

How strong are the human rights safeguards of the EBRD's policies?

Lessons learned from the Kolubara 'environmental improvement' project and recommendations for the current ESP revision.

*'Without explicit human rights safeguards, policies intended to advance environmental and development goals can have serious negative impacts on those rights.'*¹

Navanethem Pillay, the UN High Commissioner for Human Rights
before the Conference on Sustainable Development Rio+20

In its Environmental and Social Policy (ESP) the European Bank for Reconstruction and Development (EBRD) declares its commitment to *'ensure through its environmental and social appraisal and monitoring processes that the projects it finances: [...] respect the rights of affected workers and communities.'* This commitment is elaborated in the Performance Requirements (PRs) that projects are expected to meet, in particular:

- PR 1: Environmental and Social Appraisal and Management and PR10: Information Disclosure and Stakeholder Engagement (usually applied in conjunction)
- PR 2: Labour and Working Conditions
- PR 4: Community Health, Safety and Security
- PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement
- PR 7: Indigenous Peoples
- PR 8: Cultural Heritage

Experience with the implementation of the ESP in the case of several controversial projects suggests that the EBRD's environmental and social safeguards are not robust enough and need strengthened. The policy places most responsibilities on the client, and EBRD assessment and monitoring are excessively reliant on input from the client, even in cases when feedback from NGOs and communities² consistently contradicts the claims of the project sponsor. Moreover, in practice little is done to overcome the gap between the weak law enforcement at national level and the low capacity of regulators, and the high standards that the EBRD aspires to promote. In short, EBRD's human rights safeguards can fail to empower affected communities and to help overcome the policy implementation deficit in its countries of operation, in order to ensure respect for the rights of those affected by its investments.

¹ Pillay, N. 30 March 2012, *Open Letter to all Permanent Missions in New York and Geneva*, Office of the High Commissioner for Human Rights, Geneva, Switzerland.

² ... and occasionally from governmental agencies - in the case of the Oyu Tolgoi project in Mongolia, the information from the independent consultant contracted by the OT company contradicted the May 2011 fact finding mission report of the USAID.

Case study: Kolubara coal mine 'Environmental Improvement' project, Serbia

The decision on the Kolubara 'environmental improvement' project was made in July 2011, at the time when the forced removal of the local graveyard of the Vreoci community was initiated.³ The village was 'under siege'⁴ with thousands of police forces securing the smoothness of the operation in front of the eyes of the helpless people. The removal of the remains of the diseased family members of the villagers was done in the most barbaric fashion, without the necessary church ceremony, against the community's religious beliefs and customs, and in breach of Serbian law. The graveyard was guarded by police forces for months until the exhumations took place, while Vreoci people were not allowed to enter.

In spite of the protest in front of the EBRD office in Belgrade and the appeals to the EBRD Board of Directors from the local community⁵ and from NGOs, and in spite of on-going corruption investigations of the company⁶, the loan for the Kolubara project was approved. Indirectly a message was conveyed by the EBRD's decision-makers, that the corporate social responsibility practices of the EPS company satisfy the high standards that the bank claims to promote.

The EBRD responded with arguments about the project's narrow area of influence, failing to demonstrate the level of concern needed to signal to the company that it must tidy up its act with regards to human rights. It may be seen as a norm for a business institution to take the side of its business partner, however, as a public institution the EBRD should play fairer role in protecting the public interests, individual and communal rights.

A year after the approval of the project, two community complaints have been submitted to the EBRD's Project Complaint Mechanism, claiming a number of violations of human rights, predominantly related to two problems: 1) the unbearable living conditions in the area around the mine, due to environmental pollution from coal extraction, processing and transportation and 2) unresolved problems with land expropriation and resettlement.

Claims in the two PCM complaints sharply contradict information in the Stakeholder Engagement Plan⁷ and the Environmental and Social Action Plan, prepared by the ESP company, and suggest that their implementation a year after project approval has not progressed sufficiently to address the grievances of the project affected people.

Two years after project approval, information on the implementation of the above plans is impossible to find on either the EBRD's or the client's web sites. Monitoring by CEKOR⁸

³ The Vreoci cemetery lies on an estimated 50 million tonnes of coal and its exhumation was a precondition for digging an additional 600 million tonnes of lignite, CEE Bankwatch Network, 2013, *Slideshow: Resettlement issues at the Kolubara lignite mine in Serbia*, on-line at: <http://bankwatch.org/kolubara/slideshow>

⁴ Provost, C. 2013, *op.cit.*

⁵ Council of the local community Vreoci, 05.07.2012, Letter '*Request to postpone the decision on postponement on the loan for the Environmental Improvement Project at the Kolubara Mine Basin in Serbia*' to the Board of Executive Directors of the European Bank for Reconstruction and Development, annex to the Vreoci PCM complaint.

⁶ CEE Bankwatch Network, Press Release *EBRD should not condone illegal resettlements and corruption by investing in Kolubara*, on-line at: <http://bankwatch.org/news-media/for-journalists/press-releases/ebrd-should-not-condone-illegal-resettlements-and-corrupti>

⁷ The SEP claims that "*EPS and RB Kolubara do not anticipate any significant issues concerning communication with and equitable treatment of stakeholders that could be adversely influenced by the proposed improvements to the coal mining equipment at the Kolubara Mining Basin.*"

⁸ Bankwatch member in Serbia.

of the resettlement and expropriation processes confirms that these are significantly delayed, with people waiting for years for a fair compensation that would allow them to resettle, resulting in continued exposure to extreme pollution⁹, degraded public services infrastructure and general insecurity about the future. Constructing new houses is prohibited in the area, while repairing old ones or investing on one's land is regarded by the company – and the court - as an attempt to raise the price of property due for expropriation. As a result some people are forced to migrate, leaving their cracking homes without any compensation.¹⁰

Following the brutal removal of the Vreoci graveyard, owners of more than 120 graves and tombstones initiated appeals to the Administrative Court of Serbia on the illegal transfer of their relatives' remains, yet the Court has not ruled on these. Prior to that private land and home owners have submitted numerous claims for compensation for their property, but have found no redress for their grievances. A 2011 Resolution of the Serbian Ombudsman¹¹ concluded that the allegations by communities affected by the Kolubara mine are justified and confirmed violations by the company of Serbian law and the Constitution.

Judging by the case law of the European Court for Human Rights, in Europe violations of human rights are more pronounced in the periphery of the EU and in its neighbourhood, where the enforcement of environmental and human rights law is weaker and the national remedies are too often failing.¹² The EBRD must be well aware of this problem, especially in Serbia, where the bank has had other bitter experiences with resettlement and forced eviction, as in the case of the Gazela bridge reconstruction project. The fact that the EPS is a state-owned company, that avails of the strong political support from state institutions, including the courts, should have been no secret to the due diligence, especially in the light of the fact that the EBRD has worked with the EPS for over a decade.

What lessons have we learned from the Kolubara project?

The operations of EPS at the Kolubara coal mine have caused considerable environmental and private property harm to the nearby communities and have violated a wide range of human rights, namely:

- Traditional rights, such as property rights;
- Procedural rights, such as the right to information, public participation in decision-making and access to justice;
- Environmental rights, such as the right to a clean environment and the right to health¹³;
- Cultural rights, such as the right freely to participate in the cultural life of the community¹⁴, the right of access to and enjoyment of cultural heritage and religious practices.

⁹ Some people live as far as 40 meters away from the open pits of the coal mine, literally overlooking the vast coal mine, others live as far as 200 meters away, and pollution is further spread by the 300 trucks and 20 trains that transport coal on a daily basis.

¹⁰ See CEE Bankwatch Network, 13 May 2013, Blog post air treatment is a long time coming at Serbia's Kolubara lignite min, on-line at: <http://bankwatch.org/news-media/blog/fair-treatment-long-time-coming-serbias-kolubara-lignite-mine>

¹¹ Serbian Ombudsman, 21 April 2011, Resolution # 8260/21.04.2011.

¹² Emmet, F. 2011, *The Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe - Conclusions Drawn and Lessons Learned*, Eleven International Publishing, The Hague

¹³ As part of the right to private and family life, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case law of the European Court for Human Rights.

¹⁴ According to the Universal Declaration of Human Rights.

Based on the Kolubara case, Bankwatch has the following recommendations for the Environmental and Social Policy of the EBRD with regards to human rights:

- 1) Country strategies (CSs) should include an assessment of the capacity of the state institutions to protect human rights and to provide redress for grievances of citizens from harm caused by business, including by state-owned giants, like the ESP in Serbia. Additionally, CSs should set concrete strategic objectives for promotion of better respect and protection of human rights, that investments in the given country will aim to achieve.
- 2) Sectoral strategies and policies should similarly assess the capacity of the industry (the energy and mining industry in the case of Kolubara) and of the countries of operation to Protect, Respect and Remedy¹⁵ and should set strategic sectoral objectives with regards to human rights. Currently Section F of the ESP states that country and sectoral strategies should simply '*summarise*' and '*describe the country's key environmental, social and human rights issues.*'
- 3) In order to prevent reputational and operational risk, and to improve the overall social corporate responsibility of its clients, due diligence should be improved to better pick up human rights problems as social factor investment risks. For example, due diligence should acknowledge disputes and pending court cases against the company, as part of setting a less biased baseline against which Stakeholder Engagement Plans (SEPs) and Environmental and Social Action Plans (ESAP) should be designed.
- 4) As part of Social Impact Assessment, Human Rights Impact Assessment should be carried out for the whole operation, without a limitation being imposed by a narrowly defined project area of influence. This approach should especially apply for old clients of the bank, who repeatedly receive investments for various sides of their business.
- 5) SEPs should define clearly the communities and households, whose rights will be threatened or negatively impacted by the project. They should be distinguished from the range of institutional stakeholders, such a police forces or fire departments,¹⁶ and should be consulted separately prior to approval of the SEP by the EBRD and signing of the project.
- 6) Progress with implementation of the SEP or ESAP – for example by setting up a grievance mechanism for project-affected people – should be a contractual condition for disbursement of investments.
- 7) The EBRD should provide up-to-date information on the implementation of the project, on mitigation of anticipated human rights and other adverse impacts, including progress with SEO and ESAP implementation. This should be done through PSD up-dates, as well as monitoring data disclosure on the client's web site, and disclosure by the bank upon request.

¹⁵ Protect, Respect And Remedy: A United Nations Policy Framework For Business And Human Rights

¹⁶ Worth to note that the Lazarevac police department is identified in the Kolubara project SEP as a stakeholder, due to '*increased engagement of police forces in the case of local population or focus groups protests.*'