

GOING ABROAD

**A critique of the European Investment
Bank's External Lending Mandate**



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EXECUTIVE SUMMARY

This report provides an analysis of how the European Investment Bank (EIB) is fulfilling its development role under the so-called External Lending Mandate (ELM) for the period 2014-2020. It also formulates key recommendations for improving this mandate as part of the review currently being conducted by the European institutions. This review process represents an opportunity for critical changes needed to ensure that the EIB's external operations contribute to EU external policies and priorities including, most notably, climate change, human rights, transparency as well as ownership and the sustainability of development practices.

In his foreword to the Result Measurement Framework annual report for 2015, the EIB's president, Werner Hoyer, wrote: *"To give you some figures about the impressive results of the new projects signed in 2015: enough energy generated to supply the needs of over 7 million households in the countries concerned; more than 1.3 million households benefiting from improved water supply or sanitation; half a million passengers benefiting daily from improved urban and rail transport and over 530 000 jobs supported in SMEs and midcap companies. These are just some of the results expected from almost EUR 7.7bn in new approved lending over 2015."*¹

These may be impressive figures, but this report sheds light on the more questionable quality and effectiveness of EIB operations and on the neglected areas of the bank's performance outside Europe, such as transparency and access to information practices, its attitude towards tax evasion and tax dodging, human rights due diligence and the EIB's aspirations to be a key player in the EU's response to the situation in the Middle East and Northern Africa region. All of these aspects have a serious impact on the beneficiaries of concrete projects supported by the EIB, specifically on their basic rights and freedoms. These qualitative and fundamental aspects need to be seriously considered in order to ensure that EIB projects bring other benefits (such as poverty and inequalities reduction, or local ownership) than simply a stream of statistical results resulting from projects, as outlined by the bank's president.

The main conclusions and recommendations developed in this report are the following:

ENHANCING THE TRANSPARENCY OF EIB OPERATIONS AND THEIR VISIBILITY IN COUNTRIES OF OPERATION

The EIB fails to fully comply with its obligations contained in the EU Treaty, EU legislation on access to information, the ELM Decision and its own Transparency Policy. Its Public Register needs to be improved in order to, among other things, include: results, evaluations and impact appraisals of projects, all finance contracts with only confidential information redacted, the opinions of the European Commission and economic feasibility studies. EIB clients should inform other stakeholders about the EIB's involvement during the public consultation phase, through information disseminated in local media and other appropriate means of disseminating information already at the stage of project appraisal – once any given project enters the EIB's project pipeline.

DOING MORE TO FIGHT TAX EVASION AND TAX DODGING

In spite of existing EIB policies and European legislation, we have documented several cases of EIB projects taking place via clients operating in tax havens.² Therefore, we recommend that co-legislators request that the EIB adopts a responsible taxation policy by the end of 2017, one which requires country-by-country reporting from EIB clients, ensures that clients disclose information about their ownership structure, includes a commitment to report annually to the European Parliament – in a public manner – on the implementation of its future responsible Taxation policy, with precise figures on the tax impact (especially on corporate taxation on profits) of EIB investments and lending.

ADDRESSING THE BLACK HOLE OF EIB OPERATIONS VIA FINANCIAL INTERMEDIARIES

We recommend granting the EU guarantee only for financial intermediaries which do not

¹ http://www.eib.org/attachments/country/eib_rem_annual_report_2015_en.pdf

² <http://www.counter-balance.org/fight-tax-havens-start-with-the-european-investment-bank-argues-new-report/>

operate in offshore financial centres, which have substantial local ownership and which are equipped to implement a pro-development approach that supports the specificity of SMEs in each country. The EIB should ensure that intermediated loans are subject to the same transparency requirements as other types of loans. Such funds largely operate via offshore financial centres contrary to any kind of development logic – it appears that the wealth management logic of these speculative funds is inherently contradictory to development goals and policies. Therefore, the EIB should impose a moratorium on the use of private equity funds

TOWARDS A HUMAN RIGHTS POLICY AND SOUND PROJECT-LEVEL ASSESSMENT

We recommend that the EIB adopts a Human Rights Policy by the end of 2017, one which will: streamline human rights due diligence into all levels of the project cycle to ensure that the EIB is not causing, contributing or being directly linked to any human rights violations in its performance; develop practical guidance on the assessment of aspects related to all basic human rights and all possible affected groups, to be used during the ex-ante assessment and ongoing monitoring on a project-by-project basis, including projects via financial intermediaries; require from the European Commission an assessment to point out the risks of human rights violations taking place via bank operations under the EU guarantee. The European Commission should also conduct such an assessment for every new Framework Agreement between the EIB and third countries, as well as for Delegated Decisions on ELM eligible countries.

THE EIB'S EXTERNAL ACTION IN THE CONTEXT OF FORCED DISPLACEMENT

The European institutions ought to thoroughly assess the capacity of the EIB to deliver on the needs of forced displacement inside and outside Europe. The track record of EIB operations in the Middle East and Northern Africa (see chapter 7) casts doubts on the bank's capacity to operate in the region for the full benefit of its population.

Therefore, we call on the co-legislators to adopt a cautious approach and not grant further resources and functions for the EIB in the region – neither via the activation of an additional EUR 5.3 billion guarantee nor the granting of a central role in the upcoming External Investment Plan.

This report also presents several case studies which illustrate that the EIB is still a long way from the general principles guiding EU external action as set out in Article 21 TEU. Listening, for instance, to Werner Hoyer say “(...) *In Ukraine we are providing strong financing for rural businesses (...)*”³, we ask in the name of local communities in the Ukrainian Vinnitsa region, where the EIB signed a loan agreement with the Ukrainian poultry producer PJSC Myronivsky Hliboproduct (MHP): will the bank finally start assessing the conduct of the promoters and ensure that there are no further cases of violence against local activists who were merely protesting against the abuse of their basic rights?

The EIB president has also recently commented: “In Egypt we will help develop 4.8 million households with electricity to economically crippling power cuts”. However, when will the EIB establish due diligence which will provide space for civil society to express views over the massive energy investments, the companies involved and the impacts on the economy of the numerous loans? Credible human rights due diligence would also help to shed light on the crackdown on fundamental freedoms in Egypt for which the country has been under continuous scrutiny by the European Parliament.

The mid-term review of the ELM could not have been more timely given the new global agenda of Sustainable Development Goals as well as the deteriorating state of human rights in many countries which come under the Mandate. We call on the European Commission, the Council and the Parliament to use this opportunity and change the EIB mandate, in order to ensure that the bank becomes an instrument which contributes to positive changes rather than helping to create further harm for the beneficiaries of the EU's external policies.

3
http://www.eib.org/attachments/country/eib_rem_annual_report_2015_en.pdf

INTRODUCTION

The European Investment Bank, the bank of the European Union, is the biggest multilateral lender by volume in the world. Even if its primary zone of operations is Europe, the EIB is also active outside of the EU, investing in projects that aim to promote sustainable and inclusive growth in support of the EU's external policy objectives. EIB operations outside the EU constitute around 10% of the bank's lending. In 2015 the bank approved loans outside the EU in the amount of EUR 7.7 bn, which illustrates how it is perceived to be an important instrument in supporting EU policies and the development cooperation framework.

EIB operations outside Europe are based either on a mandate from the European Union, with an EU Guarantee under Decision No 466/2014/EU (the so-called External Lending Mandate, ELM), or at its own risk under dedicated facilities managed by the EIB. In addition, the EIB manages the ACP-EU Investment Facility as agreed by the EU member states and countries in the Africa, Caribbean and Pacific region under the Cotonou Agreement establishing the European Development Fund (EDF).

The current ELM, with a fixed ceiling of EUR 27bn, came into force on 25 July 2014. Its purpose is to provide an EU guarantee to the EIB against losses under financing operations signed over the period 2014-2020 in support of investment projects (loans, loan guarantees and debt capital market instruments) in eligible countries outside the EU.

Because of its geographical scope – 68 eligible countries including pre-accession, neighbourhood and partnership, and also covering Asia, Latin America and South Africa – the ELM has become particularly important for the EU in its responses to the vulnerable situations in Turkey, the Middle East and the Northern Africa region. In the coming five years the EIB plans to lend over EUR 15bn in its 10 Mediterranean partner countries and in Turkey.⁴ In accordance with proposals set by its president, Werner Hoyer, during the 'Supporting Syria & the Region Lon-

don 2016' conference, an additional EUR 3 billion can be pledged to this amount as part of the EU guarantee.

The implementation of the ELM also faces a key challenge: while it is based on the general principles guiding EU external action as set out in Article 21 TEU, such as supporting democracy and the rule of law, human rights and fundamental freedoms, the majority of the ELM eligible countries are described as authoritarian or hybrid regimes by the Economist Intelligence Unit in its 2015 Democracy Rating.

In 2016, the European Commission started a mid-term review of the ELM. The authors of this report view this process as an opportunity for the introduction of deep reforms to better align the EIB's external operations with EU external policies and priorities including most notably climate change, human rights and ownership and sustainability of development practices.

The mid-term review of the ELM could not have been more timely given the new global agenda of Sustainable Development Goals, as well as the human rights breakdown in many countries which come under the ELM. This calls for the issues expanded upon in this report to be addressed to ensure the coherence of the EIB's operations with EU priorities and values such as transparency and public participation, democracy and the rule of law, human rights and fundamental freedoms.

As civil society organisations committed to making the EIB a more open, sustainable and democratic institution, CEE Bankwatch Network and Counter Balance provide in this report their analysis of the challenges faced by the EIB in implementing its development mandate. A critical analysis of EIB operations outside of Europe is needed in order to identify areas of change for the bank. In this context, this report provides key recommendations for decision-makers to re-orient the activities of the EIB if it is to fulfill its development mandate.

⁴ <http://www.eib.org/infocentre/press/releases/all/2016/2016-030-syrian-refugee-crisis-the-eus-bank-calls-for-an-ambitious-response.htm>

TRANSPARENCY MATTERS

Enhancing the transparency of EIB operations covered by the EU guarantee and their visibility in countries of operation

As an institution of the EU, the EIB is governed by the principles and values underlying the creation of the union. Its statute consists of an integral part of the TEU and the Treaty on the Functioning of the European Union. Therefore, transparency matters for the EIB, as the EU strives to apply the highest transparency standards through applying the principle of openness enshrined in Article 1 of the TEU and the right of public access to documents enshrined in Article 42 of the EU Charter of Fundamental Rights.

The EIB adopted a revised Transparency Policy in 2015 in order to enforce the principles guiding transparency within the EU. The policy describes how it *“understands transparency to refer to an environment in which the objectives of policies, its legal, institutional and economic framework, policy decisions and their rationale, and the terms of its member institutions’ accountability are provided to the public in a comprehensive, accessible and timely manner. Transparency is therefore an essential condition for a free and open exchange with stakeholders whereby the rules and reasons behind policies and practices are fair and clear to all parties”*.⁵

Indeed, ensuring the transparency of the EU institutions and access to information is key for enabling a wider understanding of the EU’s actions undertaken in realisation of its policies, including actions supporting the Union’s external cooperation. Transparency and access

to information is also crucial for fostering sustainable development with the principles of public participation in decision-making and the right to justice, in environmental matters in particular.

Decision No 466/2014/EU of the European Parliament and of the Council of 16 April 2014 granting an EU guarantee to the EIB against losses under financing operations supporting investment projects outside the Union (ie, the ELM, or the ELM decision) imposes certain duties on the bank in reference to transparency obligations.

This decision makes it explicit that, as a publicly owned investment bank, EIB financing operations should contribute to the general principles guiding Union external action, as referred to in Article 21 TEU, of consolidating and supporting democracy and the rule of law, human rights and fundamental freedoms, and to the implementation of international commitments and agreements, including environmental agreements to which the Union is a party. EIB actions should also be in line with the United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)⁶. One of the EIB’s duties is the carrying out of thorough due diligence and the provision of information relevant for the assessment of its contribution to the fulfilment of EU external policy and

5 The EIB Group Transparency Policy, 10 March 2015, <http://www.eib.org/infocentre/publications/all/eib-group-transparency-policy.htm>

6 Decision No 466/2014/EU of the European Parliament and of the Council of 16 April 2014 granting an EU guarantee to the EIB against losses under financing operations supporting investment projects outside the EU.

7 Decision No 466/2014/EU, Art.9

strategic objectives⁷. In accordance with the ELM decision, the EIB, also in line with its Transparency Policy and progressively with International Aid Transparency Initiative (IATI) standards, should make publicly available on its website information related to all of its financing operations carried out under the guarantee, in particular indicating whether an investment project is covered by the EU guarantee and how it contributes to the goals of the EU's external action, in particular in relation to its economic, social and environmental impacts. The EIB's investment strategies for regions and countries, such as the ELM itself and the integral operational guidelines for regions, should also be published along with the framework agreements with recipient countries⁸ and all project completion reports⁹.

8

Under the ELM, the EIB enters into a Framework Agreement with every country before commencing country operations. Framework agreements describe the EIB status in the country and the legal basis of its operations.

9

Reports summarising a given project's results at the time of their completion

10

http://ati.publishwhatyoufund.org/wp-content/uploads/2016/02/ATI-2016_Report_Proof_DIGITAL.pdf

11

European Parliament resolution of 28 April 2016 on the European Investment Bank (EIB) – Annual Report 2014 (2015/2127(INI))

EIB TRANSPARENCY AND ACCESS TO INFORMATION PRACTICES: WEAKNESSES AND SHORTCOMINGS.

Having extensively monitored EIB operations in recent years, our assessment is that the EIB fails to fully comply with its obligations under the EU Treaty, EU legislation on access to information, the ELM Decision and its own Transparency Policy.

According to the 2016 Aid Transparency Index¹⁰ which assesses the transparency of major global donors, including multilateral development banks, the EIB received a 'fair' ranking, an improvement on its performance in 2015 when it was placed in the 'poor' category. However, the bank still lags behind many others donors such as the European Commission, the African Development Bank and the Asian Development Bank. In particular, the EIB has received the recommendation to make the results, evaluations and impact appraisals of projects consistently available to the public. The European Parliament has also noticed a need for improvement in the EIB's transparency and duly made several suggestions in its Annual Resolution adopted in May 2016¹¹. For example, it stated that the EIB should publish aggregate statistical data, as well as information regarding sub-projects financed by financial intermediaries and strive to achieve the highest levels of transparency and

institutional accountability by ensuring proactive public disclosure of exhaustive and sound budgetary information and access to financial data related to EIB-funded projects. Moreover, the European Parliament called for maximum transparency and publicity regarding the system of contracts and subcontracts for EIB projects, and also encouraged the bank to strictly follow requirements related to its public register of environmental documents (see below).

PUBLICATION OF PROJECT RELATED INFORMATION

The EIB does not fully comply with the obligation to publish information in relation to the economic, social and environmental impacts it finances under its mandate.

Indeed, there are many documents related to the environmental, social and development impacts of its operations that the EIB does not publish:

Result Measurement Sheets (so-called ReM sheets);

Environmental and Social Appraisal Forms;

Project Completion Reports: although the EIB announced it would publish project completion reports in its Public Register, to date it has published only few reports. The justification so far has been that the completion reports for projects approved since 2014 under the current mandate would only be available at some date in the future.

Project monitoring reports;

Project evaluations.

These documents may only be made available upon request and only after a project approval; yet they are not registered in the EIB's Public Register where all documents containing environmental information should be registered. This means that the register does not hold all the documents drawn up by the bank for the purpose of decision-making, monitoring and project

evaluation and accessing them on request proves to be very rather lengthy process.

Regarding Environmental and Social Data Sheets, these are created specifically for the purpose of publication in the register and constitute the summaries of the EIB's environmental and social and appraisal process. This means that the EIB has not entirely fulfilled its commitment, made to the European Ombudsman, to actively disseminate the content of documents related to its projects, such as the ReM Sheet, the Environmental Appraisal Report, the Environmental Assessment Forms and the environmental conditions included in the Finance Contract¹². It is in this context that, in February 2016, the European Ombudsman made further recommendations in a letter addressed to the bank's president on how to improve proactive transparency of the EIB, including through further development of its Public Register¹³. While the EIB publishes Environmental and Social Data Sheets which contain a summary of the bank's environmental and social appraisal of projects, it fails to publish its ex-ante development assessment of projects which is included in the Result Measurement Sheets and ex-post evaluations in the Completion Reports. These are documents which already exist in EIB internal files – disclosing such files of public interest should be an easy task for the bank.

TRANSPARENCY OF PROJECT IMPLEMENTATION AND MONITORING

Although the bank should require project promoters to carry out thorough monitoring during project implementation until completion on, inter alia, economic, developmental, social, environmental and human rights impacts, it does not make this information publicly available. The public lacks information about how EIB financed projects are implemented, including information related to environmental and social obligations placed on project promoters. Project specific webpages are not regularly updated to reflect the status of projects (eg, 'under implementation', 'completed'). An example of how to improve on

this point is provided by the World Bank, which regularly publishes project implementation statutes, providing an assessment of project implementation as well as project monitoring reports.

EIB VISIBILITY FOR ITS PROJECTS' LOCAL STAKEHOLDERS: A KEY ISSUE FOR ACCOUNTABILITY

The other issue which deserves more attention from the EIB is its visibility in recipient countries, in particular the visibility of its financing to certain projects. This problem has already been raised by the Court of Auditors in its report on the added value of the ACP Investment Facility¹⁴ and in the Diagnosis Report of PwC for the External Lending Mandate 2014-2020¹⁵. While the Court of Auditors recommended the EIB to ensure that financial intermediaries include a reference to the Investment Facility in their on-lending contracts so that end beneficiaries are informed about the source of the funding, PwC stressed that the communication effort currently undertaken does not ensure that the visibility is sufficiently enhanced at the final beneficiary level. It recommended that communication and visibility objectives could be further promoted and supported within the ELM through a dedicated strategy involving various stakeholders.

This issue is of particular importance for ensuring that people impacted by projects can effectively execute their rights as provided for by the EIB's environmental and social principles and standards, as well as the EU's high level objectives for external action, including their right to appeal to the EIB complaints office and the European Ombudsman. In this context, the issue of visibility is also a matter of accountability for the EIB. In parallel, the implementation of the Aarhus Convention, which the EU is a party to, requires transparency, especially the active dissemination of information to ensure access to environmental information, public participation in environmental decision making and access to justice in environmental matters.

12

Decision of the European Ombudsman, closing her own initiative inquiry 01/3/2013 concerning the European Investment Bank, Decision of 25 June 2014, para.44.

13

Letter from European Ombudsman to the EIB's President in regard to proactive transparency, 22 February 2016

14

'The ACP Investment Facility: does it provide added value?', European Court of Auditors, 2015

15

'Evaluation of the External Lending Mandate 2014-2020, Diagnosis report', PwC, May 2016

RECOMMENDATIONS

Due to the unique character of operations covered by the EU guarantee which entail the budget of the EU, further improvements concerning the transparency of such operations are required. The EIB's transparency practices should be in line with the existing EU legal framework, the ELM decision and at least comply with the standards and practices of other global, public financial institutions, in particular:

The EIB should improve its Public Register and list all documents which contain – or may contain – information related to the environment, both those which are subject to active dissemination and those which are available on request;

In particular, the EIB should publish the results, evaluations and impact appraisals of projects on a systematic basis via the publication of all environmental and social appraisal forms and reports, including Result Measurement Framework sheets, monitoring reports and project completion reports as a source of information on the implementation and impacts of projects;

We recommend that all finance contracts for operations under the EU budget guarantee are published on a regular basis, and that only those parts which contain confidential information are redacted in line with the general principle of disclosure;

Despite the fact that all projects financed by the EIB are subject to an opinion from the European Commission, these opinions are

not currently available to the public even though they would assist in the understanding of the decision-making process for operations covered by the EU guarantee. Since there is no compelling reason why these opinions should not be subject to regular disclosure, we are calling for a proactive disclosure of such opinions by the European Commission;

In order to enhance the effective use of public resources for projects that really need such support, alongside a minimum level of transparency, the EIB should also publish economic feasibility studies for projects covered by the EU budget guarantee;

Finally, in order to improve visibility on the ground, project promoters should be obliged to inform other stakeholders about the EIB's involvement during public consultations, through information being made available in local media and other appropriate means of disseminating information, already at the stage of project appraisal – once the project enters the EIB's pipeline.

GIVING PRIORITY TO THE FIGHT AGAINST TAX EVASION AND TAX DODGING

Preventing and stopping aggressive tax planning and double non-taxation is currently high on the international and European political agenda. The financial crisis provided a necessary push for political leaders to increase attention on the matter and to develop action plans. This was then reinforced by a series of scandals in recent years such as SwissLeaks, LuxLeaks and the most recent Panama Papers. And taxation matters very much for both the EU and developing countries.

In early 2013, the Organisation for Economic Cooperation and Development (OECD) – the international body which sets the rules governing how multinational companies pay tax – took the unprecedented step of focusing attention on the broader issue of tax avoidance by addressing the problem of tax base erosion and profit shifting by multinational companies¹⁶. Companies use a number of schemes to shift profits across borders to take advantage of tax rates that are lower than in the country where they made the profit. According to the OECD, some multinationals end up paying as little as five percent in corporate taxes when smaller businesses are paying up to 30 percent.

Figures from UNCTAD published in 2015 estimate that tax dodging by multinational companies costs developing countries at least \$100 billion annually¹⁷. Additionally a 2014 report by Eurodad, a coalition of development NGOs, has calculated that developing countries lose more income through tax evasion than what they gain via aid, remittances and foreign investments combined¹⁸.

In this context, the review of the ELM represents a key opportunity to orient the EIB towards a more rigorous approach for combatting tax evasion and tax dodging. Indeed, it is the only file in which the co-legislators (European Parliament and Council) can have a direct and binding say about how the EIB should conduct its operations.

For the EU, it is a matter of policy coherence that its own financial arm lives up to its development mandate and contributes to the domestic resource mobilisation of third countries instead of financing clients which dodge or evade taxes.

It is crucial that the EIB as the self-styled ‘EU bank’ takes serious steps to address the current shortcomings of its policy and practices in such a way that it rules out any support to companies that apply questionable taxation practices. It could be argued that cases where EIB funds end up in or support companies who make use of tax havens represent a violation of the bank’s own statutes which require the bank to employ its funds “as rationally as possible in the interests of the Union”.

As swathes of tax issues remain hard to tackle via purely legal means, public institutions such as the EIB need to go beyond what it is strictly obliged to do and rather look into all the options it has available to avoid its funding supporting companies which rely on harmful tax practices. This requires a policy framework that allows the bank to take a proactive and responsible approach to tackle abuses wherever these appear.

16

http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page1

17

http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

18

Eurodad, 2014, ‘The state of finance of developing countries 2014’ <http://eurodad.org/files/pdf/549197afa285f.pdf>

19

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1454056581340&uri=COM:2016:24:FIN>

20

<http://www.counter-balance.org/fight-tax-havens-start-with-the-european-investment-bank-argues-new-report/>

21

http://www.counter-balance.org/wp-content/uploads/2016/08/The-dark-side-of-EIB-funds_report.pdf

22

For this report we used the Financial Secrecy Index of the Tax Justice Network, a “politically neutral ranking for understanding global financial secrecy, tax havens or secrecy jurisdictions, and illicit financial flows,” which provides a more comprehensive picture of what we refer to here as ‘secrecy jurisdictions’.

23

http://www.counter-balance.org/wp-content/uploads/2011/01/Tax_Havens_English_web.pdf

24

<http://www.eib.org/infocentre/publications/all/eib-policy-towards-weakly-regulated-non-transparent-and-uncooperative-jurisdictions.htm>

25

‘The Dark side of EIB funds’, Counter Balance, 2016.

26

<http://www.eib.org/about/documents/ncj-policy-addendum.htm>

27

<http://www.oecd.org/tax/transparency/>

In the past the EIB has shown that the political will that would allow such an approach does exist within the bank. In 2009 it was the first international financial institution to adopt a policy against ‘non-cooperative jurisdictions’ (NCJ). Despite some shortcomings, this was a remarkable step.

However, the bank has since failed to keep up with both political momentum and political developments related to taxation. This issue has become even more relevant now that the private sector is being pushed to the frontline in order to finance the newly adopted UN Sustainable Development Goals, and there is a serious need for public money to support the private sector to ensure that recipient companies pay their fair share of tax.

We present below the main flaws in current EIB policies aimed at stamping out current tax dodging practices by its beneficiaries and describe how these issues could be addressed via the mid-term ELM review.

WHAT IS PROBLEMATIC IN EIB LENDING?

As part of its anti-tax avoidance package published on 28 January 2016, the European Commission recalls in its communication ‘External Strategy for Effective Taxation’ that European legislation prohibits EU funds from being invested in entities in third countries which do not comply with international tax transparency standards. Therefore, it calls on EU international financial institutions – namely the EIB and the European Investment Fund (part of the EIB group) – “to transpose good governance requirements in their contracts with all selected financial intermediaries”. The Commission also claims that the EIB needs to go further than its current transparency requirements to ensure fair tax competition. It goes on by regretting that “*in the past [it] has had to block certain projects submitted by the financial institutions [meaning the EIB] because they involved unjustifiably complex tax arrangements through harmful or no tax regimes in third countries*”¹⁹. Indeed, in the 2015 report ‘Towards a responsible taxation policy for the EIB’²⁰, Counter Balance has already documented several cases of EIB projects taking place via clients operating in tax havens. Furthermore, in its recent report ‘The dark side of EIB funds’²¹, Counter Balance looked into all investment funds supported by the EIB from 2011 to 2015 and discovered that the EIB invested EUR 470 million in investment funds located in the Top 30 secrecy jurisdictions, as defined by the Financial Secrecy Index²². This means that 67% of the volume of EIB private equity operations went to clients located in the Top 30

secrecy jurisdictions, which can also be called ‘problematic jurisdictions’ or just ‘tax havens’. Why does this happen?

Simply put, major loopholes remain in the EIB policy which is supposed to ensure the bank fights against tax evasion and tax dodging.

In 2009, the EIB became the first international financial institution to adopt a public policy explicitly addressing the issue of offshore financial centres, then referred to as NCJs²³.

The EIB policy²⁴ includes a general prohibition on investments linked to NCJs, except in limited circumstances. Notably the EIB policy also includes a relocation clause within a few months, prescribing a mandatory relocation for an EIB beneficiary if operating in an NCJ. It should be pointed out that at that point in time the introduction of this relocation clause was a significant step forward in terms of assigning a precise role to IFIs in their proactive work to promote responsible taxation by the private sector and to prevent the abuse of tax havens.

However, the policy lost most of its power not long after its adoption. The EIB had based its due diligence and compliance on the ‘OECD black and grey list’ as reviewed under the G20 mandate in 2009. Soon thereafter these lists became empty again as a result of tax havens signing information exchange agreements among themselves to comply with the G20 commitment. In fact, global blacklisting processes have now mainly become a diplomatic exercise, even if, in the wake of the recent Panama Papers scandal, EU leaders have been calling for a new listing process to address these shortcomings²⁵.

As a result of pressure by civil society organisations and the European Parliament, in March 2014 the EIB updated its NCJ policy with an addendum²⁶ that harmonises the EIB’s approach with that of the Global Forum on Transparency and Exchange of Information for Tax Purposes (hereafter the Global Forum)²⁷. CSOs have repeatedly argued that the Global Forum uses unambitious criteria, as it predominantly focuses on banking secrecy instead of corporate tax dodging. In addition, the Global Forum does not include many developing countries, and thus it cannot claim to be truly global. Since the inception of the Global Forum process, the EIB has therefore retreated from its leading position in tackling tax avoidance to a less pro-active role, one shared by other financial institutions²⁸.

While the EIB’s NCJ policy was ambitious at the time, it nonetheless included a number of

loopholes. A major problem is that the EIB's policy does not prohibit project promoters from registering in a country other than in which they are economically active – and produce economic value – because of “other tax burdens that make the structure uneconomic”. This implies that counter-parties are still permitted to move to offshore financial centres to benefit from lower taxation and/or higher secrecy. Moreover, project promoters can still operate in a prohibited jurisdiction if this jurisdiction offers a level of “corporate security”. The policy remains unclear about what this can and might entail.

More broadly, as concerns the implementation of the policy, currently the public is neither aware of the number of applications turned down by the EIB due to non-compliance with its NCJ Policy nor of the number of relocations requested and implemented as per the policy's stipulations. For the time being there is no detailed reporting provided by the EIB for external stakeholders – including the European Parliament – about the implementation of its NCJ policy and the above-mentioned elements.

RECOMMENDATIONS

The current political climate at EU level is a unique window of opportunity for the EIB to raise its profile and set a precedent among financial institutions. We hope the bank can reinvent and realise once again a progressive drive on tax issues that was previously present in order to establish a truly responsible policy on taxation. In order to do so, we recommend co-legislators to request the EIB, via the ELM, to:

Adopt a responsible taxation policy by the end of 2017. A first step in this regard should be the revision of its NCJ policy, as a key component of a broader taxation policy. An open and inclusive public consultation with all stakeholders should take place for both processes. Such a responsible taxation policy should build upon the three recommendations developed below:

- Require from all its clients under the ELM public country-by-country reporting.

In order to be eligible for EIB financing and investment, all beneficiaries, whether corporations or financial intermediaries, that are incorporated in different jurisdictions have to disclose country level information about their sales, assets, employees, profits and tax payments in each country in which they operate in their audited annual reports;. Beneficiaries must make contracts with host governments public and in particular

disclose their fiscal regime in each country in which they operate. Such a measure would be coherent with the most recent developments at EU level to introduce country-by-country reporting requirements for private banks (the CRD IV Directive) and for gas, oil and mining companies (the Accounting Directive);

- Ensure that all companies and financial institutions involved in its transactions disclose information regarding beneficial ownership of any legal structure directly or indirectly related to the company, including trusts, foundations and bank accounts;

HOW THE EIB IGNORES CALLS FROM THE EUROPEAN PARLIAMENT ON TAX JUSTICE

By maintaining the status quo in recent years, the EIB has been systematically ignoring calls from the European Parliament to act on tax justice issues. Here are the most recent texts adopted by the European Parliament on the matter:

Resolution on EIB operations in 2013, adopted in March 2015, “calls on the EIB to refrain from cooperation with financial intermediaries having a negative track record in terms of transparency, tax evasion or aggressive tax planning practices, or use of other harmful tax practices such as ‘tax rulings’ and abusive transfer pricing, fraud, corruption or environmental and social impacts; encourages the EIB to make both direct funding and funding via intermediaries contingent upon the disclosure of both country-by-country tax-relevant data along the lines of the CRD IV provision for credit institutions, and beneficial ownership information; to this end, calls on the EIB to establish a new responsible taxation policy, starting from the review of its policy on non-cooperative jurisdictions (NCJ policy) in 2015.”

Resolution on EIB operations in 2014, adopted in April 2016, “calls on the EIB to establish a new responsible taxation policy, starting from the review of its NCJ policy in 2016; calls on the EIB to make both direct funding and funding via intermediaries contingent upon disclosure of both country-by-country tax-relevant data along the lines of the CRD IV provision for credit institutions, and beneficial ownership information.”

European Parliament resolution of 14 April 2016 on the private sector and development (2014/2205(INI)) “calls on the EIB and the other development financial institutions of Member States to ensure that companies which receive their support do not participate in tax evasion.”

- Report annually to the European Parliament, in a public manner, on the implementation of its NCJ policy and of its future responsible taxation policy, with precise figures on the tax impact (especially on the corporate taxation on profits) of EIB investments and lending.

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<http://www.counter-balance.org/fight-tax-havens-start-with-the-european-investment-bank-argues-new-report/>

ENHANCING TRANSPARENCY

The EIB's operations through financial intermediaries

Supporting small and medium enterprises (SMEs) and local private sector development is one of the EIB's objectives under the ELM. In order to reach this objective the bank does not lend directly to a project, but instead uses what we will refer to in this report as 'financial intermediaries'. Indeed, the EIB willingly uses financial intermediaries, mostly commercial banks and investment funds, to reach out to local private enterprises, in particular those of small and medium size.

This type of lending at the EIB has doubled in 15 years, accounting currently for approximately 1/3 of the bank's total operations²⁹. In 2015, EUR 24.8 billion was loaned to European SMEs via intermediated operations. Outside of Europe, intermediated loans account for around 40% of the EIB's operations.

There are two principal ways for these intermediated operations to take place:

1. The EIB disburses large loans to private banks for these institutions to pass on (or 'on-lend') in smaller loan tranches to final beneficiaries which are mainly comprised of SMEs.
2. The EIB also conducts investment operations through financial intermediaries via investment and private equity funds.

The stated objectives of the EIB make clear that all its intermediated loans must further at least one of the following policy goals:

“Increase in growth and employment potential – including SME and Mid-Cap support

Economic and social cohesion by addressing economic and social imbalances, promoting the knowledge economy/skills and innovation and linking regional and national transport infrastructure

Environmental sustainability – including supporting competitive and secure energy supply

Action for climate-resilient growth”³⁰

The EIB is further stepping up its operations outside of Europe using this financing approach. In June 2016, when presenting its new 'Crisis Response and Resilience Initiative' to the European Council, the EIB *inter alia* proposed to “support the creation of jobs through more support for small businesses and micro-enterprises”³¹. It is clear from EIB communications that more financial intermediaries in the Middle East and North Africa (MENA) and the Western Balkans are to be supported under the initiative.

WHAT'S PROBLEMATIC?

The use of financial intermediaries comes with a number of challenges which may undermine a positive development impact and which, up to now, have not been addressed properly by the EIB.

A GENUINE TRANSPARENCY CHALLENGE

The main critique echoed on many occasions

29
EIB Annual Report 2015,
<http://www.eib.org/infocentre/publications/all/activity-report-2015.htm>

30
<http://www.eib.org/products/lending/intermediated/index.htm>

31
<http://www.eib.org/infocentre/press/releases/all/2016/2016-164-new-eib-initiative-to-help-europes-southern-neighbourhood-and-western-balkans-endorsed-by-eu-leaders.htm>

by civil society, the European Parliament and academics is the lack of transparency inherent to this type of lending. Even though the EIB grants its lending under support from EU states (via the ELM guarantee) and the EU budget (via European Development Funds for its Investment Facility in ACP countries), the bank provides next to no information on where the money ends up.

Information about the ultimate beneficiaries is not made public due to commercial confidentiality clauses included in contracts with the financial intermediaries. This makes it impossible to assess the economic and social impact of the loans and prevents a targeted approach to certain sectors or types of SMEs. EIB investments need to be subject to detailed public review. They must first of all serve local needs and aspirations. Foreign support should support the scaling up of successful local initiatives and help with their replication elsewhere.

In accordance with its own transparency policy and EU principles on access to documents and information (see chapter XX above), the EIB should make publicly available all EIB financing operations carried out under the ELM, in particular indicating whether an investment project is covered by the EU guarantee and how it contributes to the goals of the EU's external action, noting in particular its economic, social and environmental impacts.

For the time being, the bank is failing to fulfil its transparency obligations when it

comes to investments through financial intermediaries. The EIB fails to regularly inform whether a loan is covered by the EU guarantee, while information on anticipated economic, social and environmental impacts is limited to repetitive, theoretical statements that *“final beneficiaries will be requested to comply with applicable national and EU legislation, as appropriate”, or “The intermediary shall be required to ensure that the final beneficiaries undertake to implement and operate the relevant investments in conformity with national and applicable EU environmental law including the relevant international environmental agreements.”*

Furthermore, the EIB does not provide information how financial intermediaries distributed the EIB loans, whether they have proven capacity and capability to manage the environmental and social aspects, including impacts and risks arising from their operations, according to EU standards. Information on final projects financed through the intermediaries is unknown, even on an aggregated level. Not applying the same standards to these loans exempts a large part of the EIB's lending activity from transparency and openness principles, fails to ensure any accountability as to the way loans are spent and projects are carried out, and provides no details about what impacts they have on the environment. This approach prevents people impacted by projects financed through financial intermediaries from executing their right to complaint to the EIB complaints mechanism and the European Ombudsman.

INSUFFICIENT DUE DILIGENCE

By outsourcing part of its lending, the EIB outsources part of its responsibilities as well. Reliance on third parties for the carrying out of due diligence is a dangerous trend which can seriously undermine the quality and the potential positive outcome of the lending. The EIB should at all times remain responsible and provide more clarity on how these procedures are carried out in order to improve transparency and avoid the misuse of funds.

Another problem relates to the nature of the financial intermediaries with whom the EIB

works. They are mostly western commercial banks with little or no interest in development and, they often operate from tax havens. Since these intermediaries swallow part of the loan-related benefits, the EIB is actively strengthening a type of financial sector which is not adapted to the needs of local economies. Counter Balance is especially concerned about the use of a specific type of financial intermediary, namely private equity funds. The EIB should not use private equity funds as financial intermediaries given their focus on high returns, which clearly contradicts a 'pro poor' approach.

PRIVATE EQUITY FUNDS: THE DARK SIDE OF EIB LENDING

In its recent report 'The dark side of EIB funds: How the EU's bank supports non-transparent investment funds based in tax havens', Counter Balance describes how the EIB uses tax havens and offshore incorporated private equity funds, frequent cases of revolving doors and the systematic lack of transparency involved in these type of operations. In addition to challenging the business model behind the public support to those investment funds, the main conclusions of this report – focused on the 29 private equity funds in which the EIB has invested between 2011 and 2015 – were:

1. Taxation issue - many of these investment funds are located in tax havens and secrecy jurisdictions

- From 2011 to 2015, the EIB invested EUR 470 million in investment funds located in secrecy jurisdictions, as defined by the Financial Secrecy Index;
- 67% of the volume of the EIB's private equity operations went to clients located in the top 30 secrecy jurisdictions;
- The country where most of these investment funds are domiciled is Mauritius.

2. The lack of transparency linked with these investment funds

For ten funds, or just over one third of those reviewed, there was only limited information dis-

closed about their final beneficiaries, while for six of them (21% of those reviewed) it was impossible to find any information on where the EIB support went.

Furthermore, the EIB does not shed any light on whether the investment funds it supports have any proven capacity and ability to manage – in line with EU standards – the environmental and social impacts and risks arising from their operations. Information on final clients financed through the intermediaries is unknown, even at an aggregated level.

3. Private equity funds are a black hole for development

It remains to be clarified why the EIB, which is both a publicly-backed institution carrying out EU development work and an avowedly non-profit making body, should be investing in funds that have neither expertise nor interest in development matters, and whose main purpose is short term profit. A development institution has development goals which should supersede any other financial return goal. Development impacts and financial returns are often incompatible, especially in the case of private equity funds which aim for double-digit rates of return in the short- and medium-term – the horizon of private equity funds operations.

The European Parliament has repeatedly called on the EIB to revise its approach to financial intermediaries and step up the transparency of its operations. For instance, in April 2016, the parliament asked the bank to “reinforce its due diligence activities so as to improve the quality of information on ultimate beneficiaries and to more effectively prevent transactions with financial intermediaries with a negative record in terms of transparency, fraud, corruption, organised crime, money laundering and harmful social and environmental impacts or registered in offshore financial centres or tax havens which resort to aggressive tax planning”³². This echoes repeat calls by the European Parliament since 2012 that have systematically been ignored by the EIB.

So far – apart from organising promotional and informational stakeholders’ workshops – the bank has not launched any serious process to revise its approach in this area. In terms of transparency, it lags behind the IFC. Indeed, following an audit in 2013 which revealed that the IFC “did not have the information on the end use of funds available” and “knows very little about potential environmental or social impacts of its financial markets lending”³³, the IFC announced that it would disclose the high-risk sub-projects of the investment funds it supports, therefore allowing more public scrutiny over the real impacts of its operations³⁴.

The ELM should allow the Community guarantee to be granted only for financial intermediaries not operating in offshore financial centres, which have substantial local ownership and are equipped to implement a pro-development approach supporting the specificity of SMEs in each country. We advise the bank to exclusively work with locally embedded intermediaries which are focused on providing financial services to the poor in a responsible and transparent manner or which are supporting sustainable development more widely. The EIB should not cooperate with financial intermediaries with a negative track record in terms of transparency, fraud, corruption and environmental and social impacts.

The EIB should ensure that intermediated loans are subject to the same transparency requirements as other types of loans. And, in particular, it should make available on its webpage information on:

Due diligence conducted for every financial intermediary, in particular its capacity and capability to manage the environmental and social aspects of projects, as well as its development track record.

All final projects which were supported through financial intermediaries and the development impacts of these projects and their contribution to EU external action objectives. It seems that under the Impact Financing envelope, the REM+ system shows that it is possible for the EIB to report on the final beneficiaries of its operations – this should become a standard practice.

Annual aggregated country by country reporting on contribution to EU external action objectives, in particular the development impacts of financial intermediaries’ loans.

Develop a database of financial intermediaries, with stringent criteria for selection.

In addition, the EIB should impose a moratorium on the use of private equity funds. Problems linked to investment funds are merely linked to the business model underlying their use, that of ensuring a so-called ‘trickle-down effect’ in national economies. Those funds often operate via offshore financial centres contrary to any kind of development logic – it is abundantly clear that the wealth management logic of these speculative funds inherently runs contrary to development goals and policies. Incremental reforms would not be sufficient to genuinely tackle this issue. In order to lift the moratorium, the EIB would need to do undertake major reforms of its transparency policy, its approach to tax dodging and tax evasion and impose strict limits on conflicts of interests.

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‘Report on the European Investment Bank (EIB) – Annual Report 2014’, European Parliament, (2015/2127(INI))

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Compliance Advisor Ombudsman. (2012). ‘CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries’, 10 October 2012. See: http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf

34

‘An assessment of transparency and accountability mechanisms at the European Investment Bank and the International Finance Corporation’, Eurodad, 2015



In a recent report entitled 'On dangerous ground', Global Witness identified 2015 as the worst year on record for the killings of land and environmental defenders, with 185 killings across 16 countries, out of which 171 took place in ELM eligible countries. This environment of violence, intimidation and closing civil society space significantly increases the risk that EIB-financed activities will contribute to or exacerbate human rights violations, if they are not accompanied by appropriate human rights due diligence.

GETTING SERIOUS ON HUMAN RIGHTS

Towards a Human Rights Policy and sound project-level assessment



International financial institutions have increasingly repeated the importance of public participation and a rights-based approach, especially as part of the new SDG agenda. However, in many countries one can observe that the basic human rights of civil society representatives are more and more under attack, from violent crackdowns on protests and the criminalisation of speech, to arbitrary arrests and the detention of human rights defenders. This is all the more concerning as without an active civil society speaking without fear about the needs and rights of their communities, no sustainable development agenda can be successfully implemented.

This is also a concern of the United Nations, as stated by Maina Kiai, UN Special Rapporteur on Freedom of Assembly and Association: “In this environment of rapidly closing space for public participation, it is critical for development banks and

their member countries to defend that role. (...) Yet too often these institutions fail to ensure basic access to information and participation by the very communities impacted by these projects (...) When funds are provided to governments or private companies to implement development projects, banks should always ensure that human rights are respected, particularly the rights central to civic space: the freedoms of assembly, association, and expression.”³⁵

Furthermore, Michael Horst, the United Nations’ Special Rapporteur on the Situation of Human Rights Defenders, who is preparing a report on the situation of Environmental Human Rights Defenders, has underlined the role of IFIs, stating that “development banks must (...) establish effective measures and protocols to empower defenders and respond to any threats or crackdowns against individuals or civil-society organizations defending human rights in connection with development activities,³⁶” also advocating for a ‘zero-tolerance

35 <http://foreignpolicy.com/2016/07/19/its-time-for-development-banks-to-start-listening-maina-kiai/>

36 www.project-syndicate.org/commentary/development-aid-human-rights-by-michel-forst-2016-08

approach' to killings and violent acts against environmental and human rights defenders.

In July 2016, 156 civil society groups from all over the world published a statement³⁷ calling on all IFIs to ensure that the activities which they finance respect human rights and that there are spaces for people to participate in the development of IFI projects and hold IFIs to account without risking their security. It was merely a call in support of the realisation of basic rights to freedom of expression, assembly, and association, which are often overlooked in human rights assessments.

The EIB operates under the ELM in several regions which require special attention when it comes to human rights. Out of 68 countries eligible under the ELM, only two are considered to be 'full democracies' and 25 are described as 'flawed democracies' by the Democracy Index prepared by the Economist Intelligence Unit for 2015³⁸. More than half of them are the countries called either 'hybrid regimes' or purely 'authoritarian' (14 countries). Twenty countries are assessed in terms of political rights and civil liberties as NOT FREE and the other 30 as PARTLY FREE by the Freedom House in 2016³⁹. Given the profiles of the countries under the ELM, it is especially important to have and effectively use human rights due diligence. Annex 1 to this report provides the full ranking of countries of operations under the ELM. This due diligence should be conducted in accordance with the general principles guiding EU external action as set out in Article 21 TEU, and focus on consolidating and supporting democracy and the rule of law, human rights and fundamental freedoms.

In line with the EIB Statement of Environmental and Social Principles and Standards, the bank restricts its financing in so called third countries to projects that respect human rights and comply with EIB social standards, based on the principles of the EU Charter of the Fundamental Rights (the Charter) and international good practices. It also commits to follow a human rights-based approach when considering the social aspects of the projects, which is described as mainstreaming the principles of human rights law into the EIB's practices.

In 2011, the EIB announced a review of its project social performance standards to ensure their complementarity with the UN Guiding Principles on Business and Human Rights

(UNGP). Unfortunately, the bank has not implemented any clear guidelines ensuring that operations in ELM eligible countries, which have not introduced National Action Plans under the UNGP, are in line with the UN Principles.

Nevertheless, a 2012 study by two Belgian academics presents a critical analysis⁴⁰ of the EIB's approach to human rights issues and underlines the need for a comprehensive human rights policy at the bank. The study states that "(...) 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. Human rights considerations are weakly embedded into the EIB's appraisal and monitoring process, 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."

SHORTCOMINGS OF THE EXISTING FRAMEWORK: A LACK OF SERIOUS HUMAN RIGHTS DUE DILIGENCE FOR INDIVIDUAL PROJECTS

The EIB is the EU's bank, driven by EU policies, and working in strict cooperation with the European Commission and the European External Action Service (EEAS) in charge of the assessment of the political and social situation in countries of operations of the EIB. However, all of this does not mean the EIB is not responsible itself for conducting serious human rights assessments, especially given the fact that, as part of its ELM, the bank operates in very difficult regions which have shortages in the fields of democracy, good governance and fundamental human rights. In this regard, it is even more obliged to ensure that its own appraisal process will include serious human rights due diligence for every project considered for financing.

The tools for project level assessment of compliance with the given mandates and its own social and environmental principles and standards are provided by the EIB Environmental and Social Handbook. In the Handbook there are a number of accountability 'safeguards' to be used during the appraisal process: "In-depth

37
http://rightsindevelopment.org/?page_id=4691

38
www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2015

39
www.freedomhouse.org/report/freedom-world/freedom-world-2016

40
'A responsible lender? The European Investment Bank's Environmental, Social and Human Rights Accountability', Nicolas Hachez, Jan Wouters, July 2012

Existing standard of environmental and social impact rating/assessment of the EIB for investment and framework loans	Missing human rights angle to be added
Pre-appraisal stage	
<p>Environmental and Social Screening and Project Identification Note (page 103 of the Handbook): determining the potential E&S risks and impacts of concerns, the nature and magnitude of the potential impacts and a preliminary indication of the promoter's capacity to manage these issues.</p>	<p>The screening checklist lacks a section on assessing the political situation of the project area, and possible indirectly affected areas (as in the case of trans-boundary investment projects) and the impact of the project on this situation and the rights of people directly and indirectly affected by the project (especially the right to justice, freedom of thought and speech, freedom from torture and arbitrary detention, right to freedom of movement, as well as the fundamental rights to life and liberty).</p>
<p>Categorisation of environmental and social impacts and risks - E&S impact rating (A,B,C,D) (page 107 of Handbook); a series of questions is being sent to the promoter, on the basis of the response received, Opinion for Appraisal document (an internal document used for appraisal authorisation by the EIB's Senior Management) is prepared as well as in the environment section of the Note to the Commission; categorisation determines also bank human resources allocated to the project, which means it is an important moment in the appraisal process.</p>	<p>The questions to be considered for the appropriate categorisation do tackle human rights issues in a limited range of topics such as resettlements, vulnerable groups, labour issues, health safety and access to information. They do not include the following aspects:</p> <ol style="list-style-type: none"> 1. Which basic human rights can be at risk due to project implementation (to determine the range of human rights to be assessed)? 2. Which groups of people/communities can be directly or indirectly affected by the project (to determine the scope of the further assessment)? 3. Does the promoter use the standard of United Nations Guiding Principles (UNGP) on Business and Human Rights in its performance?
<p>Screening for Legislative Compliance - identification of the main legal requirements applicable to the project. With regards to projects in third countries for which a formal ESIA is required, the ESIA process and content must be consistent with the requirements of the EU EIA Directive. The EIB requires that all projects/operations, irrespective of the Region, that are likely to have significant adverse social impacts, are subject to a social impact assessment (SIA). Outside the EU, all operations/projects should comply with national legislation, be consistent and aligned with EU environmental and social standards and should adhere to international best environmental and social practices.</p>	<p>Social impact assessments address project-related social impacts and risks according to the requirements spelled out in the EIB Social Standards. Unfortunately, those standards do not correspond to all basic human rights, but only have a limited scope. There should be more standards corresponding to all basic human rights, especially political rights. There is also no clear commitment to comply with the UNGP.</p>
<p>Screening for social issues - outside the EU, the EIB operations contribute to the EU development goal of poverty alleviation and sustainable development. The EIB will also verify that operations are aligned with international conventions on human rights and that they do not result in human rights abuses. This is particularly relevant in situations where the legal and administrative environment may be weak and in potential conflict zones.</p>	<p>The Screening should include a specific part related to human rights, based on practical guidance on assessment of aspects related to all basic human rights and all possible affected groups.</p>
<p>Article 19 procedure: The EIB shall request the European Commission's opinion on all financing operations within the framework of the procedure provided for in Article 19 of the Statute of the EIB.</p>	<p>The European Commission should indicate assessed risks related to human rights and point out mitigation measures, which should be undertaken if the project is to be financed by the EIB.</p>
Appraisal stage	
<p>E&S Due Diligence with the tasks to develop the project definition, the assessment area, the environmental and social conditions, the environmental and social reporting in progress and completion reports from the promoter/borrower to the EIB, it includes among others social due diligence, stakeholder engagement and public consultation, E&S management/action plan, E&S rating</p>	<p>E&S due diligence should include a separate part related to human rights risk analysis and mitigation measures based on practical guidance on assessment of aspects related to all basic human rights and all possible affected groups.</p>
<p>Appraising social issues - at minimum, the Team shall appraise the core issues set out in the five Social Standards. Depending on the context and type of project/operation, the Team may also need to assess other relevant issues necessary for the carrying out of a comprehensive social appraisal.</p>	<p>The description in the Handbook (page 126) indicates five Social Standards, which must be used in appraising social issues. But it allows also the broadening of the scope of the social appraisal. This provides the space for the inclusion of the full range of human rights impacts to be assessed, although it is necessary to operationalise them and not leave it to the sole decision of the bank's staff.</p>
<p>Revision of the environmental and social capacity of the promoter.</p>	<p>Assessment of the promoter's track record on human rights and its capacity to prevent human rights violations and to eventually mitigate potential human rights violations in relation to the project at stake.</p>
<p>E&S Management Plan.</p>	<p>The plan should include mitigation measures designed to prevent human rights violations.</p>
<p>Final Environmental and Social Impact Rating (A,B,C,D) should indicate the acceptability of the project for EIB financing. It should summarise the findings and conclusions of the environmental and social assessment.</p>	<p>The final Environmental and Social Impact Rating should explicitly rate the impact on human rights and summarise the impact related to all basic human rights and all possible affected groups.</p>
<p>Result Measurement Framework.</p>	<p>The assessment should include indicators measuring the impact of the project on the human rights of all possibly affected groups.</p>

assessment of the likelihood and severity of identified impacts is necessitated, so as to “prioritise actions to address actual and potential adverse human rights impacts (by) first seek(ing) to prevent and mitigate those that are most severe” (UNGP 24). The likelihood that potential human rights impacts may occur is often based on (i) the country context related to specific rights and (ii) specific business relationships that pose particular risks to human rights.”⁴¹ However, it is unclear how the EIB verifies this and how it can influence the practices of clients.

Environmental and Social Data Sheets, which summarise the appraisal process in the field of the environmental and social impacts of projects, are also limited in their social part to public participation and resettlement processes if applicable, which reflects the narrow scope of the EIB’s project appraisal process. They lack an overview of the broader social impacts of projects, e.g gender issues, poverty alleviation or human rights.

According to the ELM, the assessment of the proposed projects should be implemented through a number of concrete measures, in particular by reinforcing the EIB’s capacity to appraise the environmental, social and development aspects of investment projects, including human rights, fundamental freedoms and conflict-related risks, and by promoting local consultations with public authorities and civil society. Unfortunately, the instruments to secure the rights of the people affected are not sufficient to live up to these commitments. They do not ensure a proper assessment, neither with regard to the range of relevant human rights to be considered, nor in relation to the kinds of affected groups of people.

The Social Assessment Summary provided by the Handbook (p.203) includes only five issues to be undertaken in the appraisal process: population movements – including resettlement and migration, vulnerable groups – including women, minorities and indigenous peoples, compliance with ILO core labour standards and impacts on employment, attention to occupational and community Health & Safety, outreach – consultation and participation with shareholders and stakeholders.

On looking closer at the outreach issue, the Handbook describes the EIB’s approach to stakeholder engagement: “Stakeholder engagement, including disclosure and dissemination of information, will be planned for and carried out in line with the principles of prior, informed and free engagement and informed participation, in order to lead to

broad community support by the affected communities (...) of the project’s activities.” If the participation of local communities in the decision making process around the project is really limited only to convincing them to support the investment – which opens the door to simple corruption – then it is completely contrary to the concept of sustainable development. Special attention must be given to the inclusion of all possible affected groups, who should have the right to object if investments undertaken in the name of development disrupt their actual needs, are imposed against the population’s will, can expose members of the affected community to serious human rights risks, and can damage the local ecosystem.

Nevertheless, even the bank’s existing weak framework for the inclusion of human rights issues into its project cycle could be exercised more effectively. The current EIB management has hardly made any public commitments on this issue, demonstrating a recurring lack of political willingness to face this challenge. This is also proved by the understaffing of the Environmental and Social Office at the EIB – the relevant office in charge of human rights due diligence – which is a serious obstacle to conducting proper human rights due diligence.

FURTHER CHALLENGES: TOO NARROW RANGE OF HUMAN RIGHTS ASSESSED, DISREGARD OF INDIRECTLY AFFECTED PEOPLE AND LACK OF A GENUINE PROJECT-BY-PROJECT APPROACH

A relevant question then remains about the scope of the human rights considerations the EIB should take into account. While preparing the UNGP, the UN Secretary General’s Special Representative on Business and Human rights, Professor John Ruggie, analysed hundreds of public allegations against companies regarding human rights abuses. His team discovered that there is not a single human right that companies have not been accused of violating somewhere in the world. The only sensible conclusion is therefore not to create a sub-set of rights only relevant to business, but to recognise them all. Ruggie concluded that there are 30 internationally recognised human rights and that they are all relevant to business on a prima facie basis. Such a comprehensive approach should also be adopted by the EIB.

The EIB’s environmental and social appraisal narrows the understanding of impacts on human rights to the issues of resettlement and

41
EIB Environmental and Social Handbook, p.6

mitigation for local communities (the right to property, to adequate housing and standard of living and food), impact on vulnerable groups (the right to non-discrimination, to equality before the law, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly and the integration of persons with disabilities), worker's labour standards (workers' rights) and public consultations as well as the involvement of stakeholders (access to information and justice). The Handbook does not contain detailed procedures for the assessment of the impact on all the other basic human rights of people directly (workers employed, local communities, resettled groups, project beneficiaries) as well as indirectly (the society in the country of the operation) connected with the project, such as, for example, the right to justice, a fair trial, freedom of thought and speech, freedom from torture and arbitrary detention, the right to freedom of movement, as well as the fundamental rights to life and liberty. For instance, already during the screening on the Project Identification Note stage, an initial assessment of the situation with regard to which potential stakeholders may be impacted by the project, and whose basic rights can potentially be at risk, should be done. In the screening guidelines, there is no indication of that kind apart from the issues of involuntary resettlement, vulnerable groups and indigenous people as well as labour issues. The lack of adequate due diligence present at the EIB is evident in the negative impacts documented in the cases presented below.

The existing EIB due diligence does not consider the social situation in a country related to the state of human rights and does not properly assess potential risks to human rights in relation to project realisation. Moreover, it does not propose mitigation measures or relevant finance contract clauses.

To challenge this, there is a need to create properly designed human rights due diligence, which would be used on a project-by-project basis. It is especially important given that the huge majority of the countries eligible for EIB financing under the EU guarantee (ELM Annex III) struggle to respect democracy and the rule of law, human rights and fundamental freedoms – namely the EU benchmark described in Article 21 of the TEU.

Furthermore in Principle 4 of the UNGP, human rights due diligence is pointed as an important tool for the operation of financial institutions such as the EIB, noting that: "Where these agencies (development finance institutions –

from the author) do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State. Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support."⁴²

RECOMMENDATIONS

EIB commitments regarding complementarity with the UN Guiding Principles on Business and Human Rights and the vulnerable political rights and civil liberties record of the countries eligible under the EU guarantee create a strong need to improve the EIB's policies and standards applicable during the whole project cycle.

The ELM review can serve as an opportunity to overcome these shortcoming. In order to do so, we recommend:

The adoption of a Human Rights Policy by the end of 2017, one which streamlines human rights due diligence into all levels of the project cycle to make sure the bank is not causing, contributing or directly linking itself to any human rights violations in its activities.

The development of practical guidance on the assessment of aspects related to all basic human rights and all possible affected groups to be used during the ex-ante assessment and ongoing monitoring on a project-by-project basis, including for projects involving financial intermediaries. Based on such assessment, human rights clauses should be envisaged in loan contracts and human rights reporting requirements should be required for all clients in line with Principles 17, 18 and 20 of the UNGP describing proper human rights due diligence for business.

A requirement from the European Commission for an assessment to point out the risks of human rights violations of the bank's operations under the EU guarantee.

The European Commission should also conduct such an assessment for every new Framework Agreement between the EIB and third countries, as well as for delegated decisions on ELM eligible countries.

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Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf



Under the watchful eye of Aliyev

AZERBAIJAN: A TEST CASE FOR THE EIB

THE POLITICAL RIGHTS OF AZERI CITIZENS NEGATIVELY IMPACTED BY EIB LOANS



The EIB only started lending in Azerbaijan in 2013. The case of the loan to the International Bank of Azerbaijan, signed on 16th September 2015, clearly shows the limits of the EIB's human rights due diligence.

The EIB signed a loan agreement of EUR 50 million with the International Bank of Azerbaijan (the majority of whose shares lies with the authoritarian Azeri regime) to finance projects promoted by small and medium enterprises and midcaps. The Environmental and Social Data Sheet for this loan is not available on the EIB webpage, nor does the project description state or elaborate how the bank will ensure that this loan will not be used for human rights violations. Without proper human

rights due diligence, including also the assessment of the project's impact on the political rights of Azeri citizens, this loan appears to be typical support boosting the private sector in the Caucasus.

On closer inspection, one can see, that:

The International Bank of Azerbaijan is one of the many tools of President Aliyev; the bank is known as a significant financial supporter of the State Oil Company of Azerbaijan, whose income helps to strengthen the authoritarian regime in Azerbaijan.

The tragic human rights record of Azerbaijan is of major concern to many European institutions, including the European Parliament and the Council of Europe. The project in question stood in explicit conflict with a European Parliament resolution published six days before the signing of the loan (10th of September 2015) condemning the human rights breakdown in Azerbaijan and appealing for suspending funding other than direct support to civil society.

The loan was provided at a time when the state had started the privatisation of the International Bank of Azerbaijan. A majority of leading independent economic experts in Azerbaijan believe that the 51 percent state share in the International Bank of Azerbaijan will eventually be privatised by members of the ruling family through non-transparent schemes. According to records collected by the Organized Crime and Corruption Reporting Project (OCCRP), members of the Aliyev family and their close advisors are significant share holders in at least eight major Azerbaijan banks. They control assets in those institutions worth more than USD 3 billion. There is no simple way to check who benefits from any transaction with the government as corporate ownership information is confidential in Azerbaijan.

Given all of this, it is doubtful that the EIB's loan will support inclusive growth, a sustainable economy or social development and democracy. Instead, it is more likely to strengthen the regime of President Aliyev and the country's elites. Even if the loan was not designed to support the ruling family, the dictatorial system is constructed in such a way that most investments in the country's economy end up benefiting the regime.



EIB FINANCING OF THE NENSKRA DAM PROJECT IN GEORGIA COULD TREAD ON LAND AND CULTURAL RIGHTS

On June 13, 2016 the EIB officially announced that it is considering a loan to a Georgian state-owned Partnership Fund and the South Korean public enterprise K-Water to construct a 280 MW hydro-power scheme on the Nakra and Nenskra rivers in the Upper Svaneti region of northwestern Georgia⁴³. The EIB is currently conducting its due diligence process. However, during this ongoing assessment the bank has not communicated whether and how it has acted on the project controversies that have emerged since the developer released the project's environmental and social impact assessment (ESIA) in June 2015.

Since then the local population and national and international civil society have raised concerns about the company's failure to conduct a proper ESIA and inform the affected communities about the dam's impacts, including involuntary resettlement and loss of customary lands. While the dam is located in a pristine alpine valley, the area is highly geologically unstable and suffers from frequent landslides and mudflows. This is adding to people's fears that the construction and operation of a dam could trigger further natural catastrophes.

Both the affected communities and civil society organisations have communicated to the EIB board of directors and management their worries and concerns⁴⁴ about the project's negative impacts on the local population, though no meaningful reaction has come from the bank in reaction to these grievances despite the escalation of local protests which have seen an intervention from special police forces and resulted in the arrest of eight people.⁴⁵

The geological surveys and the work on the access roads that commenced in October 2015 are already advanced to where they are interfering with people's rights to use the land. The project documentation released so far does not include any assessment of the project's impacts on livelihoods and fails to propose a livelihood restoration plan.

It remains doubtful how the EIB could add meaningful value to the project if it does not communicate with the local community and does not oversee the project developer assessing properly the negative socio-economic consequences and respecting human rights, as should have happened from the project's outset.

43

NENSKRA HPP
Reference: 20150670
<http://www.eib.org/projects/pipeline/2015/20150670.htm>

44

Preliminary comments on the Nenskra hydropower plant Environmental and Social Impact Assessment consultation process June 2015 <http://bankwatch.org/sites/default/files/comments-Nenskra-ESIA-consultation-25Jun2015.pdf>

Social impacts of the Nenskra dam, Georgia Briefing paper to the EIB Management, February 25, 2016 <http://bankwatch.org/sites/default/files/briefing-Nenskra-EIB-25Feb2016.pdf>

CSO Update for the EIB Board 8 Mar 2016 <http://bankwatch.org/sites/default/files/presentation-Nenskra-EIBBoard-Mar2016.pdf>

Address of the Chuberi Community of Mestia Municipality to the EIB Board of Directors, 18 April 2016

Letter on Nenskra hydropower plant to the EIB President, Management Committee and Board of Directors, 23 May 2016

Eight arrested in protest against Georgian dam, May 2016 <http://bankwatch.org/news-media/blog/eight-arrested-protest-against-georgian-dam>



TWO PROBLEMS IN ONE PROJECT: SUPPORTING UNSUSTAINABLE AGRICULTURE SCHEMES AND IGNORING THE VIOLATION OF FUNDAMENTAL FREEDOMS OF LOCAL COMMUNITIES IN UKRAINE

On December 1, 2014 the EIB signed a loan agreement with the Ukrainian poultry producer PJSC Myronivsky Hliboproduct (MHP) to construct two grain-storage facilities, one fodder-processing plant and one sunflower-crushing plant in the Vinnitsa region in Ukraine⁴⁶. MHP is a vertically-integrated group of more than 20 companies which controls the whole cycle from grain and fodder production, through breeding, poultry production and meat processing, to the distribution and sale of its products. In the Vinnitsa region the company possesses several other facilities besides the grain-storage, for example, a breeder farm, a hatchery, rearing zones with broiler houses, a slaughter house, waste treatment facilities and a by-products

plant. The company boasts of its position as the biggest meat producer and one of the biggest grain producers in Ukraine, with a land bank of nearly 400,000 hectares in 12 regions of the country⁴⁷.

Though the company does create jobs and produce cheap poultry, it also causes serious concerns among local people. They are worried about the lack of transparency behind the company's aggressive expansion plan in particular about the intense pressure put on individual owners to lease their land, even if they have indicated that they are not interested and are afraid for their health and livelihoods. The confrontation between the company and the

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MHP Agri-Food Reference: 20120184 <http://www.eib.org/projects/pipeline/2012/20120184.htm>

47

'Black Earth', September 2015 <http://bankwatch.org/sites/default/files/BlackEarth-UAagri.pdf>



Kateryna Onopriienko
in Moshny

local opposition groups has led to several violent attacks against activists. The company denies any involvement.

Some of the concerns are related to specific facilities, others to the general conduct of the company. When communicating about the general concerns such as poor social screening and land pressure cases to the EIB, the bank declared that it is not responsible for the wider activities of the company nor for its general misconduct with the concerned local population:

“During the appraisal the EIB project team concluded that, due to its technical characteristics, its geographical isolation from

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‘Briefing: Problematic MHP expansion in Ukraine with EBRD support’ <http://bankwatch.org/sites/default/files/briefing-EBRD-MHPUkraine-01Feb2016.pdf>

‘The problems with MHP’s expansion in Ukraine’, 11-12 May 2016 <http://bankwatch.org/sites/default/files/briefing-EBRD-MHP-expansion-10May2016.pdf>

49

E-mail from EIB: Ukraine: project 20120184 / MHP’s environmental and social performance, November 11, 2015

other investment elements of the promoter and its offtaker basis, the project financed by the EIB (ie. a series of silos and elevators, a sunflower crushing and oil extraction unit and the fodder plant including logistical, environmental and utility services) was certainly part of the chicken meat production and commercialisation value chain investment, but could not be considered as integrated (in the sense of the EIA (2011/92 EU) or IE (2010/75 EU) Directives) with other investments of the promoter or other investors happening, or due to happen in the wider Vinnitsa region. EIB due diligence has therefore concentrated in the environmental and social impacts of the project plant rather than the wider activities of the promoter in the region or country.⁴⁹”

The EIB’s conclusion is worrisome from the point of view local people and civil society as the company is abusing people’s basic rights to decide over the well-being of the environment they live in and are pressured to lease their land even if they have explicitly denied interest in dealing with the company. In taking decisions in such cases the EIB, as a development bank, should take into consideration the overall social impact and conduct of the company, because in the long run individual investments contribute to the overall corporate expansion strategy.

EGYPT – INVESTING IN THE DARK

Egypt is one of the countries where the EIB, together with the European Bank for Reconstruction and Development, has invested under the goal of supporting the transition to democracy after the Arab Spring. The EIB has mostly invested in Egypt with the aim of addressing the frontline priorities of the government of Abdel Fattah el-Sisi, namely energy and economic development. However, as this section will argue, the EIB is failing to deliver projects that contribute to the sustainable development of the country, as the EIB's investments in energy, industry and SMEs are not considering human rights, transparency and good governance in their operations. The EIB's mega projects in Egypt showcase the disconnection between the local realities and the government's priorities which most international financial institutions are following. They also illustrate the gap in community ownership and participation that this model of development projects leaves behind.

Priorities gone wrong

The EIB's presence in Egypt has been stepped up in the past five years since the revolution despite the increased crackdown on basic freedoms including, most notably, freedom of speech. In Egypt, the EIB has provided investment loans totalling more than EUR 7.1 billion since it started its operations in 1979, and more than EUR 2.6 billion since 2010⁵⁰. As is the case in most of the north African countries where it operates, almost EUR 3 billion in EIB projects has targeted the energy sector including a number of gas power stations, distribution lines and refineries.

Energy supply is indeed one of the crucial priorities for Egypt, along with food security, with energy consumption increasing sharply by around five percent per year while supplies have

an average increase of one percent per year⁵¹. These are also sectors which have benefited from subsidies accounting for around a quarter of Egyptian GDP⁵². To address shortages in the energy system, the approach of the Sisi government has been to invest in gas-powered power plants. The viability of these new gas power stations is questionable given the massive reliance of the system on gas (close to 80 percent) and the controversies related to land compensation, water usage and the crackdown on freedom of speech, inhibiting people from expressing themselves freely⁵³. Like other north African countries, Egypt has huge potential for solar energy development – the current share is a tiny 0.14 per cent. In spite of this, 97 percent of EIB investments between 2007 and 2014, accounting for over EUR 1.6 billion, have gone to fossil fuel projects⁵⁴.

EIB projects in Egypt mainly follow the priority lines drawn up by Sisi's government, priorities that are heavily criticised by civil society for being based on massive investments in energy companies mired in corruption and dependency on international investors. National investment plans, especially in energy and infrastructure, lack economic and social feasibility studies and are not backed by a comprehensive long-term strategy⁵⁵. For the energy sector specifically, there is a complete disregard of the potential for alternative renewable energy with no objectives being set for reducing the dependence on fossil fuels and cutting emissions. The diversification of the energy system is a priority also in relation to economic diversification and the need to divert the massive financial support that is being allocated to state energy companies mired in corruption.

'Western' human rights do not apply to this country

The above subtitle is not just a conclusion of the

50

'European Investment Bank: Energy Sector: Africa and Egypt', EIB, March 2016:

http://africasmartgridforum2016.org/sites/default/files/presentations/EIB%20activity%20in%20the%20Energy%20Sectorin%20Egypt%20and%20Africa,%20Rica_0.pdf

51

'Egypt: an EIB loan to the North Giza II power plant', Bankwatch, November 2015: <http://bankwatch.org/sites/default/files/ENP-MENA-Egypt.pdf>

52

Ibid

53

'Egypt: an EIB loan to the North Giza II power plant', Bankwatch, November 2015: <http://bankwatch.org/sites/default/files/ENP-MENA-Egypt.pdf>

54

Ibid

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'Lack of Strategy in the 2030 strategy', Social Watch, 2016, <http://www.socialwatch.org/node/17212>

situation in the Egyptian society, but is an actual statement made by Egypt's president in May 2016⁵⁶.

The human rights situation in Egypt does not show signs of improvement, and the European Parliament has so far adopted three resolutions⁵⁷ specifically condemning the crackdown on basic freedoms and the hesitancy of the Egyptian authorities to take concrete steps. Among the most condemned acts in recent years is the ban and confiscation of funds of a number of national and foreign NGOs in 2011, the arrest of 43 journalists, activists and other civil society members in 2013 and the recent gag order imposed on the media. The latest statement from the European Parliament on Egypt describes a situation of concern for the EU: "We are witnessing a mounting pressure on independent Egyptian civil society organisations, in particular human rights organisations and defenders. The recent imposition of travel bans, asset freezes and the summoning of human rights defenders are not in line with Egypt's commitments to promote and respect human rights and fundamental freedoms as guaranteed by its Constitution and enshrined in the EU-Egypt Association Agreement, which is the basis for our partnership."⁵⁸

The complete lack of space and instruments for civil society participation, along with the crackdown on activists and non-governmental organisations, means that people are not able to express themselves freely and organise to oppose or suggest alternatives to investment projects and priorities set out by the ruling class. In this sense, it is difficult to see how the EIB can ensure that even its basic accountability and participation tools are working to ensure ownership and that they are not just a checklist for approving projects.

The situation in Egypt with investment projects being disconnected from local realities, and with basic freedoms bottom of the list for the government while large investment projects go ahead in areas inhabited by vulnerable communities⁵⁹, shows the urgency with which the EIB needs to develop a framework for conducting human rights assessments. Such an instrument would not only support a realistic reflection of the impact that projects can have, but it would also provide communities with extra tools for participation and decision-making with respect to the projects that are being pushed and imposed from above by the government.

RECOMMENDATIONS

The EIB should require that its projects in the energy sector in Egypt are based on a sustainable energy strategy that includes concrete measures and indicators for reducing dependency on fossil fuels and that takes into consideration vulnerable groups within the Egyptian population. The EIB should require that such a strategy is developed through an open and equal consultation process. Without such a strategy, the EIB's projects in Egypt completely lack legitimacy and create a pattern of unsustainable investments supported by the international community.

The EIB should improve its due diligence procedures to ensure that projects are publicly consulted and developed in a transparent and participatory manner. In this sense, no projects should be approved without human rights due diligence integrated into the entire project cycle.

56 Egyptian president says 'Western' human rights don't apply to his country, Independent, 2016, <http://www.independent.co.uk/news/world/africa/human-rights-egypt-western-perspective-president-sisi-a7014756.html>

57 European Parliament resolution on Egypt, notably the case of Giulio Regeni <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT+MOTION+B8-2016-0338+0+DOC+XML+V0%2F%2FEN&language=EN>

58 European Union External Action, Statement by the spokesperson on civil society in Egypt http://eeas.europa.eu/statements-eeas/2016/160324_01_en.htm

59 'Egypt: an EIB loan to the North Giza II power plant', Bankwatch, November 2015: <http://bankwatch.org/sites/default/files/ENP-MENA-Egypt.pdf>

TURKEY – EIB SUPPORT TO BROADBAND PROJECT DISREGARDING ITS HUMAN RIGHTS OBJECTIVES

In recent years, the Turkish government has adopted law amendments that restrain internet freedoms and expand online censorship and surveillance. The government has been actively blocking websites and prosecuting social media users.

In this context, the EIB decided to provide a loan for rolling-out fixed broadband telecommunication services in six eastern regions of Turkey. Therefore, CEE Bankwatch Network requested the EIB to explain its due diligence to prevent directly or indirectly supporting violations of the rights to privacy or freedom of expression through censorship, surveillance or network shutdowns. The request also enquired whether the bank raised publicly and privately with Turkish government officials concerns about censorship, surveillance, and network shutdowns and related human rights violations, and if it took steps to influence the legal and regulatory reforms to safeguard privacy and freedom of expression in Turkey. The bank replied that Turk Telekom was a private company with a minority stake held by the Turkish government which had no influence in the management of the

company and its investment plans on an existing open market in which companies have no influence on the government decisions that are applied through the Telecommunication Authority.

The EIB concluded that, as the EU financial institution, it was not in its role or mandate to comment on decisions taken by the government of a partner country and such issues would fall under the responsibility of other EU institutions which also approve the mandates under which the EIB operates outside the EU.

Nevertheless, it is worth noting that the European Commission had warned that in Turkey website bans of disproportionate scope and duration continued, and since May 2009 the Telecommunications Communication Presidency (TİB) had published no statistics on banned sites while court cases were ongoing against the YouTube video-sharing website and other web portals. In 2012, the Commission indicated that the Law on the Internet, which limited freedom of expression and restricts citizens' right to access to information, needed to be revised⁶⁰.

60
Commission Staff Working Document, Turkey 2012 Progress Report, 10.10.2012 http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf



FINANCING A DAM IN LAOS GOES AGAINST THE EU'S SUSTAINABLE DEVELOPMENT OBJECTIVES

Village in Laos affected by the Nam Theun 2 project. Credits: International rivers

The EIB joined the Nam Theun 2 dam project in April 2005, providing EUR 45 million. The EIB promised that the dam would have a high development impact and would contribute to regional integration, sustainable economic and social development in Laos by providing net environmental benefit for the region, improved living standards and economic development for the local population in one of the poorest countries in the South East Asia region.

By the time of the dam's inauguration in 2010, problems such as destruction of fisheries, flooding of riverbank gardens and water quality problems remained unresolved ⁶¹.

In 2014 the EIB, using its Result Measurement methodology, assessed that the project had resulted in increased government revenues for poverty reduction and environmental programmes and that the environmental and social impacts of the project are being addressed through significant mitigation and compensation measures and programmes to ensure the economic development and improvement in the living standards of local affected communities.

Soon after, in December 2014 the Asian Development Bank and World Bank-financed Panel of Experts (POE) reported that the Government of Laos had failed to comply with the project's Concession Agreement by not providing necessary support to the livelihood programs for affected villagers. The NGO International Rivers

also reported that downstream communities along the Xe Bang Fai, some of which are more than 100 kilometres away, have complained that the river water remains dirty, unsuitable for drinking, and at times so filled with bacteria and debris that anyone who bathes, swims or washes clothes there experience severe rashes. Shellfish, small aquatic animals and algae gathered by women as sources of food have all disappeared. Villagers have also estimated a significant decline in the fish population, leading to the loss of one of the most significant sources of daily protein.⁶²

In October 2015, the Panel of Experts decided to extend the Resettlement Implementation Plan for the Nam Theun 2 Hydroelectric Project due to failures in the implementation of social and environmental programs. What was supposed to be the best single-largest option to contribute to sustainable social and economic development became a source of hardship for people. Instead of the promised social well-being, poverty reduction, improvements in the living standards, protection of the interest of affected people, including the ethnic minority, the project has caused impacts which are difficult to properly manage.

The EIB itself has failed to properly monitor the project to ensure the implementation of environmental and social programs in line with the finance contract. It has also failed to adequately report the status of projects and deal with the problems which have occurred with the implementation of mitigation measures.

⁶¹ <http://www.counter-balance.org/nan-theun-hydropower-project-laos/>

⁶² 'Nam Theun 2 Affected Villagers Put illusions of the "model project" in Doubt' <http://www.internationalrivers.org/blogs/294-0>

EXTERNAL ACTION

In the context of forced displacement

As part of the mid-term review of the ELM, the European Commission was to assess the need and viability for the allocation of an extra EUR 3 billion in guarantees for the external actions of the EIB. The EIB has already stated that the activation of the EUR 3 billion envelope will be key to filling the gap in financing new initiatives for addressing forced displacement, both under its own Crisis Response and Resilience Initiative and as part of the Commission's new Partnership Framework under the Agenda on Migration, in which the EIB is to be a central implementer of an upcoming External Investment Plan. Thought to be one of the hot topics during the revision of the ELM, a critical analysis of the argumentation for the activation of the extra envelope is even more important now as the European Commission has outlined in its September report and proposal to the European Parliament and the Council that an extra EUR 5.3 billion is needed for the ELM⁶³, EUR 2.3 billion more than initially projected. The amount corresponds to increases needed for EIB's proposal of a Crisis Response and Resilience Initiative that would address needs of host and refugee communities in the MENA region and western Balkans.

Hence this chapter provides an overview of the current challenges the EIB is facing in delivering on development and humanitarian priorities, including needs related to forced displacement in and outside Europe. The chapter also formulates recommendations for the European Commission about its upcoming financial initiatives.

PENDING QUESTIONS ON A NEW WAVE OF FINANCIAL INITIATIVES

Responding to the above mentioned calls by EU institutions, the EIB has come forward with a Crisis Response and Resilience Initiative intended to "build resilience and create more job opportunities in the EU's Southern Neighbourhood and the Western Balkans regions by stepping up support for vital infrastructure and the private sector".⁶⁴

The EIB press release describes the new initiative as a step forward for addressing pressing needs in the region in relation to forced displacement and migration to Europe. It also points out that the EIB's external lending mandate needs to be extended – via the EUR 3 billion envelope – and also complemented by grant financing. So far no further information is available on whether this initiative is anything new at all in terms of the nature of projects it seeks to support, the strategy for matching priorities or how it would relate to other development actors and strategies, ensure additionality of projects and measure results in relation to the specific needs of migrant, transit or host communities.

While the Crisis Response initiative is still in its initial concept phase, the humanitarian nature of its priorities are clearly out of reach for the expertise and capacity of the EIB, an institution with no experience in assessing

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Report from the Commission to the European Parliament and the Council
<http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=COM:2016:584:FIN>

64

<http://www.eib.org/infocentre/press/releases/all/2016/2016-164-new-eib-initiative-to-help-europes-southern-neighbourhood-and-western-balkans-endorsed-by-eu-leaders.htm>

needs or implementing projects in any of the cluster systems of humanitarian assistance. Addressing the humanitarian needs of forced displacement is an imperative for the EU and should continue to be supported through grant funding towards professional humanitarian agencies. Furthermore, humanitarian agencies and strategies including crisis response have as their main objectives ensuring the safety and rights of people, and are not mainly concerned with private sector-led development and creating a business enabling environment.

At the same time, the European Commission plans to establish an External Investment Plan, under which the EIB is likely to play a central role. The Commission argues that such a plan will take as a model the “successful Investment Plan for Europe”.⁶⁵ Given our critical analysis of the Investment Plan for Europe⁶⁶, this raises doubts rather than positive expectations.

The Commission has announced that the plan will be based on three pillars: leveraging more private funds using public resources; technical assistance, and; enabling the business environment. While presented as an innovative new tool for investing in long-term development, it is difficult to see what added value the plan will bring in reality with respect to both the nature of projects supported and the financial source for this instrument – to be mainly based on existing instruments and leveraging more public funds.

In this new external investment framework, as well as in the EIB discourse promoting itself as an institution fit for working on development needs related to forced displacement, we identify several risks:

Increasing the EIB’s portfolio of projects in highly volatile areas in the post-Arab Spring context bears some risks. Indeed, as demonstrated in the previous chapters of this report, the EIB is an institution which severely lacks the instruments needed to operate in the EU neighbourhood without doing harm and ensuring the additionality of projects for those most in need.

Current shortcomings are for example a lack of human rights assessment and monitoring, gender policy and procedures, a more in depth results measurement framework and increased transparency, as well as the necessary tools for community empowerment and participation in the entire project cycle: selection, implementation and evaluation.

Both the European Commission and the EIB should adapt their narrative around the need for more private sector investments to address the medium and long-term needs of forcibly displaced people as not only do financial institutions lack the instruments needed to operate in this environment but also, as the next sub-chapter will argue, such private investments are not fit for the needs of sustainably addressing

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http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/communication_external_aspects_eam_towards_new_migration_ompact_en.pdf

66

<http://www.counter-balance.org/new-report-whats-new-in-the-investment-plan-for-europe-business-as-usual-or-genuine-innovation/>
<http://stories.bankwatch.org/best-laid-plans>

what the EU calls ‘the migration crisis’. Therefore, the EUR 5.3 billion envelope should be disconnected from the discourse of enhancing interventions to address forced displacement, as these extra guarantees will unlikely bring anything new to the EIB’s portfolio and the way in which the institution operates.

The EIB in the MENA region: a questionable track record casting doubts on future operations in the region

During the period following the Arab Spring, the EIB together with other IFIs came forward with numerous commitments to deliver on development objectives in the region. Nevertheless, the portfolio of projects supported through the ELM, as well as projects financed through blending facilities such as the Neighbourhood Investment Facility, do not show clearly the additionality of EIB projects as part of the process of fostering sustainable and environmentally sound development of the region based on human rights, community ownership and the empowerment of those most in need.

SUSTAINABILITY ISSUES

A recent CEE Bankwatch Network study looking at European public finance in the European Neighbourhood region found that while the EIB provided the largest amount of finance for energy projects in the region (EUR 5.6 billion for 51 projects)⁶⁷, a large number of fossil fuels projects were supported, mostly gas projects. The largest recipients were Tunisia and Egypt⁶⁸. The EIB financed 17 fossil fuel projects worth EUR 3.2 billion between 2007-2014.

In the meantime, renewables and energy efficiency projects were supported mostly through different instruments such as the Green for Growth Fund, with a total of EUR 77 million for renewables and energy conservation via intermediaries and a total of EUR 780 million under the European Neighbourhood Partnership Instrument⁶⁹, four times less than went to fossil fuels⁷⁰.

While the energy sector is one of the priorities for many Arab countries, the needs are elsewhere as the sector is characterised by ageing infrastructure, inefficiency and a huge reliance on oil and gas (up to 90 percent reliance on fossil fuels in some Arab countries)⁷¹ as a side effect of cheap subsidies and continuous investment (see the example of Egypt page XX). In this context, international financial institutions have not supported the diversification of the sector

and many investments seem to be benefiting primarily Europe, such as the Southern Gas Corridor. An NGO analysis⁷² of EIB investments in the MENA region argues that energy lending has mostly benefited European companies and exporters, projects which are highly concentrated on co-financing large-scale infrastructure projects. The EIB does not have at this stage sufficient experience in developing projects that respond to local community needs.

With respect to western Balkan countries, mainly Serbia, Macedonia and Bosnia and Herzegovina, the EIB has largely financed SMEs as well as a few energy and infrastructure projects. In Turkey, one of the key transit country for migrants and refugees, an analysis of EIB projects shows a clear drive for mega infrastructure projects. Turkey is so far the largest recipient of EIB loans outside of Europe, with EUR 25.8 billion disbursed since 2000. While more than half of the finance has been granted to SME projects, large energy and transport projects are still on top of the list, including controversial ones such as the planned Southern Gas Corridor’s Turkish part (TANAP).

WHAT NEW APPROACH FOR THE REGION?

An allocation of an extra EUR 5.3 billion by the European Commission to the EIB for the ELM is unlikely to bring a significant shift in the EIB operations in the neighbourhood region. Indeed, stated priorities in terms of access of the most vulnerable to education, health system, water and sanitation programmes as well as economic empowerment are not at the core of the EIB’s business model when operating outside of Europe. Indeed, current EIB investments focus largely on the energy sector and SMEs.

While access to energy is important, the region presents different needs such as the modernisation of and improving the efficiency of existing infrastructure as well as investments in local renewable energy initiatives, and not in large fossil fuels exploration and transmission projects.

When it comes to SME projects, the EIB has not been operating in a transparent manner as argued in chapter 2 on financial intermediaries. Therefore, it is difficult to assess the results and impacts on the final beneficiaries of the credit line projects awarded by the EIB.

Moreover, the EIB has little experience in projects in the softer sectors such as health and education outside the EU. And while infrastructure and water management are among the key

67
<http://bankwatch.org/sites/default/files/ENP-energy-exec-summary.pdf>, page 2

68
Ibid, p5

69
The European Neighbourhood and Partnership Instrument [ENPI] is the financial instrument for European neighbourhood policy [ENP].

70
Ibid

71
<http://www.annd.org/data/item/pdf/26.pdf>, page 4

72
<http://www.annd.org/data/item/pdf/26.pdf>

priorities, projects are not selected and assessed involving the groups in need. At the same time, increasing EIB financing in these sectors that are traditionally supported through grants, places a high risk of increasing the indebtedness of recipient and host countries.

So far, the EIB lacks a framework for human rights due diligence, lacks the tools to involve communities such as the migrant community in designing projects, to coordinate with other stakeholders relevant to the development strategy of the region, especially from civil society, to avoid overlap and be able to fill the necessary gaps and to assess the results and impacts of its projects.

AN INSUFFICIENT DEVELOPMENT IMPACT ORIENTATION

Besides its ability and willingness to address the need for assessing and monitoring human rights implications in its projects as presented in the previous chapter, another key structural issue for the bank is its ability to measure the results and impact of projects on a broader range of beneficiaries and on other areas outside the direct sector in which the investment is made.

As argued in a briefing by Bankwatch and Counter Balance addressed to the European Commission in February 2016, the Results Measurement Framework (REM) of the EIB used for evaluating projects lacks the necessary indicators to assess the impact of a project on its broader operational environment. In this sense, the first pillar of the framework, meant to evaluate the contribution of the project to the EU's external objectives, only assesses the compliance in principle.

There is no framework for linking the outcomes and outputs identified on other relevant aspects of the EU and country priorities (such as inequalities, poverty, gender, human rights) besides the priorities of the sector in which the investment is made. Therefore, even though a project has direct outcomes in one specific sector (energy, transport, infrastructure), its impact on other development related aspects should be assessed to ensure coherence and identify eventual risks posed on other development priorities. This gap in the first pillar of the REM prevents the EIB from assessing its impact on specific communities in need of larger projects in the infrastructure, energy or other technical sectors. Furthermore, the lack of involvement of both indirect and direct beneficiaries and stakeholders in the

REM makes it harder for the EIB to prove the additionality of its projects.

With respect to pillars 2 and 3 of the REM, the existing indicators are mostly quantitative and differentiate by sector, strictly aiming to measure the results of activities. They focus on technical and measurable project outcomes such as energy produced (GWh/year), length of road/ rail built, time savings, increase in air traffic movements etc. The indicators fail to assess the impact of the achieved results on the operating environment, including: financial transparency, quality of labour standards, standards on information disclosure, rule of law, ownership, formal economy creation, human rights and good governance among many. From this perspective, it is difficult to see how the REM is able to be used for comprehensive evaluations of projects that are designed to address the needs of communities impacted by the so-called 'migration crisis', be they migrants or host communities.

In conclusion, when analysing the legacy and focus of EIB operations in the neighbourhood region, it appears that the bank is heavy on mega energy and infrastructure projects while its operations are fraught with structural problems linked to transparency, a lack of human rights due diligence, limited stakeholder involvement and incomplete evaluations of its impacts. Hence, we conclude that the EIB is not the best placed institution to deliver on the complex social priorities of vulnerable host and migrant communities from the neighbourhood region. An allocation of an extra EUR 5.3 billion in guarantees will not bring any major shift in EIB projects in the region.

In addition, the mega projects preferred by the EIB are often pure financial operations benefiting large businesses, and the brief public hearings which take place as part of such projects' preparations are merely a box-ticking exercise to ensure compliance with the bank's social standards. A number of ELM countries of operation have autocratic regimes and a lack of proper community engagement in the project cycle can lead to projects being selected based on the unrealistic priorities of economic elites and ruling classes, such as in the case of Azerbaijan.

Development resources are scarce and the EUR 5.3 billion from the EU budget is needed for development action, for creating a space for migrant and host communities to develop their own future, and not for projects which will significantly benefit financial intermediaries and large investments funds.

RECOMMENDATIONS

The European institutions ought to thoroughly assess the capacity of the EIB to deliver on the needs of forced displacement both inside and outside Europe, looking at the legacy of its investment portfolio and the instruments of the bank for assessing and developing rights-based interventions.

If the EU is to provide an extra EUR 5.3 billion in guarantees to the EIB, then it should include strict conditionality for how the EIB operates:

Clear procedures for selection of projects to ensure that no harm is done, to show additionality, ownership and a clear link to local priorities;

Human rights assessments and gender assessment on a project by project basis to be conducted; the process for selecting projects should be democratised, including consultations with direct and indirect beneficiaries, coordination with humanitarian actors and local authorities;

The Results Measurement Framework needs improvement so that it includes indicators that effectively assess the impact of the outputs and outcomes on the operational environment of the project, the ownership of partner countries, the contribution of this impact to all EU external priorities and elements of country strategy and the degree of stakeholder involvement; furthermore, the transparency of the framework needs to be strengthened via a systematic disclosure of ReM sheets and project monitoring reports on the EIB website for each project benefiting from the EU guarantee under the ELM.

In order to strengthen the accountability of EIB operations outside of Europe – especially

given the sensitivity of its zones of operations – a solution could lie in a new form of external supervision being implemented over the existing grievance mechanisms. This could mean a renewed and extended role for the European Ombudsman for all EU development cooperation. This mechanism would be mandated to cover concerns related to the impact of EU development funding, including both the EIB and European Commission funding, and for both EU and non-EU citizens. Such a mechanism would then also cover the blending facilities being set up at European level in order to merge European Commission grants with loans from the international financial institutions to support EU external action. In order to ensure the proper functioning of this external grievance mechanism, a supervisory structure for this (and eventually an appeal mechanism) is also needed. This could be achieved by building on the current structure of the Ombudsman mechanism, with the requirement that it is budgeted and appointed by the European Parliament. A concrete supervisory role would be given to a European Parliament committee which could act as an appeal mechanism with some investigative powers abroad. Furthermore, the European Parliament could be put in charge of appointing a specific Deputy Ombudsman in charge of this new division within the institution. Such a renewed structure would be a way to increase independent oversight of EIB activities.

ANNEX 1

LIST OF EIB COUNTRIES OF OPERATION UNDER THE ELM

	Countries eligible under the current EU guarantee	Freedom House INDEX 2016	Economist Intelligence Unit 2015 Democracy Rating
1	Iceland	FREE	FULL DEMOCRACY
2	(Former Yugoslav Republic of) Macedonia	PARTLY FREE	FLAWED DEMOCRACY
3	Montenegro	PARTLY FREE	FLAWED DEMOCRACY
4	Serbia	FREE	FLAWED DEMOCRACY
5	Turkey	PARTLY FREE	HYBRID REGIME
6	Albania	PARTLY FREE	HYBRID REGIME
7	Bosnia and Herzegovina	PARTLY FREE	HYBRID REGIME
8	Kosovo	PARTLY FREE	
9	Algeria	NOT FREE	AUTHORITARIAN
10	Egypt	NOT FREE	AUTHORITARIAN
11	Israel	FREE	FLAWED DEMOCRACY
12	Jordan	NOT FREE	AUTHORITARIAN
13	Lebanon	PARTLY FREE	HYBRID REGIME
14	Libya	NOT FREE	AUTHORITARIAN
15	Morocco	PARTLY FREE	HYBRID REGIME
16	Palestine	NOT FREE	AUTHORITARIAN
17	Tunisia	FREE	FLAWED DEMOCRACY
18	Republic of Moldova	PARTLY FREE	FLAWED DEMOCRACY
19	Ukraine	PARTLY FREE	HYBRID REGIME
20	Armenia	PARTLY FREE	HYBRID REGIME
21	Azerbaijan	NOT FREE	AUTHORITARIAN
22	Georgia	PARTLY FREE	HYBRID REGIME
23	Russia	NOT FREE	AUTHORITARIAN
24	Argentina	FREE	FLAWED DEMOCRACY
25	Bolivia	PARTLY FREE	HYBRID REGIME
26	Brazil	FREE	FLAWED DEMOCRACY
27	Chile	FREE	FLAWED DEMOCRACY
28	Colombia	PARTLY FREE	FLAWED DEMOCRACY
29	Costa Rica	FREE	FLAWED DEMOCRACY
30	Ecuador	PARTLY FREE	HYBRID REGIME
31	El Salvador	FREE	FLAWED DEMOCRACY
32	Guatemala	PARTLY FREE	HYBRID REGIME

Countries eligible under the current EU guarantee		Freedom House INDEX 2016	Economist Intelligence Unit 2015 Democracy Rating
33	Honduras	PARTLY FREE	HYBRID REGIME
34	Mexico	PARTLY FREE	FLAWED DEMOCRACY
35	Nicaragua	PARTLY FREE	HYBRID REGIME
36	Panama	FREE	FLAWED DEMOCRACY
37	Paraguay	PARTLY FREE	FLAWED DEMOCRACY
38	Peru	FREE	FLAWED DEMOCRACY
39	Uruguay	FREE	FULL DEMOCRACY
40	Venezuela	PARTLY FREE	HYBRID REGIME
41	Bangladesh	PARTLY FREE	HYBRID REGIME
42	Brunei	NOT FREE	
43	Bhutan	PARTLY FREE	HYBRID REGIME
44	Cambodia	NOT FREE	HYBRID REGIME
45	China (including Hong Kong and Macao Special Administrative Regions)	NOT FREE	AUTHORITARIAN
46	India	FREE	FLAWED DEMOCRACY
47	Indonesia	PARTLY FREE	FLAWED DEMOCRACY
48	Iraq	NOT FREE	HYBRID REGIME
49	Laos	NOT FREE	AUTHORITARIAN
50	Malaysia	PARTLY FREE	FLAWED DEMOCRACY
51	Maldives		
52	Mongolia	FREE	FLAWED DEMOCRACY
53	Myanmar/Burma	NOT FREE	HYBRID REGIME
54	Nepal	PARTLY FREE	HYBRID REGIME
55	Pakistan	PARTLY FREE	HYBRID REGIME
56	Philippines	PARTLY FREE	FLAWED DEMOCRACY
57	Singapore		FLAWED DEMOCRACY
58	South Korea	FREE	FLAWED DEMOCRACY
59	Sri Lanka	PARTLY FREE	FLAWED DEMOCRACY
60	Thailand	NOT FREE	HYBRID REGIME
61	Vietnam	NOT FREE	AUTHORITARIAN
62	Yemen	NOT FREE	AUTHORITARIAN
63	Kazakhstan	NOT FREE	AUTHORITARIAN
64	Kyrgyzstan	PARTLY FREE	HYBRID REGIME
65	Tajikistan	NOT FREE	AUTHORITARIAN
66	Turkmenistan	NOT FREE	AUTHORITARIAN
67	Uzbekistan	NOT FREE	AUTHORITARIAN
68	South Africa	FREE	FLAWED DEMOCRACY

