**Second Submission to the European Investment Bank's Public Consultation on Anti-Corruption Policy**

TO: The European Investment Bank
CC: EIB Executive Directors

13th September 2007

**General remarks**

This submission complements the first one presented by our organisations during the first round of public consultation on the European Investment Bank's new policy on anti-fraud and anti-corruption matters. Our organisations welcomed the opportunity to attend a second meeting with the EIB and other relevant stakeholders to discuss in detail issues arising from the first round. However, we want to express our disappointment at the EIB's limited receptiveness to some of the most important issues at stake here, and its unwillingness to incorporate them into its new draft. This particularly applies to the issues of representation agreements, global loans and integrity commitments.

In particular, although the EIB recognises the complexity of anti-corruption issues and the need to bring in external consultants or relevant European institutions, we do not see how this will be reflected in the policy which the EIB aims to finalize before the end of the year. It seems to us that the **Bank favours a rapid conclusion to the consultation over a stringent and effective anti-corruption policy**, an approach we regard as unnecessarily rushed given the complexity of the outstanding issues.

At the same time it is apparent that **the EIB's general approach to fraud and corruption problems remains highly reactive**. To fight what former World Bank President James Wolfensohn called the "cancer" of corruption and achieve its stated 'zero tolerance for corruption' commitment, the **EIB must make anti-corruption work a key priority for the institution. The Bank's current attitude seems to us unacceptably lax and complacent**, relying on the fact that the EIB has detected only a limited number of illegal acts affecting its operations. It would be a serious mistake to under-estimate the magnitude of the problem just because EIB's capacity to detect corruption may be inadequate; we should not forget that (as admitted by the Inspector General) the mid-90s scandal affecting the Lesotho Highlands Water Project came about in large part because the EIB did not have adequate mechanisms in place to detect corruption.

We have long welcomed EIB's interest in working with the other signatories to the September 2006 Singapore anti-corruption agreement to harmonise corruption and fraud procedures and share information on companies and tenderers committing dubious acts. However, we remain concerned at EIB's rationale for signing up to Singapore: the Bank shows little signs of taking a genuinely pro-active approach to preventing corruption and **we hope that the Bank is not merely trying to minimise the reputational risk corruption poses, but is fully committed to improving the development impacts of its lending** (we note that in all extra-EU lending the

Bank is supposed to conform to EU development goals, and in ACP lending EIB operations fall under the development objectives of the Cotonou Agreement).

To reiterate a point we made in the first submission, we believe that EIB should take advantage of its unique blending of development and commercial objectives to become a frontrunner and develop its own pro-active approach to fight corruption that goes well beyond the Singapore commitments. We likewise urge the EIB to **adopt a pro-active policy which goes far beyond the minimum legal provisions binding EIB operations**, using the enormous leverage provided by its €50 billion annual portfolio to pre-empt corruption and implement innovative new procedures, including **pro-active ex-ante due diligence for all operations**. This may require new financial and human resources, including training for all EIB staff, to ensure operationalisation and mainstreaming of such policies.

We welcome the EIB's publication of its first Inspector General Fraud Investigations Annual Report for 2006 as a positive step towards transparency in EIB operations and accountability to stakeholders. At the same time, we find the report disappointing in its paucity of actual content and in the level of information available, especially with regard to cases where the Bank found actual fraud or corruption.

**Whistleblower protection**

We welcome EIB's commitment to develop a more advanced internal policy for protecting whistleblowers. We would be happy to contribute to the development of this policy and are keen to be consulted by those in charge of drafting the new policy before it is finalised. We would also like to put EIB's consultant in touch with our partners who have carried out specific work on the issue, in particular the well-respected Government Accountability Project (GAP) in Washington. We believe there are several key principles to whistleblower protection that should become cornerstones of the policy, as reflected in GAP's best practice memo. They include:

- *Whistleblower protection should extend to all Bank staff, including former and temporary employees, consultants and contractors.*
- *Employees must have the ability to report directly to multiple authorities, including the Bank's board. This action should be permitted and encouraged.*
- *The independence of the Bank's investigative unit must be ensured by having it report directly to the Bank board and subject to external evaluation.*
- *Criteria for protected disclosures and prohibited retaliation must be standardized based on existing and tested international norms.* The definitions for protected disclosures, banned retaliation, and permissible audiences have been standardized in legal instruments under the International Labor Organization, the Universal Declaration of Human Rights, the OAS Model Whistleblower Law and the U.S. Whistleblower Protection Act. The EIB should apply these definitions to its own operations.
- *Standards of proof of retaliation must be adopted and applied placing the burden on the Bank to prove that its representatives have not retaliated when whistleblowers report harassment and professional reprisal.* GAP recommends standards identical to those adopted by the U.N., O.A.S. and U.S. Whistleblower Protection Act, among others.
- *Due process rights must be accessible and enforceable. In the absence of a credible and binding internal adjudicatory alternative, access to an external adjudicative body separate from the Bank is necessary to pursue claims of retaliation for whistle blowing. Until such a forum is available, current administrative conflict resolution mechanisms must be reformed to operate on due process norms and must be given the power to issue "make whole" remedies, including special attention to the unique vulnerabilities of visa holders.*
- *Fundamental due process by an impartial and public tribunal is enshrined in international law and the law of most nations.* GAP advocates modernizing procedural rights for internal appeals, and adding the option for binding external arbitration. These rights include: being represented by professional counsel, a formalized discovery process for relevant evidence, open hearings, bringing witnesses forward, decisions in writing with detailed reasoning, and a balanced and incorruptible process for selection of

**Debarment**

We believe it is of utmost importance that the EIB cooperates with the European Commission in the **definition of adequate debarment procedures. We urge the EIB to include a precise debarment procedure in the final draft of the policy** and not to postpone this decision until the review of the new policy. Such a decision is needed in order to harmonise EIB operations with other IFIs under the terms of the Singapore agreement.

In that context, we regret that the EIB cannot even access the European Commission's internal database of companies found guilty of fraud or corruption. While the EIB should push to change this state of affairs, we also urge the Bank to set up its own internal database which would benefit from a constant and pro-active exchange of information with other European institutions and with other IFIs. We also urge EIB to seek further clarification where necessary of the relevant EU law and statutes and make that legal terrain apparent to interested stakeholders.

We believe that at the minimum, the procurement document should require **disclosure of previous sanctions of the individual bidders, including affiliated companies.** We understand the intention of the EIB to move on a case by case basis in its investigations and eventual sanction, but if it wants to get serious in its anti-corruption fight, the Bank must address the issue of parent companies' responsibility.

**Payment and contract transparency**

We welcome EIB's interest in joining the Extractive Industries Transparency Initiative (EITI) as a first step to increase payment transparency in multinational companies' operations in developing countries. However, we believe EITI is utterly insufficient unless at the same time borrowers and promoters disclose project agreements – such as Host Government Agreements, Production Sharing Agreements or Power Purchase Agreements –if they wish to justify their secrecy under 'commercial confidentiality' provisions. In particular, clauses often found in these agreements, such as stabilisation clauses, often limit potential developmental benefits of sponsored projects, as well as having serious human rights and environmental and social impacts. The EIB should undertake clear steps in the direction of more transparency of these documents under its new anti-fraud and anti-corruption policy.

We believe that at **a minimum, EIB must require that agents' fee be clearly disclosed**. We would also reiterate the importance of **disclosure of finance contracts between the EIB and the client**. Transparency of these contracts would serve the public interest as well as help to clarify the anti-corruption provisions envisaged in the contract agreement between the EIB and the promoter/borrower.

**Representation agreements**

We express our **deep frustration at the EIB's dismissal of the issue of representation agreements, which due to their secrecy are the principal vehicle through which corruption usually takes place**. EIB must draw lessons from the Lesotho case and realise that these agreements are key vectors for the payment of bribes. Making them transparent is the only mechanism by which the EIB during its due diligence can prevent this kind of corruption from taking place. The issue of agents is not tackled in the policy. One of the responses to the first submission on page 31 included a statement that 'the Covenant of Integrity also applies to agents'; however, even this is not clearly mentioned in the policy itself. We strongly urge that the Bank take seriously the issue of agents, and that the final draft of the policy requires transparency of representation agreements and of the fees paid to the agents. Like tendering companies, agents should include proof of non-conviction for fraud and corruption.

**Integrity commitment and covenants of integrity**

**We would like to underline our disappointment with what we perceive as the very limited and vague legal status of the covenant of integrity**, despite the integrity commitment, which is part of the finance contract. For now there is still very little clarity on integrity commitments – their format and their legal leverage.

We understand that tenders are regulated by national law, but disagree that the only action that the EIB could undertake is eventually to recall the loan. By leaving the ex-ante screening only to project directors and the solution of potential problems only to the promoters, the EIB refuses to consider the possibility of including legal mechanisms as a deterrent to illegal acts for promoters and borrowers. In this sense, **we regard the EIB as abjuring its responsibility to take all possible pro-active steps to prevent corruption in the projects it backs**.

Given that contracts are usually filed in countries other than the host country and are executed under specific law chosen ad hoc in different countries, we believe that the EIB could introduce guidelines and criteria for borrowers and promoters to refer to appropriate legal systems before they approach the Bank for funding. It is also crucial that the Covenant of Integrity be signed by all members of consortia or joint ventures benefiting from EIB support, potentially including the parent companies of the corporations involved.

We would also like to reiterate the need for establishing **monitoring mechanisms** to assess actual adherence to those commitments. We would support, as a possibility mentioned in the consultations on September 4th, making tendering procedures require bidders to include in their documentation information on all cases where they were charged with corruption or any corrupt, fraudulent, coercive or collusive practices.

**Sanctions available to the EIB**

We would like to return more broadly to the issue of the potential sanctions available to the EIB, apart from debarment. We believe that suspension of contracts or decision not to award a contract in case of allegations of corruption need to be clearly spelled out and clarified. We see the potential problem of paralysis of projects based on 'mischievous allegations', as mentioned in the Bank's response; however, a case-by-case process does not inspire confidence that the Bank is committed to a systemic and coherent deterrent to corrupt practices.

We reiterate that where corruption allegations are assessed as strong enough for the bank and/or OLAF to open a case, the contract should be suspended or the decision on awarding the contract should be postponed until the case is clarified. This option could be covenanted in finance contracts in favour of the lender to protect lender liability. Again, suspension of contract and/or recovery of misapplied funds should be possible not only on the basis of a formal final court decision but also in case of clear administrative decisions, as noted by Transparency International and OLAF. That requires strong cooperation between the EIB and the Commission, involving EIB access to the Commission's database of excluded candidates and bidders. Finally, we would appreciate if the policy elaborates more on what are the 'appropriate legal steps to recover misapplied funds' as mentioned in point 13 of the policy.

**Points from the First Submission Not Adequately Addressed by EIB**

Issues we raised earlier without response from EIB which we believe should still be incorporated into the policy include:

- Abuse of *'tax havens'*: we would like to see more clearly how the EIB is adopting a pro-active policy that vigorously encourages companies to avoid this practice. In this regard, we note how the World Bank recently agreed to study in detail the development implications of financial flows through tax havens.

- Clarification on how the Bank's findings on corruption instigate *prosecution* – we find the EIB response to this comment highly disappointing. The policy does not indicate how such prosecutions would be instigated.

- Application of anti-fraud policy to *global loans* – we are not satisfied with the Bank's response that the responsibility for control of global loans is left to the borrower/financial intermediary. We believe the EIB needs to take responsibility for ensuring that the financial intermediary applies strict anti-fraud policy and equally shows zero tolerance for corruption. The current policy does not respond to that issue.

- We believe EIB's references to various conventions including UNCAC and OECD, though very plausible, are not enough to ensure the conventions are truly operationalised and implemented. The weak Bank response to the comment from Mr. Dunnett gives considerable reason to wonder how genuinely these conventions are considered and implemented by the EIB. We would like to see the policy clearly explain how the conventions will be operationalised and promoted among the Bank's clients.

We look forward to continued fruitful dialogue based on the issues raised in these discussions.

With best wishes,

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