COMMENTS ON THE EUROPEAN INVESTMENT BANK’S (EIB’s) STATEMENT OF ENVIRONMENTAL AND SOCIAL PRINCIPLES AND STANDARDS

BASED ON DRAFT FROM 18 MARCH 2008

BY THE NATIONAL ASSOCIATION OF PROFESSIONAL ENVIRONMENTALISTS (NAPE) - UGANDA

Contact Person

Mr. Frank Muramuzi,  
Executive Director,  
P. O. Box 29909 Kampala Uganda  
Tel: +256-414-534453; +256-414-530181  
Cell phone: +256-772-492362  
email: nape@nape.or.ug; napeuganda@yahoo.com  
website: www.nape.or.ug
Brief Profile of NAPE

NAPE is a Non-Governmental Organization (NGO) that was established in 1997 and registered by the Ministry of Internal Affairs in Uganda in 1998 as a non-for-profit and apolitical organization dealing in environmental matters. It is an organization that lobbies and advocates for judicious use and management of natural resources with a view of ensuring transparency, accountability and sustainability in the water and energy sectors. It is a membership organization whose membership is currently 80 and is growing.

NAPE's Vision is: “A Uganda society using natural resources in a sustainable manner”

NAPE's Mission is: “To influence and guide society on sustainable use of natural resources”.

NAPE's Objectives:

- Advocating for fair influence of global/regional development agenda on national development agenda;
- Minimizing natural resource use and management related conflicts;
- Advocating for development programmes that are socially and environmentally sound.

Since 1998, NAPE has been at the forefront of of many environmental lobby, advocacy and campaigns, including the proposed construction of the Bujagali hydro-power project on River Nile in Uganda. NAPE has been campaign against the Bujagali project in its current state, because the project is riddled with many controversies and is likely to cause severe social, economic and environmental impacts in Uganda.

For further Information please contact Mr. Frank Muramuzi, Executive Director NAPE at the following address:- P. O. Box 29909 Kampala Uganda; Tel: +256-414-534453; +256-414-530181; email: nape@nape.or.ug; napeuganda@yahoo.com; website: www.nape.or.ug

THE COMMENTS

Structure of the document

1. We are pleased to see that the EIB tries to separate principles and the standards within the document. Nevertheless standards still need to be further elaborated within this document.

2. The document should systematically separate the provisions that are different for EU and non-EU operations. This should be done either by separate paragraphs or bullet points as appropriate (this division is already there in a number of parts, but in others the provisions are mixed).
3. Consultation, Participation and Public Disclosure Standards and procedural Standards should be in the end of the document as they are overarching topics, and it should be clear that they apply to all of the sections, not only the Environmental Standards

4. Access to remedies, including existing paragraphs 38 and 39, should be separated in a separate section at the end of the document (see the details proposal)

5. Monitoring, enforcement and seeking redress mechanism should be separated in a separate section at the end of the document (see the details proposal)

6. Although we understand that a number of issues are addressed through Environmental and Social Practices Handbook, we believe that all Principles and Standards should be clearly spelled out within the statement. The Statement should contain specific links to EU law and EU practices implementing the EU environmental and social principles such as precautionary, prevention, polluters pay principle, etc. Handbook could then elaborate those further.

**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 European Investment Bank.

8. The EIB Statement of Environmental and Social Principles and Standards (SESPS) needs to apply to all type of the Bank investments. Global loan, Framework loans, Structural Funds loans. These represents a substantial part of operation of the Bank in terms of number and amount of the money allocated. Investments Funds and Loan Guarantee Instruments that are 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 through the intermediary banks where such effects might be negative for the environment and society. The due diligence of the other public banks such as IBRD, 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 and out EU countries. 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. Therefore, the lack of adequate legal framework in a non-EU country or lower standards applied by a leading Multilateral Development Bank are not a reason for EIB to finance projects that are not in line with EU and international standards.

   The Statement does not only require that EU environmental standards should be used as benchmarks, but also mentions that many factors such as economic considerations, the feasibility, the capacity of the promoter (borrower), the state of the
environment, should be assessed and taken into consideration before requiring promoters (borrowers) in non-EU countries to apply EU environmental standards. For example, paragraph 25 of the Statement considers that the costs and benefits of implementation, the capacity of the promoter and the financial resources available, would be some factors that could impede the direct implementation of EU standards. The provisions of the background section of the Statement also mention that “in the rest of the world, local circumstances (i.e. the state of the environment, and economic considerations) may justify lower standards than would be applied in the EU”.

Therefore, the Bank reserves itself the right not to require promoters to apply EU standards in non-EU countries, because of local circumstances. Such conditions are very broadly defined and in our view are not based on any reliable arguments. The Statement implicitly recognizes that lower standards may be applied in third countries. Such argumentation underlines the main economic approach of the Bank that prioritizes economic considerations over the protection of the environment. Moreover, we do not understand what the Bank is alluding to when it considers that the “state of the environment” may justify the implementation of lower environmental standards. It seems more than paradoxical to justify the implementation of lower environmental standards by referring to the state of the environment. These vague conditions restricting the implementation of higher environmental standards can be found in other provisions of the Statement.

Paragraph 28 of the Statement concerning emission standards states that “for projects outside the EU, national legislation sets the minimum mandatory standards and where EU standards are more stringent than national standards – if practical and feasible- the higher standards are required, sometime a phased approach must be justified”. The very aim of applying EU standards outside the EU is to level the playing field and to provide for a high level of protection of the environment in third countries through the projects funded by the Bank. Therefore, the Bank should commit to require the implementation of those standards as the rule and not as an exception. Moreover, the terms “if practical and feasible” are vague and can easily be invoked by the promoters and the EIB in order to avoid the implementation of more stringent standards. In other words, the possibilities to apply higher EU emission standards in third countries are very low since such vague circumstances will be required.

Paragraph 29 of the Statement on ambient standards also uses the same approach, it states that “outside the EU, the EIB applies national requirements, unless there is evidence to suggest the need for a higher EU standard for reasons of cost-effectively protecting the natural environment and/or human health”. The same comments can be made than the ones made above on point 28 of the Statement. It is clear from reading the Statement that the rule is the implementation of national standards and that the enforcement of EU standards is the exception. Whereas, it should be evident for the Bank that the highest standards should always be the ones to apply in order to ensure a better protection of the environment and to participate in the sustainable development of the host country. However, promoters outside the EU have to apply national ambient standards and only when there are reasons of cost-effectively protecting the natural environment and/or human health”, they would have to apply higher EU ambient standards.

Finally paragraph 23 of the Statement also establishes a double standard policy. It mentions that “the EIB requires that all projects comply with the EU EIA Directive and that outside the EU and the enlargement countries, in countries where EU law does not apply, the EIA process and content, where an EIA is required 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. Therefore, requiring an EIA complying with the “principal requirements of the EU directive” is far from imposing the implementation of the EIA directive in third countries. Furthermore, the Bank does not specify which requirements should be considered as the principal ones and consequently implies that the requirements deemed not to be the “principal ones” set by the Directive shall not be applied in countries outside the EU.

10. Even in the cases where EIB start assessment of the projects that are in advance stage of development and other financial institutions are present the Bank should set up minimum criteria for its participation. The minimum criteria should be in line with the fundamental EU environmental and social standards and practices and International Conventions adopted by EU and country of operation.

**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:

11. 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 there 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.

12. 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 term and long term objectives to fight climate change.¹

13. The EIB will include a training on climate change for all the newly recruited staff (see *Natexis Banque Populaire practice*) and regular training for all its staff.

14. The EIB will integrate the respect of its GHG emissions targets in the evaluation of the staff working on the issue.

15. Commitment to the process for revision, including public consultation, on the Handbook that would be subsequent to the adoption of the Statement.

16. 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 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, which should be incorporated in the current statement.

17. There should be established a process of monitoring and evaluation of the standards against the principles of the Statement on a continuing basis.

¹ Several private banks already have specific intranets on climate change and GHG reduction: HSBC, Banque Populaire, JPMorgan Chase, Dexia, Société Générale, Bank of America.
18. The document should be a subject to continuous evaluation, quality assessments and regular review on a three-year circle.

Maximizing Benefits

19. Statement in paragraph 9 should be further elaborated within the standards - particularly in relation to the methodology for the quantification and valuation of the environmental and social externalities.

20. EIB needs to develop lending policies and targets in the 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 support should be given to projects that are part of regional / national plan that provide for integral solution in waste management in line with waste management hierarchy.

Minimising harm

21. We welcome the fact that EIB introduced a principle of no funding for projects on the basis of their negative environmental and social impact and violation of 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 are (is) not a sufficiently strong language for minimizing the harm. We think that clear criteria on no-funding linked to EU hard law and International agreements will benefit both promoters and affected communities. We will propose the following specification about the group of projects NOT TO BE financed by the Bank.

Areas: So far the Statement says under Biological Diversity, paragraph 43 that the “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 clarified in the way that EIB excludes financing of any industrial projects with adverse and unmitigated impact on areas that are classified as protected areas under the EU nature conservation directives or under the Ramsar, Bonn, Bern and UN Biodiversity Convention. In this case, for the classification of adverse impact and procedure derogation of no-funding principle should be based on the EU hard law – e.g. the Art.6 requirements from the Habitat Directive.

Beyond this, the ban to finance should include areas that are UNESCO World Heritage Sites. Outside of the EU, protection areas will not be classified according to the EU directives and only wetlands may be protected under the Ramsar Convention, the EIB should therefore 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” isn’t 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 too 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 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 where 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 potentially conflict zones.

**Technologies**: The EIB is lacking in its statement 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 Source Book 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.

**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\(^2\).

**Principles**

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

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

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

25. Gender equality should be also part of social principles

26. An Integrated Environmental and Social assessment should be required followed by a comprehensive Environmental an Social Action Plan

27. We consider that presumption of legality principle applied for the Bank lending inside EU favours countries with bad enforcement of the EU law. There should not be any presumption either that Member States of the UE transposed correctly 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 laws of the host country comply with EU law, it does not mean that the Promoter does. There is therefore 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 and when it does not do so be held accountable.

28. As a principle within 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.

29. In sensitive sectors (listed in the chapter on Climate change), promoters are 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.

30. 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.

31. Planned GHG emissions and mitigation measures undertaken by the promoter of the project are made public 30 days before the approval of the project by the Board of the EIB.

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\(^2\) 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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32. Annual assessment of the mitigation measure undertaken and the actual GHG emissions of EIB backed projects are also made public.

**Environmental Standards**

33. 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.

34. Paragraph 24. the list should be further extended and/or extended and converted to the annex of the Statement.

- by listing other products or activity deemed illegal by 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 in length

- 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.

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.

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3 EBRD Environmental and Social Policy, as approved by the Board of Directors on 12 May 2008
by listing the exclusion list that are used for Global loans (from limited sample that we manage to obtain we understand that this includes):

Industry (other than agro-industry) and services
- Manufacture and distribution of weapons and ammunition, arms and military equipment
- Manufacture and distribution of tobacco products
- Housing, except for social housing in connection with programmes for urban renewal and/or urban regeneration
- Schemes to improve the urban quality of life
- Waste incineration and processing of toxic waste
- Gambling and betting activities

Agro-industry
- Cold stores, other storage, treatment and packaging facilities in restricted or excluded sectors,
- For direct further processing for non-intervention purposes
- Milling of cereals, production of semolina, malting
- Production of starch from any raw material as well as investments concerning products derived
- Processing of flax and hemp
- Processing of oil seeds and protein crops
- Processing of tobacco
- Grading and packaging of hen’s eggs
- Specialist pig markets
- Processing of fisheries products other than for human consumption or the elimination of waste

**Biological Diversity**

35. The EIB should refer in the statement into the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity.

36. The EIB should at minimum define the Critical Habitats and Natural Habitats (especially for operations outside EU). There are various definitions that could be used, but most practical might be to use the EBRD one and WB Group.

37. Any activities that would lead to the conversion or degradation of Critical Habitat should be prohibited.

38. Activities for natural habitats should be appropriately assessed against the alternatives, if overall benefit outweigh the cost, as a next step mitigated and compensated when impact can not be avoided following the procedure described in Art.6 of the Habitat Directive.

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4 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

5 Critical habitat is a subset of both natural and modified habitat that deserves particular attention. Critical habitat includes areas with high biodiversity values, 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)
39. Paragraph 45: for the project outside the EU the decision about the overriding national interests cannot be made by the respective national authorities, but needs to be subjected to full public consultation, consultation with relevant conventions and approval of the European Commission.

40. Genetically Modified Organisms (GMOs) No GMOs should be 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.

41. Invasive alien species should be mentioned in the context of the possible intentional and unintentional introduction by the bank client.

42. The Bank clients involved in natural forest harvesting or plantation development will 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.

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

**Climate Change**

44. As financier of many investment projects, the EIB should play a leading role in shifting investments towards a less carbon intensive economy. **Present investments should 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.

45. 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;

46. 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.

47. 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.

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*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.*
48. 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).\(^7\)

49. It is highly important not only to keep 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.

50. 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 will reduce its induced GHG emissions within EU countries by 30% by 2020 and 80% by 2050, compared to 1990, or at least 3% per year on average. Outside EU countries, the EIB will reduce its induced GHG emissions by 50% by 2050, or at least 1.5% per year on average.\(^8\)

- A specific evaluation of sensitive sectors will be conducted. The EIB will 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.

51. 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.

52. 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.

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\(^7\) As best practice, see JP MorganChase commitment: “JP Morgan 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.

\(^8\) 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).
Human rights

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

53. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent.

54. Accountable governance should be recognised as an integral part of sustainable development. The EIB should acknowledge that “human rights” include civil, cultural, economic, political and social rights, as well as the right to development.

55. The EIB should recognize that within its spheres of activity and influence it should have the commitment to proactively promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international law, as well as national law. Promoters (borrowers) are 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.

56. EIB should develop principles and standards on the use of Security Forces by its clients. EIB should require that Promoter (borrower) abides by the Voluntary Principles on Security and Human Rights⁹ 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.

57. To avoid adverse impacts of projects on communities of Indigenous Peoples, or when avoidance is not feasible, the promoter (borrower) is required to minimize, mitigate, or compensate for such impacts. The promoter (borrower) 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.

58. The promoter (borrower) 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. And also for affected communities to seek redress against the adverse impacts of the project.

59. The promoter (borrower) 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.

60. The promoter (borrower) 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:

61. The draft Statement should further cover key standards that are currently missing, such as:
   - 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 and compensation;
   - Clear requirements on social assessment

62. Operations outside of the EU must clearly show their contribution to achieving the Millennium Development Goals (MDGs). For that reason, the EIB should require that the Promoter (borrower) 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 identifies alternative projects options to try to avoid physical displacement and other social negative impacts.

63. The Promoter (borrower) 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 ESAP (p. 14). *(Currently, only biodiversity action plan is required and only in the EU).*

64. 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.

**Social assessment**

65. 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 (borrower) following the EIR recommendations, so that the EIB is able to identify “the cumulative impact of projects and socio-economic linkages to environmental issues”\(^{10}\).

66. The Statement should further develop a clear set of standards that the project promoter (borrower) should apply and the EIB should approve a project only after the promoter (borrower) has fulfilled satisfactorily the EIB requirements for comprehensive environmental and social assessment in-line with the EBRD’s Performance Requirement PR1.\(^{11}\)

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

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\(^{11}\) EBRD Environmental and Social Policy, approved by the Board of Directors 12 May 2008, p. 18
Indigenous peoples

68. 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 those listed in the EBRD Environmental and Social Policy\textsuperscript{12} in order to ensure harmonization of those requirements among the EPE signatories in-line with the following recommendations:

69. That the EIB is committed 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 promoters (borrowers) 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.

70. Where the customary rights to land and resources of Indigenous Peoples are affected, the Bank requires the promoter (borrower) 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 that 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”\textsuperscript{13}. The Indigenous Peoples Development Plan should be updated throughout the whole project cycle. The EIB requires the promoter (borrower) to ensure culturally appropriate, informed and active participation of affected indigenous peoples and their communities (this is developed further in section “Consultation, participation and public disclosure”).

- 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.

\textsuperscript{12} Performance Requirement 7, Indigenous Peoples; EBRD Environmental and Social Policy, as approved by the Board of Directors on 12 May 2008

71. Promoters (borrowers) are 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.

72. Promoters (borrowers) are also 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.

**Compensation and Resettlement**

The Statement does not describe to which international recognized social standards it adheres to, we have to draw on various documents.

73. The standards included in the "Guidance note 1 - Dealing with population movement and resettlement" from the Handbook should be incorporated into the Statement setting minimum standards as requirements for project promoter (borrower), and further detailed in-line with the EBRD Performance Requirement 5\(^\text{14}\). The standards should cover Land Acquisition, Compensation, Involuntary Resettlement and Economic Displacement, and a Resettlement Action Plan should be required spread throughout the project's lifespan.

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

- informed consent by the affected people;
- 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 should be better off after removal (displacement).\(^\text{15}\)

**Labour and working conditions**

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

76. The Promoter (borrower) should guarantee that contractors and subcontractors will base the employment relationship on the principle of equal opportunity and fair

\(^{14}\) EBRD Environmental and Social Policy, as approved by the Board of Directors on 12 May 2008

treatment, and will not discriminate with respect to a person's political affiliations and 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 discipline.

77. The EIB should require that the promoter (borrower) ensures the protection and promotion of the health of workers.

78. The EIB clients should ensure appropriate working conditions and terms of employment as well as recognize worker's rights to form and join workers' organizations.

**Cultural Heritage**

79. The derogation for affecting cultural sites should be given only in case of lack of feasible alternatives and over-riding public interest – i.e. requirement similar to the precautionary principle of the Art. 6 from the Habitat Directive (OR there might be some specific legislation in EU or UN about cultural heritage protection) probably also some words in case the project cause irreversible and unmitigated able impact.

**Procedural standards**

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

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

82. We welcome the EIB statement that requires the **EA to cover the entire projects** (p.32 from p.16), but not only the bits financed by EIB. We want also that the Bank covers under this point the requirement that the EA covers different stages of the project or of systems of projects that promoter (borrower) is planning in certain areas. In this way, the EA could take into account the cumulative environmental impacts. As a specific example, groups of projects with cumulative impacts should be considered in the Gibe I, Gibe II and Gibe III project financed by the Bank in Ethiopia.

83. Paragraph 32 - for projects where the environmental impacts are likely to be significant, the preparation of an Environmental Management Plan should be a binding requirement of the Statement.

**Consultation, Participation and Public Disclosure**

84. **Transparency of contracts**: the draft Statement, p. 40, now reads: “…project-specific requirements may be incorporated into the Finance Contract”. Instead, it should read: **“the project-specific requirements shall be incorporated into the Finance contract and disclosed to the public”**. The reason for this is that public disclosure of those requirements would enable monitoring of implementation of those requirements by affected public.
85. The Statement does not mention the Aarhus Convention and Regulation n°1367/2006 regarding the public participation in the decision-making process, it only refers to the EIA Directives. This is one way of restricting the scope of the public consultation. The Aarhus Regulation is only mentioned as regards the PDP document, which only applies to the access to information. However, Article 9 of Regulation n°1367/2006 requires the Community Institutions and Bodies to comply with the Aarhus Convention’s provisions relating to public participation in decision-making as well. As an EC body, the EIB is subject to Regulation n°1367/2006. EIB even acknowledges this in the Statement.

Consequently, paragraph 37 on public consultation and participation needs to be strengthened in order to reflect the requirements of the Aarhus Convention and of Regulation n°1367/2006. The Statement should therefore be modified as follows:

- The Statement should refer explicitly to Regulation n°1367/2006 and not only to the EIA Directives as regards public participation in decision-making;
- The Bank should not require a “public consultation and timely disclosure of appropriate information” only for projects that require an EIA. This is not a relevant criterion. Indeed, Regulation n°1367/2006, as well as the Aarhus convention, requires a public consultation to be organized even when an EIA is not needed;
- The Bank should include a provision on public consultation as regards its plans and programmes relating to the environment in compliance with Article 9 of Regulation n°1367/2006. As explained earlier, the Bank is subject to the Aarhus Regulation and should not therefore only provide for requirements applicable to the projects carried out by a promoter (borrower), but should also insert provisions applicable to the Bank policies regarding public consultation;
- The Statement does not provide any procedural steps applicable to public participation. Moreover, the language of the text should be much more precise and stringent in order to impose obligations on the promoters (borrowers) and not mere choices. Instead of stating “as early as possible,” the text should read “when all options are still open” as Article 9 of Regulation n°1367/2006 requires. The public consultation needs to be organized before decisive steps are taken and not once the public may (does) not have any input (contention) on the carrying out of the project. The promoters should not only be “encouraged” “to engage stakeholders in meaningful dialogue”, but should be obliged to organize the consultation of the public concerned;
- The mere consultation of the public does not necessary guarantee the Bank’s consideration of the project or guarantee the promoter (borrower) of an input of the public during the consultation. Paragraph 37 of the Statement should therefore require the promoter (borrower) to “take due account of the outcomes of the public participation” as required by Article 9(4) of Regulation n°1367/2006;

86. For projects located outside of the EU, there is need for a requirement that the EIA process (including the public consultation) should be completed before the approval of the project by the EIB board of directors;

87. The full EIA documentation for projects located outside of the EU should be in accordance with good international practice (e.g. World Bank) released for at least 120 days;
88. Within the EU, development consent should be given in accordance to EIA Directives before project approval by the EIB Board of Directors.

Access to Remedies and Redress

89. 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 that should be followed by the person(s) 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. This should include a mechanism for redress against a bank assisted project. The language of this paragraph is very 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(s) 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(s) 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.

90. 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 instituting 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.”

16 Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents
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 (petitioners or claimants) to the European Court of Justice in case the reply provided by the EIB within the internal review procedure is not considered satisfactory by the NGO (petitioners or claimants).

**The reporting and monitoring mechanism entailing a liability mechanism**

91. 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 (borrower) who must apply the environmental and social requirements set by the bank in the financing contract. However, we consider that the bank should also share a part of the responsibility when it finances projects that 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 (borrower) 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, yet the Statement refers to the reporting obligation of the promoters. We will, therefore, comment this way. 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 (borrower) 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 (borrower) must enable the Bank to effectively follow the implementation of the project and its compliance with the environmental and social standards imposed by the Bank on the promoter (borrower).

Hence, this mechanism should be more precisely describe in the Statement and in a way that imposes clear obligations on the promoter (borrower) and on the Bank.

92. 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 (borrower) to the Bank and providing the measures applicable in case of breach of contract concluded between the promoter (borrower) 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 (borrower). This obligation should be set-out and detailed in other provisions of the Statement, e.g. "the reporting obligation of the promoter (borrower)", 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.

93. The reporting obligation engenders a monitoring obligation from the Bank. However, neither the Handbook nor the Statement provide any binding measures to be taken after the promoter's (borrower's) reporting regarding 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." But, the Handbook does not provide for any follow-up steps to be undertaken by the Bank once it has been informed by the promoter (borrower) 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 when they use the word “may” and only mention what could be entailed by such a breach. The use of the word “may” is very weak language, because it does not explicitly exert an obligation on the Bank.

Point 5 reads as follows: “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 (borrower) are more than uncertain and that it does not guarantee that the Bank will systematically adopt the necessary measures to either force the promoter (borrower) to comply with environmental and social standards, cease any disbursements or recover the funds already disbursed. This provision should be written in a way that provides clear conditions under which the failure of the promoter (borrower) to comply with environmental and social standards imposed by the Bank would result into financial consequences.

Moreover, Point 5 of the Statement’s preamble must be read in the light of other provisions of the handbook. Point 192 of the Handbook states that “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."
We consider that the reporting obligation of the promoters (borrower's) 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 rather that the compliance of the promoter (borrower) with EU law should really be a *sine qua non* condition to the funding of the project. Consequently, we consider that the Bank should not establish a presumption according to which the promoters (borrower's) are fully responsible for implementing projects financed by the Bank as stated in point 192 of the Handbook. On the contrary, the Bank has a real role to play in order to ensure the environmental integrity of the projects it finances. The monitoring mechanism it establishes in the Handbook and the Statement should guarantee that.

Furthermore, during the last public consultation organized by the Bank, the officials of the Bank affirmed that they were not applying a presumption of legality according to which EU legislation is correctly applied within the EU Member States and according to which the promoter (borrower) is responsible for implementing it. However, both texts, the Statement and the Handbook provide for such a presumption of legality. Moreover, there should not be any presumption that each Member States of the UE (or transpose correctly EU directives) 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 laws of the host country comply with EU law, it does not mean that the Promoter (borrower) does. There is therefore a real need for clarification on this issue.

There should not be any presumption of legality, on the contrary, that the Bank must monitor and control the compliance of the promoter (borrower) and when it does not do so, the Bank should be held accountable.

Point 193 of the Handbook goes on to state that “*there are in general, three stages where these checks could be made and these are covered by three different types of control by the Bank: (…)*”. The first stage concerns the “*conditions for signature*” of the loan; and the second one, the conditions for disbursement. The third and last stage concerns “*particular undertakings*: “*meaning these environmental matters must be completed to the satisfaction of the Bank during the implementation and sometimes operation of the project. Non-compliance with these conditions would be an important consideration should the Promoter wish to receive further funding from the Bank on a subsequent project, but could also in an extreme case result in the Bank recalling its funds from a project*”.

The language of this provision is very weak from a legal point of view. The expressions “*sometimes*, “*an important consideration*”, “*could*” and “*extreme case*” really reflect the fact that neither the Handbook nor the Statement are binding documents. It is also a reflection of the Bank’s reluctance to submit itself to real commitments with regard to ensuring the environmental and social integrity of the projects it funds.

According to point 193 of the Handbook, there is no systematic consequence of any nature, legal, financial or otherwise to the non-compliance of the promoter (borrower). The only consequences provided by point 193 are only potential ones i.e. the possibility of the Bank’s refusal to fund another future project carried out by the same promoter (borrower) or the possible recall of the Bank’s funds. This, however, is provided for only in extreme cases and is not, even in such cases, systematic and compulsory.

Indeed, the reporting obligation suggests that the Bank is and should be aware of the environmental and social standards applied by the promoter (borrower), but also
requires the bank’s awareness of the non compliance of the promoter (borrower) with the requirements of the Bank and thus with EU law. The reporting mechanism should therefore entail a reactive response of the Bank encompassing the adoption of measures in case the reporting from the promoter (borrower) reveals that the project has not been carried out in compliance with the relevant requirements or/and when it has/had a negative impact on the environment that was not foresaw in the EIA. The Bank should take appropriate measures to sanction the promoter (borrower), but also to ensure that measures (actions) are taken in order to remedy the negative impact on the environment.

Moreover, we consider that the Bank should specify under which conditions it shall carry out physical monitoring of the projects and on-site visits aimed at ascertaining whether the promoter (borrower) is carrying out the project with due diligence and in compliance with EU environmental standards. The Handbook enshrines some provisions on possible on-site follow-up. However, it is only for category B projects and nothing binding is provided for, nor any conditions on when it shall be compulsory nor what consequences shall follow as result of such visits and monitoring in case the Bank witnesses a lack of compliance.

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

- The reporting obligation of the promoter (borrower);
- The monitoring obligations of the Bank and its implications notably when and under what 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 (borrower) with the Statement.

94. According to point 5 of the preamble Statement, the obligations of the promoter (borrower) 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 after the reporting of the promoter (borrower) revealing its non-compliance with the environmental and social standards set in EU law should constitute 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 also constitute the liability of the Bank. In this way, the bank’s liability could be engaged for instance:-

- When no reporting from the promoters (borrowers) on specific issues of compliance and no remedial actions are taken by the Bank;
- When according to the reports of the promoter (borrower), the promoter does not comply with the environmental and social requirements of the Bank such as lack
of EIA, approval of an EIA that manifestly does not corresponds to reality, and/or the Aarhus obligations are 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 has found that the project is 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 (borrower) 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 (borrower), 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 (borrower) with its legal obligations, [It would be good to cite examples of cases where the projects were carried out in total violation of Aarhus convention or other legal requirements and where the Bank could not ignore the situation]. The awareness of the Bank about such illegal situations shall constitute the possible liability of the Bank provided it does not take appropriate remedial measures (actions). As explained earlier and as the Statement provides (but in a non-binding language), these measures would encompass the injunction to the promoter (borrower) 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.

This liability mechanism would be triggered according to the Aarhus Regulations’ provisions on access of members of the public to justice to which the Bank is already subject to.