

**EVALUATING THE APPLICATION OF EU ENVIRONMENTAL
STANDARDS IN EUROPEAN PUBLIC BANKS' INVESTMENT
PROJECTS IN THIRD COUNTRIES:**

**TOWARDS
LEGAL ENVIRONMENTAL INDICATORS**

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**Evaluating the Application of EU Environmental Standards in
European Public Banks' Investment Projects in Third Countries:
Towards legal environmental indicators**

Het evalueren van de toepassing van EU milieu-standaarden in
investeringsprojecten van Europese publieke banken
in derde landen: Op weg naar juridische milieu-indicatoren

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ABBREVIATIONS

BATs	Best Available Techniques
BHSF	Barents Hot Spots Facility
BIT	Bilateral Investment Treaty
BSAP	Baltic Sea Action Plan
CCP	Common commercial policy of the EU
CEB	Council of Europe Development Bank
CJEU	Court of Justice of the European Union
CLP	Competition law and policy Indicators
DAC	OECD Development Assistance Committee
EAP	Environment Action Programme
EBRD	European Bank for Reconstruction and Development
ECB	European Central Bank
ECG	Evaluation Cooperation Group
ECHR	European Convention on Human Rights and Fundamental Freedoms
EEA	European Environment Agency
EEC	European Economic Community
EECCA	Countries of Eastern Europe, Caucasus and Central Asia
EHS	World Bank Environmental, Health, and Safety Guidelines
EIA	Environmental Impact Assessment
EIB	European Investment Bank
EP	Equator Principles
EPE	European Principles for Environment
ESAP	Environmental and Social Action Plan
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GEF	Global Environmental Facility
GIIP	Good International Industry Practice
ICAS	Chartered Accountants of Scotland
IEEP	Institute for European Environmental Policy
IFC	International Finance Corporation
IFI	International Financial Institution
IFOAM	International Federation of Organic Agriculture Movements
ILO	International Labour Organisation
IMF	International Monetary Fund

INECE	International Network for Environmental Compliance and Enforcement
IOC	Irkutsk Oil Company
IPPC	Integrated Pollution Prevention and Control
IRM	EBRD Independent Recourse Mechanism
ISO	International Organisation for Standardisation
KPK	Kuzbass Pischekombinat Company
LEI	Legal Environmental Indicators
LES	Legal Environmental Standards
MAI	Multilateral Agreement on Investment
MDB	Multilateral Development Bank
MEA	Multinational Environmental Agreement
MFI	Multinational Financial Institution
NEFCO	Nordic Environment Finance Corporation
NGO	Non-Governmental Organisation
NIB	Nordic Investment Bank
NMF	Nordic Environmental Development Fund
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OJ	Official Journal
OVOS	Assessment of Impact on the Environment procedure in Russia
PEEI	Principal European Economic Indicator
POINT	Policy Use and Influence of Indicators
PRI	UN Principles for Responsible Investment
SEA	Single European Act
TEC	Treaty on the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TGF	Testing Ground Facility
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNFCCC	UN Framework Convention on Climate Change
WGI	Worldwide Governance Indicators
WHO	World Health Organisation
WHSD	Western High Speed Diameter Road
WJP	World Justice Project

Chapter I

INTRODUCTION

The island of Sakhalin is located off Russia's Far Eastern coast. The environment of the island is particularly rich in resources, making Sakhalin the third largest producer of fish products in the Russian Far East. A unique population of critically endangered Pacific Grey Whales feeds there during the summer.¹

The Sakhalin II project on the island is the largest integrated oil and gas project in the world,² and at a cost of over \$25 billion, it includes three large offshore platforms, one of the world's largest liquefied natural gas plants, and oil/gas export terminals. Unfortunately, Sakhalin II is also associated with severe social and environmental impacts and risks, including threats to the feeding grounds of the Grey Whale, as well as to the livelihoods of Sakhalin fishing communities and indigenous peoples.

The European Bank for Reconstruction and Development (EBRD) has been the largest investor in Russia,³ and it applies European Union (EU) legal environmental standards to its direct investments in third countries.⁴ In 2004-2007, the Bank was considering financing the Project, which would have implied that the oil and gas development undertaking met minimal environmental and social standards.⁵ At the same time, however, environmental groups led by the WWF criticised the funding of Sakhalin II for violating the environmental standards adhered to by the Bank.⁶

The associated violations of both Russian and European environmental standards could have contributed to the EBRD's withdrawal from the Sakhalin project in 2007.⁷ What is certain is

¹ According to the International Union for Conservation of Nature (IUCN) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Grey Whale is threatened with extinction.

² According to its sponsor, *Sakhalin Energy Investment Company, Ltd.* It is currently composed of Gazprom, Royal Dutch Shell, Mitsui, and Mitsubishi, and was largely designed and built by Royal Dutch Shell. See www.sakhalinenergy.com/en/company/overview.wbp, accessed 12.3.2015.

³ Until the European Council decision on sanctions against Russia that involved temporarily reducing and, subsequently, stopping the extent of EBRD project finance in the country. See Council Regulation concerning restrictive measures in response to the annexation of Crimea and Sevastopol. (EU) No.1351/2014, 18.12.2014.

⁴ EBRD Environmental and Social Policy (2008), p. 2.

⁵ *Sakhalin II: Fit for purpose decision slammed by Sakhalin islanders, EBRD's reputation on the brink* Sakhalin Environmental Watch press release 14.12.2005.

⁶ See *The Wall Street Journal Europe*, 11.10.2005.

⁷ The EBRD realised it could not guarantee application of the required environmental standards as regarded the process of laying the pipelines (by *Sakhalin Energy*). Numerous violations were registered by the NGOs and later by the national controlling agency (Rosprirodnadzor). The Bank had to refuse to finance the project. See www.bellona.ru/articles_ru/articles_2008/ebrd_presentation, accessed 20.03.2015. See also Douma W. (2010) *The EBRD and Russia: Stimulating European Principles for the Environment*. In Douma W., Mucklow F. (eds.) *Environmental Finance and Socially Responsible Business in Russia*. T.M.C. Asser Press. 169-185. pp. 180, 181.

that the EBRD could not have committed itself to this major investment – thought to be some 500 million euro⁸ – without facing severe censure regarding the breach of environmental standards.⁹

The EBRD has financed a number of environmentally and/or socially harmful projects.¹⁰ The example of the Sakhalin II project shows how crucial it is for all parties involved in investment to avoid uncertainty about the applicable environmental standards, and to ensure that they are applied in practice. The lack of confidence regarding application of the standards brings about significant negative consequences for all stakeholders, including a higher risk of harmful environmental side effects, a lack of legal certainty on the part of affected parties, and the potential risk of an investor's withdrawal from the project.

1. Legal environmental standards

In the general framework of EU law, environmental law ensures the efficient protection and application of environmental standards *within the EU* first and foremost. To date, more than half of the national environmental legislation in the Member States originates from Brussels.¹¹ These legal standards are based on the guiding principles listed in the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU), and can be found in EU secondary environmental legislation and case law.

Also when acting externally, the gradual 'Europeanisation' based on actual achievements¹² is visibly taking place: according to the TEU, the EU 'shall define and pursue common policies and actions... to preserve and improve the quality of the environment and the sustainable

⁸ See Douma W. (2010) The EBRD and Russia: Stimulating European Principles for the Environment. In Douma W., Mucklow F. (eds.) *Environmental Finance and Socially Responsible Business in Russia*. T.M.C. Asser Press. 169-185. p. 180.

⁹ Lugar R. (2006) *European Bank for Reconstruction and Development (EBRD)*. Report to Members of the Committee on Foreign Relations, United States Senate, 109th Congress, second Session, 16.06.2006. pp. 14-16.

¹⁰ For example, the Bank has been funding a major polluter, the ZSNP aluminum smelter in Slovakia. See Adelle *et al.* (2010), p. 48; Goldberg D., Hunter D. (2015) *EBRD's Environmental Promise: A Bounced Check?* Center for International Environmental Law. And although in recent years the EBRD has increased its investments involving energy efficiency, NGOs claim it continues to diminish the impacts of these investments by simultaneously financing carbon-intensive developments such as coal, oil and gas production, transportation and generation, motorways, and airports. CEE Bankwatch website, 'Who we monitor: the European Bank of Reconstruction and Development (EBRD)', <http://bankwatch.org/our-work/who-we-monitor/ebrd>, accessed 17.09.2013.

¹¹ See Vogler J. (2011) European Union Environmental Policy. In Elliott L., Breslin S. (eds.) *Comparative Environmental Regionalism*. Taylor & Francis. 19-37. p. 21; Guay T. (2014) *The Business Environment of Europe: Firms, Governments, and Institutions*. Cambridge University Press. p. 61; UK Parliament (2005) *Energy efficiency*. House of Lords Science and Technology Committee. 2nd report of session 2005-06, Vol. 1. p. 138. According to the European Commission representative, in total there are currently 146 EU documents regulating the environment as well as consumer and health protection: 89 Directives and 57 Regulations. See Stoodley J. (2015) *Implications of the Commission's Better Regulation Agenda for Interinstitutional Relations*. Speech at the symposium 'Better Regulation in the EU Revisited: Benefitting Business and Citizens'. T.M.C. Asser Instituut, 23.04.2015. See also Douma W. *et al.* (2007) Europese invloed op regelgeving meetbaar. *Nederlands Juristenblad* 29. 1828-1834. p. 1829, where the authors come to the conclusion that approximately 66% of Dutch environmental law originates in Brussels.

¹² Amtenbrink F. (2007) Continuation or Reorientation - What Future for European Integration? Inaugural Lecture. *Erasmus Law lectures* 9. Boom Juridische uitgevers. pp. 3-4.

management of global natural resources'.¹³ The 'relationship with neighbouring countries shall be founded on the values of the Union',¹⁴ one of which is a high level of environmental protection. In its relationship 'with the wider world, the Union shall contribute to [...] the sustainable development of the Earth'.¹⁵ By setting this task in the Lisbon Treaty, the European Union has created one of the most explicit legal commitments to a sustainable future anywhere in the world.¹⁶

It has been argued that the EU can be considered a trendsetter in global environmental governance, despite the fact that it often 'falls short of its self-proclaimed leadership role'.¹⁷ One way the EU is giving an external dimension to its environmental policy is by means of the inclusion of environmental standards – as a voluntary condition – in foreign direct investment (FDI) agreements¹⁸ with third countries.¹⁹ However, contrary to the existing practice on democratic and human rights standards,²⁰ there is currently no consistent inclusion of European environmental protection standards in such agreements. In 1995-1998, the Organisation for Economic Cooperation and Development (OECD) launched the negotiation of a Multilateral Agreement on Investment (MAI), which would have included standard environmental protection provisions in investment agreements. The negotiation failed, however, *inter alia* due to irreconcilable differences among the negotiating parties.²¹ Against this background, the EU has been criticised for its approach to environmental standards in its relations with third countries, particularly in the area of EU-funded direct investment projects.²² There was also recognition of the problem

¹³ Article 21 (2) (f) TEU.

¹⁴ Article 8 (1) TEU.

¹⁵ Article 3 (5) TEU.

¹⁶ Aldson F. (2011) *EU Law and Sustainability in Focus: Will the Lisbon Treaty Lead to 'The Sustainable Development of Europe'?* Dissertation, Academia.edu. p. 1.

¹⁷ Vogler J., Stephan H. (2007) The European Union in global environmental governance: Leadership in the making? *International Environmental Agreements: Politics, Law and Economics* 7 (4), p. 389.

¹⁸ Foreign direct investment (FDI) is defined by the Organisation for Economic Cooperation and Development as the category of international investment made by an entity resident in one economy (direct investor) to acquire a lasting interest in an enterprise operating in another economy (direct investment enterprise). The lasting interest is deemed to exist if the direct investor acquires at least 10% of the voting power of the direct investment enterprise. See OECD (1999), p. 7. For a detailed definition, see Chapter III.

¹⁹ Under 'third countries' here are meant those that are not an EU-accession country: *i.e.* those not legally bound by the obligation to approximate their national legislation with that of the EU. The term 'third country' is used in the Treaties, where it means a country that is not a member of the Union. This meaning is derived from 'third country' in the sense of one not party to an agreement between two other countries. Even more generally, the term is used to denote a country other than two specific countries referred to, for instance, in the context of trade relations. This ambiguity is also compounded by the fact that the term is often incorrectly interpreted to mean 'third-world country'. See Fahlbeck R. *et al.* (2001) *European employment & industrial relations glossary*. Eurofound — European Foundation for the Improvement of Living and Working Conditions.

²⁰ European Commission (2010) *EU Guidelines on Human Rights Dialogues With non-EU Countries*; see also High Representative for the Elimination of Racial Discrimination (2010), Declaration 21.03.2010. www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/113458.pdf, accessed 30.03.2010.

²¹ Twenty EU Member States are members of the Organisation for Economic Co-operation and Development, founded in 1961. The European Commission has the status of observer; its representatives participate alongside Members in the work of the entire Organisation and its different bodies. The OECD promotes achievement of the highest sustainable economic growth and employment, as well as a rising standard of living in member countries and in the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations. See www.oecd.org.

²² UNCTAD (2008) *International Investment Rulemaking: Stocktaking, Challenges and the Way Forward*; see also Grey K., Brack D. (2002) *Environmental Issues in Policy Based Competition for Investment: A Literature Review*. OECD Environment Directorate. p. 312.

internally, when the former Environment Commissioner Margot Wallström stressed repeatedly that her priority was a better ‘policy coherence between external commitments and internal policies’.²³

Following the adoption by the European Commission of communications on integrating environment and sustainable development into economic and development cooperation policy,²⁴ on the sustainable development strategy,²⁵ and on the global partnership for sustainable development,²⁶ the EU approved in 2002 a specific Strategy on Environmental Integration in External Policies.²⁷ The aim of this strategy was to consider how to pursue environmental objectives more effectively in the day-to-day performance of the EU with regard to external relations. The European Union encourages the initiatives of other actors,²⁸ such as the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), the Council of Europe Development Bank (CEB), the Nordic Environment Finance Corporation (NEFCO), and the Nordic Investment Bank (NIB),²⁹ all of which proclaimed to have bound themselves voluntarily to EU environmental principles and standards when investing abroad, by signing the Declaration on the European Principles for the Environment (EPE).³⁰ Despite its title, this Declaration is not only based on principles, but also attributes main significance to the application EU legal environmental standards. Thus, it is argued that although called ‘principles’, the European Principles for the Environment are in fact much broader than that. The Declaration outlines the legislative and operational framework governing the application of legal environmental standards in third countries in the framework of foreign direct investment projects. At the same time, as discussed below, the reservation of the EPE Declaration, subjecting the

²³ Wallström M. (2003) *Implementing the WSSD Outcomes*. Speech at the European Parliament. Sustainable Development Inter-Group. Strasbourg, 24.09.2003.

²⁴ European Commission (2000) Communication Integrating environment and sustainable development into economic and development cooperation policy - Elements of a comprehensive strategy, COM (2000)264.

²⁵ European Commission (2001) Communication A sustainable Europe for a better world: A European Union strategy for sustainable development. Proposal to the Gothenburg European Council. COM (2001)264.

²⁶ European Commission (2002) Communication Towards a Global Partnership for Sustainable Development. Communication, COM (2002)82.

²⁷ Barcelona European Council (2002) Council strategy on environmental integration in the external policies of the General Affairs Council.

²⁸ See, for instance, European Commission (2009) Promoting effective financing for the environment in regions covered by the enlargement process and the European Neighbourhood Policy. SEC 1309 final; European Commission (2012) Memorandum of Understanding between The European Commission, The European Investment Bank together with the European Investment Fund, and The European Bank For Reconstruction And Development In Respect Of Cooperation Outside The European Union; European Commission (2003) Memorandum Of Understanding Between The European Commission, in Liaison with The European Investment Bank, The European Bank For Reconstruction And Development, The International Bank For Reconstruction and Development, The International Finance Corporation, The Nordic Investment Bank, The Nordic Environment Finance Corporation, and The Council Of Europe Development Bank, The Black Sea Trade & Development Bank on Cooperation For Accession Preparation of Central and East European Countries, Cyprus, Malta, and Turkey.

²⁹ Further in the text addressed as ‘EPE Banks’ or just ‘Banks’.

³⁰ Declaration on the European Principles for the Environment (2006), attached in Annex I to this study. The EPE initiative is examined in detail in Chapter V.

application of European environmental standards to local conditions in third countries, contributes to legal uncertainty and poses accountability questions in relation to EPE Banks' investments.³¹

Additionally, it is argued that such voluntary 'standard' possesses a rather elusive character, which explains, among other things, the absence of a standard's definition in academic literature. Consequently, it is necessary to study closely what a 'legal standard' is, and to crystallise its definition, what is done in Chapter II of this study. There it is suggested to define a legal environmental standard as *a legal norm based on principles and comprising primary and secondary European legislation, aiming at the most objective, effective, and contemporary implementation of environmental law*. Subsequently, armed with this knowledge, it is important to find a correct way to evaluate the application of such standards.

And indeed, it is recognised that more legal research is needed in this area.³² Up to the present, the European Commission has never examined the factual application of European environmental legal standards in third countries in the framework of EPE.³³ Specific legal instruments, such as investment agreements, incorporating environmental standards and thereby channelling of investment flows towards more sustainable development, remain largely unaddressed in the current literature.³⁴ No independent assessment of the application of European environmental standards in the framework of FDI projects has ever been conducted.³⁵

2. Research question: towards legal environmental indicators

The European Union strives towards the integration of environmental protection requirements in all policies of the Union, thus including regulating of external direct investment in the framework of Common Commercial Policy.³⁶ In addition, the EU-based EPE Banks declare that they voluntarily apply European environmental protection standards in their investment projects located in third countries. In order to evaluate the current situation concerning the application of legal European environmental standards in third countries, a theoretical and practical

³¹ Under an 'accountable investment' is understood an investment project, possessing and applying a mechanism, which consists of 1) *processes*, such as formulating objectives and assessing their realisation; 2) *consequences* that follow the results of assessment; 3) *preconditions*, ensuring the functioning of the whole mechanism, such as transparency and setting of a yardstick. See Chapter IV on the detailed overview of the accountability mechanism.

³² Cordonnier Segger M., Gehring M. *et al.* (eds.) (2011) *Sustainable Development in World Investment Law*. Kluwer Law International. p. 679.

³³ See inquiries to the European Commission DG Environment, email exchange 16.1.2011; inquiries at the EIB, telephone interview 6.02.2011; inquiries at EBRD, email exchange 30.01.2015. See generally, Schulze K., Tosun J. (2013) External dimensions of European environmental policy: An analysis of environmental treaty ratification by third states. *European Journal of Political Research* 52. 581-607. p. 582;

³⁴ See *Ibid.*

³⁵ For example, thus far no evaluations are being carried out by the Commission regarding the extent to which such environmental requirements are to be incorporated systematically into the EU Foreign Direct Investment policy. See inquiries at the European Commission, DG Environment & DG Trade; email exchange 9.4.2010 and 03.04.2015.

³⁶ See Article 11 TFEU.

instrument is needed. However, such an instrument does not yet exist in the field of environmental law.³⁷

Therefore, the goal of this study is to provide answers to the principle legal question: *'Which instrument can evaluate the application by the EPE Banks of European legal environmental standards in the framework of European direct investment projects in third countries?'*

This study aims at filling this lacuna by elaborating an *evaluation methodology* that allows the application of EU legal environmental standards in third countries to be evaluated. Subsequently, it constructs *legal environmental indicators* and applies them in a proof of concept.

It should be emphasised that this study does not provide a final set of legal environmental indicators. Instead, it suggests a set that is illustrative, and to be seen as the first step in their development. Arriving at a final and accepted set of legal environmental indicators requires taking into consideration responses, further input, and constructive comments from all parties that are directly or indirectly involved in the practices of project finance. It is also important to note that even an agreed upon set of legal environmental indicators is not final or complete: it allows for a broader set of indicators in the future, as the Banks and their stakeholders might need additional indicators that are measurable and important for them. At the same time, it is essential that a set of legal environmental indicators be agreed upon relatively soon, to allow for a comprehensive evaluation of the application of EU legal environmental standards in third countries as a commitment under the Declaration on the European Principles for the Environment.

The goal of the study is twofold. On the one hand, it focuses on resolving methodological difficulties in order to contribute to an accurate assessment of the application of EU legal environmental standards in foreign direct investment projects. On the other hand, it demonstrates in practice the application of the developed indicators. In the absence of an overarching instrument of European or international law in the field, the added value of the proposed legal environmental indicators is difficult to overestimate. By developing a methodology of standards' evaluation and an illustrative set of indicators, this study contributes primarily to the adherence to EU environmental standards by EPE Banks. In addition, the study lays a general foundation for future research into the extraterritorial application of European environmental law in the field of project finance.

The primary source of inspiration for legal environmental indicators involves the recently elaborated indicators for human rights standards,³⁸ as well as those for labour standards.³⁹ Other important sources are legal indicators on insolvency, launched by the EBRD in 2004;⁴⁰ on

³⁷ See Thomas S. (2006) Sustainable Development in Infrastructure Projects– more than just a utopian ideal? *Prinsent Masons*. p. 2.

³⁸ See UN High Commissioner for Human Rights publication OHCHR (2012) Human rights indicators: A guide to measurement and implementation. United Nations Office of the High Commissioner for Human rights, New York and Geneva.

³⁹ See Block R. *et al.* (2003) *Labor Standards in the United States and Canada*. Upjohn Institute for Employment Research; Cuyvers L., Bulcke, van den, D. (2004) *The Quantification Of Respect For Selected Core Labour Standards: Towards A Social Development Index?* ILO Staff Seminar on Qualitative Indicators of Labour Standards and their Application, ILO, Geneva, 14-15.09.2004; Block R. (2005) *Indicators of labour standards: an overview and comparison*. Working Paper 54. International Labour Organisation.

⁴⁰ See for further details Harmer R., Cooper N. (2003) *Report on the Results of the assessment of the Insolvency Laws of Countries in Transition*. Insolvency Law Assessment Project. EBRD. See generally on the EBRD employing indicators for its internal

corporate governance, elaborated by the EBRD a year later,⁴¹ and on competition law and policy, constructed by the OECD in 2007.⁴² These existing indicators are discussed in detail in Chapter VI.

3. Research scope

At the outset, it is important to bear two things in mind. Firstly, the whole of the given study remains within the legal domain. However, as the research question cannot be answered solely by using legal methods, certain studies from other fields are used as *auxiliary disciplines*, with instruments borrowed from, for instance, economics, sociology, and even statistics.

Secondly, throughout the study, the research reflects the complexity of evolving forms of governance and corporate social responsibility, and involves layers of rules stemming from multiple sources, including the philosophy of law, corporate law, environmental law, commercial law, and consumer protection law. These fields generally include both ‘hard’ law, such as federal and state statutes, and ‘soft’ law, such as codes and practices.⁴³

Thirdly, the study chooses the perspective of European Environmental law. However, considering the subject matter, it is devoted not only to legal environmental provisions, but also to environmental aspects of European investment in general, and of self-regulation by investors in particular. This special focus makes the study innovative and authentic. The context in which the export of European standards occurs shows that new regimes have emerged, allowing for non-state actors⁴⁴ – such as public financial institutions, private investors and non-governmental organisations – contributing to the spreading of European environmental standards outside European borders. For the purpose of this study, the choice is to focus primarily on investment projects realised by public investors, who bind themselves voluntarily to adhere to EU environmental standards.⁴⁵

Finally yet importantly, although this study primarily concerns the five EU-based investment banks signatory to the European Principles for the Environment, the term of International Financial

surveys Governance by Indicators: Halliday T. (2012) Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations. In Davis K., Fisher A., Engle Merry S. (eds.) *Global Power Through Classification and Ranking*. Oxford University Press. 180-202. pp. 184-190.

⁴¹ See Cigna G. (2006) *Corporate governance in action – where do we stand?* ERBD.

⁴² Hoj J. (2007).

⁴³ See for instance Zumbansen P. (2006) The Parallel Worlds of Corporate Governance and Labor Law. *Indiana Journal of Global Legal Studies* 13 (1). 261-312 (analysing the embeddedness of corporations in layers of rules of both business and employment protection natures).

⁴⁴ This is a broad term encompassing intergovernmental organisations, non-governmental organisations, transnational corporations and investment banks, as well as new forms of governance such as ‘public-private partnerships’ (PPPs) and ‘multi-stakeholder groups’. See Pieth M. (2009) Preface. In Peters A. *et al.* (eds.) *Non-state actors as standard setters*. Cambridge University Press. p. xix.

⁴⁵ In other words, the major EU-based investment banks signatory to the European Principles for the Environment: EBRD, EIB, NIB, CEB, NEFCO.

Institutions (IFIs) is often used in order to underline that the statements made in relation to the EPE Banks could also have implications beyond these Banks to other financial institutions.

The scope of this study is narrowed to FDI projects involving EPE Banks. Foreign direct investment has been one of the defining characteristics of the world economy over the past two decades, with the European Union being one of the biggest investors.⁴⁶ Some developing economies have emerged as major recipients of FDI funding in recent years, while many others have attempted to attract such funding, often by offering fiscal and financial incentives to foreign investors.⁴⁷ The European FDI, complete with its benefits and shortcomings,⁴⁸ can provide a strong stimulus regarding economic growth in the world's national and regional economies,⁴⁹ thereby contributing to the realisation of the EU external objectives of contributing to the sustainable development of the Earth.

As regards the geographical scope of the study, the focus lies on the 'channelling' of investment and standards from the European Union to third countries. This means that the countries not covered by this study are those that are candidates for accession to the EU, and are bound by the obligation to harmonise their environmental legislation with European standards, as well as countries covered by the EU Neighbourhood policy.⁵⁰

Another important aspect concerns the choice of legal environmental standards whose application is to be evaluated. Instead of attempting to examine the numerous legal principles and standards found in environmental law, and their eventual application in practice,⁵¹ the choice has been to limit the study to a certain number of legal standards that focus on the general cross-sectoral, rather than particular sector-specific requirements. Such standards of a general nature are as a rule broadly applicable, independent of the regulatory sector, and can be found, for example, in the Directive on environmental impact assessment and in the Directive on industrial emissions, applicable to almost any project that has a significant impact on the environment.⁵² This does not mean, however, that other legal environmental standards are considered to be of less importance or that cannot be traced using the corresponding legal environmental indicators.

Generally, in line with the research question, this study focuses on the technical aspects of evaluating standards, with the purpose of developing a methodology for such an evaluation.

⁴⁶ In 2009, EU27 was a net investor in the rest of the world, with outflows higher than inflows by 42 bn Euro. See Eurostat (2010).

⁴⁷ JBICI (2002), p. 2.

⁴⁸ Regarding negative consequences of FDI, see for instance Jones T., McNally R. (1998) Pollution for export. *Unesco Courier* 51(12). p. 10; UNED (2001) Towards Earth Summit 2002. *Economic Briefing Series* No. 1; Alfaroa L. et al. (2004) FDI and economic growth: the role of local financial markets. *Journal of International Economics* 64 (1). 89-112.

⁴⁹ UNCTAD (2012) World Investment Report 2012. p. 19.

⁵⁰ Officially comprising member countries of the Union for the Mediterranean (Albania, Algeria, Bosnia and Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, the Palestinian Authority, Syria, Tunisia, and Turkey), and countries of Eastern Partnership (Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine).

⁵¹ For studies examining a broad range of principles and standards in European environmental law, see Smith D. (2005) *EU Environmental Law: From Absence (1957) to Sustainable Development (1992) to Corporate Social Responsibility (2004)*. *Jean Monnet/Robert Schuman Paper Series* 5 (4).

⁵² Respectively, Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2012] OJ L 26/1, and Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control), [2010] OJ L 334/17.

4. Methodological approach

The methodological approach adopted by this study is characterised by two aspects, one related to the underlying approach and theory, and the other – to the voluntary nature of the European Principles for the Environment.

Concerning the first one, a *functional approach* to the environmental standards used by investment banks as a precondition to financing a project is used in this study. As is shown below, this approach to law fits well, as it is problem-oriented: namely, it assumes that the law is meant to serve given purposes – functions – and that it is assessed in terms of how well it performs these functions.

On the one hand, this study is of an academic nature, based on fundamental research. The problems of legal *implementation* as such fall outside its scope. On the other hand, however, the study relates directly to the *application* of law in practice. Its goal is to devise a mechanism to evaluate the application of standards, thus laying a solid foundation for a practitioner's reference, and therefore demanding more than simply a black-letter approach.⁵³

Thus, this study follows in the steps of Ehrenberg, who opted for the functional explanation of the nature of law. Carefully avoiding the opposing views held by the anti-functionalist Green⁵⁴ and the normative functionalists Perry and Moore,⁵⁵ Ehrenberg defends the possibility of a *neutral functional theory of law*. The function of laws is understood to be similar to that of instruments: 'They are created, developed and maintained to serve a purpose, or with a point, even if that purpose or point is not quite as clearly worked out as in the case of tools'.⁵⁶ Noteworthy, this theory recognises that the nature of legal regimes have to change in order to keep pace with changes in the economy and in society.⁵⁷

As far as this study is concerned, the neutral functional theory of law increases the practical relevance of fundamental legal research.⁵⁸ Moreover, it is assumed that law is not an isolated field, but that it must continuously and systematically respond to, and anticipate, social changes and new scientific knowledge 'without compromising on key legal values such as the rule of law'.⁵⁹

⁵³ As Fox and Bell wrote, 'The traditional view of law (sometimes referred to as a 'black-letter' approach) is to regard law as a set of legal rules derived from cases and statutes, which are applied by a judge who acts as a neutral and impartial referee seeking to resolve a dispute. [...] Such a definition of law is necessarily limited and does not seem to accord with the reality of law'. Fox M., Bell C. (1999) *Learning Legal Skills*. Blackstone. p. 9.

⁵⁴ Green L. (1998) The Functions of Law. *Cogito* 12. 117-124; Green L. (1996) The Concept of Law Revisited. *Michigan Law Review* 94. 1687-1717. p. 1709.

⁵⁵ Moore M. (1992) Law as a Functional Kind. In George R. (ed.) *Natural Law Theory: Contemporary Essays*. Clarendon Press. 188-242. p. 206; Perry S. (1998) Hart's Methodological Positivism. *Legal Theory* 4. 427-467.

⁵⁶ Ehrenberg K. (2009) Defending the Possibility of a Neutral Functional Theory of Law. *Oxford Journal of Legal Studies* 29 (1). 91-113. p. 91. See also Emerson M. *et al.* (2011) Upgrading the EU's Role As Global Actor: Institutions, Law and the Restructuring of European Diplomacy. Brussels Centre for European Policy Studies. p. 18.

⁵⁷ UK Environmental Agency (2005) *Delivering for the Environment. A 21st Century Approach to Regulation*. p. 1.

⁵⁸ Although traditionally legal scholars considered it their task to inform practitioners about the content of the law, and to comment on judicial decisions and new drafts (fundamental research), legal research is becoming more practice-oriented and applied. See Taekema S., Van Klink B. (2011), pp. 20-21. That being said, however, applied research undoubtedly cannot be carried out without a solid theoretical basis and defined terminology, thus requiring a certain fundamental activity.

⁵⁹ Gupta J., Sanchez N. (2012) Global Green Governance: Embedding the Green Economy in a Global Green and Equitable Rule of Law Polity. *Review of European Community & International Environmental Law* 21 (1). 12-22.

The neutral functional theory thus fits well with research on regulatory mechanism such as the application of environmental standards in third countries in the framework of FDI projects, with the European Union playing a key role in developing such standards and ensuring their implementation in Member States.⁶⁰

Concerning the second aspect of the methodological approach, related to the nature of the applied standards, initiatives such as the European Principles for the Environment are not binding by nature. Therefore, their application in practice in third countries is more difficult to assess than that of principles or rules, contained in a legal treaty. Additionally, the availability of a reservation in the Declaration on the European Principles for the Environment, allowing suspending the application of a standard 'subject to local conditions', makes such standards rather elusive.

In theory, the reservation leaves room for the standards' non-application in third countries. Therefore, a new way needs to be found to evaluate their application. From the methodological point of view, this fact has two consequences. First, the application of the legal environmental standards in third countries by EPE Banks cannot be approached in terms of a *study on their enforcement*: instead, considering the public nature of the signatory Banks, the realisation of their commitment in practice can be approached by means of a *study on the public accountability of Banks*. Second, it has to be clarified, whether the Banks' application of such standards brings peculiarities in the functioning of their accountability mechanism, as is done in Chapters IV and V.

The complexity of the concepts considered in this study requires methodological choices to be made. Diverse research methods are applied in different parts of the study, answering the purposes of a legal study, the construction of an indicator, and a proof of concept.

The first part of this study is in the shape of a 'legal study' (Chapters II-V). It 'sets the scene' for the whole project, provides the necessary definitions of key notions, and describes and outlines the legal framework related to the export of European legal standards by FDI projects. In this theoretical part, the assessment of relevant environmental standards, principles, and best practices used by some European investors as preconditions to investment in third countries is carried out. This is done by analysing the following: 1) legislation and policy documents; 2) decisions of the Court of Justice of the European Union; 3) soft-law measures and major environmental practices; and 4) academic writings in the field. In addition to the classical legal research, *qualitative research* is included in this phase in the form of working visits and consultations with the European Parliament and European Commission officials, as well as with key investors such as the EBRD and the EIB to gain further insight. This involves interviews with officials from the relevant departments dealing with European environmental law and/or investment policy.

The second part of the study is devoted to the construction of a legal basis and methodology for *legal environmental indicators* (Chapters VI-VII). Its purpose is to elaborate the instrument that allows evaluating the application of European environmental standards in direct investment projects outside the EU. The major steps in this methodology correspond to the International

⁶⁰ In his article on global environmentalism and the greening of international society, Falkner claims that different forms of greening international society all constitute a process of a 'deep-seated normative change'. Falkner R. (2012) Global Environmentalism and the Greening of International Society. *International Affairs* 88 (3). 503-522. p. 505.

Network for Environmental Compliance and Enforcement (INECE) three-stage model for identifying, designing, and using indicators, set up for environmental compliance and enforcement programmes.⁶¹ It is important to note in this context that the similar ideas to trace the application of legal standards with the help of indicators have been taking place since 2002 in different legal areas, such as in human rights law.⁶² Moreover, within environmental law a set of compliance indicators has recently been elaborated, which, although not focusing on the application of legal standards, serves as a starting point for the construction of legal indicators.⁶³ The proposed legal environmental indicators developed in the present study thus build on and are complementary to what has already been initiated, and are based partially on legal indicators elaborated in other areas of law.

Finally, the last part of the study represents a proof of concept, designed to demonstrate how the elaborated methodology can be applied in three EBRD-financed investment projects in Russia (Chapter VIII). The choice is based on the need to have knowledge of the legal system of the third country where the investment projects are situated. The data gained via such a proof of concept is illustrative of the academic legal research that took place earlier in the project. The evaluation of the application of European legal environmental standards is conducted by means of an *evaluation form*, designed for use by a wide range of FDI project stakeholders. For the purpose of this proof of concept, and in keeping with the illustrative aims, the form has been filled in by the author herself. Therefore, this part of the study is not to be confused with an empirical research method, which derives certain hypotheses and subsequently tests them to determine whether the proposed answer is right or wrong.

Nevertheless, it is acknowledged that by filling in the form the author poses the risk of a subjective and incorrect evaluation, resulting from insufficient information about the application of a certain legal standard in practice. Therefore, in order to ensure as much objectivity as possible when evaluating the extent to which a standard has been applied, the information regarding investment projects is collected in a number of ways: namely, via 1) project-related documentation; 2) interviews with project managers (in person, via phone calls and email contacts); 3) results of project-related litigation; 4) information from EBRD personnel and project websites; 5) information provided by the NGOs concerned; 6) project-related Internet and media publications; and 6) the study of related national legislative acts and academic writings.

Additionally, to ensure their verification, the achieved results are submitted for comment and validation to the relevant stakeholders and independent experts from EPE Banks, the European

⁶¹ INECE (2008) Performance measurement Guidance for Compliance and Enforcement Practitioners.

⁶² And also in competition law, insolvency law, and corporate governance. See Hoj J. (2007) *Competition Law and Policy Indicators For the OECD Countries*. OECD Economics Department Working Papers 568; Alemani E. *et al.* (2013) *New Indicators of competition Law and Policy for OECD and non-OECD Countries*. Economics Department Working Papers 1104; Harmer R., Cooper N. (2003) *Report on the Results of the assessment of the Insolvency Laws of Countries in Transition*. Insolvency Law Assessment Project. EBRD; Cigna G., Enriques L. (2006) *Law in Transition 2006: Assessing the effectiveness of corporate governance legislation*. EBRD Publications.

⁶³ See OECD (2009) *Measuring Results of Environmental Regulation and Compliance Assurance: Guidance for Countries Of Eastern Europe, Caucasus, And Central Asia*.

Commission, the European Environmental Agency, and the non-governmental organisation the ‘CEE Bankwatch’, the Belgian environmental legal and policy consultancy ‘Milieu’ and others.⁶⁴

5. Outline

By focusing on the application of European environmental standards outside the EU, this study provides a vision of environmental law that is comprehensive and critical, theoretical, and at the same time relevant for practice, ranging as it does from abstract to concrete situations, and from broad concepts to particular arrangements. Subsequently, this perception is narrowed down to the peculiarities of environmental self-regulation by International Financial Institutions and, eventually, by EPE Banks.

Faced with the challenge of combining the critical consideration of an academic lawyer with the positivist view of a practitioner, the current study is composed of nine chapters.

The current Chapter I provides an introduction to the whole study by clarifying its research question, scope and the methodological approach.

Setting the basis in relation to normative definitions, Chapter II seeks to define a legal standard as part of legal norm. It addresses first the general theoretical debate on the distinction between and the meaning of principles and standards, by turning to the philosophy of law and briefly considering legal theories of Dworkin, Raz, Daci, Kaplow, Posner, Kennedy, Braithwaite and Drahos. A better understanding of standards’ nature and place in the general hierarchy of norms contributes, in turn, to the formulation of their clearer definition. Second, the status of principles and standards in European Union law is analysed, leading to the formulation of a definition of a ‘European legal environmental standard’, as is used in this study. Thus, in this chapter the understanding of legal environmental standard is crystallised, facilitating a firmer grip on the subsequent discussion regarding the evaluation of such standards’ application.

Building upon this knowledge, Chapter III starts by bringing terminological clarity in relation to the *application* of European environmental standards in third countries, and subsequently examines the *actors*, their *rationale*, and the *frameworks* shaping this activity. While doing so, this chapter addresses *the role* of the European Union and of International Financial Institutions in promoting the environmental standards worldwide; gives attention to *the reasons* these actors are doing so; and examines the existent legal and regulatory *frameworks* used to apply environmental standards in third countries.

Chapter IV places the issue of the Banks’ application of legal environmental standards in an accountability context. To this end, it builds a theoretical framework for the environmental accountability of International Financial Institutions. Without designing new accountability concepts, it organises the existent arrangements into the IFIs’ accountability mechanism, possessing three components. It is argued thereby that the *processes* component, which comprises setting objectives, and assessing an actor’s behaviour, logically precedes the *consequences*

⁶⁴ See Annex II for the list of names and institutions.

component, with its penalties or rewards; and both of these components, in turn, cannot function without such *preconditions* as transparency or a yardstick. This knowledge is important as the basis for a future debate on the application of environmental standards within the framework of foreign direct investment projects by concrete Banks, whereby the availability of both transparency and yardsticks as preconditions to accountability is hard to overestimate.

Chapter V, in turn, examines *whether the existing accountability arrangements of the EPE Banks ensure a comprehensive application of standards, and what its missing instrument is*. To begin with, it takes a detailed look at the nature, character, and application peculiarities of the EPE Declaration as a legal framework for the Banks' environmental accountability. Thereafter, making use of the acquired knowledge on the International Financial Institutions' accountability mechanism, it applies the general analytical framework, developed in the previous chapter, to the existing environmental accountability mechanisms of the EPE Banks. It concludes by summarising the revealed shortcomings of the Banks' environmental accountability.

The knowledge built by Chapters IV and V allows the Chapter VI considering indicators as essential instruments within the accountability mechanism, allowing to operationalise a yardstick: to translate objectives into quantifiable criteria and thus to evaluate their factual application. It thus looks at indicators as main instruments used for evaluations, beginning by categorising the different indicators' typologies, and then suggesting reconsidering the current perception of performance indicators in order to single out *legal performance indicators*. Subsequently the focus of Chapter VI lies on legal indicators that started to appear as a popular evaluation instrument over the last two decades. The overview of the most prominent among those currently existing, and their various methodologies demonstrates that not all legal performance indicators possess the same legal characteristics. This analysis leads to the conclusion that *legal environmental indicators* are needed as an instrument to determine the presence of European legal environmental standards at different stages of an investment project.

In accordance with the neutral functional theory of law, addressed in section 5 above, Chapter VII constructs legal environmental indicators, by providing their definition, elaborating a specific methodology for their construction and by introducing a sample set of legal environmental indicators. By doing so, it establishes an evaluation method, consisting of assigning scores to the indicators, and calculating the degree to which the standards have been evaluated. This methodology has been inspired by methodologies used in other legal fields.⁶⁵

The newly developed indicators and the evaluation method are subsequently subjected to proof in Chapter VIII, in the framework of three Russia-based EBRD projects, evaluating the application of concrete environmental standards, as envisaged by the Declaration on the European Principles for the Environment. Logically, therefore, Chapter VIII completes the previous chapters, demonstrating in practice how legal environmental indicators as instruments for evaluation, defined by Chapter VI and set into a methodological framework by Chapter VII, contribute to the resolution of problems, related to the functioning of the accountability mechanism of IFIs in general (Chapter IV) and of EPE Banks in particular (Chapter V), and allow evaluating the

⁶⁵ For an overview, see Chapter VI, Section 3.1.

application of legal environmental standards (Chapter II) in EPE Banks' direct investment projects (Chapter III).

In the concluding Chapter IX, the answers to the research question are synthesised and the findings of the study are highlighted. Moreover, as the study highlights the vital importance of being able to evaluate how European legal environmental standards are applied in third countries, it advocates the use of legal environmental indicators as the best suitable instrument for such evaluation, while also making a number of recommendations and suggestions for further research.

Chapter II

STANDARDS AMONG GOVERNING LEGAL NORMS

The greatest difficulty regarding an analysis relating to environmental law is the current terminological confusion characterising the choice and the definition of concepts used by scholars, international organisations, business, NGOs, and States when they discuss the effects of International Financial Institutions' initiatives in the field of environment. The ambiguity of the terms breeds confusion. Some talk about an 'emerging set of norms and rules promoting democratic accountability for transnational environmental harm',¹ while others refer to legal principles, norms, guidelines, or responsibilities in relation to environmental law.² The notion of 'standard' is used most frequently, although a definition or an explanation is rarely given as to its legal status.³

This study focuses on the application of the provisions of the Declaration on the European Principles for the Environment by the signatory EU-based International Financial Institutions. As it is demonstrated in Chapter V, this Declaration is not only based on principles, but also attributes primary importance to EU legal environmental standards and to their practical application in third countries in the framework of investment projects. Thus, it is argued that although called 'principles', the European Principles for the Environment are in fact much broader than that. For the subsequent analysis, it is therefore crucial to clarify in this chapter the difference between the 'principles' and 'standards', as well as to define the notion of a 'standard' and to consider its legal nature.

The distinction between principles and standards can be dealt with by adopting different approaches to the norms⁴ as a starting point. The approach applied to the classification below can

¹ Mason M. (2005) *The New Accountability: Environmental Responsibility Across Borders*. Earthscan. pp. 3, 174.

² Morgera E. (2009) *Corporate Accountability in International Environmental Law*. Oxford University Press. p. 65, different terms in the titles by the Sub-Commission on the Promotion and Protection of Human Rights with regard to transnational corporations and other business entities are considered, such as 'Principles related to the Human Rights Conduct of Companies' (2000) UN Doc E/CN.4/Sub.2/2000/WG.2/WP. 1; 'Draft Universal Human Rights Guidelines for Companies' (2000) UN Doc E/CN.4/Sub.2/2000/WG.2/WP. 1Add.1; and finally 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 [emphasis added].

³ Some call both rules and standards 'principles'; others (notably Dworkin) use the term 'standard' as a broad category comprising rules, standards, principles, and policies; and others use 'rules' and 'standards' as synonyms rather than antonyms. See Dworkin R. (1984) *Taking Rights Seriously: New Impression with a Reply to Critics*. 4th ed. Duckworth. pp. 22-28, 72-80; Schauer F. (1991) *Playing by the rules: a philosophical examination of rule-based decision-making in law and in life*. Clarendon Press. pp. 12-15; and generally, Radin M. (1989) Reconsidering the Rule of Law. *Boston University Law Review* 69 (4). 783-790.

⁴ Similar to the approach by Braithwaite and Drahos, analysed in Section 1.2 below, a 'norm' is used in this study as a general term, to sum up 'principles, standards and rules'. Similarly, in European Union law the term *norm* has a potentially wide range of reference to include any provision in a legal system that has some significance or impact on the law in force, be it a principle or a standard.

be called *structural*, since it involves seeing norms as entities that are organised in a certain way: namely, as conditional statements that correlate generic cases, or sets of features, with certain solutions.⁵

While analysing principles and standards, this chapter cannot avoid also paying attention to other norms, which are frequently confused with standards. All these norms originate from public international law, which, although mostly composed of co-equal norms, shows some elements of hierarchy.⁶ As Beyerlin and certain other scholars see it, '[a]t the top of this hierarchy, norms of *jus cogens* and obligations *erga omnes* are of higher legal quality than the mass of ordinary norms', while 'at its bottom, in the grey area between international 'hard law' and 'soft law', there exists an ever-growing number of amorphous 'concepts' and 'principles', whose nature and normative quality are far from clear'.⁷ While the general hierarchical vision of the different legal norms presented by Beyerlin does not incite any objection, one can argue with his interpretation of the term 'principle', which has placed it at the bottom of that hierarchy. Another problem is that in practice, and to quote Dhondt, 'terms such as rules, principles, legal principles, standards, objectives and guidelines are used incoherently to mean similar and different things'.⁸ Kaplow writes that the use of terms 'varies greatly (which is no surprise since most dictionaries offer definitions of each term that use the other), and logically distinct issues are often combined or confused'.⁹ This reveals the need to shed more light on the nature and normative quality of the terms 'principle' and 'standard'.

The sections below first address the general theoretical debate on the distinction between and the meaning of principles and standards. This is done by turning to the philosophy of law and briefly considering legal theories of Dworkin, Raz, Daci, Kaplow, Posner and Kennedy, their writings laying the substance for a separate approach by Braithwaite and Drahos, whereby a standard receives a place of its own between other norms, such as principles and rules. Analysing the different theories, the current study adopts the 'Braithwaite and Drahos approach' to the interrelation of norms as a basis for further analysis. A better understanding of a standards' nature and of its place in the general hierarchy of norms contributes, in turn, to the formulation of its clearer definition.

Second, the status of principles and standards in European Union law is analysed. Considering the general scope of this study, related to the application of legal environmental standards in third countries, the focus here lies more on standards than on other norms.

⁵ See Atienza M., Manero J. (2012) Rules, Principles, and Defeasibility. In Beltrán J., Ratti G. (eds.) *The Logic of Legal Requirements*. 238-253. p. 240.

⁶ Beyerlin U. (2007) Different Types of Norms in International Environmental law: Policies, Principles and Rules. In Bodansky et al. (eds.) *The Oxford Handbook of International Environmental Law*. Oxford University Press. p. 426.

⁷ *Ibid.* See also Shapiro S. (2007) The 'Hart-Dworkin' Debate: a Short Guide for the Perplexed. University of Michigan Law School, Public Law and Legal Theory Working Paper Series. Working Paper 77; Freedman J. (2010) Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited. *British Tax Review* 6. 717-736.

⁸ Dhondt N. (2003) *Integration of Environmental Protection into other EC Policies: Legal Theory and Practice*. Avosetta Series, Europa Law Publishing. p. 16.

⁹ Kaplow L. (1999) General Characteristics of Rules. In Bouckaert B., Geest G. (eds.) *Encyclopedia of Law and Economics, Vol. V. The Economics of Crime and Litigation*. Edward Elgar. 502-528. p. 508.

Subsequently, special attention is given to the role of principles and standards in European *environmental law*. This allows the formulation of a definition of the notion of a ‘European legal environmental standard’, as is used in this study. Thus, in this chapter the understanding of legal environmental standard is crystallised, facilitating a firmer grip on the subsequent discussion regarding the evaluation of such standards’ application.

1. GENERAL DICHOTOMY BETWEEN PRINCIPLES AND STANDARDS: THE THEORETICAL DEBATE

In the academic world, there is an ongoing debate about the correlation between different types of legal norms. Thus, the idea of principles standing behind standards and informing their application, or being used to create new rules, is found in the jurisprudential literature that deals with the theories of judicial decision-making and interpretation.¹⁰ The analytical demarcation borders between principles and standards are set in different manners by diverse scholars, and it can be divided roughly into two approaches. The one is characterised by the debate ‘on the degree of weight’ (Dworkin), ‘attractiveness’ (Raz, Kaplow) and ‘precision’ (Kennedy, Posner) of standards and principles. The other, although based on writings of the authors above, is marked by approaching the ‘principles-standards’ debate using ‘the measure of conduct’ (Braithwaite, Drahos), placing a standard on equal foot with principles. This division is an attempt to introduce a systematic theoretical perspective pertaining to existing academic polemics on the matter, and by no means does it pretend to be exhaustive.¹¹ The paragraphs below address both approaches, after which it revisits the principles-standards debate and gives special attention to ‘standard’ among other legal norms.

1.1 Principles and standards: distinction based on the degree of weight, abstractness and precision

One way to set up a demarcation border between norms is to claim that principles have less specificity because, unlike rules, they can conflict with one another. This conflict is resolved by

¹⁰ Braithwaite J., Drahos P. (2000) *Global Business Regulation*. Cambridge University Press. p. 18.

¹¹ Such an attempt was previously made by, for instance, Atienza and Manero. However, it differs from the present study in that it focused on the separation between rules and principles in relation to the normative qualification of certain conduct, and does not pay as much attention to standards. See Atienza M., Manero J. (2012) Rules, Principles, and Defeasibility. In Beltrán J., Ratti G. (eds.) *The Logic of Legal Requirements*. 238-253. p. 239.

decision-makers, assigning ‘weights’ to the relevant principles in order to reach a decision.¹² This manner of distinguishing principles and rules is presented broadly in Dworkin’s approach.¹³

Dworkin used the term ‘standard’ in the meaning of a ‘norm’, writing about ‘standards called principles’ and ‘standards called rules’.¹⁴ Therefore, in his writings, there is no real debate on the distinction between principles and standards: according to Dworkin, a principle is defined by contrast to rules.¹⁵ Taking a step further in this theory, one can see that he distinguished ‘principles in the generic sense’ (or in the broad sense) and ‘principles in the narrow sense’.¹⁶ Principles in the broad sense would thus comprise principles in the narrow sense, ‘policies’ and ‘other sort of standards’.¹⁷ A principle in the narrow sense of the word is defined by Dworkin as ‘a standard to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice of fairness or some other dimension of morality’.¹⁸ A ‘policy’ is defined as ‘that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community’.¹⁹ When Dworkin talks about ‘principles’ as distinguished to ‘rules’, he talks about principles in the broad sense of the word, comprising in this notion ‘principles in the narrow sense, policies and other standards’.²⁰

One more aspect that cannot escape attention is the distinction between legal principles and ‘principles as such’. According to Dworkin, there are multiple tests needed to determine legality of a principle. He firmly states that the origin of principles lies not in a particular decision of a certain legislature or court, but ‘in a sense of appropriateness developed in the profession and the public over time’.²¹ Dhondt claims that there is some kind of ‘interpretative test’ of law in Dworkin’s writings, such as *Law’s Empire*, where he argues that judges can decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best ‘constructive interpretation’ of the political structure and legal doctrine of their community.²² It concerns principles that justify the settled rules by identifying the political and moral concerns and traditions of the community, which support the rules.²³ Dhondt cites at that point Soeteman’s

¹² Here the term ‘decision-makers’ is used to include legislators, judges, administrators, and others who are bound by and/or attempt to implement statutes, judicial texts, and other types of legal provisions in the form of rules and standards. The term ‘law-makers’ is used to include legislators, judges, administrators, and other officials who draft statutes, judicial texts, and other types of legal documents in the form of rules or standards.

¹³ Ronald Dworkin, deceased on 14 February 2013 aged 81.

¹⁴ See, generally, Dworkin R. (1977) *The Philosophy of Law: Oxford Readings in Philosophy*. Oxford University Press.

¹⁵ Dworkin R. (1978) *Taking Rights Seriously*. Harvard University Press. p. 24f. Dworkin’s theory is remarkable by what he himself called ‘logical’ distinction between rules and principles. He wrote that both ‘legal principles’ and ‘legal rules’ reflect certain decisions about legal obligations arising in certain circumstances. However, the difference between the two lies in the character of direction they give. Dworkin (1984), p. 36.

¹⁶ Dworkin R. (1984) *Taking Rights Seriously: New Impression with a Reply to Critics*. Duckworth, 4th ed., pp. 23-24.

¹⁷ *Ibid.*

¹⁸ Dworkin (1984), p. 22.

¹⁹ *Ibid.*

²⁰ See Dworkin (1977).

²¹ Dworkin (1984), p. 40.

²² Dhondt N. (2003) *Integration of Environmental Protection into other EC Policies: Legal Theory and Practice*. Europa Law Publishing Avosetta Series. p. 130, writing about Dworkin (1986) *Law’s Empire*. Harvard University Press.

²³ Dworkin (1984), p. 67.

interpretation of Dworkin's test, according to which identification of legal principles is possible as a result of constructive operations, during which two questions need to be answered: whether the principle sufficiently fits into the law that needs to be interpreted, and whether the principle satisfactorily supports the applicable law, *i.e.* supports the practice, in addition to being attractive itself.²⁴

It should be acknowledged that the views of Dworkin, presented above, are not fully comprehensive but rather have the form of an outline. Bringing all the arguments together, in Dworkin's view principles may conflict with each other; they may have different 'weight', *i.e.* be of lesser or greater importance for a decision-maker.

Another way to draw a borderline between these notions is by arguing, like Raz and others, that principles prescribe highly unspecific acts, while rules prescribe relatively specific acts. Without really contradicting the legal theorisation of Dworkin, other scholars focus on the degree of abstractness between rules and principles. While Dworkin insists on a qualitative difference between rules and principles, legal theorists such as Raz, Daci and Kennedy²⁵ support the view that rules and principles show only a difference of degree, since both are norms that 'have a relationship of family resemblance with one another' and 'they have a similar or analogical role in legal discretion'; in other words, principles have greater generality than rules, but otherwise there are no special characteristics to distinguish them from rules.²⁶ This forms the essential difference with the views of Dworkin.

Addressing the relationship between principles and rules, the writings of Raz may be named a 'refinement' of Dworkin's theory. Notably, while for Dworkin the conflict between legal rules is unthinkable, Raz suggests that legal rules, just like principles, may conflict with each other, and may have a dimension of weight, while the distinction between rules and principles lies in the character of act that it prescribes.²⁷ While rules prescribe relatively specific acts, principles prescribe highly unspecific actions.²⁸ Consequently, the more 'abstract' a legal norm is, the higher is the chance that it can be identified as a principle. In his writings, Raz does not give any attention to a standard, and even seem to avoid using the term.

The approach of Raz has been adopted and elaborated upon by other scholars. Thus, already in 1976 Kennedy mentions that principles and rules possess different degree of generality.²⁹ Talking about principles, he uses the term 'standard' in his work, and goes as far as making it a

²⁴ Soeteman A. (1991) Hercules aan het werk. *Rechtsbeginselen, Ars Aequi special* 10. 744-756; Soeteman A. (2009) Rechtsbeginselen en positivisme!?. *Netherlands Journal of Legal Philosophy (Rechtsfilosofie & Rechtstheorie)* 1 (38). 1-10.

²⁵ See Kennedy D. (1976) Form and substance in private law adjudication. *Harvard Law Review* 89 (8). 1685-1778; MacCormick N. (1995) *Legal Reasoning and Legal Theory*. Clarendon Press; Raz J. (1999) *Practical Reason and Norms*. Oxford University Press; Daci J. (2010) Legal principles, legal values and legal norms: are they the same or different? *Academicus International Scientific Journal* 2. 109-155.

²⁶ See Aarnio A. (1990) Taking rules seriously. *Archives for Philosophy of Law and Social Philosophy. Supplement* 42. 180-192. pp. 180-181.

²⁷ Raz J. (1990) *Practical Reason and Norms*. 2nd ed. Oxford University Press. pp. 49-84.

²⁸ Raz J. (1972) Legal Principles and the Limits of Law. *Yale Law Journal* 81 (5). 823-854. pp. 851. According to the author, examples of relatively specific acts are assault, murder, rape and speeding while promoting human happiness, respect for human dignity and increase of productivity are among examples of highly unspecific actions.

²⁹ Kennedy D. (1976) Form and substance in private law adjudication. *Harvard Law Review* 89 (8). 1685-1778. p. 1689.

synonym of a 'policy', in order to underline its unspecific nature.³⁰ According to Kennedy, when a judge relies on a certain principle, he nevertheless looks further and applies in development of that principle other more precise norms, such as rules:

At the opposite pole from a formally realisable rule is a standard or principle or policy. A standard refers directly to one of the substantive objectives of the legal order. Some examples are good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness. The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.³¹

Kennedy sees the two great social virtues of rules, as opposed to principles, being the restraint of official arbitrariness and certainty.³²

Further developing the discussion within this approach, Daci writes that principles have an important role as 'generalisation standards', used to reason upon the validity of written laws.³³ Subsequently, he has tried to classify principles on basis of their theoretical meaning and importance. He claims that hierarchically the constitutional principles shall be considered as basic (superior) principles of the entire system of legal principles, them also being the fundamental source of other, 'ordinary' legal principles.³⁴ Daci, however, does not explain what he means under 'ordinary' legal principles. He concludes his analysis by underlining that the idea to classify legal principles is recent and 'does not imply any real value in a daily use, but rather can be used as a powerful tool in legal reasoning'.³⁵ The essence of the approach by Raz and the others, where standards – or 'norms', depending on the terminology adopted by the authors – can be legal or non-legal, and can subsequently be subdivided in principles and rules. The distinction in this approach by Raz, Kennedy and Daci is thus in terms of abstractness.

One more way to approach the dichotomy between the norms, as demonstrated by Kaplow and Posner, is to regard rules as different from principles in precision and the size of costs, associated with the formulation and enforcement of one or another type of legal norm. This approach offers rather an economic than a legal analysis of the extent to which legal commands should be promulgated as rules or principles. The term of 'legal principle', as Dworkin and Raz used it, is replaced here by the term 'standard'.³⁶ Followers of this approach agree that rules are those legal criteria, which distinguish legal from illegal conduct in a simple and clear way.

³⁰ Kennedy (1976), p. 1689.

³¹ *Ibid.*, p. 1688.

³² *Ibid.*

³³ Daci (2010), p. 113.

³⁴ *Ibid.*, p. 112.

³⁵ Daci (2010), p. 112.

³⁶ There is evidently a substantial variation in the use of terminology and in the content of definitions, sometimes even by a single author. The choice of 'rules' and 'standards' or 'rules' and 'principles' as terms may contribute to the confusion. Outside the debate over formulation of the law, such terms as a 'rule', a 'standard of judgment' and a 'regulating principle' are often used interchangeably. See, for instance, Webster's New Collegiate Dictionary (1977).

Standards, however, are general legal criteria, which are unclear and vague and necessitate complicated judiciary decision-making.³⁷

No doubt, there are various costs associated with the formulation and enforcement of legal norms. There exist systematic factors, which affect the relative cost of rules and standards. In his article on 'Rules versus standards' Kaplow emphasised two dimensions of the problem. First, the choice between rules and standards affects costs: rules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct.³⁸ Second, when individuals can determine the application of rules to their contemplated acts more cheaply, conduct is more likely to reflect the content of previously promulgated rules than of standards that will be given content only after individuals act.³⁹ The article considers how these factors influence the manner in which rules and standards should be designed, and explores the circumstances in which rules or standards are likely to be preferable. Some aspects of a law – those likely to apply to many acts – shall, according to Kaplow, be best included in a rule, whereas others – those unlikely to apply – shall be best left to a standard.⁴⁰

Kaplow's ideas are close to those of Posner. Posner suggests that standards may have lower initial specification costs, but they have higher enforcement and compliance costs than rules.⁴¹ Summarising Posner's views, Schäfer wrote that there were three different costs associated with a legal norm: 1) the costs of norm specification; 2) the costs of rule adjudication; and 3) the costs of compliance with a legal norm, especially the costs resulting from legal uncertainty.⁴²

The desire to minimise total costs, according to Posner, should be the dominant consideration in the choice between precision and generality, that is, between rules and standards. Taking preciseness as criteria, Ehrlich and Posner distinguish between rules and standards in the following way: 'a rule withdraws from the decision-maker's consideration one or more of the circumstances that would be relevant to decision according to a standard', while 'the difference between a rule and a standard is a matter of degree - the degree of precision'.⁴³ The degree of preciseness in legal statutes defines, largely, the division of labour between parliaments on the one hand and the judiciary as well as the bureaucracy on the other.⁴⁴ A law consisting of rules leaves little or no discretionary power to those who administer it; and a law consisting of imprecise standards delegates the refinement of the standard to the judiciary or the bureaucracy.⁴⁵

Kaplow also addresses the level of detail with which laws should be formulated and applied, emphasising how this question concerning the laws' relative simplicity or complexity can be

³⁷ See Ehrlich I., Posner R. (1974) An Economic Analysis of Legal Rulemaking. *Journal of Legal Studies* 3. 257-286; Diver C. (1983) The Optimal Precision of Administrative Rules. *Yale Law Journal* 93. 65-109; Kaplow L. (1992) Rules Versus Standards, An Economic Analysis. *Duke Law Journal* 42. 557-629.

³⁸ Kaplow (1992), p. 564.

³⁹ *Ibid.*, p. 563.

⁴⁰ Kaplow (1992), p. 584.

⁴¹ See Posner R. (1998) *Economic Analysis of Law*. Aspen, 5 ed.

⁴² Schäfer (2002), p. 2.

⁴³ Ehrlich, Posner (1974), p. 258.

⁴⁴ Schäfer (2002), p. 2.

⁴⁵ *Ibid.*, p. 2.

distinguished from that of whether laws are given content *ex ante* (rules) or *ex post* (standards).⁴⁶ Thus, a rule might list hazardous substances that may not be released into the water supply whereas a standard may only proscribe releases of hazardous substances, leaving the determination of which substances are hazardous to adjudication, after releases have occurred.⁴⁷ This distinction results, according to Kaplow, in different degrees of complexity of rules and standards: Simple Rules, Simple Standards, Complex Rules, and Complex Standards.⁴⁸ But eventually, as Kaplow writes, ‘it is a matter of choice how much detail will be incorporated in rules and standards, and it is hardly the case that rule-like systems tend to be particularly simple and standard-like schemes extremely precise in actual operation’.⁴⁹

1.2 Principles and standards: distinction based on the measure of conduct

Braithwaite and Drahos developed the views summarised above, into a separate approach. Most importantly for this study, these authors gave their own schematic illustration of the interrelation of norms, whereby a standard receives a place of its own between other norms.

Braithwaite and Drahos explicitly share the views of Raz, Kennedy and Daci: in their millennium work on the ‘theories of business regulation’ they also distinguish rules from principles based on the degree of abstractness:

Norms, standards, principles and rules are all elements that can be conceptualised. [...] Norms is a generic category, which includes rules, principles, standards and guidelines. We have distinguished rules from principles in terms of the degree of abstractness. Rules are specific, principles have a high degree of generality.⁵⁰

Next to it, the authors define ‘principle’ as ‘settled agreements of conduct, recognised by a group’ and believe that different actors adhere themselves to different principles.⁵¹ Similar to Dworkin, the authors believe that by using a certain mechanism some principles can be given weight over the other principles.⁵²

Nonetheless, when developing a ‘theory of business regulation’, Braithwaite and Drahos formulate their own approach by giving their own schematic illustration of how they think these elements are related, which differs from the views of Raz, Kennedy and Daci. Noteworthy, a

⁴⁶ Kaplow L., Shavell S. (1999) Economic Analysis of Law. Harvard Law School Discussion Paper 251. See also other authors addressing this issue: Sullivan K. (1992) The Supreme Court 1991 Term, Foreword: The Justices of Rules and Standards. *Harvard Law Review* 22; Kelman M. (1987) *A Guide to Critical Legal Studies*. Harvard University Press; Schlag P. (1985) Rules and Standards. *UCLA Law Review* 33. 379-400.

⁴⁷ Kaplow (1999), p. 509.

⁴⁸ *Ibid.*

⁴⁹ Kaplow (1999), p. 510.

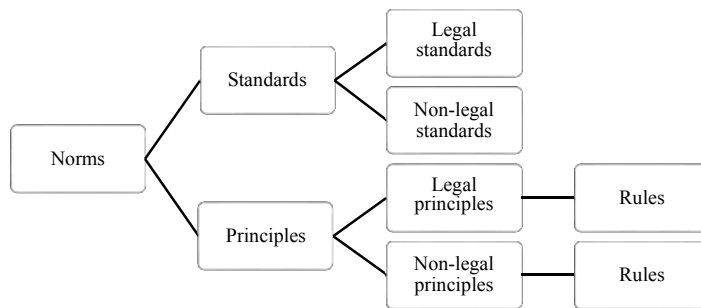
⁵⁰ Braithwaite, Drahos (2000), p. 18-19.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 19.

standard receives a place of its own: it is no longer a synonym of an overall general norm, as Dworkin and Raz used it, nor is it equal in meaning to a principle or a policy, like in the writings of Kennedy. In an attempt to define a ‘standard’ by comparing it to a ‘principle’, the authors consider ‘the measure of conduct’ being its central feature, which differs dramatically from the use of a standard in the earlier approaches.⁵³ In Braithwaite and Drahos’ mind, while principles bring about mutual orientation between actors, standards can be applied to measure their performance.⁵⁴ Also, unlike principle, a standard can have a high degree of specificity – accounting standards and capital adequacy standards are seen by the authors as good example hereof.⁵⁵ Interestingly enough, Braithwaite and Drahos, unlike others, do not go further into comparing a standard and a rule, and do not say why a standard differs from a rule, while (possibly) possessing the similar degree of specificity. In their book, these authors provide the illustration of the relation between the principles, rules, standards and guidelines. According to them, the guidelines form a separate kind of norms. As they lie outside of this study’s scope, they are left out of the original figure without jeopardising the general idea. The Figure 1 below is therefore an adapted version of the Braithwaite and Drahos’ original figure.⁵⁶

Figure 1. Braithwaite and Drahos’ approach



This figure shows that, according to this approach, a norm is the all-comprising element of the legal system. All other elements, such as principles and standards, can be summarised together as ‘norms’. The struggle between principles has been carefully re-examined under this approach. According to it, rules are distinguished from principles based on the degree of abstractness, while both of them are ‘norms’. Later on this approach was extended by the authors to also cover

⁵³ See Braithwaite, Drahos (2000), pp. 18-19.

⁵⁴ *Ibid.*, p. 20.

⁵⁵ Braithwaite, Drahos (2000).

⁵⁶ For the original figure that comprises the guidelines, see Braithwaite, Drahos (2000), p. 20.

standards, which, while also being a norm, differ in function from principles and can be applied to measure the actors' performance.⁵⁷

1.3 Principles and standards revisited

The arguments presented above helped in the review of the framework regarding the general dichotomy between principles and standards. The analysis of the approaches used in the philosophy of law in order to make a distinction between principles and standards has been useful, and allows determining their competing advantages. What unites them both is the view on the hierarchy of norms, whereby the gradation is made from more general to more concrete norms.

The major differences between the two ways to address 'principles-standards' debate can be summarised as follows. Firstly, the question is whether principles, being synonymous with standards, can have the same legality and be enforced in the same manner as rules. Secondly, the main terminological difference can be observed around the placement and use of the term 'standard'.

Discouraged by the attempt to bring clarity into this confusing divergence of meanings, Schlag wrote that 'considering the virtues and vices of [...] standards is a meaningless endeavour'.⁵⁸ It is interesting to revisit the above debate three decades later, bearing in mind developments in the modern theory of law, influenced by ongoing economic, social, and cultural change.⁵⁹ The goal of this section is, therefore, despite Schlag, to make another attempt to formulate a vision regarding the normative meaning and the hierarchy of principles and – most importantly – standards.

1.3.1 Principles

It is difficult to agree with Beyerlin, who has placed principles at the bottom of the normative hierarchy.⁶⁰ His classification can be explained by the fact that many norms and policy statements are too quickly called 'principles'.⁶¹ According to Winter, international lawyers have

⁵⁷ Braithwaite, Drahos (2000), p. 20.

⁵⁸ Schlag (1985), p. 379.

⁵⁹ Noteworthy, adopted by this study the 'neutral functional theory of law' approach recognises that the nature of legal regimes have to change in order to keep pace with changes in the economy and in society. Modern regulatory thinking needs to consider the divergent interests of the many parties involved. In order to ensure the most effective regime, the process of legal standard-setting aims at finding *the right combination* of applicable principles and rules, as well as political decisions, positions, declarations, and soft law. Consequently, next to 'traditional legal norms' in the form of principles and rules, there is an increasing room for standards as a flexible and dynamic instrument of law.

⁶⁰ See Beyerlin (2007), p. 426.

⁶¹ Perhaps the most characteristic of these meanings are brought together by Atienza and Manero, who distinguished between in the following manner: a) a 'principle' in the sense of a very general norm, insofar as it regulates a case whose relevant

not yet adopted a clear distinction between principles and rules: the term ‘principle’ is often used, but in fact what is being discussed is a ‘rule’.⁶²

Whether this is true can be debated. Verschuuren gave the notion of ‘principle’ a definition that contrasted it to rules: ‘principles go beyond concrete rules or policy goals; instead they say something about a group of rules of policies, they denote what a collection of rules has in common, or what a common goal is of a collection of rules’.⁶³

The debate addressed in previous sections showed that a principle was seen traditionally as a special kind of norm, possessing a general meaning that differentiated it from more concrete legal rules. This was also reflected in the latest definition given to it by the Institute of Chartered Accountants of Scotland (ICAS): namely, ‘A principle is a general statement, with widespread support, which is intended to support truth and fairness and acts as a guide to action’.⁶⁴

Principles, contrary to rules, do not prescribe, but they point in a certain direction, giving guidelines for an action while not necessarily requiring one. It is possible that competing principles point in different directions. Hence, for a principle to be applied in a specific situation, it must first be clarified precisely which principle carries most weight. At the same time, as opposed to Raz’s notion, it is suggested that these features are not intended to be necessary characteristics of either rules or principles, since one can easily find declarative legal rules, or legal rules that allow for exceptions under European Union law. Such examples show that rules and principles indeed form a continuum. The dimensions are only meant to characterise the extent to which particular legal provisions resemble ‘prototypical’ rules or principles.⁶⁵

One can agree with Winter that principles can be understood to possess legal value. According to him, non-legal principles should be called policies, ideals, objectives, and so on. The legal value of a norm is derived from legislation or from court jurisprudence. In the first case, it is based on a political decision, while in the second it is grounded on common experience and common sense.⁶⁶

characteristics are very general; b) a ‘principle’ in the sense of a norm drawn up in particularly vague terms, as happens with those that include what jurists call *undetermined legal concepts*: that is, concepts that have not only an open-textured periphery but that are centrally vague – for example, ‘abuse of a right’, ‘good faith’, ‘due care and attention’...; c) a ‘principle’ in the sense of a norm that expresses the superior values of a legal system, or of an institution; d) a ‘principle’ in the sense of a policy or programmatic norm – namely, a norm that stipulates the obligation to seek certain ends; e) a ‘principle’ in the sense of a norm directed to law-applying bodies, which establishes in a general way how the applicable norm should be selected, interpreted, and so on; and f) a ‘principle’ of a largely general statement or maxim that allows the systematisation (or the synthetic presentation) of the legal system or of a part of it – for example, such as the principle of the rational legislator. See Atienza M., Manero J. (2012) Rules, Principles, and Defeasibility. In Beltrán J., Ratti G. (eds.) *The Logic of Legal Requirements*. 238-253.

⁶² See Winter G. (2004) The Legal Nature of Environmental Principles in International, EC and German Law. In Macrory R. (ed.) *Principles of European Environmental Law*. The Avosetta series 4. Europa Law Publishing. p. 21.

⁶³ Verschuuren J. (2006) Sustainable Development and the Nature of Environmental Legal Principles. *Potchefstroom Electronic Law Journal* 9 (1). 1-57. p. 6.

⁶⁴ Institute of Chartered Accountants of Scotland (2006) Principles not Rules: a Question of Judgement. ICAS report. p. 2.

⁶⁵ This position coincides with that of Verheij *et al.*, who claim that the actual differences between rules and principles are treated as dimensions by which a set of legal provisions can be localised on the continuum. See Verheij B. *et al.* (1998) An integrated view on rules and principles. *Artificial Intelligence and Law* 6 (1). 3-26. p. 26.

⁶⁶ Winter also underlined that ‘principles have legal value’, a feature that allows them to be ‘distinguished from political goals on the one side and moral values on the other’. Winter G. (2004) The Legal Nature of Environmental Principles in International, EC and German Law. In Macrory R. (ed.) *Principles of European Environmental Law*. The Avosetta series 4. Europa Law Publishing.

Looking at the hierarchy of norms, it can be concluded that a principle possesses a higher moral character than a rule, as it can be placed at the highest hierarchical level among legal norms.

As far as a certain form is concerned, principles can be given a different shape. They can be found in written, formal law; they can be part of legislation and treaties; and together with more concrete rules – in combination with these rules – they can impose duties on the State or on individuals.⁶⁷ The choice between principles and rules thus depends largely on the context. The Global Environmental Facility (GEF) illustrates this point: the GEF's Principles of Cooperation among the Implementing Agencies (the UN Development Programme, the UN Environmental Programme, and the World Bank) are written very generally, and envisage the building of trust and long-term relations rather than elaborate rules of inter-agency demarcation.⁶⁸ The Instrument Establishing the Global Environmental Facility uses more precise rules concerning the organisation of its constituencies and division of resources.⁶⁹ Finally, very detailed World Bank rules are used to protect the trusteeship administration of GEF monies from risks of deprecations by Member States or staff, and from pressures by other organisations.⁷⁰

The main functions of legal principles have been formulated best by Verschuuren. According to him,

- principles fill in open or unclear rules; they can be used in interpreting rules in concrete cases by administrative authorities as well as by the courts;
- principles form the basis for new national and EU legislation or international treaties;
- principles form the basis for self-regulation, or otherwise help to determine how private parties should behave in the social order.⁷¹

Verschuuren points quite correctly that a distinction can be made between general principles of law, being principles that are valid for all fields of law (e.g. the principle of equality of arms), and legal principles that are valid for a specific field of the law (i.e. environmental law).⁷² Below, Section 2.2 of this Chapter deals explicitly with principles of environmental law.

pp. 27-28. This vision was further developed by Ellis, who stated that while 'legal principles are no different in structure or function than moral or political principles', 'the difference lies only in their status within legal systems, which in turn may have an impact on the way in which they are used in legal argumentation, or the extent to which their invocation can render arguments more persuasive'. Explaining the statement, the author wrote that 'the binding nature of legal, as opposed to political or moral, principle simply means that those engaged in legal argumentation are not free to disregard the principle if they do not find it useful or convenient to refer to it', but at the same time in a situation where there may be a 'range of principles, included in applicable conventions or having the status of customary law, that apply, and they may not all point in the same direction, with the result that their relative weight will have to be determined in light of the context'. See Ellis (2008), p. 2. Dhondt, however, took an opposite view when writing about environmental principles in the context of the European Union: 'Principles have no direct legal consequences, require no specific action or they allow for derogation and are therefore not legally binding rules'. Dhondt N. (2002) *Environmental Law Principles and the Case Law of the Court of Justice*. In Seridan M., Lavrysen L. (eds.) *Environmental Law Principles in Practice*. Bruylant.

⁶⁷ Ellis (2008), p. 16.

⁶⁸ This example is borrowed from Kingsbury B. (2007) *Global Environmental Governance as Administration: Implications for International Law*. In Bodansky *et al.* (eds.) *The Oxford Handbook of International Environmental Law*. Oxford University Press. p. 71.

⁶⁹ See Kingsbury (2007), p. 71.

⁷⁰ See *Ibid.*

⁷¹ Verschuuren (2006), p. 17.

⁷² *Ibid.*, p. 7.

1.3.2 Standards

No notion seems to have been used so widely and with such diverse meanings as the term ‘standard’. The frequent and often irrational use of the word has given it an unclear status,⁷³ so it is not surprising that scholars have been reluctant to afford it a common definition. Summarising the legal theoretical approaches regarding the term ‘standard’, it appears that Dworkin and Raz considered it a synonym for a general norm, and placed it at the highest level in the normative hierarchy.

When Dworkin attacked the model of rules formulated by legal positivism, he did so by first dividing the general category of ‘standards’ into ‘rules’, and then into ‘principles, policies and other sorts of standards’ that ‘do not function as rules’.⁷⁴ This approach seems by now to be too general and outdated.⁷⁵ However, while the majority of scholars currently address the legal norm, some authors still follow in Dworkin’s footsteps, using the expressions ‘a standard called principle’ or ‘a standard called rule’.⁷⁶

Contrary to this view, a ‘standard’ was seen by Braithwaite and Drahoš as a sub-division of a norm, next to a principle (see Figure 1 above). According to them, a standard was more detailed and specific than a principle.

Following the common law tradition, the terms ‘principles’ and ‘standards’ are sometimes used interchangeably when there is a specific understanding of standards as opposed to rules.⁷⁷ Scholars like Posner and Kaplow seem to have substituted the notion of principle for that of standard, by comparing it to rules. In their theory, a standard is an imprecise form of a norm.

When referring to legal principles, Kennedy used the term ‘standard’ in his work. He mentioned possible variations meaning the same thing: ‘at the opposite pole from a rule is a standard or principle or policy’.⁷⁸ For Kennedy, a rule is a highly realisable legal provision, while a ‘standard’ is a provision that is not formally realisable.⁷⁹ This understanding of the meaning of ‘standard’ has also been adopted by other scholars.⁸⁰

Next to this abstract discussion, another context in which the term ‘standard’ is used in practice is worth mentioning. These are the worldwide health, proprietary, industrial, agricultural, commercial, and other types of *technical* standards promulgated by national, regional, and international standard-setting organisations (such as the International Organisation for

⁷³ According to the Merriam Webster dictionary, a standard is *something established by authority, custom, or general consent as a model or example*. The Cambridge Dictionary defines it as *a level of quality or a moral rule, which should be obeyed*. Finally, the Oxford English dictionary defines a standard as a rule, principle, or means of judgement or estimation; a criterion, measure. Cambridge Dictionaries Online, <http://dictionary.cambridge.org/dictionary/british/standard>, accessed 5.05.2015.

⁷⁴ See Dworkin (1977) *Taking Rights Seriously*. Harvard University Press; Dworkin (1977) *The Philosophy of Law (Oxford Readings in Philosophy)*. Oxford University Press.

⁷⁵ See discussion on the use of the term standard ‘the Dworkin way’ in Radin (1989), pp. 795-796.

⁷⁶ See for instance Dhondt (2003).

⁷⁷ Kaplow (1992).

⁷⁸ Kennedy (1976), p. 1688.

⁷⁹ Kennedy (1976), p. 1688.

⁸⁰ See for instance Schlag (1985).

Standardisation (ISO), the International Federation of Organic Agriculture Movements (IFOAM), the World Health Organisation (WHO), and others).

The various interpretations of the same term, as mentioned above, result in confusion, demonstrating that the provisions called ‘standards’ are in fact very different by nature. Supposedly, these are those ‘other sort of standards’ that Dworkin included at the lowest level in his hierarchy of norms. Obviously, these standards are much less general, and can be either an established norm or a voluntary requirement, serving as the development and the specification of the existing norms from the second level of normative hierarchy. Usually such standards are also very technical – hence the name ‘technical standards’, so as not to confuse them with ‘just’ standards.⁸¹ Dodgson *et al.* define them as a ‘set of technical specifications adhered to by a producer’, which can be established ‘by a standards authority [...], by voluntary agreement within an industry, or may exist de facto in line with the standards of predominant companies’.⁸² In the WTO Agreement on Technical Barriers to Trade, a technical standard is defined as a

‘Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method’.⁸³

As to how they are set up, technical standards can be divided into two categories: *de facto* and *de jure*. According to Dodgson, ‘When a particular set of specifications gains market share such that it guides the decisions of other market participants, those specifications become a de facto technical standard’.⁸⁴ Thus, this can be a custom, convention, company product, corporate standard, and so on, which becomes generally accepted and dominant. The ISO standards for environmental management are an example of this.⁸⁵ The great majority of technical standards,

⁸¹ See Section 2.2.2 below for the European definition of a technical standard. Some of these standards are called *product or process standards* (PPS), which under International environmental law refer to setting quantitative or qualitative emission or discharge limits regarding pollution activities, or specific procedural steps for environmental auditing, accounting, and environmental management programmes.

⁸² Dodgson M. *et al.* (2008) *The Management of Technological Innovation: Strategy and Practice*. Oxford University Press. p. 8.

⁸³ WTO (1994) Agreement on Technical Barriers to Trade. Annex I (2). Similarly, in the Brazilian Guide on Good Regulatory Practices, a technical standard is defined as a ‘...document established by consensus and issued by an recognised agency which provides, for common and repeated use, rules, guidelines or characteristics for products, services, goods, personnel, processes or production methods. Its compliance is not mandatory. It may also deal with terminology, symbols, and packaging, marking or labelling requirements that are applicable to a product. Technical standards must be based on consolidated results, whether scientific, technological or derived from experience, seeking to optimise the benefits for the society’. National System of Metrology, Standardization and Industrial Quality (2007) *The Brazilian Guide on Good Regulatory Practices*. p. 5.

⁸⁴ Dodgson *et al.* (2008), p. 8.

⁸⁵ The ISO 14000 standard addresses various aspects of environmental management, such as life cycle analysis, communication, and auditing. It provides practical tools for companies and organisations allowing them to identify and control their environmental impact, and therefore to improve their environmental performance. Any organisation regardless of its activity or sector can be certified to it. Such certificate then provides assurance to company management and employees as well as external stakeholders that environmental impact is being measured and improved. See www.iso.org/iso/home/standards/management-standards/iso14000.htm, accessed 5.05.2015.

however, are not *de facto*, and are elaborated through negotiations between academics, companies, standard-setting authorities, and governments.⁸⁶ Standards achieved through such procedures of deliberation – sometimes legally enforceable – are referred to as *de jure* standards.⁸⁷ This being said, it must be mentioned that the borderline between legally enforceable and voluntary standards is currently fading because of rapid technological changes and the constant need for updated technological guidelines.⁸⁸ Figure 2 below places technical standards below rules. It has been stated above that rules are of a wide-ranging nature, while specific cases fall under a certain rule. It appears that these specific cases are managed best when additionally governed by sub-rules or by legislative provisions, as well as by technical standards or by semi-compulsory provisions.⁸⁹

1.3.3 Legal standards as a special category

Taking into account the theoretical and practical use of the term ‘standard’, it can nevertheless be supposed that a standard in its contemporary popular understanding is neither simply a technical standard nor a general norm. It is therefore appropriate to explain the legal status of standards within the broader category of norms, and to outline the term’s definition. Such a definition can contribute to the evaluation of the application of European environmental legal standards by International Financial Institutions. As non-legal norms are outside the scope of this study, it is important to crystallise what a ‘legal standard’ actually is.

In legal research, the notion of ‘standard’ does not yet seem to have a settled definition, either, although the term ‘legal standard’ is frequently used. Immorgino and Pagano talk about ‘legal standards of regulation’ in relation to a government’s corruption.⁹⁰ In their respective works, Cotula and Romson use the notion ‘environmental standard’ as a synonym for ‘environmental regulation’.⁹¹ Moreover, in the UN Manual On Human Rights For Judges, Prosecutors, and Lawyers, the notion of ‘legal standard’ is used as a synonym for a ‘legal rule’.⁹² In the absence of a common definition, however, the above-mentioned sources seem to possess a *feeling* regarding the nature of a legal standard, which makes it difficult to agree with earlier statements made by

⁸⁶ Chapter III will provide a closer look at the standard-setting bodies.

⁸⁷ Dodgson *et al.* (2008), p. 8.

⁸⁸ See Kagami M. *et al.* (2004) *Information Technology Policy and the Digital Divide: Lessons for Developing Countries*. Edward Elgar. p. 232.

⁸⁹ Technical standards are only considered here because they illustrate the possible use of the term ‘standard’. Another example is *operational standards*, which stand for an international organisation’s internal instructions to its staff. Technical and operational standards, policies, guidelines, and sub-rules fall outside the scope of this study.

⁹⁰ Immordino G., Pagano M. (2010) Legal Standards, Enforcement and Corruption. *Journal of the European Economic Association* 8 (5). 1104-1132. p. 1107.

⁹¹ Cotula L. (2008) Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses. *Journal of World Energy Law & Business* 1 (2). 158-179. p. 159; Romson A. (2011) International Investment Law and the Environment. In Cordonnier Segger M. *et al.* (eds.) *Sustainable Development in World Investment Law*. Kluwer Law International. 37-52. p. 42.

⁹² UN Office of the High Commissioner for Human Rights (2003) *Human rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers*, Vol. 1, p. 317

Kennedy and Posner, who considered it to be an ‘amorphous idea’, and denied the possibility of a standard being enforced.⁹³

Instead, put in general and simplistic terms, standards appear to be situated on the same level of the hierarchy as rules and principles. Such a vision of the term ‘standard’ is thus closest to the approach of Braithwaite and Drahos (see Figure 1 above), at least as far as the position of a standard in the hierarchy of norms is concerned.⁹⁴ As to its legal nature, a standard appears to possess elements of both rules and principles. Like rules, it can be guided by one or more principles,⁹⁵ and like principles, it strives to reflect the higher moral goals. In this respect, the definition of ‘standard’ by the Cambridge Dictionary as a ‘moral rule that should be obeyed’⁹⁶ seems to be appropriate. Notably, a rule/standard distinction is deceptive, and appears to be a dichotomy; in fact, it is a continuum of greater or lesser ‘ruleness’.⁹⁷ Nonetheless, it needs to be underlined that *functionally* a standard is neither a rule nor a principle. Arguably, while being ‘on an equal footing’ with them, it does not replace or substitute for these norms. The purpose of a standard is obviously different from that of a principle or a rule. A principle may sound very general – for example, ‘nature should be protected’. The function of a rule would be to introduce at least one of the aspects of that principle ‘into real life’, by translating it into a justiciable norm. An example of such a rule-like provision would be: ‘no one is allowed to cut trees’ (in order to protect the natural environment). Governing by rules, and rules only, is obviously far too rigid, and leaves little discretion to a decision-maker. As Overton warns, ‘...the arbitrariness and unfairness can also flow from the mechanical application of a cookie-cutter rule’.⁹⁸ It can even be supposed that rules alone are not able to regulate efficiently the multifaceted range of situations that might arise in practice, when cutting trees may appear possible and even necessary, just as rules alone cannot entirely translate general principles into detailed legislative provisions.

Standards, however, seem to be there to fill in this regulatory gap.⁹⁹ For example, a standard might make a rule more open-ended by stating that ‘no one is allowed to cut trees unless in possession of a licence issued by the municipality, and which is valid at the moment the cutting takes place’. In order to do this, standards require a legal technique: namely, ‘...when the sphere to be controlled is such that it is impossible to identify a class of specific actions to be uniformly done or forborne, and to make the subject of a simple rule, yet the range of circumstances varies but covers familiar features of common experience’, a common judgement weighs up and strikes ‘a balance between the social claims that arise in various unanticipated forms’.¹⁰⁰ Considering the

⁹³ See Kennedy (1976), p. 1689; Ehrlich, Posner (1974), p. 258.

⁹⁴ See, generally, Braithwaite, Drahos (2000).

⁹⁵ As to the factual consequences of an application of rules, one can agree with the formulation by Sullivan: ‘A rule captures the background principle [...] in a form that from then on operates independently’. Sullivan (1992), p. 58.

⁹⁶ Cambridge Dictionaries Online.

⁹⁷ Sullivan (1992), p. 58, fn 231. See also Radin M. (1991) Presumptive Positivism and Trivial Cases. *Harvard Law Review* 105 (14). 828-832. p. 823, where the author explains that rules and standards are theoretical endpoints on a continuum rather than sharply distinct categories.

⁹⁸ Overton S. (2002) Rules, Standards and *Bush v. Gore*: Form and the Law of Democracy. *Harvard Civil Rights-Civil Liberties Law Review* 37. 65-102. p. 75. See also Sullivan (1992), p. 58.

⁹⁹ For the discussion on the application of standards by International Financial Institutions, see Chapter III of this study, Sections 3.2 and 4.2.

¹⁰⁰ Hart (1994), p. 134. Cf Morgera (2009), p. 68.

judicial practice as an example, while the ‘rule-like’ approach of a court would be to ‘adhere to the precedent or common practice’, the flexible ‘standard-like’ approach would be to ‘overrule when wrong’.¹⁰¹ Legal standards, therefore, as Arnaud rightly puts it, have a ‘normative character, but their content and object are only partially normative, making reference to elements beyond law such as social custom or human reasonability’: namely, the ideas of normality, and of average or common practice.¹⁰² Thus, when attention is focused on their function rather than on their content, standards can lead to just results in a specific case, rather than having an abstract content that is abstractly just.¹⁰³ Citing Overton,

More flexible standards can promote fairness by allowing a decision-maker to consider relevant factors overlooked by a rule, to adapt to unforeseen contexts, and to treat substantively similar cases alike. Additionally, standards can promote clarity, as rules often degenerate into confusing and complex schemes of detailed sub-rules and exceptions, decipherable only by those with extensive expertise or resources. Further, decision-making is often more legitimate using standards: rather than hiding behind a mechanical application of a rule, standards force a decision-maker to explain the reasons for a decision and take responsibility for it.¹⁰⁴

Therefore, strictly speaking, the description of a standard as a ‘rule, principle, or means of judgement’, given by The Oxford English Dictionary¹⁰⁵ and upheld by certain scholarly literature,¹⁰⁶ is not correct from this legal theory point of view, because, as advocated above, standard, while retaining elements of both rules and principles, is neither a rule nor a principle, but a distinct legal norm.

Last but not less important, there is one more aspect that deserves attention, and that makes standards so distinct from principles and rules: namely, the origins of these norms. Theoretically, the emergence of a particular standard is stimulated by a concrete situation, for which a certain approach – a standard – is being created. Regarding practice, it is suggested that decision-makers should collaborate with organisations and other stakeholders¹⁰⁷ in a certain field to provide sector-

¹⁰¹ Sullivan (1992), p. 70.

¹⁰² Arnaud A. (ed.) (1993) *Dictionnaire Encyclopedique de Theorie et de Sociologie du Droit*. Cercle de sociologie et nomologie juridiques. p. 581.

¹⁰³ Weil P. (1992) *Le droit international en quête de son identité: cours général de droit international public. Recueil des Cours*. Vol. 237. p. 206.

¹⁰⁴ Overton (2002), p. 100. Comparable to it is the French definition of a legal standard by *Dictionnaire Encyclopedique De Theorie Et De Sociologie Du Droit*, It is considered to be a legal term with an indeterminate or variable content (*notion floue*) responding to the need to isolate a certain category of normative expressions characterised by the lack of predetermination and by the impossibility of applying them without proceeding to an appreciation on a case-by-case basis, with reference to what is normal or average. See Arnaud (1993), p. 581.

¹⁰⁵ The Oxford English Dictionary, entry 10b.

¹⁰⁶ See Peters A. *et al.* (2009) (eds.) *Non-State Actors as Standard Setters*. Cambridge University Press. p. 12; see also Schaper M. (2009) Non-state environmental standards as a substitute for state regulation? In Peters A. *et al.* (eds.) *Non-State Actors as Standard Setters*. Cambridge University Press. pp. 304-307, where the author uses *rules* as synonyms of *standards*.

¹⁰⁷ *Stakeholders* are defined here as groups or individuals who are committed financially or otherwise to a company, or who can be affected by its activities. As well as companies, customers, employees, suppliers, communities, and shareholders or other financiers, this term also includes a broader group of actors, such as governments, media, non-governmental organisations, and others. Their interests do not always coincide. See *Financial Times* definition online, <http://lexicon.ft.com/Term?term=stakeholders>, accessed 5.05.2015.

specific guidelines that may help companies to implement the necessary control measures. For each new regime, consensus must be reached about what counts as acceptable.¹⁰⁸ When a guideline becomes a recognised common regulatory practice, one can talk about the ‘natural’ emerging of a standard.¹⁰⁹ Hence, this activity can be observed moving from a concrete case to a general abstraction, appearing ‘from the bottom’. By contrast, a rule-making activity can be observed moving from an abstract level of law-making to the application in a concrete situation, coming ‘from above’. Schematically, *a rule is born to be accepted*, coming from such sources as Parliamentary laws or Presidential decrees, while *a standard needs to make its way towards acceptance*: in other words, codes of conduct, regulatory practices, voluntary norms, guidelines, and other soft law provisions – all related to a particular subject – will only become a standard when generally recognised. Here lies one of the major differences between a rule and a standard, and this is how a standard turns out to be more wide-ranging and adjusted to a specific regulatory sector than a rule.

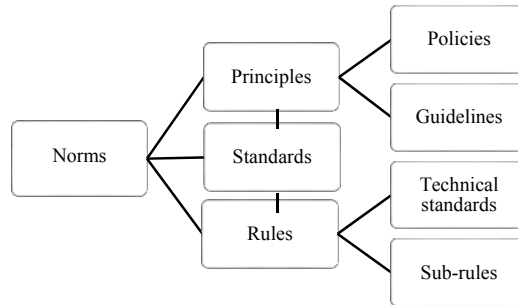
Considering the above, the definition of a standard can be distilled at this stage into *a sector-specific legal norm based on principles and comprising rules, aiming to provide the most objective, effective,¹¹⁰ and contemporary implementation of law*. To reflect this vision, standards are thus placed at the same level as principles and rules (see Figure 2), and are logically connected with each other.

¹⁰⁸ See, generally, Korobkin R. (2000) Behavioral Analysis and Legal Form: Rules vs. Standards Revisited. *Oregon Law Review* 79, 23-60.

¹⁰⁹ Braithwaite and Drahos assume that guidelines are common in areas of uncertainty. They may be used when actors agree that something should be done, but there are no principles available to guide behaviour, making guidelines a provisional instrument relevant in new or quickly changing circumstances. See Braithwaite, Drahos (2000).

¹¹⁰ *Efficiency* is defined by the Business Dictionary as the degree to which objectives are achieved and the extent to which targeted problems are solved. In contrast to efficiency, *effectiveness* is determined without reference to costs and, whereas efficiency means ‘doing the thing right’, effectiveness means ‘doing the right thing’. See the link to the article on www.businessdictionary.com/definition/effectiveness.html#ixzz2KsKfVYg9, accessed 27.10.2014. The Brazilian Guide on Good Regulatory Practices develops this definition further by saying that legal provisions must have legal, political, economic, and social robustness to be effective, in other words, it must be accepted and applied by the entire society, achieving the objectives that guided its publication. See National System of Metrology, Standardization and Industrial Quality (2007) The Brazilian Guide on Good Regulatory Practices.

Figure 2. Standards revisited



This having been said, it should be mentioned that in this study the terms ‘rules’, ‘principles’, and ‘standards’ are used for the purpose of a theoretical analysis. The whole debate addressed above was partially a result of the fact that legal norms ‘in real life’ seldom appear in the pure form of a principle, a rule, or a standard. There is a sliding scale in which provisions containing principles can be rule-like and can be referred to as to a rule; similarly, provisions containing standards can at times be difficult to distinguish from a rule. Moreover, provisions containing these norms can in practice be found in a variety of legal documents. This variety is relative, however, since, as Overton claims, legal documents may fall anywhere on a graduated continuum between the extreme poles of rule-like and standard-like.¹¹¹

Summarising, one may conclude that the term ‘standard’ can be found at all levels of a normative hierarchy, depending on its definition. Based on the above analysis, and considering contemporary developments within the philosophy of law, it is argued – as can be seen from Figure 2 – that there are three possibilities of interpreting the standard: 1) according to Dworkin, as an all-inclusive synonym for a general legal ‘norm’, used to sum up rules and principles; 2) as a technical sub-rule, occupying the lowest level of the normative gradation; or 3) as one of legal norms, placed on an equal level with rules and principles. Regarded this last way, legal standards would give a decision-maker more room in which to manoeuvre, allowing handling of exceptional, specific cases. A rule could miss this. Standards thus help to avoid errors that may arise from a mechanical application of rules; they are more ‘expert-like’ norms compared to rules, as they translate the general rule, ‘adapting’ it to a specific context or sector of law. This last approach to the notion of standard is given the most attention further in this study.

¹¹¹ Overton (2002), p. 73.

2. GENERAL DICHOTOMY BETWEEN PRINCIPLES AND STANDARDS: EUROPEAN UNION LAW

As elaborated above, the vision pertaining to legal norms is reflected in the European approach.

The general characteristics of principles and standards formulated earlier will serve in this section as the departure point in order to further examine these norms in the context of European Union law, with special emphasis placed on crystallising what kind of norms are the legal standards of European environmental law.

2.1 The EU legal order

The relationship between international law and European Union law is usually viewed as being ‘monistic’ in nature, in that international agreements concluded by the European Union form an ‘integral part’ of European law, and may have a direct effect.¹¹² Indeed, the EU seems to have no problem with allowing binding international norms to become part of its legal order.¹¹³ The Court of Justice of the European Union (CJEU) and the General Court have at various times adopted provisions of public international law as a source of EU law.¹¹⁴ Potentially, therefore,

¹¹² It should be noted, however, that the division into a monist and a dualist approach grows out of use in relation to modern legal theories. As Nijman and Nollkaemper write: ‘The political and social context that inspired the original theories of dualism and monism is a very different one from that of today. The emergence of new non-legal developments, different from those that inspired traditional monism and dualism, call for alternative theoretical approaches that allow us to systematize, explain, and understand changes in the relationship between international and national law and, at the same time, to give direction to the future development of international and national law. [...] Increasing cross-border flow of services, goods and capital, mobility, and communication have undermined any stable notion of what is national and what is international’. Nijman J., Nollkaemper A. (2007) (eds.) *New Perspectives on the Divide between National & International Law*. Oxford University Press. p. 10.

¹¹³ Wessel R. (2011) *Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?* In Cannizzaro E. et al. (eds.) *International Law as Law of the European Union*. Martinus Nijhoff. p. 3.

¹¹⁴ See for instance cases C-286/90, *Anlagemyndigheden v. Poulsen Diva Navigation Corp.* [1992] ECR I-601; T-102/96, *Gencor v. Commission* [1999] ECR II-753; and the most recent, T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649, where the General Court accepted the primacy of the UN Security Council resolutions over the EU law subject to review for compliance with *jus cogens* (paras 226, 282-286). Though often referring to customary international law and general principles of law, the CJEU has for many years avoided any explicit statement on the position and effect of these rules and principles of law in the EC/EU legal order. According to Wouters and Van Eeckhoutte, it has simply applied these norms either to delimit the competences between Member States and the Community (see cases C-41/74, *Van Duyn v. Home Office* [1974] ECR I-1337, para. 22; C-89/85, *Ahlström Osakeyhtiö and Others v. Commission* [1988] ECR I-00099, para. 18), as rules of interpretation (see case C-149/96, *Portuguese Republic v. Council* [1999] ECR I-8395, paras 34-35) or as a gap-filler in the absence of explicit provisions governing a certain aspect on which the CJEU needed to decide (see case C-37/00, *Weber v. Universal Ogden Services Ltd* [2002] ECR I-02013, para. 31), without any statement as to their legal position. Wouters J., Van Eeckhoutte D. (2006) (eds.) *Doorwerking van internationaal recht in de Belgische rechtsorde: recente ontwikkelingen in een rechtstakoverschrijdend perspectief*. Intersentia. pp. 168-169. But whether international law norms can be invoked depends on whether the norms are directly applicable – see for instance case C-401/12P till C-403/12P, JM 2015/33, *Council and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*. [not yet published]. pp. 283-290.

international treaties, international customary law, general principles of international law, and acts of international organisations are all sources of EU law.¹¹⁵ Consequently, one would expect that the legal norms introduced into or created within the European legal order would possess the same characteristics as they do under international law.

However, from relatively early in its case law, the CJEU sought to label existent European Communities as being substantially different in terms of general public international law, constituting ‘a new legal order’. It judged that ‘[...] *the Community constitute a new legal order of international law*’¹¹⁶ and that ‘[...] *by contrast with ordinary international treaties, the EEC Treaty has created its own legal system,*’¹¹⁷ whereby ‘[...] *the transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail*’.¹¹⁸

The aforementioned point of view is also supported in general by legal theorists. As Von Bogdandy writes: ‘There are good reasons for conceiving the EU as one body of public authority and the law of the EU Treaty and that of the Community Treaties as a single legal order, delimiting it from the legal orders of the Member States on the one hand and from international law on the other hand’.¹¹⁹

By labelling European Union law as being distinct from general international law, the CJEU has given it certain discretion as to when to consider an international law provision as a source of European law. EU law is thus characterised by its openness to international law, but also by its self-positioning as distinct and *sui generis*, which enables the CJEU and the Union to reject at a conceptual level, in a given instance, a standard public international law approach in developing the law.¹²⁰ Furthermore, the introduction of international legal principles to the EU legal order also establishes new principles and standards of EU law. Considering this difference, it is therefore important to take a closer look at EU legal norms using the example of EU environmental law.

¹¹⁵ Conway G. (2010) *Conflict of Norms in European Union Law and the Legal Reasoning of the European Court of Justice*. Brunel University. p. 31.

¹¹⁶ Case 26/62, *Van Gend en Loos* [1963] ECR I, para 12.

¹¹⁷ Case 6/64, *Costa v. ENEL* [1964] ECR 585. See also Joined Cases C-402/05 P and C-415/05 P, *Kadi and al Barakat International Foundation v. Council*, supra n. 93, where the CJEU held that the Community was an autonomous legal system with respect to international law (paras. 282, 316).

¹¹⁸ Case 6/64, *Costa v. ENEL* [1964] ECR 585, at 594.

¹¹⁹ Bogdandy, von, A. (2010) *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*. *European Law Journal* 16 (2). 95-111. p. 107. But see for instance Pellet, for whom the European legal order is still just an ‘ordre juridique de droit international’: Pellet A. (1994) *Les fondements juridiques internationaux du droit communautaire*. *Collected Courses of the Academy of European Law* 5 (2). 193-271. p. 245.

¹²⁰ Conway (2010), pp. 31-32. The author states further on that ‘this opens up the problem of opportunistic positioning of the EU as either consistent with or different from general public international law, depending on whatever characterization would achieve a desired result’. See *Ibid*, p. 32.

2.2 Principles and standards in EU environmental law

Just as in international law, in European Union law the term *norm* has a potentially wide range of reference to include any provision in a legal system that has some significance or impact on the law in force – or on *acquis communautaire*, which the European Union aims to maintain in full and to build upon.¹²¹

The sources of EU law include primary legislation, or the legal norms contained in the founding and amending Treaties, and secondary legislation, or the legal norms that can be endorsed by institutions of the Union by virtue of the powers given to it by the Member States.¹²² Additional sources of law in the EU legal order are the agreements with third countries, the general principles,¹²³ and CJEU case law.

Environmental regime in the EU is shaped by legal norms based on EU law. These rights and obligations may be contained in a variety of EU legislative instruments: namely, regulations, directives, and decisions.¹²⁴ Increasingly, EU environmental norms are also influenced by agreements that the parties enter into voluntarily, and by soft law mechanisms.¹²⁵ To achieve its objectives, especially in certain areas where environmental laws are being challenged by other sector-specific provisions in the field of common commercial policy or investment, the EU has chosen norms of soft law such as codes of conduct and international/European framework strategies.¹²⁶

Protection of the environment was not mentioned initially in the Treaty of Rome (1958), and it was not until 1973 that the first of a series of European Environment Action Programmes (EAP) was launched. The design and application of EU environmental law have been shaped by a set of international principles and standards, which have been given a progressively more concrete form by scores of international conventions adopted in their wake.¹²⁷ Certainly, the internal development

¹²¹ Article 2 TEU. The term *acquis communautaire* refers to rules and practices that were ‘acquired’ by the EU during the term of its existence; however, Mathijsen notes that the decisions taken under the enhanced cooperation with third states do not become part of the *acquis*. See Mathijsen P. (2007) *A Guide to European Union Law*. Sweet & Maxwell. pp. 5, 7.

¹²² In accordance with Article 288 TFEU.

¹²³ See generally Tridimas T. (2006) *The General Principles of EU Law*. Oxford University Press, 2d ed.

¹²⁴ Article 288 TFEU. According to this article, recommendations and opinions that as well can be adopted by the European institutions have no binding force.

¹²⁵ See, for instance, Resolution of the Council and the Representatives of the Governments of the Member States, on a code of conduct for business taxation. 1.12.1997, OJ 1998, C 2/1. The subsequent Commission Communication ‘Tax Policy in the European Union - Priorities for the years ahead’ states that ‘the use of non-legislative approaches or ‘soft legislation’ may be an additional means of making progress in the tax field’. European Commission COM(2001) 260 final, pp. 10, 22-24.

¹²⁶ See, for example, European Commission (2014) Recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing, OJ L 39, 72–78, where the Commission suggests minimum safeguards when fracking the shale gas; see also European Commission (2011) Communication on a Roadmap for moving to a competitive low carbon economy in 2050, COM (2011)0112; European Commission (2010) Communication Energy 2020 A strategy for competitive, sustainable and secure energy, COM (2010)0639 and European Commission (2011) White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011)0144. These documents reflect the EU’s goal of reducing greenhouse gas emissions by 80-95% below 1990 levels by 2050 as part of the effort needed from developed countries as a group.

¹²⁷ Such as the 1972 Stockholm Declaration on the Human Environment, the 1982 World Charter for Nature, and the 1992 Rio Declaration on Environment and Development – as well as Agenda 21 – intended to clarify the scope of the 1992 UN Declaration.

and challenges within the Union have also had a major influence. Von Homeyer provides an analytical overview of EU environmental governance from the early 1970s up to the present, where he argues that EU environmental governance could be described as an amalgam of four to five environmental governance regimes that have been layered successively on top of each other over the past thirty-five years.¹²⁸ The evolution of EU environmental law started with the ‘environment regime’, which was followed later by the ‘internal market regime’, the ‘integration regime’, the ‘sustainable development regime’, and the emerging ‘climate regime’.¹²⁹ These governance regimes can be distinguished in terms of their prevailing overall political priorities, legal foundations, decision-making methods, types of legitimating justification, underlying political dynamics, types of environmental objectives, and instruments. Despite certain modifications, each of the regimes can still be discerned in EU environmental policy and law.¹³⁰

The Single European Act (1986) marked the beginning of a prominent role for environmental protection in European policy-making, introducing the environment-related provisions and confirming the Community’s task of setting up a European environmental policy.¹³¹ European environmental policy was expanded substantially by the Treaties of Maastricht (1992), Amsterdam (1997) and Lisbon (2009), *inter alia*, by making sustainable development of the Earth one of the EU’s central objectives,¹³² and by strengthening the principle under which environmental protection requirements must be integrated into other policies and activities of the Union.¹³³

European environmental policy is currently a rapidly developing bulk of norms that influence almost any sphere of law-making, not only within but also outside the geographical borders of the European Union.¹³⁴ These principles have had considerable influence on the drafting of secondary EU environmental legislation¹³⁵ and on CJEU case law – and in particular on the formulation and further elaboration of environmental standards. And indeed, European environmental law is characterised by the intensive ongoing activity of setting standards, with a consequence being the emergence of new standards as a response to environmental challenges. This is why it is important to examine more closely the nature of principles and standards in EU environmental law.

¹²⁸ Homeyer, von, I. (2009) The evolution of EU environmental governance. In Scott J. (ed.) *Environmental Protection. European Law and Governance*. Oxford University Press. pp. 18-22.

¹²⁹ Homeyer, von (2009).

¹³⁰ See *Ibid.*

¹³¹ Until 1 December 2009, only the European Community (EC) and the European Atomic Energy Community (EAEC) possessed a legal personality. Article 47 of the Treaty on European Union (TEU) conferred explicitly the legal personality to the European Union, as a consequence of a merger between the European Community and the European Union.

¹³² Article 3 (5) TEU.

¹³³ Article 11 TFEU. The need for environmental integration in EU sector policies had already been articulated in the Third Environmental Action Programme (EAP) from 1983, resulting in a legal status in the Single European Act (1987) (Article 130 r), and was subsequently elaborated and given new accents in the Third, Fourth, Fifth, Sixth, and current Seventh EAPs. See also Persson Å. (2004) *Environmental Policy Integration: An Introduction*. Stockholm Environment Institute. p. 5. See further Chapter III, Section 2.1, on the application of Article 11 TFEU and external EU environmental action.

¹³⁴ See Chapter III on the rationale and the existent frameworks of the legal standards’ application in the third countries.

¹³⁵ Such as Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2011] OJ L 26/1 (EIA Directive); Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC, [2003] OJ L 41/26 (Directive on access to information); and Directive 2008/1/EC concerning integrated pollution prevention and control, [2010] OJ L 334 (Directive on industrial emissions).

2.2.1 Principles

Principles, governing the environmental law-making in European Union, can be roughly divided in ‘general principles’ and ‘environmental principles’.

This study uses the term ‘general principle’ in the way Dworkin understood it in order to characterise those norms of primary law having a normative founding function for the whole of the EU legal order: general principles determine the foundations in order to justify the exercise of public authority.¹³⁶ This includes the development of the category of general principles of law as a source of EU law.¹³⁷ Similarly to this approach, Von Bogdandy defines principles in EU primary law as ‘special legal norms relating to the whole of a legal order’, which ‘can fulfil the function of ‘gateways’ through which the legal order is attached to the broader public discourse’.¹³⁸

Some general principles were clearly imported into the EU legal system from such sources as constitutions of the Member States, as the constitutional and legal traditions of Member States play an important role in filling gaps in the EU legal order, or else from international treaties and agreements such as the European Convention on Human Rights (ECHR). Other principles have been developed by the CJEU. In the EU, ‘the Treaties form the starting point for the elaboration concerning grounds for judicial review’.¹³⁹ The general principles laid down in the Treaties assist the CJEU in the interpretation and application of EU law. Numerous secondary law instruments demand this, as they are to be interpreted in the light of founding principles.¹⁴⁰ Accordingly, the CJEU uses conformity with the primary law as a method of interpretation.¹⁴¹

General principles set a normative frame of reference for the whole of the EU legal order. In international law, such legal principles have an open texture and degree of generality or abstraction that makes them inherently more uncertain compared to more conclusive, clear-cut legal rules.¹⁴² Examples include the principle of good faith and proximate causality.¹⁴³ In EU law, the category of general principles of law is similar to that in international law, while it includes more explicitly human, environmental, and social rights and principles specific to the nature and the functioning of the European Union itself (such as subsidiarity, proportionality, conferral, legal certainty, equal

¹³⁶ See Dworkin R. (1977) *Taking Rights Seriously*. Duckworth.

¹³⁷ See Tridimas (2006).

¹³⁸ Bogdandy, von (2010), p. 104. The author also remarks that ‘in EU law, it has to be distinguished between principles, in particular founding principles, and objectives. The EU ‘is founded’ on principles (Article 6 (1) TEU), and principles limit the actions of the Member States and the EU. Objectives, on the other hand, stipulate the intended effects in social reality’. (*Ibid.*, p. 106).

¹³⁹ Craig P., Burca, de, G. (2011) *EU Law. Text, Cases, and Materials*. Oxford University Press. p. 109.

¹⁴⁰ Conway (2010), p. 100. Writing about the nature of EU principles, the author remarks: ‘There is one function that a legal doctrine of principles cannot usually fulfil: to delimit right and wrong in a concrete case. This is a result of the general vagueness of principles’. *Ibid.*, p. 101.

¹⁴¹ See for instance case C-314/89, *Rau* [1991] ECR I-1647, para 17; case C-98/91, *Herbrink* [1994] ECR I-223, para 9; cases C-465/00, C-138/01 and C-139/01, *ORF* [2003] ECR I-4989, para 68; case C-540/03, *Parliament v. Council* [2006] ECR I-5769, paras 61 *et seq.*, 104 *et seq.* Craig and De Burca write that ‘the general principles afford the EU Courts considerable power over the interpretation of Treaty Articles and the interpretation and validity of other Union acts’. See Craig, Burca, de (2011), p. 110.

¹⁴² See Sections 1.5.1 and 1.5.2 above, see also Conway (2010), pp. 32-33.

¹⁴³ Brownlie I. (2008) *Principles of Public International Law*. Oxford University Press, 7th ed. pp. 19-27.

rights, effectiveness of remedies, transparency, and others).¹⁴⁴ Noteworthy is that not all norms that are referred to as *principle* in the Treaties or by the CJEU actually constitute *general* principles of EU law.¹⁴⁵ A general principle usually lays down *general* requirements, including, for example, in Article 6 (1) TEU or Article 8 TFEU.¹⁴⁶ A similar type of principle is Article 11 TFEU, otherwise referred to as the ‘principle of integration’, which stipulates that ‘environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development’. Being ‘one of the most important principles of EU law as far as environmental protection is concerned’,¹⁴⁷ the integration principle, however, no longer has the special status of a ‘general principle’,¹⁴⁸ and is referred to by the TFEU as a ‘principle of general application’.¹⁴⁹ This explains why, although being of general application, this principle is sometimes classified as an environmental principle.

Although not the only integration clause to be found in the Treaties,¹⁵⁰ the principle of integration is the oldest one: namely, the requirement to integrate environmental considerations into other policies of the Union ‘dates back to the very beginnings of EEC activity in the field of environmental protection’.¹⁵¹ The idea of including environmental considerations in all EU policies as introduced early in 1973 by the First Environment Action Programme (EAP),¹⁵² and was transformed into a legal obligation later by the Single European Act in 1987.¹⁵³

¹⁴⁴ See Craig, Burca, de (2011), p. 109.

¹⁴⁵ Bogdandy, von (2010), p. 106.

¹⁴⁶ Article 6 (1) TEU states that ‘the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’, while Article 8 TFEU states that ‘in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’.

¹⁴⁷ See Kramer L. (2004) The Genesis of EC Environmental Principles. In Macrory R. (ed.) *Principles of European Environmental Law*. Europa Law Publishing. p. 33.

¹⁴⁸ The integration principle was made in 1997 a ‘general principle’ of (then) European Community law, see Article 6 EEC Treaty.

¹⁴⁹ See title II of TFEU, ‘Provisions having general application’. This change made Jans talk about the ‘proliferation of integration principles brought about by the Lisbon Treaty’ that resulted in the ‘weakening of the current environmental integration principle and could, ultimately, [...] lead to a weakening, or even a downgrading, of environmental standards’. Jans J. (2011) Stop the Integration principle? *Fordham International Law Journal* 33 (5). 1533-1547. p. 1547.

¹⁵⁰ See for instance Articles 7-13 TFEU on gender equality, employment and social and human health protection, non-discrimination and consumer protection.

¹⁵¹ Kramer (2004), p. 33.

¹⁵² Programme of action of the European Communities on the environment, 20.12.1973, OJ C112/1. Since 1971, the work of the European Commission in the environmental field has been directed by goals formulated by Environmental Action Programmes (EAP). An EAP is based on a proposal from the Commission, but since the 6th EAP it has been subject to a full legislative procedure leading to agreement between the European Parliament and the Council of Ministers. The negotiation process is a great opportunity for a strategic debate on the future of EU environmental policies, a debate in which not only are the three decision-making bodies involved but stakeholders can also have their say. These Programmes present a systematic approach for tackling environmental problems, reflecting fundamental elements of contemporary thinking and problem perceptions. They have set ambitions and targets, identified priority areas of work and, progressively, have also elaborated on the need to integrate environmental objectives and conditions into other policies. See EEB website ‘Sustainability. Seventh Environmental Action Programme’, www.eeb.org/index.cfm/activities/sustainability/7th-environmental-action-programme/, accessed 27.10.2014.

¹⁵³ Single European Act, [1987] OJ L 169/1. The Act added to the EEC Treaty Articles 130R, 130S and 130T, enabling the Community ‘to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational utilization of natural resources’.

The principle of integration is further reflected in the Charter of Fundamental Rights of the European Union.¹⁵⁴ According to Article 37 of the Charter, ‘a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’.

The principle of integration has also exercised considerable influence on the drafting of European secondary legislation, as can be seen from its frequent inclusion in preambles to regulations, directives, and decisions,¹⁵⁵ and in its decisive influence on some standing rulings by the CJEU. In Jans’ opinion, the secondary European legislation can – and indeed must – be interpreted in the light of the environmental objectives of the Treaty, even outside the environmental field.¹⁵⁶ As Morgera emphasises, ‘by requiring the systematic pursuance of environmental objectives, principles and criteria in all EU policies and activities, the environmental integration requirement has an ‘amplifying effect’ on EU environmental policy’.¹⁵⁷

The text of Article 11 TFEU stipulates that environmental integration is aimed ultimately at promoting sustainable development. The concept of sustainable development in its current form can be traced back to the Conference on the Human Environment, hosted by the United Nations in 1972 in Stockholm, followed by the creation of the United Nations Environment Programme (UNEP) in 1973.¹⁵⁸ This in turn led to this notion being included explicitly in a vast number of documents and declarations, and it became the centre of attention of many subsequent conferences.¹⁵⁹ The International Court of Justice has recognised sustainable development as a concept by invoking it in the ‘Gabčíkovo-Nagymaros’ case.¹⁶⁰

In CJEU case law, there are very few references to this notion, and the Court itself has not elaborated a definition or outlined its understanding of the term. In 2001, a broad Strategy for Sustainable Development was launched by the European Council in Gothenburg,¹⁶¹ and in 2002

¹⁵⁴ Charter of Fundamental Rights of the European Union, 30.03.2010, OJ 2010/C 83/02.

¹⁵⁵ Sadeleer, de (2002), p. 1. On the example of the application of this principle in the third countries (inspired by the EU environmental legislation), see Russian Federal law ‘On Environmental protection’, 10.01.2002 No 7, Article 3.

¹⁵⁶ Jans (2011), p. 1541. For instance, the CJEU has accepted that Common Commercial policy instruments, including trade restrictions, can serve environmental protection purposes. For an overview with reference to the relevant CJEU case law, see Eeckhout P. (2011) *External Relations of the European Union – Legal and Constitutional Foundations*. Oxford University Press. pp. 39-56. Worth mentioning here is the CJEU’s contribution to the establishment of the principle’s value in the case C-62/88 *Greece v Council* [1990] ECR I-1527, para 20,) which has ‘cemented its applicability to all EU policies and activities’. Aldson F. (2011) *EU law and sustainability in focus: will the Lisbon Treaty lead to ‘the sustainable development of Europe’?* *Environmental Law & Management* 23. 284-299. p. 293.

¹⁵⁷ See Morgera E. (2012) *European Environmental Law*. In Alam S. *et al.* (eds.) *Routledge Handbook of International Environmental Law*. Routledge. 427-442.

¹⁵⁸ Gehring M., Newcombe A. (2011) *An Introduction to Sustainable Development in World Investment Law*. In Cordonnier Segger M., Gehring M. *et al.* (eds.) *Sustainable Development in World Investment Law*. Kluwer Law International. 3-12. p. 6.

¹⁵⁹ The World Commission on Environment and Development came in its report ‘Our Common Future’ with what currently has become the most popular definition of sustainable development: ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. See Brundtland Report (1987) Oxford University Press, Part I. Ch. 3, Ro. 27.

¹⁶⁰ See International Court of Justice Case Concerning the Gabčíkovo-Nagymaros project (Hungary v. Slovakia), Judgement of 25 September 1997, ICJ Reports 1997, para. 140.

¹⁶¹ European Commission (2001) *A Sustainable Europe for a Better World: A European Strategy for Sustainable Development*. Communication, COM (2001) 264 final; reviewed by the Commission in 2009: European Commission (2009) *Review of the European Union Strategy for Sustainable Development*. Communication, COM (2009) 400 final.

its external dimension was defined in Barcelona, ahead of the UN World Summit on Sustainable Development in 2002.¹⁶² There is a common perception that sustainable development must take into account three interconnected factors: economic development, social (human rights) development, and environmental protection.¹⁶³ This can be the reason why this concept was not mentioned among the ‘pure’ environmental principles of Article 191 TFEU. Some authors argue that while it is referred to as a principle, the commitment to sustainable development is more of a guideline to a policy than a normative-legal concept.¹⁶⁴ Nevertheless, in the preamble to the Treaty on European Union, sustainable development is mentioned as a ‘principle’, and is linked specifically to, *inter alia*, environmental protection.¹⁶⁵ Some argue that by incorporating this provision into the Treaty, the Union has created one of the most explicit legal commitments to a sustainable future anywhere in the world, possibly elevating environmental protection over economic and social concerns.¹⁶⁶ However, considering the place that the explicit and implicit protection of European economic interests occupies in the Treaty,¹⁶⁷ this point seems to be equivocal, if not too idealistic, and certainly abstract. Rather, it appears correct to suggest, in line with Duran and Morgera, that ‘the definition of sustainable development, [...] is primarily a political question and thus a matter for legislative discretion’.¹⁶⁸ Consequently, sustainable development is considered by this study as a ‘concept’ rather than a ‘principle’ as characterised earlier in this chapter.

At the same time, in addition to overarching principles such as the principle of integration, these are also sets of principles for a single policy area such as those of Article 191 (2) TFEU (environmental policy) or Article 127 (1) TFEU (monetary policy).

Contributing to this diversity, principles in EU primary legislation can also be labelled as *democratic* (Title II TEU), *basic* (Article 19 TEU), *guiding* (Article 119 (3) TFEU), *fundamental* (Article 153 (4) TFEU), *uniform* (Article 207 (1) TFEU), *common* (Article 223 (1) TFEU), *essential* (Article 2 of Protocol No.37 on the Financial Consequences of the Expiry of the Treaty Establishing the European Coal and Steel Community and on the Research Fund for Coal and Steel), or *cornerstone* (Declaration No. 17 concerning primacy). Additionally, as regards principles laid down in Article 6 (1) TEU as well as other principles located in Title I TEU pertaining to the

¹⁶² European Commission (2002) Towards a Global Partnership for Sustainable Development. Communication, COM (2002) 82 final.

¹⁶³ More on the necessity of re-thinking the concept of sustainable development in EU law: see Aldson (2011).

¹⁶⁴ See for instance Clarke T. (2007) The Materiality of Sustainability. In Benn S., Dunphy D. (eds.) *Corporate Governance and Sustainability: Challenges For Theory And Practice*. Routledge. 219-251. p. 225. See also on the problematic practical applicability of the concept Lightfoot S., Burchell J. (2005) The European Union and the World Summit on Sustainable Development: Normative Power Europe in Action? *Journal of Common Market Studies* 43 (1). 75-95. On the difference between the notions of sustainable development and that of sustainability, see Aldson (2011), p. 284.

¹⁶⁵ See TEU, recital 9: ‘Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields’. See also European Council (2005) Guiding Principles of Sustainable Development. Presidency Conclusions. 16-17.06.2005.

¹⁶⁶ Aldson (2011), p. 1.

¹⁶⁷ See Article 3 (1) TFEU on the Union’s exclusive competence in the areas of the Customs Union and the Common Commercial Policy, Articles 28-37 TFEU on the Free Movement of Goods, Articles 206 and 207 TFEU on the Common Commercial Policy.

¹⁶⁸ Marin Duran G., Morgera E. (2012) *Environmental Integration in the EU’s External Relations*. Hart Publishing. p. 36.

allocation of competences, loyal cooperation, and structural compatibility, Von Bogdandy suggests referring to them as *founding principles*.¹⁶⁹ According to him, other principles of primary law do not belong to these overarching founding principles, but serve to concretise and thus derive constitutional content from them.¹⁷⁰ On top of this, the CJEU refers occasionally to *constitutional principles* of the EC (now TFEU) Treaty, but without further clarification.¹⁷¹ It seems that whatever the name, the principles referred to here as ‘general principles of EU law’ afford Courts full authority concerning interpretation of the Treaty Articles as well as the interpretation and validity of other legal acts of the European Union, and in that respect they differ from other legal norms.

Principles and objectives form the basis of EU environmental policy. These are objectives aimed at preserving the environment, protecting human health, implementing natural resources rationally, and promoting norms at the international level to deal with regional or worldwide environmental problems, in particular in combating climate change.¹⁷²

The core environmental principles are listed in Article 191 (2) TFEU:

Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.¹⁷³

The analysis of principles of the European Union relating to environmental protection, such as the one contained in Article 11 TFEU, as well as principles set out in Article 191 TFEU, has been conducted by, among others, De Sadeleer, and also by Jans and Vedder and by Duran and Morgera.¹⁷⁴ All these principles – with the exception of the precautionary principle – were already present in Title II of the 1973 First Environment Action Programme, which did not contain any legally binding requirements. In addition, most environment-related policy programmes, political statements, strategy documents, or White or Green Papers refer to one or more of these principles. For example, the EU Environment Action programmes have always referred to different environmental principles, which were meant to be made operational in due course through norms

¹⁶⁹ Bogdandy, von (2010), p. 105. According to Article 6 (1) TEU, the European Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union, which possess the same legal value as the Treaties.

¹⁷⁰ *Ibid.*

¹⁷¹ Cases C-402/05 P and C-415/05 P, *Kadi v. Council* [2008] ECR I-0000, paras 5 & 285.

¹⁷² TFEU Article 191 (1).

¹⁷³ In addition, some points are mentioned in Article 191 (3) that are of less relevance for this study. They relate to the obligation of the Union to take into account the following when preparing its policy on the environment: available scientific data, diverging regional conditions, potential advantages and drawbacks of action, and the balanced development of the regions.

¹⁷⁴ See generally Sadeleer de, N. (2002) *Environmental Principles: From Political Slogans to Legal Rules*. Oxford University Press; Sadeleer, de, N. (2004) *Environmental Principles: Modern and post-modern law*. In Macrory R. (ed.) *Principles of European Environmental Law*. Europa Law Publishing; see also Jans, Vedder (2012), pp. 13-31; Marin Duran G., Morgera E. (2012) *Environmental Integration in the EU's External Relations*. Hart Publishing. pp. 15-20, 28-43.

adopted by normal legislative procedures. The CJEU and national courts frequently apply these principles in their decisions.¹⁷⁵

2.2.2 Standards

In European Union law, the notion of a standard is at least as popular as that of a principle. It is used in both primary and secondary sources of law, and *especially* in documents having a soft law character. For example, in its Conclusions on the EU's trade policy of 2010 the Council called upon the European Union to 'promote convergence and equivalence of rules and standards [...], including through greater use of international standards as a means of ensuring the satisfaction of ambitious and legitimate regulatory objectives'.¹⁷⁶

The term 'standard' is used in three different ways in European Union law, as a general norm, a technical specification, and a standard as such. However, the European legal order seems less 'theorised' in comparison to the international legal order. Thus, in the academic literature there is hardly any example to be found of an 'old-fashioned' first usage in which 'standard' is being used as a synonym for a general legal norm.¹⁷⁷

With regard to the second manner of using the term, there is a possibility to take standard for a rule, further dividing it into a sub-rule or a technical standard. This resemblance requires therefore further attention.

Rules in the sense of final, all-or-nothing requirements can be seen as a typical illustration of binding norms. At the other end of the 'bindingness scale' within the EU legal order lie the soft law instruments such as formalised statements or programmes of action, with some definition of methods or ways of implementing policy, or material that may influence interpretations of norms such as travaux préparatoires.¹⁷⁸ Senden identifies three types of European soft-law sources: these are preparatory and informative instruments such as White Papers and Green Papers from the Commission; interpretative and decisional instruments such as inter-institutional communications and interpretative communications and notices; and steering instruments such as Council Recommendations and Commission Opinions.¹⁷⁹ The present study covers the array of legally binding European norms, thus excluding purely soft law instruments, such as opinions from EU institutions, while at the same time including sources relevant for the interpretation of these norms,

¹⁷⁵ See in general Sadeleer, de (2004); Dhondt N. (2002) *Environmental Law Principles and the Case Law of the Court of Justice*. In Seridan M., Lavrysen L. (eds.) *Environmental Law Principles in Practice*. Bruylant. Regarding the way national courts apply European environmental principles, see Macrory R. et al. (2004) (eds.) *Principles of European Environmental Law*. Europa Law Publishing.

¹⁷⁶ European Council (2010) Council Conclusions on the EU's trade policy. 21.12.2010. p. 4.

¹⁷⁷ Dworkin and Hart in their respective writings did not refer to a term *standard* in relation to European law. See Dworkin (1977), Dworkin (1978), Dworkin (1984), Dworkin (1986), Hart H. (1994) *The Concept of Law*. Clarendon Press.

¹⁷⁸ See generally in the EU context: Senden L. (2004) *Soft Law in European Community Law*. Hart Publishing. Under the soft law here are understood quasi-legal instruments such as codes of conduct, guidelines, practices, non-binding papers, and agreements that have considerable potential to become 'hard law' in future.

¹⁷⁹ See Senden (2004), pp. 188-119.

insofar as such sources may by incorporation become binding because reference to them is required by, or adopted through, a norm of interpretation.¹⁸⁰ The ‘legally binding’ rules include those that can form the basis of a judicial decision.¹⁸¹

As set out in Article 288 TFEU, the three main types of binding legislative instruments of European institutions are regulations, directives, and decisions.¹⁸² However, each of them contains both rules and standards that are applied in different ways depending on the type of legislative instrument.¹⁸³

With reference to the reflection addressed above in Section 1.3.3 on the nature of legal standard, it can be assumed that alike rules, standards under the European legal order also possess a prescriptive character. At the same time, it is maintained that legal standards are not identical to technical standards or sub-rules.

The European definition of a technical standard can be found in the Council Directive laying down a procedure for the provision of information in the field of technical standards and guidelines, which defines a standard as a ‘technical specification approved by a recognised standardisation body for repeated or continuous application, with which compliance is not compulsory, and which is one of the following:

- international standard: a standard adopted by an international standardisation organisation and made available to the public;
- European standard: a standard adopted by a European standardisation body and made available to the public;
- national standard: a standard adopted by a national standardisation body and made available to the public’.¹⁸⁴

¹⁸⁰ See Pauwelyn J. (2003) *Conflict of Norms in Public International Law - How WTO Law Relates to Other Rules of International Law*. Cambridge University Press. p. 6.

¹⁸¹ *Ibid*, p. 6; provided it is applied inside the European Union.

¹⁸² Articles 290-291 of the TFEU provide further for a distinction between legislative, delegated, and implementing acts. Read more in Craig, Burca, de (2011), pp. 131-141.

¹⁸³ On the application of regulations, directives, and decisions, and the direct effect of EU law, see further Amtenbrink F., Vedder H. (2010) *Recht van de Europese Unie*. Boom Juridische Uitgevers. pp. 174-197.

¹⁸⁴ Directive laying down a procedure for the provision of information in the field of technical standards and regulations, 98/34/EC, OJ L 204, 21.7.1998, Article 1 (4). Note that a technical standard in European legal practice is obviously different from ‘technical regulation’. To compare, in the same Directive the term of ‘*technical regulation*’ is defined as ‘*requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States..., prohibiting the manufacture, importation, marketing or use of a product. De facto technical regulations include: 1) laws, regulations or administrative provisions of a Member State which refer either to technical specifications or other requirements or to professional codes or codes of practice which in turn refer to technical specifications or other requirements and compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions; 2) voluntary agreements to which a public authority is a contracting party and which provide, in the public interest, for compliance with technical specifications or other requirements, excluding public procurement tender specifications; 3) technical specifications or other requirements which are linked to fiscal or financial measures affecting the consumption of products by encouraging compliance with such technical specifications or other requirements; technical specifications or other requirements linked to national social-security systems are not included*’. (Article 1 (9)).

European technical standards are currently being adopted by one of the three recognised European Standardisation Organisations (ESOs) – CEN, CENELEC, and ETSI¹⁸⁵ – and being devised by all interested parties by way of a transparent, open, and consensus-based procedure.¹⁸⁶ A standard of this kind is defined by CENELEC as a

‘... document, designed for common and repeated use, to be used as a rule, guideline or definition. It is both consensus-built and approved by a recognised body. Standards are created by bringing together all interested parties such as manufacturers, consumers, and regulators of a particular material, product, process or service. All parties benefit from standardisation through increased product safety and quality as well as lower transactions costs and prices’.¹⁸⁷

From an academic point of view, this definition is obviously very broad, and it says little about the essence or the place of a standard in a hierarchy of norms. To that extent, the definition given by the EIB regarding the nature of a technical standard provides more information:

‘The standards relate to three aspects:

- the technical characteristics of a project, in terms of planned and actual emissions and other environmental performance indicators;
- the characteristics of the host environment and its immediate neighbourhood, including its habitat and associated flora and fauna;
- the processes adopted and the management arrangements applied for project development, implementation, and operation that have a bearing on the environmental and social impacts and outcome of a project’.¹⁸⁸

Obviously, the legal standard as analysed above is broader than just ‘technical characteristics of a project’. Therefore, it is necessary to turn to the understanding of a ‘standard’ used in the third way - *the legal standards*.

Neither European legislation nor academic scholarship offers a clear definition of a ‘legal standard’, while at the same time there are many examples of the use of the term in European legal, social, and political studies.¹⁸⁹ The absence of detailed technical specifications, their apparent legal nature, and their compulsory application create a clear distinction between legal standards and technical standards described above. Moreover, the lack of a definition does not seem to stand in

¹⁸⁵ Together forming sister organisations of the European Committee for Electrotechnical Standardisation (CENELEC), of which the main field of activity covers the Electrotechnical domain; the European Committee for Standardisation (CEN), of which the main fields of activity cover various sectors Air and Space, Chemistry, Construction, Consumer Products, Energy and Utilities, Food, Health and Safety, Healthcare, Heating, Cooling, Ventilation, ICT, Materials, Measurement, Mechanical Engineering, Nanotechnology, Security and Defence, Services, Transport and Packaging and others; and the European Telecommunications Standards Institute (ETSI), of which the main field of activity is Telecommunications (applicable standards for Information & Communications Technologies including fixed, mobile, radio, broadcast, internet, and several other areas).

¹⁸⁶ See the website of the European Committee for Electrotechnical Standardisation (CENELEC) www.cenelec.eu/faq/faq_entry.htm#_Toc286929756, accessed 5.03.2013.

¹⁸⁷ See the website of the European Committee for Electrotechnical Standardisation (CENELEC) www.cenelec.eu/faq/faq_entry.htm#_Toc286929756, accessed 5.03.2013.

¹⁸⁸ EIB (2009) *The EIB Statement of Environmental and Social Principles and Standards*. para 31.

¹⁸⁹ See for instance Schlag (1985); Immordino, Pagano (2010); Overton (2002); Peters A. *et al.* (2009).

the way of setting standards, and is especially remarkable in areas of European Union law regulating environment, human rights, investment, and accountancy.

Bodansky *et al.* talk about the emergence of *international* environmental law as a distinct field, citing the new types of concerns, new actors, and new setting of standards and compliance procedures.¹⁹⁰ There is no doubt that *European* environmental law adheres to these distinctions. The reason for this lies, first of all, in the unique character of environmental problems, which are transboundary rather than national, involve not only political issues but also form a threat to human health and well-being, and are of considerable technological complexity. These problems result primarily from private rather than governmental activities,¹⁹¹ and are highly uncertain and in a state of rapid flux.¹⁹² All of this means that in order to address these specific challenges, European environmental law has developed into a complex regulatory regime. Noteworthy is that by doing so it needs to consider the divergent interests of the many parties involved, and must change the way it regulates these interests, in order to keep pace with changes in the economy and in society.¹⁹³ Modern regulatory thinking has gone much further than the ‘carrot and stick’ approach. In order to be the most effective, the legal standard-setting aims at finding *the right combination* of applicable principles and rules, as well as political decisions, positions, declarations, and soft law. Consequently, in addition to traditional legal norms in the form of principles and rules, it increasingly often uses legal environmental standards as a flexible and dynamic instrument of law. For a brief reference further on, the term ‘standard’ is used to denote the ‘legal environmental standard’.

The body of legal standards in European environmental legislation is enormous, and can be systematised according to the *sector* to which the standards belong, the *rights and duties* they provide, and their *legal effects*:

Cross-sectoral versus sector-specific. As the standards can be found in the EU environmental *aquis*, they can be subdivided into *sector-specific* standards, governing a particular sector of environmental law (e.g. waste, energy, chemicals, pulp, and paper) and *cross-sectoral* standards, which stretch out to regulate a number of sectors, or even all of them (such as requirements related to the Environmental Impact Assessment, the Environmental Liability, the Integrated Pollution Prevention and Control, *etc.*).

Substantial versus procedural. The existing environmental standards can also be divided into *substantial* and *procedural* types, based on their legal effects. Substantive standards are the statutory or written standards that provide legal rights and obligations to citizens and companies. They define the legal relationship between environmental actors. By contrast, procedural standards are more guidelines than statutory rights,¹⁹⁴ but do form legal standards if they are laid down in

¹⁹⁰ Bodansky J. *et al.* (2007) *The Oxford Handbook of International Environmental Law*. Oxford University Press. p. 24.

¹⁹¹ Bodansky *et al.* (2007), p. 24.

¹⁹² *Ibid.*

¹⁹³ See UK Environmental Agency (2005) *Delivering for the Environment. A 21st Century Approach to Regulation*. p. 1.

¹⁹⁴ Just as procedural law deals with the method and means by which substantive law is made and administered, in the same way substantive environmental standards define rights and duties, while procedural standards provide the machinery for enforcing these rights and duties. See Corley R. *et al.* (1999) *The Legal and Regulatory Environment of Business*. The McGraw-Hill Publisher. p. 13.

EU law or are accepted as binding in the jurisprudence of the CJEU. It must be noted that, especially in environmental law, it all often starts with procedural standards, and only later are more substantive standards sometimes formulated.

Binding versus non-binding. There are *binding* and *non-binding* standards as well. At the European level, standards can be found in a variety of legislative instruments, most commonly in directives. From the start, it has been customary to use the directive relating to action in the field of the environment.¹⁹⁵ Recent times have seen the adoption of directives that are ‘broader and smarter than ever before, and can comprise taxes, trading schemes, voluntary agreements, and environmental management systems’.¹⁹⁶ According to Bodansky *et al.*, ‘...this has led to new types of normative development, blurring the distinction between legally binding and non-legally binding norms, public and private standard-setting, and international and domestic law’.¹⁹⁷ At the same time, it needs to be said that this increases the importance of norms such as principles, which provide the moral basis and the necessary development vectors in the chaotic world of emerging norms. Moreover, it should be pointed out that – in accordance with the Treaty – only the Court of Justice of the European Union has the jurisdiction to deliver an authoritative and binding interpretation of any provision of EU law, whatever its form.¹⁹⁸

The above demonstrates that a legal standard plays a significant role among the norms of environmental law. Due to its broad and flexible nature, it ensures a comprehensive implementation of law. Reflecting on the nature and meaning of European environmental standards, it can be suggested that a European legal environmental standard is not much different from a hypothetical legal standard as analysed in Section 1 of this Chapter. Theoretically, it is a legal norm, guided by principles. In practice, regarding the different way the term ‘standard’ is used, one can say that in European Union law a difference between a legal environmental standard and, for example, a technical standard, is blurred. Legal standards can comprise certain elements of technical standards¹⁹⁹ as well as a code of conduct, voluntary agreements, and other originally soft law instruments. In Section 1.3.3, it was proposed to define a legal standard as a *sector-specific*

¹⁹⁵ Jans, Vedder (2012), p. 18.

¹⁹⁶ UK Environmental Agency (2005) *Delivering for the Environment. A 21st Century Approach to Regulation*. p. 2.

¹⁹⁷ Bodansky *et al.* (2007), p. 24.

¹⁹⁸ See TEU Article 19 (3). See also Farmer A. (2010) (ed.) *Sourcebook on EU Environmental Law*. Institute for European Environmental Policy. p. 7. Important decisions of the CJEU on the interpretation of key aspects of the environmental *acquis* and environmental standards in particular are, for example, case C-72/95, *Kraaijeveld* [1996] ECR I-05403, on classification of Annex II-projects of EIA Directive (85/337/EEC); case C-457/02, *Niselli* [2004] ECR I-10853 on clarification of the definition of waste under Waste Directives 75/442/EEC and 91/156/EEC; case C-444/00, *Mayer Parry Recycling* [2003] ECR I-06163 clarifying when, according to Directive 75/442/EEC, as amended by Directive 91/156/EEC and Decision 96/350/EC, waste material can be considered to be a recycled material; case C-231/97, *van Rooij* [1999] ECR I-06355 concerning the interpretation of the term ‘discharge’ in Directive 76/464/EEC on pollution by dangerous substances discharged into the aquatic environment; and case C-252/05, *Thames Water Utilities* [2007] ECR I-03883 on the classification of sewage water that escaped from sewers, in line with Waste Directive 75/442/EEC.

¹⁹⁹ See for instance legal standards the accident prevention (Directive 96/82/EC on the control of major-accident hazards involving dangerous substances, [1996] OJ L 10); waste-water treatment (Directive 91/271/EEC concerning urban waste-water treatment, [1991] OJ L 135); waste disposal (Directive 2008/98/EC on waste, [2008] OJ L 312); and industrial emissions (Directive 2008/1/EC concerning integrated pollution prevention and control, [2010] OJ L 334). These instruments include Annexes with technical standards for particular cases, which in this case become legally binding.

legal norm based on principles and comprising rules, aiming to provide the most objective, effective, and contemporary implementation of law. Elaborating on this general definition, the European legal environmental standard can be delineated as *a legal norm based on principles and comprising primary and secondary European legislation, aiming at the most objective, effective, and contemporary implementation of environmental law.*

Chapter III

APPLICATION OF EUROPEAN ENVIRONMENTAL STANDARDS IN THIRD COUNTRIES

In the previous chapter, it became clear what the legal norms are that govern environmental protection in the EU, and what is understood by the expression ‘legal environmental standards’. Building upon this knowledge, the current chapter first brings terminological clarity in relation to the *application* of European environmental standards in third countries. Subsequently, it examines the *actors*, their *rationale*, and the *frameworks* shaping this activity. In other words, this chapter aims to determine the *who*, *why*, and *how* regarding involvement in the application of European environmental standards in third countries.

To this end, first *the role* of the European Union and of International Financial Institutions (IFIs) in promoting the environmental standards worldwide is addressed.

Attention is then given to *the reasons* these actors are taking part in the application of European environmental standards in third countries. With this aim, the legal framework for EU external environmental action, the political and economic incentives will be considered, in addition to the rationale for IFIs to engage in environment-friendly financing.

In addition, the legal and regulatory *frameworks* used to apply environmental standards in third countries, are examined. In this context, the shaping of the European investment policy, representing a framework for the channelling of the environmental standards, is analysed. The main voluntary environmental initiatives of International Financial Institutions are also considered, aimed at ensuring that investors’ activities benefit the environment, or at least do not harm it, while also continuing to generate profits for shareholders.¹ Subsequently, the study gradually narrows the focus to Foreign Direct Investment as a specific framework for standards’ application in third countries.

¹ According to the Directive on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, a ‘shareholder’ means any natural person or legal entity governed by private or public law, who holds, directly or indirectly, shares of the issuer in its own name and on its own account; shares of the issuer in its own name, but on behalf of another natural person or legal entity; depository receipts, in which case the holder of the depository receipt shall be considered as the shareholder of the underlying shares represented by the depository receipts. See Directive 2004/109/EC.

1. APPLICATION OF EUROPEAN ENVIRONMENTAL STANDARDS IN THIRD COUNTRIES: EXPLANATION OF THE TERM

Before proceeding, it is necessary to make a terminological specification of the notion ‘application of European environmental standards in third countries’.

To begin with, it can naturally be implied that this notion corresponds to what is customarily referred to in the literature as ‘application’ outside the European Union.² It must be underlined, however, that understood traditionally, an *application* of European legislation gives an immediate effect of EU law in national jurisdictions of the Member States. Moreover, it requires certain enforcement mechanisms. Thus, it is important to keep in mind that the application procedure in this sense takes place only in relation to EU Member States, starting with the accession date.

Further on, when talking about the transfrontier nature of environmental interests and the extraterritorial character of the rule of reason, Jans and Vedder use the term ‘transfrontier application’.³ This notion is also close to the term ‘external effect’, which is used in relation to a certain legal provision, and can frequently be found in CJEU terminology.⁴ However, while determining that a provision has legal effect not only in a place of origin but also across the border, these terms are not used in relation to the external borders of the Union, but are traditionally applied in an *intra-EU framework*. Therefore, the notions of ‘transfrontier application’ and ‘external effect’ do not fully suit the context of this analysis.

Alternatively, in the academic literature, the reference to ‘extraterritorial application of EU law’ can often be found, for example in relation to inclusion of aviation activities in EU greenhouse gas emissions scheme,⁵ animal welfare,⁶ or generally, in relation to the European Union as a global exporter of legal norms.⁷ Yet, this study is reluctant to address every type of EU standards’ application in third countries as ‘extraterritorial’, considering the fact that extraterritoriality as legal concept has originally been applied to a nation state, and is characterised by the application of *national provisions* to events occurring outside a state’s territory.⁸ The conclusion that it is for the state to determine the extent to which domestic laws should apply to facts occurring abroad, follows from the *Lotus* case of the Permanent Court of International Justice (PCIJ), where the Court held that, with respect to ‘the application of laws and the jurisdiction of their courts to persons,

² See, for instance, Craig P., Burca, de, G. (2011) *EU Law: text, cases and materials*. Oxford University Press, 5th ed.; Cremona M. (2003) (ed.) *The Enlargement of the European Union*. Oxford University Press, Collected Courses of the Academy of European Law XII/1; Kühn Z. (2005) The Application of European Law in the New Member States: Several (Early) Predictions. *German Law Journal* 06 (03). 563-582.

³ Jans J., Vedder H. (2012) *European Environmental Law: after Lisbon*. Europa Law Publishing. p. 290. Jans and Vedder use the term in relation to the application of Article 36 TFEU.

⁴ See for instance cases C-322/11, *K* [2013] ECR I-0000 (para 59); C-304/02, *Commission v France* [2005] ECR I-06263 (para 30); C-532/99, *Bixner* [2002] ECR I-02157 (para 82, 101), where this terminology is used by the CJEU.

⁵ See generally Koziel T. (2012) Extraterritorial Application of EU Environmental Law – Implications of the ECJ’s Judgment in *Air Transportation Association of America*. *Columbia Journal of European Law* 19 (1).

⁶ See Lawrence J. ‘The Extraterritorial Reach of EU Animal Welfare Rules’, *EU Law Analysis Blog*, 23.06.2015, <http://eulawanalysis.blogspot.nl/>, accessed 13.10.2015.

⁷ See Scott J. (2014) Extraterritoriality and Territorial Extension in EU Law (June 8, 2013). *American Journal of Comparative Law*, Vol. 62, No. 1, 2014.

⁸ Parrish A. (2009) Reclaiming International Law From Extraterritoriality. *Minnesota Law Review* 93. pp. 815, 842.

property and acts outside their territory’, international law leaves states ‘a wide measure of discretion’.⁹

It is worth observing that when addressing the ‘application’ of certain pieces of the EU *acquis*, the notion of ‘approximation’ is sometimes used in legal literature. For a proper understanding of the discussed legal phenomena, it is essential to appreciate the difference between these two notions.¹⁰ The approximation is also related to the application of standards outside of the EU, but not always combined with an obligation to apply them. Although an approximation may, in the case of countries joining the European Union, lead to a full application,¹¹ this does not happen *per se*.¹² In formal terms, as long as a country is not a Member State, EU law does not apply internally. Writing about non-applicant countries, Matta describes the legal approximation ‘as a voluntary political choice of bringing a third country legislation into tune with the EU legislation’.¹³ Countries of the EU Neighbourhood area are to a different degree involved in the approximation of domestic legislation with that of the EU. However, in the absence of a similar legal tradition, neighbouring and third countries are often unable to make full use of ‘advanced’ EU standards.¹⁴ In addition, because of the ever-evolving nature of European environmental legislation, the approximation is also compared to ‘chasing the horizon’, as the candidate country is forced to keep up with the new legal developments, best practices, and updates taking place in the EU.¹⁵ Considering the above, the notion of approximation does not really reflect the type of legal consequences that accompany the application of European environmental standards in third countries outside the EU Neighbourhood.

Therefore, in relation to the application of European legal standards in third countries, it is most suitable to refer to their ‘*external application*’. Similarly to the language of the TFEU,¹⁶ the word ‘external’ reflects best the type of legal application in question. Unlike the transfrontier, or transboundary application, where one can think about the legal relationship taking place between two Member States, external application makes clear that the relevant parties are the European Union and third countries.

⁹ Case *S.S. Lotus (France v. Turkey)*, Publications of the Permanent Court of International Justice 1927. Serie A (10). p. 19.

¹⁰ Lazowski A. (2009) With but without you...The Europeanisation of Legal Orders of the Neighbouring Countries. In Ott A., Vos E. (eds.) *50 Years of European Integration: Foundations and Perspectives*. T.M.C. Asser Press & Cambridge University Press. 247-270. p. 249.

¹¹ In the case of applicant countries, the objective of the environmental approximation process is to ensure the complete alignment of national environmental legislation – and the corresponding administrative system – so that it complies 100% with the EU *acquis*, and not just on paper but also in fact. See European Commission Guide to the Approximation of the European Union Environmental Legislation, SEC (97) 1608, p. 3.

¹² Lazowski (2009), p. 249.

¹³ Matta A. (2009) Updating the EU-Russia Legal Approximation Process: Problems and Dilemmas. In Maiani F. *et al.* (eds.) *European Integration Without the EU Membership: Models, Experiences, Perspectives*. EUI Working Paper MWP 2009/2010. p. 62.

¹⁴ See Lazowsky A. (2012) *European Union as a Normative Power – Export of EU law to Third Countries*. Guest lecture at Erasmus University Rotterdam, 10.01.2012. See also Xanthaki H. (2008) Legislation transplants in legislation: defusing the trap. *ICLQ* 57. 659-673. p. 659.

¹⁵ See for instance Lazowsky A. (2001) Adaptation of the Polish legal system to European Union law: Selected aspects. SEI Working Paper 45. p. 9.

¹⁶ See for example Part V of the TFEU, on the Union’s external action.

Furthermore, in the given context this term is argued to mean two things: *the extent* to which environmental standards are included in the legal requirements of investment projects, and *the activity* whereby EU environmental requirements – among others – govern these projects’ realisation in third countries.¹⁷ In the framework of a particular investment project in a third country, the term can thus be defined as all activities by which European environmental standards find their way into concrete investment commitments, and in due course into certain results.¹⁸

2. APPLICATION OF EUROPEAN ENVIRONMENTAL STANDARDS IN THIRD COUNTRIES: THE ACTORS

The European Union is seeking to establish a role for itself as a significant actor on the global stage.¹⁹ Recent developments in both the EU and the global legal order have triggered a change in the way the academic community addresses the relation between international law and the law of the European Union. In the past, most studies seemed to focus mostly on the functioning and the role of international law within the European legal order. The latest example is the publication by Cannizzaro, Palchetti, and Wessel, in which it is explored how, and to what extent, international law still forms part of, and plays a role in, the current legal order of the European Union. Unlike them, however, Kochenov and Amtenbrink in their edited volume concentrate on the active (co-)shaping of the international legal order by the EU, where the Union is perceived to take on an active rather than a passive role. They affirm that ‘there can be little doubt that the EU is not only firmly established within the international legal order, but also actively involved in shaping it’, whereby this role is sooner ‘a conscious choice rather than an unexpected side-effect of the Union’s engagement with the international legal order’.²⁰ The contributions included in that volume are an example of an increasing number of studies that demonstrate the change of perspective from international law influencing the EU law towards the EU as a global actor²¹ that ‘exports’ its legal standards to the rest of the world.

¹⁷ A ‘project’ is defined by the EU Directive on the assessment of the effects of certain public and private projects on the environment (the EIA Directive), meaning the ‘execution of construction works or of other installations or schemes, and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources’. See Directive 2011/92/EU, Article 1 (2) (a).

¹⁸ Alternatively, Cremona uses the term ‘export’ defining the European Union as an ‘exporter of norm’. Cremona M. (2004) The Union as a Global Actor: Roles, Models and Identity. *Common Market Law Review* 41 (2), 553-573. p. 553. Although the ‘export’ of standards is not really a legal term, it can be regarded as simplified jargon and a synonym for a more accurate notion of the ‘external application’ of standards.

¹⁹ Craig, Burca, de (2011), p. 303.

²⁰ Kochenov D., Amtenbrink F. (2013) Introduction: the active paradigm of the study of the EU’s place in the world. In Kochenov D., Amtenbrink F. (eds.) *European Union’s Shaping of the International Legal Order*. Cambridge University Press. p. 349.

²¹ The term used for example in Bretherton C., Vogler J. (1999); Hettne B., Söderbaum F. (2005) Civilian power or soft imperialism? EU as a global actor and the role of interregionalism. *European Foreign Affairs Review* (Kluwer Law International). 10(4). 535-552; Zielonka J. (2008) Europe as a global actor: empire by example? *International Affaires* 84 (3), 471-484.

Such a change of perspective can be explained by the broadening of areas where the Union feels the urge to promote its values. It develops from only actively shaping the international legal order areas, closely linked to its economic activities and related interests (such as trade and the global financial system), to also including issues such as democracy, the rule of law, and protection of the environment.²² Methods used by the Union have also diversified – Cremona mentions at least five roles played by the EU as a global actor: 1) a laboratory and model for other regions; 2) a market player defending and promoting its own economic interests; 3) a *generator of rules and an exporter of norms*;²³ 4) a force for stabilisation within the EU and beyond; and 5) a magnet and neighbour using the incentive of membership.²⁴

Giving special attention to the third role played by the Union, it is important to describe the legal framework governing EU relations with the wider world in the field of environment.

At the same time, the European Union does not single-handedly and unilaterally contribute to the application of environmental standards in third countries. Along with governmental and supra-governmental institutions, corporate and financial entities are equally important players.²⁵ The global economic, political, cultural, and environmental interconnections not only ‘drain political authority from nation-states – long the dominant form of political organisation in world politics’²⁶ – it can be argued that they also cause an increasing shift from ‘government’ to ‘governance’, altering the way in which authority and power are being exercised in the administration of the world’s economic and social resources in relation to environmental matters.²⁷ Seen from the administrative law point of view, governance can refer as well to situations where non-governmental actors play a role in making and implementing public policy.²⁸ Thus, continuing the discussion about the application of legal environmental standards in third countries, it is impossible to ignore recent developments in the environmental domain. The past two decades have shown that International Financial Institutions are also becoming increasingly involved in shaping their environmental regime.²⁹ With new actors come new forms of standard setting: the classic division between state regulation, on the one hand, and self-regulation,³⁰ on the other hand, is giving way to hybrid forms of environmental regime.³¹

²² See Kochenov, Amtenbrink (2013), p. 358.

²³ Emphasis added.

²⁴ Cremona (2004), p. 553.

²⁵ See for example Sustainability Reporting Guidelines (2002) Global Reporting Initiative. p. 1.

²⁶ Steger M. (2009) *Globalization*. Oxford University Press. p. 1.

²⁷ Under ‘governance’ here is understood the manner in which power is exercised in the management of the world’s economic and social resources in order to safeguard the environment.

²⁸ Airo-Farulla G. (2000) Administrative Law and Governance. In Finn Ch. (ed.) *Sunrise or Sunset? Administrative Law in the New Millennium*. Australian Institute of Administrative Law. 268-292. p. 269.

²⁹ See Pieth M. (2009) Preface. In Peters A., Koechlin L., Förster T., Zinkernagel G. (eds.) *Non-State Actors as Standard Setters*. Cambridge University Press. p. xix.

³⁰ As used in this study, the term ‘self-regulation’ refers specifically to attempts by IFIs to develop standards or codes of behaviour and performance. It is also used in this sense by Ebrahim in relation to non-profit organisations (see Ebrahim A. 2003a, p. 819).

³¹ See Pieth (2009), p. xix. Therefore, a theoretical distinction between pure ‘public’ and ‘private’ governance seems no longer to be precise. Instead, in the given context it would make sense to speak about ‘government regulation’ as opposed to ‘transnational corporate regulation’. See in relation to transnational corporations Zumbansen P. (2011) Neither ‘Public’ nor ‘Private’, ‘National’ not ‘International’: Transnational Corporate Governance from a legal Pluralist Perspective. *Journal of Law and Society* 38 (1). 50-75.

The section below will consider the EU and International Financial Institutions as promoters of European legal environmental standards in third countries.

2.1 The European Union as a promoter of environmental standards

It is understood that in the general framework of EU law, European environmental law is there to ensure the efficient protection and application of environmental standards first and foremost within the EU. The history of the development of environmental law in Europe was addressed briefly in Chapter II.³² Environmental protection today is a competence shared between the European Union and its Member States,³³ listed in detail in Articles 191, 192, and 193 TFEU.

At the same time, in addition to ongoing internal developments, European environmental policy received an external dimension as the EU's international position experienced a gradual greening process from the late 1980s onwards.³⁴ The former Secretary General of the European Commission Catherine Day argued in 2003 that the EU 'must make sure we develop and implement sound policies at home and make them compatible with those we advocate internationally'.³⁵ The EU received the political approval of its Member States for its external actions in the field of the environment in a Declaration to the Nice Treaty, in which they acknowledged:

'...to be determined to see the European Union play a leading role in promoting environmental protection in the Union and in international efforts pursuing the same objective at global level. Full use should be made of all possibilities offered by the Treaty with a view to pursuing this objective, including the use of incentives and instruments which are market-oriented and intended to promote sustainable development'.³⁶

And indeed, since the Treaty of Nice has come into force in 2003, the gradual 'environmentalisation' of EU external policies has visibly been taking place. At present, EU environmental objectives are encompassing and allowing for a broad range of measures, including extraterritorial environmental objectives.³⁷ Nothing in Article 191 TFEU limits the 'Union policy on environment' to internal objectives or to the Union's territory,³⁸ and Articles 191 (1) and (4) TFEU address the Union's competence to take external actions to protect the environment.³⁹

³² See further on the development of European environmental law Jans, Vedder (2012), pp. 1-52.

³³ Article 4 (2) (e) TFEU.

³⁴ Falkner R. (2006) *The European Union as a 'Green Normative Power'?* *EU Leadership in International Biotechnology Regulation*. Centre for European Studies Working Paper Series 140.

³⁵ Day C. (2003) A View from the Bridge. *Environment for Europeans* 13 (1). p. 3.

³⁶ Declaration on Article 175 of the Treaty establishing the European Community, 2001.

³⁷ Jans, Vedder (2012), p. 38.

³⁸ Eckes C. (2013) EU Climate Change Policy: Can the Union Be Just (and) Green? In Kochenov D., Amtenbrink F. (eds.) *European Union's Shaping of the International Legal Order*. Cambridge University Press. p. 177.

³⁹ *Ibid.*

When writing about EU external environmental action, it is impossible not to mention the legal framework that governs it. Thus, much has already been said about the integration clause of Article 11 TFEU,⁴⁰ which relates to what is known as *external integration*: in other words, the integration of environmental objectives in other policy sectors.⁴¹ This clause was developed further by the Sixth Environment Action Programme (EAP) adopted in 2001. One of the most interesting contributions of the Sixth EAP has been the focus on the obligation to integrate environmental requirements in different EU *external* policies such as the common commercial policy (CCP) and the development and cooperation policy.⁴² This has been translated into three main goals:

- stimulation of a positive and constructive role of the European Union as a leading partner in the protection of the global environment and in the pursuit of sustainable development;
- development of a global partnership for environmental and sustainable development; and
- integration of environmental concerns and objectives into all aspects of the Union's external relations.⁴³

These Treaty provisions and goals have been upheld in the Seventh EAP, currently in force until 2020. According to this document, 'as a leading provider of environmental goods and services, the Union should promote global green standards, free trade in environmental goods and services, the further deployment of environment and climate-friendly technologies, protection of investment and intellectual property rights and the international exchange of best practice.'⁴⁴

The goals of the Sixth and Seventh Environment Action Programmes are being realised through different strategies, combining the direct negotiations, the conclusion of multilateral agreements, and the participation of the European Union in international institutions, together with its Member States. In the field of politics and diplomacy, the EU has incorporated environmental protection into its *acquis* for its external relations, adding it to its demands for democracy and human rights as one of its permanent interests as a global actor.⁴⁵ It has also adopted as permanent principles of its environmental policies the main principles of international environmental law. Concepts such as the principle of common but differentiated responsibilities, the sustainable development concept, the precautionary principle, and many others have been introduced into different EU treaty reforms and acts of legislation based on the idea of environmental integration.

⁴⁰ See Chapter II, Section 2.2 on the Article 11 TFEU.

⁴¹ Jans, Vedder (2012), p. 22.

⁴² Decision No 1600/2002/EC laying down the Sixth Community Environment Action Programme, 22.07.2002, OJ 2002 L 242/I. See also Castillo del, T. (2010) Revisiting the External Dimension of the Environmental Policy of the European Union: Some Challenges Ahead. *Journal for European Environmental & Planning Law* 7 (4). 365-390. p. 368.

⁴³ See Article 2 (6), Decision No 1600/2002/EC laying down the Sixth Community Environment Action Programme, 22.07.2002, OJ 2002 L 242/I.

⁴⁴ Decision on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'. No 1386/2013/EU L, 20.11.2013, OJ 354/171, para 105. Commenting on this goal set in the Seventh EAP, the European Environmental Agency writes, 'Implementing this programme will require improved knowledge, including a more detailed understanding of the interplay between economic, social and environmental factors in the transition to an inclusive green economy. Indicators and environmental accounting are important tools in improving this understanding'. EEA (2014) Towards better tools for decision-making – EEA indicators and accounts. p. 1.

⁴⁵ On conditionality in the EU external policies, see Weber S. (1995) European Union Conditionality. In Eichengreen B. *et al.* (eds.) *Politics and Institutions in an Integrated Europe*. Springer-Verlag. 193-220; Schimmelfennig F., Sedelmeier U. (2004) Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe. *Journal of European Public Policy* 11 (4). 661-679; Matta (2009).

As shown above, the Treaties allowed the European Union to promote its environmental interests externally long before Lisbon. Nonetheless, despite the space to do so was offered by the Treaties, it was not as explicitly present as after Lisbon, and was referred to mainly in policy papers. For the purpose of this study it is important to underline the place given by the Treaties to the external dimension of EU environmental policy since 2009. At the times when the current treaty text was taking its explicit form, Cremona wrote: ‘For the first time, [...] the Union will have a set of overall principles, values and objectives guiding its external policy-making’, meaning that ‘external action is to be not only guided by but also designed to promote these principles, through developing relations with third countries and organisations which share the Union’s values and through promoting multilateral solutions to common problems’.⁴⁶ The concept of sustainable development and the integration principle play the key role here. Article 3 (5) TEU introduces a direct link between sustainable development and EU external relations by declaring that ‘in its relations with a wider world, the Union shall contribute to [...] the sustainable development of the Earth’, as one of the general objectives of the Union.

Moreover, the makers of the Treaties considered it important to introduce Article 21 TEU, which further interconnects international law and European legislation on trade and environment. Obviously, it was necessary to introduce explicitly the fundamental objectives that govern EU relations with the wider world, in the Union’s primary law, despite the already present – but too general – goals of Article 3 (5) TEU. The new provision is based on the logic of the already existing documents, such as the Laeken Declaration⁴⁷ and the Environment Action Programmes. It adds the common commercial policy to a set of non-prioritised goals for EU external action, and at the same time, it requires the EU to consider environmental protection as part of its external objectives.

More specifically, Article 21 (2) (d) TEU states that the EU ‘should foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’. Article 21 (2) (f) TEU declares that the EU should ‘help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’. These objectives are to be followed in all fields of EU external action and in the external aspects of its other policies such as development, trade, agricultural, fisheries, transport and energy policies, as well as in the environmental policy itself.⁴⁸ In spite of the integration principle, the EU common commercial policy did not take fully into account the environmental aims and principles before the entry into force of the Lisbon Treaty.⁴⁹ The new Article 21 (2) TEU could therefore be seen as reinforcing the function hitherto played only by Article 11 TFEU of constitutionally underpinning ‘mutual supportiveness’ between EU external trade and environmental policies, by requiring the

⁴⁶ Cremona M. (2003) The Draft Constitutional Treaty: External Relations and External Action. *Common Market Law Review* 40. 1347-1366. p. 1348.

⁴⁷ Laeken Declaration On the Future of the European Union, Laeken European Council (2001), Presidency Conclusions, Annex I.

⁴⁸ European Commission (2005) Communication Accelerating progress towards attaining the Millennium Development Goals, COM (2005)0134 final.

⁴⁹ Marin Duran G. (2013) The Role of the EU in Shaping the Trade and Environment Regulatory Nexus. In Vooren van, B. *et al.* (eds.) *The EU's Role in Global Governance: the Legal Dimension*. Oxford University Press. p. 228.

EU political institutions to take environmental policy objectives into account when defining and implementing the CCP.⁵⁰

Since the entry into force of the Treaty of Lisbon in 2009, Foreign Direct Investment (FDI) is mentioned explicitly as forming part of the common commercial policy.⁵¹ In relation to the European Union FDI regime, the integration clause, contained in Article 11 TFEU, has yet to see its realisation. At present, Article 21 TEU sets out a series of principles and objectives that are to guide all of the Union's external action, while Article 205 TFEU refers explicitly to Article 21 TEU stipulating that the Union's action 'shall be guided by the principles, pursue the objectives, and be conducted in accordance with the general provisions laid down' in Article 21 TEU. The importance of Article 21 TEU, which lays down the legal basis for the Union's engagement with the international legal order, is thus hard to overestimate.

Nevertheless, it is unlikely that the CJEU will interpret the Treaty provisions, such as the new Article 21 TEU, as entailing a strictly enforceable obligation for the EU legislator to effectively integrate, or give priority to, environmental considerations within external trade policy-making.⁵² The CJEU can instead be expected to maintain its position, allowing the EU political institutions, when conducting the CCP, to enjoy a considerable margin of discretion in balancing the various – at times even conflicting – policy objectives established by EU Treaties.⁵³ It is thus unlikely that a European trade measure would be challenged before the CJEU only because it does not sufficiently integrate the environmental considerations.⁵⁴

2.2 International Financial Institutions as promoters of environmental standards

International Financial Institutions (IFIs) can be defined as global and regional development banks offering public and private sector financing.⁵⁵ In this study, the focus is on *public* financial institutions.⁵⁶

⁵⁰ Marin Duran (2013), p. 228.

⁵¹ Article 207 (1) TFEU. The EU CCP falls under the exclusive competence of the Union (Article 3 (1) (e) TFEU).

⁵² Marin Duran (2013), p. 228.

⁵³ *Ibid.*

⁵⁴ At the moment of writing, there were no CJEU cases on Article 21 TEU. However, in relation to the jurisprudence in Article 11 TFEU, this view is supported by Marin Duran and Morgera, as well as by Cremona. See Marin Duran G., Morgera E. (2012) *Environmental Integration in the EU's External Relations – Beyond Multilateral Dimensions*. Hart Publishing. pp. 28-33, and Cremona M. (2013) Coherence and the EU External Environmental Policy. In Morgera (ed.) *The External Environmental Policy of the European Union: EU and International Law Perspectives*. Cambridge University Press.

⁵⁵ At the private end of the spectrum there are purely commercial IFIs, representing banks with large international project portfolios, such as ABN AMRO, Deutsche Bank, Barclays Group or Citigroup. At the opposite end there are public IFIs, managing public funds. They have been established (or chartered) by more than one country, and hence are subjects of international law. Good examples hereof are the World Bank Group and the International Monetary Fund (IMF), lending between US\$30-\$40 billion to low and middle-income countries each year (see the website of The Center of International Environmental Law (CIEL), 'About International Financial Institutions'. www.ciel.org/Intl_Financial_Inst/About_IFIs.html#aboutifi, accessed 21.05.2013) and the European Investment Bank, the largest source of development finance in the world, which lent 77 billion Euro to global projects in 2013 (EIB (2014) Annual Activity Report. p. 33).

⁵⁶ See the discussion on the public nature of IFIs in Chapter IV, Section 1.2.

Some public IFIs have a status of a Multilateral Development Bank (MDB). These institutions, such as the European Bank for Reconstruction and Development (EBRD), perform their financing and professional advising for the purpose of development.

Several banks and funds that lend to developing countries are sometimes grouped together as Multilateral Financial Institutions (MFIs). They differ from the MDBs in that they have a narrower ownership/membership structure and they focus on special sectors or activities. Among these are the European Investment Bank (EIB), the Nordic Development Fund and the Nordic Investment Bank (NIB).

Finally, some of these banks are also sometimes classified as Regional Development Banks or Regional Financial Institutions. The functions of such banks are similar to the ones described above, but have a particular focus on a specific region. Such institutions are the Council of Europe Development Bank (CEB), the European Bank for Reconstruction and Development (EBRD) and the Nordic Environment Finance Corporation (NEFCO). This research uses the general term of 'International Financial Institutions' when addressing the development banks all together.

The scope of this study is eventually narrowed down to the five Europe-based International Financing Institutions, signatory to the 2006 Declaration on the European Principles for the Environment (EPE).⁵⁷ With the endorsement of the European Commission, the EPE were launched by the European Investment Bank (EIB) and four other above-mentioned investment banks: the European Bank for Reconstruction and Development (EBRD), the Council of Europe Development Bank (CEB), the Nordic Environment Finance Corporation (NEFCO) and the Nordic Investment Bank (NIB).⁵⁸ The so-called EPE Banks have bound themselves to promote sustainable development and to protect and improve the environment, not just among EU Member States, where such requirements are mandatory, but also in the near neighbourhood of the EU and in the other regions of the world.⁵⁹ Before proceeding further, each of these Banks is described below, in order to facilitate the further analysis of their environmental policy.

The European Investment Bank (EIB) is the most unusual of all five EPE Banks. It is both an EU body⁶⁰ and a bank, owned by all the Member States of the European Union. Created at the beginning of the European integration process,⁶¹ the EIB is not a European Union institution within the meaning of Article 13 TEU, but it is a financial body governed by public law, with legal personality⁶² and an administrative structure separate from that of the other EU institutions.⁶³ Its

⁵⁷ For the text of the Declaration on the European Principles for the Environment (2006), see Annex to this study. See also Chapter V on the nature, character and the legal effect of the Declaration.

⁵⁸ In this study addressed as 'Banks' or 'EPE Banks'; also addressed in the same way by Hachez N., Wouters J. (2011) *A Responsible Lender? The European Investment Bank's Environmental, Social and Human Rights Accountability*. Working Paper 72, p. 14.

⁵⁹ See 'Signatory Banks', EIB website www.eib.org/projects/topics/environment/epe/signatory-banks/index.htm, accessed 24.05.2012.

⁶⁰ 'Bodies normally form integral part of the EU institutional set up, and as such are subject to the Treaties, including the Charter of Fundamental Rights'. Hachez, Wouters (2011), p. 4.

⁶¹ The EIB was created in 1958 by Articles 129 and 130 of the Treaty establishing the European Economic Community (Treaty of Rome), signed by Belgium, France, Germany, Italy, Luxemburg and the Netherlands.

⁶² Article 308 (1) TFEU.

⁶³ According to the CJEU, the status of the EIB as of an international financial institution requires a certain 'independence' from the rest of the EU order: '[i]n order to perform the tasks assigned to it by [...] the Treaty the [EIB] must be able to act in complete

primary task is to support sound investments.⁶⁴ By doing so, the EIB provides funding for large, often transnational projects - or for economic activities that do not have ready access to finance (e.g. in less developed regions, or to small and medium enterprises) in the territories of Member States. However, by decision of the Board of Governors, the Bank may also grant financing for investment to be carried out outside the territories of Member States.⁶⁵ The functioning of the EIB has similarities with the corporate functioning of a commercial bank in that the EIB follows best banking practice in the functioning of its decision-making bodies and in the activities of its control functions.⁶⁶ It also has similarities with the governance of EU institutions, as the EIB is embedded in the EU institutional framework of transparency and accountability,⁶⁷ imposing on the Bank similar to other EU institutions obligations to ensure public access to information and to account for its (investment) decisions.

The European Bank for Reconstruction and Development (EBRD) possess sixty-four shareholders, including all the EU Member States, Canada, Japan, Russia and USA, and by two intergovernmental institutions: the European Union and the European Investment Bank. The powers of the EBRD are vested in the Board of Governors to which each member appoints a governor, generally the minister of finance. Every EBRD's shareholder makes a capital contribution.⁶⁸ The guarantees by the shareholding countries enable the Bank to borrow funds on the international capital markets.

The EBRD's area of operation stretches from central Europe to central Asia and the southern and eastern Mediterranean. Since the establishment in 1991, the Bank has become one of the largest financial investor in the region. It provides project financing for banks, industries and businesses, and also works with publicly owned companies.⁶⁹ Noteworthy, the Bank invests only in projects that could not otherwise attract financing on similar terms, and usually acts as co-investor, funding up to 35% of the total project cost.⁷⁰

The Council of Europe Development Bank (CEB) enjoys a unique and original position in Europe, both because of the nature of the projects it finances, the sectors in which it undertakes its action and the geographic scope of its shareholder base.⁷¹ The Bank sees itself as 'a financial instrument in the service of social cohesion in Europe'.⁷² Bank's investment activity is structured

independence on the financial markets, like any other bank'. See case 85/86, *Commission v. Board of Governors* [1988] ECR I-1281, para 28.

⁶⁴ The mission of the EIB is set out in Article 309 TFEU, and its Statute is annexed to the Treaties in the form of a Protocol (Protocol No. 5).

⁶⁵ EIB (2012) *The Governance of the European Investment Bank*. p. 4.

⁶⁶ See *Ibid.*, p.14.

⁶⁷ EIB (2012), p. 14.

⁶⁸ See the list of shareholders and the amount of their respectful contribution at EBRD website, www.ebrd.com/pages/about/who/shareholders.shtml, accessed 14.06.2013.

⁶⁹ See 'What we do' at the EBRD website. Each of Bank's projects is tailored to the needs of the client and to the specific situation of the country, region and sector. Direct investments by the Bank generally range from €5 million to €230 million. www.ebrd.com/pages/about/what.shtml, accessed 14.06.2013.

⁷⁰ See EBRD (2013) *Guide to EBRD financing*. p. 3.

⁷¹ European Evaluation Society, 'Council of Europe Development Bank', accessed 10.09.2013.

⁷² CEB (2010) *Corporate Social Responsibility Report*. p. 1.

along three lines of action: strengthening social integration, managing the environment and supporting social public infrastructure.

The CEB is based on a Partial Agreement among Council of Europe Member States and, according to its Articles of Agreement, is subject to the Council's overall authority.⁷³ It operates within the framework of the Council of Europe and supports its priorities.⁷⁴ Unlike the other EPE Banks, the CEB bases its activity on its own funds and reserves and receives no aid or subsidy from its forty-one member states. It is thus a separate legal entity and is financially independent. The CEB represents a major instrument of the policy of solidarity in Europe, in order to help its member states to 'achieve sustainable and equitable growth': it thus participates in financing social projects, responds to emergency situations and, in doing so, contributes to improving the living conditions of the most disadvantaged population groups.⁷⁵

The Nordic Investment Bank (NIB) is an International Financial Institution, with eight shareholders from Nordic and Baltic countries: Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden. The NIB's basic capital amounts to approximately EUR 4,142 million and consists of a 'paid-in' and a 'callable' capital.⁷⁶ This means that the NIB's member countries have subscribed to the authorised capital in proportion to their gross national income, and while about 10% of this figure is currently paid into the Bank, the remainder can be called in from member governments at the discretion of the Bank's Directors.⁷⁷

The NIB aims to promote competitiveness and support environmental objectives by providing financing in the form of loans and guarantees for activities in which NIB can add value and complement other financing sources.⁷⁸ Its environmental focus areas are cleaner production and resource management; environmental technology; emission reductions; and renewable energy.⁷⁹ In its evaluation of environmental impacts, the Bank takes into account these focus areas and quantitative assessments of environmental benefits, when deciding whether or not to finance a project.⁸⁰ Outside the membership area, the NIB has operations projects in the selected focus

⁷³ See 'The CEB and the Council of Europe' Agreement at the CEB website, signed in 1956. See www.coebank.org/Contenu.asp?arbo=74&theme=1, accessed 14.06.2013.

⁷⁴ At this stage, the Council of Europe priorities are based on six strategic axes: Protection and Promotion of Human Rights; Threats to the Rule of Law; Development of Pan-European common standards and policies; Justice; Democratic Governance; Sustainable Democratic Societies. See CEB (2012) Strategic Priorities for 2012-2013, available at www.coe.int/t/reform/news_priorites_strategiques_en.asp, accessed 20.04.2015.

⁷⁵ European Evaluation Society, 'Council of Europe Development Bank', accessed 10.09.2013.

⁷⁶ See the NIB website www.nib.int/about_nib/capital_structure/authorised_capital, accessed 19.06.2013.

⁷⁷ See *Ibid.*

⁷⁸ See the NIB website www.nib.int/about_nib/capital_structure/authorised_capital, accessed 19.06.2013. For example, the NIB, together with Nordic Environment Finance Corporation (NEFCO), are part of the Nordic Finance Group, consisting of four international financial institutions located in Helsinki, Finland. The other institutions within the group are Nordic Development Fund (NDF) and Nordic Project Fund (Nopef). All four members of the Nordic Finance Group offer different types of financing and possess different competences. Thus Nordic Development Fund is a multilateral development finance institution that provides grant financing for climate projects in poor developing countries (see www.ndf.fi, accessed 12.09.2013), while Nopef is an organisation that aims to strengthen the international competitiveness of Nordic enterprises by providing co-financing for feasibility studies that support export projects and the internationalisation of Nordic enterprises. See www.nopef.com/pages/eng/nopef/about-nopef.php, accessed 12.09.2013.

⁷⁹ Next to being party to the Declaration on the European Principles for Environment, NIB participates actively in other environmental initiatives, such as the Northern Dimension Environmental Partnership (NDEP).

⁸⁰ See the NIB website, 'Mission Strategy', www.nib.int/about_nib/mission_strategy, accessed 19.06.2013.

countries: Belarus, Brazil, China, India, Poland, Russia, South Africa, Ukraine and Vietnam, while it also has negotiated agreements on financial cooperation with national governments in Africa, Asia, Europe and Eurasia, Latin America and the Middle East, which allows it to participate in the financing of projects in both public and private sectors.⁸¹

Nordic Environment Finance Corporation (NEFCO) was founded in 1990 as an International Financial Institution by the Nordic countries. It is owned by Denmark, Finland, Iceland, Norway and Sweden, including the three autonomous territories of the Faroe Islands, Greenland and Åland. Its mission is to promote cost-effective ways to reduce the environmental pollution coming from regions neighbouring their borders. Working in partnership with both private and public investors, NEFCO has financed a wide range of environmental projects in Central and Eastern European countries, including Russia, Belarus and Ukraine. With a capital of EUR 113.4 million, NEFCO operates as a partner, lender or guarantor in economically viable projects, whereby the long-term participation of a Nordic partner is a prerequisite for the project to receive financing.⁸² This participation may include various forms of direct investment by a private or public enterprise.

The NEFCO administers a range of different funds for a variety of purposes, such as the NEFCO Investment Fund,⁸³ the Nordic Environmental Development fund (NMF),⁸⁴ the Barents Hot Spots Facility (BHSF),⁸⁵ the Baltic Sea Action Plan (BSAP) Fund,⁸⁶ the Nordic Climate Facility,⁸⁷ the Testing Ground Facility (TGF)⁸⁸ and the Arctic Council Project Support Instrument.⁸⁹

⁸¹ Furthermore, NIB has cooperation agreements with three regional multilateral banks: the Black Sea Trade & Development Bank, the Central American Bank for Economic Integration CABEL and the Andean Development Corporation CAF. Through these institutions, NIB can operate also in countries where it has no agreement on financial cooperation. See NIB website, www.nib.int/loans/countries, accessed 19.06.2013.

⁸² See 'Financing Instruments' at NEFCO website, www.nefco.org/introduction/nefcos_funding_resources, accessed 19.06.2013.

⁸³ The NEFCO Investment fund amounts to Euro 113.4 million. The fund provides loans and equity financing.

⁸⁴ The NMF is originally established by the Nordic Ministers of Environment in 1995, to support the realisation of projects that otherwise would not materialise or could be realised only later in the future. Local participation in the financing is required. The maximum grant is one-third of the total project cost. The capacity of the fund is approximately EUR 60 million.

⁸⁵ The environmental Hot Spots in the Barents Region are managed by NEFCO on behalf of the Governments of Finland, Iceland, Norway and Sweden with a special mandate to work with environmental issues and projects in the Arctic and the Barents regions.

⁸⁶ The BSAP Fund is managed by NEFCO and the Nordic Investment Bank (NIB). The fund provides grants for technical assistance to projects that support the implementation of the HELCOM plan related to the restoration of the Baltic Sea ecological status.

⁸⁷ The Nordic Climate Facility finances projects that have a potential to combat climate change and reduce poverty in low-income countries. It is financed by the Nordic Development Fund (NDF) and implemented jointly with the Nordic Environment Finance Corporation (NEFCO).

⁸⁸ The Baltic Sea Region Testing Ground Facility (TGF) is a fund, which provides financial assistance to projects, primarily by purchasing emission reduction credits. The TGF was established in 2003 by the governments of Denmark, Finland, Iceland, Norway and Sweden.

⁸⁹ In 2005 NEFCO was appointed as the Fund Manager of the Arctic Council Project Support Instrument, a financial initiative aimed at preventing pollution of the Arctic. Interested Arctic Council member states, observers and others are invited to financially contribute to the Arctic Council Project Support Instrument.

3. APPLICATION OF EUROPEAN ENVIRONMENTAL STANDARDS IN THIRD COUNTRIES: THE RATIONALE

Before turning to the diverse motives for Europe-based International Financial Institutions to become self-regulating exporters of standards, the rationale for the external application of environmental standards by European Union has to be observed.

3.1 Rationale for the EU to apply standards in third countries

Why does the European Union set such a priority on positioning itself on the world stage, focusing strongly on external cooperation, and seeking to promote its ‘values and interests’, as expressed in Article 3 (5) TEU? Reflecting on the driving forces behind this, one can think of several reasons, ranging from down-to-earth necessity to safeguard economic interests and to create a level playing field for trade and industry to abstract moral values and obligations to contribute to worldwide sustainable development.

3.1.1 EU objectives

The first and most important objective of the European Union (then the European Economic Community) was the establishment of a common market.⁹⁰ The economic goals are still highly visible among other internal objectives of the Union, contained in Article 3 of the Treaty on the European Union. Among them are the development of an internal market where competition is free, within the framework of a social economy market whose aim is full employment; the creation of a sustainable development with an economic growth capable of fulfilling the well-being needs of society; and the promotion of economic, social, and territorial cohesion and solidarity among Member States.⁹¹

Therefore, following the development of European integration, EU international environmental engagement could be explained by its economic interests. As previously said, according to Article 3 (5) of the Treaty on European Union, in its relations with third countries the European Union sets for itself a general objective to ‘contribute to the sustainable development of the Earth’. This objective is then repeated in more detail in Article 21.⁹² The link between economic

⁹⁰ According to Article 2 of the EEC Treaty, ‘The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it’.

⁹¹ See Article 3 (3) and (4) TEU.

⁹² For detailed analysis, see section 2.1 above.

objectives and environmental interests is understandable, as strong economic growth is always accompanied by the rising need for energy resources. The EU increasingly competes for energy resources with emerging economies and energy producers themselves, which also results in extensive greenhouse gas emissions.⁹³ The relevance of Europe's energy security and climate change mitigation policy, therefore, depends to a very large degree on reductions in the energy and carbon intensity of non-EU countries.⁹⁴ In this regard, it is not a secret that the condition for European economic and political success lies in the creation – for EU-based companies and investors – of an international common-level playing field, which would be as close as possible to European standards. The EU acts in this respect as a market player, protecting and supporting its own economic interests. By promoting some of the world's most advanced environmental standards in third countries, the European Union secures the competitive advantage of its industry and builds a positive reputation for its environmentally friendly products abroad. Therefore, according to many, the Union approaches the environment through the economic lens, and a broader EU environmental policy may to some extent be a spillover from the Union's primary concern of trade liberalisation both within and outside the internal market.⁹⁵

3.1.2 EU values

Nonetheless, considering the general principles guiding the Union's external action,⁹⁶ it is unlikely that the European Union *itself* would explain its international environment-related engagements as driven only by economic interests and profit-related considerations. Indeed, next to economic *objectives*, the European environmental policy is characterised by moral obligations, or *values*. It is based on the values of freedom, democracy, equality, law enforcement, and respect for human rights and dignity.⁹⁷ When projected to external relations, the EU, being one of the largest consumers and most developed economies, according to Boute, has a 'historic responsibility' and 'strong moral reasons' to assist developing countries.⁹⁸ Boute writes further that 'strategic, geopolitical and commercial considerations become problematic if they lead to a reduced effectiveness of the moral agenda'.⁹⁹ Already in practice in 2001, the Laeken Declaration addressed the future of the European Union as a promoter of its values to the rest of the world, asking

⁹³ Boute A. (2013) The EU's Shaping of an International Law on Energy Efficiency. In Kochenov D., Amtenbrink F. (eds.) *The EU's Shaping of the International Legal Order*. Cambridge University Press. p. 218.

⁹⁴ *Ibid.*

⁹⁵ See Eckes (2013), p. 188; McCormick J. (2001) *Environmental policy in the European Union*. Palgrave Macmillan. p. 18; Bretherton C., Vogler J. (1999) *The European Union as a Global Actor*. Routledge. p. 85.

⁹⁶ See Article 21 (1) TEU.

⁹⁷ Article 3 TEU.

⁹⁸ Boute A. (2013), p. 217.

⁹⁹ Boute A. (2013), p. 221. 'Effectiveness' is a general balance among many other less general governance concepts, such as accountability or competitiveness. See Johnson W. 'How to identify Corporate Governance concepts'. eHow Blog, accessed 15.04.2014.

‘What is Europe's role in this changed world? Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?’¹⁰⁰

EU engagement in applying environmental *acquis* in third countries is linked to the EU’s general sustainable development commitments. As mentioned above, in relation to the environmental law, the Treaties contain the clear objective to ‘define and pursue common policies and actions [...] to preserve and improve the quality of the environment’,¹⁰¹ and in its relationship ‘with the wider world, the Union shall contribute to [...] the sustainable development of the Earth’.¹⁰²

Van Vooren, for example, writes that the Union has an ambitious political agenda and a legally binding mission statement to shape the international legal order in line with its own values.¹⁰³ On the basis of Articles 3 (5) and 21 TEU, Kochenov and Amtenbrink also cautiously accept the vision of the Union as that of a missionary, which highlights the fact that the EU is equipped with an ambitious duty not only to defend but also to spread its values beyond its own territory.¹⁰⁴

At the same time, Falkner, for example, finds problematic the interpretation of the EU global green role as one that promotes abstract values over and above the national interest, whereby environmental goals are seen as becoming part of global order policy.¹⁰⁵ Falkner claims that this provides an incomplete picture of the forces driving EU foreign policy, and instead needs to be grounded in an analysis of the political and economic basis and persisting inconsistencies of EU foreign environmental policy.¹⁰⁶ His critique seems valid. This is also confirmed by practice that shows that while striving to be a trendsetter in global environmental regime, the EU often ‘falls short of its self-proclaimed leadership role’.¹⁰⁷ The Union indeed has been praised for its leadership role in climate change negotiations and for the sustainable development promotion in the UN framework.¹⁰⁸ Nevertheless, some substantive criticism about the EU mentions the latter being

¹⁰⁰ Laeken Declaration On the Future of the European Union, Laeken European Council (2001), Presidency Conclusions, Annex I.

¹⁰¹ Article 21 (2) (f) TEU.

¹⁰² Article 3 (5) TEU.

¹⁰³ Vooren van, B. (2013) The EU’s Financial Transaction Tax: shaping Global Financial Governance in Its Own Image. In Kochenov D., Amtenbrink F. (eds.) *The European Union’s Shaping of the International Legal Order*. Cambridge University Press. p. 302.

¹⁰⁴ Kochenov, Amtenbrink (2013), p. 325.

¹⁰⁵ See Falkner (2006).

¹⁰⁶ See *Ibid.*

¹⁰⁷ Vogler J., Stephan H. (2007) The European Union in global environmental governance: Leadership in the making? *International Environmental Agreements: Politics, Law and Economics* 7 (4). 389-413. p. 389.

¹⁰⁸ See Vogler J. (2005) The European Contribution to Global Environmental Governance. *International Affaires* 81 (4). 835-850. p. 844. For example, at the beginning of the COP15 meeting in Copenhagen, at the first preparatory stage of the negotiations, where experts on various subjects such as mitigation, finance, and technology operate, the EU acted as an important negotiating party, representing the joint vision of the twenty-seven EU Member States. As one delegate subsequently said: ‘[at this senior civil servant level] it was really clear that the others saw the EU as a player with important knowledge and expertise that had to be taken into consideration. At this technical level there was clearly respect for the EU. You could feel that people perked their

‘crippled by its deeply unsustainable trade, agriculture, and fisheries policies, its unwillingness to meet developing countries halfway on aid and debt cancellation, its internal coherence, and its lack of leadership’.¹⁰⁹ The above demonstrates that the values of the European Union alone provide too weak a rationale for the consequent application of legal environmental standards in third countries.

3.1.3 Renewed *raison d’être*

It is therefore equally difficult to explain EU environmental activism internationally as being driven only by morals and values. Rather, the strong focus of the EU on external environmental cooperation needs to be seen in a broader framework of the Union being in constant need to legitimise itself, searching for its ‘updated’ *raison d’être*. Writing about the general reason for the European Union to exist, De Burca observes that while at its origin Europe was primarily inwardly focused on repairing and strengthening a damaged continent so as to deliver internal peace and prosperity, it has become as much or more concerned today with its external dimension:¹¹⁰ namely, with enhancing Europe’s global economic and political influence and role.¹¹¹ She argues that when the question of Europe’s *raison d’être* is raised today, the importance of having a relatively unified European political system to counterbalance the influence of other existing and rising powers has become a more significant part of the answer than was previously the case.¹¹² In line with this logic, when trying to understand the role the European Union plays on the international stage, Manners argues that the fact that the EU has been constructed on a normative basis ‘predisposes it

ears when the EU was talking. (Telephone interview with UK delegate, 10 May 2010). Cf Groen L., Niemann A. (2012) Challenges in EU External Climate Change Policy-Making in the Early Post-Lisbon Era: The UNFCCC Copenhagen Negotiations. In Cardwell P. (ed.) *EU External Relations Law and Policy in the Post-Lisbon Era*. T.M.C. Asser Press. pp. 315-333.

¹⁰⁹ Coates B. (2002) *The World’s Biggest Summit – So What?* World Development Movement. p. 9. The 2015 World Summit on Climate Change, held in Paris, witnessed the similar critique. Thus, according to the heads of Climate Action Network Europe, the EU has to ‘come out of its comfort zone’ and to ‘offer something to developing countries, including finance’, if it ‘wants to play a leadership role’. *EU Observer* 10-12-2015. Teffer P. ‘EU urged to give more climate money to world’s poor’.

¹¹⁰ The notion of ‘external dimension’ is understood here as an instrumental additional dimension of the originally internal European policy (such as the Environmental Policy), which in its essence cannot be considered as an external policy in its own right (such as the common commercial policy or the common foreign and security policy). There are numerous ways for European policies to acquire an external dimension. Firstly, they can become subject to international multilateral talks, whereby the European Commission can assume a shared or exclusive competence to act on behalf of the European Union and its Member States. Secondly, the internal EU policies can have an *unintended* external influence on third countries, an *intended* export of policy standards via bilateral and/or multilateral treaties, and an extension of European policies to third countries through institutionalised forms of cooperation. See in general Cardwell P. (2008) The common foreign and security policy of the European Union as a system of governance: The Euro-Mediterranean partnership. Manuscript, The University of Edinburgh.

¹¹¹ Burca de, G. (2013) Europe’s Raison d’Etre. In Kochenov D., Amtenbrink F. (eds.) *The European Union’s Shaping of the International Legal Order*. Cambridge University Press. p. 18. According to De Burca, although the external dimension of European integration never lost its importance, ‘the last two decades in particular have brought a more sustained focus on the external and global significance of European integration, and when the question of Europe’s *raison d’être* is raised today, the importance of having a relatively unified European political system to counterbalance the influence of other existing and rising powers has become a more significant part of the answer than was ever previously the case’.

¹¹² Burca, de (2013), p. 19.

to act in a normative way in world politics'.¹¹³ A key aspect, he suggests, is that the EU should act to extend its norms, where universally accepted, into the international system.¹¹⁴ He writes quite rightly that the expansion of the EU normative basis to the world stage represents a key development in providing greater legitimacy for the EU as an international power, and 'allows the EU to present and legitimate itself as being more than the sum of its parts'.¹¹⁵ Thus, the reason for 'project Europe'¹¹⁶ to exist has become much broader than the original goal of creating peace and prosperity. Many other transboundary and global issues, such as human rights, energy security, and of course environment, have become vital areas where the Union must become a role model in order to prove its necessity. Paraphrasing Manners and De Burca, it can be argued that the external dimension of European policies – including objectives of the environmental policy – gained such importance that they can be seen as a new set of fundamental commitments that legitimise 'project Europe'. The defence and promotion of European environmental values and interests at an international level do contribute to strengthen what De Burca refers to as the 'mission legitimacy' of the EU in a renewed, contemporary context.¹¹⁷

The Treaties clearly provide for EU external action in the field of environment, and as a consequence, for the dissemination of European environmental standards outside the European Union. At the same time, Eckes underlines that in Article 3 TEU the environment is not listed among EU values and interests, but is presented as part of the economic logic of the internal market.¹¹⁸ Arguably, the European *raison d'être* today demands giving priority to pressing economic problems. External environmental influence thus forms only one – albeit very important – part of EU external policies.

3.1.4 Interest from third countries

Finally yet importantly, while the sections above consider the internal European reasons for applying environmental standards in third countries, the possibility of exporting the standards, initiated in a subliminal way by external demand, must not be overlooked: namely, European attempts to set up a bulk of high-quality environmental standards fall on rich soil. There is enough evidence that the setting of European norms exercises a 'magnetic influence' on the environmental

¹¹³ Manners I. (2002) Normative power Europe: a contradiction in terms? *Journal of Common on Market Studies*, 40 (2). 235-258. p. 252.

¹¹⁴ *Ibid*, p. 253. See Chapter II on the concept of 'norm' as viewed in this study, including principles, rules, and standards. On the notion of norm see also Zielonka J. (2008) Europe as a global actor: empire by example? *International Affairs* 84 (3). 471-484. p. 471. A vast body of such norms is already agreed upon within the EU, but it is not shared by the EU global economic competitors such as US, Japan, China, Brazil, Russia, or India.

¹¹⁵ *Ibid*, p. 244.

¹¹⁶ The former President of the European Commission Barroso refers to the EU as 'project' in, for example, his interview with the Nobel Prize Committee. This jargon is also used by newspapers such as *the Guardian*. See The Nobel Peace Prize 2012 for the European Union, Telephone interview with José Manuel Barroso and Traynor I. 'Project Europe clears legal hurdle but Merkel holds key to political union'. *The Guardian*, 12.09.2012.

¹¹⁷ Burca, de (2013), p. 26.

¹¹⁸ See Eckes (2013), p. 177.

regimes of many other international actors.¹¹⁹ In this way, European environmental laws and best practices have become an ‘export commodity’, and inevitably exert a certain influence on the legal practices of third countries, which in one way or another become acquainted with these standards.¹²⁰ Moreover, it can be assumed that at times other jurisdictions voluntarily copy European environmental provisions in their own legislation, or apply similar environmental standards.¹²¹ Indeed, Xanthaki reaffirms that legislative drafters from third countries ‘borrow... legislative texts from the EU as a means of promoting and developing legislation quickly and effectively’.¹²² For example, the substantive reform of environmental legislative frameworks in countries of Eastern Europe, the Caucasus, and Central Asia (EECCA) is based largely on the concepts of relevant European legislation.¹²³ Due to the economic, political, geographical and other aspects, the EU *acquis communautaire* becomes for these countries an attractive point of reference. The extension of the European Union to the borders of Belarus, Moldova, Ukraine, and Russia has provided a powerful incentive, particularly for Moldova and Ukraine, to focus environmental regulatory reform on moving their national environmental legislation closer to EU norms.¹²⁴ In addition, the transboundary character of environmental problems necessitate some adjustment of these countries’ environmental legislation to be able to adequately address such problems together with the EU.

This of course does not mean that European environmental standards automatically achieve their full legal effect even outside the Union. However, European environmental standards do lay the basis for possible further approximation towards European legal environmental standards. For example, even in EECCA countries that do not identify closer integration with the European Union as a central political and/or economic goal, it is recognised that strengthened relationships with EU Member States in terms of trade and investment will require a certain degree of convergence of environmental regimes: namely, adoption, to a feasible extent, of the main principles and features of EU legislation, without necessarily transposing environmental directives article by article.¹²⁵ In

¹¹⁹ Such as UNEP, WTO, Multinational Corporations, International Financial Institutions, central, regional, local, and municipal governments of sovereign states, etc. Under an ‘international actor’ here is understood any social structure, which is able to act and to have an impact on the global or international system. See for instance Vogler (2005), p. 841, where also the term ‘magnetic influence’ is used.

¹²⁰ Ratsiborinskaya D. (2012) European investment projects in third countries: legally green? *elni Review* 1 (12). 2-7. p. 4.

¹²¹ ‘Borrowing from another legal system is the most common form of legal change’: see Watson A. (1991) *Legal Origins and Legal Change*. Hambledon Press. p. 73.

¹²² Xanthaki (2008), p. 659.

¹²³ OECD (2007) *Translating Environmental Law Into Practice: Progress in Modernising Environmental Regulation and Compliance Assurance in Eastern Europe, Caucasus and Central Asia*. p. 23.

¹²⁴ *Ibid*. This can be explained by the geographical position and the competition for political influence between the European Union and the Russian Federation, with the current governments of Moldova and Ukraine choosing the European side. Moldovan President Nicolae Timofti said in the interview with Interfax that ‘the top priorities facing Moldova include the signing of an association agreement with the European Union and liberalising visa rules’ (Chisinau, 14.06.2013). According to the Representative of Ukraine to the European Union, Konstantin Yeliseiev, the signed ‘EU-Ukraine Association Agreement is the most ambitious association agreement ever concluded by the EU with a third country. It will transform Ukraine’s commitments on systemic reforms into a legal obligation. [...] Its signature will significantly increase the country’s attractiveness as a place to invest, which will help to offset the current trade deficit with the EU’ (available online <http://ukraine-eu.mfa.gov.ua/en/about-mission/head/interviews/993-kostiantyn-yeliseiev-dispelling-the-myths-of-ukraine-eu-relations>, accessed 20.04.2015).

¹²⁵ See OECD (2007) *Translating Environmental Law into Practice. Progress in Modernising Environmental Regulation and Compliance Assurance in Eastern Europe, Caucasus and Central Asia*. p. 23.

attempting to codify environmental laws, these principles and standards are set and become influential in legal systems outside the European Union. The EU, therefore, by its very nature and *raison d'être*, has become a global environmental standard-setter and an initiator for global environmental action.

3.2 Rationale for IFIs to apply standards in third countries

Following this examination of the rationale behind EU external action in the field of environmental protection, the driving forces for Europe-based investors to apply EU standards abroad will be addressed next.

When the 'protection and the improvement of the quality of the environment' had been established as an unequivocal EU objective,¹²⁶ Europe-based International Financial Institutions were quick to follow the global 'green' trend. But what caused this apparent necessity? Obviously, Europe-based financial institutions, with the exception of the EIB,¹²⁷ are not legally bound by EU objectives. While the EIB aims to 'further the objectives of the European Union by making long-term finance available for sound investment',¹²⁸ the individual missions of other EPE Banks are highly diverse, ranging from goals to 'promote market economies that function well' (EBRD)¹²⁹ to the necessity to 'contribute to strengthening social cohesion in Europe' (CEB) to activities to 'improve competitiveness and the environment of the Nordic and Baltic countries' (NIB); with only the NEFCO possessing an explicit environmental objective to 'promote cost-effective ways to reduce the environmental pollution emanating from regions adjacent to the Nordic countries'.¹³⁰

There exist several possible reasons behind the Banks' applying European environmental standards in third countries. These are the economic attractiveness of environmentally friendly investment; the external pressure of international legal developments in the field of sustainable investment, combined with the lack of guidance at the EU level;¹³¹ the public nature of EPE Banks,

¹²⁶ Article 3 (3) TEU.

¹²⁷ On the nature of the European Investment Bank as the EU body, see Section 2.2 above.

¹²⁸ See the mission of EIB at www.eib.org/about/accountability/reporting_on_corporate_responsibility/gri/1-1-1-profile/1-1-4-governance-commitments-and-engagement/4-08.htm, accessed 28.10.2013.

¹²⁹ The European Bank for Reconstruction and Development was established in 1991 in London with the aim of promoting transition to market-oriented economies in the countries of Central and Eastern Europe and Central Asia. See the Bank's mission on www.ebrd.com/pages/about/what/mission.shtml.

¹³⁰ See these Banks' missions: for CEB on www.coebank.org/Contenu.asp?arbo=74&theme=1&ChangeLangue=EN; for NIB on www.nib.int/about_nib/mission_values; and for NEFCO on www.nefco.org/introduction/mission_and_strategy. Accessed 28.10.2013.

¹³¹ Governments and non-governmental investors alike begin to link international trade with the social responsibilities of business, mostly engaged with environmental and social standards. Such a concept was given the title 'sustainable investing'. See for example the European Commission commitment to conducting social impact assessments of all major new trade agreements (see <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/>, accessed 28.04.2015); the United States *Trade Act 2002*, which obliges any new American free trade agreements to protect fundamental workers rights and the environment (Article 11, www.gpo.gov/fdsys/pkg/BILLS-107hr3009enr/pdf/BILLS-107hr3009enr.pdf, accessed 28.04.2015); and the United States *Trade Policy Agenda 2003* (see https://ustr.gov/archive/Document_Library/Report_Publications/2003/2003_Trade_Policy_Agenda/Section_Index.html, accessed 28.04.2015). The key difference between sustainable and 'old-

with the EIB being not less than the body of the European Union; and the overall pressure of the general public and non-governmental organisations, concerned about environmental degradation as a by-product of investment projects. Hypothetically, in relation to each particular investor, not one but a combination of several of these reasons can apply.

3.2.1 Economic attractiveness of 'green' investment

According to Lyon and Maxwell, financial institutions 'will enter voluntary environmental agreements and/or engage in acts of corporate environmentalism when the benefits of the act exceed its associated costs'.¹³² Thus, it is assumed by the authors that the focus of European IFIs is primarily on competitiveness and financial revenues. At the same time, perceived more broadly, investment brings about not only economic but also strong environmental and social impacts. This argument is supported by the fact that the last two decades have seen considerable attention being paid by academics, lawyers, economists, and social scientists to environmental regulatory competition for investment.¹³³ The increase in investment flows to developing countries in the last twenty years has stimulated a debate on the link between the associated profits and the environment, particularly as such investment often goes into resource extraction, infrastructure, and manufacturing operations.¹³⁴

When examining the relationship between trade openness and environmental pollution in Latin America, Birdsall and Wheeler conclude that pollution-intensive industries were more likely to be located in the most protectionist countries.¹³⁵ The economic analysis by Cole also allowed concluding that 'the downturn in emissions experienced at higher income levels appears to be a result of the increased demand for environmental regulations, increased investment in abatement technologies (both facilitated by higher income levels), and trade openness'.¹³⁶ The logic behind this theory is that if access to global markets leads to greater economic development, and development leads to a better environmental regime, it follows that liberalised trade and investment

fashioned' approaches to investment is that sustainable investors tend to give more weight and attention to environmental issues. In its broadest sense, sustainable investing means including environmental and social factors in investment decisions.

¹³² Lyon T., Maxwell J. (2001) Voluntary approaches to Environmental Regulation: a Survey. In Franzini M., Nicita A. (eds.) *Economic Institutions and Environmental Policy*. Ashgate Publishing Ltd. p. 18.

¹³³ See Knill C. *et al.* (2008) Balancing competitiveness and conditionality: environmental policymaking in low-regulating countries. *Journal of European Public Policy* 15 (7). 1001-1018; Gray K. (2002) Foreign Direct Investment and Environmental Impacts – Is the Debate Over? *RECIEL* 11(3). 306-313.

¹³⁴ See Mabey N., McNally R. (1998) *Foreign Direct Investment and the environment. From pollution havens to sustainable development*. WWF-UK Report. p. 9. See also Spatareanu M. (2007) Searching for pollution havens: the impact of environmental regulations on foreign direct investment. *Journal of environment and development* 16 (2). 161-182. p. 181, on the connection between the foreign direct investment and the environment.

¹³⁵ Birdsall N., Wheeler D. (1993) Trade Policy and Industrial Pollution in Latin America: Where are the Pollution Havens? *Journal of Environment and Development* 2 (1). 137-149. Cf Drezner D. (2006) *The Race to the Bottom Hypothesis: An Empirical and Theoretical Review*. The Fletcher School, Tufts University. p. 11.

¹³⁶ Cole M. (2004) Trade, the Pollution Haven Hypothesis and the Environmental Kuznets Curve: Examining the Linkages. *Ecological Economics* 48. 71-81. p. 79.

lead to a race-to-the-top situation.¹³⁷ Stronger environmental policies can improve a host country's competitiveness by fostering innovation and efficiency.¹³⁸ This relates to the situation in which an investment, while already bound by high standards, comes into the host country regardless of the domestic regulatory level.¹³⁹ Noteworthy is that the recent empirical study by the OECD, based on newly developed econometric techniques and a very broad sample, demonstrates support 'for the positive effect of relative environmental policy stringency on foreign direct investment patterns'.¹⁴⁰ Similarly, data relating to U.S. foreign direct investment in developed and developing countries reveal that U.S. firms invested a greater percentage of pollution-intensive industries in countries with stricter environmental standards.¹⁴¹ This is also the case concerning investment originating from the European Union.¹⁴²

3.2.2 International legal developments

Worth noting is that all the aforementioned environmental initiatives were born (or updated, in the case of OECD Guidelines) in the same period, some ten years ago, and are currently witnessing their own revision. This phenomenon could be explained by the fact that the failed negotiations between OECD members on the Multilateral Agreement on Investment in 1998 left States without any agreed upon mechanisms to regulate investment.¹⁴³ In the absence of an overarching regime, the international community witnessed a rise in sustainable investment initiatives, many of which were focused on the environment. These initiatives resulted from a number of well-publicised environmental and social disasters associated with the building of large roads, dams, and other infrastructure projects of questionable economic viability in areas containing fragile ecosystems, primarily tropical rainforest or areas where many thousands of local inhabitants had to be displaced and their traditional lands inundated or paved over.¹⁴⁴ Even before

¹³⁷ See Vogel D. (1997) Trading up and governing across: transnational governance and environmental protection. *Journal of European Public Policy* 4 (4). 556-571; Griswold D. (2001) Trade, Labor, and the Environment. How Blue and Green Sanctions Threaten Higher Standards. *Trade Policy Analysis* 15. A 'race-to-the-top' theory, according to which greater exposure to the liberalised trade leads to better environmental regime, is counterbalanced by the 'race-to-the-bottom' theory, which argues that increased competition for trade and foreign direct investment could consequently lead to the lowering of environmental standards. See Medalla E., Lazaro D. (2007) Does Trade Lead to a Race-to-the-bottom in Environmental Standards? In La Croix S., Petri P. (eds.) *Challenges to the Global Trading System: Adjustment to Globalization in the Asia-Pacific Region*. Routledge. p. 86.

¹³⁸ See Porter M. (1990) *The Competitive Advantage of Nations*. Free Press.

¹³⁹ Under 'host country' or 'host state' here is understood the state-recipient of the investment flows.

¹⁴⁰ Kalamova M., Johnstone N. (2011) *Environmental Policy Stringency and Foreign Direct Investment*. OECD Environment Working Papers 33. OECD Publishing. p. 25.

¹⁴¹ Anderson C., Kagan R. (2000) Adversarial Legalism and Transaction Costs: The Industrial Flight Hypothesis Revisited. *International Review of Law and Economics* 20. 1-19. Cf Drezner (2006), p. 11.

¹⁴² Eurostat, European Union Foreign Direct Investment Yearbook 2007, p. 22, available at: <http://ec.europa.eu/eurostat> (accessed 22.04.2015) p. 23. See also Annex to the OECD (1999) BIAC Discussion paper. Conference on Foreign Direct Investment and Environment. The Hague, 28-29.01.1999.

¹⁴³ Gray (2002), p. 312.

¹⁴⁴ Himberg H. (2002) *International Financial Institutions, Environmental Standards and Foreign Direct Investment: Bringing the Learning Curve to Full Circle*. Policy Paper. New America Foundation. p. 6.

the European Union took the lead as a trendsetter in environmental standardisation, calls for 'greening' of investment had been coming from the international arena, although mostly representing developed countries. The environmental conditionality, which began to develop via the previously described initiatives undertaken in the framework of the United Nations, the World Bank Group, and the OECD, provided an alternative to the adoption of the worldwide regime. It can be argued that from the EU point of view, the adoption by IFIs of the initiatives similar to the European Principles for the Environment, falls very much in line with the Union's objectives regarding transboundary and global issues such as competitiveness in the investment markets, energy security, and environmental protection. At the time when the common EU investment policy is yet to be developed, the European Commission considers such voluntary initiatives as 'a basis for further harmonisation of approach, as well as an invitation for additional parties to adopt the same principles'.¹⁴⁵

3.2.3 Public nature of IFIs

As explained above, Europe-based International Financial Institutions, with the exception of the EIB, are initially not bound by EU objectives. However, due to their public nature, they cannot remain immune to political pressure from the European Union and its Member States. As regulators and legislators, governments can force IFIs to accept certain sustainable development principles by legislating accordingly. In the European context, the five banks – signatory to the European Principles for the Environment (EPE Banks), described above¹⁴⁶ – are publicly owned by the national governments of the Member States, which became members by contributing to their funds. The Member States thus can impose certain requirements involving the Banks' conduct. As the Member States' contributions involve taxpayers' money, such IFIs are evidently more subject to public pressure.¹⁴⁷

Moreover, IFIs generally facilitate the flow of investment to developing and emerging markets. Europe-based IFIs that have the function of Multilateral Development Banks also channel EU development assistance funds to the EU Neighbourhood region and other third countries. As discussed above, environmental issues have become one of the crucial areas in which the Union aims to become a role model. This investment is subject to the EU conditionality policy, which, along with human rights and political requirements, often includes the environmental component. Thus, for example, at its meeting in Stockholm in March 2001, the European Council agreed that the then Community should open up EIB lending for selected environmental projects in Russia's

¹⁴⁵ EIB website, 'The European Principles for the Environment adopted by five European Multilateral Financing Institutions', www.eib.europa.eu/infocentre/press/releases/all/2006/2006-052-the-european-principles-for-the-environment-adopted-by-five-european-multilateral-financing-institutions-.htm, accessed 28.04.2015.

¹⁴⁶ See Section 2.2 above.

¹⁴⁷ Himberg (2002), p. 3.

Baltic Sea basin.¹⁴⁸ The specific criteria imposed by the Council were, *inter alia*, that ‘projects shall have a strong environmental objective and be of significant interest to the EU’, and that ‘the EIB shall co-operate and co-finance with other International Financial Institutions in order to ensure reasonable risk-sharing and appropriate project conditionality’.¹⁴⁹

3.2.4 Pressure from the general public

Although the mandates of most International Financial Institutions as development banks are focused on poverty alleviation, they often provide financial support to projects that have significant social and environmental impacts.¹⁵⁰ Bank-financed projects can involve significant social and environmental costs such as the displacement of local communities, threats to indigenous peoples, and the destruction or degradation of the environment.¹⁵¹ IFIs’ activities have often been carried out without the informed participation of the concerned public,¹⁵² non-governmental organisations, and – in many cases – even the legislatures of the Banks’ borrowing countries. Moreover, despite some progress, IFIs still do not release comprehensive information in a timely manner during project design and implementation.¹⁵³ Issues such as the building of dams, the development of oilfields in sensitive marine environments, the impact on tropical forests, protected areas, and the rights of indigenous peoples are typically driven by heavily orchestrated campaigns by environmental non-governmental organisations (NGOs).¹⁵⁴ The impact of NGOs, the media, and public opinion, directed to the necessity to introduce – and ultimately to improve – the environmental procedures and policies of investors, should not be underestimated. Generally, NGO campaigns are targeted directly at a certain bank, or at the Bank’s environmental staff that may be sympathetic to environmental concerns, or even at sympathetic donor governments,

¹⁴⁸ Proposal for a Council Decision granting a Community guarantee to the European Investment Bank against losses under loans for certain types of projects in Russia and the Western New Independent States (WNIS). COM/2004/0385 final - CNS 2004/0121. This initiative resulted in EIB-EBRD-NIB projects such as the modernisation of the sewage system in St. Petersburg; see the summary of the project at www.ebrd.com/news/2013/ebd-hails-success-of-st-petersburg-clean-river-project.html, accessed 28.04.2015.

¹⁴⁹ Proposal for a Council Decision granting a Community guarantee to the European Investment Bank against losses under loans for certain types of projects in Russia and the Western New Independent States (WNIS). COM/2004/0385 final - CNS 2004/0121.

¹⁵⁰ CIEL website. ‘About the International Financial Institutions’. www.ciel.org/Intl_Financial_Inst/About_IFIs.html#aboutifi, accessed 6.06.2013.

¹⁵¹ CIEL website. ‘About the International Financial Institutions’. www.ciel.org/Intl_Financial_Inst/About_IFIs.html#aboutifi, accessed 6.06.2013.

¹⁵² ‘Public’ is the term defined in the EU Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive), meaning ‘one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups’ (Article 1 (2) (d)); while ‘public concerned’ means the public affected or likely to be affected by, or having an interest in, environmental decision-making procedures. For the purposes of this definition, according to Article 1 (2) (e) of the EIA Directive, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. See also Chapter VIII in relation to the terminological difference between ‘public’ and ‘public concerned’.

¹⁵³ CIEL website. ‘About the International Financial Institutions’. www.ciel.org/Intl_Financial_Inst/About_IFIs.html#aboutifi, accessed 6.06.2013.

¹⁵⁴ Himberg (2002), p. 6.

typically the US, the UK, the Netherlands, and the Scandinavian countries.¹⁵⁵ According to the Center for International and Environmental Law, series of policies and procedures that are intended to offset some of the environmental and social risks were eventually established by IFIs as a response to civil society and to pressure from the donor country.¹⁵⁶ Ultimately, the risk to a Bank's safe and environmentally friendly reputation can jeopardise the very viability of the institution. It can be assumed that as with many standard-setting procedures, EPE Banks also moved originally towards voluntary standards of sustainable investment without any real intention of having a dramatic positive effect on the environment, 'but purely for the sake of windowdressing'.¹⁵⁷ Faced with public pressure and demands of their stakeholders, combined with the growing demand for sustainable products and services, the Banks needed to be doing something about the environment.¹⁵⁸ Effects, however, seem to be positive for all sides. Together with others, the EPE initiative demonstrates an essential role for IFIs in the nexus between economic gains and environmental considerations. They are seen by many as pioneers in corporate self-regulation, staying open to public pressure and taking on board concerns communicated by NGOs and intergovernmental organisations like OECD.¹⁵⁹ In addition to a 'green' image and increased corporate competitiveness, they are becoming engaged in a promising legal exercise, reviewing the traditional 'polarity' between economic profit and environmental concerns.

4. APPLICATION OF EUROPEAN ENVIRONMENTAL STANDARDS IN THIRD COUNTRIES: THE FRAMEWORKS

The study of the application of European environmental standards in third countries is continued by an overview of the *general* legislative and regulatory frameworks used by the European Union and by International Financial Institutions to channel legal environmental standards to third countries. This overview serves as a stepping-stone for a subsequent discussion on a *specific regulatory framework* allowing for the application of environmental standards in third countries: the foreign direct investment.

¹⁵⁵ See Himberg (2002), p. 6.

¹⁵⁶ CIEL website. 'About the International Financial Institutions'. www.ciel.org/Intl_Financial_Inst/About_IFIs.html#aboutifi, accessed 6.06.2013.

¹⁵⁷ Peters A. *et al.* (2009) Towards non-state actors as effective, legitimate, and accountable standard setters. In Peters A. *et al.* (eds.) *Non-State Actors as Standard Setters*, Cambridge University Press. 492-562. p. 509.

¹⁵⁸ As an example, see critical review by CIEL: 'The European Bank for Reconstruction and Development: An Environmental Progress Report', www.ciel.org/Publications/summary1.html, accessed 2.02.2012. For a definition of the term 'stakeholder', see Chapter II, Section 1.3.3.

¹⁵⁹ See for example Gjørlberg M. (2011) Explaining Regulatory Preferences: CSR, Soft Law, or Hard Law? Insights from a Survey of Nordic Pioneers in CSR. *Business and Politics* 13 (2). 452-503; Kochan N. (2010) The EBRD Pioneers In Risk. *Financial Risk Management News and Analysis*.

4.1 Application of standards in third countries by the EU: general frameworks

The EU has a strategic interest in shaping how environmental standards are understood in global policy terms, and that action is taken to prevent damage to the Union's economic competitiveness.¹⁶⁰ The Union possesses a number of instruments to achieve this end, adopted on both global and EU levels.

4.1.1 Multilateral Environmental Agreements

Due to the sheer size of its economy, the European Union 'casts a long ecological shadow'.¹⁶¹ Because the 'wrong' image could have a serious economic effect, however, the EU has a clear interest in ensuring continuation of the present sustainability discourse.¹⁶² The Union is therefore eager to see that the way it defines and applies environmental standards is reflected in the regional or worldwide multilateral environmental agreements (MEAs). At present, more than two hundred such MEAs, involving more than two countries, are known to exist. A number of them are global treaties, such as the 1992 Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal,¹⁶³ or the 1992 UN Framework Convention on Climate Change (UNFCCC)¹⁶⁴ and the 1997 Kyoto Protocol to UNFCCC¹⁶⁵. A greater number of MEAs possess a regional character, such as the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution,¹⁶⁶ or the 1983 Bonn Agreement,¹⁶⁷ which provides a framework for international cooperation in tackling oil and other pollution of the North Sea.

As an example of an intergovernmental organisation, the European Union is provided with a legal personality by Article 47 TEU, which, according to Article 216 TFEU, possesses the right to conclude international agreements. Thus, alongside Member States, the EU is currently a signatory to, and a participant in, more than sixty major multilateral environmental agreements.¹⁶⁸

On a less positive note, however, next to this 'good track-record when it comes to membership of multilateral environmental agreements', 'a number of Member States have still not ratified key agreements'.¹⁶⁹ As recognised by the Seventh Environmental Action Programme, 'this compromises the Union's credibility in related negotiations', and therefore 'Member States and

¹⁶⁰ See Baker S. (2000) *The EU: Integration, Competition and Growth and Sustainability*. In Lafferty W., Meadowcroft J. (eds.) *Implementing Sustainable Development*. Oxford University Press. p. 308.

¹⁶¹ Bretherton, Vogler (2006), p. 80.

¹⁶² Lightfoot S., Burchell J. (2005) *The European Union and the World Summit on Sustainable Development: Normative Power Europe in Action?* *JCMS* 43 (1). 75-95. p. 78.

¹⁶³ See the Convention's website www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx, accessed 7.07.2015.

¹⁶⁴ See the Convention's website <http://unfccc.int/2860.php>, accessed 7.07.2015.

¹⁶⁵ See http://unfccc.int/kyoto_protocol/items/2830.php, accessed 7.07.2015.

¹⁶⁶ See Convention's website www.unep.ch/regionalseas/regions/med/t_barcel.htm, accessed 7.07.2015.

¹⁶⁷ See Agreement, www.bonnagreement.org/, accessed 7.07.2015.

¹⁶⁸ See Bretherton, Vogler (2006), p. 93.

¹⁶⁹ See Decision on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'. No 1386/2013/EU L, 20.11.2013, OJ 354/171, para 101.

the Union should ensure the ratification and approval, respectively, in a timely manner, of all MEAs to which they are signatories'.¹⁷⁰

4.1.2 International environmental protection

No matter how high EU environmental standards are, they cannot guarantee the protection of the European Union citizens from the negative consequences of trans-boundary and global environmental degradation. Moreover, their application within the European Union is not sufficient in order to reduce the negative consequences of the European economic activities internationally. Confronting the challenges of such global problems as climate change, biodiversity loss and biosafety, deforestation, air and water pollution, and chemicals management, requires commitment and cooperation at the international level.¹⁷¹ The European Union addresses these challenges via, among other, international engagement in environmental protection.

Thus, following the UN Conference on Sustainable Development, or 'Rio+20', held in Rio de Janeiro in 2012,¹⁷² the EU is active in the reform of the UN institutions responsible for sustainable development (ECOSOC and the High Level Political Forum) and for environment (UNEP).¹⁷³ The European Union also has been contributing to the development of the Sustainable Development Goals, a universal framework based on the three dimensions of sustainable development: social, environmental and economic. The decision to formulate these goals was a key outcome of Rio+20. To this end, the European Commission issued in 2014 a Communication 'A Decent Life for All: from Vision to collective Action', which describes key principles and proposes priority areas and potential targets for the years following 2015, as a contribution towards establishing a limited number of Sustainable Development Goals.¹⁷⁴

Next to engagements in multinational fora, the European Union has been unilaterally supporting environmental, nature conservation and climate action projects throughout the EU as well as internationally. The main financial instrument for such projects is the Programme for the Environment and Climate Action (LIFE), established in 1992. Although primarily designed for supporting projects within the European Union, LIFE recognises the necessity of a broader approach. In the preamble to the Regulation on the establishment of a Programme for the Environment and Climate Action, it is acknowledged that:

For environmental and climate action-related investments within the Union to be effective, some activities need to be implemented outside its borders. Those investments may not always be financed under the Union's external action financial instruments. Interventions in countries not directly

¹⁷⁰ Decision on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'. No 1386/2013/EU L, 20.11.2013, OJ 354/171, para 101.

¹⁷¹ See European Commission (2014) Communication A Decent Life for All: From vision to collective action, COM (2014)0335.

¹⁷² See the United Nations Conference on Sustainable Development website www.uncsd2012.org/, accessed 9.07.2015.

¹⁷³ See DG Environment website, 'International issues', http://ec.europa.eu/environment/international_issues/index_en.htm, accessed 9.07.2015.

¹⁷⁴ European Commission (2014) Communication A Decent Life for All: From vision to collective action, COM (2014)0335.

participating in the LIFE Programme, and participation of legal persons based in those countries in activities financed under the LIFE Programme should exceptionally be possible.¹⁷⁵

Subsequently, the Regulation clarifies which third countries can be considered eligible for funding, narrowing the list down to the third countries participating in European Union programmes, such as the European Free Trade Association (EFTA) countries-parties to the Agreement on the European Economic Area (EEA); candidate countries, potential candidates and acceding countries to the European Union; countries to which the European Neighbourhood Policy applies; and countries-members of the European Environmental Agency.¹⁷⁶

4.1.3 Copenhagen criteria

Although the candidate countries fall outside of the scope of this study, the Copenhagen criteria is briefly touched upon below in order to provide for a complete overview of frameworks used by the EU when applying the environmental standards externally.

For countries that are aspiring to accede to the Union, the European Council of 1993 in Copenhagen identified the criteria to be fulfilled. According to the Council Presidency conclusions:

‘Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union’.¹⁷⁷

The Copenhagen criteria thus consist of a number of requirements such as stable democratic institutions, the rule of law, and a functioning market economy, as well as an infrastructure capable of implementing and enforcing EU law. These criteria were further extended by Article 49 TEU, which underlines the requirement for a new candidate for accession to respect the values of the Union referred to in Article 2 TEU. Article 49 TEU also adds to these criteria a geographic requirement for the candidate to be a ‘European’ state. Additionally, as well as the Copenhagen criteria, the conditionality related to the enlargement procedure includes the requirement for all prospective members to enact legislation to bring their laws in line with the body of European law, built up over the history of the Union – the *acquis communautaire*. The *acquis* contains the primary

¹⁷⁵ Regulation 1293/2013/EU on the establishment of a Programme for the Environment and Climate Action (LIFE) and repealing Regulation 614/2007/EC, [2013] OJ L 347/185.

¹⁷⁶ *Ibid*, Article 5.

¹⁷⁷ Copenhagen European Council (1993) Presidency Conclusions. Article 7 (A) (iii).

and secondary laws of the EU, currently subdivided into thirty-five chapters,¹⁷⁸ and one section of the *acquis* contains EU laws concerning the environment. According to Kapios, the approximation of this section of the *acquis* by the applicant countries is not an easy task: they face difficulties ranging from a lack of the necessary financial resources to an administrative structure that is not prepared to implement and enforce the EU legislation.¹⁷⁹ Standards between the applicants and the EU vary widely, and EU environmental legislation covers a wider scope of issues.¹⁸⁰ The European Commission also recognises that ‘all the candidate countries have to make a serious effort in order to reach existing EU standards’.¹⁸¹

4.1.4 Development aid

In addition to enlargement, the EU possesses a conditionality mechanism with respect to development aid. Taking the EU and Member States collectively, the EU is the world’s largest provider of official development assistance (ODA), amounting to EUR 53 billion in 2013, or half of the global total, and directed to more than hundred countries.¹⁸² Without doubt, the EU is also a significant trading partner for developing countries, as well as an important source of technology, innovation, investment, and entrepreneurship.¹⁸³ This reality allow European actors to bind assistance together with certain conditions, such as the introduction of anti-corruption measures or human rights standards, thus laying down the application of certain EU standards as the prerequisite for grants. A recent Commission Communication stresses the importance of bringing development and environmental agendas together in a post-2015 development assistance framework,¹⁸⁴ which is currently being formulated by the OECD.¹⁸⁵

The challenge, however, lies not only in enhancing Europe’s global power but also primarily in externally applying standards, for which there is more demand among existing and emerging global players, without forcing global competitors to embrace them.¹⁸⁶ As Zielonka puts it, ‘to be successful in today’s world, Europe needs to export its legislation to other countries, but it can do it in a modest and novel way that will not provoke accusations of ‘regulatory imperialism’’.¹⁸⁷ One

¹⁷⁸ See Europa Enlargement website, http://ec.europa.eu/enlargement/policy/glossary/terms/chapters_en.htm, accessed 17.04.2015.

¹⁷⁹ Kapios P. (2002) Environmental Enlargement in the European Union: Approximation of the *Acquis Communautaire* and the Challenges that it Presents for the Applicant Countries. *Sustainable Development Law & Policy* 2 (2). 4-9. p. 5.

¹⁸⁰ See *Ibid.*

¹⁸¹ European Commission (1998) Communication on Accession Strategies for Environment: Meeting the Challenge of Enlargement with the Candidate Countries in Central and Eastern Europe. Brussels, COM (1998)294. p. 6.

¹⁸² European Commission (2013) Communication A Decent Life for All: Ending poverty and giving the world a sustainable future. Brussels, COM (2013)92. p. 2.

¹⁸³ European Commission (2013) Communication A Decent Life for All: Ending poverty and giving the world a sustainable future. Brussels, COM (2013)92. p. 2.

¹⁸⁴ See *Ibid.*

¹⁸⁵ See OECD (2012) Development Assistance Committee Communiqué.

¹⁸⁶ See Zielonka (2008), p. 471.

¹⁸⁷ See Zielonka (2008), p. 471.

of the remarkable instruments in this regard is 'blending', which involves the complementary use of grants and non-grant sources such as loans or risk capital to finance investment projects in developing countries.¹⁸⁸ Blending projects, which use funds from donors such as the EU and Member States, combine this financing with different supplementary flows, primarily in the form of foreign direct investment, to receive the revenues that serve to finance additional costs associated with adherence to high social and ecological standards.¹⁸⁹

4.2 Application of standards in third countries by IFIs: general frameworks

As emphasised earlier in this chapter, not only the European Union but also International Financial Institutions have been involved in the application of environmental standards in third countries. IFIs 'have been in the forefront of assuming a share of responsibility by setting in place procedures to assess the environmental impacts of their project development and lending activities'.¹⁹⁰ Today virtually all financial institutions have at least some general environmental guidelines in place to assess environment-related risks prior to determining which projects to finance,¹⁹¹ thereby creating frameworks for the application of European environmental standards in third countries.

In order to better understand the common approach adopted by EPE Banks¹⁹² towards social and environmental standards for project finance, it is worth having an overview of other remarkable initiatives that guide IFIs.¹⁹³ These voluntary regulatory initiatives have been undertaken over the last two decades, both on the European continent and worldwide. The European Principles for the Environment, being the most recent environment-related voluntary declaration in the sector of international finance, was inspired, *inter alia*, by initiatives such as the United Nations' Principles for Responsible investment, the Equator Principles, the International Finance Corporation Policy on Environmental and Social Sustainability, and by the World Bank Group Environmental, Health, and Safety Guidelines.

¹⁸⁸ European Report on Development (2013), p. 122.

¹⁸⁹ Since 2007, the European Commission has launched seven blending facilities to support large-scale infrastructure and SME development, including the Infrastructure Trust Fund (ITF) in Africa, the Neighbourhood Investment Facility (NIF) for European Neighbourhood and Partnership countries, the Western Balkans Investment Framework (WBIF), the Latin America Investment Facility; and the Investment Facility for Central Asia. These facilities link EU budget grants, sometimes topped up with grants from financial institutions and EU Member States, with loans from accredited international, regional and European bilateral financial institutions such as the European Investment Bank, Agence Française de Développement (AFD), and the KfW Bankengruppe. See European Report on Development (2013), p. 122.

¹⁹⁰ Goldenman G. (1999) The Environmental Implications of FDI: Policy and Institutional Issues. In *Foreign Direct Investment and the Environment*. OECD. p. 25.

¹⁹¹ *Ibid.*

¹⁹² This common approach by EPE Banks, the European Principles for the Environment, is discussed extensively in Chapter V.

¹⁹³ Project finance is a method of financing often used to create large infrastructure projects in which the borrower is often a company specially formed to create an infrastructure facility, and the lender is repaid primarily from the cash flow and the value of the facility itself. See Marco M. (2011) Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party-Beneficiary Status for Project-Affected Communities. *Fordham International Law Journal*. 34 (3). 452-503. p. 453.

The overview of environment-related investment principles, presented below, does not pretend to be comprehensive, nor does it aim to compare which set of principles is better or more effective when applied to project finance.¹⁹⁴ Instead, its purpose is to demonstrate the growing demand for an *overall* investment framework, incorporating social and environmental criteria.

4.2.1 *The United Nations' Principles for Responsible Investment (PRI)*

Adopted in 2006, this is probably the most well-known set of investment principles being promoted and used today.¹⁹⁵ The PRI are 'public' in that they have been promulgated by a group of public institutions (United Nations Environmental Programme's Finance Initiative and the UN Global Compact), although this has been done in conjunction with a group of twenty leading institutional investors – the PRI Investor Group. The PRI are 'voluntary' in that they are nonbinding, and are aimed at institutional investors, specifically institutional portfolio investors.¹⁹⁶ The PRI scheme is global in scope and universal in terms of sector. Signatories commit to incorporate environmental and social principles into all their investment decisions, regardless of asset class or location. By the end of 2014, the PRI had more than thirteen hundred signatories from forty-five countries.¹⁹⁷

4.2.2 *The World Bank Group Environmental, Health, and Safety (EHS) Guidelines*

Another significant trend takes place within the World Bank, which is currently in the process of updating and consolidating its fifteen-year-old environmental and social safeguard policies into an integrated environmental and social policy framework.¹⁹⁸ The World Bank Group EHS Guidelines are a good example thereof. The EHS Guidelines are technical reference documents

¹⁹⁴ For research on which initiative is better and more effective, see the research of Scheltema (e.g. Scheltema M. (2014) Assessing Effectiveness of Private Regulation in the CSR Arena. In Gedragscodes in internationaal, Europees en privaatrechtelijk perspectief, Juridische betekenis, effectiviteit en handhaving (Preadvies Vereniging voor Burgerlijk Recht). Uitgeverij Paris; Scheltema M. (2014) Assessing effectiveness of international private regulation in the CSR arena. *Richmond Journal on Global Law and Business* 13 (2). 265-373; Scheltema M. (2014) An assessment of the effectiveness of international private regulation in the corporate social responsibility arena, a legal perspective. *Maastricht Journal of European and Comparative Law* 21 (3). 390-412, on enforcement issues in private law. For another overview of investment principles, see Behrman N. (2011) (ed.) *Investing for sustainable development? A review of investment principles – trends and impacts*. Just Economics. International Institute for Environment and Development.

¹⁹⁵ See Behrman (2011), p. 14.

¹⁹⁶ A version of the PRI has also been adapted for the private equity sector, so that the PRI cover both public and private equity markets.

¹⁹⁷ See Principles for Responsible Investment website, 'Signatories', www.unpri.org/signatories/signatories/, accessed 28.04.2015.

¹⁹⁸ See World Bank's website, <http://go.worldbank.org/00E973V3B0>, accessed 20.02.2012.

with general and industry-specific examples of Good International Industry Practice (GIIP).¹⁹⁹ As part of the World Bank Group,²⁰⁰ the International Finance Corporation (IFC)²⁰¹ uses the EHS Guidelines as a technical source of information during project appraisal activities, as described in IFC's Environmental and Social Review Procedures Manual.²⁰² The EHS Guidelines combine the performance levels and measures that are normally acceptable to IFC and that are generally considered achievable in new facilities at reasonable costs by existing technology. For IFC-financed projects, application of the EHS Guidelines to existing facilities may involve the establishment of site-specific targets with an appropriate timetable for achieving them. The environmental assessment procedure may recommend alternative (higher or lower) levels or measures, which, if acceptable to IFC, become project- or site-specific requirements.²⁰³ When host country environmental regime differs from the levels and measures presented in the EHS Guidelines, projects will be required to achieve whichever is more stringent.²⁰⁴

4.2.3 The International Finance Corporation (IFC) Policy on Environmental and Social Sustainability

Noteworthy is the International Finance Corporation IFC Policy on Environmental and Social Sustainability. Originally adopted in 2006, the IFC's Policy on Environmental and Social Sustainability is part of a larger IFC's Sustainability Framework, updated in 2012. The Sustainability Framework consists of three main components: the Policy on Environmental and Social Sustainability, which defines IFC's commitments to environmental and social sustainability; the Performance Standards, which define clients' responsibilities for managing their environmental

¹⁹⁹ As defined in IFC's Performance Standard 3 on Resource Efficiency and Pollution Prevention. See IFC (2012) Performance Standards.

²⁰⁰ The World Bank Group consists of five organisations: the International Bank for Reconstruction and Development (IBRD), that lends to governments of middle-income and creditworthy low-income countries; the International Development Association (IDA), which provides interest-free loans and grants to governments of the poorest countries; the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA), created to promote foreign direct investment into developing countries to support economic growth, reduce poverty, and improve people's lives by offering political risk insurance (guarantees) to investors and lenders; and the International Centre for Settlement of Investment Disputes (ICSID) which provides international facilities for conciliation and arbitration of investment disputes. See World Bank website, www.worldbank.org/en/about, accessed 22.04.2015.

²⁰¹ The International Finance Corporation was set up in 1956. By now it is the largest global development institution focused exclusively on the private sector. It provides three services – Investment Services, Advisory Services, and Asset Management, which are mutually reinforcing and delivering global expertise to clients in more than a hundred developing countries. IFC provides both immediate and long-term financing. See www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc, accessed 22.04.2015.

²⁰² IFC (2011) Environmental and Social Review Procedures Manual.

²⁰³ See International Finance Corporation website, 'Environmental, Health, and Safety Guidelines', www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/ehsguidelines, accessed 8.04.2015.

²⁰⁴ *Ibid.*

and social risks; and the Access to Information Policy, which articulates IFC's commitment to transparency.²⁰⁵

4.2.4 The Organisation for Economic Co-operation and Development (OECD) Corporate Governance Principles

The OECD issued in 2004 its revised Corporate Governance Principles. According to the Organisation, 'the Principles are a living instrument offering non-binding standards and good practices as well as guidance on implementation, which can be adapted to the specific circumstances of individual countries and regions'.²⁰⁶ Next to the Principles, in 2011 appeared the revised OECD Guidelines for Multinational Enterprises, that encourage investors to harmonise their environmental practices across the source and the host countries by adopting technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise.²⁰⁷ These are recommendations that provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.²⁰⁸

In relation to the above, a revised Statement on Global Corporate Governance Principles appeared in 2009, issued by International Corporate Governance Network (ICGN).²⁰⁹ It generally endorsed the OECD Principles and in addition highlighted some extra elements that corporations shall consider when making investment decisions.

4.2.5 The Equator Principles (EPs)

Most remarkable, to date there exist two main sets of social and environmental standards that have been launched not under the auspices of renown international organisations, such as OECD or UN, but autonomously by the international banks and financial institutions. One of these sets,

²⁰⁵ For more details, see IFC (2012) Policy on Environmental and Social Sustainability.

²⁰⁶ OECD (2004) Principles of Corporate Governance, p. 4.

²⁰⁷ The Guidelines were updated in 2011 for the fifth time since they were first adopted in 1976. Adhering governments insisted on the review to ensure that the Guidelines remained a leading tool to promote responsible business conduct in the changing landscape of the global economy.

²⁰⁸ See OECD (2011) *OECD Guidelines for Multinational Enterprises*. OECD Publishing.

²⁰⁹ The International Corporate Governance Network (ICGN), founded in 1995, represents investors, companies, financial intermediaries, academics and other parties interested in the development of global corporate governance practices. One of its objectives is to facilitate international dialogue on issues of concern to investors. The ICGN believes that it is in the public interest to encourage and enable the owners of corporations to participate in their governance. See ICGN (2005) Global Corporate Governance Principles. p. 1.

the European Principles for the Environment, will be addressed in detail in Chapter V. The other, the Equator Principles, was first launched in 2003 by the ten global private financial institutions²¹⁰ and the International Finance Corporation. The Principles constitute an international voluntary code of conduct, developed by banks to encourage consideration of environmental and social issues in project financing.²¹¹ They are based on the IFC Policy on Environmental and Social Sustainability and on the World Bank Group Environmental, Health, and Safety Guidelines. Subsequently, more than seventy other European and non-European financial institutions adhered to the Principles, which represent almost 80 percent of project financing around the world.²¹² The Principles were revised for the third time in 2012. They have become the first credit risk management framework for determining, assessing and managing environmental and social risk for projects where total project capital costs exceed US\$10 million.²¹³ The financial institutions that adopted the Equator Principles commit to not providing loans to projects where the borrower will not, or is not able to comply with their respective social and environmental policies and procedures. In addition, while the EPs are not intended to be applied retroactively, the EPs Financial Institutions apply them to all Project Finance transactions covering expansion or upgrade of an existing facility where changes in scale or scope may create significant environmental and/or social impacts, or significantly change the nature or degree of an existing impact.²¹⁴ According to Macve and Chen, such codes can flexibly bridge the gap between individual companies' sustainability initiatives and mandatory, legal provisions.²¹⁵ It is possible to say that starting from the EPs launch it has become possible to talk about the 'sustainable banking', comprising not only financial, but also environmental (and social) dimensions.²¹⁶ Yet, the Principles are not without their critics. From the start, many stakeholders still feel the principles do not go far enough.²¹⁷ In addition, despite the requirement for banks to report annually on how they were applying the

²¹⁰ ABN AMRO Bank, N.V., Barclays plc, Citi, Crédit Lyonnais, Credit Suisse First Boston, HVB Group, Rabobank Group, The Royal Bank of Scotland, WestLB AG, and Westpac Banking Corporation.

²¹¹ Codes of conduct are defined in the literature as 'voluntary expressions of commitment that set forth standards and principles for business conduct' Kolk A. *et al.* (1999) International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves? *Transnational Corporations* 8 (1). 143-80. p. 2. They cover a broad range of issues, such as the environmental management, human rights, labour standards, the fight against corruption, consumer protection, information disclosure, competition, and science and technology. See OECD (2001) Foreign Direct Investment and Sustainable Development. OECD Global Forum on International Investment, Mexico City.

²¹² Thomas S. (2006) Sustainable Development in Infrastructure Projects – more than just an utopian ideal? *Prinsent Masons*. p. 1.

²¹³ See 'About the Equator Principles', www.equator-principles.com/index.php/about-ep, accessed 8.04.2013.

²¹⁴ 'About the Equator Principles', www.equator-principles.com/index.php/about-ep, accessed 8.04.2013.

²¹⁵ See Macve R., Chen X. (2010) The 'Equator principles': a success for voluntary codes? *Accounting, Auditing & Accountability Journal* 23 (7). 890-919. p. 890.

²¹⁶ See Yeoh P. (2009) Sustainable banking: The Commercial and Legal Impacts of Private Self-Regulatory Initiatives. *European Energy and Environmental Law Review* 12. 274-288. p. 274.

²¹⁷ An example is the BankTrack, a Netherlands-based coalition of civil society groups that has been pressuring Equator banks to go further since the launch of the Principles. Also, the support by Equator banks for controversial projects like the 1,760 km Baku-Tbilisi-Ceyhan pipeline and the Sakhalin II project leave doubts about principles' real value. On detailed *pros* and *cons* of the Equator Principles, see Putten van, M. (2008) *Policing the Banks: Accountability Mechanisms For The Financial Sector*. McGill-Queen's University Press. See also generally Macve R., Chen X. (2010) The 'Equator principles': a success for voluntary codes? *Accounting, Auditing & Accountability Journal* 23 (7). 890-919.

principles, ‘accountability and transparency have long featured as a major grouch’.²¹⁸ Under the Equator Principles, those constructing high-risk projects are obliged to provide a grievance mechanism for affected groups to express their concerns. The banks themselves, however, do not face such requirement.

4.3 Application of standards in third countries via foreign direct investment: a specific regulatory framework

The sections above addressed general frameworks providing for the external application of environmental standards, as well as the general motives behind the export of standards by the EU and by the EU-based International Financial Institutions. The further discussion focuses at a specific regulatory framework, whereby the focus lies particularly on foreign direct investment (FDI) as a means for the application of European environmental standards in third countries. Both the European Union and IFIs engage in FDI, making it a key driver regarding international economic integration.²¹⁹ As the largest source of FDI in the global economy, the EU considers it a key means to promote development and economic and social growth,²²⁰ and EU-based investors regard FDI as a necessary step to remain competitive on the global scale. Many engage in FDI to increase profits, to improve cost structures, to access new markets, and to source important materials, knowledge, and other essential inputs, in order to improve their productivity and to increase sales.²²¹

4.3.1 FDI: definition

The OECD and the International Monetary Fund (IMF) define ‘foreign direct investment’ as a category of international investment made by an entity resident in one economy (direct investor) to acquire a lasting interest in an enterprise operating in another economy (direct investment enterprise).²²² The *lasting interest* is deemed to exist if the direct investor acquires at least ten

²¹⁸ Balch O. (2012) Sustainable finance: how far have the Equator Principles gone? *Guardian Professional*, 15.11.2012.

²¹⁹ OECD (2008) Benchmark Definition of Foreign Direct Investment. p. 1.

²²⁰ See European Commission website, ‘Trade topics: Investment’, <http://ec.europa.eu/trade/creating-opportunities/trade-topics/investment/>, accessed 22.04.2015. The Foreign Direct Investment from the EU27 to the rest of the world reached EUR 171 billion in 2012, while investment from the rest of the world into the EU27 was EUR 159 bn in 2012. In 2012, the main destinations of EU27 investments were the Offshore financial centres (EUR 18 bn), Canada and India (both 16 bn), the USA (15 bn), China and Hong Kong (both 10 bn) and Russia (9 bn). The main investor into the EU27 was by far the USA (99 bn), followed by Canada (19 bn), Japan (8 bn), Russia and Hong Kong (both 7 bn). Source: Eurostat STAT/13/91, accessed 13.06.2013.

²²¹ Sunesen E. *et al.* (2010) Impacts of EU outward FDI. Copenhagen Economics report. p. 7

²²² See OECD (1999). p. 7. A similar definition by the International Monetary Fund considers the FDI as ‘the acquisition abroad (*i.e.*, outside the home country) of physical assets, such as plant and equipment, or of a controlling stake (usually greater than 10% of shareholdings)’. See IMF (2003) Global Financial Stability Report Glossary.

percent of the voting power of the direct investment enterprise.²²³ The investment is *direct* because the investor, which could be a foreign person, a company, or a group of entities, is seeking to control, manage, or exert significant influence over the foreign enterprise. This leads to the situation in which the investor is directly involved in the project, without channelling the funds via any intermediary enterprise.

Eurostat gives FDI the same definition, adding that subsequent transactions between affiliated enterprises are also direct investment transactions. As such a relationship affords the investor an effective voice in management of the enterprise and a substantial interest in its business, FDI implies a *long-term relationship* between the direct investor and the direct investment enterprise.²²⁴ Investment may take place through the establishment of an entirely new company, referred to as a ‘greenfield’ investment, or through the complete or partial purchase of an existing company, via a merger or an acquisition.²²⁵

Additionally, the Economy Watch classifies the FDI as inward and outward, depending on the direction of capital flow. *Inward* FDI occurs when foreign capital is invested in local resources. The factors propelling the growth of inward FDI include tax breaks, low interest rates, and grants.²²⁶ *Outward* FDI, also referred to as ‘direct investment abroad’, is often supported by the government against risks associated with the activities of national investors in a foreign country.²²⁷

Finally, Ohno defines FDI as international financial flows with the intention of controlling or participating in the management of an enterprise in a foreign country.²²⁸

It has become clear from the above that FDI intends to ‘control’ or, more mildly, ‘participate in’ the management of a business enterprise. However, despite the ever-growing importance of this notion in European law, the Lisbon Treaty does not contain a definition of either ‘investment’ or ‘foreign direct investment’.²²⁹

Nonetheless, this knowledge can be deduced from the interpretation by the CJEU in light of the Nomenclature annexed to the Directive for the implementation of Article 67 of the Treaty,²³⁰

²²³ OECD (1999), p. 7.

²²⁴ See Eurostat (2007) European Union Foreign Direct Investment Yearbook, p. 22.

²²⁵ *Ibid.*

²²⁶ See the Economy Watch, www.economywatch.com/foreign-direct-investment/definition.html, accessed 27.03.2013.

²²⁷ See *Ibid.* It must be mentioned that FDI can also take a third form, and this entails short- or long-term lending between parents and affiliates.

²²⁸ Ohno K. (2006) *The Economic Development of Japan: The Path Traveled by Japan as a Developing Country*. GRIPS Development Forum, pp. 213-216.

²²⁹ For a definition of FDI under the Treaty of Lisbon, see Wenhua S., Sheng Z. (2011) The Treaty of Lisbon: Half Way toward a Common Investment Policy. *European Journal of International Law* 21 (4), p. 1059. However, inclusion of the wording foreign ‘direct’ investment in TFEU Articles 206 and 207 implies that there is some type of foreign ‘indirect’ investment that would not be part of the common commercial policy. This seems to be the case for portfolio investments. See Moerenhout T., Perez Aznar F. (2010) *Competence Shift from the EU Member States to the EU*. Geneva Graduate Institute of International and Development Studies.

²³⁰ See for instance cases C-446/04, *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para 181; C-157/05, *Holböck* [2007] ECR I-04051, para 34; C-101/05, *Skatterverket v A* [2007] ECR I-11531, para 46; C-194/06, *Orange European Smallcap Fund* [2008] ECR I-03747, para 100; C-274/06, *Commission vs. Spain* [2008] ECR I-00026, para 18; C-326/07, *Commission vs. Italy* [2009] ECR I-02291, para. 35; and C-112/05, *Commission v. Germany* [2007] ECR I-08995, para 18, in relation to the Directive 88/361/EEC of 24 June 1988, OJ L 178, 8.7.1988.

which in turn is based largely on widely accepted definitions given by the IMF and the OECD, presented above.

Noteworthy, foreign direct investment is differentiated from ‘portfolio investment’, where there is neither intention nor interest as regards controlling an enterprise. The purpose of portfolio investment is to obtain a good financial return, such as in the case of investing in stocks, bonds, gold, art objects, and so forth.²³¹

Operationally, three types of FDI exist:

- Equity acquisition - buying shares in an existing or a newly created enterprise;
- Profit re-investment - companies or banks re-investing their profits for further expansion;
- Loans from a parent company or a bank.²³²

Remarkable, however, is that at the same time the EBRD uses the term ‘direct investment operations’ explicitly as opposed to ‘financial intermediary operations’. In the case of financial intermediary operations, it is the client who functions as a financial services provider,²³³ while all other operations are referred to by the Bank as ‘direct investment operations’.²³⁴

4.3.2 European Union and FDI: shaping a new investment policy

Currently, the legal basis regulating the sustainable investment system internationally is ‘chaotic’.²³⁵ There is still no multilateral investment regime, but rather a ‘spaghetti bowl’ of more than three thousand bilateral investment treaties (BITs) worldwide, containing pieces of unsynchronised provisions adopted under the auspices of the World Trade Organisation (WTO), the Organisation for Economic Co-operation and Development (OECD), and the World Bank.²³⁶ Accordingly, the investment regime of the European Union or the Member States can take different forms. Very often investment agreements are part of a broader international treaty, examples of which are the Multilateral Investment Agreements, such as GATS in the framework of the WTO; investment provisions in specific intergovernmental agreements, regulating a particular issue; investment provisions in the Bilateral Trade Agreements between the EU and a third country; or the Bilateral Investment Treaties (BITs) as such, regulating access to investment resources, relevant types of investment, investors’ protection rules, and so on. Remarkable is that from the

²³¹ Ohno (2006), pp. 213-216.

²³² See *Ibid.* At the same time, Ohno warns that while the theoretical definition of FDI is clear, in reality there are serious measurement problems caused by facts as such as: 1) while a loan from the parent company is counted as FDI, a bank loan guaranteed by the parent company is not; 2) whether the value of foreign investment is recorded at book value or at market value makes a difference, as the latter changes due to inflation/deflation and capital gain/loss; and 3) statistics for commitment (approval or promise to invest) is easier to collect, but actual implementation is more difficult to determination.

²³³ EBRD (2008) Environmental and Social Policy. p. 6, fn 10.

²³⁴ See EBRD (2008), p. 6, fn 10.

²³⁵ Argument used by Prof. R. Echanti (World Trade Institute, University of Bonn) during the roundtable ‘European Investment Agreements in the Post-Lisbon Era’, Brugge, 28.03.2012.

²³⁶ Member States’ BITs have generally been based on model agreements. The USA has also used a model BIT, dating from 1982, as the basis for its BITs and for the investment chapters in bilateral Free Trade Agreements (FTAs). For an overview of existing Bilateral Investment Treaties, see www.worldbank.org/icsid.

great number of existing bilateral investment agreements worldwide almost half have an EU Member State as a party. This has happened because until the entry into force of the Treaty of Lisbon, Member States were generally competent to conclude BITs and to regulate investment protection. The large number of BITs involving EU Member States is lacking in coherence regarding obligations, and so creates a highly fragmented European approach towards investment. This lack of a common position on investment has arguably undermined the EU's ability to articulate and to pursue international negotiations on investment, whether in the OECD, the WTO, or in bilateral and regional trade agreements.²³⁷ Therefore, even though EU Member States together account for more FDI (inward and outward) than any other trading entity, other countries have led in shaping investment regimes.²³⁸ This difficulty in negotiating matching agreements also translates into a relative loss of competitiveness for European investors and the European economy in the world.²³⁹ Finally, Member State investment policies and BITs have created inequality among European investors internally.²⁴⁰ Whereas some Member States such as Germany, Britain, France, the Netherlands, and Italy have been extremely active in negotiating BITs with a wide range of countries, others have remained inactive.²⁴¹ According to a European Commission study, the uneven distribution of BITs among EU Member States could therefore distort investment flows within the Internal Market.²⁴²

An attempt to establish some uniformity in investment agreements took place already in 1995-1998, when the OECD launched negotiation of a Multilateral Agreement on Investment (MAI), which would have included, *inter alia*, standard environmental protection provisions in investment agreements. The negotiations failed, *inter alia*, due to irreconcilable differences among negotiating parties over the substance of the issue of foreign direct investment, and because of growing civil society opposition worldwide.²⁴³ A report by a French MEP Catherine Lalumière condemned the concept of MAI on the grounds that investment protection provisions combined with investor-state dispute settlement encroached too far into national sovereignty (right to regulate) but did not go far enough in terms of obligations regarding investors (i.e. on environment and labour standards).²⁴⁴ Against this background, the EU has been criticised for its approach to environmental standards in its relations with third countries, in particular in the area of EU-funded direct investment projects.²⁴⁵

²³⁷ See Bungenberg M. (2010) Going global? The Common Commercial Policy after Lisbon. In Herrmann Ch., Terhechte J. (eds.) *European yearbook of international economic law*. Springer-Verlag. 123-151.

²³⁸ See European Commission (2010) *The EU approach to International Investment Policy after the Lisbon Treaty*. DG For External Policies of the Union. p. 10.

²³⁹ European Commission (2006) *Issue paper – upgrading the EU investment policy*. p. 2.

²⁴⁰ European Commission (2010), p. 10.

²⁴¹ European Commission (2010), p. 10.

²⁴² *Ibid.*

²⁴³ More on MAI negotiations: Neumayer E. (1999) Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD-negotiations. *Wirtschaftspolitische Blätter* 46 (6). 618-628. It should be noted that later in 2009 G-8 Summit came up with Concluding Report of the Heiligendamm Process, addressing, for instance, energy efficiency and homogeneous standards in the field, but with no legally binding obligations.

²⁴⁴ Lalumiere C., Landau J. (1998) Report on the Multilateral Agreement On Investment. Intermediary Report.

²⁴⁵ UNCTAD (2008); see also Gray (2002), p. 312.

MAI negotiations took place almost two decades ago, but the debate is still ongoing, and at present it is still not clear, as Sanna-Randaccio and Sestini put it, ‘which are the instruments of environmental policy to be preferred in the present context of highly integrated economies, and whether uniform environmental measures should be applied in all countries or instead country-specific environmental policies should be adopted’.²⁴⁶ There is thus no unanimous point of view on the degree of flexibility to be introduced in a possible future international agreement on the environment. Meanwhile, this demonstrates that there is still room for European incentives related to sustainable investment regime.

The EU has been developing a common platform on investment for some time, and has concluded a number of Free Trade Agreements (FTAs) with investment chapters.²⁴⁷ More is needed, however, in particular with regard to a balance between investment protection to match the existing Member State BITs and enough room for an EU competence to regulate policies such as the environment.²⁴⁸ As a first step in that direction, Article 207 TFEU made FDI part of the common commercial policy.²⁴⁹ According to Woolcock, this has been ‘by far the most important extension of the EU exclusive competence’,²⁵⁰ as with time the Union will need to develop an EU model investment agreement to be applied in any future EU BITs or investment chapters in free trade agreements.

In 2011, the European Parliament adopted a resolution regarding future European international investment policy, which contained provisions on the inclusion of social and environmental standards. The Parliament stressed that ‘the EU’s future policy must also promote investment which is sustainable, respects the environment (particularly in the area of extractive industries) and encourages good quality working conditions in the enterprises targeted by the investment’, and asked the Commission ‘to include, in all future agreements, a reference to the updated OECD Guidelines for Multinational Enterprises’.²⁵¹ With reference to the investment chapters in FTAs, it reiterated its call for a corporate social responsibility clause²⁵² and effective

²⁴⁶ Sanna-Randaccio F., Sestini R. (2011) Foreign direct investment and environmental policy: have location factors been neglected? *Asia-Pacific Journal of Accounting & Economics* 18 (1). 45-60. p. 45.

²⁴⁷ Woolcock S. (2010) EU Trade and Investment Policymaking After the Lisbon Treaty. *Intereconomics* 1. p. 24.

²⁴⁸ *Ibid.* This will not be an easy balance to find, especially given the history of opposition to some aspects of investment rules in the EU, such as MAI.

²⁴⁹ The EU has exclusive competence in the area of common commercial policy; see Article 3 (1) (e) TFEU. An important change introduced by the Lisbon Treaty in relation to investment regime is the granting of co-legislative powers to the European Parliament. From now on, the Parliament has to give its consent when an investment treaty enters into force.

²⁵⁰ Woolcock (2010), p. 22.

²⁵¹ European Parliament (2011) *Resolution on the future European international investment policy*. 6.04.2011, para 27.

²⁵² Corporate Social Responsibility (CSR) emphasises an approach to corporate governance and operations that integrates and balances the self-interest of the corporation, and those of investors, with the concerns and interests of the public. See Gonthier C. (2009) Foreword. In Kerr M. *et al.* (eds.) *Corporate Social Responsibility: A Legal Analysis*. LexisNexis. The European Commission has defined CSR as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with stakeholders on a voluntary basis’. European Commission (2001) Green Paper Promoting a European framework for Corporate Social Responsibility, COM (2001) 366. CSR mechanisms are therefore designed to ensure that corporate activity benefits (or at least does not harm) society and the environment, while also continuing to generate profits for shareholders. See British Petroleum (2004) *Defining Our Path. Sustainability Report 2003*, p. 31. Adelle *et al.* also write: ‘The Commission has recognised the role of CSR as a contributing factor to the Lisbon Strategy for Growth and Jobs as well as its potential in the pursuit of sustainable development. The EU’s role in CSR is *limited* [emphasis added] because the Commission admits that the CSR is fundamentally about voluntary business behaviour. Consequently, the European Commission works more

social and environmental clauses to be included in every FTA the EU signs.²⁵³ Parliament also requested the Commission to assess how such clauses have been included in Member State BITs, and how they could be included in future stand-alone investment agreements.²⁵⁴

In September 2011, the General Affairs Council of the European Union officially approved a negotiating mandate for investment protection measures under proposed free trade agreements with India, Singapore, and Canada, the first one since the transfer of competence on international agreements concerning FDI from individual Member States to the EU.²⁵⁵ The mandate provides that the future investment agreement

‘... shall be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner’.²⁵⁶

Another significant initiative is the EU-US negotiations regarding the Transatlantic Trade and Investment Partnership (TTIP) that started in July 2013 with the aim to remove trade barriers in a wide range of economic sectors to make it easier to buy and sell goods and services between the EU and the US.²⁵⁷

Obviously, given the EU commitment to high standards and the exposure of European firms to international competition, it is in the competitive interests of the EU to support investment agreements that will pressure other states to adopt similarly costly provisions.²⁵⁸ This may provide an initial explanation as to why the EU has sought to gain exclusive competence in regulating FDI.²⁵⁹ European standards regulating human rights, good governance, environmental protection,

closely with European business to support CSR by attempting to give it greater political visibility and encouraging European enterprises to be more active in this area’ (Adelle C. *et al.* (2010) *The External Dimension of the Sixth Environment Action Programme: An Evaluation of Implementing Policy Instruments*. Report for the IBGE-BIM. IEEP. pp. 45-46).

²⁵³ European Parliament (2011), para 28. In 2010, the Commission presented a proposal regarding a new investment regime, taking into account the revised OECD Guidelines for Multinational Enterprises and the existing initiatives undertaken by investment banks with respect to corporate social responsibility. Commission Proposal COM(2010)344 for a Regulation Establishing transitional arrangements for bilateral investment agreements between Member States and third countries. The updated OECD Guidelines for Multinational Enterprises were published 25.05.2011.

²⁵⁴ European Parliament (2011), para 29.

²⁵⁵ Although highly secretive, the text of the mandate was ‘leaked’ and has become accessible by the general public. See text published by NGO’s Global Research and Seattle to Brussels Network, www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html, accessed 1.02.2012. See also Adelle C. *et al.* (2010) pp. 38-48.

²⁵⁶ See Adelle C. *et al.* (2010) pp. 38-48.

²⁵⁷ See press release on <http://ipc.state.gov/241092.htm>, published 24.04.2015, accessed 28.04.2015. For more information on the Transatlantic Trade and Investment Partnership (TTIP): <http://ec.europa.eu/trade/policy/in-focus/ttip/>. The negotiations’ obstacle has to do with granting the EU market access to U.S. agricultural products that contain genetically modified materials.

²⁵⁸ See Kelemen R. (2010) Globalizing European Union Environmental Policy. *Journal of European Public Policy* 17 (3). 335-349, p. 337.

²⁵⁹ Since the entry into force of the Treaty of Lisbon, FDIs fall under the EU Common Commercial Policy (CCP) (see Article 207(1) TFEU). The EU CCP falls under the exclusive competence of the Union (Article 3 (1) (e) TFEU).

and sustainable development must also be taken into account in formulating trade policy within the WTO as well as in the negotiation of bilateral trade and investment agreements.²⁶⁰

Two conclusions can be drawn from the above analysis.

Firstly, it can be seen that the EU is currently going through the cumbersome procedure of shaping a new investment policy. Considering the developments worldwide and the dynamic nature of investment regime, it is no coincidence that such codification at the EU level is taking place at this particular moment. A common EU policy on investment is therefore likely to take some time, but if the EU wishes to shape international investment rules, it will want to include comprehensive rules in some of the agreements currently being negotiated.²⁶¹

Secondly, in addition to existing bilateral agreements on investment, concluded by the Member States prior to the Lisbon Treaty, the world may witness a gradual introduction of ‘umbrella’ guidelines regulating European FDI, enriched with minimum homogeneous environmental protection requirements for all EU-based investors establishing their presence in third countries.²⁶² Until that time, a realisation of the integration principle of Article 11 TFEU can be seen within the corporate social responsibility programmes and voluntary regulatory frameworks adopted by public and private investors.

4.3.3 IFIs’ environmental regime and FDI: increased demand for certainty in standards’ application

The sections above have demonstrated that, in the absence of a specific EU FDI regime, the actual application of European environmental standards in third countries takes place on the basis of investors’ good will, and in the framework of their environmental regime.

It is argued that Banks’ environmental regime as part of a general regulatory concept involves not only governments’ activities but also the manner in which decision-makers at *all levels* deal with the exercise of power.²⁶³ Furthermore, the environmental regime can refer as well to situations where non-governmental actors play a role in making and implementing public policy internationally.²⁶⁴

²⁶⁰ Cremona M. (2006) A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty? EUI Working Papers Law 2006/30. p. 30.

²⁶¹ Woolcock (2010), p. 24.

²⁶² Ratsiborinskaya (2012), p. 7.

²⁶³ See World Resource Institute (2002) Environmental Governance. Whose voice? Whose choice? *World Resources 2002-2004: Decisions for the Earth: Balance, voice, and power*. p. 6.

²⁶⁴ See Airo-Farulla (2000), p. 269. The European political and academic debate on governance is broad (Joerges C. (2007) Integration through de-legalisation? An irritated heckler. European Governance Papers N-07-03; O’Mahoney J., Ottaway J. (2009) Travelling Concepts: EU Governance in the European Social Sciences Literature. In Kohler-Koch B., Larat F. (eds.) *European Multi-Level Governance*. Edward Elgar) and it is marked by two polar approaches. According to one, ‘governance’ means rules, processes and behaviour that affect the way in which powers are exercised at the European level, particularly as regards openness, participation, accountability, effectiveness and coherence. Hereby the governance is defined as every form of ordered rule to achieve policy results by public and/or private actors (see, e.g., European Commission (2001) European Governance. A White Paper. 25.7.2001 COM (2001) 428 final. p. 8, fn.1). In the other approach, the term ‘governance’ is used

According to Braithwaite and Drahos, green groups within the environmental arena seek to institutionalise concepts such as sustainable development and precautionary principle, while other actors such as transnational corporations support principles of economic growth and lowest-cost location'.²⁶⁵ Braithwaite and Drahos suggest that 'the successful weighting of one principle over another has consequences for both the conduct and for the regulatory change'.²⁶⁶ And indeed, based on the concept of sustainable development, the environmental regime involves 'adequately balancing conflicting individual (private) interests and communal (public) interests in the changing world'.²⁶⁷ Using this broad conceptualisation, environmental regime in practice involves much more than simply government activities: according to the World Resource Institute, it 'relates to decision-makers at all levels – government managers and ministers, business people, property owners, farmers, and consumers; in short, it deals with who is responsible, how they wield their power, and how they are held accountable'.²⁶⁸

The environmental regime of International Financial Institutions can thus be best characterised in line with the UNEP definition as 'multi-level interactions (i.e. local, national, global) among, but not limited to, three main types of actors: namely, states, financial institutions and civil societies, which interact with one another, whether in formal and informal ways; in formulating and implementing policies in response to environment-related demands and inputs from society; bound by environmental rules, principles, and standards; for the purpose of attaining environmentally sustainable development'.²⁶⁹

As demonstrated in the previous section, one way the European Union has been giving an external dimension to its environmental policy is by supporting the inclusion of environmental standards (as a voluntary condition) in IFIs' foreign direct investment projects in third countries,²⁷⁰

in relation to a very particular form of mechanism, in which public and private actors cooperate in an open way in order to reach common public policy goals, or even in relation to those governing mechanisms that do not take recourse to public authority and the sanctions of government (See for example Heritier A. (2002) (ed.) *Common Goods: Reinventing European and International Governance*. Rowman & Littlefield Publishers). In between these two approaches, the term 'governance' in used in this book in accordance with the definition given by Chiti, who describes it as a 'mechanism of governing or steering that may involve public bodies as well as private actors, formal and informal instruments (for example, legally binding acts and soft law), assuming that the links between public and private may take a great variety of forms and technical solutions'. (Chiti E. (2012) *The Governance of Compliance*. In Cremona M. (ed.) *Compliance and the Enforcement in the EU Law*. Oxford University Press. 31-56. p. 32).

²⁶⁵ Braithwaite J., Drahos P. (2000) *Global Business Regulation*. Cambridge University Press, p. 18.

²⁶⁶ Braithwaite, Drahos (2000), p. 19.

²⁶⁷ See *When private actors contribute to public interests*. A PhD roundtable forum on law and governance. (19.04.2013) The Netherlands Institute of Law and Governance (NILG).

²⁶⁸ World Resource Institute (2002), p. 6.

²⁶⁹ The original definition, given in the framework of UNEP Environmental Education and Training (EET), see www.unep.org/training/about/index.asp, accessed 22.04.2015. See also the Ecogovernance Blog, <http://ecogov.blogspot.com/2007/04/definition-of-environmental-governance.html>, Accessed 13 June 2013. The term 'good governance' is used to describe governance characterised by high levels of transparency, accountability, and fair treatment. See Stanford University (2009) *Syllabus 2009-10 on Environmental Governance*.

²⁷⁰ In general, see the Seventh Environmental Action Programme (EAP), stating that the 'transparent engagement with non-governmental actors is important in ensuring the success of the 7th EAP and the achievement of its priority objectives'. Decision on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'. 1386/2013/EU L, 20.11.2013, OJ 354/171, para 22.

which also correspond to EU objectives as contained in Article 21 TEU.²⁷¹ For greater clarity, the previous chapter has explained the nature of these environmental standards and provided their definition. In order to achieve their application in third countries, coordination involving the EU and banking priorities is taking place.²⁷² Thus, the role of European institutions and civil society in the subsequent ensuring of the viability of IFI initiatives and codes of conduct, addressed in this chapter, shall not be neglected.

International Financial Institutions start to elaborate codes of conduct or voluntary standards in order to enhance or to improve their own environmental behaviour. Based on the existent state/regional legislation, these standards have their own important function, filling in gaps in the environmentally friendly investment regime. As Morgera writes, such standards are

‘... particularly useful when facing temporal gaps in which the legal system is not yet ready to regulate emerging problems, and interested parties find solutions inspired by good faith and common sense. Such can be the specific case of normative gaps due to the relation between international law-making and State sovereignty [...] In a way, legal standards may be compared to the category of ‘quasi-droit’ in the sense that standards favour the normative power of international organisations and break the conditions of classic ‘access to normativity’, accelerating the evolution of international law with the hope to overcome States’ resistance or the inertia of the traditional mechanisms of law-making’.²⁷³

The above allows for a preliminary conclusion that opportunities for the banking sector to contribute to higher environmental standards are increasing. IFIs in general and EPE Banks in particular are among ‘the world’s most influential institutions’,²⁷⁴ and, similar to the multinational corporations, addressed by Morgera, ‘their role is essential in supporting action to achieve environmental sustainability goals agreed at an international level, and in fully implementing the objectives of multilateral environmental agreements (MEAs)’.²⁷⁵ The voluntary initiatives towards a ‘greener’ banking behaviour allow IFIs to make the most of environment-related opportunities.

These positive changes, however, are often seen as ‘piecemeal and contradictory’,²⁷⁶ leaving the impression that considerable gaps exist between corporate rhetoric and practice,²⁷⁷ and that

²⁷¹ See Article 21 (2) TEU, paras (f) and (h), stating that ‘the Union [...] shall work for a high degree of cooperation in all fields of international relations’, in order to ‘help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’ and to ‘promote an international system based on stronger multilateral cooperation and good global governance’.

²⁷² See for example the Memorandum of Understanding between the European Commission, the European Investment Bank together with the European Investment Fund, and the European Bank for Reconstruction and Development in respect of Development outside the EU. 29.11.2012. www.eib.org/attachments/mou_cooperation_outside_the_eu.pdf, accessed 20.04.2015.

²⁷³ Morgera E. (2009) *Corporate Accountability in International Environmental Law*. Oxford University Press. p. 69.

²⁷⁴ World Resource Institute (2002).

²⁷⁵ Morgera (2009), p. 8.

²⁷⁶ *Ibid*, p. 9.

²⁷⁷ Utting P. (2002) Towards Corporate Environmental Responsibility. In Utting P. (ed.) *The Greening Of Business in Developing Countries*. Zed Books & UNRISD. pp.1, 6, where the author addresses these problems in relation to transnational companies.

‘the dominant strategy of economic growth continues to be business as usual’.²⁷⁸ As public institutions, IFIs are deemed to ensure the proper application of their voluntary standards. The question arises whether the EPE Banks can ensure a comprehensive application of legal environmental standards in third countries. If they succeed in doing so, their reliability and environmentally friendly reputation becomes stronger, while their initially voluntary code of conduct contributes to the codification and enhancement of environmental requirements within the investment regime.

²⁷⁸ Utting (2002), p. 6.

Chapter IV

ESTABLISHING AN ANALYTICAL FRAMEWORK FOR THE ENVIRONMENTAL ACCOUNTABILITY OF INTERNATIONAL FINANCIAL INSTITUTIONS

We cannot wait for the 'ideal' system of global environmental governance to be negotiated, but must move forward on a number of overlapping fronts – prioritizing real environmental outcomes rather than institutional elegance.

Mabey N., McNally R.¹

The previous chapter has addressed the role of International Financial Institutions in environmental governance. Their initiatives include efforts to develop and maintain internal control systems, to improve their reporting on non-financial performance and, most importantly, to enhance environmental accountability.² This demonstrates that increasing public concerns are taken into account by financial institutions,³ while at the same time it makes essential the adequate account giving.

The present chapter builds a theoretical framework for the environmental accountability of International Financial Institutions. It does not design new accountability concepts, but examines existent arrangements in relation to IFIs. And although this study in general does not intend to provide an in-depth normative inquiry into the concept of accountability, some knowledge of it is important as the basis for a future debate on the application of environmental standards within the framework of foreign direct investment projects.

While doing so, this chapter builds upon the preceding discussion on environmental governance by International Financial Institutions by addressing the public nature of their accountability. Subsequently, it analyses theoretical approaches to the normative concept of accountability, and, finally, it distils the structure and the functioning of the accountability mechanism in relation to International Financial Institutions.

¹ Mabey N., McNally R. (1998) Foreign Direct Investment and the Environment. WWF-UK Report.

² See Adelle C. *et al.* (2010) *The External Dimension of the Sixth Environment Action Programme: An Evaluation of Implementing Policy Instruments*. Report for the IBGE-BIM. IEEP. p. 44.

³ See also OECD (2002) Alternatives to Traditional Regulation.

1. ACCOUNTABILITY OF INTERNATIONAL FINANCIAL INSTITUTIONS

With regard to the accountability of International Financial Institutions, at least two facts are noteworthy: firstly, these institutions exercise public power; secondly, they exercise it outside the classical system of checks and balances, which flows from Montesquieu's separation of powers concept, attributed to a State.⁴

From this, it follows that in order to make IFIs accountable, there needs to be a certain arrangement, or a particular set of requirements in place.

1.1 IFIs as actors in accountability relationships

IFIs' accountability relationships focus on either *internal* aspects – such as profit-influenced behaviour of individuals within organisations and responsibilities towards shareholders of an organisation⁵ – or, alternatively, they possess *external* aspects:⁶ *namely*, they can be directed towards the stakeholders, the wider public,⁷ and in particular towards persons affected by an organisation's activities.⁸ In both cases, however, the approach is characterised by the view of this relationship as being a hierarchical interaction between an *agent* and a *principal*, in which the agent with a delegated authority has a personal obligation to answer to the principal regarding performance of the delegated responsibilities.⁹

Within the New Public Management model,¹⁰ the agent-principal relationship is seen as accountability-based performance management in the form of monitoring, auditing, yardsticking,

⁴ See Gordon S. (2006) *Montesquieu: The French Philosopher who Shaped Modern Government*. The Rosen Publishing Group.

⁵ For the definition of 'shareholder' in accordance with the European law, see Chapter III, Section 1.

⁶ The combination of externally driven and internally generated accountabilities also can be found in the study by Ebrahim, for whom it is 'the means through which individuals and organisations are held externally to account for their actions and the means by which they take internal responsibility for continuously shaping and scrutinising organisational mission, goals, and performance'. Ebrahim A. (2003) Making sense of accountability: Conceptual perspectives for northern and southern nonprofits. *Nonprofit Management and Leadership* 14 (2). 191-212. p. 194.

⁷ For the definition of 'public' in accordance with the European law, see Chapter III, Section 3.2.4.

⁸ On the differences between the two types of accountability, so called 'shareholder model' and 'stakeholder model', see Keohane R. (2003) Global Governance and Democratic Accountability. In Held D. *et al.* (eds.) *Taming Globalisation: Frontiers of Governance*. Polity Press. p. 130. See also UN High Commissioner on Human Rights (2013) Who will be accountable? Human rights and the Post-2015 Development Agenda. p. 28. Furthermore, outside of this study, it is suggested to also distinguish a certain accountability of an actor towards other actors-parties to the same code of conduct. Taking the EPE Banks as an example, the question remains, however, which measures are there in the possession of the Banks in case one of them does not apply the EPE Principles as diligently as the others.

⁹ For the agency theory, see Jensen M., Meckling W. (1976) The theory of the firm: managerial behaviour, agency costs and ownership structure. *Journal of Financial Economics* 3. 305-360; Ross S. (1973) The economic theory of agency: the principal's problem. *American Economic Review* 63. 134-139; Stiglitz J. (1974) Incentives and risk sharing in sharecropping. *Review of Economic Studies* 41. 219-255.

¹⁰ New Public Management model has emerged in 1980s to confront the existent problems. This model is originated from the fusion of economic theories and private sector management techniques. The most important particularities of this model are the decreasing government size, the decentralisation of management authority, the emphasis on efficiency, effectiveness and

and evaluating.¹¹ It is considered a tool for enhancing a government's ability to deliver public goods and services more effectively and efficiently, while ensuring value for money. In accounting, the concept's long tradition is more limited in scope, referring to financial prudence and accounting in accordance with guidelines and instructions,¹² but the principle of delegating some authority, evaluating performance, and imposing sanctions remains the same: when decision-making power is transferred from a principal to an agent, there must be a mechanism in place for holding the agent to account for its decisions and actions.¹³ Traditionally, such a transfer of power has taken place from citizens to government, but it also increasingly often happens from a government to independent agencies and institutions exercising public powers.¹⁴

However, this relationship becomes problematic when a person or an entity, fulfilling the role of an agent, is able to make decisions that have an impact on another person or entity that is fulfilling the role of principal. The problem arises because sometimes the agent is motivated to act in his own best interests rather than those of the principal. In this regard, Mulgan very correctly calls it a 'chameleon-like relationship'.¹⁵ Therefore, accountability in public administration has been defined as an obligation on the part of public officials to report on the usage of public resources and to account for failing to meet stated performance objectives.¹⁶ It envisages imposing sanctions, if necessary, and ultimately by removing the agent from power.

Nonetheless, it has become obvious that accountability relationships cannot be reduced to principal-agent relationships due only to the numerous accountability links that involve various stakeholders. Consequently, Stapenhurst and O'Brien mention the appearance of a new school of thought, in which – in the absence of a clear vertical principal-agent relationship – the multiplicity of accountability links is seen as a horizontal relationship.¹⁷ In other words, conventional vertical relationships stretch out 'to also include horizontal relationships, where government shares its responsibility with public and private entities involved in government decision-making and delivery of tasks'.¹⁸ Here the holding to account often happens indirectly, and is delegated to other actors in power. In contrast to the vertical accountability, horizontal accountability takes on a large

economy. See more in Fatemi M., Behmanesh M. (2012) New Public Management Approach and Accountability. *International Journal of Management, Economics and Social Sciences* 1 (2). 42-49. p. 42.

¹¹ Fombad M. (2013) Accountability challenges in public-private partnerships from a South African perspective. *African Journal of Business Ethics* 7. 11-25. p. 1.

¹² See Normanton E. (1966) *The Accountability and Audit of Governments: A Comparative Study*. Manchester University Press; Barton P. (2006) Needed: Higher Standards for Accountability. *NCLB: Taking Stock, Looking Forward* 64 (3). 28-31.

¹³ See Fombad (2013); Lindberg S. (2009) Accountability: the core concept and its subtypes. ODI Working Paper 1.

¹⁴ See Curtin D. (2005) Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability. *Regulation Through Agencies: A New Paradigm of European Governance*. 87-117.; Curtin D. (2007) Holding (Quasi-) Autonomous EU Administrative Actors to Public Account. *European Law Journal* 13 (4). 523-541.

¹⁵ Mulgan R. (2000) Accountability: an ever-expanding concept? *Public Administration* 78 (3). 555-573. p. 555.

¹⁶ See Armstrong E. (2005) *Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues*. United Nations. p. 1.

¹⁷ See Stapenhurst R., O'Brien M. (2005) *Social Accountability in the Public Sector*. World Bank Institute Working Paper 33641. p. 2; see also Goetz A., Gaventa J. (2001) *Bringing Citizen Voice and Client Focus into Service Delivery*. Working Paper 138; Goetz A., R. Jenkins (2001) Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-Sector Oversight in India. *Public Management Review* 3 (3).

¹⁸ Fombad (2013), p. 21.

variety of forms. For example, it exists when one State actor has the formal authority to demand explanations from or impose penalties on another State actor.¹⁹

A very recent attempt to draw a picture of horizontal accountability relationships, at least within the political science context, was made by Bovens. Instead of using *principal-agent* terminology, Bovens suggests talking about the *actor-forum* relationship, in which the *actor* has an obligation to explain and to justify his or her conduct, the *forum* can pose questions and pass judgement, and the actor may face consequences.²⁰ This terminology proposed by Bovens will be used further in this study, as it helps to avoid a schematic understanding of the accountability relationship as dual and linear. Instead, and similar to the reality faced by International Financial Institutions, it symbolises ‘accountability chains’ or an ‘accountability web’, where, depending on a situation, an *actor* can be represented by a government authority or by a public or private organisation, while a *forum* comprises an actor’s different stakeholders, directly or indirectly affected by the actor’s activities: that is, individuals, governmental, and non-governmental organisations.

Nevertheless, it needs to be mentioned that as a formal check-and-reporting mechanism, the vertical principal-agent relationship can still be useful for performance management, monitoring of outcomes, and reporting, in order to hold those involved in this relationship answerable. Hence, public elections are the classical example of vertical accountability, where the Parliament is being held to account by non-State agents. Here the citizens play a direct role in holding State organs, vested with public power, to account.²¹

1.2 The public nature of IFIs

The inconsistencies in understanding accountability are partially explained by the fact that ‘government and governance operate across different levels’,²² varying according to the public or private nature of the actors.

¹⁹ Goetz A., Jenkins R. (2002) Voice, Accountability and Human Development: The Emergence of a New Agenda. *UNDP Occasional Paper*, UNDP. p. 4. The authors illustrate this statement: ‘Executive agencies must explain their decisions to legislatures, and can in some cases be overruled or sanctioned for procedural violations. Political leaders hold civil servants to account, reviewing the bureaucracy’s execution of policy decisions. Bureaucracies are themselves constituted according to accountability relationships, subordinates answering to their superiors in a chain of command that ultimately leads back to political representatives, who wield a variety of sanctions. Accountability systems also empower independent agencies, such as regulatory bodies, auditors-general and anti-corruption commissions, to engage in detailed scrutiny of the actions and decisions of bureaucrats and politicians’. p. 5.

²⁰ See Bovens M. (2007) Analysing and Assessing Accountability: a Conceptual Framework. *European Law Journal* 13 (4). 447-468. p. 450-451. The author remarks that the relationship between the forum and the actor can have the nature of a principal-agent relation, with the forum being the principal. However, at the same time, in many accountability relations the forums are not principals of the actors: for instance, courts in cases of legal accountability or professional associations in cases of professional accountability. The notion of the accountability relationship as being that between an ‘actor’ and a ‘forum’ will be used further in this study.

²¹ See Goetz, Jenkins (2002), p. 4-5.

²² See Curtin D., Nollkaemper A. (2005) Conceptualizing accountability in international and European law. *Netherlands Yearbook of International Law* 36 (1). 3-20. p. 13.

This is why it is essential to specify the *nature* of International Financial Institutions, focusing on the accountability arrangements for public institutions as opposed to private ones. This difference reflects the distinction between public law, which traditionally covers governments and their relations with citizens, and private law, which deals with the mutual relations of private individuals and private companies.²³ It can be expected that accountability mechanisms will not necessarily be identical for public and private institutions. There are diverse types of available legal remedies, different stakeholders and audiences, different mandates and roles, and different ownership structures.²⁴

The normative arguments for the public nature of International Financial Institutions' accountability result in their specific role as both *public* and *development* organisations.²⁵ The public nature of Europe-based IFIs has already been touched upon in Chapter III in relation to reasons for them to engage in the export of European environmental standards.²⁶ To facilitate further discussion on IFIs' duty to account, it is essential to highlight the following three characteristics.

Firstly, International Financial Institutions as discussed in this study are *publicly owned* organisations. They have been established by more than one State, and sometimes also by regional economic organisations,²⁷ which provides them with a public nature and a mandate, and makes them subjects of international law.

Secondly, unlike private banks, the financial institutions in question *operate with public funds* from different nation-States. Their accountability thus possesses 'an international legal dimension'.²⁸ It should be noted that according to Scott, public accountability is not necessarily limited to public institutions, but can also extend to private bodies that exercise public privileges or receive public funding.²⁹ Some IFIs, like the World Bank, are often engaged in financing unilaterally,³⁰ while others, like the Banks-signatories to the Declaration on the European Principles for the Environment, share this responsibility by co-financing projects in various

²³ See Airo-Farulla G. (2000) Administrative Law and Governance. In Finn Ch. (ed.) *Sunrise or Sunset? Administrative Law in the New Millennium*. Australian Institute of Administrative Law. 268-292. p. 268. See also Mulgan R. (2000a) Comparing Accountability in the Public and Private Sectors. *Australian Journal of Public Administration* 59 (1). 87-97. p. 88, saying that accountability arrangements differ according to the type of institution, and that 'the law makes an important distinction between 'private' companies, where the number of shareholders and their right to transfer shares are limited, and 'public' companies that are free of such restrictions and whose shares may be traded'.

²⁴ See Putten, van, M. (2008) Policing the Banks: accountability mechanisms for the financial sector. McGill-Queen's University Press. p. 59; Bovens M., Schillemans Th. (eds.) (2009) *Handboek publieke verantwoording*. LEMMA. p. 24, where the authors argue that public accountability is a special form of accountability. According to them, an accountability process can be described as public when it is characterised by three components: 1) it concerns public money, tasks, and/or responsibilities; 2) it happens publicly; 3) it is driven by public interest.

²⁵ See Ebrahim A., Herz S. (2007) *Accountability in Complex Organisations: World Bank Responses to Civil Society*. Harvard Business School Working Paper 08 (027), p. 3.

²⁶ See Chapter II, Section 3.2.3.

²⁷ In case of EBRD, also by the European Union and by the European Investment Bank who are the shareholders in addition to 68 nation-states. See characteristics of the Banks in Chapter III, Section 2.2.

²⁸ See Putten, van (2008), p. 60.

²⁹ Scott C. (2000) Accountability in the Regulatory State. *Journal of Law and Society* 27 (1). 38-60. p. 50.

³⁰ See Ebrahim A., Herz S. (2007) *Accountability in Complex Organisations: World Bank Responses to Civil Society*. Harvard Business School Working Paper 08 (027).

combinations.³¹ Two or three of the EPE Banks often invest together, sharing financial and social responsibilities within the same project.³²

Thirdly, although not part of a traditional government structure, International Financial Institutions play a role in making and *implementing public policy*.³³ Their public authority is formally delegated by governments-shareholders, and their legitimacy 'depends on some combination of conformity to shared norms and established law'.³⁴ Like the World Bank, most IFIs are multilateral development banks by nature: in other words, their mandates pursue development goals.³⁵ Guided by public interest, these Banks too are therefore presumed to respect social values in their financial activities.

From the three characteristics above – public ownership, the fact that they operate with public funds, and that they implement public policy – it can be deduced that IFIs' accountability should be a public one. Members of the public, public organisations, and institutions form the forum for International Financial Institutions.

2. ACCOUNTABILITY AS A NORMATIVE CONCEPT

Although widely used, the notion of accountability 'may mean many different things to different people'.³⁶ Many scholars write about accountability without explaining what it is. Those who do, demonstrate that there are many ways to define it. Lindberg, for example, has brought together a list of authors who addressed the concept.³⁷ It appears that the concept has a broad range of meaning, extending from 'relationship' to 'obligation', and from a 'way to be considered

³¹ This may pose a question as to whether shared investment makes the Banks not only co-responsible but also co-accountable. Arguably, this is not the case, as accountability takes the shape of an individual arrangement for each Bank. While the Banks may be guided by the same environmental objective, they nevertheless employ different instruments to achieve it.

³² See for example European Commission (2012) Memorandum of Understanding between The European Commission, The European Investment Bank together with the European Investment Fund, and The European Bank For Reconstruction And Development In Respect Of Cooperation Outside The European Union.

³³ See on this topic Airo-Farulla (2000), p. 269; Bovens M. (2006). Analysing and assessing public accountability. A conceptual framework. European governance papers (EUROGOV). C-06-012006.

³⁴ Grant R., Keohane R. (2005) Accountability and Abuses of Power in World Politics. *American Political Science Review* 99 (1). 29-43. p. 35. The author specifies that the predominant legal instruments in the case of IFIs are charters or articles of agreement. These contain the procedures according to which they have to act to make their rulings authoritative, defining 'input', or 'process' legitimacy.

³⁵ See Moncrieffe J. (2001) Accountability: Idea, Ideals, Constraints. *Democratisation* 8 (3). 26-50. p. 46, who wrote in relation to development institutions that their 'flawed economic strategies can exacerbate adverse social conditions; adverse social situations can facilitate practices that are inimical to the principles of accountability; and a lack of accountability can, in turn, undermine development'.

³⁶ Cf Bovens M. (2010) Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism. *West European Politics* 33 (5). 946-967. p. 946.

³⁷ The list presented by Lindberg included at least fifty-two publications attempting to define accountability; see Lindberg (2009), p. 6; see also Moncrieffe (2001), p. 27; Mulgan (2000), p. 555.

answerable' to a 'set of principles and procedures'. Moreover, no standard definition of terms exists within the notion of accountability itself, as similar terms are used for different concepts, and different terms are used to describe similar concepts.³⁸ This diversity can be explained at least by the differences in approach towards accountability relationships, the nature of the actor, and, ultimately, by the aims that accountability pursues.³⁹

Understood generally, the major aim of accountability is to ensure the proper control of public power: 'properly applied, it can be a useful tool to limit abuses of power'.⁴⁰ Nonetheless, apart from this universal aim, the concept of accountability can serve a number of additional purposes. Thus, according to Van Gerven, thinking in terms of accountability may open new and broader dimensions, highlighting the contribution of accountability to the protection of democratic values, both in the sense of involving citizens through democratic procedures as well as involving them in public accountability.⁴¹

In turn, Werner highlights the possibility for accountability to ensure the existence of non-compliance procedures, which can facilitate social learning and contribute to the protection or renewal of the integrity of the actor.⁴²

Perhaps even more importantly in the context of this study, the concept of accountability may serve the aim of 'enhancing the legitimacy of international and European law as such'.⁴³ For example, the application of European environmental standards in investment projects on the territory of non-EU countries can be justified by accountability requirements towards investors.⁴⁴

Therefore, in an attempt to systemise the diverse academic literature on the topic, Bovens concluded that generally one could distinguish between two types of accountability: that is, as a *virtue* of a public or private body and as a *mechanism*.⁴⁵ In short, in the former case, Bovens regards accountability as a normative concept, a set of standards designed to evaluate the behaviour of public actors.⁴⁶ In the latter case, accountability is considered a mechanism, used in a narrower, descriptive sense, related to an institutional arrangement.⁴⁷ One can agree with Bovens, who believes that the concept of accountability seen in a narrow context as a mechanism is more

³⁸ See Schilder D. (1997) Overview of results-based accountability: components of RBA. *Harvard Family Research project. Harvard Graduate School of Education*, p. 2.

³⁹ This list is by no means exhaustive. Thus, in addition to the reasons mentioned, and in relation to the context of international law, Curtin and Nollkaemper also include the diversity of actors involved in the processes of accountability and the diversity of persons and institutions to which an account must be rendered. See Curtin D., Nollkaemper A. (2005) Conceptualising accountability in international and European law. *Netherlands Yearbook of International Law* 36 (1). 3-20. pp. 9-11.

⁴⁰ Keohane R. (2005) Abuse of power: assessing accountability in world politics. *Harvard International Review* 27 (2). 48-53. p. 48.

⁴¹ See Gerven, van, W. (2005) Which form of accountable government for the European Union? *Netherlands Yearbook of International Law* 36. 227-258. p. 229.

⁴² See Werner W. (2006) Responding to the undesired state responsibility, risk management and precaution. *Netherlands Yearbook of International Law* 36. 39-63. p. 70; Curtin, Nollkaemper (2005), p. 9.

⁴³ Curtin, Nollkaemper (2005), p. 10.

⁴⁴ The discussion on legitimacy remains outside of the scope of this research.

⁴⁵ Bovens M. (2010) Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism. *West European Politics* 33 (5). 946-967. p. 948.

⁴⁶ *Ibid.*, pp. 948- 950.

⁴⁷ See *Ibid.*

common to European scholarly debates.⁴⁸ At the same time, Bovens himself eventually comes to the conclusion that ‘both concepts are closely related and mutually reinforcing’.⁴⁹

Bovens’s line of reasoning is followed in ensuing sections of this chapter. The concept of accountability is addressed below in a discussion of the existing disciplinary approaches, and by subsequently revisiting the concept from the perspective of International Financial Institutions.

2.1 Disciplinary approaches towards the concept of accountability

The concept of accountability has received its own interpretation within diverse disciplinary approaches. Curtin and Nollkaemper make the distinction between legal, political, and administrative accountability, recognising at the same time that the list is not limited to these three.⁵⁰ According to the authors, the reason for making these distinctions lies in the nature of the actor, with legal, political, and administrative forms of accountability corresponding to the exercise of powers by public institutions.⁵¹ Hence, it is useful to categorise briefly each of the forms to demonstrate how the exercise of powers by International Financial Institutions is seen through the prism of these disciplinary approaches.

2.1.1 Legal approach

Some of the most deliberate language on accountability has emerged from the field of law.⁵² Applied to a legal context, it has traditionally been concerned with the exercise of public power by a State. This is why, according to Brunnee, the features of legal accountability are, firstly, that an actor is held to account for acts that conflict with international obligations, and secondly, that the procedure of justification and possible consequences is governed by law.⁵³ Seen from the legal perspective, accountability is focused on ‘deterrence and punitive measures, on the threat of legal action in cases of failure to meet legal obligations’.⁵⁴

Looking beyond State as an actor in accountability relationship, the International Law Association underlines that the ‘accountability is linked to the authority and power’ of public

⁴⁸ Bovens (2010), p. 948.

⁴⁹ *Ibid.*, p. 962.

⁵⁰ Bovens (2010), pp. 8-9. Other forms include, for example, financial, institutional and reputational accountability.

⁵¹ See Curtin, Nollkaemper (2005), p. 11. The authors emphasise that the exercise of powers by private entities goes beyond the familiar forms of legal, political, and administrative forms of accountability, and thus requires other new forms of accountability for this type of governance.

⁵² Ebrahim (2003), p. 194.

⁵³ Brunnee J. (2005) International legal accountability through the lens of the laws of State responsibility. *Netherlands Yearbook of International Law* 36. 3-38. p.22.

⁵⁴ Ebrahim (2003), p. 195.

institutions, laying upon them ‘the duty to account’ for the exercise of public power.⁵⁵ Morgera, in turn, emphasises that the concept ‘is grounded on quasi-legal and quasi-judicial dimensions, which are often substantiated by the presence of compliance or review mechanisms that function outside companies’.⁵⁶ Moreover, accountability is seen as a feature that to a greater or lesser degree is *expected* from an institution, even *imposed* on it. Hence, the definition by Curtin and Nollkaemper, who see the concept of accountability as a possibility for an external authority to call a person or body exercising power to take responsibility for that exercise.⁵⁷ According to Ebrahim, however, legal accountability, although important and necessary, ‘is highly constrained’ and ‘is focused on external regulation for ensuring accountability, with little regard for internal and less formalised organisational norms or expectations’.⁵⁸

The legal form of accountability thus seems to be only part of a broader concept, which includes political and administrative perspectives.

2.1.2 Political approach

In political science, the decision-making is guided not only by legal but also by political considerations. The form and nature of political accountability is fundamentally different from legal accountability: whether the actor acted in conformity with the law is key to legal accountability, but will generally only be of marginal significance to political accountability.⁵⁹ Accountability here belongs to a class of concepts under the more general category of ‘methods of limiting power’.⁶⁰ In political science, John Locke’s theory of the superiority of representational democracy is built on the notion that accountability is only possible when the governed are acting separately from the governors.⁶¹ The separation of powers was also a major concern for the Fathers of the American Constitution, and few areas have been as fundamental to thinking about the political system in America as that of accountability.⁶² De Beaufort, Wijnholds, and Hoogduin

⁵⁵ See International Law Association (2004) *Accountability of International Organisations*. Berlin Conference Report. p. 5.

⁵⁶ Morgera E. (2009) *Corporate Accountability in International Environmental Law*. Oxford University Press. p. 22.

⁵⁷ See Curtin, Nollkaemper (2005), p. 8. See also Arnall A. (2002) Introduction: The European Union’s Accountability and Legitimacy Deficit. In Arnall A., Wincott D. (eds.) *Accountability and Legitimacy in the European Union*. Oxford University Press. p. 1.

⁵⁸ Ebrahim A. (2003a) Accountability in Practice: Mechanisms for NGOs. *World Development* 31 (5). 813-829. p. 194.

⁵⁹ See Curtin, Nollkaemper (2005), p. 12.

⁶⁰ Others being, for instance, violence, economic pressure, public shame, anarchy, and devolution of power. See Lindberg (2009), p. 5.

⁶¹ Locke J. (1690) *Second Treatise of Government*. Ed. by C. McPherson (1980), Hackett Publishing Company.

⁶² See Lindberg (2009), p. 11. See also Finer H. (1941) Administrative Responsibility and Democratic Government. *Public Administration Review* 1. 335-350; Friedrich C. (1940) Public Policy and the Nature of Administrative Responsibility. In Friedrich C., Mason E. (eds.) *Public Policy*. Harvard University Press; Dubnick M., Romzek B. (1993) Accountability and the Centrality of Expectations in American Public Administration. In Perry J. (ed.) *Research in Public Administration*. JAI Press. 37-78.

refer to the accountability of central banks as ‘the degree to which the banks explain or make visible their policies to Parliament and/or the public’.⁶³

At the same time, political accountability is not limited to ensuring representative democracy within a State. At the international level, in the absence of State institutions, States generally possess a reduced control over the actions or inactions of international organisations or financial institutions. Addressing the accountability of the World Bank, Van Putten, for example, sees it as ‘an obligation to answer for a responsibility that has been conferred and delegated’.⁶⁴ Political accountability in this case manifests in the form of non-compliance procedures and demands for increased transparency⁶⁵ on the part of International Financial Institutions.

2.1.3 Administrative approach

The administrative approach contributes further to an understanding of the concept of accountability by referring to practices of an administrative nature, such as shortening the term of a contract, the resignation of civil servants, or the exercise of disciplinary punishments. According to Wang, administrative accountability concerns ‘the extent to which an administrative agency is answerable to its supervisory constituencies for the tasks assigned to it’.⁶⁶ These tasks include compliance with legal, organisational, managerial, and financial rules and instructions, healthy financial conditions, and the accomplishment of organisational goals.⁶⁷ Administrative accountability is thus about ‘the administrative policy, about the relative emphasis to be placed on external scrutiny and sanctions compared with other means of securing the compliance of officials’.⁶⁸

The debate in administrative accountability-related literature has focused on two questions. One question is related to the improvement of accountability instruments, and takes place between supporters of the enhancement of internal codes of conduct and professional standards⁶⁹ and those who advocate the development of an external system of checks and balances.⁷⁰ Thus, Friedrich believes that public officials can deal with administrative problems effectively through internal checks, which are created on the basis of professional standards and technical knowledge in order

⁶³ Cf Amtenbrink F. (1999) *The Democratic Accountability of Central Banks. A comparative study of the European Central Bank*. Hart Publishing. p. 38.

⁶⁴ Putten, van (2008), p. 20.

⁶⁵ Transparency is defined by Amtenbrink and Lastra as ‘the degree to which information on [one’s] actions is available’. Amtenbrink F., Lastra R. (2008) *Securing Democratic Accountability of Financial Regulatory Agencies – A Theoretical Framework*. In De Mulder R. (ed.) *Mitigating Risk in the Context of safety and security. How Relevant is a Rational Approach?* Rotterdam: Erasmus School of Law & Research School for Safety and Security (OMV). 115-132. p. 127.

⁶⁶ Wang X. (2002) *Assessing Administrative Accountability: Results From a National Survey*. *American Review of Public Administration* 32 (3), 350-370. p. 350.

⁶⁷ See *Ibid.*

⁶⁸ Mulgan (2000), p. 571.

⁶⁹ See Friedrich (1940).

⁷⁰ See Finer H. (1941). Regarding the debate between Friedrich and Finer in the 1940s, see Wang (2002), p. 351; see also Shafritz J., Hyde A. (1997) *Classics of public administration*. Harcourt. pp.14-26.

to ensure accountability.⁷¹ By contrast, Finer considers that external control by elected legislators is the only way to maintain the responsibility of officials in public administration. According to Finer, internal checks and control in relation to professionals are likely to lead to corruption and maladministration.⁷²

The second question relates to the types of control. Romzek and Dubnic have introduced a new approach to the administrative accountability model by dividing it into two dimensions, depending on the source of control, which can be either internal or external, and the degree of control, which can vary from high to low.⁷³ According to this model, internal control is realised through the fulfilment of internal administrative rules and mandates. Alternatively, according to Wang, 'the external control and request for administrative accountability come from legal accountability mechanisms, which emphasise a fiduciary relation between governmental agencies and their trustees, as well as from political accountability, which mainly concerns governmental stakeholders' oversight'.⁷⁴

2.2 Accountability concept revisited

In the last fifteen years, the concept of accountability has become fashionable, not just among lawyers, political scientists, and academic scholars but also within the broader community concerned with such diverse areas as administration, development, business ethics, governance, international organisations, financial institutions, policy networks, democratisation, civil society, and welfare state reform.⁷⁵ Undoubtedly, it remains a complex, elusive, abstract, multifaceted, and contested issue that can be approached in different ways, depending on the role, institutional context, era, and political perspective.⁷⁶ At the same time, there are features that are common to the concept of accountability, notwithstanding the disciplinary approach or the nature of the actors.

2.2.1 Integrated approach

When looking more intensively at accountability relationships, it becomes clear that they are not static but are evolving. Consequently, another reason that the accountability concept cannot be reduced only to a fixed principle-agent vertical model but requires a broader view is because ongoing changes occur in the multiple principal-agent relationships of an actor. Arguably, these

⁷¹ See Friedrich (1940).

⁷² See Finer (1941).

⁷³ See Romzek B., Dubnick M. (1994) Issues of accountability in flexible personnel system. In Ingraham P., Romzek B. (eds.) *New paradigms for government: Issues for the changing public service*. Jossey Bass Publishers. 263-294. p. 270.

⁷⁴ Wang (2002), p. 351.

⁷⁵ See Lindberg (2009), p. 1.

⁷⁶ Fombad (2013), p. 12.

relationships stretch further than the legal texts, and often ‘include non-formalised common practice activities, which could be influenced by ethics and social values’.⁷⁷ It is thus supposed that not all of these relationships grow to the stage of being codified on paper in the form of a legally binding contract or a statute. Practice demonstrates that in addition to such official juridical arrangements, there exist other, factual relationships, which include common practice and can even differ from what is actually regulated *de jure*. For instance, as Amtenbrink confirms, the relationship between a bank and a government has often altered over the years, and is hardly ever reflected entirely by the legal provisions.⁷⁸ A good example is the decision by the European Central Bank (ECB) to demonstrate its commitment to accountability by going beyond the statutory obligations in its regular reporting. Thus, the ECB voluntarily publishes a Monthly Bulletin rather than the required quarterly report, and members of the Governing Council deliver numerous speeches to address relevant topics of concern to the public.⁷⁹ Moreover, the ECB President and Vice-President provide an in-depth explanation of the ECB's assessment of the economic situation and the rationale for its monetary policy decisions at the regular press conferences that immediately follow the first Governing Council meeting of each month.⁸⁰ At the expert level, informal discussions take place between ECB representatives and members of the European Parliament on ECB policies and other issues where the ECB has specific expertise.⁸¹

Furthermore, ‘in the real world there is very often a difference between whom one is accountable to according to law or accepted procedure, and whom one is accountable to because of their practical power to impose a sanction’.⁸² Goetz and Jenkins give the examples of politicians, who, although *de jure* are answerable to citizens, are in fact more concerned with the ‘sanctions wielded by corporate interests, such as the withdrawal of campaign finance’, and of governments, whose conduct *de facto* is very much ‘driven by the rewards or punishments offered by other governments or by international organisations’.⁸³

Therefore, this study is concerned with the real-world practices of account giving. Consequently, while each of the aforementioned disciplinary approaches to accountability forms a specific framework, it becomes clear that the conceptualisation of IFIs’ practices needs to be taken one step further by introducing a comprehensive, *integrated* legal, political, and administrative approach. Hence, the concept will not be dogmatic but instead will be flexible enough to consider new, unconventional types of actor-forum relationships, while taking into account both judicial and factual, non-regulated aspects of this relationship.

⁷⁷ Fombad (2013), p. 21.

⁷⁸ Amtenbrink (1999), p. 23.

⁷⁹ European Central Bank website, ‘Accountability’, www.ecb.europa.eu/ecb/orga/accountability/html/index.en.html, accessed 6.10.2014.

⁸⁰ European Central Bank website, ‘Accountability’, www.ecb.europa.eu/ecb/orga/accountability/html/index.en.html, accessed 6.10.2014.

⁸¹ *Ibid.*

⁸² Jenkins R. (2006) Accountability and the WTO dispute settlement system. In Benz A., Papadopoulos Y. (eds.) *Governance and Democracy. Comparing national, European and international experiences*. Routledge. 252-272. p. 255; see also Goetz, Jenkins (2002).

⁸³ *Ibid.*, p. 255. See also Goetz, Jenkins (2002), p. 6.

2.2.2 Results-based accountability

It is generally accepted that an accountable actor can take responsibility for achieving objectives, and can bear the consequences of this.⁸⁴ Furthermore, the issue of expectations, related to the course of actions and the final result, is central to the entire accountability concept.⁸⁵ Scholars agree that the state of being accountable is closely related to the forum's expectations of a certain type of conduct and performance.⁸⁶ Moreover, the actor plays here an equally active role. According to Brandsma and Schillemans, the actor's anticipation of its forum expectations shapes the way, in which it frames its conduct and performance, just as accountability forums base their inquiries and assessments on implicit or explicit expectations.⁸⁷ This appears also correct in relation to the International Financial Institutions, which possess public type of accountability. And in the end, punishments or rewards emanate from the discrepancy between expectations and performance.⁸⁸

Another and even greater challenge is to translate 'public interest' into clear objectives, and to incorporate public expectations into preconditions regarding the accountability mechanism. The discrepancy between forum expectations and actual performance can be considerable if an actor enjoys considerable discretion in formulating its policies and strategies. The same problem occurs regarding anticipations of an actor with respect to what can be expected from it by the forum if the forum formulates vague or general objectives. All this generates uncertainties about the actor's accountability. Grant and Keohane argue that IFIs 'are in fact accountable – indeed, more accountable in many respects than powerful States – but in ways quite different from those envisaged by observers who equate accountability with participation'.⁸⁹ The authors call this a 'talking past each other' effect, explaining that to officials of the World Bank, these are NGOs who seem to be accountable to nobody, whereas officers of the Bank must answer to their supervisors, and ultimately to the States that empowered them, while to the representatives of NGOs, it is the World Bank that lacks accountability because it does not answer to those affected by its policies, the very people for whom the NGOs claim to speak.⁹⁰ The example of financial institutions demonstrates that the 'talking past each other' effect is caused by an incomplete incorporation or an unclear translation of the forum's expectations into the actor's objectives.

Hence, the question arises as to how to bring the actor's objectives in predictable and measureable relation to the achieved results.

⁸⁴ See Ebrahim A. (2010) *The Many Faces of Nonprofit Accountability*. Harvard Business School Working Paper 10-069; Fox J., Brown L. (1998) (eds) *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements*. Cambridge, the MIT Press; Cornwall A. et al. (2000) Introduction: Accountability through Participation: Developing Workable Partnership Models in the Health Sector. *IDS Bulletin* 31 (1), 1-13.

⁸⁵ See Brandsma, Schillemans (2013), p. 956.

⁸⁶ Day P., Klein R. (1987) *Accountabilities: Five public sectors*. Tavistock. p. 240; Dubnick M., Romzek B. (1993), p. 43; Kim S. (2005) Balancing competing accountability requirements. Challenges in performance improvement of the nonprofit human service agency. *Public Performance and Management Review* 29 (2), 147-65. p. 147.

⁸⁷ Brandsma, Schillemans (2013), p. 956.

⁸⁸ *Ibid.*

⁸⁹ Grant, Keohane (2005), p. 29.

⁹⁰ *Ibid.* Emphasis added.

In his recent book on ensuring accountability and measuring performance, Worth has addressed different possible ways of doing so, also describing the accompanying benefits and shortcomings of each of them.⁹¹

One way to measure the actor's performance is to examine the organisation's financial ratio. The advantages of using financial indicators are that the data are objective, readily available, and easily compared.⁹² However, critics argue that they 'fail to account for the realities faced by many organisations, that they may be at least misleading and that they are potentially destructive'.⁹³

Another way is to 'measure against peers', or to use benchmarking: in other words, to obtain a more accurate picture and measure progress by comparing data from organisations that are similar in their mission, size, location, and other characteristics.⁹⁴ However, this instrument also has its critics. Among the main obstacles are mentioned the extensive investment of time and effort, the difficulty in finding comparable funding environments, and the risks of manipulating initial data in order to obtain the most favourable outcomes.⁹⁵

One more theory about measuring performance is called 'blended value', and its content is close to that of the sustainable development concept. The theory suggests that next to the economic value and social revenues of investment, organisations simultaneously generate one more component – their positive or negative impact on the environment. They must then be evaluated in terms of how much of all three components – or the blended value – they create in total. However, although intellectually intriguing, this theory faces challenges to its wider acceptance, essentially because there remain significant difficulties in defining and measuring the social and environmental impact.⁹⁶

Finally, the overview offered by Worth concerning possible ways of ensuring accountability by measuring performance contains an 'outcome approach', an alternative way of measuring performance by comparing what in fact has been achieved 'against the organisation's mission'.⁹⁷ According to the author, this method 'has gained wide acceptance' and 'has been adopted by many foundations and government agencies for measuring their grantees' effectiveness'.⁹⁸ This method,

⁹¹ Worth (2014), p. 133-164.

⁹² *Ibid.*, p. 142.

⁹³ Worth (2014), p. 142. See also Fremont-Smith M. (2008) *Governing Nonprofit Organizations. Federal and State Law and Regulation*. Harvard University Press; Green P., Gabor G. (2012) *Misleading Indicators: How to reliably measure your business?* Praeger.

⁹⁴ *Ibid.*, p. 145.

⁹⁵ See *Ibid.*, p. 146. See also Surz R. (2005) Warning! Peer Groups Are Hazardous to Our Wealth. *Senior Consultant* 8 (3); Ankrim E. (1998) Peer-Relative Active Portfolio Performance: It's Even Worse Than We Thought. *Journal of Performance Measurement*. 6-11; Surz R. (1996) Portfolio Opportunity Distributions: A Solution to the Problems with Benchmarks and Peer Groups. *Journal of Performance Measurement*. 24-30.

⁹⁶ See *Ibid.*, p. 155. See also Bonini S., Emerson J. (2005) Maximizing Blended Value - Building Beyond the Blended Value Map to Sustainable Investing, Philanthropy and Organizations. Unpublished research paper, Hewlett Foundation; Nicholls A. (2009) 'We do good things, don't we?': Blended Value Accounting in social entrepreneurship. *Accounting, Organizations and Society* 34. 755-769.

⁹⁷ Worth (2014), p. 146.

⁹⁸ *Ibid.* On this method, see also Horsch, K. (1996) Results-based accountability systems: Opportunities and challenges. *The Evaluation Exchange* 2 (1). 2-3; Schilder D. (1997) *Overview of results-based accountability: components of RBA*. Harvard Family research project. Harvard graduate school of education; Young N. *et al.* (1994) Getting to outcomes in integrated service

also known as ‘*results-based accountability*’, indeed appears to fit better than others to establish the extent of IFIs’ public accountability. At a minimum, results-based accountability implies that the expected results or objectives are clearly articulated, and that data are collected regularly and reported to estimate whether the results have been achieved.⁹⁹ It therefore calls for institutions to take responsibility for initiating some action and *the results* of that action.¹⁰⁰ However, the practical application of the accountability concept may face problems. Worth remarks that the ‘obstacles to measuring outcomes are the loftiness and vagueness of many mission statements’.¹⁰¹

Therefore, while there is a need of clear objectives, leading to measurable results, the initial problem appears to nestle in imprecisely, ambiguously, broadly formulated objectives, which at the very least lead to uncertainties if not to manipulations. In that situation, even while trying to ‘do the right thing’, IFIs do not necessarily achieve their broadly formulated mission goals, nor are they considered accountable by their forum.¹⁰² Accordingly, as Amtenbrink writes in relation to Central Banks, ‘the absence of an unequivocal, quantified objective laid down in [...] a statute or a legally binding document may decrease the effective accountability of the bank’.¹⁰³ The solution as regards enhancing results-based accountability, therefore, might be to ensure the presence of a yardstick, which would make it possible to determine whether an actor has adequately carried out its duties.

Moreover, accountability as a substantial concept implies that actors are rewarded or sanctioned for their performance by the relevant forum based on accurate information.¹⁰⁴ Therefore, as argues in the next sections, it is most important that the concept of accountability acknowledges a high degree of transparency and yardsticking as essential preconditions for its proper functioning. These preconditions will serve as basis for the creation of an objective, contemporary approach to accountability. Applying the neutral functional theory of law,¹⁰⁵ adopted for this study and analysed in Chapter I, the features addressed above suggest the time is ripe for a revision of the existent concept, in order to accommodate public actors such as International Financial Institutions. Therefore, the next step in this chapter is to approach the concept of accountability as a mechanism.

delivery models. In *Making a difference: Moving to outcome-based accountability for comprehensive service reforms* 7. National Center for Service Integration.

⁹⁹ See Schilder (1997), p. 1.

¹⁰⁰ Horsch K. (1996) *Results-Based Accountability Systems: Opportunities and Challenges*. Harvard Family research project. Harvard graduate school of education. p. 1.

¹⁰¹ Worth (2014), p. 147. Another problem that application of the accountability concept can face in practice is a possible lack of information about an investment project.

¹⁰² See Worth (2014), p. 141.

¹⁰³ Amtenbrink (1999), p. 45.

¹⁰⁴ See Borowicz M. (2013) The internal ratings-based and advanced measurement approaches for regulatory capital under the ‘Basel regime’. In Miller G., Caffagi F. (eds.) *The Governance and Regulation of International Finance*. Edward Elgar. 167-208. p. 191.

¹⁰⁵ See Ehrenberg K. (2009) Defending the Possibility of a Neutral Functional Theory of Law. *Oxford Journal of Legal Studies* 29 (1). 91-113.

3. ACCOUNTABILITY AS A MECHANISM

An *accountability mechanism* refers to the functioning of the concept in practice. The broader view suggests that it is both about being held responsible by others and taking responsibility for oneself,¹⁰⁶ assigning to the concept both an external dimension, seen as an ‘obligation to meet prescribed standards of behaviour’,¹⁰⁷ and an internal one, experienced as a ‘felt responsibility’, communicated through the individual action and goals of an organisation.¹⁰⁸ Giving definition to the notion of accountability, Stiglitz outlined ‘objectives’, ‘assessment procedures’, and ‘consequences’ as its three basic components.¹⁰⁹ However, unlike Stiglitz, the present study argues that setting objectives and assessing results can be labelled together as ‘processes’ of accountability. Furthermore, in line with Amtenbrink and his analysis of financial institutions, this study underlines the importance of ‘preconditions’ as one more part of accountability mechanism.¹¹⁰ It is therefore maintained that in essence the accountability mechanism consists of three components: 1) *processes*, whereby actors are given – or take upon themselves – certain objectives, and there is a reliable way of assessing whether they have met these objectives; 2) *consequences* that exist for both the case in which actors have done what they were supposed to do and the case in which they have not done so; and 3) *preconditions* that ensure the proper functioning of the accountability mechanism.

3.1 Three components of the accountability mechanism

‘Processes’, ‘consequences’ and ‘preconditions’ as basic components of the accountability mechanism, are graphically shown on Figure 1. ‘Processes’ refer to any activities that are directed at ensuring an accountable performance of an actor. The ‘consequences’ can take form of a carrot or a stick, depending on the factual attaining or not attaining of objectives. The ‘preconditions’ comprise everything that is needed to objectively judge actor’s performance. Subsequently, these components have to be operationalised in practice via certain instruments. Therefore, Figure 1 contains examples of instruments, corresponding to the relevant components.

¹⁰⁶ Ebrahim (2003a), p. 814. See also Cornwall A. *et al* (2000) Introduction: accountability through participation: developing workable partnership models in the health sector. *IDS Bulletin* 31 (1). 1-13. p. 3.

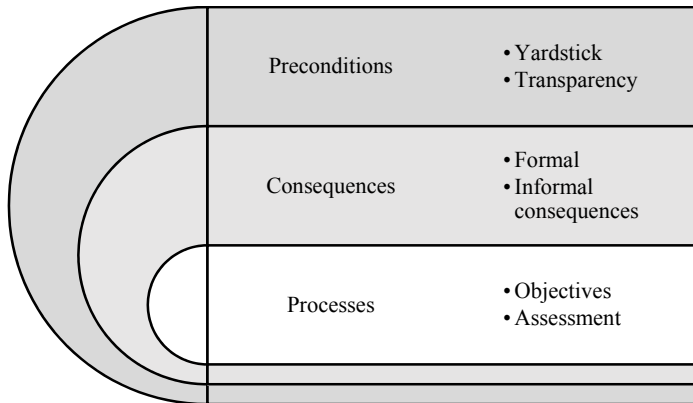
¹⁰⁷ Chisolm L. (1995) Accountability of nonprofit organisations and those who control them: the legal framework. *Nonprofit Management and Leadership* 6 (2). 141-156. p. 141.

¹⁰⁸ See Fry R. (1995) Accountability in organisational life: problem or opportunity for nonprofits? *Nonprofit Management and Leadership* 6 (2). 181-195. p. 182.

¹⁰⁹ Stiglitz J. (2003) Democratising the International Monetary Fund and the World Bank: Governance and Accountability. *Governance: An International Journal of Policy, Administration, and Institutions* 16 (1). 111-139. p. 111.

¹¹⁰ In relation to the transparency and yardstick as important preconditions of accountability mechanism, see generally Amtenbrink (1999); Amtenbrink, Lastra (2008).

Figure 1. Components of the accountability mechanism and their instruments



In summary, as Figure 1 shows, certain ‘processes’ as a component of the accountability mechanism, lead to the appearance of certain ‘consequences’ and cannot function without certain ‘preconditions’, while being interrelated with each other. The *processes* phase, such as setting objectives, and assessing an actor’s behaviour, logically precedes the *consequences* phase, with its penalties or rewards; and both of these components, in turn, cannot function without such *preconditions* as transparency and a yardstick. It must be mentioned at the outset that in real life these components seldom stay in the indicated logical order: at times the order changes, and some processes occur simultaneously or multiply, serving different accountability arrangements. The three-component accountability mechanism, sketched in Figure 1, serves primarily as a heuristic device that ‘helps researchers to analyse the messy realities of real world accountability’.¹¹¹ The additional benefit is that it helps to locate accountability shortages within the three phases, as it focuses on the component(s) of accountability that may be missing in a situation: that is, a vagueness of processes, an inability to correct and redress, or an absence of necessary preconditions. In the sections below the components and the corresponding instruments, allowing realisation of these components in practice, are analysed further.

¹¹¹ Brandsma G., Schillemans T. (2013) The Accountability Cube: Measuring Accountability. *Journal of Public Administration Research Theory* 23 (4). 953-975. p. 956.

3.2 ‘Processes’ as a component of the accountability mechanism

‘Processes’ as a component of the accountability mechanism, make use of such instruments as setting objectives to be achieved and assessing the implementation of such objectives in practice.

3.2.1 Objectives

Members of a forum set objectives for an actor to achieve, and actors like International Financial Institutions have as their forum multiple stakeholders with multiple objectives. This leads to the problem of multiplicity of external objectives.¹¹² This situation is especially true for public accountability, where different members of a forum, representing diverse members of society and being politically active, endorse an actor with different objectives.¹¹³ These can be thus addressed as *external* objectives.

In addition, an actor enjoys greater or lesser autonomy in formulating own objectives. Nevertheless, while technically these are *internal* objectives, they are commonly born from the various relationships with forum members, and reflect their expectations.

As will be discussed later in this chapter, a reliable accountability mechanism depends very much on a careful and precise formulation of these objectives.¹¹⁴

Objectives can possess a judicial, administrative, financial, political, or social character, and can even be mutually exclusive, such as environmental safeguards and economic gains in relation to the same investment project. Structurally, Grant and Keohane highlight the three sets of potentially conflicting objectives: those serving the interests of the shareholders, those being the reason that International Financial Institutions were established, and those that appeared additionally, such as the ‘evolving standards of benefits and harms’.¹¹⁵

As the previous chapter has shown, environmental objectives are increasingly often adopted by IFIs as a consequence of increased public concerns about these organisations’ environmental accountability.

Setting objectives can motivate achieving them, but to stimulate extra effort, the objectives must encourage real progress but at the same time not be impossible.¹¹⁶ They must, however, not be too easy.¹¹⁷ To meet these requirements, certain instruments such as *policies* and *strategies* can be helpful. Creation of a policy as a written document allows the formulation of an abstract

¹¹² It should be noted that within the structure of one particular actor there might be different objectives at different institutional levels: project level, governing board level, mandate level, and so on. This leads to the problem of a multiplicity of *internal* objectives. This problem, however, deserves additional research, and neither the financial aspects nor the internal governance of the Banks forms part of this study.

¹¹³ See Stiglitz (2003), p. 112.

¹¹⁴ See Section 3.4.2 in relation to yardstick.

¹¹⁵ Grant, Keohane (2005), p. 37.

¹¹⁶ See World Bank (2012) Yardstick Global Poverty Reduction. *World Bank Research Digest* 7 (1). p. 2.

¹¹⁷ World Bank (2012), p. 2.

objective into a coherent set of goals that reflect applicable laws, instructions, and industry standards.

Policies are there to be implemented. Hence, in order to achieve a given objective, an organisation should also design and deploy a certain *strategy* with at least some deadlines for putting the formulated policies into effect in the light of specific circumstances within an organisation. These instruments should help to avoid juggling with objectives. Thus, Stiglitz provides an example of the International Monetary Fund (IMF) assessing its intervention in East Asia in 1997 as successful, during the period that the whole region was undergoing a financial crisis, unemployment rates were rising, and the GDP of most countries was even lower than that before the Fund's intervention.¹¹⁸ However, the IMF considered its intervention a success because of the exchange rate stabilisation, which was indeed one of its initial objectives.¹¹⁹

3.2.2 Assessment

Closely related to the formulating of objectives, another problematic issue concerns how to assess performance, as the topic of assessment as one of the 'processes' within accountability, has a number of challenging aspects.

To begin with, there is an *ex ante versus ex post* debate. Arguably, not every 'assessment' can function as an instrument of accountability 'processes'. Whatever disciplinary approach to accountability is taken, it cannot escape the debate related to the *moment* the assessment takes place. Some assessment procedures function as a preliminary check and occur before an objective is fulfilled. Other procedures function as the final evaluation after a certain goal has been achieved. According to some studies, both procedures can function as accountability components, with the first being considered time-wise as a *preventive (ex ante)* action and the second as a *remedial (ex post)* action.¹²⁰ Writing about public accountability in the financial sector, Lastra and Shams imply that 'accountability can either be exercised before/during the process of taking the decision/action, or after the decision/action has been taken'.¹²¹ As an example, they propose the case of *ex ante* accountability, in which members of the forum interfere in choosing the holders of power, or in which the forum's consent is required for the decision of the actor to be final, such as the appointment procedures of central bank officials when such procedures require parliamentary approval.¹²² At the same time, according to the authors, 'the reporting requirements and the appearances of the central bank chairman or governor in front of parliamentary committees are

¹¹⁸ Stiglitz (2003), p. 114.

¹¹⁹ *Ibid.*

¹²⁰ See UN High Commissioner on Human Rights (2013) *Who will be accountable? Human rights and the Post-2015 Development Agenda*. p. 28; see also International Law Association (2004) Committee on the Accountability of International Organisations Berlin Conference report.

¹²¹ Lastra R., Shams H. (2000) *Accountability: ex ante or scrutiny, ex post or Control and Transparency*. Rules, Incentives and Sanctions Enforcement in Financial Regulation Working Paper. p. 6.

¹²² According to Lastra and Shams, parliamentary debate on inflation targets can be regarded as a way of exercising accountability *ex ante* or through scrutiny. Lastra, Shams (2000), p. 6.

ways of exercising accountability through control or *ex post*'.¹²³ Quintyn *et al.* similarly suggest that *ex ante* accountability refers to reporting before action is taken (for example, consultations with stakeholders on supervisory and regulatory policy), while *ex post* accountability refers to the reporting after action has been taken.¹²⁴ It is with reference to the fact of an assessment taking place that the author defines accountability as either *a priori* (*ex ante*) or *a posteriori* (*ex post*). The terminology of the United Nations also distinguishes between these terms: *ex ante* accountability is defined as 'ensuring that budget allocations adequately reflect policy priorities', while *ex post* accountability means 'holding government to account for performance and results'.¹²⁵ Furthermore, according to Moncrieffe, the *ex post* accountability is in principle straightforward, and refers to holding public officials accountable through the law, through other monitoring and sanctioning mechanisms, and ultimately through elections.¹²⁶ Nevertheless, the author himself finds the *ex-ante* dimension of accountability 'more difficult to define', while stating that it 'allows for a continual check on policies', and 'aims to enhance the responsiveness of agents to those whom they are expected to serve and [...] to improve the quality of representation'.¹²⁷ This dimension is therefore worth examining.

In summarising the definitions, it becomes clear that *ex ante* accountability is understood as taking preventive measures, reporting, or adopting policies before *action* as such is being taken. Considering the arguments above, however, it is questionable as to whether the notion of *preventive* accountability suits the logic of the concept itself. Thus, for example, Grant and Keohane warn about 'an important mode of constraining the powerful that must be distinguished from accountability'.¹²⁸ What the above-mentioned authors understand under *ex-ante* accountability, Grant and Keohane accurately call 'a mechanism of checks and balances', 'designed to prevent action that oversteps legitimate boundaries by requiring the cooperation of actors with different institutional interests to produce an authoritative decision'.¹²⁹ Good illustrations of such check and balance mechanisms are environmental impact assessments and project appraisal procedures used in project investment practices. Consequently, while the aforementioned studies understand *ex post* accountability as an obligation to answer for actions that *have already taken place*, and *ex ante* accountability as taking preventive measures, the position adopted by this study distances itself from this theoretical approach. Instead, as Grant and Keohane correctly put it, accountability mechanisms always operate *after the fact*: 'exposing actions to view, judging and sanctioning them'.¹³⁰ Indeed, from the analysis above it appears correct that 'to be accountable' has to do with the possibility of assessing compliance with the

¹²³ Lastra, Shams (2000), p. 6.

¹²⁴ Quintyn M. *et al.* (2007) The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors. IMF Working Paper, p. 17.

¹²⁵ See United Nations Multilingual Terminology Database (UNTERM), <http://unterm.un.org/DGAACS/unterm.nsf/8fa942046ff7601c85256983007ca4d8/808e79bd0bb746fc8525728e00676b2e?OpenDocument>, accessed 20.10.2013.

¹²⁶ Moncrieffe (2001), p. 27.

¹²⁷ Moncrieffe (2001), p. 27.

¹²⁸ Grant, Keohane (2005), p. 30.

¹²⁹ *Ibid.*

¹³⁰ Grant, Keohane (2005), p. 30.

agreed standards of responsibility and adopting appropriate corrective action, based on the action *that has already taken place*. Accountability is a means of assigning responsibility for failures that *have already happened*. Therefore, it excludes any possibility of a time-wise division of the concept into ‘before the action’ and ‘after the action’. Goetz and Jenkins also affirm that ‘*ex post* accountability is, in a strictly definitional sense, the only true form of accountability’.¹³¹ ‘Holders of power are expected to take actions, the impacts of which can be assessed only after the fact by agents of accountability, who may choose to impose sanctions if explanations for the decision, or its outcome, are deemed insufficient’.¹³² Time-wise, the *ex post*, or *remedial* accountability, thus seems to be the only existing accountability in the sense of this analysis.

Additionally, it becomes apparent from the above discussion that the notions of ‘accountability’ and ‘assessment’ are often mixed and used interchangeably. It is therefore important to emphasise that the availability of assessment procedures as such does not make an actor accountable. Assessment is only one instrument of only one component (‘processes’) of the accountability mechanism, and this mechanism works properly only when all components are in place and operational. It is further argued that while being a necessary condition for an accountable actor’s status, the ‘checks and balances’ (*ex ante*) assessment procedures can hypothetically be considered to be an instrument within an actors’ accountability mechanism.¹³³ It is, however, not a separate form of accountability. Instead, as will be developed below, this is one of the yardsticks ‘in-between stops’ on the way to achieve the objective.¹³⁴ Another type of assessment (*ex post*) is a means of identifying success and failure *from the past action*. To sum up, viewed as a learning and evaluation exercise, *assessment* as an instrument of an accountability component can take place both *a priori* and/or *a posteriori*.

Furthermore, as an instrument of accountability mechanism, assessment can take different forms depending on the subject. Thus, this can be an evaluation of an overall performance, of financial aspects, or of specific aspects such as employment or environmental policy; in addition, such evaluations can be of either an *internal* or an *external* character.

Examples of internal evaluations are financial reporting, internal auditing, or other types of internally initiated and internally held controls. International Financial Institutions, for example, indicate the internal assessment of their activities as an essential instrument of accountability.¹³⁵ In this situation, however, the old question ‘*Quis custodet ipsos custodes?*’ – loosely translated as ‘Who evaluates the evaluators?’ – remains as relevant as ever.¹³⁶ At the same time, Amtenbrink warns that an actor ‘shall not itself be in charge of measuring progress in meeting the

¹³¹ Goetz, Jenkins (2002), p. 8.

¹³² *Ibid.*, p. 8.

¹³³ See Goetz, Jenkins (2002), who write that both *ex ante* and *ex post* checks help to underscore the degree to which the frequency of scrutiny and public justification is an important variable affecting the capacity of accountability systems to alter the incentives facing power holders.

¹³⁴ See Section 3.4.2 in this chapter on the application of the yardstick.

¹³⁵ See for example Internal Control Standards Committee (2001) Internal Control: Providing a Foundation for Accountability in Government. International Organization of Supreme Audit Institutions; Independent Evaluation Group (2011) *A Review of World Bank Support For Accountability in the Context of Governance and Anticorruption*. IEG Working paper 2011 (5).

¹³⁶ See Linn J. (2012) Evaluating the evaluators: Some Lessons from a Recent World Bank Self-Evaluation. *Scaling Up Development Impact Brookings Series* 9. 1-7. p. 1.

[...] policy objective',¹³⁷ otherwise there is a risk that the actor 'may find room for manoeuvre with regard to interpretation of the [...] data, possibly concealing its own shortcomings'.¹³⁸ Thus, self-evaluations should be seen instead as input to an independent external evaluation.¹³⁹

Examples of external assessment are external auditing, performance assessments, or investigations by specialised commissions or bureaus and assessment reports done by NGOs. External assessment can be initiated both internally and externally, but should further be held independently from the actor. In addition, as will be discussed below,¹⁴⁰ transparency has become a major precondition for an accountable way of handling, which is being demanded by the forum. The engagement of independent accounting firms by IFIs for conducting yearly evaluations can be seen as a cautious step towards external assessment. Subsequently, an officially recognised and formalised external assessment by independent evaluators such as PriceWaterhouseCoopers, Deloitte, and KPMG has become common practice, despite the fact that the quality of their evaluations can at times be questioned.¹⁴¹ Some IFIs, like the World Bank, came to realise that an 'independent evaluation is an essential building block for effective development programs, which creates an objective basis for assessing results, providing accountability, and helping development practitioners to learn from experience'.¹⁴² It also realised that 'to ensure impartiality and transparency, the evaluation function needs to be independent of institutional management and free of conflicts of interest'.¹⁴³ This led to the creation of an Independent Evaluation Group, which enjoys a neutral status and is charged with the task of providing an objective assessment of the World Bank Group's work results, and identifying and disseminating the lessons learned from the Group's experience.¹⁴⁴

Moreover, the World Bank together with other IFIs has been working to enhance assessments. Already in 1996, the Evaluation Cooperation Group (ECG) was established by the heads of evaluation departments with the aim, *inter alia*, of harmonising performance indicators as well as evaluation methodologies and approaches in assessments of public sector operations.¹⁴⁵ The ECG

¹³⁷ Amtenbrink (1999), p. 338.

¹³⁸ *Ibid.*, p. 338.

¹³⁹ Linn (2012), p. 6.

¹⁴⁰ See section 3.4.1.

¹⁴¹ Regarding deficiencies in audits and the failure to address the quality critics, see for example press releases of the Public Company Accounting Oversight Board (PCAOB): in relation to Ernst & Young, PCAOB (2013) Release No.104-2013-087, Washington; in relation to Deloitte & Touche LLP's, PCAOB (2013) Release No.104-2013-191, Washington; and in relation to PriceWaterhouseCoopers PCAOB (2010) Report on 2009 Inspection of PricewaterhouseCoopers LLP. New York.

¹⁴² IEG (2007) Improving Development Results Through Excellence in Evaluation. World Bank, 1-8. p. 3.

¹⁴³ IEG (2007) Improving Development Results Through Excellence in Evaluation. World Bank, 1-8. p. 3.

¹⁴⁴ See the International Evaluation Group website, 'About IEG'. <http://ieg.worldbank.org/about-us>, accessed 16.01.2014. The Director-General of the IEG reports directly to the World Bank Group's Board of Directors. The IEG's approach to evaluation reflects the OECD's Development Assistance Committee (DAC) standards, the good practice standards of the Evaluation Cooperation Group (ECG), addressed below, and the norms and standards of the United Nations Evaluation Group (UNEG). See IEG Methodology on <http://ieg.worldbank.org/methodology#footnotes>, accessed 10.02.2014.

¹⁴⁵ Members of the ECG are the African Development Bank Operations Evaluation Department, the Asian Development Bank Independent Evaluation Department, the European Bank for Reconstruction and Development Evaluation Department, the European Investment Bank Operations Evaluation, the Inter-American Development Bank Office of Evaluation and Oversight, the International Fund for Agricultural Development Office of Evaluation, the International Monetary Fund Independent Evaluation Office, the Islamic Development Bank Group Operations Evaluation Department, and the World Bank Group Independent Evaluation Group. Aspiring Members are the Black Sea Trade and Development Bank Independent Evaluation

uses two instruments to promote evaluation harmonisation among IFIs: good practice standards and benchmarking studies to assess the extent to which ECG members apply these standards.

Additionally, there is an increasingly influential array of watchdog organisations that proactively examine the public sector actors. Such evaluations are undertaken with or without the cooperation of the organisations on which they focus,¹⁴⁶ and can be seen as a counterbalance to the officially sanctioned external assessments. According to Worth, they are an important force in creating increased transparency, and they exert an influence because of the visibility they enjoy.¹⁴⁷ One example of such a non-profit external evaluator is the CEE Bankwatch Network, an international non-governmental organisation with member groups from countries across Central and Eastern Europe. Bankwatch was set up formally in 1995, and has become one of the most significant networks of environmental NGOs in the region.¹⁴⁸ It sees itself as a ‘public finance watchdog with bite’.¹⁴⁹

Arguably, assessment reports produced by NGOs mend or fill the gap in external IFI assessments. The problem with NGO assessments, however, is that – in the absence of an official status – critical assessment reports are not always taken seriously, and thus are not incorporated into the ‘lessons learned’ by International Financial Institutions.

3.3 ‘Consequences’ as a component of the accountability mechanism

The consequences of attaining or not attaining objectives are a component that distinguishes accountability from other concepts related to the public nature of an actor, such as responsibility or responsiveness. Goetz and Jenkins underline that it is essential to note that accountability is not synonymous with either of these terms.¹⁵⁰ ‘Responsiveness’, they write, ‘is the desired attitude of power-holders towards ordinary citizens: we wish them to be responsive to the concerns and problems of citizens, to listen with impartiality and fairness to divergent views, and to subject all expressions of need and interest to publicly agreed rules for weighing and assessing the merits of claims and cases’.¹⁵¹ In addition, quite correctly, ‘the responsiveness of public-sector actors is not governed by the same set or intensity of rules, checks, and constraints as the accountability of these actors’.¹⁵²

Office, and the Council of Europe Development Bank Ex Post Evaluation. In addition to these, four IFIs have Permanent Observers’ status: the GEF Evaluation Office, the Global Environment Facility Evaluation Office, the OECD-DAC Evaluation Network and the United Nations Evaluation Group.

¹⁴⁶ See Worth M. (2014) *Nonprofit Management. Principles and Practice*. SAGE Publications. p. 140.

¹⁴⁷ Worth (2014), p. 140.

¹⁴⁸ See European Commission website, ‘Environmental Communications Network’, http://ec.europa.eu/environment/archives/networks/networks_en.htm, accessed 30.04.2015.

¹⁴⁹ See Bankwatch Leaflet, p. 2.

¹⁵⁰ Goetz, Jenkins (2002), p. 8.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

The same can be said about the notion of responsibility. Goetz and Jenkins observe that although ‘the idea of responsibility is closely related to accountability’, it is ‘also distinguished by the lack of formal compulsion’; and while ‘an actor may feel responsible for taking action to improve the lot of poor people’, it may not be *required*, technically and legally, to account for its actions or non-actions.¹⁵³

For the whole concept of accountability, it is thus important that the component of consequences exists and is workable. As Brandsma and Schillemans put it, ‘in the end, the forum will pass judgement on the behaviour of the actor in the consequences phase and will punish, correct or reward the actor when needed’.¹⁵⁴

3.3.1 Seven types of consequences

In their study on accountability and abuses of power, Grant and Keohane have paid considerable attention to this issue, and have devised seven types of consequences, which they call *hierarchical, supervisory, fiscal, legal, market, peer, and public reputational accountability*.¹⁵⁵ These types are summarised below (Figure 2), indicating the relevant kind of consequences for a particular category of accountability actor and forum.¹⁵⁶

Figure 2. Seven types of consequences in the accountability mechanism

Type of consequences	Accountability forum	Accountability actor	Consequences for the actor
Hierarchical	Leaders of an organisation	Subordinate individual	Loss of career opportunities
Supervisory	States	Multilateral organisation and its executive	Restraints on ability to act, loss of office
Fiscal	Funding agencies	Funded organisation	Budget restrictions

¹⁵³ Goetz, Jenkins (2002), p. 8. See also Mulgan, who writes that accountability concentrates on the external issues of scrutiny such as calling to account, requiring justifications, and imposing sanctions, thus leaving responsibility to cover the internal issues of personal culpability, morality, and professional ethics. See Mulgan (2000), p. 558. In turn, Morgera observes that ‘accountability, as opposed to responsibility, seems to make reference to the means rather than the result that should be achieved by environmentally sound conduct in light of public expectations’. Morgera (2009), p. 21.

¹⁵⁴ Brandsma, Schillemans (2013), p. 956.

¹⁵⁵ Grant, Keohane (2005), pp. 35-41.

¹⁵⁶ The concept of Figure 2 is borrowed from Grant, Keohane (2005), p. 36, with some minor adjustments. Thus, for instance, the authors use the term ‘legal consequences’, to be imposed by ‘courts’. For the context of this study, taking into consideration the nature of International Financial Institutions, the broader term ‘judicial consequences’ is used, and to be imposed by ‘judicial authorities’.

Judicial	Judicial authorities	Individual official or an organisation	From restriction of authority to criminal penalties
Market	Equity and bond holders, consumers	Organisations or governments	Loss of access to or higher cost of capital
Peer	Peer organisations	Organisations and their leaders	Effects on network ties and therefore on others' support
Public reputational	Peers and diffuse public	Individual or organisations	Diffuse effects on reputation, prestige, self-esteem

In summary, in Figure 2 the *hierarchical* consequences apply to the relationships within an organisation; the *supervisory* consequences refer to relations between organisations, where one of organisations acts as an actor; the *fiscal* consequences 'describe mechanisms through which funding agencies can demand reports from, and ultimately sanction, agencies that are recipients of funding'; the *judicial* consequences 'refer to the requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas'; the *market* consequences allow 'investors and consumers to exercise their influence through markets', the *peer* consequences 'arise as the result of mutual evaluation of organisations by their counterparts', which can have an influence on cooperation and, therefore, on the possibility 'to achieve their own purposes'; and, finally, the *public reputational* consequences involve using 'reputation as a form of 'soft power', which provides a mechanism for accountability even in the absence of other mechanisms'.¹⁵⁷ Arguably, in relation to the environmental engagements of International Financial Institutions, there could be *supervisory*, *fiscal*, *judicial*, *market*, *peer*, and *public reputational* types of consequences. Considering the multilateral nature of IFIs and the external nature of environmental accountability in question, *hierarchical* consequences, directed at the internal management within an institution, are less applicable.

3.3.2 Formal and informal consequences

Arguably, consequences discussed above can be divided into *formal* and *informal*.¹⁵⁸ Thus, formal consequences such as hierarchical, supervisory, fiscal, and legal types are mostly known beforehand, and are most often to be found in legal contracts and administrative provisions, or are

¹⁵⁷ Grant, Keohane (2005), p. 37.

¹⁵⁸ See Elster J. (1999) *Accountability in Athenian Politics*. In Przeworski A. et al. (eds.) *Democracy, Accountability, and Representation*. Cambridge University Press. pp. 253-278; also Brandsma, Schillemans (2013), p. 956, who write that sanctions may be formal or informal, and can also be either positive or negative, although negative sanctions seem to be most common.

otherwise highly predictable on the basis of existing legislation. By contrast, informal consequences are not incorporated into any legal provision, and, unlike market, peer, and reputational types, are not always predictable. They are nevertheless of considerable importance, as they can have, *inter alia*, a positive or a negative influence on the actors' reputation, credibility, publicity, number of clients, and income. In real life, formal and informal consequences appear to be interconnected and part of the same mechanism. As a rule, formal consequences are followed by informal ones, while at the same time, the opposite sequence of events cannot be excluded.

Once established that consequences as a component of accountability mechanism can be divided into formal and informal categories, consequently, it can be deduced that instruments used by this component can be divided in the same way. On the administrative side, among the formal consequences, these instruments could take a form such as financial fines or rewards, and a diminishment or an increase in subsidies or aid. On the juridical side, formal instruments could take the form of litigation or measures like a termination – or an extension – of licences and contracts.

The informal consequences often involve instruments such as positive or critical publications in mass media and public action, as well as an increase or decrease in demands for loans and grants, as the result of an increase or decrease in credibility. Among instruments frequently used in relation to the environmental involvements of International Financial Institutions are the revocations of funds, additional conditions on funding, and the extension or termination of projects, contracts, and licences.

3.4 'Preconditions' as a component of the accountability mechanism

Ultimately, it will be seen that 'preconditions' as a component of the accountability mechanism should be considered a necessary requirement for its proper functioning.

A number of preconditions for accountability have enjoyed considerable attention in the academic community. Thus, in relation to financial institutions Amtenbrink distinguished transparency and yardsticking as most crucial preconditions for their accountability.¹⁵⁹ Hachez and Wouters, writing about the accountability of the European Investment Bank, distinguished three principal preconditions on which actors are expected to base their accountability arrangements: transparency, public participation, and the availability of remedies.¹⁶⁰ Considering the structure of the IFIs' accountability mechanism, proposed by this study, one can argue that the availability of remedies, suggested by Hachez and Wouters as a separate precondition, already falls under the 'consequences' component (see Section 3.3 above). Public participation, in turn, is an important element of a 'yardsticking' procedure, suggested, but not broadly developed by Amtenbrink and

¹⁵⁹ See Amtenbrink (1999).

¹⁶⁰ See Hachez N., Wouters J. (2012) A Responsible Lender? The European Investment Bank's Environmental, Social and Human Rights Accountability. *Common Market Law Review* 49. 47-96. These preconditions coincide with the procedural rights for public under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998.

aimed at bringing an actor's objectives in a measurable relation to the achieved result. For the accountability mechanism to work, it has to be based on these preconditions.¹⁶¹

3.4.1 Transparency

Arguably, in relation to International Financial Institutions, the most prominent precondition of accountability, addressed by the academic literature, appears to be transparency.¹⁶² The core of this precondition lies in the perception of 'accountability as a process'¹⁶³ in which the actor plays not a passive but active role: 'for the party who is accountable, the heart of the matter is to explain as rational as possible the results of efforts to achieve the specific task objectives'.¹⁶⁴ To be able to do so, the actor must first of all ensure the transparency of its actions. Quite rightly, Amtenbrink calls transparency 'a prerequisite for other mechanisms of accountability', saying that 'whatever other arrangements [...] may exist, they are limited in their scope without transparency because the information [...] is crucial for the evaluation' of the actor's performance.¹⁶⁵

To ensure the preconditions for accountability, an organisation should develop, implement, and communicate to stakeholders the policies based on the appropriate external criteria found either in legal provisions and instructions or in settled industry best practices. It should be underlined, however, that preconditions are not always clearly present in *de jure* agreements. It is argued that along with these agreements, preconditions reflect general public expectations regarding an actor's conduct, which makes them even more significant in the case of accountability with regard to public bodies. The public nature of IFIs accountability is accompanied by a set of expectations, or imperatives, about what constitutes their accountable behaviour.¹⁶⁶ Most, if not all, International Financial Institutions have to face public expectations according to which their activities need to become more aligned with substantive and procedural norms of transparency, rule of law, public participation, protection of the environment, and human rights. Of course, the intensity of these expectations can vary in practice, reflecting the developments in society as a

¹⁶¹ See also Ebrahim, Herz (2007), p. 4, who, without using the word 'yardstick', nevertheless write that the World Bank has consistently found a correlation between, on the one hand, the extent and quality of setting projects' objectives involving all stakeholders, and transparency - and, on the other hand, the overall quality of the project.

¹⁶² See, for instance, Martinez L. (2013) Transparency in International Financial Institutions. In Bianchi A., Peters A. (eds.) *Transparency in international law*. 77-105; Amtenbrink (1999); Hachez, Wouters (2012); Stiglitz J. (2002) Transparency in Government. In Islam R. (ed.) *The Right to Tell: The Role of Mass Media in Economic Development*. The World Bank; Nelson P. (2001) Transparency Mechanisms at the Multilateral Development Banks. *World Development* 29 (11); Laurens B. *et al.* (2009) *Central Bank Independence, Accountability, and Transparency - A Global Perspective*. International Monetary Fund; Glucker A. (2013) Public participation in environmental impact assessment: why, who and how? *Environmental Impact Assessment Review* 43. 104-111; Simons P. (2012) *International law's invisible hand and the future of corporate accountability for violations of human right*. *Journal of Human Rights and the Environment* 3 (1). 5-43.

¹⁶³ See Bovens, Schillemans (eds.) (2009), p. 24.

¹⁶⁴ Browder L. (1971) Introduction: Emerging Patterns of Administrative Accountability – A Point of View. In Browder L. (ed.) *Emerging Patterns of Administrative Accountability*. Mr Cutchan Publishing Corp. 28-46. p. 2. Cf Amtenbrink (1999), p. 38.

¹⁶⁵ Amtenbrink (1999), p. 56.

¹⁶⁶ See Ebrahim, Herz (2007), p. 3.

whole.¹⁶⁷ For example, since the 1980s the World Bank has been the subject of NGO campaigns demanding increased accountability with respect to the negative environmental and social effects of its investments. In their study concerning the accountability of complex organisations, Ebrahim and Herz write that NGO campaigns ‘have been successful in forcing the [World] Bank to consider the negative impacts of its lending operations and to adopt a set of safeguard policies on sensitive issues, such as environmental impacts, involuntary resettlement and the impacts on indigenous peoples’.¹⁶⁸ It shows that although enjoying considerable independence and not being a part of a traditional government structure, IFIs are susceptible to public opinion and public demands, and are using instruments of self-regulation, such as codes of conduct, to provide a platform to enhance accountability to their forums and to themselves.¹⁶⁹

Nonetheless, even if preconditions are in place, their availability does not yet guarantee that the organisation is accountable. Paradoxically, transparency *can be present* as a feature in a non-accountable organisation, while, conversely, an organisation *cannot be accountable* without being transparent. Paraphrasing Amtenbrink, while this element forms a vital precondition of accountability, by itself it should not be perceived as an effective instrument of accountability.¹⁷⁰ For example, in the case of transparency, ‘the knowledge alone does not put stakeholders in a position to demand corrections and to possibly sanction undesired behaviour’,¹⁷¹ just like an active involvement of interested external parties alone can neither prevent nor solve problems in the event of an investor’s failure. For example, a problematic aspect of IFIs’ assessment is that at times there exists a significant difference in internal and external assessment results. Intentionally or unintentionally, there is often a lack of clarity about internal assessment procedures, while at the same time IFIs distrust external and public evaluations. It is appropriate to use Stiglitz’s example of the IMF, which had refused to engage in the public evaluation after the East Asia crisis, on the basis that transparency could undermine its effectiveness.¹⁷² This view has been shared by many actors in the financial world,¹⁷³ and can be explained by the centuries-long tradition of

¹⁶⁷ Romzek and Dubnick regarded accountability as ‘the means by which public agencies and their workers manage the diverse expectations generated within and outside the organisation’. According to the authors, these expectations could be based on bureaucratic procedures, on existing laws, on professional norms, and on political demands. (Romzek B., Dubnick M. (1987) Accountability in the Public Sector: Lessons from the Challenger Tragedy. *Public Administration Review* 47 (3). 227-238. p. 228.)

¹⁶⁸ Ebrahim, Herz (2007), p. 10. Consequently, while frequently presented as ‘their own’ initiatives, such as the introduction of environmental or human rights-related strategies, these initiatives are nevertheless originally imposed on international financial institutions by their forum’s expectations.

¹⁶⁹ As Chapter III has shown, most environment-related codes of conduct have been adopted by International Financial Institutions within the past fifteen years, demonstrating not only an attempt by IFIs to improve their image but also the increasing necessity and expectations of the financial sector to introduce ‘common positions, strategic alliances coordinated action, and proof of accountability’ in order to influence effectively national and international policy. (See Schweitz M. (2001) *NGO network codes of conduct: accountability, principles and voice*. Conference paper. International Studies Association Annual Convention, Chicago. p. 4.)

¹⁷⁰ Amtenbrink F. (2012) Towards an Index of Accountability for Informal International Lawmakers? In Pauwelyn J. *et al.* (eds.) *Informed International Lawmaking*. Oxford University Press. 337-355. p. 349.

¹⁷¹ *Ibid.* See also Bovens, who wrote that transparency is instrumental for accountability, but is not constitutive of it. Bovens (2006), p. 6.

¹⁷² See Stiglitz (2003), p. 115.

¹⁷³ See in general Hamalainen S. (2001) The ECB’s Monetary Policy - Accountability, Transparency and Communication. Conference speech, ‘Old Age, New Economy, and Central Banking’ conference, Frankfurt; Gruner H. (2002)

competitiveness and rivalry in the banking sector. As a result, however, the assessment procedure does not always involve the general public (lack of public participation), and assessment results are not always available to it (lack of transparency).

3.4.2 Yardstick

Already in 1979, Hicks and Streeten had mentioned a yardstick as an instrument in their research into development indicators, but without elaborating further on it.¹⁷⁴ Studies on results-based accountability have used the term with a different meaning, confusing it with benchmarking, while benchmarking involves comparisons among organisations rather than focusing on achieving objectives within one organisation.¹⁷⁵ Remarkably, in 1999 in his book on the accountability of Central Banks, Amtenbrink propagates using a yardstick by saying that ‘where such yardstick is missing, the assessment of [...] performance as such may not take place, or is based on variables in the form of political or other indeterminate considerations’.¹⁷⁶ Evidently, in his book the author perceives the yardstick as a quantifiable objective.¹⁷⁷ Building upon this understanding, and in order to further define a yardstick as part of an accountability mechanism, three propositions are made.

Firstly, it is suggested that a yardstick derives from objectives. And indeed, a clear and precise objective, expressed within a specific time frame and in quantifiable terms, can in itself be sufficient in order to function as a yardstick, and should lie at the basis of an actor accounting for its actions. At the same time, however, not every objective can serve as a yardstick. The articulated objectives can reflect the expected results and desired achievements in vague and general terms, without reference to time or without attached quantifiable measures.¹⁷⁸ However, this does not permit the operationalisation of objectives by comparing actual achievements against it. This also

How Much Should Central Banks Talk? - A New Argument. *Economics Letters* 77. 195-198; see Clare A., Courtenay R. (2001) Assessing the Impact of Macroeconomic News Announcements on Securities Prices under Different Monetary Policy Regimes. Bank of England Working Paper 125 (3), who argue that publication of internal documents can affect the asset price, suggesting that much information only confuses investors. Crujisen, van der, C. *et al.* (2008) *Optimal Central Bank Transparency*. Unpublished manuscript. De Nederlandsche Bank, Tilberg University and University of Amsterdam, suggest that ‘agents may be confused by the large and increasing amount of information’, and also argue that excessive transparency may cause agents to realise how uncertain the bank is about economic conditions and the efficacy of policy, contributing to the fragility of bank’s status. Others, like Goodhart C. (2001) Monetary Transmission Lags and the Formulation of the Policy Decision on Interest Rates. Federal Reserve Bank of St. Louis Review. 165-181, question whether requiring the bank to provide information about its intermediate goals, only to miss them, might lead to clients’ confusion and doubts about the competence of policy makers. Furthermore, Mishkin F. (2004) Can Central Bank Transparency Go Too Far? NBER Working Paper 10829 (10), warns that a high degree of transparency might disturb contacts with the public, who lack the expert knowledge required to understand the provided materials, and who thus misinterpret them.

¹⁷⁴ Hicks N., Streeten P. (1979) Indicators of development: The search for a basic needs yardstick. *The World Bank. World Development* 7 (6). 567-580. p. 567.

¹⁷⁵ See Horsch (1996); Schilder (1997); Wang (2002); Young *et al.* (1994).

¹⁷⁶ Amtenbrink (1999), p. 335.

¹⁷⁷ See *Ibid.*

¹⁷⁸ See Schilder (1997), p. 2.

demonstrates that a yardstick differs from a generally formulated objective in that while such an objective theoretically indicates a vector towards a result to be achieved, a yardstick specifies a route leading to that result, with a schedule and stops in between. A general objective indicates *what* should be achieved, while a yardstick describes *how* and *when* this would be done.¹⁷⁹ A yardstick consists of ‘micro-level goals that, if achieved, would imply success on a grander scale’.¹⁸⁰ Consequently, to this end, a yardstick transforms a general objective into a quantifiable criterion with specified time frames. It is therefore considered an important precondition of results-based accountability, against which the achieved results are compared.

Secondly, as with objectives, a yardstick can arguably include internal and external dimensions. Thus, the yardstick is formed *internally* by reflecting the actors’ goals, but also *externally*, taking into consideration expectations of the forum. This is the point at which these dimensions marry, blended into a certain compromise agreement on applicable standards.

Additionally, the yardstick is argued to be flexible enough to take into account as well the informal accountability arrangements, common practices, and contextual information that is not reflected in legal statutes and mission statements.

Subsequently, the yardstick in its essence can be defined as *a precondition of results-based accountability that transforms the general objective into a quantifiable criterion within the specified time frames.*

Thus, if addressed properly – with equal attention given to internal and external priorities, to formal and informal arrangements, and to actual context – the yardstick, next to transparency, can prove to be an important precondition of an accountability mechanism that leads to narrowing the gap between what the forum expects and what the actor achieves.

Considering the above, it is argued that a judgement regarding a state of being accountable or non-accountable can only take place if the yardstick is available. In other words, a sharp quantifiable criterion with defined time frames must lie at the basis of establishing results-based accountability regarding International Financial Institutions.

A yardstick can be found in the objectives of an organisation if they answer the specific criteria of being precise and quantifiable. In this respect, it should be mentioned once again that the clarity and non-ambivalence of objectives used as a yardstick play an important role. There should be a clear agreement on *what* constitutes an appropriate standard of behaviour, because the broader the objective, the more difficult it is to hold an actor to account for its conduct.¹⁸¹

In the case of broadly formulated objectives, a yardstick should be established on the basis of the existent general objectives, by way of operationalising these objectives into quantifiable

¹⁷⁹ For example, while one of the objectives of World Bank activities is the reduction of poverty, the respective yardstick is a particular poverty rate percentage by a certain year. See Ravallion M. (2012) *Yardsticking Global Poverty Reduction*. World Bank Policy Research Working Paper 6205. p. 8.

¹⁸⁰ Sawhill J., Williamson D. (2001) Measuring what matters in nonprofits. *McKinsey Quarterly*. p. 3.

¹⁸¹ Noteworthy is that in the opinion of Faure ‘it may be unwise to regulate by means of vague standards [...]. Instead, the regulator should set out a limited number of environmental obligations in a very precise way, thus minimising the need for further reliance upon administrative authorities for their implementation or effectiveness’. Faure M. *et al.* (2010) Bucking the Kuznets Curve: Designing Effective Environmental Regulation in Developing Countries. *Virginia Journal of International Law* 15 (95). 96-156. p. 123.

criteria, by specifying the applicable standards, and by setting time frames for the realisation of these objectives.

Moreover, the introduction of a yardstick as a precondition of accountability mechanism does not stop at the level of general objectives. In practice, it should also be applicable to any specific objective – whether of a financial, structural, environmental, or any other nature – at any level, from the Governing Board to the project level.

It would appear that the use of a yardstick as part of an accountability mechanism is primarily the responsibility of an actor. However, it must be emphasised that not only the actor but also members of the forum are responsible for the accurate application of this instrument. In accountability relationships, a yardstick therefore does not represent only a certain agreed standard of behaviour, which allows an actor's deviating behaviour to be highlighted. Of equal importance is that the yardstick can function as a protective shield, ensuring that the accountability mechanism is being neither used nor abused by any of the political interests or by any of the parties. Without an agreed upon yardstick, accountability arrangements formulated in overly general objectives are likely to become random and politicised, with the attainment of goals being determined on the basis of inspectors' free will, or on the lobbying of interested parties, without a legal arrangement forming the basis of these relationships.

Consequently, the application of a yardstick can serve at least three purposes. Firstly, by creating precise and quantifiable criteria as well as by specifying the time frames, it contributes to clarity in the relationship between actor and forum. In addition, it helps to avoid vagueness in setting objectives and voluntarism in assessing the outcomes.

Secondly, it allows for taking into consideration both internal and external interests, specifying the applicable standards, and thus narrowing the gap between results attained by the actor and expectations of the forum.

Lastly, the yardstick can serve as a mechanism for evaluation. It is suggested that a particular yardstick can be sub-divided according to an objective's implementations phases: initial, procedural, and concluding.¹⁸² This function is addressed in the following chapter in relation to Banks that are signatory to the European Principles for the Environment.

¹⁸² The initial, procedural, and concluding phases mentioned here refer to the stages of an objective's implementation in the framework of a particular project, and should not be confused with the three components of an accountability mechanism ('processes', 'consequences', 'preconditions').

Chapter V

APPLYING THE ACCOUNTABILITY MECHANISM TO EPE BANKS

The foregoing discussion has allowed the theoretical framework of accountability mechanism to be formulated.

In this chapter, different components of this theoretical framework are applied to the concrete accountability arrangements of the five Europe-based Banks.¹ In 2006, these Banks signed the Declaration on the European Principles for the Environment (EPE Declaration), endorsed by the European Commission. The Declaration establishes a common approach towards investment projects, based on the application of environmental provisions contained in EU Treaties as well as in EU secondary legislation. According to the Declaration, the signatory Banks are ‘committed, subject to their respective environmental policies, to applying EU principles, practices and standards to all projects financed by the Signatory institutions’.² Outside the European Union, such standards are to be applied ‘subject to local conditions’.³ However, while the Banks say they apply the provisions of the EPE Declaration, some NGOs claim there exists a considerable gap between the declarations and the practice.⁴ The Banks have often been criticised for their lack of transparency and accountability, and for the way they address environmental issues in their operations.⁵ Therefore, the general inquiry of this study remains whether the Banks’ commitment under the EPE Declaration is being realised.

In the light of this general question, the current chapter examines whether the existing accountability arrangements of the EPE Banks ensure a comprehensive application of standards, and whether any instruments of their accountability mechanism are missing.

To begin with, it takes a detailed look at the nature, character, and application peculiarities of the EPE Declaration, as the Declaration forms the environmental mandate relating to EPE Banks, the initial point for their environmental accountability framework.

¹ The European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD), the Council of Europe Development Bank (CEB), the Nordic Environment Finance Corporation (NEFCO), and the Nordic Investment Bank (NIB); further in the text addressed altogether as ‘EPE Banks’ or ‘the Banks’.

² See Declaration on the European Principles for the Environment, 2006, in the Annex I to this study, addressed below as ‘EPE Declaration’. See also Chapter II, section 2.2.2 on the nature of the EU environmental legal norms and the definition of European environmental standards.

³ *Ibid.*

⁴ See for example CEE Bankwatch Press release ‘Dreams of European Investment Bank Quitting Coal Go Up in Smoke – For Now’. 28.02.2013; Gutner T. (2002) *Banking on the Environment: multilateral development banks and their environmental performance in Central and Eastern Europe*. MIT Press. p. 37; Bacheva F. (2005) Bridging the gap between EBRD rhetoric and the reality in the Balkans. CEE Bankwatch (available online, http://ngo.ro/pipermail/mediu_ngo.ro/2005-May/000844.html, accessed 30.04.2015).

⁵ See Gutner (2002), pp. 2, 3, 11; CIVITAS. EU Factsheets. www.civitas.org.uk/eufacts/FSINST/BO2.php, accessed 28.01.2014; Wright C. (2007) *European Investment Bank: Promoting Sustainable Development, ‘Where Appropriate’*. Study for CEE Bankwatch Network. p. 55; Douma (2010), pp. 169-185; and in general Hachez, Wouters (2012).

Thereafter it applies the general analytical framework, developed in the previous chapter, to the existing environmental accountability mechanisms of the EPE Banks.

The chapter concludes by summarising the revealed shortcomings of the Banks' environmental accountability and by highlighting the missing instruments of their accountability mechanism. It emphasises the importance of a possibility to evaluate the application of legal environmental standards for the proper functioning of EPE Banks' accountability mechanism. Considering the outlined nature and definition of European legal environmental standards, based on principles and comprising primary and secondary European legislation,⁶ this chapter argues that the time is ripe for the construction of an accessible and effective method for evaluation of these standards' application, in the shape of a set of indicators.

1. EPE DECLARATION AS A LEGAL FRAMEWORK FOR BANKS' ENVIRONMENTAL ACCOUNTABILITY

By signing the Declaration on the European Principles for the Environment, the Council of Europe Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the Nordic Environment Finance Corporation, and the Nordic Investment Bank⁷ promised to 'promote responsible stewardship and provide a consistent and visible mechanism for engaging with project sponsors in addressing environmental issues'.⁸ They believe that 'this will allow the IFIs to better manage credit and project risk related to the environment'.⁹ Needless to say, this initiative has been endorsed wholeheartedly by the Directorate General Environment of the European Commission.¹⁰ Thus, the Commission assured that the European Principles for the Environment initiative contributes to an 'increased harmonisation of environment principles, practices and standards associated with the financing of projects', while at the same time underlined how important it is to 'encourage other banks and bilateral donors, operating in the countries covered by this document, to become EPE signatories'.¹¹

⁶ See Chapter II, Section 2.2.2 for the definition of the European legal environmental standard.

⁷ See Chapter III, Section 2.2, on the short description of the Banks – signatory to the 2006 Declaration on the European Principles for the Environment.

⁸ See the EPE Declaration (2006). Through this common EU approach, IFIs want to 'promote responsible stewardship and provide a consistent and visible mechanism for engaging with project sponsors in addressing environmental issues'. In turn, this allows the IFIs to 'better manage credit and project risk related to the environment'. See the EIB website, 'European Principles for the Environment', www.eib.org/projects/topics/environment/epe/index.htm, accessed 24.05.2014.

⁹ EPE Declaration (2006).

¹⁰ This allows speaking about multi-level environmental governance in the European Union. The European Commission and EPE Banks also welcome the association of other parties with the EPE. See European Commission (2009) *Promoting effective financing for the environment in regions covered by the enlargement process and the European Neighbourhood Policy*. SEC 1309 final.

¹¹ European Commission (2009) *Promoting effective financing for the environment in regions covered by the enlargement process and the European Neighbourhood Policy*. SEC 1309 final. In line with the European Commission' position, it is assumed that the 'export' of EU legal standards to third countries inevitably results in certain effects, among which are indirect approximation, the creation of regional standards, and the process of learning from third countries' standards.

While forming the framework for Banks' environmental accountability, the Declaration on the European Principles for the Environment does not mention any accountability arrangements, and only provides for substantive environmental standards. With regard to these legal standards, EPE Banks-financed projects are bound by European Union law when they are located within the EU. However, 'the status of the EU law is unclear' when the Banks operate in third countries.¹² This is why, when discussing the EPE Banks' accountability mechanism, it is necessary to begin with the clarification of the nature, the character, and the legal effect of this code of conduct.

1.1 The European Principles for the Environment: nature

The European Principles for the Environment are based on international and European principles. As previously mentioned, they comprise the Equator principles.¹³ Like them, the EPE require borrowers to meet certain environmental criteria before a project is considered for investment. Noteworthy, however, is that unlike the Equator Principles, the EPE do not recite specific principles but instead refer back to the guiding environmental principles enshrined in the Treaty on European Union and in the Treaty on the Functioning of the European Union (in particular, the polluter pays, precautionary and prevention principles, and the principle that environmental damage should as a priority be rectified at source),¹⁴ together with the project-specific practices and standards incorporated in EU secondary environmental legislation¹⁵ and CJEU case law.¹⁶ Through their environmental policy, the CEB, the EBRD, the EIB, the NEFCO, and the NIB have aligned themselves voluntarily with the logic of Articles 3 TEU and 11 TFEU, which require a high level of environmental protection and amelioration of environmental quality, as well as the integration of environmental considerations into other sector policies. Special importance in the EPE is given to project-specific European standards on environmental impact assessment, industrial installations, water and waste management, air and soil pollution, nature protection, and occupational health and safety. In addition, the EPE encompasses the best EU practices in the fields of environmental management, transparency, public consultation, and reporting.¹⁷ Consequently, although called 'principles', the European Principles for the Environment are in fact much more than that, according to the characteristics of a 'principle', provided in Chapter II. Of course, as described above, the Declaration contains references to principles of European environmental law, which shall guide the activities of the Banks. However,

¹² See Hachez N., Wouters J. (2012) A Responsible Lender? The European Investment Bank's Environmental, Social and Human Rights Accountability. *Common Market Law Review* 49. 47-96. p. 94.

¹³ See Chapter III, Section 4.2.5.

¹⁴ See Article 191 (2) TFEU.

¹⁵ Thomas S. (2006) Sustainable Development in Infrastructure Projects— more than just an utopian ideal? *Prinsent Masons*. p. 1.

¹⁶ The European Principles for the Environment adopted by five European Multilateral Financing Institutions, EIB press release 2006-052-EN.

¹⁷ The EU Environmental Management and Audit Scheme (EMAS) is an example of such best practice. See also in OECD (1999) Best Practice Principles for environmentally Responsible Corporate Behaviour. Foreign Direct Investment and the Environment conference proceedings. p. 105.

what the signatory Banks are deemed to apply in their investment projects, are primarily ‘standards’, as defined in Chapter II of this study.¹⁸

With the assistance of the Institute for European Environmental Policy, the Banks have prepared a Sourcebook on EU Environmental law,¹⁹ which represents a comprehensive guide on the applicable EU environmental standards. These standards are both *cross-sectoral*, such as provisions on environmental impact assessment, environmental liability, access to environmental information and public participation, and so on, and *sector-specific*, containing provisions regulating energy, agriculture, chemicals, waste management, and other sectors. The Sourcebook is ‘designed to enable project sponsors, particularly those from outside the EU, to identify those EU environmental standards that projects supported by EPE Banks are expected to meet’.²⁰ However, the EU legal provisions contained in the Sourcebook derive primarily from EU Directives and Regulations, and are therefore addressed originally to EU Member States and not to project developers. From the start, this fact makes application of these provisions at an investment project level a challenge.²¹

As does the European Commission, the Banks affirm that the EPE were launched in response to the drive for an increased harmonisation of environmental principles, practices, and standards associated with the financing of projects.²² It is a joint effort to implement the notion of sustainable development – the ‘fundamental right of present and future generations to live in a healthy environment’.²³ This approach has a global character insofar as it applies across all sectors of the Banks’ activities. Also geographically, and as part of corporate self-regulation, the Banks are determined to apply these standards not only to projects within the EU but in all countries within their respective mandates. The geographical territory covered by their mandates is remarkable: for example, the European Bank for Reconstruction and Development (EBRD) is an International Financial Institution that supports projects in more than thirty countries, ranging from the Southern and Eastern Mediterranean, to Central and Eastern Europe, to Central Asia.²⁴

One less positive remark, however, concerns the viability of the EPE initiative. It is difficult to judge how the EPE is given structure, whether the Banks hold regular meetings on the topic, or simply discuss the effects of the EPE Declaration on environmental aspects of their investment.²⁵

¹⁸ See Chapter II, Sections 2.2.1 (principles) and 2.2.2 (standards).

¹⁹ Farmer A. (2010) (ed.) Sourcebook on EU Environmental Law. Institute for European Environmental Policy.

²⁰ *Ibid.*, p. 6.

²¹ See Kramer L. (2013) The legal framework governing the EU efforts in promoting EU environmental standards in third States. ‘EU environmental norms and third countries: the EU as a global role model?’ Workshop presentation, T.M.C. Asser Institute, The Hague, 19.04.2013.

²² See for European Investment Bank www.eib.europa.eu/projects/topics/environment/epe/index.htm; for Nordic Investment Bank www.nib.int/about_nib/environment/environmental_cooperation/epe, accessed 30.04.2015.

²³ Brundtland Report (1987) Oxford University Press, Part I. Ch.3, ro. 27.

²⁴ See the EBRD webpage, ‘Countries of operation’, www.ebrd.com/where-we-are.html, accessed 30.04.2015.

²⁵ Although in 2016 it will be ten years since the launch of the initiative, there is no separate website devoted to EPE, its goals, and its implementation results. A summary of the EPE initiative can be found on the webpages of the EIB, the NIB, NEFCO, and the CEB, while the EBRD simply refers to the EIB website when mentioning its commitment to the EPE Declaration in its Environmental and Social Policy. See EBRD (2008) Environmental and Social Policy. p. 2, fn. 3.

It is also difficult to say whether this particular initiative is in fact open and is made attractive for other IFIs to join.²⁶

1.2 The European Principles for the Environment: character

The legal environmental standards adopted by EPE Banks are not really conventional. From the legal point of view, these are voluntary or ‘non-State’ standards, in other words, standards that are not set by a State and are not enforceable by ordinary legal mechanisms: namely, by courts.²⁷ And indeed, the EPE was envisaged as a voluntary initiative. In the absence of a comprehensive European regime regulating foreign direct investment, the application of European environmental standards in projects outside the EU takes place only on a voluntary basis.

Considering the voluntary character of the EPE Declaration, the natural question that arises concerns the extent to which it binds the Banks. On the one hand, the Declaration contains the provision that the Banks ‘are committed, subject to [their] respective environmental policies, to applying EU principles, practices, and standards to all projects financed by the Statutory Institutions’.²⁸ On the other hand, it is unclear how much commitment to applying the standards is contained in this wording. Consequently, from the legal point of view, it can be suggested that the Declaration is not binding, since there is no explicit legal obligation to apply the EPE in investment projects. To support this statement, the Declaration can be compared to the ‘Working procedures between the EIB and the Commission services’. Like the EPE Declaration, this document contains a provision, stating that:

‘Projects to be financed in third countries are assessed on the basis of appropriate environmental principles and standards, taking into account those enshrined in EU policy and legislation in the field of environment. In all cases projects shall comply with related national and relevant international environmental legislation’.²⁹

Obviously, EU legal obligations could not be imposed upon non-EU countries, as these countries are not required to transpose EU legislation into their national legal order, as opposed to the twenty-eight EU Member States, which do have this obligation. Therefore, there is clearly an obligation for an EU Member State to carry out, for example, an Environmental Impact Assessment

²⁶ The Banks say they hope others will follow their example: ‘As we move forward with the EPE process, the Signatories of the Declaration will encourage other European-based institutions to share the common approach to environmental sustainability as well as work together on specific topics in the interests of greater coherence’. The EPE Declaration (2006), p. 2. However, it is unclear as to whether they mean that other IFIs will launch similar initiatives – or that they are in principle open for others to join the EPE. In the latter case, the mechanism of adherence needs to be clarified: will there be an official signature of the EPE Declaration by a new party, or is a simple unilateral declaration enough?

²⁷ The term is used by Schaper in Schaper M. (2009) *Non-State Environmental Standards as a Substitute for State Regulation?* In Peters A. *et al.* (eds.) *Non-State Actors as Standard Setters*. Cambridge University Press. 304-323. p. 304.

²⁸ EPE Declaration (2006), para 5.

²⁹ European Commission and EIB (2009) *Working procedures between the EIB and the Commission services (DG ENV and DG ECFIN) in the consultation of the Commission under Article 21 of the EIB Statute*, para 2.1.1.

(EIA), respecting all parts of the procedure (data collection, assessment, consultation with the competent environmental authorities and the public in general, etc.), while in a non-EU state, ‘similar’ appropriate standards should be considered, accurately ‘taking into account those enshrined in EU policy and legislation’, in line with the EIB-Commission Working procedures.³⁰

According to an explanation by the European Commission, the EPE Declaration – by its character being a document signed by several IFIs to have as coherent an approach as possible to the application of environmental standards – could not go as far as the ‘Working procedures’ agreement between the EIB and the Commission. The latter is a more ‘binding’ type of agreement only between the Commission and the EIB. The philosophy behind it is that when EU taxpayers’ money is spent on actions within the European Union, the relative EU legislation and policy should be respected, while for actions outside the EU, similar standards should be applied as much as possible, to ensure that public funds are spent in an optimal fashion with respect to the environment.³¹

However, these ‘unconventional’ voluntary standards in the form of the EPE Declaration play an increasingly important role in the development of a conventional environmental regulatory regime.³² Once a bank signs a code of conduct, it becomes mandatory for this bank, since the legal status of the code of conduct for signatory parties differs from its legal status for the rest of the world. In the case of the EPE Declaration, following the expressed commitment to standards’ application, the Banks become *accountable* to their shareholders for its sound implementation. The Banks themselves envisage that they could be held liable for any non-compliance with the undertaken obligations, if not in a regular court, then via compliance mechanisms set up by the Banks themselves. In this way, the Banks, bound by a mutual commitment, make application of the EPE in third countries essential among themselves, attributing to it a certain element of a mandatory requirement.

Moreover, it can be argued that the EPE also have an unavoidable effect on investor-client relationships in the framework of a particular investment project. Thus, just like the Banks themselves, their clients in host countries are expected to share the commitment to the European Principles for the Environment as a whole and to the EU environmental standards in particular. The Banks mention explicitly the necessary application of precaution, prevention, polluter-pays principles, and the principle that the environmental damage shall be rectified at source; the EU environmental standards, in particular those related to industrial pollution, water and waste management, air and soil pollution, occupational health and safety, and the protection of nature.³³

³⁰ See European Commission and EIB (2009) Working procedures between the EIB and the Commission services (DG ENV and DG ECFIN) in the consultation of the Commission under Article 21 of the EIB Statute, para 2.1.1.

³¹ See email exchange with the Deputy Head of Unit ‘Cohesion Policy and Environmental Impact Assessments’, DG Environment, European Commission, 18.03.2011.

³² See Ratsiborinskaya D. (2012) European investment projects in third countries: legally green? *elni Review* 1 (12). 2-7. p. 3.

³³ See for instance EBRD (2008) Environmental and Social Policy, p. 2.

1.3 The European Principles for the Environment: application

The geographical scope of the standards involves uncertainty about the possibility of applying them to all Bank projects. The European Principles for the Environment are applicable at least to the respective regions of operations of each signatory institution.³⁴ It is essential to realise that for projects located in EU Member States, the European Economic Area countries, the EU Acceding, Accession, Candidate and – to some extent – potential Candidate Countries, the EU approach, defined in the Treaties, and the relevant secondary legislation are the logical, uncontested, and mandatory reference.³⁵ Projects in these regions should also comply with any obligation and standards upheld in the relevant Multilateral Environmental Agreements. However, it is remarkable that in all other countries, projects financed by the signatories should comply with the appropriate EU environmental principles, practices, and standards *subject to local conditions*.³⁶ This means that because of such a reservation clause contained in the Declaration, the Banks are bound to apply the EPE in third countries, but not really obliged to do so in the event that local circumstances stand in the way.³⁷ To Douma, ‘this implies that compliance with EU law can be put on the backburner or set aside’.³⁸

Considering these derogations with regard to local conditions, there is evidently no one hundred percent promise to apply European environmental standards in third countries when certain local circumstances obstruct proper implementation of the EPE.

In addition, there is no explicit further indication as to what kind of circumstances these can be. In relation to situations where the reservation is applicable, Banks themselves declare to apply standards with reference to such factors as ‘the costs of application’ and ‘the local conditions that prevail’.³⁹

On the one hand, such provision makes think about *physical circumstances* that prove to be an obstacle. An example of this can be a project’s infrastructure not enabling a comprehensive application of the EPE, as some technologies designed for EU Member States and required for application by EU environmental law are not envisaged to function in harsh conditions, such as temperatures below -45 degrees Centigrade, which is a regular winter temperature in Russia and Mongolia.⁴⁰

³⁴ See the EIB website ‘The European Principles for the Environment’, www.eib.europa.eu/projects/topics/environment/epe/index.htm, accessed 30.04.2015.

³⁵ See The European Principles for the Environment (2006) EIB Corporate Responsibility Report. p. 43

³⁶ *Ibid.* According to the European Commission, ‘in practical terms, it is often a challenge to interpret the application of the EPE principles in countries outside the EU, for example, in the ENP countries’. See the European Commission (2009) *Promoting effective financing for the environment in regions covered by the enlargement process and the European Neighbourhood Policy*. SEC 1309 final.

³⁷ The NIB and EIB state that ‘the signatories will apply the EPE, with reference to local circumstances’. See ‘The European Principles for the Environment’, NIB website, www.nib.int/about_nib/environment/environmental_cooperation/epe, accessed 11.11.2014.

³⁸ Douma W. (2010) The EBRD and Russia: Stimulating European Principles for the Environment. In Douma W., Mucklow F. (eds.) *Environmental Finance and Socially Responsible Business in Russia*. T.M.C. Asser Press. 169-185. p. 175.

³⁹ See the EPE Declaration (2006).

⁴⁰ Prasek D. (2013) *The European Principles for the Environment – EBRD Experience*. ‘EU environmental norms and third countries: the EU as a global role model?’ workshop presentation, T.M.C. Asser Institute, The Hague, 19.04.2013.

On the other hand, supposedly, one can also think of *legal hurdles* or situations where national regulatory provisions in third countries do not enable full application of the EPE. For example, according to EBRD Environmental and Social Policy, the unavoidable displacement of local residents, caused by projects such as the construction of a motorway, must be duly compensated, and the rate of compensation for lost assets should be calculated at full replacement cost: namely, the market value of the assets plus transaction costs.⁴¹ Host countries that do not have similar provisions in their national legislation at times refuse to grant compensation at full cost.⁴² This shows that the type of regulatory structure of a host country makes its environmental legislation more or less sensitive to European influence. Additionally, as it is demonstrated in Chapter VIII, third countries lack competent authorities that can take appropriate steps to implement provisions of the EU legislative instruments (e.g. to enable an appropriate assessment under the EIA Directive or to fulfil the requirement of the Directive concerning integrated pollution prevention and control, obliging large-scale industrial projects to possess an integrated permit).

On their part, the Banks acknowledge that the national environmental requirements of a host country are impossible to disregard: for example, the EBRD's Environmental and Social Policy states that

'... the projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements'.⁴³

As investment practice of the Banks demonstrates, when domestic standards are in place, and when these are higher than EU standards, these are the domestic standards that can and must be applied. The EBRD Policy, for example, also clarifies that

'... when the host country regulations differ from the levels and measures presented in EU environmental requirements, projects will be expected to meet whichever is more stringent... For each project, the Bank will identify and agree with the client the relevant applicable environmental requirements and guidelines'.⁴⁴

The Banks seem to recognise that there is room for improvement regarding legal certainty in relation to EPE application. They promise that 'the signatories will assess compliance with the EPE before agreeing financing'.⁴⁵ The NIB states that in the process of EPE application, the Banks 'will build up the capacity to meet and enforce the requirements of the Principles'.⁴⁶ An EBRD representative explained that, in practice, the Bank strives to apply the same technical and legal

⁴¹ See EBRD (2008), Performance Requirement 5: Land Acquisition, Involuntary Resettlement and Economic Displacement, p. 32. The EBRD Policy is based on Performance Requirements, reflecting the European Principles for the Environment.

⁴² Prasek (2013).

⁴³ EBRD (2008), p. 26.

⁴⁴ EBRD (2008), p. 27.

⁴⁵ Thomas (2006), p. 2.

⁴⁶ NIB website, 'Environmental Principles for the Environment', [www.nib.int/about_nib/environmental/environmental_cooperation/epe](http://www.nib.int/about_nib/environmental_environmental_cooperation/epe), accessed 19.06.2013.

standards as within the European Union for new project facilities, while for existing facilities, sometimes built decades previously, the Bank proposes an environmental plan that envisages a gradual upgrade towards the EPE.⁴⁷ For co-financed projects, the signatories will seek to agree upon a common approach to the project with the other financing institutions involved and, where possible, based on or consistent with the EPE.⁴⁸

Additionally, it is maintained, following the logic of Biedenkopf, that with a growing number of projects applying EU standards, uncertainties about their impact and efficiency decrease.⁴⁹ It should also be mentioned in this regard that environmental standards tend not to be significantly different among developed countries: in environmental matters, many States face problems similar to those of the EU due to comparable domestic developments like industrialisation, the change in consumption patterns, and lifestyles.⁵⁰ Many are interested in learning from the European experience.⁵¹ Therefore, such 'natural' approximation process is not limited to only one country. Considering the broad geographical mandate of the EPE Banks in Eastern Europe and Central Asia, the common approach may in the long run create a regional legal standard level for environmental requirements that pertain to investment projects.⁵² This would enhance economic predictability and legal certainty, and be a positive effect for all parties involved.

In summary, it becomes obvious from the above that the actual level of environmental protection that could potentially be achieved in European FDI projects in third countries cannot be identical to that in the EU.⁵³ Despite the adherence of EPE Banks to EU principles and standards, the set of applicable standards in a particular investment project depends on the local situation, conditions, and domestic legal requirements – and possibly even on the cost of application.⁵⁴

This having been said, however, legal uncertainty remains as to the extent to which the EPE is to be applied in each particular investment project. The reservation making application of the EPE in third countries subject to local conditions contributes to flexibility in standards' application, but limits the effects of such application in practice. More importantly, it questions the status of the EPE Declaration as the Banks' environmental accountability framework.

⁴⁷ Prasek (2013).

⁴⁸ Thomas (2006), p. 1.

⁴⁹ Biedenkopf K. (2009) *Policy Diffusion and Environmental Pioneership: Insights for Transatlantic Cooperation fostering Biodiversity and Biosafety?* Institute of International Studies Research Programme. p. 6.

⁵⁰ Prasek (2013).

⁵¹ Thuzar M. (2012) ASEAN and the European Union: Lessons in Integration. *e-International Relations*. p. 1; Bilal S. (2005) *Can the EU Be a Model of Regional Integration? Risks and challenges for developing countries*. Conference paper, European Centre for Development Policy Management (ECDPM). p. 1. See also Chapter III, Section 3.1.4, regarding the interest from third countries in applying European standards.

⁵² As expected, outside of the projects financed by the EPE Banks, the EU standards are more likely to be selected, adopted or applied, if they are comparable with the domestic practices, rules, and traditions.

⁵³ However, it is assumed that European legal standards can indirectly result in a gradual change in third-country environmental standards, caused not by political but by economic incentives. Applying EU standards in investment projects, EPE Banks provide a powerful argument for a host country legislator in favour of doing likewise: particular successful investment projects may be a demonstration of the beneficial application of EU standards, thus providing a good example for local authorities. Given their voluntary character and their practical orientation, European standards and the best practices used in investment projects serve as an example for other similar projects in a given country. This effect was referred to as 'lesson-drawing' in Schimmelfennig F., Sedelmeier U. (2005) *The Europeanisation of Central and Eastern Europe*. Cornell University Press.

⁵⁴ In this regard, see Douma (2010), p. 175.

The question about the Banks' accountability therefore acquires a more instrumental character, and can be modified as 'how to test whether and to what degree the European Principles for the Environment are being applied in the Banks' foreign direct investment projects?' Knowing from the outset that European standards might not be fully applied in a particular project – and in relation to the question posed above – the central problem raised by this study is 'how to evaluate the degree of standards' application?'⁵⁵ A closer look at the Banks' accountability mechanism might shed some light on this problem.

2. THE MECHANISM OF EPE BANKS' ACCOUNTABILITY

Obviously, the law of the European Union cannot be imposed upon the legislation of third countries. At the same time, however, the Declaration on the European Principles for the Environment, discussed above, commits the signatories to promote EU environmental standards outside the Union, notwithstanding that 'for projects in countries other than EU members, the time frame [...] for achieving compliance with EU environmental requirements [...] may take into account the cost of application and the local conditions that prevail'.⁵⁶ From this perspective, the voluntary standards that EPE Banks commit themselves to follow are, according to Hachez and Wouters, 'vague and incomplete, and hardly form a basis for accountability'.⁵⁷

While disagreeing with these findings, this study admits the vagueness around the European environmental standards' application in third countries. At the same time, it argues, in such a situation, a firm theoretical accountability framework is needed, equipped with instruments that allow the evaluation of the degree of standards' application. Such a framework, similar to the one established in Chapter IV, can be applied to the Banks' common investment procedures in relation to third countries. Therefore, it is necessary to examine the respective investment practices of EPE Banks according to the components of the accountability mechanism: 'processes', 'consequences', and 'preconditions'.⁵⁸ Each of these components of accountability mechanism is addressed below in relation to EPE Banks. This analysis will be conducted below on the example of the two EPE Banks that provide the largest investment volumes to third countries: the EIB and the EBRD.⁵⁹ In addition, as it has become clear from the theoretical study on the IFIs' accountability, an analysis of a Bank's environmental conduct cannot be founded only on legal provisions. In order to consider

⁵⁵ One can go even further by questioning, in situations where local circumstances prevent the full application of EU legal standards, how much application is *enough* to ensure that the Banks nevertheless fulfil their environmental mandate, as expected by their forum? This is, however, a question for future research, which can be based comfortably on the findings of this study.

⁵⁶ EBRD (2008), p. 27.

⁵⁷ See Hachez, Wouters (2012), p. 94.

⁵⁸ See Chapter IV, Section 3.1, Figure 1.

⁵⁹ Thus, in 2013 the EBRD invested in total EUR 8,498 million, with two-thirds outside the EU (see EBRD (2013) Financial report); the EIB disbursed in total EUR 54 001 million, of which EUR 5,459 million was to third countries (see EIB (2013) Financial report).

the full range of the Banks' existing environmental accountability, this study therefore needs to focus on both its *de jure* and *de facto* aspects.⁶⁰

2.1 'Processes' as a component of EPE Banks' accountability mechanism

According to the findings of the previous chapter, 'processes' as a component of the accountability mechanism, make use of such instruments as setting objectives to be achieved and assessing the implementation of such objectives in practice.

2.1.1 Objectives of EPE Banks

The central objective of the Declaration has to do with 'applying EU environmental principles, practices and standards to all projects financed by the Signatory institutions'.⁶¹ Not all signatory Banks, however, have been environment-oriented from the beginning. As already discussed in Chapter III, the individual mandates of each of the Banks are highly diverse, and not necessarily include the objectives of environmental protection. Therefore, after signing the Declaration, all five signatories were united by a newly formulated common goal, and application of the EPE was introduced officially as another general objective in addition to, for example, commercial gains and financial competitiveness. However, being primarily financial institutions by nature, the EPE Banks seem to be caught between their role as banks pursuing financial goals and the development objective of their mandate. On top of this, there appear to be additional though not less important standards of operation, such as environmental safeguards.

The Sourcebook on EU Environmental law, prepared by the Banks together with the Institute for European Environmental Policy, translated the general objective of EPE application into a comprehensive guide with regard to the applicable cross-sectoral and sector-specific European environmental legislation, practices, and standards that needed to be considered during project planning and development.⁶²

As well as these common objectives, each of the Banks elaborated its individual environmental objectives, which are contained in instruments such as respective strategies, statements, and missions. For example, the European Investment Bank in its 2009 *Statement of Environmental and Social Principles and Standards* declares that 'in the rest of the world, though EU law formally does not apply, the benchmark for the EIB is again the legal principles and standards of the EU'.⁶³ Interestingly, at the same time, according to the Statement, 'any derogation

⁶⁰ See Amtenbrink F. (1999) *The Democratic Accountability of Central Banks. A comparative study of the European Central Bank*. Hart Publishing. p. 39.

⁶¹ See EPE Declaration 2006.

⁶² Farmer (2010).

⁶³ EIB (2009) *Statement of Environmental and Social Principles and Standards*. p. 18.

from the requirements of the Bank should be justified by the promoter within the framework of the general environmental and social principles and standards' and 'in some cases phasing will be justified such that the goal of EU requirements is achieved in stages, an approach also sometimes adopted by the EU in the enlargement countries'.⁶⁴ The EIB thus lays the primary responsibility for non-application of EU environmental standards with the party that applies for an investment grant.

The EIB *Environmental and Social Handbook*⁶⁵ is one step closer to the practical application. It provides an operational translation of the policies and principles contained in the Statement of Environmental and Social Principles and Standards. It defines, *inter alia*, the main objectives in order for projects to be eligible for EIB financing on environmental grounds. These include tackling climate change: e.g. energy efficiency and renewable energy; protecting nature and biodiversity; reducing the impact of the environment on human health: e.g. the supply of safe drinking water and waste-water treatment, and improvements to air quality; promoting the sustainable use and management of natural resources: e.g. waste management and watershed management; and improving the quality of life in urban environments: e.g. urban transport and urban renewal.⁶⁶

Moreover, the EIB Board of Directors has approved a periodical Operational Plan. According to the Operational Plan for 2013-2015, climate action is the main focus of the Bank's lending in regions outside the EU.⁶⁷

In practice, as already mentioned, it is the promoter of a particular EIB project that is responsible for achieving compliance with specific project objectives, applying relevant legal standards and policies, and managing the environmental impacts and risks associated with the project – for example, by structuring the project to meet the EIB's environmental standards and requirements.⁶⁸

In turn, in 2008 the EBRD adopted the Environmental and Social Policy (ESP), and further revised it in 2014. In its ESP, the Banks confirmed its commitment to 'promoting environmentally sound and sustainable development in the full range of its investment and technical cooperation activities'.⁶⁹ To give this general objective a more definite form, the Bank developed a number of performance requirements (PRs) for key areas of environmental issues expected to be met by financed projects. Each performance requirement defines its objectives and the desired outcomes, followed by the specific requirements for clients to help them achieve these outcomes.⁷⁰ Thus, for

⁶⁴ EIB (2009) Statement of Environmental and Social Principles and Standards. p. 18. Note that a party-beneficiary that receives an investment grant is referred to by the EIB as 'promotor', and by the EBRD as 'client'. This terminology is used in this study reciprocally in relation to each of the two Banks, analysed below.

⁶⁵ EIB (2013) Environmental and Social Handbook.

⁶⁶ See EIB (2013), pp. 99-100.

⁶⁷ EIB (2013a) The EIB Group Operational Plan 2013-2015. Luxembourg. p. 22.

⁶⁸ The 'promoter' is defined as 'EIB's counterpart in an operation/project, as defined in the finance contract'. See EIB (2013), p. 7. The EBRD, by contrast, uses for that purpose the term 'client', defined as 'the executing agency that signs the Contract for the Services' with the Bank. See EBRD (2012) Harmonised Standard Form of Contract: Consultant's Services. p. 11. In this study, these terms are used interchangeably.

⁶⁹ See EBRD (2008), p. 2. See also Article 2 (1) (vii) of the Agreement Establishing the European Bank for Reconstruction and Development. In EBRD (2013) *Basic Documents of the EBRD*. p. 5.

⁷⁰ EBRD (2008), p. 7.

example, under PR 1 on the Environmental and Social Appraisal and Management, the Bank requires clients to develop a systematic approach, tailored to the nature of their projects, to managing environmental risks and opportunities.⁷¹ Although not compulsory, clients are encouraged to consider adopting accredited management systems such as the ISO 14001.⁷²

Furthermore, as a signatory to the European Principles for the Environment the Bank underlines its commitment to ‘promoting the adoption of EU environmental principles, practices and substantive standards by EBRD financed projects, where these can be applied at the project level, regardless of their geographic location’, specifying further that ‘when host country regulations differ from EU substantive environmental standards, projects will be expected to meet whichever is more stringent’.⁷³

As for concrete project objectives, each client is expected to set up an overall environmental and social action plan (ESAP), taking into consideration that ‘projects will be designed to comply with the relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements’.⁷⁴ Compliance with relevant national laws is an integral part of all PRs. In a situation when the ‘host country regulations differ from the levels and measures presented in the EU environmental requirements, projects will be expected to meet whichever is more stringent’.⁷⁵ Finally, ‘where EU environmental requirements do not exist, the client will apply other good international practice such as the World Bank Group Environmental Health and Safety Guidelines’.⁷⁶ This means that the Bank identifies and agrees with the client on the relevant applicable environmental requirements and guidelines in relation to each particular project.

2.1.2 Assessment of EPE Banks’ environmental conduct

With regard to assessment as one of ‘processes’ within the Banks’ accountability mechanism, it can be argued that all five Banks follow their internal assessment rules, and realise assessments in practice. However, several general problematic aspects exist, related to assessment of differences between Banks’ factual and legal arrangements, as well as to hurdles of internal and external assessment. These aspects are addressed in greater detail below.

Assessment of legal and factual arrangements. One problematic aspect of assessment relates to the differences between factual and legal arrangements. On the one hand, research shows that while in theory there exists some inconsistency between the two,⁷⁷ in practice it seems to be even

⁷¹ EBRD (2008), p. 15.

⁷² *Ibid.*, p. 17. See for further reference ISO (1996) *ISO 14001 - Environmental Management – Specifications with Guidance for Use*. International Organisation for Standardisation: Technical Committee. ISO/TC 207, Geneva.

⁷³ EBRD (2014) Environmental and Social Policy, p. 1.

⁷⁴ EBRD (2008), p. 26.

⁷⁵ See *Ibid.*, p. 27.

⁷⁶ *Ibid.*

⁷⁷ See Chapter IV, Section 3.2.2.

stronger in the case of International Financial Institutions.⁷⁸ Consequently, in the sense of Amtenbrink, any study of the IFIs' accountability mechanism restricted to the legal provisions governing the accountability at some point may fall short in terms of in-depth assessment.⁷⁹ The reason for this is that the boundaries of accountability are in a constant state of flux.⁸⁰ The actual degree of accountability may depend upon factual circumstances rather than only upon legal provisions.⁸¹ For example, political engagement of late has been geared towards pushing voluntary self-regulation into enforceable commitments – though not necessarily through state ruling. In other words, in real life, *de facto*, an International Financial Institution frequently has an accountability arrangement that is different from what can be deduced purely on the basis of legal provisions.⁸²

Nevertheless, the recognition of a voluntary code is 'influenced by the process through which it is established, thus making the code creation process crucial to its eventual adoption'.⁸³ The process often involves some degree of participatory negotiation, frequently lasting over two years, with most codes also including some form of compliance assessment or certification.⁸⁴ Consequently, Goetz and Jenkins argue that the distance between factual and juridical accountability in practice is getting smaller, by saying that the 'new, more exacting standards of accountability, combined with a decreasing public tolerance for weak enforceability, are raising awareness (if not yet closing the gap) between *de jure* and *de facto* accountability'.⁸⁵

As discussed above, although obligations listed in the EPE Declaration originally possess a voluntary character, they become mandatory for the circle of the signatory Banks, since the legal status of a code of conduct for them differs from the code's legal status for the rest of the world. Therefore the possibility of judging the Banks' performance by an independent body, and not only internally but externally as well, is of considerable importance. At the same time, the Declaration engages the Banks in promoting European environmental standards outside the EU, 'if practical and feasible' and 'subject to local conditions'. It therefore makes no sense to focus closely on the *enforcement* of legal environmental standards, because their application in third countries remains conditional. In this situation, it is difficult to talk about 'traditional' forms of environmental compliance and enforcement, guaranteed by national judiciary and based on the rule of law. However, this is not the rule of law in its classical form. A key concept in this new approach will

⁷⁸ Edwards R. (2008) The Role of the General Counsel of an International Financial Institution. *Kansas Journal of Law & Public Policy* XVII (2). 254-272; Bradlow D. (2009) Developing Countries Debt Crises, International Financial Institutions and International Law: Some Preliminary Thoughts. Washington College of Law Research Paper 2009-01.

⁷⁹ See Amtenbrink (1999), p. 22.

⁸⁰ Goetz A., Jenkins R. (2002) Voice, Accountability and Human Development: The Emergence of a New Agenda. *UNDP Occasional Paper*, UNDP, p. 8.

⁸¹ See Amtenbrink (1999), p. 22.

⁸² Moreover, financial institutions often face plural accountabilities (financial, environmental, social) that change over time.

⁸³ Ebrahim A. (2003a) Accountability in Practice: Mechanisms for NGOs. *World Development* 31 (5). 813-829, p. 820. See also Scott, who writes that a code becomes legitimate when it is viewed as 'the property of a situation or behavior that is defined by set of social norms as correct or appropriate' (Scott W. (1992) *Organisations: rational, natural and open systems*. Prentice Hall, p. 305), or as a 'condition reflecting cultural alignment, normative support or consonance with relevant rules or laws' (Scott W. (1995) *Institutions and organisations*. In Whetten D. (ed.) *Foundations for Organisational Science*. Sage, p. 45).

⁸⁴ Ebrahim (2003a), p. 820.

⁸⁵ Goetz, Jenkins (2002), p. 86.

involve the notion of accountable investment, with an evaluation of the extent to which EPE standards have been implemented at the level of a project as part of the existing accountability mechanism within each of the Banks. For reasons of clarity, it needs to be repeated that this approach is based on *ex-post* evaluations of EPE application in investment projects, or at the end of each phase of the multi-phased project. It is not to be confused with other types of assessments that the Banks may hold *ex-ante*, such as project screening and appraisal.⁸⁶

Banks' internal assessment. Another problematic aspect can be found in the organisation of the Banks' internal assessment. Under each particular investment project concerning EIB involvement, it is contractually agreed that the promoter will provide the Bank with periodic and final environmental reporting. It is also the promoter's task to facilitate monitoring missions carried out by the EIB or third parties. The Bank itself assigns the project team, which has overall responsibility for the project operation, including environmental aspects. The project team is supported in its activities by the environment, climate, and social office (ECSO), whose task also involves an environmental and social assessment of operations. The extent of the team's intervention is determined by the level of required environmental due diligence,⁸⁷ as well as by the significance and complexity of the potential impacts and risks.⁸⁸ Furthermore, in the event that a project is expected to have a significant impact on the environment, the environmental assessment group (ENVAG) within the EIB can also designate a representative with the appropriate sector expertise who supports and provides advice to the Team on environmental matters. Nevertheless, 'the responsibility for the project appraisal and monitoring remains with the Project Team'.⁸⁹

As well as the above, the EIB possesses an Operations Evaluation mechanism (EV), which falls under the Inspectorate General department. Operations Evaluation carries out *ex-post* evaluations not only of particular projects but also of a broader range of activities undertaken by the EIB Group.⁹⁰ The evaluation takes place during the later stages of the project's cycle, ranging normally from a year and a half to three years after its completion; in exceptional cases, however, the EV may carry out an evaluation during implementation of the project.⁹¹ Its objective is to assess the Bank's operations 'with a view to identifying aspects which could improve operational

⁸⁶ While the screening and appraisal of an applicant project, undertaken before the official disbursement of funds, can also assess the extent to which the project client has taken the EPE standards into account.

⁸⁷ 'Due diligence' stands for a comprehensive appraisal of a business undertaken by a prospective buyer, with the aim of establishing its assets and liabilities, and evaluating its commercial potential. See Stevenson A., Lindberg C. (2010) (eds.) *New Oxford American Dictionary*. Oxford University Press.

⁸⁸ See EIB (2013), p. 99, saying that 'If an ECSO specialist has been attributed as a team member to a project, the ECSO specialist will review the environmental and social monitoring reports and, as necessary, will participate in the monitoring missions to ensure project compliance with the environmental and social conditions. In these cases, the ECSO specialist will be responsible for signing off on the promoter's compliance with the environmental and social conditions'.

⁸⁹ EIB (2013), p. 100.

⁹⁰ See EIB (2009) Operations Evaluation Terms of Reference. p. 2. According to this mandate, Evaluation 'focuses on the quality and the results of the EIB Group's operations within the framework of relevant EU policies (the Treaty, Directives, Council Decisions, Mandates, etc.) and the decisions of the EIB Governors'.

⁹¹ See EIB Evaluation Methodology, at www.eib.europa.eu/projects/evaluation/methodology/index.htm, accessed 10.02.2014.

performance, accountability and transparency'.⁹² However, a problem such as the lack of human resources stands in the way of comprehensive and frequent evaluations.⁹³

Compared to the EIB, the EBRD appears to take a more active role in assessment activities, which it splits into *monitoring* and *evaluation*. The Bank has formulated the purpose of a monitoring process, and has stipulated that monitoring is intended to be carried out by both the client and the Bank.⁹⁴ For each project, the Bank will construct a monitoring programme with the client, specifying the appropriate monitoring tools, based upon the results of due diligence and of any public consultation that has taken place and is within the framework of legal agreements concluded with the client.⁹⁵

The evaluation of the Bank's environmental performance and of the environmental aspects of EBRD-financed projects is conducted by the Bank's Evaluation Department (EvD), which is independent of the Bank's operations and reports directly to the Bank's Board of Directors.⁹⁶

Regarding the methods employed for assessment, in general, methods used by the Operation Evaluation section of the EIB and the Evaluation Department of the EBRD resemble the outcome approach to assessing performance, laying at the basis of a results-based accountability,⁹⁷ and where the 'starting point for [...] evaluations are the environmental and social objectives established for each project at the time of commitment, and the relevant Environmental Policy, Country, and Sector Strategy effective at the time of commitment'.⁹⁸ In other words, an assessment of the Bank's projects and policies aims at 'establishing how well they meet their objectives and the extent to which they comply with the Bank's mandate',⁹⁹ known as results-based accountability.¹⁰⁰ In relation to the assessment methods, both the EIB and the EBRD are members of the Evaluation Cooperation Group (ECG). According to the practices established by the ECG, each evaluation conducted by the Banks seeks to identify objectives and results at three levels:

⁹² EIB (2009) Operations Evaluation Terms of Reference. p. 2.

⁹³ EIB (2013b) Operations Evaluation: Ex post evaluation of EIB's Investment Fund Operations in FEMIP and ACP countries. p. 2.

⁹⁴ The EBRD distinguishes between several purposes that monitoring can serve. The first is to ensure that the applicable standards and various environmental and social goals included in legal agreements are being met. The second is to keep track of ongoing environmental and social impacts associated with investments, and to provide feedback on the effectiveness of mitigation measures. The third is to use the monitoring data as indicators of how the Bank's investments are contributing to sustainable development at both the project and the portfolio levels, by tracking improvements achieved during project implementation. See EBRD (2008), p. 2.

⁹⁵ See EBRD (2008), p. 2. According to it, the 'monitoring mechanisms include, inter alia: (i) review of periodic reports submitted by the client (at a minimum, annually) on the implementation of ESAPs and any other environmental and social requirements; (ii) monitoring missions by the Bank's environmental and social specialists or consultants to conduct a detailed review of investments with significant social and environmental issues and impacts, in order to determine whether the client is implementing the ESAP and complying with the environmental and social covenants; and (iii) periodic third party monitoring, for example, by independent specialists or representatives of the local communities, submitted to the client and the Bank'.

⁹⁶ EBRD (2008), p. 2.

⁹⁷ See Chapter IV, Section 2.2.2. See also next Chapter VI for extensive discussion on performance evaluation using indicators.

⁹⁸ EBRD (2013), p. 8.

⁹⁹ *Ibid.*

¹⁰⁰ For a definition of results-based accountability, see Chapter IV, Section 2.2.2.

- Output - the products, capital goods, and services that result from an operation;
- Outcome - the short and medium-term effects directly attributable to output;
- Impact - the positive or negative long-term effects to which an operation contributes, directly or indirectly, intended or unintended.¹⁰¹

Under the ECG, evaluation questions are designed around the OECD Development Assistance Committee (DAC) Criteria, focusing on:

- Relevance (additionality, or how the Bank has added value to the project);
- Effectiveness (fulfilment of operational objectives and financial performance of the project or company);
- Efficiency (bank handling and bank investment performance);
- Impact and sustainability (transition impact, environmental and social impact and change).¹⁰²

Overall performance is rated on a four-point scale: in the EIB's case, a project can be assigned rates of an *excellent*, *satisfactory*, *partially unsatisfactory*, or *unsatisfactory* performance,¹⁰³ while in the case of the EBRD, a project can be rated *highly successful*, *successful*, *partly successful*, or *unsuccessful*.¹⁰⁴ Information obtained during evaluations is collected from documentation including background document reviews, literature reviews and case studies, as well as from interaction with participants through interviews, focus groups, structured questionnaires, anonymous surveys, and field inspections.¹⁰⁵

Banks' external assessment. One more problematic aspect relates to the realisation of the Banks' external assessment. As already formulated in relation to IFIs in general, the self-evaluation practices of EPE Banks should be considered as a weakness, unless it is simply a first step in a wide-ranging process involving and learning from both internal and external assessment.¹⁰⁶ The Banks are not alone with regard to assessment activities: external stakeholders also keep an eye on the process, or are themselves involved in judging the performance of EPE Banks.

It has become clear from the overview that problematic aspects exist in relation to the assessment of EPE Banks. Among them is the gap between internal and external assessments, and the discrepancy in assessments caused by factual and legal arrangements. Considering the above, on a general note, the global network of civil society groups – BankTrack – demanded that the

¹⁰¹ See the EBRD Methodology, at www.ebrd.com/pages/about/what/evaluation/methodology.shtml, accessed 10.02.2014.

¹⁰² *Ibid.*

¹⁰³ The EIB Evaluation Methodology, at www.eib.europa.eu/projects/evaluation/methodology/index.htm, accessed 10.02.2014.

¹⁰⁴ EBRD (2013), p. 8.

¹⁰⁵ See EBRD Methodology, at www.ebrd.com/pages/about/what/evaluation/methodology.shtml, accessed 10.02.2014.

¹⁰⁶ See Chapter IV, Section 3.2.2, for discussion on different types of assessment. For example, the EBRD Evaluation Department has appointed an External Advisory Panel of Experts 'to peer review individual studies, provide expert advice to the Evaluation Department, or develop and deliver customised training'. See the EBRD Methodology, at <http://www.ebrd.com/pages/about/what/evaluation/methodology.shtml>, accessed 10.02.2014.

Banks come up with a ‘new set of reporting obligations’, including ‘measurable targets for implementation, shared with the public at time of adoption’.¹⁰⁷

Others, like CEE Bankwatch,¹⁰⁸ were for this reason critical from the beginning with regard to the launch of the European Principles for the Environment. According to Stoczkiewicz, the CEE Bankwatch Network’s Policy coordinator, ‘while we very much welcome the fact that the EIB has signed up to the European Principles for the Environment, the devil is always in the details – in this case in the implementation policies and procedures’.¹⁰⁹ Bankwatch criticises the EIB for frequently neglecting environmental and social aspects in its investments, for a strong aversion to share information with the public, and for the fact that its staff is too small to monitor projects effectively.¹¹⁰

Thus, according to Bankwatch, the major problem is that the EIB does not commit itself to a binding set of operational environmental and social policies.¹¹¹ For example, the EIB is accused of failing to support EU policy goals of tackling climate change and supporting sustainable development. The Bank’s lending in the important energy and transport sectors, and specifically its lending outside the EU, often has clearly negative – sometimes devastating – impacts on the environment and on the well-being of affected communities.¹¹²

Also the EBRD has financed a number of environmentally and/or socially harmful projects.¹¹³ And although in recent years the Bank has increased its investments involving energy efficiency, Bankwatch claims it continues to diminish the impacts of these investments by

¹⁰⁷ BankTrack (2011) *The Outside Job. Turning the Equator Principles towards people and planet*. BankTrack submission to the Equator Principles update process. p. 5. BankTrack follows the operations and investments of private-sector banks, and their effect on society and the environment. See www.banktrack.org, accessed 10.02.2014.

¹⁰⁸ CEE Bankwatch focuses on the problems that result from projects backed by publicly owned financial institutions such as the European Investment Bank and the European Bank for Reconstruction and Development, as well as EU structural funds. Bankwatch monitors their activities and promotes environmentally, socially, and economically sustainable alternatives to their policies and projects. See <http://bankwatch.org>, accessed 10.02.2014.

¹⁰⁹ See Friends of the Earth Europe (2006) *EIB signs up to EU environmental principles - but the devil is in the details, warn NGOs*. Press release, www.foeeurope.org/press/2006/joint_30_May_EIB.htm, accessed 11.02.2014.

¹¹⁰ See CEE Bankwatch website, ‘Who we monitor: the European Bank of Reconstruction and Development (EBRD)’, <http://bankwatch.org/our-work/who-we-monitor/ebd>, accessed 17.09.2013; see also Husova K. *et al.* (2009) *Change the lending, not the climate. The European Investment Bank’s dirty energy tendencies are eclipsing its advances on clean energy – and undermining EU climate targets*. CEE Bankwatch; see also CEE Bankwatch website, ‘Who we monitor: the European Investment Bank (EIB): transparency and participation’, <http://bankwatch.org/our-work/who-we-monitor/eib/eib-transparency-participation>, accessed 17.09.2013; and Stoczkiewicz M. (2011) *EBRD and the environment - A marriage not yet made in heaven. Bankwatch Mail* 48.

¹¹¹ See CEE Bankwatch website, ‘Who we monitor: the European Bank of Reconstruction and Development (EBRD)’, <http://bankwatch.org/our-work/who-we-monitor/ebd>, accessed 17.09.2013.

¹¹² Husova *et al.* (2009). This report claims that €7 billion was invested for energy in the global South by the EIB in the 2002-2008 period, of which 93% went to oil, gas, large hydropower projects, and transmissions lines. Looking at EIB lending inside as well as outside the EU, the report found that between 2002 and 2008 the EIB lent €18 billion to the extractive industries sector, for oil, gas, and coal projects. This investment accounts for 49 percent of the EIB’s lending to the entire energy sector (generation and transmission businesses) during that period. Therefore, while the EIB has started to increase its greener lending practices, especially on climate mitigation, its continued role in financing environmentally damaging projects undermines its credibility. See also the CEE Bankwatch website, ‘Who we monitor: the European Investment Bank (EIB): negative impacts’, <http://bankwatch.org/our-work/who-we-monitor/eib/eib-negative-impacts>, accessed 17.09.2013.

¹¹³ For example, the Bank has been funding a major polluter, the ZSNP aluminum smelter in Slovakia. See Adelle *et al.* (2010), p. 48; Goldberg D., Hunter D. (2015) *EBRD’s Environmental Promise: A Bounced Check?* Center for International Environmental Law.

simultaneously financing carbon-intensive developments such as coal, oil and gas production, transportation and generation, motorways, and airports.¹¹⁴

Next to Bankwatch, another coalition of the Counter Balance was created in 2007 for the purpose of scrutinising the European Investment Bank.¹¹⁵ Later it ‘expanded the scope of work to other public investment banks such as the European Bank for Reconstruction and Development and the national Development Financial Institutions (DFIs) – all public financial institutions that operate similarly’.¹¹⁶ This organisation also promotes and advocates for stronger accountability mechanisms for these EPE Banks.¹¹⁷

Nevertheless, with respect to external assessment, it can be summarised that the methods used by the above-mentioned assessment organisations to evaluate the environmental component of the Banks’ activities can be narrowed down to case studies, reports, and sporadic publications in the media, or to reports on the Banks’ own websites. In relation to these methods, it can be concluded that while they might be a useful tool to highlight an occasional incidence of faulty implementation of a Bank’s environmental strategy, in general they are not regular, and not based on a particular methodology; hence, they are not sufficient to provide for a systematic external assessment. This may be why – almost a decade after the launch of the European Principles for the Environment – no independent assessment of their application has taken place.

2.2 ‘Consequences’ as a component of EPE Banks’ accountability mechanism

Like the EBRD, the EIB claims that ‘the accountability is a key concept for the Bank’.¹¹⁸ However, while the EBRD, as was shown in the previous section, understands the core of the concept as ‘assessing the effectiveness of the Bank operations’, the EIB sees the main goal of accountability in offering the ‘third parties direct access to a platform for expressing grievance and for seeking remedies as it helps detect and correct system deficiencies’.¹¹⁹ While the EBRD approach, therefore, relates to the assessment component of the accountability mechanism, the EIB approach refers instead to the preconditions for their functioning, related to public participation and public access to justice. Nevertheless, both approaches come together in the consequences phase: they offer room for learning and correction, and, at least in theory, focus on making the Banks more successful in fulfilling public expectations and in increasing the environmental benefits of FDI projects.

¹¹⁴ CEE Bankwatch website, ‘Who we monitor: the European Bank of Reconstruction and Development (EBRD)’, <http://bankwatch.org/our-work/who-we-monitor/ebrd>, accessed 17.09.2013.

¹¹⁵ Counter Balance is a European coalition of development and environmental NGOs aiming at the reform of IFIs, and intending ‘to make European public finance a key driver of the transition towards socially and environmentally sustainable and equitable societies’. See www.counter-balance.org, accessed 10.02.2014.

¹¹⁶ See www.counter-balance.org/about/, accessed 10.02.2014.

¹¹⁷ See for example Stoyanova D. (2014) Holding the EIB to account – a never-ending story.

¹¹⁸ EIB (2013c) Complaints Mechanism Activity report 2009-2012. p. 3.

¹¹⁹ *Ibid.*

In practice, the Banks have different arrangements allowing the public to respond to their activities. The EIB has set up a Complaints Mechanism, allowing the forum – individuals, organisations, or corporations affected by EIB activities – to complain.¹²⁰ The procedure is twofold. Firstly a member of the public can address the Complaints Mechanism Division of the EIB, which is operationally independent of EIB's other departments, and can look for a solution and advise the EIB on a corrective action. Secondly, if the Complaints Mechanism fails to find a satisfactory response, the complaint can be referred to the European Ombudsman.¹²¹ This, however, is not an easy option for residents of third countries, as only European nationals and/or EU residents (or in the case of a legal person, companies that have a registered office in the EU) may lodge a complaint concerning an alleged incident of maladministration with the European Ombudsman.¹²² As far as practical aspects of accountability are concerned, some authors regret that the EIB is not under CJEU jurisdiction, as judicial review would be the most effective remedy available to external stakeholders.¹²³ The Complaints Mechanism/the European Ombudsman construction is considered to be too weak an alternative to judicial review, while more advantage should be taken of the EIB being part of the EU legal order to guarantee an effective accountability to external stakeholders.¹²⁴

Alternatively, the EBRD has established the Independent Recourse Mechanism (IRM) to examine and review complaints about financed projects. The IRM 'gives local groups that may be directly and adversely affected by a Bank project, a means of raising complaints or grievances with the Bank independently from banking operations'.¹²⁵ The IRM has two functions: 1) serving as a Compliance Review that assesses whether the Bank has complied with its policies, specifically the Environmental and Social Policy and the project-specific provisions of the Public Information Policy in relation to a specific project, and 2) problem-solving, the aim of which is to restore a dialogue between parties, typically members of the affected group and the project sponsor, with a view to resolving issues that have given rise to the complaint or grievance.¹²⁶ In assessing a complaint, there may be a recommendation for a compliance review or for a problem-solving initiative – or both or neither.¹²⁷ Worth mentioning is that complainants must be 'a group of two or more people with a common interest, which has suffered or is likely to suffer direct harm as a result of a project that the Bank is likely to finance or has financed'.¹²⁸

¹²⁰ 'Complainants do not need to be directly affected by the EIB decision, action or omission and are not required to identify the applicable rule, regulation or policy that may have been breached'. EIB (2010) Complaints Mechanism Principles, Terms of Reference and Rules of Procedure. p. 11.

¹²¹ EIB (2010) Complaints Mechanism Principles, Terms of Reference and Rules of Procedure. p. 9.

¹²² See Article 227 TFEU. In 2008, the EIB and the European Ombudsman signed a Memorandum of Understanding, in which the latter commits 'whenever the only reason not to inquire into a complaint alleging maladministration by the EIB is that the complainant is not a citizen or resident of the EU, to using the own-initiative power to open an inquiry into the matter'. See European Ombudsman, European Investment Bank (2008) Memorandum of Understanding, accessed 11.02.2014.

¹²³ See Hachez, Wouters (2012), p. 94-95.

¹²⁴ See *Ibid.*

¹²⁵ EBRD (2008), p. 14.

¹²⁶ *Ibid.*, p. 10.

¹²⁷ See *Ibid.* See also the EBRD website, 'Integrity', at www.ebrd.com/about/integrity/irm/about/, accessed 30.09.2014.

¹²⁸ EBRD (2004) Independent Recourse Mechanism. p. 7. NGOs can also act for the group if they provide evidence that there is no adequate or appropriate possibility within the local community to file a complaint.

In relation to the three other EPE Banks, it is remarkable that while the Nordic Investment Bank (NIB) provides some possibility for complaints via its Office of the Chief Compliance Officer,¹²⁹ the Council of Europe Development Bank (CEB) and the Nordic Environment Finance Corporation (NEFCO) do not possess any institutionalised mechanism to deal with complaints. While making possible the feedback from persons concerned, these Banks seem to understand accountability as the availability of some procedural principles of transparency, fight against corruption and internal maladministration, without any coherent links. This fact does no good for the proper functioning of their accountability mechanism.

2.3 ‘Preconditions’ as a component of EPE Banks’ accountability mechanism

The general theoretical discussion about the actor-forum relationship revealed that in order to judge the results, a certain *yardstick* is needed, which would serve as a point of reference in the event of an actor's deviating behaviour being claimed.¹³⁰ To be functional, it is crucial for this yardstick to be based firmly on distinct agreements with members of the forum, and not become too elusive, thus preventing the forum from holding the Banks accountable for their conduct. Basically, it must at least be strong enough to be used against a Bank during the ‘consequences’ phase.

The study of EIB and EBRD practices does not reveal their using of yardstick on a regular and consistent basis. Whereas, on the basis of the arguments set forth in Chapter IV,¹³¹ the role of a yardstick as a ‘precondition’ for the functioning of the EPE Banks’ accountability mechanism must be emphasised. It is argued, that also in relation to the Banks’ accountability mechanism, yardstick is linked to its other components. In relation to ‘processes’ component, the strong link between the objectives and the yardstick has already been addressed in Chapter IV, with the yardstick serving as an arrangement for an actor to answer for its actions. As has been suggested, by comprising a number of applicable standards, and by dividing Banks’ environmental objectives into concrete and quantifiable goals, with a suitable set of instruments to evaluate the achievement of those goals, the yardstick would help in avoiding intentional or unintentional juggling with objectives, such as application of European environmental standards.¹³² Additionally, it would allow discussion regarding the exact degree of implementation in relation to a specific objective.

The yardstick is also linked to the assessment within ‘processes’ component in that it enhances it by giving it a clearer framework, and by providing the instruments (indicators) that make use of the assessment’s instruments.

¹²⁹ See the NIB website, ‘Report misconduct and corruption’, at www.nib.int/contact_us/report_misconduct_and_corruption, accessed 17.02.2014.

¹³⁰ See Chapter IV, Section 1.1, on the actor-forum accountability relationship, and Section 3.4.2 on the necessity of introducing the yardstick into such a relationship.

¹³¹ See Chapter IV, Section 1.1, on the actor-forum accountability relationship.

¹³² See the definition of a yardstick in Chapter IV, Section 3.4.2.

Ultimately, the yardstick as a ‘precondition’ of an accountability mechanism is also related to ‘consequences’ component in that it helps to enforce objectives by adding to the list of alternatives to judicial review. Indeed, trustworthy data showing, for example, that a Bank has done everything possible to reach an environmental objective, demonstrating at what stage things went wrong, and proving that the reasons were unforeseeable or of external character, can assist in avoiding costly litigation. One way or another, the yardstick can contribute to the compliance review.

With regard to transparency, according to the Aid Transparency Index, the EBRD and the EIB are categorised as having poor transparency standards among international investors, and are the two most non-transparent multilateral development banks.¹³³ The poor availability of information forms a major barrier to external assessment. It can be said that the European Principles for the Environment oblige the Banks to meet lenient reporting criteria, which makes it difficult for an external observer to judge the quality and the progress in terms of how the Principles are implemented.¹³⁴ Stakeholders like CEE Bankwatch feel that a reliable way of determining whether the Banks fulfil their obligations under the EPE Declaration is still lacking.¹³⁵ For instance, according to the CEE Bankwatch, despite gradual improvements, the EIB remains the least transparent major public International Financial Institution.¹³⁶ This can be due to the provisions of the EIB Environmental and Social Handbook, according to which, in relation to the preconditions to accountability, the promoter of a concrete investment project is responsible for ensuring transparency and public participation by ‘disclosing project-related environmental information’ and ‘carrying out any stakeholder engagement and consultation required, and/or verifying that any project-related stakeholder engagement and consultation activities carried out by third parties (e.g. host government agencies) meet the standards expected by the EIB’.¹³⁷ Therefore, the Bank itself makes an impression of a closed institution that ‘takes decisions mostly solitarily without inviting or allowing others to be involved – not even those directly affected by its lending’.¹³⁸ Overall, Bankwatch is challenging the EIB to live up to its title of the ‘EU Bank’ and to become transparent and accountable – ‘an institution that values real public benefits and positive environmental and social impacts as highly as lending volume and commercial viability’.¹³⁹

In contrast to the EIB, the EBRD is experienced by Bankwatch’ experts as a ‘communicative bank’, organising annual meetings with NGOs.¹⁴⁰ However, despite the EBRD’s willingness to

¹³³ Aid Transparency Index (2014) International Aid Transparency Initiative. p.1.

¹³⁴ The Sourcebook on EU Environmental law suggests that IFIs follow the standards on the information disclosure, formulated for the corporations: ‘the relevant requirements in this area flow mainly from the provisions of the Aarhus Convention on access to information, public participation in decision-making, and access to justice in environmental matters, which has been ratified by the EU and all its Member States (except Ireland), as well as by most of the Banks’ partner countries in the Eastern Europe, Caucasus, and Central Asia region (except Russia), and of the Convention’s Kiev Protocol on Pollutant Release and Transfer Registers (PRTR), implemented in EU law’. See ‘Disclosure of Environmental Information Held by Corporations’, Farmer (2010), pp. 23-25.

¹³⁵ CEE Bankwatch website, ‘Who we monitor: the European Investment Bank (EIB): transparency and participation’, <http://bankwatch.org/our-work/who-we-monitor/eib/eib-transparency-participation>, accessed 17.09.2013.

¹³⁶ *Ibid.*

¹³⁷ EIB (2013), p. 97.

¹³⁸ *Ibid.*

¹³⁹ CEE Bankwatch website, ‘Who we monitor: the European Investment Bank (EIB)’, accessed 30.09.2014.

¹⁴⁰ Stoczkiwicz M. (2011) EBRD and the environment - A marriage not yet made in heaven. *Bankwatch Mail* 48. p. 4.

engage reasonably openly with civil society in Central and Eastern Europe and beyond, it has been ultimately disappointing for Bankwatch ‘to tally the Bank’s environmental impulse [...] with its actual lending record’.¹⁴¹ Besides, according to the EBRD Public Information Policy, ‘the disclosure of project information is the responsibility of clients’, while the Bank itself does not disclose the following: 1) documents intended for internal purposes, board documents, privileged information such as legal advice and correspondence with legal advisers; 2) any information, the disclosure of which might prejudice an investigation or any legal or regulatory proceedings, that, if disclosed, would in the Bank’s view seriously undermine the policy dialogue with a member country; 3) information that, if disclosed, could violate the law, or prove a threat to the national security of a member country; 4) information, the disclosure of which would contravene the Agreement Establishing the Bank; 5) information in the Bank’s possession that was not created by the Bank, and is identified by its originator as being sensitive and confidential; 6) information related to procurement processes, including pre-qualification information submitted by prospective bidders, tenders, proposals, or price quotations; 7) financial, business or proprietary information received by the Bank in the analysis or negotiation of any investment authorised under Article 11 of the Agreement Establishing the Bank; 8) any treasury operation or any donor-funded or technical assistance project, unless permission is given by the entity or entities concerned to release this information; and finally, 9) information regarding staff members, former staff members, or prospective staff members.¹⁴² In addition, ‘in limited circumstances, the Bank may delay the disclosure of certain information that it would otherwise make publicly available because of market conditions or timing requirements, such as conditions or information relating to publicly listed companies, securities offerings or connected with a commercially sensitive transaction involving, for example, an acquisition or a financial restructuring’.¹⁴³

As to the EIB, the Bank has a number of responsibilities in relation to the assessment of project activities in comparison to the national legal framework, as well as to the EIB environmental and social principles and standards (including the European Principles for the Environment), and also in relation to the assessment of the promoter’s capacity and activities in implementing those standards. Important in this regard is that the Bank is acknowledged to be responsible for ‘disclosing information about its projects in accordance with the requirements of the Aarhus Convention and the EIB Transparency Policy’.¹⁴⁴ Comparably to EBRD, in accordance with the EIB Transparency Policy, ‘while the Bank is committed to a policy of presumption of disclosure and transparency, it also has a duty to respect professional secrecy, in compliance with European laws, in particular Article 339 of the Treaty on the Functioning of the European Union, as well as legislation to protect personal data’.¹⁴⁵ Furthermore, ‘national regulations and banking sector standards covering business contracts and market activity may also apply to the EIB: notably, access shall be refused where disclosure would undermine the protection of the public

¹⁴¹ *Ibid.*

¹⁴² See EBRD (2008), pp. 9-10.

¹⁴³ *Ibid.*, p. 10.

¹⁴⁴ EIB (2013), p. 98. See also UNECE (1998) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, EIB (2015) The EIB Group Transparency Policy.

¹⁴⁵ EIB (2010) Transparency Policy. pp. 9-10.

interest, [...] commercial interests of a natural or legal person; intellectual property; court proceedings and legal advice; the purpose of inspections, investigations and audits'.¹⁴⁶

Summarising the EBRD and EIB policies in relation to access to information, it can be concluded that their provisions leave the Banks much room for manoeuvre for classification of certain information as 'undisclosable', clarifying the poor transparency record attributed to them by the Aid Transparency Index. However, Banks themselves appear to perceive it differently.

Thus, in relation to the accountability, the EBRD Evaluation Policy stipulates that

'... through evaluation, the EBRD demonstrates three key elements of good governance:

- Accountability – assessing the effectiveness of Bank operations;
- Transparency – independently reviewing operations and openly reporting findings;
- Improved performance – learning from past experience to improve future operations'.¹⁴⁷

It is worth noting that, according to the Evaluation Policy cited above, the EBRD sees accountability only as 'assessing the effectiveness of Bank operations'. From the Policy, it follows that there are four components that the evaluation should demonstrate in order for the Bank to find itself 'accountable': delivery on a mandate; coherence and synergy in the use of various instruments; an objective absorption of the lessons of experience and their integration into new activities; and an active pursuit of improved performance over time.¹⁴⁸

This does not appear to be completely correct. Arguably, accountability is more than just an assessment of whether the expected result was reached. This study has already demonstrated that assessment is only one part of the accountability component – 'processes' – along with 'consequences' and 'preconditions'. Furthermore, it is shown that the EBRD considers transparency separately, as another 'element of good banking practice' and not as one of 'preconditions' for accountability. From this fact, it might be concluded that if the Bank fails to ensure transparency, it could still consider itself 'accountable', as long as the 'assessment of effectiveness' is taking place. It is difficult to agree with such a view, as the Bank's operations might still be effective even while it risks being unaccountable. Arguably, the EBRD approach is based on 'input parameters', and it judges the accountability on the basis of, for example, the number of 'green' projects and the number of certified staff. By contrast, as the accountability mechanism essentially includes certain 'processes', which lead to certain 'consequences' and cannot function without certain 'preconditions',¹⁴⁹ it is important to consider not only *what* is achieved but also *by which means* and *on which conditions*. The EBRD example demonstrates that 'assessing the effectiveness of Bank's operations'¹⁵⁰ does not equal accountability; while one of the functions of the accountability mechanism is, indeed, to use assessment in order to 'steer by results'; and to stimulate the Banks to achieve higher levels of performance by using rewards or

¹⁴⁶ *Ibid.*

¹⁴⁷ EBRD (2013) Evaluation Policy, p. 8.

¹⁴⁸ EBRD (2013), p. 2-3. Terminology used in EBRD evaluations is borrowed by the Bank from the OECD (2010) *Glossary of Key Terms in Evaluation and Results-Based Management*. OECD (online).

¹⁴⁹ See Chapter IV, Section 3.4.

¹⁵⁰ EBRD (2013), p. 8.

sanctions in the consequences phase. The availability of preconditions, such as transparency and yardstick, would bring clarity and predictability in Banks' performance and would allow talking about not only effective but also accountable banking.

3. THE MISSING INSTRUMENT OF THE EPE BANKS' ACCOUNTABILITY MECHANISM

The goal of the above sections was not to design new accountability concepts but to examine the existent structures involving those Banks that are signatory to the Declaration on the European Principles for the Environment on the example of the EBRD and the EIB. The study demonstrates that these Banks' activities relating to application of the Principles can be divided into a number of activities related to setting of objectives, realising assessments and experiencing consequences. The realisation of these activities in practice is based on certain preconditions. Above, the critical study on the components of EPE Banks' accountability mechanism have been realised. However, this does not permit a conclusion to be drawn about the ultimate *functioning* of this mechanism. While the sections above do provide an insider's view of the operation and interrelations of the accountability components, they still do not answer the question at the core of this chapter: namely, whether the existing accountability arrangements of the EPE Banks ensure a comprehensive application of standards. All in all, it has become clear that it is difficult to assess the Banks' success in applying European environmental standards, as certain additional instruments of their accountability mechanism are required.

As mentioned, the Banks 'consider the EPE as a common legal framework to be promoted and exported in their regions of operation'.¹⁵¹ However, an examination of the Banks' efforts in implementing EU environmental standards in third countries suggests that they try to tailor them to their own individual structure and needs.¹⁵² As indicated above, projects financed by EPE Banks in third countries must comply with EU environmental principles, practices, and standards, subject to local conditions.¹⁵³

Consequently, paraphrasing Hachez and Wouters, it is suggested that, to a significant extent, the EPE Banks's principles, standards, and operational policies do not constitute a firm substantive accountability framework containing clear-cut performance standards to be *applied* in relation to all Bank-financed projects. Instead, they look like an indicative list of potentially relevant elements that the Banks will *consider* in making their finance decisions.¹⁵⁴ As a result, EPE Banks can suffer problems of credibility, leading to accusations regarding the lack of accountability. For example,

¹⁵¹ Adelle *et al.* (2010), p. 39.

¹⁵² See *Ibid.*

¹⁵³ *Ibid.*, p. 39.

¹⁵⁴ See Hachez, Wouters (2012), p. 17.

as shown in Chapter IV, it is questionable whether the Banks can be trusted fully to assess and monitor their own behaviour while they are investing public funds.¹⁵⁵

Furthermore, the Banks do not possess a clear vision of their accountability concept and mechanism. As a consequence, they frequently classify themselves as *accountable*, although such preconditions of accountability as transparency and availability of a yardstick are either not available or functioning.¹⁵⁶

In relation to transparency, for example, as the research shows, the Banks consider themselves to be *transparent* when only one or two – but not all – components of their accountability mechanism are in fact transparent.¹⁵⁷ Thus, there is clearly considerable room for improvement regarding existing practices.

In relation to yardstick, it was demonstrated that EPE Banks, being simultaneously financial institutions, development banks, and organisations bound by environmental obligations, have a wide array of objectives, often of general nature. This multiplicity and vagueness of objectives can result in calculating behaviour on the part of a Bank: if it fails with respect to one objective, it can claim it was trying to achieve another, let alone acting in line with the preconditions. Consequently, ‘the less a [...] bank is bound to specific objectives the more difficult it becomes to evaluate the bank’s performance, since a suitable yardstick is missing’.¹⁵⁸

It can be concluded that in accordance with the neutral functional theory of law, applied to this study in general, it is maintained that the Banks’ code of conduct has been ‘created, developed and maintained to serve a purpose’.¹⁵⁹ Such purpose, formulated in the Declaration on the European Principles for the Environment, consists, in general, in ‘protecting but also improving the environment in the interest of sustainable development’, and in particular, in ‘applying EU principles, practices and standards to all projects financed by the Signatory institutions’.¹⁶⁰ Put in the context of accountability, the Banks’ attempts to regulate the environmental impacts of their investment projects suggest a higher level of *de facto* accountability. At the same time, other facts, such as Banks’ insufficient attention to the ‘preconditions’ of accountability, demonstrate that self-regulation and even increased attention to the social effects of investment projects do not necessarily go hand in hand with a high degree of accountability. Obviously, an evaluation

¹⁵⁵ See Chapter IV, Section 1.2, on the public nature of IFIs accountability. See also Section 3.1.2 in this chapter on the Banks’ internal and external assessments.

¹⁵⁶ See Chapter IV, Section 3.4, on the detailed description of the accountability mechanism’s preconditions.

¹⁵⁷ For instance, the NIB was reluctant to provide the author with more information on project evaluation methodology, and refused the request to participate in due diligence assessments in the capacity of an academic researcher. When asked about the grounds for this refusal, the Bank invited the author to ‘get acquainted with confidentiality rules and practices in the financial and banking world’. See email exchange with NIB Head of Environmental Unit, 15.03.2011. When in contact with the EIB, the author was reminded to appreciate an ‘exceptional’ approach, which might not be guaranteed for any further request [for information], on the grounds that the Bank ‘has neither the time nor the personnel resources to offer academic researchers such a possibility’. See email exchange with the EIB Information Officer, 08.03.2011. The EBRD, in turn, refused to provide any information on the ex-post evaluation of investment projects – or the projects’ Final reports – classifying them as ‘internal documents’. See email exchange with Director of Project Appraisal section, EBRD Environment and Sustainability Department, 03.02.2015.

¹⁵⁸ Amtenbrink (1999), p. 47.

¹⁵⁹ Ehrenberg K. (2009) Defending the Possibility of a Neutral Functional Theory of Law. *Oxford Journal of Legal Studies* 29 (1). 91-113. p. 91.

¹⁶⁰ EPE Declaration (2006), p. 1.

regarding the application of European environmental standards in third countries, based only upon the knowledge regarding the Banks' accountability mechanism proves difficult, as it lacks the evaluation of concrete results. In this way, it is difficult to hold the EPE Banks accountable for the non-application or insufficient application of European environmental standards within their investment projects.

Apparently, each Bank is to account individually for the non-application or insufficient application of European environmental standards when investing in third countries. At the same time, from the analysis above, it has become clear that the practical issue of applying the European Principles for the Environment has to do with the importance of having the possibility of evaluating the presence and application of these standards in the Banks' investment projects. However, such a conclusion is troubling. In relation to codes of conduct, the key challenge, according to Ebrahim, 'lies in the coordination of these [...] standards and accountability mechanisms so that they come to be viewed as legitimate means of improving accountability', while being 'part of complex accountability process linked to [...] normative views on organisational behaviour'.¹⁶¹ Therefore, in relation to EPE Banks, which are bound by one code of conduct and often co-finance projects on the same environment-related conditions, to achieve such application, it is necessary to bring the environmental objectives contained in the Declaration in line with a predictable and measureable relation to the expected results of Banks-financed projects. In other words, a yardstick shall be established and made operational via certain methods and instruments. Hence, increasing the chances of European environmental standards being applied requires at least that the Banks, as well as their forums, have at their disposal developed *methodology* that allows evaluation of this application. Moreover, it is important that the instruments used to evaluate the application of legal environmental standards are *the same* for internal and external use. The reason for this is the need to ensure that the same standards of evaluation and the interpretation of final results are used both by the Banks and by the external stakeholders.

The present methodologies used by EPE Banks do demonstrate the inclusion of environmental issues in the projects' assessment. However, these aspects form only a small part of an overall financial performance assessment.¹⁶² To ensure a reliable way of environmental standards' evaluation, the Banks do not simply need the possibility of blindly assessing compliance with financial rules – they also need to focus increasingly on factual environmental achievements, including those in the framework of a particular investment project. Thus, it is suggested to develop a separate evaluation methodology for compliance with environmental rules at the level of a project. In the case of EPE Banks, such an evaluation must focus on the application of the European environmental standards, in accordance with the Declaration on the European Principles for the Environment.

To avoid vagueness and juggling with objectives, it is important for general policy statements to be transformed into 'measurable performance targets, which are set, measured, audited and publicly reported upon [...]; the philosophy behind these efforts is that actions are more convincing

¹⁶¹ Ebrahim (2003a), p. 822.

¹⁶² See in general Putten, van, M. (2008) *Policing the Banks: Accountability Mechanisms for the Financial Sector*. McGill-Queen's University Press.

than words, and, in business, anything has to be measurable if it is to be taken seriously'.¹⁶³ In order to achieve this, suitable and publicly available instruments for ensuring the Banks' accountability are needed. The current chapter strongly emphasises this fact. In the absence of a transparent methodology to evaluate the factual fulfilment of concrete objectives, stakeholders have no idea about whether European legal environmental standards are being applied in investment projects, nor do they have the possibility of making an independent 'reality check' regarding the Banks' behaviour. Without suitable instruments, a yardstick as a precondition for the functioning of accountability mechanism cannot be operationalised, the application of European legal environmental standards cannot be evaluated and, generally, the Banks' environmental accountability cannot be put to the test.

It should be emphasised here that such instruments must be *the same* for use by all five EPE Banks.¹⁶⁴ This would ensure a consistent standard of evaluation and would lead to the coherence of final results; it is hoped as well that this would lead to the simplification of evaluation procedures, making them more user friendly.

Finally, these instruments should be flexible enough to be adapted and implemented when assessing the investment practices of other banks.

Based on the above arguments, this study advocates the need to elaborate a set of *indicators* that would be given a conceptual place in evaluating the application of legal environmental standards. According to Schilder, 'indicators are quantifiable measures which enable [...] to assess progress towards achievement of intended objectives', as they 'always specify time frames and are expressed in measurable terms'.¹⁶⁵ With the help of indicators, it can be demonstrated how objectives are incorporated during the initial, procedural, and concluding phase of a particular project that involves investment from one or several EPE Banks. Using the corresponding indicators, each phase can subsequently be evaluated.¹⁶⁶

Indicators reveal that the account-giving process, expected in theory on the basis of the set of objectives, can at times differ dramatically from the process in practice. Indicators thus allow demonstrating that at times the Banks *de facto* do even more than is expected from them, while at other times, they do less than they *de jure* are obliged to do.

Hence, as instruments of evaluation methodology, the indicators would help to establish whether European legal standards have been applied, which in turn would provide information on how the accountability mechanism functions in each particular investment project.

¹⁶³ Adams J. (1999) Foreign Direct investment and the Environment: the Role of Voluntary Corporate Environmental Management. In *Foreign Direct investment and the Environment*. OECD. p. 102.

¹⁶⁴ See also Amtenbrink (1999), pp. 40-59.

¹⁶⁵ Schilder D. (1997) Overview of results-based accountability: components of RBA. *Harvard Family research project. Harvard graduate school of education*. p. 2.

¹⁶⁶ According to Janez Potočnik, European Commissioner for Environment (2004-2014), '...we will never get to desired long term results if we are not able to demonstrate our progress. And to do that, we have to be able to measure it. And not everything is measurable. The main objective that I see for 2050 – that the entire human population lives a decent life on the planet that can support it for as far in the future we can think of – is difficult to express statistically. But breaking this objective into measurable milestones, charting pathways and being clever and consistent about the indicators that can demonstrate the progress towards it - this must be possible'. Potocnik J. (2011) Measuring green growth and natural capital - the importance of statistics in environment policy, Speech at the Plenary session of the Eurostat Conference. Brussels 11(164). 10.03.2011.

Evaluating the compliance of investment projects with the European Principles for the Environment internally as well as externally, and making the results available to the public, will improve the quality of the Banks' environmental regime and contribute to their image of being trustworthy. It is maintained that the continuing use of a yardstick and greater transparency will contribute in general to stronger environmental accountability on the part of EPE Banks.

Chapter VI

LEGAL ENVIRONMENTAL INDICATORS: THEORETICAL FOUNDATIONS

As we commit to implement a new sustainable growth model, we should encourage work on measurement methods so as to better take into account the social and environmental dimensions of economic development.

'G20 Leaders' Statement, Pittsburgh 2009

Indicators cannot simply be pulled 'off the shelf', but may need to be developed through research.

Alyson Warhurst¹

In Chapters IV and V, it has been argued that a yardstick as one of the preconditions to the functioning of the accountability mechanism, is required in order to allow for more accurate judgements on the accountability of a financial institution by translating its environmental objectives into concrete and quantifiable goals to be achieved within a certain period of time. Chapter V concluded that without suitable instruments, a yardstick could not be made operational. As one of the preconditions to the functioning of the accountability mechanism, a yardstick can be seen through the prism of an *evaluation*. Generally, 'the main role of the evaluation procedure is to support policy development and improve the effectiveness of activities'.² The European Commission delineates evaluation as a 'judgment of interventions according to their results, impacts and the needs they aim to satisfy'.³ It is broadly addressed further by the UNDP study,

¹ Warhurst A. (2002) *Sustainability Indicators and Sustainability Performance Management*. IIED Report 43. p. 116.

² European Parliament (2002) Resolution on the Commission's evaluation activities, 2002/2131(INI). C 279 E/74 OJ. ro. 12.

³ European Commission (2000) Focus on results: strengthening evaluation of Commission activities. Communication. SEC(2000)1051. p. 2; see also European Commission (2008) Consolidated evaluation guide, DG Enlargement.

which defines it as ‘a process of comparing the goal of the activity/event with the actual achievement’,⁴ which coincides with the function of the yardstick.⁵

The main instruments used for evaluations are *indicators*, which for several reasons are considered the best suitable tool: they are deemed to be logical instruments of self-regulation; they are used traditionally as compliance instruments by governments; and they are used in many branches, ranging from the economy to education.⁶ Additionally, indicators are functionally useful because of their ability to aggregate data for higher-level interpretation and application, which differentiates them from raw data.⁷

The two previous chapters have built the normative basis for considering indicators as essential instruments within the accountability mechanism, allowing operationalising a yardstick: to translate objectives into quantifiable criteria and thus to evaluate their factual application.⁸ In this chapter, the focus lies primarily on *legal* indicators that started to appear as a popular evaluation instrument over the last two decades. One can speculate that this phenomenon was an inevitable result of the new environmental regime, aimed at inclusion of new types of actors and legal subjects such as International Financial Institutions.⁹

Hereafter, first a general overview of the function and definition of an indicator is given. Thereafter, the second part analyses the different typologies, and then suggests reconsidering the current perception of performance indicators in order to single out *legal performance indicators*, followed by an overview of most prominent legal performance indicators among those currently existing, and their various methodologies. Finally, the groundwork for the introduction of a similar instrument for environmental law, aimed in particular at evaluating the application of legal environmental standards is developed.

⁴ Steiner A. *et al.* (2003) (eds.) *Environmental Governance Sourcebook*. UNDP Regional Bureau for Europe and the Commonwealth of Independent States. p. 200. Evaluation must not be confused with *monitoring*, which according to the authors, refers to ‘the measuring, reporting and analysing of the changing conditions of certain events over the course of time’, and ‘provides the basis for analysis of a system or event’. Although there is some overlapping, ‘the differences exist in methodology, purpose, scope and time of implementation’ and ‘in comparison to monitoring, evaluation is a more comprehensive and in-depth activity, focused on a wider scope of questions related to programme management and its impact’ (p. 200). Moreover, monitoring often forms the initial phase of the evaluation.

⁵ See Chapter IV, Section 3.4.2 on the definition and the function of yardstick as a precondition to the functioning of the IFI’s accountability mechanism.

⁶ See Peters A. *et al.* (2009) (eds.) *Non-State Actors as Standard Setters*, Cambridge University Press. p. 282. See also the Commission Communication, which proposes a procedure for adopting environmental agreements when they are used as instruments for self-regulation, with a particular emphasis on the role of indicators. Commission Communication on Environmental Agreements at Community Level within the Framework of the Action Plan on the ‘Simplification and Improvement of the Regulatory Environment’ [COM(2002) 412 final - Not published in the Official Journal], 17.07.2002.

⁷ See Hales D. (2010) *An Introduction to Indicators*. UNAIDS. p. 18.

⁸ Eventually, operationalising a yardstick can permit conclusions to be drawn with regard to actors’ accountability. However, as already mentioned in Chapters I and V, establishing the degree of accountability on the part of EPE Banks is beyond the goal of this study.

⁹ Aspects of International Financial Institutions’ environmental regime are addressed in Chapter III, Section 4.3.3.

1. FUNCTION AND DEFINITION OF AN INDICATOR

There is no single, universally accepted definition of the term ‘indicator’.¹⁰ Etymologically, the word comes from the Latin verb ‘*indicare*’, meaning ‘to disclose’ or ‘to point out’.¹¹ The OECD defined an indicator in 1993 as:

a parameter or a value derived from parameters, which points to, provides information about, describes the state of a phenomenon/environment/area, with a significance extending beyond that directly associated with a parameter value.¹²

This definition shows that scope and methodology can vary greatly from one indicator, or set of indicators, to another. Moreover, the definition demonstrates that an indicator can possess different characteristics and fulfil different functions. In general, however, most indicators are created with the goal of defining important features of a larger system.¹³ According to the Institute for European Environmental Policy, ‘indicators are essentially standardised units of information related to societal goals and objectives’.¹⁴ In other words, ‘indicators accumulate information by aggregating different and multiple data’,¹⁵ as they ‘aim to describe as much about a system as possible in as few points as possible’, and by doing so they ‘help us understand a system, compare it and improve it’.¹⁶

An indicator is based on variables, data, and parameters. Figure 1 demonstrates graphically the hierarchical relationship between the *variables*, *data*, *parameters*, *indicators*, and an *objective* as ‘outside-in’ growth towards a greater level of abstraction.¹⁷ In other words, it represents a connection between the outside variables, reflecting certain segments of a factual situation, and the inside objective, reflecting the total picture of a desired situation.

¹⁰ Scrivens K., Iasiello B. (2010) *Indicators of ‘Societal Progress’: Lessons from International Experiences*. OECD Statistics Working Papers 2010 (04). OECD Publishing, p. 8. For an overview of various indicator definitions, see Reyntjens D., Brown J. (2005) *Indicators: An Overview*. INDECO Project No. 513754, Institute for European Environmental Policy, pp. 1-3.

¹¹ Hammond A. et al. (1995) *Environmental Indicators: A Systematic Approach to Measuring and Reporting on Environmental Policy Performance in the Context of Sustainable Development*. World Resources Institute, p. 1. The use of the term ‘indicator’ in a scientific experiment was first recorded in 1842 in the research of Grove. See Grove W. (1846) *On the Correlation of Physical Forces*. Course of Lectures delivered in 1843-1846. Available in ‘*Science in the Nineteenth-Century Periodical*’, online electronic index, www.sciper.org/browse/bib_g.html, accessed 4.05.2015.

¹² OECD (2003) *Environmental indicators: Development, Measurement and Use*. OECD Environment Directorate Environmental Performance and Information Division, p. 5.

¹³ See Pencheon D. (2008) *The Good Indicators Guide: understanding how to use and choose indicators*. UK National Health Service Institute for Innovation and Improvement.

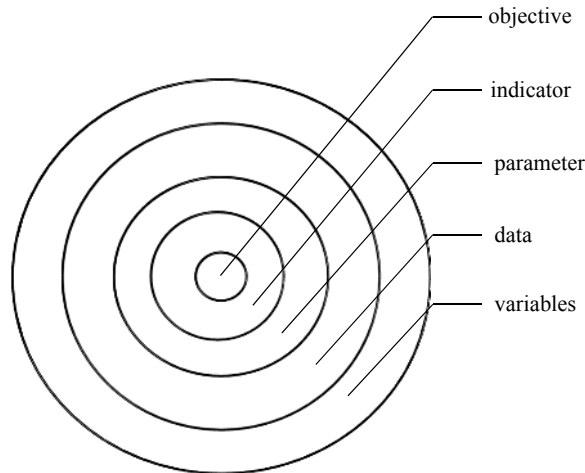
¹⁴ Reyntjens, Brown (2005), p. 2.

¹⁵ See OECD (2003), p. 5.

¹⁶ Pencheon (2008), p. 5.

¹⁷ The Figure is partially inspired by Reed B. (2012) *Selecting water, sanitation and hygiene indicators*. Water, Engineering and Development Centre, Loughborough University, p. 5. Reed used a similar hierarchical figure, on top of which he, however, placed a ‘target’, preceded by a ‘standard’ and a ‘guideline’. In his logic, all of these make use of an ‘indicator’, based, nevertheless, on ‘parameters’, ‘variables’ and ‘data’.

Figure 1. From variables to an objective



Considering these relationships in greater detail, a *variable* can be equalled to ‘raw’ information, representing the initial factor that changes or can be changed.¹⁸

Unlike it, *data*, which are situated one level higher, is defined here as being quantitative or qualitative information, obtained as a result of the measurement and analysis of variables. Their relationship is thus marked by the fact that variables, in accordance with the chosen jargon, can be either ‘measured’, ‘analysed’, or ‘processed’ – in other words, it can undergo an action that at the end results in a piece of data.

Going one step further, significant data may be called *parameters*, especially if they define or describe important elements of the project, and they can provide extra information about the wider context. Parameters thus differ from simple variables and data by possessing a higher level of information aggregation.

Furthermore, some of the most abstract parameters can be used as *indicators*.¹⁹ Interestingly, Mitchell mentions that in the wake of the data explosion and the rapid growth in the range of techniques for the measurement, storage, and retrieval of data, there is a widening sea of data; in comparison, however, there is a desert of information.²⁰ Subsequently, indicators provide this information by telling something about the status of a project, a programme, an organisation, or a

¹⁸ See Reed (2012), p. 5.

¹⁹ See *Ibid.* It must be borne in mind that there is no consistent use of the terms ‘data’ and ‘variables’ in the literature, where these terms are at times used interchangeably.

²⁰ See Mitchell G. (1996) Problems and Fundamentals of Sustainable Development Indicators. *Sustainable Development* 4 (1). 1-11. p. 2.

certain environment, as well as about the variable that is being measured,²¹ by aggregating and simplifying, or by ‘translating’ the large amount of data in a comprehensible way.

In practice, and in order to judge performance, along with this descriptive purpose, indicators can be used differently by matching them against an *objective* (see Figure 1). In this relationship, for instance, Slocombe sees an indicator as an *a priori* defined characteristic of an organisation that can provide feedback on the progress towards the management of goals and objectives.²² Seen from the point of view of the analysis made in previous chapters, the definition of Slocombe, however, refers rather to a yardstick than to an indicator. In order to clarify this, Figure 1 places an objective at the centre, where a yardstick – or a clear and quantifiable objective that functions as a yardstick – serves as a criterion of what the actor is expected to achieve, as well as when and how.²³ Set in the accountability framework, indicators function as an instrument of such a yardstick, evaluating the progress towards objectives, and technically enabling the possibility of actors giving an account of their actions.

Significantly, although indicators function as an information instruments, they should not be confused with statistics, as they communicate more than just information regarding the data on which they are based. According to Hammond *et al.*, an indicator is ‘something that provides a clue to a matter of larger significance or makes perceptible a trend or phenomenon that is not immediately detectable. [...] Thus, an indicator’s significance extends beyond what is actually measured to larger phenomena of interest’.²⁴ Unlike statistics, indicators are used to tap concepts that are less directly quantifiable.²⁵ Measuring body temperature illustrates this statement by not only indicating the current temperature of the human body but, in the event the temperature is higher than normal, by providing a strong indication that the person is ill and experiencing a virus or infection; the body temperature is also an indicator of human health.²⁶

Consequently, OECD terminology highlights the two major functions of an indicator:

- to reduce the number of measurements and parameters that normally would be required to give an exact presentation of a situation;²⁷ and
- to simplify the communication by which the measurement results are provided to the user.²⁸

²¹ See OECD (2003), p. 5; Reed (2012), p. 5.

²² See Slocombe D. (1999) Defining goals and criteria for ecosystem-based management. *Environmental Management* 22 (4). 483-493. p. 484.

²³ The relationship between an objective and a yardstick is addressed in Chapter IV, Section 3.4.2. It is argued that a clear and precise objective, indicating a specific time frame and containing quantifiable goals, can in itself be sufficient in order to function as a yardstick, and can form the basis of an actor’s accountability.

²⁴ Hammond *et al.* (1995), p. 1.

²⁵ Bryman A. (2012) *Social Research Methods*. Oxford University Press. p. 164.

²⁶ Example borrowed from Niemeijer D., Groot, de, R. (2008) A conceptual framework for selecting environmental indicator sets. *Ecological Indicators* 8. 14-25. p. 15.

²⁷ Accordingly, the number of indicators and the level of detail covered by indicators need to be narrowed down. A broad coverage with too many indicators may as a result communicate confusing information. See OECD (2003), p. 5.

²⁸ The OECD study emphasises that ‘due to this simplification and adaptation to user needs, indicators may not always meet strict scientific demands to demonstrate causal chains. Indicators should therefore be regarded as an expression of ‘the best knowledge available’. OECD (2003), p. 5. See also Smeets R., Weterings R. (1999) *Environmental indicators: Typology and overview*. European Environmental Agency Technical Report 25, who note three major uses of indicators being a) to supply of information on particular problems, allowing policy-makers to prioritise issues; b) to support policy development and optimisation of the

In a subsequent study, the Institute for European Environmental Policy (IEEP) further specified the functions of an indicator as *monitoring*, *evaluation*, and *communication*.²⁹ This classification does not really contradict OECD terminology, but approaches it from a different angle: namely, in connection with different policy cycles. According to the IEEP, ‘monitoring is the most operational of these three functions’ as ‘it entails a continuous assessment of management actions in the framework of policies and plans that have been decided on’, whereas the evaluation is an ‘assessment of relevance, efficiency, impact (both intended and unintentional) and performance against stated societal objectives or goals’.³⁰ Furthermore, the evaluation ‘is normally linked to a control mechanism that should lead to corrective actions being taken if necessary’, and ‘it will also feed into the process of specifying the objectives, developing policies and plans to achieve them and the allocation of resources’.³¹ As to the communication function, all indicators, regardless of their monitoring or evaluation functions, simplify information that can help to reveal complex phenomena,³² based on the results of monitoring and evaluation. In this regard, the IEEP adds that for optimal realisation of the communication function, it is ‘necessary to identify the audience and the message that will need to be conveyed’.

To conclude, it can be stated that indicators represent an influential instrument for communicating summary information to the public and to decision-makers. The most important features of indicators are monitoring, which ensures movement towards an objective; evaluation, which improves implementation and leads to increased accountability; and simplification of the communication while transmitting the information. At the same time, as with any form of informative instruments, there are limitations to their use. The acceptability of any indicator depends on the availability and confidence of the data, as well as the interpretation of the indicator. The interpretation is particularly important, as indicators tend to provide only the core information on a particular situation rather than presenting the whole picture within the relevant context.

2. GENERAL TYPOLOGY

As it has become clear from above, the common feature and the function of indicators is the communication – as they enable or promote information exchange regarding the issue they address.³³ As to the rest, the typology of indicators can be significantly different. Indicators can be

assignment of resources to address priority issues; c) to monitor effectively the effects of policy responses. According to Warhurst, in generic terms, these functions can equally be performed by environmental, social, and economic indicators. Warhurst (2002), pp. 14-16.

²⁹ See Reyntjens, Brown (2005), p. 2.

³⁰ *Ibid.*

³¹ Reyntjens, Brown (2005), p. 2.

³² Gabrielsen P., Bosch P. (2003) *Environmental Indicators: Typology and Use in Reporting*. EEA internal working paper. European Environment Agency. p. 5.

³³ Gabrielsen, Bosch (2003), p. 5.

categorised in many different ways, depending on the classification criteria. For example, this can be done according to the subject, classifying indicators into human rights, environmental, labour, development, etc. groups; or depending on indicators' quantitative (involving numerical measurements) or qualitative (for example, involving opinions or perceptions) nature; or else, according to the conceptual framework, for example, classifying them into structural, process and outcome indicators. Noteworthy that next to this lucid classification, indicators may differ simply 'due to the fact that different groups working on indicators have approached the subject in slightly different ways'.³⁴ Below the most common ways to categorise indicators are introduced. Such typology analysis will contribute to a better understanding of legal indicators, addressed later in this chapter.

2.1 Classification according to subject matter

There are a lot of aspects that have to be measured for projects, programmes and services to be operational. Projects (such as the construction of a wastewater treatment works), programmes (such as a training course for hygiene promoters across a whole organisation), and services (such as the provision of a water supply in an urban area) involve the management of social, human, economic, environmental and physical parameters.³⁵ These parameters can be monitored and evaluated using indicators, which differ according to the subject matter. There is an ever-growing number of areas, such as human rights, development policy, labour rights, environmental legislation, where these instruments are being applied.

Some indicators can be used through several subject fields. One of the most important impetuses for the development of such indicators was the adoption in 1992 during the United Nations Conference on Environment and Development (UNCED) of the Agenda 21 and the emergence of the sustainable development as a guiding principle for policy development.³⁶ Chapter 40 of the Agenda 21 declares that indicators of sustainable development should be developed to provide a solid basis for the decision-making at all levels and to contribute to a self-regulating sustainability of integrated environment and development systems.³⁷ It states that 'while considerable data already exists, as the various sectoral chapters of Agenda 21 indicate, more and

³⁴ Reyntjens, Brown (2005), p. 3.

³⁵ See Reed (2012), p. 1.

³⁶ Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organisations of the United Nations System, governments, and groups in every area of human impact on the environment. See the United Nations sustainable development knowledge platform, <http://sustainabledevelopment.un.org/index.php?page=view&nr=23&type=400&menu=35>, accessed 16.10.2014. See also Schirnding, von, Y. (2002) *Health in Sustainable Development Planning: The role of indicators*. World Health Organisation, Geneva. p. 19.

³⁷ Agenda 21 (1992) United Nations Sustainable Development. Chapter 40: Information for Decision-making. Earth Summit, para 4. See also Adelle C., Pallemarts M. (2009) *Sustainable Development Indicators: overview of relevant FP-funded research and identification of further needs*. Institute for European Environmental Policy & European Commission. This report aims to assess the European Commission funded projects, which refer to indicators supporting the renewed Sustainable Development Strategy, in order to provide recommendations for indicators' use within the EU and beyond. The report reviews more than 40 research projects, related to indicators' development in the field of sustainable development.

different types of data need to be collected at the local, provincial, national and international levels, indicating the status and trends of the planet's ecosystem, natural resources, pollution and socioeconomic variables'.³⁸

The sustainable development indicators are based on the existent indicators from at least three major subject fields – economy, social science and environment – which are briefly examined below.

2.1.1 Economic indicators

Economic indicators are 'the bedrock of making a thorough investment assessment as well as making sound judgment concerning the various areas of investments'.³⁹ These indicators are used to evaluate the current conditions and to forecast the financial or economic trends with the goal, for example, to foresee future prices. Economists and investors clarify that 'in the context of technical analysis, an indicator is a mathematical calculation based on a securities price and/or volume', while in the fundamental analysis, 'economic indicators that quantify current economic and industry conditions are used to provide insight into the future profitability potential of public companies'.⁴⁰ Such indicators can be based on a GDP rate, an unemployment rate or a stock exchange index.⁴¹ Eurostat issues monthly data for short-term economic analysis, showing an evolution of the economic activity in the European Union and the euro area.⁴² These reviews are based on Principal European Economic Indicators (PEEIs), mostly provided by the European Central Bank.⁴³

2.1.2 Social indicators

Examining the development of indicators as social science instrument, Land identifies three categories: *normative welfare indicators*, which focus on direct measures of welfare and are subject to the interpretation that if they change in the right direction while other parameters remain

³⁸ Adelle, Pallemmaerts (2009), para 2.

³⁹ See Omega Capital Research (2013) Economic and Financial Indicators - a Tool for Investment Decisions. 1-6. p. 1.

⁴⁰ See study by Lakštutienė A. (2008) Correlation of the Indicators of the Financial system and Gross Domestic Product in European Union Countries. *Engineering Economics* 3 (58). 7-18.

⁴¹ For instance, the United States financial community uses 10 leading economic indicators that tend to move in advance of the overall economy. These indicators include, *i.a.*, the average manufacturing-worker work week (from the employment report); the initial jobless claims; the manufacturers' new orders for consumer goods and materials (from the factory orders report); the manufacturers' new orders for non-defence capital goods (from the factory orders report) and the building permits. See Hales (2010), p. 40.

⁴² See Eurostat website, 'Official Publications', http://epp.eurostat.ec.europa.eu/portal/page/portal/euroindicators/publications/official_publications, accessed 16.10.2014.

⁴³ For the list of the Principal European Economic Indicators, see the 'Statistics' portal at http://epp.eurostat.ec.europa.eu/portal/page/portal/euroindicators/publications/official_publications, accessed 23.06.2014.

the same, the welfare level has risen or people are better off; *satisfaction indicators*, which measure psychological satisfaction, happiness, and life fulfilment by using survey research instruments that ascertain the subjective reality in which people live; and the most inclusive category, *descriptive social indicators*, which are indexes of social conditions (*i.e.* contexts of human existence) and changes therein for various segments of a population.⁴⁴ Among the fields that need social indicators, Land highlights the development of social accounting systems, the monitoring of institutional values and structures, and the production of improved social forecasts and forecasting techniques, because ‘while issues of public concern may change from time to time, the critical public and private sectors continue to need information about current social conditions and trends’.⁴⁵

2.1.3 Environmental indicators

The renowned accredited environmental management system of ISO 14001 defines an environmental indicator as ‘a specific expression that provides information about an organisation’s environmental performance, efforts to influence that performance, or the condition of the environment’.⁴⁶

According to the Australian State of the Environment report, the environmental indicators are ‘the physical, chemical, biological or socioeconomic measures that best represent the key elements of a complex ecosystem or environmental issue’ and that can organise the environmental information both spatially and over time.⁴⁷ Considering the specificity of the environmental indicators, the OECD member countries have agreed to use a framework for discussing them, known as the *pressure-state-response model*.⁴⁸ In this model, indicators fall into the three categories: indicators of environmental pressures, indicators of environmental conditions, and indicators of societal response. The indicators of environmental pressures concentrate on direct and indirect influence on the environment by human activities, coming from energy, transport, industry, agriculture and other sectors. The indicators of environmental conditions, otherwise addressed as the ‘ecological indicators’, represent a simplification of nature, which is perceived to be a system characterised by a high structural complexity, considerable spatial heterogeneity and temporal fluctuations.⁴⁹ The indicators of societal responses show the extent to which society

⁴⁴ See Land K. (1983) Social Indicators. *Annual Review of Sociology* 9. 1-26. p. 1.

⁴⁵ *Ibid.*, p. 1.

⁴⁶ ISO (1996) *ISO 14001 - Environmental Management – Specifications with Guidance for Use*. International Organisation for Standardisation: Technical Committee. ISO/TC 207, Geneva. p. 11.

⁴⁷ Government of Australia (2008) State of Environment Report. Summary. p. 4.

⁴⁸ OECD (2003), p. 9; INECE (2008) *Performance Measurement Guidance for Compliance and Enforcement Practitioners*. International Network for Environmental Compliance and Enforcement. p. 2. DPSIR framework stands for ‘driving forces’, ‘pressures’, ‘states’, ‘impacts’ and ‘responses’.

⁴⁹ Turnhout E. *et al.* (2007) Ecological indicators: Between the two fires of science and policy. *Ecological Indicators* 7. 215-228. p. 218.

responds to environmental concerns, by referring to individual and collective actions and reactions, intended to mitigate or prevent environmental harm, remedy, damage already inflicted, and to preserve natural resources.⁵⁰ The OECD *pressure-state-response model* has been further elaborated by the European Environmental Agency and has become known as the DPSIR framework.⁵¹

In the European Union, the Commission, in October 2001, proposed that additional environmental indicators should be developed, reflecting the consumption of toxic chemicals, the disability-free life expectancy, the biodiversity, the resource productivity, the recycling rate of selected materials and the generation of hazardous waste.⁵² The Council proposed more indicators for the future in December 2001.⁵³ However, according to the European Environmental Agency, ‘few indicators are currently available at the interfaces between environment, society and economy, because multiple causes are generally difficult to capture, unless more aggregated indicators are used’.⁵⁴ These aggregated indicators, such as performance indicators, addressed below, should focus on a ‘higher level actions rather than on the individual consequences that arise from, for example, the use of energy, materials and chemicals’.⁵⁵

2.2 Classification according to data type

Indicators can be differentiated based on the type of data they use. Data, lying at the basis of an indicator, can be of *quantitative* and *qualitative*, or, as it is alternatively called, of a statistical and narrative nature.

2.2.1 Quantitative data

Quantitative, or statistical data can be measured objectively, most frequently using numerical values. It can be analysed using statistical methods and can be displayed using tables, charts, histograms and graphs. The aim of a quantitative study is to classify features, count them and construct statistical models in an attempt to explain what is observed.⁵⁶

⁵⁰ See INECE (2008), p. 2. According to the INECE Guidance, this last type of indicators is used by policy makers to communicate information about the state of the environment to the public.

⁵¹ See Gabrielsen, Bosch (2003), p. 6; Kristensen P. (2004) *The DPSIR Framework*. Workshop paper. National Environmental Research Institute, Denmark. pp. 1-3. See also EEA (2014) Digest of EEA indicators. p. 17.

⁵² See European Commission (2001) *Environment 2010: Our future, Our choice, The Sixth Environment Action Programme*, COM (2001) 31 final. Brussels. p. 9; European Commission and Eurostat (2001) *Environmental Pressure Indicators for the EU*. Luxembourg. p. 1.

⁵³ European Council (2001) *Council conclusions on environment-related headline indicators for sustainable development with a view to monitoring progress in the implementation of the EU Sustainable Development Strategy*, No 14589/01.

⁵⁴ EEA (2002) *Environmental signals 2002: Benchmarking the millennium*. Environmental Assessment Report 9. p.10.

⁵⁵ *Ibid.*

⁵⁶ Hales (2010), p. 80.

Until recently, the majority of indicators studying an organisation's performance have been derived from the environmental or financial aspects of business, and these have lent themselves to quantitative measures.⁵⁷ However, 'the continuing development of indicators, particularly in the social dimension, has demonstrated that qualitative measures are equally useful in many cases, particularly where impacts have a larger degree of subjectivity, and cannot be readily distilled down to one or more numerical measures'.⁵⁸

2.2.2 *Qualitative data*

Qualitative, or narrative, data is measured subjectively, as it generally represents the views, attitudes and perceptions of an individual or a group of individuals. Qualitative data is commonly communicated in the narrative form, using pictures or objects - thus not numerically. Kirk and Miller suppose that a qualitative approach to data is distinct from a quantitative one in that 'technically, a 'qualitative observation' identifies the presence or absence of something, in contrast to 'quantitative observation', which involves measuring the degree to which some feature is present'.⁵⁹ At the same time, according to the contravening meaning of Kucera, 'the qualitative character of indicators may reveal more about their effects' and 'they are most helpful in determining what is working and what can be improved'.⁶⁰ Presumably, the one or the other type fits most according to the context: roughly speaking, quantitative indicators are most common in financial analysis, while qualitative indicators can be better used in the social studies. Also, in essence, as Warhurst rightly says, 'both quantitative and qualitative indicators convey essential elements of the data by abstracting from the wealth of specific detail'.⁶¹

Furthermore, it is possible that a set of indicators, developed in relation to a particular aspect (for example, water), represents a balanced mix of quantitative and qualitative indicators, depending on the range of factors.⁶² Additionally, as it will be shown further in this chapter, it has become common to assign numerical values to qualitative indicators, thus 'blending' the both types for the sake of the evaluation quality and objectivity.

For the sake of accuracy, it shall be mentioned that next to the general division into quantitative and qualitative, the data, which forms the basis of an indicator, can further be classified in a number of different ways, which are of less relevance to the present study.⁶³

⁵⁷ See Warhurst (2002), p. 14.

⁵⁸ Warhurst (2002), p. 14.

⁵⁹ Kirk J., Miller M. (1986) *Reliability and validity in qualitative research*. Sage Publications. p. 9.

⁶⁰ Kucera D. (2007) (ed.) *Qualitative indicators of labour standards. Comparative methods and applications*. Springer. p. 7.

⁶¹ Warhurst (2002), p. 14.

⁶² See Global Reporting Initiative (2002) Sustainability Reporting Guidelines. In relation to water quantitative indicators can measure total water use, rate of water recycling, discharges to water bodies, while qualitative indicators can focus on the degree of enjoyment and accessibility of water sports and recreation as experienced by the population.

⁶³ Thus, in relation to the character of initial variables, the overview done by Reed highlights nominal data, ordinal data, interval values data, ratio and assigned data. In relation to the categorisation and observation methods, Reeds further distinguishes between discrete and continuous data, exclusive data, disaggregated data, direct, indirect and proxy data, primary and secondary

2.3 Classification according to structure and hierarchy

As Reed has summarised it, ‘indicators quantify and simplify phenomena to help us understand complex situations’.⁶⁴ They can be classified according to their hierarchy and structure.

In relation to the structure, there is a difference between a *regular indicator* and *indices* of indicators. As it has already been shown above, indicators are instruments that focus and condense information about complex issues to be used further in different ways, for example, for managing, monitoring and reporting tasks. Raw or processed data, condensed according to the data type and the applied methodology, forms ‘aggregates’ of data, or ‘indicators’. Consequently, such initial indicators can be further aggregated into complex indices. Indices thus are composed of aggregates of indicators. There exist a number of indices worldwide, such as the Human Development Index,⁶⁵ the Environmental Performance Index,⁶⁶ the Logistics Performance Index,⁶⁷ the Index of Economic Freedom,⁶⁸ the Migrant Integration Policy Index⁶⁹ and others. Indices specify an architecture that identifies constituent high-priority issues with all metrics calculated on a common scale.⁷⁰ Moreover, indices can also be further aggregated themselves to form complex indices in order to support high-level decision-making.⁷¹

In relation to the hierarchy, there is a difference between *headline indicators* and *operational indicators*. Headline indicator possesses a strategic character while providing a feedback on progress against overarching policy objectives.⁷² On the contrary, operational indicators measure the more detailed components of headline indicators.⁷³ Naturally, a complex index can use more than just these two hierarchical levels. A good illustration is the European Commission list of indicators for monitoring the implementation of the political priorities, agreed at the Gothenburg and Barcelona European Councils and related to the commitments entered into by the European Union at the Johannesburg world summit on sustainable development.⁷⁴ This list takes the form of a hierarchical framework of twelve headline indicators (corresponding to the main sustainable development themes identified at the European and international level), the forty-five core policy

data and, finally, data, originated from different administrative levels (global, national, regional and local), ‘with each lower level providing more detail and supporting the higher levels’. See Reed (2012), pp. 7-9.

⁶⁴ Reed (2012), p. 9.

⁶⁵ See the UNDP (2014) *Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience*. United Nations Human Development Report. (online), <http://hdr.undp.org/en/data>, accessed 16.10.2014.

⁶⁶ Emerson J. et al. (2012) *Environmental Performance Index and Pilot Trend Environmental Performance Index*. Yale and Columbia Universities.

⁶⁷ See the World Bank Logistics Performance Index Homepage, <http://lpi.worldbank.org/>, accessed 16.10.2014.

⁶⁸ See the 2014 Index of Economic Freedom Homepage, www.heritage.org/index/, accessed 16.10.2014.

⁶⁹ See the Migrant Integration Policy Index Homepage, www.mipex.eu/, accessed 16.10.2014.

⁷⁰ Sherbinin, de, A. et al. (2013) *Indicators in Practice: How Environmental Indicators are Being Used in Policy and Management Contexts*. Yale and Columbia Universities. p. 3.

⁷¹ Reed (2012), p. 10.

⁷² See Reyntjens, Brown (2005), p. 3. Note that the OECD Environmental indicators are divided differently, into core-key-sectoral indicators. See OECD (2003), p. 6. Yet, despite different terminology the general idea behind the hierarchical structure stays the same: it brings clarity and structure into abundance of diverse information.

⁷³ Reyntjens, Brown (2005), p. 3.

⁷⁴ European Commission (2005) *Sustainable Development Indicators to monitor the implementation of the EU Sustainable Development Strategy*. Communication SEC (2005)161 final, 09.02.2005.

indicators (corresponding to the key objectives of each theme) and the ninety-eight operational indicators (corresponding to measures implementing the key objectives).⁷⁵

2.4 Classification according to conceptual framework

Indicators are designed to deliver different types of messages. They can therefore be classified according to the different conceptual and theoretical frameworks, used by the indicators' developers.

2.4.1 Descriptive and performance indicators

An indicator should always convey a clear message, based on relevant variables.⁷⁶ Subsequently, according to the type of this message, the vast variety of indicators can be divided in two conceptual frameworks. Generally speaking, this can be either the variables simply conveying a message on 'what is happening over time' – or the variables that provide an answer to the question 'how much the 'what is happening' coincides with the desired situation'.⁷⁷ Thus, according to these two conceptual frameworks, indicators can roughly be divided into the two groups: *descriptive* and *performance* indicators.

The *descriptive indicators* show *what is happening*, and allow to build a link between a change in one variable and a consequent change in another variable. For example, these indicators may demonstrate a rise of emissions and the consequent concentration of certain pollutants in the atmosphere. Another example is represented by the social, demographic or economic developments in the societies, and the corresponding changes in the life styles, the level of consumption and the production patterns. Descriptive indicators are broadly addressed in the EEA studies of 1999 and 2003.⁷⁸ They are usually presented as a line diagram showing the development of a variable over time.⁷⁹ A typical example of such indicators are the 'vital signs' indicators, developed by the United States Government Accountability Office to analyse the ecosystem health status and trends, allowing identifying the concentration of air pollutants in precipitation and its effects on water quality.⁸⁰

⁷⁵ See *Ibid.*

⁷⁶ Gabrielsen, Bosch (2003), p. 12.

⁷⁷ Consequently, this is reflected in the evaluation procedures. E.g., in EU the environmental evaluation takes place on two levels: a) evaluation of the state of environment and b) evaluation of the implementation of policies and their efficacy. See Brussels Environment (2010) *The Issue of evaluation in the framework of European Environmental Policy*. 1-39. p. 2. Available online, http://document.leefmilieu.brussels/opac_css/doc_num.php?explnum_id=5401, accessed 4.05.2015.

⁷⁸ See Smeets, Weterings (1999), p. 8; Gabrielsen, Bosch (2003), p. 12.

⁷⁹ Gabrielsen, Bosch (2003), p. 12.

⁸⁰ See United States Government Accountability Office (2004) *Environmental indicators: Better coordination is needed to develop environmental indicator sets that inform decisions*. GAO-05-52. p. 17.

The *performance indicators*⁸¹ use the same variables as the descriptive indicators, but they are connected with the original objectives.⁸² Generally, being linked to a policy objective or a reference value, they indicate the distance between the factual situation and the anticipated one, formulated in the objective. Subsequently, these indicators are applied to ‘communicate the need for additional measures’⁸³ and thus are used as a management instrument. Alternatively, the performance monitoring as a conceptual framework allows making a judgement on the accountability of an actor, bound by the treaty or a code of conduct.⁸⁴ As such, performance indicators can thus be used to hold actors accountable,⁸⁵ what makes them extremely relevant for this study.

This being said, it should be observed that while there are no uncertainties in relation to the descriptive indicators’ methodology, the scholar community possesses no single settled opinion on what exactly do the performance indicators comprise. Indicators that do not fit neatly either the descriptive or the performance conceptual framework, get peculiar names. For example, experts of the European Environment Agency (EEA) in studies delineate, next to descriptive and performance indicators, *efficiency indicators*, illustrating the efficiency of production and consumption processes, *policy effectiveness indicators*, and finally, *total welfare indicators*, which aggregate together economics, social and environmental dimensions to illustrate whether overall welfare is increasing.⁸⁶ At the same time, the authors of the Global Reporting Initiative define performance indicators as ‘indicators that elicit comparable information on the economic, environmental, and social performance of the organisation’,⁸⁷ data, which is not included by the EEA under the performance indicators. Even more confusing is the fact that Pintér and Swanson in their study for the World Bank Institute, when studying the role of indicators in the decision-making procedure, give similar definition not to performance, but to *policy* indicators, marking them as indicators that help ‘to outline policy goals in specific terms, monitoring progress, and providing feedback to managers and the public about outcomes’.⁸⁸ The authors write that ‘assuming that a straightforward connection between specific policies and outcomes can be made – which is not always the case – indicators can play a key role in continuous policy learning and adaptation’.⁸⁹ De Sherbinin *et al.* shed light on this confusing discrepancy. According to the authors, ‘*performance* indicators are used to inform *policy* decisions and manage progress towards

⁸¹ Important to note hereby that a ‘performance indicator’ as particular type of indicators, shall not be confused with the notion of a ‘performance monitoring’, which represents a special type of a conceptual framework.

⁸² See Gabrielsen, Bosch (2003), p. 13. See also European Commission (2008) Consolidated evaluation guide, DG Enlargement, p. 4.

⁸³ Smeets, Weterings (1999), p. 15.

⁸⁴ Note that Paul defines ‘accountability’ as ‘holding individuals and organisations responsible for performance measured as objectively as possible’. See Paul S. (1991) *Strengthening Public Service Accountability: A Conceptual Framework*. World Bank. Discussion Paper 136. p. 2.

⁸⁵ In relation to environmental accountability, see Smeets, Weterings (1999), p. 11.

⁸⁶ See Smeets, Weterings (1999); Gabrielsen, Bosch (2003).

⁸⁷ Global Reporting Initiative (2011) Sustainability Reporting Guidelines. p. 5.

⁸⁸ Pintér L., Swanson D. (2004) Use of Indicators in Policy Analysis. World Bank Institute. p. 8.

⁸⁹ Pintér, Swanson (2004), p. 8.

policy goals'.⁹⁰ The authors demonstrate thus that these are performance indicators that are sometimes called 'policy indicators'.⁹¹ Furthermore, they describe the roles of performance indicators, identified under the European Union project on Policy Use and Influence of Indicators (POINT), which are, in relation to the environmental policy,

- an *instrumental one* – through the direct use of indicators to manage environmental problems or improve environmental conditions through monitoring programs;
- a *conceptual one* – the use of indicators to shape ideas in public debates, focusing on framing issues and the promotion of certain world views; and
- a *political one* - when indicators are used to legitimise (or delegitimise) policies or policy actors, which includes both outright legitimisation for tactical purposes or symbolic use of indicators by policy actors.⁹²

Alternatively, another list has been created for the UNDP good performance indicators.⁹³ The roles of these indicators, as formulated by the UNDP, come down to:

- providing informed decision making for the on-going programme or project management;
- measuring progress and achievements, as understood by the different stakeholders;
- clarifying consistency between activities, outputs, outcomes and impacts within a project;
- ensuring legitimacy and accountability to all stakeholders by demonstrating progress;
- assessing project and staff performance.⁹⁴

The above demonstrates that in relation to the existent approaches to the methodologies and frameworks, indicator developers have yet a long way to go to attain a coherent approach. Further, it shows that while the descriptive indicators supply information regarding the data, performance indicators further relate this actual information to the initial goals. Taking this methodological difference as a starting point, the performance indicators deserve nevertheless further consideration.

2.4.2 Policy performance indicators and legal performance indicators

The aforementioned studies, as well as the results of the POINT project, describe only one aspect of the performance indicators' function, related to the policy effects. Meanwhile, it is argued that the function of performance indicators is twofold.

⁹⁰ Sherbinin, de, *et al.* (2013), p. 4, [emphasis added]. The authors give examples of such performance indicators: in the economic area – the gross domestic product (GDP) and rates of inflation, which are used to gauge the vitality of an economy and to guide policy; and in the area of development policy - scores from the Human Development Index (HDI) or the group of indicators associated with the Millennium Development Goals (MDGs), which can assess their progress towards social and economic development.

⁹¹ See the case studies in Sherbinin, de, *et al.* (2013), pp. 21-34.

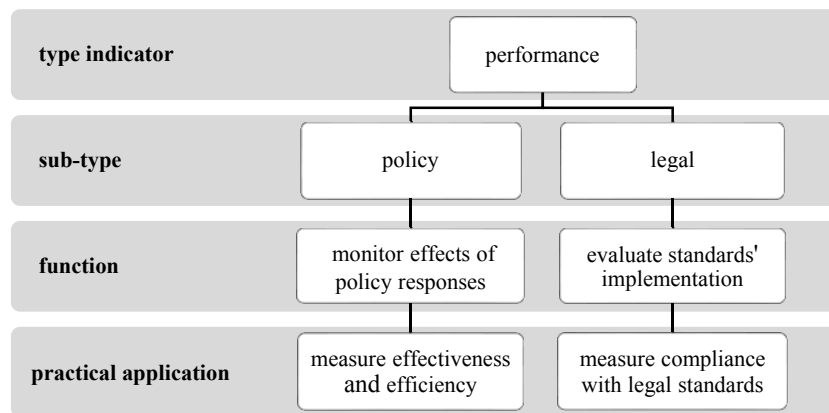
⁹² See Sherbinin, de, *et al.* (2013), p. 8.

⁹³ See UNDP (2009) Handbook On Planning, Monitoring and Evaluating for Development Results.

⁹⁴ UNDP (2009) Handbook On Planning, Monitoring and Evaluating for Development Results, p. 61.

This argument is presented graphically in Figure 2. It suggests that performance indicators can arguably be subdivided into *policy performance* and *legal performance* indicators. These types, although very much interrelated, differ according to their function: while policy performance indicators perform tasks mainly of a management nature, evaluating the *effects* of a certain policy as well as *the way* it was implemented (effectiveness and efficiency monitoring),⁹⁵ legal performance indicators focus on the *degree* to which the applied legal standards reflect the originally set objective (compliance monitoring).⁹⁶

Figure 2. Functions of performance indicators



Otherwise, results of the UNDP research represent not only the indicators' roles, related to the policy effects, but also indicate the roles related to the evaluation of legal performance. Analysing the UNDP's list of good performance indicators on the basis of the suggested classification in Figure 2, it becomes clear that functions such as 'providing information for decision-making or for project management', 'assessing the performance of staff', or 'measuring a project's progress' can be performed by the policy performance indicators, while 'ensuring accountability of a project's

⁹⁵ Such indicators are also used by the European Commission in its evaluation of all kinds of activities; see the Commission's general evaluation standards in European Commission (2000) Responding to Strategic Needs: Reinforcing the use of evaluation including regulations and international agreements. Communication SEC(2007)213. Annex II, p. 20; and European Commission (2004) *Evaluating EU activities - A practical guide for the Commission services*. See also Toulemonde J. et al. (2005) Triple Check for top quality or Triple burden? Assessing EU Evaluations. In Schwartz R., Mayne J. (eds.) *Quality Matters: seeking confidence in evaluation, auditing, and performance reporting*. Transaction Publishers. 69-90.

⁹⁶ It should be noted that the Expert group on enforcement and compliance indicators of the International Network for Environmental Compliance and Enforcement (INECE) was one of the first to suggest using performance indicators to monitor compliance and enforcement. However, this suggestion took the form of a general idea, without making a further conceptual division within performance indicators and inviting the further development of indicators at government level. See in general INECE (2008).

investor by demonstrating the degree of legal standards' implementation' falls under the legal performance indicators' responsibility. Thus, obviously, the UNDP good performance indicators represent a mix regarding policy performance and legal performance indicators.

Another similar example can be found in Warhurst's writings about 'environment achievement indicators', where the author characterises them as indicators that 'cover specific progress towards targets which can be set by the company in its environmental policy, thrown up by baseline audits, established by treaty obligations, or codes of conduct and guidelines to which the company is a signatory', as well as 'compliance with existing environmental regulatory requirements, a record of environmental suits and legal challenges to the company based on environmental performance, and environmental initiatives by the company that extend beyond normal operations'.⁹⁷ Such a definition contains equally mixed features of both legal and policy performance indicators.

2.4.3 Performance indicators: conceptual frameworks

Consequently, it appears logical that evaluations involving performance indicators may vary according to their conceptual purpose, as they take place either in order to monitor effectiveness and efficiency or to monitor compliance. Each of these conceptual frameworks can apply its own methodology, and can also differ according to the level of application (State, project, or programme). To this end, the practical application of policy performance indicators has a particular logical cycle, reflecting the initial recourses, efforts made during realisation of a project, immediate results achieved by a project, and, finally, the ultimate impact that a project has achieved.

Monitoring effectiveness and efficiency

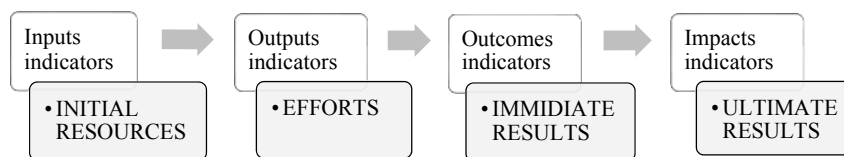
The monitoring of effectiveness and efficiency represents a management instrument that is applied frequently in the design, the execution, and the evaluation of programmes and projects.⁹⁸ The standards and the corresponding obligations are then translated into concrete indicators, which in turn are divided into input, output, outcome, and impact indicators (Figure 3).⁹⁹

⁹⁷ Warhurst (2002), p. 48.

⁹⁸ See Hales (2010), p. 78.

⁹⁹ This conceptual framework has been used broadly for monitoring performance. See INECE (2008), p.14; UNDP (2009), pp. 55, 61; Hales (2010), p. 29; Reed (2012), p. 22.

Figure 3. Efficiency and effectiveness monitoring



More specifically, the *input* indicators relate to the original resources within the project, and therefore they measure time, staff, funding, materials, equipment, and similar data that contribute to a project's initial success.

The *output* indicators are activities, events, services, and products, directed to achieve a project's objectives. These indicators demonstrate a level of effort towards an outcome, but do not indicate the extent to which the outcome is achieved.¹⁰⁰

The *outcome* indicators measure the immediate results of a project's outputs. They can also provide information regarding progress towards a project's objectives, as well as about the behaviour change attained. An example of an outcome of an inspection would be a change in facility management practices.¹⁰¹

The *impact* indicators measure the ultimate result the project was designed to achieve, such as an improvement in ambient air quality or a reduction in the number of people living in areas in which pollutant standards were exceeded.¹⁰²

Monitoring compliance

By contrast, the practical application of legal performance indicators makes it possible to measure the implementation of particular standards. Once a treaty is ratified, or a code of conduct is adopted, it is necessary to assess the actor's commitment to applying the accepted standards. Most commonly, *compliance monitoring* is used in relation to an actor at international, regional, and national levels to determine whether the relevant obligations under treaties or codes of conduct are met. Such a conceptual framework uses a configuration of structural, process, and outcome indicators (Figure 4) having the purpose, firstly, of measuring the *commitment* to certain legal obligations; secondly, of measuring the *efforts* required to make that commitment a reality; and

¹⁰⁰ INECE (2008), p. 4. Note that the INECE study refers to the 'outcome' and 'impacts' stages as 'intermediate outcomes' and 'final outcomes', respectively.

¹⁰¹ INECE (2008), p. 4.

¹⁰² *Ibid.*

thirdly, of evaluating the *results* of those efforts in terms of the enjoyment of particular legal rights or standards.¹⁰³

Figure 4. Compliance monitoring



According to Figure 4, *structural* indicators reflect the commitments and assist in such an assessment. They reflect the ratification and adoption of legal instruments and the existence as well as the creation of basic institutional mechanisms deemed necessary for the promotion and protection of a particular standard.

Process indicators reflect the concrete efforts made by actors to transform their commitments into the desired results. As opposed to structural indicators, this involves indicators that continuously assess the policies and specific measures taken by the actor to implement its commitments on the ground.

Outcome indicators demonstrate the achieved results by evaluating the attainment of the original commitments. They reflect the degree of enjoyment of particular rights or standards in a given context. It should be noted that an outcome indicator consolidates over time the impact of various underlying processes that can be captured by one or more process indicators.¹⁰⁴

It can be concluded from the above that the current use of performance indicators on practice demonstrates that no clear theoretical distinction is made between the two sub-types of performance indicators. A good example are the functions of the UNDP good performance indicators, listed earlier in this section.¹⁰⁵

At the same time, it is argued that the clear separation of functions within performance indicators on the basis of Figure 2 above contributes to a better categorisation of the typology of performance indicators in general, and to the typology of legal performance indicators in particular.

¹⁰³ This conceptual framework was first suggested by the Office of the High Commissioner on Human Rights in order to reflect the triple structure of the international obligation to respect, protect, and fulfil human rights. See OHCHR (2012) Human rights indicators: A guide to measurement and implementation. United Nations Office of the High Commissioner for Human rights, New York and Geneva. pp. 5-7, 33. It is argued that such a general triple obligation can also be applied to duty bearers with respect to other rights: for example, the right to a clean and safe environment.

¹⁰⁴ See OHCHR (2012), p. 7.

¹⁰⁵ See UNDP (2009).

3. ANALYSIS OF EXISTENT LEGAL INDICATORS

From the previous sections it has become clear that there exists significant diversity in the typology and functions of indicators. The study below provides the example of several sets of existent legal indicators, followed by their analysis.

3.1 Practical examples of legal indicators

As the Figure 2 above has shown, the legal indicators arguably represent *a specific form* of performance indicators.

Yet, when considering legal indicators, the fair question that may arise is what does the word ‘legal’ add to an indicator? It can be acknowledged right away that not all indicators being called ‘legal’, are legal performance indicators within the logic of this study.¹⁰⁶ A bright example is the Audit Scotland, the national public bodies’ audit institution, which refers to the clear-cut policy performance indicators as ‘legal performance indicators’, simply because they were meant to evaluate the functioning of Scotland’s Legal Service.¹⁰⁷

Although the above division of performance indicators into *policy* and *legal* indicators is a novelty, the intuitive attempts to design indicators with a legal component in order to evaluate the compliance with legal norms have already been taking place for more than a decennia. For example, since 2003 the EBRD has been active in elaborating legal indicators in selected areas of commercial law.¹⁰⁸ And in 2007 the OECD competition law and policy indicators saw light,¹⁰⁹ followed by the UN Commissioner’s legal indicators for the human rights standards.¹¹⁰ In order to get an idea of what exactly is meant by academia and practitioners by the term ‘legal indicators’, the most prominent indicators with a legal component are shortly examined below.¹¹¹ After the examination of the indicators’ methodologies, the acquired knowledge is critically analysed, contributing to further conceptualisation of the legal indicators’ understanding.

¹⁰⁶ It shall be noted that just like in earlier chapters, the approach towards the analysis and construction of indicators is based on the European law, and in particular on the European environmental law.

¹⁰⁷ See Audit Scotland (2011) Legal Performance Indicators. pp. 1-20. Published online at www.audit-scotland.gov.uk/performance/docs/2011/CPI_1011_legal.pdf, accessed 14.03.2015.

¹⁰⁸ See the EBRD website, ‘Legal Reform Overview’, www.ebrd.com/what-we-do/sectors/legal-reform/overview.html, accessed 20.05.2014.

¹⁰⁹ Hoj J. (2007) *Competition Law And Policy Indicators For The OECD Countries*. Economics Department Working Papers 568. OECD.

¹¹⁰ See UN Commissioner for Human rights website, www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx, accessed 14.03.2015.

¹¹¹ The criteria for choosing these sets of indicators was the availability in their methodologies of a ‘legal component’, in other words, the evaluation of a compatibility with a certain legal standard.

3.1.1 The EBRD legal indicators

In order to gain information on the legal regime in the countries of operation, the European Bank for Reconstruction and Development has been making an evaluation of the selected regulatory fields, such as corporate governance, energy, insolvency, judicial capacity, public procurement, securities markets and telecommunications/electronic communication. Below the indicators on secured transactions, corporate governance and insolvency are considered in greater detail.

The very first legal indicators launched by the Bank in 2003 were the *legal indicators on secured transactions*, designed to evaluate the legal progress in the transition countries where the Bank operates.¹¹² A year later, in 2004, the *legal indicators on insolvency* were launched, in order to assess how the legislation, together with the local institutional framework (including rules of procedure, courts and judges, and insolvency administrators) in each country of operation work to create a functional (or dysfunctional) insolvency legal regime.¹¹³ *Legal indicators on corporate governance* were constructed in the framework of corporate governance legislation assessment in the countries of Banks' operation in 2005.¹¹⁴

The methodologies employed in evaluations using these indicators, are comparable. They are based on the analysis of sample scenarios, made by the law firms in each of the countries.¹¹⁵ Thus, for example, as the 'insolvency laws differ widely in their design and substance', the Bank designed a methodology, based on case-studies, whereas the leading insolvency lawyers in each country were presented with a 'case that they might encounter in their practice', and were asked to 'answer a series of questions relating to how the law might operate in regard to such a case situation'.¹¹⁶

The general objective of these EBRD methodologies is to 'test whether and the extent to which the law may be effectively applied in practice'.¹¹⁷ More particularly, the insolvency

¹¹² See Dahan F. et al. (2004) *Enforcing secured transactions in Central and Eastern Europe: an empirical study*. EBRD. p. 5.

¹¹³ See Harmer R., Cooper N. (2003) Report on the Results of the Assessment of the Insolvency Laws of Countries in Transition, See Harmer R., Cooper N. (2003) Report on the Results of the Assessment of the Insolvency Laws of Countries in Transition, at www.ebrd.com/downloads/legal/insolvency/report_ia.pdf, accessed 4.05.2015. Noteworthy that the methodology for the indicators' construction was free to access via the Bank website under the title '2004 Insolvency legal indicator survey' until the end of 2014.

¹¹⁴ See Cigna G., Enriques L. (2006) *Law in Transition 2006: Assessing the effectiveness of corporate governance legislation*. EBRD Publications. The goal of this Assessment is the evaluation of the corporate governance legal regime in each of the EBRD member country, with a focus at the national legislative and institutional framework. Noteworthy that, alike with the insolvency indicators, the 'Legal Indicator Survey on Corporate Governance', was removed from the EBRD website in 2014.

¹¹⁵ The content of the case studies can be found at the EBRD webpage, 'Legal Indicators Survey on Corporate Governance', www.ebrd.com/downloads/legal/corporate/case.pdf, accessed 04.05.2015.

¹¹⁶ See 'Legal Indicators Survey on Corporate Governance', 'Methodology', www.ebrd.com/downloads/legal/corporate/case.pdf, accessed 04.05.2014.

¹¹⁷ See EBRD website, *cached*, '2004 Insolvency legal indicator survey', www.ebrd.com/pages/sector/legal/insolvency/legal_indicator.shtml, accessed 8.04.2014. The Survey on Insolvency was expected to answer such legal questions as: (1) may the law be conveniently, expeditiously and inexpensively accessed by the users of the law? (2) does the recourse to the law (by, e.g., the initiation of proceedings) produce an efficient result? (3) is there adequate institutional capacity within the courts to apply the law? and (4) is there general adherence to the maxim of the 'rule of law' (in particular, whether it is undermined as a result of, e.g., political patronage, cronyism, other interference or corruption)?

indicators' methodology aims to reflect such factors as time, cost, barriers to efficient application, the institutional capacity (such as competence and access to the courts), and the general effectiveness.¹¹⁸ As for the evaluations involving legal indicators on corporate governance and the secured transactions, they have to reflect speed, simplicity, enforceability, costs and the institutional environment.¹¹⁹ Although referred to as 'legal' indicators, these indicators are in fact an example of mixed sets of policy and legal performance indicators, focusing simultaneously, on policy application (speed, simplicity, costs), and on legal aspects (enforceability and access to courts).

As the majority of questions in the studied evaluation questionnaires provide for multiple-choice responses, the answers are assigned a particular score, ranging from 0 to 4 in case of the insolvency indicators. The score reflects a five-point progression from a clear 'yes' to a clear 'no' (or from 'extremely low' to 'very high').¹²⁰ In case of the indicators on secured transactions the results of empirical case-studies have been compared with the best international practice, allowing to assign scores ranging from 0 (the worst) to 10 (the best) to each of the participating countries.¹²¹ Similarly, also the questionnaire for the corporate governance indicators provides for multiple-choice responses. Each question is individually scored on a range of 1 to 10 (one representing the lowest and ten - the highest score), thus reflecting a ten-point progression from a clear 'yes' to a clear 'no' (or from 'extremely low' to 'very high').¹²²

Noteworthy, the EBRD recognises the limitations in its methodologies. Among these are the limited number of practitioners within each country, a case study-specific set of circumstances, and subjectivity due to hard-to-measure variables such as courts' competence, simplicity of procedures and ease of enforcement.¹²³ In addition, as the Survey on Corporate Governance notes, 'national legislations differs widely in their design and substance', and thus 'while it may be possible to test the entirety of a corporate governance regime, to examine a number of regimes under a single exercise requires the consideration of many variables and alternative possibilities that arise from those differences in legislation', and 'the results of any such testing would produce an incoherent final product'.¹²⁴ This explains why the choice was made for measuring only one aspect of the corporate governance, this being 'the possibility for a minority shareholder in both a

See the EBRD website, 'Legal and economic importance of the Survey', www.ebrd.com/pages/sector/legal/insolvency/legal_indicator.shtml, accessed 8.04.2014.

¹¹⁸ From the point of view of the above division between the policy performance indicators and legal performance indicators, the EBRD legal indicators' methodology basically focuses on measuring *both aspects* of performance indicators, and not only the legal ones.

¹¹⁹ On the meaning of these terms see the EBRD webpage, 'Legal Indicators Survey on Corporate Governance', www.ebrd.com/pages/sector/legal/corporate/indicator.shtml, accessed 14.04.2014.

¹²⁰ Narrative additional explanations to the answers were not scored individually, but helped to make the scoring more precise, reinforcing the answers or indicating contradictions.

¹²¹ See Dahan *et al.* (2004), p. 5.

¹²² See the EBRD website, *cached*, 'Legal Indicators Survey on Corporate Governance', www.ebrd.com/pages/sector/legal/corporate/indicator.shtml, accessed 14.04.2014. Additionally, narrative explanations to the answers were taken into account. Although not scored individually, they helped to make the scoring more precise, reinforcing the answers or indicating contradictions.

¹²³ See *Ibid.*

¹²⁴ *Ibid.*

listed and an unlisted company to effectively obtain information on the transactions undertaken by the company and, in case, initiate proceedings (before a court or an arbitration panel) to effectively obtain redress'.¹²⁵

On a small note, next to the EBRD, an attempt to investigate another aspect of corporate governance, related to the effect of legal change on the lending behaviour of banks in twelve Central and Eastern European countries, was also independently made by Haselmann *et al.*¹²⁶ The authors based their work on an earlier attempt by Pistor *et al.* to introduce legal indicators,¹²⁷ and additionally elaborated two new indicators, showing 'whether a country's law recognises that a legally valid security interest can be established without transferring possession of this asset to the lender', and 'whether a country has a system in place for the registration of such security interests'.¹²⁸

3.1.2 The World Bank Worldwide Governance Indicators

The World Bank Worldwide Governance Indicators (WGI) measure the quality of public governance,¹²⁹ focusing on six dimensions: Voice and Accountability, Political Stability and Absence of Violence, Government Effectiveness, Regulatory Quality, Rule of Law and Control of Corruption.

These dimensions represent a mix of political and legal aspects of public performance. The indicators with a legal component, such as the Rule of Law, 'capture perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence'.¹³⁰ Another set of legal indicators, named the Voice and Accountability, 'captures perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media'.¹³¹

¹²⁵ *Ibid.* The results of the Survey using the legal corporate governance indicators can be found at EBRD (2005) Institutional environment for corporate governance in the EBRD's countries of operations (online); EBRD (2005) Comprehensive country-by-country analysis of the results of each case study (online); EBRD (2005) Results for 'Disclosure' in a weighted average of cases 1 and 2: Institutional environment, Simplicity, Enforceability and Speed (online).

¹²⁶ See Haselmann R. *et al.* (2010) How Law Affects Lending. *The Review of Financial Studies* 23 (2). 549-580.

¹²⁷ Pistor K. *et al.* (2000) Law and Finance in Transition Economies. *Economics of Transition* 8. 325-368.

¹²⁸ Haselmann *et al.* (2010), p. 552.

¹²⁹ Governance in this context is understood as 'the traditions and institutions by which authority in a country is exercised. This includes (a) the procedures by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies; and (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them'. Kaufmann D. *et al.* (2010) The Worldwide Governance Indicators: Methodology and Analytical Issues. *Policy Research Working Paper 5430*. World Bank. p. 4.

¹³⁰ See the Rule of Law indicators description at the World Bank website, 'Worldwide Governance Indicators', <http://info.worldbank.org/governance/wgi/rl.pdf>, accessed 15.04.2014.

¹³¹ See the Voice and Accountability indicators description at the World Bank website, 'Worldwide Governance Indicators', <http://info.worldbank.org/governance/wgi/va.pdf>, accessed 15.04.2014.

Within the WGI methodology, the aggregate indicators are based on several hundred individual underlying variables, taken from a wide variety of data sources and reflecting the views on governance of survey respondents and public, private, and NGO sector experts worldwide.¹³²

All these individual variables have been rescaled to run from 0 to 1, with a step of 0,1, with higher values indicating better outcomes.¹³³ According to Kaufmann *et al.*, these individual indicators can be used to make comparisons of countries over time, as well as to compare the scores of different countries on each of the individual indicators.¹³⁴ At the same time, it is recognised by the authors that these types of comparisons are subject to margins of error, especially when the scores from different individual sources are compared for a single country.¹³⁵

3.1.3 The OECD competition law and policy indicators

The competition law and policy indicators (CLP) were initially elaborated by the OECD in 2007 and were further updated in 2013. The aim of the 2007 competition law and policy indicators is ‘to measure the strength of policies aimed at preserving and promoting market competition by empowering antitrust and sectoral authorities’, focusing exclusively on the OECD countries.¹³⁶ The 2013 indicators had the same goal, while examining the competition regimes in the thirty-four OECD and the fifteen non-OECD jurisdictions.¹³⁷

These indicators are set to assess the ability of a country’s competition regime to achieve more competition while allowing efficiency gains, and thus they cover areas where there is a broad consensus on what constitutes a ‘good’ policy setting in that respect.¹³⁸ In total, there are two sets of indicators. The first set measures the effectiveness of competition regimes and covers the following areas: (i) scope of action (the legal powers to investigate and impose sanctions on

¹³² See Kaufmann *et al.* (2010), p. 2. These sources include *corporate surveys*, like the World Economic Forum’s Global Competitiveness Report, the Institute for Management Development’s World Competitiveness Yearbook, the World Bank/EBRD’s Business Environment and Enterprise Performance surveys, the Gallup World Poll, Latinobarometro, Afrobarometro, and the Americas Barometer. Also, the sources for the WGI include country analysts at the major multilateral development agencies (the European Bank for Reconstruction and Development, the African Development Bank, the Asian Development Bank, and the World Bank). Furthermore, they include expert assessments provided by the United States Department of State and France’s Ministry of Finance, Industry and Employment. Finally, the data sources are provided by different NGOs, such as Reporters Without Borders, Freedom House, and the Bertelsmann Foundation. The final category of data sources is the *commercial business information providers*, such as the Economist Intelligence Unit, Global Insight, and Political Risk Services.

¹³³ Kaufmann *et al.* (2010), p. 7.

¹³⁴ *Ibid.*, p. 8.

¹³⁵ For instance, a developing country might receive a score of 0.7 on a 0-1 scale from one data source covering only developing countries, but might receive a lower score of 0.5 on the same 0-1 scale from a different data source that covers both developed and developing countries. This difference in scores could be due to the fact that the reference group of comparator countries is different for the two data sources, rather than reflecting any meaningful difference in the assessment of the country by the two sources. See Kaufmann *et al.* (2010), p. 8.

¹³⁶ Hoj (2007), p. 2.

¹³⁷ Alemani E. *et al.* (2013) *New Indicators of competition Law and Policy for OECD and non-OECD Countries*. Economics Department Working Papers 1104. OECD. p. 4.

¹³⁸ See Alemani *et al.* (2013), p. 6.

antitrust infringements and to investigate, remedy, or block mergers); (ii) policy on anticompetitive behaviours (approaches towards the assessment of horizontal and vertical agreements, exclusionary conducts and mergers as well as effective action taken against anticompetitive behaviours); (iii) probity of investigation (independence and accountability of the institutions enforcing the competition law as well as their procedural fairness); and, finally, (iv) the competition advocacy, *i.e.* activities promoting competition by other means than standard enforcement of the competition law, such as the review of regulatory measures that might have an impact on competition.¹³⁹

The second indicator set covers the same topics, but breaks them down into more specific policy areas. In both cases, the indicators capture both *de jure* and *de facto* information. Among these indicators the ones with 'legal' aspects trace such issues as competences of competition authorities, related to powers to investigate, to sanction and remedy.¹⁴⁰

All the CLP indicators can potentially vary from 0 to 6, with zero being the highest, and six being the lowest score.

Just like with other previously examined indicators, the authors of the CLP indicators warn that, due to their nature, the indicators do not perfectly reflect the complexity of competition policy settings.¹⁴¹ They are based on a questionnaire, format of which inevitably imposes a limited range of nuances. As a result, similar indicators values can hide important differences across competition regimes.¹⁴² Consequently, it is suggested that the indicators should be seen as 'providing an approximate indication of the overall strength and scope of a competition policy regime, rather than a complete and detailed representation of its characteristics, and as such they should be interpreted with caution'.¹⁴³ Nevertheless, despite these limitations the authors find the indicators a useful instrument for policy makers and practitioners that can simplify and quantify information, and provide comparable measures of various dimensions of competition law and policy.¹⁴⁴

3.1.4 The Block-Roberts measurement system of mandatory labour standards

The goal of the Block-Roberts measurements system of mandatory labour standards is to determine the impact of different labour standards across countries, originally between the US and Canada.¹⁴⁵ The authors formulated the methodology in 2007 by first determining the essence of a labour standard. According to them, a labour standard incorporates: (a) the substance of the

¹³⁹ See Alemani *et al.* (2013), pp. 27-28.

¹⁴⁰ The actions covered by the indicator include imposing sanctions and remedies for antitrust infringements, blocking or remedying anticompetitive mergers, limiting the cost of the procedure by shortening the length of the investigation and reducing the damages that such behaviours can cause by imposing interim measures. See Alemani *et al.* (2013), pp. 27-28.

¹⁴¹ See *Ibid.*, p. 6.

¹⁴² Alemani *et al.* (2013), p. 7.

¹⁴³ Alemani *et al.* (2013), p. 7.

¹⁴⁴ See *Ibid.*

¹⁴⁵ See Block R. (2007) Indicators of Labour Standards: an Overview and comparison. In Kucera D. (ed.) *Qualitative indicators of labour standards. Comparative methods and applications*. Springer. 27-56.

standard as determined by the enabling legislation and (b) the rigour with which the legislation is enforced.¹⁴⁶

Once particular standards were distilled from the legislation, an index was created for each of the standards, consisting of a sub-index for each particular provision under the standard.¹⁴⁷ The weight from 0 to 10 has been assigned to each provision that is greater when the level of protection given to employees is greater.¹⁴⁸ Thus, the absence of a provision was assigned the score of zero, and ‘the strongest provision among all the jurisdictions’ received the score of ten, and ‘the provisions of intermediate strength were assigned intermediate values in accordance with the number of possible categories in the provision’.¹⁴⁹ Remarkably, the highest possible score under this methodology is not based on an absolute standard of protection, but on a highest protection standard actually provided to employees, making the evaluation system relativistic rather than absolutist.¹⁵⁰ Authors themselves underline that their method ‘does not rely on a universal benchmark, such as ILO Conventions’, but rather ‘uses as benchmark the most generous provision and standard in the jurisdictions being studied’, which makes the method feasible and realistic.¹⁵¹ The disadvantage of the method is that it only suits best for studying countries or political jurisdictions at comparable levels of development and with comparable levels of democracy.¹⁵²

3.1.5 Legal indicators for human rights standards

The United Nations Office of the High Commissioner for Human Rights (OHCHR) has published the *Human Rights Indicators Guide* in 2012.¹⁵³ The publication aims to assist in developing quantitative and qualitative indicators to measure progress in the implementation of international human rights norms and principles.¹⁵⁴ The Guide describes the conceptual and methodological frameworks for human rights indicators and provides concrete examples of indicators identified for a number of human rights – all originating from the Universal Declaration of Human Rights.¹⁵⁵ The Guide is aimed at ‘use of indicators in the international legal framework’.¹⁵⁶

The OHCHR defines a human rights indicator as specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and

¹⁴⁶ Block (2007), p. 31.

¹⁴⁷ Block (2007), p. 31.

¹⁴⁸ Block R. (2005) *Indicators of Labour standards: an overview and comparison*. International Labour Organisation Working paper 54, pp. 5-6.

¹⁴⁹ *Ibid*, p. 6.

¹⁵⁰ See Block (2007), p. 32.

¹⁵¹ Block (2007), p. 50.

¹⁵² *Ibid*, see also Block R. *et al.* (2003) *Labour standards in the US and Canada*. W.E. Upjohn Institute for Employment Research.

¹⁵³ OHCHR (2012).

¹⁵⁴ Walker S. (2005) Human rights impact assessments of trade-related policies. In Gehring M., Cordonnier Segger M. (eds.) *Sustainable Development in World Trade Law. Global trade and Finance Series. Vol. 9*. Kluwer Law International. 217-256.

¹⁵⁵ Universal Declaration of Human Rights 1948.

¹⁵⁶ OHCHR (2012), p. 9.

standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.¹⁵⁷

Not all indicators are newly developed. The Report indicates that while some indicators could be unique to human rights because they owe their existence to specific human rights norms or standards and are generally not used in other contexts, there could be a large number of other indicators, such as commonly used socioeconomic data that could meet (at least implicitly) all the definitional requirements of a human rights indicator.¹⁵⁸

The conceptual framework for the OHCHR human rights indicators focuses on measuring the commitments of duty bearers, primarily the State, to their human rights obligations and the efforts they undertake to meet those obligations.¹⁵⁹ Each category, through its information sets, brings to the fore an assessment of the steps taken by the State parties to meet their obligations, be it that of respecting, protecting or fulfilling a human right. The OHCHR indicators are thus legal performance indicators, clearly designed for the compliance evaluation, concentrating on the normative content of a human right.

Interestingly, the conceptual framework of the human rights indicators also recognises the existence of the cross-cutting human rights, such as non-discrimination and equality, participation, access to remedy, accountability, rule of law and good governance. The indicators that capture the cross-cutting human rights norms or principles cannot be associated exclusively with the realisation of a specific human right on a state level, but are generally meant to capture the extent to which the implementation and realisation of human rights respects, protects and promotes, for instance, non-discrimination and equality, participation, access to remedy and accountability.¹⁶⁰

The Guide also recognises a problem with regard to the proposed indicators, namely, the fact that ‘the enumeration of human right standards in treaties and their further elaboration by the treaty monitoring bodies and other human rights mechanisms and instruments may remain quite general and many human rights appear to overlap’, which explains why ‘human rights treaty provisions are not particularly helpful in the identification of appropriate indicator(s)’.¹⁶¹ As a starting point, it is therefore important that the narrative on the legal standard of a human right is translated into a limited number of characteristics or attributes of that right.¹⁶²

The parameters used by the Human Rights indicators come from the events-based data on human rights violations (describing acts of possible violations and identifying victims and criminals); socioeconomic and other administrative statistics, referring to quantitative or

¹⁵⁷ OHCHR (2012), p. 2.

¹⁵⁸ See *Ibid.*, p. 2.

¹⁵⁹ At the same time, the Guide states that ‘there is no intention of using this work to support an index to rank countries according to their human rights performance. Owing to the complexity of human rights, such a tool is neither easy to conceptualise, nor necessarily desirable from the point of promoting and monitoring the realisation of human rights. Given that many human rights standards are multifaceted, interrelated and interdependent, it is methodologically difficult to segregate them into meaningful indices for constructing universally acceptable composite measurements for use in cross-country comparisons. This, however, does not rule out that identified indicators can be used to undertake some comparison across countries, but such use is bound to be confined to comparing performance on a few specific human rights standards at a time, and not the entire gamut of human rights’. OHCHR (2012), p. 10.

¹⁶⁰ See OHCHR (2012), p. 8.

¹⁶¹ OHCHR (2012), p. 8.

¹⁶² *Ibid.*

qualitative information related to the standard of living and other facets of life; perception and opinion surveys (polling a representative sample of individuals for their personal views on a given issue); and the expert judgements (including combined assessments of a human rights situation with the help of a limited number of ‘informed experts’).¹⁶³

3.1.6 The World Justice Project Rule of Law Index

The World Justice Project (WJP) Rule of Law Index was first presented in 2008 and is an on-going initiative that implies a collaboration of academics, practitioners and representatives of civil society from almost 100 countries.¹⁶⁴ It is a ‘multinational and multidisciplinary effort to strengthen the rule of law throughout the world’, as the WJP aims to assess whether state institutions protect fundamental rights and allow for delivery of justice to an individual.¹⁶⁵ The WJP Rule of Law Index comprises forty-seven indicators, organised around nine dimensions of the rule of law: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice and informal justice.¹⁶⁶

The WJP team developed a set of five questionnaires based on the Index’s conceptual framework, to be administered to experts and the general public. On average, there are more than three hundred potential local experts per country to respond to the experts’ questionnaires, and local polling companies are engaged to implement the household surveys.¹⁶⁷ This general population poll used a representative sample of one thousand respondents’ questionnaires consisting of closed- ended questions completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labour law, and public health, reflecting their perceptions of the government, the police, and the courts, as well as the openness and accountability of the state, the extent of corruption, and the magnitude of common crimes to which the general public is exposed.¹⁶⁸ Thereafter final scores on the forty-seven indicators were constructed using a five-step procedure.¹⁶⁹

According to the authors of the Rule of Law Index, the data were subject to a series of tests to identify possible biases and errors, such as the cross-checking of all sub-factors against more

¹⁶³ See *Ibid*, pp. 10-11.

¹⁶⁴ See the World Justice Project website, <http://worldjusticeproject.org/>, accessed 23.06.2014.

¹⁶⁵ Agrast M. *et al.* (2014) Rule of Law Index 2014. The World Justice Project. p. 3.

¹⁶⁶ See Agrast *et al.* (2014), p. 172. A more detailed description of the variables used to calculate the Index scores is available in Botero J., Ponce A. (2012) *Measuring the Rule of Law*. World Justice Project Working Paper 2.

¹⁶⁷ See *Ibid*, p. 9.

¹⁶⁸ Agrast *et al.* (2014), p. 9.

¹⁶⁹ See Botero, Ponce (2012), pp. 20-21. The procedure included the following steps: (a) codification of the questionnaire items as numeric values; (b) producing the country scores by aggregating the responses from several individuals (experts or general public); (c) normalised the raw scores; (d) aggregated the normalised scores into sub-factors and factors using simple averages; (e) produced the final rankings using the normalised scores. The score ‘normalisation’, according to the Project, holds in the application of ‘min-max’ method, including the codification of the answers so that all values fall between 0 and 1, with 1 being the highest possible score (most rule of law) and 0 being the lowest possible score (least rule of law).

than sixty third-party sources, including quantitative data and qualitative assessments drawn from local and international organisations, and a sensitivity analysis, conducted by the Econometrics and Applied Statistics Unit of the European Commission's Joint Research Centre, in collaboration with the WJP team, to assess the statistical reliability of the results.¹⁷⁰

3.2 Lessons to be learned from the existing legal indicators

The above analysis of the six sets of indicators with a legal component makes it possible to draw a number of significant conclusions.

First of all, it becomes clear that not every indicator possesses the same 'legal' characteristics. Thus, as was shown, EBRD legal indicators assess national laws in several areas in countries where the Banks operate, and compare the results with the best international practice. Generally, according to the analytical design, EBRD indicators demonstrate no logical separation between policy performance indicators and legal performance indicators as such.

By contrast, the World Bank admits that its Worldwide Governance Indicators represent a mix of indicators evaluating both political and legal aspects. Within this mix, the indicators with a legal component, such as Rule of Law, represent a separate set of indicators, and focus on the extent to which a legal norm has been implemented.

OECD competition law and policy indicators represent a similar mix pertaining to policy performance and legal performance, with a greater emphasis on the monitoring of policy performance.

The Block-Roberts labour law indicators differ from EBRD, OECD, and WB indicators in that they focus exclusively on mandatory legal standards and their application in practice, assigning scores to qualitative data. It is a remarkable starting point for a legal indicators methodology, as it is not mixed with the methodological elements designed for policy performance indicators.

Finally, the legal indicators for OHCHR human rights standards and the World Justice Project rule of law indicators are of a more universal and multidimensional nature. On the basis of the division within performance indicators, suggested earlier in this chapter,¹⁷¹ it is worth noting that human rights indicators are designed not so much for monitoring how effectively or efficiently human rights standards are applied, but for monitoring compliance at a State level, as the indicators in question focus on States as primary duty bearers. In turn, WJP Rule of Law indicators possess a well-elaborated methodology, validated together with the European Commission. However, the spectrum of these indicators is extremely general. As with indicators relating to human rights, Rule of Law indicators are designed to be applied at State level and not at the level of a project or programme.

¹⁷⁰ See the World Justice Project website, 'Methodology', www.worldjusticeproject.org/methodology, accessed 19.06.2014.

¹⁷¹ See Section 2.4.2 above.

The particular characteristics of legal indicators described above can be narrowed down to the following. Firstly, the fact that legal indicators have begun to appear in different areas of law signifies that for the last decade there has been an increasing necessity for enhanced evaluation of legal application and compliance.¹⁷² Yet, although the existent legal indicators focus on legal standards, they do not really reflect the role played by these standards. By far, not all of them evaluate the extent to which these standards are actually being applied, while at the same time it is correctly argued that this function should form the basis for the creation of legal indicators.¹⁷³ Consequently, the relationship between legal indicators and legal standards is not studied well enough and will be explored further.

The legal indicators observed in the different examples, do not pay enough attention to the fact that legal standards vary, either with time (problem with legislation updates) or per country (problem of interpretation). This means that, ideally, the indicators should not be a static set of information criteria, but should be revisited and updated regularly. This may lead to the rejection of a particular indicator after some time, either because the assumptions were proven wrong or the nature of the links has changed.¹⁷⁴

What is more, there seems to be little convergence between different institutions that construct legal indicators, as well as between different sets of indicators designed for the same topic. A good example of such plurality in understanding are the OHCHR human rights indicators, designed by the UN platform, and the independent WJP rule of law indicators, both addressing, *inter alia*, access to justice. Another example of such 'double-work' from outside of the examined list is in the form of Sustainable Development indicators, where, according to Pallemarts and Adelle, the relationship between many different sets of indicators used by the European Commission and by other EU institutions and bodies needs to be clarified, especially between the Eurostat Sustainable Development indicators for Sustainable Development monitoring, the Structural Indicators for Lisbon Strategy monitoring, and various sets of other indicators.¹⁷⁵

Finally, a wide understanding of what actually comprises a legal indicator allows it to adopt different forms. As recognised by the developers themselves, this in turn may lead to diversities in understanding the concept and methodologies aimed to identify and develop indicators, which can sometimes be a source of confusion.¹⁷⁶ It becomes necessary, therefore, to have a minimum common understanding of what constitutes a legal indicator. Additionally, increased transparency related to the methodology, as well as meaningful dialogue between institutions evaluating similar issues, may reduce the confusion and overlap regarding the use of indicators.

At the same time, the overview of the existing legal indicators, their methodologies, and their shortcomings makes it possible to draw a general concept of a legal indicator by formulating its specific features.

¹⁷² See Werksman J. *et al.* (2014) *Improving Compliance with International Environmental Law*. Routledge. p.117.

¹⁷³ See OHCHR (2012), pp. iii, 6.

¹⁷⁴ Reyntjens, Brown (2005), p. 10.

¹⁷⁵ See Pallemarts M., Adelle C. (2009) *Overview of FP-funded research on SDIs and identification of further needs*. Conference paper. EUROSTAT/DG Research Conference 'Research on Sustainable Development Indicators: Taking Stock of Results and Identification of Research Needs'. Luxembourg, 30.09.09. p. 30.

¹⁷⁶ See also OHCHR (2012).

Firstly, a legal indicator apparently differs from any other indicator, as it focuses on legal standards. Generally, using a specific methodology, it operationalises a yardstick by comparing the *de facto* existent legal standard with a certain objective. This allows the application of legal standards to be evaluated, a characteristic that facilitates defining a legal indicator as an *evaluation instrument used to determine whether and to what extent a legal standard has been applied*.

Secondly, and following on from the above, a legal indicator can be applied at State, project, or programme levels. When applied at the level of a project or a programme, a legal indicator functions as an instrument of a results-based accountability.¹⁷⁷ In other words, it permits conclusions to be drawn with regard to the accountability of the actor that deems to have applied legal standards.

Thirdly, a legal indicator provides for the analysis of a legal gap. It highlights areas where further efforts are needed with respect to compliance with legal standards.

4. TOWARDS LEGAL ENVIRONMENTAL INDICATORS

The development of EU environmental law has reached the point at which stakeholders need clearer and more precise information regarding the application of European environmental standards, and not only within the EU, but also abroad.

This is not to say that compliance with legal environmental provisions has never been evaluated.¹⁷⁸ A number of environmental agencies, in particular in Europe and in the United States, have developed useful, and, in some cases, sophisticated indicators.¹⁷⁹ However, as the present study demonstrates, more needs to be done to improve the measurement of environmental

¹⁷⁷ See for example Wang X. (2002) Assessing Administrative Accountability: Results From a National Survey. *American Review of Public Administration* 32 (3). 350-370. Regarding results-based accountability, see Chapter IV, Section 2.2.2. Alternatively, legal indicators can be employed at the State level, in the framework of a State accountability mechanism.

¹⁷⁸ See for example Hiil (2012) *Monitoring and Evaluation of the Rule of Law and Justice in the EU: Status Quo and the Way Ahead?* Concept paper, see also the results of two symposiums on *Monitoring and Evaluating Rule of Law in EU Member States; Critical Analyses of Current and Proposed Mechanisms*, organised by S. Taekema (Erasmus University Rotterdam) and R. Janse (University of Amsterdam) on 24.11.2014 and 23.03.2015, <https://rechtensamenlevingdotorg.files.wordpress.com/2014/04/monitoring-rule-of-law-in-the-eu.pdf>, accessed 2.05.2015.

¹⁷⁹ Mazur E. (2011) Outcome indicators of environmental compliance assurance in OECD countries: Challenges and avenues for further development. *INECE Ninth International Conference on Environmental Compliance and Enforcement*. 718-731. p. 719. See for example at the EU level: Ballesteros M. (2013) *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness*. European Parliament Study. At the level of Member States: UK Government (2013) *Transposition Guidance: How to Implement European Directives Effectively*. Outside of the EU: US Environmental Protection Agency (2014) *Advancing Environmental Justice through Compliance and Enforcement*. BUT, such evaluations have been mixed with policy evaluations, as there is no specific set of purely legal tools yet, allowing for evaluating the legal aspects of compliance. See US Environmental Protection Agency (2002) *Guide for Measuring Compliance Assistance Outcomes*; and US Environmental Protection Agency (2006) *Expanding the Use of Outcome Measurement for EPA's Office of Enforcement and Compliance Assurance*, Report to OMB.

compliance results.¹⁸⁰ Having said that, there is currently no instrument to assess the *legal side* of an environmental regime, such as the availability of access to justice and access to information for affected parties in the framework of an investment project in a third country. The availability and character of the European Principles for the Environment clearly demonstrates the desirability of such legal indicators.

The need for the construction of legal environmental indicators has been strongly anticipated by the analytical community. Thus, according to the International Network for Environmental Compliance and Enforcement (INECE), performance measurement indicators should be identified, developed, and used to improve decision-making and resource prioritisation, to evaluate programme efficiency, and to communicate as to how effectively the programme responds to prioritised environmental problems.¹⁸¹ This position is supported by Warhurst, who in his recommendations regarding future research, also underlines the need for the refinement of appropriate methods to ensure the relevance of performance indicators and their reflection of different stakeholders' perspectives.¹⁸² The author writes about the need for a set of comprehensive methods and instruments to be developed – such as a 'logical framework' for sustainability performance evaluation and communication'.¹⁸³ Additionally, the Council of Europe Parliamentary Assembly similarly states that 'the conventional tools for economic analysis do not permit to reliably ascertain' whether the environmental instruments, such as 'the provisions of the Kyoto protocol, as well as of Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community, are implemented'.¹⁸⁴ It advocates the introduction at all levels of environmental regime of an environmental accounting system that would permit a 'greater accountability of decision-makers'.¹⁸⁵

The main challenge in this regard is the elaboration of an appropriate set of indicators. As Reed correctly warns, the identification and selection of indicators constitutes a research project in itself, going through several stages before the most suitable measures can be selected.¹⁸⁶ Furthermore, while the existent environmental indicators measure *the state of a situation* (descriptive indicators) or the *effectiveness or efficiency of a policy* (policy performance

¹⁸⁰ See Mazur (2011), p. 719; see also Stahl M. (2005) Using indicators to lead environmental compliance and enforcement programs. *INECE Seventh International Conference on Environmental Compliance and Enforcement*. 189-196.

¹⁸¹ INECE (2009) *Principles of Environmental Compliance and Enforcement Handbook*. International Network for Environmental Compliance and Enforcement. p. 14.

¹⁸² Warhurst (2002), p. 116.

¹⁸³ *Ibid*, p. 116.

¹⁸⁴ Council of Europe (2004) *Environmental accounting as a sustainable development tool*. Parliamentary Assembly Recommendation 1653. ro. 6. p. 1. Note that Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC has been amended by Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ 2009 L140/52.

¹⁸⁵ *Ibid.*, ro.11-12, p. 2.

¹⁸⁶ See Reed (2012), p. 8.

indicators), there is an increasing need for a new sub-set of environmental indicators that would focus on evaluating the application of legal standards.¹⁸⁷

Additionally, considering the ever-increasing involvement of International Financial Institutions in environmental regime, their environmental compliance has become a burning issue.¹⁸⁸ In particular, with relation to Banks signatory to the 2006 Declaration on the European Principles for Environment, it is generally argued that next to financial performance, environmental performance will also become an increasingly important aspect to scrutinise.¹⁸⁹ Since early 2011, Europe-based International Financial Institutions have been put under pressure by the European Parliament and the European Council to report more specifically on the progress and outcome of investment projects,¹⁹⁰ which means the elaboration of more detailed and specific indicators.

The findings in Chapters IV and V demonstrate that the general concept with respect to results-based accountability suggests, *inter alia*, that information is duly collected and reported in order to determine whether the intended results have been achieved.¹⁹¹ With the main function of an indicator being the communication of information, it is argued that legal environmental indicators as an instrument of results-based accountability will offer the opportunity to gain more accurate information on the application of legal European environmental standards within investment projects funded by EPE Banks.

¹⁸⁷ See also Chapter V, Section 4.1, concerning the shortcomings of EPE Banks' accountability mechanism, and Section 4.2, on indicators as instruments of a yardstick within the Banks' accountability mechanism. This chapter has demonstrated that such legal indicators already exist in other fields of law. Considering them, and inspired by their methodologies, the chapter argues further that the time is ripe for introducing a set of *legal environmental indicators* as part of environmental performance indicators.

¹⁸⁸ See Himberg H. (2002) *International Financial Institutions, Environmental Standards and Foreign Direct Investment: Bringing the Learning Curve to Full Circle*. Policy Paper. New America Foundation; Shihata I. (1996) *Implementation, Enforcement and Compliance with International Environmental Agreements – Practical Suggestions in light of the World Bank's Experience*. *Georgetown International Environmental Law Review* 37-51; Halliday T. (2012) *Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations*. In Davis K. *et al.* (eds.) *Global Power Through Classification and Ranking*. Oxford University Press. 180-202.

¹⁸⁹ See in general Warhurst (2002), p. 14.

¹⁹⁰ Dunne J. (2014) *Mapping the Cost of Non-Europe, 2014-19*. European Parliament. Noteworthy is that according to Parliament, 'The European supervisor should have the competence and responsibility to: [...] strengthen international supervisory coordination and, where appropriate, represent the Union in international financial institutions'. See Recommendation 1.1 relating to a single supervisory mechanism, European Parliament (2012) Report with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup 'Towards a genuine Economic and Monetary Union', PE 494.867v04-00, A7-0339/2012, (2012/2151(INI)) 24.10.2012.

¹⁹¹ See Chapter IV, Section 2.2.2, regarding the general concept of a result-based accountability, and Chapter V, Section 3.1.2, concerning the assessment methods by EPE Banks in particular. See also Schilder D. (1997) *Overview of results-based accountability: components of RBA*. Harvard Family research project. Harvard graduate school of education. p. 1.

Chapter VII

CONSTRUCTING LEGAL ENVIRONMENTAL INDICATORS

When you measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind: it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced to the stage of science, whatever the matter may be.

Lord Kelvin¹

This chapter builds on the findings of Chapter II, clarifying the nature of European legal environmental standards, of Chapter V, demonstrating the necessity to be able to evaluate the application of these standards in EPE Banks' investment projects in third countries, and Chapter VI, arguing that legal indicators can ensure the proper functioning of the Banks' accountability mechanism by enabling the evaluations and functioning as an instrument of a yardstick, and that the application of legal environmental standards within an investment project can be evaluated with the help of legal performance indicators.

This chapter provides the definition of legal environmental indicators, introduces methodology for the construction of legal *environmental* indicators, inspired by methodologies used in other legal fields,² and based thereon, identifies concrete indicators that can be used in evaluations. The main goals in developing this methodology are: 1) the elaboration of a structured and consistent approach to translating legal environmental standards into indicators; and 2) the elaboration of an evaluation method, consisting of assigning scores to the indicators, and calculating the degree to which the standards have been applied in an investment project.

¹ Thomson W. (Lord Kelvin), lecture on 'Electrical Units of Measurement', delivered 3.05.1883, published in Thomson W. (1891) *Popular Lectures*. Vol. I, p. 73; also cited in Reed B. (2012) *Selecting water, sanitation and hygiene indicators*. Water, Engineering and Development Centre, Loughborough University. p. 1.

² For an overview, see Chapter VI, Section 3.1.

1. LEGAL ENVIRONMENTAL INDICATORS: THE DEFINITION

The general overview of indicators' typology, presented in the previous chapter, provides an overview of indicators according to their subject matter, type of data, hierarchical structure, and conceptual framework. These criteria can be applied as well to legal environmental indicators, in order to provide their preliminary description.³

Thus, as to *subject matter*, the indicators relate to the environment. More specifically, the indicators in question focus on European legal environmental standards, enshrined in the Treaty on the European Union and the Treaty on the Functioning of the European Union, and based on project-specific practices and standards incorporated in secondary EU environmental legislation and CJEU case law.⁴

As to the *type of data* they evaluate, these are primarily qualitative indicators. However, the possibility of attributing numerical values to a proposed qualitative indicator should not be overlooked, as it creates greater clarity, and thus can foster accountability relationships within a particular investment project. Along with the methodologies of the indicators analysed, it is suggested to adopt a *bottom-up approach*, with scores ranging from 0 (when an investment project does not implement any European environmental standards) to 4 (when standards employed in a given investment project are considered to be in line with European environmental standards).

Furthermore, legal environmental indicators possess their own *structure and hierarchy*. In theory, they can form the whole indices, and can be subdivided into headline indicators and operational indicators, and be cross-sectoral and sector-specific. Headline legal environmental indicators reflect the implementation of the general environmental principles, while operational legal environmental indicators evaluate the application of more specified environmental standards.

As to *conceptual framework*, it is obvious that legal environmental indicators constructed for EPE Banks are envisaged primarily for application at project level. Consequently, the focus of the proposed indicators lies on evaluating compliance rather than on monitoring a project's efficiency and effectiveness. These indicators aim to evaluate the progress towards the application of European environmental legal standards within a particular investment project, indicating the degree to which this application is achieved. Noteworthy is that with the distilled new legal features of performance indicators,⁵ such an evaluation acquires a state-of-the-art dimension.

The yardstick for such an evaluation in relation to EPE Bank projects is derived from the Sourcebook on EU Environmental law.⁶ The Sourcebook is designed to enable stakeholders from the European Union and from third countries to identify the EU environmental standards that EPE-financed projects are expected to meet. 'It consolidates the main features of key EU sector specific and thematic environmental legislation, in terms of the requirements, especially qualitative and

³ In Chapter VII each of these characteristics is further elaborated into a new methodology.

⁴ Legal environmental indicators evaluate the implementation of environmental standards, characterised by the European Principles for the Environment adopted by five European Multilateral Financing Institutions, 2006-052-EN. See also the European Principles for the Environment, the EIB website, accessed 23.06.2014.

⁵ See Section 2.4 above on the conceptual subdivision of performance indicators into *policy* and *legal* performance indicators.

⁶ See Farmer A. (2010) (ed.) *Sourcebook on EU Environmental Law*. Institute for European Environmental Policy.

quantitative standards, relevant to the project financing activities of the EPE Banks'.⁷ Moreover, 'it contains links to the full text of the legislation, guidelines and other available supporting material to which the user can refer for further guidance'.⁸

In summary, the proposed legal environmental indicators are based on European legal environmental standards; are qualitative by nature; are applied on the basis of a project; are constructed to evaluate the distance between the factual and the anticipated situation, formulated in the yardstick; and are designed to be used both by actors and their forums and by investors and their stakeholders.

In keeping with the above, legal environmental indicators can enhance the accountability of project developers, and at the same time can contribute ultimately to learning about the application of environmental standards by highlighting the areas of poor compliance.

Hence, considering the aforementioned characteristics, and based on the previously formulated definition of a legal indicator,⁹ it is possible to formulate a specific definition for a legal environmental indicator. It can be defined as an *evaluation instrument, aggregating qualitative information, utilised to determine whether and to what extent an environmental legal standard has been applied in a given project*. This indicator is linked to the *normative content* of requirements involving environmental standards – including project developers' obligations, with transparency and the existence of a yardstick being necessary preconditions. It is essential to highlight that without sufficient clarity as to the content of environmental standards, the indicators cannot function properly as an instrument of accountability mechanism.

In the next chapter, a methodological step will be taken towards the construction of legal environmental indicators, designed particularly to evaluate the application of European legal environmental standards in FDI projects involving EPE Banks.

2. THE THREE-STAGE MODEL FOR THE CONSTRUCTION AND USE OF LEGAL ENVIRONMENTAL INDICATORS

Before proceeding, it is necessary to outline the steps required for the construction of indicators.

To begin with, it should be remembered that currently there exists no single settled manner as to how to construct indicators.¹⁰ Moreover, there are no settled rules or criteria that would establish the compulsory features of new indicators. This is a consequence of the fact that existing methodologies differ according to the type of indicators.¹¹ Moreover, such diversity can be

⁷ Farmer A. (2010) (ed.) *Sourcebook on EU Environmental Law*. Institute for European Environmental Policy. p. 5.

⁸ *Ibid.*, p. 5.

⁹ See Section 3.2 above.

¹⁰ This conclusion is drawn in Chapter VI, following research on the existent sets of legal indicators and their methodologies.

¹¹ See Chapter VI, Section 2, for a general overview of different types of indicators.

explained by the considerable difference in subject fields that involve indicators as instruments. Furthermore, as regards legal performance indicators in particular, it has been argued that, unlike descriptive indicators, they have been in use for only a short period of time, representing a relatively new instrument that needs further systematisation.¹²

Nevertheless, attempts have been made to find the best suitable framework model for the construction of performance indicators. One of the most prominent examples of how environmental activities can be regulated involves activities under the auspices of the International Network of Environmental Compliance and Enforcement (INECE),¹³ which came up with a three-stage model for *identifying, constructing, and using* the indicators.¹⁴ According to this model, it is necessary at first to identify potential indicators by determining their scope, developing common definitions, and selecting criteria for their evaluation. The second stage of the model is devoted to the construction process, during which the new indicators emerge. Finally, the third phase involves actual use of the indicators by testing them in real-life investment projects.

Another example involves the Food and Agriculture Organisation (FAO) guidelines for constructing indicators on sustainable development, produced to support implementation of the code of conduct for responsible fisheries.¹⁵ These guidelines contain five steps: *specifying the scope, developing a framework, specifying the standards and objectives, choosing a set of indicators, and specifying the method of aggregation and visualisation*.¹⁶ The INECE and FAO models have both been set up for *national* environmental compliance programmes at a State level. Nevertheless, these multi-purpose models can be adapted to the construction of legal environmental indicators, suitable for use by EPE Banks at the level of their investment projects.

These models have been chosen because in varying degrees they are relevant to any public programme, project, or organisation, and not just with respect to government activities. While the three-stage INECE model consists of *identifying, developing, and using* indicators,¹⁷ and the five-step FAO model focuses on *specifying the scope, developing, specifying criteria and objectives, choosing indicators, and specifying the method*, it is suggested that the model proposed for the construction of legal environmental indicators contains the stages of *methodology design, indicator development, and use of the indicators in practice*. The major change concerns the methodological

¹² As the overview in the previous Chapter has demonstrated, the different sets of legal performance indicators began to appear after 2000. See Chapter VI, Section 3.1. However, these should not be confused with policy performance indicators, which have already been in use for a longer period. See in general OECD (1993) OECD Core Set of indicators for environmental performance reviews: A synthesis report by the Group on the State of the Environment.

¹³ The International Network for Environmental Compliance and Enforcement (INECE) was founded in 1989 by the Dutch and US environmental agencies. Currently there are more than 4,000 members from international organisations, governmental agencies, and non-governmental organisations. Additional support is provided by the United Nations Environment Programme (UNEP), the World Bank Institute, Environment Canada and the Organisation for Economic Co-operation and Development (OECD), the European Commission, and other governments and organisations. The INECE uses regulatory and non-regulatory approaches to guide compliance with and enforcement of environmental laws and guidelines that promote the sustainable use of natural resources and the protection of ecosystem integrity at the global, regional, and national levels. See the INECE website, 'Overview', www.inece.org/overview/, accessed 4.11.2014.

¹⁴ INECE (2008) Performance measurement Guidance for Compliance and Enforcement Practitioners. p. 10.

¹⁵ FAO (1999) Indicators for sustainable development of marine capture fisheries. FAO Technical guidelines for Responsible fisheries 8. p. 14.

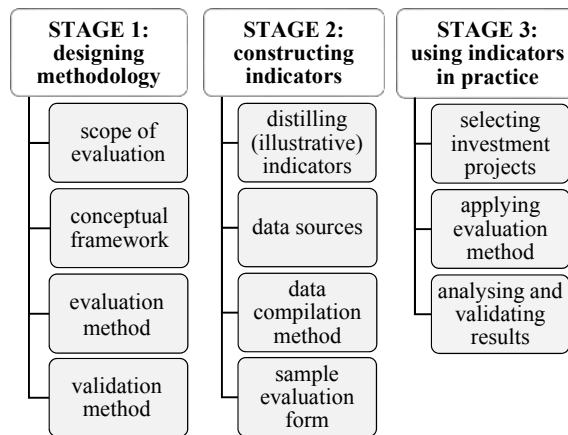
¹⁶ *Ibid.*, p. 14.

¹⁷ See INECE (2009) *Principles of Environmental Compliance and Enforcement Handbook*, International Network for Environmental Compliance and Enforcement. p. 105.

stage of the model, which plays a more prominent role. Therefore, the stage at which the methodology is being elaborated becomes the primary, first stage of the proposed model.

Within the methodological stage, another important adjustment to the INECE and FAO models is the introduction of a validation component.¹⁸ The validation encourages one to look back at the practical application of the newly created indicators, and to adjust possible shortcomings, thus providing for further learning.

Figure 1. The three-stage model for the construction and use of legal environmental indicators



The model suggested for the construction and practical use of legal environmental indicators consists of three stages: *designing the methodology*, *constructing the indicators*, and *using the indicators in practice* (Figure 1), each comprising the relevant sub-stages. The first and second stages are addressed below, while the third is discussed in the following chapter.

¹⁸ FAO (1999) mentions in the recommendations to reporting that in order to become a success, 'indicators and analyses using indicators should be open to validation and verification by any interested party' (p. 33); the INECE (2008) does not mention validation at all.

3. DESIGNING THE METHODOLOGY

In designing a methodological framework, the main objective is to adopt a structured and consistent approach to answering questions as to *what* exactly will be evaluated and *how* this will be done. Firstly, it is necessary to specify the scope of the future indicators. Secondly, there is a need for an adequate conceptual framework as a rationale for identifying and designing the relevant indicators, and not reducing the exercise to a mere listing of possible alternatives.¹⁹ Thirdly, it is important that the indicators represent suitable methodologies involving data evaluation and validation.

3.1 The scope of the evaluation

An essential matter that needs to be decided upon at the beginning of any effort to construct indicators is the scope of the effort.

As with any other indicators, in designing a set of legal environmental indicators, it is necessary to strike a balance between *generally relevant* indicators (the ‘core set’) and *contextually specific* indicators, as both are needed.²⁰ The former indicators focus on the *general features* of an evaluated situation, which are *common to all other issues* related to the environmental regime. Their function lies therefore in a primary evaluation of the matter, offering an initial picture. At the same time, the latter indicators, being context-specific, are complementary to the generally relevant indicators. Allowing for a *more in-depth examination of the specific conditions* of each particular matter, they *provide supplementary information* to the initial picture. Therefore, when constructing indicators from scratch, it is important to realise what type is being constructed.

Another aspect that cannot be overlooked is the *level of the evaluation*. Environmental law indicators could be used in a wide variety of situations, from the evaluation of national compliance and enforcement programmes in relation to an international treaty to the evaluation of projects at regional/municipal levels. The set of legal environmental indicators can differ, depending on the evaluation level.

Determining the scope of future indicators is therefore essential, which is recognised in the existing practice. For example, in order to determine the scope, developers of the Human Rights indicators suggest answering two questions:

- in relation to the evaluation object, will the indicators be of a general or a specific nature, covering general legal and regulatory frameworks or only a specific law or requirement, industry sector, geographic area or non-compliance pattern? and

¹⁹ See OHCHR (2008) Report on Indicators for Promoting and Monitoring the Implementation of Human Rights. *International Human Rights Instruments*. pp. 4-5.

²⁰ See for example OHCHR (2012) Human rights indicators: A guide to measurement and implementation. Summary. United Nations Office of the High Commissioner for Human rights, New York and Geneva. p. 9.

- in relation to the evaluation level, will the indicators be applied at a national or a sub-national level, covering the national compliance and enforcement programmes, or in a programme or project at the regional/district, state, or local/municipal level?²¹

It is first necessary to answer these questions, and to clarify the standards that are to be evaluated as well as the evaluation level.

3.1.1 Specifying the standards to be evaluated

Generally, while indicators are undeniably useful, there is still considerable room for improvement in the indicator selection procedure.²² The scope of standards to be evaluated by the proposed indicators is determined by the Declaration on the European Principles for the Environment.²³

Therefore, legal performance indicators will focus primarily on EU legal environmental provisions contained in EU Treaties, as well as in EU secondary legislation.²⁴

As the EPE Banks are ‘committed, subject to their respective environmental policies, to applying EU principles, practices and standards to all projects financed by the Signatory institutions’,²⁵ the primary relevant indicator of a general nature should be the one to measure this commitment.

As for the other indicators, the reference can be made to the before-mentioned Sourcebook on EU environmental law, issued by the Institute for European Environmental Policy, which comprises the main *cross-sectoral* and *sector-specific requirements* of European environmental law, applicable in the Banks’ investment projects in third countries.²⁶ Therefore, technically, the indicators should be constructed based on the structured environmental requirements contained in the Sourcebook.

However, the research framework does not allow elaboration of an all-inclusive set of legal environmental indicators, which would reflect every standard in every sector of European environmental law, both of a cross-sectoral and a sector-specific nature. To this end, it was chosen to develop indicators that focus only on *general (cross-sectoral) requirements* rather than on particular sector-specific requirements. Such indicators are of a general nature, and are as a rule widely applicable, independent of the sector of environmental law.

²¹ See in general OHCHR (2008), pp. 4-5.

²² Niemeijer D., Goot, de, R. (2008) A conceptual framework for selecting environmental indicator sets. *Ecological indicators* 8. 14-25. p. 14.

²³ See EPE Declaration (2006).

²⁴ According to the wording of the EPE Declaration, ‘the ‘European Principles for the Environment’ consist of the guiding environmental principles enshrined in the EC Treaty and the project-specific practices and standards incorporated in EU secondary legislation on the environment’, as well as ‘best EU practice in the fields of environmental management, transparency, public consultation and reporting’. See the Declaration text, Annex to this study, p.1.

²⁵ See *Ibid.* See also Chapter II, Section 2, on the nature of EU environmental legal norms.

²⁶ Farmer A. (2010) (ed.) *Sourcebook on EU Environmental Law*. Institute for European Environmental Policy.

From all the standards of a cross-sectoral nature contained in the Sourcebook on EU environmental law,²⁷ it is chosen to construct legal environmental indicators to measure the application of environmental standards in areas of:

- environmental impact assessment;
- access to environmental information; and
- permit requirements for industrial installations.²⁸

Using these illustrative indicators as initial guidance, further work on the construction of sector-specific indicators can be done in the future, based on the elaborated methodology and allowing for a more detailed and focused assessment of a specific legal environmental standard, guided by the requirements of a particular investment project.

3.1.2 Specifying the evaluation level

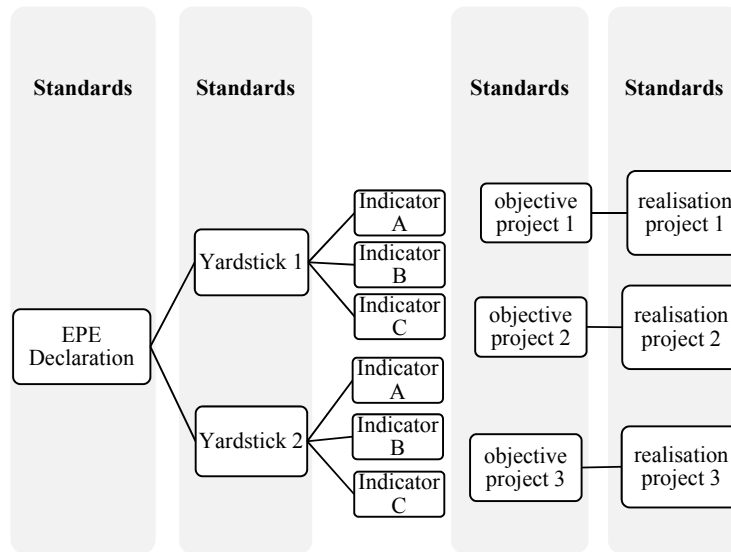
It follows from the general context of this study that legal environmental indicators are to be constructed not for the evaluation of national compliance or enforcement programmes but for the evaluation of projects-recipients of direct investment from EPE Banks.

Nevertheless, it is still necessary to bring further clarity in relation to the exact level of evaluation, as schematically the legal environmental standards can be found at the levels indicated below.

²⁷ The Sourcebook on EU environmental law contains the following environmental standards of a cross-sectoral nature: Environmental Impact Assessment, Disclosure of Environmental Information and Public Participation, Environmental Liability, Integrated Pollution Prevention and Control – Permit Requirements, Industrial Risk Prevention and Management, Environmental Management Systems, Management of Chemicals, Waste Prevention and Management, Noise Prevention and Management, Energy Efficiency, Air Quality and Climate Change, Surface Water Quality, Soil and Groundwater Protection and Nature Protection. See Farmer (2010).

²⁸ See Section 4.1 below.

Figure 2. Levels containing the legal environmental standards



Firstly, as can be seen from Figure 2, environmental standards and the commitment to their application can be found in the EPE Declaration. The Declaration represents the general intention and principles that bind EPE Banks and, consequently, all the investment projects in which the Banks participate.²⁹

Secondly, the reference to the application of environmental standards can be found in yardsticks. As Chapter IV has shown, a yardstick represents a precondition of results-based accountability that transforms the general objective into a quantifiable criterion within the specified time frames.³⁰ In practice, the very general provisions of the EPE Declaration were developed further by the Sourcebook on EU Environmental law, which is ‘designed to enable project sponsors [...] to identify the EU environmental standards which projects supported by the EPE Banks are expected to meet’,³¹ or the EBRD Environmental and Social Policy, which contains a number of Principles, implementing the Declaration.³² It is noteworthy that technically there can be more than one yardstick, as reflected in Figure 2.

The figure also demonstrates that each particular yardstick contains a corresponding set of indicators. To this end, the quantitative and qualitative indicators as specific instruments of

²⁹ See EPE Declaration (2006).

³⁰ See Chapter IV, Section 3.4.2, on the definition and application of a yardstick.

³¹ Farmer (2010), p. 5.

³² See EBRD (2008) Environmental and Social Policy, Performance Requirements 1, 3, 4, and 10.

evaluation are employed, demonstrating the degree to which the standards, comprised by the yardsticks, have been applied. Remarkably, as some environmental standards of a cross-sectoral nature are comparable to similar standards in other fields of law (e.g. access to information or public participation in decision-making), some legal environmental indicators can be based on the previously existent indicators borrowed from those fields.³³

Thirdly, the environmental standards can be found in the objectives of EPE Banks' investment projects. Each investment project has its own general objective, related to topics such as municipal and environmental infrastructure, power and energy, transport, natural resources, agribusiness, and so forth.³⁴ Such general objectives form the project's legal framework, and may not contradict the Banks' commitment to the European Principles for the Environment. It is important to determine, therefore, whether there is mention of *commitment* to EPE standards in the project's general objective.

Fourthly, the environmental standards are present during the course of a projects' realisation. The *efforts* made towards application of the EPE in the course of project's implementation, as well as the achieved *results* also form the levels at which evaluation should take place.

Thus, answering the questions posed at the beginning of this section, and related to the scope of legal environmental indicators, these indicators are characterised in two ways: firstly, as indicators of general context, based on cross-sectoral environmental standards; and secondly, considering their purpose, legal environmental indicators operate at project level, evaluating the objectives and procedures of the project's realisation and achievement of outcomes.

3.2 The conceptual framework of evaluation using legal performance indicators

In the previous chapter, it was proposed to make a division of the performance indicators.³⁵ It has been demonstrated that conceptually, *legal performance indicators* should be separated from *policy performance indicators*.³⁶ It is true that both types measure performance, and to a certain extent are interrelated. Nevertheless, as has been argued, *policy* performance indicators focus on the efficiency and effectiveness of a policy realisation, while *legal* performance indicators focus on compliance with legal standards.³⁷ As a consequence, when applied in practice, these two types of indicators use different conceptual evaluation frameworks.

As was demonstrated in Chapter VI, the conceptual framework of the compliance evaluation by legal performance indicators uses a triple configuration of *structural*, *process*, and *outcome* indicators, for the purpose of evaluating commitments to certain legal obligations; the efforts

³³ See Chapter VI, Section 3.1, for an overview of existent legal indicators.

³⁴ See for example the EBRD website, 'Project Summary Documents', www.ebrd.com/work-with-us/project-finance/project-summary-documents.html, accessed 12.01.2015; the EIB website, 'Projects financed, breakdown by sector', www.eib.org/projects/loans/sectors/index.htm?start=2015&end=2015, accessed 12.01.2015. Such classification makes selection of the applicable general standards, contained in the Sourcebook on EU Environmental law, more concrete (see Farmer 2010).

³⁵ See Chapter VI, Section 2.4.2.

³⁶ See *Ibid.*

³⁷ See Chapter VI, Section 2.4.2.

required to make the commitments a reality; and the results of those efforts in terms of the enjoyment of particular legal rights or standards.³⁸ It was observed that a comparable conceptual framework was proposed by the Office of the High Commissioner on Human Rights in order to reflect the triple structure of the international obligation to respect, protect, and fulfil human rights.³⁹ However, it is argued that such a general triple conceptual framework can be applied not only to human rights standards but also to environmental standards, and not only for the purpose of monitoring compliance at the international level but at the level of investment projects as well, where it acquires a new dimension.

To demonstrate the above, this conceptual framework is further elaborated in Figure 3 below, in order to be applied to the principal evaluation areas on a project scale. It includes a short description of activities, in which each type of indicator sets is employed, as well as examples of the areas that are to be evaluated by the indicators. It should be mentioned that these areas are not exhaustive.

Figure 3. Triple conceptual framework and the examples of major evaluation areas of legal performance indicators

Indicator type	Short description	Examples of evaluation areas
Structural indicators (Commitments)	<p>Structural indicators reflect commitment to the application of European environmental standards or the existence of basic institutional mechanisms (judicial and non-judicial) allowing the application of environmental standards. These could be the availability of legal instruments similar to European ones, the adoption of environmental and investment agreements, and their incorporation into domestic legislation.</p> <p>As the higher standard prevails,⁴⁰ the structural indicators may require examining the corresponding environmental standards of a host country.</p> <p>Structural indicators are used primarily to evaluate the project's general objective and actions taken at the beginning stage of the project.</p>	<p>General legal framework and rules, applicable to the project</p> <p>General objective formulated for the particular project</p> <p>Action taken at the initial stage of the project (environmental impact assessment, public awareness campaign, facts of public participation)</p>

³⁸ See Chapter VI, Figure 4.

³⁹ See OHCHR (2012), pp. 5-7, 33; OHCHR (2008), Annex I: List of illustrative indicators, p. 21.

⁴⁰ Prasek D. (2013) *The European Principles for the Environment – EBRD Experience*. 'EU environmental norms and third countries: the EU as a global role model?' workshop presentation, T.M.C. Asser Institute, The Hague, 19.04.2013; see also, generally, EBRD (2008).

<p>Process indicators</p> <p>(Efforts)</p>	<p>Process indicators trace the instruments and efforts <i>de facto</i> implementing European legal environmental standards during realisation of the project.</p> <p>They evaluate concrete environment-related activities that did or did not take place, environmental permit requirements that have or have not been realised, environmental rights that have or have not been enjoyed.</p> <p>Unlike structural indicators, process indicators are used primarily to evaluate the project's implementation phase.</p>	<p>Environment-related complaints received and the proportion redressed</p> <p>Permit requirements for the particular project with the relevant time frames</p> <p>Project budget allocation to environment-related activities</p>
<p>Outcome indicators</p> <p>(Results)</p>	<p>Outcome indicators evaluate the degree of the <i>de facto</i> enjoyment of environmental standards.</p> <p>They demonstrate the achieved results by evaluating the realisation of the original objectives. Over time, outcome indicators consolidate the impact of various underlying procedures that can be captured by one or more <i>process indicators</i>.⁴¹</p> <p>Outcome indicators evaluate the project's end results.</p>	<p>Number of complains from stakeholders</p> <p>Infringements and possible exemptions; use of the 'reservation'</p> <p>Range of imposed sanctions for the non-application of standards</p>

In practice, a clear linear division in structured-process-outcome indicators is not always easy to find. In addition, as far as evaluation areas are concerned, it should be recalled that it is an open list that can be extended further or shortened, according to a practitioner's need. Nevertheless, for the proposed analysis, it is important to focus on the three types of activities within an investment project, reflecting the commitments, efforts, and results.

In terms of content, at first glance the relevance of the triple conceptual framework with its division into structural, process, and outcome indicators in relation to a particular standard might not be obvious. And indeed, it may seem that only the outcome indicators are required in order to evaluate the realisation of an original project's objective by assessing the final result. The comparison of the original objective with the achieved outcomes, specified by a yardstick, seems to be sufficient to judge the extent to which legal environmental standards have been applied in a particular investment project.

Nevertheless, the function of structural and process indicators within this conceptual framework should not be underestimated.

⁴¹ See OHCHR (2012), p. 7.

Firstly, an evaluation based on the triple conceptual framework helps to demonstrate at what level/project stage the problems are situated, and resulted in the absence of a partial or full observance of environmental standards.

Secondly, as will be shown below, not every indicator can measure a project's 'outcome' or 'results' stage. A good example is the indicator measuring 'commitment to the EPE in the project's general objective'.⁴²

Thirdly, the full realisation of a project's objectives can sometimes be beyond the good intentions of the investor. This holds particularly true when one considers the specific character of the European Principles for the Environment, adopted as a voluntary code of conduct; the Banks' investment activities, taking place outside the European Union; and the applicability of the reservation,⁴³ subjecting the full application of legal environmental standards to local conditions.

This does not mean, however, that investors should not strive to fully realise project's objectives. This is why it is argued that the commitments and efforts made during an investment project's realisation must not be overlooked.⁴⁴ Moreover, the degree of commitments, especially efforts measured by the structural and process indicators, can serve as proof that investors did their best in the given circumstances. Thus, while the outcome indicators alone allow one to draw conclusions regarding *de facto* compliance,⁴⁵ the structural and process indicators provide additional information on efforts taken on the path towards outcomes, thus providing a more sophisticated picture of investors' accountability.⁴⁶

Considering the commitments and efforts made during a project's realisation is thus no less important for the assessment of the results-based accountability than simply possessing information concerning the achieved results. Therefore, the triple conceptual framework makes legal environmental indicators a valuable instrument of the accountability mechanism.

Furthermore, the proposed conceptual framework basically serves as a stepping stone to two evaluation methodologies:

- a '*quick-scan*' methodology, allowing for an evaluation of quick results, with the aim of obtaining an approximate idea as to how far the standards have been applied. It makes use only of the outcome indicators, and is easy to use, but it offers less objectivity and transparency;⁴⁷ and

⁴² See Section 3.1.2 above.

⁴³ See Chapter V, Section 1.3. The NIB and EIB state that 'the signatories will apply the EPE, with reference to local circumstances'. See the NIB website, 'The European Principles for the Environment', www.nib.int/about_nib/environment/environmental_cooperation/epe, accessed 13.11.2014.

⁴⁴ According to the Office of the United Nations High Commissioner for Human Rights, 'working with such a configuration of indicators simplifies the selection of indicators, encourages the use of contextually relevant information, facilitates a more comprehensive coverage' of the identified attributes of a standard – and perhaps even diminishes the overall number of indicators required to evaluate the realisation of a particular standard. See OHCHR (2008), p. 10.

⁴⁵ See also Eugene Mazur, who writes that the review of existing outcome indicators and the analysis of their respective strengths and weaknesses suggests that it is not possible to identify a universal optimal set of these indicators, because the functionality of individual outcome measures ultimately depends on their purpose, such as for example the internal performance assessment. Mazur E. (2011) Outcome indicators of environmental compliance assurance in OECD countries: Challenges and avenues for further development. *INECE Ninth International Conference on Environmental Compliance and Enforcement*. 718-731. p. 718.

⁴⁶ See Chapter V, Section 4.2.

⁴⁷ Such methodology is in essence comparable to the labour standards assessment by Block and Roberts, with the difference that the Block-Roberts methodology subsequently offers a comparison of measurement results between States (originally between the US and Canada). See Block R. (2007) Indicators of Labour Standards: an Overview and comparison. In Kucera D. (ed.)

- an *extensive methodology*, including the triple commitments-efforts-results evaluation procedure,⁴⁸ allowing for a detailed evaluation of how European legal standards have been applied within an investment project.

This being said, the further analysis concentrates on the latter, as the triple commitments-efforts-results evaluation does not only allow a more detailed examination of a particular standard's application within an investment project – but, theoretically, it also permits the assessment of the investors' accountability.

3.3 The evaluation method

Although indicators represent an empirical model of reality and not reality itself, they must nonetheless be analytically sound and have a fixed evaluation methodology.⁴⁹ It is therefore extremely important to create a logical and specific sequence of operations that can be seen as determining the value of the indicator,⁵⁰ or 'measuring' the indicator.

This in turn makes it possible to evaluate legal environmental standards. The proposed method of measuring indicators and subsequently evaluating standards is addressed in detail below.

3.3.1 Legal performance evaluation: assigning scores to indicators

Qualitative approaches are distinct from quantitative ones in that 'technically, a 'qualitative observation' identifies the presence or absence of something, in contrast to 'quantitative observation', which involves measuring the degree to which some feature is present'.⁵¹ As Webley puts it, the 'qualitative data sometimes need to be quantified to provide some understanding of how frequently particular themes emerge within the data'.⁵² Supporting this point of view, it is argued that the combination of both approaches fits best when legal performance indicators are being used. While the qualitative character of legal environmental indicators may reveal more about their properties, the use of quantitative method elements results in the evaluation being more precise.

Legal performance evaluation is designed for legal performance indicators. The originality of the proposed evaluation rests in the underlying methodology. In short, the proposed legal

Qualitative indicators of labour standards. Comparative methods and applications. Springer. 27-56; Block R. *et al.* (2003) Labour standards in the US and Canada. W.E. Upjohn Institute for Employment Research. p. 4.

⁴⁸ Such methodology is comparable to the assessment conducted for human rights indicators. See OHCHR (2012).

⁴⁹ See Hammond A. *et al.* (1995) *Environmental Indicators: A Systematic Approach to Measuring and Reporting on Environmental Policy Performance in the Context of Sustainable Development.* World Resources Institute, Washington. p. 1. Under *measurement* here is understood assigning a certain score to an indicator.

⁵⁰ See Hales D. (2010) *An Introduction to Indicators.* UNAIDS. p. 20.

⁵¹ Kirk J., Miller M. (1986) *Reliability and Validity in Qualitative Research.* Sage Publications. p. 9.

⁵² Webley L. (2010) Qualitative Approaches to Empirical Legal Research. In Cane P., Kritzer H. (eds.) *The Oxford handbook of Empirical legal Research.* Oxford University Press. 936-950. p. 949.

environmental indicators possess a *qualitative character* with assigned *numerical values*. The possibility of attributing numerical values to a proposed qualitative indicator is most helpful in determining ‘what is working and what can be improved’.⁵³ It creates greater clarity in discussion on the application or non-application of environmental standards by providing a possibility of expressing the results in concrete numbers. This in turn functions as an additional instrument for internal self-regulation and for external control, thus fostering the accountability of a particular investment project.

More specifically, the legal performance evaluation adopted for the proposed legal environmental indicators is based on a *bottom-up graded* approach. Evidently, such an approach offers the possibility of attributing a certain gradation to a qualitative result; starting with the bottom where the result is nil, and ending at the top, resulting in full compliance with the standards.

In order to provide for the quantitative assessment of a qualitative indicator, the choice was made to measure the data using a Likert scale (see Figure 4). Often used in social studies, Likert scales may be tailored for any given instrument, and such a customised scale is likely to produce an instrument of high precision.⁵⁴ The scale allows for five choices,⁵⁵ symmetrically spread from the neutral answer in the middle. In the case of the application of environmental standards, it is suggested to label the choices ranging from ‘no application’ to ‘narrow application’, ‘partial application’, ‘wide-ranging application’, and ‘comprehensive application’ (see Figure 4).⁵⁶

Figure 4. Assigning scores to the indicators

Scores	Labelled choices	Percentage
0.	No application	0 – 20%
1.	Narrow application	20 – 40%
2.	Partial application	40 – 60%
3.	Wide-ranging application	60 – 80%
4.	Comprehensive application	80 – 100%

⁵³ Kucera D. (2007) *Qualitative Indicators of Labour Standards: Comparative Methods and Applications*, Springer. p. 7.

⁵⁴ See Munshi J. (2014) *A Method for Constructing Likert Scales*. Sonoma State University. p. 1; see also Likert R. (1932) A Technique for the Measurement of Attitudes. *Archives of Psychology* 140 (6).

⁵⁵ Under ‘choices’ here are meant a number of alternatives comprising a measurement scale.

⁵⁶ Interesting is that in his recent research on semantic scales, Munshi suggests adding two points to the traditional five-point Likert scale, thus allowing for some extra ‘small but unambiguous distinctions’. See Munshi (2014), p. 9. Likert himself, in his original paper, did not consider the number of choices to be an important issue, stating that only if five alternatives were used was it necessary to assign values from one to five, with three assigned to the undecided position. See Likert R. (1932) A Technique for the Measurement of Attitudes. *Archives of Psychology* 140 (6). Cf Munshi (2014), p. 1. The proposed scale for the measurement of legal performance indicators can indeed be extended to include extra choices if necessary.

Research shows that in order to judge compliance or non-compliance with a standard, most currently existing methodologies boil down to being a comparison of *achieved results* against the relevant yardstick, or, in other words, of the factual practice that took place in a certain investment project in relation to a specific obligation under a legal standard.⁵⁷ Arguably, the subsequent conclusion on the *partial application* or the *non-application* is thus taken on an almost intuitive basis, and is supported neither by cognitive thinking nor by methodological calculations. Adopted in this way, such a conclusion can hardly lead to further legal debate on its grounds.

It is argued, therefore, that a ‘yes’ or ‘no’ assessment must be avoided, as it limits indicators to a simple qualitative conclusion on the application/non-application of a standard. In addition, when assessing partial application (e.g. the availability of access to published environmental information but not to internal files), it is maintained that the numerical grading will provide extra information on the *degree* to which European environmental standards have been implemented, pointing out areas of weaknesses where policies and standards could be strengthened.

For the sake of methodological clarity, however, it should be emphasised that the present study does not deal with the problems that result in the non-application of standards. It is not concerned with the question as to whether a certain degree of application, scored by a standard, constitutes ‘*enough*’ or ‘*not enough*’, eventually allowing a conclusion of ‘*enough*’ or ‘*not enough*’ level of accountability reached by a particular project. Similar matters could be the subject of separate study. In order to get there, a reliable evaluation mechanism, applicable to the qualitative data, is required. Hence, considering its research question, this study focuses on the technical aspects of evaluating standards, with the intention of devising a methodology for such a mechanism.

3.3.2 Evaluation of standards’ application

With regard to the evaluation method, the corresponding scores on the scale for legal performance indicators thus range from 0 (when an investment project does not implement any European environmental standards) to 4 (when environmental standards employed in a given investment project are considered to be fully in line with European standards) (see Figure 4).⁵⁸ In practice, each indicator, when measured and corresponding to a particular environmental standard, is assigned one of these five scores (resulting in i_1 , i_2 , i_3 , and so on; see Figure 5). However, it is important to realise that as there may be several indicators per standard, the *maximum possible compliance score* for that particular standard equals the total number of indicators (i_n) multiplied by four (with ‘four’ being the maximum compliance score for a single indicator). The computed

⁵⁷ See the methodologies for legal indicators summarised in Chapter VI, Section 3.1; see also Mutitt G. (2003) *Evaluation of compliance of the Baku-Tbilisi-Ceyhan (BTC) pipeline with the Equator Principles*. MVO Platform; and Indicative summary table of progress towards meeting environmental targets or objectives in EEA (2014) Digest of EEA indicators. pp. 34-35.

⁵⁸ Alternatively, in accordance with EIB evaluation procedures, individual investment projects were rated for environmental and social performance in four categories: ‘Excellent’, ‘Satisfactory’, ‘Partly Unsatisfactory’, and ‘Unsatisfactory’. See EIB (2010) Operations Evaluations. Evaluation of Activities Under the Risk Sharing Finance Facility. www.eib.org/attachments/ev/ev_rsff_en.pdf, p. 2, accessed 19.11.2014.

average mean of the factual scores per indicator would provide a *factual compliance score*, corresponding to the application of a particular legal environmental standard within a certain investment project.⁵⁹

Figure 5. Evaluating a standard's application degree

Legal environmental standard	Indicators	Scores of indicators (0 - 4)	Scores of a standard		Degree of application (%)
			maximum score	factual score	
Standard 1	Indicator 1	i_1	$i_n \times 4$	$i_1+i_2+i_3$	$\frac{(i_1+i_2+i_3) \times 100\%}{i_n \times 4}$
	Indicator 2	i_2			
	Indicator 3	i_3			

i_1, i_2, i_3 – scores, assigned to an indicator 1, indicator 2, and indicator 3

i_n – total number of indicators per standard

Knowledge of the maximum compliance score and the factual compliance score allows one to determine the actual degree to which a particular standard has been applied. In order to do so, the maximum possible compliance score is assigned the degree of 100 percent. Consequently, as can be seen from Figure 5, the actual extent of the application can be determined by dividing the factual compliance score (nominator) by the maximum compliance score (denominator), and by subsequently multiplying the result by one hundred percent.⁶⁰

The percentage obtained can be translated into a final score, or into a labelled choice, according to the same five-point scale described above (see Figure 4), assuming that there is an equal interval of twenty percent between each of the choices. This means, for example, that up until an approximate application amounting to twenty percent, a standard should be assigned a score of '0', as in such a case it is hardly possible to speak of any significant application that would really differentiate the EPE project from any other investment project that is not bound to apply European environmental standards. When an application can range between twenty and forty percent, a final score of '1' should be assigned, as it indicates the narrow presence of European environmental standards in an investment project. Consequently, the interval between forty and sixty percent should be scored as a 'partial' or medium-level application, with a final score of '2'. An approximate application level up to eighty percent should be scored '3', corresponding to a

⁵⁹ The mean, or a sum of all values divided by a number of values in a group, is the most common average that is computed in descriptive statistics. The method is described *i.a.* in Salkind N. (2011) *Statistics for people who (think they) hate statistics*. Sage Publications. p. 20.

⁶⁰ According to UNAIDS methodology, the numerator is defined as 'the top number of a common fraction, which indicates the number of parts from the whole that are included in the calculation', and the denominator – as 'the bottom number of a common fraction, which indicates the number of parts in the whole'. See Hales (2010), p. 20.

‘wide-ranging’ application. And finally, the highest score of ‘4’ should be assigned to a comprehensive – *i.e.* more than eighty percent – application of European environmental standards.

3.4 Validation method

The concept of validity is described by a wide range of terms in qualitative studies.⁶¹ This concept is not a single, fixed, or universal one, but ‘rather a contingent construct, inescapably grounded in the processes and intentions of particular research methodologies and projects’.⁶²

Validity determines whether the findings that flow from data would provide an accurate reflection of the phenomenon being researched.⁶³ Put simply, ‘it is a property of an assessment tool that indicates that the tool does what it says it does’.⁶⁴ In the present study, validity is therefore understood as a degree to which the indicators are able to capture an accurate reflection of a situation related to the application of legal environmental standards within a particular investment project.⁶⁵

And although some qualitative researchers have argued that the term ‘validity’ is not applicable to qualitative research, they have realised at the same time the need for some kind of qualifying check or measure for their studies.⁶⁶

Hence, this means that the newly developed indicators must be subjected to a validation procedure. For this study, the type of validation test used is to prove *content validity*,⁶⁷ the purpose of which is to establish ‘whether a sample of items truly reflects an entire universe of items in a certain topic’.⁶⁸

To determine content validity, an expert assessment of the acquired results is required.⁶⁹ The structure of this validation is similar to that used by the United Nations’ High Commissioner for Human Rights (OHCHR) for Indicators for Promoting and Monitoring the Implementation of Human Rights.⁷⁰ This choice can be explained by the fact that the conceptual framework for legal environmental indicators has to a large extent been inspired by Human Rights indicators.⁷¹ It therefore assumed that the method of validation, applied for the Human Rights indicators and adjusted to the scale of research, would also suit the newly developed environmental indicators.

⁶¹ Hales (2010), p. 20.

⁶² Winter G. (2000) A comparative discussion of the notion of validity in qualitative and quantitative research. *The Qualitative Report* 4 (3&4), p. 1.

⁶³ Webley (2010), p. 944.

⁶⁴ Salkind (2011), p. 117.

⁶⁵ See Phelan C., Wren J. (2005) Exploring Reliability in Academic Assessment. UNI Office of Academic Assessment; Cronbach L. (1971) Test validation. In Thorndike R. (ed.) *Educational Measurement*. American Council on Education.

⁶⁶ Golafshani N. (2003) Understanding Reliability and Validity in Qualitative Research. *The Qualitative Report* 8 (4), 597-607. p. 602.

⁶⁷ In statistics and in the field of social studies, there are three types of validation tests: content validity, criterion validity and construct validity. For a detailed description of these types of tests, see Salkind (2011), pp. 118-119.

⁶⁸ Salkind (2011), p.118.

⁶⁹ See Salkind (2011), p.118.

⁷⁰ See OHCHR (2008) Report on Indicators for Promoting and Monitoring the Implementation of Human Rights. *International Human Rights Instruments*.

⁷¹ See Chapter VI, Section 2.2.

The validation procedure used by the OHCHR consisted essentially of consultations with relevant experts and stakeholders, organised between 2005 and 2012 in different countries and regions.⁷² In relation to this study, considering its much smaller size and capacity, the choice was made to follow the same method of consultations with relevant experts, while adjusting their scale to that of this research.

4. CONSTRUCTING INDICATORS

While designing the methodology, the theoretical conceptual framework has been clarified, and the selection criteria, data sources, and the manner of compilation for future indicators have been specified. In the section below, the next step devoted to the construction of indicators is based on these previous stages.

4.1 Distilling illustrative indicators

As follows from Figure 2 above, the intention to apply legal environmental standards is contained in the projects' objectives. Therefore, a project-specific indicator such as the '*commitment to the European Principles for the Environment contained in the general objective of a project*' needs to be developed.⁷³

Moreover, as specified in the section devoted to the indicators' scope, it was decided to focus on general legal environmental indicators for cross-sectoral standards such as the *environmental impact assessment, access to environmental information, and permit requirements for industrial installations*.⁷⁴

The indicators for these cross-sectoral standards focus generally on aspects such as transparency, public participation, and public access to justice, thus demonstrating the presence of the preconditions on which the Banks base their accountability arrangements in relation to a particular investment project.⁷⁵

⁷² The validation procedure of the OHCHR included two stages, held first at the international and subsequently at the national level. In the first stage, discussions with an identified panel of experts, including those from treaty bodies, human rights special procedure mandate-holders, academia, non-governmental organisations, and relevant international organisations. In the second stage, discussions were held with national-level stakeholders, including human rights institutions, policy makers, and agencies responsible for reporting on the implementation of human rights treaties, statistical agencies responsible for data collection and representatives from relevant non-governmental organisations. See OHCHR (2010) for a note regarding work on the use of indicators to promote and monitor the implementation of human rights. p. 2; OHCHR (2008), p. 4.

⁷³ See Section 3.1.2. According to the INECE study, the 'performance indicators are most effective when they reflect management priorities and are linked to a limited number of program goals and objectives'. INECE (2009), p. 109.

⁷⁴ See Section 3.1 above.

⁷⁵ On the preconditions required for the accountability mechanism to function, see Chapter IV, Section 3.4.

It should be emphasised again that the list of proposed legal indicators per examined standard does not claim to be exhaustive; the complete number of indicators to be used is to be determined by the context of each given project. The purpose of this study is to offer a pathway to the creation of an evaluation instrument for the relevant principles and standards, as well as to demonstrate its application in practice.

4.1.1 Indicator of commitment to the European Principles for the Environment in a project's general objective

Explicit commitment to the European Principles for the Environment, or to EU environmental standards, is a prerequisite for projects hoping to obtain funding from an EPE Bank.⁷⁶ The commitment must therefore already be present at the stage of the project proposal that is submitted to the Banks together with an investment proposal. The indicator, measuring the commitment to EPE, will always be classified as a *structural* indicator under the triple conceptual framework. Its goal is to demonstrate whether the stated commitment to the application of European legal environmental standards is reflected in a general objective of a particular investment project.

Figure 6. Legal environmental indicators: commitment to the EPE

	Standard: Commitment to the European Principles for the Environment
Indicator: Structural	Commitment to the European Principles for the Environment (or to the EU environmental standards) is incorporated in project's general objective.

4.1.2 Indicators for the environmental impact assessment standard

The EU standard on the Environmental Impact Assessment (EIA) is to be found in the Directive on the assessment of the effects of certain public and private projects on the environment

⁷⁶ See EBRD (2014) Environmental and Social Policy, p. 1.

(EIA Directive),⁷⁷ and is summarised in the Sourcebook on EU Environmental law.⁷⁸ It comprises four stages of assessment.

The specific obligation under stage one is ‘screening’ (Article 4). It is the procedure that aims to determine whether a further EIA is required. To this end, it classifies the project in one of the two Annexes, according to the gravity of any possible environmental impact.⁷⁹ Annex I of the Directive contains the description of installations carrying the risk of causing serious damage to the environment, and which therefore need an obligatory EIA. Annex II of the Directive contains the description of installations having no or insignificant risk of harming the environment, and which therefore do not require an EIA.⁸⁰

The obligation in stage two is called ‘scoping’, and relates to projects that require a further EIA (Article 5). Under the scoping procedure, additional information is gathered with respect to the project, its possible adverse effects on the environment, and possible alternative scenarios.

Stage three involves being regulated by the standards related to ensuring that the public is given timely notice concerning the character of the project, its possible adverse effects on the environment, and the conditions regarding consent to the project’s development. To this end, ‘the public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures [...] and shall [...] be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken’ (Article 6 (4)).⁸¹ The Directive leaves the choice of means of informing and consulting the public open, providing the examples of methods such as bill posting within a certain radius, and publication in local newspapers, as well as for consulting the public concerned by way of written submissions or a public inquiry (Article 6(5)), but underlines the importance of providing ‘reasonable time frames’ for informing and consulting the public (Article 6 (6)).⁸² Additionally, in order to identify the ‘public concerned’, the International Finance Corporation (IFC) issued a Guidance Note on public consultation with regard to the EIA, which prescribes identifying ‘primary’ and ‘secondary’ stakeholders, as well as ‘legitimate stakeholder representatives’.⁸³ According to the IFC Guidance Note, primary stakeholders are ‘individuals, groups or local communities that may be affected by the Project, positively or

⁷⁷ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2012] OJ L 26/1 (EIA Directive).

⁷⁸ Farmer (2010), pp. 12-22.

⁷⁹ See Annexes I and II to the EIA Directive.

⁸⁰ In line with the Directive, the EBRD has its own internal classification scale for projects, which uses the term ‘category’ instead of ‘annex’. Projects under Category I will always need an EIA. To avoid confusion in relation to annexes, the term ‘category’ is also used in this study.

⁸¹ ‘Development consent’ is defined as the decision of the competent authority, which entitles the developer to proceed with the project. See EIA Directive, Article 1. It is worth noting the terminological difference between the notions of ‘public’ and the ‘public concerned’. The EIA Directive defines the ‘public’ as ‘one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups’, while the ‘public concerned’ has a narrower meaning, and is used for ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures’, whereas the ‘non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest’ (Article 1 (d) and (e) EIA Directive).

⁸² Additional guidance on good practices in the field of public participation can be found in the UNECE (2000) *Good Practice Handbook on Public Participation in Making Local Environmental Decisions*.

⁸³ IFC (2007) International Finance Corporation’s Guidance Notes: Performance Standards on Environmental and Social Sustainability. Guidance Note 1 on Social and Environmental Impact Assessment, para G15.

negatively, and directly or indirectly...’ especially ‘...those who are directly affected, including those who are disadvantaged or vulnerable’, while secondary stakeholders are ‘broader stakeholders who may be able to influence the outcome of the Project because of their knowledge about the affected communities or political influence over them’.⁸⁴ The ‘legitimate stakeholder representatives’ may be represented by people or organisations, such as elected officials or non-elected community leaders, who have extensive support amongst the stakeholder groups identified, and can act as a two-way channel of communication between the company and its stakeholders.⁸⁵

Finally, the fourth stage of the environmental impact assessment procedure concerns approving the project – during which the public are to be notified about the decision to grant or to refuse consent regarding development – while making available the following information:

‘(a) the content of the decision and any conditions attached thereto;

(b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation;

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects’ (Article 9).

Additionally, the Directive requires the public concerned to be granted access to administrative and judicial review procedures (Article 11).

Based on provisions of the EIA Directive, five legal indicators have been constructed, as presented in Figure 7 below.

Figure 7. Legal environmental indicators: environmental impact assessment

Standard: Environmental Impact Assessment (EIA)				
	Screening (Art. 4 EIA Directive)	Scoping and EIA (Art. 5 EIA Directive)	Public participation and consultation (Art. 6 EIA Directive)	Approval (Art. 9 and 11 EIA Directive)
Indicator: Structural	The division into Annex I and Annex II took place at the initial stage of the project	The evaluation of impacts and issues (Annex IV EIA Directive) took place at the initial stage of the project in the form of Environmental Impact Statement	Availability of information about the proposed project; Possibility for the ‘public concerned’ to react within the settled time frames before the development consent is granted	-

⁸⁴ IFC (2007), para G15.

⁸⁵ *Ibid.*

Indicator: Process	-	-	-	Public is informed about the competent authorities' decision on the project and its conditions
Indicator: Outcome	-	-	-	Access to a review procedure of EIA for the 'public concerned' before a court of law is ensured

4.1.3 Indicators for the access to environmental information standard

The EU standard pertaining to public access to environmental information is covered primarily by the UNECE Aarhus Convention on access to information, public participation in decision-making, and access to justice in environmental matters,⁸⁶ ratified by the EU and all its Member States (except Ireland). It is ratified by many of the EPE Banks' countries of operation outside the European Union. The Directive on public access to environmental information⁸⁷ transposes the provisions of the Aarhus Convention into European environmental law. The Directive regulates three basic areas, related to ensuring access to information, to the exceptions, and to ensuring access to justice.

In relation to public access to environmental information, it is worth noting that the definition of 'public' under the Directive is broad, and includes 'one or more natural or legal persons, and [...] their associations, organisations or groups'.⁸⁸ In addition, the notion of 'environmental information' in the Directive encompasses information in any form on the state of the environment or on the state of human health and safety, and is the same as the definition in the Aarhus Convention.⁸⁹ Correct classification is important, as 'environmental information' comes under the specific provisions of the Directive, which tend to provide broader access rights than exist for access to general administrative information.⁹⁰ Furthermore, the definition of 'public authority' in the Directive is broad, and does not include only governmental bodies or public administrations at national, regional or local level, performing public administrative functions under national law; it

⁸⁶ UNECE (1998) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

⁸⁷ Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC, [2003] OJ L 41/26 (Directive on access to information).

⁸⁸ Directive on access to information, Article 2 (6).

⁸⁹ *Ibid.*, Article 2 (1). See also European Commission (2012) Report from the Commission to the Council and the European Parliament on the experience gained in the application of Directive 2003/4/EC on public access to environmental information, COM(2012) 774 final, 17.12.2012, p. 5.

⁹⁰ *Ibid.*

also comprises ‘any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of’ bodies or persons exercising governmental authority or performing public administrative functions.⁹¹ This definition includes providers of environmental management services under the control of public authorities, regardless of their legal status, such as, for example, holders of concessions or public contracts for municipal waste management, or operators of urban waste-water treatment facilities, which may act as promoters of projects eligible for Bank funding.⁹²

In relation to the exceptions, there are a limited number of grounds on which public authorities may refuse a request for access to information. Within the scope of the Sourcebook, prepared especially for EPE Banks as a set of guidelines on environmental standards, the most relevant grounds have to do with cases in which:

- the request concerns material in the course of completion, or unfinished documents or data;
- the request concerns internal communications;
- disclosure of the information would adversely affect intellectual property rights;
- disclosure of the information would adversely affect the confidentiality of commercial or industrial information where provided for by national or EU law to protect legitimate economic interests;
- disclosure of the information would adversely affect the interests or protection of the person who has supplied information on a voluntary basis without being under a legal obligation to do so, unless that person consents to the release of such information.⁹³

According to the Directive, any ‘grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal’.⁹⁴ The last two above-mentioned grounds cannot be invoked when the information relates to emissions into the environment.⁹⁵ Moreover, the information must be supplied in part if it can be separated from the items exempted under the Directive’s confidentiality provisions.⁹⁶

Finally, in relation to access to justice, the Directive requires that ‘any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with’, have this refusal reconsidered by that or another public authority, ‘or reviewed administratively by an independent and impartial body established by law’.⁹⁷ In addition, the Directive provides for the possibility of such review ‘before the court of law or another independent and impartial body established by law [...] whose decisions may become final’ and binding on the public authority holding the information.⁹⁸

Figure 8 below contains the four constructed legal indicators that are related to public access to environmental information.

⁹¹ See Directive on access to information, Article 2 (2).

⁹² Farmer (2010), p. 23.

⁹³ Farmer (2010), p. 23.

⁹⁴ Directive on access to information, para 16.

⁹⁵ Farmer (2010), p. 23.

⁹⁶ *Ibid.*

⁹⁷ Directive on access to information, Article 6 (1).

⁹⁸ *Ibid.*, Article 6 (2) and 6 (3).

Figure 8. Legal environmental indicators: access to environmental information

Standard: Public access to environmental information			
	Ensuring access (Art.3)	Exceptions (Art. 4)	Access to justice (Art. 6)
Indicator: Structural	-	-	-
Indicator: Process	Availability of environmental information by public authorities	Information refusal has to be well-grounded and provided within one month	-
Indicator: Outcome	-	-	Access for any applicant to a review procedure in case of ignored or inadequately answered request, by the same or another authority
			Access for any applicant to a Court of law or another independent or impartial body, whose decisions are final and binding on the public authority holding the information

4.1.4 Indicators for integrated permit requirements for industrial installations standard

The standard regulating industrial installations – known also as integrated pollution prevention and control standard – concerns primarily the permit requirements for new or existing industrial and agricultural activities, as defined in Annex I to the Directive on industrial emissions (integrated pollution prevention and control).⁹⁹ These activities are grouped into six categories: energy; production and processing of metals; minerals; chemicals; waste management; and ‘other’. The ‘other’ group includes facilities operating in the areas of pulp and paper production, textile treatment, tanning, food production, and intensive rearing of poultry and pigs. Threshold values for different categories of installations, where these exist, are set out in Annex I of the Directive.¹⁰⁰

⁹⁹ Directive 2008/1/EC concerning integrated pollution prevention and control, [2010] OJ L 334 (Directive on industrial emissions).

¹⁰⁰ Farmer (2010), p. 35.

Under the Directive, industrial installations are to operate in such a way that certain general principles are followed. In relation to permit requirements, the general principles are: to ensure that no installation, or combustion plant, or waste incineration plant is operated without a permit (Article 4 of the Directive); to adopt an integrated approach towards the permit conditions, with regard to emissions to air, soil, and groundwater, and to the monitoring and management of waste generated by the installations (Article 14 (1) of the Directive); to take all appropriate preventive measures against pollution by applying the ‘best available techniques’ (BAT) (Article 14 (3-6) of the Directive); to ensure that operators regularly provide the public with information on permits’ conditions and with the results of emission monitoring (Articles 24, 65 of the Directive).

In relation to the legal standard regulating permit requirements for industrial installations, four indicators have been constructed (see Figure 9).

Figure 9. Legal environmental indicators: permit requirements for industrial installations (integrated pollution prevention and control)

Standard: Permit requirements for industrial installations			
	Permits (Art. 12, 14)	Best Available Techniques (Art.14 (3))	Access to information and public participation (Art. 24, 65)
Indicator: Structural	Availability of an integrated permit for installation under Annex I, including all prescribed requirements	-	The public concerned can participate in procedures of granting, changing or updating the permits
Indicator: Process	-	BATs are applied during the production process	Permits’ information and results of emission monitoring is disclosed to the public
Indicator: Outcome	-	-	-

4.2 Data sources

In the previous chapter, it was indicated that the proposed legal environmental indicators are based on European legal environmental standards; are qualitative by nature; are applied on a project’s basis; and are designed to evaluate the distance between the factual and the anticipated

situation encompassed in the yardstick.¹⁰¹ In addition, the indicators' triple conceptual framework helps to specify where to search for relevant data sources for *structural*, *process* and *outcome* indicators.¹⁰²

Thus, the structural indicators might evaluate, on the one hand, the general existent legal framework and rules related to the implementation of European legal standards in the host country, while, on the other hand, they might consider the investment agreements for a certain project. To this end, the general information required for these indicators can be found in EPE Banks' environmental reports, country studies, and in the European and national statistical database by industry and by region (and in the case of availability - by private companies), while more specific information can be found in the technical summaries and other documents developed for a particular EPE Bank's investment project.

The data sources for process indicators might be found by analysing the content of environment-related complaints received by the Banks; results of workshops, awareness campaigns and other public participation measures; and the extent of a budget allocation to the environment-related activities. Such information can be found in the investment projects' environment impact assessments and other publicly available documentation, such as summaries of the workshops and public consultations.

Information on the outcome indicators can emerge from a comparison of the documentation, describing the project's goals, with the project's deliverables and final reports. Other important data involve the total number of complaints from stakeholders, and related to eventual environmental infringements; restricted access to information; and limits to public participation. Furthermore, it is essential to consider whether the reservation – foreseen by the Declaration on the European Principles for the Environment and subjecting the application of the European environmental standards to local conditions – has been used.¹⁰³ Such subtle data can be obtained from interviews with project executives and directly and indirectly concerned stakeholders, such as members of the public, non-governmental organisations, and the media.

4.3 Data compilation method

The data can be compiled as an evaluation form. This form is based on sample indicators for the assessment of environmental impact, access to environmental information, and permit requirements concerning the industrial installations' standard, as elaborated above. To this end, each particular indicator is in the form of a question, while still reflecting the division in structural, process, and outcome phases.

Nonetheless, it must be pointed out that data provided by the indicators are not without limitations. It is crucial to understand that such data need a context – for instance, a time frame, a benchmark, or a standard for comparison – to realise their full value as a management

¹⁰¹ Farmer (2010). See also Chapter VI, Section 4.

¹⁰² See Figure 3, Section 3.2 above.

¹⁰³ See EPE Declaration (2006).

instrument.¹⁰⁴ The evaluation outcomes should often be considered as a *signal* that indicates the need for a closer inspection or a further study in order to understand the forces and influences behind the application of European legal environmental standards within investment projects.

Therefore, the evaluation form contains a number of open questions, often with sub-questions. Open questions leave room for context-specific remarks, thus ensuring greater clarity.

In addition, however, the evaluation form is designed for use during external or internal evaluations undertaken by stakeholders as well as by the Banks. As has been maintained throughout this study, the idea behind this is the creation of the possibility of evaluating how legal environmental standards are applied in EPE Bank projects *for all parties, using the same methodology*. Application of the same evaluation methods will help to avoid the situation in which parties *evaluate past each other*. Moreover, in the event of using the same evaluation method but with divergent results, any subsequent discussion on the application of European Principles for the Environment needs to concentrate on issues such as the availability of sufficient transparency and access to environmental information for external evaluators,¹⁰⁵ as well as on sufficient diligence and project-related impact awareness for internal evaluators.

It should be emphasised once again that this form does not represent an instrument – for instance, a score list – of an empirical study.

For the purpose of this study, the evaluation form is to be filled in as a *proof of concept* – discussed in the next chapter – using mainly publicly available data, obtained online and complemented by inquiries in person, via telephone and email.

4.4 Sample evaluation form

Based on the triple conceptual framework and on indicators for the three cross-sectoral environmental standards developed above, a number of questions can be formulated. These questions further specify the data that are to be found for each particular indicator. Since the indicators as a measurement instrument can be better seen and understood within a particular context, the evaluation form envisages room for an explanatory answer (evaluation). Further, once the *de facto* situation in relation to a particular question is evaluated, it can be assigned a score, ranging from ‘no application’ to ‘comprehensive application’, or from ‘0’ to ‘4’.¹⁰⁶

¹⁰⁴ INECE (2009), pp. 100-115.

¹⁰⁵ For instance, in relation to project-related information, the EBRD takes upon itself to ‘inform the public of project development through Project Summary Documents. At the same time, project sponsors and clients entrust confidential information to the Bank, which the Bank, as a financial institution promoting the development of the private sector, has an obligation to respect’. EBRD (2014) Public Information Policy, p. 7.

¹⁰⁶ See Section 3.3.1, Figure 4.

Figure 10. Evaluation form

Type	Indicator for 'general commitment to EPE'	Evaluation	Score
Structural	Has the commitment to the application of the European Principles for the Environment (or to the application of the EU environmental standards) been incorporated in the general objective of the investment project?		
Type	Indicators for EIA standard	Evaluation	Score
Structural	<p>1. Did the screening and the subsequent classification into Category I or Category II-type took place at the initial stage of the project?</p> <p>2. Was the Environmental Impact Assessment (or similar) issued at the initial stage of the project, containing:</p> <p>2.1 description of the project with information on its location, design and size.</p> <p>2.2 main factors likely to be significantly affected by the project.</p> <p>2.3 significant effects the project is likely to have on the environment.</p> <p>2.4 description of the measures envisaged to avoid, reduce and possibly remedy of significant adverse effects.</p> <p>2.5 outline of the main alternatives studied by the developer and the main reasons for his choice, taking into account the environmental effects?¹⁰⁷</p> <p>3. Was the access to information ensured prior to the development consent, including:</p> <p>3.1 identification of stakeholders ('primary stakeholders' and 'secondary stakeholders');</p> <p>3.2 making the information about the project available to stakeholders;</p> <p>3.3 allowing them to react within min 30 days before the development consent was granted?</p>		
Process	4. Was the public informed about the competent authorities' decision on the project, its conditions, the reasons for this decision and the possibility of public participation?		
Outcome	5. Was the public concerned ensured access to a review procedure of the EIA or of the public participation before an administrative authority and/or before a court of law?		

¹⁰⁷ Annex IV of the EIA Directive contains a more detailed list of information to be provided by the developer, but this is indicative only, as the Directive stipulates that this information is to be provided only as far as a Member State considers it relevant to a given stage of the consent procedure. See Farmer (2010), p. 15.

Type	Indicators for 'access to environmental information' standard	Evaluation	Score
Structural	-		
Process	<p>1. Was the environmental information on the project made available at request within one month (with max extension to two months)?</p> <p>2. In case of information refusal, was it well grounded (comparable to requirements of Art.4 Directive 2003/4/EC) and provided within one month?</p>		
Outcome	<p>3. In case of wrongful refusal of information or inadequately answered information by public authority, is it possible to have it reconsidered by that authority, or by another public authority, or to have an administrative review?</p> <p>4. Was it possible to access the review procedure before a court of law, whose decisions may become final and binding on the public authority holding the information?</p>		
Type	Indicator for 'Integrated permit requirements for industrial installations' standard	Evaluation	Score
Structural	<p>1. Was an integrated permit for Category I installation available and did it include the description of:</p> <p>1.1 installation and activities</p> <p>1.2 nature and volume of emissions into air, water and land</p> <p>1.3 measures of waste prevention and recovery</p> <p>1.4 measures related to the monitoring of emissions?</p> <p>2. Could the public concerned participate in procedures of granting, changing or updating the permits?</p>		
Process	<p>3. Was the BATs applied during the production process?</p> <p>4. Was the following made available to the public:</p> <p>4.1 competent authorities' decision on the project, including the copy of a permit</p> <p>4.2 general binding rules applicable for installations</p> <p>4.3 results of the emissions' monitoring</p>		
Outcome	-		

The present section presents an analysis that goes into the selection of specific indicators, as well as the preparation of tables of illustrative indicators for different legal environmental standards, making use of the outlined conceptual and methodological approaches. Questions in the evaluation form in Figure 10 cover selected cross-sectoral standards of environmental impact assessment, access to environmental information, and permit requirements regarding industrial installations, which are frequently referred to in investment projects that have significant impact on the environment.

At the same time, it needs to be made clear that this evaluation form contains only a limited number of indicators with an illustrative purpose. In practice, their number will depend on the context and on the objective of the exercise, such as the existent environmental concerns in the area, the goal and the scale of the project, and other factors.¹⁰⁸ Therefore, for practical use in the future, it is important to have a comprehensive set of indicators regarding legal environmental standards, with the actual choice of indicators made by the users in the light of their objectives and the context of the project.

¹⁰⁸ See OHCHR (2012), p. 12. The INECE study finds that such problem-specific, tailor-made performance indicators are effective for evaluating performance and solving specific environmental and non-compliance problems. INECE (2009), pp. 100-115.

Chapter VIII

USING THE LEGAL ENVIRONMENTAL INDICATORS IN PRACTICE: PROOF OF CONCEPT

In practical terms, it is often a challenge to interpret the application of the EPE principles in countries outside the EU.

European Commission¹

In the third and final stage of the proposed model for the construction and use of legal environmental indicators, developed in Chapter VII,² the elaborated indicators are applied to concrete investment projects as proof of concept. Such proof provides a testing ground before the indicators are used in practice. In this stage, the data has been analysed, indicators have been adjusted or refined, and mistakes have been corrected.³ Theoretically, the proof of concept regarding projects is chosen to try out the new indicators on a small scale, in order for them to be extended later and applied broadly. At the end of this section, the achieved results are analysed and validated.

1. CRITERIA FOR SELECTING THE INVESTMENT PROJECTS

Of all five EPE Banks, the choice was made to examine projects that were fully or to a large extent financed or co-financed by the EBRD. The reasons for this choice were purely practical, and can be explained by the availability of a clearly formulated and well-developed transparency policy, better access to necessary information on investment projects, and a more explanatory and user-friendly website in comparison to other EPE Banks, as well as by the established good contacts of the author of this study with the EBRD.

The focus is on projects launched after 2008, owing to the fact that the EBRD Environmental and Social Policy, incorporating the requirement of the European Principles for the Environment

¹ European Commission (2009) Promoting effective financing for the environment in regions covered by the enlargement process and the European Neighbourhood Policy. Commission staff working document, SEC (2009) 1309 final.

² See Chapter VII, Section 1, Figure 1.

³ See OHCHR (2008) Report on Indicators for Promoting and Monitoring the Implementation of Human Rights. *International Human Rights Instruments*. p. 4.

application, took effect on 12 November 2008. Therefore, investment projects involving this proof of concept were chosen to fit this condition.

Additionally, as regards the type of projects, 'Category A' projects were chosen in relation to proof of concept. For these types of projects, the application of EU environmental standards such as the Environmental Impact Assessment procedure was deemed compulsory due to their size and impact. According to the EBRD Environmental and Social Policy, a project is classified as 'Category A' if it may result in potentially significant and diverse adverse future environmental and social impacts and issues that, at the time of categorisation, cannot readily be identified or assessed, and that require a formalised and participatory assessment procedure carried out by independent third-party specialists.⁴ The Policy further requires that for such projects a stakeholder engagement programme be reported to the Bank's Board of Directors, and that stakeholders' comments and concerns be taken into 'account in its decision-making process as part of assessing the overall benefits and risks of the Bank operation'.⁵

Furthermore, geographically, the use of indicators was to be tested in EBRD direct investment projects in the Russian Federation, as the author of the study possesses the necessary expertise in language and in the national environmental legislation. In addition, the country has been the biggest recipient of financing from the EBRD.⁶ Methodologically, Russia fits the definition of 'third country', as it is not a candidate for EU accession, and not even a 'neighbour' according to the EU Neighbourhood policy classification.⁷ EU cooperation with Russia has been based on the Partnership and Cooperation Agreement dating back to 1994,⁸ which does not contain an obligation to approximate national environmental standards to those of the European Union. Noteworthy is that while the field covered by this case study is characterised by a high political

⁴ Alternatively, a project can be classified as 'Category B' if the potential adverse environmental and social impacts that it might give rise to are typically site-specific, and are readily identified and addressed through mitigation measures. Otherwise, a project is classified as 'Category C' if it is likely to result in minimal or no adverse environmental or social impacts, and therefore requires no further environmental and social appraisal beyond categorisation. See EBRD (2008) Environmental and Social Policy. p. 6. Appendix 1 to the Policy contains an indicative list of 'Category A' projects.

⁵ EBRD (2008), p. 6.

⁶ Russia received from EBRD EUR 1.8 billion in investment in 2013, in addition to loans worth around USD 1.4 billion, from a total of EUR 9 billion that the Bank invests in the course of a year in all its 35 countries of operation, from Mongolia to Morocco. See ITAR-TASS, <http://itar-tass.com/en/economy/738823>, accessed 05.02.2015.

⁷ According to the European Commission, 'the European Neighbourhood Policy (ENP) aims at developing a special relationship between the EU and each of its partner countries, contributing to an area of security, prosperity and good neighbourliness'. European Commission (2014) Neighbourhood at the Crossroads: Implementation of the European Neighbourhood Policy in 2013. Joint Communication of the High Representative Of The European Union For Foreign Affairs And Security Policy, JOIN(2014) 12 Final, 27.3.2014. p. 2. The European Neighbourhood includes Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, the Republic of Moldova, Morocco, Palestine, Syria, Tunisia, and Ukraine. European Commission (2014), p. 2, fn. 2.

⁸ Agreement on partnership and cooperation establishing a partnership between, on one side, the European Communities and their Member States and, on the other side, the Russian Federation. OJ L 327, 28.11.1997. 0003-0069.

content,⁹ the chosen approach aims as much as possible to depoliticise the debate by focusing on purely legal questions.¹⁰

Considering the above choices, the projects selected for proof of concept are:

1. Kuzbass Pishkombinat;
2. Irkutsk Oil and Gas Company; and
3. WHSD central section road.

Started after 2008, these projects fall under the EBRD Environmental and Social Policy, incorporating commitment to the application of the European Principles for the Environment.¹¹ Furthermore, the three investment projects represent, respectively, agribusiness, natural resources, and transport, thus allowing the application of European environmental standards to be tested in a broad range of industrial sectors.

1.1 Kuzbass Pishkombinat project

The Kuzbassky Pishkombinat Company (KPK) breeds pigs and produces meat products for sale within Siberia, operating a number of existing farms and meat processing facilities. KPK's main meat processing facilities are located in the town of Novokuznetsk, from where it distributes meat products throughout Siberia.

The KPK and the EBRD invested in new build facilities and the upgrade of existing facilities to include:

- upgrades and improvements to the existing meat processing facilities by the end of 2008;
- further expansion of the newly constructed pig breeding farm, and associated pig fattening farm, doubling the size and capacity of the farm by the end of 2009;
- upgrade of the recently acquired dairy farm replacing the old facilities with new build facilities (barns and milking parlour) and restocking the herd by the end of 2009;
- upgrade of the recently acquired beef cattle farm replacing the old facilities with new build facilities (overwintering barns) and restocking the herd by the end of 2009;
- upgrade of the existing slaughterhouse in the middle of 2009;
- construction of a 'new build' slaughterhouse, close to the pig farm, in the middle of 2009;

⁹ Thus, the European Union summit in Brussels on 17.07.2014 suspended the signing of new financial agreements with the EBRD and the EIB, as well as announced suspension of some European programmes of assistance to Russia. See ITAR-TASS, <http://itar-tass.com/en/world/741006>, accessed 05.02.2015.

¹⁰ The sensitive political background that affects the EU-Russia relationship at the moment of writing should be, when necessary, taken into account in order to contextualise the issues at hand. The chapter tries, however, to overcome this sensitivity by focusing, from an institutional and legal perspective, on common solutions to achieve mutual environmental, legal, and financial benefits for the European and Russian partners.

¹¹ EBRD (2008). According to the Performance Requirement 3 of the Policy, Land Acquisition, Involuntary Resettlement and Economic Displacement. p. 32. The EBRD Policy is based on Performance Requirements, reflecting the European Principles for the Environment.

- construction of a 'new build' animal feed production plant from November 2008 through to the middle of 2009; and
- distribution and sales network, including its own shops, between November 2008 and the middle of 2009.¹²

The project has received an EBRD loan of EUR 20 million to partially finance the mid-term investment programme of the KPK. The business sector for investment was classified by the EBRD as 'agribusiness', project number 38903.¹³

1.2 Irkutsk Oil and Gas Company project

The Irkutsk Oil Company (IOC) is an independent oil and gas company that operates in the Eastern Siberian region of Irkutsk, created in 2000 for development of the oil and gas resources.¹⁴ The EBRD is the shareholder of the company.¹⁵

The goal of the investment was the establishment of a gas cycling scheme, contributing to significant reduction of gas flaring by re-injection of the associated and natural gas into the reservoir.¹⁶ The proportion of utilisation of the associated gas was expected to be as high as 96% for the total volume produced during the entire service life of the field.¹⁷ It was expected to result in a reduction of greenhouse gas emissions by utilising nearly 1 million cubic metres of gas per year.

Additional expected results of the project included:

- support to a junior private company in the upstream oil and gas sector in Russia, which is otherwise dominated by large (state-owned) majors;
- increased transparency, improvements in environmental and corporate governance practices to align the company with best international practices;
- potential demonstration effect to other oil and gas companies in Russia of the benefits from gas flaring reduction (before such practice becomes binding in regional law).¹⁸

The project had a total cost of EUR 125 million, with the EBRD investing EUR 90 million. In addition, EUR 35 million has been mobilised from Sberbank of Russia in 2008 to assist with the funding of the gas utilisation project. The business sector for investment was classified by the EBRD as 'natural resources', project number 38626.

¹² Kuzbass Pishkombinat Livestock and Meat Processing Project (2008a) Non Technical Summary for the Environmental and Social Impact Assessment. p. 4.

¹³ See EBRD website, 'Projects', 'Kuzbass Pishkombinat', www.ebrd.com/work-with-us/projects/esia/kuzbass-pishkombinat.html, accessed 27.01.2015.

¹⁴ See EBRD website, 'Projects', 'Irkutsk Oil and Gas Company', [www.ebrd.com/work-with-us/projects/esia/irkutsk-oil-and-gas-company-\(debt\).html](http://www.ebrd.com/work-with-us/projects/esia/irkutsk-oil-and-gas-company-(debt).html), accessed 27.01.2015.

¹⁵ The Bank owns 8.15% of the IOC shares.

¹⁶ See *Ibid.*

¹⁷ Irkutsk Oil Company (2008a) Environmental and Social Impact Assessment, Yakarta Oil and Gas Field Development. Executive Summary. p. 2.

¹⁸ See Irkutsk Oil Company (2008a), p. 2.

1.3 WHSD central section road project

The Project covered the construction and financing of the central section of the Western High Speed Diameter Road (WHSD) in St. Petersburg, including also the subsequent operation and maintenance of the entire road. The motorway was intended to become an integral part of the Pan-European Transport corridor IX, connecting Helsinki, St. Petersburg, Moscow, Kiev and South-European countries.¹⁹

The completion of the WHSD project was expected to relieve the transport congestion problems in St Petersburg through:

- linking the City's commercial seaport to the Ring Road;
- providing transport links between southern, western and northern parts of the city that by-pass the historic centre;
- reducing the traffic and other man-caused impact on streets, bridges, culture and architectural monuments of the city centre.²⁰

The project was implemented by the established joint-stock company 'Western High-Speed Diameter' (the 'WHSD'). It was operated on the basis of the Public-Private Partnership (PPP) between the city's Government, the 'WHSD' and the EBRD's borrower company 'Northern Capital Highway'. The EBRD invested EUR 200 million in the project with a total cost of EUR 2,5 billion.²¹ The business sector for the investment was classified by the EBRD as 'transport', project number 43006.²²

¹⁹ See WHSD Central Section Construction (2011a) Non-Technical Summary of the Integrated Environmental and Social Impact Assessment. p. 7.

²⁰ See EBRD website, 'Projects', 'WHSD central section road ppp', www.ebrd.com/work-with-us/projects/esia/whsd-central-section-road-ppp.html, accessed 07.02.2015.

²¹ See EBRD website, 'Project Summary Documents', 'WHSD central section road ppp', www.ebrd.com/work-with-us/projects/psd/whsd-central-section-road-ppp.html, accessed 07.02.2015.

²² See *Ibid.*

2. APPLYING THE EVALUATION METHOD

The three projects chosen to demonstrate proof of concept are analysed using the elaborated indicators, by means of a sample evaluation form.²³ The results of this analysis are grouped in charts. In accordance with the conceptual framework²⁴ and the sample evaluation form, the indicators for each standard have been devised and categorised into *structural*, *process* and *outcome* types, in order to be able to evaluate, respectively, the *commitments*, *efforts*, and *results* within each project.

Following this established framework, the evaluation method developed in Chapter VII has been applied. The method envisages two steps,²⁵ the first of which is the legal performance evaluation, resulting in assigning a particular *score* ranging from ‘0’ to ‘4’ to each particular indicator.

The second step represents the evaluation of the application of standards, based on the results of the legal performance evaluation. To this end, the scores attained during the first step are calculated to result in the percentage degree of the application of legal environmental standards in each of the three investment projects. The calculation has been performed using the method described in Chapter VII.²⁶

2.1 Standards’ application: Kuzbass Pishkombinat project

The evaluation of standards’ application in EBRD *Kuzbass Pishkombinat project* has been marked by a strong commitment to the application of European standards. The project issued a timely EIA with well-developed project documentation, and granted public access to this information by different means, including the organisation of public hearings. At the same time, the evaluation revealed an apparent absence of public involvement in the preliminary stage of the project, which is probably due to a low awareness of public environmental rights. Another problem is related to the application of ‘Integrated permit requirements for industrial installations’ standard, because, as will be demonstrated below, the national permitting system envisages separate permits for airborne emissions, water discharge and waste disposal, and for the handling of hazardous waste, and with regard to public participation, the national legislation hardly allows for public participation in granting, changing or updating the permits.

²³ See Chapter VII, Section 3.2.3, for the concept regarding the sample evaluation form.

²⁴ See Chapter VII, Section 2.2 for an explanation of the triple conceptual framework for legal environmental indicators.

²⁵ See Chapter VII, Section 2.3.

²⁶ See Chapter VII, Section 2.3.2 for the method of calculating the extent to which standards were applied.

Standard	Indicator		Evaluation	Score	Standard's application
General commitment to EPE	Structural	1. Has the commitment to the application of the European Principles for the Environment (or to the application of the European Union standards) been incorporated in the general objective of the investment project?	1. Yes: according to the Non Technical Summary, 'the new buildings will be designed to western European standards with animal welfare built into the design'. ²⁷	4	100%
Environmental Impact Assessment	Structural	1. Did the classification into category A, B or C took place at the initial stage of the project? 2. Was the EIA issued at the initial stage of the project, containing: 2.1 description of the project with information on its location, design and size; 2.2 main factors likely to be significantly affected by the project;	1. Yes, the project has been classified as category A. 2. The EIA (OVOS and State Expertise) was issued, containing: ²⁸ 2.1 the location, ²⁹ design ³⁰ and size ³¹ were indicated; 2.2 the cumulative impacts ³² and potential impacts ³³ indicated;	4 3	70%

²⁷ Kuzbass Pischekombinat Livestock and Meat Processing Project (2008a), p. 13.

²⁸ OVOS is a procedure required under national legislation, comparable to the EIA. It is required for the industrial projects with a considerable impact on the environment, listed in OVOS Regulation (see Regulation on the Assessment of Environmental Impacts, 16.05.2000, No. 372). At the same time, the provincial and federal authorities are given the discretion to initiate an OVOS procedure for other types of projects. Ratsiborinskaya D. (2010) Russian Environmental Law – an Overview For Businesses. In Douma W., Mucklow F. (eds.) *Environmental Finance and Socially Responsible Business in Russia*. T.M.C. Asser Press. 45-68. p. 58. The OVOS is preceded by the State Expertise, the very first environmental impact assessment stage compulsory for any industrial project.

²⁹ See Kuzbass Pischekombinat Livestock and Meat Processing Project (2008b) Supplementary information. p. 7; Kuzbass Pischekombinat Livestock and Meat Processing Project (2008a), pp. 5, 35-39.

³⁰ Kuzbass Pischekombinat Livestock and Meat Processing Project (2008a), pp. 5-19.

³¹ Kuzbass Pischekombinat Livestock and Meat Processing Project (2008b), p. 12. Kuzbass Pischekombinat Livestock and Meat Processing Project (2008a), pp. 5-19.

³² Kuzbass Pischekombinat Livestock and Meat Processing Project (2008b), pp. 25-30.

³³ *Ibid*, pp. 16-32, 36-41.

Standard	Indicator	Evaluation	Score	Standard's application
	<p>2.3 significant effects the project is likely to have on the environment;</p> <p>2.4 descriptions of the measures envisaged to avoid, reduce and possibly to remedy significant adverse effects;</p> <p>2.5 outline of the main alternatives studied by the developer and the main reasons for his choice, taking into account the environmental effects?</p> <p>3. Was the access to information ensured prior to the development consent, including:</p> <p>3.1 identification of stakeholders ('primary stakeholders' and 'secondary stakeholders');</p> <p>3.2 making the information about the project available to stakeholders;</p> <p>3.3 allowing them to react within at least 30 days before the development consent was granted?</p>	<p>2.3 well-described, also in OVOS documentation;³⁴</p> <p>2.4 description is provided fully;³⁵</p> <p>2.5 some indication about alternatives was provided, but only partially.³⁶</p> <p>3. Access to the information was ensured:</p> <p>3.1 stakeholders were very clearly identified and categorised.³⁷</p> <p>3.2 stakeholders were informed via mass media and internet;³⁸</p> <p>3.3 two month time was granted for public to react.³⁹</p>	4	

³⁴ Kuzbass Pischekombinat Livestock and Meat Processing Project (2008b), Annex A.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 34.

³⁷ Kuzbass Pischekombinat Livestock and Meat Processing Project (2008c) Public Consultation and Disclosure Plan, pp. 6-7.

³⁸ The summary of measures informing the public was outlined in Kuzbass Pischekombinat Livestock and Meat Processing Project (2008c), p. 7-8, including the publications in newspapers, a TV program, internet posts.

³⁹ The public hearings were held in the town administration of Kuzbass on 13.11.2007 and 30.11.2007. See the announcement of the town administration on <http://webcache.googleusercontent.com/search?q=cache:fTVVTEnBbn0J:admknz.info/document.do%3Bjsessionid%3DA06324A45B670697C9A83E0C6A27FD68%3Fid%3D55314+&cd=14&hl=en&ct=clnk&gl=nl> (cached). Accessed 29.01.2015.

Standard	Indicator		Evaluation	Score	Standard's application
	Process	4. Was the public informed about the competent authorities' decision on the project, its conditions, the reasons for this decision and the possibility of public participation?	4. There was no specific information: neither about such decision, nor about the possibility for public to participate in the decision-making. ⁴⁰	0	
	Outcome	5. Was the public concerned ensured access to a review procedure of the EIA procedure? Otherwise, was it provided with the possibility to complain to an administrative authority and/or before a court of law?	5. A review procedure was ensured: a public grievance mechanism was developed by the project. At the same time, it did not envisage nor provide information on access to administrative authorities or to courts. Theoretically, such access exists and it is regulated by the legislative acts. ⁴¹	3	
Access to environmental information	Structural	-	-		

⁴⁰ As literature and practice demonstrates, the public awareness of its environmental rights is not so high in Russia, especially outside of the big cities. Also, despite the legal obligations, there is no culture of extensively involving public in administrative decision-making. See Kutuzov V., Popov A. (2004) *Access to Environmental Information: Legal Aspects*. Orenburg University. (in Russian). p. 5. For the purpose of this evaluation, contrary to the preliminary stage of the project, there was no information provided about the competent authorities' decision on the project, and on the possibility of public participation in decision-making. Therefore, the indicator scores '0'.

⁴¹ The research showed no evidence of any opposition to the project. The company reports that there were no claims or objections from local stakeholders regarding the chosen project site. Kuzbass Pischekombinat Livestock and Meat Processing Project (2008c), p. 8. However, there might be other reasons why the public did not make use of the possibility to complain to an administrative authority or to a court of law, such as low civil society activity, low legal and environmental awareness and low trust in administrative justice. In theory, such right is granted by the Federal Law 'On ensuring access to information on activities of state bodies and municipalities', 09.02.2009 No 8, article 23; the Federal Law 'On the Protection of the Environment', 10.01.2002 No 7, as amended by Federal Law No 374 27.12.2009, article 13 (3); and the Federal Law 'On reviewing before a Court of law actions and decisions, violating rights and freedoms of citizens' 27.04.1993 No 4866-I, as amended 9.02.2009, article 4. The indicator scores '3', because the established grievance mechanism, although in place, neither envisages nor provides information on access to justice.

Standard	Indicator		Evaluation	Score	Standard's application
	Process	1. Was the environmental information on the project made available at request within one month (with max extension to two months)?	1. Yes	4	69%
		2. In case of information refusal, was it well grounded (comparable to requirements of Art.4 Directive 2003/4/EC) and provided within one month?	2. There is no evidence of refusals taking place in relation to the project. ⁴² Yet, considering the context of the project, there is a high probability of only partial application of this requirement.	2	
	Outcome	3. In case of wrongful refusal of information or inadequately answered information by public authority, is it possible to have it reconsidered by that authority, or by another public authority, or to have an administrative review?	3. There is no evidence of such refusal, taking place in relation to the project. ⁴³	2	
		4. Was it possible to access the review procedure before a court of law, whose decisions may become final and binding on the public authority holding the information?	4. There were no review procedures before a court of law in relation to the project. At the same time, theoretically, it is possible to address a court for a review. ⁴⁴	3	

⁴² The absence of refusals is due to the fact that there were no claims or objections from local stakeholders, and thus no information requests. In theory, the information can be refused if it constitutes state secret (regulated by the Federal Law 'On State Secret', 21.07.1993 No. 5485-188) or commercial secret (regulated by the Federal Law 'On Commercial secret', 29.07.2004 No. 98). However, as it can be seen from practice, information refusals, although usually are provided timely within 30 days, are not always well-grounded. See Yakel J., Saveljeva I. (2013) *Right to access to environmental information: manual for citizens and NGOs*. Optim Print. (in Russian). p. 61. Put in the context, the indicator scores '2', because in case of information refusals taking place, only partial application of the standard is expected.

⁴³ Such right is granted by the Constitution of the Russian Federation (Article 24 (2)) and by the national legislative acts. According to Cheremeteff *et al.*, 'at least in theory, there is a strong focus on procedural environmental rights, including the right to access to environmental information, the right to public participation and the right to access to justice' (Cheremeteff *et al.* (2012), p. 508). At the same time, there is evidence that 'in practice, this right is remains not fully realised, of some virtual character, not understood by the population and not supported by legal acts, as well as by the administrative and judicial practice' (Kutuzov, Popov (2004), p. 5). The indicator scores '2' because, seen from the context, in practice there is a fifty percent chance of the information refusals' reviews by the administrative authorities.

⁴⁴ The judicial system of Russia is comprised of the Constitutional Court, civil courts, *arbitrazh* courts (for commercial litigation) and military tribunals, where private parties and NGOs have standing. See Cheremeteff *et al.* (2012), p. 508. Additionally, there

Standard	Indicator		Evaluation	Score	Standard's application
Integrated permit requirements for industrial installation	Structural	1. Was an integrated permit for category A installation available and did it include the description of:	1. Integrated permit is not yet compulsory in Russia. Therefore, the local conditions do not allow applying such standard, as to its form. ⁴⁵ As to the content, however:	1	31%
		1.1 installation and activities;	1.1 description was provided;		
		1.2 nature and volume of emissions into air, water and land;	1.2 emission limit values (ELVs), discharge limit values (DLVs) and waste disposal limits were calculated and included into respected permits / licences;		
		1.3 measures of waste prevention and recovery;	1.3 partially included into a separate licence on waste management;		
		1.4 measures related to the monitoring of emissions?	1.4 partially included into emission licence. ⁴⁶		

is a possibility to complain to the Procuratura (the Federal centralised system of constitutional and legislative control see the Federal Law 'On Procuratura of the Russian Federation', 17.01.1992 No 2202-I, and to the Human Rights Ombudsman (see the Federal Law 'On the Human Rights Ombudsman in the Russian Federation' 26.02.1997 No 1). The Federal law 'On Information' establishes the possibility of judicial review of access to information refusal, including the compensation for the damages (Article 24). In practice, 'this possibility is rarely used as individuals and companies try to avoid conflict with the authorities' (Ratsiborinskaya D. (2010) Russian Environmental Law – an Overview For Businesses. In Douma W., Mucklow F. (eds.) *Environmental Finance and Socially Responsible Business in Russia*. T.M.C. Asser Press. 45-68. p. 60). 'Practice demonstrates that, as a rule, judicial procedure demands much time (months and sometimes, years) and money (to cover costs of experienced lawyers). At the same time, getting the environmental information can sometimes be crucial within a short period, in order to influence decision-making. This is why it is important to use other means of getting to information' (ECOLIFE environmental blog, www.eclife.ru/index.php, accessed 24.03.2015). Considering this fact, the indicator scores '3'.

⁴⁵ The permit system in Russia envisages separate permits for airborne emissions, water discharge and waste disposal, and for the handling of hazardous waste. See Federal Law 'On the Protection of the Environment', 10.01.2002 No 7, as amended by Federal Law No 374 27.12.2009, articles 3 and 30. See also Cheremeteff *et al.* (2012), pp. 509-510; see, generally, Ruut J., Hahn D. (2009) *Comparison of RF and EU environmental permitting principles*. Interim Technical Report. TACIS Harmonisation of Environmental Standards II project.

⁴⁶ According to the national law, the 'company must arrange (and pay for) an inventory of its emission and discharge sources, draft emission limit values, draft discharge limit values and draft waste disposal limits' (Ratsiborinskaya (2010), p. 59). Unlike the EU integrated permit standard, the Russian permit system represents an 'end-of-pipe' approach which 'does not incorporate pollution prevention measures and provides neither stimulation to apply best available technologies nor encourage environmental protection' (*Ibid*, p. 57). Considering that, 'subject to the local conditions', the standard could only be applied partially, as to its content. The indicator scores '1', as only points 1.1 and 1.2 have been fully realised.

Standard	Indicator		Evaluation	Score	Standard's application
		2. Could the public concerned participate in procedures of granting, changing or updating the permits?	2. The national legislation does not envisage the participation of public concerned in granting, changing or updating the permits. Yet, the public can influence the permit conditions via judicial mechanism. ⁴⁷	0	
	Process	3. Were the BATs applied during the production process?	3. The initial reason for the company to look for EBRD investment was the necessity to modernise its production process, including the application of best available technologies. ⁴⁸	3	
		4. Was the following made available to the public: 4.1 the competent authorities' decision on the project, including the copy of a permit;	4. Partially available: 4.1 not directly via the company; ⁴⁹	1	

⁴⁷ Private parties can challenge the government bodies' decisions on the issue or refusal of a permit or a license, if such decisions constitute a breach of citizens' constitutional rights. See Ratsiborinskaya (2010), p. 53, where the author gives an example of a case of N. Fadeyeva, who went as far as lodging an application against the Russian Government with the European Court of Human Rights and won the case. (Application No. 55723/00, *Fadeyeva v. Russia*, ECHR 9 June 2005). The ECHR ruled that based on the Article 8 of the European Convention of Human Rights, the governments are legally responsible for preventing serious damage to their citizens' health caused by pollution from industrial installations, even when they are privately owned and run. The indicator scores '0', because the standard of public participation in the procedures of granting, changing or updating the permit conditions cannot be applied without starting a judicial procedure.

⁴⁸ The intention to apply BATs was mentioned in the Project's technical summary (Kuzbass Pischekombinat Livestock and Meat Processing Project (2008a), p. 23), the intention to apply BREFS – in the Supplementary information (Kuzbass Pischekombinat Livestock and Meat Processing Project (2008b), p. 5). The BREF-documents are gradually being made part of the Russian national standardisation system by integrating them into the Codes of Practice or national standards, in line with the procedures established with the Federal Law 'On Technical Regulation', 1.07.2003. See also Hahn, Begak (2010), pp. 93, 94. The probability is high that the project did its best to apply BATs, facilitated by the EBRD investment. However, the indicator scores '3' as there is no possibility to fully verify this proposition, with the EBRD politely but firmly refusing access to Project Final Report / Evaluation Report, classified it as an 'internal document' (see email exchange with the EBRD representative dated 2.02.2015 and 3.02.2015).

⁴⁹ The copies of a permit/a licence are kept at the regional division of the Ministry of Natural Resources and Ecology, and can be granted public access on demand.

Standard	Indicator		Evaluation	Score	Standard's application
		4.2 the general binding rules applicable for installations;	4.2 not directly available via the company; the rules are however, public, and can be found via internet or via the regional administration;		
		4.3 the results of the emissions' monitoring.	4.3 available upon request. ⁵⁰		
	Outcome	-	-		

2.2 Standards' application: Irkutsk Oil and Gas Company project

Similarly to the project above, the evaluation of standards' application in EBRD *Irkutsk Oil and Gas Company project* demonstrates a distinctly formulated commitment to the application of European standards, a well-organised EIA procedure and documentation and a good realisation of public communication policy, despite that the Company itself recognised that there was room for improvement in comparison to the Banks' standards. Also this project was unable to ensure the application of 'Integrated permit requirements for industrial installations' standard due to the national permit requirements, as well as the public participation in granting, changing or updating the Company's permits.

⁵⁰ According to ECOLIFE, many types of environmental impacts by an installation can alternatively be detected using freely accessible sources; this however, may require high expertise of controllers. ECOLIFE environmental blog, www.ecolife.ru/index.php, accessed 24.03.2015. The indicator scores '1', as the standard in this project cannot be applied the way it is deemed to be applied, according to the EU legislation. At the same time, some of its elements are present.

Standard	Indicator		Evaluation	Score	Standard's application
General commitment to EPE	Structural	1. Has the commitment to the application of the European Principles for the Environment (or to the application of the European Union standards) been incorporated in the general objective of the investment project?	1. Clearly yes: the project envisaged the 'implementation of the environmental management systems consistent with international best practice'; 'waste management plan based on EU standards and principles'; ⁵¹ and 'the Project has been designed to be consistent with EU environmental standards, and where such standards do not exist, other relevant international standards'. ⁵²	4	100%
Environmental Impact Assessment	Structural	1. Did the classification into category A, B or C took place at the initial stage of the project? 2. Was the EIA issued at the initial stage of the project, containing: 2.1 description of the project with information on its location, design and size; 2.2 main factors likely to be significantly affected by the project;	1. Yes, the project has been classified as category A. 2. The EIA (OVOS) was issued, containing: 2.1 present: detailed description of the project's location, size, ⁵³ design; ⁵⁴ 2.2 present: detailed description of potential impacts by the project; ⁵⁵	4 3	90%

⁵¹ Project Summary, EBRD website, www.ebrd.com/work-with-us/projects/psd/irkutsk-oil-and-gas-company-debt.html, accessed 18.02.2015.

⁵² Irkutsk Oil Company (2008a), p. 3.

⁵³ See Irkutsk Oil Company (2008b) Environmental and Social Impact Assessment. p. 5.

⁵⁴ See Irkutsk Oil Company (2008b), pp. 8-11; see, generally, Irkutsk Oil Company (2008c) Environmental and Social Action Plan.

⁵⁵ Irkutsk Oil Company (2008b), pp. 12-16.

Standard	Indicator		Evaluation	Score	Standard's application
Environmental Impact Assessment	Structural	2.3 significant effects the project is likely to have on the environment;	2.3 partially present: described but not in detail, as insignificant; ⁵⁶	4	90%
		2.4 descriptions of the measures envisaged to avoid, reduce and possibly to remedy significant adverse effects;	2.4 present: described, including the mitigation measures; ⁵⁷		
		2.5 outline of the main alternatives studied by the developer and the main reasons for his choice, taking into account the environmental effects?	2.5 not present: alternatives for the project have not been provided. ⁵⁸		
		3. Was the access to information ensured prior to the development consent, including:	3. Access to the information was ensured:		
		3.1 identification of stakeholders ('primary stakeholders' and 'secondary stakeholders');	3.1 stakeholders were identified; ⁵⁹		
		3.2 making the information about the project available to stakeholders;	3.2 The EIA (OVOS and State Expertise) results were released locally, on the company website as well as on the EBRD website; ⁶⁰		

⁵⁶ Irkutsk Oil Company (2008b), pp. 12-16; public expressed concerns about insufficient information. See Irkutsk Oil Company (2008d) Stakeholder Engagement Plan. Results of Preliminary Consultations, Annex IV, p. 45.

⁵⁷ Irkutsk Oil Company (2008b), pp. 12-16.

⁵⁸ This can be explained by the fact that the investment was intended to introduce the modifications (related to the technologies of gas flaring) to the already existent and fully operational project. The indicator scores '3' because points 2.3 and 2.5 were not completely realised.

⁵⁹ Irkutsk Oil Company (2008d), pp. 13-18.

⁶⁰ See Irkutsk Oil company website, www.irkutskoil.ru/about/history/, accessed 26.03.2015; the EBRD website, 'Project Summary Documents'. Irkutsk Oil and Gas Company project description, www.ebrd.com/work-with-us/projects/psd/irkutsk-oil-and-gas-company-debt.html, accessed 1.02.2015.

Standard	Indicator		Evaluation	Score	Standard's application
Environmental Impact Assessment		3.3 allowing them to react within at least 30 days before the development consent was granted?	3.3 yes, including the organised meetings with the public. ⁶¹		
	Process	4. Was the public informed about the competent authorities' decision on the project, its conditions, the reasons for this decision and the possibility of public participation?	4. The Company recognised that additional measures on information disclosure were required to comply with the EBRD standards. ⁶² It reports, however, that all stakeholder groups were engaged in consultations and supported its on-going and planned activities. ⁶³	3	
	Outcome	5. Was the public concerned ensured access to a review procedure of the EIA procedure? Otherwise, was it provided with the possibility to complain to an administrative authority and/or before a court of law?	5. Yes to all as the company have implemented a Stakeholder Engagement plan and a grievance mechanism for all operations. ⁶⁴	4	

⁶¹ Irkutsk Oil Company (2008d), p. 33; see also email exchange with a EBRD representative coordinating the project, who was present at the public consultations in Russia, dated 23.03.2015.

⁶² See Irkutsk Oil Company (2008b), p. 5. Nevertheless, the meetings and consultations with the public, as well as the information of the company website provide broad information on project's conditions and the position of the authorities. See <http://irkutskoil.ru/press-center/tsena-na-neft-dlya-kotelnykh-g-ust-kut-mozhet-byt-znachitelno-snizhena/>, accessed 26.03.2015. See also an article in the local newspaper 'Ust-Kut Weekly', reporting on the successful public consultations on the project plans that took place on 22.12.2009. Усть-Кутская Еженедельная газета, «Одобрение общественности получено», 1.01.2010, <http://dialog.ust-kut.org/?2010/1/07012010.htm>, accessed 26.03.2015. The indicator scores '3'.

⁶³ Irkutsk Oil Company (2008b), p. 5.

⁶⁴ Internet search showed that in practice, there was no evidence of any opposition to the project. The company, as well as media report that there were no claims or objections from local stakeholders regarding the chosen project site. Усть-Кутская Еженедельная газета, «Одобрение общественности получено», 1.01.2010, <http://dialog.ust-kut.org/?2010/1/07012010.htm>, accessed 26.03.2015. See also EBRD website, 'Project Summary Documents'. Irkutsk Oil and Gas Company project description, www.ebrd.com/work-with-us/projects/psd/irkutsk-oil-and-gas-company-debt.html, accessed 1.02.2015. In theory, the right of access to environmental justice is realised by the Federal Law 'On the Protection of the Environment', 10.01.2002 No 7, as amended by Federal Law No 374 27.12.2009, article 13 (3); and by the Federal Law 'On reviewing before a Court of law actions and decisions, violating rights and freedoms of citizens' 27.04.1993 No 4866-I, as amended 9.02.2009, article 4.

Standard	Indicator		Evaluation	Score	Standard's application
Access to environmental information	Structural	-	-		75%
	Process	1. Was the environmental information on the project made available at request within one month (with max extension to two months)?	1. The information on the project was available.	4	
		2. In case of information refusal, was it well grounded (comparable to requirements of Art.4 Directive 2003/4/EC) and provided within one month?	2. There is no evidence of refusals taking place, with project being actively involved in information dissemination. At the same time, in theory, there is a probability of an information refusal due to 'commercial secret'. ⁶⁵	3	
Outcome	3. In case of wrongful refusal of information or inadequately answered information by public authority, is it possible to have it reconsidered by that authority, or by another public authority, or to have an administrative review?	3. In theory, such right is granted by the national legislation. ⁶⁶ There is no evidence of such refusal taking place in the project.	2		
	4. Was it possible to access the review procedure before a court of law, whose decisions may become final and binding on the public authority holding the information?	4. There were no procedures before a court of law during the course of the project. In theory, it is possible to address a court for a review. ⁶⁷	3		

⁶⁵ See fn 42 above. The company has a good record of acting in a transparent and socially-friendly way. Yet because of the existing theoretical probability of information refusal due to a 'commercial secret', the indicator scores '3'.

⁶⁶ See fn 43 above.

⁶⁷ See fn 44 above. The review procedures are regulated primarily by the Federal Law 'On ensuring access to information on activities of state bodies and municipalities', 09.02.2009 No 8, article 23; the Federal Law 'On Environmental protection', 10.01.2002 No 7, article 13 (3); and the Federal Law 'On reviewing before a Court of law actions and decisions, violating rights and freedoms of citizens' 27.04.1993 No 4866-I, article 4, on the possibility to access the information.

Standard	Indicator		Evaluation	Score	Standard's application
Integrated permit requirements for industrial installation	Structural	1. Was an integrated permit for category A installation available and did it include the description of:	1. There is no requirement for an <i>integrated</i> permit under the national legislation, so it is not possible to apply this part of a standard subject to local conditions. ⁶⁸	1	31%
		1.1 installation and activities;	1.1 included;		
		1.2 nature and volume of emissions into air, water and land;	1.2 included into separate licences;		
		1.3 measures of waste prevention and recovery;	1.3 partially included into a separate licence on waste management;		
		1.4 measures related to the monitoring of emissions?	1.4 partially included into emission licence. ⁶⁹		
		2. Could the public concerned participate in procedures of granting, changing or updating the permits?	2. Such practice is not envisaged by the national legislation: the standard is not applied subject to local conditions.	0	
	Process	3. Were the BATs applied during the production process?	3. Intention to apply BATs is present, ⁷⁰ and main goal of the project is to upgrade the oil extraction process to achieve the gas flaring reduction, using BATs. ⁷¹	3	
		4. Was the following made available to the public:	4. Partially available:	1	

⁶⁸ At the same time the project possesses all necessary permits and licences in accordance with the national legislation. See the same evaluation for Kuzbass Pishkombinat above, fn 45.

⁶⁹ See also fn 45 & 46 above. Considering that, 'subject to the local conditions', the standard could only be applied partially, as to its content, and not at all as to its form. The indicator scores '1', as only points 1.1 and 1.2 have been fully realised.

⁷⁰ Irkutsk Oil Company (2008b), p. 2; see, generally, Irkutsk Oil Company (2008c).

⁷¹ The indicator scores '3' because, despite the high probability, it is impossible to fully verify the application of BATs in practice. The project evaluation documents were classified by the EBRD as 'internal documents'. See email exchange with the EBRD representative dated 2.02.2015 and 3.02.2015. See also evaluation of Kuzbass project above, fn 48.

Standard	Indicator		Evaluation	Score	Standard's application
Integrated permit requirements for industrial installation		4.1 the competent authorities' decision on the project, including the copy of a permit;	4.1 available in general terms; copy of the permit was not directly available; ⁷²		
		4.2 the general binding rules applicable for installations;	4.2 not directly available via the company; can be found via Internet.		
		4.3 the results of the emissions' monitoring.	4.3 most often available upon request. ⁷³		
	Outcome	-	-		

2.3 Standards' application: WHSD central section road project

In relation to the EBRD participation in *WHSD central section road project*, the evaluation of standards' application highlighted the low and inexplicit commitment to the application of European standards. In comparison to two other projects above, this project is marked by little attention to the possible significant effects on the environment and the solutions to avoid them in the project's EIA documentation. Unlike with other evaluated projects, here public demonstrated high environmental awareness and was eager to participate in decision-making procedures, while the municipality declined, which resulted in judicial recourses. Yet, the story of this large project's realisation revealed the positive changes in relation to the public participation and public access to information since the Bank joined the group of investors. In relation to the application of an integrated permit and other related requirements, this project scored the lowest of all.

⁷² Copies of permits and licences can be acquired from the regional branch of the Ministry of Natural Resources and Ecology.

⁷³ See also fn 50. The indicator scores '1', as the standard in the given context cannot be fully applied in line with the European practice. At the same time, some of its minimal elements are present.

Standard	Indicator		Evaluation	Score	Standard's application
General commitment to EPE	Structural	1. Has the commitment to the application of the European Principles for the Environment (or to the application of the European Union standards) been incorporated in the general objective of the investment project?	1. The commitment was formulated very generally and not in the project's documentation but in a summary on the EBRD website: 'an Environmental and Social Action Plan has been developed to mitigate the potential adverse impacts of the project and structure the project to meet EBRD Environmental and Social Policy and its Performance Requirements'. ⁷⁴	1	25%
Environmental Impact Assessment	Structural	1. Did the classification into category A, B or C took place at the initial stage of the project? 2. Was the EIA issued at the initial stage of the project, containing: 2.1 description of the project with information on its location, design and size; 2.2 main factors likely to be significantly affected by the project;	1. The project has been classified as category A. 2. The EIA (OVOS) took place, so that: 2.1 description of location, design, size is available; ⁷⁵ 2.2 factors likely to be significantly affected are well described, in detail; ⁷⁶	4 1	70%

⁷⁴ See EBRD website, 'Project Summary Documents', 'WHSD Central Section Road PPP', at www.ebrd.com/work-with-us/projects/psd/whsd-central-section-road-ppp.html, accessed 19.02.2015. EBRD Environmental and Social Policy and its Performance Requirements are based on the Declaration on the European Principles for the Environment. The commitment has not been mentioned in the description of the Project, see WHSD Central Section Construction (2011a), p. 9.

⁷⁵ See WHSD Central Section Construction (2011b) Stakeholder Engagement Plan. pp. 7-11; WHSD Central Section Construction (2011a), p. 9.

⁷⁶ WHSD Central Section Construction (2011a), pp. 27-45.

Standard	Indicator		Evaluation	Score	Standard's application
Environmental Impact Assessment	Structural	2.3 significant effects the project is likely to have on the environment;	2.3 such effects were described in the Non-Technical Summary and OVOS but not fully; ⁷⁷	3	
		2.4 descriptions of the measures envisaged to avoid, reduce and possibly to remedy significant adverse effects;	2.4 provided, but were not comprehensive; ⁷⁸		
		2.5 outline of the main alternatives studied by the developer and the main reasons for his choice, taking into account the environmental effects?	2.5 provided very shortly, implying there are almost no alternatives to the Project. ⁷⁹		
		3. Was the access to information ensured prior to the development consent, including:	3. Access was ensured:		
		3.1 identification of stakeholders ('primary stakeholders' and 'secondary stakeholders');	3.1 stakeholders were identified as 'critical group' and 'general stakeholders'; ⁸⁰		
		3.2 making the information about the project available to stakeholders;	3.2 EBRD organised a periodical 'Open house', providing open access to documents and public consultations; ⁸¹		

⁷⁷ *Ibid*, but see article by Obuhova, who writes that as a result of an additional ecological expertise in 2011, held by the order of the Governor of St. Petersburg, OVOS documents and procedures were not fully in line with the legal provisions. Moreover, they did not contain information on the protected flora and fauna, situated on the way of the construction sites. See Obuhova K. 'WHSD is stuck in bushes', on-line news portal *Fontanka.ru*, 16.01.2012. (in Russian). www.fontanka.ru/2012/01/16/141/, accessed 26.03.2015.

⁷⁸ See fn 77 above, see the provided measures in WHSD Central Section Construction (2011a), pp. 45-51.

⁷⁹ WHSD Central Section Construction (2011a), pp. 9-11. Considering all fact, the indicator scores '1', because although the detailed EIA has been issued for the project, it turned out not to be fully consistent with the requirements.

⁸⁰ WHSD Central Section Construction (2011b), pp. 23-25; see also *List of stakeholders* at pp. 38-45.

⁸¹ The summary of measures informing the public is outlined in a Stakeholders Engagement plan, WHSD Central Section Construction (2011b), pp. 26-33.

Standard	Indicator		Evaluation	Score	Standard's application
Environmental Impact Assessment		3.3 allowing them to react within at least 30 days before the development consent was granted?	3.3 Public Environmental Assessment, public consultations and hearings took place. ⁸²		
	Process	4. Was the public informed about the competent authorities' decision on the project, its conditions, the reasons for this decision and the possibility of public participation?	4. Informing the public has become better after the EBRD joined the project. Stakeholder engagement action plan was adopted, ⁸³ which was crucial considering the public general opposition to this project. ⁸⁴ Yet part of information on the project was in hands of the city administration, unwilling to make it public at that time. ⁸⁵	2	

⁸² However, CEE Bankwatch was rather critical about the provided information and as a consequence, about the quality of the Public Environmental Assessment, held in 2006-2008. See Summary of Public Environmental Impact Assessment of Western High-Speed Diameter project, available online at http://bankwatch.org/documents/_environmental_analysis_ECOM_10_07_summary_eng.pdf, accessed 19.02.2015. In addition, physical and moral intimidation of the public opposing to the project was reported (see Bellona (2008) They'll pave paradise and put up...a high-speed road). Media has been reporting difficulties in obtaining the information about the project plans and impacts from the city administration (see Maier T. (2013) Partnerships to Revitalise Infrastructure? World Finance. 10.01.2013; Obuhova K. 'WHSD is stuck in bushes', on-line news portal *Fontanka.ru*, 16.01.2012. (in Russian)). At the same time, this does not allow to judge on the (non-) application of the EPE standards by the EBRD, because the Bank joined the Project as co-financer later, in 2009. Considering the whole picture, and the results of efforts taken by the investor, the indicator scores '3'.

⁸³ See WHSD Central Section Construction (2011b), pp. 26-33. Document underlines, however, that public information and participation 'apply at the preparatory stages of the Project and do not apply to further stages of Project development and construction'.

⁸⁴ The *World Finance* wrote in relation to the project: 'Public consultation is not a tradition in Russia. In the past, infrastructure projects have not given due consideration to those potentially affected, thus widening the gap between decision-makers and the public. But with the WHSD it appears that things are beginning to change, thanks to the involvement of the EBRD – an international finance institution whose stringent requirements exceed current local standards'. See Maier (2013).

⁸⁵ WHSD Central Section Construction (2011b), p. 14. As it can be seen from the Human Rights Activists' Report, public was at times indirectly deprived from the right to take part in the environmental consultations in relation to the project. Such consultations were organised during the office hours and during the summer vacations. See Bellona (2007) Report on the Human rights situation in St. Petersburg. Annex 11. www.liga-rr.ru/html/sovet-spb/001-11.html, accessed 27.03.2015. Later the situation got better, and at the time of the current study the municipal website offered much information on the construction of the highway. See https://gov.spb.ru/gov/terr/reg_kirovsk/stroitelstvo-v-rajone/stroitelstvo-zapadnogo-skorostnogo-diametra/, accessed 26.03.2015. See also, generally, in 40 above in relation to the Kuzbass Pischekombinat project. The indicator scores '2' because of the partial inapplicability of the standard (due to the local conditions) at the time of project realisation.

Standard	Indicator		Evaluation	Score	Standard's application
	Outcome	5. Was the public concerned ensured access to a review procedure of the EIA procedure? Otherwise, was it provided with the possibility to complain to an administrative authority and/or before a court of law?	5. A public grievance mechanism was developed by the project. ⁸⁶ Unless unsuccessful, it directs an interested person 'to submit a claim to the court, according to the [national] Civil Procedural Code'. ⁸⁷ Some members of the public were indeed involved in the review of the EIA. ⁸⁸	4	
Access to environmental information	Structural	-	-		62,5%
	Process	1. Was the environmental information on the project made available at request within one month (with max extension to two months)? 2. In case of information refusal, was it well grounded (comparable to requirements of Art.4 Directive 2003/4/EC) and provided within one month?	1. The information by the EBRD was timely available; while due to the local practices, authorities were at times non-collaborative or unwilling to provide (full) information. ⁸⁹ 2. There is no evidence of well-grounded refusals; the environmental information was problematic to get. ⁹⁰	2 0	

⁸⁶ WHSD Central Section Construction (2011b), pp. 34-36.

⁸⁷ *Ibid.*, p. 36.

⁸⁸ The article by Obuhova reports that the state environmental surveillance agency, Rosprirodnadzor, has been using the assessment documentation developed by the public activists. Obuhova K. 'WHSD is stuck in bushes', on-line news portal *Fontanka.ru*, 16.01.2012. (in Russian). This allows to assign to the indicator score '4'.

⁸⁹ See fn 85 above.

⁹⁰ Some information on the project was not directly refused, but was made hard to get. See e.g., article by Belovranin A. 'Why the Port of St. Petersburg is afraid of two more public environmental expertises?' *Novaja Gazeta*, 11.11.2013, (in Russian) <http://novayagazeta.spb.ru/articles/8204/>, accessed 26.03.2015, where the author describes how the environmental information is being hidden from the public by declining to collaborate properly. See also articles by Ponomareva V. 'Road in place of wildlife sanctuary', *Ecology and Law*, 15.01.2008 (in Russian), www.bellona.ru/articles_ru/articles_2008/zsd_yuntolovo, and 'EBRD: environmental policy and practice', *Ecology and Law*, 1.03.2008 (in Russian), www.bellona.ru/articles_ru/articles_2008/ebd_presentation, both accessed 26.03.2015, who writes about the bank declining to share its environmental analysis of the WHSD with the public, classifying it as a document of internal use, and at the same time offering to summarise it orally. The indicator scores '0'.

Standard	Indicator		Evaluation	Score	Standard's application
	Outcome	<p>3. In case of wrongful refusal of information or inadequately answered information by public authority, is it possible to have it reconsidered by that authority, or by another public authority, or to have an administrative review?</p> <p>4. Was it possible to access the review procedure before a court of law, whose decisions may become final and binding on the public authority holding the information?</p>	<p>3. Theoretically, such right is granted by the national legislation.⁹¹ In practice, public was making active use of this right, addressing public authorities for an administrative review.⁹²</p> <p>4. Right is granted by national legislation; public was making active use of this right, addressing the courts and the Prokuratura.⁹³</p>	4	
Integrated permit requirements for industrial installation	Structural	<p>1. Was an integrated permit for category A installation available and did it include the description of:</p> <p>1.1 installation and activities; 1.2 nature and volume of emissions into air, water and land; 1.3 measures of waste prevention and recovery; 1.4 measures related to the monitoring of emissions?</p>	<p>1. Integrated permit is not yet compulsory under Russian legislation.⁹⁴ Therefore, as to its form, the European standard cannot be applied, subject to local conditions. However, the availability of permits and licences are compulsory and includes the description of emission limit values, discharge limit values and waste disposal limits.⁹⁵</p>	1	12,5%

⁹¹ For detail, see the evaluation of Kuzbass Pischekombinat project above, fn 43.

⁹² Between others, the Ministry of Natural Resources and Ecology, the Rospirodnadzor and the office of the Governor of St. Petersburg.

⁹³ See, e.g., decision of the St. Petersburg City Court No. 33-13848/2013, Case *Intarsia v. Environmental Prokuror of St. Petersburg*, where the court supported the Prokuror in defending the public environmental interests in relation to the endangered plant species, damaged by the construction firm Intarsia. Intarsia was one of the subcontractors in WHSD project.

⁹⁴ Same as for the Kuzbass project, see above.

⁹⁵ See the comment in Kuzbass Pischekombinat and in Irkutsk Oil Company projects' evaluation, fn 45 & 46. Just like with other two projects, this indicator scores '1', because the minimum provisions of the standard have been applied.

Standard	Indicator		Evaluation	Score	Standard's application
Integrated permit requirements for industrial installation		2. Could the public concerned participate in procedures of granting, changing or updating the permits?	2. Such practice is not envisaged by the national legislation: the standard is not applied subject to local conditions. ⁹⁶	0	
	Process	3. Were the BATs applied during the production process?	3. No information on application of BAT is available. ⁹⁷	0	
		4. Was the following made available to the public:	4. Partially available:	1	
4.1 the competent authorities' decision on the project, including the copy of a permit;		4.1 not directly available, can be requested at the regional department of the Ministry of Natural Resources and Ecology;			
	4.2 the general binding rules applicable for installations;	4.2 available via internet and via environmental department of the municipality;			
	4.3 the results of the emissions' monitoring.	4.3 available but upon request. ⁹⁸			
Outcome	-		-		

⁹⁶ In practice, the public can use judicial matters in order to initiate a change, update or withdrawal of a permit. Yet, the indicator scores '0', as there are no established ways for public concerned to participate on a regular basis in procedures of permit negotiation.

⁹⁷ Intention to apply BATs has not been mentioned in the Project's technical summary. It recommends, however, 'to use advanced technology' in the construction. See WHSD Central Section Construction (2011a), p. 30. The WHSD Company also does not mention BATs at its website, while describing and illustrating the applied technologies: <http://nch-spb.com/stroitelstvo/tehnologii/>, accessed 26.03.2015. Therefore, the indicator scores '0'.

⁹⁸ See also fn 50 & 73. The indicator scores '1', as the standard in the given context cannot be fully applied in line with the European practice. At the same time, some of its elements are present.

3. ANALYSING AND VALIDATING THE RESULTS

The proof of concept executed above allowed a demonstration of the practical use of the legal environmental indicator developed for measuring general commitment to the European Principles for the Environment, as well as indicators measuring the cross-sectoral standards involving environmental impact assessment, access to environmental information, and permit requirements with regard to industrial installations. Below, the results of the proof of concept are analysed and validated. Moreover, the general analysis of the proposed legal environmental indicators' usability is presented.

3.1 Analysis of the proof of concept

The results of the evaluation of the European environmental standards' application have already been summarised above in relation to each of the three investment projects.⁹⁹ It must be remembered that the results obtained in this legal exercise do not represent the rating of a concrete project. Expressed as a percentage, the results show *the degree of success* in applying the legal European standards, which is not the same as, for instance, the extent of a financial institution's compliance with national legislation. In other words, this proof of concept represents a measurable *illustration* of the provision of the Declaration on the European Principles for the Environment, which states that '...the Signatories are expected to comply with the appropriate EU principles, practices and standards... subject to local conditions'.¹⁰⁰

The analysis of the three investment projects, carried out in the framework of proof of concept, has revealed, firstly, that in all three projects, a general commitment to European environmental standards (or to the EPE in general) could be found in varying degrees.¹⁰¹ Thus, while in the Kuzbass Pishkombinat and Irkutsk Oil Company projects this standard has been applied fully, its application in the WHSD project did not reach a level higher than 25 percent.

Secondly, the Environmental Impact Assessment took place prior to the realisation of all three projects, which made it possible to speak of a 'comprehensive' or a 'wide-ranging' application of the 'EIA' standard. The evaluation of this standard in the projects concerned resulted in 70, 90, and 70 percent application, respectively.

Thirdly, likewise, in relation to the 'Access to Environmental Information' standard, all projects scored highly enough, resulting, in 69, 75, and 62.5 percent, respectively.

Fourthly, however, common to all three projects has been the inability to apply the 'Integrated permit requirements for industrial installations' standard, common for these types of installations in the European Union. This can be explained by the fact that the analysed installations are subject

⁹⁹ See Sections 2.1, 2.2, and 2.3 above.

¹⁰⁰ See EPE Declaration (2006), Annex I to this study.

¹⁰¹ This commitment is expressed to a greater or lesser degree, making it possible to speak of only 'partial application' in the case of the WHSD central section road project.

to national legislation, while currently there is no requirement to possess an integrated permit under the environmental legislation of the Russian Federation. Moreover, as a logical consequence, there is also no expertise with respect to the issuing or to the application of such a permit. This outcome can be seen as a demonstration of the inability to apply EU environmental standards outside the European Union, ‘subject to local conditions’.¹⁰² A similar situation arises with regard to the possibility for the public concerned to participate in procedures of granting, changing, or updating the permits, or to obtaining information on their requirements. In contrast to the EU, national legislation envisages public participation at the initial – environmental impact assessment – stage, but not so much after a project has begun. Subsequently, as to ‘Integrated permit requirements for the industrial installation’ standard, the level of its application both in the Kuzbass Pishkombinat and the Irkutsk Oil Company projects was 31 percent, while in the WHSD project it was not higher than 12.5 percent.

The analysis of the overall results has demonstrated that in a comparison of the three projects, the Irkutsk Oil Company project showed the highest rate of EU legal environmental standards’ application. This can be explained by the fact that the company is relatively independent and successful, and willing to apply high-quality standards and technologies in its production processes. Additionally, at the time, the Bank was the only investor in the project, which had been structured according to the EBRD requirements.

By contrast, of the three projects the WHSD project demonstrated the lowest extent of the EU environmental standards’ application. Arguably, this was because the Bank had joined this large-scale project at a later stage, and because it was one of many (non-EPE) investors, thus making it difficult to impose additional investment conditions.

3.2 Analysis of the legal environmental indicators’ usability

Beyond the baseline study of European environmental standards’ application in the three investment projects, in line with the main research question, the query is whether the legal environmental indicators developed in Chapter VII, are indeed the suitable instruments that can evaluate the application by the EPE Banks of European legal environmental standards in the framework of European direct investment projects in third countries. It shall be recalled that the most important features of indicators are monitoring, which ensures movement towards an objective; evaluation, which improves implementation and leads to the increased accountability; and simplification of the communication while transmitting the information.¹⁰³ At the same time, however, this study has revealed that in practice, in line with the epigraph to this chapter, the task to evaluate the application of the European environmental standards in third countries using the indicators can be confronting. As with any form of informative instruments, there are limitations to their use.

¹⁰² The wording of the EPE Declaration, p. 2. See Annex I to this study.

¹⁰³ See Chapter VI, Section 1 on the function and definition of indicators.

It can be concluded that the major challenges to the usability of the proposed indicators are the confidence and the availability of the analysed information, as well as the correct interpretation of the indicators. While this conclusion is common to a number of existing studies,¹⁰⁴ this study formulates its distinct solutions to these challenges, specific to the proposed legal environmental indicators.

Hence, the usability of indicators depends on the *confidence of the data*. The legal environmental indicators face the problem related to the qualitative character of information that they need to evaluate, which is sometimes very broadly and generally formulated. This study addresses this challenge by providing a definition of a legal environmental standard as a legal norm, thus clarifying what exactly are the data to be evaluated.

Additionally, the usability of indicators depends on the *availability of the data*. In various places of this study the crucial importance of transparency is advocated, as a precondition of Banks' accountability – but also as a prerequisite for an objective evaluation using indicators. Practice showed that in the course of assigning scores to indicators, it was not always immediately possible to do so. At times, this was because there was no factual application of a standard in a concrete situation.¹⁰⁵ As the proof of concept has demonstrated, the absence of (sufficient) information to answer certain questions of the sample evaluation form in relation to the concrete investment projects has led to a necessity, in such cases, to assign the score to the indicator, taking into consideration the legislative context, relevant judicial practice (if available), common practice in similar situations, academic studies in the field, and reports from the mass media. This approach, however helpful in getting an approximate impression of the national possibility to apply a European environmental standard in a third country's regulatory context, does not always provide for an objective and verifiable evaluation. In order to contribute to a better availability of data, necessary for indicators' optimal usability, it is suggested to enhance the Banks' transparency regulations, by adopting a homogenous set of rules (between the EPE Banks) on what exactly data shall be made public in relation to the application of the European environmental standards. Additionally, the Banks should take a stricter approach towards the transparency rules in the projects with their involvement.

Ultimately, the usability of indicators also depends on their correct *interpretation*. The interpretation is particularly important, as indicators tend to provide only the core information on a particular situation rather than presenting the whole picture within the relevant context. In this relation, the proof of concept has revealed the importance of the knowledge of the national regulatory context and practice. To enhance the proposed indicators' usability, they should be used in combination with legal gap analysis of the national environmental regulatory framework. This

¹⁰⁴ See, for instance, the studies of Mitchell G. (1996) Problems and Fundamentals of Sustainable Development Indicators. *Sustainable Development* 4 (1). 1-11; Reed B. (2012) *Selecting water, sanitation and hygiene indicators*. Water, Engineering and Development Centre, Loughborough University; Gabrielsen P., Bosch P. (2003) *Environmental Indicators: Typology and Use in Reporting*. EEA internal working paper. European Environment Agency; Reyntjens D., Brown J. (2005) *Indicators: An Overview*. INDECO Project No. 513754, Institute for European Environmental Policy; OECD (2003) *Environmental indicators: Development, Measurement and Use*. OECD Environment Directorate Environmental Performance and Information Division.

¹⁰⁵ See for example the evaluation of 'Access to environmental information' standard in the framework of the Kuzbass Pischekombinat project.

approach would contribute to a more objective interpretation of the indicators by seeing them in the broader legislative context, and, therefore, to a more accurate assignment of indicators' scores.

The analysis on legal environmental indicators' usability demonstrates their limits as an evaluation instrument. At the same time, in the course of this study the absence of a suitable alternative instrument or of a sound methodology fit for the purposes of the legal standards' evaluation, has been sufficiently displayed. Some existing instruments, although environment-relevant, do not evaluate the legal dimension of environmental standards.

Another important argument in favour of legal environmental indicators is that some limitations to their use are of external character, and do not represent distinctive features of the indicators themselves. Similarly to the situation with the application of legal indicators for human rights, they can be summarised as 'awareness gaps, knowledge gaps, resource gaps, efficiency gaps and cooperation gaps'.¹⁰⁶

Aware of the legal environmental indicators' limits as an evaluation instrument, this study follows the adopted functional approach to law and takes a user's perspective, concentrating at contribution to a greater legal certainty in relation to the standards' application. Consequently, considering the analysis above, the overall conclusion of this study is an informed and pragmatic suggestion of adopting legal environmental indicators as an instrument enabling the evaluation of the European legal environmental standards' application by the EPE Banks. Despite it all, in the end, the proposed legal environmental indicators represent an influential instrument for communicating summary information to the public and to decision-makers.

3.3 Validation of results

According to the developed methodology, the results of the evaluation should be subjected to a content validation procedure.¹⁰⁷ For that purpose, the study of real-life EPE Bank projects, applying the elaborated indicators and resulting in the evaluation of certain environmental standards, needs to be subjected to an examination by experts.

To this end, experts from academia, International Financial Institutions (EBRD and EIB), EU-related bodies (the European Commission and the European Environmental Agency), an NGO (CEE Bankwatch) and a legal consultancy (Milieu) were asked to comment on the legal environmental indicators and the evaluation results in terms of proof of concept.¹⁰⁸ These experts peer-reviewed the proposed conceptual framework, the methodology, the choice of illustrative indicators, and the procedure for validating results at the level of an investment project. In general, these reviewers were highly supportive of the project's results. The importance of the proposed indicators and of the possibility of evaluating the application of legal standards' was repeatedly

¹⁰⁶ Starl K. *et al.* (2014) *Baseline Study on Human Rights Indicators in the Context of the European Union*. Fostering Human Rights among European Policies FP7 Collaborative Project GA No. 320000. Work Package 13 (1).

¹⁰⁷ For a description of the content validation method, see Salkind N. (2011) *Statistics for people who (think they) hate statistics*. Sage publications. p. 118; see also Chapter VII, Section 2.4.

¹⁰⁸ See Annex II to the study for the list of persons validating and commenting on study results.

emphasised. There was no doubt that the proposed legal environmental indicators could eventually function as an instrument to ensure environmental accountability and the sound application of environmental standards in investment projects.

At the same time, and in relation to the documentation presented, the experts identified the method's vulnerability: namely, the possibility that scores might be assigned subjectively. In this connection, the general doubt was expressed regarding the transparency and accessibility of information.

Furthermore, in relation to the logic of this study, some experts felt it important to emphasise the need to take into account other legal environmental indicators, depending on the project and on the investment area. The reviewers' comments led to minor adjustments of the conceptual framework and of the evaluation method, and contributed ultimately to their clarity and academic soundness.

Moreover, as well as by the experts' review, the general results of this study including the elaborated indicators were presented and discussed at a number of workshops and conferences, which provided extremely useful feedback.¹⁰⁹ Based on the responses during these events, a continuous attempt has been made to refine the framework and improve the methodology for evaluating the application of legal environmental standards in third countries.

¹⁰⁹ The results of the project were offered for discussion by the author in a different capacity during the following events: *'Linking Trade and Non-Commercial Interests: the EU as a Global Role Model?'* CLEER-Asser Institute workshop (9. 11.2012, participant); *'EU Environmental Norms and Third Countries: The EU as a Global Role Model?'* CLEER-Asser Institute workshop (19.04.2013, chair); *'Rethinking the rule of Law'* Erasmus School of Law research seminar (22.04.2013, participant); *'EU-Russian Energy law'* Groningen University – Gasunie (29-30.05.2013, speaker); *'International investment regulation'* Utrecht University - Dutch Ministry of Economic Affaires (4-5.11.2013, participant); *UACES 45th Annual Conference*, Kings College London - Deusto Law School (7-9.09.2015, speaker).

Chapter IX

TOWARDS LEGAL ENVIRONMENTAL INDICATORS AS AN EVALUATION INSTRUMENT OF THE EPE DECLARATION IN DIRECT INVESTMENT PROJECTS

This study has examined the European Principles for the Environment (EPE) as one of many voluntary codes of conduct, adopted in the last two decades by International Financial Institutions (IFIs) in relation to the environmental aspects of their investments. The EPE, celebrating in 2016 its ten years' anniversary, commits the signatory banks to 'applying [...] EU principles, practices and standards to all projects financed by the Signatory institutions', subjecting this application in third countries to the local conditions.¹

It has been revealed that the contemporary environmental and investment laws appear to be unequipped to provide instruments able if not to guarantee then at least to apprise and provide certainty in the realisation of such a commitment in practice. In an attempt to contribute to resolving such a situation, the following question is addressed: '*Which instrument can evaluate the application by the EPE Banks of European legal environmental standards in the framework of European direct investment projects in third countries?*'

The study has been undertaken from the perspective of European environmental law, and by adopting a functional approach to law. This approach assumes that the law is meant to serve certain purposes – functions – and that it is assessed in terms of how well it performs these functions. This approach recognises that the nature of legal regimes have to change in order to keep pace with changes in the economy and in society. Therefore, without judging the degree of EPE Banks' environmental accountability, the concept of accountability is used as one of the frameworks of the environmental regime, allowing putting the application of environmental standards in project financing in third countries into regulatory context. Subsequently, the focus lies on the elaboration of an instrument making it possible to evaluate application of the legal standards in practice.

Hence, considering its nature, its functional approach to law and its research question, this study has focused on the technical aspects of evaluating standards, with the intention of devising an instrument for such evaluation.

¹ European Principles for the Environment Declaration (2006).

1. Application of European environmental standards as part of EPE Banks' accountability: the study framework

Initiatives such as the Declaration on the European Principles for the Environment are not binding by nature; they represent a code of conduct voluntarily adopted by the Banks. Thus, they cannot be approached in terms of a *study on their enforcement*. However, their emergence demonstrates the lack of a developed international investment regime. Such initiatives can therefore be seen as alternative soft laws aiming, *inter alia*, at the creation of a common level playing field for at least those institutions/parties holding to a particular code. Their obedience to such a code of conduct is a prerequisite to the code's viability. Even more importantly, by adopting a code of conduct, a financial institution makes it part of its internal regulatory regime. Considering the public nature of the examined Banks, the realisation of EPE Declaration provisions in practice can be approached by way of a *study on Banks' public accountability*.

In the light of the chosen approach and in light of the overarching research question, the study has been structured to first of all reflect on the nature of the European Principles for the Environment. It shows that the EPE, although using the word 'principles' in its title, focuses primarily on the application of legal environmental standards during the realisation of investment projects. Additionally, the academic literature does not provide a definition of a 'standard' as a legal norm. Therefore, in Chapter II a theoretical distinction between a 'principle' and a 'standard' has been introduced, giving legal standard a place among general legal norms. With reference to the reflection addressed in Chapter II on the nature of a legal standard, it has argued that while principles set a normative frame of reference for the whole of the EU legal order, standards are guided by, or based on principles, while possessing a prescriptive character. At the same time, it has been maintained that legal standards are not identical to technical standards or sub-rules. Thus, the legal standard is defined as *a legal norm based on principles and comprising primary and secondary European legislation, aiming at the most objective, effective, and contemporary implementation of environmental law*. As a result, the understanding of legal environmental standard is crystallised, facilitating a firmer grip on the subsequent discussion regarding the evaluation of such standards' application.

With regard to the standards' application, the *rationale* for the European Union – and especially for the Europe-based International Financial Institutions to apply the European environmental standards in third countries has been addressed, against the background of the role of the European Union and of International Financial Institutions in promoting the environmental standards worldwide. Reflecting on the driving forces for the European Union to engage in this process, several reasons are identified, ranging from necessity to safeguard economic interests and to create a level playing field for trade and industry to abstract moral values and obligations to contribute to worldwide sustainable development. In turn, the main reasons for International Financial Institutions to do so are suggested to be, among others, an economic attractiveness of such investment, international legal developments, public nature of IFIs and pressure from the general public.

Additionally, the existent legal and regulatory frameworks are examined, used to apply environmental standards in third countries. In this context, the shaping of the European Investment

Policy, representing a legal framework for the channelling of the environmental standards, is analysed, next to the main voluntary environmental initiatives of International Financial Institutions, such as the World Bank Group Environmental, Health, and Safety Guidelines or the Equator Principles. The Foreign Direct Investment was considered an important regulatory framework for the IFIs to apply the environmental standards in projects in the countries of their operation. In this regard, the study argues that the IFIs, having to be publicly accountable, are deemed to ensure the proper application of their voluntary environmental codes of conduct. The question arises whether the existing accountability mechanisms of the EPE Banks can ensure a comprehensive application of legal environmental standards in third countries, in line with the Declaration on EPE. In clarifying this issue, Chapter V examines whether the existing accountability arrangements of the EPE Banks ensure a comprehensive application of standards. It has first taken a detailed look at the nature, character, and application peculiarities of the EPE Declaration. Addressing the nature of Banks' accountability, it is argued that as the EPE Banks are guided by public interest, and invest their funds directly, they are directly accountable for the projects' failures and successes, also in relation to the environmental standards' application.

Addressing this problem, the issue of the Banks' application of legal environmental standards can be placed in an accountability context. To this end, the theoretical framework for the environmental accountability of International Financial Institutions has been built. Without designing new accountability concepts, the existent arrangements are organised into the IFIs' accountability mechanism, possessing three components. It has argued thereby that the *processes* component, which comprises setting objectives and assessing an actor's behaviour, logically precedes the *consequences* component, with its penalties or rewards; and both of these components, in turn, cannot function without the *preconditions* component, comprising, but not limited to, transparency and yardstick. This knowledge is important as the basis for a future debate on the application of environmental standards within the framework of foreign direct investment projects by concrete Banks, whereby the availability of both transparency and yardstick as preconditions to accountability is hard to overestimate.

The study concludes that IFIs possess the 'results-based' type of accountability, which focuses on how to bring the actor's objectives in predictable and measureable relation to the achieved results. At a minimum, results-based accountability implies that the expected results or objectives are clearly articulated, and that data are collected regularly and reported to estimate whether the results have been achieved.² IFIs should therefore take responsibility for initiating some action and *the results* of that action.³ Therefore, while there is a need of clear objectives, leading to measurable results, the initial problem appears to nestle in imprecisely, ambiguously, broadly formulated objectives, which at the very least lead to uncertainties if not to manipulations. The solution as regards enhancing results-based accountability, therefore, lies in applying of a yardstick, as essential preconditions for its proper functioning. As, unlike transparency, the *yardstick* has not been distinctly formulated in the academic writings, it has been defined it as a

² See Schilder D. (1997) *Overview of results-based accountability: components of RBA*. Harvard Family research project. Harvard graduate school of education, p. 1.

³ Horsch K. (1996) *Results-Based Accountability Systems: Opportunities and Challenges*. Harvard Family research project. Harvard graduate school of education, p. 1.

precondition of results-based accountability that transforms the general objective into a quantifiable criterion within the specified time frames. Moreover, accountability as a substantial concept implies that actors are rewarded or sanctioned for their performance by the relevant forum on the basis of accurate information.⁴ This is vital, considering that, for example, according to the Aid Transparency Index, the EBRD and the EIB were assessed as having poor transparency standards among international donors, and are the two most non-transparent multilateral development banks.⁵ Therefore, arguably, it is most important that the IFIs provide a high degree of transparency, which will serve as a basis for the creation of an objective, contemporary approach to accountability.

Considering the outlined nature and definition of European legal environmental standards, based on principles and comprising primary and secondary European legislation, time is ripe for the construction of an instrument for evaluation of these standards' application.

2. In search of the possibility to evaluate the application of European environmental standards in EPE Banks' investment projects: lessons learned

The goal of the study is twofold. On the one hand, it focuses on resolving methodological difficulties in order to contribute to an accurate evaluation of the application of EU legal environmental standards in foreign direct investment projects. On the other hand, it demonstrates in practice the application of the developed evaluation instruments. While trying to achieve this goal and at the same time reflecting on the research question, a number of findings have been produced.

2.1 The need for legal environmental indicators

The full application of the European principles for the Environment in an investment project can sometimes be beyond the good intentions of the investors. This can be demonstrated by the analysis of the specific character of the European Principles for the Environment, adopted as a voluntary code of conduct; by the investment activities of the Banks outside the European Union; and by the applicability of the reservation, contained in the Declaration on the EPE and subjecting full application of legal environmental standards to local conditions. However, this does not mean that investors should not strive to realise fully a project's objectives. For this reason, it can be argued that the commitments and efforts made during realisation of the investment projects should not be overlooked.

⁴ See Borowicz M. (2013) The internal ratings-based and advanced measurement approaches for regulatory capital under the 'Basel regime'. In Miller G., Caffagi F. (eds.) *The Governance and Regulation of International Finance*. Edward Elgar. 167-208. p. 191.

⁵ Aid Transparency Index (2014) International Aid Transparency Initiative.

Yet, by examining the application of legal environmental standards through the prism of the Banks' environmental accountability, the study demonstrates that it is a challenge for International Financial Institutions to translate 'public interest' and expectations into clear objectives involving the preconditions of an accountability mechanism. In relation to environmental codes of conduct, there can be considerable discrepancy regarding what different stakeholders expect and the actual performance of the Banks if the Banks enjoy wide discretion in formulating and applying their policies and strategies. The same problem occurs regarding anticipations of an actor with respect to what can be expected from it by the forum if the forum formulates vague or general objectives. The examined relationship between financial institutions and their stakeholders demonstrates that the 'talking past each other' effect, when the promises and results achieved by an actor are not in line with the expectations of its forum, is often the result of an unclear translation of public expectations into the Banks' objectives, or the vague formulation of these objectives, which leaves the Banks room for manoeuvre in relation to their commitments. This generates uncertainties concerning their accountability.

In search of the most suitable method for evaluation of the application of European legal environmental standards as the projects' objectives, first, and foremost, it can be concluded that to ensure a reliable way of environmental standards' evaluation, the Banks do not simply need the possibility of blindly assessing compliance with financial rules. Instead, they need to focus increasingly on factual environmental achievements, including those in the framework of a particular investment project. Accordingly, to achieve such application, it is necessary to bring the environmental objectives contained in the EPE Declaration in line with a predictable and measurable relation to the expected results of Bank-financed projects. However, in addressing this problem, it becomes clear that without suitable instruments, a yardstick as a precondition for the functioning of accountability mechanism cannot be operationalised, the application of European legal environmental standards cannot be evaluated, and, generally, the Banks' environmental accountability cannot be put judged upon.

The discussion on the Banks' accountability does not also address the issue of *when* the Banks can be considered accountable regarding individual investment projects. This type of outlying issue remains outside the scope of the study, and must be resolved by the investors' stakeholders, introducing criteria of an 'accountability strength'. Instead, the study represents the first methodological step in that direction, by developing an *evaluation instrument*. And indeed, as a novel element in general legal approach, it suggests using *legal indicators* as the instrument of a yardstick. Legal environmental indicators as such are a sub-type of existing performance indicators. Along with *policy performance indicators*, aimed at monitoring the effects of policy responses, and thus measuring the effectiveness and efficiency of a policy, the function of *legal performance indicators* is to provide information on the application of standards. Such information makes it possible to evaluate the application of legal standards, and can subsequently be used to introduce responding regulatory measures and changes. Moreover, the extent of the commitments, and especially the efforts measured by the indicators, can serve as proof that investors did their best in the given circumstances. Therefore, the indicators can provide additional information regarding efforts made on the way to striving to achieve a project's objective, and thus allow the accountability of investors to be judged.

2.2 Conceptualising and constructing legal environmental indicators

Based on the analysis of the existent methodologies for indicators' construction from different legal fields, and equipped with knowledge that the main function of an indicator is the communication of information, it is argued that *legal environmental indicators* as an instrument of results-based accountability offer the opportunity to gain more accurate information on the application of European environmental standards within investment projects funded by EPE Banks. Defining them as *evaluation instruments, aggregating qualitative information, utilised to determine whether and to what extent environmental legal standards have been applied in a given project*, a separate evaluation methodology for compliance with environmental rules at the level of a project is developed and thereafter tested.

The proposed conceptual framework serves as a basis for two evaluation methodologies:

- a *'quick-scan' methodology*, focusing only on a project's results (allowing for a quick evaluation of results, with the aim of obtaining an approximate idea about the extent to which the standards have been applied; being easy to use but offering less objectivity and transparency); and
- an *extensive methodology*, including the triple commitments-efforts-results evaluation procedure (comparable to the assessment done with regard to human rights indicators; allowing for a long but detailed evaluation of the application of European legal standards within an investment project).

The suggested triple commitments-efforts-results conceptual framework can contribute to the alternatives to judicial review. For example, trustworthy data – showing that a Bank has done everything possible to reach an environmental objective, demonstrating exactly at what stage of the project problems occurred, and illustrating that the reasons were unforeseeable or of an external character – can assist in avoiding costly litigation.

The study proposes a model for the construction and use of legal environmental indicators, containing the stages of *methodology design, indicator development, and indicators' use*, and realises it in practice.

When designing the methodology, the scope of the evaluation is specified, the triple commitments-efforts-results conceptual framework is further elaborated, and the evaluation and the validation methods are established. When developing indicators, it distils four project-specific cross-sectoral indicators, corresponding to the intention to apply legal environmental standards, contained in projects' objectives: *commitment to the European Principles for the Environment contained in the general objective of a project, environmental impact assessment, access to environmental information, and permit requirements for industrial installations*. The indicators for these cross-sectoral standards focus generally on aspects such as transparency, public participation, and public access to justice, thus demonstrating the presence of the preconditions on which the Banks base their accountability arrangements in relation to a particular investment project.

To operationalise the proposed legal environmental indicators, an *evaluation form* is developed. The form has a universal character, and thus is designed for use by the project's stakeholders as well as by the Banks' employees, both in external and internal evaluations of an investment project's results. The idea behind the form is to create a possibility of evaluating the application of legal environmental standards in EPE Bank projects *for all parties, while using the*

same methodology. The application of the same evaluation methods helps to avoid the situation in which parties evaluate ‘past each other’.

In stage three of the proposed model for the construction and use of legal performance indicators, the elaborated indicators have been applied to concrete investment projects as proof of concept, using the evaluation form. Expressed as a percentage, the results of the evaluation represent an *illustration* of the provision of the Declaration on the European Principles for the Environment, which states that ‘...the Signatories are expected to comply with the appropriate EU principles, practices and standards... subject to local conditions’.

Assigning scores to indicators has turned out to be difficult at times. Firstly, because there was no factual application of a standard in a concrete situation. In such cases, the score was assigned to the indicator, taking into consideration the legislative context, relevant judicial practice (if available), common practice in similar situations, academic studies in the field, and reports from the mass media. Among other things, the proof of concept has revealed that such European legal standard as an integrated permit requirement under the Directive on Industrial Emissions, was not applied in all three investment projects because the national legislation requires separate licences for emissions and discharges into each media – air, water, and land – as well as a permit for waste disposal. Such an outcome can be seen as a demonstration of the inability to apply EU environmental standards outside the European Union due to the local conditions related to the differences in environmental regulatory context. Similar situations do not contribute to legal certainty, despite the fact that these were foreseen by the Declaration on the European Principles for the Environment, which subjects the application of standards to local conditions in third countries. At the same time, this reservation reflects the fact that not all EU environmental standards can be applied outside the European Union, such circumstances accentuate the need for reliable information regarding *factual application*. The importance of legal environmental indicators cannot be overestimated, as they comprise the evaluation tool that helps to diminish uncertainty and brings clarity with regard to the actual application of European environmental standards.

On a general note, the lack of information, the absence of a distinctly formulated yardstick and other problems do not ‘ruin’ the proof of concept. One of the lessons learned in the course of the study is the realisation that these shortcomings do not embody the purpose the proof of concept serves. As such, the proof of concept has demonstrated what the potential of the new evaluation methodology is – and where the challenges lie. Generally, the discovered shortcomings have contributed to a much more theoretical study, providing the grounds for further research.

3. Legal environmental indicators as an evaluation instrument: the challenges

In answering the main research question, it is shown that legal environmental indicators are indeed the suitable instruments that can evaluate the application by the EPE Banks of European legal environmental standards in the framework of European direct investment projects in third countries. It demonstrates that the most important features of indicators are monitoring, which

ensures movement towards an objective; evaluation, which improves implementation and leads to the increased accountability; and simplification of the communication while transmitting the information. By conceptualising, constructing, and by successively using the sample indicators in a proof of concept, the study builds a solid argument in their favour. By doing so, it has provided a well-founded answer to the research question.

At the same time, however, this answer raises successive questions related to the *practical application* of legal environmental indicators as the evaluation instrument. When trying to operationalise the proposed indicators, it has been revealed that using them in practice can be confronting. It has therefore acknowledged that, as with any form of informative instruments, there are limitations to their use, which cannot be neglected and which create challenges of internal and external character.

3.1 Using legal environmental indicators: internal challenges

The study has demonstrated that the major internal challenges to the usability of the proposed indicators are the confidence of the analysed information and the correct interpretation of the indicators, including the objectivity in assigning the scores.

In relation to the *confidence of the analysed information*, the legal environmental indicators face the problem related to the qualitative character of information that they need to evaluate, which is sometimes very broadly and generally formulated. This problem is addressed by providing a definition of a legal environmental standard as a legal norm, thus clarifying what exactly are the data to be evaluated.

Moreover, it has been argued that the Sourcebook on EU Environmental Law, serving as a reference on applicable European environmental standards, should be updated, by revising the applicable environmental standards (in accordance with changes in EU environmental law); by excluding those standards that, as practice has shown, cannot be applied in third countries; by including as an annex the sample form for evaluating the application of standards.

Another challenge is the *correct interpretation* of the proposed indicators. The interpretation is particularly important, as indicators tend to provide only the core information on a particular situation rather than presenting the whole picture within the relevant context. In this relation, the proof of concept has revealed the importance of the knowledge of the national regulatory context and practice. The indicators should be used in combination with legal gap analysis of the national environmental regulatory framework, which would contribute to a more objective interpretation of the indicators by seeing them in the broader legislative context, and, therefore, to a more accurate assignment of indicators' scores.

Additionally, it is important to avoid subjectivity in assigning scores to indicators when evaluating application of the European environmental standards by analysing a broad range of relevant information for an objective judgement, including general public consultations, academic research, judicial decisions, and NGO and mass-media publications; and by including independent experts in the EPE evaluation team.

3.2 Using legal environmental indicators: external challenges

Relative to the confidence of data, addressed above as an internal challenge, there is the external challenge of the *availability of information*, that has become apparent in the process of the construction and the operationalisation of legal environmental indicators. It involves the problems of transparency and willingness to cooperate from the side of the EPE Banks.

In various places of this study the crucial importance of transparency is advocated, as a precondition of Banks' accountability – but also as a prerequisite for an objective evaluation using indicators. Practice showed that in the course of assigning scores to indicators, it was not always immediately possible to do so. At times, this was because there was no factual application of a standard in a concrete situation.⁶ As the proof of concept has demonstrated, the absence of (sufficient) information to answer certain questions of the sample evaluation form in relation to the concrete investment projects has led to a necessity, in such cases, to assign the score to the indicator, taking into consideration the legislative context, relevant judicial practice (if available), common practice in similar situations, academic studies in the field, and reports from the mass media. This approach, however helpful in getting an approximate impression of the national possibility to apply a European environmental standard in a third country's regulatory context, risks the objectivity of the evaluation. In order to contribute to a better availability of data, necessary for indicators' optimal usability, it has been suggested to enhance the Banks' transparency regulations, by adopting a homogenous set of rules (between the EPE Banks) on what exactly data shall be made public in relation to the application of the European environmental standards. Additionally, the Banks shall take a stricter approach towards the transparency demands for the projects with their involvement.

Close to the issue of transparency is the problem of the willingness to cooperate. In the course of research, some of the EPE Banks were reluctant to provide the author with inquired information related to projects' evaluation methodologies, or with information on the ex-post evaluation of investment projects, hiding behind the confidentiality rules and practices in the financial and banking world, as well as behind the lack of manpower to contribute to academic research. Similarly, inquiries with the management of the investment projects or the recipient companies hardly brought any results.

Noteworthy, in relation to ensuring transparency and external evaluations, the availability of rather successful practices by other IFIs to learn from, is stressed, such as World Bank, which came to realise that an independent evaluation is essential for effective development programs, providing accountability, and helping development practitioners to learn from experience,⁷ as well as that to ensure impartiality and transparency, the evaluation function needs to be independent of institutional management and free of conflicts of interest.⁸ This led to the creation of an Independent Evaluation Group, which enjoys a neutral status and is charged with the task of providing an objective assessment of the World Bank Group's work results, and identifying and

⁶ See for example the evaluation of 'Access to environmental information' standard in the framework of the Kuzbass Pischekombinat project.

⁷ IEG (2007) Improving Development Results Through Excellence in Evaluation. World Bank, 1-8. p. 3.

⁸ *Ibid.*, p. 3.

disseminating the lessons learned from the Group's experience.⁹ Moreover, the World Bank has been working together with other IFIs to enhance evaluations, establishing the Evaluation Cooperation Group (ECG), represented by the heads of evaluation departments of different IFIs with the aim, among other, of harmonising performance indicators as well as evaluation methodologies and approaches in evaluations of public sector operations. The EPE Banks could establish and make use of similar instruments to promote evaluation harmonisation among them to assess how the European environmental standards are being applied.

3.3 Using legal environmental indicators: dealing with challenges

The challenges addressed above may raise doubts in relation to the proposed indicators indeed being the best suitable instrument for evaluation of legal environmental standards. Yet, aware of the legal environmental indicators' limits as an evaluation instrument, this study follows the adopted functional approach to law and takes a user's perspective, concentrating at contributing to a greater legal certainty in relation to the standards' application.

These challenges do not automatically imply that the proposed indicators cannot be used to their full potential. Nevertheless, the knowledge of the existent challenges and limitations shall be taken along when using the indicators in practice.

Thus, first of all, it is necessary to ensure better transparency on the part of EPE Banks. This could be done by disclosing more documents on investment projects that have already been finalised, thus enabling a better external analysis of Banks' operations; disclosing more information on complaints to the Banks by regulators, affected communities, and the general public; claiming better transparency regarding projects' developers applying for an investment loan from a Bank, as a precondition for such a loan, and regarding the monitoring of a project's operation; replacing non-transparent auditing-type reports with evaluations open to the public, based on accessible methodology; and, finally, granting access to information at a different regulatory level, for example, by creating an intra-signatory committee on the implementation of EPE, comprising representatives of Banks' evaluation departments and projects' stakeholders. For example, this means that access to information must be granted at a different regulatory level, such as an independent committee on the application of the EPE. The establishment of such a body would lead to the institutionalisation of EPE, giving to it more 'weight', and at the same time, it would change the current practice, when the partial availability of information leaves the evaluator fully dependent on the cooperation and good will of the Banks.

Likewise, the *de facto* application of the European environmental standards can be enhanced by such measures as a better incorporation of environmental goals and principles in a comprehensive financial strategy; elaborating *guidelines* on the necessary steps required to ensure application of the standards; including systematic ex-post evaluations on the coherence with EPE

⁹ See the International Evaluation Group website, 'About IEG', <http://ieg.worldbank.org/about-us>, accessed 16.01.2014, and 'IEG Methodology', <http://ieg.worldbank.org/methodology#footnotes>, accessed 10.02.2014.

with respect to the agreements, projects, plans, and programmes involving EPE Banks; ensuring a *harmonised evaluation* in relation to all EPE Bank signatories; making it a *real* and not an *abstract* requirement by, for instance, publicly reporting not only on successes but also on failures; accepting to fund a prospective investment project only after thorough evaluation of the intention and capacity to apply EPE standards; striving, in projects with plural investors, to create a level playing field to the highest environmental standards (thus following a race to the top rather than to the bottom); and by enhancing the grievance and complaint mechanisms, ensuring their true independence and public accessibility.

Next, the evaluation procedures can be enhanced by using *the same* methodology among all EPE Banks to ensure the same standard of evaluation and the coherence of final results; ensuring *the same* methodology of evaluation for internal and external use is applied both by the Banks and by external stakeholders, leading to the same standards of evaluation and interpretation of final results; making the evaluation methodology user-friendly and flexible enough to be adapted and used when assessing investment practices involving other International Financial Institutions; and by Banks, as signatories to the EPE Declaration, engaging together in a comparative analysis of the respective experiences with EPE standards, the developed evaluation mechanisms, and the legal interpretative methods. The findings imply that if the proposed evaluation methodology is applied to the same investment project by different stakeholders, and divergent evaluation results are acquired, the discussion related to the application of the European Principles for the Environment should concentrate on issues such as sufficient transparency and sufficient access to environmental information for the external evaluators, as well as on the project's adequate diligence and impact awareness for the internal evaluators.

The implications highlighted above permit the future integration of the research results into general legal discourse on environmental aspects of investment, and on the environmental accountability of International Financial Institutions. Furthermore, they underline the vital importance of being able to objectively evaluate how European legal environmental standards are applied in investment projects, while this study aims to become the first step in this direction.

Consequently, considering the internal and external challenges outlined above, the overall conclusion nevertheless takes a form of an informed and pragmatic suggestion of adopting legal environmental indicators as an instrument enabling the evaluation of the European legal environmental standards' application by the EPE Banks. In the end, the proposed legal environmental indicators remain the best suitable instrument for communicating information to the public and to the decision-makers.

4. Studying the application of legal environmental standards: the future

The focus of this study has been largely on the *evaluation* of the Banks' commitment with respect to the Declaration on the European Principles for the Environment. Nevertheless, as the Banks undertake their journey towards sustainable investment, the *future* of this code of conduct, as well as of the legal environmental indicators, should be addressed.

4.1 Suggestions for future research

The proof of concept demonstrates how the indicators could be applied in practice using the evaluation form: for instance, evaluating application of the EU legal environmental standards in three EBRD investment projects in Russia. The importance of this legal exercise lies in putting the constructed evaluation methodology to work. Although every attempt has been made to achieve the maximum objectivity regarding the evaluation, further proof is still needed, and thus may form a subject of the future research.

The added value of a subsequent analysis based on the current study can be guaranteed by looking further than only the EBRD-sponsored projects in Russia, and by examining other EPE Banks and their projects in other countries of operation. Such analysis can eventually result in construction of an algorithm allowing comparing the five Banks-signatories to the EPE in relation to their implementing the provisions of EPE Declaration, or in relation to certain specific parameters, such as availability of transparency and yardstick. Similar to the Dutch initiative 'Eerlijke Bankwijzer', applied, among other, in relation to national private banks' environmental performance,¹⁰ such comparison can have broad practical application.

Additionally, the current study can serve as inspiration for additional research into such questions as the diligence of International Financial Institutions in implementing the adopted codes of conduct; the preconditions for a voluntary code of conduct (e.g. that of the EPE) to become attractive to other International Financial Institutions; the extent to what the European Principles for the Environment are incorporated into the internal policies of different EPE Bank signatories; the difference among the ways the Banks apply EPE standards in their respective projects; the extent to what the Banks rely on complaints from the concerned public to improve the general functioning of their accountability mechanisms; the missing functions from the Banks' complaint mechanisms, and their effect on the relationship between the Banks and their complaining clients.

Finally, a general recommendation concerns the necessity to re-open the broad discussion on the public accountability of International Financial Institutions by addressing the question of *when* the investment can be considered accountable, and by introducing criteria regarding 'accountability strength'; and by introducing 'accountability panels', set up by the Banks, and involving a wide range of stakeholders' representatives.

¹⁰ See *NRC Handelsblad* 7-07-2015. Driessen C. 'Beleggen in Shell en Boeing mag niet van de Eerlijke Bankwijzer' (in Dutch).

4.2 The European Principles for the Environment: future prospects

It is argued that when signing the Declaration, the EPE Banks did not realise the full extent of the challenges that this commitment's realisation would pose in practice. These challenges include, *inter alia*, the fact that the EU legal standards, contained in regulations, directives and decisions are rather addressed to Member States than to project developers; moreover, that there is a lack of appropriate mechanisms and competent authorities in third countries to allow for the implementation of provisions laid down by EU Directives (e.g. integrated permit requirement under the Directive on industrial emissions); besides, it is unclear how to apply the legal provisions of an EU Regulation or Directive that are beyond control of a company receiving the investment. Subsequently, considering these limitations, one might question whether this Declaration goes further than being just a symbolic act.

Despite these doubts, however, an initiative such as EPE is a positive example for national investors and other International Financial Institutions. It sets for the Banks the level playing field regarding applicable environmental standards that must be adhered to, regardless of geographical location. The generation of a common level playing field is much aspired by the EU in relation to the environmental standards applied by EU-based investors in third countries.

Moreover, the study provides a new vision with respect to the 'greening' of foreign direct investment, moving away from the conflicting '*environment versus financial profit*' approach and towards the recognition of environmental requirements being a stimulus for a sustainable investment regime, and of the investors' environmental responsibility becoming an obvious and natural part of any project, contributing to their positive image and financial credibility. Importantly, the vital precondition for the EPE or a similar initiative to become successful is a developed and functioning accountability mechanism, using the correspondent indicators as an evaluation tool.

In relation to their factual application, it is clear that the European Principles for the Environment leave room for improvement. Following a reflection on the implications and the findings of the study, the question arises as to whether initiatives like the EPE constitute a new trend in environmental regime – or whether they are simply filling a temporary niche until a hard-law rule emerges. In the absence of EU-level regime, the EPE initiative as such seems more like a basis for further harmonisation of approach to the environmentally-conscious investment, as well as an invitation for additional parties to adopt similar principles.

In addition, the voluntary standards arguably follow a life cycle, during which the less viable and institutionalised ones are eventually abandoned, while the others adjust to a changing regulatory environment, and develop from being fillers of a regulatory niche to legal norms that are binding. Therefore, in terms of the future, one cannot but agree with those observers that argue that the EPE are of a temporary nature, forming a 'vector' for a future binding regulatory instrument in the field. In the words of Morgera, 'it is understood that these activities represent an interim solution, which is increasingly necessary while States continue to debate whether and how to ensure corporate environmental accountability through other, formal means of enforcement'.¹¹

¹¹ Morgera E. (2009) *Corporate Accountability in International Environmental law*. Oxford University Press, p. 207.

It is further suggested that initiatives like the EPE could be reinforced through the adoption of contractual or other detailed procedures, similar to those adopted by the World Bank Inspection Panel and the Evaluation Cooperation Group, further institutionalising and operationalising the application of European environmental standards.

For the above reasons, *in the short term*, the Banks might revise the EPE, narrowing the Principles down to those that are applicable at the project level, and excluding those that, as has been long and repeatedly indicated, cannot be applied in third countries ‘subject to local conditions’, or owing to their own legal design.

In the long term, the adoption of a binding instrument can be foreseen, relying on a recognised evaluation mechanism. Moreover, another insight into the future invites to suggest that such a regulatory instrument, applied to investment projects, can lead to the appearance of a whole new discipline of ‘*sustainable investment law*’, a certain fusion between environmental law, labour law, human rights standards, investment law, and project management disciplines. As Taekema and Van Klink write, ‘an ... approach that is successful in integrating knowledge from different sources may at some point become a discipline in its own right’.¹²

4.3 Legal environmental indicators: future prospects

The elaboration of the legal environmental indicators as an instrument allowing evaluating the application of the European environmental standards in the EPE Banks’ investment projects has been the key finding of this research.

Talking about their future, it is possible, similar to the analysis of the future prospects of the EPE Declaration above speculate on the short- and long-time prospects.

Thus, *in the short term*, the proposed indicators and the methodology for the creation of additional indicators shall become the accepted evaluation instrument under the revised Declaration on the European Principles for the Environment (EPE-2). The obligation to evaluate the application of the environmental standards within each particular investment project shall come routinely as a package next to other reporting obligations.

Employed more broadly, the Banks’ experience with the application of the EPE Declaration’s provisions can serve as a basis for creation of an algorithm, allowing assessing Banks’ policy and factual achievements in the field of environmental protection, inspired by the existent Dutch ‘Eerlijke Bankwijzer’, designed to assess the private national banks. The evaluation form, elaborated by this study, can serve as a basis for creation of such an assessment algorithm.

In the long term, the legal environmental indicators can become a recognised evaluation mechanism, automatically becoming part of each newly adopted or revised code of conduct in the field of environment. Similar to directives as instrument of EU environmental law, such an instrument may contain ‘minimum harmonisation’ requirements pertaining to parties in an

¹² Taekema S., Klink, van, B. (2011) On The Border. In Klink, van, B., Taekema S. (eds.) *Law and Method: Interdisciplinary Research into Law*. Mohr Siebeck. 7-32. p. 31.

investment project, leaving room for the voluntary adoption of more stringent environmental standards. Nevertheless, the inclusion of a set of indicators as part of a code of conduct such as the EPE attributes more weight to its otherwise abstract commitments.

5. Final remarks

The EPE Banks' code of conduct does not constitute a firm substantive framework containing clear-cut standards to be applied in relation to all bank-financed projects. Instead, they look like an indicative list of potentially relevant objectives, that the Banks will consider applying in the third countries.

To avoid vagueness and juggling with objectives, it is important for general policy statements to be transformed into 'measurable performance targets, which are set, measured, audited and publicly reported upon [...]; the philosophy behind these efforts is that actions are more convincing than words, and, in business, anything has to be measurable if it is to be taken seriously'.¹³ In order to achieve this, suitable and publicly available instruments for ensuring the Banks' accountability are needed. In the absence of an instrument for evaluation of the factual fulfilment of the concrete objectives, stakeholders have no idea about whether European legal environmental standards are being applied in investment projects, nor do they have the possibility of making an independent 'reality check' regarding the Banks' commitments. In other words, without legal environmental indicators, a yardstick as a precondition for the functioning of accountability mechanism cannot be operationalised, the application of European legal environmental standards cannot be evaluated and, generally, the Banks' environmental accountability cannot be put to the test.

On a more general note, the success in implementing the commitments contained in the Declaration on the European Principles for the Environment is not only an administrative or a bureaucratic issue – it is also a political one, requiring changes in the regulatory attitude. One good example of such a necessary adjustment is a change towards transparency on the part of the Banks and towards their understanding of what this notion involves. Another example is a shift from perceiving environmental and financial interests as conflicting ones, and towards realising their unavoidable interdependence.

Importantly, the successful use of the legal environmental indicators, institutionalising the standards' application, can be an incentive for similar initiatives to be adopted by newly appearing IFIs, such as BRICS Development Bank or Asian Infrastructure Investment Bank (AIIB), that commits itself to operate in a 'lean, clean and green' way.¹⁴ The findings of the present study can serve as the lessons drawing by the new financial institutions, to contribute to their environmentally

¹³ Adams J. (1999) Foreign Direct investment and the Environment: the Role of Voluntary Corporate Environmental Management. In *Foreign Direct investment and the Environment*. OECD, p. 102.

¹⁴ According to the president of the AIIB, Jin Liqun. See *NRC Handelsblad* 30-06-2015. Garschagen O. 'Eigen wereldbank triomf voor China' (in Dutch).

friendly reputation, and to ensure these institutions are not loaded with 'ghosts of the past', related to the poorly functioning accountability mechanism.

Ten years after its adoption, the Declaration on the European Principles for the Environment remains a much-needed code of conduct. It is therefore vital that it does not just remain declarative and gradually gets forgotten. With a little good will and more regulatory incentives from the signatory Banks, this code of conduct can enter the second decennia of its existence equipped with evaluation instruments. Legal environmental indicators are the best suitable instrument that can evaluate the application by the EPE Banks of European legal environmental standards in the framework of European direct investment projects in third countries. Such instruments would allow for the EPE transformation from a declarative initiative into a regulatory mechanism. Contrary, by not addressing the uncertainties related to the application of the European environmental legal standards in third countries, the Banks-signatory to the EPE Declaration risk 'losing face' in relation to their good 'green' intentions. Decennia since the launching of the European Principles for the Environment, the time is ripe for a mechanism to be created that will put them to work. Fortunately, the rewards for such effort are potentially great.

ANNEX I



Declaration

The European Principles for the Environment

We, the Signatories of the Declaration, have a shared responsibility towards protecting but also improving the environment in the interest of sustainable development, which we believe can best be achieved working more closely together.

We hereby endorse and reinforce the European consensus on the values attached to the fundamental right for both present and future generations throughout the world to live in a healthy environment.

This Declaration, recognizing the comparable approach taken by the Signatories to environmental management and to the integration of environmental considerations in their respective operations and mandates, is based on the particular EU approach to the environment, which is as strong as any that exists.

The "European Principles for the Environment" (EPE) consist of the guiding environmental principles enshrined in the EC Treaty and the project-specific practices and standards incorporated in EU secondary legislation on the environment. The principles include, in particular, the precautionary principle, the prevention principle, the principle that environmental damage should as a priority be rectified at source, and the polluter pays principle¹.

We underline the importance of the EPE, which promotes the EU approach to environmental sustainability, and we are committed, subject to our respective environmental policies, to applying EU principles, practices and standards to all projects financed by the Signatory institutions.

The geographical scope of the EPE covers, at least the respective regions of operations of each Signatory institution, or any other geographic area it deems appropriate, including the EU 25 and European Economic Area (EEA) countries, the EU Acceding, Candidate and potential Candidate Countries and the Countries that are covered in the "European Neighborhood and Partnership Instrument", implemented according to the following modalities:

In the Member States of the EU, the EEA countries, the EU Acceding, Candidate and potential Candidate Countries, the Signatories hereby agree to provide financing to public or private sponsors of projects only where the projects comply with the above principles and the relevant secondary EU legislation². Of the EU secondary legislation particular emphasis is given to:

- The EU acquis related to environmental assessment;
- The EU Directives related to industrial production, water and waste management, air and soil pollution, occupational health and safety, and the protection of nature, where these can be applied to specific projects.

We also agree that projects in this region should comply with any obligations and standards enshrined in relevant Multilateral Environmental Agreements (MEAs), according to applicable EU law (e.g. biodiversity, climate change, the ozone layer, wetlands, persistent organic pollution, trans-boundary air pollution, endangered species and environmental information, and others that may be ratified from time to time).

¹ Treaty Establishing the European Community 2002, Article 174 (2).

² In some countries, a phased approach with certain requirements of the *Acquis Communautaire* may be adopted in accordance with negotiated accession agreements.



In all other countries, projects financed by the Signatories are expected to comply with the appropriate EU environmental principles, practices and standards - and with regard to EU financing, due respect for the European Neighborhood Policy and the EU policy towards Russia - subject to local conditions. In such financing, we will apply the EPE, with reference to such factors as the costs of application, the local conditions that prevail and the time frame for the phased application for implementing the EPE.

In the case of co-financed projects, we will work together to agree a common approach to the project, where possible, based on or consistent with the EPE and its methods of implementation as outlined above.

We also aim as part of the EPE to promote best EU practice in the fields of environmental management, transparency, public consultation and reporting³.

As we move forward with the EPE process, the Signatories of the Declaration will encourage other European-based institutions to share the common approach to environmental sustainability as well as work together on specific topics in the interests of greater coherence.

30 May 2006

Mr. Raphaël Alomar
Governor
Council of Europe Development Bank

Mr. Jean Lemierre
President
European Bank for Reconstruction and Development

Mr. Philippe Maystadt
President
European Investment Bank

Mr. Magnus Rystedt
Managing Director
Nordic Environment Finance Corporation

Mr. Johnny Åkerholm
President
Nordic Investment Bank

³ The EU "Environmental Management and Audit Scheme" (EMAS) is an example of such best practice.

ANNEX II

List of persons and organisations providing comments and validating the study findings

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Samenvatting

HET EVALUEREN VAN DE TOEPASSING VAN EU MILIEU- STANDAARDEN IN INVESTERINGSPROJECTEN VAN EUROPESE PUBLIEKE BANKEN IN DERDE LANDEN: OP WEG NAAR JURIDISCHE MILIEU-INDICATOREN

Dit proefschrift betreft een onderzoek naar de mogelijkheid om de toepassing van Europeesrechtelijke milieustandaarden door de Europese publieke banken in hun directe investeringsprojecten buiten de Europese Unie, te evalueren.

De Verklaring betreffende de Europese Beginselen voor het Milieu (Declaration on the European Principles for the Environment), aangenomen in 2006 met steun van de Europese Commissie, verplicht de vijf ondertekenende en in EU gevestigde banken (de Ontwikkelingsbank van de Raad van Europa, de Europese Bank voor Wederopbouw en Ontwikkeling, de Europese Investeringsbank, de Noorse financiële corporatie en de Noorse Investeringsbank) om ‘de EU beginselen, praktijken en standaarden toe te passen op alle door deze partijen gefinancierde projecten’. Daarbij geldt dat de toepassing in derde landen afhankelijk is van de plaatselijke omstandigheden. De Verklaring behoort tot de vele vrijwillige gedragscodes die in de laatste twee decennia aangenomen zijn door internationale financiële instellingen met betrekking tot de milieuaspecten van hun investeringen. Deze gedragscode is niet bindend, maar drukt uit dat er behoefte bestaat aan regulering van internationale investeringen door publieke banken. De Verklaring vormt een regeling die er onder meer op gericht is een gezamenlijk ‘level playing field’ te scheppen voor de aangesloten partijen (hoofdstuk III). Gezien de beloftes van de banken wordt er groot belang gehecht aan de daadwerkelijke toepassing van de Europeesrechtelijke milieustandaarden in derde landen. Dat is allereerst zo omdat het naleven van de gedragscode door deze partijen een noodzakelijke voorwaarde is voor de levensvatbaarheid ervan. Ten tweede is dat omdat het opereren met publieke fondsen door deze banken een instrument vormt van het Europese buitenlandse beleid, wat met zich meebrengt dat de banken hun beloftes nakomen. Ten derde is dat zo omdat het karakter van directe investeringsprojecten, die het kader vormen voor de toepassing van de standaarden in kwestie, de Banken *direct* verantwoordelijk maakt voor het naleven van hun eigen beleid.

Er is echter weinig bekend over de feitelijke toepassing, en de mate waarin dit gebeurt, van deze standaarden door de banken. Daardoor kunnen zij niet of nauwelijks aangesproken worden op het niet-naleven van hun beloftes. De toezichthoudende niet-gouvernementele organisaties, zoals de CEE Bankwatch, uiten veel kritiek op de banken over, onder andere, hun non-transparante manier van handelen. De hedendaagse milieu- en investeringsregelgeving blijkt niet toegerust om geschikte instrumenten te verschaffen die het nakomen van een toezegging zoals vervat in de Verklaring betreffende de Europese Beginselen voor het Milieu in de praktijk garanderen, of om een vorm van zekerheid te bieden door de toepassing van standaarden te evalueren. Om bij te dragen aan een oplossing voor dit probleem richt deze studie zich op de volgende onderzoeksvraag:

‘welk instrument kan de toepassing van Europeesrechtelijke milieustandaarden evalueren in het kader van Europese directe investeringsprojecten in derde landen?’

Het onderzoek is gedaan vanuit het perspectief van de Europese milieuregelgeving; daarbij is gekozen voor een functionele benadering tot het recht (hoofdstuk I), waarin een standaard als juridische norm een cruciale rol speelt (hoofdstuk II). De toepassing van Europese Beginselen voor het Milieu is benaderd door middel van een studie naar de publieke verantwoordelijkheid van de genoemde Banken (hoofdstuk IV). Deze studie neemt, zonder de *mate* van milieuverantwoordelijkheid van de Banken te toetsen, het concept van verantwoordelijkheid *als een bestuurlijk kader*. Dit maakt het mogelijk de toepassing van milieustandaarden in een wettelijke context te plaatsen. Er worden aanbevelingen gedaan om het functioneren van het mechanisme van het afleggen van verantwoordelijkheid te verbeteren door middel van een *maatstaf* (yardstick) die de door de banken zelf aangegane milieu-toezeggingen verbindt met het bereikte resultaat binnen een concreet investeringsproject (hoofdstuk V).

Vervolgens richt het onderzoek zich op de uitwerking van de instrumenten van de maatstaf, de *indicatoren*, die het directe verband tussen de toezegging en een resultaat daadwerkelijk kunnen meten (hoofdstuk VI). Door het milieurechtelijke kader van het onderzoek is het mogelijk aan de hand van *juridische milieu-indicatoren* de toepassing van de milieurechtelijke standaarden in de praktijk te beoordelen. Soortgelijke juridische indicatoren zijn al ontwikkeld voor enkele andere rechtsgebieden, zoals het arbeidsrecht en mensenrechten, maar bestaan nog niet in het milieurecht. Gebaseerd op de bestaande wetenschap in andere rechtsgebieden, beschrijft het proefschrift uiteindelijk een stap-voor-stap opgebouwde methodologie voor het construeren en toepassen van juridische indicatoren voor het milieurecht (hoofdstuk VII).

Tot slot is de reeks van illustratieve indicatoren getoetst aan een bewijs van de methode (‘proof of concept’) in het kader van drie investeringsprojecten in Rusland waarbij de Europese Bank voor Wederopbouw en Ontwikkeling betrokken is (hoofdstuk VIII). In dit hoofdstuk wordt in de praktijk gedemonstreerd hoe het instrument, dat is ontwikkeld in de hoofdstukken VI en VII, bijdraagt aan het oplossen van de problematiek die is geïdentificeerd in de hoofdstukken IV en V.

Als slotbeschouwing wordt een aantal conclusies getrokken en aanbevelingen gedaan voor de verbetering van de huidige situatie met betrekking tot de toepassing van de Europeesrechtelijke milieustandaarden buiten de Europese Unie in projecten gefinancierd door Europese publieke banken (hoofdstuk IX). De concrete voorstellen, die zich voornamelijk richten tot de banken en hun belanghebbenden, omvatten onder andere het bieden van meer transparantie met betrekking tot de naleving van de gedragscode; het verzekeren van *de facto* toepassing van de Europeesrechtelijke milieustandaarden; het vermeederen van de beoordelingsprocedures; het vermijden van bevooroordeeldheid bij de beoordeling van de toepassing van de Europeesrechtelijke milieustandaarden, in het bijzonder voor wat betreft het toewijzen van het aantal punten aan indicatoren; het verbinden van de financiële uitgaven van de Banken met het nakomen van milieuverplichtingen binnen investeringsprojecten; het bijwerken van de ‘Sourcebook on European Environmental Law’; en het opnieuw openen van het debat over de milieuverantwoording van de internationale financiële instellingen. Met de aanbevelingen beoogt deze studie een bijdrage te leveren aan het algemene juridische debat over milieuaspecten van investeringen en de milieuverantwoordelijkheid van de internationale financiële instellingen.

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