I. Appreciation

The author appreciates the care and effort that has gone into the new statement. One may value the greater clarity on the application of EU principles outside the EU. The new statement seems particularly improved on the following points:

- Collaboration with the promoter to enhance project value (§3)
- Enforcement of environmental obligations (§8)
- Promoter’s duty to conduct environmental assessment (§16)
- Clear intent to exclude harmful and non-viable projects (§20)
- Insistence on compliance with environmental law (§34)
- Respect for practicality and cost-effectiveness (§39)
- Elaboration of social standards (§49 to 53)
- Support for technology transfer to LDCs (§67)
- Heeding the Millennium Ecosystem Assessment of the UN (§62).

The author also acknowledges the care with which the Bank responded to his comments in the first round of consultation.

II. Synthetic View

The document is a step forward for the Bank and is a useful compendium of the legal provisions that govern the environmental impact of certain kinds of collective human activity within the EU or in the EU’s sphere. It is, in effect, in broad terms a declaration that the Bank requires its borrowers to respect the EU law applicable to the projects which they ask the Bank to finance or, sometimes, to do more.

The Bank should follow a parallel tradition, from another field, of imposing a higher standard than EU law, for instance the requirement of an open procurement process for private borrowers.

Instances where the Statement already provides that the Bank might ask for more than EU law compliance are these:

- Where there remains significant damage to the environment, after mitigation (§§4 and 20);
- Where the borrower must internalise, i.e. pay for, external damage (§12);
- Where international practice sets a more stringent standard (§30);
- Where the promoter has not used the best available technique (§31);
- Where an international environmental convention has been signed but not yet ratified by the EU or is not yet in force (see §34)
• Where the borrower’s risk management system is inadequate (§40);
• Where a co-financier applies a higher standard (§42);
• Where a country is off limits (§44) or in a state of conflict (§45);
• Where cultural heritage and protected sites are at stake (§54 to §56);
• Where a project damages biodiversity (§65);
• Where carbon emission pricing materially weakens a project’s ERR (§66bis);
• Where the borrower is required to apply mitigation to the emissions (§66bis).

This commentary will examine how the principles cited by the Bank, in particular the precautionary principle, may be used to sharpen the expression of social and environmental concern.

Before examining individual paragraphs, it may be useful to identify some broad omissions and to offer editorial suggestions to improve the clarity of the document. These points will also find their backing in the selective individual comments.

III. Omissions

Here are a few points that the Statement could, by its own terms, elaborate or refine:

1. Due Diligence (§§ 20 of Background and 46)
   A. The Statement refers to a duty of due diligence on projects where the Bank has reason to reverse the general assumption of conformity to EU law. The statement does not show how the Bank would justify or verify that assumption case by case. It does not describe the nature or sources of evidence that might rebut it. Laconically, the Statement mentions that in certain countries, and where certain laws are at issue, the Bank would bring due diligence into play (Preamble §14). This is hard to grasp as a working principle.
   B. The Bank does not invite civil society to assist it in deciding where to apply its scarce human technical resources to assess the environmental risk (despite acknowledging the role of civil society in §14(b) of the Background to the Statement, despite §59 and despite the role that the EU precautionary principle gives to minority opinion and public consultation). It should include public participation in the due diligence process.¹
   C. In one instance, the Bank’s reluctance to question a state borrower’s assertion that it complies with EU law has been the subject of criticism by the European Ombudsman. The Bank could, among other measures, acknowledge the findings of the Ombudsman by confirming that it checks that a host country applies the EIA Directive in accordance with any interpretation given by the European Court of Justice.²

¹ In the case of 1807/2006/MHZ the European Ombudsman stated: “the NGOs in this case have played a valuable role in bringing to the EIB's knowledge relevant elements which the Bank was previously unaware of. The Ombudsman trusts that the EIB will in the future consider continuing to engage constructively with NGOs in the different Member Countries and also outside the EU.”

² In the case of 1807/2006/MHZ.
2. Geographical Scope of Principles and Standards

The geographical scope of social principles, in particular, remains unclear. There are contradictory remarks about the reasons and circumstances in which national non-EU rules or co-lenders’ standards may prevail over EU standards. The geographical distinction is sometimes twofold and sometimes threefold. Into the third category, fall the candidates for membership of the EU, also known as the "enlargement countries".

In particular, the references to “phasing-in” of EU environmental standards and principles is vague (see §19 of the Background for environmental and social principles and, for the environment alone, see §30 in general, §36 for the enlargement countries and §37 for the rest of the world). The frequent use of this expression suggests that this pliable doctrine is widely used by the Bank. It is said to be based, in one context, on the accession agreement between the EU and the relevant enlargement country. Yet the term is used in a broader context.

3. Application of EU Law

Since the essential point of the Statement is expressed at §18 and §19 of the Background, namely that the Bank strictly applies EU law within the EU and flexibly elsewhere, the Statement needs to go further into the implications of that proposition. It should offer guidance on how the Bank would deal with the following typical cases:

- Where the facts to show whether the promoter complies with EU law are not all known;
- Where the interpretation or application of EU law is unclear;
- Where compliance depends on the borrower’s risk management procedures;
- Where the unknowns are exceptionally large, or
- Where the scale of the project calls for especial careful analysis and diligence.

4. Extractive Industry

There is one passing reference to the Extractive Industry Review³ (the “EIR”) (§46) but no renewal of, or link to, the Bank’s commitment to its principles. The EIR principles would have applied to the Bank’s recent financing of a copper and cobalt mine in the Congo. This project is owned by joint venture led by a US corporation, which has been attacked in a US court for its alleged complicity in human rights abuses perpetrated by the military in support of its mining operations in an Asian country. It would be reassuring to know that the Bank would apply the precautionary principle to its involvement in such a project. The Bank’s non-technical summary of the case, as published on its website, reveals scant concern for human rights, governance, loss of forest, or the containment and disposal of noxious effluent.

Here are some of the recommendations made in the EIR⁴ and left unaddressed both in the present EIB statement and in the Bank’s response:⁵

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⁴ See for instance Environmental Defence Fund: EDF EIR summary
⁵ See EIB EIR response
• Refuse to support extractive industry investments in situations characterized by conflict, oppression or systemic corruption;
• Promote transparent revenue management and just revenue sharing so that communities affected by an extractive project share in the benefits;
• Require support for workers laid-off by mine closings.

One might also refer to the Bank’s engagement with the Extractive Industries Transparency Initiative.⁶

5. Climate Change

Crucially, the document fails to reflect the European Council’s official and repeated expressions of urgency before the threat of climate change. It fails to rise to the Bank’s own expression of concern (Background, §5).

IV. Editorial Suggestions

Here are some suggestions to sharpen the message:

1. It would help to know the class of reader to whom the statement is addressed. §9 of the Background lists categories of intended audience. This passage declares that the statement intends to “inform” those readers, but it does not include the borrower or project operator as an intended reader. Surely, these parties are more likely than others to draw useful information from this Statement? Revision is necessary to make the Statement comprehensible to this class of reader.

2. It would be useful at the beginning to state that the definitions are integral to the document. More generally, although the Statement does not aim to be a legal instrument, its wording could be tightened. This is important, not least because the Bank accepts to be judged by the Statement (§7 of Background), as it was by its precursor (see EIB’s submission to the Ombudsman quoted in the MHZ case.)

3. There are undefined terms that would benefit from a link to a definition, notably “environmental sustainability” (§2 and §14 of the Background and §59 of the Statement), “balanced spatial development” (§54), “MDG 7” (Background §5), PDP (§58), ILO “core labour standards” (§48), “mitigation hierarchy” (§65 primo) and “protected area” (§63bis).

4. There are terms defined in the glossary but not used in the main text, such as acquis communautaire, environmental acquis, Bern Convention, Corporate Governance (EIB), ESIAF and its full name, and ISO 14000. Their definitions are defunct vestiges of the first draft of the Statement.⁸

⁶ See EIB press release of 17th October 2008
⁷ The Bank’s web page with that title does not define it: EIB environmental sustainability
⁸ Moreover, there is duplication between certain terms used in endnotes and terms defined in the Glossary. Examples are the Aarhus Regulation and Ramsar.
5. Some paragraphs contain two or more good points, which however suffer from their mutual proximity. Separation of concepts would assist the reader. For example, the relation of “company property” to “health and safety” in §53 is unclear. Other examples are in §§ 4 and 11, combining business opportunity with business risk, and §20.

6. The statement might usefully include a recapitulative table showing whether a standard or principle applies outside the EU as well as within.

V. Chapter-by-Chapter Commentary

1. Background

This section of the Statement is said to be outside the Statement and to have been outside the scope of consultation. Nevertheless, certain principles are as clearly stated in the Background as in the core of the Statement. Only one of its paragraphs, namely §5, is strictly about background. The rest are about context, summary, principles, priorities, sources, and exposition.

The following paragraphs of the Background call for especial comment:

§5: Climate change is not only an environmental challenge; it is challenge, tout court. To treat this global matter as another, albeit important, environmental matter understates the scale and urgency of the needed response.

§8: Social well-being. Social and environmental policies might benefit from separate treatment. In the following respects, the two policy fields require different approaches:

- Social issues are often about soft law, while environmental issues are usually about hard, or “black letter”, law;
- Social claims concern moral and social rights of individuals, whereas the environment concerns physical impacts on human life;
- Most social issues concern process, while the environmental concern output;
- Social issues use the language of human rights, while environment relates to welfare;
- Investment projects may benefit the environment but will rarely induce positive respect for social rights.

While it is not necessary to split the issues, an added paragraph or two could let the reader better grasp the different levels of diligence and accountability practised and accepted by the Bank.

In §16, fourth line, the word “authority” should be changed to “intermediary”.

Paragraphs §§18 and 19 are critical. They deserve greater prominence in the body of the Statement. §18 raises doubts on the Bank’s consistency. For instance, the mention of “mandatory... requirements” implies that other requirements of the Bank are not mandatory.
Secondly, the Bank here reserves the right to apply “higher standards” as a matter of, among other things, “individual practice”. This needs a fresh look, since it is oxymoronic, in that an individual approach is the antithesis of a standard.

2. The Statement

2.1 Preamble

§7, last sentence, could be expanded to express the Bank’s readiness to admit evidence from NGOs and other stakeholders (as defined in the glossary) on the impact of a project, and to allow them time to assemble their evidence in the environmental assessment (see also §9 and §14(b) of the Background and §59).

§10, last sentence, speaks of the financing of institutions, whereas the Bank is confined to lending for projects. It may not lend for general purposes.

§11 treats two entirely separate issues, namely (1) new financial instruments and (2) viability criteria. It may be better to separate them.

§13: The last sentence, on the “polluter pays” principle, duplicates other passages (e.g. §§ 23, 27 and 63 primo), and may be dispensed with. It has no relevance to the Bank, except where it might require the borrower to compensate persons affected by a project.

§20 is a key statement. It is complex and falls into two parts. That would be made clearer in the text, if the word “where” were added after the second “and/or”. If the paragraph means that the Bank will decline to finance a project compliant with European law, if it nevertheless leaves significant adverse impacts, the statement is admirable. If it does not mean this, it may need clarification.

2.1.1 Precautionary Principle

§23 mentions the precautionary principle, as one of the consequences of the axiomatic “high level of environmental protection” imposed by Article 174(2) of the EC Treaty. This principle should be central to the Bank’s approach to the environment. It receives too little attention in this Statement. The Statement only applies it to the borrower (§24), while it should also apply to the Bank itself. The Commission’s communication to the Council of 2nd February 20009 considers the principle, and the Council’s Resolution on the Precautionary Principle, promulgated at Nice on 4th December 2000, calls on all EU institutions to apply the principle in their activities10. As the communication states, the principle applies to decisions in all fields.

The Bank could adapt its working methods to give better expression to the principle. Since there is no single legislative or judicial definition of the principle, one may suggest a definition that fits the Bank. It might run as follows:

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10 At point 2, the Council: “Considers that the precautionary principle applies to the policies and action of the Community and its Member States and concerns action by public authorities both at the level of the Community institutions and...”
The Bank shall put human well-being before economic interests. It shall take all proportionate means to ensure that it does not finance or assist in any investment project that does not respect applicable EU law or national law or which may do material harm to humans, biodiversity or ecosystems. The Bank shall ensure that it obtains all information reasonably necessary to ascertain that this test is met. For that purpose, it shall take into account reports from CSOs and minority technical opinions, and may, where appropriate, require the promoter to conduct a more extended assessment than the EIA Directive or other applicable law requires.

While some elements of this definition are contained in the Statement, there is no all-embracing statement of the principle.

2.2 Environmental and Social Principles

§24 refers to “significant and irreversible damage”. The more common standard (see the UNFCCC, the Rio Declaration and other treaties as cited in de Sadeleer, Environmental Principles, OUP 2003 at p 163) is “significant or reversible damage”. The paragraph should align itself to the latter phrase.

§28 is the only paragraph in this chapter that deals with social principles. It would be worth placing it in a separate chapter.

2.3 General Environmental Standards

§30 in part repeats §§18 and 19. The first sentence fails to make it clear whether international practice ranks above or below EU law. Of course, international principles, to which the EU has subscribed, necessarily form part of EU law.

§33: Please distinguish between procedural standards and process standards, as defined in the glossary but not mentioned elsewhere. Are they identical?

2.4 Environmental Standards in the EU and Enlargement Countries

§34: Please merge the second and third bullets, since international conventions signed by the EU are on an equal footing to EU environmental law, if not higher.

2.5 Environmental Standards in the Rest of the World

§37 should state that the EU standards apply, unless the borrower demonstrates that they are not feasible. The paragraph should show that the Bank puts the burden of proof on the borrower to show either (a) that the national law is superior to the EU law, or (b) that to apply EU law is not feasible.

§42 seems to give and to take at the same time. There is no need to state that the Bank may accept other lenders’ policies, except if they are arguably weaker or narrower than those of the EU. If that is the intent, it is better to say so. If not, co-financiers may be surprised to find the Bank, as latecomer, insists on a standard incompatible with the terms agreed by the original lender and the borrower. Please delete or strengthen the paragraph.
2.6 Social Standards – Human Rights Approach

Please state in its title that this chapter applies inside and outside the EU.

§44 might avoid an initial sense of ambiguity by being worded thus: “The Bank does not finance projects which breach the Bank’s social standards or violate human rights.” Like §28, this paragraph effectively puts human rights above human welfare.

The Bank might strive to clarify its position. The public’s right to give or withhold consent, for instance, might work to the detriment of welfare. Where would the Bank stand, if such a conflict of principle arose?

The Bank’s social standards, mentioned here, are left undefined. The relation between undefined social standards and the social principles of §28 is unclear.

§45 is obscure. Firstly, it does not state how the EIB determines whether a project might breed conflict. Secondly, on a project in a post-conflict country, should the Bank to be more cautious or to be more tolerant? Perhaps both?

2.7 Cultural Heritage

In §55 and §56, it would be well to clarify whether the Bank is imposing a test higher than the test laid down by the relevant international convention and applied under §54. Does the Bank assume that national law or EU law conforms to the convention, absent contrary argument from any source?

In §55 it would be well to recognise that not all cultural practices are linked to cultural sites or objects. They deserve independent protection.

2.8 Consultation, Participation and Public Disclosure

This chapter about procedures falls strangely between substantive rules relating to cultural heritage and biological diversity.

In §58 please cut down on the four uses of the word “meaningful” for reasons of superfluity. Please also cut back on the references to dialogue, and look again at the sense of the paragraph.

It would be useful to state here, if not by way of amendment to the Bank’s statement on PDP, the attitude of the Bank towards a borrower’s disclosure of the finance contract. Since the contract is the key to understanding how the Bank interprets and implements certain of the commitments made in this Statement, the Bank could fittingly declare that it will require all public borrowers, if not all private borrowers, to disclose their environmental covenants towards the Bank, or agree to their disclosure by the Bank.

11 In the light of the European Ombudsman’s comments in the case 948/2006/BU
2.9 Biological Diversity

While, in §62, it is good to endorse the UN’s Millennium Ecosystem Assessment, the cited figure of 60% for the proportion of downgraded ecosystem services is an isolated statistic that means little by itself. A more general statement about decline of ecosystems might fit the context better.

In §64 primo, the term “critical habitat” may not be ideal. It is defined, more restrictively than here, in the US Environment Protection Act. It seems not to be defined in EU legislation. The definition given in the Statement also suffers in that it describes not so much a habitat as a site.14

2.10 Climate Change

As the Statement says at §5 of the Background, Climate Change is one of two greatest human challenges of the twenty-first century. Yet the Statement devotes only one page out of twenty-one to the subject. Paragraph §64 bis is a broad statement without operational significance, and it is hardly adequate to speak of “climate-friendly” lending (§65). The author sets out below some brief proposals by which the Bank might give due weight to this defining preoccupation of our age.

In §65 bis, the reference to forests is too wide. The Bank has a limited role to play in protection of natural forests. Its mandates covers commercially exploited forests and not land use in general. Perhaps its mandates should be expanded.

In §66 bis, it would be fitting to state that the cost of emissions are not only calculated but also taken into account, in determining whether a project meets the Bank’s target for economic rate of return.

In §69, the study of whether projects are robust to withstand extreme climatic events is more a matter of banking prudence than of environmental policy.

§70 is unchanged from the text of seven months ago. One wonders what progress has been made with other IFIs towards agreeing on a common methodology for measuring and reporting the carbon footprint of projects.

This chapter could include a bolder exposition of the Bank’s vision on climate change. Here are some proposals:

- Draw up and publish a provisional methodology and metric for determining the carbon footprint of the Bank’s projects, starting with large;
- Work towards agreeing a common metric with governments and other institutions;

12 http://www.millenniumassessment.org/en/About.aspx#1

13 Defined in the EU Habitats Directive thus: “natural habitats means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural.”

14 Defined thus: “site means a geographically defined area whose extent is clearly delineated”
• Work towards a phased target of reducing and eliminating lending to projects with a high carbon footprint intensity;
• Progressively require borrowers to buy offsets for GHG emissions, even if they are covered by free EU allocated emission rights or are outside the European carbon trading scheme;
• Apply the precautionary principle in requiring all the volatile emissions of a project be identified and eliminated, unless their radiative forcing effect is not measured and compensated;
• Expand carbon investment funds and link to Bank lending;
• Articulate a Bank policy favourable to experimental renewable energy projects and public buildings’ energy efficiency;
• Apply to Bank-financed projects higher energy efficiency standards than EU norms, profiting from the Bank’s bargaining power in the present financial market.

VI. Summary

The Bank has work to do to reflect the principle that, as a Community body, the EIB should act transparently and be at the service of the citizen.15 This Statement offers an occasion to do so. The Bank has not quite taken it.

The Bank should aim for a participatory process of risk assessment and it should better define the where, the when and the how of due diligence. Adoption of the precautionary principle to the Bank’s own decisions is a way to do this.

The Bank should collect, as in section II above, and state, following the model of its open procurement requirement, the instances where it applies a higher environmental or social standard or principle than EU law requires.

The Bank should show how it handles uncertainty in the meaning or application of the EIA Directive or any other EU environmental law.

Finally, the Statement should show a bolder response towards the Bank’s acknowledged challenge of climate change.


15 A duty recalled by the European Ombudsman in case 948/2006/BU at §1.15.