

katinka jesse | omgevingsrecht | environmental law

The European Investment Bank and environmental supply chain impacts

Legal opinion on environmental supply chain impacts caused outside the European territory but directly linked to European infrastructural, EIB financed projects

Commissioned by:
Both ENDS
Nieuwe Keizersgracht 45
1018 VC Amsterdam

Dr. K.D. Jesse
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1 Introduction

The European Investment Bank (EIB), set up by the Treaty of Rome, is the European Union's financial institution. The EIB has legal personality and is financially independent. Its shareholders are the Member States of the EU. The EIB provides (long-term) financing and loans to projects in the EU, in EU candidate countries and in countries outside the EU as part of the European development aid and cooperation strategies.¹ According to its website, it is the world's largest multilateral borrower and lender by volume, generally financing one-third of each project.² Its aim is to contribute to economic, social and territorial cohesion within the European Union (EU) by supporting projects that significantly contribute to, inter alia, growth, employment and environmental sustainability in Europe and beyond.³

According to the EIB Statement of Environmental and Social Principles and Standards,

[t]he environmental and social policies, principles and standards as well as the operational practices of the EIB derive from and reflect the evolving EU approach and that of other international institutions towards the promotion of environmental sustainability and social well-being, in the broader context of the goal of sustainable development.⁴

In view of the prominent position the EIB, according to its own statements, attaches to sustainable development, Both Ends asked to provide a legal opinion on the following question:

On what grounds could conditions or requirements be set with respect to EIB financing regarding significant environmental supply chain impacts that are caused outside the European territory but that are nevertheless linked to infrastructural projects within the EU for which the EIB provides finances?

To answer this question, the focus is first on the European constitutional instruments (i.e., the Treaty on European Union and the Treaty establishing the European Community), together with the Charter of Fundamental Rights of the European Union (paragraph 2). Next, European policy instruments that may be relevant for the question (i.e., the European sustainable development strategy, the 7th Environmental Action Programme and the European corporate social responsibility strategy), will be addressed (paragraph 3). This is followed by a discussion of the relevant principles, policies and standards of the EIB (i.e., the EIB Statement, the EIB Environmental and Social Handbook including the United Nations Guiding Principles on Business and Human Rights that project promoters according to the Handbook should apply, the European Principles for the Environment and the Equator-principles).

2 The Treaty of Lisbon

The Lisbon Treaty has amended the two treaties that formed the constitutional basis of the EU: the Treaty on European Union (TEU, a.k.a. the Maastricht Treaty)⁵ and the Treaty establishing the European Community (a.k.a. the Treaty of Rome) that was renamed to the Treaty on the Functioning of the European Union (TFEU).⁶ The Lisbon Treaty, signed by the EU member states on 13 December

¹ Ibid.

² See <www.eib.org>.

³ Ibid.

⁴ European Investment Bank, The Statement of Environmental and Social Principles and Standards, 2009, p. 5.

⁵ See Consolidated version of the Treaty on European Union, OJ 26 October 2012, C326/13.

⁶ See Consolidated version of the Treaty on the Functioning of the European Union, OJ 26 October 2012, C326/47.

2007, entered into force on 1 December 2009. Both the TEU and the TFEU refer to environmental protection, whether or not in relation to sustainable development.

Article 3 TEU (ex article 2 TEU) stipulates in section 3 that

[t]he Union shall [...] work for the sustainable development of Europe based on [...] a high level of protection and improvement of the quality of the environment. [...]

This provision implies the protection and improvement of the European environment rather than the global environment. Section 5 of the same article however determines:

In its relations with the wider world, the Union shall [...] contribute to peace, security, *the sustainable development of the Earth*, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights [...] (emphasis added).

Here, the global environment is part of what the Union shall contribute to. Obviously, this broader scope is also adopted in the general provisions on the Union's external action. Article 21(2) TEU provides:

The Union shall define and pursue common policies and action, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] ⁷
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development [...].

Article 11 TFEU points in the same direction:

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

However, article 191 TFEU (ex article 174 TEC), which sets out the overall objectives and principles relating to the environment, takes an opposite position. This is not so much apparent from section 1, which stipulates:

[u]nion policy on the environment shall contribute to pursuit of the following objectives:
— preserving, protecting and improving the quality of the environment,
— protecting human health,
— prudent and rational utilisation of natural resources,
— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Rather, this becomes clear from section 2 and 3. Section 2 stipulates that this Union policy on the environment 'shall aim at a high level of protection taking into account *the diversity of situations in the various regions of the Union*' (emphasis added), followed by the principles of environmental law

⁷ In addition, section 3 of article 21 TEU stipulates that the Union 'shall ensure consistency between the different areas of its external action and between these and its other policies.' See in this respect also article 7 TFEU.

on which the Union policy shall be based. As section 2 explicitly refers to European regions instead of World regions, this section implies that the Union policy on the environment merely relates to the European environment. The same appears to be true with respect to section 3. This section determines that the Union, in preparing its policy on the environment, shall take account of, inter alia, 'environmental conditions in the *various regions of the Union*' as well as of 'the economic and social development of *the Union as a whole* and the balanced development of *its regions*' (emphasis added). The fourth objective of section 1 does not change this focus on the European environment. After all, 'promoting measures at the international level [...]' is not quite the same as taking measures at the territory of the Union to deal with environmental supply chain impacts caused outside this territory.

Therefore, from article 191 TFEU follows that neither the objectives nor the principles relating to the environment (i.e., the precautionary principle, the prevention principle, the principle that environmental damage should as a priority be rectified at source and that the polluter pays principle) apply to environmental supply chain impacts caused outside the EU. Apparently however, article 191 TFEU is nevertheless applied to these impacts, presumably through internal customary law, i.e., customary law within the European Union as an international organization.⁸ This could be best illustrated by referring to the European 'Timber regulation' and the 'Bio fuels directive', both of which are concerned with environmental supply chain impacts caused outside the EU, and both of which are based on article 192(1) TFEU in conjunction with article 191 TFEU.⁹ From these two instruments follows that environmental supply chain impacts caused outside the European territory but which are linked to activities within this territory may indeed provide a reason to take European action.

Still, the attributed institutions to take the actions referred to in article 191 TFEU are limited. After all, article 192(1) TFEU provides

[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

As article 192(2) TFEU merely provides the powers and limits to the European Parliament and the Council to take actions to achieve the objectives regarding the environment, the achievement of these objectives is not transferred to other institutions, bodies (such as the EIB), offices or agencies.

The EIB does play a role in the implementation of the Charter of Fundamental Rights of the European Union of 7 December 2000 and adapted on 12 December 2007.¹⁰ Following article 6 TEU, the Charter has the same legal value as the TEU and the TFEU. The organs to which the Charter confers powers are broader than that of these treaties. Article 51(1) Charter stipulates:

[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only

⁸ Compare Henry G. Schermers & Niels M. Blokker, *International Institutional Law, Unity within Diversity*, Leiden/Boston 2011, § 1339.

⁹ See Regulation 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, as well as the European Parliament legislative resolution of 11 September 2013 on the proposal for a directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources (COM (2012)0595 – C7-0337/2012 – 2012/288 (COD)).

¹⁰ See Charter of Fundamental Rights of the European Union, as adopted in, inter alia, OJ 26 October 2012, C326/391.

when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

One of the principles, as referred to in Article 51(1) of the Charter, concerns environmental protection. Article 37 Charter provides,

[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 51(1) of the Charter in conjunction with Article 37 of the Charter therefore determines that also the EIB, as a body of the Union, has to integrate and ensure both a high level of environmental protection and the improvement of the quality of the environment into its policies. However, as Article 37 does not specify the scale of the environment to be protected and improved, it is questionable whether this article addresses the global or merely the European environment. The reference to the principle of sustainable development at the end of the article possibly suggests the former one.

To conclude, neither the Charter nor the TEU and the TFEU unambiguously provide for the possibility, let alone the obligation, to deal with environmental supply chain impacts caused outside the territory of the European Union but which are linked to activities within this territory. In the next paragraph, the focus is therefore shifted to European policy documents that may provide insights regarding the question of this legal opinion.

3 Internal European policies with an external dimension

This paragraph deals with three European policy fields that may be of relevance to this question: the European Sustainable Development Strategies, the European Environmental Action Programme and the European Corporate Social Responsibility strategy.

Sustainable development strategies

The European Council adopted the first EU Sustainable Development Strategy in 2001.¹¹ This strategy was complemented by a Communication on the external dimension of sustainable development entitled 'A Global Partnership for Sustainable Development' in 2002.¹² Based on an extensive review process,¹³ the European Council adopted a renewed sustainable development strategy in 2006.¹⁴ All three documents include commitments towards the external dimension of sustainable development.

According to the 2006 renewed strategy, one of its key objectives is to

¹¹ European Commission, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, 15 May 2001, COM (2001)264 final – not published in the Official Journal.

¹² European Commission, Towards a Global Partnership for Sustainable Development, COM (2002)82 final – not published in the Official Journal.

¹³ See <http://europa.eu/legislation_summaries/environment/sustainable_development/l28117_en.htm>.

¹⁴ Council of the European Union, Review of the EU Sustainable Development Strategy? Renewed Strategy, 2006 – not published in the Official Journal.

actively promote sustainable development worldwide and ensure that the EU's internal and external policies are consistent with global sustainable development and its international commitments.¹⁵

In view of the relationship between these internal and external policies, the 2001 strategy already addressed the global dimension of European production and consumption:

[m]any EU policies influence prospects for sustainability far beyond the borders of the Union, and EU production and consumption increase the pressure on shared global environmental resources. It is therefore important to ensure that measures we take to move towards sustainable development in Europe contribute towards sustainable development in the rest of the world'.¹⁶

More specifically, the 2002 Communication on the external dimension of sustainable development related the foregoing to the sustainable management of natural and environmental resources:

[s]ome of the action included in the European Union's internal strategy will be instrumental in diminishing the ecological impact the European Union has on the rest of the world. By managing natural resources in a more sustainable manner, and decoupling resource consumption and pollution from economic growth, the European Union will also contribute to global sustainable development.¹⁷

The 2006 renewed strategy however does not continue down this pathway, despite the consideration that sustainable development is an 'overarching objective of the European Union set out in the Treaty, governing all the Union's policies and activities.'¹⁸ Although one of the seven key challenges is sustainable consumption and production, the strategy does not specifically address supply chain impacts caused outside the European territory with a link to activities within this territory, as was included in the 2001 strategy ('careful assessment of the full effects of a policy proposal must include estimates of its economic, environmental and social impacts inside and outside the EU').¹⁹

The 2006 strategy does pay specific attention to the EIB as part of the key challenge 'Global poverty and sustainable development challenges'. This challenge aims to '[t]o actively promote sustainable development worldwide and ensure that the European Union's internal and external policies are consistent with global sustainable development and its international commitments'.²⁰ One of the corresponding actions to this key challenge reads as follows:

[i]nvestments through the European Investment Bank and the EU-Africa Partnership for Infrastructure should support sustainable development objectives. The European Investment Bank should assess its lending against the contribution to achieving the Millennium Development Goals and sustainable development.²¹

¹⁵ Ibid., p. 4.

¹⁶ Ibid., p. 9.

¹⁷ European Commission, Towards a Global Partnership for Sustainable Development, COM (2002) 82, p. 11.

¹⁸ Council of the European Union, Review of the EU Sustainable Development Strategy? Renewed Strategy, 2006, p. 2.

¹⁹ European Commission, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, 15 May 2001, COM (2001)264 final, p. 6.

²⁰ Council of the European Union, Review of the EU Sustainable Development Strategy? Renewed Strategy, 2006, p. 7.

²¹ Ibid., p. 21.

This quote may offer a portal to address environmental supply chain referred to in this legal opinion. As such, it is however too abstract to form a basis to oblige the EIB to do so. Other references that may be of relevance for this legal opinion are not included in these European documents regarding sustainable development. Hence, we quickly move forward to the 7th Environmental Action Programme.

7th Environmental Action Programme

One of the nine priority objectives of the 2013 7th Environmental Action Programme (EAP) is dedicated 'to increase the Union's effectiveness in addressing international environmental and climate-related challenges'.²² By far the largest part of this objective relates to the European external dimension. Examples of this dimension are the following considerations: 'the Union will engage proactively in international efforts to develop the solutions needed to ensure sustainable development globally',²³ and '[m]any of the priority objectives set out in the 7th EAP can only be fully achieved as part of a global approach and in cooperation with partner countries, and overseas countries and territories'.²⁴ The 7th EAP only very occasionally includes considerations with respect to internal environmental objectives that (also) have an external dimension. An example of this is the phrase '[t]he Union should continue to promote environmentally responsible business practices [...]',²⁵ as well as the assurance that 'the impact of consumption in the Union on the environment beyond the Union's borders is reduced'.²⁶ Two more considerations include the following:

The Union should also leverage its position as one of the largest markets in the world to promote policies and approaches that decrease pressure on the global natural resource base. This can be done by changing patterns of consumption and production [...].²⁷

In order to increase the Union's effectiveness in addressing international environmental and climate-related challenges, the 7th EAP shall ensure that by 2020: [...] assessing the environmental impact, in a global context, of Union consumption of food and non-food commodities and, if appropriate, developing policy proposals to address the findings of such assessments, and considering the development of a Union action plan on deforestation and forest degradation.²⁸

These quotes clearly acknowledge that EU's internal environmental objectives may be instrumental to external EU policies. Apart from few exceptions though,²⁹ thus far the EU has not been paid much attention to the operationalisation of this instrumental pathway.

Corporate Social Responsibility Strategy

As a result of the call of both the European Parliament and Council to the Commission to further its policy on corporate social responsibility (CSR), as well as several commitments of the Commission in this respect, the Commission presented its 'Renewed EU strategy to promote Corporate Social

²² Decision of the European Parliament and the Council on a general union environment action programme to 2020 "Living well, within the limits of our planet", 20 November 2013, 2012/0337, p. 80.

²³ Ibid.

²⁴ Ibid., p. 81.

²⁵ Ibid., p. 86.

²⁶ Ibid., p. 87.

²⁷ Ibid., p. 85.

²⁸ Ibid., p. 91.

²⁹ I.e., the Timber Regulation and the Bio fuels Directive, see paragraph 2 above.

Responsibility' in 2011.³⁰ It now defines CSR as 'the responsibility of enterprises for their impacts on society'.³¹ To meet this responsibility, enterprises

should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders.³²

According to the renewed strategy, CSR is not only in the interests of the enterprises, but also in the interests of society as a whole:

[t]hrough CSR, enterprises can significantly contribute to the European Union's treaty objectives of sustainable development and a highly competitive social market economy.³³

In addition, the renewed CSR strategy shows awareness of progress with CSR on the global level: the Commission is committed to make European policy to promote CSR fully consistent with internationally recognized principles and guidelines regarding CSR, in particular the recently updated OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights;³⁴ which 'together make up an evolving and increasingly coherent global framework for CSR.'³⁵

According to the renewed CSR strategy, from these principles and guidelines follows that:

CSR at least covers human rights, labour and employment practices [...], *environmental issues (such as biodiversity, climate change, resource efficiency, life-cycle assessment and pollution prevention)*, and combating bribery and corruption. Community involvement and development [...] are also part of the CSR agenda. The promotion of social and *environmental responsibility through the supply-chain*, and the disclosure of non-financial information, are recognised as important cross-cutting issues (emphasis added).³⁶

The emphasis on the supply chain as one of the important cross-cutting issues, also follows from the consideration that

[t]o identify, prevent and mitigate their possible adverse impacts, large enterprises, and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, *including through their supply chains* (emphasis added).³⁷

³⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-2014 for Corporate Social Responsibility, 25 October 2011, COM (2011), 681 final. See for the call and commitments, *ibid.*, p. 4.

³¹ *Ibid.*, p. 3. The European Commission previously defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis', see COM (2001) 366.

³² *Ibid.*

³³ *Ibid.*, p. 3

³⁴ *Ibid.*, p. 6-7.

³⁵ See <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/guidelines-principles/index_en.htm>.

³⁶ *Ibid.*, p. 7.

³⁷ *Ibid.*, p. 6.

The Commission is therefore committed to develop a policy ‘to encourage companies to measure and benchmark their environmental performance using a common lifecycle based methodology that could also be used for disclosure purposes’.³⁸

From the quotes clearly follows that the supply chain forms part of the renewed CSR strategy. Whether or not this is also true for the corporate responsibility documents of the EIB, will be dealt with in the next paragraph.

Before proceeding with the next paragraph, it is important to observe that, specifically with respect to investors, the renewed CSR strategy notes that ‘[...] investors are in a position to enhance market reward for socially responsible companies through the [...] investment decisions they take [...]’,³⁹ and ‘[p]ublic authorities have a particular responsibility to promote CSR in enterprises which they own or in which they invest.’⁴⁰ As the Commission (rightly) includes the supply chain in its interpretation of CSR, public authorities, such as the EIB, also have a particular responsibility to promote environmental due diligence through the supply chain in enterprises which they own or in which they invest. The next paragraph also addresses whether the EIB indeed promotes such environmental due diligence through the supply chain.

4 EIB: corporate responsibility

One of the lending priorities of the EIB is the protection and improvement of the natural environment and the promotion of sustainable communities in support of sustainable development.⁴¹ The associated environmental and social policies, principles and standards of the EIB thus reflect the promotion of sustainable development as adopted in international and European law and policies.⁴² A considerable instrument in this respect is the 2009 EIB Statement of Environmental and Social Principles and Standards (the ‘Statement’). After earlier Environmental Statements in 1996, 2002 and 2004, this Statement is ‘an important expression of the Corporate Responsibility and aspirations of the Bank and makes transparent the requirements against which the projects it finances are assessed and should be judged.’⁴³ It must be applied in all EIB operations, whether it regards public or private sector financing.

Complementing the Statement is not only the EIB Environmental and Social Practices Handbook (the ‘Handbook’) that translates the Statement into operational practices, but also the European Principles for the Environment (EPE) drawn up by five European-based international financial institutions to provide a benchmark against which to assess the environmental performance of the signatory institutions and their financed projects.⁴⁴

As the Standard, and the Handbook and EPE which complement it, is an ‘important expression’ of the EIB’s corporate responsibility, which is ‘reflected by our support for the creation of a sustainable and inclusive economy without compromising the ability of future generations to meet their needs’,⁴⁵ these three documents will be discussed in view of the question of this legal opinion.

³⁸ Ibid., p. 12.

³⁹ Ibid.

⁴⁰ Ibid., p. 11.

⁴¹ European Investment Bank, The EIB Statement of Environmental and Social Principles and Standards, 2009, p. 5. Through <www.eib.org>.

⁴² Ibid., p. 5-6.

⁴³ Ibid., p. 6.

⁴⁴ Ibid., p. 6-7.

⁴⁵ See <<http://eib.europa.eu/about/cr/index.htm>>.

The Statement of Environmental and Social Principles and Standards

The ways in which articles 191 and 192 TFEU are worded (see section 2 above), leave unimpeded that of central importance to the environmental approach of the EIB are the environmental principles of EU law, notably, the integration principle and the principle of aiming at a high level of environmental protection.⁴⁶ The latter is based on the precautionary principle, the prevention principle, the principle that environmental damage should be rectified at source, and the polluter pays principle.⁴⁷ According to the EIB, a requirement that underlies these principles is that

investment decisions reflect their true value to society, including through the prices people are willing to pay [...] to protect and enhance the environment and the costs that society incurs when the environment is damaged.⁴⁸

This quote raises the question: which society? European society or the global society? If supply chain impacts are to be incorporated in investment decisions, the true value to global society would be reflected. This would equally apply even now the environmental principles of the Statement are mainly based on the environmental principles of article 191(2) TFEU, which, as showed above, are merely addressed at the European territory. The supply chain is however not included in the Standard. But it does state, with respect to the environmental standards the EIB applies:

[t]he EU approach to the environment and social well-being is only one example of good international practice to which the EIB subscribes. Other approaches that incorporate good international practice are acceptable to the Bank and justified in some circumstances. They are used to reinforce the scope and robustness of the EU approach to environmental and social matters in respect of specific issues and/or in specific sectors. This may be the case [inter alia] *where a given subject is not adequately covered in EU legislation [...]* (emphasis added).⁴⁹

As supply chain impacts, generally, are a subject not adequately covered in EU legislation, the Bank could accept a supply chain approach. Especially because the Handbook indeed includes considerations with respect to the supply chain (see below).

Environmental and Social Handbook

The Handbook applies to all EIB operations likely to have significant environmental and social impacts and risks. These impacts and risks have to be taken into account as early as possible.⁵⁰

On a number of occasions, the Handbook addresses the supply chain of the project. In its second volume 'EIB Environmental and Social Practices and Procedures', the different stages of the loan cycle (i.e., pre-appraisal, appraisal and monitoring) are addressed. In the pre-appraisal stage, project promoters have to, inter alia, '[c]onsider where practical and feasible, the environmental and social impacts through the *supply chain* [...]' (emphasis added).⁵¹

In the following appraisal stage project promoters need to carry out several 'environmental and social due diligence tasks', including, inter alia, the assignment of the project to the appropriate

⁴⁶ Ibid., p. 13-14.

⁴⁷ Ibid.

⁴⁸ Ibid., p. 14.

⁴⁹ Ibid., p. 9.

⁵⁰ European Investment Bank, Environmental and Social Handbook, 2013, p. 14. Through <http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf>.

⁵¹ Ibid., p. 107.

assessment category. Thereto, the results of the screening process should be considered. One of the elements to consider is the question: '[a]re there third party or supply chain issues?'⁵²

Still, both quotes do not provide a dedicated, general reference to the supply chain. With respect to environmental impacts causing biodiversity degradation and/or climate change, the case is however different. Both biodiversity and climate change are among the key environmental issues the EIB is committed to.⁵³

Within the context of the biodiversity assessment, the supply chains of the project are not only one of the benchmarks for the screening,⁵⁴ but they are also within the scope of the assessment:

In recent years a number of industry sectors have developed and/or adopted formal standards that incorporate principles, criteria and indicators, subject to independent audit and verification. In cases where living natural resources represent a significant part of the procurement budget, as much as possible, the promoter should seek to contract with those companies in their sector that abide by credible and recognised standards or certification schemes of sustainable management.

Credible recognised standards are those which are objective and achievable, founded on a multistakeholder consultative process, encourage step-wise and continual improvements, and provide for independent verification through appropriate accredited bodies.

For commodities other than living natural resources, promoters involved in the purchasing, processing or trading of such commodities should seek *to identify their supply chain risks and assess their operational and reputational exposure to such risks* (emphasis added). In situations where such concerns are identified, promoters should find ways to address them in a manner commensurate with their degree of control and influence.⁵⁵

With respect to climate change, one of the requirements for project promoters is to provide the EIB information on risks the projects face and also those of the system within which they operate, such as, inter alia, 'vulnerability in the supply chain'. If significant climate change risks are identified, the promoter needs to identify and apply the necessary measures to reduce these risks as well as to establish appropriate monitoring systems.⁵⁶

Of importance is furthermore the reference to the United Nations Guiding Principles on Business and Human Rights in the Handbook:

The Handbook builds upon and reflects the EIB Statement on Environmental and Social Principles and Standards (EIB Statement), [...] and other relevant and applicable instruments such as the EU Treaties, the Charter of Fundamental Rights of the European Union, the EU environmental *acquis*, international conventions and multilateral environmental and human rights agreements, such as [...] the UN Guiding Principles on Business and Human Rights.⁵⁷

And:

To all its operations and activities, the EIB applies a number of core environmental and social

⁵² Ibid., p. 107-108.

⁵³ Ibid., p. 12. See also, e.g., the EIB Statement, p. 5-6.

⁵⁴ Ibid., p. 38.

⁵⁵ Ibid., p. 38-39.

⁵⁶ Ibid., p. 46.

⁵⁷ Ibid., p. 96.

standards and processes that reflect international standards and best practice. All EIB-supported operations, independently of the form of financial commitment, i.e. lending, blending or advising, should, inter alia,:

- Apply the European Principles for the Environment;
- Apply the UN Guiding Principles on Business and Human Rights [...].⁵⁸

The UN Guiding Principles on Business and Human Rights have derived from the request of the UN Human Rights Commission, which is the predecessor of the current Human Rights Council, 'to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises'. His mandate was, among other things, '[t]o identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'.⁵⁹ Following his appointment as special representative on 25 July 2005, professor Ruggie presented a 'conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors' on 7 April 2008.⁶⁰ This Framework for Business and Human Rights ('Framework') consists of three pillars: (1) the duty of states to protect human rights; (2) the responsibility of business enterprises to respect human rights; and (3) access to remedies for those affected by human rights violations. The Human Rights Council welcomed this Framework and extended the Special Representative's mandate to operationalize it.⁶¹ Ruggie subsequently presented his Guiding Principles on Business and Human Rights (Guiding Principles),⁶² which were welcomed and endorsed by the Human Rights Council.⁶³

The adoption of the 2008 Framework and 2011 Guiding Principles has boosted a common and coherent understanding of the relationship between business enterprises and human rights. In fact, despite some fierce criticism,⁶⁴ the Framework and Guiding Principle appear to be the dominant paradigm for discussing CSR.⁶⁵

⁵⁸ Ibid., p. 101.

⁵⁹ E/CN.4/2005/69 of 20 April 2005, Resolution of the Commission on Human Rights and transnational corporations and other business enterprises, para. 1.

⁶⁰ A/HRC/8/5, 7 April 2008, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights, p. 1.

⁶¹ A/HRC/RES/8/7 of 18 June 2008, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

⁶² A/HRC/17/31, 21 March 2011, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework.

⁶³ A/HRC/RES/17/4 of 16 June 2011, Human rights and transnational corporations and other business enterprises, para. 1.

⁶⁴ See, e.g., P. Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights', 3 *Journal of Human Rights and the Environment* 2012, and the Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights, January 2011, supported by Amnesty International, CIDSE, International Network for Economic, Social and Cultural Rights, International Federation for Human Rights, Human Rights Watch, International Commission of Jurists, and Rights and Accountability in Development, at <www.business-humanrights.org>. Their criticism includes that the (then) draft guiding principles do not provide 'sufficient guidance to close the governance gaps identified by the SRSG as the root cause of the business and human rights predicament today'.

⁶⁵ See, e.g. the references in L.C. Backer, 'The United Nations' 'Protect- Respect-Remedy' Project: Operationalizing a Global Human Rights Based Framework for the Regulation of Transnational Corporations', Conference Paper, Symposium: Corporations and International Law, Santa Clara Law, 2010, through <law.scu.edu>, pp. 4-5. According to the final statement of the Oslo Conference on Corporate Social Responsibility, Norway, 13-14 November 2012 'the UN Guiding Principles on Business and Human Rights represent a watershed that opens the way to more coherent approaches to CSR', through <www.regjeringen.no/upload/UD/Vedlegg/csr/csrkonf_slutt121114.pdf>.

Following his mandate, the focus in both the Framework and the Guiding Principles is on business and human rights. Yet Ruggie acknowledges that human rights and the environment are frequently intertwined:

Nearly a third of [the investigated human rights cases] alleged environmental harms that had corresponding impacts on human rights. Environmental concerns were raised in relation to all sectors. In these cases, various forms of pollution, contamination, and degradation translated into alleged impacts on a number of rights, including on the right to health, the right to life, rights to adequate food and housing, minority rights to culture, and the right to benefit from scientific progress. A number of environmental issues also prompted allegations that a firm had either impeded access to clean water or polluted a clean water supply, an issue raised in 20 per cent of cases.⁶⁶

It is therefore arguable that environmental impacts at least fall under the scope of the Guiding Principles as long as: a) environmental harms are perceived from an ecocentric view, b) the extent or scope of the likely environmental harm is sufficiently serious to infringe on a human right, and c) physical distance, time sequence or causation questions do not provide a stumbling block for a human right infringement.⁶⁷

Of relevance for the supply chain are principles 13 and 19 of the Guiding Principles. Principle 13 reads:

The responsibility to respect human rights requires that business enterprises:
(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

This principle acknowledges that business enterprises may be involved with human rights impacts 'either through their own activities or as a result of their business relationships with other parties.'⁶⁸ The term 'business enterprise's activities' is understood to include both actions and omissions. The term 'business relationships' is understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.⁶⁹

Guiding Principle 19 elaborate, together with Guiding Principles 18, 20 and 21, the essential components of human rights due diligence, of which the parameters are defined in Guiding Principle 17. Guiding Principle 19 deals with integrating the findings from business enterprises' impact assessments across relevant internal functions and processes, and taking appropriate action. Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

⁶⁶ A/HRC/8/5/Add.2, 23 May 2008, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, para. 27.

⁶⁷ See, K.D. Jesse and E.V. Koppe, Business Enterprises and the Environment; Corporate Environmental Responsibility, *Dovens Schmidt Quarterly* 2014/4, p. 177-178 (to be published).

⁶⁸ See Commentary to Guiding Principle 13.

⁶⁹ See for both definitions, *ibid*.

(ii) The extent of its leverage in addressing the adverse impact.⁷⁰

A large part of the Commentary to Guiding Principle 19 is devoted to ‘appropriate actions’ and in particular to the situation that a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services due to its business relationship with another entity:

Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences. The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond. If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors. There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so. Where the relationship is “crucial” to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise’s business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

It thus follows from the Guiding Principles that supply chain induced human rights impacts are part of business enterprises’ human rights due diligence, also if human rights impacts . In demanding project promoters to apply the Guiding Principles, the EIB needs to ensure that with respect to all of its funded projects appropriate action is taken in order to prevent and mitigate adverse supply chain induced human rights impacts, also when biodiversity degradation and climate change are not at issue.

European Principles for the Environment

The EIB, together with four other European multilateral investment institutions, drafted the declaration ‘The European Principles for the Environment’ (EPE) in 2006.⁷¹ The aim of the EPE is to protect and improve the environment and to promote environmental sustainability.⁷² It concerns the environmental management and the integration of environmental considerations in the interest of sustainable development in the project financing of the signatories.⁷³ They ‘endorse and reinforce the European consensus on the values attached to the fundamental rights for both present and

⁷⁰ See Guiding Principle 19(b).

⁷¹ Council of Europe Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, Nordic Environmental Finance Corporation, the Nordic Investment Bank, Declaration ‘The European Principles for the Environment’, 30 may 2006, 2006-052-EN. Through <http://www.eib.org/attachments/strategies/european_principles_for_the_environment_en.pdf>.

⁷² Ibid.

⁷³ Ibid.

future generations *throughout the world* to live in a healthy environment' (emphasis added).⁷⁴ To that end, the EPE are based on the European guiding environmental principles, in particular the principles enshrined in article 191(2) TFEU,⁷⁵ and the practices and standards incorporated in the EU secondary legislation on the environment.⁷⁶

As shown above, neither these European guiding environmental principles nor the practices and standards incorporated in EU secondary legislation on the environment, generally, include the environmental supply chain. The EPE itself does not refer to it either.

To conclude this paragraph, neither the EIB Statement nor the EPE offer (the beginning of) a response to the question of this legal opinion. The EIB Handbook does. In fact, it provides the main angle to address the environmental supply chain, all the more so because it obliges project promoters to apply the UN Guiding Principles for Business and Human Rights.

For projects outside the EU, the EIB has adhered to the Equator-principles.⁷⁷ The Equator-principles are a financial industry benchmark for determining, assessing and managing social and environmental risk in project financing.⁷⁸ This adherence does however not alter the conclusion. Not only due to the limited adherence to projects outside the EU, but also because from principle 2 Equator-principles in conjunction with its Exhibit II follows that environmental supply chain impacts do not form part of the these principles.

4 Conclusion

Although the EIB Handbook, complemented with the UN Guiding Principles on Business and Human Rights, provides some guidance for incorporating conditions regarding the environmental supply chain in EIB project financing, it is far from clear how project promoters should address issues in their supply chain. The UNEP Finance Initiative,⁷⁹ to which the EIB has not adhered, offers in its Human Rights Guidance Tool for the Financial Sector a number of ways. These include:

Audits Suppliers can be audited on social and environmental grounds to ensure that they meet particular standards required by the purchasing company. Best-practice standard audits will be comprehensive and involve review by independent third parties.

Visits Ad hoc visits to supplier locations can be carried out by the purchasing company, or by a third party representative on its behalf, to check that standards are being upheld.

Contracts Contractual agreements between suppliers and the company can contain specific human rights protection or performance clauses. Human rights requirements may form part of the invitation to tender process.

Action Plans Companies can engage with their suppliers to support them in making changes over time in areas where required standards are not met.⁸⁰

For the EIB, nothing stands in the way to incorporate (one or more of) these or other ways in their funding contracts with project promoters. In fact, to put flesh on the bones of its commitments

⁷⁴ Ibid.

⁷⁵ The EPE predates the Treaty of Lisbon, it therefore refers with respect to the environmental principles to article 174(2) Treaty Establishing the European Community 2002 (outdated) .

⁷⁶ Ibid.

⁷⁷ In 2004, the EIB subscribed to these. Through <<http://www.equator-principles.com/index.php/in-the-media/in-the-media-by-year/73-2004/147-eib-subscribes-to-the-equator-principles-for-projects-outside-the-european-union>>.

⁷⁸ See <www.equator-principles.com>. Adopted 23 June 2003, changed 6 July 2006 and 4 June 2013.

⁷⁹ See <<http://www.unepfi.org>>. The UNEP Finance Institute is a global partnership between the UNEP and over 200 financial institutions, including banks, insurers and fund managers.

⁸⁰ See <<http://www.unepfi.org/humanrightstoolkit/supplychain.php>>.

regarding the supply chain, as included in the Handbook (and in the UN Guiding Principles of Business and Human Rights to which the Handbook refers), such ways offer the possibility for the EIB to seriously look into supply chain impacts caused outside the European territory but are nevertheless linked to projects within this territory. Enforcement of such contract condition(s), should primarily be the project promoter's responsibility. But the EIB is not left empty-handed:

A breach of contract and/or poor project performance in other respects requires corrective action by the promoter, in agreement with the Bank. A failure by the promoter to agree such action with the Bank and to take appropriate action may have financial and legal consequences for the promoter, e.g. a halt to disbursements, and/or recovery of the finance outstanding, if the promoter does not fulfill the requirements of the Bank during a reasonable period of time.⁸¹

Moreover:

[a]ny natural or legal person affected, or perceived to be affected, by a decision of the EIB may lodge a complaint to its Secretary General, either in writing or through the internet. The Complaints Office ensures the centralised handling and registration of complaints, a structured investigation, internal and external reporting and a pro-active approach. If the affected party is not satisfied with how the complaint is dealt with by the internal EIB process, s/he may lodge a complaint concerning maladministration against the Bank with the European Ombudsman (EO). Maladministration covers the failure to act in accordance with the requirements of the Bank, including applicable legislation and/or respect for human rights and the principles of good administration.⁸²

It appears from this quote that such a complaint may be lodged both against a EIB funding decision and in the course of the implementation of the funded project. Such complaints, if successful, could possibly catalyze a move towards serious attention for environmental supply chain impacts, and thus towards global sustainable development.

⁸¹ EIB Statement, p. 11

⁸² Ibid., p. 20-21.