CEE bankwatch network

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CEE Bankwatch Network comments on EBRD Environmental and Social Policy,

Part 2: Safeguarding Human Rights. Why the EBRD's Environmental and Social Policy needs Human Rights Due Diligence?

The EBRD's Environmental and Social Policy of 2014 (the Policy, ESP) recognises the responsibility of the bank's clients to respect human rights and declares that the EBRD will be guided by the International Bill of Human Rights, the UN Declaration of Human Rights and the eight core conventions of the International Labour Organization (ILO)[1]. In addition, the EBRD committed in ESP2014 that it "*will not knowingly finance projects which either involve or result in forced evictions"* [2] and requires from its clients to engage with relevant stakeholders "*bearing in mind the spirit and principles"* of the Aarhus Convention[3], which guarantees the rights to information, participation in decision-making and access to justice on environmental matters.

While the ESP's Performance Requirements (PRs) for clients elaborate further on the responsibilities of project promoters to safeguard a limited number of human rights, the EBRD's role and specific commitments to human rights protection remain declaratory and vague. The EBRD's Environmental and Social Procedures of 2015 clarify the bank's process for E&S appraisal and monitoring of projects, but lack attention to human rights, although the approach to gender impacts could be applied for identifying human rights risks and impacts.

The policy's PR2 and PR5 provide for strong safeguards of labour, land and housing rights, however, their implementation is weakened by flawed approach to categorisation of projects and weak PR1 and PR10 on assessment, information disclosure and stakeholder engagement. The Policy needs to be strengthened in its recognition and protection of rights to informed participation of affected people and civil society in decision-making, and would benefit greatly from introducing the concept of Human Rights Due Diligence (HRDD). The Policy also needs considerable improvements to properly safeguards the rights of women, minorities, vulnerable and marginalised groups.

HRDD, as distinct part of social due diligence, can ensure financial and social sustainability of the EBRD's investments by identifying and managing potential financial, legal and reputational risks for projects.

Rationale for proper human rights due diligence (HRDD)

In line with Pillar I of the UN Guiding Principles on Business and Human Rights, shareholders of the EBRD have a duty to ensure that the institution acts consistently with their human rights obligations.[4] A relevant question remains about the scope of human rights considerations the EBRD should take into account?

The UN Secretary General's Special Representative on Business and Human rights, prof. J.Ruggie, analysed hundreds of public allegations against companies regarding human rights abuses while preparing the United Nations Guiding Principles (UNGP). His team discovered that there is not a single human right that companies have not been accused of violating

1 See ESP2014, B. The EBRD commitments, para 9.

2 See ESP2014, C. Integrating E&S considerations into the project cycle, para 21.

3 See ESP2014, C. Integrating E&S considerations into the project cycle, para 34.

4 UN Guiding Principles on Business and Human Rights, Guiding Principles 1, 3, 8, 9.

somewhere in the world. Prof. Ruggie concluded that there are thirty internationally recognized human rights and that they all are relevant to business on a prima facie basis[5]. Such comprehensive approach should also be applied by the EBRD.

Proper HRDD carried out by the EBRD is important due to the fact that major studies and rankings show a broad-based deterioration in the practice of democracy and a shrinking space for public participation in decision-making. How does it relate to the EBRD portfolio? Out of thirty-eight countries of operation of the EBRD only sixteen are considered "free", according to the Freedom House last report *Freedom in the World*[6] (see also the Table below). The report's methodology is derived in large measure from the Universal Declaration of Human Rights, the report assesses the real-world rights and freedoms enjoyed by individuals, rather than governments or government performance per se.

Then, according to Economist Intelligence Unit (EIU) Democracy Index[7], for thirty-six assessed countries from the EBRD portfolio, twelve are hybrid regimes, nine are authoritarian and none is a full democracy. The Democracy Index is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture.

Table 1.

	Country	**Freedom House INDEX 2018**	**Economist Intelligence Unit Democracy Index 2017**
1	Albania	PARTLY FREE	HYBRID REGIME
2	Bosnia and Hercegovina	PARTLY FREE	HYBRID REGIME
3	Bulgaria	FREE	FLAWED DEMOCRACY
4	Cyprus	FREE	FLAWED DEMOCRACY
5	FYR Macedonia	PARTLY FREE	HYBRID REGIME
6	Greece	FREE	FLAWED DEMOCRACY
7	Kosovo	PARTLY FREE	-
8	Montenegro	PARTLY FREE	HYBRID REGIME
9	Romania	FREE	FLAWED DEMOCRACY
10	Serbia	FREE	FLAWED DEMOCRACY
11	Croatia	FREE	FLAWED DEMOCRACY
12	Estonia	FREE	FLAWED DEMOCRACY
13	Hungary	FREE	FLAWED DEMOCRACY
14	Latvia	FREE	FLAWED DEMOCRACY
15	Lithuania	FREE	FLAWED DEMOCRACY
16	Poland	FREE	FLAWED DEMOCRACY
17	Slovak Republic	FREE	FLAWED DEMOCRACY
18	Slovenia	FREE	FLAWED DEMOCRACY
19	Armenia	PARTLY FREE	HYBRID REGIME
20	Azerbaijan	NOT FREE	AUTHORITARIAN
21	Belarus	NOT FREE	AUTHORITARIAN
22	Georgia	PARTLY FREE	HYBRID REGIME
23	Moldova	PARTLY FREE	HYBRID REGIME
24	Ukraine	PARTLY FREE	HYBRID REGIME

5 See 2008 report and related materials, Ruggie J., *Protect, Respect, Remedy*: https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/reports-to-un-human-rights-council/2008

6 Report *Freedom in the World 2018* available on: https://freedomhouse.org/report/freedom-world-2018-table-country-scores

7 Report *Democracy Index 2017* available on: *http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2017.pdf&mode=wp&campaignid=DemocracyIndex2017*

25	Kazakhstan	NOT FREE	AUTHORITARIAN
26	Kyrgyz Republic	PARTLY FREE	HYBRID REGIME
27	Mongolia	FREE	FLAWED DEMOCRACY
28	Tajikistan	NOT FREE	AUTHORITARIAN
29	Turkmenistan	NOT FREE	AUTHORITARIAN
30	Uzbekistan	NOT FREE	AUTHORITARIAN
31	Egypt	NOT FREE	AUTHORITARIAN
32	Jordan	PARTLY FREE	AUTHORITARIAN
33	Lebanon	PARTLY FREE	HYBRID REGIME
34	Morocco	PARTLY FREE	HYBRID REGIME
35	Tunisia	FREE	FLAWED DEMOCRACY
36	West Bank and Gaza	NOT FREE	-
37	Russia	NOT FREE	AUTHORITARIAN
38	Turkey	NOT FREE	HYBRID REGIME
		Only 16 out of 38 are free.	9 out 36 are authoritarian; 12 out of 36 are hybrid regimes; None are full democracies.

According to Article 1 of the Agreement establishing the EBRD, the bank is mandated to support transition in countries committed to and applying the principles of multiparty democracy, pluralism and market economics. It is worrying to see that more than half of the bank's countries of operation have serious problems with those principles, according to worldwide recognized analysis of EIU or Freedom House. Even if the legal guarantees for the rights do exist in many countries, they are often not sufficient for on-the-ground fulfillment of those rights. Implementation matters.

That is why detailed and proper HRDD is needed, starting from the level of country and sectoral strategies, to the proper assessment on every stage of project appraisal and monitoring of project implementation.

Need for improved HRDD in the EBRD's ESP

According to briefing of Coalition for Human Rights in Development entitled "*Human Rights Due Diligence for Development Finance Institutions*", human rights due diligence is an ongoing process necessary to ensure that either the bank or its clients respect, protect, and work toward fulfillment of human rights. This process involves:

- **identifying** human rights risks and impacts directly or indirectly connected with the bank's activities;
- **preventing** human rights abuses;
- **mitigating** adverse human rights impacts, and
- **maximizing** positive human rights impacts where possible;
- **accounting** for how human rights are impacted and impacts are addressed, and
- **remedying** any adverse impacts.

There are several layers to human rights due diligence:
1) bank's own due diligence to ensure that it respects, protects and fulfills human rights within its own projects,
2) bank's procedures ensuring that its public and private sector clients undertake human rights due diligence in accordance to their respective human rights obligations or responsibilities within the context of the supported projects, and
3) where those clients are acting as financial intermediaries, bank's procedures to assess and address the human rights impacts of the end use of its investments.

The EBRD's Environmental and Social Policy of 2014 defines "social" as referring to "*those issues which pertain to project-affected people and their communities and workers and*

related to socioeconomic status, vulnerability, gender identity, human rights, sexual orientation, cultural heritage, labour and working conditions, health and safety and participation in decision making".

The policy already includes some strong human rights safeguards, which it should preserve. For example, several PRs include strong references to rights and international human rights standards, namely:

PR 2 on Labour and Working Conditions sets as an objective "*to respect and protect fundamental principles and rights of workers*" as defined by ILO conventions and refers extensively to labour rights, namely: the respect for workers' rights, including freedom of association and right to collective bargaining; promotion of decent work agenda, including fair income, security in the workplace and social protection for families, [...] the freedom to express concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men; the right to express grievances in an established independent process; the right of workers to privacy and data protection; worker's freedom of movement; rights regarding proper working conditions; protection against gender-based discrimination and promotion of access of women to jobs and qualifications; requirements regarding security personnel in line with the Voluntary Principles on Security and Human Rights.

PR 5 on Land Acquisition, Involuntary Resettlement and Economic Displacement supports the universal respect for, and observance of, human rights and freedoms and specifically the right to adequate housing and the continuous improvement of living conditions, in line with the Universal Declaration for Human Rights and the International Covenant on Economic Social and Cultural Rights. It sets high standards for protecting both legal and customary land and land use right, as well as the right to adequate housing of people with no legally recognisible rights or claims to the land; it sets ambitious objectives to restore or improve the livelihoods and standards of living of displaced persons to pre-displacement levels; and to improve living conditions among physically displaced persons through the provision of adequate housing. Importantly, this PR affords special protection to women, for example in cases when national law and tenure systems do not recognise the rights of women to hold or exchange property, as well as opportunities for women with regards to access to credit, job opportunities and skills training (as resettlement assistance[8]).

PR7 on Indigenous Peoples (IPs) sets the objectives to ensure respect for the human rights of IPs; including the right to informed participation of IPs and recognition of the principle of free, prior and informed consent (FPIC), outlined in the UN Declaration on the Rights of IPs. In addition, PR7 recognises the different roles, needs, vulnerabilities and discrimination risks for women, children and the elderly in indigenous cultures, and thus the need to address gender issues and mitigate potential disproportionate gender impacts of a project[9].

However, <u>the problem is the limited application of PR7 provisions</u>, as the EBRD has failed to recognise or treat project affected people as IPs, in spite of their self-determination and request for FPIC, for example in the recently approved Nenskra hydropower project in the Svaneti region in Georgia.

Similarly, in spite of the strong human rights provisions and the number of related Guidance Notes[10], <u>the implementation of PR2 and PR5 is week</u>, as evidenced by several complaints related to labour and resettlement disputes at the EBRD's Project Complaints Mechanism

8 See ESP 2014 PR5 para 19.

9 See ESP2014 PR7 paras 6 & 8.

10 See EBRD Guides and resources here on resettlement and labour: http://www.ebrd.com/who-we-are/our-values/environmental-and-social-policy/implementation.html

(PCM)[11]. The results from the PCM's compliance reviews and problem-solving initiatives can inform improvements to the policy language and implementation of the PRs, as often the problems result from inadequate disclosure of information and meaningful participation in decision-making.

In spite of the attention to women's rights in PR2, PR5 and PR7, the Policy provides very weak gender safeguards, as its overal focus on gender is insufficient. According to experience to date with gender impact assessments for projects, gender mitigation measures and the incorporation of gender in ESAPs and SEPs within the Bank`s projects are showing the necessity to enforce gender-sensitive due diligence within the ESP. Efforts to Protect women's rights in practice lag far behind efforts to Promote gender opportunities in projects. Thus, the EBRD should follow the EIB`s approaches to incorporate better the "Protect" pillar in its Policy (as it is lacking in the EBRD's Strategy on Gender Equality and Women's Economic Empowerment), through increased reference to women's rights and the introduction of specific tools and guidance as part of the bank's and clients' HRDD.

Major gaps for participatory, transparent and accountable HRDD

Unlike the well formulated labour, land and housing rights, many of the human rights from the UN Declaration find no reference in the ESP2014, for example: the rights to justice and fair trail, freedom from torture and arbitrary detention (Rule of Law); the right to petition, freedoms of thought, speech, press, assembly, movement; as well as the fundamental rights to life, safety and liberty. The bank's E&S Procedures of 2015 fully disregard human rights, while the guidance for clients to support proper HRDD is limited to labour and resettlement standards.

Eventhough the Policy, including **PR10 on Information Disclosure and Stakeholder Engagement**, commits the EBRD to the implementation in its projects of the Aarhus Convention and thus guarantees participation rights on environmental matters, PR10 fails to affirm the right of affected people and interested stakeholders to informed participation on non-environmental issues. The strength of PR1 and PR10 depends greatly on the categorisation of projects, which could benefit from enhanced HRDD.

Categorisation of projects and the related information disclosure and consultation requirements for projects are a major problem when it comes to protecting and promoting the participation rights of affected communities and stakeholders. Although Appendix 2 of the ESP2014 instructs that Category A should be assigned to projects "*which may result in significant adverse social impacts to local communities or other project affected parties*" this cannot be done without proper HRDD at the concept review stage of the project development.

Recommendations:

1. Section A of the Policy should make an explicit reference to the EBRD's mandate to promote human rights alongside multiparty democracy, rule of law, and environmental and social sustainability, in line with the constitutional and international legal obligations of its shareholders.

2. The ESP must list all thirty rights defined in the UN Declaration of Human Rights and should include reference to all international and regional core human rights conventions, including the European Convention on Human Rights and the European Charter of Fundamental Rights of the European Union, in its definition of human rights.

11 See the PCM's Register here: http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html

3. In Section B of the Policy paragraph 9 should be expanded to elaborate on the EBRD's own commitments to HRDD and on the related requirements to its clients: "*The EBRD will advance a human rights based approach to development and will carry out human rights due diligence that includes the full scope of relevant human rights risks and impacts, including contextual risks and activities of its clients and other actors, such as authorities, suppliers and third parties. The EBRD recognises the responsibility of clients and their business activities to respect human rights and that this is an integral aspect of environmental and social sustainability. This responsibility involves respecting human rights, avoiding infringement on the human rights of others, and addressing adverse human rights impacts that their business activities may cause, or to which they may contribute. The EBRD requires that its clients, including financial intermediaries, should conduct human rights impacts assessment in line with the UN Guiding Principles on Business and Human Rights.*"

4. In Section B, paragraph 17 on country and sectoral strategies should be expanded as follows: "*The EBRD's country strategies, as well as sector strategies and policies, will contain information on the potential environmental and social challenges and opportunities associated with the EBRD's envisaged activities. These strategies will set concrete strategic objectives for promotion of better respect and protection of human rights that investments in the given country will aim to achieve.*";

5. In Section C of the Policy add to paragraph 23 on Categorisation: "*The EBRD categorises each project to determine the nature and level of environmental, social and human rights investigations, information disclosure and stakeholder engagement required. This will be commensurate with the nature, location, sensitivity and scale of the project, and the significance of its potential adverse future environmental, social and human rights impacts. Past and present environmental, social and human rights issues and risks associated with project-related existing facilities will be subject to environmental and social appraisal regardless of the categorisation.*"

6. In Section C of the Policy paragraph 24 should change: "*A project is categorised A when it could result in potentially significant adverse future environmental, social and/or human rights impacts which, ~~at the time of categorisation, cannot readily be identified or assessed, and which, therefore,~~ require a formalised and participatory environmental and social as well as human rights impact assessment process. A list of indicative Category A projects is presented in Appendix 2 to this Policy*.";

7. In Section C expand paragraph 32: "[...] The Bank will therefore (i) assess the investment based on the risks and impacts inherent to the particular sector and the context of the business activity, and (ii) assess the client's capacity to implement the project in accordance with the PRs." into: "The Bank will therefore (i) assess the investment based on the risks and impacts inherent to the particular sector and the context of the business activity, with view of the the severity of adverse human impacts determined by scope (how many people affected), scale (how grave the harm is), remediability (how easy or difficult to remediate), and vulnerability (how exposed or resistant are different groups to the impact) and (ii) assess the client's capacity to implement the project in accordance with the PRs.";

8. In Section C paragraph 42 on Legal documentation and paragraph 43 on Monitoring should be expanded to include commitments for inclusion of human rights clauses in loan contracts and human rights reporting requirements for all clients, in line with the Principle 17, 18 and 20 of the UNGP describing the proper human rights due diligence for business[12];

9. In Section C paragraph 43 on Monitoring should be expanded: "*[...] The EBRD will also periodically verify the monitoring information prepared by clients through site*

12 See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

visits to projects by the Bank's environmental and social specialists and/or independent experts, as well as against input from communities and affected right-holders. Monitoring reports or audits should be public and disclosed to project affected communities in a manner and timeframe that will allow them to impact decisions relating to the project.";

10. In PR 1 paragraph 1 should be expanded: "*This Performance Requirement (PR) establishes the importance of integrated assessment to identify the environmental and social impacts, as well as human rights risks related to the country and sector context, and the client's management of environmental and social performance throughout the life of the project. [...]*";

11. In PR 10 in paragraph 3 an additional objective should be added: „*identify human rights risks and impacts directly or indirectly connected with the bank' activities, prevent human rights abuses, mitigate and remedy adverse human rights impacts, and maximize positive human rights impacts where possible.*";

12. In PR 10 paragraph 5 to change into: "*Clients will conduct stakeholder engagement on the basis of providing local communities that are directly affected by the project, right-holders and other relevant stakeholders with access to timely, relevant, understandable and accessible information, in a culturally appropriate manner, and free of manipulation, interference, coercion and intimidation. This includes information on relevant rights under national and international law and bank' standards, the content of and process for risk analysis and mitigation, the content of the bank' due diligence requirements, the delineation of responsibilities between bank and clients, contractual requirements, monitoring and enforcement processes, and availability of grievance and accountability mechanisms. In situations where people are unable to speak freely, clients will take additional measures to ensure meaningful consultation, including by engaging independent third parties when appropriate.*"

13. In PR 10 paragraph 7 to be expanded: "*[...] The requirements of national law with respect to public information and consultation, including those laws implementing host country obligations under international law, as well as UN Guiding Principles on Business and Human Rights, must always be met.*"

14. In PR 10 paragraph 16 should be changed as follows: "*Disclosure of relevant project information helps stakeholders understand the risks, impacts and opportunities of the project. ~~If communities may be affected by adverse environmental or social impacts from the project,~~ [T]he client will provide the communities with access to the following information (the Information): [...]*";

15. In PR 10 paragraph 20 will be changed into: "*The client will inform affected communities and stakeholders in a timely manner of the final decision on the project, associated environmental and social mitigation measures and any benefits of the project for the local communities, along with reasons and considerations on which the decision is based, and the grievance or complaint mechanism or process available. In a situation where people are unable to speak freely additional measures to ensure meaningful consultations will be undertaken.*";

16. In PR 10 paragraph 28 should include an addition: "[...] Client will ensure remedy for any human rights abuses they have caused or contributed to or are linked to. Remedy should prioritise restitution wherever possible, rather than mere compensation.";

17. In PR10 an additional paragraph 29 on clients' grievance mechaniasms should be included: "*Grievance mechanism should meet the United Nations Guiding Principles on Business and Human Rights criteria: legitimacy, acceptability, accessibility,*

predictability, equitable, transparent, rights-compatible, and a source of continuous learning."