

Amnesty International Comments on EBRD Mining Strategy July 2012

Amnesty International welcomes the opportunity to comment on this strategy. While the mining industry contributes to a range of positive impacts, including the creation of jobs, mining activity also has a long history of negative impacts on human rights, as the strategy paper acknowledges.

Amnesty International has worked on the extractive sector for more than a decade, undertaking research on numerous cases where oil, gas and mining operations have caused or contributed to human rights abuses. Through our research and engagement with both companies and affected communities we have developed specific recommendations for states, companies and international financial institutions engaged in extractive operations. These evidence-based recommendations inform the comments provided below and represent the main concerns Amnesty International has on the EBRD mining strategy

1. Overall Comments

The strategy document has a far greater focus on clearing the way for mining activity to occur than on protection of rights and the environment. Amnesty International is concerned that, taken as a whole, the strategy document suggests that EBRD is glossing over very real challenges to emphasise the importance of establishing a structure to finance mining. In particular:

- The EBRD strategy does not adequately address the risks that accompany privatization of national assets. In numerous countries the process of privatization of extractive industries has resulted in unfair deals being agreed in which private actors make substantial gains as a result of unethical or illegal practices. The issue of privatization, as presented in the paper, focuses on the problems of state-ownership but fails to deal in any adequate way with the dangers of privatization and the history of national wealth being plundered for the private gain of the few. Privatization may well bring benefits but EBRD should recommend a process that is fully transparent, with consultation and robust safeguards.
- EBRD support to private actors should be accompanied by robust human rights due diligence, with additional measures taken in countries where regulation is weak and exploitative practices are reported in the extractive industry. Within the strategy paper, however, there is no suggestion that the EBRD should carry out human rights due diligence in order to identify and address human rights risks associated the extractive projects EBRD is considering to fund.
- At the start of the document there is a reference to UN Guiding Principles on Business and Human Rights (known as the GPs). However, thereafter there is no reference to either the GPs or to human rights directly impacted by mining activity. Although the EBRD claims its strategy has taken note of the important development represented by the GPs, which were endorsed by the UN Human Rights Council, the document does not reflect this and does not suggest ways to incorporate these developments into EBRD's policies and strategies. Even within the social and environmental section, the human rights of affected communities are not acknowledged. This contrasts sharply with the repeated reference to the rights of companies in relation to mining.

2. Specific Issues

2.1 Legislation

While encouraging all Countries of Operation (COOs) to have strong and effective legislative frameworks, there must be discussion about enforcement, which is often the more serious gap. Good legislation is, without doubt, vital as the foundation to ensure that business operates in a manner that respects human rights and the environment, but robust enforcement is necessary. This can be particularly challenging in countries where the State is relatively weak and corporate interests may exert undue influence on the executive or on regulatory agencies of the state. The history of international financial institutions (IFIs) and companies influencing legal frameworks¹ to the advantage of foreign economic interests requires scrupulous transparency in order to avoid repetition of past bad practices in this regard. The following should be included or given greater attention in the strategy paper:

- Any legislative reform should be done transparently so that people can understand what is being done and why.
- The EBRD and the companies it finances should be fully public about any advice they give the state on national laws.
- Laws related to social and environmental protections should be publicised to all potentially affected communities in ways that are accessible to them, with information on how to make a complaint to an independent body if companies do not follow legal requirements. The EBRD should ensure financial support to such initiatives.
- The EBRD should support robust enforcement mechanisms in the areas of social and environmental protection, including through technical support and assessments of corporate influence on the regulatory bodies.
- The EBRD should also have appropriate means to conduct independent checks on companies alleged to have violated national laws, and means by which stakeholders, such as communities and civil society groups, can raise concerns about legislative breaches with EBRD.

2.2 Disclosure of information and transparency

This section is insufficient to address widely-reported problems in the mining sector, which include lack of disclosure of information that communities and CSOs have consistently asked for in mining operations, including: data on environmental and social impacts; ongoing monitoring data, including on pollution and a range of other risks factors and impacts; agreements with the state regarding access to land; relationship with security forces; and revenues. The EBRD strategy should require that companies funded by EBRD ensure access to all information related to mining projects (presumption of disclosure), subject only to a limited set of exception, which should be clear, as narrowly drawn as possible and easy to interpret.

2.3 Financial intermediaries

The strategy states that financial intermediaries can “only realistically be expected to monitor client compliance against national laws, but not against other standards for which there is no in-country infrastructure for measuring, monitoring, inspection, and enforcement. The Bank views this as appropriate for the majority of financial intermediaries.” This is wholly insufficient.

¹ For example by urging changes to legislation that limits the capacity of individuals or groups to initiate legal action. This occurred, for example, in Papua New Guinea where legislation was passed at the instigation of BHP to prevent claims from compensation related to the Ok Tedi mine. The mining (Ok Tedi Re-stated Eight Supplemental Agreement) Act 1995 contained a number of provisions that directly infringed on affected villagers’ right to seek redress. The Act eliminated all previously available legal grounds to seek compensation from Ok Tedi Mining Limited (OTML) and its shareholders (including BHP limited) in the PNG courts: excluded compensation claims arising from environmental and social impact: and limited claims arising from environmental impact of the mine:: Mining (Ok Tedi Re- stated Eight Supplemental Agreement) Act 1995, clause 5. During a trial in Australia initiated by members of some affected communities, it emerged that BHP’s Papua New Guinean lawyers had been involved in drafting the legislation. BHP’s role in the preparation of the legislation resulted in the community’s members’ lawyers filing a contempt of court action with the Supreme Court of Victoria. J Cummins found BHP to have acted in contempt of court, stating his judgment: “I am satisfied beyond reasonable doubt that BHP has sought to block the actions of these plaintiffs to law”. Dagi, Rex & Ors v BHP Ltd (can 004028077) & Ok Tedi Mining Ltd, Judgement, Contempt of Court, 20 September 1995. For the full text of the Judgement see: <http://vsc.sirsidynix.net.au/Judgments/Civil/1990+/492814>. pdf, last accessed 20 June 2010/

The EBRD strategy paper goes on to admit that, “The situation in many of EBRD’s COOs with respect to stakeholder engagement is challenging. Historically, community concerns have often been overlooked in the interest of production output, whereas enforcement of environmental and safety standards has been poor, creating significant legacy issues...Mechanisms for stakeholder engagement has often been lacking or poorly applied and experience in good stakeholder engagement and management is often lacking, both by companies and authorities. As is the case elsewhere in the world, it is common in EBRD’s COOs for local communities, which often bear the brunt of environmental damage and social destabilization as a result of mining activities.... In addition to the perceived lack of engagement by local stakeholders, they can also be concerned about the equity of tax revenue and other benefit dispersion for local communities.”

Amnesty International agrees with the above assessment and would add that there is also considerable evidence to show that companies can be deemed to be “compliant” with national law, in contexts where the assessment of compliance is based on information given by the company to regulators who cannot or do not verify data, even when it is challenged by communities.

At the very least compliance with national laws should be verified through process such as independent reviews carried out randomly by EBRD. This should apply both to activity funded directly by EBRD and to activity funded by intermediaries.

2.4 Comments on section 4: supporting responsible mining: approach to ehs&s issues

There are significant shortcomings within this section, which are deeply worrying. Specifically:

No adequate due diligence by EBRD

The bank leaves it to the company to do all the due diligence and does not define a process for EBRD to do independent due diligence or any adequate means for verifying the information provide by companies. Although the Bank refers to its own due diligence, there is no information on what this consists of, and it appears limited to reviewing data provided by the company receiving the funding. As noted above, widely available evidence of poor practice by companies appears to be ignored, even though EBRD has stated that mining projects have frequently been associated with social problems.

In countries where governance is weak or the state institutions are poorly resourced or are corrupted then a company may operate with no meaningful oversight. Relying on data provided by companies can, in such contexts, be meaningless.

The EBRD should establish a system of independent assessments which can be done on a random basis, such that they do not occur for every project but any project can be subject to a check.

Involuntary resettlement

While Amnesty International understands that the EBRD defines its approach to involuntary resettlement, in its Performance Requirement 5 on Land Acquisition, Involuntary Resettlement, and Economic Displacement, these policies are not wholly consistent with international human rights standards on eviction and resettlement. They do not contain an explicit prohibition of on forced evictions (i.e., evictions that are carried out contrary to international human rights law, which requires a number of specific safeguards to be in place prior to any eviction). As involuntary resettlement is a critical issue in many extractive projects, EBRD should make sure its mining strategy incorporates the need for full adherence to international and regional standards pertaining to the right of housing and to the requirements contained in the UN Basic Principle and Guidelines on Development Based Evictions and Displacement

The rights to food, water and health

EBRD also fails to incorporate in its mining strategy consideration of how the risks posed by pollution and environmental damage, which can be caused by mining projects, impact on a

range of human rights, such as the rights to health, water, food and adequate standards of living. The EBRD should ensure that its clients consider the risks posed by pollution to human rights and put in place systems that explicitly identify, mitigate and / or remedy any potential negative impacts on human rights.

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