Counter Balance Critique of “The EIB Statement of Environmental and Social Principles and Standards” (18 March 2008 draft)

June 20th 2008

Introduction

Counter Balance, the coalition of European NGOs formed to challenge the European Investment Bank, is pleased to contribute to the ongoing development of the EIB’s Statement of Environmental and Social Principles and Standards (hereafter ‘the Statement’). There are aspects of the Statement that we recognize as steps forward in the developmental principles to which the Bank subscribes, and we are pleased to acknowledge them. We note the Bank’s onus on the ‘ongoing’ process of developing social and environmental standards, and hope that the process will result in rapid and substantive changes to a document we regard as good on aspirational principles but profoundly lacking in binding commitments, mechanisms of enforcement and recognition of the EIB’s existing obligations.

We also reiterate our dissatisfaction with the results of the previous consultation process in which we were involved, on the EIB anti-corruption policy. In our view, we presented a series of substantive and legally grounded proposals in response to what again was a fairly nebulous EIB first draft lacking in concrete commitments. We were therefore disappointed to find that the second draft did not engage anything like as concretely with our proposals as we would have liked to see, tending at times to ‘cherry pick’ some of the easier or more technically arcane recommendations without in our opinion making the firm commitments to the major issues necessary to genuinely tackle the problem of corruption.

We sincerely hope that on this occasion, the Bank’s approach is significantly different. The Statement as it stands is unacceptably vague, discretionary and lacking in binding commitments. It consists primarily of aspirational principles and generalised commitments that in real terms are often little more than hortatory. The Bank consistently fails to acknowledge that because of its position within the institutions of the European Union, it is already committed by law to a high and specific standard of procedures. The EIB has legal and developmental obligations that this Statement must acknowledge and find ways to put into practice.

General Observations

1. As noted above, the Statement almost entirely fails to acknowledge the active obligations under EU and international law which the Bank has as a result of its position in the EU institutions. These (extremely numerous) obligations include:
   • Under the EU Sustainable Development Strategy, “support[ing] sustainable development objectives. The EIB should assess its lending against the contribution to achieving the MDGs and sustainable development.” The SDS also mandates “high quality impact assessments” for all major policy decisions.
   • Under the Cotonou Agreement which governs its Africa lending, “co-operation shall be directed towards sustainable development centered on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.”

1 The EU’s Renewed Sustainable Development Strategy. p.21
2 Cotonou Agreement, p.9, Art.9.
• Under the European Consensus for Development, “the key principle for safeguarding indigenous peoples’ rights in development co-operation is to ensure their full participation and the free prior and informed consent (FPIC) of the communities concerned.”

• Under the United Nations Declaration on the Rights of Indigenous People, which the EU has adopted, “indigenous peoples shall not be forcibly removed from their land or territories without the free, prior and informed consent (FPIC) of the peoples concerned and after agreement on just and fair compensation.” The Convention on Biological Diversity, also adopted by the EU, advocates empowering indigenous people and safeguarding their knowledge and practices.

We could continue; the point is that in this Statement, the EIB hasn’t even begun. Indeed, the Bank actively understates the extent of its legal obligations. For example, paragraph 23 of the Statement provides that “the EIB requires that all the projects comply with international conventions that the host country may have ratified.” However, Article 300(7) of the EC Treaty states that “Agreements concluded under the conditions set out in –Article 300 of the EU treaty– shall be binding on the institutions of the Community and on Member States”. Therefore, international conventions ratified by the European Community form an integral part of EU law. As the Bank committed to subject the funding of the projects carried out outside the EU to EU Environmental law, the Statement should logically provide that standards required by the EIB encompass international environmental conventions ratified by the EU and not only the ones that the host country ratified.

We note the reference in footnote 8 to a “reference manual” of “relevant EU environmental legislation.” We urge the Bank to publish this manual as soon as possible and to make it a binding part of the Statement and of EIB practice.

2. The Bank systematically fails to take on the responsibilities necessary to ensure that its projects contribute to sustainable development and fulfils its obligations. Instead, EIB devolves responsibility onto project promoters, as its Social and Handbook makes clear: “EIB procedures are derived from the presumption that Promoters are fully responsible for implementing projects financed by the Bank, including all environmental aspects, such as studies, EIA processes, the implementation of mitigation and/or compensation measures and monitoring the success/effectiveness of these measures after implementation. The Bank limits itself to determining the conditions attached to its financing are met.”

This simply is not good enough: as we said in the anti-corruption consultation, the EIB must become vastly more pro-active in ensuring the correct outcomes for its investments. The EIB provides political risk insurance for promoters who seek to ensure they have the political and financial weight of the EU behind them; the appropriate price for that insurance needs to be paid not in money but in time and commitment to sustainability. As a legal opinion on the Statement says, “the reporting obligation of the promoters should not consist in a mere information obligation to the Bank as regards the social and environmental standards according to which the project is carried out, but the compliance of the promoter with EU law should really be a sine qua non condition to the funding of the project…[T]he Bank has a real role to play to ensure the environmental integrity of the projects it finances.”

3. The Bank’s continuing refusal to accept binding operational standards seriously compromises its credibility both in this consultation and in development finance work in general. As the legal opinion goes on to note, “the fact that neither the Handbook nor the

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3 European Consensus on Development, Council/Member States/European Parliament/Commission on EU Development Policy Joint Statement, 2005, para.103, p.30. This is also mentioned in the Cotonou Agreement, p.9, Art.9.
4 The UN Declaration on the Rights of Indigenous People, Article 10
5 This approach has been reaffirmed by the ECJ in several cases such as Case C- 12/86 Demirel [1987] and case C-13/00 Commission versus Ireland [2002] and case C-239/03 Commission versus French Republic [2004] more commonly known as the “Etang de Berre” case.
6 EIB Environmental and Social Practices Handbook, August 2007, point 192
7 Anais Berthier et al., ‘Comments on EIB’s Statement of Environmental and Social Principles and Standards’, ClientEarth, 13 June 2008, pp.3-4
Statement are binding documents [illustrates] the reluctance of the Bank to submit itself to real commitments ensuring the environmental and social integrity of the projects it funds. It is a consistent source of confusion to us how Bank staff and clients operate in such an unpredictable and unclear regulatory environment, since the Statement is so aspirational and as Chris Wright puts it, “the Handbook comes across as guidance notes for internal staff that could be a supplement to a set of operational policies that currently do not exist.”

4. The lack of binding standards is paralleled by a deficiency in enforcement or implementation mechanisms, with the result that Bank staff have a systematic discretion over the application of policies and standards that can only have a deleterious effect on social and environmental integrity. The most glaring example of this is the use of EU laws as so-called “benchmarks” when operating outside the EU. Far from ensuring the application of EU laws to EIB projects outside the EU (which it must be remembered are the only source of protection for affected people, given the EIB’s lack of binding policies and effective redress), in the EIB’s own words the ‘benchmark’ principle “may justify lower standards than would be applied in the EU,” based on a wide range of discretionary factors ranging from “local circumstances—the state of the environment and economic considerations” to “the costs and benefits of application, the capacity of the promoter and the financial resources available.” As Berthier et al put it, “It is clear from reading the Statement that the rule is the application of national standards and that the enforcement of EU standards is the exception. Whereas, it should be evident to the Bank that the highest standards should always be the ones applied in order to ensure better protection of the environment and to participate in the sustainable development of the host country.”

Not only is this simply unacceptable, it betrays a fundamental misunderstanding of the purpose of standards and laws. The objective of environmental and social policies is to provide clarity, accountability and a level playing field so that promoters, funders and affected people alike know what is expected of them and the project alike. There will always be pressing reasons, whether fiscal or political, for companies and banks to cut corners and make exemptions: that is why standards need to be clear and unwavering. In permitting “benchmarking”, the EIB is sending an unambiguous signal that not only is it not interested in the welfare of people in developing countries, it is not interesting in doing real development work. And yet, as we have shown, it legally has no choice.

5. On a related topic, even EIB policies that appear to be solid are applied only partially, destroying their effectiveness. Having made much of its commitment to the EU EIA Directive, for example, the Statement then says that, “that outside the EU and the enlargement countries, in countries where EU law does not apply…where an EIA is required [it] must be consistent with the principal requirements of the EU directive.” A Directive, like any other text of law, in order to produce its expected effects has to be applied thoroughly and not partly. Quite apart from failing to specify what constitutes the ‘principal requirements’, the Bank here is actively undermining its legal commitment to do its job.

The same problem applies elsewhere. Consultation, for example, “can be operationalised at ‘different levels of intensity’ [sic]… depend[ing] on ‘ the nature of the proposed investment, the social and political context in which that investment is planned, the promoter’s commitment to transparency and accountability and the local legislative environment.” Again, enormous latitude for the Bank, minuscule redress for affected people.

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8 Ibid, p.4
10 EIB Statement of Environmental and Social Principles and Standards, article 14
11 Ibid, article 25
12 Berthier et al, op. cit., p. 11. They conclude that benchmarking “is not clear and does not guarantee legally the systematic application of EU environmental standards in projects carried out outside the EU. This term does not have any legal substance and seems only to legitimate the double standard policy of the EIB.”
13 Wright, op. cit., p.35
6. There are several key issues that are conspicuous by the absence or their scanty treatment. Virtually all of them are social issues, which betrays the origins of the statement as an environmental document onto which social issues have been inadequately grafted. We urge the EIB to go back and revise the social component here in particular. Key issues which need far more coverage include:

- Monitoring and reporting mechanisms—traditionally the weakest and most poorly handled aspect of IFI lending, and also one of the most crucial for the success not only of individual projects but of the entire development bank.
- Compensation
- Involuntary resettlement
- Free Prior and Informed Consent, not consultation
- Distributional impacts of development, not just spreadsheet growth
- Ex-ante, as opposed to ex-post, forms of project design and appraisal, finding innovative ways to include local communities and people
- An independent, specialised accountability and redress mechanism

We would be happy to provide whatever advice and assistance we can with these and other topics.

The remainder of this submission addresses the thematic issues raised by the statement, and adds several the Bank has not yet addressed.

**Application of the policy to the EIB Group and all its operations in and outside EU**

7. Similar to EIB’s Public Disclosure Policy, the Environmental and Social Statement should apply to the whole EIB Group, not only to the European Investment Bank.

8. The EIB Statement of Environmental and Social Principles and Standards (SESPS) need to apply to all type of the Bank investments. Global loans, Framework loans and Structural Funds loans represents a substantial part of operation of the Bank in terms of loan numbers and the amount of money allocated. Investment Funds and Loan Guarantee Instruments, relatively new financial instruments of the Bank, should be subject of the same social and environmental standards.

Currently the EIB does not check the environmental and social effects of the projects financed trough the intermediary banks where such effects might be negative for the environment and society. The due diligence of the other public banks such as EBRD and IFC (new report is expected) on the projects financed by the intermediary banks demonstrate number of cases where the projects financed even under the title of environmental / renewable energy projects are in violation with the Bank’s standards. Subsequently under the new EBRD Environmental and Social Policy there are very clear rules for the standards that financial intermediaries should apply.

9. The EIB Statement should target equal environmental and social standards for operations in countries in and out of the EU. Several provisions of the Statement implicitly or explicitly assert that projects financed by the EIB in non EU-countries are not subject to EU environmental standards.

    The role of the EIB is to promote EU policies and EU standards. The lack of adequate legal framework in the non-EU country or lower standard applied by a leading Multilateral Development Banks could not be a reason for a Bank financing projects that are not in line with EU and international standard.

**Resources and Institutional Arrangements**

We believe that the Statements omitted to address institutional capacity for the implementation of the Statement and the Handbook. This should include the following points:
10. EIB should commit to allocate appropriate resources to ensure an effective implementation of the Statement and Handbook, including adequate staff resources to oversee the appraisal and monitoring of all projects according to the degree of significance of any expected environmental and social impacts. While they are still concerns about the capacity on handling the environmental issues within the EIB, the social, indigenous people and human rights at minimum require additional staff capacity and expertise.

11. The EIB should dedicate a specific part of its intranet to information on climate change, evaluation of its own practice, and presentation of its short terms and long terms objectives to fight climate change.  

12. Commitment to the process for revision should include public consultation on the Handbook subsequent to the adoption of the Statement.

13. The draft Statement reads: “The Bank requires the following minimum social standards to be applied by the promoter, using its Economic and Social Impact Assessment Framework (ESIAF)”. The ESIAF should be made a publicly available document, and has not been done yet. There is reference to the old Development Impact Assessment Framework (DIAF), which is applicable to the ACP countries and ESIAF is supposed to be updated to cover all non-EU countries. Similarly to the Handbook, the DIAF outlines the indicators used by the EIB Project Directorate when assessing projects, and does not put clear requirements to the project promoter; such requirements should be incorporated in the current statement.

14. A process should be established for monitoring and evaluation of the standards against the principles of the Statement on a continuing basis.

15. The document should be subject to continuous evaluation, quality assessments and regular review on a three-year circle.

**Maximising Benefits**

16. The Statement in paragraph 9 should be further elaborated in the standards section - particularly with regard to the methodology for quantifying and evaluating the environmental and social externalities.

17. The EIB needs to develop lending policy and targets in the areas of environmental protection and sustainable communities. This will ensure comprehensive understanding and transposition of the 6th EAP objectives. For example in the field of waste management, the Bank’s support should be given to projects that are part of regional / national plan; this will provide for integral solution in waste management in line with waste management hierarchy.

**Minimising Harm**

18. We welcome the fact that the EIB introduces a principle of no funding for projects on the basis of their negative environmental and social impact and violation of the EU and international law (p.4 from the Preamble).

We consider however that the specific criteria and benchmarks for not financing a project such as harm on human beings, projects that are ethically and morally controversial and projects that involve transfer of significant environmental impact, do not have sufficiently strong language for minimizing the harm. We think that clear criteria for no-funding linked to the EU hard law and International agreements will benefit both the promoters and affected communities. We propose the following specification about the group of projects TO NOT BE financed by the Bank.

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14 Several private banks already have specific intranets on climate change and GHG reduction: HSBC, Banque Populaire, JPMorgan Chase, Dexia, Société Générale, Bank of America.
Areas: Under the section on Biological Diversity, paragraph 43, the Statement reads: “EIB applies the principles and standards reflected in the EU nature conservation Directives on Habitats and Birds… but also those recognised by the Ramsar, Bonn and Bern Conventions.” This needs to be further clarified in the way that EIB excludes financing of any industrial projects with adverse and unmitigated impact on areas classified as protected areas under the EU nature conservation directives or under the Ramsar, Bonn, Bern and UN Biodiversity Convention. In this case, the classification of adverse impact and procedure derogation of the no-funding principle should be based on the EU hard law – e.g. the art.6 requirements from the Habitat Directive. Beyond this, the exclusion list should include areas that are UNESCO World Heritage Sites.

Outside of the EU, where protection areas will not be classified according to the EU directives and only wetlands may be protected under the Ramsar Convention, the EIB should exclude financing of industrial projects in IUCN I-IV protected areas (I: Strict Nature Reserve and Wilderness Area; II: National Park; III: Natural Monument IV: Habitat/Species Management Area). This would follow the 2000 IUCN World Conservation Congress resolution calling on all states to ban investments of extractive projects in protected areas, classified as IUCN categories I-IV. The reference made so far to IUCN in paragraph 24 that the EIB will reject a project that has “unmitigated negative impacts on the red list of species and their associated habitats” is not clear enough as it may allow financing when “negative impacts are mitigated”, without giving any detail as to how this mitigation will be judged, what will be the timeframe for negative effects and their mitigation as some effects might show only after some time when it is to late for mitigation measures.

The clear exclusion of financing in certain areas is getting more common among financiers: The US Overseas Private Investment Corporation will not finance projects in World Heritage Sites, Ramsar areas or IUCN areas category I-IV. Private banks such as HSBC has policies on mining and oil and gas, which exclude financing in World Heritage Sites and Ramsar wetlands.

Political environment: Paragraph 24 states that the EIB will reject a project “where there are restrictions in terms of access to environmental information, public participation in decision-making and access to justice in environmental matters…” This is a very positive start but needs clarification as to how the EIB will measure this. Being serious about this, the Bank would need to have “black lists” of countries where the lack of freedom of speech prevents public participation in decision-making and access to justice.

Another aspect of “political environment” in which no projects should be financed, are conflict zones and potential conflict zones. Especially extractive projects deteriorate the situation in zones prone to or with existing conflicts. The extractive Industries review was very clear on this point and recommended that IFC and MIGA should under no circumstances support oil, gas, and mining projects in areas involved in or at high risk of armed conflict. The EIB statement should have a clear paragraph to exclude financing in conflict zones and potential conflict zones.

Cultural Heritage: Paragraph 42 states that “EIB does not finance a project which threatens the integrity of sites protected for special cultural or other significance.” This again is a positive start but needs clarification as to what status of protection EIB has in mind. At least the statement should explicitly prevent financing industrial projects in UNESCO World Cultural Heritage Sites. Apart, there are cultural heritages with important roles for communities without being officially protected as World Heritage Site. The EIB needs to clarify how it will assess the “special cultural or other significance” and which sort of protection will exclude financing.

Technologies: A) Nuclear: The draft Statement lacks a clear exclusion of dangerous technologies such as nuclear power. The Asian Development Bank lays out its reasons against involvement in nuclear power in its document “Bank Policy Initiatives for the Energy Sector”: 23. (…) The Bank is very much aware of this background and has not been involved in the financing of nuclear power generation projects in the DMCs due to a number of concerns. These concerns include issues related to transfer of nuclear technology,
procurement limitations, proliferation risks, fuel availability and procurement constraints, and environmental and safety aspects. The Bank will maintain its policy of non-involvement in the financing of nuclear power generation.

The World Bank argues similarly in its Technical Paper #154: Environmental Assessment Sourcebook Volume III: Guidelines for Environmental Assessment of Energy and Industry Projects by the World Bank Environment Department: "Nuclear plants are thus uneconomic because at present and projected costs they are unlikely to be the least-cost alternative. There is also evidence that the cost figures usually cited by suppliers are substantially underestimated and often fail to take adequately into account waste disposal, decommissioning and other environmental costs. Furthermore, the large size of many nuclear plants relative to developing country systems leads to risk of substantial excess capacity should demand fail to increase as predicted. A nuclear investment strategy lacks flexibility to adapt to changing circumstances. The higher costs would require large increases in tariffs and could threaten the financial viability of the systems if nuclear power were a significant part of the total..."

The EIB should follow the example of these two public banks and state clearly that it excludes financing of nuclear power plants as well as any suppliers to the nuclear cycle, from Uranium mines to enrichment plants.

B) GHG intensive technologies:
The EIB should exclude new fossil fuel projects from its lending activity. The sector of fossil fuels is a major cause of climate change, and in this regard it cannot apply for public support. The EIB concentrates on improving energy efficiency of existing fossil fuel projects.

Principles

19. Principles regarding the human rights declaration and conventions are missing.

20. Projects can be approved for financing only after “free, prior and informed consent” (FPIC)

21. The EIB social requirements should be applicable both in and outside EU.

22. Gender equality should be also part of social principles.

23. An Integrated Environmental and Social assessment should be required followed by a comprehensive Environmental and Social action plan.

24. We consider that presumption of legality principle applied for the Bank lending inside EU favour countries with bad enforcement of the EU law. There should not be any presumption either that Member States of the EU transpose correctly the EU directives, or comply with the relevant regulations. Indeed, Member States are often subject to the infringing procedure provided by article 226 of EC Treaty for precisely not complying with EU law. And even when the legislation of the host country is in conformity with the EU legislation, this does not mean that the Promoter applies the legislation. Therefore, there is a real need for clarification on this issue.

There should not be any presumption of legality, on the contrary, the Bank must monitor and control the compliance of the promoter with its requirements, and when the promoter fails to do so, to be held accountable.

15 As called by the European Parliament in its resolution of 29 November 2007 (article 29 : “Calls for the discontinuation of public support, via export credit agencies and public investment banks, for fossil fuel projects and for the redoubling of efforts to increase the transfer of renewable energy and energy efficient technologies”.

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25. As a principle within the EU, the EIB should follow the European Commission decisions about infringements regarding “non conformity” or “bad application” of EU law and halt the relevant project appraisal and/or money disbursement.

26. In sensitive sectors (listed below in the chapter on Climate change), promoters should be required to systematically disclose planned GHG emissions of the project; in addition, they have to integrate ambitious mitigation measures to ensure the sustainability of the project.

27. The EIB should incorporate the cost of GHG emissions into its financial and economic analyses before making a financing decision. The social cost of carbon emissions has been estimated at a minimum of $85 / ton of CO2 equivalent in a recent authoritative report for the UK government by Sir Nicholas Stern, former chief economist for the World Bank. Internalizing the cost of carbon in this way may alter investment choices, and the EIB will encourage clients to evaluate alternative energy technologies.

28. Planned GHG emissions and mitigation measures undertaken by the promoter of the project should be made public 30 days before the approval of the project by the Board of the EIB. Annual assessment of the mitigation measure undertaken and the actual GHG emissions of EIB backed projects should also made public.

Environmental Standards

29. Paragraph 23 of the Statement provides that “the EIB requires that all the projects comply with international conventions that the host country may have ratified.” However, Article 300(7) of EC Treaty states that “Agreements concluded under the conditions set out in – Article 300 of the EU treaty- shall be binding on the institutions of the Community and on Member States”.

Therefore, international conventions ratified by the European Community form an integral part of EU law. This approach has been reaffirmed by the ECJ in several cases such as Case C-12/86 Demirel [1987] and case C-13/00 Commission versus Ireland [2002] and case C-239/03 Commission versus French Republic [2004] more commonly known as the “Etang de Berre” case. As the Bank committed to subject the funding of the projects carried out outside the EU to EU Environmental law, the Statement should logically provide that standards required by the EIB encompass international environmental conventions ratified by the EU and not only the ones that the host country ratified.

30. In Paragraph 24, the list should be further extended and/or converted to the annex to the Statement.

- by listing other products or activity deemed illegal or international conventions and agreements, or subject to international phase out or bans, such as:
  - Production of or trade in products containing PCBs
  - Production of or trade in pharmaceuticals, pesticides/herbicides and other hazardous substances subject to international phase-outs or bans
  - Production or use of or trade in unbonded asbestos fibres or asbestos-containing products
- the production of or trade in any product or activity deemed illegal under host country (i.e. national) laws or regulations,
- Trade in wildlife or production of or trade in wildlife products regulated under CITES
- Transboundary movements of waste prohibited under international law
- Activities prohibited by host country legislation or international conventions relating to the protection of biodiversity resources or cultural heritage
- Drift net fishing in the marine environment using nets in excess of 2.5 km
- Shipment of oil or other hazardous substances in tankers which do not comply with IMO requirements
• Trade in goods without required export or import licenses or other evidence of authorization of transit from the relevant countries of export, import and, if applicable, transit.\(^{16}\)

**Human rights**

The EIB should include a separate section on human rights impacts and elaborate on possible violations adopting the following recommendations:

31. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

32. The EIB should acknowledge that “human rights” include civil, cultural, economic, political and social rights, as well as the right to development.

33. The EIB should recognise that within its spheres of activity and influence, it has the commitment to proactively promote, secure the fulfilment of, respect and protection of human rights recognised in national and international law. Promoters should be required to develop a Human Rights Impact Assessment (HRIA) and implement an effective monitoring programme to ensure the full respect of human rights during the operations.

34. EIB should develop principles and standards on the use of Security Forces by its clients. EIB should require that the promoter abides by the Voluntary Principles on Security and Human Rights\(^{17}\) and the use of the Security Forces is explicitly limited to preventive and defensive purposes in proportion to the nature and extent of the threat.

35. To avoid adverse impacts of projects on communities of Indigenous Peoples, or when avoidance is not feasible, the promoter should be required to minimize, mitigate, or compensate for such impacts. The promoter shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by projects as well as reparations, restitution, compensation and rehabilitation for any damage done or property taken.

36. The promoter should establish recourse to independent appeal and arbitration procedures in case of disputes (as established in paragraph 40 of the statement) that will be designed to allow the affected community and workers to express concerns about the security arrangements and acts of security personnel.

The promoter should inform all relevant stakeholders including workers of the availability and use of the procedures. If government security personnel is deployed to provide security services for the promoter, the promoter will communicate to the relevant public authorities its intent that the security personnel act in a manner and encourage the relevant public authorities to disclose the security arrangements for the client’s facilities to the public.

The promoter has to investigate any allegations of unlawful or abusive acts of security personnel, take action to prevent recurrence, and report unlawful and abusive acts to public authorities as well as to the EIB.

**Social Standards**

General comments:

37. The draft Statement should further cover key standards that are currently missing, such as:

\(^{16}\) For the points above Appendix 2: EBRD Environmental and Social Exclusion List could be used as a reference point as the EBRD is also signatory of EPE

Standards on gender, non-discrimination and equal opportunities;
Protection of the work force in context of child labour or/and forced labour
Land acquisition and resettlement
Clear requirements on social assessment

38. Operations outside of the EU must clearly show their contribution to achieving the Millennium Development Goals. For that reason, the EIB should require that the promoter develops an Integrated Environmental and Social assessment, the latter of which consists of Stakeholders Analysis, Impoverishment Risk Analysis when vulnerable groups may be affected, and a Comprehensive Options Assessment that identify alternative projects options to try to avoid physical displacement and other social negative impacts.

39. The Promoter should be required to produce an Environmental and Social action plan, both for projects in and outside of the EU, clearly stated in the Statement, similarly to the EBRD’s Environmental Social and Action Plan.

40. Demonstrable public acceptance of all key decisions should be achieved through agreements negotiated in an open and transparent process conducted in good faith and with the informed participation of all stakeholders.

Consultation, Participation and Public Disclosure

41. Counter Balance welcomes the EIB’s acknowledgement of the relevance of the Aarhus Regulation and its principles of public consultation, access to information and access to justice to EIB-funded projects. This is an important piece of legislation and should serve to open up EIB’s project appraisal and design processes beyond a narrow circle of technocrats to include affected people and EU citizens. We urge the EIB to apply the principles of Aarhus to all aspects of its operations, not merely consultation. We also echo the call in Chris Wright’s report that EIB should “much more forcefully confirm that it is prepared to extend the rights and entitlements given to local communities in the Aarhus Convention to project-affected communities in non-EU countries by incorporating it into binding policy.”

42. Counter Balance is also pleased to see several other general principles on consultation identified in the statement, notably that “Stakeholder concerns should be carefully considered as early as possible in the assessment process;” the commitment to disseminating project information and to engaging in “meaningful dialogue” with affected people, both by the Bank and by the promoter; references to the “added value” and “sustainability” provided by local communities; and of “citizens’ rights” in relation to major projects. All of these are important principles, albeit left large as mere principles, and it is encouraging to see EIB make reference to them.

43. However, in other respects, the consultation section is a microcosmic illustration of the grievous deficiencies of the Bank’s Environmental and Social Statement as a whole. It is extremely cursory, given the complexity of the issues and the volume of debate over best practice among IFIs, NGOs and academics. As EIB policy consistently does, the consultation section places almost no obligations on the Bank, ignoring EIB’s existing duties and focusing entirely on discretionary possibilities. It also seems to regard consultation merely as a stage on the road to the inevitable approval of the project; and most of all it simply omits enormous issues that follow on logically from consultation, notably indigenous peoples, resettlement and compensation. We will run briefly through these concerns.

Consultation is different from other aspects of project appraisal, because it involves the acquisition of a ‘social license to operate’: the need to ensure that people who own or identify with the territory or ecosystem affected by major projects receive a fair share of the
benefits, have some control over the project and are not economically or socially disadvantaged by it. Partly this is a question of human rights, partly of moral obligations, but it is also a very practical issue for project success. Projects that go ahead in the face of systematic opposition from local communities are more expensive, provoke major unrest and are more likely to fail. As a World Commission on Dams (WCD) working paper noted, “projects ‘succeed’ only where affected communities have been able to determine their design, operation and implementation.”

The EIB, however, has a further reason to pay careful attention to consultation: its **existing legal obligations** under EU law and international treaty. These are numerous and highly relevant to consultation. EIB staff have been openly sceptical about the applicability of **free, prior and informed consent (FPIC)** to the Bank’s operations, yet the wider frame within which it operates obliges it to take FPIC seriously. Both the European Consensus for Development and the Cotonou Agreement, under which the Bank lends in Africa, note that “the key principle for safeguarding indigenous peoples’ rights in development co-operation is to ensure their full participation and the free prior and informed consent (FPIC) of the communities concerned.” The EU has also adopted the Convention on Biological Diversity, which advocates empowering indigenous people and safeguarding their knowledge and practices, and most notably the United Nations Declaration on the Rights of Indigenous People, which states that, “indigenous peoples shall not be forcibly removed from their land or territories without the free, prior and informed consent (FPIC) of the peoples concerned and after agreement on just and fair compensation.”

In other words, **EIB is already committed by law, due to the position it occupies within the EU, to a high and specific standard of consultation procedures.** Yet this statement ignores FPIC and entirely and hardly mentions indigenous people. This is a deep failure of responsibility and likely to lead to illegal activity. It also points to a major failing within the EIB: the discretionary way in which it applies its principles. These choices and decisions are not up to the Bank: they are obligations under law. Yet the EIB continues to act as though the decision on what rules to apply and the extent to apply them were a matter for staff to decide.

44. There is no definition of what constitutes “meaningful” consultation or dialogue. Consultation “can be operationalised at ‘different levels of intensity’ [sic]... depend[ing] on ‘ the nature of the proposed investment, the social and political context in which that investment is planned, the promoter’s commitment to transparency and accountability and the local legislative environment.’” There is no commitment to actively disseminate project information and awareness, merely to “make public on request any relevant unclassified environmental information.” There is no guarantee that affected people will be involved in concrete ways that make a real difference in project design, only that the Bank will “carefully consider” their input.

The amount of latitude all this gives the Bank is vast; the leverage or power it provides to poor people unhappy with the EIB’s work is miniscule. And yet the EIB itself says “adverse impacts cannot be mitigated without the meaningful participation of affected male and female stakeholders, who should be effectively involved in decisions that affect their livelihoods.”

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21 The UN Declaration on the Rights of Indigenous People, Article 10
22 Wright, op. cit., p.35
23 In places the Bank explicitly puts the interests of the powerful over those of affected people: its *Environmental and Social Practices Handbook* gives national authorities the power to decide “whether the development outweighs the nature conservation importance of the site.” (p.42)
The inadequacy of the EIB’s only proposed solution to its failures of consultation, lodging a complaint with the European Ombudsman, has been addressed elsewhere. The Ombudsman solution is entirely inadequate: it is limited to a narrow issue of ‘maladministration’, it is available only to EU citizens and most of all the EO lacks the requisite specialised knowledge and the teeth to provide real redress. The EIB urgently need to introduce a genuinely independent accountability mechanism.

45. Perhaps the single least satisfactory aspect of the consultation section is its failure to engage with the concrete realities of development projects. For one, the entire tone and tenor of the piece is predicated on the seeming inevitability of the project going ahead as planned. There is no reference to any ‘no project’ option, nor of the possibility that consulted people might significantly change, redefine or amend the initial proposal. Essentially, what seems to be implied by consultation is the opportunity to rubber stamp an existing scheme. This is the very opposite of FPIC or any genuine form of consultation, which is predicated on at least some degree of reciprocity, project change and building local capacity.

Resettlement and Compensation

46. Even worse is the almost total lack of reference to either involuntary resettlement or compensation. Consultation means an awful lot more than just sending out a pile of questionnaires before going ahead with a mine or pipeline. It means designing long-term plans to “improve or at least restore [affected people’s] standard of living or livelihoods,” according to the IFC’s relevant Performance Standard. If resettlement and compensation aren’t done to a high standard, the IFC notes, projects cause “long-term hardship and impoverishment for affected persons and communities, as well as environmental damage and social stress in areas to which they have been displaced.”

These issues have been debated by EIB’s peers for decades. As long ago as 1997, ICOLD, the International Commission on Large Dams, concluded that, “For the population involved, resettlement must result in a clear improvement of their living standard, because the people directly affected by a project should always be the first to benefit instead of suffering for the benefit of others. Special care must be given to vulnerable ethnic groups.” In dam projects, the WCD paper noted that, “Resettlement is now seen as an integral part of projects on a par with the engineering or construction components, and accounts for approximately 30% of the overall costs of rural projects involving relocation and 50% of urban projects.”

There is a very extensive literature available on both issues, starting with the practices and policies of the other IFIs. And yet indigenous peoples, resettlement and compensation get scant if any mention in the EIB statement.

Clearly there is a long way to go, and we look forward to seeing these issues given their due prominence in the second draft of the statement. We are reluctant, moreover, to proffer ‘best practice’ suggestions to the EIB, not least because the Bank is not like the other development funders in that it has, as noted, significant existing legal obligations as part of the EU. Moreover, there has been a notable watering down of IFI standards in recent years, led by the IFC’s switch to performance standards. ‘Best practice’ is very often far from the best a bank can do, especially a bank with the political and economic power of the European Union behind it.

However, in the case of compensation, the 1998 Involuntary Resettlement Policy of the Inter-American Development Bank (IDB) covers many of the key issues that the EIB must take into account if it is to fulfil its legal, let alone its developmental obligations. They include:

- informed consent by the affected people;

26 IFC Performance Standard 5, Land Acquisition and Involuntary Resettlement, paras.9, 2
27 Cited in Colchester, op.cit., pp.48-9, p.53
• their extensive participation in the design of the compensation and resettlement plan;
• full recognition of customary rights;
• fair compensation including special measures to compensate for loss of cultural property (such as burial or sacred sites) and to minimise disruptions to existing patterns of socio-cultural organisation;
• compensation with land for land lost where required;
• indigenous communities be better off after removal.28

We sincerely hope that these important principles form the basis of the consultation section in the second draft of the EIB Environmental and Social Statement.

Indigenous peoples

47. The EIB should recognise that Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies, are often among the most marginalized and vulnerable segments of the population. They are particularly vulnerable if their lands and resources are transformed, encroached upon by outsiders, or significantly degraded. These characteristics expose Indigenous Peoples to different types of risks and severity of impacts, including loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and disease. The EIB should adopt the same standard as they are listed the EBRD Environmental and Social Policy29 in order to ensure harmonization of those requirements among the EPE signatories in line with the following recommendations:

48. The EIB should commit to ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples and requires to promoters to identify in the process of Social and Environmental Assessment all communities of Indigenous Peoples who may be affected by the project within the project’s area as well as the nature and degree of the expected social, cultural and environmental impacts on them, and avoid adverse impacts.

49. Where the customary rights to land and resources of Indigenous Peoples are affected, the Bank should require the promoter to prepare an acceptable Indigenous Peoples Development Plan based on free, prior and informed consent (FPIC) in line with the UN declaration on the Rights of Indigenous Peoples and the full engagement of the Indigenous Peoples’ representative bodies, as well as in line with the European Union Council Resolution on Indigenous Peoples (1998) calling for “the full participation of indigenous peoples in the democratic processes of their country… asserts they should participate fully and freely in the development process…[recognizing]…their own diverse concepts of development…the right to choose their own development paths, [including]…the right to object to projects, in particular in their traditional areas”.30 The Indigenous Peoples Development Plan should be updated throughout the whole project cycle. The EIB requires the promoter to ensure culturally appropriate, informed and active participation of affected indigenous peoples and their communities.

• The FPIC should be applied throughout the whole project cycle, in line with the recommendations of the WCD and EIR review and at an earliest possible stage.
• FPIC should be required for all projects that may affect indigenous peoples and communities. The EIB should ensure that the project promoter has the capacity to successfully engage in the process, and where enabling conditions such as national legislation and political environment are not in place, should engage in the monitoring of the FPIC process and outcomes.

29 Performance Requirement 7, Indigenous Peoples; EBRD Environmental and Social Policy, as approved by the Board of Directors on 12 May 2008
50. Promoters should be required to establish and maintain an ongoing relationship with the Indigenous Peoples affected by a project throughout the life of the project, to foster good faith negotiation with Indigenous communities when projects are to be located on traditional or customary lands and to respect and preserve the culture, knowledge and practices of Indigenous Peoples.

51. Promoters should also be required to provide sufficient time for Indigenous Peoples’ collective decision-making processes and facilitate the Indigenous Peoples’ expression of their views, concerns, and proposals in the language of their choice, without external manipulation, interference, or coercion, and without intimidation.

**Biological Diversity**

52. The Statement should make a clear reference to the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity.

53. The EIB should at minimum define the Critical Habitats and Natural Habitats (especially for operations outside of the EU). There are various definitions that could be used but most practical might be to use the definition of the EBRD\(^3\) or the WB Group\(^4\).

54. Any activities that would lead to the conversion or degradation of Critical Habitats, should be prohibited.

55. Activities for natural habitats should be appropriately assessed against the alternatives; if overall benefits outweigh the costs, when impact cannot be avoided, there should be measures to for mitigation and compensation following the procedure described in art.6 of the Habitat Directive.

56. In paragraph 45: for projects outside of the EU the decision about the overriding national interests should not be made by the respective national authorities, but needs to be subject to public consultation, consultation with relevant conventions and approval of the European Commission.

57. There should be no Genetically Modified Organisms (GMOs) used or released to the environment without approval being given by the competent authorities and full public consultations, or where the relevant local authority has declared itself as GMO free.

58. Invasive alien species should be mentioned in the context of the possible intentional and unintentional introduction by the Bank’s client.

59. The promoter involved in natural forest harvesting or plantation development should not cause any conversion or degradation of critical habitat. Where feasible, the client will locate plantation projects on unforested land or land already converted outside the natural habitats.

60. Protection of fresh waters and marine system should be also a part of standards.

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\(^3\) Paragraph 13, EBRD Performance Requirement 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources; EBRD Environmental and Social Policy, as approved by the Board of Directors on 12 May 2008

\(^4\) Critical habitat is a subset of both natural and modified habitat that deserves particular attention. Critical habitat includes areas with high biodiversity value3, including habitat required for the survival of critically endangered or endangered species: [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)
Climate Change

61. As financier of many investment projects, the EIB should play a leading role in shifting investments towards a less carbon intensive economy. Present investments determine the carbon intensity of the future to come. As the impact of the projects financed will come about later, when the projects have finished, it is crucial that strict reduction targets are set today.

62. The following elements should be included in a bank’s climate change policy:
- Assessing and reporting the bank’s climate impact
- Setting measurable reduction targets
- Shifting financing from fossil fuels to energy efficiency and renewable energy

63. The EIB Statement of Environmental and Social Principles and Standards submitted to public consultation does not include strong and binding standards to fight climate change. It should be corrected to include such commitments. The EIB recognizes that climate change is happening.

The EIB recognizes that it has direct and induced responsibilities in climate change, through the emission of GHG from its activities and through the GHG emissions generated by the projects the EIB supports. As climate change is today a global emergency and a clear EU priority, the EIB is undertaking voluntary and binding measures to fight climate change and reduce its direct and induced GHG emissions.\(^\text{33}\)

64. The induced emissions quantification should be explicitly defined in the Statement. These emissions are associated with waste disposed off-site, as well as the generation of imported electricity, caused by a company’s supply chain, external distribution or employee business travel. No less important are indirect emissions connected with other sectors. Some projects with relatively low GHG balance can induce a significant increase of emissions in another sector of the economy.

65. The EIB should commit to annual reporting for each project on GHG emissions in tons of CO2 equivalent (including the 6 gases listed in the Kyoto Protocol) as well as total assessment of the carbon footprint. The methodology to evaluate these emissions is the Greenhouse Gas Protocol (all scopes 1, 2 and 3 included).\(^\text{34}\)

66. It is highly important not only for keeping an overview but also to assess future actions on reductions. The reporting should be carried out in a systematic and common manner and the reported information should be relevant, complete, consistent, transparent and accurate. Annual GHG reporting helps projects to identify GHG emissions reduction opportunities and build a middle and long term strategy to manage and reduce GHG emissions. The reporting should include a calculation of GHG emissions per unit of the product of the facility to show the efficiency improvements.

67. Clear and binding GHG reduction objectives:

Reporting of induced GHG emissions is the tool to set up radical targets of GHG reduction. To be coherent with the EU climate policy, the EIB shall commit to reduction its induced GHG emissions within EU countries by 30% by 2020 and 80% by 2050, compared to 1990, or at

\(^{33}\) Recent researches in the banking sector have shown that direct GHG emissions of banks represent around 0,1% of induced emissions of banks through loans and investments. Direct emissions are marginal: therefore the priority has to be put on induced emissions.

\(^{34}\) As best practice, see J P MorganChase commitment : “JPMorgan Chase will annually report the aggregate greenhouse gas emissions from our power sector projects”. URL: http://www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/clim.
least 3% per year on average. Outside EU countries, the EIB should reduce its induced GHG emissions by 50% by 2050, or at least 1.5% per year on average35.

A specific evaluation of sensitive sectors should be conducted. The EIB should set absolute emissions reduction targets for each of these sectors, and adopt specific sectoral policies. Sensitive sectors cover: transport, extractive industries, energy, forestry and agriculture.

The induced emissions quantification should be explicitly defined in the Statement. These emissions are associated with waste disposed off-site, as well as the generation of imported electricity, caused by a company’s supply chain, external distribution or employee business travel. No less important are indirect emissions connected with other sectors. Some projects with relatively low GHG balance can induce a significant increase of emissions in another sector of the economy.

68. The EIB should commit to annual reporting for each project on GHG emissions as well as total assessment of the carbon footprint. It is highly important not only for keeping an overview but also to assess future actions on reductions. The reporting should be carried out in a systematic and common manner and the reported information should be relevant, complete, consistent, transparent and accurate. Annual GHG reporting helps projects to identify GHG emissions reduction opportunities and build a middle and long term strategy to manage and reduce GHG emissions. The reporting should include a calculation of GHG emissions per unit of the product of the facility to show the efficiency improvements.

Social assessment

69. The social assessment should be an integral part of the environmental assessment to form an Integrated Environmental and Social Assessment and should be made compulsory to the project promoter following the recommendations of the Extractive Industries Review, so that the EIB is able to identify “the cumulative impact of projects and socioeconomic linkages to environmental issues”36.

70. The Statement should further develop clear set of standards that the project promoter should apply and the EIB should approve a project only after the promoter has fulfilled satisfactory the EIB requirements for comprehensive environmental and social assessment in line with the EBRD’s Performance Requirement PR1. 37

71. The EIB should specify for the client “no-go circumstances” under which where they will not provide lending.

Labour and working conditions

72. In line with the European Union and related agreements with ACP and other partner countries, the EIB should commit to the promotion of core labour standards and should require that the Promoter develops and implements verifiable programmes and procedures to ensure that the core labour standards of the International Labour Organization (ILO) are fully respected.

73. The Promoter should guarantee that contractors and subcontractors will base the employment relationship on the principle of equal opportunity and fair treatment, and will not discriminate with respect to aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment, access to training, promotion, termination of employment or retirement, and

35 Environment Ministries of the EU recommended a target of -60 / -80 % GHG emissions of the 25-EU by 2050 (Environment Council of March 10, 2005).
37 EBRD Environmental and Social Policy, approved by the Board of Directors 12 May 2008, p. 18
discipline.

74. The EIB should require that the promoter ensures the protection and promotion of the health of workers.

75. The EIB clients should ensure appropriate working conditions and terms of employment as well as recognize workers right to form and joint workers’ organizations.

Cultural Heritage

76. Paragraph 41 lays out a broad concept the EIB has of cultural heritage, which is laudable. Yet, the paragraph lacks a clarification how the EIB will find out about the special cultural importance of a site. The paragraph therefore needs to define that local people should be consulted as to the social and cultural significance of the site. This could be part of the social assessment. Where a project affects a cultural heritage, the EIB should demand a cultural heritage management plan.

77. Paragraph 42 allows derogations from the exclusion of financing projects that threaten the integrity of sites protected for special cultural or other significance. Some conditions for the derogation are set: lack of feasible alternatives and over-riding socio-economic benefits as well as adequate restoration measures adopted, funded and maintained. The paragraph should clarify how the assessment of feasible alternatives and over-riding socio-economic benefits will be undertaken.

Procedural standards

78. The draft Statement should stipulate the requirement of partnership with third parties (Country national and local authorities, other donors and other EU institutions and civil society) for ensuring project compliance with EIB environmental and social requirements in the assessment and implementation phase.

79. The EIB should request and ensure that the promoter will provide information in the local language. English and French only are not enough for most of the African Countries.

80. We welcome that the EIB Statement requires the EA to cover the entire projects (p.32 from p.16), but not only the bits financed by EIB. We consider that the Bank should further set requirements that the EA covers the different stages of the project or of series of projects that the promoter is planning in certain area. In this way the EA could take into account the cumulative environmental impact. As specific example for groups of projects with cumulative impact should be considered the Gibe I, Gibe II and Gibe III projects financed and considered for financing by the Bank in Ethiopia.

81. In paragraph 32 - the projects where the environmental impacts are likely to be significant the preparation of the Environmental Management Plan should be a binding requirement of the Statement.

Access to remedies

82. Paragraph 38 of the Statement provides the possibility to lodge a complaint against the decisions of the Bank. Given the importance and the nature of such a provision, the procedural steps which should be followed by the person lodging the complaint should be precisely described and should be written in a legal language in order to make the procedure efficient, predictable and reliable. Yet, the language of this paragraph is more than weak and does not provide any legal security.

Indeed, paragraph 38 of the Statement provides that: “Any natural or legal person affected, or feeling affected, by a decision of the EIB may lodge a complaint to its Secretary General,
either in writing or through the internet. The Complaints Office ensures the centralized handling and registration of complaints, a structured investigation, internal and external reporting and a pro active approach.”

Moreover, paragraph 38 of the Statement does not fix any delays within which the EIB should reply to the natural or legal person affected by one of its decision. The establishment of delays is important since it obliges the Bank to answer in a limited period of time, and therefore improves the accountability of the Bank. The Bank should, thus, specify depending on the request made, within how many days it shall reply to the person making the complaint, knowing that it will be either subject to the provisions of Regulation n°1049/2001 or to the provisions of Regulation n°1367/2006.

83. The Statement does not mention any possible legal action before the European Court of Justice. According to paragraph 39 of the Statement, it seems that the Bank considers that the European Ombudsman is the only remedy there should be against its decisions. However, point 35 of the Statement underlines that “the EIB is an EU body that complies with the Aarhus Regulation”, indeed as an EU body the Bank is subject to this Regulation. The Aarhus Regulation refers notably to Regulation n° 1367/2006 of September 2006.

This Regulation, in accordance with the Aarhus Convention, grants access to justice in environmental matters against the decisions of EC bodies, such as the EIB, under several conditions.

According to this Regulation, an NGO has to make a request for an internal review to the Community institution or body that has adopted or omitted to adopt an administrative act under environmental law, prior to be able to institute a proceeding before the Court. The NGO will then be able to challenge the reply of the institution or body if it is not satisfied with it.

Indeed, according to article 10 of Regulation n°1367/2006: “Any non-governmental organization […] is entitled to make a request for internal review to the Community institution and body that has adopted an administrative act under environmental law or in case of an alleged administrative omission, should have adopted such act.”

As regards the access to the European Court of Justice, article 12 of the same Regulation states that “the non-governmental organization which made the request for internal review, pursuant to Article 10 may institute proceedings before the Court of justice in accordance with the relevant provisions of the Treaty”.

The Statement should therefore refer to Regulation n°1367/2006 and comply with its requirements in providing access to NGOs to the European Court of Justice in case the reply provided by the EIB within the internal review procedure is not considered as satisfactory by the NGO.

The reporting and monitoring mechanism entailing a liability mechanism

84. Point 1 of the preamble of the Statement provides that: “The EIB has developed a set of environmental and social requirements throughout the project cycle to ensure the sustainability of all the projects that it finances, regardless of where a project is located. Promoters are responsible for preparing and implementing projects financed by the Bank, and in particular responsibility for legal compliance rests with the promoter and the competent authorities of the host country”.

Therefore all the responsibility lies with the promoter who must apply the environmental and social requirements set by the bank in the financing contract. However, we consider that the

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38 Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents
bank should also share a part of responsibility when it finances projects which do not comply with the environmental and social standards set out by Statement.

The Statement and the Handbook set a monitoring system according to which the promoter must report to the Bank on environmental aspects of the project carried out. This reporting mechanism is detailed in the Handbook which is not the object of the consultation organized by the Bank, however, the Statement refers to the reporting obligation of the promoters, we will therefore comment this one: Indeed, point 5 of the preamble of the Statement states that: “For projects approved for EIB financing, any obligations on the promoter that derive from the environmental and social requirements of the EIB for a particular project are described in the Finance Contract signed between the EIB and the promoter and are monitored by the Bank according to a reporting schedule agreed between the Bank and the promoter”.

First, the reporting of the promoter should enshrine the state of the projects’ compliance with the environmental and social requirements deriving from the Bank Statement and thus from EU law. This reporting mechanism imposed on the promoter must enable the Bank to effectively follow the carrying out of the project and its compliance with the environmental and social standards imposed by the Bank on the promoter.

Hence, this mechanism should be more precisely describe in the Statement and in a way to impose clear obligations on the promoter and on the Bank.

85. As a preliminary remark, this provision should not only be stipulated in the preamble of the Statement as it is quite an important provision providing for a reporting mechanism on behalf of the promoter to the Bank and providing the measures applicable in case of breach of the contract concluded between the promoter and the Bank. An entire article should thus be dedicated to this reporting mechanism in the Statement.

Moreover, according to point 5 cited earlier, the Bank has an obligation to monitor the implementation of the obligations of the promoter. This obligation should be set out and detailed in another provisions of the Statement, like the reporting obligation of the promoter, in the corpus of the Statement and not only in the preamble. It should lay down the specific obligations of the Bank to monitor and control the applicability of the Statement by the promoter.

86. The reporting obligation engenders a monitoring obligation from the Bank. However, neither the Handbook not the Statement provide for binding measures to be taken following the reporting from the promoter on non-compliance issues and negative impact on the environment.

Point 189 of the Handbook states that “in all cases, whatever monitoring category is chosen, the Promoter should promptly inform the Bank in case of “significant changes” that may imply non-compliance with EIB policy and guidelines on environment, and/or that may negatively impact the project implementation and expected outcomes from an environmental point of view.”

However, the Handbook does not provide for any following steps to be taken by the Bank once it has been informed by the promoter of its non compliance with the Statement or the Handbook.

Point 5 of the preamble cited above provides for some measures that could be adopted in case of non-compliance by the promoter, unfortunately they are not stipulated in a binding way and only mention what could be entailed by such a breach in using a very weak language as “may” which does not imply any obligation on the Bank.

Point 5 reads the following way: “A breach of contract requires timely corrective action by the promoter, in agreement with the Bank. A failure to take appropriate action may have financial consequences for the promoter, e.g. a halt to disbursements, and/or recovery of the finance
outstanding. For projects located in the EU, the EIB applies a presumption of legality - that national legislation conforms to EU legislation and is implemented and enforced - unless there is evidence to the contrary”.

This provision of the Statement is thus far from establishing a sufficient and satisfactory monitoring mechanism. Indeed, it seems that the consequences of the reporting from the promoter are more than uncertain and that it does not guarantee that the Bank will systematically adopt the necessary measures to either force the promoter to comply with environmental and social standards, cease any disbursements or recover the funds already disbursed. This provision should be written in a way to provide clearly for the conditions under which the failure of the promoter to comply with environmental and social standards imposed by the Bank would entail financial consequences.

The Bank should therefore insert in the Statement specific provisions on:

- The reporting obligation of the promoter
- The monitoring obligations of the Bank and its implications notably when and under which conditions the Bank carries out physical monitoring of the Project and on-site follow up of environmental matters
- The measures the Bank would be obliged to adopt in cases of non-compliance of the promoter with the Statement.

87. According to point 5 of the preamble Statement, the obligations of the promoter that derive from the environmental and social requirements of the EIB for a particular project are monitored by the Bank. Any obligations entail accountability from the entity subject to the said obligations, in the present case, the Bank shall therefore be accountable and liable in case it does not comply with its monitoring obligations.

The way to make the Bank accountable is to make the monitoring obligation of the Bank binding. This liability of the Bank could be engaged through the reporting mechanism imposed on the promoters of the projects. The lack of appropriate response and of monitoring from the Bank following the reporting of the promoter revealing its non-compliance with the environmental and social standards set in EU law should entail the liability of the Bank.

Moreover, the Bank should not rely exclusively on the reporting from the promoter but instead carry out its own monitoring (physical monitoring, on-site follow up…). The lack of monitoring or the appropriate monitoring by the bank on the conditions under which the project is carried out should therefore entail the liability of the Bank.

That way the Bank liability could be engaged for instance:

- When no reporting from the promoters on specific issues of compliance and no remedying action taken by the Bank
- When according to the reports of the promoter, the latter does not comply with the environmental and social requirements of the Bank: lack of EIA, approval of an EIA that manifestly does not correspond to reality, Aarhus obligations not respected. To illustrate this situation we refer to the decision 1807/2006/MHZ of the ombudsman in which he considered that the Bank had committed an instance of maladministration.

“By failing to react to the 2002 and 2003 Polish reports, on the basis of which it appeared that the Polish authorities did not consider that the EIA Directive procedure was necessary for the flood reconstruction and repair works – an interpretation which appears to be contrary to the one given by the Court of Justice to the EIA Directive – the EIB committed an instance of maladministration.”

- When a physical monitoring and on-site follow up has been carried out by the Bank or by an independent audit firm and that the project is considered as not in compliance
with EU environmental standards and that the Bank has not taken the appropriate corrective measures.

- In case it is of common (public) knowledge that the projects have negative impacts on the environment and that the reporting from the promoter does not correspond to the reality on the grounds in the host country and to the public knowledge. In certain cases, the projects financed by the Bank are largely commented by the media and by the local NGOs as being detrimental to the environment. We consider that the monitoring obligation of the Bank enshrines the obligation to control the quality of the data provided by the promoter instead of presuming him in compliance with the legal requirements imposed by the Bank. Indeed, in some cases, the Bank cannot ignore the lack of compliance from the promoter with its legal obligations. The awareness of the Bank about such illegal situations shall entail the possible liability of the Bank provided it does not take appropriate remedying measures. As explained earlier and as the Statement provides (but in a non binding language), these measures would encompass the injunction to the promoter to comply with the environmental and social requirements of the Bank, the refusal to disburse any more funds and possibly the recalling of the funds. In case such measures are not adopted by the Bank, the latter shall be liable and the compliance mechanism shall be triggered.

END

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The coalition Counter Balance involves the following members:

CEE Bankwatch Network, Europe
Les Amis de la Terre, France
urgewald, Germany
World, Economy, Ecology and Development (WEED), Germany
Campagna per la Riforma della Banca Mondiale, Italy
BothEnds, Netherlands
Bretton Woods Project, United-Kingdom