and an expansive number of relevant stakeholders, another characteristic of environmental problems is that there is no certainty in the success of measures adopted. Several factors have to be taken into consideration; the changing nature of an environmental situation, incomplete data, and, more importantly, the 'human factor' or the unpredictable human behaviour which could considerably affect the severity of environmental problems, altogether causing uncertainties in environmental models of governance.[56] The dynamics of environmental problems require periodic review and constant reassessment of measures applied to follow up its implications and analyse whether such measures efficiently respond to the problems, as can be seen from requirements for a party to report under several international environmental agreements.

The characteristics of environmental problems as abovementioned are distinct factors grounding the learning-based approach of experimentalism. First, the transboundary nature of environmental problems, setting the limits on a state government, highlights the need for alternative actors to mediate the differentiation across national borders; the conception of reflexive governance which emphasises the role of non-state actors as 'horizontal intermediators' would effectively respond to this quest. Second, the polyarchic characteristic of environmental problems requires the engagement of relevant actors not limited to the

[55] Anne Glucker et al, 'Public Participation in Environmental Impact Assessment' (2013) 43 Environmental Impact Assessment Review 104.

[56] See Holger R. Maier and James C. Ascough II, 'Uncertainty in Environmental Decision-Making: Issues, Challenges and Future Directions' (2006) International Congress on Environmental Modelling and Software 308; Sally Eden, 'Environmental Issues: Knowledge, Uncertainty and the Environment' (1998) 22 Progress in Human Geography 425.

regulator and the regulatee; experimentalist governance would undoubtedly fit in this condition since the full engagement of non-state actors in deliberation is highly encouraged for the achievement of its learning goals. Further, the experimentalist approach in setting the open-ended deliberation with no pre-set answers could potentially handle the dynamic and consistent changing conditions of environmental problems.

It must be noted that experimentalism might not be the only solution for environmental problems; there are various approaches to deal with environmental issues, as could be seen in the EU in which the member states cooperate to establish strong environmental policies and still apply the command-and-control approach which proves to be a successful scheme in environmental management.[57] However, in a state where the government is weak or does not sufficiently pay attention to environmental regulation, experimentalism could be an option to supplement the limited role of the state. Since the experimentalist approach does not centrally focus on the role of the state as a regulator or a controller but supports the model of interdependence and significantly recognises the important role of non-state actors in learning mechanisms, it can address the problems of ineffectiveness or insufficiency of environmental regulation in cases where the state government does not have the capacity or is not willing to regulate environmentally hazardous activities, as usually seen in most developing countries including Thailand. Moreover, after considering the limits of state regulation, it should subsequently be noted that even in cases where the state does not neglect the issues of environmental problems and has the full capacity to regulate environmental management, non-state actors performing in the model of reflexive governance could possibly provide a more efficient regulatory regime for addressing environmental problems.

The contexts of Thailand will be investigated in Chapter 4 to discuss further whether EP regulation can apply to raise environmental and social standards in a developing country by relying on the learning-based approach. The study of Thailand will provide meaningful information for developing the institutional design of the EP regime to ensure that the EP framework can serve as an effective regulatory measure in environmental governance.

[57] It must be noted that EU environmental governance adopts the idea of mutual learning and experimentalism, but its main regulatory approach remains the command-and-control model. This issue will be explored in detail in Chapter 2.

IV. The Limits of Experimentalism and Private Regulation in Environmental Management

While there are advantages associated with experimentalism as enumerated above, the learning-based model of governance, which is very different from the conventional command-and-control approach, emphasises the role of non-state actors, raising concerns that implementation of experimentalist regulation might require institutional designs or development to ensure its regulatory achievement. The first issue is the capacities of participants. As reflexive governance requires thick proceduralisation to encourage full learning and behavioural changes, the participants should be sufficiently empowered to engage in the regulatory processes. The second issue to consider is that of legitimacy. Private regulation, including the experimentalist mechanisms operated by non-state entities, usually faces critiques of its legitimacy. There are doubts about the legitimacy of a regulatory regime where private actors perform significant roles in governance, including the case of environmental management which is conventionally considered to be in the public policy area. This leads to concerns on the accountability of private actors in a private regulatory regime in terms of how to ensure that non-state actors will be accountable for their regulatory performances. The fourth critique of experimentalism and private regulation is that of enforcement mechanisms. While, under the model of control, a state regulator has authority to enforce rules or standards, experimentalist governance which relies on a model of interdependence lacks enforcement power. This can cast doubts on its actual effectiveness in regulation. The last issue to consider is the preservation of certain fundamental values, since private regulation might prioritise private benefits rather than public interests. These issues are now explored and will be further discussed in the context of the EP regime in later chapters.

(1) Capacities of Participants

The organisation of an experimentalist learning process is conducted not by merely aggregating all relevant actors as much as possible and placing them in a forum for discussion but must also make them actually engage in deliberative interaction so as to encourage mutual learning and achieve its goal in creating innovative solutions, including inducing the adaptation of actors' behaviours as required for such situations. The participants' capacities are considered one of key factors that contribute to the success of the learning process.

A variety of approaches have been introduced to empower or enhance actor's capacities in engaging in deliberation, such as organising a process that provides access to information and

encourages exchange of ideas.[58] Democratic experimentalism, as introduced by Sabel et al, though useful in its flexibility in framing the problems in an open-ended way and encouraging innovative solutions, has a weakness in erroneously assuming that participating actors have sufficient capacities in joint deliberation.[59] Apart from their general capacities, there are further limits to the actors' abilities in achieving the goal of learning. Schon and Argyris indicate the limits of 'organisational learning' in the experimentalist model in that participating actors might retain their behaviour as fixed with their routines rather than alter themselves properly after learning-based deliberation.[60] The term 'repetition compulsion' is applied to explain such a situation where an actor might restrict itself to its pre-existing position and unconsciously obstruct itself from adjustment; these 'defensive strategies' would hinder the success of full learning which targets the participating actors to review and correctly adapt their representations and behaviours as appropriate in dynamic contexts.[61] The re-framing measures are, therefore, required to free actors from their fixed preferences and overcome this limitation to full learning.

There is also an issue of the potential hindrance to deliberation resulting from the differentiation among actors from different subsystems. According to the theory of autopoiesis, each subsystem has its own norms and rationales; such differentiation of 'perception or cognition' among different subsystems could cause difficulties in mutual understanding[62], which is one of the main goals of experimentalism. The learning process through deliberative discourse, therefore, needs mediation to help the participants understand different perceptions and rationality of other actors from different subsystems. 'Translation' is required not simply in terms of providing definitions of words in different languages but in terms of explaining the different logic of different groups from different backgrounds,[63] so that the participants could successfully engage in the deliberation and earn the benefits of learning. Such a role of translator is supposed to facilitate the mutual learning in a horizontal approach with no

[58] Lenoble and Maesschalck (n 32) 15; see Peter Vincent-Jones and Caroline Mullen, 'From collaborative to genetic governance: the example of healthcare services in England.' in Olivier De Schutter and Jacques Lenoble, *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Hart Publishing 2010).
[59] Lenoble and Maesschalck (n 32) 16.
[60] See Chris Argyris and Donald A. Schon, *Organizational learning II: Theory, Method, and Practice, Volume 2* (2nd edn, Addison-Wesley Publishing Company 1996).
[61] Lenoble and Maesschalck (n 32) 16 – 17.
[62] Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 33, 40.
[63] ibid 48.

hierarchy; Black suggests that a state regulator seems therefore inappropriate.[64] This might challenge the autopoietic nature of EP regulation in terms of whether the state is always required to perform the role of translator for private regulation or whether the EP framework can develop its institutional design to provide this 'translation' function by itself. Since this thesis assumes the EP's potential as an alternative measure when the state fails to address environmental problems effectively, it is interesting to explore whether a translator needs to be the state or not. This issue will be further discussed in Chapter 5 after examination of the EP functions in Chapter 3 and the contexts of Thailand as a developing country in Chapter 4.

(2) Legitimacy

Legitimacy has been variously defined by a number of scholars. Even for state regulation which should raise fewer questions about its legitimacy due to its legal basis and representative democracy, the debates on normative requirements for legitimate governance are still vibrant. The mutual keywords found in most definitions of legitimacy are 'credibility' and 'acceptability'; a regulatory organisation is legitimate when it can gain trust and acceptance from stakeholders, notably those who are subject to governance.[65] It is noticeable that one significant reason that an organisation attempts to establish legitimacy is to gain acceptance, and at the same time, acceptability is also included as the meaning of legitimacy. The logical explanation for such linkage is that a regulatory regime must be able to justify its functions of governance in the eyes of other social members, and then, because its performance is considered justifiable and appropriate in other actors' perception, it is pragmatically accepted.

The rationale for constructing organisational legitimacy and the legitimacy requirement for acceptability both indicate the interrelation between legitimacy and public perception towards the organisation. It is thus important that the institutional design of a regulatory regime is responsive to the normative expectation of other social members. From various arguments and literature, legitimacy can be principally categorised into three types: (1) pragmatic legitimacy (2) normative/moral legitimacy and (3) cognitive legitimacy. The construction of such legitimacy is all related to the acceptance of the regulatory organisation by other actors but based on different reasons.[66]

[64] ibid 51-52.
[65] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regime' (2008) 2 Regulation and Governance 137, 144.
[66] ibid.

With regards to the first type of legitimacy, 'pragmatic legitimacy', was first introduced by Max Weber who argued that the legitimacy of a regulatory regime should be measured by 'the factual existence of such a power of command'[67]. The acceptance of those who are subject to governance indicates that such regulation is agreed from regulated parties and is thus in accordance with the concept of positive law.[68] A regulatory regime which responds to the interests of a social majority and allows public participation in regulation can justify itself to people and represent the rationality of its exercise of power. The people's belief in such regulation will result in legitimacy.[69]

This form of legitimacy significantly depends on 'the self-interested calculations' of stakeholders to decide whether they will accept such regulatory organisation.[70] This characteristic of pragmatic legitimacy arguably allows manipulation from regulating organisation. An organisation can 'purchase' its legitimacy by providing the outcomes that satisfy particular entities in order to gain their acceptance.[71]

In contrast to the pragmatic concept, 'normative legitimacy' or 'moral legitimacy' relies on the moral appropriateness of regulation. This form of legitimacy is thus more difficult to manipulate, compared to pragmatic legitimacy which rests on the satisfaction of stakeholders, notably the regulated entities. Regardless of whether the interests of the stakeholders are satisfied or not, a regulatory regime is legitimate when its activity 'is the right thing to do'.[72] While Weber's theory of pragmatic legitimacy argues that a regulatory organisation requires acceptance from those it aims to govern, the normative concept claims that it is the moral values and the conformity to social norms which constitute legitimacy of a regulatory institution.[73]

As earlier mentioned, all types of legitimacy are related to social acceptance. The fact that normative legitimacy does not direct its focus towards the stakeholders' expectations does not

[67] Max Weber, *Economy and Society: An Outline of Interpretive Sociology, Volume 1* (University of California Press 1968) 948.
[68] ibid.
[69] Lutz Schrader and Tobias Denskus, 'The Debate on NGO's Legitimacy: What Can We Learn from the Classics?' in Jens Steffek and Kristina Hahn (eds.), *Evaluating Transnational NGOs: Legitimacy, Accountability, Representation* (Palgrave Macmillan 2010) 31.
[70] Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 Academy of Management Review 571, 578.
[71] ibid 584.
[72] ibid 579.
[73] Alex Levitov, 'Normative Legitimacy and the State' (2016) Oxford Handbooks Online <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-131> accessed on 12 April 2021.

mean that it is completely 'interest-free'.[74] The preconditions of normative legitimacy are still rooted in 'acceptability' but, rather than setting the regulatory 'output' that are desirable for certain entities, the normative concept focuses on the 'input' and 'throughput' dimensions of regulation. The 'input' dimension concerns the questions of who is responsible for making decisions and who can participate in a regulatory process.[75] The 'throughput' dimension refers to procedural requirements of regulation, such as transparency and accountability mechanisms.[76] The way to foster legitimacy is not limited to providing the outcomes which serve the stakeholders' interests. In most cases, fair processes can strongly build trust and confidence of people as much as, or even more than, the outcomes can capture particular people's interests and induce their acceptance for the regulation.[77] Establishment of procedures that embed morals, common values, or norms of a social system is the usual approach to justify and rationalise a regulatory regime in the normative concept of legitimacy. 'Procedural legitimacy' is one significant form of normative legitimacy, especially when outcome measures are still absent.[78] 'Responsiveness, fairness, transparency, accountability' are typically referred as the key values for designing regulatory institutions and constitute procedural legitimacy.[79]

The third type of legitimacy relies on the 'cognitive' frame by which such regulatory organisation is coherent with the majority's perception for the sensibility of organisational activities.[80] The rationality and predictability of regulatory actions, as well as the meaning of their existence in the perception of other social members, constitute cognitive legitimacy of such regulatory organisation.[81] Unlike pragmatic legitimacy and normative legitimacy which respectively focus on the regulatory outcomes and processes, cognitive legitimacy rests on the organisational identity itself. While the pragmatic concept is criticised for its potential of being manipulated easily, founding cognitive legitimacy is arguably concerned with identity- or

[74] Suchman (n 70) 579.
[75] Ingo Take, 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared' (2012) 18 Swiss Political Science Review 220, 223.
[76] ibid.
[77] See Jonathan Jackson, Jenna Milani, and Ben Bradford, 'Empirical Legitimacy and Normative Compliance with the Law' in Ali Farazmand (ed.) *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer 2018).
[78] W. Richard Scott, *Organisations: Rational, Natural and Open systems* (5th edn, Taylor and Francis 2002).
[79] Steven Bernstein, 'Legitimacy in intergovernmental and non-state global governance' (2011) 18 Review of International Political Economy 17, 18.
[80] E. N. Bridwell-Mitchell and Stephen J. Mezias,'The Quest for Cognitive Legitimacy: Organizational Identity Crafting and Internal Stakeholder Support' (2012) 12 Journal of Change Management 189, 192.
[81] Suchman (n 70) 582.

image- building strategies.[82] Although the establishment of definition and meaning of a regulatory organisation seems concerned with internal stakeholders to develop an organisational identity rather than external actors, this form of legitimacy is not completely irresponsive to other entities. The external perception provides ideas for the organisational members on how to conceptualise their organisational identity properly.[83]

After considering all three types of legitimacy, the key requirement of legitimacy management is the 'communication'.[84] For the pragmatic dimension, the regulation must respond to the stakeholder's interests and provides expected outcomes. For the normative dimension, the regulatory design must incorporate morals, values, and norms, to ensure that its performance or decisions are the right things to do in the eyes of the public. Lastly, the cognitive dimension requires the rationalisation of institutional identities, making the regulation comprehensible and attaining cognition from the people. No matter which type of legitimacy is claimed, a regulatory regime that fails to communicate with other social members cannot succeed in gaining acceptance and constructing legitimacy. Communication is necessary for acknowledging the expectation that the stakeholders have towards the regulation, realising the public perceptions on the right things that the regulatory scheme should do, and understanding the people's cognition of a regulatory institution.

Private regulation, including the experimentalist mechanisms operated by non-state entities, is usually challenged as regards its legitimacy, since, unlike governmental organisations or state agencies, a private regulatory scheme initiated by private institutions is not based on any delegation of power from the government.[85] Legitimacy is important as it creates a sense of obligation and encourages active support for such a regulatory regime.[86] The institutional design of private regulation therefore needs to establish legitimacy in order to gain public acceptance. Private regulation cannot achieve its regulatory goal under the experimentalist approach if it cannot communicate with other entities in the society. Without public acceptance, a regulatory regime cannot claim public engagement and might not reach its goal of learning.

[82] Bridwell-Mitchell and Mezias (n 80) 194 – 196.
[83] ibid 195-196.
[84] Suchman (n 70) 585
[85] Scott, Cafaggi and Senden (n 5) 2.
[86] Donal Casey and Colin Scott, 'The Crystallization of Regulatory Norms' (2011) 38 Journal of Law and Society 76, 89.

Chapter 5 of the thesis will return to discuss the establishment of legitimacy in all the three forms for the EP regime.

(3) Accountability

Accountability refers to the concept that a regulatory authority has the obligation to give an account of its activities. A number of scholars broadly define accountability as the duty to explain and justify regulatory actions.[87] However, the scope and design of 'acceptable' accountability mechanisms still raise vigorous debates. Typically, the accountability questions are 'who' has to be accountable 'to whom' for 'what actions' and 'how.'[88] Different theoretical grounds have been raised to answer the questions, especially the question of how to institutionalise accountability in a regulatory regime.

The traditional concept of accountability rests on the relationship between an entity which gives an account, namely the regulator, and another entity which holds it accountable. Based on the doctrine of fiduciary trusteeship which embodies paternalism, accountability mechanisms emphasise the role of experts or elected representatives who are considered competent to conduct a review or to oversee regulatory decisions.[89] Regulatory oversight can be conducted in the political domain, such as referring to the legislative body or resting on electoral mechanism, to force explanation or justification from regulatory authorities.[90] Apart from relying on existing constituents, in some cases, new oversight bodies might be particularly established to perform the role of account holder, such as the public ombudsman and the national audit offices.[91] Judicial review is another classic device to ensure accountability. While political accountability mechanisms, including particular oversight bodies, imply a hierarchical relationship between the account-holders – as the grantors of regulatory authorities

[87] See E. L. Normanton, 'Public Accountability and Audit: A Reconnaissance' in B. Smith and D. C. Hague (eds), *The Dilemma of Accountability in Modern Government: Independence Versus Control* (Palgrave Macmillan 1971); Richard Mulgan, '"Accountability": An Ever-expanding Concept?' (2000) 78 Public Administration 222; John Roberts and Robert Scapens, 'Accounting Systems and Systems of Accountability' (1985) 10 Accounting Organizations and Society 443.

[88] Jerry Louis Marshaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' (2007) 116 Yale Law School Research Paper 115.

[89] Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) 352; Martin Lodge, 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing Limited 2004) 130.

[90] Baldwin, Cave, and Lodge (n 89) 343.

[91] Colin Scott, 'Accountability in the Regulatory State' (2000) 27 Journal of Law and Society 38, 41.

or the designated entities – and the regulators[92], legal accountability mechanisms such as judicial review emphasise the role of judicial systems to check the lawfulness of regulatory decisions in terms of procedural due process.[93]

The changed context of regulation, in terms of fragmented regulatory power and more pluralistic regulators, disclose the limits of the traditional accountability mechanisms to hold non-state regulators accountable. Apart from the proliferation of new actors in regulation, the notion of egalitarianism has changed the social values towards provision of an individual's rights and caused societal distrust of state authority.[94] The concept of accountability needs to be 'extended' to hold more actors accountable and to incorporate more values to be accounted for. Scott calls such reconceptualisation as 'extended accountability'.[95]

Along with the growing significance of markets in the world economics, the neo-liberal model of accountability emphasises market mechanisms as the means to hold private regulators accountable for their activities, by relying on the competition among private actors in the market to satisfy the consumers' and avoid a negative reputation.[96] In opposition to the doctrine of fiduciary trusteeship which trusts experts and specialist bodies more than lay people, the doctrine of consumer sovereignty believes in consumers' capabilities to make choices and therefore suggests a different model of accountability mechanisms.[97] Consumers are assumed to choose what they think they deserve, which means that they will support a business the performance of which does not create concerns, unacceptable risks, or negative impacts for them. Competition will then force private regulators, which are typically profit-driven entities in the market to, refrain from unacceptable behavior, to adhere to their regulatory standards, or to justify their activities. This application of market mechanisms to constitute accountability requires transparency as a precondition to provide consumers with sufficient information for their choices.[98]

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[92] See Richard B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 American Journal of International Law 211, 246-247.
[93] See Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016); Kenneth F. Warren, *Administrative Law in the Political System: Law, Politics, and Regulatory Policy* (6th edn, Routledge 2019).
[94] Baldwin, Cave, and Lodge (n 89) 349.
[95] Scott (n 91) 48.
[96] Scott (n 91) 49.
[97] Lodge (n 89) 131.
[98] ibid.

Building on the consumer sovereignty doctrine is the idea of citizen empowerment, accountability mechanisms in this perspective encourage a more active role for people than merely choosing what they are offered in the market as consumers. The citizen empowerment doctrine, reflecting egalitarianism, focuses on the public participation in regulatory processes.[99] The oversight of a private regulator can be conducted though public participation, especially including the stakeholders who are potentially affected by regulatory activities. This approach reduces the gap between the regulators and the public. In comparison with accountability mechanisms through oversight by experts or specialists, and the market mechanisms, enabling public involvement in regulation provides direct accountability for regulators to respond to the parties potentially affected.

The design of accountability mechanisms which emphasises public involvement further supports the legitimacy of such a regulatory regime. As already discussed, all forms of legitimacy are closely tied to the public perception of regulation. Public participation in accountability mechanisms can directly address the problems of public resistance and relieve public dissatisfaction, rendering the regulation 'acceptable' in the eyes of the public as approved through public participation. Due to the current characteristics of most regulatory regimes as polycentric and decentralised as well as regimes which adopt experimentalism supporting learning among diverse actors, the accountability relationship cannot be set in the command-and-control model that directs what the regulators should do merely on the basis of what the laws require. Interdependence among different constituents in a regulatory regime has challenged the traditionally hierarchical model and suggested 'dialectical' accountability relationships.[100] Public involvement in accountability supports public discourse as well as encouraging information exchange from diverse perspectives. Such a citizen empowerment doctrine requires the idea of reflexive law and learning-based regulation. Setting accountability mechanisms based on this doctrine will create coherence throughout the processes of a regulatory regime which signifies mutual learning.

Since the functions of private regulation usually combine the role of standard setting, monitoring, and enforcement within a single entity, rather than separating powers as in the state regulatory regime, Cafaggi suggests 'the separation of regulatory functions' to generate accountability[101]. Formation of networks could also be an alternative approach to encourage

[99] ibid 132.
[100] See Anthony Giddens, *The Constitution of Society* (Cambridge University Press 1984); Black (n 65) 150.
[101] Scott, Cafaggi and Senden (n 5) 13.

mutual control among regulatees either in terms of competition or cooperation. The application of procedural rules has been suggested as an approach to increase accountability[102], and in order to gain public acceptance and establish legitimacy for private regulation, the processes of collective action must be inclusive and set no pre-determined limits. [103] The institutionalisation of the regulatory regime which formulates accountability could to some extent relieve public concerns on conflict of interests or the green-washing regime. The thesis, therefore, studies the concepts of legitimacy and accountability so as to suggest the development of the EP regime to gain public acceptance.

The proliferation of regulatory bodies apart from states and international institutions in global governance has been recognised and led to the introduction of the idea of 'global administrative law (GAL)'. The increasingly diverse bodies that take the role of regulators, referred to as 'global administrative bodies', extend from conventional national governments and formal international organisations to include informal intergovernmental regulatory networks, public-private cooperation or 'hybrid' regulatory regimes, and private regulatory bodies.[104] Study of GAL in a research project at New York University School of Law emphasises the problem of 'accountability deficit' in such a form of transnational governance, since this regime usually has neither an overarching institution nor the separation of power in terms of the checks-and-balances system of most domestic governance.[105] Kingsbury, Krisch, and Stewart argue for the development of global administrative law, in particular terms of finding principles and mechanisms, for establishing accountability.[106]

Study of GAL implies the necessity of an overarching body as a part of accountability mechanisms. As the EP regulatory regime assigns the role of regulators to private financial institutions, allowing such private actors to perform decision-making power comparable to administrative bodies, the EP framework may learn a lesson from GAL that it may need the establishment of an oversight body to improve its accountability and generate legitimacy of the regime. Stewart particularly suggests the importance of certain mechanisms for preventing the ignoring or exclusion of potentially affected party by regulators. These mechanisms, in his

[102] ibid 15.
[103] Scott (n 4) 45.
[104] Benedict Kingsbury, Nico Krisch, and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 17.
[105] ibid 27; Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 The American Journal of International Law 211, 212.
[106] Kingsbury, Krisch, and Stewart (n 104) 26.

opinion, could not be classified as accountability mechanisms but significantly strengthen the effectiveness of accountability mechanisms; such mechanisms include transparency, participation, and requirement for providing reasons in making certain decisions.[107] These ideas of GAL provide useful information for the development of institutional design of the EP framework. Chapter 6 of this thesis will examine how accountability mechanisms should be established in EP regulation, and the idea of setting a single overarching body will be raised for discussion.

(4) Enforcement

Since the regulatory form under the experimentalist approach replaces the model of control with the model of learning, the issues of implementation and alignment of participants are questioned, especially when the regime does not explicitly provide any enforcement mechanisms. Conventionally, the effectiveness of enforcing any required behaviours occurs when a regulator has capacity for escalating the level of enforcement to be more stringent.[108] The EP as a form of private regulation would certainly face this critique. No matter how great the deliberation it could construct, as long as the results of the deliberation are not implemented and cannot be enforced, the learning approach could not successfully achieve its goals of encouraging review and change in participants' behaviours and representation.

However, the effectiveness of regulated entities in self-regulation is recognised and encouraged to apply before the state intervention. Ayres and Braithwaite introduce the concept of 'responsive regulation' with its distinct application in enforcement, emphasising the effectiveness of leaving the regulated business to self-regulate; the state will step in only when such self-regulation fails to achieve the expected results or proves to be ineffective.[109] Although the model of responsive regulation highlights the significant role of non-state actors in self-enforcement, the role of state law remains at the top of the pyramid, in line with their assumption that this model works with 'a strong regulatory state.'[110] This assumption is challenged by the fact that, in some states such as Japan, self-regulation could still succeed in enforcement with no significant requirement for state capacities.[111] This issue on whether the

[107] Stewart (n 105) 255-268.
[108] Scott, Cafaggi and Senden (n 5) 11.
[109] See Ian Ayres and John Brathwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992).
[110] Scott (n 7) 158.
[111] ibid.

role of the state is required for successful enforcement is to be further examined later in this thesis.

Private regulation often applies incentives, rather than control, as regulatory instruments to create alignment from participants. In some cases, non-state actors could be motivated by concerns with their reputation. Competition and community pressures are external factors that could lead non-state actors to move towards certain policy goals without requiring the application of command-and-control mechanisms from the government[112], as could be seen from the regulatory regime of the Forest Stewardship Council in which market pressure has significant influence in forcing compliance with the FSC standards.[113] The thesis will explore incentives and functions of the EP framework in environmental governance in Chapter 3 and discuss whether it is sufficiently attractive for expansive adoption among private financial institutions. While the idea of responsive regulation supports the assumption that EP regulation can has its own mechanisms to ensure compliance, there might be some development required for the institutional design of the EP regime in order to make its environmental governance efficient and achieve its learning goal of experimentalism. EU environmental governance, which will be explored in the next chapter, can provide an example on how the concept of reflexive regulation is adopted in the command-and-control model of governance to address to problem of compliance deficits.

(5) Preservation of Certain Fundamental Values

The last problematic issue of experimentalism is the preservation of certain fundamental values. The reason that most private actors decide to participate in any regulatory mechanisms voluntarily is to preserve their interests; such private interests always tend to be prioritised over public interests.[114] Any institutional design, as a result, has to consider on how to incentivise private actors to operate the regulatory regime in the public sphere without diluting fundamental values or basic rights. Although public pluralism is recognised and the autonomy of subsystems is respected, it does not mean that reflexive governance should hold no constraints on non-state actors. As long as its performance has significant impacts on other systems within our fragmented society, signifying the exercise of regulatory power, certain constraints must be established to ensure that its operation is coherent with constitutional values

[112] Scott (n 4) 56.
[113] Casey and Scott (n 86) 85.
[114] See Scott, Cafaggi and Senden (n 5) 9.

of the society[115], and to prevent the imbalance of influences and pressures among actors engaged in private regulation, which might obstruct the learning process.[116]

Some literature on proceduralisation focuses solely on process and techniques without consideration for substantive concerns or moral values, such as Teubner's early work on theory of autopoiesis which defines systems as 'normatively closed' but 'cognitively open', leading Teubner to adopt a clear separation between procedures and substantive values.[117] However, Black argues that a procedural aspect of proceduralisation cannot be considered separately from substantive concerns, for the pursuit of substantive goals remains but the strategy to reach such goals is simply changed from direct command from the state to a deliberative mechanisms leading to the participants' own realisation. Proceduralisation should not be merely regarded as a regulatory technique with no consideration of substantive values.[118] Although the concept of reflexive governance shifts the regulatory model from direct control to inducement, it does not mean that the substantive goals do not exist or that it should let non-state entities decide anything as they deem appropriate without any constraints.

Black introduces the idea of 'constitutionalised autonomy' which recognises the autonomy of each different system but still requires the functions of such systems to be coherent with constitutional values.[119] However, the substantive values are neither meant to be directly imposed on any actors nor particular set as the outcomes of the regulation. The concept of constitutionalised autonomy emphasises indirect strategies by establishing the processes or institutionalising the regulatory regime to provide assurance that such values are maintained.

Overall, the problematic issues of private regulation under a reflexive approach as identified above indicate the necessity of institutional design to address such concerns and develop a model of successful learning-based regulation. The requirements for the empowerment of actors' capacities in deliberative learning, the establishment of legitimacy and accountability, the mechanisms to encourage implementation or alignment of participants, and the protection of certain fundamental values, could raise the question of the role of the state in tackling such

[115] Black (n 9) 51, 53.
[116] Tony Prosser, 'Constitutions as communication' (2017) 15 International Journal of Constitutional Law 1039, 1044.
[117] Black (n 14) 602.
[118] ibid 598 – 599.
[119] Black (n 9) 51.

issues. Further, even if private regulation does not cause any regulatory failure, the theories of reflexive regulation still acknowledge the role of the state in regulation but in a shifted form from a traditional controller to a facilitator.

V. The Role of the State in Reflexive Regulation

The recognition of the limited capacities of state regulation in a hierarchical model of control does not imply the end of the role of the state. On the contrary, state regulation is still required to ensure that a private self-regulatory regime can successfully operate to achieve its policy goals.

As the actors' capacities need empowerment to create actual learning and deliberation, along with public concerns on the potential conflict of interests among non-state actors[120], as well as the imbalance of influences and pressures among actors engaged in private regulation[121], institutional design and processes are necessary, leading to the question of the proper role of the state and the shifted form of state law. In the literature on private regulation and reflexive governance, most scholars share similar standpoints in which the role of the state in regulation still exists, but its strategy needs to alter to give some regulatory space to non-state actors. The role of the state and law under the theory of reflexive governance is not to control directly but to ensure social integration.[122] In other words, the role of the state is reduced to be in the background as a facilitator[123] and perform indirect forms of power as a 'steering mechanism[124]' rather than a direct command. Black mentions several forms of co-ordination between the state and non-state function of governance. Her 'decentring' model suggests a shift from state direct regulation to indirect strategies and the diffusion of a regulatory role to other entities which might be more effective in performing such function.[125]

Such a changing role of the state could refer to the theory of autopoiesis in terms that 'integration' is the key approach to stimulate the fragmented society to move towards any policy goals with respect to the autonomy of each subsystem rather than directly top-down

[120] Cafaggi (n 3) 21.
[121] Prosser (n 116).
[122] Black (n 9) 45.
[123] See De Burca, Keohane, and Sabel (n 49).
[124] Scott (n 7) 153.
[125] Black (n 14) 600-601.

command applied under the hierarchical model.[126] Under reflexive governance, the state would not enact the law to impose any substantive outcomes particularly but establish the processes of the system in a way that such system could achieve the public policy goals on its own.[127]

As the term 'steering mechanisms' implies, the state in this model of governance would not directly regulate the behaviours of actors but establish institutional structures or procedures to empower non-state actors to reach regulatory objectives. Since the theory of autopoiesis together with the theory of reflexive law emphasises the internal capabilities of a system to self-generate and self-reproduce regulation, procedural regulation would be a proper form of law to perform the integrative function, as the state only structures the processes and leaves the regulatory operation, such as decision-making, to be the responsibility of that system itself. This strategy is not something new. As could be seen in most market systems, the state imposes fundamental rules such as the law of contract and property rights which are required for investment and business transactions.[128] The establishment of preconditions or structures would ensure the smooth, effective operation of the private regime. However, the state still preserves a certain authority to command or intervene in the market to prevent the failure of market such as monopoly or imbalance of information.[129] Such case of market setting and state intervention reflects the implications of Habermas' discourse theory.

In *Between Facts and Norms*, Habermas reconceptualises the role of law in 'modern society' and emphasises the theory of communicative action, suggesting the 'dual character of law', which will be explored hereafter. The pluralisation in a society inevitably causes conflicts among subsystems due to differentiated views of values and expectations. Habermas applies the term 'duality' in modern law to indicate the tension between 'facticity' or the actual effectiveness of law in the real world and 'validity' or rational acceptance, and then suggests that a legal mechanism cannot function properly unless it gains recognition from social members or its addressees.[130] The process of 'societal rationalisation'[131] is required for bridging facticity and validity, and that can be done through the institutionalisation of a discursive process which encourages communication among social actors. Habermas's

[126] ibid 601.
[127] Black (n 14) 601.
[128] Scott (n 7) 146.
[129] ibid.
[130] *See* William Rehg, 'Translator's Introduction' in Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996).
[131] ibid xix.

standpoint is that the role of modern law should strike a balance between the liberal perspective which focuses on the protection of individual freedom and the republicanism which emphasises the democratic process in terms of popular sovereignty. Law, as Habermas suggests, should preserve private autonomy through the guarantee of rights and freedom on one hand, and preserve public autonomy by establishing the rational basis for the citizen's acceptance on the other hand.[132] Habermas introduces his discourse theory which underlines the communicative process providing an opportunity for potentially affected parties to exchange ideas and information. Such a discursive-theoretic approach is a ground for justifying a decision of lawmakers and establishes legitimacy, in terms of deliberative democracy, through the procedure of 'rational opinion- and will-formation'[133]. Habermas argues that this approach supports the idea of democratic self-organisation and responds to the pluralistic nature of modern society.[134]

However, in certain cases, a discursive process might not succeed in reaching consensus on the basis of rationalisation. The negotiation for compromising between different parties can deviate from the ideal of finding the 'better argument' based on rational acceptance and, instead, rely on imbalanced bargaining power, allowing some participants to threaten or influence other participants to cooperate. The institutionalisation is therefore required to ensure the equal settings of participants in negotiation.[135] According to Habermas's 'proceduralist concept of democracy', the 'system of rights' which provides a set of rights which protect private and public autonomy is necessary for securing legitimate democracy of such discursive process.[136] The role of the state is required for enforcing the system of rights as well as for establishing the process that encourages democratic communication flows among participants but, at the same time, preserves certain public values. Habermas's argument supports the ideas of experimentalism but, at the same time, still requires structuring the communicative processes in order to protect rights and secure public participation.

Habermas's discourse theory is in some areas the opposite of Sabel et al's democratic experimentalism. Experimentalism supports the decentralisation of regulatory power and gives significance to local knowledge and full deliberation among non-state actors. Discourse theory,

[132] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 118 – 131.
[133] ibid 457.
[134] ibid 458.
[135] ibid 166 - 167.
[136] ibid xxx – xxxiv.

despite recognising the important role of non-state actors in learning processes, places a significant emphasis on communication between subsystems and suggests that some necessary conditions are required for establishing effective communication and social discourse, since mere pluralism is insufficient to establish successful social learning.[137] Discourse theory creates two implications; the first implication is the provision of rights necessary for enabling effective communication among participants in an equal setting, and the second implication is the requirements for mechanisms to prevent the distortion of communication by imbalance of power.[138] Such implications imply the necessity for setting precommitments for the learning process.

There are two types of precommitment: substantive and procedural. Substantive precommitment preserves certain social values and protects fundamental rights such as human rights or freedom of contract; however, this type of precommitment is criticised for its inflexibility and for ruling out particular choices. Procedural precommitment, on the other hand, is more coherent with the liberal theory due to its proper balance between setting the conditions and encouraging participation and openness.[139] With reference to Habermas' theory, Prosser suggests a communicative approach which establishes the conditions for open procedures but at the same time sets certain constraints to preserve fundamental values and balance information. This approach does not direct the participants towards any particular choices or directly rule out any specific choices but establish procedures designed for preventing imbalanced influences among actors which could possibly lead to distorted communication.[140]

Discourse theory also refers to the concept of deliberative democracy, claiming that the legitimacy of regulation could be established when 'all possibly affected' entities could participate in the discourses.[141] The thesis will apply this concept of deliberative democracy, along with the theory of pragmatic legitimacy, to consider an institutional design for the EP regime. As Casey and Scott suggest with respect to pragmatic legitimacy, 'for a regulatory norm to be legitimate, it must be accepted by those to whom it is addressed'[142], the EP framework needs to develop the inclusiveness of its learning-based process so as to obtain or

[137] Prosser (n 116) 1043.
[138] ibid 1046.
[139] ibid 1042.
[140] ibid 1044.
[141] ibid 1046.
[142] Casey and Scott (n 86) 88.

enhance legitimacy. The concept of 'deliberative democracy' as applied in EU experimentalist governance could be also applied to support legitimacy in the EP experimentalist model.[143]

After considering reflexive governance and experimentalism, a new legal paradigm which shifts the form of regulatory model would become more effective to address certain problems which the state lacks capacities or fails to solve. The model of interdependence and the growing role of non-state entities in regulation could change the way the state interacts with private entities from hierarchy to heterarchy. However, the limits of experimentalism might raise the question whether the state is required for performing a role of structuring an institutional design for the EP regime and ensuring the effective learning and the achievement of the policy goals. Although it is suggested that procedural regulation is emphasised as a state instrument for inducement and social integration, rather than substantive law, the state must restrain itself from unnecessary intervention. As one form of 'regulatory trilemma' described by Teubner is creeping legalism, in cases that the law excessively controls other subsystems, the 'self-reproduction capacity' of such subsystem could be damaged.[144] The institutional design and the proper role of the state in the context of the EP framework would be further discussed in detail in later chapters.

VI. Conclusion

In conclusion, this thesis starts from an argument that the learning-based approach in reflexive governance is appropriate to apply in the area of environmental management due to its responsiveness to the characteristics of environmental problems. Then, the experimentalist functions of the EP regime will be assessed, leading to the inference that the EP can encourage environmental development. The next issue is that of institutional design for the EP regime to achieve successfully the goal of learning. Reinforcement of actors' capacities, enhancement of legitimacy and accountability, establishment of mechanisms for implementation and alignment of participants, and protection of fundamental values are four main elements in developing the EP institutional design. The role of the state is then required when a private entity exercises regulatory power, not as a rule controller but as a facilitator by providing rights and organising a process to ensure the protection of important values, so that the aim of full learning could be

[143] See Sabel and Zeitlin (n 51).
[144] Scott (n 7) 152.

achieved, followed by radical change in actors' behaviours and the creation of innovative measures for environmental development.

The effectiveness of the EP as a form of private regulation in environmental management may provide a solution in the cases when state regulation is inadequate or not willing to regulate. This hypothesis is to be further explored and interrogated throughout the thesis with a particular focus on the case of a developing country. While Chapter 2 studies EU environmental governance as an example of how the ideas of reflexive regulation can be implemented in a regulatory regime, the case of a developing country as Thailand will be examined in Chapter 4 to discuss whether the EP framework which adopts the ideas of reflexive regulation can also apply in a country where state environmental regulation has not been much developed and does not explicitly promote any proactive role of private actors.

CHAPTER 2:

EU Environmental Governance

The European Union (the 'EU') is often referred to as an exemplar of a regional union which can establish a regulatory system across nations, not only from an economic perspective but also from social and environmental perspectives. This chapter explores EU environmental governance as a case study for evolution of regulatory approaches in environmental regulation. The EU is well-known for its 'command-and-control' approach to environmental regulation in terms of permits and authorisation. However, the limitations of the traditional approach have been recognised, leading to growing interests in finding other regulatory approaches to supplement the conventional application of top-down regulation. Flexibility, collaboration, public participation, and mutual learning are key characteristics of the 'new' environmental governance which has been introduced to address the perceived shortcomings of the old, traditional form of regulation. The study of the evolution of EU environmental governance can provide useful knowledge on how command-and-control regulation could be adapted in response to the dynamic nature of environmental problems and how to design a regulatory regime to address compliance deficits which are a significant problem that usually occurs when the regime involves diverse actors, as well as how to encourage mutual learning in environmental decision-making. The lessons from studying EU environmental governance are useful for discussion on the implementation of EP regulation which embeds the concept of reflexive regulation in the context of a developing country in Chapter 4 as well as provide a model for developing the institutional design of the EP regime in Chapters 5 and 6.

This chapter begins with exploring the traditional command-and-control approach in EU environmental governance in order to identify the limitations that the 'new' governance has to address and then investigates the characteristics of 'new' governance. Section II studies the growing role of public participation in EU environmental governance, followed by observations on the significance of business actors, particularly financial institutions, under the European Green Deal scheme in Section III. Then, the problems of EU environmental framework are discussed in Section IV along with the institutional design required for this new governance. Finally, Section V concludes the lessons learnt from the study of EU environmental governance for the application of EP regulation in a developing country.

I. Limitations of the traditional command-and-control approach in EU environmental governance and the emergence of 'new' governance

Up to the 1970s, environmental problems were typically recognised as threats or harms to human health, and most environmental laws at this early time focused on reducing pollution or harmful substances.[1] The EU environmental regime applied the command-and-control approach, which involved taking measures such as prohibiting certain substances that posed health risks and the use of permit systems, to battle environmental problems.[2] The non-state actors which had significant roles at that time were experts, due to the 'strong technocratic orientation' of the Commission[3]. Public participation had not been emphasised until the introduction of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters on 25 June 1998; this Convention is usually referred to as the 'Aarhus Convention'. The issue of public participation in EU environmental governance is further discussed in Section II.

With the environmental standards set in terms of environmental quality requirements based on scientific knowledge, the EU's regulatory approach to environmental governance was 'top-down'.[4] However, as the membership of the EU grew, the community became more diverse. The differentiated situations of the member states make the application of uniform, top-down environmental standards ineffective in terms of compliance deficits. In other words, each member state does not have the same capacities to adopt the same environmental standards, not only because of unequal technological advancement but also because of economic and political disparities among member states.[5] The escalation of sanctions for non-compliance did not solve the situation where the state was unable to comply with the requirements. Such compliance deficits indicated the failure of the typical command-and-control approach in regional environmental governance.

[1] Ingmar von Homeyer, 'The Evolution of EU Environmental Governance' in Joanne Scott (ed), *Environmental Protection: European Law and Governance* (Oxford University Press 2009) 8.
[2] Maria Lee, *EU Environmental Law, Governance and Decision-Making* (Hart Publishing 2014).
[3] Von Homeyer (n 1) 9-10.
[4] ibid 10.
[5] Charalampos Koutalakis, 'Regulatory Effects of Participatory Environmental Networks: The Case of the "Seville Process"' in Thomas Conzelmann and Randall Smith, *Multi-Level Governance in the European Union: Taking Stock and Looking Ahead* (Nomos 2008).

Apart from the problems of compliance deficits, direct regulation with inflexible standards does not work effectively along with the dynamic nature of environmental problems. As there are uncertainties about risks concerned with some activities or substances, technological advance can later change the conditions or requirements for environmental management. Fixed top-down regulation does not create incentives for business actors to conduct further research and develop better measures for addressing environmental problems.[6] It is understandable if they simply follow the requirements as checklists for their business authorisation; there is no reason for them to increase their costs to find out innovative measures. This problem is commonly found in most command-and-control governance as discussed in Chapter 1. One key theme of experimentalism is to address the problems of which the solution is yet to be known and concerns considerable uncertainties, which the conventional command-and-control model fails to solve effectively. It is interesting to see how the EU has shifted its environmental regulatory approach to embrace the idea of mutual learning and collaboration along with its reliance on top-down, command-and-control approach as the fundamental mode of governance.

Although the development of environmental measures relies on scientific knowledge, the mere reliance on experts does not assure effective decisions as most information concerning pollution or environmental risks is from the regulated private actors. The idea that one regulatory institution has all required knowledge is implausible. The command-and-control approach can order the regulated entity to provide information, but without public scrutiny, 'regulatory capture' can occur in terms of information manipulation by the regulated.[7] Centralised, top-down regulation in EU environmental governance is, therefore, ineffective for addressing problems which require collaboration from several sectors, not simply limited to experts and regulated actors. Furthermore, the fact that the regulatory procedures, starting from standard-setting, monitoring, and finally enforcement, significantly require information from private actors can cause high administrative costs for state regulators to implement environmental standards.[8] Direct regulation is thus criticised for being 'less cost-effective than other approaches'[9].

[6] Katharina Holzinger, Christoph Knill and Ansgar Schafar, 'Rhetoric or Reality? 'New Governance' in EU Environmental Policy' (2006) 12 European Law Journal 403, 405 – 406.
[7] See Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory Strategy, and Practice* (2nd edn, Oxford University Press 2012) 43 – 45, 107 – 108.
[8] Von Homeyer (n 1) 10-11.
[9] Lee (n 2) 84.

Despite several flaws in the command-and-control approach in environmental governance, harmonised standards are still needed in the EU community.[10] Globalisation and economic competition require the elimination of trade barriers to establish a level playing field in the market. Environmental standards often become disguised trade barriers and can both create and hinder competitive advantage. Harmonised standards are therefore preferred to protect economic interests.[11] However, the EU has recognised the limits of the traditional fixed command-and-control environmental regulation and made a shift towards a more collaborative approach with the broader inclusion of stakeholders and more flexible regulation which supports decentralisation and encourage local adaptation.

The important change could be seen from the amendment of the Treaty Establishing the European Community ('TEC') by the Treaty of Amsterdam in 1997. Article 175 TEC[12], which replaces Article 130s, indicates more flexibility in environmental decision-making process as well as decentralisation by enabling Member States to impose stricter national environmental measures.[13] For the inclusion of stakeholders in an environmental decision-making process, the 5th Environmental Action Programme ('EAP'), which is an environmental policy framework for the European Union[14] adopted in 1992, emphasises the involvement of 'a mixing of actors and instruments at the appropriate levels' as referred to as the 'shared responsibility' concept.[15] Article 175 TEC as well as the 5th EAP reflect the gradual change

[10] Von Homeyer (n 1) 13.

[11] ibid.

[12] Article 175 TEC now becomes Article 192 of Treaty on the Functioning of the European Union ('TFEU').

[13] Stefani Bär and R. Andreas Kraemer, 'European Environmental Policy after Amsterdam' (1998) 10 Journal of Environmental Law 315, 326 – 328; Article 192.4 and 192.5 TFEU (ex Article 175 TEC) provides that

'4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:

- temporary derogations, and/or
- financial support from the Cohesion Fund set up pursuant to Article 177.'

[14] For further information about the EAP and the current EAP, see Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, 'Environmental Action Programmes' <www.bmu.de/en/topics/europe-international-sustainability-digitalisation/europe-and-environment/environment-action-programmes/> accessed 19 December 2020; European Commission, 'Environment Action Programme to 2020' <ec.europa.eu/environment/action-programme/> accessed 19 December 2020.

[15] Council of the European Communities, 'Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council on a Community programme of policy and

from the traditional command-and-control regulation towards the more flexible, collaborative approach, which is referred to as 'new' governance.

The emergence of new governance cannot be accurately pinpointed at a specific time as such new 'architecture' of governance has been gradually shaped during the mid-1980s and 2000 in response to the growing recognition of diversity among Member States and the limits of a traditional regulatory approach.[16] Importantly, the aim of new governance is not to replace but to supplement the command-and-control approach, moving toward a more informed top-down approach with more participation of stakeholders in decision-making processes.[17] The three themes of new governance as Maria Lee concludes are (1) flexibility, (2) collaboration, and (3) information and learning.[18] This section will explore how such themes are established in this new form of governance.

(1) Flexibility

As illustrated above, the fixed top-down environmental standards cannot effectively respond to the dynamic nature of environmental problems and the differentiated contexts among Member States, causing implementation problems. Flexibility is therefore an indispensable theme in the new governance approach. Flexible regulation can be established in various forms including erasing the boundary between compliance and non-compliance.[19] Applying open-ended terms in legislation can also provide flexibility in terms of indicating a range of factors to be taken into consideration with no definite prescription of an approach, allowing flexible application of such legislation in different situations.[20] This flexible model appears in EU environmental governance to address the problem of compliance deficits. With regards to the differentiated conditions, including economic and political contexts, among Member States, the model emphasising on 'flexibility in implementation' reduces the prescriptiveness in EU substantive environmental standards, leaving the decision on how to substantively implement

action in relation to the environment and sustainable development – A European Community programme of policy and action in relation to the environment and sustainable development' [1993] OJ C138/5 01-93.

[16] Charles F. Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 European Law Journal 271, 279.

[17] Lee (n 2) 85.

[18] See Lee (n 2) ch 7.

[19] See Lee (n 2) 87.

[20] Ibid.

the directives to the Member States' discretion.[21] An outstanding example of this form of flexibility in EU environmental governance is the EU regulatory framework for industrial pollution.

The key Directive for addressing industrial pollution problems is the Industrial Emission Directive ('IED')[22], which entered into force in 2011[23], replacing the Integrated Pollution Prevention and Control ('IPPC') Directive[24]. The core concept of the IPPC Directive, which is then passed on to the IED, is the application of integrated measures to holistically address industrial pollution in all media, namely soil, water and air and, therefore, overcomes the problems associated with 'media-specific, compartmentalised' regulation.[25] To control pollution at its source, the IED still relies on the command-and-control approach by using permit authorisation for industrial installations. The Directive requires the Member States to establish 'emission limit values' for polluting substances in the permit[26]; the emission limit values set the restriction for the emission level of particular pollutants during certain periods of time.[27] The emission limits indicate the application of performance standards in terms of setting the highest amount of pollution allowed for emission without specifically prescribing technological approaches to achieve such requirement.[28] However, the decision on the emission limits value is based on the principle of 'Best Available Techniques' or 'BAT'.

The IED provides the definition of BAT as 'the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and where that is not practicable, to reduce emissions and the impact on the environment as a whole.'[29] The open-ended terms of BAT allows more

[21] Joanne Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU' in G De Búrca, Joanne Scott, and G De Búrca, *Constitutional Change in the Eu from Uniformity to Flexibility?* (Hart Publishing 2000) 259.

[22] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

[23] European Commission, 'Industrial Emissions Directive' <ec.europa.eu/environment/industry/stationary/ied/legislation.htm> accessed 20 December 2020.

[24] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [2008] OJ L24/8.

[25] Bettina Lange, 'The EU Directive on Industrial Emissions: Squaring the Circle of Integrated, Harmonised and Ambitious Technology Standards?' (2011) 13 Environmental Law Review 199, 200.

[26] IED, art 14.1.

[27] IED, art 3(5).

[28] Scott (n 20) 260 – 261.

[29] IED, art 3(10).

flexibility than prescribing specific techniques and grants wide discretion to Member States to set the emission standards as appropriate for their domestic conditions. However, the IED does not let the Member States determine their permit conditions by simply referring to what they considered 'BAT' for their countries, or else each Member State would have no incentives to introduce better BAT, claiming that the BAT they are using is always the best. The IED requires the process of drafting 'BAT reference documents' or 'BREF' which includes the conclusions on BATs to apply in each case or sector.[30] Member States have to take the BAT conclusions into account in deciding on their BATs and permit conditions.[31] The BREF drafting process is further discussed in the following section of this chapter. Overall, the IED requirements for using BAT as references for setting emission requirements and other permit conditions indicate flexibility that can help addressing disparities among Member States but still prevent an irrational claim for BATs that takes advantages of such open-ended terms by requiring Member States to use their discretion in determining permit conditions with reference to the BAT conclusions. Flexibility also encourages research and development of new technologies that can reduce costs or can work better to meet emission requirements, since the permit conditions do not prescribe specific techniques but set the emission limit values with reference to BATs. In other words, an operator is incentivised to find the most cost-effective way to achieve emission requirements, encouraging the discovery of better BAT.

Although a permit mechanism under the IED signifies that the command-and-control approach remains a key regulatory instrument in EU environmental governance, the concept of BAT indicates the gradual transformation from the tradition controlling approach with uniform, top-down environmental standards to being 'less coercive' and recognising differentiated conditions among Member States.[32] The harmonisation is limited to requiring some factors to be taken into account, such as that the technology must be the most effective as practically available, and allow the Member State to have 'substantive discretion in implementation' or 'substantive flexibility'.[33] This flexibility can to some extent address the implementation problems in EU environmental governance.

[30] IED, art 13.
[31] IED, art 14.3.
[32] Charalampos Koutalakis, Aron Buzogany, and Tanja A Borzel, 'When Soft Regulation Is Not Enough: The Integrated Pollution Prevention and Control Directive of the European Union' (2010) 4 Regulation & Governance 329, 330 – 331.
[33] Scott (n 21) 260.

Such flexibility reflects the 'principle of subsidiarity', which was formally recognised in the Treaty of the European Union (TEU) or the Maastricht Treaty. The principle of subsidiarity allocates the competence for regulation to a Member State in cases where such regulatory areas do not require the exclusive competence from the EU and that a Member State has sufficient capacity to regulate in such regulatory areas effectively.[34] This principle helps prevent the risks of a Member State being overruled in uniform regulatory standards or the risks of political domination in decisions.[35] The principle of subsidiarity presumes that a Member State is in a better position to decide on the most appropriate measures, as a Member State is closer to its citizens than the EU.[36] The objective of the principle of subsidiarity is responsive to environmental regulation, for the problems and contextual conditions of each Member State are best known by its national government.

Noticeably, unequal capacities and different national conditions among EU Member States share some resemblance to the so-called 'North-South' divide, which usually refers to the difference between developed countries and developing countries.[37] The EU's acknowledgment that such disparities are the cause of compliance deficits leads to changes in their regulatory approach to embrace the idea of experimentalism. This new form of EU

[34] TEU, art 5 provides that

'1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.'

[35] Andreas Follesdal, 'Subsidiarity and Democratic Deliberation' in Eric Odduar Eriksen and John Eric Fossum (eds), *Democracy in the European union: Integration Through Deliberation?* (Taylor & Francis Group 2000) 86, 99.

[36] European Parliament, 'The Principle of Subsidiarity' <www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity> accessed 20 December 2020.

[37] See the Introduction Chapter of this thesis.

environmental governance reflects their attempt to regulate environmental management across the region, with recognition of diverse conditions of each member state. The Equator Principles (EP) regulatory regime is different from EU governance in various aspects, especially that the EP regime is private regulation while the EU is an international organisation for regional cooperation. The EU regulatory model cannot, therefore, apply directly to EP regulation. However, the EP framework is questioned in relation to its implication in a developing country of which the national conditions and state policies might not support its effectiveness in environmental management as much as in a developed country. The EU new governance can to some extent provide a case study of how reflexive governance helps addressing the problems of compliance deficits.

The fact that the EU adopts the concept of experimentalism and has made changes to its conventional command-and-control regulation to encourage more collaboration and public participation indicates the growing application of the learning-based approach to overcome some limitations of top-down regulation. If the EU relies on this idea to address the problems of compliance deficits resulted from disparities among Member States, the EP regime can potentially rely on its learning-based regulatory approach and experimentalism to raise environmental standards in a developing country despite the 'North-South' divide. This does not mean that the EP framework is completely perfect but that it can provide an alternative to regulate environmental management transnationally. Some further development and institutional design are required but, arguably, the EP regime has the potential to address environmental and social problems which state regulation, normally using the command-and-control approach and having boundary limitations, fails to solve.

However, the flexible environmental regulation approach may result in a race to the bottom. As there are significant rationales for harmonised environmental standards to prevent disguised trade barriers and to promote competitive advantage, the different levels of environmental standards might cause the relocation of industries from a Member State with stricter standards to another Member State with laxer environmental regulation.[38] To avoid the problems potentially caused by the principle of subsidiarity, the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which was later introduced in 1997, has elaborated the application of the principle by establishing procedures to control subsidiarity.[39]

[38] See Katharina Holzinger and Thomas Sommerer, '"Race to the Buttom" or "Race to Brussels"? Environmental Competition in Europe' (2011) 49 Journal of Common Market Studies 315.
[39] Lee (n 2) 21.

The EU solution by setting procedural constraints while allowing substantive flexibility can suggest the development of new governance which tends to apply procedural regulation rather than strictly setting substantive outcomes.

The 'race-to-the-bottom' thesis does not only apply to the EU region. The disparities among different countries or even among different states in a federal state have raised concerns that some governments might lower their environmental standards to attract foreign investments, especially when trade globalisation allows easier flows of investments across borders.[40] The EP framework, as a form of private transnational regulation, is assumed to address the 'race-to-the-bottom' situation, for it does not have boundary limits like the state, and to raise environmental standards of a country where state regulation is lax or inadequate. Thailand is taken as a case study where environmental standards have been lowered to encourage investments in development projects. The EU environmental governance which has embraced a more experimentalist approach and relies more on procedural constraints than setting substantive governance shares similar approach with the EP regime, which emphasises learning as well as relies on procedural regulation. EU environmental governance can therefore provide an interesting model for the application of experimentalism and procedural regulation in the EP framework to raise environmental standards in a developing country as Thailand. This issue is further discussed in Chapter 4.

(2) Collaboration

As outlined above, one notable limitation of the traditional command-and-control approach is that the approach is limited to gaining insights on environmental regulation from experts. One significant theme of the new governance approach is collaboration, which advocates wider participation of stakeholders in a decision-making process. Lee defines the term 'collaborative governance' as a forum for both public and private actors to work together on addressing a problem.[41] Jody Freeman explains this collaboration as not simply including consultation but further encouraging deliberation and interaction among participants.[42] As the issue of public participation in EU governance needs a whole section for discussion, this issue is further

[40] See Nita Rudra, *Globalization and the Race to the Bottom in Developing Countries*, (Cambridge University Press 2008); Kirsten H. Engel, 'State Environmental Standard-Setting: Is There a Race and Is It to the Bottom' (1997) 48 Hastings Law Journal 271.
[41] Lee (n 2) 89.
[42] Jody Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 University of California, Los Angeles Law Review 1.

explored in Section II of this chapter. This section basically enumerates the Seville process in the IED as an example of collaborative governance in EU environmental regulation.

The Seville process

While the IED vaguely provides the definition of BAT and assigns to each Member State the right to determine its own emission standards and permit conditions in compliance with the BAT principle, in order to control the national environmental standards, the 'BAT reference documents' ('BREFs') are drafted under the IED as reference for a Member State national authority to decide on BAT.[43] The process of drafting BREFs is done within the Technical Working Groups (TWGs) which must be composed of 'Member States, the industry concerned, non-governmental organisations promoting environmental protection and the Commission.'[44] The Seville process provides a forum for information exchange and deliberation among stakeholders from diverse sectors. It can be seen from the composition of TWGs that the Seville process is not purely technical as a fact-finding process but inevitably concerns 'interest representation'. In other words, negotiation for a balance between private and public interests could be expected in the Seville process.[45] The inclusion of non-state actors in the drafting process in BREFs not only provides a wide(r) range of information but also prevents the domination of industries in setting BAT reference standards in their interest.[46] However, there are still concerns that the environmental interest groups might have limited resources compared to the industries, and some data provided by the industries might require special expertise to understand.[47] Also, there can be a case where the resources might be extensively found online but some participants have limitations to their internet connection. Such potential problems indicate the necessity of institutional design and procedural requirements to establish mechanisms for preventing information manipulation, supporting full engagement of all participants in deliberation, and encouraging more public scrutiny. This issue is later discussed in Section IV.

[43] Scottish Environment Protection Agency, 'Best Available Techniques (BAT) reference documents (BREFs)' <www.sepa.org.uk/regulations/pollution-prevention-and-control/best-available-techniques-bat-reference-documents-brefs/> accessed 22 December 2020.
[44] IED, art 13.
[45] For further discussion, see Bettina Lange, *Implementing EU pollution Control: Law and Integration* (Cambridge University Press 2008) ch 5.
[46] Koutalakis (n 5).
[47] Lee (n 2) 117.

Overall, the Seville process under the IED promotes greater recognition of the significance of inclusive participation from both public and private actors and the shift from the traditional hierarchical model to be more collaborative. Deliberation among the actors concerned can optimise the environmental decisions so as to be responsive to politics, economics, and social conditions, introducing a new form of governance as 'context-oriented'.[48] This collaborative governance indicates the adoption of reflexive theory. The IED includes not only experts but also Member States, relevant industries and NGOs, in the process. Such encouragement of deliberation indicates respects for different views and conditions of other subsystems, treating the participants in a horizontal relation, rather than applying the conventional top-down approach, which is the key characteristic of reflexive governance as discussed in Chapter 1. This collaborative governance is also related to the third theme of new governance which is 'information and learning'.

(3) Information and Learning

The uncertain, dynamic nature of environmental problems is one significant reason for flexibility in environmental regulation, allowing continuous adaptation of measures to address the problems in a timely manner. In order to find out better solution, the idea of a learning process is thus emphasised in the new governance.[49] This form of 'learning' does not simply mean exchange of information but aims to promote the self-reflection of participants and influence behavioural changes.[50] This indicates a shift toward reflexive law in EU environmental regulation. As already discussed, the idea of democratic experimentalism, which is a form of reflexive law already explored in Chapter 1, appears in EU new governance in terms of more flexibility and collaboration. The uncertainty of proper strategy for addressing environmental issues effectively, as well as the polyarchic regulatory power in the EU, namely the Commission, the Member States and local authorities, are the factors that make experimentalist governance appropriate for EU environmental governance.[51]

[48] Holzinger, Knill and Schafar (n 6) 407 – 408.

[49] Edward Challies, Jens Newig, Elisa Kochskämper and Nicolas W. Jager, 'Governance Change and Governance Learning in Europe: Stakeholder Participation in Environmental Policy Implementation' (2017) 36 Policy and Society 288.

[50] Andrea Lenschow, 'Transformation in European Environmental Governance' in Rainer Eising, and Beate Kohler-Koch (eds), *The Transformation of Governance in the European Union* (Taylor & Francis Group 1999).

[51] Sabel and Zeitlin (n 15) 280.

Wider participation in a decision-making process and decentralisation support learning from a variety of actors as well as from multi-level governance.[52] Since information is the key for learning, and most information is in the hands of industries or private actors,[53] collaboration from non-state parties is substantially required for this learning-based governance. This third theme of new governance therefore has a close link to the second theme, as the learning requires 'substantive input' and deliberation among a wide range of actors.[54] A good example of experimentalist governance established in the EU community is the 'Open Method of Co-ordination' ('OMC') which emerged in the 1990s within the employment policy as a regulatory instrument for reconciling diversity among Member States towards common European objectives.[55] The OMC establishes a framework for consultation among representatives of the Member States with the Commission as a surveillant[56]. At the heart of the OMC is the institutionalised mutual learning process, which supports experience sharing from diverse national representatives and encourages the exchange of best practice.[57] The OMC, unlike most EU committees at that time which typically consisted of experts, applies the model of cooperation among autonomous national representatives in the light of joint decision-making, inferring less centralised governance.[58] Although there were critiques that the OMC could not actually create any significant modification of behaviour among Member States[59], the emergence of the OMC indicates the growing recognition of learning-based method in EU governance.

The shift from the traditional command-and-control approach to encourage more learning could then be seen in later EU environmental regulation, such as the Seville process under the

[52] Challies, Newig, Kochskämper and Jager (n 49) 290.

[53] The Commission acknowledged the problem that the regulatory authorities did not have sufficient resources for information required for an efficient control of chemicals. See Elizabeth Fisher, 'The "Perfect Storm" of REACH: Charting Regulatory Controversy in the Age of Information, Sustainable Development, and Globalization' (2008) 11 Journal of Risk Research 541, 547.

[54] Burkard Eberlein and Dieter Kerwer, 'New Governance in the European Union: A Theoretical Perspective' (2004) 42 Journal of Common Market Studies 121, 123.

[55] See J. Zeitlin, 'The Open Method of Co-ordination in Question' in J. Zeitlin and P. Pochet (eds) with L. Magnusson, *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (P.I.E. Peter Lang 2005) 22 – 23.

[56] European Union, 'Open Method of Coordination' <eur-lex.europa.eu/summary/glossary/open_method_coordination.html> accessed 22 December 2020.

[57] Eberlein and Kerwer (n 54).

[58] ibid 130.

[59] See Baldwin,Cave and Lodge (n 7) 392.

IED, which supports information sharing and learning among public and private participants[60], and the preparation and management of river basin management plans under the Water Framework Directive ('WFD')[61] which has a cyclical review of plans and requires the inclusion of stakeholders in such process, indicating 'learning and continual adaptation.'[62]

Among the increasing role of information in EU environmental regulation, the EU's chemicals regulation can exemplify a regulatory framework in which information plays a key role. The Registration, Evaluation, Authorisation and Restriction of Chemicals regulation, or as widely known in an abbreviated name as the REACH regulation[63], considers information as an important regulatory tool in controlling chemicals, since the disclosure of information allows public scrutiny and could raise the self-awareness of regulated entities, leading to their behavioral change to reduce environmental risks concerned with their chemical products.[64] Since chemical products are inevitably related with the market system, the REACH framework applies a market-based approach in combination with authorisation, which is a typically command-and-control approach.[65] Article 5 of the REACH regulation establishes duties for manufacturers and importers of chemicals to provide information about their chemicals during the process of registration before their chemical products can enter the EU market.[66] Such requirement for registration is referred to as the 'no data, no market' rule[67], for the submission of a 'technical dossier', which provides important information about the chemical substances including guidance on its safe use[68], is required for registration. The REACH framework relies

[60] Magnus Gislev, 'European Innovation and Exchange of Information about BAT' (European Conference: The Sevilla process: A driver for environmental performance in industry, Stuttgart, April 2000) 79 – 81.
[61] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.
[62] Challies, Newig, Kochskämper and Jager (n 49) 294.
[63] Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.
[64] Lee (n 2) 91.
[65] Elizabeth Fisher, 'The "Perfect Storm" of REACH: Charting Regulatory Controversy in the Age of Information, Sustainable Development, and Globalization' (2008) 11 Journal of Risk Research 541, 545.
[66] REACH Regulation, art 5 provides that 'Subject to Articles 6, 7, 21 and 23, substances on their own, in preparations or in articles shall not be manufactured in the Community or placed on the market unless they have been registered in accordance with the relevant provisions of this Title where this is required.'
[67] REACH Regulation, art 5.
[68] European Chemicals Agency, 'The Registration Dossier' <echa.europa.eu/regulations/reach/substance-registration/the-registration-dossier> accessed 23 December 2020.

on the concept that a chemical substance is not allowed to circulate on the market unless important information on its identification, safe use, and potential risks is sufficiently provided.[69]

Although setting the obligation for manufacturers or importers to provide information is not new and reflects the typical command-and-control measure, the REACH framework provides an example of how the market is applied to control the behaviors of manufacturers in the aspects of environmental and public health protection by requiring the disclosure of information as a condition to enter the market and then letting the public scrutinise such information. The public responses, especially from consumers, will put pressure on manufacturers to adapt their business to have more concerns on health risks from chemical substances; competition in the market can also incentivise private entities to incorporate the ideas of safety into their business, leading to further innovation.[70]

Fisher uses the term 'privatisation' of information to signify one feature of the REACH framework[71], for this regulatory regime shifted the usual burden of regulating bodies to collect information on chemicals to private entities which are usually a major source of such information. The obligation of private entities to provide information as required for registration internalises the 'cost of producing information about chemical safety' [72], representing the polluter pays principle. Without the obligatory requirements to provide information, private actors, as typical profit-driven corporations, do not have any interests in increasing their costs for generating safety information, and worse than that, the finding of health risks associated with their chemical products could cause negative impacts for their market.[73] The idea of setting the registration as a precondition for market access is therefore a measure that let the market system controls the behaviour of registrants after the information about their products are disclosed to the public, inferring a form of 'regulated self-regulation' in terms of setting the rules for the market and letting the market participants control one another.[74] Moreover, the duty to provide information provides an opportunity for an industry

[69] Veerle Heyvaert, 'The EU Chemical Policy: Towards Inclusive Governance?' (2008) LSE Legal Studies Working Paper No. 7/2008, 6.
[70] Fisher (n 65), 545.
[71] ibid 548.
[72] ibid.
[73] Lee (n 2) 207.
[74] See Christian Hey, Klaus Jacob, and Axel Volkery, 'Better Regulation by New Governance Hybrids? Governance Models and the Reform of European Chemicals Policy' (2007) 15 Journal of Cleaner Production 1859.

to realise the unknown risks concerned with their products and potentially lead to their self-reflection to have more safety concerns.[75]

Article 29 of the REACH regulation also establishes a Substance Information Exchange Forum ('SIEF') as a forum for potential registrants, downstream users, and relevant third parties to exchange data and collaborate to prepare the information as required for registration.[76] The SIEF can help generate comprehensive information and accommodate collaboration between private actors. However, the SIEF reflects the 'deeply privatised nature of chemical data production', which can be considered from a positive side in that it improves the efficiency in collecting comprehensive and updated data on chemical substances, but on the other hand, there are concerns over the credibility of information which is mutually produced by private actors.[77] An institutional design and procedural requirements for establishing transparency are thus needed to ensure that information can be accurately applied in learning-based governance. The REACH framework tries to prevent the problems of misleading information and underestimation of risks concerned with chemical substances by establishing the European Chemicals Agency ('ECHA') as an entity for 'hierarchical' oversight and encouraging 'peer' oversight from other registrants as competitors in a market.[78]

The significance of information in shaping registrants' behaviour through the market under the REACH regime shares some similarities with the idea of learning-based governance which emphasises empowering other actors by providing necessary information for deliberation, as explored in Chapter 1. However, while the IED's collaborative mechanism supports information sharing and mutual learning, a major flaw of REACH is its limited opportunity for public participation in the decision-making process. Although the registration orders the disclosure of information on chemical substances to the public, the REACH framework does not provide a mechanism for the public to request for third-party review of chemical authorisation.[79] The limits of public participation in the REACH framework deserve further investigation along with other frameworks, so there will be more discussion on this issue in

[75] See Matin Fuhr and Kilian Bizer, 'REACH as a Paradigm Shift in Chemical Policy: Responsive Regulation and Behavioural Models' (2007) 15 Journal of Cleaner Production 327.
[76] REACH Regulation, arts 29 - 30.
[77] Suzanne Kinston, Veerle Heyvaert, and Aleksandra Čavoški, *European Environmental Law* (Cambridge University Press 2017), 455.
[78] Lee (n 2) 208
[79] See Heyvaert (n 69) 13 – 15.

Section IV which is a particular section on public participation and institutional design in the EU environmental governance.

Nevertheless, the REACH framework exemplifies the application of information as a regulatory tool for facilitating private self-regulation through the market mechanism. Even though the REACH framework is still based on the command-and-control governance, in terms of setting conditions for registration and authorisation, it allows for a more active role of private actors in governance and reduces the role of the regulator to applying procedural control rather than substantive control. The enhancement of co-operation with private actors in regulating chemical substances implies the adoption of new governance which signifies gradual transformation of the traditional command-and-control approach which emphasises top-down regulation towards more learning-based governance.

The IED and the REACH framework can demonstrate how reflexive regulation can be applied in practice. EU environmental governance adopts the idea of experimentalism to address disparities among EU Member States and currently involves more diverse stakeholders in regulatory processes than its previous reliance on experts. Mutual learning is encouraged in response to uncertain, dynamic natures of environmental problems. With the EU's consistent efforts to place itself as the leader in sustainable development, the form of EU environmental governance as it has developed to embrace experimentalist concepts can considerably support the argument that reflexive regulation can supplement – and potentially overcome some limits of – the conventional command-and-control model in environmental governance and provide the basis for drawing lessons for EP implementation in a developing country, namely Thailand, which will be discussed in later chapters.

II. The growing importance of public participation in EU environmental governance

As discussed above, while the command-and-control approach remains the key regulatory measure in the EU's environmental governance, the hierarchical 'top-down' relationship has gradually been transformed to emphasise more mutual learning and to endorse the idea of democratic experimentalism. Public participation has therefore gained greater significance in environmental management. Information exchange and deliberative discourse among various actors, not limited to state actors, can provide a source for 'creativity and innovation' in

problem solving[80], which serves the aim of experimentalism. Also, the involvement of potentially affected parties in the decision-making process fulfils democratic values of the process, reflecting a 'democratic political contest' between representatives of different interests.[81] It is therefore useful to explore the role of public participation in EU environmental governance, so as to see how an experimentalist regulatory instrument can work along with the command-and-control regulatory framework.

One important Convention that must be explored in this section is the 'United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' or the 'Aarhus Convention' which emphasises the role of public participation in environmental governance and explicitly recognises procedural rights considered essential for ensure public engagement. After that, this section will discuss 'comitology' which is an important process in drafting and implementing EU laws, as comitology provides deliberation among national representatives of Member States which to some extent implies the adoption of experimentalist governance, despite some critiques on its legitimacy and politically intensive.

(1) The Aarhus Convention

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters or the 'Aarhus Convention' was adopted in 1998 and entered into force in 2001. This Convention is well known for its emphasis on procedural rights required for environmental governance, as referred to as the 'three pillars', which are (1) access to environmental information, (2) public participation in environmental decision-making, and (3) access to justice. These three rights are inter-related and provide mutual support.[82] The Council of the European Commission enacted the Decision to adopt and become a party to the Aarhus

[80] See Cisca Joldersma, 'Participatory Policy Making: Balancing between Divergence and Convergence' (1997) 6 European Journal of Work and Organizational Psychology 207.
[81] Ciaran O'Faircheallaigh, 'Public Participation and Environmental Impact Assessment: Purposes, implications, and Lessons for Public Policy Making' (2010) 30 Environmental Impact Assessment Review 19 ,23.
[82] Lee (n 2) 160.

Convention in 2005[83], followed by Regulation (EC) Number 1367/2006[84], known as the 'Aarhus Regulation', which sets out on how the EC implements the Aarhus Convention. In 2021, the Council of the EU agreed Regulation (EU) Number 2021/1767[85] to amend the Aarhus Regulation to strengthen public scrutiny and ensure the compliance of EU Member States with the Aarhus Convention. While Regulation (EC) Number 1367/2006 implements the Aarhus Convention at the EU level, setting the internal procedures of the EU institutions in accordance with the 'three pillars' of the Aarhus Convention, Directive 2003/4/EC[86] and Directive 2003/35/EC[87] have adopted the ideas of the first and the two pillars and were implemented in the national law of the EU member.[88] This means the Aarhus Convention has been implemented in the EU at two levels: the EU level and the member state level.

With regards to the first pillar, Article 4 of the Aarhus Convention establishes the general right of access to environmental information for the public on their request, without requiring any proof of their 'interests' or relation to such information.[89] Article 5 also sets out the obligation

[83] 2005/370/EC: Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

[84] Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

[85] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2021] OJ L356/1.

[86] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26.

[87] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC – Statement by the Commission [2003] OJ L156/17. Please note that this Directive does not only deal with the requirements for public participation under the Aarhus Convention but also amends the IPPC Directive.

[88] European Commission, 'The Aarhus Convention' <ec.europa.eu/environment/aarhus/legislation.htm> accessed 15 July 2022.

[89] Art 4.1 provides that 'Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

for public authorities to update and disseminate environmental information to the public in cases that there is 'any imminent threat to human health or the environment'.[90] While Article 4 provides 'passive' access to information in terms of setting out the duty of public authorities to provide information when requested, Article 5 obliges public authorities to disseminate environmental information 'on their own initiative', indicating 'active' access to information.[91] Access to information is a procedural right that supports transparency in decision-making; this concept is embedded in several pieces of EU legislation. Article 15 of TEU emphasises openness of the EU bodies with an aim for good governance[92]; the Access to Documents Regulation[93] was then adopted to set more detailed rules about access to documents. Such right is also established in Charter of Fundamental Human Rights of the European Union as 'right of access to documents.'[94] The recognition of the right to environmental information in the Aarhus Convention emphasises the idea that access to information is essential for transparency. The provision of this right enables public scrutiny of decision-making, encouraging careful thinking over issues which usually have wide impacts or concern high risks such as environmental management, and enabling potential affected parties to know the facts and the reasons for the decisions made.

For the second pillar, the idea of 'public participation in environmental decision-making' takes a further step from the first pillar which poses the public as recipient of information; this second pillar supports the more active role of the public in terms of participants in an inclusive decision-making process. Article 6 of the Aarhus Convention describes the obligations for public participation 'in decisions on specific activities', such as requiring a reasonable timeframe for the public to prepare for their effective participation in environmental decision-making process[95], and requiring the reasons for environmental decisions to be provided to the public.[96] The requirements under Article 6, which focus on decision-making for particular activities as listed in Annex I of the Convention, are related to the concept of Environmental

(ii) The information is already publicly available in another form.'

[90] Aarhus Convention, art 5(1)(c).

[91] See David Blundell, 'Access to and Collection of Environmental Information' in Charles Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Hart Publishing 2015).

[92] TEU, art 15.1.

[93] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

[94] Charter of Fundamental Rights of the European Union 2010.

[95] Aarhus Convention, art 6.3.

[96] ibid, art 6.9.

Impact Assessment ('EIA') which evaluates the environmental and social risks associated with a project. The Environmental Impact Assessment Directive (or the 'EIA Directive') was amended in 2003 to implement Article 6.[97]

With the Aarhus Convention, and its implementation by the EIA Directive, the public is consistently included in various phases of the decision-making process, allowing engagement of potentially harmed parties at an early stage. Such requirements encourage information exchange and mutual learning at the commencement of and throughout the whole decision-making process. However, the mere fact that the process includes a wide range of actors does not mean there is equal representation of interests[98] or that the system is free from bias. To ensure the actual and meaningful engagement of participants, a non-technical summary of information is required[99] so that participants can understand the technical information discussed in the process. This requirement indicates an effort to enhance the capacity of participants and to prevent the manipulation from industries which have more information and expertise. However, despite the non-technical summary provided, the nature of the EIA usually concerns highly technical information which might remain too difficult for non-specialists to understand and so to contribute to the decision-making. Some arguments suggest that the EIA Directive should emphasise more the role of environmental non-governmental organisations as competing expertise for balancing against industries.[100] This idea indicates the concept of proceduralisation in terms of setting procedural requirements and institutional designs for supporting environmental governance.

While Article 6 of the Aarhus Convention address 'specific activities', Article 7 applies to 'plans, programmes and policies relating to the environment'. Although Article 7 is merely one paragraph which simply makes links to some obligations for public participation under Article 6 to be applied to preparation of plans and programmes relating the environment, it provides a more proactive role for public participation. Article 7 sets out public participation in the strategic decision-making process which has wider impacts than the decision-making on a

[97] European Commission, 'Environmental Impact Assessment' <ec.europa.eu/environment/eia/eia-legalcontext.htm> accessed 5 January 2021.

[98] Studies on the consultation under the REACH framework conclude that openness is not necessarily linked to equal capacities in consultation. See T Persson, 'Democratizing European Chemicals Policy: Lessons from the Open Consultation on REACH' (2005) Paper Prepared for the Workshop on the Institutional Shaping of EU-Society Relations.

[99] Aarhus Convention, art 6.6(d).

[100] Lee (n 2) 169.

particular activity under Article 6. This provision solves the problem of the public being included too late in decision-making that their participation does not have significant impact on environmental management[101], in terms of requiring public participation at the stage of 'preparation of plans and programmes relating to the environment.'[102] It must be noted that although the title of Article 7 mentions 'policies relating to the environment', it does not impose the requirements of public participation for the 'policies' at the same degree as it requires for 'plans and programmes'.[103] Article 7 simply requires the party to 'endeavour to provide opportunities for public participation' as considered appropriate in preparing policies relating to the environment.

The obligation under Article 7 relates to the Strategic Environmental Assessment Directive (the 'SEA Directive')[104]. The SEA Directive imposes the obligations to conduct environmental assessment for any public plans and programmes which have potentials to cause significant environmental impacts. The EU has passed the SEA Directive with the aims to promote the idea of sustainable development; the idea of SEA is considered 'a further development' of an EIA in terms of incorporating environmental consideration into 'more mainstream decision-making.'[105] The SEA Directive has been introduced with an effort to 'fill the gap' of the EIA Directive, as the public participation in an EIA process might be too late to make a meaningful impact for addressing environmental problems.[106] In other words, the role of the public in an EIA decision-making is typically 'reactive' to a proposed project.[107] Also, at the time when SEA is taken, there can be more alternatives for consideration in reducing environmental harms than the stage of an EIA process where the project has been proposed and some alternatives are not available anymore.[108] Another advantage of SEA is that the cumulative and/or large-

[101] Jerzy Jendroska, 'Public Participation in the Preparation of Plans and Programs: Some Reflections on the Scope of Obligations under Article 7 of the Aarhus Convention' (2009) 6 Journal for European Environmental and Planning Law 495, 498.
[102] Aarhus Convention, art 7.
[103] Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 The Modern Law Review 80, 101.
[104] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.
[105] Elizabeth Fisher, Bettina Lange, and Eloise Scotford, *Environmental Law: Texts, Cases, and Materials* (2nd edn, Oxford University Press 2019) 737; see Jane Holder and Maria Lee, *Environmental Protection, Law and Policy: Text and Materials* (2nd edn, Cambridge University Press 2009) 597 - 604
[106] Lee (n 2) 171-174.
[107] ibid.
[108] Riki Therivel, *Strategic Environmental Assessment in Action* (Taylor & Francis Group 2010) 18.

scale environmental impacts of several projects can be addressed in an SEA process, but not in an EIA process where the decision is typically made on a project-by-project basis.[109]

However, there are some critiques that the SEA is highly abstract, since the tangible impact of an environmental plan or programmes cannot be easily seen, compared to the impact of a particular project. Participants might not effectively contribute to the decision-making process or might be dominated by some interest groups.[110]

Article 8 is another requirement which extends the inclusion of public participation process beyond the EIA decision-making which is project-based decision-making to the level of legislative decisions. The obligation to 'promote effective public participation' under Article 8 applies to the preparation of 'executive regulations and/or generally applicable legally binding normative instrument.' [111] Article 8 does not limit the incorporation of environmental consideration and public participation to environmental legislation but to any legislation which may have significant environmental impacts.

For the third pillar, Article 9 provides 'access to justice' to ensure that the rights established under the Aarhus Convention, namely access to environmental information and participation in environmental decision-making, can be enforced and that the remedies are provided.[112] Since the term 'environmental justice' has a broad definition, it must be noted here that 'access to justice' as the third pillar of the Aarhus Convention refers to a specifically procedural aspect, that of reviews and remedies.[113] Article 9 provides access to judicial review for a person whose right to environmental information is ignored or refused[114], and a person can challenge the

[109] ibid.
[110] ibid.
[111] Aarhus Convention, art 8.
[112] James Maurici, 'Access to Justice: Review Procedures and Costs' in Charles Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Hart Publishing 2015).
[113] The United States Environmental Protection Agency (EPA) defines 'Environmental Justice' as 'the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.' (United States Environmental Protection Agency, 'Learn about Environmental Justice' (22 September 2021) <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> accessed 10 December 2021.) The term 'environmental justice' has a meaning in a procedural aspect as the equal, 'meaningful' right to participate in environmental decision-making process and to request for remedies for their damage caused from any environmentally or health deteriorating activities. However, environmental justice can have a meaning in a substantive perspective in terms of fair distribution of environmental benefits and burdens. See Felicity Millner, 'Access to Environmental Justice' (2011) 16 Deakin Law Review 189.
[114] Aarhus Convention, art 9.1.

legality of a decision under Article 6.[115] Unlike the previous pillars, there is no specific Directive for implementing the obligation for access to justice; this obligation is incorporated in other environmental legislations such as Article 11 of the EIA Directive and Article 25 of the IED, which sets the obligation of the EU Member States to ensure access to a review process for a person who has a 'sufficient interest' or can maintain 'the impairment of a right'[116]

The emergence of the Aarhus Convention signifies the important role of procedural rights in environmental governance. Its implementation in the EU indicates the adoption of learning-based governance, as the Aarhus Convention emphasises public participation and establishes essential rights to support public engagement and deliberation with equal representation of interests. The growing role of the public in a regulatory regime infers the shift of EU environmental governance from the traditional command-and-control model to embrace more experimentalism and collaborative learning. The requirements under the Aarhus Convention and the EU implementation, namely the translation of technical information to be comprehensible for non-specialists, the inclusiveness of participating actors, and the balanced representatives of diverse interests, can provide an example of how thick proceduralisation, as explored in Chapter 1, can be organised to support learning processes in practice. This information can also provide a model for how to institutionalise public participation under the EP regime, which will be discussed in later chapters.

One outstanding innovation of the Aarhus Convention is the significant role of NGOs in promoting environmental protection. The definition of the 'public concerned' provided in the Aarhus Convention regards NGOs working for environmental protection as having an interest

[115] ibid, art 9.2.

[116] Article 11.1 of the EIA Directive provides that 'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.' Article 25.1 of the IED provides that 'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 [Access to information and public participation in the permit procedure - Researcher] when one of the following conditions is met: (a) they have a sufficient interest; (b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.'

in environmental decision-making.[117] While the Aarhus Convention requires its parties to provide access to information for the public, the requirements for public participation emphasise the involvement of 'the public concerned', not 'the public' in a general term. The inclusion of environmental NGOs in decision-making processes, as being considered 'the public concerned', can indicate the attempt of the Aarhus Convention to strike a balance against economic interests. However, such inclusion of NGOs does not guarantee that the public interests will be comprehensively or equally represented. Generally, there are risks of NGOs being captured or some active NGOs are excluded from a participation process. While the Aarhus Convention emphasises the role of NGOs, it does not sufficiently encourage 'general public involvement.'[118] EP regulation should therefore be aware of the potential that a participation process may not organise a proper balance of interests represented.

However, inclusion of the 'general' public in a decision-making process is difficult – if not impossible – in practice, in terms of costs and time-consuming. In addition to learning how the EU implemented the Aarhus Convention and support public participation, the design for participation processes under the EP regime should also recognise the concerns that participation processes might be overstated under the Aarhus Convention. There are still risks of capture and some interests being underrepresented. The institutional design of EP regulation should ensure that a participation process can encourage mutual learning among participants and prevent capture or imbalance of power among participants. This issue will be further discussed in Chapter 5 of the thesis.

(2) Comitology

Comitology is a process in the EU regulatory regime which supervises implementation of legislation by the Commission. Generally, the implementation of EU laws is the responsibility of a Member State; however, in some areas of regulation in which uniform implementation is required, the Commission is granted implementing powers and applies a comitology process to allow oversight from Member States.[119] The comitology committees are composed of one

[117] Aarhus Convention, art 2.5 provides '"The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

[118] Lee and Abbot (n 103) 87.

[119] European Commission, 'Implementing and Delegated acts' <ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_en> accessed 3 January 2021.

representative from each Member States and a Commission official as a chairperson.[120] The initial aim of establishing comitology was to deal with technical issues in the EU's agricultural policy but was then criticised for its lack of transparency and democracy, and for the role of the European Parliament which is considerably less involved, compared to the Council. The need to strengthen legislative scrutiny has caused the reform of comitology in the Lisbon Treaty, as enumerated in Articles 290 and 291 of the TFEU.[121]

The restructuring of comitology to increase the role of the European Parliament and the Commission in balancing with the power of the Council supports the idea of 'democratic level-playing field' but one significant point is that, despite the addition of check-and-balance process from the EU legislative body, this comitology reform does not include any roles for 'non-institutional stakeholders' in the procedure[122]. Since all members of the comitology committee, except the chairperson, are national representatives, with no inclusion of independent scientific body or non-state stakeholders, the committee undeniably represents itself as a political body, in the sense of representing Member States' interests. The composition of the committee creates problems of legitimacy accountability, for there are concerns that 'national interests, priorities and values' might overwhelmingly dominate public interests.[123] This is to be contrasted with the Seville process under the IED which includes a wide range of stakeholders including not only representatives of Member States but also industries and environmental interest groups. The composition of the committee in the Seville process has more diverse interests represented, permitting the Seville process to have better deliberative discourse than comitology[124]. However, some argue that comitology can establish legitimacy by providing mechanisms for 'deliberative supranationalism' through which participants contribute to the discourse by basing their arguments on the EU interests rather than their own national interest.[125] In other words, the concerns that comitology will turn out as negotiation for national interests are considered exaggerated as the participants are required to discuss and

[120] European Commission, 'Comitology' <ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts/comitology_en> accessed 3 January 2021.
[121] Ellen Vos, '50 years of European Integration, 45 Years of Comitology' (2009) 3 Maastricht Faculty of Law Working Paper.
[122] Corina Stratulat and Elisa Molino, 'Implementing Lisbon: What's New in Comitology?' (2011) Brussels: EPC Policy Brief April.
[123] Maria Lee, 'Experts and Publics in EU environmental law' in Damian Chalmers and Anthony Arnull, *The Oxford Handbook of European Union Law* (Oxford University Press 2015).
[124] Scott (n 21) 272.
[125] See Christian Joerges and Jurgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 European Law Journal 273.

conclude on the best interests of the EU as a whole. This argument still needs further tangible proof than a mere claim about the literal objectives of comitology, especially when comitology still has problems due to its lack of transparency in terms of not including the public in the process. The public can still have doubt about the so-called supranationalism in deliberation as long as there is no establishment of inclusive participation processes.

Overall, although comitology supports the idea of collaboration among Member States, its structure, despite the Lisbon Treaty, still has problems of legitimacy and accountability and casts doubt on its deliberative discourse. This can imply that, unless public participation is sufficiently embedded in a regulatory regime, the issues of legitimacy, accountability, and democracy of such a regulatory framework cannot be addressed. Although some new EU legislation such as the IED has set a process which broadly engages various stakeholders, a comitology procedure can still have a role in such a framework and potentially incorporate political interests into an environmental decision. For example, after the BREF is drafted in the Seville process, a comitology process is ultimately applied before the adoption of the BAT conclusions. Practically, the political influence in environmental decision-making can be expected, especially in risk assessment which does not limit consideration to merely environmental risks, but proceduralisation and institutional design are needed to ensure that environmental values will have sufficient weight, as least equal with other values, in such decision-making. Although there are technical changes to the comitology process including strengthening legislative scrutiny, the inadequacy of transparency mechanisms, especially that non-state stakeholders are not included in the process, has not yet been addressed.

III. The European Green Deal – Business and Environmental Development in the EU

The role of private actors in the 'new' environmental governance does not merely focus on public participation in environmental decision-making but also emphasises collaboration between the state and the business actors in environmental development. The European Green Deal was introduced in 2019 in a Communication from the Commission[126], setting a roadmap

[126] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal COM/2019/640 final.

for implementing the UN 2030 Agenda and Sustainable Development Goals (SDGs)[127] by transforming the EU's economy to be more sustainable. The underlying objective of the EU Green Deal is to make Europe climate neutral by 2050. Its Action Plan has been provided to 'boost the efficient use of resources' in EU economy, emphasising green technology and the circular economy.[128] The circular economy is a model of 'production and consumption' based on the idea of reducing waste by extending the life cycle of products as long as possible, such as by reusing, repairing, and recycling.[129] Noticeably, the EU Green Deal implies the changing direction of industries and business in the EU to be more environment-friendly at the starting point of their business structure.

Typically, emission of greenhouse gases, particularly carbon dioxide, is closely linked with the operation of various economic sectors, notably industries, buildings, transport, and agriculture.[130] In order to transform the EU economy to be more 'green', collaboration from all economic sectors is required. The European Green Deal adopts the idea of the green economy [131] as the new growth strategy. Sustainable investment is a key to encourage environment-friendly innovations and establish a more energy-efficient infrastructure. The European Green Deal Investment Plan (EGDIP), also recognised as Sustainable Europe Investment Plan (SEIP), has been launched to prepare the funding for such economic transition. There is an allocation of EU budget for mobilising sustainable investment.[132] However, the mere reliance on EU budgets for such tremendous changes in economic infrastructure is not sufficient; the collaboration of private banks and financial institutions is required. The InvestEU programme, which creates partnership among the European Investment Bank (EIB)

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[127] UN General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development* (21 October 2015) A/RES/70/1. The UN 2030 and SDGs will be further discussed in later chapters of this thesis.

[128] European Commission, 'A European Green Deal' <ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 11 February 2021.

[129] European Parliament, 'Circular Economy: Definition, Importance and Benefits' (3 March 2021) <www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits> accessed 10 December 2021.

[130] The EU Commission revealed in its factsheet on 11 December 2019 that the energy sector caused more than 75% of the EU's greenhouse gas emissions, while buildings caused 40% of energy consumption and transport constituted 25% of the emissions. See European Commission, 'What is the European Green Deal?' (11 December 2019) <ec.europa.eu/commission/presscorner/detail/en/fs_19_6714> accessed on 11 February 2021.

[131] The idea of the green economy will be examined in Chapter 4 in light of the environmental concept which recognises the needs of developing countries to achieve their goals of economic development.

[132] European Commission, 'The European Green Deal Investment Plan and Just Transition Mechanism explained' (14 January 2020) <ec.europa.eu/commission/presscorner/detail/en/qanda_20_24> accessed 11 February 2021.

Group and other financial institutions, will help provide financial support for mobilising public and private investment through the InvestEU Fund. The EU budget guarantees the InvestEU Fund, but an EU Member State can also voluntarily supplement support in some policy areas.[133]

The European Green Deal places sustainability 'at the heart' of investment.[134] The EU selective investment in green technologies can incentivise private actors to incorporate environmental considerations into their business operation and development. The significance of sustainable investment is therefore considered the key mobilisation towards the aim of climate neutrality in 2050, and private financial institutions play an important role in supporting economic transition in terms of boosting green innovations and encouraging energy-efficient business. This idea of the European Green Deal implies collaborative governance and shares similarities with the EP regulatory regime which assigns the role of regulator to private financial institutions to prevent environmentally devastating projects.

IV. The problems of the EU new environmental governance and the need for improved institutional design

As explored in the previous sections, the EU new governance approach was introduced to address the limitations of the traditional command-and-control approach in environmental governance. Its features emphasise flexibility, collaboration, and learning, with more inclusion of non-state actors, responding to the dynamic nature of environmental problems. The increasing role of private actors, both industries, which are typically regulated, and stakeholders, especially environmental interest groups, supports mutual learning in horizontal relation with participants, shifting the EU regulatory regime which traditionally applies a hierarchical model. Experimentalist governance could be observed in EU new governance. However, some critiques of this new form of governance reveal the problems that need institutional reform to ensure the actual learning.

This section selects some key problems of EU new environmental governance for discussion, which are the political nature of decision-making process, capacities of participants and stakeholders, legitimacy and accountability of the regime. Then, the suggestions for facilitators

[133] European Commission, 'The InvestEU Programme: Questions and Answers' (18 April 2019) <ec.europa.eu/commission/presscorner/detail/et/memo_19_2135> accessed 11 February 2021.
[134] Ursula von der Leyen, 'A Union that Strives for More: My Agenda for Europe' (16 July 2019) Political Guidelines for the Next European Commission 2019-2024.

and mediators required for deliberation and mutual learning will be explored in light of institutional design.

(1) Political Nature of Decision-making Process in EU environmental Governance

Although public participation has an increasing role in EU environmental decision-making in terms of information sharing and mutual learning, a decision-making process does not limit the consideration merely to environmental aspects; other competing values such as economic growth or infrastructure development might outweigh and divert the decision from environmental interests. The REACH Framework discussed above provides an interesting example of the EU's approach to risk regulation in environmental governance. Even though the risk assessment on chemical products requires scientific information with regards to environmental and health risks associated with such chemicals, other aspects are to be taken into consideration in the decision-making process. Risk regulation is not a merely scientific assessment but ultimately concerns the 'political determination' of the level of unacceptable risks.[135] Input information for the assessment is certainly scientific and technical but 'the final decision is political'[136]. The division between the phases for a technical process and a political process could be seen in the separation of risk regulation into two phases, starting from the 'risk assessment' which is a scientific-based process and then the 'risk management' which is a political process.[137] The scientific information about risks concerned with chemical products is the basis for decision-making, but the authority is not simply bound by scientific facts. The REACH framework does not require zero risk but the risks at an acceptable level; costs and benefits in other aspects, such as in economic terms, have to be taken into consideration to find out a proportional decision for risk management. The final decision therefore involves a value judgment and is undeniable political with balancing costs and benefits from all aspects.

The *Pfizer* case is a landmark case of the application of the precautionary principle, indicating the ultimate role of the Commission, which is a political body, not a scientific expert committee, in risk management. Scientific evidence is to be taken into consideration, but the risk management is inherently a political decision-making procedure; the Commission which has more political accountability is to perform the role of decision-maker. Scientific

[135] Maria Lee, 'The Precautionary Principle in the Court of First Instance' (2003) 14 King's College Law Journal 86, 89.
[136] Lee (n 2) 43.
[137] ibid 39-40.

committees might be consulted but their opinions do not bind the Commission whether to authorise or unauthorise the chemicals at issue.[138]

Even in the BAT framework for which the Seville process includes public participation, a comitology process is ultimately applied before the adoption of the BAT conclusions. Since comitology is criticised for its national representation and undeniably acts as a political institution, it seems that most environmental decisions in EU environmental governance are ultimately political. The political nature of the process is reasonably predictable, as decision-making should consider all relevant aspects, but institutional design is essential to ensure that environmental interests will not be overruled. In this regard, the EU has developed participatory processes to be more inclusive and has encouraged more public scrutiny to generate transparency of its governance. It can imply that the EU relies on establishment of transparency and accountability to ensure that the political dimension of its environmental governance will not irrationally pre-empt the environmental dimension. However, public participation and accountability are still problematic issues in EU environmental governance and require some development as will be discussed below.

(2) Capacities of Participants and Stakeholders

To achieve the aim of learning, it is important that participants must have capacities to contribute to the deliberation in decision-making. The problems that are often seen in environmental assessment is the technical information which usually require certain expertise to understand. Black's 'proceduralisation' is required in terms of 'translation' of information to ensure that participants fully understand the content of their discourse.[139] The requirements under the Aarhus Convention and the EIA Direction for providing non-technical information to the public concerned indicate an effort to address this problem. This translation is not only essential for full engagement of participants in a decision-making process but also required for information disseminated to the public as in the REACH framework. Since the objective of registration under the REACH requirements is to apply information as an instrument to encourage public scrutiny and pressure for safety standards of chemical products, the information should be translated for lay people to understand. The significance of translation

[138] See further comment in Lee (n 135), and Ellen Vos, 'Antibiotics, the Precautionary Principle and the Court of First Instance: Cases T-13/99 Pfizer Animal Health SA v Council of the European Union and T-70/99 Alpharma Inc. v Council of the European Union' (2004) 11 Maastricht Journal of European and Comparative Law 187.

[139] Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 33.

to the effectiveness of public participation highlights the role of regulating authorities to control the translation to be accurate and understandable for non-experts.

Further, the proportion of interest groups in a decision-making process is important for ensuring balanced representation. Since industries or business entities usually have more resources and expertise, allowing them to manipulate the decision easily as already discussed in the previous section, an unequal footing based on information in hand can obstruct the ability of other participants to contribute to deliberation, and might distort environmental consideration in decision-making [140] . The participation in decision-making must be institutionalised to have a balanced proportion of diverse interests. Although an individual can be a stakeholder in relation to an environmental decision, the process should include environmental interest groups which usually have expertise in environmental matters.

Nonetheless, the Aarhus Convention and its implementation have indicated efforts to enhance the capacities of the public to participate in environmental management by providing procedural rights essential for a public role in taking part in considering or reviewing environmental decisions.

(3) Legitimacy and Accountability

Legitimacy and accountability are important for the public acceptance of regulation. Institutional design is therefore necessary to ensure transparency of a regulatory system. Disclosure of information allows public scrutiny as well as provision of standing to enforce their rights and request for judicial review of a decision. Efforts to establish legitimacy and create accountability in EU environmental governance areparticularly exemplified in the Aarhus Convention which explicitly affirms procedural rights essential for public participation.

The democratic deficit is a long-debated problem of EU governance, since the Commission and the Council have been criticised for having wide powers while the European Parliament of which the members are elected has a more limited role despite its normative functions as the EU legislative body. The comitology reforms after the Lisbon Treaty to some extent increase the control of the European Parliament as already discussed; the enhancement of legislative scrutiny can increase democratic deliberation in decision-making, shaping the EU regulatory system to be more democratic and transparent.[141] However, the conditions for ‘blocking’ a

[140] Heyvaert (n 69) 22.
[141] See Stratulat and Molino (n 122).

Commission proposal are de facto restricted due to the limited timeframe and some controversial issues are politically sensitive that the committee cannot reach a qualified majority as required.[142]

The increase of participatory processes is an 'instinctive response' to problems of democratic legitimacy of EU governance.[143] Although there is more public engagement in a decision-making process such as the Seville process and more environmental rights for the public, such processes remain 'ad hoc and patchy' to establish legitimacy.[144] The REACH framework, despite its innovative measures in applying information as a regulatory instrument, is criticised for its restricted public participation. The role of the public in decision-making is usually limited to technical information on particular subjects.[145] While the objective of public participation should be mutual learning, which is not limited to sharing expertise and information but also to recognise their values and perception on potential risks and environmental management, the REACH framework simply treats public participation as source of information. A better procedural setting is required for encouraging actual engagement and more contribution of the public in a decision-making process.

Apart from the importance of public participation in a decision-making process in enhancing legitimacy, the right to access to justice set out in the Aarhus Convention can create accountability in regulatory decisions. Article 9 of the Aarhus Convention enables an environmental NGO to request review of the Commission's decision. However, the review under this Article is limited to an internal review, not a judicial review.[146] It must be noted that the standing for an individual to request a judicial review of the Commission's decision, even after the more relaxed requirements under the Lisbon Treaty, is still strictly limited to only a few limited situations, often rendering it impossible for individuals to request a judicial review.[147] Anyway, it is a different case for a judicial review to challenge any decision, act or

[142] Daniel Gueuen, 'The New Comitology Reform' (An EU Labyrinth Insider Speaking Out, 10 April 2017) <danielgueguen.blogactiv.eu/2017/04/10/the-new-comitology-reform/> accessed 6 April 2019.
[143] Lee (n 2) 182-183.
[144] ibid 187.
[145] ibid 217.
[146] Heyvaert (n 69) 16-17; see Case T-94/04 *European Environmental Bureau (EEB), Pesticides Action Network Europe, International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Worker's Associations (IUF), European Federation of Trade Unions in the Food, Agricultural and Tourism sectors and allied branches (EFFAT), Stichting Natuur en Milieu and Sevenska Naturskyddföreningen v. Commission* [2005] ECR II-4919.
[147] See Steve Peers and Marios Costa, 'Court of Justice of the European Union (General Chamber), Judicial review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit

omission of a member state as required under the Aarhus Convention, namely the requirements for public participation under Article 6; Article 9 explicitly requires the member states to provide the public 'access to a review process before a court of law' or before other 'independent and impartial' bodies under the law.[148]

(4) Institutional Design and the Procedural Setting for New Environmental Governance

The new governance reduces the role of centralised regulation and shaped the traditional command-and-control governance to encourage more mutual learning and allocate some regulatory role to private parties. Despite flexibility provided in this new form of governance, institutional structure and procedural requirements remain as constraints to ensure the effectiveness and efficiency of the measures to achieve the policy goals of environmental development. EU environmental governance does not completely abolish the command-and-control measure but applies the learning-based approach as a supplement to address the limits of the former, as could be seen from the IED which still applies a permit mechanism for controlling industrial emission and the REACH framework which remains significantly centralised and controls registration of chemicals and authorisation of some substances. However, the characteristics of new governance as flexibility, collaboration, enhancement of public participation, and emphasis on information, require reform of the institutional setting to facilitate the functions of this new governance to achieve its goal in mutual learning and behavioural change of some actors in order to address environmental problems.

Provision of procedural rights, as with the Aarhus Convention and its implementation, is simply an initial step; further development is still needed. The discussion of problems of new governance above can infer that a 'steering mechanism' for active deliberation[149] is essential for enhancing the capacities of participants and ensuring equal representation of interests as well as actual engagement of stakeholders. The procedural setting for transparency and accountability by increasing public participation and allowing public scrutiny could help establish legitimacy to obtain public acceptance of regulatory decisions. In cases where there is dissatisfaction with a decision, a grievance mechanism is required to reduce the centralised power and establish a counterbalance with the Commission's power.

Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission' (2012) 8 European Constitutional Law Review 82.

[148] Aarhus Convention, art 9.

[149] See Koutalakis (n 5).

V. Lessons for the application of the EP in a developing country

Although the status of EU environmental governance is different from EP regulation, for the former is a regional framework while the latter is private regulation, the study of EU environmental governance can provide useful ideas for developing the EP regime and support the argument that the EP framework can help in addressing environmental problems in a developing country. There are four lessons that can be drawn from EU environmental governance. *First*, EU governance serves as a notable example of the adoption of reflexive theory or a learning-based model as a regulatory approach for environmental governance. The EU applies a flexible, collaborative model to deal with the problem of compliance deficits and to respond to the dynamic nature of environmental problems of which the precise solution is still debated. Developing countries share some similarities with some EU members in the sense that their conditions, such as the lack of technologies and supportive structures for environmental development or inadequate knowledge about effective environmental management, might impede their compliance with international environmental standards. With reference to EU environmental governance as a regulatory model, it is reasonable to assume that the EP framework which adopts the concept of reflexive governance can apply to address environmental problems in a developing country.

Second, public involvement in regulation is significantly emphasised in the EU new governance. It can be observed that the EU does not deny the fact that its environmental decisions are ultimately political. However, the EU has developed regulatory transparency and established legitimacy by encouraging public scrutiny to ensure that environmental aspects will not be arbitrarily overruled by political dimensions. This suggests that public involvement is a key answer for building legitimacy and generating acceptance for a new regulatory regime. The institutional design of the EP framework therefore has to focus on how to ensure public involvement and stakeholder engagement. Special contexts of developing countries, such as culture and social values, should also be considered in designing the participation process. Chapter 4 will study Thailand's context to explore the factors that might impede the achievement of learning-based EP regulation. Further, EU environmental governance is criticised for not sufficiently providing a channel for individuals or local communities to request a judicial review. The EP framework should consider establishing accountability mechanisms which allow stakeholders and other affected parties to file a complaint by

themselves so as to support public involvement not only in the decision-making process but also at the post-decision stage, filling the gap which EU environmental governance has.

Third, even though the reflexive theory suggests the model of interdependence rather than the traditionally hierarchical relationship between regulators and regulatees, EU environmental governance still requires institutional settings and procedural rights to support the mutual learning. This implies EU's embracing of Black's proceduralisation. As can be seen from the REACH Framework, the ECHA has been established as an oversight body for preventing misleading information. While the EP framework established the EP Association, its responsibilities mainly include administration and policy development; the EP Association does not act as an overarching body to oversee the EP compliance. The structure and functions of EP regulation will be investigated in the next chapter, however, at this stage, a question can be raised on whether or not the EP institutional design requires any oversight body as in EU environmental governance.

Fourth, the emergence of the European Green Deal as well as the InvestEU programme indicates the growing significance of sustainable finance for helping in environmental development. The movement of big financial institutions to mobilise environment-friendly business together with the more proactive role of private actors from economic sectors will become the growing trend that influences, or put pressure on, other private financial institutions to become environmentally and socially responsible. This trend will presumably increase EP adoption and then make the EP standards widely applied across the world. However, the global trend alone will not guarantee growing adoption of the EP framework. The EP framework must be able to provide sufficient incentives for adoption and its institutional design and mechanisms should ensure that its goals for sustainable finance by relying on the concept of reflexive governance can be achieved. This leads to further exploration of the EP framework in Chapter 3, followed by the study of Thailand's context to discuss whether EP regulation can succeed in raising environmental standards and encouraging sustainable projects in a developing country in Chapter 4.

Overall, the current EU environmental governance has been evolved to be more reflexive, particularly in lights of experimentalism, and emphasises mutual learning as well as public participation while retaining the command-and-control approach as a core model of governance. The development of EU environmental regulation is a good model for how a typical regulator can adapt itself to function more as a mediator for information exchange and

deliberation and a facilitator for a learning process. Despite some further development of institutional design which is required, the current EU environmental framework provides an impressive sample of environmental governance that has changed to address its limitation.

CHAPTER 3:

The Equator Principles Framework as Environmental Regulation

This chapter examines the Equator Principles (EP) regulatory regime with the focus on its background, functions, and critiques. However, before discussing on EP regulation, the chapter begins with an examination of some international environmental principles and ideas which recognise the dilemma of developing countries as well as encourage involvement of private actors in environmental governance. Since the thesis argues that the EP framework can help in addressing the problem of differentiated environmental standards especially between developed and developing countries, a brief exploration of such principles and ideas will provide useful information for further discussion whether the EP framework can be successfully implemented and raise environmental standards in a developing country. Then, the background for the emergence of EP regulation will be provided in Section II before discussing the role of private financial institutions as regulators in this non-state regulatory regime in Section III. After that, Section IV studies the functions of the EP regulation in encouraging more sustainable investment and incorporating environmental and social consideration into its business decision. This section provides a summary of the EP framework and its development in response to public criticisms. The incentives that encourage, or the pressures on, private financial institutions to adopt the EP regime are then explored in Section V. After considering the voluntary-based application for the EP adoption, Section VI discusses the critiques of its accountability and the necessity for improving the EP institutional design. The analysis presented in this chapter will be developed further to suggest the institutional design for EP regulation to address the public concerns about its actual implication in promoting sustainable finance and raising environmental and social standards in later chapters.

I. International Environmental Principles and Developing Countries

As outlined in the Introduction Chapter of this thesis, there has been development of several international environmental principles which emphasise the idea that economic development can be achieved along with the environmental goals. Such principles and concepts can imply international recognition of the dilemma of developing countries as well as international efforts to bridge the North-South divide. This section selects two important concepts to examine: sustainable development and the green economy. The study of these two concepts can manifest

the international efforts to promote global partnership and encourage cooperation from developing counties to address environmental problems. The role of private actors has also received growing significance in environmental regulation as evidenced by the introduction of some policy measures which encourage more proactive role of private actors in environmental regulation. Such development of principles and ideas has emphasised that economic development can be done along with environmental protection, and therefore, to some extent, supports the argument for potential success of the EP framework, which is private regulation introduced by commercial banks and private financial institutions, in addressing environmental problems.

(1) Emergence of 'Sustainable Development'

When environmental problems were explicitly recognised at the global level for the first time in 1972 at the United Nations Conference on the Human Environment in Stockholm, the importance of the environment to humans was emphasised; however, it was not until 1987 that the term 'sustainable development' was introduced in the Report of the World Commission on Environment and Development, or the Brundtland Report, in 1987[1], which provided the groundwork for the Rio Declaration on Environment and Development 1992.[2] The concept of sustainable development reconciles the necessity for economic development with the importance of upholding social values and protecting the environment. To develop a country in a sustainable way, which would create long-term benefits to the nation, environmental protection together with social equality should be taken into consideration as well.

The principle of sustainable development has significant influence in reconceptualising the goals of development, emphasising the importance of environmental and social dimensions rather than merely focusing on economic development. The adoption of this principle has changed the direction of government policies to consider development in all its dimensions, balancing environmental and social development against economic development. However, the three dimensions of sustainability – economic, environmental and social – have been criticised as economic development remains the dominant dimension in the development laws,

[1] Report of the World Commission on Environment and Development: Our Common Future (1987).
[2] Rio Declaration on Environment and Development, UN Doc A/CONF.151/6/Rev.1 (1992). See Principles 1, 3, and 4.

regulations and policies of most states[3], and the goal to eradicate poverty has persistently formed an overarching policy framework for international global governance, since the Rio Declaration in 1992, the Millennium Development Goals (MDGs)[4] in 2000, and the Sustainable Development Goals (SDGs) in 2015.

The term 'sustainable development' makes its first appearance in the Brundtland Report 1987 with its definition as the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs', introducing the ideas of inter-generational and intra-generational justice. This definition is considered anthropocentric in terms of focusing on human needs[5], considering the values of the environment as serving humans rather than protecting the environment for its intrinsic value.[6] It should be also noted that the language used in the Brundtland report which emphasises the 'needs', apart from implying anthropocentrisim, arguably indicates top-down development design.[7] The term 'needs' implies a very different meaning in comparison with the term 'rights' applied in the Stockholm Declaration, since the term 'rights' empowers people to exercise and defend their own rights rather than letting the state decide what are human 'needs'.

The concept of sustainable development later appeared in the Rio declaration 1992 with more attention to rights and environmental justice, as Article 10 recognises procedural rights required for ensuring environmental justice, which include access to information, participation in a decision-making process, and access to justice. Article 10 was then developed to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters or the Aarhus Convention 1998, marking an advanced step in establish inclusive decision-making in

[3] Margherita Pieraccini and Tonia Novitz, 'Sustainability and Law: A Historical and Theoretical Overview' in Margherita Pieraccini and Tonia Novitz (eds) *Legal Perspectives on Sustainability* (Bristol University Press 2020) 25.

[4] United Nations Millennium Declaration 2000.

[5] ibid 17.

[6] Most environmental laws have been considered anthropocentric, as the value of the environment was made linked to human interests. The concept of ecocentrisim has been lately introduced to underline the intrinsic value of the nature and considered humans as a part of the nature. This concept could be seen in the Convention on Biological Diversity, the World Charter for Nature, and the Convention on the Conservation of European Wildlife and natural Habitats. For further details on the development of ecocentrism in environmental law, see Susan Emmenegger and Axel Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' (1994) 6 Georgetown International Environmental Law Review 545.

[7] Pieraccini and Novitz (n 3) 17.

environmental areas.[8] Although the Aarhus Convention has a limited number of signatories, mostly in the European region, it provides a guideline for other nations to develop procedural rights required for environmental governance. Moreover, along with the introduction of sustainable development in the Rio Declaration, another outcome of the Rio Conference is Agenda 21[9], which provides an action plan to achieve sustainability. The first section of Agenda 21 focuses on achieving the goals in social and economic dimensions in term of eradicating poverty, while the environmental dimension is separately considered in the second section on conservation and management of resources for development. The separated consideration of the three dimensions is different from the later environmental measures which will be discussed below in terms that the later measures integrate the three dimensions and consider them as a whole.

Overall, the concept of sustainable development has developed since its first appearance in the global forum in 1992 to later international goals. The scope and meaning of this principle have evolved over time, from a simple definition contained in the Brundtland Report 1987 as emphasising inter-generational and intra-generational justice, to suggest the importance of participation and inclusive decision-making process in Rio Declaration 1992, and then to the recognition of the three dimensions of sustainable development in the World Summit on Sustainable Development 2002.

(2) The Idea of the 'Green Economy'

In order to achieve a win-win situation for economic growth without degrading environmental and social quality, the idea of the 'green economy' has been discussed since the Rio Conference in 1992, as reflected in Principle 8 of the Rio Declaration which encourages the reduction of unsustainable production and consumption and Principle 16 which suggests the internalisation of environmental costs.[10] However, it was not until the financial crisis in 2008 that the concept of the green economy received extensive attention. The subprime mortgage crisis in 2008 caused one of the most severe global recessions, followed by high rates of unemployment.[11]

[8] ibid 18 – 19.

[9] *Agenda 21, Rio Declaration, Forest Principles* (United Nations Conference on Environment and Development, 1992).

[10] United Nations Division for Sustainable Development, 'A Guidebook to the Green Economy' (2012) <sustainabledevelopment.un.org/content/documents/GE%20Guidebook.pdf> accessed 11 August 2020.

[11] United Nations Environment Programme, 'Global Green New Deal: Policy Brief' (2009) <wedocs.unep.org/bitstream/handle/20.500.11822/7903/A_Global_Green_New_Deal_Policy_Brief.pdf?sequence=3&amp%3BisAllowed=> accessed 11 August 2020.

Unfortunately, the financial crisis was not the only crisis the world was facing at that time; the severe impact of climate change was recognised, as the levels of greenhouse gas has been continuously rising, causing higher temperature, rising sea levels, erosion and a number of natural disasters.[12] While governments needed to launch policy measures to stimulate economic recovery, the idea of the green economy has then been revived as an appropriate solution to address both economic and environmental crisis at the same time.

The United Nations Environmental Programme (UNEP) supports the green economy as a new economic paradigm to encourage investment in 'green' development, namely low-carbon production and environment-friendly technologies. This new economic paradigm has been suggested as a solution to restore the world economy in a sustainable direction, encouraging technological development and innovation to be less dependent on carbon fuel. In 2009, the UNEP released its stimulus plan called a 'Global Green New Deal' proposing policy measures to recover economic growth by requiring governments to allocate their stimulus spending on green development with the three goals, which were (1) to rebuild the world economy, (2) to eradicate poverty, and (3) to reduce carbon dependency and environmental degradation.[13] The concept of the green economy has been revived and received significant attention in Rio+20 Conference in 2012 as a means to achieve sustainable development.[14] However, the Conference did not provide a precise definition of the green economy. The concept of the green economy is usually referred to the UNEP's definition as the economy which improves 'human being and social equity, while significantly reducing environmental risks and ecological scarcity', emphasising less dependency on carbon and efficient use of natural resources.[15]

This idea could attract support from both business and governments since it can provide policy measures for addressing both unemployment and environmental problems,[16] allowing economic growth and investment to continue while maintaining environmental and social

[12] ibid.
[13] United Nations Division for Sustainable Development (n 10) 8.
[14] Ulrich Brand, 'Green Economy – the Next Oxymoron? No Lessons Learned from Failures of Implementing Sustainable Development' (2012) GAIA—Ecological Perspectives for Science and Society 28.
[15] United Nations Environment Programme, 'Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication - A Synthesis for Policy Makers' (2011) <sustainabledevelopment.un.org/content/documents/126GER_synthesis_en.pdf> accessed 11 August 2020.
[16] Eleonore Loiseau, Laura Saikku, Riina Antikainen, et al, 'Green Economy and Related Concepts: An Overview' (2016) Journal of Cleaner Production 361.

quality.[17] However, it can be observed that there have not been any precise quantitative tools to measure the 'green' of the economy yet. The UNEP simply provides guidance for designing indicators to assess the policies.[18] The economic policies remain under the jurisdiction and, therefore, the discretion of each nation's government. Although the idea of the green economy offers a new scheme for national economic policies towards sustainable development, it is difficult to measure a country's success in achieving greening its economy.

It is generally recognised that a green economy will transform the eco-industry from 'downstream environmental protection' to be environment friendly from the production stage by encouraging low-carbon or resource-saving technologies.[19] However, there are concerns that the concept of the green economy indicates the 'economisation' of sustainability, with significant reliance on technological development and market mechanisms in terms of green production and consumption, framing the solution for environmental problems to low-carbon transition.[20] This could demonstrate the instrumentalism of environmentalism, reflecting the separation between humans and nature, with humans' control of nature rather than respecting the intrinsic value of nature.[21] Private actors have important roles in the green economy since this system requires their research and development of green innovation.

The significant role of the private sector in promoting sustainable development in this new economic paradigm has raised concerns by some developing countries due to their lower capacities to support the same standards of green practices as developed countries and to compete in the green market.[22] This might make it harder to eradicate poverty in their countries. However, it is important to recognise the role which private actors can play in promoting sustainability. The concern that the governments in developing countries cannot provide sufficient support might not significantly affect the development of the green economy in the current world where globalisation and trade liberalisation allow the transnational flow of

[17] United Nations Environment Programme (n 11).

[18] United Nations Environment Programme, 'Using Indicators for Green Economy Policymaking' (2014) <www.un-page.org/files/public/content-page/unep_indicators_ge_for_web.pdf> accessed 10 February 2022.

[19] Olibia Bina, 'The Green Economy and Sustainable Development: An Uneasy Balance?' (2013) Environment and Planning C: Government and Policy 1023, 1024.

[20] See ibid; Shi Qingqi, 'On the Development of Green Economy' in Ness David, *The Green Economy and its Implementation in China* (Enrich Professional Publishing 2011).

[21] Bina (n 19) 1039.

[22] Shawkat Alam and Jona Razzaque, 'Sustainable Development versus Green Economy: the Way Forward?' in Shawkat Alam, Sumudu Atapatu, Carmen G. Gonzalez, and Jona Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 615 – 616.

financial resources and technologies. Private financial institutions can help in raising environmental standards in developing countries in terms of setting environmental requirements for loan approval, encouraging business entities to develop more sustainability in their business performances. With the trend towards a green economy, the governments in developing countries will undoubtedly support the greening of private entities as it relieves the state's burden in creating a green economy. The idea of the green economy and its implication in developing countries implies the significance of financial institutions in environmental governance, and can therefore support the suggestion for considering the EP framework as a regulatory alternative in environmental governance.

Although the documents on the green economy directly mention the significance of sustainability as a holistic term including the three dimensions, a number of references are predominantly made to the economic dimension, raising concerns that this concept might 'dilute' the focus on other dimensions of development and return to the narrow focus on economic pillar.[23] However, the recently released SDGs have reclaimed other dimensions. While the MDGs place much weight on economic development, with merely one goal for environmental sustainability, the SDGs has revived the idea of integrated development. Environmental goals have been incorporated with other dimensions, indicating the interlinkage among economic, social and environmental policies, indicating the comprehensive consideration of all dimensions as a whole rather than fragmented pillars as before. For example, although the target to establish sustainable food production systems can be categorised as a social policy goal, it is implicitly linked with environmental dimensions in the sense that good environmental quality is required for food security as environmental degradation can affect food production.[24] The 2030 Agenda which contains the SDGs is known for its integrated approach in balancing all three dimensions of sustainability. The concept of global partnership can also be observed from the 2030 Agenda, since it does not only re-connect all three pillars in its SDGs but also recognises the significance of the cultural context to be considered along with the three dimensions of sustainable development.[25] As the MDGs were criticised for being captured by the North, the SDGs explicitly acknowledge the diversity of

[23] Pieraccini and Novitz (n 3) 21.

[24] Mark Elder and Simon H. Olsen, 'The Design of Environmental Priorities in the SDGs' (2019) Global Policy 70, 73.

[25] Margherita Pieraccini and Tonia Novitz, 'Agenda 2030 and the Sustainable Development Goals: "Responsive, Inclusive, Participatory and Representative Decision-Making"?' in Margherita Pieraccini and Tonia Novitz (eds) *Legal Perspectives on Sustainability* (Bristol University Press 2020) 41.

cultures and encourage inclusive participation of local communities rather than merely relying on expert opinion as the MDGs.[26]

The 2030 Agenda also gains supports from the Addis Ababa Action Agenda, which is the result of the Third International Conference on Financing for Development, providing guidelines for financing sustainable development and incorporating environmental consideration into financial decision-making.[27] So far, the idea of green economy has been developed from a broad concept, revived in the Rio+20 Conference as a pathway to sustainable development. This idea now supplements sustainable development by suggesting an integrated approach for balancing the three dimensions of sustainability and encouraging inclusiveness and global partnership.

The idea of the Global Green New Deal once proposed by the UNEP in 2009 has been later developed at the regional level. For example, the European Union's 'European Green Deal 2020' provides an action plan for members to establish a low-carbon economy and delink economic development from environmental degradation.[28] The idea of financing green industries also came to the United Nations Conference on Trade and Development (UNCTAD) and the Trade and Development Report 2019 on financing a global green new deal indicates the recognition of the widespread adoption of green economy and that developing countries should prepare to transform their economic paradigm and infrastructure to be more resource-efficient and encourage investments in clean energy.[29] The preparation for a green economy has also spread to private financial institutions. A group of banks and supervisors has established a Network of Central Banks and Supervisors for Greening the Financial System (NGFS) in 2017 to support the role of the financial system in cooperating with other institutions to achieve environmental sustainability and promote low-carbon development.[30] Such business movement indicates the reconceptualisation of private financial institutions to become more

[26] ibid 43.

[27] See the Addis Ababa Action Agenda of the Third International Conference on Financing for the Development (2015)

[28] European Commission, 'A European Green Deal' <ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 12 August 2020.

[29] Richard Kozul-Wright, 'How to finance a Global Green New Deal' (United Nations Conference on Trade and Development, 7 November 2019) <unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2229> accessed 12 August 2020; see also United Nations Conference on Trade and Development, 'Trade and Development Report 2019: Financing a Global Green New Deal Overview' (2019) <unctad.org/en/PublicationsLibrary/tdr2019overview_en.pdf> accessed 14 April 2022.

[30] Network of Central Banks and Supervisors for Greening the Financial System, 'Origin and Purpose' (13 September 2019) <www.ngfs.net/en/about-us/governance/origin-and-purpose> accessed 13 August 2020.

proactive in environmental development, and noticeably supports the idea of EP regulation which poses private financial institutions as regulators.

II. Background of the Equator Principles Regulatory Regime

The Equator Principles (EP) are a form of private regulation which incorporates environmental and social considerations into the risk management of private financial institutions. In the past, companies whose business operations pollute the environment or exploit natural resources have been the main objects of public condemnation and the target of environmental laws.[31] Meanwhile, financial institutions, while not directly damaging the environment on their own, contribute considerably to environmental degradation since their financial support allows hazardous activities or environmentally devastating projects to be initiated and operated. Until the late 1980s, financial institutions generally acted in a way that suggested that environmental and social issues were irrelevant to their business. It was external pressures, particularly from NGOs' campaigns in the late 1980s and the early 1990s, that caused the World Bank to reform its policies in accordance with the concept of sustainable development.[32] The International Financial Corporation (IFC), which is a lending arm of the World Bank Group, particularly focusing on financing and supporting the private sector in developing countries[33], mainly relied on project viability and rates of return to consider financing a project until in the early 1990s the IFC followed the World Bank's procedure in terms of including environmental specialists in the due diligence process.[34]

[31] For examples, see Marc Gunther, 'Under Pressure: Campaigns that Persuaded Companies to Change the World (The Guardian, 9 February 2015) <www.theguardian.com/sustainable-business/2015/feb/09/corporate-ngo-campaign-environment-climate-change> accessed 10 January 2020.

[32] Oren Perez, 'The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance' (2007) Bar-Iland University Law School Working Paper No. 07-3.

[33] International Finance Corporation, World Bank Group. 'About IFC' (2015) <www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new> accessed 7 January 2020.

[34] Christopher Wright, 'Setting Standards for Responsible Banking: Examining the Role of the International Finance Corporation in the Emergence of the Equator Principles' in Frank Biermann, Bernd Siebenhuner and Anna Schreyrogg (eds*) International Organisations in Global Environmental Governance* (Routledge 2014).

The NGO campaigns asked the international financial institutions to pay more attention to 'social, environmental, and human rights issues' in making their lending decisions.[35] Since a number of developmental projects are often undertaken in developing countries where environmental and social standards are usually lax or ineffective in preventing environmental degradation, the World Bank Group, in response to public pressures, set its own environmental standards for assessing the risks associated with a project. In 1998, the World Bank launched the Pollution Prevention and Abatement Handbook (PPAH) to provide guidelines for environmental assessment of World Bank projects.[36] A borrower is required to comply with such standards as a precondition of lending. This may result in a borrowing country adhering to higher environmental and social standards than the usual compliance with its domestic laws. However, the PPAH did not constitute any legally binding commitment for private financial institutions, and since procedures of environmental assessment normally increased the operating costs of a project, most private financial institutions did not find reasons to voluntarily adopt the PPAH[37] until later facing intense public pressure.

In the 1980s and 1990s, the World Bank and the International Monetary Fund (IMF) launched the structural adjustment programmes (SAPs) which played a key role in the privatisation of state-owned industries.[38] Such privatisation led to the eventual decline of public funds in operating the business and increased the role of private finance as the new source of loans.[39] Starting in 1997, NGOs turned their attention to private financial institutions as the new 'power players'[40], especially after the Three Gorges Dam incident in China. The Three Gorges Dam was a project to build a large dam across the river in China for a hydroelectric plant. The construction was blamed for causing significantly adverse impacts on the environment, particularly from its chemical wastes and destruction of natural sites, and resulting in forcing

[35] John M Conley and Cynthia A Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) 33 Law and Policy 542, 558.
[36] Robert F Lawrence and William L Thomas, 'The Equator Principles and Project Finance: Sustainability in Practice?' (2004) 19 Natural Resources and Environment 20, 21-22.
[37] ibid 22.
[38] Conley and Williams (n 35) 543.
[39] Douglas Sarro, 'Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance' (2012) 13 German Law Journal 1525, 1528.
[40] Niamh O'Sullivan and Brendan O'Dwyer, 'Stakeholder Perspectives on a Financial Sector Legitimation Process: The Case of NGOs and the Equator Principles' (2009) 22 Accountaing, Auditing & Accountability Journal 553, 662; Conley and Williams (n 5) 558.

local people to move out from their living places.[41] Considering the risks of adverse environmental and social impacts, the World Bank denied a loan for this project. However, the Three Gorges Dam was able to find financial supports from private financial institutions, which were not bound under the World Bank's environmental policies and guidelines. Since private financial institutions still decided to approve loans for the project with less attention to its environmental and social risks, the construction was financially practicable.[42]

Private financiers have important roles in business operations; in most cases, a large development project, which usually causes significant environmental and social impacts, relies on loans from private financial institutions to start or expand the construction. If such financial institutions incorporate environmental and social consideration into their decisions on project finance in a meaningful way and reject loans for harmful projects, environmental and social damage can be prevented. This has led to the call for private financing institutions to play a more active role in encouraging sustainable development, as they should be held responsible for environmental harms concerned with the projects they financially support. The term 'unseen polluters' has been applied to the financiers, for their carbon footprint does not actually reflect the environmental impacts involved in their business but the loans they provide for their clients allow the operation of hazardous projects and indirectly cause environmentally adverse impacts.[43]

A number of NGOs' campaigns have been launched to raise public awareness and put pressure on private commercial banks. One of the most influential campaigns was run by the Rainforest Action Networks (RAN) which began in 2000 and targeted Citigroup as being the large financial supporter for fossil-fuel industries and several polluting projects. The campaigns included customer boycotts, personal naming and shaming, and disorderly protests, causing the Citigroup to take an action in setting its environmental policies and standards to relieve the public uproar.[44] The collaboration of NGOs to put pressure on private financial institution was intense and led to the Collevecchio Declaration at the World Economic Forum in January 2003.[45] The Collevecchio Declaration, which was drafted and endorsed by over 200 civil

[41] See Britannica, 'Three Gorges Dam' (*Encyclopedia Britannica*, 27 September 2021) <www.britannica.com/topic/Three-Gorges-Dam> accessed 15 January 2022.
[42] James A Snyder and Arthur B Muir, 'Green Wave or Greenwash?' (2005) The Secured Lender 32, 36.
[43] Banjamin J Richardson, 'Financing Sustainability: The New Transnational Governance of Socially Responsible Investment' (2007) 17 Yearbook of International Environmental Law 73, 75.
[44] O'Sullivan and O'Dwyer (n 40) 562.
[45] ibid 561, 563.

society organisations[46], emphasises how financial institutions can contribute to sustainable development and asks for their commitments to six principles, which are (1) sustainability, (2) 'do no harm', (3) responsibility, (4) accountability, (5) transparency and (6) sustainable markets and governance.[47] The Declaration suggests the inclusion of environmental and social impact assessment into the risk management procedures of financial institutions as an immediate step for their commitment to sustainability.[48] With the large number of civil society organisations endorsing it, the Collevecchio Declaration exemplifies the serious movement for more responsibilities from financial institutions.

The growing public dissatisfaction undoubtedly affected the reputation of targeted financial institutions. As noted by Wright and Rwabizambuga most business corporations need to strengthen, or, at least, maintain their reputation, they have to respond quickly to public expectations.[49] In 2002, a group of private financial institutions arranged a meeting to address public concerns[50] and this led to the introduction of the Equator Principles (EP) in June 2003[51], in the same year as the Collevecchio Declaration. The EP provide a framework for environmental and social risk management, based on 'the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability' (hereby referred to as the 'IFC Performance Standards') and 'the World Bank Group Environmental, Health and Safety Guidelines.' [52] This regulatory framework incorporates environmental and social considerations into the decision-making process of financial institutions before approving a loan for a project. The fact that the EP were introduced in the same period as the Collevecchio Declaration, albeit before the conclusion of the latter in 2003, may suggest that the public pressure at that time was so intense that private financial institutions needed to take action and prepare prompt measures to relieve the public uproar. In other words, regaining a good

[46] Jan Willem van Gelder, 'The Do's and Don'ts of Sustainable Banking – A BankTrack Manual' <www.banktrack.org/download/the_dos_and_donts_of_sustainable_banking/061129_the_dos_and_donts_of_sustainable_banking_bt_manual.pdf> accessed 8 January 2022.

[47] The Collevecchio Declaration on Financial Institutions and Sustainability 2003.

[48] Willem van Gelder (n 46).

[49] Christopher Wright and Alexis Rwabizambuga, 'Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles' (2006) 111 Business and Society Review 89, 89-95.

[50] Adebola Adeyemi, 'Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation' (2014) 16 Environmental Law Review 91, 101.

[51] The Equator Principles, 'About the Equator Principles' (2022) <equator-principles.com/about-the-equator-principles/> accessed 17 January 2022.

[52] The Equator Principles 4 (EP 4) 2020, principle 3.

reputation in the public view does matter for private financial institutions and can induce changes in their policy direction.

The EP framework is primarily directed at developing countries where environmental and social standards under national laws are perceived to be lax or insufficient; however, the widespread adoption of the EP framework by financial institutions has expanded the scope of the EP regulation beyond its initial scope.[53] The emergence of the EP as a form of private environmental regulation has significantly changed the conventional role of private actors, which have traditionally been considered 'reactive' to state regulation, to become more 'proactive'[54] since in this regulatory regime private financial institutions perform the role of regulators.

The contribution of financial institutions to sustainable development has been demonstrated in the United Nation's 2030 Agenda for Sustainable Development[55], launched in 2015. Paragraphs 43 and 44 of the Agenda particularly emphasise the role of international financial institutions in mobilising resources for developing countries.[56] The significance of finance also appears throughout the Agenda as it intersects with other goals in the Sustainable Development Goals (SDGs), which are the goals set in this Agenda for global achievement by 2030. For example, SDG 15 requires the mobilisation of financial resources for financing sustainability, especially in developing countries[57] The growing recognition of financial institutions at the global stage supports the idea that private financial institutions can contribute considerably to encouraging sustainable development and should therefore take a proactive role in environmental governance.

[53] O'Sullivan and O'Dwyer (n 40) 564.

[54] Andrew Hardenbrook, 'The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility' (2007) 40 Vanderbilt Journal of Transnational Law 197, 203.

[55] UN General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development* (21 October 2015) A/RES/70/1.

[56] Paragraph 43 provides that 'We emphasize that international public finance plays an important role in complementing the efforts of countries to mobilize public resources domestically, especially in the poorest and most vulnerable countries with limited domestic resources. An important use of international public finance, including official development assistance (ODA), is to catalyse additional resource mobilization from other sources, public and private…', and paragraph 44 provides that 'We acknowledge the importance for international financial institutions to support, in line with their mandates, the policy space of each country, in particular developing countries...'

[57] See UN General Assembly (n 25), Goals 15.a & 15.b.

III. The Role of Private Financial Institutions as Regulators and the EP Framework as Private Environmental Regulation

The key theme of the EP framework is to incorporate environmental and social consideration into financial decisions of private financial institutions, with the aim of promoting sustainable finance. The EP provide guidelines for assessing and managing environmental and social risks associated with the projects seeking loans. As the EP requirements refer to the IFC Performance Standards, in order to understand the concept and functions of the EP regulatory regime, this section starts with a brief explanation on what such standards are about. The IFC, which is a lending arm of the World Bank Group[58], explicitly recognised the concept of sustainable development in its Strategic Directions paper and attempted to mitigate the negative impacts of its financing activities, leading to the introduction of its own Performance Standards in 2006.[59] The content of the Performance Standards provides guidance for the clients to assess and manage the risks or mitigate the adverse effects of their proposed projects in order to secure finance under the loan.[60] Inclusion of environmental and social considerations in risk assessment does not only occur in the IFC project finance, but it is also applied by other developmental organisations, such as the International Monetary Fund (IMF) and multilateral developmental banks (MDBs), which used to be the main financial resources for investment projects in developing countries. However, the privatisation and the globalisation of financial services increase the number of private commercial banks, shifting the significant role in providing financial resources from the abovementioned international developmental organisations to private institutions.[61] Since private institutions are not subject to the IFC Performance Standards or the World Bank's environmental guidelines,[62] each private commercial bank could set their own environmental standards for financing a project.

[58] See Section II of this chapter, and International Finance Corporation (n 33).

[59] International Finance Corporation's Performance Standards on Social and Environmental Sustainability (30 April 2006). It must be noted that when the EP were first introduced in 2003, the IFC Performance Standards have not been published yet. At that time, the EPI referred to the World Bank's PPAH which was mentioned in Section I of this chapter before changing the reference to the IFC Performance Standards in the EP II (2006). The IFC Performance Standards have been later updated in 2012. See International Finance Corporation's Performance Standards on Environmental and Social Sustainability (1 January 2012).

[60] Adeyemi (n 50) 97.

[61] Hardenbrook (n 54) 205.

[62] ibid.

As the operation of a project usually relies on external loans rather than being entirely self-financing[63], financial institutions gain significant influence over their clients. The decision of financial institutions whether to grant loans can determine the viability of a project. Such an important role of financial institutions as the source of funds which capacitate the initiation and operation of a project places financial institutions into a powerful position to regulate private activities. The EP regulatory regime assigns the role of regulators to private financial institutions in environmental governance and requires them to reject financial support for a project which does not comply with the EP environmental and social standards. With this requirement, the EP framework can prevent the construction of an environmentally detrimental project. Although an investor is normally regulated under the policies and regulations of a country where the project is constructed, private financial institutions are the main sources of funds and can require an investor to minimise potential environmental risks of the project or to submit an environmental management plan to ensure that the project will not significantly cause environmental damage.

In response to the public uproar against the commercial banks as 'indirect polluters' and to regain a positive reputation in environmental development, the EP have been introduced as uniform standards to be voluntarily adopted among private financial institutions.[64] Even though the EP are initiated by private entities which are not subject to the IFC Performance Standards and the World Bank's guidelines, these entities still refer to such standards as substantive requirements. The main reasons for the reference are that, first, as the IFC Performance Standards are widely recognised and accepted by the public, the reference to the Performance Standards can gain public acceptance and ensure the supports from the NGOs[65]; second, most private financiers are accustomed to the IFC Performance Standards and this could reduce their hesitation to adopt the EP regime; third, the IFC framework has been designed to be applied globally without any specific conditions for regional application, so the IFC Performance Standards can be globally applied to all private financiers.[66]

EP regulation assigns the role of regulators to private financial institutions, including commercial banks, which are known as profit-driven institutions. This form of regulation challenges the traditional concept that state is a regulator and private entities are regulatees.

[63] Richardson (n 43).
[64] Hardenbrook (n 54) 207.
[65] Richardson (n 43).
[66] Wright (n 34) 12-13.

Without the limits of national boundaries, private actors have benefits which state actors do not have. In the reduction of trade barriers to encourage global markets, financial services can transcend across nations and overcome geopolitical difficulties which state regulators cannot. This means that financial institutions can influence their clients' behaviour by setting the conditions that the clients have to satisfy before obtaining a loan; such conditions do not have national boundary limits as they are voluntary agreement between private parties – lenders and borrowers.

Most environmental problems are transboundary and cannot be easily resolved by one act of state regulation. A number of international agreements have been launched to encourage global collaboration in addressing environmental issues such as the Vienna Convention for the Protection of the Ozone Layer, and the United Nations Framework Convention on Climate Change. However, international laws only bind their signatories, and such agreements particularly deal with certain environmental issues. Until now, and notwithstanding the success of regional regulation, such as the European Union environmental governance, there is no institutional system of global environmental regulation. Environmental standards therefore vary among different countries and are significantly different between developed and developing countries. The needs to diminish poverty and improve living conditions of their citizens cause most governments in developing countries to focus on economic development. Various policies and measures are applied to attract foreign investments, including setting low environmental standards to reduce costly burdens for investors, leading to a 'pollution haven' and a 'race to the bottom' in environmental standards among developing countries.[67] Although every country cannot apply identical laws due to different cultures and socio-economic conditions, the level of environmental standards should not be significantly different otherwise polluting sources will be simply shifted from developed countries to developing countries where environmental regulation is weak or lax.

The Bhopal incident in 1984 illustrates the significant difference of environmental regulations and justice between a developed country, the United States, and a developing country, India. The Indian government allowed the construction of certain hazardous projects as part of its economic development strategy, but this caused the transfer of dangerous operations to the country. The Indian laws at that time were considered inadequate for preventing environmental

[67] Lyuba Zarsky, 'Havens, haloes and spaghetti: untangling the evidence about foreign direct investment and the environment' (The OECD conference on Foreign Direct Investment and the Environment, The Hague, 28–29 January 1999).

damage and for redressing the problem; for example, they did not require insurance coverage for the project which obviously had environmental and social risks. The surviving victims and families of victims of the poisonous gas leaked from the project in Bhopal brought a case to the Indian court for civil remedies. Despite the compensation they received from such a case, they later filed a lawsuit in the federal court of the United States, since the parent company of the plant was a US company. The Indian law was criticised for its old, bureaucratic approach, which protected the government from liability.[68] It was doubtful whether this project would have been allowed or whether there would be further requirements for minimising hazardous risks if the industry site was in the US. However, the claims brought to the US court were dismissed as being barred by the former settlement in the Indian court.[69]

Ecosystems are globally connected; pollution and hazards from environmental degradation in one country will sooner or later impact the ecosystems of other countries. The gap in environmental standards between and among developed countries and developing countries must, therefore, be minimised. To solve the problem when state regulation is weak or ineffective in environmental management, private regulation can be an alternative approach for achieving a harmonised approach to environmental governance.

In the contemporary global economy, private corporations play a key role in the economic development of a nation. In cases of environmental damage from developmental projects, the sources of pollution or environmental deterioration are often the activities of private corporations. Therefore, if environmental concerns and the concept of sustainable development are incorporated into the business operations of private entities, environmentally devastating projects will not be initiated even though the state laws do not prohibit such activities. The proactive role of private actors in self-regulation will address the problems which most state regulation has limits to its ability to solve. As already mentioned, environmental problems require transnational collaboration. While state regulation has to respect other national sovereignty, private regulation usually relies on the voluntariness of participating private entities and is therefore less concerned with national jurisdictions, compared to traditional state

[68] Sudhir K Chopra, 'Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity' (1994) 29 Valparaiso University Law Review 235, 246 – 252.

[69] See Business and Human Rights Resource Centre, 'Union Carbide/Dow Lawsuit (re Bhopal, filed in the US)' <www.business-humanrights.org/en/latest-news/union-carbidedow-lawsuit-re-bhopal-filed-in-the-us/> access 7 January 2022.

legislation.[70] Without the detailed procedure conventionally required by the laws as national legislation, private regulation can easily adapt to current problems and respond quickly to the public concerns.[71] As most private entities are profit-driven, they have an incentive to change their behaviour to be environmentally friendly as responding to their customers' behaviour, rather than the government responding to public opinion.[72] Moreover, in some cases, the state may lack capacities in collecting accurate information and could not effectively solve environmental problems due to information deficit, while private actors have access to such information.[73]

Private actors also have greater knowledge and expertise for addressing certain issues than the national government; for instance, in the case of EP regulation, commercial banks have dealt with clients from both developed and developing countries, so they have expertise in assessing environmental and social risks associated with the proposed projects, which a national government in a particular country will not comparably have.[74] There are thus a number of reasons why private regulation has more advantages than state regulation in environmental development. The proactive involvement of private actors in regulation suggests an alternative form of governance apart from state regulation. With support from the theories of reflexive law as explored in the Chapter 1, the EP regulatory functions will be discussed in the following section along with the investigation on their application of a learning-based approach in environmental management.

IV. The EP Regulatory Functions and the Learning-Based Approach in Environmental Governance

Since its introduction in 2003, the EP framework has received a positive response from private financial institutions. This is unsurprising since it was designed by a group of large commercial banks with reference to the standards with which most private financial institutions are familiar.[75] Most private financiers regarded EP adoption as a means to regain their reputation after a series of NGO's campaigns calling for their responsibilities in environmental

[70] Michaek P Vandenberg, 'Private Environmental Governance' (2013) 99 Cornell Law Review 129, 164.
[71] ibid 162.
[72] ibid 138.
[73] Richardson (n 43) 76.
[74] Sarro (n 39) 1540.
[75] Richardson (n 43) 90.

development.[76] There are currently 130 financiers from around the world which adopt the EP, known as the Equator Principles Financial Institutions or 'EPFIs'.[77] Despite positive feedback on encouraging the proactive role of private entities, there have been some criticisms on its actual implications in preventing environmentally damaging projects[78], leading to its revisions in 2006, 2013, and the recent revision officially published in 2020, known as the EP4. The consistent revisions reflect the efforts of private financial institutions to respond to and address public concerns, especially those of civil society, on its actual effectiveness in encouraging sustainable investments, but whether such revisions can satisfy the public or still require further improvement to ensure that the EP framework applies a meaningful approach to engage stakeholders in its regulatory regime is an issue to further discuss in this thesis.

The EP consist of ten principles, setting procedural standards for incorporating environmental and social risks into decision-making processes of EPFIs, as well as encouraging participation of stakeholders. The framework assigns the role of regulators to EPFIs in terms of assigning them to consider thoroughly the environmental and social risks and/or impacts associated with the project proposed for their financial supports. The EP require the clients applying for loans or financial services under the scope of EP regulation to conduct assessment as required under the EP standards (which will be explored below) and ensure that the construction of the project will not inappropriately threaten the environment or local communities. The ten principles constituting the EP are as follows.

Principle 1: Review and Categorisation

Principle 2: Environmental and Social Assessment

Principle 3: Applicable Environmental and Social Standards

Principle 4: Environmental and Social Management System and Equator Principles Action

Principle 5: Stakeholder Engagement

Principle 6: Grievance Mechanism

[76] See O'Sullivan and O'Dwyer (n 40) 563 – 565.

[77] The Equator Principles Association, 'Members & Reporting' (2022) <equator-principles.com/members-reporting/> accessed on 20 April 2022.

[78] See Synder and Muir (n 42).

Principle 7: Independent Review

Principle 8: Covenants

Principle 9: Independent Monitoring and Reporting

Principle 10: Reporting and Transparency

This section starts with the scope of EP regulation in subsection (1), followed by subsection (2) exploring the categorisation of projects under the EP regime and the requirements for each category. Subsection (3) explains how public participation is required in the EP framework, and subsection (4) considers the review and monitoring of EP compliance, before the enforcement of EP standards is explored in subsection (5).

(1) The Scope of EP regulation

The EP as introduced in 2003 were designed as a guideline for considering environmental and social risks concerned with a project proposed for finance with the capital costs of USD 50 million or more. The scope of the EP was criticised at that time after its 2003 introduction for being too narrow, since the condition for applying the EP standards was set for projects with high capital costs which means that this regulatory framework would apply to only very large projects, while there could be a project of which the overall costs were lower than USD 50 million but might cause significant environmental harms.[79] Further, there were concerns about misrepresentation of a project through segmentation.[80] Rather than proposing the whole project of which the total capital costs makes it fall under the EP requirements, an EPFI's client might initially get a loan for a project that costs lower than USD 50 million and then re-apply for another loan for the project expansion to avoid the application of the EP standards. This could also occur in cases of the project categorisation, in terms that the EP set different requirements for clients depending on the category their projects are in. Such categorisation relies on the level of risks and potential damage associated with the project.[81] A client applying for finance from an EPFI might simply present a segment of a project as causing small environmental impacts so that such project is categorised with fewer environmental requirements than it is supposed to be if presenting the whole project.

[79] Hardenbrook (n 54) 207-208.

[80] ibid 208.

[81] The details of each category and their requirements will be explored and discussed in the next subsection.

The EP association did not ignore these criticisms; later in 2006 and in 2013, the second and the third revisions of the EPs were published and markedly solve the problem of limited scope by lowering the capital costs of projects under the EP application to be USD 10 million or more, and expanding the scope of EPFIs' activities covered by EP regulation from only project finance to advisory services and project-related loans as well as bridge loans.[82] To prevent inaccurate categorisation resulting from segmentation, the revised EP clarify the definition of a project to include an expansion or upgrade of an existing project.[83]

The current scope of the EP application after the recent revision in 2020 (EP4) is thus not limited to project finance but also expands its application to other activities associated with the operation of a project, including project finance advisory services, project-related corporate loans, bridge loans, and, as added in the EP4, project-related refinance and project-related acquisition finance. The EP4 also lowers the total aggregate loan amount in relation to project-related corporate loans from USD 100 million in the previous EP scope to USD 50 million, meaning that the EP4 applies to more financial activities than their previous versions. Although the application of EP regulation will not be retroactive, any 'expansions or upgrades of an existing project' after the EP are in effect have to comply with the EP standards.[84] To date, considering the conditions of project total capital costs at USD 10 million, the EP framework has not applied to all projects but has only focused on large projects where there is a risk of causing environmental and social harms. However, its scope has been expanded to cover not only project finance but also other financial products which can contribute to prevention of environmentally and socially harmful projects. The fact that the EP revisions have lowered the total capital costs and, recently, the total aggregate loan amount in cases of project-related loans can imply the attempt to expand the EP application and the potential that environmental and social aspects will be incorporated into more financial products in the future.

(2) Categorisation and Environmental and Social Impact Assessment: *the key measures for environmental regulation under the EP regime* **[Principle 1 – Principle 4]**

Project Categorisation

The EP standards impose different requirements for different groups of projects depending on the likelihood that they will cause environmental and social harms. A project will therefore be

[82] The Equator Principles II (EP II) 2006 and The Equator Principle III (EP III) 2013, scope.
[83] EP 4, exhibit I : glossary of terms.
[84] ibid, scope.

categorised in the first place before deciding which EP requirements apply to them. Principle 1 provides guideline for categorising a project by basing the assessment on the degree of its 'potential environmental and social risks and impacts.' There are three categories as follows,

> 'Category A – Projects with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented;
>
> 'Category B – Projects with potential limited adverse environmental and social risks and/or impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures; and
>
> 'Category C – Projects with minimal or no adverse environmental and social risks and/or impacts.'[85]

Projects determined into different Categories go under different requirements. On account of having more severe environmental and social risks, projects falling under Categories A and B are subject to more requirements under the EP framework than projects under Category C. However, Principle 1 merely provide guidelines for categorisation without defining how to define 'significant' or suggesting the criteria to refer to in considering risks and/or impacts. The application of broad terms with no precise explanation as such can result in diverging approaches applied in categorisation. Leaving the categorisation to each EPFI's discretion can lead to different standards adopted in environmental and social assessment, since, as already mentioned, the categorisation is related to the level of procedural requirements under the EP regime. The vagueness and subjectivity of the term 'significant' in Principle 1 have raised concerns on the transparency of the EP framework. [86] However, there is a contrasting view that such a term is sufficiently clear in itself and indicates an objective standard.[87] The transparency concerns on how each EPFI implements the EP standards in terms of categorisation can cause critiques that EP regulation is simply a window-dressing measure for reputational benefits without actually taking serious on sustainable finance. This issue will be further discussed in

[85] ibid, principle 1.

[86] See Banker Editor, 'Application of the Equator Principles Lands Adherents in Hot Water' (*The Banker*, 5 March 2007) <www.thebanker.com/Comment-Profiles/Leaders/Application-of-Equator-Principles-lands-adherents-in-hot-water?ct=true> accessed 10 January 2022; Benjamin J Richardson, 'Can Socially Responsible Investment Provide a Means of Environmental Regulation ?' (2009) 35 Monash University Law Review 262, 280.

[87] Nigel Clayton, 'The Equator Principles and Social Rights: Incomplete Protection in a Self-Regulatory World' (2009) 11 Environmental Law Review 173, 185.

Chapter 5 on how to improve the EP's transparency; an overarching entity to review EPFIs might be needed, or some further requirements should be added.

Environmental and Social Impact Assessment

The categorisation of projects is related to the core requirement of the EP framework – the environmental and social impact assessment. Principle 2 of the EP requires the EPFI's client to conduct an 'appropriate Assessment'[88] which incorporates environmental and social risks and impacts associated with the project and must include approaches to address such risks and impacts. In cases where there are still some small impacts left, the remedy must be also stated in the Assessment Documentation.

The EP framework does not specify the precise details of the assessment but provide an illustrative list of what 'potential environmental and social issues' should be recognised and addressed in the Assessment process of a project, such as 'consideration of feasible environmentally and socially preferable alternatives', 'use and management of dangerous substances, 'greenhouse gas emissions level and emissions intensity.'[89] Such an illustrative list only provides guidelines on issues to consider in the Assessment of a project; there might be some issues in the illustrative list that are irrelevant to certain projects and therefore are not included in the Assessment, or some other issues not contained in the illustrative list might have to be considered in addition to the issues in the illustrative list.

The requirement that EPFI's client must conduct an Environmental and Social Impact Assessment as required for their project's category has marked a key measure of the EP regime in supporting sustainable investment since the EPI in 2003. However, there have been developments through time which expands the requirements of Assessment to more categories of projects, implying the EP's determination to encourage sustainable development. While in the past, Category C projects were not required to conduct any Assessment under the EP regime, the EP4 now require all clients of which the projects are in the scope of the EP framework, no matter what Category they are in, to conduct an appropriate Assessment. The EP framework sets a particular requirement for projects in Category A and, 'as appropriate', for projects in Category B, to conduct an Environmental and Social Impact Assessment (ESIA).

[88] The original text of EP uses the term 'appropriate Assessment' with a capital 'A' for the term 'Assessment', assumably to emphasise that it is the Environmental and Social Impact Assessment under the EP framework.
[89] EP 4, exhibit II: an illustrative list of 'Potential Environmental and Social Issues to be Addressed in the Environmental and Social Assessment Documentation'.

Since the projects in such Categories are usually large projects with significant risks, the ESIA must comprehensively assess environmental and social risks and impacts from all aspects.[90] While the EP4 still do not require Category C projects to prepare an ESIA, the clients may be asked to conduct a 'limited' or 'focused' environmental or social assessment as appropriate for some specific risks or impacts associated with such projects.

The revised Principle 2 of the EP4 also include the consideration of potential 'Human Rights impacts' and 'climate change risks' in the assessment, and that applies not only to the ESIA but also in other Assessment of which the project concerns such issues. Principle 2 suggests the United Nations Guiding Principles on Business and Human Rights (UNGPs)[91] as the reference for assessment of Human Rights risks, and the Climate Physical Risk and Climate Transition Risk categories of the Task Force on Climate-related Financial Disclosure (TCFD)[92] as the reference for the assessment of the climate change risk.

Applicable Environmental and Social Standards

Principle 3 clarifies that the Assessment process as required under the EP framework has to comply with host country laws and regulations concerning environmental and social management. However, the EP framework recognises persistent problems of differentiated environmental and social standards between developed and developing countries. Developed countries where environmental and social governance is considered sufficient to protect the society and the environment are classified as 'Designated Countries.'[93] Originally, Principle 3 required a project located in Designated Countries to comply with the relevant regulation of such a country as minimum standards. Meanwhile, for Non-Designated Countries, which include most developing countries, the reliance on national laws might not be sufficient; Principle 3 indicates the applicable standards to assess the EP compliance of a projected located in Non-Designated Countries by referring to the IFC Performance Standards and the World Bank Guidelines, as provided in Exhibition III. The EP requirement for applying the IFC

[90] EP 4, exhibit I provides that 'Environmental and Social Impact Assessment (ESIA) is a comprehensive document of a Project's potential environmental and social risks and impacts. An ESIA is usually prepared for greenfield developments or large expansions with specifically identified physical elements, aspects, and facilities that are likely to generate significant environmental or social impacts. Exhibit II provides an overview of the potential environmental and social issues addressed in the ESIA.'

[91] United Nations' Guiding Principles on Business and Human rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework 2011.

[92] Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017).

[93] EP 4, exhibit I.

Performance Standards and the World Bank Guidelines for projects constructed in countries of which the environmental regulation does not meet international standards in encouraging sustainable investment supports the ideas discussed in Chapter 1 on the advantages of private regulation. With no boundary limits and the globalisation of financial resources, EPFIs can become influential actors that shape and/or raise environmental and social standards in developing countries. The EP framework reinforces the argument that private regulation can overcome limits of boundary and jurisdiction that state laws cannot do.

However, with the continuous development of international environmental and social standards, it is possible that national laws and regulations of developed countries once considered robust and sufficient for preventing environmentally and socially harmful activities are no longer enough. The EP4 has put an end to the pre-existing assumption that compliance with local laws and regulations in Designated Countries is sufficient under the EP framework. Principle 3 of the EP4 adds the requirement that the EPFI will assess particular risks associated with the project and might decide to apply some IFC Performance Standards related to such risks to the project in Designated Countries 'in addition to host country law.' This recently added requirement in the EP4 blurs the line of environmental and social standards between developed and developing countries. In other words, projects in some developed countries classified as Designated Countries still have to align with the same minimum standards, namely the IFC Performance Standards, as projects in Non-Designated Countries. This requirement demonstrates the further effort of the EP framework to set up global environmental and social standards for wide application regardless of domestic laws. Moreover, the requirements for Human Rights and Climate Change assessment as mentioned in Principle 2 also apply to all projects in both Designated and Non-Designated countries. The compliance with domestic laws in Designated Countries does not exempt such requirements under Principle 2.

The EP4 has marked a substantial step towards setting global environmental and social standards by broadening the application of IFC Performance Standards and adding requirements for including Human Rights and Climate Change impact assessment to Designated Countries, similarly to Non-Designated Countries. The EP framework might thus eventually achieve the goal of setting global standards which several international environmental forum or international agreements fails to achieve, and so address the problems of different levels of applicable environmental and social standards between developed and developing countries.

Environmental and Social Management System and Equator Principles Action

The abovementioned requirement for environmental and social assessment generates comprehensive consideration of risks and impacts of constructing a project and lets the client find available alternatives and measures to prevent or minimise such risks or impacts. Further, Principle 4 requires the establishment of an Environmental and Social Management System (ESMS) for all projects in Category A and Category B. This system is 'designed to identify, assess and manage risks and impacts' concerned with the project throughout its period of the loan. This requirement ensures that environmental and social issues associated with the project will not be merely recognised in the assessment process and will then be no longer recognised in the construction and operation of the project after the EPFI approves a loan. Principle 4 mandates the incorporation of environmental and social consideration throughout the operation of the project during the period of the loan, by requiring the preparation of a particular system with policies, plans, and procedures as part of Assessment Documentation to provide for EPFIs' consideration before deciding on the project finance.

The client is further required to prepare an Environmental and Social Management Plan (ESMP) to tackle the risks and/or impacts found out in the Assessment. The ESMP will explain the measures for preventing or minimising the risks, and in cases where there are still remaining impacts caused from the project, the ESMP will also clarify the remedies provided. The EP framework does not specify the details of the measures required in the ESMP but requires that the measures must be 'commensurate' to the risks and impacts of that project.[94] The flexibility of this EP requirement allows the client to find the most efficient approach to minimising risks and/or impacts concerned with its project. This is a benefit of flexibility in reflexive governance as discussed in Chapter 1. Moreover, if it turns out that the client cannot meet the EP standards, the EPFI will discuss the issues with its client and mutually figure out measures to make the project conform with the EP requirements in a form of an Equator Principles Action Plan (EPAP). The EP regulation does not require a specific form of the Plan but suggests that most EPAPs apply a tabular form with the lists of outstanding actions to follow up in order to ensure compliance with the procedural requirements under the EP framework.[95]

[94] EP 4, exhibit I broadly suggests that the details contained in an ESMP can range from 'a brief description of routine mitigation measures to a series of more comprehensive management plans' as 'commensurate' with the Project's potential risks and impacts.
[95] EP 4, exhibit I.

Notably, although the EP regime assigns the role of regulator to private financial institutions, it does not establish an adversarial relationship between the lender and the client. The objective of the EPAP requirement is to have a joint discussion between the EPFI and the client to find out what the client needs to do more to achieve the EPFI requirements.[96] The EP framework does not strictly require the EPFI to reject the finance of a project immediately once the assessment shows that the project is not in compliance with the applicable standards. The client is not treated as a violator but rather as a part of mutual learning with the EPFI in terms of discussing on how the project can have environmentally and socially sustainable operation. This function of the EP framework infers the concept of reflexive governance, as explored in Chapter 1, in terms of mutual learning and emphasising collaboration, rather than command and control in the conventional form of governance.

(3) Public Participation in the EP Governance [Principle 5 and Principle 6]

The mutual learning under the EP regime is not limited to the learning between EPFIs and clients but also encouraging an exchange of ideas between clients and stakeholders of the proposed project. Stakeholder engagement is particularly emphasised in Principle 5 of the EP by requiring the client, in cases of Category A and Category B projects, to 'demonstrate effective Stakeholder Engagement'. Noticeably, Principle 5 further requires the engagement as an 'ongoing process' which means that the client cannot simply organise a stakeholder engagement process as a one-off checklist to satisfy the EP requirement. According to the 'ongoing' requirements, stakeholders are expected to be included as appropriate throughout the assessment process. However, the criteria for considering who or what entity should be counted as stakeholders have not been provided in the EP regulation. Principle 5 simply identifies 'Affected Communities, Workers and where relevant, Other Stakeholders' to be included in a Stakeholder Engagement process. The Glossary of Terms in Exhibit I of the EP defines each type of stakeholders as follows.

> - '**Affected Communities** are local communities within the Project's area of influence, directly affected by the Project.'
>
> - '**Workers** are all workers engaged directly or indirectly by the client to work at the Project site, including full-time and part-time workers, contractors, sub-contractors and temporary workers.'

[96] ibid, principle 4.

- '**Other Stakeholders** are those not directly affected by the Project but have an interest in it. They could include national and local authorities, neighbouring Projects, and/or non-governmental organisations.'[97]

It must be noted that Principle 5 in the EP4 further provides a special section for recognising Indigenous Peoples as 'vulnerable segment of Project-Affected Communities' and enumerates the circumstances which affected Indigenous Peoples must be included in consultation, with guaranteed rights and protections under relevant laws. This addition signifies the rights of Indigenous People in stakeholder engagement.

There are various dimensions to consider in organising a participation process; for example, the number and variety of participants can affect the intensity of engagement and the effectiveness of learning. Stakeholders can include local people who possibly do not fully understand their risks concerning the proposed projects. The fact that the EP defines 'stakeholders' in broad terms has an advantage of flexibility in selecting stakeholders as appropriate for each case. However, without the EP provision or guidelines establishing criteria and/or the process for selecting stakeholders, the actual engagement of stakeholders can be doubted. The EPFI's client might strategically organise a participation process with an imbalanced proportion of participants, such as including more business actors in the consultation than local people, which can make the voice of local communities weaker or allow domination. While flexibility is one characteristic of reflexive governance, a regulatory regime requires appropriate institutional design to ensure that it can actually achieve the mutual learning goal. This issue will be further discussed in Chapter 5 on the EP institutional design to encourage meaningful stakeholder engagement which can contribute to mutual learning.

Principle 5 particularly requires the clients whose projects have 'potentially significant adverse impacts on Affected Communities' to structure an Informed Consultation and Participation process which engages Affected Communities in considering the issues of relevant risks and impacts as well as the project's development. The language applied in the consultation should be as preferred by the Affected Communities, and their opinions, especially from vulnerable groups, must be taken into consideration. The Assessment Documentation has to be available for Affected Communities and Other Stakeholders 'in the local language and in a culturally appropriate manner'. The EP requirements for provision of the Assessment Documentation, especially in the local language and in an appropriate manner as such, indicate recognition of

[97] ibid, exhibit I.

the limits of the learning-based governance, as explored in Chapter 1, in terms of capacities of participants. Such requirements under Principle 5 imply EP efforts to equip stakeholders with comprehensible information. This issue links back to the question on the EP institutional design to ensure that the stakeholders obtain sufficient information and comprehend their risks and situations. Black's 'proceduralisation', namely the 'translation'[98], which was discussed in Chapter 1, should also be considered in the development of EP institutional design, especially since the study on EU environmental governance in Chapter 2 exemplifies the importance of making information comprehensible in light of encouraging public scrutiny and enhancing regulatory transparency.

Public involvement in governance can also take place through a form of monitoring EP compliance. Establishment of a grievance mechanism allows affected parties to raise their concerns when finding some environmental and social issues after the assessment. Principle 6 of the EP requires that the ESMS must include setting up a grievance mechanism in cases of Category A projects as well as some Category B projects which the EPFIs consider appropriate to establish such a mechanism. Principle 6 requires the grievance mechanism under the EP regime to resolve the raised concerns with no delay by applying an 'understandable and transparent consultative process.' With such wording, resolution for the affected parties' concerns takes a form of consultation. The design of how affected parties can get access to the mechanism and get issues addressed is left to the discretion of the EPFI's client; the EP have not provided any guidelines for the processes in a grievance mechanism. So far, the EP regime does not have a specific body through which affected parties can raise a claim for EP non-compliance; a grievance mechanism is the only way that affected parties can seek redress under the EP regime.

Usually, when the public raises environmental and social issues related to the project, their claims are to challenge the project's adherence to the EP standards, and that means the clients are their opponents. The fact that they have to bring such claims to the resolving system established by the clients makes it difficult to address their concerns and assure that their claims will be dealt seriously by the clients which are considered their opponents. The EP institutional design has to consider how to ensure meaningful public involvement in monitoring the EP compliance, and that includes providing an effective mechanism so that affected parties can raise a claim against the EPFI's client or even the EPFI itself. This issue will be further

[98] Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 33.

discussed in Chapter 5, as well as the further question of whether the EP framework should establish a specific body to receive a claim rather than merely relying on the client's grievance mechanism.

(4) Review and Monitoring

To help an EPFI considering the Assessment Documentation from its client to decide whether the EP standards are satisfied, Principle 7 requires an Independent Review conducted by an Independent Environmental and Social Consultant (which will be referred to as the Consultant afterwards) for all projects in Category A and some projects, as appropriate, in Category B. The EP do not set the criteria or provide the lists of an Independent Environmental and Social Consultant but define it as 'a qualified independent firm or consultant (not directly tied to the client) acceptable to the EPFI.'[99] The condition that the Consultant must not have direct connection with the client can to some extent ensure that the Consultant is independent and has no conflicts of interests with the client. However, there can be a controversial case if the Consultant is a business firm, since it seems unconvincing to the public that such Consultant will place environmental and social issues at the forefront of its review. In 2020, the EP Guidance for Consultants on the Contents of a Report for an Independent Environmental and Social Due Diligence Review[100] was published, providing for the minimum information contained in a review report. The Guidance also provides an example format for analysing whether the project has any gaps that need to be filled for meeting the EP standards. This EP Guidance can potentially resolve the concern that the Consultant might not pay sufficient attention to environmental and social issues, for it explicitly suggests what issues to review and include in the review report.

Principle 9 also assign the monitoring role to the Consultant. The objective of Principle 9 is to ensure the consistent compliance of the project throughout the period of the loan. Therefore, the Consultant has to provide monitoring and reporting to the EPFI with the regularity indicated in the EP.

The monitoring and reporting by the Consultant can assist the EPFIs to check their clients' adherence to the EP standards. However, and apart from assigning the monitoring role to a

[99] EP 4, exhibit I.

[100] Guidance for Consultants on the Contents of a Report for an Independent Environmental and Social Due Diligence Review (October 2020)
Available at <equator-principles.com/app/uploads/Independent_ESDD_Review_Oct2020.pdf >

particular entity, the public should get access to important information concerning environmental and social risk management of a project in the EP regime. In addition to the documentation on the Assessment processes required under Principle 5, Principle 10 requires public disclosure of certain information from both clients and EPFIs. For the clients, of which the projects are categorised in Category A and, as appropriate, Category B, a summary of the ESIA, Greenhouse Gas emission levels, and 'commercially non-sensitive Project-specific biodiversity data with the Global Biodiversity Information Facility' must be provided to the public. For the EPFIs, the EP implementation report must be publicised 'at least annually' with the minimum details as illustrated in Annex B.

The requirements under EP regulation are process standards which aim to provide transparency and public participation, as could be seen from the requirement for stakeholder engagement in consultation and participation processes, as well as the requirements for disclosure of information and reporting. The relationship between the client, as a borrower, and the EPFI, as a lender, is horizontal and supports mutual cooperation in finding measures to mitigate environmental and social risks rather than top-down as in the traditional form of command-and-control governance. Such functions reflect the idea of a learning-based approach in regulation.

Overall, the EP requirements indicate the adoption of learning-based governance in terms of encouraging public involvement, especially stakeholder engagement in consultation, throughout the processes. However, the critiques which usually come with private regulation are the accountability of private regulators and the legitimacy of the regime. Transparency is indispensably related to this accountability, since, basically, disclosure of information can ensure fairness and non-arbitrariness in decision making processes. Generally, for private financial institutions, their business confidentiality, especially their client's confidentiality, is of great concern.[101] While the EP framework assigns private financial institutions as regulators, their business nature might cast doubts on whether information provided to the public is comprehensive or accurate since they still have duties towards their clients.[102] The EP institutional design therefore has to ensure transparency of the regime. The question of whether the EP requirements for reporting and transparency are sufficient or the EP institutional design

[101] O'Sullivan and O'Dwyer (n 40) 568.
[102] Hardenbrook (n 54) 209.

should be developed to enhance transparency will be the subject of further discussion in Chapter 5.

(5) Enforcement

Conventionally, state regulation has authorities to enforce the rules while private regulators do not have such power. The EP framework relies on the covenant mutually agreed between the EPFI and its client to ensure the compliance with the EP standards. Principle 8 of the EP requires the inclusion of EP compliance as a part of covenants. In cases when the client does not satisfy the EP requirements, the EPFI will first cooperate with the client to re-establish the project's compliance with the EP standards. If the client still fails to implement the compliance as agreed, the EPFI can exercise the lender's right to remedies in accordance with the agreed covenants; Principle 8 explicitly includes an event of default, which allows an EPFI to demand repayment before the due date, as a form of remedy an EPFI can get from the client in cases of non-compliance, and such non-compliance includes failure to meet the EP environmental and social standards.[103]

The EP's Guidance for EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation, recently published in December 2020, provides guidelines on what the covenants should include, such as right of the lenders to 'access and inspect property' of the project and the conditions that the EPFI can trigger an event of default to call for full repayment from the client.[104] However, the details on how the enforcement in a form of an event of default can remedy the client's non-compliance with the EP standards is not clarified. The EP framework leaves the terms of covenants to the discretion of EPFIs and simply provides the guideline for recommended content of covenants. This might lead to the confrontation between transparency and confidentiality, for the terms of covenants including the enforcement are usually protected under the client confidentiality while the remedy for environmental and social impacts serve the public interests. This can raise the question for the development of EP framework on how much transparency is required for public scrutiny and for establishing legitimacy of EP regulation.

[103] EP 4, principle 8.

[104] Guidance for EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation (December 2020), 8: covenants & 10: events of default.
Available at <equator-principles.com/app/uploads/Loan_documentation_EP_Dec2020.pdf>.

V. The Benefits of, and Pressure for, EP Adoption

As a private regulatory regime, the EP adoption is voluntary. Although the concept of the EP framework appears to be sustainable for incorporating the environmental consideration into business decisions of commercial banks and re-casts the private entities to be more proactive in environmental protection, it might cast doubts on the EP's actual effectiveness in encouraging environmentally friendly projects. If the number of EPFIs are only a few, the EP regime creates no significant results as the client could turn to other financial institutions which are not EPFIs to finance its project without any necessity to comply with the EP standards. Moreover, as the EP framework neither confers any rights nor establishes any liabilities, public pressures and watchdog organisations are possibly the only mechanisms for forcing the EPFIs' adherence to the EP standards, leading to questioning of the accountability of the EP regime.

While EP adoption might seem burdensome as complying with the EP requirements would increase costs for the client and thereby affect the total profits gained from the proposed project, EP adoption actually benefits the financial institutions because the EP framework provides guidance for careful risk management and secured finance. The requirements for environmental and social risk assessment would reveal the potential environmental liability that might occur from the project. Such liability will undoubtedly affect the profitability of the project and client's 'ability to repay the loans'.[105] Besides, environmentally devastating projects could spur local resistance and NGOs' shaming campaign as once happened in the Three Gorge Dam incident. This public pressure could cause reputational damage to both the client and the financial institution, affecting their stock price and also the profitability of the project.[106] The EP framework ensures the incorporation of these unseen costs into the EPFI's consideration of whether to finance a project, constituting secured investment. Further, the EP adoption does not only prevent reputational damage and relieve the public pressure against the financiers, it also enhances business value for the EPFI's positive reputation as environmentally friendly financiers.[107]

With all benefits mentioned above, the EP incentives are highly attractive for adoption; as profit-driven institutions, commercial banks as well as other private financial institutions would prefer safe loans and a positive reputation. Until now [April 2022], there are 130 EPFIs in 38

[105] Hardenbrook (n 54) 211.
[106] ibid.
[107] Richardson (n 43) 80.

countries around the world, and the total number of the EP members is increasing every year.[108] The total number of 130 EPFIs consists of 48 in Asia-Oceania, 44 in Europe, 14 in North America, 13 in Middle East and Africa, and 11 in Latin America. It is interesting to see that the recent adopters in the past two years are mainly from Asia, especially from China. As China is a developing country, its obligation under most international environmental agreements is usually less stringent than a developed country. The fact that a number of Chinese financial institutions have begun the process of adopting the EP indicates that the EP regime can apply widely and can potentially raise environmental standards in developing countries where Chinese financial institutions are important financial resources. It must be noted that even though the EP framework has a voluntary basis, its adoption is not 'purely voluntary,' since, apart from public pressure, commercial banks would also face pressure from other EPFIs which would certainly support environmentally and socially responsible finance, in order to maintain a level business playing field.[109] With the continuously growing number of EPFIs, the influence of the EP standards cannot be overlooked and can contribute considerably to the achievement of sustainable development.

VI. Critiques of Accountability under the EP Framework and the Consistent Development of the EP Framework to Address Public Concerns

Notwithstanding the advantages outlined above, the EP regime has been criticised on numerous grounds. The concerns over the accountability of the EP regulation have been consistently raised by NGOs, calling for the establishment of accountability mechanisms since the introduction of the first version of the EP in 2003.[110] The concept of accountability requires regulators to account for their actions and be able to provide justification for their decisions. Accountability mechanisms are designed to ensure that regulators' decisions will not be arbitrary or irrational.[111] Most accountability mechanisms are procedural such as the requirements for information disclosure, public consultation, or in a form of judicial review.[112] The EP regulation, at its first appearance in 2003, did not set up any specific regulatory bodies,

[108] The Equator Principles Association (n 77).
[109] Richardson (n 43) 79, 91.
[110] O'Sullivan and O'Dwyer (n 40) 574.
[111] Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) 339, 340.
[112] ibid.

such as an Ombudsman, to monitor and to ensure that the EP implementation of the EPFIs comply with the EP standards.[113] The EP regulation merely provides guidelines for social and environmental standards; the details on how to implement the EP are under each EPFI's discretion, raising concerns on the possibly different standards among EPFIs.[114]

Furthermore, environmental and social risk assessment requires the labour of experts. Since it is the responsibility of borrowers to conduct the assessment, experts are recruited by them. There could be 'expert shopping' in terms that a borrower will hire an expert that might have 'a less stringent approach' in assessment.[115] Moreover, the assessment under the EP regulation requires specific expertise in environmental and social issues, and there was an observation in the early years of the EP regulation that there might be shortage of 'independent consultants who specialise in the social ramifications of projects'.[116] With no detailed methods of assessment provided in the EP guideline[117], the transparency of the procedures can be questioned due to the possibility of expert shopping and the lack of expertise. This concern, along with the fact that the EP framework lacks clarity on how to select stakeholders for participating in the assessment process, as already noted in Section III, indicates the need that the EP regime has to improve its institutional design to ensure that the assessment process can achieve the goal of experimentalism.

The EP has been revised in 2006 and in 2013, as called the EP II and the EP III[118] respectively, and, recently, the EP4 was officially announced in 2020. Such consistent revision aims to address the loopholes in the EP application, as found in the previous versions, as well as to respond to the critiques. To relieve the public concerns about the accountability and transparency of the EP regulation, the EP II encouraged more communication with other concerned entities and stakeholders.[119] The requirements for 'consultation and disclosure' were stated in Principle 5 of the EP II; a borrower has to provide the 'assessment documentation and

[113] O'Sullivan and O'Dwyer (n 40) 567.
[114] ibid 571.
[115] Clayton (n 85).
[116] Paul Watchman, 'The Equator Principles: Raising the Bar on Social Impact Assessment?' in Amnesty International, Human Rights, *Trade and Investment Matters*, (Amnesty International UK 2006) 16.
[117] See further discussion on difficulties in Freshfields Bruckhaus Deringer, 'Banking on Responsibility: Part 1 of Freshfields Bruckhaus Deringer Equator Principles Survey 2005' (July 2005) <www.banktrack.org/download/banking_on_responsibility/050701_banking_on_responsibility.pdf> accessed on 10 January 2020.
[118] It should be noted here that, while the first three edition of EP are referred to as the EP I, EP II, and EP III, the recent edition of EP are officially mentioned as EP 4 instead of EP IV.
[119] Hardenbrook (n 54) 223.

AP [action plan], or non-technical summaries' to the public.[120] The EP II also included a requirement for an independent review in Principle 7[121], and set the requirements for establishment of a grievance mechanism in Principle 6.[122]

The principles revised and added in EP II reflect an effort to establish more accountability in the EP regime. However, the monitoring system in EP II remained criticised for its lack of details on how to organise the monitoring. The 'regularity' of monitoring by an independent expert, as required under Principle 9, and the disclosure of information under Principle 5, are vaguely stated to be conducted on an 'ongoing' basis throughout the period of the loan.[123] Moreover, for a grievance mechanism, its management is a part of the management system of a borrower, implying that there would be 'no outside arbitrator', but personnel employed by the borrower, to conduct the process. [124] This fact raises concerns for the actual transparency and accountability of the grievance mechanism.

The EP III (2013) and the EP4 (2020) seek to address the remaining concerns on accountability by providing more details for the procedural requirements under the EP regime. An attempt to encourage inclusive consultation and participation from stakeholders is noticeable from the revised Principle 5 to provide a more detailed process to ensure that all stakeholders, including Indigenous Peoples, are well-informed on the project and its potential risks and impacts. However, the prescriptive provision or guidelines on how to organise a participation process has not been provided yet. Meanwhile, the revised EPs have added the details of EP implementation reporting requirements in the annexes, with Annex B providing the minimum information required for an EP implementation report. Rather than simply requiring the implementation reporting from the EPFIs without clarifying the details required for the report, the addition of such annexes could ensure the transparency of an EPFI in implementation and prevent the problem of 'greenwashing' to some extent.

Nonetheless, the important issue that NGOs consider necessary has not been resolved yet. The establishment of a specific body or governance structure that could perform the functions of an Ombudsman to ensure accountability of EPFIs is what the NGOs consistently encourage for

[120] EP II, principle 5.
[121] See ibid, principle 7.
[122] ibid, principle 6.
[123] Clayton (n 85) 184; see ibid, principles 5 and 9.
[124] Clayton (n 85) 192.

the improvement of the EP regime.[125] The reliance on watchdogs, such as BankTracks, which is a civil society organisation focusing on preventing environmentally and socially harmful business activities of commercial banks[126], or other environmental NGOs, is not sufficient for claiming that the EP governance has effective accountability mechanisms.[127] Until now, there has been no particular mechanism that can effectively hold EPFIs, which are regulators under the EP regime, accountable for their behaviours. Although a grievance mechanism is now required under the revised EP regulation, it only allows affected entities to approach the borrowers, not the EPFIs.[128]

The concerns about accountability are also linked to concerns about the legitimacy of the EP regime, which is the common challenge to most private regulation, as explored in Chapter 1. There are various concepts of legitimacy, such as pragmatic legitimacy, cognitive legitimacy, and moral legitimacy.[129] The simple meaning of legitimacy, as Freeman explained in her article concerning decentred regulation, is the public acceptance of a decision.[130] Since accountability mechanisms provide justification for a regulator's decision, ensuring that the regulator's performance conforms to 'societal values and expectations'[131], legitimacy can be challenged if the accountability of regulators is still questionable. From the perspective of civil society, the development of more effective accountability mechanisms under the EP governance regime is an important factor in legitimation.[132] There are procedural requirements engaging stakeholders in the EP consultation processes and disclosing information to the public; however, without accountability mechanisms, such procedural requirements cannot guarantee that the EPFIs will actually incorporate environmental and social values into their decisions.

[125] O'Sullivan and O'Dwyer (n 40) 567.
[126] BankTrack, 'About BankTrack' (8 June 2021) <www.banktrack.org/page/about_banktrack> accessed 17 January 2022.
[127] O'Sullivan and O'Dwyer (n 40) 573.
[128] Vivian Lee, 'Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay' (2008) 6 Northwestern University Journal of International Human Rights 354, 357.
[129] Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 The Academy of Management Review 571.
[130] Jody Freeman, 'Private Parties, Public Function and the Real Democracy Problem in the New Administrative Law?' in David Dyzenhaus (ed.), *Recrafting the Rule of Law* (Hart Publishing 1999).
[131] O'Sullivan and O'Dwyer (n 40) 559.
[132] ibid 576-577.

Ashforth and Gibbs suggest that there are two forms of management which lend legitimacy to an organisation.[133] The first approach is 'substantive management', which reflects actual efforts of an organisation in adapting its structure or behaviour in accordance with social values. The second approach is 'symbolic management', which is simply designed to make the behaviour of an organisation seem compliant with social expectation, rather than actually changing its behaviours. The EP regulatory regime was introduced in response to public concerns about the seeming disregard for environmental and social issues in project finance and to protect the reputation of the actor adopting the regime. Therefore, it must be remembered that their motivation for adopting the EP framework is likely to be profit-driven, and this might cast doubts for the public on whether private actors, such as commercial banks and other private financial institutions, would impartially balance environmental and social consideration against their business interests in their decision-making processes. The flexibility in the EP regulation, as most requirements are procedural rather than defining substantive outcomes, permits the EPFIs discretion in implementation as well as a subjective assessment of whether the proposed project sufficiently satisfies the EP standards and is eligible to receive financial supports.[134] Without the establishment of effective accountability mechanisms, the processes under the EP regime can be criticised for conferring symbolic legitimation, rather than constituting substantive legitimacy.[135]

The fact that the EP regulation contains process standards, such as the requirements for ESIA and ESMP, but does not clarify substantive outcomes leads to the questions about the credibility and the actual implication of the EP framework in sustainable finance, especially when the process standards do not provide precise prescription on how to organise such processes, leaving it to the discretion of the clients. There are some projects which have been found to be in conformity with the EP procedural requirements for decision-making process and project finance has been approved in spite of NGO concerns that the operation of the project would adversely affect the environment and local people.

One example is the construction of a paper pulp mill in 2005, which was approved by the Uruguayan government and considered to be a megaproject that would bring a large amount of investment to the country. The government expected that this project would boost the economic

[133] Blake E Ashforth and Barrie W Gibbs, 'The Double-Edge of Organizational Legitimation' (1990) 1 Organization Science 177.
[134] Adeyemi (n 50) 103.
[135] O'Sullivan and O'Dwyer (n 40) 567-568.

situation of the country at that time.[136] However, the construction of the mill on the Uruguay River raised concerns and disagreement from Argentina which is located on the other side of the river. The Centre for Human Rights and Environment or CEDHA, which is an Argentinean NGO, worked to stop the construction. They filed a complaint and raised a campaign to request the EPFIs, which were the ING Group and Calyon, to withdraw their financial support from such project, claiming that the Environmental Impact Assessment did not comply to the EP standards in terms of excluding Argentinean stakeholders from the assessment and lacking consideration of cumulative impacts caused by the projects.[137]

As previously mentioned, the EP regime has not yet established any mechanisms that allow the public or affected entities to reach the EPFIs directly or to challenge their decisions in financing a project. CEDHA had to raise a campaign to put public pressure on the financiers[138], calling for withdrawal of financial support for the paper pulp mill. This indicates another problematic issue of the EP regulation, namely the lack of enforceability, which will be discussed later. Without particular accountability mechanisms for challenging the EPFIs, CEDHA had to turn to the Compliance Advisory Ombudsman or CAO, which is the independent accountability mechanism for the IFC. The CAO mandates include responding to 'complaints from project-affected communities with the goal of enhancing social and environmental outcomes on the ground.'[139] (The issues about CAO will be further discussed alongside the EP institutional design in Chapter 5.) Since the EP regulation refers to the IFC standards, the CAO which is an ombudsman for the IFC was the institution with which CEDHA could file a complaint for non-compliance with the IFC standards in order to prevent the construction of the pulp mill.[140] However, the CAO merely focused on the procedural deficiencies in approving the project.[141] After the processes were later corrected as suggested by the CAO reports, the IFC concluded that the construction of this project did not violate the IFC standards. Such a conclusion indicates that as long as the procedural requirements are qualified, a project could be justified

[136] Monte Reel, 'Economic boon in Uruguay a bane to Argentina' (*The Seattle Times*, 15 November 2005) <www.seattletimes.com/nation-world/economic-boon-in-uruguay-a-bane-to-argentina/> accessed 17 January 2022.
[137] Lee (n 128).
[138] ibid 361.
[139] Compliance Advisor Ombudsman, 'About Us' (2021) <http://www.cao-ombudsman.org/> accessed 17 January 2022.
[140] Sarro (n 39) 1554-1555.
[141] Compliance Advisor Ombudsman, 'CAO Audit of IFC's and MIGA's Due Diligence for two Pulp Mills in Uruguay' (Final Report, 22 February 2006).

as environmentally and socially safe. Finally, CEDHA could not prevent the construction of the paper pulp mill but was simply able to challenge the procedural compliance.[142] Although the ING group decided to stop its financial support to the project, there were other EPFIs and financial institutions which stepped in to finance the construction.[143] The withdrawal of the ING group has not been officially linked to the EP requirements; however, it was widely known that the ING group at that time wanted to protect their reputation from the public press.[144]

The case of the paper pulp mill indicates a significant weakness of the EP regulatory regime. The process standards are flexible and conform to the idea of learning in reflexive law which support the non-state form of governance. However, without effective accountability mechanisms and independent review, which allows the public to challenge the decisions of EPFIs, the aim to encourage sustainable investments cannot be achieved. This will definitely affect the credibility of the EP regulation. The Uruguayan pulp mill is not the only case where the compliance with the EP process standards does not conform to the public expectation in supporting an actually sustainable project. The Baku-Tbilisi Ceyhan (BTC) pipeline project is another case that met the EP procedural requirements but was not considered environmentally friendly by the public.[145] Such two cases cast doubts on the credibility of the EPs, resulting in criticisms of the real effectiveness of the EPs in preventing hazardous activities.

Moreover, EP regulation has been designed as a regulatory framework for financial institutions; it does not establish any rights or liability to any entities, either public or private.[146] The decision-making processes of EFPIs have to include public consultation and engagement of stakeholders, but the ultimate decision relies on the discretion of EPFIs. It is their judgment in balancing the benefits against the social and environmental risks or impacts of the proposed project. Affected communities and stakeholders cannot veto a project or even challenge the categorisation of a project. The EP regulation applies a voluntary incentive-based mechanism, encouraging adoption and adherence by relying significantly on 'soft' incentives for compliance rather than relying on the 'hard' enforcement mechanisms of conventional

[142] The dispute between Argentina and Uruguay on the River Uruguay was later escalated to the case before the International Court of Justice (ICJ) after the result of the IFC's CAO did not satisfy Argentinian stakeholders. See International Court of Justice: Pulp Mills on the River Uruguay (Argentina v. Uruguay) 2010.
[143] Lee (n 128) 364.
[144] ibid.
[145] Richardson (n 43) 93.
[146] EP 4, disclaimer.

regulation. Therefore, the imposition of liabilities for non-compliant EPFIs is not included. Since approaches to governance are now expanding from command-and-control to other mechanisms which are less coercive, learning and incentive mechanisms are increasingly applied as a form of governance, especially in non-state governance including the EP regulatory regime.[147]

In the absence of liabilities for non-compliant EPFIs, 'free riders' may emerge.[148] In other words, some financial institutions might simply adopt the EP regulation to obtain reputational advantages as green banks but do not adhere to the EP requirements Some financial institutions may adopt the EP yet still provide loans for environmentally detrimental projects. Such financiers are 'free riders' in terms that they do not bear costs of regulatory compliance yet still gain benefits from the reputation of other EPFIs which strictly adhere to the EP framework. Adeyemi suggests that, without careful design, the EP regime may fail to encourage sustainable investments and become a mere disguise for 'business as usual'.[149] Nonetheless, the imposition of liability might not be an efficient response to solve the problem of the free rider, for voluntary measures are typically introduced to address the regulatory problems which hard law fails to solve[150], and since the EP adoption is voluntary-based, shifting to be a hard-law form might not attract adoption or at its worst might induce withdrawal of members.

Enforcement is, therefore, another issue for which the EP regime has been criticised. As the state has authority and coercive powers to enforce the laws against non-compliant actions, the relationship between private financial institutions and their clients under the EP regime rests on the terms of the loan agreement. The processes under the EP guidelines encourage coordination between lenders and borrowers in finding out how to mitigate or address social and environmental harms rather than treating non-compliant clients as violators.[151] However, enforcement action can be costly for a private financial institution if, in cases where the operation of the project turns out to be non-compliant with the EP standards, the lending EPFI has to call an event of default and bring the case to court for a breach of covenant.[152] This fact could cast doubts on the effectiveness of the EP regulation in raising environmental and social standards, as it does not seem attractive for EPFIs to start litigation merely to force their clients

[147] Richardson (n 43) 77.
[148] Hardenbrook (n 54) 210.
[149] Adeyemi (n 50) 103.
[150] ibid 104
[151] See the discussion in Section III of this chapter.
[152] See EP 4, principle 8; Sarro (n 39) 1552 – 1553.

to conform to the EP regulation.[153] Further, the lack of accountability mechanisms does not allow the public to challenge the EP adherence of its adopters. Although there could be peer pressure from other EPFIs, they do not have any hierarchical powers to force non-compliant EPFIs to correct their behaviour. Also, the EP regulation imposes no sanctions for the EPFI's breach of the EP regulation. The establishment of an EP regulatory body to monitor the EP implementation has been consistently encouraged by NGOs, with authority given to such body to withdraw the EP membership of non-compliant financial institutions.[154] This institutionalisation could arguably solve the problem of free riders as well as increase accountability and credibility of the EP regime. The issue on EP institutional design will be future discussed in Chapter 5.

VII. Conclusion

This chapter has shown that the EP regime needs to develop its institutional design to address public concerns about accountability and to ensure that stakeholder engagement and public participation will be properly organised to encourage mutual learning in accordance with the concept of experimentalism. To date, the continuous development of the EP framework implies the good intention of EP members to enhance the effectiveness of the regime in promoting sustainable investments and indicates positively that further development will be welcomed if carefully designed to preserve the strength and benefits of private regulation but at the same time respond to public concerns. An accountability mechanism is an important further development in order to ensure transparency and accountability, which may result in further legitimacy of the regulation as well as its credibility, contributing to resolving the allegations of green washing and free riders. These issues will be further explored and discussed in Chapter 5. However, at this stage, the potential of the EP framework in raising environmental and social standards in a developing country is clear. The EP regulatory regime can contribute to sustainable development and potentially offers an alternative to address the regulatory gap that state government fails to address.

The study of the context of developing countries and case studies will be discussed in later chapter before developing suggestions on the institutional design for the EP regulatory regime

[153] Sarro (n 39) 1553.
[154] Clayton (n 85) 182-184.

to address the critiques as illustrated above. The emergence of non-state regulation does not have to replace the role of state regulators totally. The collaboration between the state and private actor is now common in various areas of governance.[155] The thesis will therefore discuss the institutional design for the EP framework along with considering the potential interaction between the state and the EP regulatory regime.

Freshfields Bruckhaus Deringer, an international law firm, revealed in its study that the EP has generated positive influence in financial markets and shaped new practice in project finance.[156] Since the EP functions could let the financial institutions redefine private business practice to be more environmentally concerned without reference to domestic laws, it can be rationally assumed the EP framework can raise environmental and social standards in a country where the domestic laws are considered ineffective or inadequate for environmental governance. The next chapter will study the contexts of Thailand and discuss whether EP regulation, with some development on its institutional design, can serve as an alternative form of governance to solve the problem where state regulation is weak or fails to encourage environmental development.

[155] Richardson (n 43) 77.
[156] Adeyemi (n 50) 101.

CHAPTER 4:

Environmental Governance in a Developing Country: The Case of Thailand

The previous chapter examined the Equator Principles (EP) framework and suggested that it can be an alternative regulatory measure for supplementing state regulation in environmental governance. The EP framework embraces the concept of reflexive governance in terms of experimentalism like the EU's approach to environmental governance which provides a good model of how the conventional command-and-control approach can be developed to incorporate the idea of mutual learning and encourage public participation in regulation. However, the context of developed countries such as the EU member states is much different from the context of developing countries. The purpose of this chapter is to shine a light on how the EP framework may enable a developing country – Thailand – to improve its regulatory approach to environmental governance. The political situation of a developing country, which can be more unstable and chaotic than in developed countries, together with the different culture and societal values, may cast doubt on whether the EP framework, as a form of private self-regulation, can apply as a regulatory measure to raise environmental standards in such countries where the societal and political structure might not support much environmental awareness. This chapter applies Thailand as a case study for environmental governance in a developing country.

The chapter begins with Section I exploring Thailand's political, economic, and cultural norms in order to understand the context of Thailand before studying the development of Thai environmental policies and legislation in terms of international obligations in Sections II and III. Thai environmental regulation is examined in Section IV, along with the regulatory structure and government authorities which are specifically assigned to handle environmental development in Thailand. The problems of state regulation in Thai environmental governance are then discussed in Section V, followed by the suggestion for private financial institutions as environmental regulators to address the problems which state regulation fails to address effectively. Section VI investigates the current position of Thai private financial institutions towards EP adoption before reaching the conclusion that the EP framework has the potential to raise environmental standards in a developing country such as Thailand.

I. Culture, Politics, Economic Development and Environmental Protection in Thailand

The ideas of sustainable development and the green economy, as examined in the previous chapter, indicate the current direction of environmental policies that consider the environmental aspect along with economic development instead of doing so separately. Such concepts compromise the situation of most developing countries where industrialisation is still required for eradicating poverty and enhancing economic growth, and mere focus on environmental protection might not attract cooperation from developing countries.

Thailand is a developing country in Southeast Asia and, similar to its neighbours and other developing countries, its economic growth has been stimulated by industrialisation, which in turn has resulted in extensive urbanisation.[1] Rapid economic growth inevitably came with environmental degradation such as pollution and waste management problems.[2] However, the western awareness of environmental issues has also arisen. Although it is noticeable that the western values, due to the powerful influence of most western countries, are usually spread across the world, there might be some cases where such western values might conflict with the culture and social values of other countries. International principles simply provide a framework for implementation; national policies, legal measures, and legislation are left to the discretion of the governments to design how to implement such principles in the context of their countries. The study of the politics and culture of Thailand will provide greater insights into environmental governance in Thailand and how international concepts on environmental management can be adapted in the Thai context.

Apart from the inseparable link between economic development and environmental management, as illustrated above, the interrelationship between politics and national economic growth is also undeniable.[3] Countries facing political unrest may find it difficult to attract foreign investors due to their unpredictable situation and potentially unpredictable policies for maintaining public order. The statistics show that political instability, as often occurring in Asian countries, negatively affects economic development, especially the stock market, in

[1] Peter Oosterveer, Somporn Kamolsiripichiaporn and Rajah Rasiah, 'The "Greening" of Industry and Development in Southeast Asia: Perspectives on Industrial Transformation and Environmental Regulation: Introduction' (2006) 8 Environment, Development and Sustainability 217, 219.

[2] ibid 220.

[3] See Gustav Ranis (ed.), *Government and Economic Development* (Yale University Press 1971); Helen James, *Security and Sustainable Development in Myanmar* (Routledge 2006).

terms of 'poor policies' or political interference.[4] When a new government is established after political turmoil, one of the urgent issues it has to address, apart from restoring public order, is to revive economic growth and solve the economic stagnation resulting from the political situation of the country. Even in the absence of political chaos, poverty is a major problem in developing countries, as could be seen from the long debate between the Global North (hereafter 'the North') and the Global South (hereafter 'the South') on economic justice and the South's argument for the necessity of poverty alleviation before environmental conservation.[5] Economic development is usually prioritised in government policies, and in political competition, economic policies are always the focus of competing political parties to persuade voters.

A study of 'the relationship between green practices in logistics operations and macro-level social factors' indicates that the political situation has impacts on not only economic growth but also environmental sustainability since it could distract the government's attention from developing environment-friendly policies.[6] Moreover, as pollution or environmental damage from industrialisation can cause health problems or negatively affect the quality of life of local communities, environmental ignorance might provoke an aggressive reaction from the locals which can develop to protest or even public uproar; as in Thailand, where illegal hunting once provoked protests against military elites at that time. (This case will be explored in the following part.) It should be noted that political pressures can push for growth-oriented policies with the possible ignorance of environmental issues on one hand, but, on the other hand, can work for raising awareness of environmental problems. For most developing countries, political pressures lead to the first scenario, and the governments tend to focus on generating economic growth rather than for environmental development.[7]

In order to fully assess how the EP framework might contribute to Thailand's environmental regulatory landscape, it is important to understand the domestic political system since

[4] Syed A. R. Khan, Arshian Shariff, Heris Golpira, and Anil Kumar, 'A Green Ideology in Asia Emerging Economies: From Environmental Policy and Sustainable Development' (2019) 27 Sustainable Development 1063, 1067.

[5] See J. Ntambirweki, 'The Developing Countries in the Evolution of an International Environmental Law' (1990) 14 Hastings International and Comparative Law Review 905.

[6] ibid 1065 – 1066.

[7] For more discussion, see David Pearce, Edward Barbier, Anil Markandya, *Sustainable Development: Economics and Environment in the Third World* (Edward Elgar Publishing 1990); E. Wayne Nafziger, *The Economics of Developing Countries* (3rd edn, Prentice Hall 1997).

democracy is often (positively) related to economic development.[8] For example, democracy supports the ideas of public participation and information sharing in terms of transparency. In order to realise economic needs and understand the market, information from the private sector is useful and exchange of ideas and experience can provide comprehensive knowledge for making government policies.[9] Democratic governance with guaranteed rights and liberties for its people recognises freedom of expression, allowing discussion and criticisms of government policies, leading to policy improvement. Accountability and transparency can enhance trust from people including the business sector and investors. Democracy also supports environmental development for the same reasons as it does economic development, since engagement of stakeholders and local communities is essential for environmental decision-making; full engagement cannot occur unless access to information and public participation are provided. However, a political system alone does not result in full engagement of people, culture and values have considerable influence in their response and cooperation in building environmental sustainability. Since the concept of democracy originated in western countries before spreading to other regions including Asia, the way that western concepts have been adopted in Asia which has its own cultures significantly different from the western countries should be explored. The study of political and cultural contexts of a country can enable us to gain a better understanding of the challenges implementing environmental regulation in such a country and how to solve them. The following section will explore how Thai culture and domestic political framework may affect the creation and implementation of environmental regulation.

(1) Asian Values, Thai Culture, and Environmental Management

With higher capacities in academic studies and their development of knowledge, the North is considered to have greater influence than the South in generating and disseminating its knowledge, norms and values on the global stage and can dominate the discussion in international forum.[10] Liberalism and the concept of democracy are conventionally referred as western values which originated in the North before spreading to the South.[11] During the colonial period, the North used the justification of civilisation and modernisation to colonise

[8] See Ranis (n 3); James (n 3); Nafziger (n 7).
[9] See Amartya Sen, 'The Importance of Democracy' in *Development as Freedom* (Oxford University Press 1999).
[10] Bhupinder S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 15 - 16.
[11] Sen (n 9) 149.

the South and universalise their norms.[12] Although Thailand has never been colonised, the country needed the legal reform to prevent the typical claim of the colonists that a country required their helps in making the country civilized. The legal reform during the reign of King Chulalongkorn, which was the time when the country was crucially facing the pressure of colonialism, therefore adopted the western concept in response to most westerners' view at that time that considered the traditional laws, trial and punishment cruel and barbaric.[13] After the colonial era, growing globalisation and trade liberalisation have been significant factors which further allow the transferring of ideas and values from western nations to Asian countries, introducing 'new transitional values' of the North to the South including Thailand, especially to the new generation.[14] A number of arguments have been raised against the endorsement of some western values in Asian countries which have their own cultures and uphold different values.[15]

'Asian values' are usually discussed with reference to the concept of Confucianism, focusing on order and discipline rather than 'liberty and freedom' as in western nations.[16] The values most Asians uphold are different from the so-called 'universal' western values, yet the term 'Asian values' is itself a homogenising and problematic term. The Asian region is too massive, and the cultures within these countries too diverse, to simply conclude that all Asian countries completely share identical values or cultures.[17] Confucianism is often mentioned as a significant feature of Asian values and has significantly influenced the value-systems of East Asian countries, such as China, Hong Kong, Taiwan, Japan, and Singapore, especially when it comes to the principle of democratisation.[18] However, and by comparison to other East Asian

[12] Carmen G. Gonzalez, 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32 Pace Environmental Law Review 407, 411.
[13] See Tamara Loos, *Subject Siam: Family Law, and Colonial Modernity in Thailand* (Cornell University Press 2006); Krisdakorn Wongwuthikun and Naporn Popattanachai, 'Siam and the Standard of Civilisation in the Nineteenth Century' in Andrew Harding and Munin Pongsapan (eds.), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021).
[14] Phillip Niffenegger, Songpol Kulviwat and Napatsawan Engchanil, 'Conflicting Cultural Imperatives in Modern Thailand: Global Perspectives' (2006) 12 Asia Pacific Business Review 403, 412 – 413.
[15] See Sen (n 9) 149.
[16] ibid.
[17] See William Theodore De Bary, '"Asian Values" and Confucianism' in *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Harvard University Press 1998).
[18] Doh Chull Shin, *Confucianism and Democratization in East Asia* (Cambridge University Press 2011).

cultures, Confucianism does not have much influence on Thai culture. The outstanding characteristic of Thai culture is its deep relationship with Buddhism.[19]

Institutional designs require understanding cultural contexts in order to find a proper measure to adopt western-originated concepts of environmental management in an Asian country, as in Thailand, which has its own culture and has upheld values differing from, or in some cases contradicting, those of western nations. This section, therefore, examines Thai culture by starting with the study of the significance of Buddhism in Thai culture and then discussing some Thai values and culture which can affect the achievement of public involvement in environmental governance.

Buddhist Influence in Thailand and Transnational Values in the Modern World

Buddhism has been established and deepened its roots in the Thai society for a long time, even before Thailand (or precisely, Siam) became a nation. With the strong faith of people towards Buddhism, most early Kings of Siam referred to the Buddhist thoughts or 'dhamma' to gain respect from people.[20] Even in cases of declaring the law – the 'Three Seals Code' – at the early time of his reign as the first king of the new dynasty, King Rama I adopted Buddhist beliefs in setting the punishment for doing bad by reference to the torments in hell.[21] However, trial by ordeal and cruel punishment under the Three Seals Code became outdated and considered barbaric in the eyes of the westerns when the ideas of liberal humanism were growing. Establishment of a more modern legal system was an urgent need at that time for proving to the western countries that Siam was civilised without the necessity to be colonized. The judicial reform and codification in the reign of King Rama V (Chulalongkorn) abolished the application of the Three Seals Code and shifted from the reliance on religious beliefs to be more secular in accordance with the western model.[22]

[19] Niffenegger, Kulviwat and Engchanil (n 14) 405.

[20] See Khemthong Tonsakulrungruang, 'Buddhist Influence on the Ancient Siamese Legal System, from Ayutthaya to the Twenty-First Century' in Andrew Harding and Munin Pongsapan (eds.), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021); Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (2nd edn, Cambridge University Press 2009).

[21] See Andrew Huxley (ed.), *Thai Laws, Bhuddhist Law: Essays on the Legal History of Thailand, Laos and Burma* (White Orchid Press 1996); Andrew Huxly, 'Buddhist Law' in Herbert M Kritzer, Bryant Garth, and Kenneth M Holland (eds.), *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (ABC-CLIO 2002).

[22] See M B Hooker, 'The "Europeanisation" of Siam's Law 1855 – 1908' in M B Hooker (ed.), *Laws of South-East Asia, vol ii* (Butterworths 1986); David M Engel, *Law and Kingship in Thailand during the Reign of King Chulalongkorn* (University of Michigan Center for South and Southeast Asia Studies 1975).

Although the modernised legal system of Thailand has separated 'dhamma' from laws, Buddhism still preserves a significant influence in the Thai society and has taken a significant part in forging Thai culture, notably in terms of the Buddhist influence on people's beliefs and behaviour. Buddhism teaches people to be kind and tolerate hardship, considering material possessions as external objects which do not actually belong to oneself. Nirvana is the ultimate goal for the resting soul to become a part of the universe.[23] The Buddhist concept of 'karma', which emphasises the virtues of doing good and the bad results of doing bad, aims to encourage people to do good and avoid bad. This moral value works along the legislation in preventing crime; however, it could have disadvantages in the sense that it implies compromising and trusting goodness in other people, together with the belief that karma will play its role if they act badly, which might allow the abuse of power of government, or dictatorship in a worse case, or might create ignorance among people, enabling certain private business to take advantages.

Buddhism was applied as a political instrument of dictatorial government in the past to motivate people against the western ideas of freedom, liberty, and real democracy, for instance, by arguing that the idea of a person has his or her rights recognised and protected by the laws can make people selfish and think of themselves rather than the society.[24] The western values are strongly in contrast to Buddhism in terms of valuing materialism from an aspect of achievement orientation while Buddhism teaches people to be selfless.[25] Anyway, the humble nature of Buddhism does not strongly oppose the introduction of western ideas to Thai society. Globalisation facilitates the transfer of western cultures to Thailand through media; new 'transitional values' such as egalitarianism, materialism, and critical questioning, are having a growing influence in the young generation of Thailand.[26]

However, since 1997, the financial crisis has significantly affected Thailand as an export-intensive economy. Thailand's rapid economic growth during that period attracted over-investment resulting in massive debts when the global economy collapsed, and, in response to this crisis, King Rama IX introduced the 'sufficiency economy theory' based on the Buddhist

[23] See Brian Peter Harvey, *The Selfless Mind: Personality, Consciousness and Nirvana in Early Buddhism*. (Routledge 1995).

[24] Charles F Keyes, 'Buddhism and National Integration in Thailand' (1971) 30 Journal of Asian Studies 551, 559 - 566; see Prayudh Prayutto, *นิติศาสตร์แนวพุทธ* [Buddhist Jurisprudence] (16th edn, Wat Nyayaves 2010), 86.

[25] Niffenegger, Kulviwat and Engchanil (n 14) 407.

[26] ibid 412 - 413.

doctrine of 'self-reliance' and the elimination of greed to prevent the same situation in the future.[27] This theory, which is the opposite of the western values that regard materials as a sign of achievement, has diluted the western values in Thai cultures to some extent by moderating the extreme end of materialism and liberalism to preserve Thai values on tolerance and inner peace. The sufficiency economy theory also paves a way for the concept of sustainable development to be promoted in all its dimensions, as it signifies the imbalance of the mere economic development without considering other development such as human, social and environment elements.[28] This interrelation between the sufficiency economy and sustainable development could explain the reason that the incorporation of such a western concept in government policies can gain acceptance in Thailand easily and could imply to some extent that when new emerging values are introduced, they are easier to blend with existing cultures if they share some similarity with the existing societal values.

Thai Culture and Problems of Environmental Management

Buddhism has significance in cultivating compromise on the part of Thai people; this could explain the obviously seen 'collectivism' in Thai society. Thai people emphasise the importance of network and connection as well as social harmony. The Thai concept of 'Kreng Jai' - that one should be humble to others - is taught and implanted in Thai community, leading to the compromise-based approach of Thai people and their avoidance of conflicts by refraining from criticising others or giving opposing views explicitly.[29] The concept of Kreng Jai is related to Buddhist teaching to think of others before oneself and be kind to each other.[30] This culture might obstruct the success of environmental governance in terms of discouraging actual public participation in the process of risk assessment or decision-making, since challenging or opposing the others' views can cause conflicts with other people and ruin the social harmony. With the collectivism cultivating a bond in a community along with the norm of Kreng Jai, a person might restraint him or herself from giving different opinions so as to avoid conflicts.

[27] Steven Rosefielde, Masaaki Kuboniwa, Satoshi Mizobata, *Prevention and Crisis Management: Lessons for Asia from the 2008 Crisis* (World Science Publishing 2013).
[28] Prasopchoke Mongsawad, 'The Philosophy of the Sufficiency Economy: A Contribution to the Theory of Development' (2010) 17 Asia-Pacific Development Journal 123.
[29] Siriyupa Roongrengsuke and Daryn Chansuthus, 'Conflict management in Thailand' in Kwok Leung and Dean Tjosvold (eds.), *Conflict management in the Asia Pacific: Assumptions and Approaches in Diverse Cultures* (John Wiley & Son (Asia) 1998).
[30] Niffenegger, Kulviwat and Engchanil (n 14) 406 – 407.

It must be noted that even though Buddhism does not set up the caste system (or 'Varna') as in the Hinduism belief, the concept of Karma leads to the belief that doing merits will result in prosperity of the next life. The social status of aristocrats or elite people is considered the result of their good deed in the past and should be respected. This Buddhist belief is related to the hierarchical nature of Thai society.[31] This belief has caused the power distancing, and, to some extent, has supported paternalism in Thai culture.

With paternalism deeply rooted in Thai cultures, Thai children are normally taught to respect and obey seniority, causing Thai people to accept decisions or orders from superiors or elites easily.[32] The 'patron-client relationships' in Thailand causes most Thai people to feel confident in letting elites make decisions rather than to take risk in making their own decisions, believing that elites might have more knowledge.[33] This culture conflicts strongly with the democratic system which promotes participation from all levels. While democratic systems emphasise people's equal rights and freedom of speech, Thai culture tends to make some people allow other ones they consider having more capacities, namely having more knowledge and information or having higher societal positions, to make a decision or dominate the discussion.

The norm that some Thai people usually 'go with the flow' and allow a small group of people, often the elite which looks knowledgeable or respectful in a society, to dominate their views marks an obstacle for public discourse to achieve its objectives of gaining information and opinions from stakeholders. Despite the requirements for comprehensive inclusion of stakeholders and local people potentially affected from a developmental project in risk assessment or decision-making process, the actual engagement of people cannot happen if they reserve their own opinions and simply follow the majority or a few elite leaders. An empirical study shows that local leaders have significant influence over farmers, namely on their opinions toward 'community development projects.'[34]

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[31] For further details about the social hierarchy in Thailand, see John Girling, *Thailand: Society and Politics* (Cornell University Press 1981); Thongchai Winichakul, *Siam Mapped: A History of the Geo-body of a Nation* (University of Hawaii Press 1994).

[32] Otto Feigenblatt, 'The Thai Ethnocracy Unravels: A Critical Cultural Analysis of Thailand's Socio-Political Unrest' (2009) 1 Journal of Alternative Perspectives in the Social Sciences 583.

[33] Gertrud Buchenrieder, Thomas Dufhues, Insa Theesfeld and Mungkung Nuchanata, 'Participatory Local Governance and Cultural Practices in Thailand' (2017) 3 Cogent Social Sciences 1, 6; see also Henry Holmes and Suchada Tangtongtavy, *Working with the Thais: A Guide to Managing in Thailand* (White Lotus Bangkok 1997).

[34] Buchenrieder, Dufhues, Theesfeld and Nuchanata (n 33) 12.

However, globalisation and the introduction of new transitional values gradually change the way local people interact with leaders; paternalistic relationships might not completely disappear but their influence is reduced. People are not easily dominated by elites or government anymore if the case is controversial and can have significant impact on their quality of life.[35] Although authoritarianism is still observed in Thai politics, as will be described in the later section, the western concepts, especially the concept of democracy, have played a role in re-shaping authoritarianism in Thailand to be compatible with democratic government, diluting the state-centred power and encouraging more activism in people to exercise their rights. Public engagement in environmental governance may be more dynamic and actually inclusive than the past, giving a good sign to learning-based forms of governance with public discourse and participation in decision-making.

(2) The Political Situation in Thailand and Environmental Development

The Siamese Revolution transformed the government system of Thailand from an 'absolute monarchy' to a 'parliamentary monarchy'[36], with the first Constitution of the Kingdom[37] in 1932, founding the government structure and establishing rights and freedom for people. (The issues concerning the Constitution of the Kingdom of Thailand will be further explored in Section IV.) Despite the enactment of the Constitution, democracy in Thailand was not well settled; dissatisfaction from consistent corruption and existing inequalities and privileges of elites has caused a number of protests, leading to political chaos and military coups to restore public order and to bring down the government at that time. This political instability in Thailand since 1932 could explain why environmental regulation has not been much developed

[35] ibid 13 – 15.

[36] To be precise, the Siamese Revolution in 1932 could not be claimed as the popular movement as in some other countries but only limited to a palace revolution. In the early years of democracy in Thailand, the engagement of lay people in politics and constitutional establishment can be counted as only a small number of citizens, and most of them were graduated abroad from the countries where democracy had already been found. See further about the history of Thailand and its constitutions in Baker and Phongpaichit (n 20); Andrew Harding and Peter Leyland, *The Constitutional System of* Thailand: A Contextual Analysis (Hart Publishing 2011)

[37] The 'Kingdom of Thailand' was previously called the 'Kingdom of Siam' until being renamed in 1939. Therefore, the official titles of the constitutions before the 1939 was the 'Constitution of the Kingdom of Siam.' Please be noted that this thesis applies the term 'Thailand' when referring to the Kingdom of Thailand as well as the Kingdom of Siam, but the precise name of the country during that period before 1939 was 'Siam.' See further about the history of Thailand and its constitutions in Baker and Phongpaichit (n 20); Harding and Leyland (n 36).

in the first era of legal reform after the Siamese Revolution. Further, the Thai government still prioritised economic development over environmental protection and conservation.[38]

The first time that an environmental issue caused widespread public uproar was in 1973, when the military prime minister of Thailand and his officers illegally invaded and hunted wild animals in the forest.[39] Their exemption from law enforcement in this case revealed the privilege of political elite and dictatorship, resulting in another military coup taking down the prime minister. Although illegal forest invasion and wildlife hunting, which included an environmental aspect in terms of conservation, were the cause of aggressive protests, this did not imply that people were actually interested in environmental development and were aware of the severity of environmental problems; environmental issues were rather applied as symbols for political movements. It was in the 1980s that peasants and local people started to realise the damage from industrialisation. A number of local protests against dam construction or the development of industrial areas occurred and required a response from the government.[40] However, such resistance was not sufficiently strong to induce a significant change in the government's approach to national environmental regulation. Rather, it was the international awareness of environment degradation coupled with industrialisation, firstly introduced in the 1972 UN conference in Stockholm, that has influenced the government to improve environmental regulation.

Although the Thai government has endorsed the concept of sustainable development and has incorporated such a concept into its policies, the tangible outcome of sustainability is yet to be found. In the 2000s, the political situation in Thailand became more democratic, as was noticeable from the source of government coming from national election, rather than from military coups or appointment as in the past. Nevertheless, despite the establishment of democracy in Thailand for a long period, the concept of authoritarianism still exists, or even dominates, in Thai political cultures.

The concept of authoritarianism is deeply rooted in most Asian countries due to its coherence with the Asian values that emphasise *discipline* rather than the western conception of

[38] Philip Hirsch and Larry Lohmann, 'Contemporary Politics of Environment in Thailand' 29 Asian Survey 439, 441.
[39] ibid 442.
[40] See Aphinya Dissaman, 'Two Decades of Pak Moon Dam Problem Case, Ubonratchathani Province: Lessons Learned from People's Movement for Environmental Conflict Resolution' (2012) 12(2) Sripatum Review of Humanities and Social Sciences 187.

freedom.[41] During the time when Thailand was governed by military leaders, the people's freedom was limited; public debate and critiques were constrained.[42] The enactment of the 1997 Constitution introduced more public participation and guaranteed people's rights and freedom, signifying more democratic governance than its predecessors. When Thaksin Shinawatra won the election and became the prime minister of Thailand in 2001, business interests and globalisation were the prominent driving forces of government policies. However, authoritarianism in Thailand has been argued as still existing but in a hybrid form due to its combination with democratic government, introducing a regulatory regime 'that [is] neither clearly democratic nor conventionally authoritarian.'[43] 'Abuses of state power', 'biased media coverage' on the part of state broadcasters, and problems of government transparency could still be found.[44] The popularity of Thaksin among grass roots made his political party win the election and gain a high number of parliamentary seats, enabling him to pass the laws that benefit his company as well as to interfere the independent institutions through 'a combination of appointment, intimidation, and bribery.'[45]

Despite remains of authoritarianism and the questionable democracy of Thailand, freedoms and liberties provided for people and communities under the 1997 Constitution allowed peasants and locals to have more voices in environmental politics than the past, and they were able to feed into and influence government decision-making to some extent.[46] Freedom of expression has been guaranteed under the Constitution.[47] However, the political structure reflects the traditional concept of state-centred governance and paternalism, which normally applies top-down regulation rather than devolution to local governance.[48] With the command-and-control approach, the success of environmental regulation in Thailand has been limited,

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[41] Sen (n 9) 231

[42] Chaiwat Satha-Anand, 'Reflections on October 6, 1976: Time and violence.' (2007) 19 Crossroads: An Interdisciplinary Journal of Southeast Asian Studies 185.

[43] Larry Diamond 'Elections without Democracy: Thinking about Hybrid Regimes' (2002) 13 Journal of Democracy 21, 25.

[44] Stephen Levitsky and Lucan A. Way, 'The rise of competitive authoritarianism' (2002) 13 Journal of Democracy 51, 55.

[45] Tom Ginsburg, 'Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution' (2009) 7 International Journal of Constitutional Law 83, 96; see further in Pasuk Phongpaichit and Chris Baker, *Thaksin* (2 edn., Silkworm Books 2009); Duncan McCargo and Ukrist Pathmanand, *The Thaksinization of Thailand* (NIAS Press 2005).

[46] Adam Simpson, Philip Catney and Timothy Doyle, *Energy, Governance and Security in Thailand and Myanmar (Burma): A Critical Approach to Environmental Politics in the South* (Taylor & Francis Group 2014) 62.

[47] Constitution of the Kingdom of Thailand 1997, arts 37 and 39.

[48] Simpson, Catney and Doyle (n 46) 63.

for most environmental standards imposed are too strict, making it impossible for industries to comply.[49] Also, state environmental regulation faces the problems of monitoring and enforcement due to the lack of information and trained officers to monitor and enforce effectively.[50] Nevertheless, there have been promising signs for the new form of environmental regulation, since the government recognises the increasingly important role for private actors in environmental governance, as could be seen from its acknowledgment of private standards and certification such as ISO 14001.[51] The new structure of the environmental regulatory regime, as will be explained in Section IV(4) of this chapter, also indicates the start of transferring certain responsibilities for environmental development to local government.

One significant factor that can seriously affect environmental development in Thailand is political instability. Political unrest, aggressive protestors, and a military coup do not directly cause environmental problems, but their outcomes can cast doubts on the effectiveness and reliability of the state in environmental governance. Political instability, or to make it clearer, the consistent shifting of government among opposing political parties, or even to military government, affects the continuity of environmental policies, measures, and regulatory approaches applied in environmental governance, and can then stagnate or impede the development of better environmental regulatory regime. The development of environmental policies and legislation in Thailand throughout the time of political instability will be explored in the following sections.

II. International Environmental Principles and Environmental Policies of Thailand

As already outlined in the previous Chapter, the principle of sustainable development has evolved over time and has been adopted by many institutions. Although the International Court of Justice (ICJ) has not yet recognised the principle of sustainable development as a customary principle of international law[52] and therefore it does not have legal-binding status, this principle has considerable influence on the Thai government policies. Thailand has taken part in the World Forum on Environmental Development since the Stockholm Declaration, as Thailand

[49] Oosterveer, Kamolsiripichiaporn and Rasiah (n 1) 220.
[50] ibid 221.
[51] ibid 222.
[52] Gabcikovo-Nagumaros Project (Hung. v. Slovk.) [1997] I.C.J. 3 (Order of Feb. 5).

endorsed the Stockholm Declaration[53], and when the concept of sustainable development made its first appearance in the United Nations Conference on Environmental and Development 1992, Thailand has become signatory to the Rio Declaration and Agenda 21, adopting the concept of sustainable development and supporting global sustainability. This requires the Thai government to prepare its policies and development plan to comply with the guidance of Agenda 21. However, since Thailand is a developing country and does not have a legal obligation to reduce its carbon emission, the policy measures in Thailand did not considerably change after the release of Agenda 21. The obvious implication was the incorporation of the principle of sustainable development in government policies and development plans, as will be further explored in Section IV. Yet, the concept has been vaguely mentioned that the development goals of the country must be sustainable, without further details on how a balance among economic, environmental, and social dimensions is to be established.[54]

Apart from the inclusion of the principle of sustainable development in national policies, the implications of Agenda 21 did not cause a substantial change in the organisation of Thai environmental governance until 2000 when the Thai government adopted Local Agenda 21. One key feature of Agenda 21 is that it emphasises the important role of local government in sustainable development due to its closeness to local communities; Chapter 28 of Agenda 21 focuses on local authorities in support of Agenda 21. In 2000, the Thai government chose three municipalities to be a sample area for assigning the local government bodies to develop their own plans for encouraging sustainable development in their area of governance[55], before later reconstructing environmental governance by officially assigning all local governments to be responsible for addressing environmental issues in their municipalities in 2017.[56]

After the World Summit on Sustainable Development 2002, the government established the national Committee for Sustainable Development, with the Office of the National Economic and Social Development Council working as the secretary team of the committee, to work on

[53] Loius B. Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 Harvard International Law Journal 423, 500.

[54] See Chandhana Indhapanya, 'Environmental Management and Sustainable Development' (2005) 1 NIDA's Journal of Environmental Management 1.

[55] Nakhon Pathom Rajabhat University, 'มนุษย์กับสิ่งแวดล้อม บทที่ 6 แนวคิดของการจัดการสิ่งแวดล้อมอย่างยั่งยืน' [Human and Environment Chapter 6: The Concepts of Sustainable Environmental Management] <home.npru.ac.th/phatthaya/subjects/aj32/Lesson%206.pdf> accessed 11 February 2022.

[56] Ministerial Regulation on Government Division, Ministry of Natural Resources and Environment 2017.

policies for sustainable development in particular.[57] According to the recent regulation, the members of the Committee, with the total number of 36 and the Prime Minister as Head of the committee, are composed of political officers, government officers, and representatives from other institutions, such as the Chamber of Commerce and Board of Trade of Thailand and the Federation of Thai Industries.[58] The members also include the experts in economic, social, and environmental development as properly assigned by the Prime Minister. However, the number of such experts is set to be 'no more than four', which means that there can be only one expert in the committee since the regulation does not set the minimum number but merely the maximum.[59] Although the mixture of policy-makers and business representatives in the committee might indicate an attempt to include ideas and comprehensive knowledge from different aspects in policy-making process, the representatives of non-governmental environmental organisations are disproportionately small in comparison with other members, not to mention the number of experts which obviously have a minor voice in the committee. The effectiveness of the committee is questionable as its composition indicates potential capture by the government. While the Agenda 21 and the current SDGs as contained in the 2030 Agenda emphasise inclusiveness in policy-making of sustainable development, the structure of the national Committee for Sustainable Development does not seem to reflect the effective engagement of stakeholders and expertise.

It should be noted that the inclusion of the concept of sustainability in environmental policies of Thailand did not experience any significant resistance from business. While democracy

[57] Buntoon Sethasirot, 'ไทยและเป้าหมายการพัฒนาที่ยั่งยืน' [Thailand and Sustainable Development Goals] (Thailand Sustainable Development Foundation, 28 July 2016) <http://www.tsdf.nida.ac.th/th/blog/10560/429-ไทยและเป้าหมายการพัฒนาที่ยั่งยืน> accessed 11 February 2022; 'เป้าหมายการพัฒนาอย่างยั่งยืน'[Sustainable Development Goals] (Open Development Thailand, 9 July 2018) <thailand.opendevelopmentmekong.net/th/topics/sustainable-development-goals/> accessed 11 February 2022.

[58] Other members are the Deputy Prime Minister, the minister attached to the Prime Minister's Office, the permanent secretaries of 18 ministries, the secretary-general of the Council of the State, the secretariat of the Office of the National Water Resources, the attorney-general, the director of the Bureau of the Budget, the director of Thailand Institute of Justice (Public Organisation), president of Thailand Environment Institute, the director of the Good Governance for Social Development and the Environment Institute, the vice president of Chulabhorn Research Institute, the president of Thailand Development Research Institute Foundation, the president of the Chamber of Commerce and Board of Trade of Thailand, the President of the Federation of Thai Industries, the secretariat and the deputy secretariat of the National Economics and Social Development Council, the secretariat of the Natural Resources and Environmental Policy and Planning, and the expert(s) in economic, social, and environmental development as the Prime Minister assigned with the total number of no more than four. See Ministerial Regulation on Committee for Sustainable Development, Office of the Prime Minister 2019.

[59] ibid.

which is a western-originated concept has not been stably established despite the fact that it has been a long time since its introduction to Thai people, the concept of sustainable development has been adopted and continuously promoted in government policies. It can be assumed, with reference to the discussion in the previous section, that the idea of sustainability is coherent with Thai culture so that it can gain public acceptance easily. On the other hand, it might be because the government has not taken the principle of sustainable development into effect and leaves it as a broad policy that people feel indifferent to the adoption of this concept.

III. International Environmental Agreement and the Obligations of Thailand

The Stockholm Declaration 1972, the Rio Declaration 1992, and the Johannesburg Declaration 2002 are notable documents known for establishing important environment principles which are adopted or further developed by particular agreements on environmental development. Such international agreements on specific environmental issues could be categorised into three main groups: (1) conservation and biodiversity, (2) ozone depletion and climate change, and (3) waste management for transboundary waste and other specific issues. This section focuses on the first two groups of international environmental law as they are reflected in government policies or amendment of existing laws of Thailand.

For conservation, the primary international agreement in this field is the 1975 Convention on International Trade in Endangered Species of Wild Fauna and Flora (known as 'CITES'), which focuses on illegal trade in wildlife. At that time, illegal trade in wildlife was a critical problem in Thailand; a number of species were significantly decreased or even extinct. Thailand participated in the foundation of CITES and ratified the Convention in 1983.[60] The country was then bound by the obligation to amend its national legislation to be coherent with the CITES standards. The CITES requires the establishment of a national committee to regulate wildlife trading as well as legal measures for sanctioning violation of laws on illegal trade of wildlife.[61] Without the required amendment to existing conservation law having been made, namely not providing legal measures for preventing illegal trade of wildlife, not establishing a licensing system, and not designating Management Authorities and Scientific Authorities to administer the licensing and trading of wildlife, the Conference of the Parties decided to

[60] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 'List of Contracting Parties' <www.cites.org/eng/disc/parties/chronolo.php> accessed 13 August 2020.
[61] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 'How CITES works' <www.cites.org/eng/disc/how.php> accessed 13 August 2020.

announce a trade ban with Thailand in 1991, resulting in all CITES member (110 countries at that time) stopping trading wildlife and wildlife products with Thailand.[62] This trade ban caused an immediate response from the Thai government to launch the Wild Animal Conservation and Protection Act in 1992 and amend the Plant Act to comply with the CITES standards in the same year.[63] The quick response of the Thai government satisfied the CITES secretariat and it withdraw the trade ban on Thailand in that year.

Although the CITES is relatively successful in addressing the problems of illegal trade of wildlife, Thailand is now facing the problems of biodiversity loss, causing extinction of several species. The degradation of environmental quality, the destruction of living habitat of wildlife, the decreasing numbers of one particular species, are reasons of biodiversity loss. The recognition of the importance of biodiversity led to the conclusion of the Convention on Biological Diversity ('CBD') in the Rio Conference. The key obligation of the CBD is the establishment of 'in-situ' and 'ex-situ' conservation.[64] The 'in-situ' conservation is the primary approach that the CBD encourages; this approach conserves the species in their natural areas, while the 'ex-situ' conservation bring the species to be conserved in provided areas such as zoo or botanical gardens.[65] The Thai government has designated a large number of national parks and conservation areas including wetlands for 'in-situ' conservation, and assigned the Department of Agriculture and Thailand Institute of Scientific and Technological Research to work on collecting seed and plant genes for 'ex-situ' conservation.[66]

The Vienna Convention for the Protection of the Ozone Layer was announced in 1985 for global cooperation in solving the problems of ozone depletion before the Montreal Protocol on Substances that Deplete the Ozone Layer applied in 1989. Thailand is a party to both the Convention and the Protocol, and is therefore obliged to avoid using and importing ozone depleting substances. To comply with its obligation under the Convention and the Protocol, the controlled substances under the Montreal Protocol have been included as toxic substances under Thailand's Toxic Substances Act 1992. The government also provided financial support

[62] Supanee Boonyawong, 'CITES กับการอนุรักษ์สัตว์ป่าในประเทศไทย [CITES and Wildlife Conservation in Thailand]' <kb.tsu.ac.th/jspui/bitstream/123456789/72/3/Article.pdf> accessed 13 August 2020.

[63] Thailand Wildlife Enforcement Network, Department of National Parks, Wildlife and Plant Conservation, 'Thailand and CITES' <ww.dnp.go.th/thailand-wen/about_tw/conduct.html> accessed 13 August 2020.

[64] Convention on Biological Diversity 1992 (CBD), arts 8 and 9.

[65] 'Sustaining Life on Earth' (*Convention on Biological Diversity*, 2009) <www.cbd.int/convention/guide/?id=nataction> accessed on 20 July 2020.

[66] Ministry of Agriculture and Cooperatives, 'Thailand's Obligations under Convention on Biological Diversity' <http://www3.moac.go.th/law_agri-preview-391091791822> accessed on 20 July 2020.

and loans for industries that are required to change their manufacture to avoid using ozone depleting substances.[67]

Unlike ozone depletion for which the situation is stable and the solution is already found by avoiding the using of certain substances, Climate Change is still a robust issue which has significantly raised global concerns and has required collaboration for finding solution. The United Nations Framework Convention on Climate Change (UNFCCC) is the first international agreement that recognised Climate Change as a problem in 1992 before the introduction of mechanisms for addressing Climate Change issues in the Kyoto Protocol 1997. Thailand has signed both the UNFCCC and the Kyoto Protocol; however, since it is not categorised as an Annex I country, Thailand does not any have obligation to reduce a specified amount of greenhouse gas. However, the Thai government acknowledges the severity of the Climate Change problem and has included the Climate Change concerns in its national policies and plans, as will be explored in later section. Although Thailand does not have the obligation to reduce an exact amount of greenhouse gas, it takes part in the Kyoto Protocol scheme as a developing country hosting projects that the Annex I countries invest for carbon credits. The Thailand Greenhouse Gas Management Organisation was established as a public organisation under the Ministry of Natural Resources and Environment to review and follow up the Clean Development Mechanism projects, and to collect data on greenhouse gas emissions in Thailand.[68]

In 2016, the Paris Agreement was launched to run after the termination of the Kyoto protocol. One outstanding feature of the Paris Agreement is that it does not explicitly divide the duties of developed and developing countries; while still recognising the 'Common but Differentiated' Principle, the Paris Agreement requires the same obligations from both developed and developing countries. Thailand is a signatory to this Agreement and has set its own Intended Nationally Determined Contribution (INDC) to reduce its greenhouse gas emission by '20 percent from the projected business-as-usual (BAU) level by 2030.'[69] Further, the Thai government is also preparing to enact the Climate Change Act. This Act will provide

[67]Department of Industrial Works, 'The Montreal Protocol on Substances that Deplete the Ozone Layer and Thailand's Obligations' <www2.diw.go.th/treaty/montreal/พิธีสารมอนทรีออลweb.pdf> accessed 20 July 2020.

[68] Thailand Greenhouse Gas Management Organisation, 'Establishment of Thailand Greenhouse Gas Management Organization Public Organization' (13 June 2019) <www.tgo.or.th/2020/index.php/th/page/วิสัยทัศน์และพันธกิจ-328> accessed 20 July 2020.

[69] Thailand's Intended Nationally Determined Contribution (INDC), submitted to the executive secretary of the UNFCCC secretariat on 1 October 2015.

an institutional framework for dealing with the climate change situation specifically, as well as the measures, including the economic incentives, for reducing carbon emissions in manufacturing processes.[70] The enactment of specific legislation responding to climate change will strengthen global cooperation in terms of indicating a positive role for a developing country in addressing climate change. However, such Act is still in the drafting process for a while and has not reached the final draft yet. Until the actual enactment, it remains to be seen whether this Act could work in practice or is a simple gimmick of the government to show its awareness of global concerns without any tangible outcomes to be expected.

IV. Development of National Environmental Governance in Thailand

As outlined above, Thailand has prioritised the economic dimension of sustainable development over environmental development, and the government's announced policies have prioritised measures for encouraging investment and addressing the problems of unemployment. In the 1990s, environmental law was not as developed as commercial laws being created during the same period in Thailand. Deforestation was the significant problem in that era and environmental laws in Thailand were originally designed with the aims of conserving forests and wildlife[71], rather than in direct response to problems associated with rapid industrialisation. However, the global concerns on environmental degradation might not allow the Thai government to ignore the problems any longer. This section studies the development of environmental policies by starting from the environmental dimension contained in the Constitutions of Thailand, setting the state duty to protect the environment and recognise environmental rights of the people. Then, the development of national policies launched by the government to include the environmental dimension along with economic development will be explored.

(1) The Constitution of the Kingdom of Thailand and Environmental Protection

The first Constitution of Thailand (or precisely, the 'Constitution of the Kingdom of Siam'[72]) in 1932 did not mention or recognise environmental issues. Indeed, it was not until the 10th

[70] Patcharee Veeranon, 'การเปลี่ยนแปลงสภาพภูมิอากาศ [Climate Change]' (*Office of Natural Resources and Environmental Policies and Planning*, 3 December 2019) <www.onep.go.th/การเปลี่ยนแปลงสภาพภูมิ/> accessed 11 February 2022.

[71] Amnat Wongbandit, *กฎหมายสิ่งแวดล้อม* [Environmental Law] (4th edn, Winyuchon 2019) 29.

[72] See footnote 36.

Constitution of the Kingdom of Thailand in 1974 that environmental development was explicitly recognised as an important issue to be included in government policies and considers environmental protection an important government policy. Section 93 provides that the state should protect the environment and address pollution problems that adversely affect the health of the people.[73] Noticeably, this provision is anthropocentric as it recognises the necessity of environmental protection to prevent harms possibly caused to humans. This supports the claim that most environmental laws were enacted for protecting human interests at the outset, rather than protecting the nature for its own value.

Thailand's political situation during that time was in intense turmoil; a number of protests for democracy consistently occurred, leading to several coups following one another in a short period of time.[74] The constitutions were repeatedly abrogated by the coups before the promulgation of the new constitutions. Attempts to resolve political unrest and establish democracy were urgent during that time. After the abrogation of the 1974 Constitution, environmental issues were not mentioned in any later Constitutions until the political situation in Thailand became more stable and the political system had been considerably well-established. The environmental dimension issue has not been mentioned in any later Constitutions until the 16th Constitution in 1997.

The 1997 Constitution has been regarded as the most democratic Constitution of the Kingdom of Thailand, for the drafting of this Constitution includes processes of public involvement, resulting in it being called as the 'People's Constitution'.[75] For example, the Constitutional Drafting Assembly of the 1997 Constitution included elected representatives from all provinces of Thailand, and public referendum would have been required in cases that the National Assembly rejected the draft constitution.[76] Although the 1997 Constitution became adopted

[73] The original text of the 10th Constitution is not available in English language. Here is the unofficial translation of section 93 by the researcher. 'Section 93 The state should maintain the environmental cleanliness and eradicate any harmful or toxic substances for the health and sanitization of the people.'

[74] Supachat Lebnak, 'กว่าจะเป็นรัฐธรรมนูญฉบับประชาชน: ย้อนรากการแก้ไขรัฐธรรมนูญก่อนปี พ.ศ. 2540' [Before Having the People's Constitution: Investigate Thai's Constitutional Amendments before BE 2540] (The Matter, 6 September 2020) <thematter.co/thinkers/before-thai-constitution-in-1997/122894> accessed 11 February 2022.

[75] See ibid; iLaw, 'รัฐธรรมนูญ 40 เป็นอย่างไร ใคร ๆ ก็พูดถึง' [Why does everyone always talk about Constitution BE 2540 (1997)?] (iLaw, 13 October 2019) <ilaw.or.th/node/5426> accessed 11 February 2022.

[76] See Ginsburg (n 45); Peter Leyland, 'Thailand's Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?' (2007) 2 Journal of Comparative Law 151.

without the need for national referendum, the drafting process of the 1997 Constitution has marked a significant step towards democracy in terms of public involvement.

The 1997 Constitution was enacted when the Thai government was democratically elected, which could reasonably explain democracy found in the drafting process. A vast array of rights officially recognised in the 1997 Constitution, as well as the protection of human rights, manifested a 'bold' effort to confer 'greater power to the Thai people than had ever been granted before.'[77] It is the first time that the Constitution of the Kingdom of Thailand particularly guaranteed environmental rights. Section 56 of the 1997 Constitution established the right of a person to preserve natural resources, biodiversity, and environmental quality that allows his or her usual and safe life. It states that

> 'The right of a person to [participate with the State and communities] in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and [conservation of the environment of a quality that permits] usual and consistent [life] in the environment which is not hazardous to health and sanitary conditions, welfares or quality of life, shall be protected, as provided by law.'[78]

The requirement for Environmental Impact Assessment (EIA) of any projects or activities which might cause adverse impact on the environment is explicitly stated in paragraph 2 of section 56, rather than simply included in the Act as usual, implying awareness of environmental concerns and determination in preventing environmental degradation that could come with industrialisation.

> 'Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organisation, consisting of representatives from private environmental organisations and from higher education institutions providing studies in the environmental field, have been obtained prior to the operation of such project or activity, as provided by law.'[79]

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[77] Paul Chambers, 'Good Governance, Political Stability and Constitutionalism in Thailand 2002' (2006) King Prajadhipok's Institute 16; see Andrew Harding and Peter Leyland (n 35), Chapter 1.

[78] Constitution of the Kingdom of Thailand 1997 (Unofficial translation, available at <www.nhrc.or.th/getattachment/c80b0c99-f47e-41ca-b861-84003ccada7d/.aspx> with some modification, in square brackets, by the researcher).

[79] ibid.

The inclusion of EIA requirements at constitution level is interesting, since, in other countries such as the EU members where EIA has long been required through the EIA Directive, EIA requirements are simply implemented into the form of a national Act. The EU environmental governance is generally known for its determination to be a world leader in environmental development, but its EIA requirements do not have to be set at constitutional level as in Thailand. The political background along with abrogation of several constitutions in Thailand does not make the inclusion of EIA requirements in the constitution a guarantee that the EIA requirements will be securely reserved. However, the introduction of EIA in the constitution might to some extent raise public awareness and remind the government of the significance of environmental management.

Section 56 also provided legal standing for a person to bring a case against government agencies or any governmental authorities in order to protect a person's rights as guaranteed by the Constitution.

> 'The right of a person to sue a State agency, State enterprise, local government organisation or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.'[80]

Although there have not been any cases brought to the court to exercise such rights, section 56 has initiated the constitutional recognition of a person's right to environmental protection.

Although the 1997 Constitution was later abolished after the military coup in 2006, some ideas of rights and governance under the 1997 Constitution still influenced later constitutions, despite some additional restrictions due to the military domination towards autocratic governance.[81] The constitutional drafting commission for the new constitution after the abolition of the 1997 Constitution, was required to apply the 1997 Constitution as a model for drafting and, in cases they suggested any deviations, explanation must be provided to the Constitutional Drafting Assembly. [82] Therefore, the 2007 Constitution which was promulgated after the 1997 Constitution similarly recognised environmental rights as had its predecessor but added an additional requirement to the conditions of section 56 of the 1997 Constitution. To compare

[80] ibid, s 56 para 3.
[81] Andrew M Marshall, *A Kingdom in Crisis: Thailand's Struggle for Democracy in the Twenty First Century* (Zed Books 2015) xi.
[82] The Interim Constitution of the Kingdom of Thailand 2006, art 26.

the difference between section 56 of the 1997 Constitution and section 67 of the 2007 Constitution, the content that section 67 has additional to section 56 is provided below in italics.

> Section 67 'The rights of a person to participate with the State and communities in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his health and sanitary condition, welfare or quality of life, shall be appropriately protected.
>
> Any project or activity which may seriously affect communities with respect to the quality of the environment, *natural resources and biological diversity* shall not be undertaken, unless its impacts on the quality of the environment *and health of the people in the communities* have been studied and evaluated and *consultation with the public and interested parties have been organised*, and opinions of an independent organisation, consisting of representatives from private environmental and health organisations and from higher education institutions providing studies in the field of environment, *natural resources or health*, have been obtained prior to the operation of such project or activity.
>
> The right of a community to take legal action against a government agency, State agency, State enterprise, local government organisation or other State authority which is a juristic person to enforce the performance of duties under these provisions shall be protected.'[83]

With regards to the rights to participate in environmental protection and the right of a community as contained in the constitutions, as well as the EIA requirements, section 56 of the 1997 Constitution requires the protection of such rights to be 'provided by law', while section 67 of the 2007 Constitution has cut such clauses, which means that the protection is in force immediately after the promulgation of the Constitution without having to wait for subordinate legislation to be enacted as required under section 56. This also applies to the EIA requirements. Moreover, section 67 of the 2007 Constitution also introduces the requirements for public hearings while encouraging the engagement of stakeholders and interested parties in the EIA process, as could be seen from the italic wordings as quoted above. It is a further step for environmental development in Thailand that the 2007 Constitution has developed from its predecessor by facilitating the protection of a person's rights and encouraging public participation in the EIA process. Also, the issue of preserving biological diversity has been

[83] The Constitution of the Kingdom of Thailand 2007, translated by the Office of the Council of the State <http://web.krisdika.go.th/data/outsitedata/outsite21/file/Constitution_of_the_Kingdom_of_Thailand.pdf>

added and the health of local people is emphasised in the EIA process apart from simply considering the environmental impact.

Although such recognition of rights in the 2007 Constitution can to some extent indicate the enduring influence of the 1997 Constitution in Thai politics and governance, the main reason that the 1997 Constitution has been known for representing a crucial point in Thai constitutional development is its institutional innovations. The 1997 Constitution has established a variety of oversight institutions with the aims to address the problems of corruption in Thailand as well as for implement the people's rights as guaranteed under the constitution.[84] Most of such institutions survive and still operate after the military coup despite the termination of its establishing constitution – the 1997 Constitution. One outstanding institution that has proved its success is the Administrative Court of which the key responsibility is to carry out the judicial review for the exercise of public authorities as well as to ensure accountability in public services.[85]

The Administrative Court had a prominent role in enforcing environmental rights under the constitution. The landmark case which indicates the success of the environmental rights under the 2007 Constitution and the role of the Administrative Court in enforcing such rights is the Map Ta Phut case in 2009. In this case, the local people in the Map Ta Phut industrial area won a case wherein the government was accused of non-compliance with the EIA requirements under the constitution and could successfully prevented hazardous activities in such area.[86] It was the first time that the local community together with non-governmental organisations brought the case against the National Environment Committee (the composition and the duties of this Committee will be further explored below), and the ministers and government agencies associated with approval of the Map Ta Phut project.[87] They were accused of non-compliance with the 2007 Constitution, as they approved the project despite the EIA process not properly

[84] For example, there are the Election Commission for overseeing election campaigns and ensuring that the election is organised in compliance with the laws, the National Counter-Corruption Commission for preventing corruption by checking whether any politicians or senior bureaucrats have unreasonable or unjustifiable increases of asset during holding their positions. See Ginsburg (n 45) 91 – 95; Leyland (n 76).
[85] See further details about the Administrative Court in Thailand in Peter Leyland, 'Droit Administratif Thai Style: A Comparative Analysis of the Administrative Courts in Thailand' (2006) 8 The Australian Journal of Asian Law 121.
[86] Supreme Administrative Court Order No. 592/2552 (2 December 2009).
[87] For further details about the role of Administrative Court and environmental activism, see Peter Leyland, 'The Origins of Thailand's Bureaucratic State and the Consolidation of Administrative Justice' in Andrew Harding and Munin Pongsapan (eds.), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021), 197 – 200.

including public hearing and consultation as required. The Administrative Court revoked the EIA approved by the government and issued a temporary injunction to suspend the project until the re-conducting of the EIA process was completed and included public consultation as well as the opinions of the 'Independent Environment Body' as required in the Constitution.[88] The current Constitution which was enacted in 2017 shares the similar protection of rights as described in its predecessors; however, the requirement for the opinions of the Independent Environment Body in the EIA process has disappeared from this Constitution. It is still questioned whether the deletion of this requirement will reduce the effectiveness of the EIA process or not since there is still the requirement for the Expert Committee under the Promotion and Conservation of National Environmental Quality Act ('NEQA'). (The Expert Committee will be explored in a later subsection.)

(2) The National Economic and Social Development Plan

Although environmental development did not feature in the Constitutions for some time, it was not completely ignored. In 1959, the Office of the National Economic Development Council was established as the government agency to study and advise the economic development plan for the government. The responsibilities of the National Economic Development Council include preparation of the National Economic Development Plan to be launched every five years as a framework setting the economic objectives along with the management and policy plan for the government to achieve such objectives. The initial name of this institution suggests a mere focus on economic development; however, in 1972, the institution was renamed the Office of the National Economic and Social Development Council[89] and the title of the plan was changed to the National Economic and Social Development Plan ('the Plan'). It was in the same period of time when the concerns on environmental pollution were raised in the Stockholm Conference. However, the structure of the Council has not been significantly changed. Noticeably, it was simply a title change to make the Plan sound responsive to global awareness. There was neither meaningful institutional re-structuring nor introduction of new policy direction but merely adding the social dimension to be considered along with economic development.

[88] Supreme Administrative Court Order No. 592/2552 (2 December 2009) and No. 1352/2553 (2 September 2010).

[89] Office of the National Economic and Social Development Council, 'History and Role of NESDC' <https://www.nesdc.go.th/nesdb_en/ewt_news.php?nid=4258> accessed 22 July 2020.

The qualifications of the National Economic and Social Development Board are described as persons who have such knowledge, expertise, or experience, in economic and social development as the Cabinet of Thailand considers appropriate.[90] As the members of the current Board are from the economic sector, such as the ex-Director of the Bureau of Budget or the ex-Governor of the Bank of Thailand[91], it is very obvious that the focus of this Council is still on economic development while social aspects are to be considered alongside. In 1977, the 4th Plan was launched which, for the first time, explicitly recognised the necessity not to overlook the environmental issues associated with economic development. The term 'sustainable development' appeared in the 7th Plan which was announced in 1992, the year that this term was introduced in the Rio Declaration. Since then, the concept of sustainable development has been continuously included in the following Plans, reflecting the need to respond to global concerns on environmental degradation and the collaboration that the Thai government has with the global partnership in addressing environmental problems.

The 8th Plan (1997 - 2001) was considered the turning point of Thai development planning, as public participation was the key focus of this plan to strike balanced development in the economic, social, and environmental dimensions. This Plan introduced the idea that people are the centre of development by signifying the importance of public participation, thus making some changes to the conventional form of state-centred governance, in which the government simply applied top-down orders. The 9th Plan (2002 - 2006) further developed on the concept of sustainable development by introducing the application of the 'sufficiency economy' in combination with such a concept. Since then, the sufficiency philosophy has been consistently mentioned with sustainable development in the following Plans. The combined application of the sufficiency philosophy and the principle of sustainable development implies an attempt to adapt the international environmental concept to Thai cultures and way of life. The 10th until the current 12th Plans have developed on their preceding ones, putting more details on strategies and more requirements for environmental development so as to respond to the critical environmental issues discovered at that time, such as the climate change problems. The overall development of national policies on the environment in Thailand indicates the state's response to the global concerns on environmental degradation and adopts the concept of sustainable development. Although the Plan simply provides a broad framework of governmental policies,

[90] See ibid; and the National Economic and Social Development Council Act 2018, s 6.
[91] ibid.

it is a good sign that the Thai government does not ignore environmental problems and the global concerns.

In the same year as the launching of the 7th Plan, the government also enacted the new Promotion and Conservation of National Environmental Quality Act with further development from the former version enacted in 1975. The revised Act covers various aspects of environmental issues including water, air, noise, and mining, and improves the organisational structure of environmental agencies in Thailand.[92] This Act also assigns the duty to the Ministry of Natural Resources and Environment to prepare the Environmental Quality Management Plan. This plan is applied as a guideline for other ministries and government agencies to work in the same direction and coherently with recognition of environmental standards proposed by the Ministry of Natural Resources and Environment. This requirement suggests an attempt to establish coherence among different governmental institutions and to include environmental considerations into their administrative actions. One interesting observation is that when the 8th Plan was in force in 1997, environmental rights were also recognised in the 1997 Constitution. Public participation has been emphasised and supported across policy and legislative instruments in Thailand since then. After examining the Constitutions and the government policies concerning environmental management in Thailand, the overview of environmental legislation in Thailand can now be explored.

(3) Overview of Environmental Laws in Thailand

Before the growing concerns on environmental devastation associated with industrialisation, the obvious environmental problem in Thailand was deforestation, for people improperly invaded the forests to cut wood or to expand their agricultural holdings. Therefore, the first group of legal statutes on environmental protection relate to the conservation of forests. The Forest Act 1942 is the first Thai environmental law, imposed to control forestry in Thailand, followed by enactment of laws on forest protection which are the National Park Act in 1961 and the National Forest Act in 1964, establishing the areas for conservation of biodiversity. There were also other acts that included some provisions preventing the damage on rivers and canals.[93] In 1975, Thailand enacted Promotion and Conservation of National Environmental

[92] Sections 64 - 68 for air and noise pollution, sections 69 - 77 for water pollution and sections 78 - 79 for waste and mining.

[93] In the past, Thai people used rivers and canals as their major commuting routes. As water has an important role in their ways of life, namely as a route, as well as for drinking and using, there are therefore a number of acts which contain provisions preventing the damage on rivers and canals. The examples are Navigation

Quality Act but it was not until the enactment of new Promotion and Conservation of National Environmental Quality Act ('NEQA') in 1992 that Thailand can be considered as having a comprehensive law on environmental protection. The NEQA has restructured environmental agencies and provided more details on measures to control environmental qualities on water, air, and noise.

The regulatory functions of the NEQA can be categorised into three areas: standard-setting; monitoring; and sanctions. With regard to the first function, the NEQA established the National Environment Committee (the 'Committee'), which is comprised of the Prime Minister, and Ministers associated with environmental management such as Minister of Natural Resources and Environment, Minister of Agriculture and Cooperatives, Minister of Transportation, Minister of Public Health, and Minister of Industry. Apart from governmental personnel, the Committee also includes experts who have knowledge and experience of environmental development and management.[94] One of the Committee's duties is to set environmental quality standards for water, air, noise and vibration, or any other environmental quality standards as appropriate.[95] The NEQA applies the approach of pollution control at its source[96], requiring the owner or occupant of a pollution source to install sewage treatment or other pollution treatment systems in order to control its emissions as required under environmental quality standards.[97] In cases where the owner or occupant of a pollution source cannot provide any required pollution treatment systems or equipment, governmental support can be requested in a form of custom tax exemption for imported equipment or provision of technological knowledge and experts on how to install or manage a pollution treatment system properly.[98]

For monitoring, the NEQA requires the owner or occupant of a pollution source to record the data of its emission and treatment system, and then submit the report to the local officers. A 'pollution control officer' authorised under this act has the power to investigate the plant or pollution source, or the pollution treatment system during working hours, in order to check its compliance with required standards.[99] The pollution control officer can propose the temporary

in Thai Waters Act 1913, Royal Irrigation Act 1942, Underground Water Act 1987, and Water Canals Act 1983.

[94] Promotion and Conservation of National Environmental Quality Act 1992 ('NEQA'), s 12.

[95] ibid, ss 13(2) and 32.

[96] ibid, s 55.

[97] ibid, ss 68 and 70.

[98] ibid, s 94.

[99] ibid, s 82.

closure of, or withdraw the license for operation of, any pollution sources that intentionally violate the environmental quality requirements.[100] For the third regulatory function, the NEQA imposed sanctions in both criminal and civil liabilities; the criminal liabilities include imprisonment and fine for violators[101], and the civil liability under the NEQA applies the strict liability approach to compensation for damage caused to life, injury, health, or properties of the others or state.[102] Generally, for criminal and civil liabilities, the enforcement must be done through a court order, except the fine penalty where the NEQA authorises the pollution control officer to enforce the sanction by himself in cases where such polluters are not industrial plants; in cases where the non-compliant polluters are industrial plants, the pollution control officer must report to the officers under the Factory Act to impose the fine instead.[103] However, before the sanction, the polluter control officer has to allow some time for the non-compliant owner or occupant of a pollution source to comply with the NEQA requirements first. If the non-complaint polluter does not follow the warning letter ordered by the pollution control officer within the time stated in the warning letter, the pollution control officer can escalate the non-compliance to sanction.[104] The NEQA is regarded as the most comprehensive environmental act in Thailand so far.

One important feature of the NEQA is the requirement for Environmental Impact Assessment or 'EIA'. The NEQA authorises the Minister of Natural Resources and Environment, with approval from the Committee, to announce a project or business operation which has or potentially has significant impacts to natural resources, environmental quality, health, quality of life, or interests of people, local communities, or the environment, to conduct an EIA before starting such project or business operation.[105] The NEQA, later amended in 2018, prescribes the details to be contained in an EIA and explicitly requires a public hearing from stakeholders, people, and local communities.[106] The Office of Natural Resources and Environmental Policy and Planning (ONEP) is assigned to check the submitted EIA, initially to assess whether it has processed in compliance with the NEQA requirements before sending for approval from the 'Expert Committee'[107] which consist of experts in the areas concerned with environmental

[100] ibid, s 83.
[101] ibid, ss 98 – 111.
[102] ibid, s 96.
[103] ibid, s 82.
[104] ibid.
[105] ibid, s 48.
[106] ibid.
[107] ibid, s 50.

assessment.[108] After the EIA is approved, the applicant still has to submit a follow-up report to prove that such applicant has conduct measures to minimise adverse effects from its operation as indicated in the approved EIA.[109] The NEQA also imposed criminal liabilities for those who do not conduct the EIA as required or do not submit the annual report.[110] However, the regulatory structure and authorities in Thai environmental governance include several government agencies which means bureaucratic collaboration is required. Arguably, although the Prime Minister has announced the Regulation of the Official Prime Minister for Collaboration in Enforcing Environmental Laws in 2007 to clarify how to collaborate among several government agencies, namely police officers, public attorneys, local governments, and other agencies authorised under environmental laws such as pollution control officers, and establish a committee to facilitate the collaboration[111], it does not effectively solve the difficulties or reduce the unnecessary bureaucracy concerning the enforcement in practice. This issue will be further discussed in Section V of this chapter.

The NEQA also establishes the Environmental Fund under the management of the Ministry of Finance.[112] The objective of this Fund is to support the costs of government agencies and local government in providing sewage treatment systems or equipment as required under the NEQA. This funding is only allocated to government agencies and local government, while private business can apply for a loan for setting pollution treatment system if it has a duty under the NEQA to establish the system.[113] The NEQA assigns the Committee to set the conditions and criteria for the activities and government agencies that could get financial support from the Environmental Fund[114], and establishes the Environmental Fund Committee to manage the fund.[115] The financial sources of the Environmental Fund are mainly from the government's allocation and from the fees and fines under the NEQA, such as releasing sewage into the environment without providing treatment as the NEQA required.[116]

From the same year as the NEQA enactment, there are a number of legislative requirements imposed to support environmental development. It could be said that 1992 was the year that

[108] ibid, s 51.
[109] ibid, s 51/5.
[110] ibid, ss 101/1 and 101/2.
[111] Regulation of the Official Prime Minister for Collaboration in Enforcing Environmental Laws 2007.
[112] NEQA, section 22.
[113] ibid, s 23.
[114] ibid, ss 27 and 28.
[115] ibid, ss 24 and 25.
[116] ibid, s 22.

the Thai government became aware of environmental concerns and environmental laws have been much developed. In a month following the NEQA enactment, the Factory Act was enacted to control the safety standards of the operation of factories and environmental consideration is incorporated in it. The Hazardous Substances Act was also enacted in the same year to regulate the disposal of hazardous waste. Not only pollution control legislation but also conservation legislation was updated in 1992 to comply with the global standards; the Wildlife Protection Act was enacted in order to implement the national obligation under the Convention on International Trade in Endangered Species ('CITES').

(4) Regulatory Structure and Government Authorities in Thai Environmental Governance

Thailand is a unitary state with one national government. Since the concepts of paternalism and authoritarianism have long been cultivated in Thai societal cultures, as explored in Section I, the Thai governance was known for its 'highly centralised administration' until the mid-1990s when the idea of decentralisation emerged in Thailand.[117] The central government is superior to local authorities for local administration in their geographical areas. Environmental governance concerns the responsibilities of both central and local authorities; the central government establishes national policies, plans, and regulations for environmental development, while local authorities enforce such policies and regulations.

With regards to the central government, the National Environment Committee has the most significant role in launching national environmental policies and establishing environmental standards. The interesting feature of the Committee is its composition which includes members from both political and bureaucratic authorities and experts, with the Prime Minister acting as President of the Committee.[118] Expert members are required in this forum to provide their specialist information and knowledge and contribute their insights into environmental management planning.

The reason that the NEQA requires several Ministers to be members of the Committee is to ensure that the decision of the Committee will integrate all Ministries concerned with environmental management, preventing the conflicts of policies among different Ministries.[119] Since the collaboration between political and bureaucratic authorities will facilitate the

[117] Alex M Mutebi, 'Recentralising while Decentralising: Centre-Local Relations and "CEO" Governors in Thailand' (2004) 26 Asia Pacific Journal of Public Administration 33.
[118] NEQA, s 12.
[119] Wongbandit (n 71) 616.

enforcement of policies and plans and bureaucratic authorities usually hold useful information necessary for environmental management, such as investment plans and national budget, the NEQA also requires certain bureaucratic authorities, such as the Secretary of the Board of Investment and the Director of Bureau of Budget, to be members of the Committee.[120]

The qualifications of the Committee seem reasonable as this encourages collaboration among authorities and experts in what appears to be a well-balanced composition. However, in reality, there is a strong likelihood that political authorities will dominate the decisions of the Committee without affording sufficient weight to opinions based on expertise. As the NEQA does not specify the exact number of experts in the Committee, but merely indicates that the Cabinet must select not more than eight experts to sit on the Committee[121], the number of experts could be a small proportion in the Committee, which potentially weakens their voices. Moreover, the selection of experts is the total discretion of the Cabinet, allowing the government to choose the persons that share the same views or standpoints as the government.

The Committee has a significant role in considering the EIA and launching national policies and plans for environmental development as well as setting environmental quality standards under the NEQA. For enforcing the policies and managing the environmental development, the ministry with direct responsibility is the Ministry of Natural Resources and Environment. There are Regional and Provincial Offices of Natural Resources and Environment to monitor environmental problems and management in their assigned areas as well as to encourage public participation in local environmental development.[122] The establishment of regional and provincial offices reflects decentralised governance, as these offices work in collaboration with local governments to address environmental problems in their areas.

It is noticeable that the composition of the Committee under the NEQA shares the same weaknesses as the Committee for Sustainable Development mentioned in Section II above: the lack of precise identification for the number of experts to prevent political domination as well as no provision of processes to authenticate the expertise qualifications of the selected experts. Such weaknesses allow domination from political parties. Although there are some environmental policies that have to be particularly dealt with by political institutions such as public expenditure or economic incentives for sustainable behaviours, the policy direction still

[120] NEQA, s 12.
[121] ibid.
[122] Ministerial Regulation on Government Division, Ministry of Natural Resources and Environment 2017.

needs to rely on scientific knowledge. The political nature of environmental policies and government decisions is also found in EU environmental governance, as could be noticed from the comitology process discussed in Chapter 2 of the thesis. However, the EU regime has established transparency and accountability to ensure that environmental aspects will be sufficiently incorporated into decision-making processes. Public involvement in EU environmental governance, especially inclusion of stakeholders, has been encouraged. While the EIA has been promoted in the Constitution of the Kingdom of Thailand since 1997, institutional design for ensuring effective public engagement has not been established yet. With the potential of political domination observed from the setting of environmental committees, the effectiveness of Thai government's environmental policies and regulation can be challenged and considered window-dressing measures which are based on political pressure rather than technocratic views. After examining the overview of environmental regulation in Thailand as well as the regulatory structure and government authorities, the limits of state regulation in environmental governance can be observed and lead to the question whether private regulation as the EP regime can apply as an alternative measure when state regulation fails to prevent environmental damage.

V. Problems of State Regulation and the Potential Role for Private Financial Institutions in Environmental Governance of Thailand

The study of national environmental governance in the preceding sections shows that Thailand has become party to several international environmental agreement and has incorporated environmental aspects into the national policies and plans. Various committees and government agencies have been set up to collaborate in environmental management to prevent environmentally harmful activities and to encourage sustainable development. However, bureaucratic processes as noticed in NEQA and involvement of too many government agencies might obstruct the success in environmental governance. This section explores the problems of state environmental regulation in Thailand before discussing the potential role of private financial institutions as alternative regulators to supplement government agencies in environmental governance of Thailand.

(1) Structural Problems in State Environmental Governance of Thailand

The governance structure poses considerable challenges for designing and implementing state environmental regulation in Thailand. As noted above, there are several committees and agencies involved in enforcing environmental laws in Thailand. An interview with one environmental government agency in Thailand shows that even though some environmental officers would like to help addressing environmental problems, some issues are not in the scope of their authorities.[123] The Office of Natural Resources and Environmental Policy and Planning (ONEP) which is assigned under the NEQA as a responsible agency to check the submitted EIA at the initial stage cannot do anything until the report is submitted to them. A Thai environmental NGO activist[124] interviewed for this study suggested that there are a number of cases where people found that the EIA process did not comply with the NEQA requirements because stakeholders were not actually included in the process but when they brought the case to the ONEP to correct the EIA process of such project, the ONEP refused to do anything as the EIA report had not been submitted to them yet. Instead of controlling the responsible actor to conduct the EIA as required by the law, the ONEP simply limits its role to checking paperwork. If the report says that the EIA process includes all relevant stakeholders with proof of identity, that is accepted despite the fact that such proof might be untrue and actual stakeholders are not included in the process as required. This causes difficulties for people in challenging the EIA process, since they have to bring a case to the court to request the new EIA process be made compliant with the legal requirements rather than to request correction of the process before its completion.[125]

Furthermore, the ONEP does not have monitoring officers under its own authority. While the NEQA assigns the monitoring role to the pollution control officers,[126] these officers are often working under other agencies, which are mainly the Pollution Control Department and also

[123] Interview VI: A Thai officer of an environmental government agency (Thailand, 1 December 2020), see Appendix of this thesis: 'List of Interviews'.

[124] NGOs in Thailand have emerged and have had a role in Thailand for more than 50 years. Generally, the policies and direction of an organisation considered an NGO in Thailand focus on conducting non-profit public services for the society, such as providing fundamental health services for impoverished people, working to address human rights problems, and functioning as a watchdog challenging an environmentally hazardous project. See ThaiNGO Team, 'NGOs คืออะไร' [What is NGO?] (13 January 2018) <www.thaingo.org/content/detail/4291> accessed 15 July 2022.

[125] Interview IV: A Thai environmental NGO activist (3 November 2020), see Appendix of this thesis: 'List of Interviews'.

[126] NEQA, s 82.

other Departments for particular environmental issues, such as Department of Fisheries in cases of pollution from fisheries, and Department of Marine and Coastal Resources in cases of marine pollution.[127] The dispersal of government authorities to officers under various departments indicates a high degree of fragmentation of the environmental governance framework in Thailand.

The monitoring process will be more complex if the project is an industry, for the pollution control officers, in cases they want to monitor such project, have to collaborate with the factory officers who are the officers under another agency – the Department of Industrial Works.[128] This makes things more complicated than it should be as there are three agencies associated with the EIA. First, the ONEP audits the report but has no monitoring officers on its own to make an actual investigation on the EIA process. Second, the pollution control officers are authorised to monitor the business or the project, but their monitoring authority only begins when that business or project has already operated. Third, in cases that such business or project is an industry, the pollution control officers cannot investigate by themselves but must pass this duty to the factory officer.

The fact that there is no accurate guideline on responsibilities of each agency in the whole EIA process, from initial audit to monitoring after the EIA approval, might impair the EIA achievement in preventing environmentally devastating activities. It seems like the EIA report is simply passed on from one agency to another. Once the EIA is approved, the ONEP does not have the duty to monitor EIA adherence, and has no power over the pollution control officers to request the EIA follow-up report. The pollution control officers also have limited authority to investigate only the project area as stated in the EIA report, but sometimes the detrimental effect of a project is far from the project area. For example, where some chemicals are leaked to water sources which are outside the project area in the EIA report, the pollution officers do not investigate the area further than stated in the EIA report. In most cases, the pollution control officers usually do not take part in any steps of the EIA process and has no ideas about the project more than as provided in the report.[129]

The announcement of the Regulation of the Official Prime Minister for Collaboration in Enforcing Environmental Laws 2007 does not set up a single overarching regulatory body to

[127] Pollution Control Department, 'News on Pollution Control' (22 April 2021) <www.pcd.go.th/pcd_news/12894/> accessed 10 February 2022.
[128] NEQA, s 82.
[129] Interview IV (n 125).

address the problem but instead establishes the new committee for facilitating collaboration. The fragmentation of governance requires one regulatory body with overarching authority to reduce bureaucratic processes, not establishment of another set of committees. The chaotic structure of governance is therefore a significant problem of state environmental regulation in Thailand. However, this problem can possibly be solved with the structural reform and the establish of a single overarching body. This problem alone might not strongly indicate the need for private regulation to supplement state regulation in environmental governance. There are, however, other limits of Thai state regulation to be considered along with it in order to conclude that private regulation can provide an alternative measure in environmental governance.

(2) Insufficient Measures to Ensure Public Participation in Environmental Regulation

Although the Constitution of the Kingdom of Thailand recognises the people's rights to participate with the state to preserve the environment and the EIA requirements are explicitly stated in the Constitution apart from the NEQA, the actual exercise of rights is limited due to the lack of state mechanisms to enforce such rights. An interview with a Thai environmental NGO activist suggested that in most cases stakeholders are not included at the beginning of the EIA process but rather at the final stage and it seem that the stakeholder's views have not taken much weight in the final assessment. For example, the entity responsible for the EIA process simply adds one session for presenting its project to local people and then allowing them to give their opinions for 5 – 10 minutes.[130] It can be said that the participation processes in most EIAs do not include any public discourse but rather project presentation to the public.

Accessibility places constraints on the ability of the people to participate in environmental regulation. The interviewee also complained that participants are not provided with simplified information before their participation. Most fact sheets provided are scientific data which are usually difficult for local people to understand. The ecological impact of the project is not often raised to participants. Some actual stakeholders were not invited to the meeting, especially the active ones. This is very inconsistent with the concept of reflexive governance explored in Chapter 1 which suggests that, in order to achieve the goal of mutual learning, participants' capacities should be enhanced with information provided. The EIA process under EU environmental governance as well as other EU environmental regulation such as REACH is now emphasising the importance of information in terms of transparency and enabling public scrutiny of environmental and social risks. While the EIA requirements have been explicitly

[130] ibid.

stated in the Constitution of Thailand, other necessary requirements for encouraging meaningful findings during the EIA processes, which are more important for making the EIA effective in addressing environmental problems, have not been established yet.

Until now, there has been no guidance on the process to make a complaint for environmental harms. Although there have been cases where people succeeded in requesting the court to revoke the EIA process that did not comply with the laws[131], the judicial process normally takes time, and the revocation of the EIA process does not mean the abolition of the project. Most people, therefore, have brought the case to revoke the license rather than to revoke the EIA process.[132] The EIA requirements in the Constitution have little meaning if there are no mechanisms for enabling people to participate and exercise their rights.

(3) Lack of Experts and Resources

A Thai environmental NGO activist explained that most committees concerned with environmental regulation have little expertise in environmental management, as can be noticed from most committees being usually composed of representatives from political institutions. The interviewee further added that there is a time limit for the Expert Committee to audit the EIA report and, since the Expert Committees are ad hoc, the selected experts are very busy in their own career path; sometimes they did not check the report thoroughly. Normally, the Expert Committee simply audits the EIA report with no deep investigation checking whether the information provided in the report is accurate in reality.[133] The information gained from the interview also suggests the problem of imbalanced proportion of representatives from political sectors and from scientific sectors, namely environmental expertise, in all Thai environmental committees as discussed in Section IV. With a small role of experts in public environmental governance, it can cast doubts on the government's dedication to environmental policies and the potential that political decisions might dominate in any decision-making, rendering environmental policies simply window-dressing measures to gain public acceptance and cohere with the global trend.

Apart from the problem of insufficient experts to audit the EIA report thoroughly, there is also lack of resources and personnel in enforcing environmental laws. An officer at a Thai government agency concerned with environmental regulation suggested that local pollution

[131] For example, the Map Ta Phut case mentioned in Section IV(1) of this chapter.
[132] Interview IV (n 125).
[133] ibid.

control officers in some areas did not have sufficient technical tools or equipment for measuring the pollution or sometimes their tools did not work properly. Also, there are not enough officers to monitor all the EIA processes under Thai laws; the investigation on the EIA process is therefore based on the submitted report.[134]

(4) Political Instability

The three problems discussed above can be solved by improving the governance structure, reducing bureaucratic processes, establishing a single overarching body, or making the Expert Committee a permanent body of which the members can develop their expertise and focus on EIA investigation. It can be argued that such problems do not imply the limits of state regulation which indicate the need for private regulation, but rather the need to restructure and improve state regulatory institutions and processes. However, one important reason that makes reliance on state environmental governance not sufficient to ensure effective environmental management in Thailand is political instability. The political instability, especially the frequent coups, does not only impede the continuous development of environmental regulation, as already discussed in the early section of this Chapter. The situation can also get worse when the military government uses its excessive power to grant total exemptions from the application of environmental regulation, allowing some environmentally degrading performance by private actors, namely business corporations and industries, or even by the state project itself.

In Thailand, the Interim Constitution, which was announced after abrogation of the pre-existing Constitution, often conferred special powers to the military regime to restore peace and order to the country. As in 2014, section 44 of the Interim Constitution of Thailand enabled Prime Minister Prayut Chan-o-cha to issue any orders as considered necessary for national reform. This provision granted the military Prime Minister an extensive power to impose or amend any laws and regulations, with recognition from the 2017 Constitution that the orders issued under section 44 are constitutional and lawful.[135] Economic stagnation has gone hand-in-hand with political unrest since the military coup in 2014 and economic problems have been the focus of government policies; investment and developmental projects are needed for creating job and spurring economic growth. Environmental standards and requirements have been regarded as

[134] ibid; Interview VI (n 123).
[135] Constitution of the Kingdom of Thailand 2017, s 279.

an obstruction and discouragement to investment, for such regulations increase costs for investors or delay the construction of the project.[136]

From such viewpoint, in 2016, Prime Minister General Prayuth Chan-o-cha used his special power conferred by section 44 to issue the National Council for Peace and Order (NCPO)'s Orders to exempt from the application of the Town Planning Act in certain areas of economic development projects ,and also to amend the law to allow certain necessary projects to proceed for approval before completion of the EIA previously required by the law.[137] The brief details of three NCPO's Orders which significantly concerns environmental aspects are as follows.

- *The NCPO's Order number 3/2559 and 4/2559* grants exemptions from the application of the Town Planning Act and its subordinate regulations in certain cases. The NCPO's Order number 3/2559 indicates the towns where the application of the Town Planning Act will not be enforced, calling such areas the Special Economic Zones. Meanwhile the NCPO's Order number 4/2559 specifies categories of industries that do not have to comply with the Town Planning Act, which are energy industries, such as power plants, power stations, and oil warehouses. These two Orders allow the construction of industries and power plants without having to consider the town planning rules, which means that industries can be constructed not limited to industrial areas but in any areas, even those situated near residential areas.

- *The NCPO's Order number 9/2559* amended the requirements for the EIA completion under the NEQA by permitting the process of approving the project to start without having to wait for the EIA process to be completed if such project is considered important and necessary. The Order also provides examples of important and necessary project as transportation and irrigation.

Although the NCPO's Orders were later abrogated and the NEQA has already been amended in 2018 to require the EIA completion as it used to be before the announcement of the NCPO's Order number 9/2559, a number of projects were allowed during the time when the three Orders were enforced and their adverse impacts to environment remain despite the termination of the NCPO's Orders. For example, there has been wide-spreading construction of waste-to-energy

[136] 'Thai Junta Scraps Regulations on Industries, Power Plants' (*Prachathai*, 22 January 2016) <prachatai.org/english/node/5789> accessed 10 February 2022; 'Thai Junta Slashes EIA Procedures on State Projects' (*Prachathai*, 9 March 2016) <prachatai.org/english/node/5919> accessed 10 February 2022.
[137] The NCPO's Orders 3/2559, 4/2559, and 9/2559.

plants in several areas, and because the NCPO's Order exempts the enforcement of the Town Planning Act for power plants, most plants are located near living areas of local people so as to save the costs for transporting the waste to the plants. Although the idea of turning waste to energy sounds environment-friendly and consistent with the concept of sustainability, it turns out that such plants do not reduce the amount of waste; on the other hand, their operation has produced particulate matters (PMs) which are harmful to respiratory system as well as emission of other pollutants which could adversely impact the health of people living around the plants.[138] The exemption from the EIA completion was blamed as a reason for these hazardous activities.

The NCPO's orders obviously exemplify the situations where the national government ignores the importance of environmental regulation and even lowers the level of existing environmental standards. Although the environmental standards are incorporated in an Act or even recognised in the Constitution, political instability in such countries as Thailand can allow government interference to abolish all such requirements and to lower environmental standards with no predictability. In this case, environmental standards set by private regulation such as the EP are more stable and have more certainty than the standards under national laws, because, so far in Thailand, the military government have limited their political interference merely to, as they usually claim, prevent any disorder or re-establish security to the country. Private self-regulation with no involvement of government bodies, as the EP regime, will not be interfered with by military authorities. In other words, in a country where there are frequent military coups like Thailand, environmental standards established by national legislation or even incorporated in the constitution can be easily abolished or exempted, especially when environmental regulation is not the priority of the military government. Private self-regulation which is independent from national government is therefore a more stable regulatory approach for environmental governance.

Having considered the problems associated with Thai environmental governance, especially the political instability which indicates the advantage of private regulation in terms of securing its environmental standards from military interference and separating from changing-back-and-forth national policies, it is clear that the EP framework could be used to address other problems relating state regulation in Thailand. First, as the EP framework adopts the concept of reflexive

[138] 'นักวิชาการสิ่งแวดล้อม เตือนต้อง"เด็ดขาด"จัดการแหล่งกำเนิดมลพิษปราบวิกฤติฝุ่นพิษ PM2.5 [Environmental Scholars Warns to Manage the Sources of PM2.5]' (*Infoquest*, 15 January 2020) <www.ryt9.com/s/iq01/3085436> accessed 10 February 2022.

governance, which emphasises a learning-based approach, stakeholder engagement is particularly encouraged, and transparency has been developed to ensure that stakeholders can get access to information concerned with environmental and social risk assessment. The EP requirements for translation and comprehensive information for lay people with no scientific expertise can help address the situation where EIA participants are provided with information they do not understand. Also, Principle 5 of the EP explicitly states that stakeholder engagement is an ongoing process throughout the project which can imply that stakeholders will not be simply included in the final step of EIA process as is occurring in Thailand.

With respect to the problem of acquiring specialists and individuals with the relevant expertise, each EPFI has to prepare their personnel and resources for checking the environmental and social risk assessment. As such assessment includes the consideration of liabilities and potential local resistance for construction of a project, which are undeniably related to the client's ability to repay the loan, EPFIs organise particular officers for investigating the EP compliance of their clients. This can help to develop the expertise of EPFIs through time rather than the Expert Committee in Thailand which is an ad hoc establishment. Also, since the EP framework is globally adopted and its environmental and social standards refer to such globally accepted, well-known standards as the IFC Performance Standards, the EP framework can to some extent ensure that the standards applied will not be too lax. With its wide adoption, the EP regime usually faces, and has to address various criticisms from civil society organisations, leading to its consistent revision and development as explored in Chapter 3. This indicates openness to public concerns and its restricted potential to ignore environmental issues.

With all the reasons explained above, the EP framework can be an alternative regulatory measure to raise environmental standards in a developing country as Thailand and supplement the role of the government in environmental governance.

VI. Thai Private Financial Institutions and EP Adoption

As already mentioned, in most developing countries including Thailand, economic development is usually a priority for government policies; environmental issues are often overlooked. One strength of the EP regime in raising environmental standards is its transnational impact. With the accelerating pace of globalisation and the free flow of financial resources, even though environmental awareness does not receive much attention from people

in such countries and does not cause public pressure for private financial institutions to adopt the EP framework, there are other foreign financial institutions which are EPFIs and can also be sources of funds. The EP standards are applied by such EPFIs and can cultivate sustainable business policies in their clients. The number of EPFIs is constantly growing and sustainable finance is now the policy direction of private financial institutions as examined in Chapter 3. It is likely that Thai commercial banks and other private financial institutions in Thailand will eventually adopt the EP framework, and that will pave the way for more significant roles for private financial institutions as regulators in Thai environmental governance.

In 2021, there were no Thai commercial banks being EPFIs, but it did not mean that they were not aware of the EP framework and sustainable lending. A scholar who works on promoting sustainable finance suggested that several large commercial banks in Thailand have been aware of the EP framework and the global trend in sustainability. They have developed their organisational structure to have a particular department for analysing environmental and social risks and/or employ experts in environmental and social governance for their institutions. These are the signs that they are preparing for adopting the EP framework. The interviewee further added that large Thai commercial banks have been aware of the changing behaviour of most private financial institutions in the global market to focus more on environmental and social policies, namely sustainable finance. They have realised that their environmental policies need some reform in response to the global trend, as they want to get prepared for their business expansion to other jurisdiction in the future.[139] A Thai bank officer accepted that regional competition is one significant driving force for Thai commercial banks to pay more attention to sustainability, as environmental policies have been promoted in several financial institutions across the world. Thai banks cannot consider only the environmental standards required under Thai laws, but they have to be aware of the international standards.[140]

This may suggest that the EP framework which establishes globally applied standards may push private financial institutions into being more prepared for sustainable finance than the state can. This may imply that the EP framework may raise environmental standards in a developing country despite the state's resistance to environmental development.

[139] Interview V with a Thai scholar who works on promoting sustainable finance in Thailand (Thailand, 10 November 2020), see Appendix of this thesis: 'List of Interviews'.
[140] Interview II with a Thai bank officer (Thailand, 21 November 2020) see Appendix of this thesis: 'List of Interviews'.

Although most Thai banks have not adopted the EP framework yet, they have already developed their policies on Environmental and Social Responsibility (ESR) to incorporate the consideration of environmental and social risks into their lending decision.[141] The fact that they have not adopted the EP framework yet is merely because they are preparing their business operation to comply with the EP standards. The Banks now have their own ESR officers to assess the risks of a project fallen in the sector of specific concerns. If the ESR officers find some concerning issues, they will pass the report to the committee to decide further. The bank is aware of environmental risks, as there have been increasing cases where the projects faced unexpected costs from environmental issues such as local resistance and liabilities; incorporating environmental consideration into the risk assessment of a project is therefore beneficial for them in assessing the client's ability to repay the loans.[142]

The information obtained from the interviews with a scholar and bank officers supports the discussion in Chapter 3 on the incentives for EP adoption. This illustrates how EP standards can be widely applied and raise environmental standards without requiring legal imposition or enforcement from the state. In January 2022, the observation from interviews conducted in 2021 that Thai commercial banks are in process of preparing for EP adoption has been verified as one large Thai commercial bank has just adopted the EP framework. Siam Commercial Bank (SCB) promotes its new strategic framework, which includes sustainable finance, and EP adoption is claimed as a significant step towards its policy goals.[143] After the first Thai EPFIs, it is to be expected that more Thai financial institutions will adopt the EP framework soon, as observed from their business preparation, their awareness of the global direction towards sustainable finance and their current business policies that concern further environmental considerations. Private financial institutions are predictably important actors in environmental governance in Thailand in the future.

[141] See Kasikorn Bank, 'Sustainability Report 2020' <www.kasikornbank.com/en/sustainable-development/SDAnnualReports/Y2020_SD_EN.pdf> accessed 10 February 2022.
[142] Interview III with a Thai bank officer (Thailand, 20 January 2021), see Appendix of this thesis: 'List of Interviews'.
[143] Siam Commercial Bank, 'SCB First Thai Bank Named a Signatory to the Equator Principles' <www.scb.co.th/en/about-us/news/jan-2022/scb-equator-principles.html?payroll-wealth?payroll-solutions%25253FPayroll-wealth> accessed 10 February 2022.

VII. Conclusion

This chapter provides a comprehensive overview of the diverse ways in which Thailand's culture and political histories have intersected with environmental governance. It has been shown that Thailand has become party to several international environmental agreements and has embraced international environmental principles and such concepts as 'sustainable development' in its national policies and the Constitutions. Environmental legislation in Thailand currently indicates more encouragement of public participation in decision-making processes. However, public inclusion does not always mean adoption of reflexive governance. The EIA requirements under Thai laws do not get any support from institutional design to ensure well-informed participants or actual stakeholder engagement.

Noticeably, although Thai culture does not cause strong resistance against such western concepts as sustainable development and democratisation, it does not encourage active public engagement in environmental management. The new generation may be more confident to speak up and exchange their views, but it is undeniable that Thai culture of 'Kreng Jai', paternalism and authoritarianism remains a significant constraint on efficient deliberation aiming for mutual learning and finding the best resolution. Without good institutional design that acknowledges this culture, it is unlikely that the EIA requirements in Thai environmental governance can create knowledge-building processes and relieve public concerns on environmental damage.

Furthermore, the bureaucratic regulatory structure and fragmented authorities obviously impede the effectiveness of Thai environmental governance in addressing environmental problems. The problems of Thai environmental regulation significantly need restructuring and better institutional design. However, the consistent political unrest usually makes the government lose focus on environmental development, or even intervene on environmental standards to promote economic growth as happened in Thailand. When state regulation is unreliable and ineffective for maintaining environmental standards, private regulation such as the EP framework which is now increasingly applied across nations and is independent from state authorities suggests an alternative means for raising environmental standards in a developing country. However, it must be noted that the EP framework still needs some development in response to critiques of its lack of accountability mechanisms as well as its institutional design which requires some improvement.

One outstanding issue that can be observed from the case of Thailand is the importance of carefully designing a participation process in an authoritarian country like Thailand, since participation is the key feature of reflexive governance. The selection of representatives from different groups of interests must be well-organised with balanced proportions to ensure that the chance of domination or capture will be minimised. That being said, there is clear scope for the EPs as a form of private environmental regulation to make a positive implication in environmental governance in Thailand. Taking into account the critiques of the EP regime and the analysis of Thailand's cultural and political framework, the next two chapters will discuss how the EP institutional design can be developed to achieve its goal in environmental development in terms of sustainable finance.

CHAPTER 5:

Institutional Design for the EP Regime (I):

Transparency, Public Participation and Legitimacy

In a state regulatory regime, the state typically obtains governing power from the people and in return subordinates its power to the constitution,[1] which sets the duties and holds the state accountable for its regulatory decisions. By contrast, private actors in a voluntary-based private regulatory scheme do not owe any legal obligations to the public in the same way that a state regulator does. The credibility and effectiveness of the EP framework, as a form of private regulation in environmental and social development, has faced various criticisms and challenges. It is predictable that when profit-driven organisations such as commercial banks have agreed upon a set of principles with the stated objectives of addressing public concerns such as environmental problems, that society might question whether such regulation is simply a strategic tool for responding to public pressure to uphold environmental and social responsibilities as corporate actors. The concept of EP regulation, which incorporates environmental and social consideration into the decision-making process of private financial institutions, suggests an interesting regulatory model for environmental governance. However, the EP framework cannot gain public acceptance from mere reliance on an interesting concept; proper institutional design is needed to ensure the public that EP regulation is not a window-dressing measure but an effective alternative for environmental governance.

The institutional design of the EP framework plays an important role in the perceived credibility and legitimacy of the EP regulatory regime. There are five main critiques which are usually found against most private regulation including the EP framework – transparency, public participation, legitimacy, accountability and enforcement. This chapter investigates the first three issues in Section I to Section III and discusses how the institutional design can address such issues. The other two issues will be explored in the next chapter. With some improvements, the EP regime can become self-reliant and help in raising environmental standards in a country where state environmental regulation is lax or insufficient.

[1] See Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World', in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, 2010).

I. The EP Framework and Establishment of Transparency

Transparency is the initial step to allow stakeholder engagement in regulation; it is therefore closely related to the establishment of participation processes, legitimacy, and accountability of a regulatory regime[2], which will be discussed in the following sections. Before exploring the transparency in the EP framework, the definition of transparency in this regard should be first settled along with the notes on the benefits of transparency. Transparency can be defined as the requirement to make regulatory activities 'accessible and assessable'[3]. In other words, the concept of transparency is closely linked to information disclosure. The importance of information in regulation has been increased over time, as in several regulatory regimes, notably the REACH framework[4] which requires disclosure of some information as a condition for access to the market and the 'Aarhus Convention'[5] which explicitly recognises the right to information. The concept of reflexive law also signifies information exchange for its learning-based regulatory approach.[6] The concept of transparency is based upon the idea that information has an important role in regulation, since information can empower a person to take a better decision.[7]

There are mainly two forms of transparency: procedural transparency and outcome transparency.[8] 'Openness', in terms of information disclosure, is fundamental to both forms of transparency. While procedural transparency refers to the disclosure of regulatory processes, such as decision-making[9], outcome transparency emphasises the disclosure of regulated performance[10], such as greenhouse gas emissions. Each form of transparency has its own advantages. Procedural transparency can improve the accountability of regulators as the public

[2] Aarti Gupta, 'Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8 Global Environmental Politics 1.
[3] Martin Lodge, 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing Limited 2004) 127.
[4] Registration, Evaluation, Authorisation and Restriction of Chemicals regulation (EC 1907/2006)
[5] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 'Aarhus Convention').
[6] See Chapter 1 of this thesis for further details and discussion.
[7] Gupta (n 2) 4.
[8] Graeme Auld and Lars H Gulbrandsen, 'Transparency in Nonstate Certification: Consequences for Accountability and Legitimacy' (2010) 10 Global Environmental Politics 97, 99.
[9] ibid.
[10] ibid 100.

can get access to the information concerning the decision-making process and then raise questions about irrational or arbitrary decisions. The fact that procedural transparency enables public scrutiny of regulatory processes can also lead to public acceptance and thus enhance the legitimacy of the regulatory scheme.[11] On the other hand, the revelation of regulated performance as required for outcome transparency can help improve accountability and legitimacy of the regulation as well, in terms that the public, especially NGOs, can refer to such disclosed information and put pressure or run a campaign against non-compliant corporations. Information disclosure can therefore encourage, or even force, behavioural change of regulated entities.[12]

Information disclosure further benefits regulated entities in terms of education. Information on non-compliance, namely decisions on sanctions or negative responses from the public, can provide a case study and clarification for other regulated entities about what behaviour must be avoided and what outcome can occur in case of non-compliance. This information is also useful for the public in terms of better understanding of the regulatory functions, as illustrated in former chapters that information can 'empower' people. With greater public scrutiny and the regulated entities being aware of potential negative impacts of non-compliance, information disclosure can deter undesirable performance. This can even lead to the improvement of regulation in response to the public feedback.[13]

Since EP regulation is initiated and operated by a group of private financial institutions which are typically profit-driven organisations, there are concerns that the EPFIs' commitments to environmental and social sustainability are not genuine but simply a strategic tool for protecting their reputation and preventing public shaming on their unsustainable finance; this is called a 'greenwashing' policy measure.[14] To allay these fears, the EP framework must establish transparency, since the more the public can investigate the performance of the EPFIs, the more

[11] ibid.
[12] ibid.
[13] Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10 Bioethical Inquiry 149, 152, 156.
[14] See Oliver Balch, 'Sustainable Finance: How Far Have the Equator Principles Gone?' (*The Guardian,* 15 Nov 2012) <www.theguardian.com/sustainable-business/sustainable-finance-equator-principles> accessed 10 March 2021; Bert Scholtens and Lammertjan Dam, 'Banking on the Equator. Are Banks that Adopted the Equator Principles Different from Non-Adopters?' (2007) 35 World Development 1307; Carol A Adams, 'Bank Exposure to Coal Projects Drowning in Greenwash' (*The Conversation,* 1 September 2015) <theconversation.com/bank-exposure-to-coal-projects-drowning-in-greenwash-45835> accessed 10 March 2021.

public scrutiny can occur and lead to development of legitimacy of the regulation. Information, as a transparency tool of the EP regulation, enables the public to examine whether the EPFIs have actually incorporated environmental consideration into their decision-making. This allows the EPFIs to prove that they do not merely adopt the EP framework as a greenwashing tool.

When the EP framework was first introduced in 2003, there were no requirements for EPFIs to disclose information on their implementation. However, in 2006 and following concerns that the EP was being used as a tool to 'greenwash' finance, the requirements for EPFIs to publish periodic reports on their EP implementation processes and experience have been added. This requirement has been amended further in the revised EP in 2013 (EP III) and 2020 (EP 4). Principle 10, as appearing in all versions of the EP regulation since 2006, constitutes the requirements for transparency of the EP regulators, namely the EPFIs, by imposing the responsibility to make a public report at least on an annual basis. In other words, the EP framework applies information disclosure as a regulatory tool to ensure that the regulators' performance has actually implemented the EP regulation and has included the consideration of environmental and social risks in its decision-making.

Although information disclosure is a key policy measure to establish transparency in a regulatory regime, instititutionalising transparency is not done simply by requiring both regulators and regulatees to provide information. The social structure, notably the influence of economic and political actors, is undeniably related to the effectiveness of information disclosure in terms of their power to manipulate information or limit capacities of the public to understand the information provided. [15] It is therefore important to design regulatory transparency with consideration of the conditions that information disclosure can actually empower people to understand and scrutinise the regulatory scheme.

There are several ways to institutionalise transparency in regulation. Lodge, referring to three different administrative doctrines, concludes that transparency can be designed in three ways.[16] The first one, based on *the fiduciary trusteeship doctrine*, is the approach typically found in the 'traditional public administration', which reflects the strict divide between the public and the

[15] Michael Mason, 'Transparency for Whom?: Information Disclosure and Power in Global Environmental Governance' (2008) 8 Global Environmental Politics 8, 9.

[16] Lodge suggests the three ways to institutionalise regulatory transparency and accountability, but since this section focuses on transparency, the discussion on accountability mechanism will be further explored in the next chapter. Lodge (n 3) 130.

private.[17] As a fiduciary acts on behalf of his or her client, the doctrine of fiduciary trusteeship in administration implies that lay audiences do not have sufficient expertise to make a rational decision. Transparency, based on this doctrine, relies on representation selected from specialists, which reflects the idea of paternalism.[18] This model is rarely applied to establish transparency in current regulatory regimes; especially with the growing adoption of the idea of reflexive law which signifies public engagement in regulation, this form of transparency is difficult to gain public acceptance.

The second way to institutionalise transparency, according to Lodge, relates to *the consumer sovereignty doctrine*.[19] This approach focuses on individuals and minimises public intervention and, in contrast with the first approach, this doctrine considers an individual capable of making a choice. Information is important as a transparency tool to support the quality of an individual's choice. The third approach, based on *the doctrine of empowering citizens*, also signifies the role of the public in regulation but argues that the second approach overlooks the reality that people have different levels of capacities to understand information.[20] The simple requirement of information disclosure without being aware of the different capacities among people might enable some individuals to dominate the others. This approach supports the idea of institutionalising transparency to ensure that the information disclosure can actually empower the public to understand and be able to scrutinise the regulatory processes. This idea is consistent with the concept of reflexive law, namely the deliberative approach and Schon and Argyris' pragmatic approach which focus on enhancing actors' capacities, as well as the idea of proceduralisation.[21]

As discussed in the former chapter, the EP regime is a form of private regulation which incorporates various non-state actors in the EPFI's decision-making process. With the EP structure that emphasises discursive collaboration between the EPFIs, as regulators, and their clients, regarded as regulatees in this regime, as well as public involvement, the EP framework indicates the implementation of the learning-based approach, or notably the concept of

[17] Martin Lodge and Lindsay Stirton, 'Accountability in the Regulatory State' in Robert Baldwin, Martin Cave, and Martin Lodge, The Oxford Handbook of Regulation (Oxford University Press 2010) 360.
[18] Lodge (n 3) 130.
[19] ibid 131.
[20] ibid 132.
[21] See Chris Argyris and Donald A. Schon, *Organizational learning II: Theory, Method, and Practice, Volume 2* (2nd edn, Addison-Wesley Publishing Company 1996); Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 33, 40.

reflexive governance. The EP regulation should therefore apply the doctrine of empowering citizens to institutionalise its transparency.

As regards the EP requirements for information disclosure, the EP regulation currently relies on the idea of empowering citizens with information which is the proper approach for its reflexive nature. However, citizen empowerment cannot be simply accomplished by mere requirement of information disclosure. The institutionalisation should also consider the challenges that most private regulation faces in ensuring its transparency.

The challenges of citizen empowerment in terms of information disclosure

As the accuracy and the extent of information provided are under the control or possibly the manipulation of information disclosers, regulatory transparency must be well designed to ensure that information disclosure can actually empower the public. The problem of 'strategic disclosure' has been usually found in reporting practices of private actors. Strategic disclosure is the disclosure of information as regulation requires but presented in a form designed to protect the reputation of the disclosers and merely signify the positive aspects rather than providing the whole picture of their performance.[22] Without verification mechanisms for the accuracy and completeness of information before published, the public might be misled and the goal of transparency cannot be achieved.[23] Another problem that can reduce the effectiveness of information as a transparency tool is 'carpet bombing' disclosure, which strategically provides large volumes of information and includes irrelevant data.[24] Too much information can confuse lay people, especially if they do not have expertise to interpret the data or to realise which data is relevant.

To prevent the problems of strategic disclosure as well as the bombardment of information, the provision of 'standardised' data is normatively desirable when private actors have the obligation to disclose their data. Standardised information can prevent disclosers from selectively revealing only positive aspects of their performance.[25] To address the lack of

[22] See Craig Deegan, Michaela Rankin and John Tobin, 'An Examination of the Corporate Social and Environmental Disclosure of BHP from 1983 - 1997' (2002) 15 Accounting, Auditing & Accountability Journal 312.

[23] David Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency' (2007) 17 Business Ethics Quarterly 453, 455-456.

[24] ibid 466.

[25] ibid, and See David Hess and Thomas W. Dunfee, 'The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution?' (2007) 17 Business Ethics Quarterly 5.

verification, it is necessary for regulatory transparency, especially in the case of private self-regulation, to have third-party oversight to ensure the accuracy of information. Several studies show that the rationale for most private actors to disclose their information is mainly to improve their reputation and to obtain public acceptance.[26] A third-party oversight body can help improving credibility of information and can also function as an intermediary for processing, interpreting, and disseminating the information for lay audiences.[27]

An oversight body can be chosen from experts, who have expertise in interpretation and comprehension of complex data, or can be a mixture of diverse actors associated with the regulated activities to encourage collaborative governance.[28] Some scholars suggest the role of the state as intermediaries in private regulation, namely in a form of government-supported intermediaries.[29] However, this function is not limited to government agencies; a group of non-state actors can perform this role as well. The topic of the role of the state will be later discussed in the thesis, but it must be noted here that to achieve the goal of transparency, a private self-regulatory regime requires a third-party oversight body.

Overall, in order to ensure that information disclosure can achieve its goal of establishing transparency of a regulatory regime, accuracy of information is required, and strategic disclosure including the bombardment of information must be prevented. Simply setting the requirement for information disclosure without proper institutionalisation cannot lead to actual achievement of regulatory transparency. Therefore, there are further two important requirements for enhancing credibility of information disclosure as well as for ensuring that such information provided can effectively empower the public to understand the regulation. The institutionalisation of regulatory transparency of the EP framework requires (1) provision of standardised information and (2) establishment of a third-party oversight body.

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[26] See Carol A. Adams, 'The Ethical, Social and Environmental Reporting Performance Portrayal Gap' (2004) 17 Accounting, Auditing and Accountability Journal 731; Craig Deegan, 'The Legitimising Effect of Social and Environmental Disclosures: A Theoretical Foundation' (2002) 15 Accounting, Auditing & Accountability Journal 282; Reggy Hooghiemstra, 'Corporate Communication and Impression Management: New Perspectives Why Companies Engage in Social Reporting' (2000) 27 Journal of Business Ethics 55.

[27] Hess (n 23) 467.

[28] Lodge (n 3) 134.

[29] See William M. Sage, 'Regulating through Information: Disclosure Laws and American Health Care' (1999) 99 Columbia Law Review 1701.

(1) Standardised Data for Each EPFI's Report

When Principle 10 was added in the EPII (2006), the requirement for EPFI reporting was broadly written to be published to the public 'at least annually about its Equator Principles implementation processes and experience, taking into account appropriate confidentiality considerations', without any further clarification of what information should be included in such a report. This lack of specificity in the contents required for an EPFI's report allows for the possibility of strategic disclosure in terms of selective disclosure or, on the contrary, 'carpet-bombing' disclosure. Without the provision of standardised data, it is difficult for lay people to know whether the information revealed is complete or complies with the EP standards. Moreover, Principle 10 explicitly recognises that the confidential duties between an EPFI, as the lender, and its client, as the borrower, are to be taken into consideration as 'appropriate'.[30] The EPII does not provide the definition of 'appropriate confidentiality considerations', implying that the discretion to decide what situation is appropriate is left to EPFIs. Such broad terms applied in Principle 10 allow too much discretion of each EPFI, potentially leading to various levels of information disclosure among different EPFIs.[31] Guidelines on reporting or provision of definitions can help provide the standards for EPFI's reports and enable lay people to assess the completeness of the reports.

The EPIII (2013) has addressed the concerns on Principle 10 by providing the minimum requirements for an EPFI's report in Annex B. The EPFI's 'Data and Implement Reporting' requirements must include the total number of its Project Finance transactions, as well as other loans and financial services under the scope of the EP application, that closed the deal within the reporting period. Then, the number of Project Finance transactions must be separately reported by Category, by business sector, by region, by country designation, and the report must also identify the number of the transactions which have had an Independent Review. The EPFIs are required to publish their reports on their website, 'in a single location and in an accessible format', ensuring that the public can see the whole picture of each EPFI's performance. These EP transparency requirements do not mandate EPFIs to include the Project name data or their clients' names in the public report, but the EPFIs will submit Project name

[30] 'Each EPFI adopting the Equator Principles commits to report publicly at least annually about its Equator Principles implementation processes and experience, taking into account appropriate confidentiality considerations.' – The Equator Principles 2006 (EP II), principle 10.

[31] Please be noted here that this statement is particularly about the EPII which lack clarification of 'appropriate confidentiality considerations.'

data to the Equator Principles Association Secretariat on the condition that their clients give consent and that such disclosure will neither violate 'applicable local laws and regulations' nor cause 'additional liability for the EPFI … in certain identified jurisdictions'. After the launch of the EPIII, the Equator Principles Implementation Note was published in 2014 providing guidance for EPFIs to implement and comply with the EP regulation. This Implementation Note clarifies the meaning of 'appropriate confidentiality considerations' that it is the situation where the EPFI can be exempted from disclosing information concerning itself or its client, if that information 'could be financially or commercially sensitive, or where disclosure violates applicable laws and regulations'[32]. Although this definition still allows some discretion of an EPFI to decide which information can be sensitive, it has scoped down the exemption of EPFI's reporting obligations to particularly sensitive issues, rather than leaving the broad term 'appropriate' undefined. The Implementation Note further provides samples of how to present the data in an EPFI's report with the breakdown number of Project Finance transactions by category, by business sector, by region, by country designation, and by whether an Independent Review has been conducted.

It could be said that the EP framework has provided standardised information to enable the public to understand what to be expected from EPFI reporting. This also benefits EPFIs in terms of providing guidance on how to make a report properly. The latest EP regulation updated in 2020 does not make changes to these requirements, so information disclosure with the details examined above is the current policy measure to institutionalise transparency in an EP regulatory regime. The development of EP regulation to address the critiques on its transparency can to some extent provide the public relief that at least they can investigate whether the EP framework s amounts to greenwashing or not.

One observation on the minimum data requirements for EPFI reporting is that there is no obligation or requirement for the EPFI to specify the numbers of transactions, loans, or other financial services, denied on the ground of non-compliance with the EP regulation. While such data might indicate how strictly an EPFI applies the EP standards in its business decisions, the requirement for revealing this information might be too stringent and meaningless in practice. Typically, a financial institution does not reject financial support for its client merely because of its non-compliance with the EP standards. There are other factors to take into consideration altogether, which makes an EPFI decide not to include such rejection as the projects denied on

[32] The Equator Principles Implementation Notes 2014.

the EP ground.[33] An interview with an NGO member whose work includes encouraging sustainable finance in Thailand indicates that the minimum data requirements in Annex B are sufficient for NGOs to investigate the EPFI's adherence to the EP standards without requiring the information on the number of transactions rejected.[34] The high number of rejections does not mean that an EPFI strictly applies the EP standards. Rather, information disclosure on the transaction approved is more useful for NGOs to examine further whether such projects really comply with the EP standards and whether an EPFI is pragmatically adherent to the EP regulation.

(2) Third-party Oversight

The preparation of an EPFI's report is an internal process in data collection. Although the current Annex B of the EP regulation identifies minimum information requirements, providing standards and guidance on what to contain in a report, the accuracy of information can still be questioned. The EP framework does not require any third-party bodies to audit the report before it is published. However, a study indicates that 70% of EPFIs applied to third-party auditors to verify the accuracy of their corporate social responsibility (CSR) reports.[35] Although the study did not focus on the EP data and implementation reports, it illustrates the practice of most EPFIs that they employ external auditors to verify their reports before the public disclosure. While the employment of external auditors is not mandatory, it should be noted that some EPFIs voluntarily bear the costs to have their reports verified. Normally, a profit-driven business does not incur unnecessary expenses unless it has reasonable returns. As already discussed, the introduction of EP regulation is to relieve the public tension against private financial institutions in environmental management. Their key concern is their reputation in the market. An explanation why some EPFIs voluntarily subject their reports to third-party auditors may be to verify their transparency to the public and gain legitimacy as a 'good' actor.

The question is whether such an external auditor can be counted as a third-party oversight body. It must be noted that there is considerable difference between an auditor and an oversight body. An auditor, despite being a separate entity from an EPFI, is hired by an EPFI and its capacities

[33] Kimberly Gaskin, 'A Question of Principles' (2007) Infrastructure Magazine 59, 63. (cited in Ariel Meyerstein, 'Are the Equator Principles Greenwash or Game Changers? Effectiveness, Transparency and Future Challenge' in Karen Wendt (ed.), *Responsible Investment Banking* (Springer 2015)).
[34] Interview IV, see Appendix of this thesis: 'List of Interviews'
[35] Aseem Prakash and Matthew Potoski, 'Collective Action through Voluntary Environmental Programs: A Club Theory Perspective' (2007) 35 Policy Studies Journal 773, 790 n 18.

to check the completeness of EPFI reporting rely on an EPFI to a large extent. Since it is the EPFI which provides information for the auditor it hires, the EPFI can limit the availability of information that the auditor can access.[36] An external auditor hired by an EPFI cannot oversee the EPFI's performance; on the contrary, its role is to certify and enhance credibility of its hirer rather than to verify. There has been a suggestion that the EPFIs should develop the standards for external auditors of EPFIs' implementation processes[37], but until now the EP framework has not introduced standards or guidance as such.

As previously described, an EPFI is required to publish data periodically in the implementation report and to submit Project Finance name data to the Equator Principles Association ('EP Association'). When the EP Association was established in 2010, the Association Governance Rules were also launched to set the processes for management, administration and development of EP regulation.[38] The Rules have introduced the procedure of de-listing any EPFI which has not complied with the reporting requirements within the timeframe.[39] After sending the final reminder to the EPFIs that do not submit required information, the Steering Committee of the EP Association will implement the removal of such EPFIs from the list of EPFIs as published on the EP Association's website and such EPFIs will not be considered the members anymore.[40] Although the addition of this procedure can to some extent be claimed as a sanction for non-compliance, the Rules do not assign the role of verification to the EP association. In other words, the EP regulation does not establish a reviewing mechanism for EPFI reporting; not to mention the function of intermediaries to help process and translate information for lay people which is yet to be found in the EP framework.

The study of EU environmental governance in Chapter 2 shows that, in a regime where information plays a significant role, such as in the REACH framework, an oversight body has been established to prevent the case of misleading information. As already mentioned, information is important for achieving the goal of mutual learning; it enables lay people, especially the stakeholders, to understand the situation and empowers participant to give their

[36] Ariel Meyerstein, 'Are the Equator Principles Greenwash or Game Changers? Effectiveness, Transparency and Future Challenge' in Karen Wendt (ed.), *Responsible Investment Banking* (Springer 2015) 277.

[37] Suellen Lazarus and Alan Feldbaum, 'Equator Principles Strategic Review – Final Report' (2011) <http://www.equator-principles.com/resources/exec_summary_appendix_strategic_review_report.pdf>.

[38] The Equator Principles Association, 'Governance & Management' (2020) <https://equator-principles.com/governance-management/> accessed on 15 March 2021

[39] The Equator Principles Association Governance Rule (December 2020), rule 6g.

[40] ibid, rules 6g and 5k.

views, concerns and suggestions accurately to the situation during the participation process. The study of Thailand in Chapter 4 suggests that the culture in some countries, namely Thailand, where paternalism is considerably strong and people tend to 'go with the flow', an oversight body for checking or verifying the information required for disclosure is necessary to prevent manipulation and ensure transparency. The lack of third-party oversight bodies remains a problem of the EP framework and this should be addressed so that the requirements for information disclosure can achieve its goals of establishing transparency and empowering the people to examine, scrutinise and criticise the EP regulatory processes.

II. Public Participation in the EP Regime

The adoption of the learning-based approach and the concept of reflexive governance which signify the role of non-state actors in discursive collaboration, has shifted the traditionally hierarchical governance with the state as a regulator to be more interdependent with private actors. Public participation has increasingly gained significance in governance, and has been incorporated as an expected feature in most regulatory regimes since the early 2000s.[41] The EP framework, which embeds the idea of reflexive governance, requires public participation, notably in the environmental and social risk assessment, to conduct a comprehensive study that includes public concerns and local perspectives on particular environmental management.

The following section explores the public participation required under the EP regulation before discussing whether the objectives of public participation can be actually achieved under the current structure of the EP framework, or whether such a requirement needs institutional design to prevent EP adoption from being a greenwashing measure with no actual implementation in environmental development.

The EP Requirements for Public Participation

The incorporation of environmental and social aspects into financial decision-making processes of private financial institutions is a central feature of the EP framework, and this is mainly done through the requirements for Environmental and Social Impact Assessment (ESIA). As already discussed in Chapter 3, private financial institutions are by their very nature profit driven. One reason that can incentivise the EP adoption is that the EP framework provides

[41] Kathryn Quick and John Bryson, 'Theories of Public Participation in Governance' in Christopher Ansell and Jacob Torfing (eds), *Handbook on Theories of Governance* (Edward Elgar Publishing 2016) 159.

guidance for assessing and managing environmental and social risks which are important for considering the potential success and the ability to repay the loan of their clients. To obtain comprehensive assessment, stakeholder participation is required for ensuring that local perspectives and concerns are taken into consideration.

From the wording of Principle 5 of the EP it can be inferred that efforts must be made to ensure that the stakeholders can actually engage in decision-making processes.[42] However, the duty to organise 'effective' stakeholder engagement in participation processes has been placed on the EPFIs' *clients* – and not the financial institution. The design of the participation processes is therefore under the discretion of the clients. The EPFIs will then review whether such processes are organised in compliance with the EP standards. The issues of monitoring and accountability of EPFIs will be discussed in the following chapter. At this stage, this section explores how the EP requirements support public participation and to what extent. Generally, there are four dimensions to consider in designing a participatory process: breadth, openness, intensity, and influence.[43] This section discusses the design of participation processes under the EP framework based on such four dimensions.

(1) The Breadth of Participation

For the first dimension, 'breadth' refers to the scope of participants involved in the process. In order to achieve the goal of participation requirements in obtaining knowledge and comprehensive information from various perspectives, the process must include key stakeholders to represent diverse interest groups[44], especially local people.[45] Paragraph 1 of Principle 5 explicitly mentions the stakeholders which must be included in the processes, which are 'Affected Communities, Workers and, where relevant, Other Stakeholders'. Exhibit I of the EP defines 'Affected Communities' as local people directly affected or living in the area of the client's projects.[46] The definition of 'Workers' include all persons working at the Project site.[47] Meanwhile, in cases where there are other parties that have interests in the project, despite not

[42] See Section III in Chapter 3 of this thesis
[43] Thomas Dietz et al, *Public Participation in Environmental Assessment and Decision Making* (National Academies Press 2008) 121.
[44] Quick and Bryson (n 41), 162.
[45] Dietz et al (n 43), 121
[46] 'Affected Communities are local communities within the Project's area of influence, directly affected by the Project.' – The Equator Principles 2020 (EP 4), exhibit I.
[47] 'Workers are all workers engaged directly or indirectly by the client to work at the Project site, including full-time and part-time workers, contractors, sub-contractors and temporary workers.' – ibid.

directly affected, such as NGOs, they are considered 'Other Stakeholders' and can be included in the participation processes.[48]

The scope of the stakeholders under the EP regime is highly comprehensive in terms of counting in all actors associated, both directly and indirectly, with the project. The fact that local communities are explicitly mentioned as indispensable participants ties in with the objectives of EP requirements for participation processes. The inclusion of workers has been added in the recent revision of the EP 4 (2020). In the former EP, Principle 5 only mentions Affected Communities and Other Stakeholders of which the definition does not mention workers. Such addition infers the EP efforts to make the participation processes inclusive of all relevant parties that might get affected from the project. Normally, when we think of the parties potentially affected by hazardous projects, local people are the first group that come to our mind. Meanwhile, workers of such projects are also associated with – or even more exposed to – any toxicity and should not be excluded from stakeholder participation.

For 'Other Stakeholders', Principle 5 leaves the participation processes open for other entities that might not be affected as the groups of people living or working in the Project's area but have interests in environmental and social issues, such as NGOs. Their engagement can provide information and knowledge from another angle, namely their experience in environmental and social problems, which the local communities might not realise or might not have the platform to raise their own voices as effectively. However, the inclusion of Other Stakeholders is not mandatory; Principle 5 sets the conditions of relevance for their inclusion. In fact, most environmental and social NGOs should participate in the project's risk assessment processes to prevent the possibility that the client might manipulate local people to agree with the project. The NGOs, with experience on environmental and social risks much greater than that of local people and workers, can help in balancing the discussion of the project's risk. Anyway, in practice, stakeholder engagement plans of most EPFIs' clients include NGOs and academic or research organisations as well as national and local authorities that might have interests in the project in the participation processes, inferring that such entities are normally relevant in most cases.[49] It is then better to include Other Stakeholders as normally required participants rather

[48] 'Other Stakeholders are those not directly affected by the Project but have an interest in it. They could include national and local authorities, neighbouring Projects, and/or non-governmental organisations.' – ibid.

[49] See Hatch Engineering and Consulting (Hatch) JSC ShalkiyaZinc LTD, 'Environmental and Social Impact Assessment of the Shalkiya Mine Expansion Project, Stakeholder Engagement Plan' (2015) <www.ebrd.com/documents/environment/esia-48347-sep.pdf> accessed 5 September 2021; South Stream

than on the condition of case-by-case relevance, as there is no substantial reason for setting such condition.

The range of stakeholders required to participate and be consulted as part of the EP framework demonstrates inclusiveness and the practice of most EPFIs' clients shows that they rarely limit stakeholders to only local communities and workers but always include other entities considered associated with the project as Other Stakeholders. The stakeholder engagement plan usually provides a section on stakeholder identification to explain what groups are considered stakeholders of the project. For example, in the stakeholder engagement plan of Shalkiya Mine Expansion Project (the 'Shalkiya Plan'), Other Stakeholders apart from the affected communities included: (1) local authorities (2) neighbouring land users (3) environmental and social NGOs, of which their activities show potential interests in the Project and (4) research and educational institutions of which their areas of study might contribute to the discussion on environmental issues.[50] The identification of stakeholders in the Shalkiya Plan suggests careful consideration to include academic entities to provide scientific information or environmentally-concerning knowledge that could be fruitful for the discussion on the Project's potential environmental effects.

By comparison, the stakeholder engagement plan of another Project, the TurkStream Gas Pipeline – Offshore Section in 2009 (the 'TurkStream Plan'), also has a section for stakeholder identification. Other Stakeholders under this plan involve a wide range of parties, which includes: (1) local government and community representatives (2) businesses and business associations (3) general public, including tourists and visitors (4) community service and infrastructure organisations (5) national and regional government authorities (6) NGOs (7) academic and research organisations (8) media.[51] The breadth of stakeholders under the TurkStream Plan is much wider than the Shalkiya Plan. Businesses and even lay people as tourists are included in the engagement process. It might be partially true that the more the public is involved, the more compliance and effective implementation can be expected in terms of generating public acceptance. However, a large number of participants does not guarantee effective participation. On the contrary, the involvement of 'too many' parties consumes

Transport BV, 'Stakeholder Engagement Plan, TurkStream Gas Pipeline – Offshore Section: Operations Phase' (2019) <turkstream.info/r/F4272E09-6217-4742-AFB4-D0F484964AAB/Turkey-Stakeholder-Engagement-Plan_2019_final_EN.pdf> accessed 5 September 2021.

[50] Hatch Engineering and Consulting (Hatch) JSC ShalkiyaZinc LTD (n 49).

[51] South Stream Transport BV (n 49).

considerable time and costs, and can dilute the engagement of some stakeholders who can provide useful information with those who do not have sufficient knowledge or attention to contribute in the process.[52] It is therefore important to find a proper balance in setting the scope of participants as appropriate for the contexts and regulatory goals.

The TurkStream Plan might *prima facie* demonstrate its thorough consideration of public participation, providing a wide range of stakeholders to engage throughout the operation of the project. However, when considering all eight groups of stakeholders and the number of parties they set under each group, officers and governmental authorities are the major proportion among other stakeholders involved in the participative decision-making processes. While the Plan describes the anticipated engagement of businesses and infrastructure organisations in the transition phase or in the response plan, the engagement of NGOs as well as academic and research organisations, despite their being identified as Other Stakeholders, is limited to access to information and being able to contact the Project for 'questions' queries or issues.'[53] The issue of level of participation will be discussed below, under the dimension of intensity. With regards to the breadth of participation, the active participants of deliberative discussion during the operation do not include any NGOs and academics specialising in environmental and social studies.

One outstanding concern of public participation in decision-making processes is that lay people might have inadequate expertise and knowledge to understand the issues and potentially make irrational decisions.[54] In case of the TurkStream Plan, the deliberative discussion included local communities and directly affected parties, along with other stakeholders as governmental authorities and businesses. On the one hand, local communities and affected stakeholders can be aware of their risks and potential adverse impacts of the project or can consult with local NGOs on environmental issues; they might be fully prepared and capable of contributing to the discussion. On the other hand, without NGOs and academics, which have knowledge and experience on environmental and social issues, to balance and exchange ideas in the discussion, local communities have considerably less information and specialised knowledge, compared to governmental authorities and businesses, and can be manipulated or might lack capabilities to engage in the discussion efficiently. This is an important issue to consider in designing the participation process, as the breadth of participation cannot be simply demonstrated by

[52] Dietz et al (n 43) 119.
[53] South Stream Transport BV (n 49) 21.
[54] Quick and Bryson (n 41) 162-163.

providing a wide range of stakeholders but the balance of different interests represented in the process and the actual engagement of all those various representatives.

While the EP standards leave the scope of stakeholders to be flexibly interpreted, which is generally good for applying appropriately to each different case, the balance of participants should be taken into consideration to prevent any manipulation or domination. The participation process with a wide range of stakeholders counted in but set with imbalanced power of engagement does not actually lead to deliberative discussion with empowered participants. The aim of stakeholder engagement then cannot be achieved. Although the last phrase of Paragraph 2 of Principle 5 states that the participation process 'should be free from external manipulation, interference, coercion and intimidation', there is no further description of how to manage as such. It is true that, generally, the standards cannot set the precise details of participants as the total number or the proportion of different interest groups; they can merely set the broad scope and let the responsible agency decide as appropriate. Nevertheless, some requirements can be added to ensure that there will not be any groups of participants dominating the stakeholders' discussion. This concern can be addressed by considering the design of participation processes along with other dimensions, which will be discussed in the following subsections.

(2) Openness

The second dimension to consider in designing participation processes is that of openness, which is related to the question of the most appropriate phase of a project to invite participation.[55] Public involvement at the early stage of regulatory processes is usually recommended because early involvement can prevent disputes or disagreement at the beginning. In other words, mutual understanding should be built before any decisions or regulatory acts have passed the point where it is hard to find compromise between interest groups and regulatory agencies. In cases of the EP framework, risk management is the key measure to incorporate environmental and social consideration not only to preserve the positive reputation of the EPFIs but also to assess their clients' capacities to repay the loans. The public concerns, especially from the local perspectives, should be recognised and addressed early, before the construction or development of projects, in order to avoid local resistance or to minimise future conflicts and costs. One common dissatisfaction of local communities in most participation processes, as also found in the interview of a Thai NGO member in Chapter 4, is

[55] Dietz et al (n 43) 122.

that they think their inclusion is too late to change any operation plan of the project; most local people viewed an Environmental Impact Assessment process as a rubber stamp for a project rather than a regulatory tool for decision-making.[56]

Principle 5 of the EP does not explicitly mandate stakeholder engagement at the early stage of the Project's construction. However, the wording of the EP requirements can to some extent show the consideration of the openness of participation. Paragraph 1 of Principle 5 requires the stakeholder engagement to be organised as an 'ongoing process', not simply a one-time checklist that might allow the later phases of construction to ignore stakeholders. Another remark on EP openness that can be noticed is the requirement for the EPFI's client to include 'an Informed Consultation and Participation process' in its risk and impact assessment.[57] To empower participants in contributing to the process, Paragraph 3 requires the client to make the Assessment Document 'readily available' to the stakeholders, with consideration of the languages and cultures of the stakeholders. The information on environmental or social risks and adverse impacts of the Project should be disclosed 'early in the Assessment process, in any event before the Project construction commences, and on an ongoing basis.'[58] Noticeably, although there are no words in Principle 5 which directly require early engagement of stakeholders, the requirement to provide necessary information accessible at the early stage and throughout the process can imply that the EP regulation recognises the importance of early engagement, as well as consistent consultation.

In addition to the requirements set in Principle 5, the EP framework refers to the IFC Performance Standards as minimum requirements for the client to conduct an environmental and social risk assessment.[59] In this regard, the Performance Standards make it clear that, in cases of identifying risks and negative impacts of the proposed project, a process of consultation must be set for stakeholders to share their information and opinions on the projects, and such consultation should be at the early stage of the process and consistently organised in order to address new emerging risks or impacts.[60] Thus, although it is not an

[56] Interview IV, see Appendix of this thesis: 'List of Interviews'.
[57] EP 4, principle 5, para 2.
[58] ibid, principle 5, para 3.
[59] ibid, principle 3.
[60] The IFC Performance Standards on Environmental and Social Sustainability 2012, Performance Standard 1.30.

explicit requirement, the early engagement of stakeholders in participation processes is encouraged under the EP regime.

Apart from the early stage of participation, the dimension of openness is linked to information disclosure to stakeholders. The section above on 'transparency' suggests that the appropriate approach to establish transparency in a form of reflexive governance as the EP regulation is citizen empowerment. Notably, transparency is closely related to effective participation in the sense that information empowers the participants to understand the issues and then have capacities to engage and contribute to the process. In other words, the right to access to information enables participants to influence the decision-making.[61] The EP framework does not only require information disclosure from EPFIs but also from the client but with a nuanced rationale. The EPFIs' obligation to disclose information is to establish the transparency of the EPFI's performance as a regulator within the EP framework; an EPFI has to publish the periodical report allowing the public to examine its behaviour. Meanwhile, the duty of the client to disclose information is mainly to empower participants before they participate in decision-making. This aspect of transparency enables the stakeholders to engage more efficiently in a decision-making process. The participation processes could not be considered to be actually opened to stakeholders if they are not fully equipped with necessary information before participating. The relationship between transparency and public participation implys that the institutionalisation of a regulatory framework cannot consider each requirement separately but must take all requirements together to design the whole institution since they are closely linked. It will be further shown in later sections that transparency and participation requirements are also related to other regulatory issues, namely the accountability and legitimacy of regulation.

Considering the requirements for client's information disclosure to support stakeholder engagement, a consultation and participation must prepare the stakeholders to be 'informed' about the environmental or social risks and adverse impacts associated with the project.[62] While it is important that stakeholders understand the environmental and social risks before entering any participation processes, the EP standards only recommend – rather than mandate

[61] Dietz et al (n 43), 132-133.
[62] EP 4, principle 5 para 2.

– such information to be provided early before the Project's construction.[63] The IFCPerformance Standards, as well, simply recommends that information should be disseminated and accessible for the public in an understandable format and in the language that local people prefer.[64]

It appears highly irrational that the EP requires an Informed Consultation and Participation process when disclosure of the necessary information as the Project's risks and negative impacts is not mandatory. In such a case, the client can possibly provide some information, such as the Project's scientific data or technical information, which is not very important for stakeholders' knowledge in considering environmental and social risks of the Project, or can even mislead them. As already discussed in the 'transparency' section, 'strategic 'information disclosure can manipulate or confuse lay people, resulting in their unawareness of the actual hazards or misunderstanding about the Project. While risk management is the key tool for EPFIs to avoid future conflicts with local communities, the stakeholders, which include local people as directly affected parties, should comprehensively realise the risks before their participation in risk assessment processes. As stated in the 'transparency section', information is important for citizen empowerment. Information disclosure on the Project's risks and impacts should be explicitly required instead of merely recommended, in order to ensure that the stakeholders have capacities to engage in the processes. It is in this way, when the knowledge barrier is put down, that the participation process can be considered 'open' to all stakeholders.

(3) Intensity

The third dimension to consider in designing participation is the intensity of opportunities for stakeholders to engage with one another. This dimension raises the question of how participants interact with one another. A process where participants are engaged in deliberative discourse, such as a negotiated decision-making process, is considered as having higher intensive participation than a public information-sharing mechanism where, involving a wide range of participants, the interaction is quite distant.[65] Adopting the learning-based approach in

[63] '… Disclosure of environmental or social risks and adverse impacts should occur early in the Assessment process, in any event before the Project construction commences, and on an ongoing basis.' – ibid, principle 5, para 3.
[64] ibid.
[65] See Cary Coglianese, 'Assessing Consensus: The Promise and Performance of Negotiated Rulemaking' (1997) 46 Duke Law Journal 1255.

regulatory design, the participation processes under the EP framework should be organised with highly intensive interaction, namely in a form of consultation where stakeholders can exchange ideas and raise concerns.

The EP requirements do not describe how stakeholder engagement should be designed. However, the IFC Performance Standards, which set the minimum requirements of the client's environmental and social risk assessment [66], require the preparation of a 'Stakeholder Engagement Plan'. The client must explain in its Stakeholder Engagement Plan about the measures for organising an inclusive participation process, ensuring that 'disadvantaged or vulnerable' parties and indigenous peoples are included.[67] The Performance Standards also set further requirements for a project with 'potentially significant adverse impacts', which can refer to a project under Category A of the EP regulation. The environmental and social impact assessment for this type of project must engage stakeholders in decision-making more than mere consultation. The affected communities must be involved in an 'in-depth exchange of views and information'. [68]

The EP requirements, with reference to the IFC Performance Standards, appear to support processes for intensive participation, requiring the client to ensure stakeholder engagement in a discursive level in case of a high-risk project and that the participants' voices or concerns will be taken into consideration. However, the clients' practice might not actually engage the stakeholders as required. The responsibilities to design participation processes are assigned to the clients; the EPFIs then review whether the clients' conduct complies with the EP standards. Although the clients are required, with reference to the IFC Performance Standard, to develop the Stakeholder Engagement Plan, explaining to the EPFI how stakeholders are engaged within consultation and participation processes, the Stakeholder Engagement Plan is not required to be made public. The information in the BankTrack's study in 2020 on stakeholder engagement in nine projects under the EP shows that there is only one out of nine projects that provided the detailed document on how stakeholders were engaged. [69] In most cases, there was some

[66] EP 4, principle 3.
[67] The IFC Performance Standards on Environmental and Social Sustainability 2012, Performance Standard 1.27.
[68] ibid, Performance Standard 1.31.
[69] BankTrack, 'Trust Us, We're Equator Banks: Part II: The Adequacy and Effectiveness of Grievance Mechanisms and Stakeholder Engagement under the Equator Principles' (November 2020). Available at <www.banktrack.org/download/trust_us_were_equator_banks_part_ii/201124__part_ii_trust_us_were_equator_banks_1.pdf>.

evidence of stakeholder engagement, such as the promotion of stakeholders' meetings on their websites or simple words saying that their projects incorporated stakeholder engagement strategy, with no further details on how the engagement was set and no document provided online for public access.

This issue links back to transparency. Information enables people to be knowledgeable and aware of their risks and rights, and to take informed decisions. The comparison of the Shalkiya Plan and the TurkStream Plan highlighted the imbalance of participants in participation processes and the concerns on domination or manipulation. This exemplifies how information disclosure can enable public scrutiny of the actual efficiency of stakeholder engagement in each project. Without the requirement for disclosure of Stakeholder Engagement Plans, the review of the clients' conduct merely rests on the EPFIs. There might be some other stakeholders not included in the Stakeholder Engagement Plan and not being aware that they were excluded if the Stakeholder Engagement Plan is not published early and accessible for the public. Public disclosure can help to alleviate or minimise the EPFIs' burdens to investigate the EP compliance of each client's plan, for there will be the public, notably the potentially affected parties and the NGOs, as helping hands.

The BankTrack's study also found that most local people were dissatisfied with the participation processes since they did not have sufficient opportunities to express their concerns and their voices were often ignored.[70] The proper intensity of participation cannot be simply organised by merely requiring the processes to include in-depth consultation with stakeholders while there is no requirement to demonstrate how the client will ensure that this is effective to the public, notably to the stakeholders themselves. Although the EP require the clients to establish a grievance mechanism[71] and the affected parties can raise a claim that they are not included in the participation processes as required under the EP standards, such a claim cannot be raised until the project's assessment is done.

Principle 10 requires the client to provide 'a summary of the ESIA' 'accessible and available online'.[72] The disclosure of ESIA can to some extent support the EP transparency in terms that the public can see the result of the client's assessment, and if they disagree, they can file a complaint under the grievance mechanism. However, this mechanism for information

[70] ibid 11.
[71] See Chapter 3 of this thesis; EP 4, principle 6.
[72] EP 4, principle 10.

disclosure is inadequate. The stakeholder engagement might be mentioned as a few sentences in the ESIA summary or might not be explained at all. In such cases, the public cannot investigate how much the stakeholders have been engaged in the assessment. Also, for the affected parties, seeing the ESIA at this stage – after the participation processes are done – does not enable them to feed into that process, to raise concerns or to exchange views anymore. The only thing they could do is to rely on the grievance mechanism, which is still subject to some critiques on its functioning and will be later discussed in Section IV of this Chapter in terms of EP accountability mechanisms. The review of the client's compliance with the EP requirements for stakeholder engagement should be opened to public scrutiny as early as possible. Reliance on the grievance mechanism is too late and, therefore, indicates inefficiency in ensuring stakeholder engagement. There are reports that, after the participation processes of one project, some groups of stakeholders felt that attention was particularly paid to certain groups while the others' concerns were barely addressed.[73] If this issue can be solved before the ESIA completion, the client can correct their conduct to be in line with the EP requirements, which is better than if this issue is discovered after the process is done, namely by a claim in a grievance mechanism, causing the client to restart the process again to address its non-compliance.

Overall, the intensity of participation required under the EP framework implies EP adoption of the idea of deliberative discourse in mutual learning, engaging stakeholders into the consultation rather than one-way communication. However, in order to ensure that all relevant stakeholders are allowed to 'engage' in the assessment processes, disclosure of the Stakeholder Engagement Plan should be required. Such a requirement will support public scrutiny and enable affected parties or NGOs to challenge the client's compliance to the EP standards before the processes end. This approach does not only ensure the intensity of participation but can also address the problems of the scope of participants, since excluded stakeholders can raise a claim if finding that the Stakeholder Engagement Plan does not count them in.

(4) Influence

The last dimension is the influence of participants over the regulatory decisions. The extent to which the public might influence and inform a project varies considerably. Participation might simply refer to sharing information and comments with a regulatory agency, with no obligation imposed on the agency that its regulatory decision has to respond to the public's input. On the

[73] BankTrack (n 69) 11.

opposite spectrum, some participatory processes might establish a commitment for regulatory agencies to adopt the results of their negotiation with participants.[74] This dimension is therefore related to the intensity dimension; while the intensity refers to how the interaction is set, the influence refers to how their voices will be responded to. Principle 5 of the EP states that the client 'will take account of … the results of the Stakeholder Engagement process, including any actions agreed resulting from such process.' Also, the IFC Performance Standards mandate that the decision-making process must incorporate the participants' views on the issues that have direct impacts to them, and in order to ensure that the participants' concerns will not be overlooked, the client is obliged to inform the stakeholders about how their concerns are addressed.[75]

The degree of public influence depends on the design of a participation process which sets the mechanisms for allowing the public contribution to affect the outcome of the process. The EP requirements make the clients committed to incorporate the participants' views into consideration. However, the influence of participants does relate to other dimensions. If the scope of participation does not include all stakeholders, or the proportion of the interests represented is imbalanced, the results of consultation might be dominated by certain groups of actors. The EP assurance that all views during the processes will not be ignored will be meaningless since the relevant stakeholders are not included at the first stage, or the discussion might be manipulated by some dominant groups and the minor voices are overcome. The fair balance of interest groups, the transparency that the Stakeholder Engagement process includes all relevant parties, and the mechanisms that allow the public to challenge the client's non-compliance with the EP standards in terms of stakeholder engagement, are all related to the fact that stakeholders can influence in the decision-making process.

The design of public influence in a participation process is not only about the impact of the participants as a whole but also that the power dynamics among participants have to be recognised and managed. When a participation process is structured to allow the public influence over decision-making, it must be aware that some groups of participants might have more powerful move and can dominate their views over other groups.[76] In this case, the

[74] Thomas C. Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Routledge: 2002) 68.
[75] The IFC Performance Standards on Environmental and Social Sustainability 2012, Performance Standard 1.31.
[76] John M. Bryson et al, 'Designing Public Participation Processes' (2013) 73 Public Administration Review 23, 29.

influence granted to the participants does not represent the public's voice but the voice of particular interest groups. The design of participation therefore has to manage the power dynamics among participants to ensure the minority and marginalised people can have equal opportunity to engage in and influence the decision-making. So, even though the EP requirements reflect the valuation of participant's views and concerns, provided that other dimensions of the participation process design are not well managed to ensure actual engagement, it could be hard to say that stakeholders can influence the decision-making process.

It must be noted that even for EU environmental governance, there have been concerns about the capacities of participants and stakeholders in participation processes, as explored in Chapter 2, resulting in the requirements for translation of information. Still, there are some further suggestions for the necessity of more measures for preventing unbalanced representation or manipulation.[77] The difficulties for achieving the goal of mutual learning through a participation process can go more severe in Thailand, where the culture and social values do not render much support for public discourse. The EP framework should be aware of the possibilities that participation processes might fail to generate public discourse, information exchanging, and mutual learning.

Overall, the EP requirements, along with the reference to the IFC Performance Standards, imply their support for stakeholder engagement. However, there are some further requirements needed to achieve the objectives of institutionalising participation processes in the EP regulation. The key missing requirement is the disclosure of Stakeholder Engagement Plans as the evidence to the public that the projects have organised processes to ensure that the assessment of their risks and adverse impacts incorporate the views and concerns of all relevant stakeholders, and that every group of stakeholders will have their voices listened to. While EPFIs maintain the role of regulators, their regulatory measures can involve collaboration from other actors. The concepts of polycentrism and reflexive governance supports the model of interdependence, as explored in Chapter 1; using the public for helping the EPFIs reviewing the clients' compliance with the EP standards is therefore in line with these two concepts. The EP framework cannot set rigid requirements such as which and how many stakeholders must be included in the participation, since the situation and context of each project are different. The EP can only set requirements for participation processes which recognise such four

[77] See Chapter 2, Section IV, of the thesis.

important dimensions stated above. It is public scrutiny which can help to ensure that a participation process has the proper breadth of participants, openness, intensity, and gives proper weight to stakeholders' voices in the process. The requirement for disclosure of the Stakeholder Engagement Plan is therefore necessary.

III. EP Regulation and Legitimacy Management

As outlined in Chapter 1, legitimacy has long been a great challenge for private governance. Unlike state governance, under which people subordinate their power to the government and allow state regulators to enforce the rules, private regulation relies on voluntary cooperation from other constituents, including regulatees, to form a stable regime and induce actual implementation. It is important for a regulatory institution to gain acceptance, particularly from stakeholders, in order to secure its regulatory functions and achieve its regulatory goals.[78] Legitimacy can justify decisions and exercises of power by a regulator, creating a sense of obligation and encouraging active support from other related actors.[79] The concept of legitimacy is usually linked with the idea of democracy. While state governance deriving power from people through representatives can rely on the democratic principle of sovereignty as the basis for its legitimacy[80], private regulation such as the EP framework was initiated by a group of private actors with mutual interests and does not have such functions of representative democracy to fall back on. The EP framework, with its background as a policy measure for commercial banks to address the growing public attention on the role of financial institutions in environmental development, has long faced critiques of simply being a 'greenwashing' tool.

Furthermore, the EP regulatory structure does not establish a single central body to control the EP implementation directly. The EP Association, founded in 2010, can de-list any EPFI which does not comply with the reporting requirements[81] but it does not have the authority to conduct a substantive review of an EPFI report or an investigation of actual implementation of each EPFI. The organisational structure of EP governance takes the form of cooperation rather than

[78] Ingo Take, 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared' (2012) 18 Swiss Political Science Review 220, 220 – 221.
[79] Donal Casey and Colin Scott, 'The Crystallization of Regulatory Norms' (2011) 38 Journal of Law and Society 76, 89; Steven Bernstein, 'Legitimacy in intergovernmental and non-state global governance' (2011) 18 Review of International Political Economy 17, 20.
[80] Take (n 78), 221.
[81] See Section 1 of this Chapter

a single central regulator as found in most state regulation and in some other non-state regimes.[82] The regulators in the EP regime, namely the EP-adopting financial institutions, apart from regulating their clients' performance which is the typical relationship between regulators and regulatees in most regulatory regimes, have to ensure that other EPFIs comply with the EP requirements as well. This organisational structure of private self-regulation – with no overarching body to control the EPFI's adherence to the EP standards – can unsurprisingly cause concerns that economic interests of the EP members might dominate over environmental and social aspects.[83] Legitimacy is therefore essential for securing the EP institution in terms of preventing public distrust and inducing the acceptance of EP regulation among stakeholders.

As explored in Chapter 1, there are three main types of legitimacy: (1) pragmatic legitimacy (2) normative legitimacy, and (3) cognitive legitimacy. While all three types of legitimacy are related to the perception of other entities towards the regulation, the indicators for evaluating legitimacy differ among such different approaches and dimensions in considering public perception. Therefore, the first question for legitimacy management is what legitimacy should be referred to for EP institutional design and how the EP framework, which is private regulation, can establish legitimacy.

The three concepts of legitimacy may be interrelated and do not exclude one another. Governance can embrace moral values and norms, constituting normative legitimacy, and conform with the stakeholder's interests and expectation at the same time, forming pragmatic legitimacy as well.[84] The categorisation of legitimacy does not mean that a regulatory regime has to choose only one legitimacy definition to refer to. The more aspects of legitimacy it can achieve, the more such a regulatory regime can gain public acceptance and validate its authority. What actually matters is to find proper indicators to evaluate the legitimacy of particular regulation and arrange the regulatory institution to comply with legitimacy requirements. This section analyses whether the EP's current functions can lend legitimacy to the EP framework, with references to the requirements of such three forms of legitimacy.

[82] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regime' (2008) 2 Regulation and Governance 137, 142.
[83] See Meyerstein (n 36).
[84] Take (n 78), 223.

Generally, there are mainly three strategies, according to Suchman, that a new regulatory regime can apply to generate legitimacy.[85] It is useful here to briefly explore Suchman's strategies for further discussion on whether the EP institutionalisation can generate legitimacy. The *first* strategy, '*conformity*', is to make the regulation *conform* with the preexisting demands in society, which are the needs or interests of stakeholders (in the case of forming pragmatic legitimacy), the 'principled ideals' of the public (in the case of constituting normative legitimacy), and the 'established models or standards' of the society (in the case of gaining cognitive legitimacy).[86]

The initial rationale of EP introduction is to respond to public uproar, led by the NGOs' campaigns, relating to the responsibilities of private financial institutions in environmental management. An immediate response was required at that time. This conformity strategy is the easiest approach for gaining legitimacy, as it simply requires the regulation to conform with what exists. A regulatory organisation, in this sense, has its structure and operation compliant with 'other already legitimate institutions' and then benefits in gaining normative legitimacy from such network.[87] One reason that some NGOs have targeted commercial banks and private financiers was in response to the launch of the World Bank and the IFC guidelines and standards on environmental consideration, which set out their respective policy directions towards sustainability.[88] This fact can explain the strategy by which the EP launchers decide to refer the EP standards to the IFC Performance Standards which were formerly introduced and widely accepted among most NGOs. 'Conformity' strategy can be said as applying in the case of the EP institutional design for gaining public acceptance and establishing legitimacy.

The *second* strategy is '*selection of environment*'. In contrast to the first strategy which makes efforts to conform with existing conditions of the society it governs, this strategy suggests displacing the regulation to the society of which the environment will grant legitimacy to the regulation without necessarily making changes to the regulation.[89] This strategy will not be discussed in the following subsection on the EP legitimacy. Since this chapter discusses how to develop EP regulation to address the problems of environmental management in a

[85] See Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 Academy of Management Review 571, 578.
[86] ibid 587 – 589.
[87] John Dowling and Jeffrey Pfeffer, 'Organizational Legitimacy: Social Values and Organizational Behavior' (1975) 18 Pacific Sociological Review 122.
[88] See Chapter 3 of this thesis.
[89] Suchman (n 85), 589.

developing country, it cannot simply suggest that, if EP regulation does not work well in a developing country, it should be implemented in other countries instead. In other words, this strategy cannot apply in cases where such regulation is suggested to be applicable in any jurisdiction in order to establish better environmental and social standards, such as the case of the EP framework.

The *third* strategy is *manipulation*. While the conformity strategy reflects a passive means to communicate with the society, by simply following the preexisting needs, norms, or cognition, manipulation is a proactive approach to create or influence the perception of audiences, such as advertisement, competition and peer pressure.[90] However, the term 'manipulation' that Suchman applies might to some extent make this strategy seem as if the regulatory organisation is trying to dominate the thoughts and perceptions of other constituencies. Rather than manipulation, which is one-way communication from regulators to stakeholders or other societal member, the implementation of Suchman's strategy in legitimacy management of the EP framework should be in line with the EP adoption of reflexive governance, which supports mutual learning. Communication with other actors can help the EPFIs, as regulators, to realise the public perception and expectations towards their organisation and allow them to explain themselves to stakeholders in return. Therefore, in similarity with the proactive measure of Suchman's 'manipulation' strategy in approaching audiences, communication should be another important strategy for legitimacy management of the EP regime. In this regard, the discourse, which infers two-way communication, and mutual learning are more proper terms to explain the strategy that underlines the interaction with other audiences than Suchman's strategy of manipulation.

After considering the strategies for establish legitimacy in a regulatory regime, the following subsection will discuss how the EP regulation is designed in conformity with the stakeholder's demands and interests, in terms of gaining pragmatic legitimacy. Next, the EP regulatory procedures will be considered to establish whether they comply with prevailing norms or moral values to obtain normative legitimacy. The establishment of cognitive legitimacy will then be analysed from the EP regulatory structure. The EP functions will be discussed, with reference to the strategies of conformity and communication.

[90] ibid.

(1) The EP and Pragmatic Legitimacy

The concept of pragmatic legitimacy is linked to the stakeholders' satisfaction. The key indicator for evaluating this type of legitimacy is the acceptance of stakeholders, especially the targeted regulatees. The stakeholders of a regulatory regime can be referred to Cashore's 'organisational audiences'[91] which consist of four groups of entities having direct interests in the regulation. The four groups are regulators[92], regulated actors, consumers or other organisations in the supply chain of regulated actors, and social interest groups. With reference to this grouping, the stakeholders of the EP regulation are the EPFIs, the EPFI's clients, and non-governmental environmental organisations.

To begin with the first group of stakeholders, the outstanding proof of acceptance for voluntary-based regulation is the number of members or adopters. In the EP case, the growing number of EPFIs across the world can signify a positive perception of most private financial institutions towards the EP framework. However, it is necessary to explore deeper than simply looking at the number of adoptions in order to conclude that the regulation has successfully satisfied the interests and demands of its stakeholders. To ensure the validity of the regime, or in other words, to establish pragmatic legitimacy, the incentives for adopting the EP framework must be sufficient to induce private financiers to comply with the standards that might cause more costs and difficulties in their business operation.

One comparable sample of private self-regulation in environmental development is the Forest Stewardship Council or the 'FSC' governance. The FSC, which is a non-state organisation, has developed principles and criteria for environmentally and socially responsible forestry. The FSC certification is granted to any forestry business that comply with the FSC standards.[93] Market access is the important interest that can capture forestry corporations. The decision to participate in this FSC governance depends on whether the participation and the obtaining of the FSC label on their products can benefit their market access. The campaign against unsustainable forestry has forced some corporates to join the FSC regime. This can illustrate

[91] Benjamin Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' in Peter M. Haas (ed.), *International Environmental Governance* (Routledge 2008).

[92] In the original paper, Cashore identifies 'the state' as the first group but, in the case of private regulation, this group should be referred to as the regulator.

[93] See Forest Stewardship Council, 'About Us' <fsc.org/en/about-us> accessed on 27 April 2021.

to some extent the shaping of consumers' demands through campaigns by some environmental NGOs and networks for more environmentally concerned forestry products.[94]

In comparison to the FSC governance, the EP regulation, despite not applying the approach of certification as does the FSC, provides similar incentives for EP adopters. The background of the EP framework is to respond to the public uproar which called for the responsibility of financial institutions for the environmental damage caused by the projects they financed. A naming-and-shaming campaign can negatively affect the financiers' reputation.[95] The significant incentive for adopting the EP standards is not much different form the case of the FSC governance, which is totally about the losses and profits. Since commercial banks and other private financiers are profit-driven entities, the fact that the EP regulation can protect them from public avoidance conforms with their conventional interests, namely their reputation and image in the eyes of consumers. Although EP regulation does not grant any certification or badge as does the FSC governance, the EPFIs' names are published on the EP's website and the EPFIs usually claim their EP adoption as a part of their socially responsible policies, which are promoted online on their own websites as well. Further, the EP requirements for environmental risk assessment helps the financial institutions to realise the hidden costs and liabilities of the project proposed for their financial supports. The incentives for adopting the EP regulation reflect a thorough comprehension of what the adopters need, which is not completely surprising since the regime is made by commercial banks.

The most important observation for the comparison between the FSC governance and the EP scheme above is that the market access benefits the FSC participants which are considered the regulatees of the regulation. Meanwhile, the entities that gain market benefits in the EP framework are financial institutions, which are considered the regulators of this regime. Nevertheless, the market benefits provided for the EP adopters are a notable indication of the EP's conformity with its stakeholders' interests. The question follows: if the market access can address the demands of regulators in the EP regime, what can then satisfy the interests of regulatees.

The EP framework does not use a certification mechanism like the FSC governance, and the clients, which are regulatees in this regime, do not get any certifications even if they adhered to the EP standards. Generally, the demand of most clients is to get their projects financially

[94] Cashore (n 91), 517.
[95] See Chapter 3 of this thesis.

approved without onerous requirements from financial institutions. Under the EP standards, the EPFIs' clients have to conduct an 'Environmental and Social Impact Assessment (ESIA)' or in some cases, they have to prepare an 'Environmental and Social Management System (ESMS)' and an 'Environmental and Social Management Plan (ESMP)'.[96] This can cause extra costs to their projects before the actual construction has even started. The question is, as the clients face higher costs for getting financial support from EPFIs, why they remain the EPFI's clients instead of going to other financial institutions which are not EP adopters.

The interview with a lawyer working for the EPFI's client[97] suggested that the costs from following the EP standards are not significant factors that can deter his client from becoming an EPFI's client. The reasons for still choosing the EPFI's finance rather than going to other financial institutions that do not require the EP compliance are twofold: (1) for promoting its environmental and social responsibilities and (2) for its future opportunities.

For the first reason, corporate social responsibility is a policy found in several corporations. EP compliance can promote the good governance of the client in terms of environmental and social responsibilities. Not only creating a positive reputation for the client, but also the project itself can benefit from relieving local resistance against the project development and minimising the chance of future environmental liabilities. The procedures required under the EP regulation support the development of good relationships between local people and the project developer in terms of sharing concerns and finding the solution that is acceptable for both sides.

In fact, what can be inferred from the interview is that the first reason is simply a side benefit. When the interviewee was asked about the reason that some investors decide to accept the costs of following EP requirements, or in other words, what benefits they obtain from becoming EPFI's clients, the significant reason is for their business opportunities. Most investors do not consider EP compliance an onerous burden, since it allows them to have more chances of financial support for the future development of their project. The interviewee explained that his clients usually decide to make the project comply with the EP standards for its future flexibility. Even the clients might finally get the loan from non-EPFIs, but in the future, they might decide to expand the project or, conversely, refinance the project with other financial institutions. The EP compliance makes it more flexible for future management. It can be

[96] EP 4, principles 2 and 4; see Chapter 3 of the thesis for more details.

[97] Interview I: A lawyer working for the EPFI's clients (Thailand, 7 January 2021), see Appendix of this thesis: List of Interviews.

inferred from such interview that the EP standards, on their own, do not provide significant incentives for the clients; they do not choose to be the EPFI's clients for the reason that the EP regime makes them more advantageous than being non-EPFIs' clients. It is because there are a number of private financial institutions which are EPFIs, and the EP compliance at the beginning of the project builds flexibility for future situations.

According to the interview, it seems that the EPFI's clients do not consider the cost of EP compliance a significant factor for choosing their lender but simply an opportunity cost for flexibility in managing their future business. This can imply their acceptance of the EP rules. If the EP standards were too burdensome or caused unreasonable costs to the clients, they would have preferred going to non-EPFIs.

The benefits of EP governance can satisfy both the regulators and the regulated parties, responding to their interests and then generating acceptance as well as incentivising them to participate in the regulatory scheme. Such satisfaction constitutes 'output' legitimacy which is a form of pragmatic legitimacy.[98] However, there is another group of stakeholders which should not be overlooked – the environmental non-governmental organisations.

Initially, EP regulation was introduced to address the growing campaigns of environmental NGOs blaming and calling for responsibilities of financial institutions for preventing environmentally deteriorating projects. The acceptance from NGOs is therefore meaningful for the validity of the regulation, and their perception of the sincerity of the EP framework in environmental and social development can to some extent influence the public perception. 'BankTrack' is an international organisation well-known for its mission to promote sustainable banks, in the aspect of human rights protection and environmental and social responsibilities.[99] BankTrack is commonly recognised as the watchdog of the EP governance; it has consistently monitored EP implementation and investigated EP compliance. The role of BankTrack in developing the EP regime is remarkable in terms of running campaigns condemning EP non-compliance and calling for the revision and development of the framework. The latest EP4 is also the achievement of BankTrack's action, albeit some concerns are not satisfactorily addressed yet, as explored in Chapter 3.[100]

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[98] Take (n 78) 228.

[99] BankTrack, 'About BankTrack' (8 June 2021) <www.banktrack.org/page/about_banktrack> accessed on 17 June 2021.

[100] BankTrack, 'Tracking the Equator Principles' (10 June 2021) <www.banktrack.org/page/tracking_the_equator_principles> accessed on 17 June 2021.

The interests of environmental NGOs can be referred back to the background of EP governance; their primary demand is that the financial institutions themselves refrain from providing financial support for projects that can cause environmental damage. BankTrack's findings of EP non-compliant projects indicates some flaws or problems of the existing EP regulation that cause failure in preventing harmful projects. Transparency, accountability mechanisms, and stakeholder engagement, are three of the main BankTrack requests for the EP development.[101] However, the fact that BankTrack has raised concerns and requests for regulatory development does not mean they completely reject the EP institution. Despite the current inability to achieve absolute conformity with stakeholders' demands, it can notably observe that the EP Association does not overlook the importance of 'communication' with stakeholders. BankTrack is always included and consulted in regulatory development, which indicates the efforts of the EP Association to understand and respond to BankTrack's concerns.

Communication is one strategy for gaining acceptance from stakeholders.[102] Moreover, empirical study of the legitimacy of certification standards in climate change governance[103] shows that the deliberative processes of sharing information and mutual learning among stakeholders and regulators are related to the acceptance of the regulation. Despite some concerns and dissatisfaction, the EP framework can still gain acceptance and constitute its pragmatic legitimacy. The interviews given by an environmental NGO representative in Thailand and a scholar working on environmental development indicate their support for the EP regime in environmental development but also emphasise that greater transparency and better accountability systems are needed for improving the regulation.[104]

The demands of NGOs are related to the normative approach of gaining legitimacy. Transparency, accountability, participation, and deliberation are general concepts commonly found among various claims of norms and moral values.[105] As already noted, different types of legitimacy can co-exist and are interrelated. In most cases, they even 'reinforce one another'.[106] The interests of NGOs in EP governance, which is the focus of constituting pragmatic

[101] ibid.
[102] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press: 1997).
[103] Coraina de la Plaza Esteban, Ingrid J. Visseren-Hamakers and Wil de Jong, 'The Legitimacy of Certification Standards in Climate Change Governance' (2014) 22 Sustainable Development 420.
[104] Interviews IV and V, see Appendix of this thesis: 'List of Interviews'.
[105] See Bernstein (n 79).
[106] Suchman (n 85), 585.

legitimacy, can at the same time reflect the concept of procedural requirements as a part of forming normative legitimacy. In other words, the interests of organisational audiences with direct interests in the policies of the EP framework, which in this case include such environmental NGOs as BankTrack, normally express the norms and values of the society.[107] The institutional design that can ensure transparency, accountability, and participatory procedures in the EP governance not only relieves the concerns and address the interests of stakeholders but also can support the establishment of normative legitimacy.

(2) The EP and Normative Legitimacy

While pragmatic legitimacy focuses on the satisfaction and acceptance of stakeholders, the idea of normative legitimacy relies on what a regulatory body should be in the senses of moral values and social norms.[108] To analyse whether the EP regime can demonstrate its normative legitimacy, which norms and values should be applied in this regard must be determined.

Currently, the model of democratic governance is applied in a large number of countries, and the expansive adoption of the democratic theory has significant influences in society norms and values of what the governance should be. The EP regime, as a form of private governance, is therefore expected to be in line with such norms and values. However, non-state regulation, including both international regulation and private regulation such as the EP framework, does not derive its governance power from 'the collective will' of regulated entities as does state regulation.[109] One of the great challenges the EP regulation has to address is to embed the democratic conception in its regulatory processes, so as to justify itself in the eyes of audiences and to constitute normative legitimacy.

The values that are conventionally considered 'global public standards' for conferring democracy and then forming normative legitimacy are participation, deliberation, and accountability[110]. It must be noted that transparency is also another important value which is commonly recognised in democratic regulation. However, some papers include transparency

[107] Cashore (n 91), 519.

[108] Alex Levitov, 'Normative Legitimacy and the State' (2016) Oxford Handbooks Online <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-131> accessed on 12 April 2021.

[109] See Wil Martens, Bastiaan van der Linden, and Manuel Worsdorfer, 'How to Assess the Democratic Qualities of a Multi-stakeholder Initiative from a Habermasian Perspective? Deliberative Democracy and the Equator Principles Framework' (2019) 155 Journal of Business Ethics 1115.

[110] Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics and International Affairs 405.

as a subset of accountability, while others recognise their interrelation but separate transparency as another issue.[111] It should be noted here that while the issues of public participation and transparency have already been earlier discussed in this chapter, this section mentions such issues again in another perspective, in lights of their relationship with the establishment of normative legitimacy, as norms and values under the concept of democratic governance.

The first democratic norm to consider is '*public participation*' in regulation. The concept of democratic governance recognises the people as the source of governmental authority, conventionally exercised through 'their elected representatives'.[112] Unlike state regulation, which is imposed by the parliament or public elected representatives, the EP regulation was created by a group of commercial banks and financiers. Generally, public participation is considered to be one key element of democracy, as it enables people and other stakeholders, to express views and concerns on the issues of state regulation, taking part in the governance of which they are the source of authority. Although the public cannot be not considered the source of authority in the case of EP regulation, the EP framework is grounded on the ideas of reflexive governance and adopts the learning-based model of governance. Participation processes are required for generating mutual learning with other stakeholders, and in supporting exchange of views and information, deliberative discourse or 'deliberation' is suggested in organising a learning process.[113] The EP functions are therefore in line with the concept of democratic governance, where other voices must be listened to and matter in regulatory development.

The issues already discussed in the EP's stakeholder engagement, namely the scope of participation, the levels of their engagement, and their influence in decision-making, are all related to the democratic norms of participation and are usually referred to when the legitimacy of private regulation is analysed in terms of democratic governance.[114] While the EP requirements for stakeholder engagement support institutionalisation of normative legitimacy in the EP regime, there are some developments required for better participation processes, in

[111] See ibid; Gupta (n 2); Lodge (n 3); Auld and Gulbrandsen (n 8); Take (n 78).

[112] The Uganda Office of the Konrad-Adenauer-Stiftung, 'Concepts and Principles of Democratic Governance and Accountability' (2011) <www.kas.de/c/document_library/get_file?uuid=56a283ae-50ff-0c9b-7179-954d05e0aa19&groupId=252038> accessed on 12 May 2021.

[113] See further details in Chapter 1

[114] See Susanne Schaller, 'The Democratic Legitimacy of Private Governance: An Analysis of the Ethical Trading Initiative' (Institute for Development and Peace, University of Duisburg-Essen 2007) (INEF Report 91/2007).

terms of ensuring effective engagement, as discussed in the former section. The revision of the EP requirements for improving stakeholder engagement therefore does not only establish more effectiveness in participation processes but also helps constructing normative legitimacy of the regime.

The next democratic norm is that regulators should be responsible for their regulatory activities. The EP framework sets up environmental standards, which traditionally falls under the area of public law, but the EP founders are private financial institutions, not the public authorities as usual. It is therefore understandable that some people, especially environmental NGOs, might doubt the effectiveness and/or legitimacy of the regime. To avoid the accusation of greenwashing, implementing the democratic procedures of checking and balancing can relieve public concerns and generate public acceptance. Transparency and accountability mechanisms are conventionally considered democratic procedures that enable social control over regulators, and have been established in most private regulation.[115] With regards to transparency, the EP requirements on reporting and information disclosure as explored in Section I of this Chapter reflect an effort to make the governance transparent and indicate conformity with normative values of democracy, since transparency may capacitate participants in deliberation and is linked to establishing legitimacy. Although BankTrack suggests some improvements on the data format to make it easier for the public to look up for information based on the project name than to find information published 'on a bank-by-bank basis', as well as to encourage obligatory disclosure of the project name[116], the EP's conformity with the concept of transparency is commonly recognised and accepted among most NGOs including BankTrack itself. The interview with a Thai scholar who calls for social and environmental responsibilities of Thai commercial banks also suggests the satisfaction of the EP standards for transparency.[117]

With regards to accountability, it must be noted that although establishing accountability in a regulatory regime *prima facie* reflects s normative approach to obtain legitimacy as it refers to the democratic norms and social values that emphasises the obligation of regulators, accountability can as well support pragmatic legitimacy. Black argues that some stakeholders might demand setting the accountability relationships in the way that benefit them, and to serve such demand might be claimed as constructing pragmatic legitimacy. However, such a demand

[115] See Marianne Beisheim and Klaus Dingwerth, 'Procedural Legitimacy and Private Transnational Governance: Are the Goods Ones Doing Better?' (2008) 14 SFB-Governance Working Paper Series.
[116] BankTrack (n 100).
[117] Interview V, see Appendix of this thesis: List of Interviews.

might then have to be balanced against the normative claim of other stakeholders that supports setting accountability in accordance with certain values or norms, such as the justice.[118]

The constant revisions of the EP framework include the development of accountability mechanisms in the EP regulation. However, BankTrack still requests 'greater accountability'. Chapter 6 of this thesis will discuss on the accountability mechanisms under the EP. Various forms of accountability mechanisms will be explored including the studies on the measures of other financial institutions. The EP framework can argue that it currently has an accountability mechanism, which means that it can satisfy this condition for claiming regulatory legitimacy. However, EP regulation might gradually lose its credibility from the public if its accountability is later found as insufficient to hold the EPFIs accountable for their actions under the EP. How to design an accountability mechanism as appropriate for a regulatory regime concerns various factors and remains debated. This issue needs a separate section for further discussion; the design for accountability mechanisms of EP regulation will be particularly analysed in the next chapter. At this stage, it is shown that accountability is an important part of democratic governance and infers social values and norms expected in a regulatory regime, making accountability required for constituting legitimacy.

(3) The EP and Cognitive Legitimacy

With the definition of cognitive legitimacy that focuses on the organisational identity, the institutional design and performance of a regulatory organisation should meet the pre-established model of typically accepted organisations. This conception of conformity is apparent in the EP framework. The EP's reference to the IFC Performance Standards and the World Bank Group's Guidelines suggest its efforts to make links with the prevailing international-recognised institutions. The World Bank Group is an organisation with 189 member countries across the world[119], and the IFC is its affiliate.[120] With their roles in promoting worldwide economic development and the growing number of the World Bank members, the status of the World Bank and the IFC obtains explicit recognition in global market. The EP's reference to the standards of such well-known organisations was a brilliant

[118] Black (n 82) 149.

[119] The World Bank, 'Who We Are' (2022) <www.worldbank.org/en/about/leadership> accessed 13 April 2022.

[120] International Finance Corporation, 'About IFC' (2022) <www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new> accessed13 April 2022.

strategy to introduce the new regulatory regime when making its first appearance in 2003. As the EP regulation was initiated by a group of commercial banks, its institutional claims as addressing environmental and social concerns and encouraging sustainable investment could cast doubts in its sincerity and effectiveness. However, it can be deduced that such a reference to the existing standards to some extent relieved the public resistance at its first emergence.

Suchman also suggests 'formalisation' as an approach to forming cognitive legitimacy.[121] Formalisation of a regulatory regime can be done by codification of regulatory procedures, transforming such informal rules to formality.[122] The EP regime advances this approach not only by publishing its standards to the public since its first introduction in 2003 but also developing its internal governance rules in 2010[123] and providing implementation notes for the EP adopters. The continuous development of the EP institution in terms of founding the secretariat, developing rules, as well as providing formal guidelines on the EP implementation, indicates the efforts to institutionalise its organisation formally and in conformity with the conventional conception of a regulatory organisation. The strategies to obtain cognitive legitimacy are obviously seen in the institutionalisation of the EP framework.

After considering three forms of legitimacy, it can be concluded that the EP framework can promote legitimacy through its standards that can earn stakeholders' acceptance as well as its conformity with democratic norms and well-recognised institutions as the World Bank and the IFC. There are some points that EP regulation will still have to develop for better institutionalisation of its legitimacy. However, with consistent development of the EP regulation over time since its introduction in 2003 until the recent version of the EP4 in 2020, the EP regime has a potential to establish its legitimacy firmly and can address the accusation of greenwashing.

IV. Conclusion

This chapter has analysed the critiques usually found against private regulation: lack of transparency, public participation and legitimacy. The EP's efforts to address such concerns

[121] Suchman (n 85) 589.

[122] See Lynne G. Zucker, 'Where Do Institutional Patterns Come from? Organizations as Actors in Social Systems' in Lynne G. Zucker (ed.), *Institutional Patterns and Organizations* (Ballinger 1988).

[123] The EP Association Governance Rules were initially published in 2010 corresponding with the founding of the EP Association in that year before further developed to the latest version of 2020.

can be observed from EP requirements for information disclosure and stakeholder engagement. However, there are some development needed for the EP institutional design to improve transparency and legitimacy of the regime, as well as to ensure stakeholder engagement and contribution to a participation process. This chapter suggests the EP framework to require provision of standardised information and disclosure of stakeholder engagement plan, and to establish a third-party oversight body to review the EPFI's reports.

While the issues of transparency, public participation and legitimacy are important for the institutional design of EP regulation, these are not all the important issues. Accountability and enforcement are significant challenges which most private regulation including the EP regime has to address. The next chapter will discuss the institutional design on the issues of accountability mechanisms in the EP regime as well as how the EP framework can ensure the EP compliance when it does not have the conventional enforcement power as state authorities.

CHAPTER 6:

Institutional Design for the EP Regime (II):

Accountability and Enforcement

While the former chapter discusses the EP institutional design for transparency, public participation and legitimacy, which are the issues related to the policy design of EP regulation, this chapter turn its focus to accountability and enforcement in the phase after the policy has been made. This chapter begins with discussion about the accountability in the EP regime in Section I and enforcement in Section II before offering suggestions for the improvement of the EP in Section III.

I. Accountability

The diversification of regulators in the modern era of polycentrism and pluralism in regulation challenges the traditional accountability mechanisms. [1] The EP framework was created by a group of private financial institutions. With no formal delegation of power from government or state regulators, political accountability cannot apply to EP regulation. Meanwhile, legal accountability is grounded on legal provisions and procedural requirements under the laws.[2] Any decisions or standards under the EP framework, despite having regulatory effects, such as standard-setting, do not create formal regulatory activities that can be checked through the judicial review process. EPFIs, which are regulators in the EP regime, are therefore not accountable under the traditional accountability mechanisms of political and legal accountability.[3]

To address the concerns that the EP framework might be a green-washing tool of private financial institutions to shift the public attention from their environmental and social responsibilities, effective mechanisms are required to hold any EPFIs accountable for their non-compliance or to justify their decisions to the public. In other words, accountability mechanisms should be established to ensure that EPFIs maintain their commitment to sustainable finance and refuse any projects failing to comply with the EP standards. The EP

[1] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) 347.
[2] ibid.
[3] See Chapter 1 of this thesis for further details on political and legal accountability.

framework is distinct for its learning-based model and experimentalist approach to regulation. Accountability mechanisms empower people and support public participation, and are therefore compatible with the key theory of the EP framework. The doctrine of citizen empowerment[4] suggests an interesting approach to institutionalise EP accountability.

(1) Accountability Relationships in the EP regulation

The accountability relationships in a particular regulatory regime are the primary issues to determine before discussing accountability mechanisms of such regime. The main six questions of accountability relationships are: (1) who is accountable? (2) to whom? (3) for what? (4) how? (5) by relying on what standards and (6) with what effects in cases of non-compliance with such standards?[5] The fourth question of 'how' is the key question that most literature and scholars discuss to find out the proper model for establishing accountability in a regulatory regime. It is noticeable from the numerical order of the questions that, before answering the fourth questions, there are three prior questions which need to be answered. The questions of 'who' is accountable 'to whom' help framing the key players in accountability setting. The question of 'for what' suggests the objectives of accountability mechanisms. Recognition of the players and objectives in accountability relationships helps setting the preconditions for designing an appropriate accountability mechanism.

The EP framework assigns to the financial institutions the role of regulators to prevent environmentally detrimental projects. It is therefore obvious that the entities which must be accountable in this case are the EPFIs. The next question is who holds the regulators accountable in this framework. Unlike state regulation in democratic governance where people are the actual owner of powers and subordinate their rights to the state to regulate the nation on their behalf, the EP regulation is the initiation of private actors with no derivation of powers from the state or the people. Notably, traditional models of accountability mechanisms such as reference to the Parliament and judicial review, which apply in the cases of state regulation, pose the account holder in a hierarchical relationship with superior authority to hold the regulator accountable. In the case of the EP framework, there is no such overarching power above the financial institutions which voluntarily agree upon the EP adoption. Arguably, EPFIs might mutually establish an oversight body to control the accountability of the regime.

[4] See more detailed discussion on different doctrines of accountability in Chapter 1

[5] Jerry Louis Marshaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' (2007) 116 Yale Law School Research Paper 115, 118.

However, it is necessary to consider the background of the EP framework. As explored in Chapter 3 of the thesis, the key rationale for the emergence of EP regulation was to relieve public criticisms and prevent negative reputations for their business. The parties which the regulation aims to address are therefore the public.

The term 'upwards accountability' refers to the relationships where accountability is rendered to superior entities such as the Parliament of the judicial court. On the other hand, there is another perspective of accountability relationships – the 'downward accountability' – towards lower groups. Downward accountability regards the entities of which the regulation aims to serve as the account holders.[6] According to this perspective, the public including the stakeholders can be the account holders of the EPFIs in the EP regulatory regime. The recognition that the public are the account holders can justify and support the necessity of public participation in accountability. Especially in the cases of private regulation, as in the EP framework, where regulators do not fall in the scope of traditional accountability mechanisms, regulatory credibility can be founded when people are directly involved in the process to ensure that the regulation actually operates as stated in its regulatory goals.

The evolution of accountability mechanisms to allow more public involvement can be observed in several multilateral financial institutions since 1993.[7] With pressure from civil society organisations promoting the idea of 'citizen-driven accountability', a number of international financial institutions have developed their policies to enable public access to information and provide grievance mechanisms for affected people to find redress or file claims on their concerns.[8] The World Bank was the first pioneer in applying this model of accountability by establishing the World Bank Inspection Panel in 1993 permitting any entities adversely affected by the projects receiving financial supports from the World Bank to file claims.[9] The proliferation of such new accountability norms has led to accountability reforms in the Asian Development Bank (ADB) in terms of establishing a mechanism for investigation and

[6] Colin Scott, 'Accountability in the Regulatory State' (2000) 27 Journal of Law and Society 38, 42 and fn 18; See also H. Elcock, 'What Price Citizenship? Public Management and the Citizen's Charter' in J. Chandler (ed.), *The Citizen's Charter* (Dartmouth Press 1997).

[7] Suresh Nanwani, 'Directions in Reshaping Accountability Mechanisms in Multilateral Development Banks and Other Organizations' (2014) 5 Global Policy 242.

[8] ibid 243; See Kristen Lewis, 'Citizen-driven Accountability for Sustainable Development' (June 2012) <www.dfc.gov/sites/default/files/2019-08/citizen-driven-accountibility.pdf> accessed 18 June 2021.

[9] Kate Nancy Taylor, 'Appraising the Role of the IFC and its Independent Accountability Mechanism: Community Experiences in Haiti's Mining Sector' (2017) 17 Sustainable Development Law and Policy 12, 13.

resolving disputes, followed by the adoption of citizen-driven accountability in the European Bank for Reconstruction and Development (EBRD), Japan Bank for International Cooperation (JBIC), African Development Bank (AfDB), European Investment Bank (EIB) and Inter-American Development Bank (IABD).[10] Such changing perspectives of multilateral banks on accountability towards more citizen-centered mechanisms is compatible with the concept of downward accountability and implies their recognition of the growing significance of public involvement. This trend among multilateral banks can pave the way for the EP framework, of which participants are private financial institutions, to adopt citizen-driven accountability. The background of the EP introduction as a policy measure to address public pressure for environmental and social responsibilities[11] can imply its support for the citizen-centered model. The public, notably the stakeholders, are the account holder in the downward relationship; therefore, they should have rights to participate in accountability mechanisms in order to ensure that the EPFIs will adhere to the EP standards and will be accountable for their non-compliance.

Following the questions of who is accountable to whom, the third question of accountability relationships is what activities the regulators must be accountable for. Again, considering the background of the EP regulation as well as its emphasis on the incorporation of environmental and social risks in the EPFI's decision-making, what the public, especially the NGOs, should expect from the EPFIs is their serious adherence to the EP standards in deciding on financial support. In other words, the EPFIs' decisions are expected to be justifiable under the EP standards.

EP regulation has been consistently revised since its first introduction in 2003, extending its scope to include all types of projects and other relevant activities of concerns. Such development demonstrates the attempts to make the EP framework actually effective in preventing harmful projects. Civil society organisations such as the BankTrack have been included in the revision process. However, the attempts to improve the EP regulation in response to the public concerns will be meaningless if some EPFIs can still support projects with environmental and social risks that do not comply with the EP standards and do not officially owe any explanations to the public. There are several cases that cast doubts on the EPFI's actual adherence to the EP standards. The Uruguayan pulp mill case and the BTC pipeline project are two distinct examples where the projects which were considered

[10] Nanwani (n 7) 243.

[11] See more details about the EP background in Chapter 3.

environmentally and socially hazardous in the public's views but the EPFIs affirmed their conformity with the EP standards and decided to grant financial support.[12] If the EP regulatory regime does not provide mechanisms for the public, notably the affected parties, to hold the EPFIs accountable for their decisions, it is difficult for EP regulation to obtain public acceptance and cognition as environmental regulation, aggravating the allegation of green-washing.

Generally, the activities that a regulator is accountable for are the exercise of regulatory powers. In the case of EP regulation, the EPFIs perform the role of regulator and use their decision powers on financial support to prevent the construction or operation of harmful projects as well as to regulate the clients' performance to comply with the EP standards in order to get financed. The exercise of regulatory powers in this case is the decision-making of the EPFIs, which is then the answer to the third question of accountability relationships, setting the objectives and the direction of designing accountability in the EP regulatory regime. The accountability mechanisms require the design to ensure that the EPFIs' decisions comply with the EP standards and that, in terms of public inclusion in accountability, affected parties can file a claim or demand redress for a grievance.

(2) Institutionalising Accountability in the EP regulatory Regime

The answers to the first three questions of accountability relationships provide the setting for designing accountability in the EP regulation; the EPFIs as the regulators are accountable for their decisions on financial business to the stakeholders that might be affected by their supported projects. The big following question is 'how' to design the EP accountability mechanisms.

As discussed in Chapter 3, the EP framework embeds the concept of reflexive law which emphasises the role of private actors in mutual learning and collaborative governance. Public inclusion can be observed throughout the EP regulatory processes. With the EP background and the fact that the project-affected parties are the account holders, the idea of citizen-driven accountability should provide an appropriate ground for designing the accountability mechanisms of the EP regime. This section begins with an overview of the current accountability in the EP regulation before discussing the appropriate levels of public

[12] See Chapter 3 of the thesis.

involvement. The citizen-driven accountability mechanisms found in other international financial institutions will be explored as models for developing the EP accountability.

The EPFIs are required under the EP framework to take environmental and social risks associated with the proposed projects into consideration and to reject any projects failing to comply with the EP standards. In order to hold the EPFIs accountable for their deviation from such obligation, two key functions are required: EPFI's compliance investigation and grievance mechanisms which enable project-affected parties to file a complaint or seek redress. The first function – compliance investigation – is to monitor the EPFIs' behaviours and ensure their actual adherence to the EP standards. This mechanism can address public concerns that the EP adoption is simply a strategic tool for avoiding naming-and-shaming campaigns against their responsibility for environmental and social degradation, and then, helps generate public trust as well as acceptance of this private regulatory regime in environmental and social development. The compliance investigation also prevents the problem of free riders by which some private financial institutions benefit from their good reputation for sustainable banking but take on no burdens to comply with the EP requirements.

The second function – the grievance mechanism – obviously reflects the idea of citizen-driven accountability in terms of enabling affected people to file their complaint directly. This function of accountability mechanisms renders the private regulation responsive to the public. The United Nations promotes the establishment of grievance mechanisms in a business enterprise for receiving feedback on the risks and impacts of its business performance on human rights and providing effective remedy for affected parties.[13] Also, the IFC which is the model for the EP development has emphasised the significance of grievance mechanisms as a measure for preventing further conflicts with local communities, solving the problems before they become too serious to handle, as well as for completing the overall process of stakeholder engagement.[14] The grievance mechanisms provide an ex post measure for correcting EPFIs' behaviour to comply with the EP standards or allowing them to justify their decisions to the public. In cases where there is damage caused, affected parties can seek redress through this accountability mechanism.

[13] United Nations' Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework 2011.

[14] International Finance Corporation, 'Good Practice Note: Addressing Grievances from Project-Affected Communities' (September 2009).

It must be noted that these two functions of accountability can be found in the EP framework. However, their effectiveness in holding the EPFI accountable and in providing satisfactory results to the public is still doubted.

(i) The compliance investigation

The EPFI's clients must conduct an Environmental and Social Impact Assessment and may be required to prepare further plans for addressing the potential risks associated with their proposed projects.[15] The EPFIs will base their decisions to grant financial support on the project's compliance with the EP standards.[16] In order to help the EPFIs in assessing such compliance, Principle 7 requires an independent review for the assessment process and Principle 9 further requires 'independent monitoring and reporting' for following up the project's compliance after receiving financially approved from the EPFIs. As already explored in Chapter 3, an independent review and a monitoring report are conducted by the Independent Environmental and Social Consultant (or hereafter 'the consultant'). The EP framework suggests the appointment of the consultant to be under the responsibility of an EPFI's client.[17] Although the consultant must be an external party 'not directly tied to the client'[18], the fact that the consultant, which is a private business[19], is appointed by the client, can make its relationship to the client similar to that of an employee and an employer. From the interviews with a financial scholar and an environmental NGO's member in Thailand[20], the reliance on the external parties appointed by the client to conduct the review and monitoring has raised concerns about the reliability of the findings. As usual in a business contract, the employees want their services to satisfy the employers; the consultant's report might not reveal accurate findings on the clients' compliance. The EP framework should establish its own independent body to perform the role of compliance investigator rather than deferring this duty to the entities appointed by each client. It is important for the EP legitimacy that the EPFIs must be accountable for their decisions. With the EP requiring the EPFIs to base their decisions on the reports on which the sources can raise doubts about their impartiality and accuracy, the EP

[15] EP 4, principle 2.
[16] ibid, principle 3.
[17] ibid, principle 9; Guidance for EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation (December 2020).
[18] EP 4, exhibit I.
[19] According to Principle 7 of the EP 4, the Independent Environmental and Social Consultant can simply be a business audit that can prove 'expertise in evaluating the types of environmental and social risks and impacts' concerned with the project.
[20] Interviews IV and V, see Appendix of this thesis: 'List of Interviews'.

claim for supporting sustainable investment and environmentally friendly projects can be easily challenged. A particular body should be therefore established.

Moreover, the compliance investigation required only checks on the project's compliance while the EPFI which is the regulator in this regime is not subject to investigation by any other bodies. This function does not support the accountability of the EPFIs as they can simply explain the reasons for their decision by referring to the Consultant's report. The IFC, which is the model for the initiation of the EP framework in promoting sustainable finance, has established an independent body to perform the accountability mechanism of compliance investigation. The Compliance Advisor Ombudsman (CAO) is the independent accountability mechanism for the IFC; one of its main functions is to conduct the review of the IFC's accountability at the project level. The CAO's function to ensure compliance with the Performance Standards has three steps, starting from an initial appraisal, then investigating on particular cases of concerns, and finally monitoring the IFC's performance in addressing the client's non-compliance.[21] However, the CAO's investigation have neither binding forces nor sanctions for non-compliance. The benefits that the public can obtain from the CAO's investigation is the information disclosed which the affected parties might use to seek redress. It must be noted that, although the last question of accountability relationships is on the results that the regulators will receive for non-compliance, the sanctions are not always required for the accountability relationships. This question is one of categorising different forms of accountability.[22] In other words, the fact that some regulatory regime does not impose sanctions for non-compliance does mean that it does not have accountability mechanisms. The CAO's compliance function applies in the case where the accountability mechanism does not constitute any formal sanctions, but this function can supplement the grievance mechanisms to support the full effectiveness of public involvement in accountability.

As noted in the preceding chapters, the EP regime does not have any overarching institution to investigate the EPFI's compliance like the IFC's CAO. The EP Association is responsible for developing and revising the EP policies and measures. The only monitoring function of the EP Association is on the EPFI's obligation to disclose their reports on financial activities in the scope of the EP regulation; whether the EPFI's decision complies with the EP standards is not

[21] Taylor (n 9), 15.

[22] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regime' (2008) 2 Regulation and Governance 137, 150; Mark Boven, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447.

under its authority. Specific offices for operating the investigation mechanisms have been established in several multilateral development banks, such as the Inter-American Development Bank (IADB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the African Development Bank (AfDB), and the European Investment Bank (EIB). Whereas the significance of institutionalising independent accountability mechanisms in an organisation has become the global trend, especially in the practices of banks and financial institutions, the lack of an investigating body in the EP regulatory regime should be corrected quickly to gain public trust in its accountability mechanisms, which critically matters for the legitimacy of the regulatory organisation.

(ii) The grievance mechanism

EP regulation requires the establishment of the grievance mechanism in Principle 6. With similarity to the requirement for the compliance monitoring, Principle 6 places the burdens on the EPFI's client to set up grievance mechanisms to resolve the concerns and grievances of project-affected parties. This requirement applies to all projects under Category A and for some projects under Category B for which the EPFI considers it appropriate to organise the grievance mechanism. Generally, the local communities are the entities that get affected by the project; in cases where there are arguments about non-compliance with the EP standards, the party to the conflict is the client that is responsible for the project at issue. Rather than establishing a permanent body to operate the grievance mechanism, EP regulation defers this duty to the client, which is the conflicting party itself. While the IFC and other financial institutions consider the grievance mechanisms an important part of accountability, the EP regulation has rarely improved its grievance mechanisms to be more responsive to the affected party. The IFC's CAO, apart from performing the compliance function, takes the role of ombudsman to resolve disputes between the project-affected communities and the clients by emphasising collaboration processes.[23] A group of multilateral development banks and financial institutions has even formed the Independent Accountability Mechanisms Network to exchange ideas and encourage mutual learning on developing accountability. They support the idea of citizen-driven accountability and emphasise responsiveness as one core principle of accountability.[24] Organising the grievance mechanisms is a key part of enabling contestation and allowing public involvement, notably the affected parties, to get redress for the harms caused to them and to

[23] Taylor (n 9).

[24] See Asian Development Bank, 'The Independent Accountability Mechanisms Network' (2015) <independentaccountabilitymechanism.net/> accessed 17 June 2021.

hold the decision-makers accountable for their decisions. While most multilateral development banks have established their own grievance mechanisms in response to the public concerns on environmental and social issues [25], the accountability of EP regulation as a private environmental regulation seems seriously inadequate if it does not constitute its own grievance mechanisms.

While the EP framework has undergone several revisions, there is yet to be an EP body for grievance mechanisms established. In 2019, 79 civil society organisations and partners jointly called for the EP to set a 'central accountability mechanism'.[26] BankTrack expresses its concerns about the EP grievance mechanisms. Their empirical studies in 2020 on stakeholder engagement in the grievance mechanisms provided by the EPFIs' clients reveal unsatisfactory results from the consultative process and the failure to provide redress for affected parties.[27] These results indicate the necessity to improve the grievance mechanisms in the EP regime, shifting from deferring such functions to the client to establishing the EP's own body.

Both functions of accountability – the compliance investigation and the grievance mechanism – of the EP regulatory regime require the establishment of a specific body. This does not mean that the EP framework needs two more bodies, since in fact one body can be constituted to perform the 'central accountability mechanism' as the groups of civil society organisations requested in 2009. The ADB, later followed by the ERBD, the JBIC, the AfDB, and the EIB, is a model for combining the two functions of accountability into one mechanism. The ADB's accountability mechanisms has been established to solve the problems as well as to investigate compliance, with the office of the special project facilitator acting to receive a complaint and manage problem solving, and the compliance review panel to process the investigation after receiving the complaint.[28] Such combination of functions is also founded in the current accountability mechanism of the CAO office that takes the role of ombudsman to solve disputes as well as compliance audit.[29]

However, the weak points of such grievance mechanisms can be recognised in terms of flexible and collaborative processes. The dispute resolution in the CAO's mechanisms was found

[25] See Nanwani (n 7) 244.
[26] BankTrack, 'Tracking the Equator Principles' (10 June 2021) <www.banktrack.org/page/tracking_the_equator_principles> accessed on 17 June 2021.
[27] ibid.
[28] Nanwani (n 7) 243- 244.
[29] See The CAO Operational Guidelines (March 2013)

successful and satisfactory in the eyes of affected parties in the cases of early processes of the project where the conflicting issues were on stakeholder engagement and information disclosure.[30] However, in cases where the project has significantly caused adverse impacts on local communities, it is difficult to form collaboration among conflicting parties to find a solution and redress. Yet, the grievance mechanism does not prevent project-affected parties from accessing judicial systems or other remedies. Although the grievance mechanism might not succeed in finding a satisfactory solution in all cases, its establishment provides a forum that the affected parties can file their claims directly, enabling them to hold the regulator accountable for addressing the grievance. One noticeable point here is that the CAO's mechanisms allow affected parties to have direct involvement with the grievance system. This is an advanced step comparable to the access to justice under the Aarhus Convention, as explored in Chapter 2, and indicates the strengthening of procedural rights required for environmental governance.

The last two questions of accountability relationships are on the sanctions and the standards for assessing the regulator's accountability. For the question of the reference standards for the EPFI's accountability, the answer is simply the EP standards. However, as regards the sanctions, it is necessary to discuss further the enforcement of the EP standards since the EPFIs are not granted enforcement power as state authorities.

II. Enforcement: Challenge of Private Regulation

One great challenge of private self-regulation is that the regulator does not derive any statutory authority to exercise judicial enforcement as do public enforcers but rather relies on contract or association rules to secure regulatory compliance.[31] Non-judicial measures are applied for encouraging compliance, such as conditions for market access, competition, peer pressure, shaming, or termination of membership.[32] While private self-regulation does not have similar judicial enforcement mechanisms as public regulation, there are some cases where private enforcement can be more efficient in changing the behaviour of regulated parties than the

[30] Taylor (n 9) 14-15.

[31] See Fabrizio Cafaggi, 'Enforcing Transnational Private Regulation: Models and Patterns' in Fabrizio Cafaggi (ed.), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar Publishing Limited 2014).

[32] See ibid; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 328.

state.[33] EP regulation shares the feature that most private regulation does not have judicial sanctioning power. The relationship between an EPFI, which is a regulator in this regime, and its client, as a regulatee, is based on an agreement. Principle 8 of the EP sets the covenants as an important means for ensuring the client's compliance with the EP environmental and social standards. In cases that non-compliance is found, the EP framework does not suggest an immediate sanction but requires the EPFI to 'work with the client' to make the project comply with the EP requirements.[34] If it turns out that the client cannot re-establish its EP compliance within the agreed timeframe, the EPFI will then enforce the remedies as stated in the covenants, which can constitute an event of default.

Principle 8 indicates the characteristics of reflexive governance in the EP regime in terms of supporting cooperation with regulated parties. The target of the EP framework is to incorporate environmental and social dimensions into business operation. Stringent sanctions can, on one hand, cause cautious behaviour by regulatees, but on the other hand, non-compliance can also occur from lack of experience and knowledge about appropriate measures in environmental management or from being unaware of non-compliant behaviours. The first step after finding non-compliance should not therefore be an immediate sanction. The EP requirement that the EPFI and its client should work together to find out how to re-establish compliance can help the client to learn about how to comply with the EP standards, generating mutual understanding between a regulator and a regulate. This measure can save time and costs in inducing environmentally friendly projects rather than applying judicial enforcement and supports collaboration rather than causing adversarial relationship. This idea is coherent with Ayres and Braithwaite's concept of the enforcement pyramid and Responsive Regulation[35] in terms that the enforcement should start from self-enforcement by private entities first and ultimately goes to state enforcement only when non-state entities fail in self-enforcement. In the case of EP regulation, judicial enforcement with reference to the terms of covenant is the last resort when an EPFI and its client cannot cooperate to bring the project back to comply with EP standards.

However, private enforcement can have one major weakness. Since the private enforcement relies on freedom of contract, the terms of covenants only bind the contracting parties. While construction of a project might affect other entities, normally local communities, they are

[33] See J. Maria Glover, 'The Structural Role of Private Enforcement Mechanisms in Public Law' 53 William and Mary Law Review 1137, 1203 – 1216.
[34] EP 4, principle 8.
[35] See Chapter 1 of the thesis.

considered third parties and do not have standing to challenge the EP non-compliance by referring to the covenants. It must be noted that they may be able to bring the case to the court and file for compensation, but the question discussed here is how to secure compliance under the EP regime. One channel that allows the affected parties to file a complaint is the EP grievance system. As earlier discussed, the EP grievance mechanisms are organised by the clients but, as the case directly concerns the clients' non-compliance, how can the EP regime ensure that the claim will be addressed with due process and responsive to affected parties? This links back to the suggestion that the EP framework should establish its own body performing the role of ombudsman, rather than merely assigning the client to set up a grievance system.

The grounds for enforcing the EP compliance are based on covenants between EPFIs and their clients; providing a complaints channel for third parties would help the EP enforcement to be more effective. An EPFI might not be aware of the client's negligence or omission to follow the EP standards as happened in most public regulation because of information capture by the client. Allowing third parties to file a complaint to the regulators can help in conducting a comprehensive investigation of EP compliance by using the public, notably affected parties, as 'monitoring agents.'[36] With this model, the EP enforcer is still the EP regulator, not the third parties, but the information obtained from the third parties can supplement the investigation on EP compliance. This model also supports the constitutional norms in terms of access to justice, and therefore helps institutionalising the EP legitimacy as well as generating public acceptance.

The next question is whether the role of ombudsman should be decentralised to each EPFI or should be assigned to one single body. To support effective enforcement, a particular body for accepting claims is required, and the investigation of the EP compliance of an EPFI's client then follows. Considering the above discussion of accountability, monitoring and checking the EPFI's compliance with the EP standards is also required. On one hand, some EPFIs might not be aware of the non-compliance of their clients and mistakenly approve the project throughout the process, but on the other hand, there are possibly the cases where EPFIs merely adopt the EP regulation for marketing and reputational purposes and do not strictly adhere to the EP standards in practice. Such a situation leads to the 'greenwashing' accusation. Therefore, a centralised body for performing the role of ombudsman should be established not only for

[36] See Cafaggi (n 31) 114; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Edgar Publishing Limited 2008).

ensuring the client's compliance to EP standards but also the EPFI's. This mechanism will support the effective enforcement of EP standards and prevent free-riding behaviours of some EPFIs. Assigning each EPFI to establish procedures for providing access to justice for third parties might not always result in more comprehensive investigation on the client's compliance if it is the EPFI itself that laxly adheres to EP standards. An ombudsman is thus required for supporting enforcement and, at the same time, this mechanism will also improve the EP accountability, addressing the critiques of greenwashing and the problem of free-riding EPFIs.

III. Ways Forward for EP institutional Design

One purpose of this thesis is to identify ways to improve and strengthen the existing EP institutional design. The outstanding requirement for improving the EP regulatory regime is to implement the model of citizen-driven accountability by organising mechanisms through which the public can get involved in checking the EP compliance of both the EPFIs and their clients. This thesis argues for the creation of a body, as seen in several multilateral financial institutions, notably the IFC's CAO, as a part of the EP regime. This body can be a panel or a committee performing the role of ombudsman and investigating the non-compliance raised by stakeholders. The actors eligible for submitting a claim should include the affected parties, which are considered third parties not bound in the covenants, and the EPFIs which find that other EPFIs simply adopt the EP as window-dressing policies with no strict adherence to the standards. Establishment of such a particular body will improve the EP accountability mechanisms and support effective enforcement in terms of using the public as monitoring agents, resulting in building normative legitimacy by adopting democratic norms of access to justice.

The functions of an ombudsman as such, however, come into play when stakeholders realise the client's non-compliance. Such accountability mechanisms normally apply after the EPFI fails to find out or ignores the fact that its client does not meet the EP requirements for addressing environmental and social concerns. The EPFI still reserves the power under the covenant to bring its client into compliance with the EP standards. To support the EPFI's role as a regulator, Principle 7 and Principle 9 allow the EPFI to require its EPFI to appoint an Independent Environmental and Social Consultant. Although the EP's recent release of Guidance for Consultants in 2020 indicates the efforts to ensure that the consultant appointed by the client will adhere to its duty in monitoring and investigating the client's compliance to

the EP standards[37], it might be better that the EP regulation breaks the link of appointment between the EPFI's client and the Consultant, and shifts the appointment to be made under the EPFI's decision instead. In other words, the EP requirements for monitoring and review should be set that the EPFI can outsource an external auditor rather than requiring the client to appoint an external consultant that can satisfy the qualifications set under the EP. With the growing expertise throughout the EP implementation over time, each EPFI might later be able to appoint its own team to work along the Consultant in monitoring and investigating the client's compliance. In cases where the EPFI questions the Consultant's report, the EP framework should provide an investigating body that the EPFI can request for advice. The EP ombudsman might bear this responsibility, or another committee might be established to take the role of investigators on EP compliance.

Noticeably, one missing element in the EP institutional design is an overarching body to control the EPFI's adherence to the EP requirements. This body should perform the role of ombudsman, accepting claims from stakeholders and investigating the non-compliance. In cases where an EPFI consistently fails to comply with the EP requirements, de-listing from the EPFI's list should apply as the ultimate sanction, as in the EP transparency requirements, in order to preserve the credibility of EP regulation and solve the free-riding problem. On the other hand, an overarching body should also provide some assistance for EPFIs to help them implement the EP standards effectively; for example, the EPFI should be able to seek assistance from an investigation team of this body to re-check its client's compliance when this is in doubt. With this institutional design, the enforcer of EP standards is still the EPFI, but the supervision by the overarching body, together with the public monitoring, will ensure that the EPFI will strictly follow the EP requirements in bringing its client's compliance to the EP standards.

Such development suggests the capacity of the EP framework to be self-reliant without significant requirement for state intervention. However, as discussed in Chapter 1 about reflexive governance, the state still plays the role of a facilitator in the background. It is interesting to see how the state will interact with EP regulation and how the EP framework can raise environmental and social standards. The thesis conclusion in the following chapter will discuss such interaction and consider the application of the EP framework in a developing

[37] Guidance for Consultants on the Contents of a Report for an Independent Environmental and Social Due Diligence Review (October 2020); see the discussion in Chapter 3 of the thesis.

country such as Thailand, where the state policy does not give much weight to environmental development and where the cultural and political contexts are different from western countries.

CHAPTER 7:

Conclusion of the Thesis

This thesis focuses on the EP framework and has questioned whether with the EP can solve the problem of diverse environmental standards among different countries by raising the standards in a country where environmental regulation is lax or insufficient, namely a developing country where economic growth is prioritised over other dimensions of development. The purpose of this thesis is, *first*, to assess EP regulation by applying a reflexive governance theoretical framing. Investigation and analysis of the EP framework from this perspective can contribute to the academic gap in theoretical discussion on the potential of EP regulation as an alternative regulatory measure supplementing the role of the state in environmental governance. *Second*, this thesis demonstrates a potential gap between rhetoric and practice of EP implication by applying Thailand as a case study for some particular conditions of a developing country which might challenge the achievement of EP regulation in applying the learning-based approach in environmental governance. The study of Thailand's context provides information and observations for developing the EP framework to be applicable in any local contexts and can be further developed for future studies on the contexts of other developing countries. The thesis *also* examines the challenges of the EP framework as private regulation and suggests improvement of the institutional design to ensure transparency, enhance public participation, and establish legitimacy and accountability mechanisms, to address public concerns on the actual effectiveness of EP regulation.

With acknowledgement of the dynamic and transboundary nature of most environmental problems, this thesis points out the limits of the traditional 'command-and-control' model of state governance, such as national boundary limits, information deficits, and rigid regulation that cannot respond to the problems efficiently. The thesis conclusively suggests the potential of private financial institutions to perform the role of regulator, with reference to the concept of reflexive regulation as a theoretical support and EU environmental governance as an example of the accepted advantages of reflexive regulation in environmental governance.

I. The EP Regulatory Regime – A Regulatory Measure for Raising Environmental Standards in a Developing Country

The idea of reflexive governance applies as the theoretical basis to support the proactive role of private actors in regulation and to suggest a model of interdependence in terms of encouraging mutual learning among different actors rather than the conventionally hierarchical relationship between regulators and regulatees. The EU has long positioned itself as the world leader in environmental governance and it embraces the idea of reflexive governance in terms of experimentalism with an emphasis on public participation. EU environmental governance serves as an interesting and contemporary example to show that the idea of mutual learning can be adopted in the regime where command-and-control has already been developed. Environmental problems have expansive impacts on various lives, communities, and nature, while the solution is still uncertain and requires further research and development. Information exchange among relevant actors, not limited to scientific experts, can lead to a more comprehensive picture of the problems. The EP framework which is private regulation that emphasises collaboration between regulators (EPFIs) and regulatees (the clients), and includes a stakeholder engagement process, indicates the adoption of a reflexive model. This leads to the key suggestion of this thesis that the EP framework can provide a regulatory measure to supplement state regulation in environmental development.

However, private self-regulation is commonly criticised for its lack of legitimacy as its establishment, unlike state regulation, does not obtain any delegation of power from the government. Particularly in case of EP regulation which is considered a response measure by commercial banks for regaining their positive reputation, the EP framework has been unsurprisingly questioned for its actual implications in preventing environmentally harmful projects. Transparency and accountability are key components that can help to establish the legitimacy of EP regulation as well as to create public acceptance. It is therefore important that the EP institutional design recognises the necessity of establishing transparency and accountability mechanisms in a way that allows for public scrutiny and ensures that any EPFI's non-adherence to EP standards without sensible justification will not be acceptable under this regime.

Inadequate enforcement is another critique that most private regulation faces. While mutual learning theoretically creates new knowledge and can lead to innovative ideas and solutions, it is useless if there is no actual implementation of the regulatory requirements. The incentive for

EP adoption is not only implementing careful risk management but also the benefits of the business reputation in environmental and social responsibility. If there is no sanction or authorities to enforce the implementation, free riders can participate and gain benefits from EP adoption without having to bear the costs for EP implementation. This can result in EP regulation losing credibility from the public and becoming a mere window-dressing measure for 'greenwashing' the business. Other EPFIs which comply with EP standards will also receive negative impact from such free riders in terms of costs and reputation of EPFIs in general. This leads to the question concerning the role of the state in EP regulation.

As explored in Chapter 1, reflexive governance does not completely reject the role of the state but suggests the shifting from a conventionally direct commander to a facilitator working in the background to ensure social integration and mutual learning. Black's concept of 'proceduralisation' signifies the importance of setting processes for facilitating the achievement of private self-regulation in mutual leaning, such as establishment of mechanisms for enabling lay people to understand relevant information (namely, the environmental and social risks associated with the project, in cases of EP regulation), and to get engaged in the deliberative discourse. Further, Habermas argues that preservation of fundamental rights and social values, such as human rights, is required to prevent imbalance of power in a communication process. This argument implies that the state might be required for setting some precommitments for supporting the learning process in reflexive governance.

The next question is whether the role of the state is indispensable for the achievement of the EP framework in environmental governance. There is no doubt that establishment of supportive mechanisms and processes by the state can help EP implementation to run smoothly and accomplish the goal of mutual learning with fewer difficulties than without the state's support. However, this thesis argues that the EP framework can help in raising environmental standards in a country where state regulation is lax or insufficient for environmental governance, and in such a case, an active role of the state to support EP regulation cannot be expected. To defend the proposition that the EP framework can still function without any specific help from the state, the thesis suggests that EP regulation can be self-reliant when the institutional design of EP regulation is carefully designed to resolve the concerns of accountability deficits, ensure stakeholder engagement as well as public scrutiny, and establish legitimacy.

The concept of Black's 'proceduralisation' signifies the establishment of processes to support the achievement of mutual learning but Black does not argue that such establishment can be

done exclusively by the state. The EP framework can be designed to ensure that the 'translation' of essential information must be provided in local languages and in non-technical terms as comprehensible for lay people, especially for the stakeholders. Chapter 5 of this thesis discusses the institutional design of EP regulation and finds that the requirements for information disclosure can indicate the EP's efforts to develop institutional transparency and enable public scrutiny on EP implementation. Public participation, or namely stakeholder engagement, in assessing environmental and social risks associated with the proposed project is emphasised in the EP framework. Chapter 5 suggests that in order to ensure the meaningful contribution of participants in a stakeholder engagement process, representatives from different interest groups must be balanced. It is however impossible for the EP framework to specify what groups and numbers of participants are proper, as it depends on the contexts of each development projects. Rather, the thesis suggests requiring the clients to disclose their stakeholder engagement plans and to allow affected people to file a complaint for not being included or for any non-compliance observed. Public monitoring of EP compliance can benefit EP regulation in at least two ways. First, EPFIs can gain information directly in other ways, not only from their clients' report. Second, the public's access to justice can help establish legitimacy for the regime and create public acceptance for credibility of the EP framework in environmental governance, as they can take part in the regulatory process.

This thesis proposes that the EP institutional design can be improved by establishing a single overarching body to receive complaints from the public and then investigate the case. Such an ombudsman body would work to ensure EPFIs' compliance with the EP standards. Although private regulation does not have any legal authority, enforcement mechanisms are not limited to legal sanctions. With reference to Ayres and Braithwaite's idea of 'responsive regulation', self-enforcement of private actors is recommended to be an initial step to take; judicial enforcement is the ultimate approach when private self-enforcement has already failed. Suspension of membership and then de-listing from the EPFIs lists can be appropriate sanctions in cases that an EPFI cannot improve its performance to comply with EP requirements. This sanction will create credibility of EP regulation and address the public concern that the EP framework might be a greenwashing measure. Other EPFIs which comply with EP standards will also benefit from such elimination of EP free riders.

The concerns of transparency, public participation, legitimacy and accountability deficit of EP regulation can be addressed by fuller development of institutional design. For Habermas' argument that preservation of fundamental rights is required to ensure the good balance

between public rights and private rights, the authority for enforcing such rights ais still reserved for the role of the state. However, this is the general responsibility of the state in securing fundamental rights such as human rights and freedom of exercise for their people. Therefore, it can be concluded that, with some development in the institutional design, EP regulation can function in a country where the state is not proactive or effective in environmental regulation, as the regime is self-reliant and does not need any particular state action in its regulatory functions.

The next point to discuss is the interaction between EP regulation and the state in cases of a developing country where state environmental regulation is lax or underdeveloped. While the EP framework does not need the state to perform the role of an overarching regulator, it can be questioned whether it is possible that the EP framework, on the other hand, may lead to the development of more effective state environmental regulation or stipulate the establishment of higher standards in state environmental governance.

The growing adoption of the EP framework across the world relies mainly on how it is perceived to improve the reputation of corporate actors and their approaches to risk management. Peer pressure and competition can help in spreading adoption globally without requiring imposition of state laws to force such adoption. As already discussed in Chapter 4, an interview reveals that most Thai banks are adapting their policies in line with the EP standards with the significant reason that they want to raise their business to regional level and implementation of internationally recognised standards, such as the EP framework, will support their position in the world financial economics. In other words, their decisions to comply with the EP standards mainly rely on the benefits of EP adoption, even though the EP regulation is not much promoted by Thai government and there is no Thai law requiring financial institutions to incorporate environmental and social concerns into their business decision. This interview further supports that argument that EP adoption does not need supporting forces from the state.

The globally growing number of EP adopters, especially big private financial institutions, can influence smaller, local banks to follow. Private financial institutions will build their capacities and expertise in environmental management, such as the ESIA processes, stakeholder engagement, and investigation of their clients' compliance. Moreover, the public, especially environmental NGOs, having increasing opportunities to get involved in participation processes, will learn the standards of engagement they should normally expect. When all

relevant actors, namely private financial institutions, investors and the public, experience and then become accustomed to global standards, state regulation of environmental and social management will eventually have to raise its standards to meet the well-recognised level as well. This bottom-up movement will then address the problems of lax or ineffective environmental laws in a developing country. This suggests that private actors propel the improvement of state regulation. When private actors change their behaviours to comply with the EP standards, the state cannot resist the trend and let its regulation lag behind private regulation. So long as the state organises an environmental impact assessment or a stakeholder engagement process with lower quality than those organised by private entities, the stakeholders will not easily accept that process as they know what a proper participation process should be. With the fact that the EP framework is dealing with environmental management, which is typically a matter of public policy, and its governance includes public participation, it is impossible that the regime will stand alone without any interaction with the state, which normatively executes public laws and policies. It must be noted that EP regulation might not have immediate implications in raising environmental standards and stipulating new policies and direction for a state which does not pay much attention to environmental development or does not have effective environmental management, notably in a developing country, but, eventually, better environmental and social standards will be established.

II. EP Regulation and the Implementation in Thailand's Context

Thailand is an example of a developing country where government policies generally recognise the idea of sustainable development without effective environmental regulation in practice. The study of the context of Thai environmental regulation in Chapter 4 suggests that international environmental principles and agreements have considerable influence in the policy direction of Thai government. However, it can be observed that the government does not take environmental problems as seriously as it should but simply include keywords such as sustainability int its plans and policies. The regulatory structure of environmental governance in Thailand significantly needs much development to resolve its problematic bureaucratic procedures and fragmented authorities. The fact that Thai environmental laws have not been sufficiently revised in response to new emerging problems as well as the messy regulatory structure implies that environmental development is not a dimension which receives much attention from the government, compared to economic development.

Chapter 4 discusses the problems of Thai state regulation in environmental governance and points out that political instability is the important reason which implies the need for EP regulation. Although the advantages of the EP framework have been explored in Chapter 4, it is still necessary to ascertain whether the EP institutional design suggested in Chapters 5 and 6 can fit in Thai culture and social values.

Thai concept of 'Kreng Jai' which reflects a collectivist culture in Thailand might obstruct the achievement of a stakeholder engagement process which is an important measure of EP regulation to create mutual learning and gain comprehensive information from different angles. With paternalism rooted in Thai society, some participants in the participation process might have marked tendencies to be manipulated by interest groups which seem more knowledgeable than them; this could include business representatives who, in the eyes of some local people, look professional and have expertise in what he or she is talking about. The fact that Thai culture can make some people refrain from raising opposing views or simply follow the majority will not benefit experimentalism and mutual learning, and might then impede the achievement of the EP framework in environmental governance.

However, the institutional design of public participation as discussed in Chapter 5 and Chapter 6 can help in addressing such problems. With a proper balance of representatives from different interest groups, manipulation can be minimised. While there will be participants from business sectors, there should also be participants from environmental organisations to strike a balance between corporate, social and environmental interests. Further, one characteristic of reflexive governance is collaboration. Even though collectivism might cause some Thai people to refrain from raising opposing opinions, the discursive approach applied in a stakeholder engagement process should not cause hostile feelings among participants but rather provide an opportunity for sharing and listening. Adherence to the concept of reflexive governance does not conflict with collectivism but, on the other hand, is compatible with Thai culture where people treat one another as cousins and friends for they are parts of the same community. Although the developer and business sector might not actually be local people, they are going to work in such areas and can therefore be considered a part of the society as well.

Nonetheless, as already noted in the discussion of the institutional design of EP regulation, the EP cannot specify the interest groups to be included in the participation process as well as the number of participants but rather imposes a requirement to set up a well-balanced participation process. Disclosure on how the stakeholder engagement process is organised is suggested as a

measure for transparency and allowing public scrutiny. This leads to the challenge of EP accountability mechanisms. If the participation process is not organised in an engagement-encouraging way as required under the EP standards, and an EPFI does not realise or, in a worst case, ignores the non-compliance of its client, it rests on stakeholders or environmental NGOs to bring the claim to the EP ombudsman.

It must be noted that the accountability mechanism applies in a different regulatory phase from the decision-making process. While the stakeholder engagement process occurs in the phase of assessing environmental and social risks of a project, which is in the decision-making process, raising claims for non-compliance takes place after the decision has been made. While Thai culture of 'Kreng Jai' might restrain some Thai people from raising opposing views, it is a different case when they find their rights are violated, their lives and health are at risk, or their usual benefits are affected. The western concepts of rights and democratism have been cultivated in Thailand for a long time. Although there has been consistent political disorder, all Constitutions of the Kingdom of Thailand recognise fundamental rights and announce the democratic concept of government, despite different levels of guaranteed rights and freedom provided. Thai people therefore get accustomed to the idea of claiming for their rights to be protected as they should have been.

The interview conducted with the Thai environmental NGO also supports the argument that, at present, local people realise the risks and damage caused by environmentally harmful project and want to take part in the participation process to raise their concerns more than the past. When people are aware of their potential disadvantages from harmful projects, if they are excluded from the participation process or find some non-compliance with EP standards, 'Kreng Jai' culture will not prevent them from filing a claim. Rather, collectivist culture can potentially make them feel that their community and social harmony is at risk, and will therefore encourage them to call for accountability from an EPFI to terminate its financial support for such a harmful project. Notably, there might be some Thai people who are still reserved and are afraid to express their concerns or dissatisfaction against the project. However, with the EP requirements for transparency, the information about the stakeholder engagement process as well as the risk management of such project will be disclosed to the public, enabling public monitoring and scrutiny. Such public disclosure allows a large number of people to consider the information; while some might be inactive in environmental concerns but others will not stay silent.

With some development in the EP institutional design, the EP framework has no significant problems in achieving its mutual-learning goal in Thai culture. The collaborative nature of reflexive governance can get along with collectivism, and democratic concepts such as rights, freedom of expression, and access of justice, are fundamentally recognised among the Thai people, and will encourage the movement for EPFI's responsibility and accountability.

Overall, the EP framework can prove to be a regulatory measure with high potential to help in raising environmental standards in a developing country where state regulation is lax or inadequate. EP regulation is largely self-reliant. Its incentives can stipulate growing adoption globally without the need for legal imposition of state laws for forcing adoption or imposing legal obligations for private financial institutions. On the other hand, EP regulation has the potential to induce the development of state regulation in line with the EP standards. It is therefore a valuable alternative form of regulation to supplement the role of the state and to address some state limits in environmental governance.

III. The Next Steps

This thesis provides theoretical supports for the argument that EP regulation can help in raising environmental and social standards of a developing country on the conditions that some improvement of the institutional design is required for ensure its effectiveness in environmental governance. There can be further research on the contexts of other developing countries to examine whether the conclusion for Thailand can be transferrable to other countries. However, the analysis of this thesis sufficiently demonstrates that the Equator Principles Association should consider applying the finding of this thesis in developing its institutional design and establishing an overarching body to perform the role of ombudsman, monitoring and checking compliance, in order to address the concerns on legitimacy and accountability deficits of the EP regulatory regime.

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APPENDIX

I. Research Ethics Application Form & Risk Assessment
(Approved by the Law Research Ethics Committee on 17/02/2020)

Research Ethics Application Form

Section 1: Applicant and Project Details (All applicants)

Name(s)	Thitinant Tengaumnuay
Email address(s)	tt17192@birstol.ac.uk
Degree Course or Post(s) Held	PhD in Law
Title of Research Project	'The Impacts of the Equator Principles as Private Self-Regulation in Environmental Development in a Developing Country'
Description of proposed empirical research, indicating: i) why that research requires prior approval by the Law School Research Ethics Committee. ii) why it is necessary to undertake the research in question. iii) Your assessment of any cost/risk to research participants	The thesis aims to explore the effectiveness of the Equator Principles (EP) as a private regulatory regime to address environmental problems in a developing country. The EP regulatory regime assigns the role of regulators to private actors, namely private financial institutions. The mere study of theories and academic literatures might not sufficiently provide accurate research answers for the thesis. The interviews of actors potentially associated with the EP regulation will provide comprehensive views towards the actual performance of the regulation in environmental management and provide information on the obstacles or pitfalls of the EP regime in practice. For example, there could be some obstacles or processes that cause difficulties for complying with the EP standards in practice, or the incentives for adopting the EP standards might not sufficiently encourage private financial institutions to do as such. The targeted participants of the interviews include governmental officials, private business actors, as well as scholars and activists, all of whom are human participants. The researcher is therefore seeking ethical approval to conduct the interviews and to ensure that the proposed plan of empirical study will not expose the participants to any undue influence or coercion. As the interviews will be conducted in Thailand, which is a non-UK country, risk assessments will be submitted to the Ethics Committee.

Section 2: Source of Funding (All Applicants)

Is the research funded, in whole or in part, by an organisation external to the University?	YES
Funding Organisation	Faculty of Law, Chulalongkorn University
Funding organisation website	www.law.chula.ac.th
Nature of funding awarded, e.g. studentship, project funding, etc.	Scholarship for development of faculty staff
If the funding is awarded under a particular programme or scheme, please identify.	The researcher is a lecturer at Faculty of Law, Chulalongkorn University, and has been granted a scholarship to study the doctoral programme in law, since all lecturers at Chulalongkorn University are required to have PhD degrees in their fields.
Does the Funding Organisation require institutional ethical review?	NO
Does the Funding Organisation have particular ethical review requirements, e.g. the use of an independent reviewer?	No

Section 3: Supervision and Training (Research Students)

Name(s) of proposed/actual supervisor(s)	Professor Tony Prosser (1st) and Dr Clair Gammage (2nd)
Have you discussed this application with your supervisor?	YES
Have you received research methods training either at Bristol or elsewhere?	YES
Please indicate the person/body that provided the training	University of Bristol
Please briefly indicate the subject matter of that training	The researcher has attended the Primary Units for Research Students (PURs) which offer training sessions for improving research skills for PhD students. The PURs course is organised in a form of seminars, providing opportunities for research students to learn how to apply different research methods including doctrinal, comparative, and

	empirical approaches. The researcher has also taken Advanced Legal and Socio-Legal Research Methods course in 2018/2019 as the suggestion of the doctoral supervisors. The seminars in this course focus on providing greater understandings for developing research methodologies in a research that concerns socio-legal studies.
Please provide the date of attendance	26 September 2018 – 13 February 2019 (PURs) and 3 October 2018 – 3 April 2019 (Advanced Legal and Socio-Legal Research Methods)
Have you attended a research ethics workshop or an equivalent session as part of your research training at Bristol or elsewhere?	YES
Please indicate the person/body that provided the training	University of Bristol (in Advanced Legal and Socio-Legal Research Methods course)
Please provide the date of attendance	6 March 2019 (Seminar 8)
Date of electronic submission of this form to primary supervisor	6/11/19

Section 4: General considerations (All Applicants)

Note: Detailed answers are **not** expected in this section. The Research Ethics Committee simply wishes to be assured that you have consulted and considered relevant guidance.

Have you reviewed and addressed the ethical implications of your proposed research in line with the Socio-Legal Studies Association Re-statement of Research Ethics (to which the School of Law subscribes)?	YES
If you are leading a research team, have you taken steps to ensure that each member of that team will have read the SLSA ethical guidance, and be fully aware of the ethical dimensions of this research?	NA
Have you reviewed and addressed the ethical requirements of conducting research at the University of Bristol?	YES
Does your project involve participants who are children or young people?	NO

Have you considered whether you need to apply for a Criminal Record Check?	YES
Does your project involve participants who lack the capacity to consent either permanently or intermittently? If so the LREC is not the appropriate body for which to apply for ethical approval (Guidance Document: Application Process, point 3)	NO
Does your project involve human health-related research? If so the LREC may not be the appropriate body for which to apply for ethical approval (Guidance Document: Application Process, point 3)	NO
Have you reviewed and addressed the University 'advice on research' in the context of data protection legislation?	YES
Does your project involve any research data that you would wish to shield from disclosure under the Freedom of Information Act 2000?	NO
Does any aspect of your research suggest the need for a risk assessment exercise prior to completion of this form (e.g. interviews away from the University)?	YES
Does any aspect of your research suggest that there may be a physical or mental risk to you, or other research team members, carrying out fieldwork with human subjects? See further, the Social Research Association's Code of Practice for the Safety of Social Researchers.	NO
If you have particular questions about any of this guidance that you would like to raise with the Law School Research Ethics Committee, please note them here.	Not applicable
If you have questions about issues that are not covered in this general section, please note them here.	Not applicable
If you have found particularly useful materials that you think may be helpful for others in addressing general ethical issues in research projects, please note them here.	Not applicable

Section 5: Specific considerations (All Applicants)

Note: Detailed answers **are** expected in this section.

Methodology

1. Please indicate your methodology and proposed data collection methods (e.g., survey questionnaire, interview, internet, focus groups, observations, secondary data). Please also indicate whether you have prior relevant research training in, or experience of, those methods.
The research methodologies of the thesis are mainly based on a theoretical approach of which most information is collected from library research. The thesis will start with an exploration of the theoretical bases for the emergence of non-state regulatory regimes, focusing on the theory of reflexive law and experimentalism. These theories will then be applied in the context of environmental regulation with the aim of developing an alternative model of environmental governance where private actors perform the role of regulators, shifting from the conventional model of command and control where the state is a hierarchical regulator to the model of interdependence which encourages more active roles of non-state actors in regulation. A limited number of interviews are to be conducted as a supplement to the theoretical research. It is recognised that a small sample may not be representative but the insights gained from key stakeholders is likely to shape the analytical frame of the thesis. The aims of the interviews are to gain viewpoints from different perspectives and to obtain useful information for understanding the EP performance in practice as well as for developing an institutional design and procedures for the EP regulation so as it could effectively address environmental problems in a developing country. The interviews will be semi-structured, for structured questions are still necessary simply to direct the interviews to gain required information but must be flexible to leave narrative space for interviewees to elaborate some issues or raise new ideas. The details on the diversity and the characteristics of interviewees is further explained in the later section of the application. With regards to the research training, the researcher has attended courses on research skills which includes the lessons on theoretical and empirical approaches as clarified in the earlier section of this application.

Additional materials provided for review	NO

Covert & Deceptive Research

2a. Are you using any covert or deceptive methods?	NO

2b. If so, please state what you propose to do and why these methods are justified.
Not applicable

Nature of Research Participants

3a. Please describe the expected characteristics of your research participants.
In order to gain a comprehensive overview of the EP performance in practice, the interviews are designed to cover different groups of participants that are involved with the EP regulation in Thailand. The targeted participants are identified from the different roles they are deemed to play in the EP regulatory regime in Thailand, which are the regulators, the regulated, the state, and the academic scholars and activists. Therefore, the interviewees could be categorised into four groups. The first group is the potential regulator in the EP regime in Thailand, namely a Thai bank or financial institution that incorporates environmental considerations in its assessment process before financing a project. The aim of interviewing this stakeholder is to obtain viewpoints on the benefits of the EP adoption from the perspective of Thai financial institutions as well as the difficulties or concerns with regards to the EP implementation. The EP adoption is voluntary, and it is important to understand why a private financial institution will decide to adhere to environmental standards. The data generated from the interviews of this group of stakeholders will be useful for analysing how much the EP regime could actually incentivize profit-driven institutions to adopt and adhere to the EP standards. The second group of interviewees are the clients of the EP financial institutions, namely the investors that applied for financial support from the EP financiers. The aim of this interview is to gain information on any difficulties or problems concerned with the EP conditions from the aspect of the investors as well as to ask for their opinions on the role of the state required in this regime. Such information will be useful for structuring the EP regulation in terms of establishing the responsibilities and transparency of the EP financial institutions as well as the proper role of the state under this form of private regulation in the eyes of clients. The third group is the state authority in environmental management in Thailand. The researcher primarily expects to interview governmental officers of the Department of Environmental Quality Promotion and any other relevant agencies. The aim to reach this group of interviewees is to gain an understanding and awareness of governmental perspectives on the impacts of the EP framework, which is private regulation, and to explore in the likely implications of working on environmental management when the EP is adopted. The information collected from interviewing this group will be useful for assessing the proper role of the state in the EP regime. The last group of participants are scholars or activists who work in the field of private environmental regulation in Thailand. They could provide updated information on the status of the EP acceptance and preparation in Thailand as well as providing further contacts to be further interviewed or who could provide useful information. Moreover, there can be a snowball effect across the interview process. The stakeholders might introduce other persons or organisations that can provide further information with regards to the EP framework. The total number of interviews will be approximately 8 – 10. Since all participants are Thai, the interviews are to be conducted in Thai language.

3b. Will your proposed research will involve contact with any of the following groups:	
Children/young people (younger than 18) / Vulnerable adults	NO
Adults or young people who lack the capacity to consent/NHS patients or service users/prisoners (in health-related research)	NO

3c. If you answered YES to either of the first two categories in 3b, you will need to consider whether you should apply for a Disclosure and Barring Service check. Please consult the Guidance Document for details.

Please outline any particular risks which you think your research might raise for those groups, or for you or your research team, and whether you believe specific measures may be needed to address them. If you believe your research may impact other groups for whom special measures may be needed, please describe the group(s) and any precautionary measures to be taken.

If you answered YES to either of the last two categories in 3b, the LREC alone is unlikely to be able to provide ethical clearance for your research. Please consult the Guidance Document for details.

Not applicable

Undue Influence

4a. How will you gain access to the proposed research setting(s)? Are there particular factors, such as power dynamics/relationships of dependency that may place undue influence upon research participants to participate, e.g. influence of gatekeepers or other intermediaries? To what extent does your methodology address such issues?

The names of financial institutions which adopt the EP standards are publicized on the EP website with the details of the projects they have financed. The researcher will use this publicly available information to identify a project in Thailand that is compliant with the EP standards and get the names of corporations that are clients to the EP financiers. The information on the website of the Association of Thai Banks also provides the names of Thai banks and their policies which recognise environmental issues. After getting the names of private financial institutions and investors, the researcher will initially contact them via email, followed by a telephone call or meeting in person. Their cooperation in giving the interview is probable as they will appreciate promoting their sustainable business operations for their reputational benefits in terms of social responsibility. Regarding the governmental officers, with reference to the researcher's prior experience with Thailand's government agencies of which the missions concern environmental policies, they welcome interviews for research. However, they will have to be contacted by telephone and then setting an appointment to meet in person, given that email correspondence is usually ignored by Thai officers. Academic scholars or activists will be willing to render information for the interview, since the researcher has already had some specific names of potential interviewing sources as recognised from their work on promoting sustainable business with particular interests in the EP framework. Similar to the groups of investors and private financial institutions, a scholar will be contacted via email first to find out a proper time for interview by telephone call or meeting in person. There will be gatekeepers of the organisation of both private business and government; for example, the researcher might have to contact the public relations personnel of private corporation and governmental agencies before getting access to a person who can provide the information for the interview, or might have to contact the secretary before directly contacting some academic scholars or activists. However, the gatekeepers in such cases will not cause any significant influence on the participants but will simply act as an intermediary between the researcher and the interviewees. Since the researcher is a Thai native and is accustomed to Thai culture, the communication with gatekeepers and interviewers will not be

problematic at all. The introduction as a PhD student who will apply the data collected for developing her thesis will also help the researcher to gain access to stakeholders.

4b Will payments or other inducements be offered to research participants	NO

4c. If you answered YES to 4b, please provide details, in particular the rationale for the use of a payment/inducement.
Not applicable

Data Protection

5a. Please describe the nature of the empirical data you expect to collect.
As clarified in section 3a, the interviewees are categorised into four groups, representing different roles in regulation. The empirical data expected to obtain are viewpoints and experience of participants, since the interviews are aimed to gain useful information on the EP performance in practice as a supplement to the theory-based research. The data collected from the first group of interviewees, which are private financial institutions, will include their policies to incorporate environmental consideration into their financial decision-making processes. For the second group of participants, namely investors, the empirical data may include particular reasons an industry or an investor decide to become a client of the EP financial institutions. Therefore, the information gained from both the first and the second group of interviewees potentially concerns corporate data which the data protection rules do not apply to. However, some information could allow the identification of a person providing such data and could be regarded as personal data under the data protection rules. This case also applies to the information gained from the governmental officials that their positions could constitute an identification of specific persons. The data expected to collect from the last group are academic views and activists' knowledge concerning the EP situation in Thailand. The information is mainly based on their opinions and experience from their working in the context of environmental development. Again, the reference to their positions or certain information from the interviews, despite anonymized, could allow the identification of a person. In cases where the participant would like to have an interview off the record, the researcher will not mention the information gained from the interview in the thesis. However, such information is still useful in terms of providing new perspectives or explaining actual practice concerning the EP governance and might provide the way to gain other useful data.

5b. Will you be collecting 'personal data' (as per the GDPR and Data Protection Act 2018)	YES

5c. If you answered YES to 5b, please indicate your assessment of whether the data collected could be used to support measures or decisions targeted at particular individuals, or might cause substantial distress or damage to a data subject (GDPR Art. 89 / DPA 2018, s.19)

There could be a case where it is necessary to mention the positions of the interviewees in the thesis for analysing the information obtained from the perspectives of certain groups of participants, and that could allow the identification of participants based on such mentioned positions. However, the data collected from the interviews basically are opinions and practical information on the EP regime which will not cause any significant harms to such participants, and there will not be any measures taken against them, since the nature of the research that simply needs the empirical information as a supplement to the theory-based research. All participants will be fully informed of their rights to give or withdraw their consents before the interviews.

5d. If you answered YES to 5b, please outline whether personal data will be pseudonymised or anonymized, and if so, how and at what stages in the research.

The researcher will anonymise any personal data since the earliest stage of the interviews. The transcription will be done by the researcher and any names as well as identifiable factors of participants will be removed or pseudonymised. The researcher will try to anonymise the data as far as possible but there might be a case where the researcher has to mention the positions of the participants or has to refer to some information that could lead to the identification of participants as explained above. The researcher will generalise such identifiable features by mentioning them in general terms, avoiding specification that might lead to identification of participants or will use pseudonyms. The participants will be informed of such situation. A prior consent from the participants is required and the researcher will not act against the participant's wish if he or she does not like certain information to be included in the thesis as it might make him or her identifiable. The researcher will carefully specify the parts of the interviews which the participants want to be off record, so they will not be publicly shared. Both anonymised and non-anonymised data as well as off-record information will be securely stored in electronic files with passwords allowing only the researcher to get access to them. The recording device will be encrypted to ensure the confidentiality and anonymity of the data collected. The researcher will inform the participants regarding how the information obtained from the interviews will be applied in the thesis and how it will be stored.

5e. Will you be collecting any of the 'special categories of personal data' (per GDPR Art.9)	NO

5f. If you answered YES to 5e, in addition to your responses in 5c, please explain briefly why you would describe your research as being 'in the substantial public interest' (GDPR Art.9 (g)).

Not applicable

5g. Will you be sharing research data with third parties in the UK but outside the University of Bristol	NO

5h. If you answered YES to 5g, please outline how you have ensured that any personal data will be transferred/disclosed securely between yourself and those parties.

Not applicable

5i. Does your research require you to share personal data of research participants with third parties outside the EEA e.g. researchers in overseas universities?	NO
5j. If you answered YES to 5i, please outline how you have ensured that any personal data transfer is in accordance with the requirements of GDPR Art. 44-49.	
Not applicable	

Informed Consent

6a. What advance information will you be providing to research participants (or their proxies)? Please provide copies of material to be provided to or, as appropriate, read to, research participants. **If you are not planning to provide advance information, in written or verbal form, please provide a full explanation – see also 2a.**	
The participants will be informed on the background and the aim of the research interviews. Their rights to render and withdraw consent at any time will be notified as well. The researcher will then tell the participants on how the information gained from them will be applied in the research. Since the interviews have to be conducted in the Thai language, the researcher will provide the translation of the consent form to interviewees.	
Additional materials provided for review	YES
6b. Will you obtain written, or recorded, consent from research participants prior to collecting data from them?	YES
6c. If you answered NO to 6b, please explain why obtaining written, or recorded, consent is undesirable in the context of your research, and outline any additional measures you believe may be necessary to ensure that the rights of research participants are adequately protected.	
Not applicable	
6d. If you answered YES to 6b, please explain how you will handle withdrawal of consent by research participants. Additionally, if your project is a multi-stage or longitudinal project, please outline how you intend to ensure that research participants will remain adequately informed and whether further grants of consents will, or may be sought.	

The researcher will listen to the participant's concerns and the reasons that they wish to withdraw their consent. In the first instance, the research will try to find a mutually agreeable solution and discuss how the interviews can be adapted to make the process more comfortable to them; for example, turning to use the data collected from them on an anonymous basis. If all the efforts to adapt the interviews to suit them are made but the participants still want to withdraw their consent, the researcher will then search for other actors that share similar experience or characteristics with the initially targeted participants and interview them instead. If the participants withdraw their consent during the research, the researcher will destroy all the information previously obtained from them.

6e. Please outline any circumstances relating to your research where legal or ethical issues might require you to disclose information pertaining to a research participant without their consent. How has this influenced the guarantees you are offering your intended research participants?

Any legal obligations such as the statutory duty to inform the police or other public bodies of information required by law or by the court will be an exceptional case that the researcher has to disclose information without asking for their consent. However, such situation is exceptional and is highly unlikely in the research interviews.

Data Security and Archiving

7a. In what format do you intend to collect and store your data? Where will it be stored and what security arrangements will be in place to ensure its safe-keeping at the various stages of the research process?

The interviews will be recorded on the university recording device and noted down in computer files. The files will be stored in an encrypted format with password setting, which will enable only the researcher to gain access to such data, in order to secure the data at every stage of the research.

7b. What will happen to the data at the end of the research process? If it is to be archived, how will this be done? If it is to be destroyed, when will this happen and how will this be achieved?

According to the University guidance, the data collected from the interview should be preserved for a minimum of ten years after the research is finished. They will be stored in digital forms accessible by the researcher and password protected to prevent any leak or improper access to such information. The encrypted electronic data will then be stored in a laptop or a USB with passcode lock during the ten-year period. The researcher will comply with the University's requirements for data storage and may apply for research data storage facility if the University is able to provide such facility. After the period of ten years as suggested by the University guidance, the recorded files will be destroyed by over-writing.

Freedom of Information

8. If a Freedom of Information request was made for the research data to be collected during this project, are there any exemptions that you would seek to claim under the Freedom of Information

Act which would require or allow the University to withhold some or all of the data from disclosure, either during the research or if archived?
No

Health & Safety

9. Are there any significant health and safety risks to the researchers, the research participants, or third parties associated with this research? Please comment on your perception of the degree of risk, in context; whether you think special precautions are necessary; and why your approach is proportionate to any risk.
The interviews will be conducted in Thailand which is a country outside the UK. Although there is no significant health and safety risks to the researcher, the risk assessment is conducted and attached with this application.

Other Information

10. Is there anything further that you think the Research Ethics Committee should know about in relation to your proposed research, such as particular risks not identified by this form, costs imposed on research participants, or particular benefits of the research that should be weighed against the risks and/or costs identified, which the form does not cater for?
-

Feedback

Feedback from participants in the ethical review process is vital to keeping it a participatory and academic (as opposed to an administrative/managerial) process. If you have any further questions about, or criticisms of, the ethics review process which the Research Ethics Committee can take into account when considering future practice, please take the time to let us know.
-

LAW
Research in the Community and Travel outside the UK
Risk Assessment Form

Section 1: Application Details

Name	Thitinant Tengaumnuay
Address	[redacted]
Mobile phone number	[redacted]
E mail address	tt17192@bristol.ac.uk
Student number (if applicable)	P 1760384
Supervisor (name and contact number)	Professor Tony Prosser
Programme title (MPhil/MSc/PhD)	PhD in Law
Title of research project	'The Impacts of the Equator Principles as Private Self-Regulation in Environmental Development in a Developing Country'
Start/end date of fieldwork (please give approximate if date(s) unknown)	May 2020 – June 2020
Previous experience or competency	The researcher attended the Primary Units for Research Students (PURs) and Advanced Legal and Socio-Legal Research Methods course in 2018/2019, which provided her an opportunity to improve her research skills and realise the possible risks that might occur during the fieldwork.

Section 2: Interview Risk Assessment

Hazard	Control Measures (e.g. training, supervision, protective equipment)
Risk of physical threat or abuse	The interview will be conducted in public places which could reduce the risks of harms caused to the researcher. However, the content of the interview does not concern any sensitive issues that might risk causing threat or abuse.
Risk of psychological trauma to Researcher (as a result of actual or threatened violence or the nature of what is disclosed during the interaction)	The nature of this interview does not concern any threatening information or sensitive issues. The informative nature of the interview will not cause any psychological trauma to the researcher.

Risk of being in a compromising situation (in which there might be accusations of improper behaviour)	The interview does not concern any profit-driven issues but aims for information and opinions from practical and expert perspectives. All the interviews will be conducted in public places and recorded, so there will be no risks of a compromising situation.
Increased exposure to risks of everyday life and social interaction (such as road accidents and infectious illness)	The country where the interview is to be conducted is her home country. She is, therefore, considerably familiar with the traffic, safety, and hygiene standards of the country and know how to prevent risks of everyday life and social interaction properly in her home country.
Risk of causing psychological or physical harm to others	The nature of the interview does not concern any sensitive issues that might cause risks of psychological or physical harms to others.
Any other hazards	None

Section 3: Travel Background Information

Travel location	Bangkok, Thailand
Dates of travel (please give approximate if date(s) unknown)	Approximately from early March to late April
Accommodation arrangements (add address, telephone and e mail where possible)	The researcher's home in Thailand: [redacted] [redacted] Email: tt17192@bristol.ac.uk, [redacted]
Travel and Transport (Licensed drivers, travel to and from the research project from the UK and within the country)	Air travel from the UK to Thailand. Public transportation within Thailand, such as Bangkok skytrain (BTS), Bangkok underground train (MRT), taxi, and bus.

Section 4: In country hazards

Hazard	**Control Measures** (e.g. training, supervision, protective equipment)
Physical **(extreme weather or natural hazards)**	There are no significant hazards as extreme weather or natural hazards in Thailand.

Biological **(poisonous plants, infectious diseases, animals, soil or water microorganisms, insects)**	The interview will be conducted in Bangkok which is the capital city of Thailand. There are no risks of biological hazards as such.
Man-made hazards **(electrical equipment, insecure buildings, slurry pits, power and pipelines)**	The interview will be conducted in a secure office; the researcher does not have to expose to any dangerous equipment or buildings. There are no risks of man-made hazards as such.

Security **(**terrorism, crime, or aggression from members of the public)	The current political situation in Thailand does not indicate any risks of terrorisms or aggression from people in Bangkok where the interview will be conducted.
Emergency Arrangements (first-aid, distance from medical facilities, accident reporting)	Medical facilities and hospitals are not difficult to find or contact in Bangkok.
Health Issues (prevalence of disease, disabilities, health conditions requirement for immunisations and health surveillance)	There are no significant risks of serious disease or requirement for immunisations in Bangkok. The nature of the interview does not concern any exposure to disease or health risks.
Cultural Issues (Local laws and customs, for example dress, drugs, sex, taking photographs of the local population etc.)	The interview does not require any particular interaction with local people or local cultures. There are no cultural issues associated with the interview.
Residual Risks	
None	

Section 5: Emergency Plan

Emergency contacts in the UK (name, address and phone numbers of UK contact)	[redacted]

Emergency contacts in the country (name, address and phone numbers of in country contact)	[redacted]
Medical care (location and details of closest health care facility where possible)	[redacted]
Communication plan **(How and when communication with the University will take place and actions following non-communications)**	The researcher will contact her supervisor by sending an email summarising the progression of work at the end of every week. In cases that there are any unforeseen problems, she can send an email to her supervisor to ask for advice before that.

Section 6: Additional Information

Pre-research meeting(s)	The researcher has an ordinary supervisory meeting with her supervisor every month to discuss her work progress.
Participant Training	Primary Units for Research Students (PURs) and Advanced Legal and Socio-Legal Research Methods course in 2018/2019
Foreign & Commonwealth Office Advice	The researcher has already checked the Foreign and Commonwealth travel advice. The area of interview, namely Bangkok, is safe to travel, and the researcher is familiar with the national laws and customs of Thailand as it is her home country.
Permission to work on site	No particular requirement for permission to work in this research
Insurance To arrange UoB student travel insurance email: insurance-enquiries@bristol.ac.uk	

Section 7: Signatures

	Name	Date
Assessment received		
Supervisor		

Section 6: Sign off for Supervisors and Primary Investigators.

Primary Supervisor's Statement (where the application is made by a research student)

I have reviewed this application, and have discussed the research design, and any training needs, with the applicant prior to its submission. I (or the alternative supervisor also named here) will provide continuing ethical oversight for this research which will take a heightened form if the applicant has not undertaken formal ethics training.	[redacted]
Date of electronic submission of this form by primary supervisor to Law School Research Ethics Committee	14/02/2020

Primary Investigator's Statement (where application is completed by project researcher)

I have reviewed this application, and have discussed the research design, and any training needs, with the applicant prior to its submission.	
Date of electronic submission of this form by Primary Investigator to Law School Research Ethics Committee	

Section 7: Checklist

All relevant questions completed	YES
Copy of risk assessment document	YES
Copy of information documents to be provided to research participants	YES
Copy of written consent sheet to be completed by research participants	YES
Other documents provided (please specify)	-
Registration checklist completed and submitted to Research and Enterprise Development	YES/NO

II. Consent Form

Informed Consent for

'The Impacts of the Equator Principles as Private Self-Regulation in Environmental Development in a Developing Country'

Please tick the appropriate boxes	**Yes**	**No**

1. Taking part in the study

I confirm that I have read and understood the information sheet about the study on 'The Impacts of the Equator Principles as Private Self-Regulation in Environmental Development in a Developing Country'. I confirm that I have had the ability to ask further questions about the study and my questions have been answered to my satisfaction.	☐	☐
I consent voluntarily to be a participant in this study and understand that I can refuse to answer questions and I can withdraw from the study at any time up to the publication of the study findings, without having to give a reason. If I withdraw my consent, any earlier data collected from me will be destroyed.	☐	☐
I understand and accept that taking part in the study involves an interview that will be recorded in an audio file and written notes, but such information will be securely stored and will be accessible by the researcher only.	☐	☐

2. Use of the information in the study

I understand that information I provide will be used to supplement the research on the Equator Principles regulatory regime. The information collected from this interview is considered empirical data for analysing the functions of the Equator Principles regulatory regime in practice.	☐	☐
I understand that the information I provide will be anonymised in the thesis as far as possible. Any personal information collected about me that can identify me, such as my name, will not be publicised.	☐	☐
If the researcher wants to use quotes in research outputs, I agree that my information can be quoted in research outputs.	☐	☐

I agree to the University of Bristol keeping and processing the data I have provided during the course of this study. I understand that these data will be used only for the purpose(s) of this study, and my consent is conditional upon the University complying with its duties and obligations under UK data protection law and relevant Thai data protection law. ☐ ☐

I understand and agree that the data collected from the interviews will be securely stored for ten years in an encrypted format with password setting. After the ten-year period, the recorded files will be destroyed by over-writing. ☐ ☐

3. Signatures

_____	_____	_____
Name of participant [IN CAPITALS]	Signature	Date

III. List of Interviews

Group 1: The Regulated

- **Interview I**: A lawyer working for the EPFI's clients (Thailand, 7 January 2021)

Aim of the interview: to obtain viewpoints on the incentives/difficulties/concerns with regards to the EP implementation and their preparation for adopting the EP framework

Questions:

1. Why did the corporation decide to join the EP? Can you explain the rationale or motivation behind the commitment to the EP?

2. What would you perceive to be the benefits of and incentives for becoming an EPFI?

3. Does the corporation have any concerns about the EP framework, or have the corporation encountered any difficulties in implementing commitments in compliance with EP?

4. Is there an internal committee or group within the corporation that is dedicated to matters relating to the EP?

Group 2: The Regulator

- **Interview II**: A Thai bank officer (Thailand, 21 November 2020)
- **Interview III**: A Thai bank officer (Thailand, 20 January 2021)

Aim of the interview: to obtain viewpoints on the incentives/difficulties/concerns with regards to the EP implementation and their preparation for adopting the EP framework, as well as their opinions about the proper role of the state in the EP framework

Questions:

1. As the bank has already adopted the UN Principles for Responsible Banking, which suggests your recognition of sustainability goals, are you preparing to adopt the EP framework? / or Have you thought about the EP adoption?

2. What are the benefits/incentives for becoming a sustainable bank?

3. If so, can you explain the process of how the bank prepares for the EP adoption?

4. Why don't you adopt the EP framework at the time you adopt the UN Principles for Responsible Banking?

5. Are there any (practical)difficulties facing implementation, or does the bank have any concerns about adopting and implementing the EP?

6. Do you have an expert team to consider the EIA conducted by the clients? / Is there an internal committee or group within the bank that is dedicated to matters relating to sustainable finance?

7. What role do you think private actors, like banks, should have in monitoring and evaluating the EP framework?

8. What role do you think the state should take in the EP framework?

Group 3: Academics and Civil Society

- **Interview IV**: A Thai environmental NGO activist (3 November 2020)

Aim of the interviews: to gain information on the problems of state environmental regulation and their attention to the importance of private financial institutions in environmental development

Questions:

1. Do you have any campaigns focusing on the responsibilities of financial institutions or the projects funded by them?

2. What is your knowledge of the EP framework?

3. What has been your involvement with the EP?

4. In your opinion, are there any significant problems of the EIA process as required under the NEQA?

5. Can you explain your understanding of how stakeholders participate in the EIA process?

6. Do you think that the actual participation of stakeholders is a meaningful process?

7. How are the participants of the EIA process selected?

8. To your knowledge, have many lawsuits on environmental matters been brought to the court?

9. Who has standing before the Thai court on environmental matters? In other words, to what extent can a civilian bring an environmental case against the state or a private actor, like a bank or a financial institution?

10. Do you think that the authorities regulating environmental issues provide clear guidance and information on environmental issues?

11. Is the process for accessing the courts clearly available? How are environmental cases dealt with? Which actors and institutions are involved? Do different agencies collaborate to solve environmental complaints?

12. What role do you think the state should take in the EP framework?

13. What do you think about the idea of assigning a private financial institution as a regulator in environmental governance?

- **Interview V**: A Thai academic author and researcher who works on promoting sustainable finance in Thailand (Thailand, 10 November 2020)

Aim of the interview: to gain updated information on the status of the EP acceptance and preparation in Thailand and identify other persons or organisations that might provide further information on the EP framework ('snowballing' research method).

Questions:

1. Do you think the idea of the EP framework can effectively address environmental problems in Thailand? Why, or why not? Any case studies?
2. In what ways have Thai private financial institutions responded to the EP framework?
3. How can we ensure that there is actually public engagement in the EIA process required under the EP framework? How can we ensure that participants have sufficient knowledge and capabilities to participate in the public discourse efficiently?
4. There are several case studies where the clients did not follow the EP requirements accurately or completely but the EPFI still finance such clients. Why do you think this happens?
5. Do you think that mechanisms for compliance with the EP should be strengthened?
6. Do you think that the EP framework is still an interesting alternative in addressing environmental problems? If so/if not, can you explain why?
7. What role do you think the state should take in the EP framework?
8. What role do you think private actors, like banks and financial institutions, should have in monitoring and evaluating the EP framework?

Group 4: The State Agencies

- **Interview VI**: A Thai officer of an Environmental Government Agency (Thailand, 1 December 2020).

Aim of the interview: to gain the information on the actual function of national environmental regulation and institutions in Thailand and to know their opinions towards the EP framework

Questions:

1. What is your knowledge of the EP framework?
2. What has been your involvement with the EP?
3. Is environmental regulation managed by one government authority or do government agencies collaborate on environmental governance?
4. To what extent is the criminal liability enforced under the NEQA? Are you aware of any instances in which a finding of criminal liability has been made?
5. What mechanisms and/or processes have been put in place to ensure the actual engagement of stakeholders in the EIA process?

6. What do you think is the major problem in national environmental regulation?

7. To what extent do you think private regulation such as the EP process can address environmental problems?

8. What do you think is the proper role of the state in the EP regime?

IV. The Equator Principles 4 (2020)

EQUATOR PRINCIPLES

THE EQUATOR PRINCIPLES
JULY 2020

A financial industry benchmark for determining, assessing
and managing environmental and social risk in projects
www.equator-principles.com

EQUATOR PRINCIPLES

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EQUATOR PRINCIPLES

PREAMBLE

Large infrastructure and industrial Projects can have adverse impacts on people and on the environment. As financiers and advisors, we work in partnership with our clients to identify, assess and manage environmental and social risks and impacts in a structured way, and on an ongoing basis. Such collaboration promotes sustainable environmental and social performance and can lead to improved financial, environmental and social outcomes. Where appropriate, we, the Equator Principles Financial Institutions (EPFIs), will encourage our clients to address potential or actual adverse risks and impacts identified during the Project Development Lifecycle.

We, the EPFIs, have adopted the Equator Principles in order to ensure that the Projects we finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management practices. EPFIs acknowledge that the application of the Equator Principles can contribute to delivering on the objectives and outcomes of the *United Nations Sustainable Development Goals* (SDGs). Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable they should be minimised and mitigated, and where residual impacts remain, clients should provide remedy for human rights impacts or offset environmental impacts as appropriate. In this regard, when financing Projects:

- we will fulfill our responsibility to respect Human Rights in line with the *United Nations Guiding Principles on Business and Human Rights* (UNGPs) by carrying out human rights due diligence;
- we support the objectives of the *2015 Paris Agreement* and recognise that EPFIs have a role to play in improving the availability of climate-related information, such as the Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) when assessing the potential transition and physical risks of Projects financed under the Equator Principles; and
- we support conservation including the aim of enhancing the evidence base for research and decisions relating to biodiversity.

The Equator Principles are intended to serve as a common baseline and framework for financial institutions to identify, assess and manage environmental and social risks when financing Projects. We commit to implementing the Equator Principles through our internal environmental and social policies, procedures and standards for financing Projects. We will not provide Project Finance, Project-Related Corporate Loans to Projects or Project-Related Refinance and Project-Related Acquisition Finance to Projects which do not comply with the

relevant Equator Principles requirements. As Bridge Loans and Project Finance Advisory Services are provided earlier in the Project timeline, we will request that the client communicates its intention to adhere to the requirements of the Equator Principles when subsequently seeking long term financing. EPFIs also acknowledge that we have broader responsibilities for identifying and managing adverse environmental and social risks and impacts, and respecting Human Rights, for financial products that fall outside of the Scope of the Equator Principles and which are managed through EPFIs' corporate environmental and social risk policies, procedures and standards. EPFIs, at their own discretion, may utilise the Equator Principles framework for financial products that fall outside of the Scope of the Equator Principles.

EPFIs will review and update the Equator Principles on a periodic basis based on implementation experience and in order to reflect ongoing learning and emerging good practice.

SCOPE

The Equator Principles apply globally and to all industry sectors.

The Equator Principles apply to the financial products[1] described below when supporting a new Project:

1. **Project Finance Advisory Services** where total Project capital costs are US$10 million or more.

2. **Project Finance** with total Project capital costs of US$10 million or more.

3. **Project-Related Corporate Loans** where all of the following three criteria are met:

    i. The majority of the loan is related to a Project over which the client has Effective Operational Control (either direct or indirect).
    ii. The total aggregate loan amount and the EPFI's individual commitment (before syndication or sell down) are each at least US$50 million.
    iii. The loan tenor is at least two years.

4. **Bridge Loans** with a tenor of less than two years that are intended to be refinanced by Project Finance or a Project-Related Corporate Loan that is anticipated to meet the relevant criteria described in 2 and 3 above.

5. **Project-Related Refinance** and **Project-Related Acquisition Finance**, where all of the following three criteria are met:
    i. The underlying Project was financed in accordance with the Equator Principles framework.
    ii. There has been no material change in the scale or scope of the Project.
    iii. Project Completion has not yet occurred at the time of the signing of the facility or loan agreement.

While the Equator Principles are not intended to be applied retroactively, the EPFI will apply the Principles to the financing of expansions or upgrades of an existing Project.

[1] Please refer to Exhibit I (Glossary of Terms) for a definition of the five financial products described herein.

APPROACH

Project Finance and Project-Related Corporate Loans

The EPFI will only provide Project Finance and Project-Related Corporate Loans to Projects that meet the relevant requirements of Principles 1-10.

Project-Related Refinance and Project-Related Acquisition Finance

The EPFI will continue to apply relevant Equator Principles requirements to the underlying Project by taking reasonable measures to ensure that all relevant existing environmental and social obligations continue to be included in new financing documentation.

Project Finance Advisory Services and Bridge Loans

Where the EPFI is providing Project Finance Advisory Services or a Bridge Loan, the EPFI will make the client aware of the content, application and benefits of applying the Equator Principles to the anticipated Project. The EPFI will request that the client confirms its intention to adhere to the requirements of the Equator Principles when subsequently seeking long term financing. The EPFI will guide and support the client through the steps required to apply the Equator Principles.

For Bridge Loans categorised A or B (as defined in Principle 1) the following requirements apply:

- Where the Project is in the feasibility phase and no impacts are expected during the tenor of the loan, the EPFI will require that the client confirm that it will undertake an Environmental and Social Assessment (Assessment) process.

- Where Environmental and Social Assessment Documentation (Assessment Documentation) has been prepared and Project development is expected to begin during the tenor of the loan, the EPFI will, where appropriate, work with the client to identify an Independent Environmental and Social Consultant and develop a scope of work to commence an Independent Review (as defined in Principle 7).

Information Sharing

Recognising business confidentiality and applicable laws and regulations, Mandated EPFIs will share, when appropriate, relevant environmental and social information with other Mandated Financial Institutions, strictly for the purpose of achieving consistent application of the Equator Principles. Such information sharing shall not relate to any competitively sensitive information. Any decision as to whether, and on what terms, to provide financial services (as defined in the Scope) will be for each EPFI to make independently and in accordance with its own risk management policies. Timing constraints may lead EPFIs considering a transaction to seek authorisation from their clients to start such information sharing before all other financial institutions are formally mandated. EPFIs expect clients to provide such authorisation.

EQUATOR PRINCIPLES

STATEMENT OF PRINCIPLES

Principle 1: Review and Categorisation

When a Project is proposed for financing, the EPFI will, as part of its internal environmental and social review and due diligence, categorise the Project based on the magnitude of potential environmental and social risks and impacts, including those related to Human Rights, climate change, and biodiversity. Such categorisation is based on the International Finance Corporation's (IFC) environmental and social categorisation process. The categories are:

Category A – Projects with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented;

Category B – Projects with potential limited adverse environmental and social risks and/or impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures[2]; and

Category C – Projects with minimal or no adverse environmental and social risks and/or impacts.

The EPFI's environmental and social due diligence is commensurate with the nature, scale and stage of the Project, and with the categorised level of environmental and social risks and impacts.

Principle 2: Environmental and Social Assessment

The EPFI will require the client to conduct an appropriate Assessment process to address, to the EPFI's satisfaction, the relevant environmental and social risks and scale of impacts of the proposed Project (which may include the illustrative list of issues found in Exhibit II). The Assessment Documentation should propose measures to minimise, mitigate, and where residual impacts remain, to compensate/offset/remedy for risks and impacts to Workers,

[2] There can be a range in the scale of potential environmental and social risks and impacts within Projects classified as Category B. In general terms, higher risk Category B Projects will be treated similarly to Category A Projects, and lower risk Category B Projects could be treated in a lighter regime. The EPFI shall, at their own discretion, determine the appropriate level of Assessment Documentation, review, and/or monitoring required to address these risks and impacts in accordance with Principles 1-10.

Affected Communities, and the environment, in a manner relevant and appropriate to the nature and scale of the proposed Project.

The Assessment Documentation will be an adequate, accurate and objective evaluation and presentation of the environmental and social risks and impacts, whether prepared by the client, consultants or external experts. For Category A and, as appropriate, Category B Projects, the Assessment Documentation includes an Environmental and Social Impact Assessment (ESIA). One or more specialised studies may also need to be undertaken. For other Category B and potentially C Projects, a limited or focused environmental or social assessment may be appropriate, applying applicable risk management standards relevant to the risks or impacts identified during the categorisation process.

The client is expected to include assessments of potential adverse Human Rights impacts and climate change risks as part of the ESIA or other Assessment, with these included in the Assessment Documentation. The client should refer to the UNGPs[3] when assessing Human Rights risks and impacts, and the Climate Change Risk Assessment should be aligned with Climate Physical Risk and Climate Transition Risk categories of the TCFD.

A Climate Change Risk Assessment is required:

- For all Category A and, as appropriate, Category B Projects[4], and will include consideration of relevant physical risks as defined by the TCFD.

- For all Projects, in all locations, when combined Scope 1 and Scope 2 Emissions are expected to be more than 100,000 tonnes of CO_2 equivalent annually. Consideration must be given to relevant Climate Transition Risks (as defined by the TCFD) and an alternatives analysis completed which evaluates lower Greenhouse Gas (GHG) intensive alternatives.

The depth and nature of the Climate Change Risk Assessment will depend on the type of Project as well as the nature of risks, including their materiality and severity. Refer to Annex A for an overview of a Climate Change Risk Assessment, including alternatives analysis requirements.

[3] Particularly paragraphs 17 – 21.
[4] See Footnote 2.

Principle 3: Applicable Environmental and Social Standards

The Assessment process should, in the first instance, address compliance with relevant host country laws, regulations and permits that pertain to environmental and social issues.

EPFIs operate in diverse markets: some with robust environmental and social governance, legislation systems and institutional capacity designed to protect their people and the environment; and some with evolving technical and institutional capacity to manage environmental and social issues.

The EPFI's due diligence will include, for all Category A and Category B Projects globally, review and confirmation by the EPFI of how the Project and transaction meet each of the Principles.

The EPFI will, with supporting advice from the Independent Environmental and Social Consultant where applicable, evaluate the Project's compliance with the applicable standards as follows:

1. For Projects located in Non-Designated Countries, compliance with the applicable IFC Performance Standards on Environmental and Social Sustainability (Performance Standards) and the World Bank Group Environmental, Health and Safety Guidelines (EHS Guidelines) (Exhibit III).

2. For Projects located in Designated Countries, compliance with relevant host country laws, regulations and permits that pertain to environmental and social issues.

The review of the Assessment process will establish, to the EPFI's satisfaction, the Project's overall compliance with, or justified deviation from, the applicable standards. The applicable standards (as described above) represent the minimum standards required by the EPFI. In addition, for Projects located in Designated Countries, the EPFI[5] will evaluate the specific risks of the Project to determine whether one or more of the IFC Performance Standards could be used as guidance to address those risks, in addition to host country laws.

The EPFI may, at its sole discretion, undertake additional due diligence against additional standards relevant to specific risks of the Project and apply additional requirements.

[5] Supported by the Independent Environmental and Social Consultant, for all Category A and, as appropriate, Category B Projects.

Principle 4: Environmental and Social Management System and Equator Principles Action Plan

For all Category A and Category B Projects[6] the EPFI will require the client to develop and / or maintain an Environmental and Social Management System (ESMS).

Further, an Environmental and Social Management Plan (ESMP) will be prepared by the client to address issues raised in the Assessment process and incorporate actions required to comply with the applicable standards. Where the applicable standards are not met to the EPFI's satisfaction, the client and the EPFI will agree to an Equator Principles Action Plan (EPAP). The EPAP is intended to outline gaps and commitments to meet EPFI requirements in line with the applicable standards.

Principle 5: Stakeholder Engagement

For all Category A and Category B Projects the EPFI will require the client to demonstrate effective Stakeholder Engagement, as an ongoing process in a structured and culturally appropriate manner, with Affected Communities, Workers and, where relevant, Other Stakeholders.

For Projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation process. The client will tailor its consultation process to: the risks and impacts of the Project; the Project's phase of development; the language preferences of the Affected Communities; their decision-making processes; and the needs of disadvantaged and vulnerable groups. This process should be free from external manipulation, interference, coercion and intimidation.

To facilitate Stakeholder Engagement, the client will, commensurate with the Project's risks and impacts, make the appropriate Assessment Documentation readily available to the Affected Communities, and where relevant Other Stakeholders, in the local language and in a culturally appropriate manner. The client will take account of, and document, the results of the Stakeholder Engagement process, including any actions agreed resulting from such process. Disclosure of environmental or social risks and adverse impacts should occur early in the Assessment process, in any event before the Project construction commences, and on an ongoing basis.

[6] See Footnote 2.

EPFIs recognise that Indigenous Peoples may represent vulnerable segments of Project-Affected Communities. All Projects affecting Indigenous Peoples will be subject to a process of Informed Consultation and Participation, and will need to comply with the rights and protections for Indigenous Peoples contained in relevant national law, including those laws implementing host country obligations under international law. IFC Performance Standard 7 paragraphs 13-17 detail the special circumstances that require the Free, Prior and Informed Consent (FPIC)[7] of affected Indigenous Peoples, which include any of the following:

- Projects with impacts on lands and natural resources subject to traditional ownership or under the customary use of Indigenous Peoples,
- Projects requiring the relocation of Indigenous Peoples from lands and natural resources subject to traditional ownership or under customary use,
- Projects with significant impacts on critical cultural heritage essential to the identity of Indigenous Peoples, or
- Projects using their cultural heritage for commercial purposes.

Globally for Projects that meet these special circumstances, the EPFI will require a qualified independent consultant[8] to evaluate the consultation process with Indigenous Peoples, and the outcomes of that process, against the requirements of host country laws and IFC Performance Standard 7.

Where Stakeholder Engagement, including with Indigenous Peoples, is the responsibility of the host government, EPFIs require the client to collaborate with the responsible government agency during the planning, implementation and monitoring of activities, to the extent permitted by the agency, to achieve outcomes that are consistent with IFC Performance Standard 7.

If a process of good faith negotiations that meets the consultation requirements of IFC Performance Standard 7 has been followed and documented, but it is not clear if FPIC has

[7] There is no universally accepted definition of FPIC. Based on good faith negotiation between the client and affected indigenous communities, FPIC builds on and expands the process of Informed Consultation and Participation, ensures the meaningful participation of Indigenous Peoples in decision-making, and focuses on achieving agreement. FPIC does not require unanimity, does not confer veto rights to individuals or sub-groups, and does not require the client to agree to aspects not under their control. Process elements to achieve FPIC are found in IFC Performance Standard 7.

[8] This may be the Independent Environmental and Social Consultant or could be another qualified independent consultant including legal advisor.

been achieved, the EPFI will determine, with supporting advice from the consultant, if this qualifies as a justified deviation from the requirements of IFC Performance Standard 7, and whether the client should pursue additional corrective actions to meet IFC Performance Standard 7's objectives.

Principle 6: Grievance Mechanism

For all Category A and, as appropriate, Category B Projects, the EPFI will require the client, as part of the ESMS, to establish effective grievance mechanisms which are designed for use by Affected Communities and Workers, as appropriate, to receive and facilitate resolution of concerns and grievances about the Project's environmental and social performance.

Grievance mechanisms are required to be scaled to the risks and impacts of the Project, and will seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate, readily accessible, at no cost, and without retribution to the party that originated the issue or concern. Grievance mechanisms should not impede access to judicial or administrative remedies. The client will inform Affected Communities and Workers about the grievance mechanisms in the course of the Stakeholder Engagement process[9].

Principle 7: Independent Review

Project Finance and Project-Related Corporate Loans

For all Category A and, as appropriate, Category B Projects, an Independent Environmental and Social Consultant, will carry out an Independent Review of the Assessment process including the ESMPs, the ESMS, and the Stakeholder Engagement process documentation in order to assist the EPFI's due diligence and determination of Equator Principles compliance. The Independent Environmental and Social Consultant will also propose or opine on a suitable EPAP capable of bringing the Project into compliance with the Equator Principles, or indicate where there is a justified deviation from the applicable standards. The Independent Environmental and Social Consultant must be able to demonstrate expertise in evaluating the types of environmental and social risks and impacts relevant to the Project.

[9]Additional guidance for the effectiveness criteria for grievance mechanisms can be found in the UNGPs, Principles 29 and 31 and related Commentary.

For Category B projects, any due diligence performed by a multilateral or bilateral financial institution or an OECD Export Credit Agency may be taken into account to determine whether an Independent Review is required.

Principle 8: Covenants

An important strength of the Equator Principles is the incorporation of covenants linked to compliance.

For all Projects, where a client is not in compliance with its environmental and social covenants, the EPFI will work with the client on remedial actions to bring the Project back into compliance. If the client fails to re-establish compliance within an agreed grace period, the EPFI reserves the right to exercise remedies, including calling an event of default, as considered appropriate.

Project Finance and Project-Related Corporate Loans

The client will covenant in the financing documentation to comply with all relevant host country environmental and social laws, regulations and permits in all material respects.

Furthermore, for all Category A and Category B Projects, the client will covenant in the financial documentation:

a) to comply with the ESMPs and EPAP (where applicable) during the construction and operation of the Project in all material respects; and

b) to provide periodic reports in a format agreed with the EPFI (with the frequency of these reports proportionate to the severity of impacts, or as required by law, but not less than annually), prepared by in-house staff or third party experts, that i) document compliance with the ESMPs and EPAP (where applicable), and ii) provide representation of compliance with relevant local, state and host country environmental and social laws, regulations and permits; and

c) to decommission the facilities, where applicable and appropriate, in accordance with an agreed decommissioning plan.

Project-Related Refinance and Project-Related Acquisition Finance

EPFIs will take reasonable measures to ensure that all existing environmental and social obligations continue to be included in the new financing documentation.

Principle 9: Independent Monitoring and Reporting

Project Finance and Project-Related Corporate Loans

For all Category A and, as appropriate, Category B Projects[10], in order to assess Project compliance with the Equator Principles after Financial Close and over the life of the loan, the EPFI will require independent monitoring and reporting. Monitoring and reporting should be provided by an Independent Environmental and Social Consultant; alternatively, the EPFI will require that the client retain qualified and experienced external experts to verify its monitoring information, which will be shared with the EPFI in accordance with the frequency required in Principle 8b.

In line with the above, in the specific case of monitoring of Project-Related Corporate Loans to national, regional or local governments, governmental ministries and agencies, the EPFI may decide between requiring an Independent Environmental and Social Consultant or relying on internal monitoring by the EPFI.

Additionally, any monitoring performed by a multilateral or bilateral financial institution or an OECD Export Credit Agency may be taken into account.

Principle 10: Reporting and Transparency

Client Reporting Requirements

The following client reporting requirements are in addition to the disclosure requirements in Principle 5.

For all Category A and, as appropriate, Category B Projects:

[10] See Footnote 2.

- The client will ensure that, at a minimum, a summary of the ESIA is accessible and available online and that it includes a summary of Human Rights and climate change risks and impacts when relevant [11].

- The client will report publicly, on an annual basis, GHG emission levels (combined Scope 1 and Scope 2 Emissions, and, if appropriate, the GHG efficiency ratio[12]) during the operational phase for Projects emitting over 100,000 tonnes of CO_2 equivalent annually. Refer to Annex A for detailed requirements on GHG emissions reporting.

- The EPFI will encourage the client to share commercially non-sensitive Project-specific biodiversity data with the Global Biodiversity Information Facility[13] (GBIF) and relevant national and global data repositories, using formats and conditions to enable such data to be accessed and re-used in future decisions and research applications.

EPFI Reporting Requirements

The EPFI will, at least annually, report publicly on transactions that have reached Financial Close and on its Equator Principles implementation processes and experience. The EPFI will report according to the minimum reporting requirements detailed in Annex B, taking into account appropriate confidentiality considerations.

[11] Except in Project-Related Refinance and Project-Related Acquisition Finance .

[12] As appropriate, organisations should consider providing related, generally accepted industry-specific GHG efficiency ratios. For industries with high energy consumption, metrics related to emissions intensity are important to provide. For example, emissions per unit of economic output (e.g., unit of production, number of employees, or value-added) are widely used (TCFD Implementation Annex, June 2017, p. 17).

[13] See www.gbif.org/.

EQUATOR PRINCIPLES

DISCLAIMER

The Equator Principles is a baseline and framework for developing individual, internal environmental and social policies, procedures and practices. The Equator Principles do not create any rights in, or liability to, any person, public or private. Financial institutions adopt and implement the Equator Principles voluntarily and independently, without reliance on or recourse to the IFC, the World Bank Group, the Equator Principles Association, or other EPFIs. In a situation where there would be a clear conflict between applicable laws and regulations and requirements set out in the Equator Principles including confidentiality obligations, the laws and regulations of the relevant host country shall prevail. Due to the unprecedented circumstances caused by the global Covid-19 pandemic, the EP Association granted an extension to allow EPFIs a 3-month grace period on the transition. All EPFIs must implement EP4 by 1 October 2020.

EQUATOR PRINCIPLES

ANNEXES: IMPLEMENTATION REQUIREMENTS

The implementation requirements detailed in these annexes are an integral part of the Equator Principles.

Annex A: Climate Change: Alternatives Analysis, Quantification and Reporting of Greenhouse Gas Emissions

Alternatives Analysis

The alternatives analysis requires the evaluation of technically and financially feasible and cost-effective options available to reduce Project-related GHG emissions during the design, construction and operation of the Project.

For Scope 1 Emissions, this analysis will endeavour to ascertain the best practicable environmental option and will include consideration of alternative fuel or energy sources if applicable. Where an alternatives analysis is required by a regulatory permitting process, the analysis will follow the methodology and time frame required by the relevant process. For Projects in high carbon intensity sectors, the alternatives analysis will include comparisons to other viable technologies, used in the same industry and in the country or region, with the relative energy efficiency, GHG efficiency ratio[4], as appropriate, of the selected technology.

High carbon intensity sectors indicatively include but are not limited to the following: oil and gas, thermal power, cement and lime manufacturing, integrated steel mills, base metal smelting and refining, and foundries, pulp mills and potentially agriculture.

Following completion of an alternatives analysis, the client will provide, through appropriate documentation, evidence of technically and financially feasible and cost-effective options and justification on why the selected technologies were not selected. This does not modify or reduce the requirements set out in the applicable standards (e.g. IFC Performance Standard 3).

Quantification and Reporting

GHG emissions should be calculated in line with the GHG Protocol[14] to allow for aggregation and comparability across Projects, organisations and jurisdictions. Clients may use national reporting methodologies if they are consistent with the GHG Protocol. The client will quantify Scope 1 and Scope 2 Emissions.

The EPFI will require the client to report publicly on an annual basis on GHG emission levels (combined Scope 1 and Scope 2 Emissions) and GHG efficiency ratio, as appropriate, during the operational phase for Projects emitting over 100,000 tonnes of CO_2 equivalent annually. Clients will be encouraged to report publicly on Projects emitting over 25,000 tonnes. Public reporting requirements can be satisfied via host country regulatory requirements for reporting or environmental impact assessments, or voluntary reporting mechanisms such as the Carbon Disclosure Project, where such reporting includes emissions at Project level.

Where appropriate, EPFIs will encourage clients to publish a summary of the alternatives analysis as part of the ESIA. In some circumstances, public disclosure of the full alternatives analysis or Project-level emissions may not be appropriate.

Climate Change Risk Assessment

The Climate Change Risk Assessment should address the following questions at a high level:

- What are the current and anticipated climate risks (transition and/or physical as defined by the TCFD) of the Project's operations?

- Does the client have plans, processes, policies and systems in place to manage these risks? i.e. to mitigate, transfer, accept or control.

This assessment should also consider the Project's compatibility with the host country's national climate commitments, as appropriate.

[14] The GHG Protocol is based on a comprehensive globally standardised framework to measure and manage greenhouse gas (GHG) emissions from operations. Available from ghgprotocol.org.

Annex B - Minimum Reporting Requirements

The EPFI will report annually and as per the requirements detailed in all of the sections below. The reports will not contain any personal information related to individuals.

Data and Implementation Reporting

Data and implementation reporting is the responsibility of the EPFI. It will be published on the EPFI's website, in a single location and in an accessible format.

The EPFI will specify the reporting period (i.e. start and end dates) for all data and implementation reporting.

Project Finance Advisory Services Data

The EPFI will report on the total number of Project Finance Advisory Services mandated during the reporting period. The total will be broken down by Sector and Region.

Data for Project Finance Advisory Services will be reported under a separate heading from Project Finance and Project-Related Corporate Loans. Project Finance Advisory Services data may exclude the Category and whether an Independent Review has been carried out because the Project is often at an early stage of development and not all information is available.

Project Finance and Project-Related Corporate Loans Data

The EPFI will report on the total number of Project Finance transactions and total number of Project-Related Corporate Loans that reached Financial Close during the reporting period.

The totals for each product type will be broken down by Category (A, B or C) and then by:

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

Data for Project Finance transactions and Project-Related Corporate Loans should be shown separately.

Project-Related Refinance and **Project-Related Acquisition Finance**
The EPFI will report on the total numbers of Refinance and Acquisition Finance transactions that reached Financial Close during the reporting period.

The totals for each product type will be broken down by:

- Sector (i.e. Mining, Infrastructure, Oil and Gas, Power, Others)
- Region (i.e. Americas, Europe Middle East and Africa, Asia Pacific)
- Country Designation (i.e. Designated Country or Non-Designated Country)

In the case of Project-Related Refinance or Project-related Acquisition Finance of Project Finance transactions, the EPFI will follow the Project name reporting for Project Finance described below.

Bridge Loans Data

Data for Bridge Loans, due to their nature, are not subject to specific reporting requirements.

Implementation Reporting

The EPFI will report on its implementation of the Equator Principles, including:

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

For the first year of Equator Principles adoption, the EPFI will provide details of its internal preparation and staff training. After the first year, the EPFI may provide details on ongoing training of staff if considered relevant.

Project Name Reporting for Project Finance (including relevant Refinance and Acquisition Finance)

The EPFI will submit Project name data directly to the Equator Principles Association Secretariat for publication on the Equator Principles Association website.

Project name reporting is required for Project Finance transactions that have reached Financial Close and encouraged for Project-Related Corporate Loans that have reached Financial Close,

- subject to obtaining client consent,
- subject to applicable local laws and regulations, and
- subject to no additional liability for the EPFI as a result of reporting in certain identified jurisdictions.

To promote consistency in project name reporting, EPFIs in a syndicate should coordinate for the mandated lead arranger or environmental agent to seek client consent on behalf of the syndicate. If not feasible, each EPFI should independently contact the client for consent at any time deemed appropriate but no later than Financial Close.

The EPFI will submit the following Project name data directly or via a web link:

- Project name (as per the loan agreement and/or as publicly recognised),
- Calendar year in which the transaction reached Financial Close,
- Sector (i.e. Mining, Infrastructure, Oil and Gas, Power, Others), and
- Host country name.

Individual EPFIs may want to publish the data as part of their individual reporting, but there is no obligation to do so.

EXHIBITS: SUPPORTING INFORMATION

Exhibit I: Glossary of Terms

Unless specified here, the Equator Principles use definitions as set out in the IFC Performance Standards.

Acquisition Finance is provision of financing for the acquisition of a Project or a Project company which exclusively owns, or has a majority shareholding in a Project, and over which the client has Effective Operational Control.

Affected Communities are local communities within the Project's area of influence, directly affected by the Project.

Assessment (see **Environmental and Social Assessment**).

Assessment Documentation (see **Environmental and Social Assessment Documentation**).

Asset Finance is the provision of a loan for the purchase of assets (such as airplanes, cargo ships, or equipment) in exchange for a security interest in those assets.

Bridge Loan is an interim loan given to a business until the longer term stage of financing can be obtained.

Buyer Credit is a medium/long term Export Finance credit where the exporter's bank or other financial institution lends to the buyer or the buyer's bank.

Climate Physical Risks are those risks resulting from climate change, which involve event-drive (acute) or longer-term shifts (chronic) in climate patterns. Acute physical risks refer to those that are event-driven, including increased severity of extreme weather events such as cyclones, hurricanes, or floods. Chronic physical risks refer to longer-term shifts in climate patterns (e.g., sustained higher temperatures) that may cause sea level rise or chronic heat waves (source: TCFD Recommendations, June 2017).

Climate Transition Risks are risks which can arise from the process of adjusting to a lower-carbon economy. These include: policy and legal risks, such as policy constraints on emissions, imposition of carbon tax and other applicable policies, water or land use restrictions or incentives; shifts in demand and supply due to technology and market changes; reputation risks reflecting changing customer or community perceptions of an organisation's impact on

the transition to a low carbon and climate-resilient economy (source: TCFD Recommendations, June 2017).

Critical Habitats are areas with high biodiversity value, including (i) habitat of significant importance to Critically Endangered and/or Endangered species; (ii) habitat of significant importance to endemic and/or restricted-range species; (iii) habitat supporting globally significant concentrations of migratory species and/or congregatory species; (iv) highly threatened and/or unique ecosystems; and/or (v) areas associated with key evolutionary processes.

Critically Endangered and/or Endangered Species are the species listed on the International Union for the Conservation of Nature (IUCN) Red List of Threatened Species[15].

Designated Countries are those countries deemed to have robust environmental and social governance, legislation systems and institutional capacity designed to protect their people and the natural environment. The Equator Principles Association makes no independent assessment of each country's performance in these areas. As a proxy for such an assessment, the Equator Principles Association requires that a country must be both a member of the OECD and appear on the World Bank High Income Country list to qualify as a Designated Country. These data sets are reviewed quarterly by the Equator Principles Secretariat to ensure that any change in status is reflected in the Designated Countries list. The list of Designated Countries can be found on the Equator Principles Association website.

Effective Operational Control includes both direct control (as operator or major shareholder) of the Project by the client and indirect control (e.g. where a subsidiary of the client operates the Project).

Environmental and Social Assessment (Assessment) is a process that determines the potential environmental and social risks and impacts (including Human Rights and climate change risks and impacts, if applicable) of a proposed Project in its area of influence.

[15] The determination of critical habitat based on other listings is as follows: (i) If the species is listed nationally / regionally as critically endangered or endangered, in countries that have adhered to IUCN guidance, the critical habitat determination will be made on a project by project basis in consultation with competent professionals; and (ii) in instances where nationally or regionally listed species' categorisations do not correspond well to those of the IUCN (e.g., some countries more generally list species as "protected" or "restricted"), an assessment will be conducted to determine the rationale and purpose of the listing. In this case, the critical habitat determination will be based on such an assessment.

Environmental and Social Assessment Documentation (Assessment Documentation) is a series of documents prepared for a Project as part of the Assessment process. The extent and detail of the documentation is commensurate with the Project's potential environmental and social risks and impacts. Where a Project has a potential to cause adverse Human Rights impacts, the Assessment Documentation should include an assessment of those impacts. Examples of Assessment Documentation are: an Environmental and Social Impact Assessment (ESIA), Environmental and Social Management Plan (ESMP), or documents more limited in scale (such as an audit, risk assessment, hazard assessment and relevant Project-specific environmental permits). Non-technical environmental summaries can also be used to enhance the Assessment Documentation when these are disclosed to the public as part a broader Stakeholder Engagement process.

Environmental and Social Impact Assessment (ESIA) is a comprehensive document of a Project's potential environmental and social risks and impacts. An ESIA is usually prepared for greenfield developments or large expansions with specifically identified physical elements, aspects, and facilities that are likely to generate significant environmental or social impacts. Exhibit II provides an overview of the potential environmental and social issues addressed in the ESIA.

Environmental and Social Management Plan (ESMP) summarises the client's commitments to address and mitigate risks and impacts identified as part of the Assessment, through avoidance, minimisation, and compensation/offset. This may range from a brief description of routine mitigation measures to a series of more comprehensive management plans (e.g. water management plan, waste management plan, resettlement action plan, Indigenous Peoples plan, emergency preparedness and response plan, decommissioning plan). The level of detail and complexity of the ESMP and the priority of the identified measures and actions will be commensurate with the Project's potential risks and impacts. The ESMP definition and characteristics are broadly similar to those of the "Management Programs" referred to in IFC Performance Standard 1.

Environmental and Social Management System (ESMS) is the overarching environmental, social, health and safety management system which may be applicable at a corporate or Project level. The system is designed to identify, assess and manage risks and impacts in respect to the Project on an ongoing basis. The system consists of manuals and related source documents, including policies, management programs and plans, procedures, requirements, performance indicators, responsibilities, training and periodic audits and inspections with respect to environmental or social issues, including Stakeholder Engagement and grievance mechanisms. It is the overriding framework by which an ESMP and/or Equator Principles AP

is implemented. The term may refer to the system for the construction phase or the operational phase of the Project, or to both as the context may require.

Equator Principles Action Plan (EPAP), or Environmental and Social Action Plan (ESAP), is prepared, as a result of the EPFI's due diligence process, to describe and prioritise the actions needed to address any gaps in the Assessment Documentation, ESMPs, the ESMS, or Stakeholder Engagement process documentation to bring the Project in line with applicable standards as defined in the Equator Principles. The EPAP is typically tabular in form and lists distinct actions from mitigation measures to follow-up studies or plans that complement the Assessment.

Equator Principles Association is the unincorporated association of member EPFIs whose object is the management, administration and development of the Equator Principles. The Equator Principles Association Secretariat manages the day to day running of the Equator Principles Association including the collation of EPFIs Project name reporting data. For more information go to the Equator Principles Association website.

Equator Principles Reviewers are EPFI employees responsible for reviewing the environmental and social aspects of transactions subject to the Equator Principles. They may be part of a distinct Equator Principles team or members of banking, credit risk, corporate sustainability (or similar) departments/divisions tasked with applying the Equator Principles internally.

Export Finance (also known as Export Credits) is an insurance, guarantee or financing arrangement which enables a foreign buyer of exported goods and/or services to defer payment over a period of time. Export credits are generally divided into short-term, medium-term (usually two to five years repayment) and long-term (usually over five years).

Financial Close is defined as the date on which all conditions precedent to initial drawing of the debt have been satisfied or waived.

Financial Threshold criteria are applied as part of the Equator Principles framework due to the significant costs involved in applying the framework (including due diligence and seeking advice from an independent environmental and social consultant) and the complex nature of large projects, where potential adverse environmental and social risks are likely to be higher.

Free, Prior, Informed, Consent (FPIC). There is no universally accepted definition of FPIC. Based on good faith negotiation between the client and affected indigenous communities,

FPIC builds on and expands the process of Informed Consultation and Participation, ensures the meaningful participation of Indigenous Peoples in decision-making, and focuses on achieving agreement. FPIC does not require unanimity, does not confer veto rights to individuals or sub-groups, and does not require the client to agree to aspects not under their control.

Global Biodiversity Information Facility (GBIF)[16] is an international network and research infrastructure funded by governments and aimed at providing open access to data about all types of life on Earth. It utilises an evolving community-developed standard which enables compiling of biodiversity data from a variety of sources, and aims to produce economic and social benefits and enable sustainable development by providing sound scientific evidence on biodiversity.

Human Rights are described in international standards aimed at securing dignity and equality for all. Every human being is entitled to enjoy them without discrimination. As a minimum, relevant human rights are those expressed in the International Bill of Human Rights – meaning the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.

Independent Environmental and Social Consultant is a qualified independent firm or consultant (not directly tied to the client) acceptable to the EPFI.

Independent Review is a review of the Assessment Documentation including the ESMPs, ESMS and Stakeholder Engagement process documentation carried out by an Independent Environmental and Social Consultant.

Indigenous Peoples: There is no universally accepted definition of "Indigenous Peoples." Indigenous Peoples may be referred to in different countries by such terms as "Indigenous ethnic minorities," "aboriginals," "hill tribes," "minority nationalities," "scheduled tribes," "first nations," or "tribal groups." As in IFC Performance Standard 7, the term "Indigenous Peoples" is used here in a generic sense to refer to a distinct social and cultural group possessing the following characteristics in varying degrees:

[16] See www.gbif.org.

- "Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- "Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- "Customary cultural, economic, social, or political institutions that are separate from those of the mainstream society or culture; or
- "A distinct language or dialect, often different from the official language or languages of the country or region in which they reside."

United Nations (UN) Human Rights Conventions, such as the UN Declaration on the Rights of Indigenous Peoples, form the core of international instruments that provide the rights framework for members of the world's Indigenous Peoples. In addition, some countries have passed legislation or ratified other international or regional conventions for the protection of Indigenous Peoples, that must be taken account of in their respective jurisdictions.

Informed Consultation and Participation is an in-depth exchange of views and information and an organised and iterative consultation that leads the client to incorporate the views of Affected Communities, on issues that affect them directly (such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues), into their decision-making process.

Known Use of Proceeds is the information provided by the client on how the borrowings will be used.

Mandated Equator Principles Financial Institution or **Mandated Financial Institution** is a financial service provider that is contracted by a client to carry out banking services for a Project or transaction.

Non-Designated Countries are those countries not found on the list of Designated Countries on the Equator Principles Association website (see also Designated Countries).

Operational Control (see **Effective Operational Control**)

Other Stakeholders are those not directly affected by the Project but have an interest in it. They could include national and local authorities, neighbouring Projects, and/or non-governmental organisations.

Paris Agreement is the instrument under the United Nations Framework Convention on Climate Change adopted on 12 December 2015 and which entered into force on 4 November 2016 (UNFCCC Dec 1/CP.21 (2015) UN Doc FCCC/CP/2015/10/Add.1).

A **Project** is a development in any sector at an identified location (the location does not need to be contiguous – a Project may be located over one or more geographic areas). It includes an expansion or upgrade of an existing operation. Examples of Projects that trigger the Equator Principles include, but are not limited to; a power plant, mine, oil and gas Projects, chemical plant, infrastructure development, manufacturing plant, large scale real estate development, real estate development in a Sensitive Area, or any other Project that creates significant environmental and/or social risks and impacts. Projects can include new developments, expansions, or upgrades both in greenfield areas or previously developed areas. In the case of Export Credit Agency supported transactions, the new commercial, infrastructure or industrial undertaking to which the export is intended will be considered the Project.

Project Completion is the date at which a Project has been finished, functions, and performs according to certain pre-defined measures (usually defined in a completion test). After this date the Project's cash flows become the primary method of repayment.

Project Development Lifecycle is the overall process of developing and executing a Project. It includes the design and planning, construction, production, closure, decommissioning and restoration of a Project site, as well as the procurement of supplies, permissions, permitting and licensing, and financing and repayment. Indicatively, the lifecycle can range from one year for simple Projects to 15 years (or longer) for larger Projects.

Project Finance is a method of financing in which the lender looks primarily to the revenues generated by a Project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure. In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the Project's output, such as the electricity sold by a power plant. The client is usually a special purpose vehicle that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the Project's cash flow and on the collateral value of the Project's assets. For reference go to: "Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards ("Basel II")", November 2005. Reserve-Based

Financing in extractive sectors that is non-recourse and where the proceeds are used to develop one particular reserve (e.g. an oil field or a mine) is considered to be a Project Finance transaction covered under the Equator Principles.

Project Finance Advisory Services is the provision of advice on the potential financing of a development where one of the options may be Project Finance.

Project-Related Corporate Loans are corporate loans, made to business entities (either privately, publicly, or state-owned or controlled) related to a Project, either a new development or expansion (e.g. where there is an expanded footprint), where the Known Use of Proceeds is related to a Project in one of the following ways:

a. The lender looks primarily to the revenues generated by the Project as the source of repayment (as in Project Finance) and where security exists in the form of a corporate or parent company guarantee;

b. Documentation for the loan indicates that the majority of the proceeds of the total loan are directed to the Project. Such documentation may include the term sheet, information memorandum, credit agreement, or other representations provided by the client into its intended use of proceeds for the loan.

It includes loans to government-owned corporations and other legal entities created by a government to undertake commercial activities on behalf of the government. For all Category A and, as appropriate, Category B Projects, Project-Related Corporate Loans shall include loans to national, regional or local governments, governmental ministries and agencies.

Project-Related Corporate Loans shall include Export Finance in the form of Buyer Credit, but exclude Export Finance in the form of Supplier Credit (as the client has no Effective Operational Control). Furthermore, Project-Related Corporate Loans exclude other financial instruments that do not finance an underlying Project, such as Asset Finance, hedging, leasing, letters of credit, general corporate purposes loans, and general working capital expenditures loans used to maintain a company's operations.

Refinance is the process of replacing an existing loan with a new loan, where the new loan will be used to pay out (retire) an existing loan, and that loan is not near or in default.

Scope 1 Emissions are direct GHG emissions from the facilities owned or controlled within the physical Project boundary.

Scope 2 Emissions are indirect GHG emissions associated with the off-site production of energy used by the Project.

Sensitive Area is an area of international, national or regional importance, such as wetlands, forests with high biodiversity value, areas of archaeological or cultural significance, areas of importance for Indigenous Peoples or other vulnerable groups, National Parks and other protected areas identified by national or international law.

Stakeholder Engagement refers to IFC Performance Standards provisions on external communication, environmental and social information disclosure, participation, informed consultation, and grievance mechanisms. For the Equator Principles, Stakeholder Engagement also refers to the overall requirements described under Principle 5.

Supplier Credit is a medium/long term Export Finance credit that is extended by the exporter to the overseas buyer.

TCFD Recommendations are the recommendations of the Task Force on Climate-related Financial Disclosures published on 15 June 2017. For more information see https://www.fsb-tcfd.org/.

United Nations Guiding Principles on Business and Human Rights (UNGPs): Available as *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* United Nations, New York and Geneva, 2011 reference HR/PUB/11/04.

Workers are all workers engaged directly or indirectly by the client to work at the Project site, including full-time and part-time workers, contractors, sub-contractors and temporary workers.

Exhibit II: Illustrative List of Potential Environmental and Social Issues to be Addressed in the Environmental and Social Assessment Documentation

The list below provides an overview of the issues that may be addressed in the Assessment Documentation. Note the list is for illustrative purposes only. The Assessment process of each Project may or may not identify all of the issues listed, or be relevant to every Project.

The Assessment Documentation may include, where applicable, the following:

1. assessment of the baseline environmental and social conditions
2. consideration of feasible environmentally and socially preferable alternatives
3. requirements under host country laws and regulations, applicable international treaties and agreements including the 2015 Paris Climate Change Agreement
4. protection and conservation of biodiversity (including endangered species and sensitive ecosystems in modified, natural and Critical Habitats) and identification of legally protected areas[17]
5. sustainable management and use of renewable natural resources (including sustainable resource management through appropriate independent certification systems)
6. use and management of dangerous substances
7. major hazards assessment and management
8. efficient production: total energy consumed per output scaling factor[18], delivery and use of energy
9. pollution prevention and waste minimisation, pollution controls (liquid effluents and air emissions), and waste management
10. greenhouse gas emissions level and emissions intensity
11. water usage, water intensity, water source
12. land cover, land use practices
13. consideration of physical climate risks and adaptation opportunities, and of viability of Project operations under changing weather patterns/climatic conditions

[17] Projects in some areas may not be acceptable for financing with the possible exception of Projects specifically designed to contribute to the conservation of the area. These areas should be identified during the assessment of Critical Habitats and brought to the attention of the EPFI as early as possible in the financing process. They include: United Nations Educational, Scientific and Cultural Organisation (UNESCO) Natural and Mixed World Heritage Sites; and Sites that fit the designation criteria of the Alliance for Zero Extinction (AZE). Refer to IFC Performance Standards Guidance Note 6 (February 2019).

[18] This modification and those pertaining to 10) – 13) are influenced by TCFD implementation annex page 8.

14. cumulative impacts of existing Projects, the proposed Project, and anticipated future Projects
15. consideration of actual or potential adverse Human Rights impacts and if none were identified, an explanation of how the determination of the absence of Human Rights risks was reached, including which stakeholder groups and vulnerable populations (if present) were considered in their analysis
16. labour issues (including the four core labour standards), and occupational health and safety
17. consultation and participation of affected parties in the design, review and implementation of the Project
18. socio-economic impacts
19. impacts on Affected Communities, and disadvantaged or vulnerable groups
20. gender and disproportionate gender impacts
21. land acquisition and involuntary resettlement
22. impacts on Indigenous Peoples, and their unique cultural systems and values including impacts to lands and natural resources subject to traditional ownership or under customary use
23. protection of cultural property and heritage
24. protection of community health, safety and security (including risks, impacts and management of Project's use of security personnel)
25. fire prevention and life safety

Exhibit III: IFC Performance Standards on Environmental and Social Sustainability and the World Bank Group Environmental, Health and Safety Guidelines

The Equator Principles refer to two separate parts of the IFC Sustainability Framework as "the then applicable standards" under Principle 3.

1. The IFC Performance Standards (PS)

Since January 2012, the following Performance Standards[19] are applicable:

PS1 - Assessment and Management of Environmental and Social Risks and Impacts
PS2 - Labor and Working Conditions
PS3 - Resource Efficiency and Pollution Prevention
PS4 - Community Health, Safety and Security
PS5 - Land Acquisition and Involuntary Resettlement
PS6 - Biodiversity Conservation and Sustainable Management of Living Natural Resources
PS7 - Indigenous Peoples
PS8 - Cultural Heritage

Guidance Notes accompany each Performance Standard. EPFIs do not formally adopt the Guidance Notes however EPFIs and clients may find them useful points of reference when seeking further guidance on or interpreting the Performance Standards. These products may occasionally be updated (for example Guidance Note 6 updated February 2019).

The IFC Performance Standards, Guidance Notes and Industry Specific Guidelines can be found on the IFC website.

2. The World Bank Group Environmental, Health and Safety (EHS) Guidelines

The World Bank Group EHS Guidelines[20] are technical reference documents containing examples of Good International Industry Practice (GIIP) as described in the IFC Performance Standards. They contain the performance levels and measures that are normally considered

[19] See www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards/.
[20] See www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/ehs-guidelines.

acceptable for Projects in Non-Designated Countries, as well as being achievable in new facilities at reasonable costs by existing technology. Two sets of guidelines are used:

The General Environmental, Health and Safety Guidelines

These Guidelines contain information on cross-cutting environmental, health, and safety issues potentially applicable to all industry sectors. They are divided into sections entitled:

- Environmental
- Occupational Health and Safety
- Community Health and Safety
- Construction
- Decommissioning

They should be used together with the relevant Industry Sector Guideline(s).

The Industry Sector Guidelines

These Guidelines contain information on industry-specific impacts and performance indicators, plus a general description of industry activities. They are grouped as follows:

<u>Agribusiness/Food Production</u>

- Annual Crop Production
- Aquaculture
- Breweries
- Dairy Processing
- Fish Processing
- Food and Beverage Processing
- Mammalian Livestock Production
- Meat Processing
- Perennial Crop Production
- Poultry Processing
- Poultry Production
- Sugar Manufacturing
- Vegetable Oil Production and Processing

<u>Chemicals</u>

- Coal Processing
- Large Volume Inorganic Compounds Manufacturing and Coal Tar Distillation
- Large Volume Petroleum-based Organic Chemicals Manufacturing
- Natural Gas Processing
- Nitrogenous Fertilizer Manufacturing
- Oleochemicals Manufacturing
- Pesticides Formulation, Manufacturing and Packaging
- Petroleum Refining
- Petroleum-based Polymers Manufacturing
- Pharmaceuticals and Biotechnology Manufacturing
- Phosphate Fertilizer Manufacturing

General Manufacturing
- Base Metal Smelting and Refining
- Cement and Lime Manufacturing
- Ceramic Tile and Sanitary Ware Manufacturing
- Construction Materials Extraction
- Foundries
- Glass Manufacturing
- Integrated Steel Mills
- Metal, Plastic, Rubber Products Manufacturing
- Printing
- Semiconductors and Electronics Manufacturing
- Tanning and Leather Finishing
- Textiles Manufacturing

Power
- Electric Power Transmission and Distribution
- Geothermal Power Generation
- Thermal Power
- Wind Energy

Mining
- Mining

Forestry
- Board and Particle-based Products
- Forest Harvesting Operations
- Pulp and Paper Mills
- Sawmilling and Wood-based Products

Oil and Gas
- Liquefied Natural Gas (LNG) Facilities
- Offshore Oil and Gas Development
- Onshore Oil and Gas Development

Infrastructure
- Airlines
- Airports
- Crude Oil and Petroleum Product Terminals
- Gas Distribution Systems
- Health Care Facilities
- Ports, Harbors and Terminals
- Railways
- Retail Petroleum Networks
- Shipping
- Telecommunications
- Toll Roads
- Tourism and Hospitality Development
- Waste Management Facilities
- Water and Sanitation