



Fatal Transaction's submission on EIB Statement of Environmental and Social Principles and Standards

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I. The European objectives on good governance and corporate transparency

The European Commission reinforced the EIB's mandate that projects "eligible for bank financing outside of the European Community is only possible when the Bank participates in implementing the Union's development aid and cooperation policies."¹ The mandate was adopted by the Council in December 2006, which authorises the EIB to lend up to € 27.8 billion with an EU guarantee. The Council Decision requires that "the consistency of the Bank's external actions with the external policies and objectives of the Community to be strengthened. The terms and conditions of this reinforced cooperation and policy dialogue are to be set out in a specific Memorandum of Understanding to be concluded between the EIB and the relevant Commission Directorate Generals."

The legal basis for development cooperation is integrated in article 117 of the "*Treaty Establishing the European Community*". In accordance with the article, the purpose of the Community policy in the sphere of development cooperation is to foster, among others, the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them. The same article stipulates that the European Commission "shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms." It has therefore developed a broad spectrum of external relations tools such as trade policy, development cooperation, cooperation under bilateral and multilateral agreements, humanitarian aid and financial assistance. In the end, Europe wants to project a coherent role as a global partner and therefore also includes external aspects in its internal policies (energy, environment).

The EIB should comply with the European Commission's objectives in these papers and programmes, such as good governance, the fight against corruption, the protection of human rights and transparency. It is our understanding that the statement should include issues such as good governance, the fight against corruption, transparency at corporate level (such as EITI), and conflict sensitivity. This last point is also included in the Commission's strategy on conflict prevention. In practice, this means that when Country Strategy Papers and Indicative Programmes are prepared, risk factors are systematically checked. For that purpose, the Commission's geographical services are using conflict indicators. In relation to this, the Commission has developed a checklist for root causes of conflict/early-warning indicators. On the basis of this conflict analysis, the EIB should assess potential underlying causes of conflict that could influence the promotor's activities.

II. EIB's Statement on Biodiversity

Fatal Transactions' comments on No. 43, 44, 45, 46 and 47 of the EIB Statement of Environmental and Social Principles and Standards, version June 2008, *videlicet* in the sphere of respecting the legal obligations of countries that signed on to the Ramsar, Bonn and Bern Conventions.

- The EIB should go beyond the legal obligations of the Ramsar Convention. This implies that they should neither support activities in wetlands nor outside the boundaries of wetlands that have negative impact on wetlands. Wetlands have an international significance in terms of ecology, botany, zoology, limnology or hydrology. This fundamental policy should not only apply to the contracting parties to

¹ Council Decision of 19 December 2006 granting a Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community.

the Ramsar Convention but also to those that have not signed on to the convention. It should also not be limited to the listed wetlands in the contracting parties. Article 4 of the Ramsar Convention stipulates the obligations of contracting parties that they “shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening.” The same vision should be supported globally.

- The EIB should not support activities that negatively impact the habitats and migratory routes of migratory species enlisted in the annex I and II of the Convention on Migratory Species. The EIB should ensure that appropriate safeguard measures are in place to avoid indirect impacts of promotor’s activities on these species e.g. capturing or killing species by employees or by relocated people.
- The EIB should not support activities in and nearby habitats and corridors of fauna and flora that are critically endangered, endangered, vulnerable and near threatened. The species are listed in the IUCN Red List of Threatened Species. The EIB should ensure that appropriate safeguard measures are in place to avoid indirect impacts of promotor’s activities on these species e.g. capturing or killing species by employees or by relocated people.
- For all projects, the EIB should ensure that potential negative impact on biodiversity is analysed by independent experts. The experts should make its analysis publicly available. The EIB should ensure that losses of biodiversity, habitats and corridors are avoided or compensated. This goes beyond the EIB’s policy that only requires that significant damage (to protected sites or outside officially protected sites) should be avoided. The EIB should require from the promotor that the data on biodiversity impact and the compensation measures are discussed ex-ante with civil society.
- The EIB should integrate the spirit of the EU Environmental Liability Directive for projects outside of European territory. A legal aspect can be found in article 174, para 4 of the Treaty Establishing the European Community which stipulates that “within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organizations” on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

III. EIB’s policy on the projection and promotion of human rights

Fatal Transactions’ comments on No. 40 of the EIB Statement of Environmental and Social Principles and Standards, version June 2008, *videlicet* the protection of people’s rights.

On human rights, we distinct two main aspects: the promotion of human rights and the protection of human rights. It is fundamental to note that the Commission’s human rights policy is one of “*contributing to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms*”. This is stipulated in Articles 177(2) and 181a(2) of the Treaty establishing the European Community stipulates that the European Community.

III.1 The promotion of human rights

The promotion of human rights is included in many agreements and Commission’s papers. One of the European Commission’s tools is its Strategy for Africa (2005) in which the Commission promotes the sound management of natural resources in Africa in order to tackle the environmental root causes of many conflicts.² It concludes, “the only way to protect the livelihood of Africa’s poor in the medium and long term is to making Africa’s development sustainable.”³ In this regard, the European Commission sees the protection of human rights

² EU Strategy for Africa: towards a Euro-African Pact to accelerate Africa’s development, page 3.

³ *Ibid*, page 6.

as one of the key elements to reach a sustainable natural resources management.⁴

The EIB has, however, neither a clear nor correct view on human rights promotion. Its minimum social (including human rights) standards only require from the promotor to develop an acceptable resettlement action plan when “significant physical displacement is unavoidable” and to prepare an acceptable Indigenous Peoples Development Plan when “the customary rights to land and resources of Indigenous People are significantly affected”. The Bank does not explain significant.

The Bank’s view on human rights is not in compliance with the Member States’ international agreed obligation to fulfill the fundamental human rights, which is defined as an affirmative duty to take appropriate measures to ensure that the human rights standard is attained. All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally, and in a fair manner, on the same footing, and with the same emphasis. Therefore, international law does not distinct between significantly and non-significantly affected rights. Putting a threshold in place that only significant effects should be resolved, is inappropriate.

The Statement should therefore be corrected and taken into account international and European law and good practices. One fundamental element is that indigenous peoples have a distinctive and profound spiritual and material relationship with their lands and with the air, waters, coastal sea, ice, flora, fauna and other resources. This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities.⁵ In summary, each of these examples underscores a number of elements that are unique to indigenous peoples: (i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability.⁶ One of the most serious problems in the EIB’s Statement is its failure to recognize the existence of indigenous land use, occupancy and ownership, and the failure to accord appropriate measures to respect and protect that use, occupancy or ownership. The Statement also does not provide the indigenous peoples their right free and informed consent to activities affecting their lands, territories and resources, which is recognized in various international instruments. The importance of the right to free, prior and informed consent has been stressed in the European Council Resolution of 30 November 1998 on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Members States.⁷

The Bank also foresees that “people negatively impacted by projects should have their livelihoods restored and/ or adequately compensated”. The Bank does not identify minimum elements that should be covered. We recommend that it should make reference and implement international good practices. Recognizing problems related to displacements, the Commission on Human Rights, by its resolution 2000/9 of 17 April 2000, appointed a Special Rapporteur on adequate housing, whose mandate is to focus on adequate housing as a component of the right to an adequate standard of living. The Special Rapporteur on adequate housing developed “Basic principles and guidelines on development-based evictions and displacement” and urges the governments and the international community to incorporate the provisions. While the principles and guidelines are not legally binding, “they

⁴ *Ibid*, pages 7 and 35.

⁵ Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, E/CN.4/Sub.2/2001/21, 11 June 2001 at para 121.

⁶ *Ibid*, at para 20.

⁷ European Commission, Programming Guide for Strategy Papers, January 2006.

are based on international human rights law”⁸. At a minimum, the guidelines require that, “regardless of the circumstances and without discrimination⁹, evicted persons or groups, especially those who are unable to provide for themselves, need to have safe and secure access to: (a) essential food, potable drinking water and sanitation; (b) basic shelter and housing¹⁰; (c) appropriate clothing; (d) essential medical services; (e) livelihood sources; (f) fodder for livestock and access to common property resources previously depended upon; and (g) education for children and childcare facilities. They also need to ensure that members of the same extended family or community are not separated as a result of evictions.”¹¹ The guidelines further state that “identified relocation sites need to include: (a) security of tenure; (b) services, materials, facilities and infrastructure such as potable drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and to natural and common resources, where appropriate; (c) affordable housing; (d) habitable housing providing inhabitants with adequate space, protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors, and ensuring physical safety of occupants; (e) accessibility for disadvantaged groups; (f) access to employment options, health-care services, schools, childcare centres and other social facilities, whether in urban or rural areas and (g) culturally appropriate housing. In order to ensure security of the home, adequate housing should also include the following essential elements: privacy and security; participation in decision-making; freedom from violence, and access to remedies for any violations suffered.”¹²

III.2. The protection of human rights

The protection of human rights by European Member States against businesses’ human rights abuses within their territories is established in international law. Consequently, the human rights norms may be applied on business enterprises indirectly through national courts and tribunals.

There is also a growing debate on the extraterritoriality principle. For instance, the International Covenant on Economic, Social and Cultural Rights provides that each State Party to the Covenant “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights.”¹³ In order to achieve the obligation, the UN Committee on Economic, Social and Cultural Rights noted on several occasions that State parties have an obligation to protect the rights of people under the jurisdiction of other States when they would be threatened by the activities

⁸ Para 3 of the Basic principles and guidelines on development-based evictions and displacement. The basic principles and guidelines can be found on the website of the Office of the United Nations Human Rights Commissioner for Human Rights (annex of the document E/CN.4/2006/41): <http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/59/PDF/G0611859.pdf?OpenElement>.

⁹ The term “discrimination” is not further explained and In General Comment 7, the UN Committee states that the non-discrimination provisions in articles 2.2 and 3 “impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.” General Comment 7 (General Comments), The right to adequate housing (Art.11.1): forced evictions:.20/05/97. The right to adequate housing (art. 11.1 of the Covenant): forced evictions.

¹⁰ Adequate housing must be in a place that enables access to employment, primary health-care, education and other social services and civic amenities. Housing configuration, spatial design and site/community organization should be determined locally and in harmony with a community’s cultural preferences and attributes.

¹¹ Para 52 of the Basic principles and guidelines on development-based evictions and displacement.

¹² *Ibid*, Para 55.

¹³ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.



of private actors whose behaviour a State may decisively influence.¹⁴ We recommend the EIB to prepare and discuss a vision on this issue.

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¹⁴ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4 (2000), para. 39; U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water, U.N. Doc. E/C.12/2002/11. 26 November 2002. Paragraph 31. See among others O. Deschutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, December 2006.



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