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Working Paper No. 72 - September 2011

A RESPONSIBLE LENDER? THE EUROPEAN INVESTMENT BANK'S ENVIRONMENTAL, SOCIAL AND HUMAN RIGHTS ACCOUNTABILITY

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ABSTRACT

This article examines the principles of accountability applied by the European Investment Bank in comparison with the practices of other Multilateral Lending Institutions. After a brief description of the EIB and its activities, the substantive and procedural principles governing the EIB's external accountability are reviewed. The substantive accountability principles considered are the applicable rules of the EU legal order and the voluntary human rights, social and environmental principles and standards which the EIB has identified for itself and committed to follow throughout its operations. The article evaluates the extent to which these norms form a credible normative framework against which the EIB's lending practices can be appraised. From a procedural accountability point of view, the article assesses the transparency and participation policies of the EIB, as well as the mechanisms offered to external stakeholders to seek redress from the EIB in case they are wronged by one of its decisions. The redress mechanisms analysed are the recent EIB's Complaints Office, the European Ombudsman and the Court of Justice. We conclude that the EIB should take more advantage of its being subjected to the EU human rights, social and environmental rules and of the EU judicial apparatus in order to upgrade its substantive and procedural accountability towards external stakeholders.

KEY WORDS
European Investment Bank, Accountability, Human Rights, Social Rights, Environment, Multilateral Lending Institutions, EU Law.

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I. INTRODUCTION

This article examines the principles of accountability applied by the European Investment Bank (EIB) in comparison with those of other Multilateral Lending Institutions (MLIs).[1] Compared to other MLIs, rather little was written on the EIB, the European Union (EU)'s long-standing MLI, though it is the world's major MLI in terms of lending activity.[2] Until recently the EIB was criticized for its weak accountability standards, though it now seems to be engaged into reform so as to improve its practices on this account. After a brief presentation of the EIB, its mandate and institutional design, we analyse and appraise its substantive and procedural accountability principles and practices. Our appraisal specifically takes into account the fact that the EIB forms part of the EU legal order and the opportunities this may offer to achieve and set best practices with regard to its accountability.

II. MULTILATERAL LENDING INSTITUTIONS, THEIR IMPACT AND ACCOUNTABILITY

As powerful development actors with considerable influence on the realization of large-scale investment projects such as infrastructure projects (e.g. building of roads, schools, hospitals, dams) or industrial projects for the exploitation of natural resources (e.g. pipelines, mining, oil drilling), MLIs have a potentially huge impact on living conditions where the projects they finance are carried out. Through financing, they contribute to the development of recipient countries, by providing capital and technical assistance, under conditions which would not be available otherwise. MLIs

[1] We define MLIs as (organs of) international organisations incorporated as banks providing finance solutions (through e.g. loans or loan guarantees) to public or private institutions for investment in development projects.

[2] See C. Wright, 'European Investment Bank: Promoting Sustainable Development, "Where Appropriate"', Study for CEE Bankwatch Network, 2007, http://www.bankwatch.org/documents/EIB_where_appropriate.pdf, p. 55.

are a great asset for promoting worldwide development. Conversely, the investment projects financed by MLIs may also carry negative externalities requiring careful oversight. Such projects sometimes involve the resettlement of local populations, the transformation of indigenous lands, deforestation, pollution, employment of workers for heavy tasks, and at times, cooperation with entities having a poor record for democracy and human rights. This impact, as well as the leverage that MLIs possess – through loan conditionality – to curb the negative aspects of investment projects, have led certain actors to demand increased accountability for MLIs' financing practices under human rights, social and environmental counts. Such demands were spurred by the revelation that certain projects had harmed local populations and the environment.

Accountability is our key word. We define it as a set of principles and procedures under which an actor accounts for the impact of its actions – as a governing entity or more generally as a power wielder – on the individuals, groups or interests that it governs or affects. Accountability is a universally recognized governance principle applicable to every institution of a public nature to ensure the latter's abidance by the democratic standards of our times.[3] We focus on accountability for human rights, social and environmental impacts, and towards stakeholders that are external to the entity in question ('the public').[4] Such accountability relationship to external stakeholders has been incrementally operationalized by MLIs in the last two decades. In order to meet external accountability demands, MLIs have since the early 1990s been putting in place accountability schemes accessible to stakeholders impacted from human rights, social or environmental points of views. Such schemes contain substantive and procedural sets of norms.[5] '*Substantive accountability norms*' are the material human rights, social and environmental rules, principles and standards by which MLIs are bound or to which they commit. They set ground rules for the projects MLIs finance. In theory, each project applying for financing must be screened against, and comply with, such ground rules before receiving finance. '*Procedural accountability norms*' refer to procedures that ensure that the substantive norms are applied in the MLI's activities and that call the organization to account in case they were not. Such procedural norms are of a prospective or retrospective nature. Prospective procedures refer to those mechanisms through which MLIs seek to '*take into account*', i.e. collect and input, stakeholder views, preferences and interests in policies or operational decisions (principle of responsiveness, *viz.* participation). Retrospective procedures are those mechanisms through which MLIs '*render account*' for their failure to abide by applicable substantive norms, by disciplining faulty agents and tracking down dysfunctions and by providing redress to victims.

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[3] A. Wolf, 'Symposium on Accountability in Public Administration: Reconciling Democracy, Efficiency and Ethics – Introduction', 66 *International Review of Administrative Sciences* 15 (2000), p. 16.

[4] On the distinction between 'internal' accountability (shareholder model), i.e. between an institution and its constituencies (e.g. the EIB and its shareholders); and 'external' accountability (stakeholder model), owed by an institution to the wider public, and in particular to the people affected by its activities, see R. Keohane, 'Global Governance and Democratic Accountability', in D. Held & M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance*, Cambridge, Polity Press, 2003, p. 130.

[5] See E. Suzuki & S. Nanwani, 'Responsibility of International Organizations: the Accountability Mechanisms of Multilateral Development Banks', 27 *Michigan Journal of International Law* 177 (2005-2006), pp. 203 ff.

III. THE EIB: A LONE STAR IN THE EU UNIVERSE

1. Institutional Status of the EIB

Present in the Treaties since 1957, the EIB is a somewhat strange object in the EU galaxy.[6] The European Treaties did not classify it under any sort of institutional category, and therefore the EIB must *a contrario* be seen as neither an EU 'institution'[7], an EU 'agency' nor an EU 'advisory body'. The EIB is therefore to be classified in the remaining category of EU organs, as a 'body'.[8] Bodies normally form integral part of the EU institutional set up,[9] and as such are subject to the Treaties, including the Charter of Fundamental Rights. However, the EIB is endowed – for the purpose of conducting its banking activities – with an international legal personality distinct from that of the Union itself (Art. 308(1) TFEU).[10] It is also organized as an autonomous corporate structure whose shareholders are the EU Member States, and is governed by a specific Statute laid down in Protocol No. 5 to the Treaties. And indeed, the ECJ has found that its status as a financial institution justifies that it may to some extent operate 'independently' from the rest of the EU order, as it stated that '[i]n order to perform the tasks assigned to it by […] the Treaty the [EIB] must be able to act in complete independence on the financial markets, like any other bank .[11]

However, according to Art. 1 of its Statute, the EIB 'shall perform its functions and carry on its activities in accordance with the provisions of the Treaties and of this Statute'. It has been argued,[12] and so judged by the European Court of Justice (ECJ), that the EIB's distinct legal personality and large 'degree of operational and institutional autonomy does however not mean that it is totally separated from the Communities and exempt from every rule of Community law. It is clear in particular from Article 130 of the Treaty [now Art. 309 TFEU] that the Bank is intended to contribute towards the attainment of the Community's objectives and by virtue of the Treaty forms part of the framework of the Community.'[13] The 'independence' of the EIB from the EU order would rather seek to protect it from interference by other EU organs 'in the management of its affairs, in particular in the sphere of financial operations',[14] and must be qualified from a public accountability perspective. This article attempts to make sense, from an accountability point of view, of the ambiguous nature of the EIB both as an EU body and as an independent financial institution.

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[6] See generally D. R. Dunnett, 'The European Investment Bank: Autonomous Instrument of Common Policy?', 31 *Common Market Law Review* 721 (1994).
[7] See Art. 13 (1) of the Treaty on European Union.
[8] The EIB is unequivocally designated as such in the case-law of the ECJ. An early case is ECJ, Case 110/75, *Mills v. European Investment Bank*, [1976], ECR p. 955. Recently, see General Court, Case T-461/08, *Evropaïki Dynamiki v. EIB*, [2011] not yet published in the ECR, para. 46. See also K. Lenaerts & P. Van Nuffel, *European Union Law*, London, Sweet & Maxwell, 2011, p. 552.
[9] See http://europa.eu/about-eu/institutions-bodies/index_en.htm.
[10] Dunnett, *supra* n 6, p. 732. Within EU Member States, see Art. 26 of the EIB Statute, annexed as the fifth Protocol to the Treaties, and C.D.C. Spirou, *La Banque Européenne d'Investissement – Aspects juridiques des ses Opérations de Financement*, Lausanne, Université de Lausanne, 1989, pp. 41 ff.
[11] ECJ, Case 85/86, *Commission v. Board of Governors*, [1988] ECR 1988, 1281, para 28.
[12] See Opinion of Advocate General Mancini in Case 85/86, *Commission v. Board of Governors* [1988] ECR 1988, p. 1281, para. 12.
[13] ECJ, Case 85/86, *supra* n 11, para. 29. See also L. Amoyel, 'Mainstreaming Human Rights in the European Investment Bank', 3 *Baltic Yearbook of International Law* 253 (2003), p. 257.
[14] ECJ, Case C-15/00, *Commission v. EIB* [2003] ECR 2003 p. I-07281, para. 102.

2. The EIB's Multi-Faceted Mandate

Art. 309 TFEU defines the 'task of the EIB' as follows:

> [T]o contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the internal market in the interest of the Union. For this purpose the Bank shall, operating on a non-profit-making basis, grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:
> (a) projects for developing less-developed regions;
> (b) projects for modernising or converting undertakings or for developing fresh activities called for by the establishment or functioning of the internal market, where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States;
> (c) projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.
> In carrying out its task, the Bank shall facilitate the financing of investment programmes in conjunction with assistance from the Structural Funds and other Union Financial Instruments.

Art. 309 only refers to activities to be carried out inside the Union, although the EIB's activities encompass both an intra-EU as well as an extra-EU dimension.[15] The EIB's historical, intra-EU role made it an instrument of economic, social and territorial cohesion of the Union. More precisely, the EIB is programmed for 'promot[ing the EU's] overall harmonious development', in particular by 'reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.'[16] However, the mandate of the EIB also extends outside the EU[17], in the framework of the Union's external relations policies, in particular development cooperation.[18] This implies striving to fulfill the EU external relations objectives listed in Art. 21 TFEU, among which feature human rights, as well as the protection of the environment.[19] Accordingly, Art. 209 TFEU calls upon the EIB to contribute to implementing the Union's development cooperation policies. The role of the EIB in this ambit was recognized by the EU and the Member States in the 'European Consensus on Development'.[20] The EIB has been carrying out extra-EU activities since 1963, and in order not to affect the EIB's credit standing as a result of extra-EU operations, the Union's budget now guarantees EIB loans made in 'eligible' countries against political and sovereign risks. This guarantee mechanism, commonly referred to as the EIB's 'External Mandate',[21] identifies policy objectives which the EIB should

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[15] The proportion of projects funded by the EIB is still hugely in favour of intra-EU projects (in a proportion of about 9/10). See http://www.eib.org/projects/loans/index.htm.

[16] See Arts 174 and 175 TFEU.

[17] See however Art. 16(1) Statute providing that the EIB may grant finance outside the territory of EU Member States, although this requires a vote at a qualified majority by the Board of Governors.

[18] See ECJ, Case C-155/07, *Parliament v. Council* [2008] ECR 2008 p. I-8103, paras. 57 ff.

[19] See Decision of the European Parliament and of the Council of 13 July 2009 granting a Community Guarantee to the European Investment Bank against Losses under Loans and Loan Guarantees for Projects Outside the Community, 633/2009/EC, *OJ L* 190, 22/7/2009, pp. 1-10, recital 8 (hereinafter the 'External Mandate'), and European Commission, Proposal for a Decision of the European Parliament and of the Council granting an EU guarantee to the European Investment Bank against losses under loans and guarantees for projects outside the European Union, 21/4/2010, COM(2010) 174 final, recital 12 (hereinafter the 'Proposal for a New External Mandate'), citing Art. 21 TFEU.

[20] European Consensus on Development: Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled 'The European Consensus on Development', *OJ* C 46, 24/2/2006, para 119.

[21] See the External Mandate, *supra* n 19.

pursue in the eligible countries. Geographically, the External Mandate covers Pre-Accession countries; Neighbourhood and Partnership Countries; Asian and Latin American countries; and South Africa. Cooperation with the ACP Countries and Overseas Countries and Territories ('OCT') is directly covered by the Cotonou Agreement[22] and the Overseas Association Decision.[23] The EIB's External Mandate must create synergies with the EU external relations policies and its various funds.[24] The EU institutions oversee the External Mandate as the Commission must report annually on it to the Parliament and the Council.[25]

The increasing complexity of the EIB's mandate has been criticized as blurring its real role in intra- and extra-EU development, and as challenging its capacity to pursue both its banking objectives and the EU's various policies. From a *sui generis* instrument of economic planning within the Union, the EIB would have evolved into a financial arm implementing an increasingly heterogeneous range of internal and external policies, always arguably 'in the interest of the Union.'[26] For example, as a response to the current economic crisis, the Commission requested the EIB to provide funds and programmes as part of its 'European Economic Recovery Plan'.[27] The EIB accordingly increased its lending volume by 30% (15 billion Euros) for the period 2009-2010, for the following objectives: support for SMEs and mid-cap companies; energy, climate change and infrastructure; and convergence lending to poorer regions.[28] NGOs criticized these measures, in particular the support to SMEs through 'global loans' (see *infra*), as lacking transparency and accountability.[29]

Also, the expansion of the EIB's mandate constrains its staff resources, which raises doubts as to its ability to make truly informed decisions, notably about the human rights, social and environmental impacts of every investment project,[30] even though an 'Environment and Social Office' (ESO), composed of specialists in environmental, social and climate change issues was created in 2009. The ESO develops the EIB's policies on these issues and advises the Projects Directorate in assessing projects along these lines.[31] Still, the Mid-Term Review of the EIB's External Mandate for 2007-2013 (the 'Mid-Term Review'), carried out by a 'Steering Committee of Wise Persons'[32], recommended that the External Mandate of the EIB be 'streamlined' and

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[22] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, done at Cotonou, on 23 June 2000, *OJ* L 317/3, 15/12/2000. See particularly Art. 31, para. 5; Art. 76, para 1(d), and generally Annexes I and II of the Agreement.

[23] Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community, 2001/822/EC, *OJ* L 314, 30/11/2001, pp. 1–77.

[24] See External Mandate, *supra* n 19, recital 15.

[25] *Id.*, Art. 6.

[26] This vague phrase was used, sometimes uncritically, to justify all sorts of additions to the EIB's mandate. See Dunnett, *supra* n 6¸ pp. 721-727.

[27] See European Commission, 'A European Recovery Plan', 26/11/2008, COM(2008) 800 final, p. 7.

[28] See EIB, 'The Bank promoting European objectives – EIB anti-crisis measures', Briefing Note No. 01, 9/3/2009, http://www.eib.org/attachments/general/events/briefing2009_01_anti_crisis_en.pdf.

[29] See Counter Balance, 'European Investment Bank and the economic crisis', 28/8/2009, http://www.counterbalance-eib.org/?p=301; and Isabella Besedova, 'Missing in action - The winners, the losers and the unknowns of the European Investment Bank's anti-crisis SME offensive in central and eastern Europe', CEE Bankwatch Network, 10/2010, http://bankwatch.org/publications/missing-action-winners-losers-and-unknowns-european-investment-banks-anti-crisis-sme-of.

[30] European Commission, 'Report from the Commission to the European Parliament and the Council on the Mid-Term Review of the External Mandate of the EIB', 21/4/2010, COM(2010) 173 final, p. 10 (concluding notably that 'a broadening and increasingly ambitious EU external agenda points to the need for increased policy coherence […].'). See also A. Wilks, 'Corporate welfare and development deceptions – Why the European Investment Bank is failing to deliver outside the EU', Study for Counter Balance, 2/2010, http://www.counterbalance-eib.org/wp-content/uploads/2011/01/SReport-EN-web.pdf.

[31] See http://www.eib.org/projects/news/eibs-environment-and-social-office.htm?lang=-en.

[32] Chaired by former IMF Managing Director Michel Camdessus. See European Investment Bank, 'European Investment Bank's External Mandate 2007-2013 Mid-Term Review', 2/2010,

refocused on sectors in which the EIB can make a difference, such as climate change mitigation, infrastructure work, or SME support.[33] Accordingly, the Proposal for a New External Mandate Decision enjoins the Commission and the European External Action Service to develop country- or region-specific 'operational guidelines' to ensure that the EIB action is in line with the EU external relations policies.[34] However, the proposal also activates the 'optional mandate', i.e. a 2 bn Euros guarantee for climate change mitigation projects,[35] which creates a two-pronged External Mandate, with the 'General Mandate' and the 'Climate Change Mandate.'[36] Moreover, the proposal urges the EIB to 'progressively increase its activity in social sectors, such as health and education.'[37] In any event, the increasingly large and complex scope of EIB missions has implications for its accountability, with more people and places potentially impacted by its activities.

3. The EIB's Lending Activities

In light of its mandate, the EIB defines itself as a 'policy-driven public bank'[38] whose objective is to attain the EU's policy objectives.[39] In practice, this is achieved through (long-term) loans and loan guarantees (Art. 309 TFEU and 16 Statute) for public or private investment projects (Art. 19 Statute).[40] The EIB also borrows and invests on capital markets to finance itself (Art. 20 and 21 Statute). The EIB grants finance 'to the extent that other funds are not available elsewhere on reasonable terms' (Art. 16(1) Statute), and that other sources of financing are also used (Art. 16(2) Statute) for at least 50% of the investment costs of a project.[41] In addition, loans are made 'conditional either on a guarantee from the Member State in whose territory the investment will be carried out or on other adequate guarantees, or on the financial strength of the debtor' (Art. 16(3) Statute).

The EIB has set substantive priorities for its finance activities, differentiated between intra-[42] and extra-EU activities.[43] Such priorities derive from the EU policy objectives and, for out-of-EU loans, are enumerated in the External Mandate itself.[44] In this regard, coordination with EU institutions, agencies and funds is taking place to ensure synergies between EIB and EU policies.[45] Cooperation with other MLIs is also

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http://www.eib.org/attachments/documents/eib_external_mandate_2007-2013_mid-term_review.pdf (hereinafter the 'Mid-Term Review'). This Mid-Term Review was mandated by Art. 9 External Mandate.

[33] Mid-Term Review, *supra* n 32, pp. 11-13.

[34] Proposal for a New External Mandate, *supra* n 19, Arts 5 and 7.

[35] See and European Commission, 'Staff Working Document Accompanying the Proposal for a Decision of the European Parliament and the Council Granting an EU Guarantee to the European Investment Bank against Losses under Loans and Guarantees for Projects Outside the EU', 21/4/2010, SEC(2010)443 final, pp. 4-7.

[36] See the Proposal for a New External Mandate, *supra* n 19, Art. 2.

[37] *Id.*, Art. 3 para. 3.

[38] See item 'What is the EIB?' in the EIB's FAQs (http://www.eib.org/infocentre/faq/index.htm).

[39] See how the EIB plans to support EU policies in EIB, 'Corporate Operational Plan 2011-2013', http://www.eib.org/attachments/strategies/cop_2011_en.pdf (Hereafter the 'Corporate Operational Plan').

[40] The EIB actually offers a variegated portfolio of products (see http://www.eib.org/products/). 'Facilities' were set up in order to implement various EU policies pertaining to a certain region or to a certain topic. See e.g. the 'Facility for Euro-Mediterranean Investment and Partnership (FEMIP)', grouping all EIB activities in that region (http://www.eib.org/projects/regions/med/index.htm).

[41] See http://www.eib.org/products/loans/index.htm.

[42] See Corporate Operational Plan, *supra* n 39, Introduction.

[43] *Id.*

[44] In the current External Mandate (*supra* n 19), such objectives are described in the recitals, while in the Proposal for a New External Mandate, they are listed in the text of the decision itself (see *supra* n 19, Art. 3).

[45] See http://www.eib.org/about/partners/cooperation/index.htm. See also Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, *OJ* L 210/25, 31/7/2006.

in order (Art. 14 Statute).[46] The EIB operates on a non-profit-making basis, and its income should be adjusted to market conditions, and enable the EIB to meet its obligations, cover its expenses, and build a reserve fund (Art. 17 Statute). The EIB grants loans and guarantees along financing provided by other EU instruments such as the Structural and Cohesion Funds or, outside the EU, the numerous external relations instruments.[47] The EIB also conducts several 'Joint Actions' with private institutions, with EC and national institutions, or with other MLIs,[48] with which increased cooperation is encouraged by the External Mandate and the Mid-Term Review.[49]

Finally, in 1994, a new instrument was created alongside the EIB: the European Investment Fund (EIF).[50] The EIF is a self-standing investment fund providing financial intermediaries with products and solutions more specifically targeted at SMEs within the EU, the (potential) candidate and EFTA countries. A public-private partnership, the EIF is owned by the EIB, the Commission, and a number of other public and private institutions. The EIB and the EIF form together the EIB Group.[51]

4. The EIB's Organizational Framework

The EIB's peculiar organizational framework allows it to operate independently as a normal bank as much as possible. The Member States are the EIB's shareholders, and contribute to the capital in proportion of their economic weight (GDP) at the time of accession.[52] The EIB's organs are the Board of Governors, the Board of Directors, the Management Committee (exercising management functions), and the Audit Committee (for control purposes).

The Board of Governors is the highest organ of the EIB, and is composed of 27 Governors (one per shareholder), who are the Ministers designated by the Member States (generally Finance Ministers: see Art. 7(1) Statute). It 'lay[s] down general directives for the credit policy of the Bank, in accordance with the Union's objectives' and ensures that they are implemented (Art. 7(2) Statute). It sets the principles applicable to the finance operations decided by the Board of Directors (*infra*). It approves the Board of Directors' annual report and the financial statements, and may decide modifications of capital (Art. 7(3) Statute).

The Board of Directors comprises 28 principal members, one appointed by each Member State, and one by the Commission,[53] and 18 alternate directors (Art. 11 (1) and (2) Statute).[54] The Board may also co-opt non-voting expert members in the

[46] See also Art 4 External Mandate (*supra* n 19) and e.g. the Memorandum of Understanding between the European Commission, the European Investment Bank together with the European Investment Fund, and the European Bank for Reconstruction and Development in respect of Development outside the EU, 1/3/2011, http://www.ebrd.com/pages/news/press/2011/110301.shtml; or with regard to collaboration with the International Finance Corporation, see http://www.ifc.org/ifcext/westeurope.nsf/Content/EIB.
47 Such as the Instrument for Pre-Accession Assistance, the European Neighbourhood and Partnership Instrument, the Development Cooperation Instrument, or the Instrument for Stability.
[48] Corporate Operational Plan, *supra* n 39, p. 7.
[49] See External Mandate, *supra* n 19, recital 13 and 16, and Mid-Term Review, *supra* n 39, pp. 31-37.
[50] See generally http://www.eif.org/
[51] See the Statutes of the European Investment Fund, adopted on 14/6/1994, last amended 30/11/2007, http://www.eif.org/attachments/about/management/EIF_Statutes_30_11_2007.pdf.
[52] As at 1 April 2010, the Bank's subscribed capital amounted to more than EUR 232bn. See http://www.eib.org/about/structure/shareholders/index.htm.
[53] The DG Economic and Financial Affairs (ECFIN) represents the Commission in the EIB Board. See http://ec.europa.eu/economy_finance/financial_operations/coordination/eib/index_en.htm.
[54] Large shareholders may appoint more alternates than smaller ones.

EIB's fields of activity (Art. 11(4) Statute and Art. 15 Rules of Procedure[55]). The Board of Directors makes the finance decisions, and 'lay[s] down the terms and conditions constituting the general framework for the Bank's financing, guarantee and borrowing operations, in particular by approving the criteria for the fixing of interest rates, commission and other charges' (Art. 16(a) Rules of Procedure, and Art. 9(1) Statute). It also approves the financing and guarantee operations[56] and authorizes borrowing operations (Art. 16(a) Rules of Procedure). These operational decisions are normally made after proposals from the Management Committee (*infra*). More generally, the Board of Directors ensures 'that the Bank is properly run in accordance with the Treaty, the Statute, the directives laid down by the Board of Governors and the other texts governing the Bank's activity in the performance of its task under the Treaty' (Art. 9(1) Statute and Art. 16(a) para. 2 Rules of Procedure). It sets the EIB's management policy, ensures consistency among EIB policies, and oversees its financial equilibrium, etc. (Art. 16(a) Rules of Procedure). In all those tasks, the Board of Directors largely relies on proposals and initiatives from the Management Committee, to which it may delegate some of its functions (Art. 9(1) Statute).

The Management Committee conducts the daily business of the EIB. It is composed of a President (who presides without vote the Board of Directors: Art. 9(2) Statute) and eight Vice-Presidents (Art. 11(8) Statute). Its main task is to administer the EIB and to prepare the Board of Directors' financing and borrowing decisions (Art. 11(3) Statute).[57] The staff of the EIB is under the authority of the President of the Management Committee (Art. 11(7) Statute), who adopts organization and operation rules for the Bank's departments, including staff rules (Art. 21 Rules of Procedure).

Contrary to most other MLIs' voting patterns, voting power is not entirely aligned with capital weight at the EIB.[58]. Decisions must be adopted at a double majority, both of the members of the Board and of the amount of capital (the majority can be simple or qualified, Art. 8 Statute). The same sort of regime applies to the Board of Directors, even though decisions at a simple majority only require one third of the votes representing one half of the capital (Art. 12 Statute). Therefore, at least in the Board of Governors, voting rules act as safeguards against unilateral decisions made by large shareholders, while barring measures lacking their support. However, for out-of-EU EIB decisions, beneficiary countries have no vote at all, contrary to the usual rules of regional development banks.[59] Therefore, what is relatively egalitarian and progressive inside the EU is also quite conservative in excluding beneficiary countries from decisions on projects located outside the EU.

[55] EIB, 'Rules of Procedure of the European Investment Bank', 1/5/2004, http://www.eib.org/about/publications/rules-of-procedure.htm?lang=-en, hereafter 'Rules of Procedure'.

[56] Under Art. 19 Statute a system of checks and balances requires that opinions from the relevant Member State, the Commission and the Management Committee be sought prior to project approval. If the Commission or the Management Committee gives a negative opinion, the Board's decision must be unanimous to grant finance. If both the Commission and the Management Committee give negative opinions, the Board may not grant finance.

[57] Under Art. 11(4) Statute the Management Committee acts 'by a majority when delivering opinions on proposals for raising loans or granting of finance, in particular in the form of loans and guarantees'.

[58] For a comparative analysis of voting rules in Regional Development Banks, see E. R. Carrasco, W. Carrington & HJ. Lee, 'Governance and Accountability: The Regional Development Banks', 27 *Boston University International Law Journal* 1 (2009); J. W. Head, 'For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks', 52 *University of Kansas Law Review* 241 (2003-2004), pp. 267 and 299.

[59] MLIs often distinguish between 'beneficiary' Member States and the others. Still, beneficiary countries usually get a vote in lending decisions, which is not the case at the EIB for out-of-EU loans. See e.g. Agreement Establishing the Asian Development Bank, done at Manila on 4/12/1965, in force 22/8/1966, Art. 1, which limits lending to 'developing member countries in the region.' That status is determined by the Board of Governors (Art. 28 4), in which all members have (weighted) votes (Art. 27 and 33).

Finally, the EIB has a control organ, the Audit Committee, which verifies that 'the activities of the Bank conform to best banking practice', and that its operations have been conducted and its books kept properly. It also audits the EIB accounts (Art. 12(1) and 12(2) Statute).

IV. PRINCIPLES OF ACCOUNTABILITY AND THE EIB

A study of the principles governing the accountability of the EIB is of great importance for a number of reasons. First, the EIB is the largest multilateral lending institution, in terms of the volume of its loans (see *supra*, section I). In 2010, it disbursed EUR 57.5bn in loans and its volume of loan signatures was 71.8 bn.[60] EIB funding therefore makes a great number of investments possible. However, the EIB's financial intervention alone does not entirely reflect its impact on investment conditions. As it usually only lends money alongside other institutions, its contribution must also be analysed in terms of its 'leverage', i.e. the extent to which EIB involvement in a project induces other actors to come on board. A 2009 study showed that for every euro lent by the EIB within the EU in 2006, an average of 3.6 euro was made available from elsewhere for the project.[61] The EIB's impact is additionally increased by its expanding geographic reach, now coupled with the EU's external relations policies. Such impact is also enhanced by the nature of the financed projects (infrastructure, energy, exploitation of natural resources, etc.[62]), which are typically the source of important positive and negative externalities.[63] This powerful position alone warrants a strong accountability review. In this regard, large private financing institutions have recently taken important steps to upgrade their accountability practices as a result of growing external scrutiny.[64]

Another element justifies paying attention to the EIB's accountability. The EIB is a public institution, governed and capitalized by public entities. It is also 'a policy-driven bank', and is mandated to implement EU policies. It is fundamentally a political organ[65] claiming to act in the public interest, in other words, a government agency. This impacts investment conditions in two respects. First, the EIB may not finance projects which do not espouse EU policy objectives. Second, the EIB's political objectives influence the behaviour of actors connected with projects. This influence may be official/legal, using conditionality in finance contracts, or more diffuse, in that (public or private) actors seeking EIB financing will be inclined to mirror the EIB's policy lines in order to receive financing.[66] Given the above, modern democratic governance standards require that the EIB be accountable, to the extent of its impact, for the design and consequences of its lending policies.[67] In the next

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[60] See EIB, 'Annual Report 2010 – Volume II: Financial Report', http://www.eib.org/attachments/general/reports/fr2010en.pdf, p. 29.

[61] N. Robinson, 'The European Investment Bank: The EU's Neglected Institution', 47 *Journal of Common Market Studies* 651 (2009), p. 656. The EIB claims that its historical leverage is 'five times the Bank's financing.' See EIB, 'EIB Directors approve anti-crisis measures', 16/12/2008, http://www.eib.org/about/press/2008/2008-159-eib-directors-approve-anti-crisis-measures-for-2009-2010.htm?lang=en.

[62] See the breakdown by sector: http://www.eib.org/projects/loans/sectors/index.htm.

[63] These effects are described as 'non-financial leverage'. See Robinson, *supra*, p. 663.

[64] See e.g. the 'Equator Principles' (http://www.equator-principles.com/), a Code of Conduct (inspired by the IFC's social and environmental 'Performance Standards'), endorsed by more than 60 high profile private banks and financial institutions who voluntarily commit to follow them in project finance activities.

[65] Contrary to the IBRD, which is prevented by its Charter to intervene, via its financial activities, in the political affairs of its borrowers. See IBRD Articles of Agreement, done at Bretton Woods on 22/7/1944, effective 27/12/1945, last amended 16/2/1989, Art. IV, Section 10.

[66] See Robinson, *supra* n 61, p. 667. Some authors encourage MLIs to use this leverage to foster laudable goals, such as corporate social responsibility. See A. Vives, 'The Role of Multilateral Development Institutions in Fostering Corporate Social Responsibility', 47 *Development* 45 (2004).

[67] In this regard, the Mid-Term Review (*supra* n 32, p. 37) recommends that out-of-EU EIB activities be revised, so as to be 'fully accountable as a public institution, and focus on tangible benefits and positive

sections we analyse and evaluate the principles governing the accountability of the EIB, from a substantive and procedural point of view.

1. Substantive Accountability Principles

Accountability implies that conduct be assessed against certain standards. In this respect, effective accountability for issues as complex and high-profile as human and social rights or the environment requires a firm normative background. This section addresses the substantive human rights, social and environmental norms against which the conduct of the EIB is supposedly benchmarked, either as a result of applicable binding rules, or of voluntary commitments made by the EIB itself.

a. In Search of an Effective Substantive Accountability Framework

MLIs are generally self-standing international organizations governed by a 'Charter Treaty'. Those Charters establish the MLI's terms of reference, and confer it relative autonomy vis-à-vis the international legal order at large, as most Charters give one of their internal organs competence about Charter interpretation.[68] Also, MLI Charters are usually vague or silent as to what norms govern other issues than the purely financial aspects of their operations. This created speculation concerning the relationship of MLI activities with international norms such as human rights, or international environmental law. Except for *jus cogens*, customary international law, and the rules of particular international law which they have adhered to,[69] MLIs have tended to downplay the relevance of those legal regimes for their activities, at least until recently. MLIs such as the World Bank tend to regard their position in respect of such international legal norms as one of promotion rather than one of obligation.[70] Schemes of accountability and internal policies based on those norms, where they exist, remain largely voluntary and stem more from a sense of political accountability in regard to sensitive issues than from a conviction to be bound by hard 'legal' obligations.[71]

As indicated above, the EIB is less of a self-standing institution than the usual MLI: it is embedded in the EU legal order (albeit with a distinctive status) which contains hard human rights, social and environmental norms backed with effective enforcement and remedies. To what extent does this elaborate legal framework act as a body of substantive accountability principles for the EIB?

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impact for the final project beneficiaries; [and so as to] strengthen the consultation process with local civil society.'

[68] See J. W. Head, 'Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks', 17 *Kansas Journal of Law and Public Policy* 194 (2007-2008), pp. 208-210 and 219. The tendency of MLI to expand the reach of their activities beyond their intended mandate through wide Charter interpretations was criticized as 'mission creep' by some authors. See Head, *supra* n 58, p. 265.

[69] See analogically S. I. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund*, London and Sidney, Cavendish Publishing, 2001, pp. 80 ff.

[70] Also, regarding the IMF, see P. Schmitt, 'The Accountability of the International Monetary Fund for Human Rights Violations', in J. Wouters, E. Brems, S. Smis & P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations*, Antwerp & Oxford, Intersentia, 2010, p. 431.

[71] See *inter alia* K. De Feyter, 'Self-Regulation', in W. Van Genugten, P. Hunt & S. Matthews (eds.), *World Bank, IMF and Human Rights*, Nijmegen, Wolf Legal Publishers, 2003, p. 79.

b. The EU Legal Order

The EIB is bound by its Statute and the Treaties, from which its existence and mandate derive. Art. 1 of the Statute makes this explicit.[72] The EIB must to act in accordance with the Treaties,[73] including with respect to human rights (notably the Charter of Fundamental Rights), social rights and policy, and the environment.[74] When acting outside the EU, the EIB is consequently bound by Treaty provisions on external relations (Part 5 TFEU), especially those on development cooperation,[75] on which the External Mandate is based.[76] This arguably requires that the EIB comply and take account of relevant international law and initiatives.[77]

Many programmatic provisions of the Treaties, i.e. 'primary' EU law, are implemented by EU legislation. What is the relationship of the EIB with secondary EU law? The ECJ has emphasized that the EIB's particular status does not remove it entirely from the EU legal order. The EIB is naturally subject to the secondary legal rules which are *applicable to it*, in the sense that it can be considered a *direct addressee* of such rules. Examples of such rules having been deemed legally binding on the EIB by the ECJ and Court of First Instance include rules applicable to the EU institutions' staff,[78] rules about income tax on the staff wages,[79] the rules concerning the powers of OLAF to combat fraud and investigate in this connection,[80] general principles of labour law,[81] and rules on public procurement.[82] It can also be argued that the EIB is bound by the EU legislations[83] (or EU agreements such as the Cotonou Agreement) assigning it special mandates outside the EU.[84]

The trickier question concerns the status of those rules of EU legislation of which the EIB cannot be considered a direct addressee and which are not *applicable* to the EIB but are nonetheless *relevant* to its activities. As an instrument of EU policies, the EIB must arguably place the body of EU human and social rights and environmental legislation at the centre of its activities. This however leaves open the question of the EIB's obligations with regard to those 'relevant' legislations when granting finance to investment projects. When secondary law provisions are not formally applicable to the EIB, if the EIB decides to grant finance to a project which is at odds with those provisions, the 'legality' (i.e. abidance to norms) of such decision EIB in relation to those provisions is not *stricto sensu* at stake.[85] Still, as an EU body, the EIB arguably has a general obligation not to undermine EU legislation, though the latter as such may not be applicable to it. EIB activities must be conducted *with due regard for* EU legislation.[86] In case it were to grant finance to a project violating EU law provisions, the EIB would rather breach its obligation of due regard than violate those provisions

[72] Art. 1 of the EIB Statute notably reads as follows: '[the EIB] shall perform its functions and carry on its activities in accordance with the provisions of the Treaties and of this Statute.'
[73] See Spirou, *supra* n 10¸ p. 161: 'la BEI n'est pas une institution proprement dite de la Communauté, mais […] sa mission se situe toute entière dans le cadre du Traité.'
[74] See e.g. Arts 151 ff. TFEU (on social standards), Arts 190 ff. TFEU (on the environment).
[75] See Art. 209 (3) TFEU.
[76] ECJ, Case C-155/07, *supra* n 18.
[77] Art. 208 (2) TFEU: The Union 'shall comply with the commitments and take account of the objectives [it] approved in the context of the United Nations and other competent international organisations.'
[78] See ECJ, Case 110/75, *supra* n 8; Case C-499/99 P, *EIB v. Hautem* [2001], ECR 2001, p. I-6733, para. 90-96.
[79] See Case 85/86, *supra* n 11.
[80] See ECJ, Case C-15/00, *supra* n 14, paras. 95 ff.
[81] See CFI, Case T-192/99, *Dunnett* et al. *v. EIB* [2001] ECR 2001 p. II-00813, paras. 95 ff.
[82] General Court, Case T-461/08, *supra* n 8.
[83] See Decision 633/2009/EC (External Mandate, *supra* n 19), esp. recital 8, and Art. 3 (2).
[84] ECJ, Case C-370/89, *SGEEM & Etroy v. EIB*, [1992], ECR 1992, p. I-06211, para. 30.
[85] Dunnett, *supra* n 6, pp. 752-753.
[86] *Id.*, p. 753.

directly. The justification for the obligation of due regard arguably lies in Arts 209 and 309 TFEU, enjoining the EIB to pursue the interests of the Union, which are pursued through EU legislation. This conclusion is also supported by the EIB policy to use EU law as social and environmental standards, even when not formally applicable.

The obligation of due regard may receive different practical applications. Obviously, the EIB may not impose conditions on a borrower which would oblige the latter to violate its obligations at EU law, but it should also craft its conditionality requirements so as to foster the borrower's compliance with EU policies.[87] Likewise, the EIB may not finance projects which violate EU law and should conduct reasonable control as to this.[88] However, the strict rules on delegation of powers regarding compliance with EU law applicable to EU 'agencies' do not concern the EIB, since its powers do not derive from an act of delegation, but from primary law.[89] In conclusion, EU primary and, up to a point, secondary rules may constitute a normative framework for the EIB. However, their capacity to act as substantive accountability principles for EIB activities is qualified by the EIB's independence and wide margin of appreciation in its operations. Alleged deviations from EU law resulting from EIB activities should be manifest before it can be accused of crossing the limits of its discretion.[90]

c. Statements of Principles

In light of the unclear status of international law for MLI activities, and in response to increasing accountability demands from civil society, MLIs have started to design internal codes of conduct equipped with grievance mechanisms, developing so-called 'best practices' in MLI accountability. Over the years, the EIB kept a low profile and asserted its autonomy towards the EU legal order.[91] As indicated above, it is unclear to what extent the Union *acquis* applies *per se* to EIB operations, and, as a result, what traction or influence EU human rights, social and environmental rules may have on the EIB's lending activities.[92] The EIB also started to adopt 'statements of principles' aiming to spell out the environmental and social standards and practices which the it commits to apply in the course of its lending operations.[93] It did so partly under pressure from the EU institutions, in particular the European Parliament,[94] and from civil society, and perhaps also because the implementation of EU development policies raises explicit human rights, social and environmental concerns.

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[87] Head, *supra* n 68, p. 213.

[88] See Decision of the European Ombudsman on complaint 1807/2006/MHZ against the EIB, 17/12/2007, http://www.ombudsman.europa.eu/cases/home.faces.

[89] S. Griller, 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine', 35 *European Law Review* 3 (2010), p. 8.

[90] Finance decisions indeed require balancing conflicting norms and interests. See L. Amoyel, *supra* n 13, p. 269.

[91] See C. Amicucci, 'The European Investment Bank', in X., *Budgeting for the Future, Building Another Europe – European Economic Policies from a Civil Society Perspective*, Rome, Sbilanciamoci!, 2008, http://www.tni.org/sites/www.tni.org/files/download/buildinganothereurope.pdf, p. 199. A coalition of NGOs – Counter Balance – was however formed in 2007 to monitor and 'challenge' the EIB on development and sustainability grounds: see http://www.counterbalance-eib.org/.

[92] See EIB, 'The EIB Statement of Social and Environmental Standards and Practices', 2009, http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf, para. 10, p. 6. (Hereinafter the 'Statement'.): 'The Bank is […] bound by EU law and committed to promoting EU policy objectives.' It is unclear though how the 'bindingness' of EU law is operationalized and enforced in finance decisions.

[93] The EIB adopted its first set of environmental principles in 1996 (Statement *supra* n 92, para. 6, p. 6.).

[94] The European Parliament closely oversees the EIB, and passed several resolutions concerning it (see Amoyel, *supra* n 13, pp. 266-267). See e.g. European Parliament, 'Resolution of 6/5/2010 on the European Investment Bank's annual report for 2008", 2009/2166(INI). On EIB social and environmental standards, see 'Resolution on EIB annual report for 2005', 15/2/2007, 2006/2269(INI), paras. 22 and 23.

The EIB has adopted a multi-tiered structure of instruments addressing social and environmental standards. At the top of the pyramid are broad statements of principles, the most prominent of which are the 2006 European Principles for the Environment, to which the EIB committed along with four other European development banks.[95] The Principles reflect a common approach to project finance, based on the environmental principles contained in the EU Treaties, as well as in EU legislation. Accordingly, the signatory banks will only finance projects which comply with the environmental rules, principles and standards enshrined in the EU Treaties, in EU legislation and in multilateral environmental agreements. Outside the EU, such rules, principles and standards will be applied 'subject to local conditions'. A second overarching statement of principles is the EIB Group's 2005 'Statement on Corporate Social Responsibility.' It states the EIB's view of sound business and its adherence to the triple bottom line, which must be applied transparently and accountably to all lending operations and in setting the EIB's lending priorities.[96]

A second tier of social and environmental principles is constituted by the 'EIB Statement of Environmental and Social Principles and Standards',[97] released in 2009 for the last version. It describes the environmental and social principles to be applied by the EIB staff and informs external stakeholders of the EIB's requirements.[98] Yet it is unclear to what extent it 'binds' the EIB from an accountability perspective. The Statement states that it 'must be applied by the staff of the EIB in all its operations', without further elaboration.[99] The Statement reaffirms the concern of the EIB for introducing environmental and social considerations[100] in its lending activities and identifies the substantive principles and standards used to that effect. In this regard, the EIB establishes that its primary frames of reference are EU law and policies, notably the sixth Environmental Action Programme of the EU,[101] the EU Sustainable Development Strategy[102] and the EU Consensus on Development.[103] In terms of implementation, the EIB will specifically target projects 'that contribute directly to environmental sustainability and social well-being in support of sustainable development.'[104] These projects are part of the EIB's environmental lending priorities.[105] On the other hand, the EIB ensures that all financed projects – even if not part of the environmental priorities – meet 'environmental and social

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[95] See the May 2006 'European Principles for the Environment', and the EPE Banks' Declaration, http://www.coebank.org/upload/infocentre/Brochure/en/EPE_Declaration.pdf. The EPE banks are the Council of Europe Bank (CEB); the European Bank for Reconstruction and Development (EBRD); the European Investment Bank (EIB); the Nordic Environment Finance Corporation (NEFCO); the Nordic Investment Bank (NIB).

[96] EIB Group, 'Statement on Corporate Social Responsibility', May 2005, http://www.bei.org/attachments/strategies/statement_csr_en.pdf. Hereinafter the 'CSR Statement', p. 3.

[97] *Supra* n 92.

[98] *Id.*, para. 9, p. 6.

[99] No mention of the Statement or of any attention to social or environmental issues is made in the Staff Regulations (see EIB, 'Staff Regulations of the European Investment Bank, 20/4/1960, last revised 1/1/2009, http://www.eib.org/attachments/general/eib_staff_regulations_2009_en.pdf) or in the 'Staff Code of Conduct' (1/8/2006, http://www.eib.org/attachments/thematic/code_conduct_staff_en.pdf), though one may expect that employees must apply the employer's policies in their professional activity.

[100] Which the EIB claims that it derives from the principle of sustainable development enshrined in EU policies (Statement, *supra* n 92, para. 8 and 10, p. 6).

[101] See Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, *OJ* L 242, 10/9/2002, e.g. Art. 7(2)

[102] Council of the European Union, Renewed EU Sustainable Development Strategy, 26/6/2006, 10917/06, http://register.consilium.europa.eu/pdf/en/06/st10/st10917.en06.pdf, urging (p. 21) the EIB to 'assess its lending against […] the Millennium Development Goals and sustainable development.'

[103] *Supra* n 20.

[104] Statement, *supra* n 92, preamble, para. 1.

[105] See Corporate Operational Plan, *supra* n 39; EIB, 'Environmental and Social Practices Handbook', 24/2/2010, http://www.eib.org/attachments/thematic/environmental_and_social_practices_handbook.pdf, p. 11 (hereinafter the 'Handbook'), and generally http://ec.europa.eu/environment/newprg/intro.htm.

acceptability' with regard to the relevant standards.[106] The EIB's policy also has a dynamic and managerial aspect: projects must include a management component to mitigate risks deriving from socially and environmentally sensitive activities.[107] In other words, for each project, the EIB seeks to increase environmental and social benefits, and decrease environmental and social costs.[108]

The Statement lists the sources of the EIB's environmental and social principles and standards: the over-arching environmental principles contained in the Treaty; the fundamental human rights referred to in the EU Charter; relevant EU environmental and social legislations; internationally recognised and sector-specific good environmental and social practices; a minimum set of social standards, 'in line with the requirements of the multilateral development banks, consistent with those identified in the Charter'.[109] The Statement requires that all the projects the EIB finances within the EU comply with the relevant environmental principles contained in international conventions incorporated in EU law,[110] in the Treaties[111] and in EU secondary law,[112] notably concerning Environmental Impact Assessments (EIAs). Within the EU such principles are binding on project promoters, but the EIB reserves the right to set higher standards where appropriate.[113] Outside the EU, the EIB also uses EU law standards as benchmarks,[114] even if they are more stringent than those applicable in the national legislation. Application of EU standards is however subject to practical feasibility and project promoters must justify derogations.[115]

The EIB applies a 'human rights-based approach' to social issues, focusing on the standards contained in the Charter of Fundamental Rights as well as on 'international good practices.'[116] Remarkably, the Statement does not explicitly refer to international *legal norms* such as the ILO Conventions, though it mentions such instruments in passing.[117] The Statement logically implies that EU legal requirements must be met by projects funded inside the EU and assumes they will be enforced by national authorities, but it is less adamant on the benchmarking of out-of-EU projects against EU social requirements. Despite the existence of a 'Sourcebook of EU Social

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[106] Statement, *supra* n 92, p. 10.
[107] *Id.*, para 4, p.10.
[108] *Ibid.*, pp. 11 ff.
[109] *Ibid.* para 8, p. 7.
[110] See *ibid.*, para. 36-38, p. 16. 'Phased compliance' is allowed in enlargement countries subject to certain conditions and justification of the project promoter.
[111] Such as the integration principle (Art. 6 TFEU), and that of aiming at a high level of environmental protection based on the precautionary principle (Art. 95(3) & 174(2) TFEU). Statement, *supra* n 92, para. 23, p. 13,
[112] Emission standards and 'ambient' standards are discussed (Statement, *supra* n 92, paras. 33-34, pp. 15-16.), and compiled in the 'Sourcebook on EU Environmental Law', Study prepared for the EPE Banks, 19/12/2008, http://www.eib.org/attachments/strategies/sourcebook_on_eu_environmental_law_en.pdf.
[113] Statement, *supra* n 92, para. 18, p. 8.
[114] *Id*, para. 20, p. 8: 'Within the EU, the EIB assumes that EU environmental and social law has been correctly transposed into national law and that national law is being enforced by the responsible authorities. EIB due diligence focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false.' Principles contained in bilateral and partnership agreements concluded with the EU in its external relations also apply. *Ibid.*, para. 19, p. 8.
[115] See *ibid.* para 40, p. 17: 'for a variety of reasons, including institutional capacity, technological capability, availability of investment funds and consumer ability and willingness to pay, for a particular project the immediate achievement of EU requirements may not be practical and in some cases may not be desirable. When the case arises, it is incumbent on the promoter to provide an acceptable justification to the Bank for a deviation from EU standards, within the framework of the environmental and social principles and standards set out in the Statement. In such cases, provision should be made for a phased approach to higher standards.'
[116] *Ibid.*, para. 46, p. 17.
[117] See Statement, *supra* n 92, paras 53-54, pp. 18-19, citing the ILO Core Labour Standards or the UN Declaration on the Rights of Indigenous People.

Law',[118] the normative references are quite vague, and are chiefly to the 'Guidance Notes' that the EIB established on social issues (*infra*), and to MLI best practices.[119] The Statement briefly discusses its approach to involuntary resettlement, indigenous people and other vulnerable groups, ILO Core Labour Standards, and Occupational Health and Safety.[120] These short and general discussions concerning a limited range of social issues may however not be said to set 'standards' as such.

The third tier of the EIB's set of substantive accountability principles seek to clarify the concrete operation of social and environmental standards in the EIB's lending activities. What the EIB calls its 'operational framework for integrating environment and social issues into EIB financing' is contained in its 'Environmental and Social Practices Handbook' (the 'Handbook'),[121] the last version of which dated February 2010. The Handbook restates the environmental and social principles and standards applied by the EIB, in a more exhaustive and precise way than the Statement, as well as the fact that all projects are – in principle – supposed to comply with them.[122] It also lists a number of accountability 'safeguards' of a more procedural nature. [123]

The Handbook then describes how these standards are applied throughout the life of the project, from its consideration for financing to its approval, launch and monitoring. Projects undergo a pre-appraisal and an appraisal phase regarding social and environmental issues prior to approval, and continued monitoring thereafter. At the pre-appraisal stage they are screened against social and environmental risks (notably to identify applicable substantive standards[124]), and categorized according to their various environmental and social impacts.[125] The pre-appraisal phase also includes obtaining the advice of the Commission.[126] The ensuing appraisal phase then enquires into whether and under what conditions projects may be approved.[127] During that phase, the EIB reviews the results of the Environmental Impact Assessments (if one was required under relevant EU law[128]) and of the Social Impact Assessments (as established under the Social Assessment Guidance Notes[129]). It also checks compliance with other relevant legal requirements (such as compliance with the biodiversity norms contained in the Birds and Habitat Directives) and a number of other elements.[130] All this information then yields an

[118] See Handbook, *supra* n 105, para 22, p. 16 and 'Sourcebook on EU Social Law – Prepared by Christopher Wright, University of Oslo, for the European Investment Bank', 4 October 2010, available from the EIB Information Desk (infodesk@eib.org) upon request, and on file with authors.
[119] Statement, *supra* n 92, para. 49, p. 18.
[120] *Id.*, paras. 51 ff., pp. 18-19. The Statement also discusses standards regarding cultural heritage (paras. 56 ff.); consultation, participation and public disclosure (paras. 59 ff., see *infra*); biological diversity (paras. 67 ff.); and climate change (paras 75 ff.).
[121] Handbook *supra* n 105, p. 9.
[122] See *id.*, pp. 16-17.
[123] See e.g. *ibid.*, p. 17, Table B.
[124] E.g. the EU law requirement of an Environmental Impact Assessment (EIA). Handbook, *supra* n 105, p. 30.
[125] *Id.*, pp. 22 ff.
[126] See 'Art. 19 procedure', *supra* n 56, and Handbook, *supra* n 105, p. 32. DG ECFIN is responsible for contacts with the EIB, and has 'set up the 'Groupe Interservice BEI' (GIB). The GIB prepares collegiate opinions on behalf of the Commission regarding the compliance with EU rules and policies of financing requests (see http://ec.europa.eu/economy_finance/financial_operations/coordination/eib/index_en.htm).
[127] See generally http://www.eib.org/projects/cycle/appraisal/index.htm.
[128] See Handbook, *supra* n 105, pp. 38 ff.
[129] The Guidance Notes are found in annex 13 to the Handbook, and relate to involuntary resettlement, labour, vulnerable groups, community health and safety, and community participation. See also the Social Impact Assessment procedure, based on the Guidance Notes, in the Handbook, *supra* n 105, pp. 52 ff.
[130] See a summary of the Environmental and Social Assessment in the Appraisal Phase (Handbook, *supra* n 105, pp. 40-41). The assessment varies with the type of loan applied for. Other elements to be assessed relate to climate change (pp. 50 ff. of the Handbook), to the Environmental and Social

'Environmental and Social Impact Rating' reflecting the degree of social and environmental risk (low, moderate, high) associated with the project. The rating must be motivated[131] and is included in the Appraisal Report, along with proposed environmental and social conditions and monitoring requirements to be included in the finance contract.[132] Based on the non-binding[133] Appraisal Report, the Board of Directors makes the final approval or rejection decision.[134]

These sets of substantive environmental and social standards have been criticized by external observers. Although the EIB's requirement of compliance with EU law where it applies (i.e. within the EU) must be approved, the strength of the reference to EU law as a benchmark for out-of-EU projects is less convincing, in particular outside (potential) candidate countries, where EU standards are only applied 'if practical and feasible' (or, in critics' words: 'where appropriate'[135]) with very vague conditions for derogation.[136] The open-endedness of the additional international environmental and social norms and standards which the EIB applies[137] is also a cause of concern. In addition, the appraisal of environmental issues at the EIB relies greatly on EIAs when they are required by relevant EU rules. EIAs are under the responsibility of the project promoter (which may create conflicts of interest) and the EIB staff is suspected to do little cross-examination.[138] To summarize, the above suggests that, to a significant extent, the EIB's principles, standards and operational policies do not constitute a firm substantive accountability framework containing clear-cut performance standards which the EIB binds itself to *apply* in relation to all projects it finances. Rather, they look like an indicative list of potentially relevant elements which the EIB will *consider* in making its finance decisions. An opposite remark can also be made regarding the general use of EU standards as benchmarks for projects outside the EU. Should this be pushed too far, the EIB risks appearing paternalistic or somewhat imperialist in applying EU law beyond its jurisdiction.

Criticism also arose in respect of social standards. Social aspects of projects within the EU are covered by the national authorities' application of EU law. Outside the EU, the EIB applies an 'Economic and Social Impact Assessment Framework' for appraising whether the project is consistent with the EIB's policies and standards.[139] In respect of social issues specifically, the Statement indicates that '[t]he EIB restricts its financing to projects that respect human rights and comply with EIB social standards, based on the principles of the Charter of the Fundamental Rights of

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capacity of the promoter (pp. 54 ff.), to public consultation and participation (pp. 55 ff.), and disclosure of information (pp. 56 ff.).

[131] Along four categories: A (acceptable with positive or neutral residual impacts – low risk); B (acceptable with minor negative residual impacts – low or moderate risk); C (acceptable with major negative residual impacts – moderate or high risk); and D (not acceptable – high risks). D-rated projects are normally 'screened out' at the end of the pre-appraisal stage. See Handbook, *supra* n 105, pp. 58-61.

[132] *Id.*, p. 70. See the points covered in the report in EIB, 'The Project Cycle at the European Investment Bank', 12/7/2001, http://www.eib.org/attachments/strategies/cycle_en.pdf; pp. 4-5.

[133] See however the checks and balances included in Art. 19 Statute (see *supra* n 56).

[134] Handbook, *supra* n 105, p. 60.

[135] See Wright, *supra* n 2. However, national legislation and international conventions ratified by the host country must always be complied with. (Statement, *supra* n 92, para. 39, p. 16)

[136] Handbook, *supra* n 105, p. 40.

[137] The Statement lists examples (*supra* n 92, para. 43, p. 17): Recommendations of the World Commission on Dams; findings and recommendations of the Extractive Industry Review; the rules of the Extractive Industry Transparency Initiative; FSC principles, EMAS Scheme. The Equator Principles are not listed, though the EIB is prepared to work on that basis 'in case of co-financing'. See *id.*, para. 23, p. 9.

[138] See Wilks, *supra* n 30, p. 20, and Decision of the European Ombudsman closing his inquiry into complaint 244/2006/(BM)JMA against the EIB, 4/5/2009, http://www.ombudsman.europa.eu/cases/home.faces.

[139] See the infosheet on ESIAF: EIB, 'The Economic and Social Impact Assessment Framework (ESIAF), http://www.eib.org/attachments/documents/esiaf.pdf.

the European Union and international good practices.'[140] The benchmark for this commitment is the 'EU social *acquis*', i.e. the body of laws, principles, policy objectives, declarations, resolutions and international agreements defining the social policy of the EU',[141] which are substantiated in an 'EIB Reference Book on EU Social Legislation'[142] and in EIB Social Assessment Guidance Notes. The Guidance Notes are five short documents specifying the standards and requirements of the EIB with regard to (i) involuntary resettlement; (ii) the rights and interests of vulnerable groups; (iii) labour standards; (iv) occupational and community health and safety; and (v) public consultation and participation in project preparation.[143] These Guidance Notes provide a framework to EIB Staff for appraising projects in regard of social issues.[144] They were criticized for their 'lack of clarity, consistency and comprehensiveness',[145] but are being revised (Guidance Notes on vulnerable groups and on public consultation and participation are still in progress). Guidance Notes are organized in reference to EIB appraisal procedures and contain references to applicable international norms, standards and EU legislations. However, they are guidelines addressed to EIB staff for preparing Appraisal Reports, but do arguably not constitute firm substantive commitments binding the EIB.

Arguably, more social issues than the five identified in the Guidance Notes can arise in relation to a project. The EIB acknowledges this,[146] but no specific standard or guidance note is available in such case. Additionally, the EIB lacks a self-standing human rights policy.[147] The EIB repeatedly refers to the Charter and claims that it will not finance projects violating human rights or located in countries declared 'off limits' for human rights motives by the European Council.[148] Despite this 'precautionary' stance, the External Mandate nevertheless makes 'eligible' a number of countries known for their poor human rights record or situation of armed conflict. Admittedly, projects in more 'sensible' countries such as Afghanistan, Belarus or Libya, require an *ad hoc* green light from the Council and the Parliament to benefit from the guarantee. However, the Proposal for a new External Mandate suggests removing this oversight for Iraq, Libya, Belarus and Cambodia.[149]

Human rights considerations are therefore weakly embedded into the EIB's appraisal and monitoring process,[150] as human rights impact assessments are not mainstreamed in practice. A credible EIB human rights policy could however make a significant difference, e.g. for human rights in business.[151] In response to this criticism, and in light of the widely recognized UN-endorsed 'protect, respect and

[140] Statement, *supra* n 92, para. 46, p. 17.
[141] Handbook, *supra* n 105, p. 16, and fn. 7.
[142] See 'Sourcebook on EU Social Law', *supra* n 118.
[143] See Annex 13 of Handbook, *supra* 105.
[144] In this regard, all Guidance Notes contain a checklist of relevant elements to be verified.
[145] See Wright, *supra* n 2, pp. 51-52.
[146] According to the Handbook (*supra* n 105, p. 52), such issues 'may relate […] to governance, transparency and capacity issues; conflict potential and sensitivity related to access to resources or allocation of project benefits; exacerbated inequalities; and complex institutional environments and social dynamics.'
[147] Wright, *supra* n 2, p. 27.
[148] See Statement, *supra* n 92, para. 46, p. 17.
[149] See the Proposal for a New External Mandate, *supra* n 19, Annex I. The Parliament in turn proposes to link EIB operations in Belarus to 'progress towards democracy'. See European Parliament, Legislative resolution of 17 February 2011 on the proposal for a decision of the European Parliament and of the Council granting an EU guarantee to the European Investment Bank against losses under loans and guarantees for projects outside the European Union, T7-0062/2011, Annex II.
[150] Mid-Term Review, *supra* n 32, pp. 15-16.
[151] In this regard, see the discussion on the role of Export Credit Agencies in UN Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', 7/4/2008, A/HRC/8/5, paras. 39-41.

remedy' business and human rights framework,[152] the EIB clarified that its 'approach to human rights is focused on respect for environmental, social and economic rights in direct link with EIB-financed projects.' It is reviewing its social standards and operational practices to bring align them with the framework.[153] Finally, an accountability gap exists for 'Global Loans', i.e. loans made to other institutions for financing investment projects pursuing certain objectives.[154] In such case, environmental and social appraisals are the responsibility of the intermediary institution, and EIB safeguards are *de facto* bypassed.[155]

In conclusion, where EU law is not legally binding, i.e. outside the EU, the EIB environmental and social standards for projects are deficient[156] and do not constitute a firm substantive benchmark for assessing EIB action. As a remedy, authors suggested to set up a definite list of 'no-go' areas or sectors.[157] And indeed, the EIB now publishes an indicative list of 'activities excluded from EIB lending'.[158] The list is general, but it specifically excludes ammunitions and weapons, as well as military/police equipment or infrastructure. Observers have moreover noted that the EIB's environmental and social standards and its operational practices are rather descriptive and hardly operative. They are more an 'aid to project preparation' for staff than real social safeguards engaging the EIB.[159] Likewise, the ESO (see *supra*), composed of experts in social and environmental issues, plays a support and advice role at the margins of the project cycle, and has no power to oppose the financing of a project. Accordingly, the Mid-Term Review pointed out deficiencies in the application of the standards and recommended that the 'due diligence process' and the project monitoring be strengthened, notably in respect of social standards.[160] Causes for all this may be the EIB's limited staff resources,[161] but also the fact that generally it seems to value the volume of the money lent rather than the quality of the projects financed. Staff is in this regard insufficiently trained to assess non-financial aspects of projects,[162] and is incentivized – via bonuses – based only on the volume of loans extended.[163] Therefore, if the EIB is to really support EU external policies, including the promotion of sustainable development, current practices should be profoundly revisited.[164] Accordingly, the Proposal for a New External Mandate aims to improve the appraisal and monitoring of social, environmental and human rights aspects of projects (Art. 6), and urges the EIB to devote sufficient

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[152] *Id.*

[153] See http://www.eib.org/about/news/business-and-human-rights.htm.

[154] Handbook, *supra* n 105, p. 44.

[155] See Wilks, *supra* n 30, p. 25. Global Loans are used in the framework of the EIB's contribution to the Commission's crisis recovery plan (see *supra*) to support to SMEs. See Counter Balance, 'European Investment Bank and the economic crisis', *supra* n 29, p. 4, noting that intermediary institutions 'will be responsible for evaluating each loan application submitted by an SME. For most operations, it will be entirely up to the intermediary bank to decide whether or not to grant a loan to the SME.'

[156] According to CSO reports, a number of dysfunctional projects tend to corroborate this. See, e.g. the numerous reports published by the NGO 'Counter Balance', http://www.counterbalance-eib.org/?cat=3.

[157] Like the IFC's exclusion list, http://www1.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/IFC+Projects+Database/Projects+Disclosure+at+IFC/Resources/IFC_Project_Exclusion_List. See Wilks, *supra* n 30, p. 23.

[158] http://www.eib.org/attachments/documents/excluded_activities_2011_en.pdf.

[159] T. Griffiths, 'Making the Grade: A survey of IFI social policies, international development standards and the policies of the European Investment Bank (EIB)', 31/12/2006, http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/eibifipoliciesbankwatchdec06eng.pdf, p. 32.

[160] Mid-Term Review, *supra* n 32, pp. 16 and 24.

[161] The Mid-Term Review points out in this regard that '[c]ompared to other IFIs, the EIB present the highest ratio in terms of lending volume per staff member.' *Id.*, p. 26. See also Wilks, *supra* n 30, p. 12.

[162] Mid-Term Review, *supra* n 32, p. 15.

[163] See Wilks, *supra* n 30, p. 12.

[164] Mid-Term Review, *supra* n 32, p. 26.

human and financial resources to external activities (recital 28).[165] In conclusion, though the EIB's lending volume exceeds that of other MLIs, its substantive accountability standards seem off the mark compared to MLIs' best practices, this in several respects ranging from the clarity and comprehensiveness of the applicable standards, to their binding and operational character.[166]

2. Procedural Accountability Principles

In this section we analyse three procedural principles that are instrumental in operationalizing accountability relationships between authorities or power wielders and their public or external stakeholders. Procedural principles are necessary to ensure that an entity acts in conformity with the substantive principles it is bound to follow. The three principles are transparency, participation and remedies.

a. A Meta-Principle: Transparency

We define transparency as the degree of access of the public to information of and concerning an institution, person or entity. Transparency acts as an enabler of accountability.[167] Lack of transparency hinders the activation of accountability channels,[168] as stakeholders are not aware of the relevant facts and practices.[169] Democratic accountability requires that governing entities adopt an active policy of openness towards their stakeholders, through information and documents disclosure.[170] The degree of openness or transparency of a person or entity is a function of four variables: the fullness of the disclosed information (i.e. what is disclosed or kept confidential); its accessibility (location, language, cost, etc.); its timeliness (before or after relevant decisions, etc.); and the existence and quality of a recourse to dissatisfied information-seekers.[171]

Transparency is one of the EU's fundamental governance principles as per Arts 1 TEU and 15 TFEU. In relation to it, the EIB however struggles with the intricacies of its dual nature: bank on the one side, requiring client confidentiality; and EU body on the other, commanding accountability to the public.[172] The EIB's special transparency regime (Art. 15, para. 3 TFEU) arguably recognizes this duality, as it states that the institutions' general transparency regime and the citizens' right of access to documents only apply to the EIB 'when exercising [its] administrative tasks.' While this notion – added by the Lisbon Treaty – is quite elusive, it might be suspected to leave out the documents of the EIB acting as a bank *per se*, especially finance contracts. It is difficult to assess what impact this may have on the applicability to the

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[165] The Parliament's first reading legislative resolution on the Proposal contains amendments that take further account of those concerns, enhance the consideration of human rights, social and environmental factors, and increase transparency. See *supra* n 149.

[166] See e.g. the EBRD's 'performance requirements' in its 'Environmental and Social Policy', May 2008, http://www.ebrd.com/downloads/about/sustainability/2008policy.pdf, or the World Bank's 'operational and safeguard policies', contained in its 'Operational Manual' (see World Bank, 'Operational Manual', last version 20/10/2011, http://go.worldbank.org/DZDZ9038D0). For a comparison see Wright, *supra* n 2.

[167] See T. N. Hale & A.-M. Slaughter, 'Transparency: Possibilities and Limitations', 30 *The Fletcher Forum of World Affairs* 153 (2006).

[168] On this notion of accountability 'channels', see, among many other sources, R. Mulgan, *Holding Power to Account: Accountability in Modern Democracy*, Basingstoke: Palgrave MacMillan, 2003; in the EU context see C. Harlow, *Accountability in the European Union*, Oxford: Oxford University Press, 2002

[169] J. Stiglitz argues that transparency reduces information asymmetries, and the risk of abuse or mismanagement. (J. Stiglitz, 'Transparency in Government ', in X., *The Right to Tell – The Role of Mass Media in Economic Development*, Washington D.C., WBI Development Studies, 2002, pp.28-29)

[170] *Id.* 29-31.

[171] P. J. Nelson, 'Transparency Mechanisms at the Multilateral Development Banks', 29 *World Development* 1835 (2001), p. 1836.

[172] See Amoyel, *supra* n 13, p. 270, characterizing the EIB's position as 'dichotomous'.

EIB of EU law regarding access to documents. As a matter of international law, the Aarhus Convention on public transparency and participation regarding environmental matters[173] encompasses EIB acts and therefore the EU Regulation implementing the Aarhus Convention (the 'Aarhus Regulation')[174] applies to the EIB. Its Art. 3 extends to the EIB the scope of Regulation 1049/2001 regarding public access to the documents of the EU Institutions[175] for what regards 'environmental information.'[176] For acts containing other sorts of information, it is clear from its title that Regulation 1049/2001 only applies to European Parliament, Council and Commission documents and not to the EIB.[177] However, given the new Art. 15 (3) TFEU, it seems that the Regulation could be amended so as to include EIB documents, but only as they concern its 'administrative tasks.'

In any event, the EIB has long adopted a 'Transparency Policy', its last version in February 2010,[178] which recognizes that the EIB is a bank *and a public institution* and that it must therefore be accountable to EU citizens and other stakeholders, owing them transparency on its operations.[179] In this respect, the EIB views transparency as 'an environment in which the objectives of policies, its legal, institutional, and economic framework, policy decisions and their rationale, and the terms of EIB accountability, are provided to the public in a comprehensive, accessible and timely manner.'[180] Operational decisions, such as project-related decisions, are excluded from this definition, which only addresses 'policies'.

Being an EU public body,[181] the EIB finds the source of its transparency policy in the EU Treaties and legislation. Complementing the provisions of the Treaties applicable to the EIB,[182] the Transparency Policy is designed so as to 'take account of and comply with' the regulation concerning public access to institutions' documents[183] and the principles of the European Transparency Initiative,[184] the Aarhus Regulation, and the regulation concerning the protection of personal data.[185] Importantly, the Transparency Policy states that, in case of discrepancy between it and the applicable EU legislation or the Aarhus Convention, the latter two will prevail.[186] The

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[173] Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ* L 264/13, 25/9/2006.

[174] See UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done in Aarhus on 25/61998, effective 30/10/2001.

[175] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* L 145/43, 31/5/2001.

[176] See EIB, 'Access to Environmental Information', 28/6/2007, http://www.eib.org/projects/documents/access_to_information.htm; and http://www.eib.org/about/news/eib-applies-the-aarhus-regulation-on-public-access-to-environmental-information.htm.

[177] The EIB held this position against a complaint before the European Ombudsman for refusing to disclose a loan contract not containing environmental information. See Decision of the European Ombudsman closing his inquiry into complaint 2145/2009/RT against the EIB, 12/3/2010, para. 11, http://www.ombudsman.europa.eu/cases/home.faces.

[178] EIB, 'The EIB Transparency Policy', 2/2/2010, http://www.eib.org/attachments/strategies/transparency_policy_en.pdf. Hereafter 'Transparency Policy'.

[179] *Id.*, point i.2, p. 4.

[180] *Ibid.*, point i.5, p. 4.

[181] *Ibid.*, point ii 7., p. 5.

[182] See Art. 1 TEU, and Art. 15 TFEU, on openness of the institutions, and Art. 6 TEU on democracy.

[183] Regulation (EC) No 1049/2001, *supra* note 175.

[184] See European Commission, 'Green Paper – European Transparency Initiative', 3/5/2006, COM(2006) 194 final, and generally http://ec.europa.eu/transparency/eti/index_en.htm#1.

[185] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ* L 8/1, 12/1/2001.

[186] On all this, see Transparency Policy, *supra* n 178, point ii.8, p. 5.

primary transparency principle at the EIB is that all information shall in principle be disclosed upon request or by publication[187] (presumption of disclosure) in a non-discriminatory manner and without privileged treatment,[188] unless there is a 'compelling reason' for non-disclosure.[189] The 'compelling reasons' accounting for exceptions to the general disclosure regime are exposed in the Transparency Policy, and most importantly include the protection of: the public interest, as regards international relations or the financial, monetary or economic policy of the EU, its institutions and bodies or a Member State; privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data; commercial interests of a natural or legal person; intellectual property; court proceedings and legal advice; the purpose of inspections, investigations and audits.[190] In particular, the EIB is mindful to preserve the degree of confidentiality required by the commercial interests of its clients, particularly its private clients.[191] Concretely, the EIB has in principle refused to disclose, e.g., the finance contracts it signs with its clients, for reasons ranging from professional secrecy under Art. 339 TFEU, to the 'professional ethics, rules and practices of the banking sector.'[192] The EIB has also been quite reluctant to disclose documents related to finance contracts, such as appraisal or monitoring reports, on grounds that they concern 'the professional evaluation and opinions forming part of the EIB's internal decision-making process.'[193]

The policy however states that the EIB must interpret exceptions to access to environmental information restrictively,[194] but as the above indicates, exceptions are rather open-ended, leaving room for interpretation.[195] Any denial of access must be motivated,[196] and the exceptions are largely copied from the applicable EU regulations. The extensive case-law from the ECJ on the matter may provide interpretative guidance.[197] In case the EIB refuses to disclose information, a confirmatory application may be filed, or a complaint to the complaints mechanism (*infra*). Information requests must normally be handled within fifteen working days, unless an extension is necessary for language or complexity reasons.[198] A reasonable fee may additionally be charged.[199]

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[187] *Id.*, point 4.1.2. p. 16. The EIB publishes the 'documents that are of general public interest, which could interest a large number of stakeholders and/or members of the public.' A list of such documents is included in Annex 1 to the Policy (p. 22) and concerns mostly general documents on the policies, standards and practices of the EIB. Exceptions to disclosure are only valid as long as justified and at most 30 years (point 4.1.4, p. 16). The archives of the EIB, some until 1980, are available at the European University Institute (Florence): http://www.eib.org/infocentre/publications/archives/index.htm.

[188] Also, see Transparency Policy, *supra* n 178, 5.1.3, p. 9: the Bank applies a language regime taking account of the public's needs. EIB's statutory documents and key documents with a particular importance for the public are available in all EU languages. Others are in at least English, French and German with possible translations.

[189] *Id.*, point 5, p. 9.

[190] Transparency Policy, *supra* n 178, point 5.2.2. and 5.2.3., pp. 9-10. The last four reasons being trumped by 'an overriding public interest', normally presumed for emissions into the environment (*Id.*, point 5.2.3., p. 10)

[191] *Id.*, point 5.2.8. p. 10. Other exceptions exist, notably as regards the Bank's own borrowing activities.

[192] See Decision of the European Ombudsman on complaint 948/2006/BU against the EIB, 28/9/2007, http://www.ombudsman.europa.eu/cases/home.faces, against a decision of the EIB not to disclose a finance contract with the Slovak Republic, on the grounds that 'as in any banking relationship, the Finance Contract, was considered confidential in the interest of the consumer.'

[193] European Ombudsman, *supra* n 88. The EIB ended up disclosing the documents, and its decisions were here made on the basis of a former version of its rules on access to documents.

[194] Transparency Policy, *supra* n 178, point 5.2.6. p. 10.

[195] One World Trust, 'Accountability Profile – European Investment Bank', 9/12/2008, http://www.oneworldtrust.org/index.php?option=com_docman&task=cat_view&gid=81&Itemid=55.

[196] Transparency Policy, *supra* n 178, point 5.2.11., p. 10 and point 4.5.10, p. 18.

[197] The European Ombudsman often refers to such case law in information disclosure cases.

[198] Transparency Policy, *supra* n 178, point 4.5.5. p. 17.

[199] *Id.*, point 4.5.13. p. 18.

The EIB's transparency practices generally compare well with those of other MLIs,[200] though two issues merit examination. First, the EIB's disclosure practices during a project's appraisal, i.e. before the Board of Directors' approval and the signature of the contract, are problematic, as the 'Proposal from the Management Committee to the Board of Directors', that is, the assessment as to whether and why a project should be financed, is not released prior to its approval.[201] After approval, public sector projects proposals are disclosed on request. For private sector projects, 'information designated by the Bank's private sector counterparts as confidential cannot be disclosed.'[202] The EIB publishes a list of the projects on its website at least three weeks prior to a Board decision,[203] with 'project summaries'. Focus in those summaries is set on environmental and social issues.[204] All public projects are listed, as well as all private sector projects responding to a call for tender in the Official Journal, and/or which required an EIA. Publication of private projects may be dispensed with to protect certain commercial interests.[205] Where an EIA is required, the project promoter must prepare a Non-Technical Summary (NTS), and an Environmental Impact Statement (EIS) in a language accessible to the local public. The promoter must publicize those documents, and the EIB provides, if possible, a link to them in the Projects List.[206]

Such policy may defeat the accountability-enabling function of transparency. If only summary information is released shortly before approval, and if 'sensitive' projects may escape disclosure for commercial reasons, stakeholders will not be able to call the EIB to account before the project is on tracks, which resembles a policy of *fait accompli*.[207] But accountability is also prospective and entails that an institution 'take account' of stakeholders' interests and preferences when acting.[208] In this regard, the absent or incomplete information disclosure prior to project approval precludes stakeholders from providing meaningful input on, or from opposing, a project.

The EIB also faces criticism for its reluctance to disclose finance *contracts*. Earlier transparency policies explicitly excluded disclosure of finance contracts, save the client's waiver.[209] Such radical position was at odds with the Aarhus Convention, whose Compliance Committee found that environmental clauses of a finance contract could qualify as 'environmental information' to be disclosed under the Convention, notably when 'there is a significant public interest in disclosure […], and a relatively small amount of harm to the [other] interests involved […].'[210] The EU

[200] The One world Trust (*supra* n 195) ranks the EIB first among Intergovernmental Organizations with regard to transparency. On the World Bank, see B. Jenkins, 'The World Bank's New Access to Information Policy – Conceptual Leap with Limits', Study for the Bank Information Center and the Global Transparency Initiative, March 2010, http://www.bicusa.org/en/Document.102097.aspx.
[201] Transparency Policy, *supra* n 178, point 4.3.1., p. 16.
[202] *Id.*
[203] The list is called the 'project pipeline' (http://www.eib.org/projects/pipeline/index.htm). Regarding the completeness of those summaries, in comparison to those of, e.g., the EBRD, an NGO writes: 'If you open at random a project description page on the website of the [EBRD], and then do the same on the EIB's website, it's not unlike comparing – respectively – a work of Tolstoy with a Japanese haiku. See Counter Balance, 'European Investment Bank and the economic crisis', *supra* n 29, pp. 3-4.
[204] Handbook, *supra* n 105, p. 34.
[205] Transparency Policy, *supra* n 178, point 4.3.2. p. 16.
[206] Handbook, *supra* n 105, p. 56.
[207] One World Trust, 'Submission to the European Investment Bank to contribute to the second round of public consultation on the review of EIB's Public Disclosure Policy', 18/11/2005, http://www.eib.org/attachments/general/events/contribution2_oneworldtrust.pdf, p. 3.
[208] On this idea of accountability as 'responsiveness', see R. Mulgan, 'Accountability: An Ever-Expanding Concept', 78 *Public Administration* 555 (2000), pp. 566 ff.
[209] See European Ombudsman, *supra* n 192.
[210] See Aarhus Compliance Committee's findings with Regard to Communication ACCC/C/2007/21 Concerning Compliance by the European Community with Its Obligations under the Convention, as adopted by the Compliance Committee at its 23rd Meeting, Geneva, 31 March-3 April 2009,

Ombudsman in turn found that confidentiality could justify refusing to disclose a loan contract, subject to the EIB's appreciation.[211] It now seems that the EIB somewhat relaxed its position, and that it may stand fairly open to partial disclosures preserving confidential information where possible. The Transparency Policy also no longer embargoes finance contracts.[212] Such progress is arguably due in part to procedures regularly introduced by NGOs before the Aarhus Convention Compliance Committee, the European Ombudsman, or the EIB Complaints Office (*infra*). 'Framework Agreements', i.e. agreements between the EIB and a country setting a framework for cooperation, are disclosed upon request, unless the partner country opposes.[213] The Aarhus Convention Compliance Committee found in this regard that a lack of consent from the other party was not as such a ground to refuse access to a financial contract.[214] One wonders whether the EIB will implement this provision, whereas the Transparency Policy gives precedence to the Convention in case of discrepancy. Finance contracts are the most relevant documents for properly overseeing the activities of the EIB on human rights, social and environmental counts. Barriers to accessing such documents therefore stymy the operation of the accountability mechanisms applicable to the EIB, and the practices of other MLIs are in some instances more liberal on these accounts.[215]

b. Participation

Accountability has a prospective and a retrospective dimension. Participation is instrumental for prospective accountability, i.e. 'taking account' of the public's interests and preferences.[216] Stakeholder participation in government is also the most essential building block of democracy broadly understood,[217] a value having constitutional standing in the EU.[218] Participation of 'citizens' in the decisions of a government body is essential, yet true accountability requires that participation be extended to all 'stakeholders', i.e. those affected by such decisions.[219] The EIB acknowledges the necessity and the usefulness of stakeholder participation in its Transparency Policy, and intends to foster 'flows of information', so that information disclosure leads to dialogue between the EIB and its stakeholders.[220]

Participation in MLI activities must take place at the policy level and at operational level. Participation at the *policy level* means that the public must be enabled to weigh in on the definition of policies governing the pursuit of their missions by MLIs. NGOs have been instrumental in emphasizing the public character of MLIs, and in their

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http://live.unece.org/env/pp/compliance/Compliancecommittee/21TableEC.html, paras. 30 (b) and (c), pp. 6-7.

[211] European Ombudsman, *supra* n 192, para. 1.11

[212] Transparency policy, *supra* n 178, point 5.2.6., p. 10.

[213] *Id.*, point 4.2.1., p. 16.

[214] See Aarhus Compliance Committee, *supra* n 210, para. 31 (b), p. 7.

[215] See Nelson, *supra* n 171, especially the chart at p. 1840. Comp. with EBRD, 'Public Information Policy', July 2011, http://www.ebrd.com/downloads/policies/pip/pipe.pdf, pp. 6 ff. For a comparison of transparency practices across MLI, not covering the EIB, see Carrasco *et al.*, *supra* n 58.

[216] On the accountability-participation relationship, see M. W. Dowdle, 'Public Accountability: Conceptual, Historical and Epistemic Mappings', in M. W. Dowdle (ed.), *Public Accountability – Designs, Dilemmas and Experiences*, Cambridge, Cambridge University Press, 2006, pp. 12 and 20 ff.

[217] See R. A. Dahl, *On Democracy*, New Haven, Yale University Press, 1998, pp. 35 ff. and H. Kelsen, 'Foundations of Democracy', 66 *Ethics* 1 (1955). In a global context, see G. De Búrca, 'Developing Democracy beyond the State', 46 *Columbia Journal of Transnational Law* 221 (2008).

[218] See Art. 2 TEU, and Title II TEU, particularly Art. 10 3: 'Every citizen shall have the right to participate in the democratic life of the Union.'

[219] The EIB recognizes this extended view of accountability in its Transparency Policy (*supra* n 178, point i.4, p. 4), and defines a stakeholder as 'a person, a group or organisation who affects or can be affected by EIB Group's actions.' (*id.* fn. 1.) This is particularly important in a global context, where the categories of 'stakeholders' and 'citizens' do not entirely overlap. In this regard, see J. A. Scholte, 'Reconceptualizing Contemporary Democracy', 15 *Indiana Journal of Global Legal Studies* 305 (2008).

[220] Transparency Policy, *supra* n 178, point 1.2.1., p. 7.

adoption of more socially and environmentally sensible policies.[221] Second, participation of stakeholders at *operational level* supposes that the EIB must engage with the people or groups affected by its decisions on particular projects, and reflect their views and interests in those decisions.

At policy level, the EIB has established an ongoing 'partnership' with civil society organizations (CSOs), taking various forms: consultations in the design of new policies;[222] annual briefing; organization of, and participation in, CSO events.[223] To manage relations with CSOs, the EIB added a Civil Society Unit to its communication department.[224] The Civil Society Unit also implements the Transparency Policy. CSOs are also to some extent involved in the EIB's evaluation by its 'Operations Evaluations' division. However, stakeholders engagement on policies is *ad hoc*, and the Transparency Policy simply states that the EIB may engage in public consultation 'on a voluntary basis', and on 'selected' policies.[225] This indicates that the EIB does not necessarily seek consultation on every policy revision.[226] The EIB therefore announces consultations on its website as they are required, with a timetable for the process.[227] CSOs were for example consulted on the EIB's new Transparency Policy, and received two rounds of opportunity to comment on drafts.[228] The process was led by a 'Review Panel' composed of members of all EIB directorates having an interest in the contemplated policies.[229] The Board of Directors finally adopted the policy, having access to all the materials that were contributed to the consultation process. A problem in this respect may concern the real representativeness of the CSOs participating in the process. The objective of the EIB's 'engagement with civil society [is] to ensure that stakeholders are heard, and that the organisation will respond adequately to their concerns. In this context, the EIB will prioritise stakeholders appropriately', and in this regard favours 'dialogue and cooperation with reputable international CSOs.'[230] It should however be kept in mind that international CSOs may themselves suffer from an accountability deficit, as many are first world organizations whose authority in representing the populations of developing countries is not necessarily straightforward.[231] The EIB did in this regard not set guidelines as to representativeness in its consultations, and seems to welcome any contribution, without proactively seeking dialogue with CSOs as representative of its stakeholders as possible.[232]

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[221] See D. B. Hunter, 'Civil Society Networks and the Development of Environmental Standards at International Financial Institutions', 8 *Chicago Journal of International Law* 437 (2007-2008).
[222] See Transparency Policy, *supra* n 178, point 7.1., p. 11. See also in general http://www.eib.org/about/partners/cso/consultations/index.htm, and EIB, 'EIB Complaints Mechanism Policy, Public Disclosure Policy and Transparency Policy Review 2009 – Draft Consultation Report', February 2010, http://www.eib.org/attachments/consultation-report.pdf.
[223] See http://www.eib.org/about/partners/cso/events/index.htm.
[224] See http://www.eib.org/about/partners/cso/contacts/index.htm.
[225] Transparency Policy, *supra* n 178, point 7.1., p. 11.
[226] For example, the EIB was not planning to consult the public regarding its new Transport Lending Policy, and CSOs complained before the Complaints Office, which recommended that the EIB engaged into consultation about this policy (see EIB Complaints Office, Conclusions Report, 16/12/2008, http://www.eib.org/about/cr/complaints/reporting/complaints_office_conclusions_report.pdf), which it did (see http://www.eib.org/about/news/public-consultation-on-the-eib-transport-policy.htm?lang=-en).
[227] Transparency Policy, *supra* n 178, point 6, p. 19.
[228] EIB, *supra* n 222.
[229] *Id.*, p. 1.
[230] Transparency Policy, *supra* n 178, points 6.1. and 6.3., p. 11.
[231] See e.g. P. Spiro, 'New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace', 18 *Cardozo Law Review* 957 (1996 - 1997).
[232] Reports on the Transparency and Complaints Policies consultations, held in 2010, reveal that participating CSOs or individuals were mostly from the developing world. See EIB, *supra* n 222. The list of participants to the consultation on the new transport lending policy was not available at the time of writing.

At operational level, the EIB recognizes that consulting local CSOs and direct stakeholders allows to better appraise and monitor projects and to enhance their sustainability.[233] Stakeholder consultation for the EIB is essential throughout the life of a project, starting with the appraisal. Participation is one of the 'Standards' listed in the Statement,[234] as is it part of the Aarhus Convention which the EIB pledged to apply and which is implemented in EU law, notably in the EIA directive.[235] Stakeholder consultation should be conducted early in project appraisal, to resolve issues in a timely manner. For projects requiring an EIA under EU law (even if located outside EU, as the EIA directive is the benchmark also for those projects[236]), consultation must follow the standards set by the Aarhus Convention, the EIA directive, the Strategic Environmental Assessment (SEA) Directive,[237] and the best practices in project finance:[238] it must be 'meaningful, transparent, and culturally appropriate', disseminate all information in a form and language appropriate to the relevant public, provide sufficient time for effective participation and include evidence that stakeholders' input was taken into account.[239] The EIB staff must ensure that consultation was up to standard.[240] For projects not requiring an EIA under EU law, meaningful consultation should be conducted as well. For projects carried out outside the EU, the Statement provides that 'national law sets the minimum disclosure, consultation and participation requirements of the Bank.'[241]

EIB's participation procedures at operational level are currently under review and are difficult to appraise. According to some analysts, they compare rather favourably with those of other MLIs,[242] but issues can nonetheless be identified in the current practice. First, a double standard is applied when projects require or not an EIA under EU law and EIB policies. If consultation standards under EIA rules are legally prescribed, those applied without an EIA remain at the level of generalities.[243] Also, the reference to EIAs and other EU legal requirements for out-of-EU projects may not be very operative as the pledge to apply such standards is not 'unequivocal' and remains subject to feasibility in regard of 'local conditions'.[244] A double standard may also exist between EU and non-EU projects when no EIA is required (which is the rule rather than the exception[245]): participation for EU projects follows EU standards while for out-of-EU projects national requirements may suffice.

Second, EIAs and the associated consultations, even when legally mandated, are the responsibility of the project promoter, and subject to conflicts of interest.[246] The EIB issued staff guidelines for examining EIAs and weighing stakeholder concerns in appraising projects.[247] In practice, it is argued that the EIB seldom contradicts conclusions of EIAs, and has insufficient expertise to address the environmental and

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[233] See Transparency Policy, *supra* n 178, point 5.3., p. 18. See also Statement, *supra* n 92, para. 62, p. 20.
[234] Statement, *supra* n 92, paras. 62 ff., p. 20.
[235] Directive No. 85/337/EEC of the Council of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment *OJ* L 175/40, 5 July 1985.
[236] Handbook, *supra* n 105, p. 133.
[237] Directive No. 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, *OJ*L197/30, 21/7/2001.
[238] The EIB is developing consultation standards going beyond EIA requirements (Handbook, *supra* n 105, p. 56)
[239] Statement, *supra* n 92, paras. 63-64, p. 20.
[240] Handbook, *supra* n 105, p. 55.
[241] Statement, *supra* n 92, para. 63, p. 20
[242] Wright, *supra* n 2, p. 37.
[243] Though in such cases legal rules may still be applicable, e.g. deriving from the Aarhus convention.
[244] Wright, *supra* n 2, p. 37.
[245] Handbook, *supra* n 105, p. 39: 'Not all projects require a full EIA in the sense defined by the EU Directive; indeed the need for a full EIA is the exception rather than the rule […].'
[246] Wilks, *supra* n 30, p. 20.
[247] Transparency Policy, *supra* n 178 point 5.5, p. 19 and Handbook, *supra* n 105, para 101 and pp. 55-56.

social issues they contain.[248] In addition, the fact raised above that the EIB publishes scarce or no information on projects prior to Board decisions curtails participation: many stakeholders will consequently have no opportunity to provide input in time. It is therefore not guaranteed that stakeholders' views and concerns will be taken into consideration in all EIB finance decisions. More generally, where an EIA is not required (and actually even when it is[249]), there is uncertainty about when and how to engage with the public. Also, the standard of review applicable to consultations carried out by project promoters is underspecified, and a clear method for computing their results into the project appraisal is lacking.[250] The Mid-Term Review confirms that, despite recent efforts, improvements can be made in engaging stakeholders and civil society systematically at project level. A proposed solution is to make more extensive use of the Union's delegations and the EIB's local offices.[251]

Finally, the particular question of the participation rights of indigenous peoples should be addressed for projects supported by the EIB. Indigenous peoples enjoy particular rights under international law. As such, they must express 'free, prior and informed consent' (FPIC) for decisions and projects affecting them. The participation threshold is high, and means readiness to negotiate, and recognition of indigenous peoples' '*right to reject* developments that do not gain community acceptance, based on informed choice.'[252] The FPIC standard is recognized in international instruments, namely the ILO Convention No. 169 on Indigenous and Tribal Peoples[253] and the UN Declaration on the Rights of Indigenous Peoples.[254] It was also acknowledged by influential consultative organs of the project finance world, such as the World Commission on Dams,[255] and the Extractive Industries Review (EIR).[256] FPIC was endorsed by the EU, e.g. in its development policies.[257] Still, MLIs seem to struggle with the concept, as the formulation 'free, prior and informed *consultation*' (FPICon) is widely used instead of 'consent'.[258] Even if the FPICon process must lead to 'broad community support', it is doubtful that this amounts to 'consent'.[259] The Inter-American Court of Human Rights interpreted FPIC as requiring genuine consent, and not simply consultations[260] leaving project deciders free to proceed irrespective of the opinion of indigenous peoples involved.

The EIB's Statement states that '[w]here the customary rights to land and resources of indigenous peoples are affected by a project, the Bank requires the promoter to

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[248] Wilks, *supra* n 30, p. 20. See, however, the recent creation of the ESO (*supra* n 31).
[249] Wright, *supra* n 2, pp. 35-37, arguing that the promoter enjoys flexibility to determine the intensity and modalities of consultation, notably as those depend on feasibility in regard to local conditions.
[250] One World Trust, 'Accountability Profile', *supra* n 195, p. 1.
[251] Mid-Term Review, *supra* n 32, p. 16.
[252] J. Cariño, 'Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice', 22 *Arizona Journal of International and Comparative Law* 19 (2005), p. 20, emphasis added.
[253] ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, done in Geneva on 27/6/1989, effective 5/9/1991. See particularly arts 6 2. and 16 2.
[254] UN General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples', Resolution 61/295, 13/9/2007, UN Doc. No. A/61/L.67 and Add.1.
[255] World Commission on Dams, *Dams and Development – A New Framework for Decision-Making*, London, Earthscan, November 2000, http://hqweb.unep.org/dams/WCD/report/WCD_DAMS%20report.pdf, p. 112.
[256] See Extractive Industries Review, 'Striking a Better Balance – Volume I: The World Bank Group and Extractive Industries', December 2003, http://irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006843AB/$File/volume1english.pdf, p. 18.
[257] See notably the European Consensus on Development, *supra* n 20, par. 103.
[258] See World Bank, 'Operational Manual', *supra* n 166, Operational Policy 4.10: Indigenous people, July 2005.
[259] See F. Mac Kay, 'The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?', 22 *Arizona Journal of International and Comparative Law* 65 (2005), pp. 86-90.
[260] Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment on Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 172, 28/11/2007, http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf, paras 134 and 137.

prepare an acceptable Indigenous Peoples Development Plan. The plan must reflect the principles of the UN Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent to any relocation.' It is still unclear how FPIC will be made operational in the future, as the EIB is still revising its Guidance Note on the 'Rights and Interests of Vulnerable Groups.'[261] The prior version of the Guidance Note provides that the ILO Convention No. 169 'provides the framework' for protecting indigenous peoples in relation to EIB projects, along with the EIR other MLIs' policies. These multiple sources do however not entirely correspond on the question of FPIC vs FPICon. Moreover, the EIB Guidance Note on Involuntary Resettlement[262] does not require FPIC for resettling indigenous peoples, but to 'assess [the] willingness of the population to move' and the 'consultation processes'[263] and to 'assure that the rights of project affected people are respected and protected'.[264] The import of the EU and international FPIC standard in EIB policies is unclear. The current revision of the Guidance Note on vulnerable peoples represents an opportunity to clarify this point.

c. Recourses and Remedies

Access to remedies for dissatisfied stakeholders is central in the accountability of a governing body. This designates the 'retrospective' side of the EIB's accountability, i.e. those mechanisms which are activated after there has been an alleged failure. Many mechanisms may seek to remedy harm, from hard ones (e.g. judicial process) to soft ones (e.g. mediation and dialogue). To some extent, the EIB is subject to accountability mechanisms of all sorts. Here we discuss the mechanisms which are open to the general public given the EIB's position as a public entity and as a result of its operations' human rights, environmental and social implications. This excludes mechanisms aimed at financially controlling the EIB;[265] at detecting and sanctioning fraud;[266] at overseeing the functioning of the EIB administration;[267] at settling disputes among EIB shareholders or between the EIB and other EU institutions, or contractual disputes between the EIB and its clients.[268] MLIs have been establishing redress mechanisms internally dealing with external stakeholder complaints.[269] The EIB did put such sort of mechanism in place, but we also review the significance of the ECJ's jurisdiction on EIB activities in terms of accountability toward the general public.

i. The Complaints Mechanism

MLIs and in particular Regional Development Banks have for some time put internal mechanisms in place for allowing stakeholders to voice concerns and obtain redress for harm caused by their operations.[270] Until 2008, the EIB relied on the European Ombudsman and on certain *ad hoc* loops leading to its higher level administration, but is now is equipped with a Complaints Mechanism. An 'operationally independent'

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[261] Guidance Note 2, Handbook, *supra* n 105, p. 111, characterizing indigenous peoples as 'vulnerable peoples'.
[262] Guidance Note 1, *id.*, p. 104.
[263] *Ibid.,* p. 105.
[264] *Ibid.*, p. 106.
[265] See Audit Committee (*supra*) and the Court of Auditors' mandate for EIB accounts (Art. 287 TFEU).
[266] See OLAF's competence in fraud-related matters (Art. 325 TFEU and ECJ, Case C-15/00, *supra* n 14).
[267] The EIB has an internal and independent 'Operations Evaluations' unit (EV) which reviews the quality and results of EIB group's activities, and suggests improvements of operational performance, accountability and transparency. See generally EIB, 'Operations Evaluation (EV) Terms of Reference', 28/11/2009, http://www.eib.org/projects/publications/operations-evaluation-terms-of-reference.htm.
[268] See Art. 271, 272 and 273 TFEU, and Art. 27 Statute.
[269] See generally M. van Putten, *Policing the Banks – Accountability Mechanisms for the Financial Sector*, Montreal and Kingston, McGill-Queen's University Press, 2008.
[270] See *id.* and Carrasco *et al.*, *supra* n 58.

internal Complaints Office (CO)[271] acts as the lower tier of the mechanism and hears complaints in first instance. The European Ombudsman acts as a second recourse failing a satisfactory CO decision. The CO is competent for complaints on cases of 'maladministration'[272] by the EIB, but not for '[d]ecisions concerning the investment mandate of the EIB, its credit policy guidelines or the EIB's participation in financing operations'.[273] The Complaints Mechanism is primarily 'compliance-focused' as it will check that the EIB abided by applicable laws, rules, principles and standards in conducting its activities, and provide recommendations to the EIB management in that regard.[274] It also acts as a mediator between the complainant and the EIB by suggesting solutions for redress.[275] Whereas the CO must hear out every party and aim for a consensual outcome, its conclusions are not binding on the EIB organs: their addressee, the Management Committee, may choose to apply them or not.[276]

Any person (whether or not an EU Citizen) may file a complaint with the CO against virtually any type of maladministration,[277] without having to show an interest, or to identify the norm relied upon. This is liberal compared to other MLIs' practices.[278] Once the complaint is filed, the CO checks its admissibility[279] and then performs an investigation and compliance review.[280] The EIB insists that stakeholder engagement must be central in complaints procedures.[281] Next to punctual remedies, the CO may suggest improvements to procedures and policies to the Management Committee, and follows up on them.[282] Dissatisfied complainants may file a confirmatory application or seize the European Ombudsman directly.[283] The standard procedure before the CO must not exceed 40 working days, with possible extensions for

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[271] EIB, 'The EIB Complaints Office (CO) - Terms of Reference', 24/6/2008, http://www.eib.org/attachments/strategies/complaints_office_tor_en.pdf, p. 3 To maximize independence and avoid conflicts of interests, it has a 'double reporting line', one to the EIB Secretary General, and one to the General Director for Strategy and Corporate Centre.

[272] Maladministration is defined as 'poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples […] are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay. [It] may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB.' See EIB, 'The EIB Complaints Mechanism – Principles, Terms of Reference and Rules of Procedure', 2/2/2010, http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf, p. 5. Hereinafter the 'Complaints Mechanism Policy'

[273] *Id.*, p. 6.

[274] *Ibid.*, p. 6, point 3.2. Relevant rules are EU Law, EIB policies, and Court of Justice-identified rules of good administration (see in this regard European Ombudsman, 'The European Code of Good Administrative Behaviour', September 2005, http://www.ombudsman.europa.eu/resources/code.faces). See EIB, 'Complaints Office Activity Report 2008', 2009, http://www.eib.org/attachments/general/reports/complaints_office_annual_report_2008.pdf, p. 3. Hereinafter the 'Activity Report'.

[275] Complaints Mechanism Policy, *supra* n 272, p. 6.

[276] *Id.*, point 7.16 p. 13.

[277] *Ibid.*, point 4.1 p. 12

[278] Activity Report, *supra* n 274, pp. 10-11. See e.g. Art. 12 of the World Bank Inspection Panel's mandate, excluding standing for 'single individuals'. See IBRD and IDA, "The World Bank Inspection Panel", 22/9/1993, Resolution No. IBRD 93-10 and IDA 93-6, http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf), and IBRD and IDA, 'Review of the Resolution Establishing the Inspection Panel 1996 Clarification of Certain Aspects of the Resolution', 17/10/1996, http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1996ReviewResolution.pdf).

[279] For example, complaints must be filed within one year after the complainant has had knowledge of the fact complained after. See Complaints Mechanism Policy, *supra* n 272, point 5.1, p. 12.

[280] For which the CO has access to 'any and all information necessary for the performance of its duties.' EIB staff must collaborate. See EIB, 'Operations Evaluations (EV) Terms of Reference', *supra* n 267, p. 4.

[281] Complaints Mechanism Policy, *supra* n 272, point 7.15, 9, p. 14.

[282] *Id.*, point 7.7-7.9 p. 13.

[283] *Ibid.*, point 11.

complex cases, or for consultations and dialogue in problem-solving.[284] CO proceedings and conclusions are only published with consent of the complainant.[285] To date, only one complaint is documented on the EIB's website.[286] An annual report must also be published by the CO.[287] In 2008, with the reform of the procedure, the number of complaints more than doubled,[288] seven of which relating to environmental and social impacts of financed projects.[289]

After exhaustion of the CO procedure, the European Ombudsman acts as the higher tier of the Complaints Mechanism, [290] as the TFEU makes him competent to hear cases of maladministration by EU 'institutions, bodies, offices or agencies'.[291] The Ombudsman therefore provides an external and independent recourse.[292] We shall not here describe the mandate of, and procedures followed by, the Ombudsman,[293] but shall point to one major deficiency of the competence of the Ombudsman with regard to the EIB's activities. Only EU citizens or 'any natural or legal person residing or having its registered office in a Member State' are normally entitled to complain to the Ombudsman.[294] This may exclude most complaints regarding projects carried out outside of the EU, raising the most concern.[295] The EIB and the Ombudsman signed a Memorandum of Understanding (MoU)[296] in which they agree that, when the only reason not to investigate is the fact that the complainant is not an EU citizen, the latter shall act *proprio motu.*[297] Potential applicants from outside the EU may however still be excluded for reasons of e.g. cost or distance. The MoU is also not binding on the Ombudsman or the EIB, and states that the Ombudsman shall not second-guess EIB substantive policies (notably in regard of environmental, social or development issues), and shall strictly focus on compliance review and problem-solving,[298] contrary to the CO, which can recommend policy changes.

Generally, the Complaints Mechanism is very soft and has no enforcement power on EIB organs. If no mutually agreeable solution can be found, it may be difficult to curb EIB's or project promoters' decisions.[299] Finally, concern also exists regarding the capacity of the CO and of the Ombudsman to carry out local fact-finding missions,[300] as well as about the accessibility of the complaints mechanism to the populations of developing countries, and their real capacity to make use of their right to complain.

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[284] *Ibid.*, point 10 p. 14.
[285] *Ibid.*, point 13 p. 15.
[286] See http://www.eib.org/about/cr/complaints/reporting/index.htm and *supra*.
[287] Complaints Mechanism Policy, *supra* n 272, point 13.4, p. 15. A report was to date only published for 2008.
[288] Activity Report, *supra* n 274, p. 3
[289] *Id.*, p. 6. A parallel accountability mechanism for transparency and participation issues in environmental matters covered by the Aarhus Convention is its 'Compliance Committee'. See Art. 15 Aarhus Convention, *supra*, and http://www.unece.or g/env/pp/ccBackground.htm.
[290] Complaints Mechanism Policy, *supra* n 272, point 4.3, p. 17.
[291] Art. 228 TFEU.
[292] Activity Report, *supra* n 274, p. 10.
[293] See Statute of the European Ombudsman, in Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, *OJ* L 113/15, 4/5/1994, and amended by European Parliament Decisions of 14/3/2002 (*OJ* L 92/13, 9/4/2002) and 18/6/2008 (*OJ* L 189/25, 17/7/2008).
[294] Art. 24 and 228 TFEU and Art. 2 2. of the Statute of the Ombudsman (*supra*).
[295] See generally Wilks, *supra* n 30.
[296] See Memorandum of Understanding between the European Ombudsman and the EIB concerning information on the Bank's policies, standards and procedures and procedures and the handling of complaints, including complaints from non-citizens and non-residents of the European Union, done in Luxembourg, 9/7/2008, http://www.eib.org/attachments/strategies/complaints_mou_eo_eib_en.pdf.
[297] Art. 3 statute of the Ombudsman (*supra* n 293) and Memorandum of Understanding, *supra* n 296, p. 2
[298] *Id.* pp. 2-3.
[299] Agreements with promoters however do happen. See Activity Report, *supra* n 274, p. 5.
[300] Mid-Term Review, *supra* n 32, p. 25.

ii. The European Court of Justice

The EIB is part of the EU order, while other MLIs are generally self-standing international organizations. In this regard, the ECJ could play an important role in the external accountability of the EIB. In this section we study the extent of the jurisdiction of the Court on EIB activities its role in the EIB's external accountability. Judicial review is a fundamental tool to check the legality of an institution's acts, and therefore a strong rule of law guarantee.[301] Judicial review of EIB decisions could ensure e.g. that an EIB decision to finance a project is in line with its mandate, or that it complies with EU law, in particular the human rights contained in the Charter of Fundamental Rights. Judicial review is generally absent of MLIs accountability schemes, and this is criticized as a democratic deficit.[302]

Art. 271 seems to establish a *lex specialis* regime in respect of the EIB:

> 'The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:
>
> […]
>
> (b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Art. 263;
>
> (c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Art. 263, and solely on the grounds of non-compliance with the procedure provided for in Art. 19 (2), (5), (6) and (7) of the Statute of the Bank […]'

This Article only provides for the review of decisions of the Board of Governors and of the Board of Directors (in limited cases), and states that only Member States and the Commission (and the Board of Directors for review of Board of Governors decisions) may institute proceedings, and not individuals affected by a decision of one of the Boards. And indeed the Court of First Instance (CFI) dismissed an action for annulment lodged by French citizens against a decision of the EIB Board of Directors to extend a loan to the city of Lyon for building a ring road around the city.[303] The CFI refused to apply its *Les Verts* reasoning against the Board of Directors' decision, because such interpretation would overstep the boundaries of Art. 271(c) TFEU and was not warranted by the increased impact of EIB activities on citizens, contrary to that of the European Parliament in *Les Verts*. The CFI also reasoned further as it doubted the capacity of the claimants to demonstrate that the decision of the Board was of direct and individual concern to them, as it considered that such decision did not affect their legal situation.[304] The claim was therefore declared inadmissible.

On a later action for annulment lodged by the Commission against a decision of the Management Committee allegedly infringing OLAF's investigative powers, the Court gave a more flexible interpretation of Art. 271, which does not cover Management Committee's decisions. The Court ruled that the challenged decision was of the

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[301] See ECJ, Case 294/83, *Les Verts v. Parliament* [1986] ECR 1986, p. 01339, para. 23). On the role of the judicial system in upholding the rule of law in the EU, see M. L. Fernandez Esteban, *The Rule of Law in the European Constitution*, London, Kluwer Law International, 1999. The rule of law is referred to in the TEU, e.g. in the preamble, Art. 2 (values), and Art. 21 (external action).

[302] See Head, *supra* n 58, pp. 268 and 299.

[303] CFI, Case T-460/93, *Etienne Tête* et al. *v. EIB*, [1993], ECR 1993, p. II-01257.

[304] *Id.*, paras. 17-18, and 22-23.

competence of the Board of Governors, and that it was reviewable under Art. 271 (b), irrespective of the fact that the decision had been made by the Management Committee.[305] The Court justified its position by restating the requirement of the rule of law, which entails that 'the EIB is subject to judicial review by the Court, in particular as provided for in Art. [271](b) EC.'[306]

And *in general*, could individuals affected by a decision of the EIB seek its annulment under the general regime of Art. 263 TFEU, which now provides for the review of acts of 'bodies'? Indications can be found in a recent judgment of the General Court, based on the EC Treaty, on an action for annulment and damages lodged by a Greek IT company whose bid to install a software at the EIB was not retained by the Management Committee following a tender procedure.[307] The EIB did not challenge the admissibility of the action, but the Court still ruled that Art. 271 TFEU (ex-237 EC) is limited in scope and 'supplementary' to the general regime of Art. 263 TFEU. The Union being based on the rule of law, '[a]cts formally adopted within the EIB by bodies other than those referred to in [Arts 271 (b) and (c) TFEU] […] must […] be amenable to judicial review if they are final and produce legally binding effects *vis-à-vis* third parties.'[308] And indeed Art. 263 TFEU now allows review of 'the legality of acts of bodies […] of the Union intended to produce legal effects *vis-à-vis* third parties.' Yet, individual actions for annulment against EIB *finance decisions* seem barred in several ways.

First, finance decisions are made by the Board of Directors, whose decisions are covered by Art. 271 (c), which as *lex specialis* excludes individual applications under Art. 263 (4).[309] Should the Commission or a Member State, as guarantors of the public interest, wish to take the matter into their own hands and challenge a finance decision of the Board of Directors to protect harmed stakeholders, they could only do so based on the violation of Art. 19 (2) and (5)-(7) Statute, i.e. the provisions establishing a system of semi-binding opinions from Member States, the Commission and the Management Committee.[310] Second, the Management Committee's decisions in financing matters are limited to 'preparing' decisions of the Board of Directors, and are also not reviewable under Art. 263 TFEU, as they are not 'intended to produce legal effects vis-à-vis third parties'.[311] Third, the Court draws a distinction between EIB decisions partaking of 'Community administration' in the framework of its 'current business', which the Management Committee is in charge of, such as procurement decisions, and the operations of the EIB in financial domains and on financial markets, such as finance decisions. The ECJ already judged that the EIB's status as a bank under the Treaties required that its independence, autonomy and reputation be preserved in financial activities, and used that reasoning to determine whether the applicability to the EIB of certain EU legislation was 'compatible' with its independence and autonomy.[312] The General Court now seems to use the compatibility criterion to determine its jurisdiction, by

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[305] ECJ, Case C-15/00, *supra* n 14, para. 73.
[306] *Id.*, para. 75.
[307] General Court, Case T-461/08, *supra* n 8.
[308] *Id.*, para. 50. Analogically, concerning another EU body, the European Agency for Reconstruction, the CFI drew from *Les Verts* the general principle that 'any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review.' See Court of First Instance, Case T-411/06, *Sogelma v. EAR*, [2008], ECR 2008, p. II-02771, para. 37.
[309] General Court, Case T-461/08, *supra* n 8, para. 47, and K. Lasok & T. Millett, *Judicial Control in the EU: Procedures and Principles*, Richmond, Richmond Law & Tax, p. 146.
[310] See *supra* n 56.
[311] The CFI ruled in Case T-460/93 (*supra* n 303, para. 18) that the EIB is mainly a credit institution and that it 'therefore does not adopt decisions having legal effects vis-à-vis third parties who are not in receipt of EIB loans or guarantees.' The General Court in Case T-461/08 (*supra* n 8, para 48) is not of that view and argues that the EIB, notably the Management Committee, is capable of taking such decisions.
[312] ECJ, Case 85/86, *supra* n 11, para. 28, and ECJ, Case C-15/00, *supra* n 14, para. 101 ff.

implying that review would be possible for acts of 'administration', but not for 'finance' decisions, thereby perhaps introducing an exception to the general principle that acts of bodies intended to produce legal effects vis-à-vis third parties are open to judicial review.[313] Fourth, should decisions of the Board of Directors or the Management Committee in financial matters ever be considered reviewable, the strict individual standing conditions of Art. 263(4) TFEU may prove difficult to meet for external stakeholders affected by projects concerned by such decisions.[314] In conclusion, these four limits arguably render nearly impossible for individual stakeholders of EIB projects to seek annulment of finance decisions.

The action for damages under Art. 268 TFEU is on the contrary open to individuals, and the Court found it, in light of the rule of law and effective judicial protection principles, to be a sufficient substitute to the individual action for annulment against acts of the EIB.[315] In that case,[316] the EIB had signed a loan contract with Mali for the laying of an electric line. The EIB was however not convinced by the ability of Mali's contractor to successfully perform the work and conditioned its disbursements to the choice of a more suitable one. Mali hired a new contractor and the dismissed contractor filed an action for damages in order to recoup the losses caused by the EIB's interferences in Mali's selection of a contractor.

The Court declared the action admissible, notably on the following grounds:

> It would be contrary to the intention of the authors of the Treaty if, when it acts through a Community body established by the Treaty and authorized to act in its name and on its behalf,[[317]] the Community could escape the consequences of the provisions of Art. [268] and the second paragraph of Art. [340] of the Treaty, the intention of which is to reserve for the Court's jurisdiction cases involving the non-contractual liability of the Community as a whole towards third parties. […] The term "institution" employed in the second paragraph of Art. [340] of the Treaty must therefore not be understood as referring only to the institutions of the Community listed in Art. [13 TEU] but as also covering, with regard to the system of non-contractual liability established by the Treaty, Community bodies such as the Bank.[318]

The action for damages also leads the Court to *de facto* review the legality of the acts of the EIB. However, the threshold to engage the non-contractual liability of a Community body is high and requires an illegal conduct, a damage, and a causal link between the two.[319] The General Court in the case above also seems to imply that

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[313] General Court, Case T-461/08, *supra* n 8, paras. 51-52.

[314] In this regard, a 'Communication' to the Aarhus Convention Compliance Committee alleged that this limited access of individuals and NGOs to annulment actions against general acts of the Institutions breached the EU's access to justice obligation under the Aarhus Convention. The Committee found that, should the ECJ's case law on the matter be maintained, the EU would *fail to comply* with Art. 9 paras. 3 and 4 of the Aarhus Convention, unless the lack of standing is compensated by appropriate administrative review mechanisms. See the Findings and Recommendations of the Aarhus Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part I) Concerning Compliance by the European Community with Its Obligations under the Convention, as adopted by the Compliance Committee at its 32nd Meeting, Geneva, 11-14/4/2011, http://live.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html, p. 22, para 94.

[315] CFI, Case T-460/93, *supra* n 303, para. 21.

[316] ECJ, Case C-370/89, *supra* n 84.

[317] The EIB was acting in pursuance of the Sixth European Development Fund. See *id.*, para 5.

[318] ECJ, Case C-370/89, *supra* n 18, paras 15-16.

[319] See ECJ, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1996], ECR 1996, p. I-01029, para. 51: 'the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.'

actions for damages is inadmissible for to the EIB's finance activities, so as to protect its autonomy and independence on financial markets.[320] Moreover, the condition pertaining to the illegal conduct is difficult to meet, as the illegality must be 'sufficiently serious.' Seriousness is appraised in regard of the margin of appreciation that the body enjoys in making its decision.[321] A wide margin of discretion entails a marginal review by the Court.[322] The EIB clearly enjoys a wide margin of appreciation in its finance decisions due to the independence required on financial markets,[323] and to the numerous and interrelated factors to be considered in making a finance decision.[324] Also, EIB decisions can be deemed illegal against the Treaties, the Charter, its Statute, an international instrument, or applicable EU legislation, but it is dubious whether illegality could result from the EIB's disregard for its own internal policies. The ECJ has already judged that EU institutions were somehow bound by their internal acts not having legal value, like the Commission guidelines on the application of competition rules. Acting, without justification, contrary to those self-imposed limits could indeed run afoul of e.g. equal treatment or citizens' legitimate expectations.[325] But would such interpretation be applicable, *mutatis mutandis*, to the Statement of Environmental and Social Principles and Standards, the Corporate Social Responsibility Statement, or the Environmental and Social Practices Handbook?

For completeness, a preliminary ruling under Art. 267 TFEU could probably also be filed on questions of EU law interpretation regarding EIB activities, for instance if a contractual dispute were pending before an EU national court. An author doubts whether an exception of illegality could be raised against EIB decisions under the same article, as Art. 271 limits standing for actions for annulment.[326] True, admitting the exception would lessen the EIB's autonomy and independence on financial markets. Yet, a blanket exclusion is debatable as the exception of illegality is not subject to this limitation in Art. 267 indent 1 (b), which includes acts of bodies. Moreover, the *raison d'être* of the exception of illegality is to serve as a safety net for claimants not meeting the standing conditions of Art. 263 TFEU.[327]

In conclusion, the EIB was repeatedly characterized by the ECJ as a body which, despite its autonomous status, was bound to comply with applicable EU law. It is unfortunate that the consequences of such interpretation were not drawn completely concerning the justiciability of EIB finance decisions. In light of the EIB's reach and impact on local living conditions, the ECJ is the most reliable and effective accountability mechanism.[328] It is regrettable that the drafters of the Treaties chose not to extend the jurisdiction of the ECJ to individual requests to annul finance

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[320] General Court, Case T-461/08, *supra* n 8, para. 57.

[321] ECJ, Cases C-46/93 and C-48/93, *supra* n 319, para. 55: the 'sufficiently serious' threshold is met when 'the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.' See ECJ, Case C-352/98, *Bergaderm* et al. *v. Commission* [2000], ECR 2000, p. I-5291, para. 40ff.

[322] P. Gilliaux, 'L'intensité du contrôle de la légalité par les juridictions communautaires', *Journal de Droit européen* 37 (2009), p. 44.

[323] General Court, Case T-461/08, *supra* n 8, para. 57.

[324] Such margin of appreciation is however not unlimited, and the Court has already judged that the EIB had overstepped it, notably in Case No. C-15/00 (*supra* n 14), para 186.

[325] See ECJ, Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri* et al., [2005], ECR 2005, p. I-05425, para. 211: 'In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.'

[326] Dunnett, *supra* n 6, p. 755.

[327] M. Wathelet & J. Wildemeersch, *Contentieux européen*, Brussels, Larcier, 2010, pp. 238-240.

[328] See Head, *supra* n 68, p. 220.

decisions. Unlike other MLIs, the EIB is part of a strong legal order but this is not enough operationalized in terms of accountability. Presently the EIB's retrospective accountability toward external stakeholders chiefly relies on bland 'maladministration' grounds and mechanisms just like all other MLIs. One can argue that the banking activities of the EIB and their involving third-parties prevent them from being suspended to review actions coming from the public. However, such actions are justified by the public nature and impact of EIB decisions. Also, the argument that ECJ jurisdiction would affect (and possibly scare away) third-party investors and financial actors is misplaced. Recourses by dismissed tenderers are open against procurement decisions even though they may affect third parties (selected tenderers). The European Central Bank's acts regarding monetary policy and price stability are also subject to Art. 263 TFEU even though they influence financial markets, and despite the ECB's necessary independence in its activities.[329] Such remedies are however warranted under the rule of law.

V. CONCLUDING REMARKS

This article reviewed the EIB's external accountability principles and practices with regard to human rights, social and environmental issues. It revealed that the EIB, despite being the world's major development lender and an EU body, largely imitated the practices of other MLIs. With regard to substantive accountability principles, EIB-financed projects are bound by EU law when located within the EU. However, the status of EU law is unclear when the EIB operates in the framework of its External Mandate. The role of EU law in setting a 'benchmark' for human rights, social and environmental practices for operations outside the EU is unclear and insufficient. Also, the voluntary standards which the EIB commits to follow are vague and incomplete, and hardly form a basis for accountability.

Procedurally, the transparency and participation principles applied by the EIB are rather progressive. However, they still display a number of shortcomings as regards the involvement of stakeholders in the appraisal of projects and in the making of concrete finance decisions. One may also regret that the EIB largely escapes the jurisdiction of the ECJ, as judicial review would be the most effective remedy available to external stakeholders. The Complaints Office/European Ombudsman construction is in this regard too weak an alternative to judicial review.

In conclusion, more advantage should be taken of the EIB's being part of the EU legal order to guarantee effective accountability to external stakeholders. Most notably, EU law should play a more pervasive role in setting the normative framework of the EIB's operations, notably outside the EU. Likewise, the EU judicial system should be used, where possible, as an independent, reliable and credible accountability mechanism in case harm is caused by the EIB to its external stakeholders.

[329] On the ECB's independence, see ECJ, Case C-11/00, *Commission v. ECB* [2003], ECR 2003, p. I-07147, paras. 130-135.

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