



PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Independent Expert on the promotion of a democratic and equitable international order; the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on the right to food; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on the human right to safe drinking water and sanitation; and the Working Group on the use of mercenaries.

REFERENCE: OL Housing (2000-9) Business enterprises (2011) Poverty (1998-11) Food (2000-9) Debt (2000-9) Health (2002-7) G/SO 214 (2005-4) OTH 4/2014

5 May 2014

Subject: Review of the Good Governance Policies of the EBRD

Dear Sir Suma Charkarbati,
Dear members of the Board of Directors,

We have the honour to address you in our capacities as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises; Independent Expert on the promotion of a democratic and equitable international order; Special Rapporteur on extreme poverty and human rights; Special Rapporteur on the right to food; Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on the human right to safe drinking water and sanitation; and Chair-Rapporteur of the Working Group on the use of mercenaries pursuant to Human Rights Council resolutions 25/17, 17/4, 18/6, 17/13, 22/9, 25/16, 24/6, 24/9, 24/18, and 24/13.

We are writing to you with regard to the ongoing process to review the good governance policies of European Bank for Reconstruction and Development (EBRD), including EBRD's Environmental and Social Policy, its Project Complaint Mechanism Rules of Procedure and its Public Information Policy. We welcome the effort to improve the good governance policies including through public consultations. In this context we would like to share with you a number of issues and concerns relating to the draft policy documents that were released for comments on 20 January 2014. As we regret that we have not been able to submit our comments earlier, we would like to offer as well our availability to arrange for a meeting between some of us and representatives of the Bank should you wish so.

We understand that a key aim of the review process is to further clarify EBRD's commitments and requirements, including by codifying good practices of EBRD and other international financial institutions, in line with the EBRD's foundational commitment "to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics" (Preamble of the Agreement establishing the EBRB).

While welcoming the inclusion of more specific safeguards with regard to gender impacts, forced evictions and the responsibility of business to respect human rights, we are of the view that the current draft policy could be further strengthened and better reflect existing principles of international human rights and environmental law and recent good international practice. It is our view that the draft policies, in its current form, may weaken EBRD's existing safeguards in some areas, and that it would be particularly important to more clearly signal how these policies are grounded in globally recognised human rights standards and norms. We would therefore kindly submit for your consideration a number of suggestions as to places where references to human rights would be particularly important to strengthen the good governance policies.

A clear commitment to human rights

We recommend that the Bank restates more explicitly its commitment to human rights in the draft Environmental and Social Policy (ESP). All EBRD member countries have ratified one or more (and mostly, several) of the core UN human rights treaties and European human rights instruments, which overlap very significantly with the issues covered by the ESP. A reference to these existing human rights legal obligations – in line with the preambular text of the Agreement establishing EBRD - could be included in paragraph 1 explaining the purpose of the policy. While the implementation of these treaty commitments is obviously the principal responsibility of the respective State party, rather than the EBRD or any other external partner, an explicit foregrounding of these and related instruments within the preambular text would helpfully frame the scope of (procedural) "due diligence" obligations relevant to the EBRD's private sector clients as well as the EBRD itself.

While the 2008 Environmental and Social Policy of the EBRD expressly stated that "the EBRD will not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to environmental

protection, human rights, and sustainable development” (para. 9) the draft guidelines take a very significant step backwards by stating that “Within its mandate EBRD will, where appropriate, seek to structure the projects it finances to be guided by the relevant principles and substantive requirements of EU and international law” (draft guidelines, para. 7). This formulation would seem to suggest, inappropriately, that international and regional treaty-based obligations are only an optional or discretionary point of reference for the EBRD, notwithstanding the clear overlap between the subject matter of those treaties and the ESP. This would be an unfortunate message for a respected institution like the EBRD to be sending to the international community, and a risky one in terms of its potential to generate contradictory regulatory regimes concerning the same project activity at country level. It ignores not only the primary obligations of States parties under the ratified treaties, but also the responsibilities of its private sector clients and of the EBRD and other actors, at a minimum, to respect those obligations and work within the framework of applicable law. We would highly recommend that, either in draft paragraph 6 or 7, the EBRD clarify that it will aim to ensure that the projects it finances are designed, implemented, and operated in compliance with international environmental and human rights law and standards.

This is not a matter of legal semantics. Recent experience of multilateral development banks has revealed consistent shortcomings in risk management and due diligence processes, that have been directly associated with serious violations of human rights of all kinds: social, political, economic, social and cultural. Examples include child labour (Uzbekistan), forced evictions and violations of indigenous peoples’ rights in connection with agribusiness projects (Honduras, Cambodia), among many others. These kinds of risks appear to be increasing in many parts of the world, in a climate of increasing competition for project finance, and – in many countries – increasing inequalities and insecurity.

For these reasons it would be important to clearly spell out that the EBRD will refrain from financing projects where there are serious human rights risks or evidence of human rights violations. In its paragraph 21, the draft ESP states that “EBRD may refrain from financing a project on environmental or social grounds” and notes that “there are several types of activities that EBRD does not finance” in accordance with an appended Exclusion List (Appendix 1). In this regard, it would be important for ERDB to clearly state that this would include serious human rights risks or evidence of human rights violations. In its current form, the Exclusion List refers to several international agreements that outlaw certain products or business activities. It would be important to also include a reference to “violations of international human rights treaties and core labour standards”.

Need to include human rights due diligence

While the draft policy recognises the responsibility of business to respect human rights (draft ESP, para 9) we consider that it would be important to include a reference to the United Nations Guiding Principles on Business and Human Rights (A/HRC/17/31, annex), the authoritative global framework for business and human rights adopted since

the last revision of the EBRD's ESP in 2008. Apart from an explicit reference, the "protect, respect and remedy" framework could usefully be reflected in the text of draft paragraph 9.

Furthermore, the draft text explaining EBRD Performance Requirement 1 could usefully include language similar to paragraph 3 of IFC Performance Standard 1: "Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project."

Finally, the policy could spell out more clearly the commonly accepted mitigation hierarchy first to "avoid and prevent" environmental, social and human rights impacts, then, if this is not possible, to "minimize and mitigate", and then "offset, compensate for or remediate" residual impacts, as a last resort (see Performance Requirement 1, para. 3 and corresponding footnote). We would also suggest to insert into the environmental and social policy language similar to paragraph 24 of the Guiding Principles on Business and Human Rights: "Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, clients should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable."

Human rights should be part of impact assessments

We note that the draft ESP does not make any reference to human rights as part of environmental and social assessment process (draft Performance Requirement 1). In this regard, it would be important to clarify that human rights considerations should be an integral part of environmental and social impact assessments, in line with Principles 17-21 of the United Nations Guiding Principles on Business and Human Rights. We therefore recommend to insert language to clarify that impact assessments carried out should also pay due attention to human rights impacts.

We also note that the draft ESP policy requires that EBRD only review impact assessments prepared by clients. We consider this problematic for a number of reasons. Clients may not have an interest in carrying out thorough impact assessments that may require adjustments to their projects and raise concerns about environmental, social or human rights impacts. Performance Requirement 1 states that depending on the potential significance of impacts and issues, some of the required assessment studies may be required to be conducted by independent third party specialists (para 8). However, in our view, it would be important that the ESP clarify that independent assessments should always be required for high-risk projects that could result in adverse environmental, social or human rights impacts. Impact assessments prepared by clients should always be carefully reviewed by the EBRD before project approval by the Board. Moreover, EBRD should play an active role in ensuring that independent impact assessments are produced rather than delegating the whole responsibility for assessing potential or actual impacts to its clients.

Security Personnel

We welcome that performance requirement 2 on health and security refers in paragraph 35 to the Voluntary Principles and Security and Human Rights. In this regard, it would be useful also to add a reference to the Montreux Document and the International Code of Conduct for Security Service Providers. Moreover, the performance requirement could be strengthened by requiring clients to ensure that security service providers and their personnel have not been implicated in past human rights abuses or any type of misconduct, and have a solid vetting system in place, which will include checking their criminal records. The sentence included in paragraph 35 of performance requirement 2 “The client will not sanction any use of force except when used for preventive and defensive purposes in proportion to the nature and extent of the threat” is problematic. To better regulate the use of force, it should be stressed that the use of firearms against persons would only be authorized in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life. Furthermore, the use of force or of weapons should comply with all national and international obligations applicable to regular law enforcement officials and, as a minimum, with the standards expressed in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). We understand that the reference in paragraph 36 to “paragraph 31 above” should be corrected to “paragraph 35 above”, as the text was renumbered. Training of employees of private security companies should include the regulation of the use of force, but also training in human rights and humanitarian law. Clients should ensure that there is an oversight mechanism in place to monitor the activities of private security companies engaged by them. Paragraph 37 should clarify that clients are always obliged to report cases of human rights abuses or unlawful acts to competent national authorities for their criminal investigation and are obliged to ensure access to remedies for victims.

Involuntary resettlement

We welcome that the draft policy includes a new requirement that “EBRD will not knowingly finance projects which either involve or result in forced evictions”, while underlining that this Performance Requirement “supports and is consistent with 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” (Performance Requirement 5, para 3 and 4). The draft policy also enumerates in a footnote (fn 10, page 34) several criteria of the right to adequate housing, such as security (of tenure), availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, safe location allowing access to employment options, health care, schools, and other social facilities and cultural adequacy. However, it would be important to amend the last sentence of footnote 10 as it seems to imply, incorrectly, that it would be sufficient for clients just to “include one or more of the aspects of adequate housing” to meet the requirements for adequate housing at resettlement sites.

We would advise that Performance Requirement 5 be further strengthened. In particular, the requirement to provide legal assistance for displaced persons, contained in the 2008 ESP, should be retained. Moreover, a reference could be made to the Basic Principles and Guidelines on Development-based Evictions and Displacement (A/HRC/4/18, annex I) and Performance Standard 5 of the International Finance Corporation. In addition, it would be important to give more attention, apart from the short reference made in footnote 11 (p. 34), to ensuring that land tenure rights are not weakened or infringed as a result of EBRD financed projects. In this regard, reference could usefully be made to the UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, endorsed by the UN Committee on World Food Security in May 2012.

Transparency and Disclosure

We note that only few amendments have been proposed in the draft Public Information Policy (PIP), which is in our view lags behind that of other international financial institutions. In particular, the policy should ensure that affected individuals are made aware of planned projects, can raise concerns, and actively participate in discussions relating to measure to avoid, mitigate or compensate negative environmental, social or human rights impacts. We consider that this would require that advance publication of social and environmental appraisals, impact assessments and management plans is not subject to confidentiality restrictions, and that public disclosure of Environmental and Social Impact Assessments is not limited to category A projects only (see draft PIP para 3.4.1). Such advance publication and public disclosure should also apply for Environmental and Social Management Plans, Resettlement Action Plans, Livelihood Restoration Plans and Indigenous Peoples Development Plans, outlining measures foreseen to avoid, minimise and mitigate negative impacts and documentation relating to the monitoring of the implementation of these plans. Financial Intermediaries should as well be required to publish Environmental and Social Impact Assessment reports and related plans to avoid, minimise and mitigate negative impacts (see Performance Requirement 9, para.16)

Monitoring and complaints procedure

In order to allow EBRD to monitor appropriately the respect of its clients for its environmental and social policy and if necessary request remedial measures, we recommend that EBRD's financing agreements include references to international human rights standards. For example, such reference could be made in paragraph 42 of the draft ESP.

The monitoring and project complaint procedure should be strengthened by ensuring an effective monitoring and grievance mechanism, including the right of victims to access an effective remedy, in line with Pillar III of the United Nations Guiding Principles on Business and Human Rights. The current draft text, stating that "EBRD... may take such action and/or exercise such remedies ... that it deems appropriate" (para 44) would fall short of an effective remedial procedure requiring the necessary predictability. The EBRD should clarify that it will take action and exercise remedies as contained in its financing agreements with the aim to secure compliance with social, environmental and human rights commitments, if the client fails to comply with agreed remedial actions.

We also recommend that provisions relating to grievance mechanisms be aligned with Principle 31 of the UN Guiding Principles on Business and Human Rights. For example para 26 of Performance Requirement 10 could specify that "grievance mechanisms should be effective, legitimate, accessible, predictable, equitable, transparent and rights compatible".

It is finally our view that complainants should be able to request a review of compliance of a project with EBRD's policies prior to the approval of a project. The draft rules of procedure of the Project Complaint Mechanism suggest in para 12 that compliance review is only possible after a project has already been approved. Similar rules apply to complainants who request to consider a project under its problem solving function (which usually can only be requested after approval or passing of final review by the Bank's Operations Committee). Such requirements would deprive concerned individuals and communities of the ability to ensure that human rights violations or negative environmental and social impacts are addressed as early as possible and that potential conflict over such issues can be prevented already at an early stage of project planning. Furthermore complainants should be able to file complaints also after the suggested one year period after the last disbursement of funds has elapsed. For example, such time limit could mean that affected individuals and communities would be unable to use the project's complaints mechanism to ensure compliance with agreed compensation or remedial measures that have not been fully implemented by a client.

As independent experts appointed by the United Nations Human Rights Council it is our responsibility to bring these observations to your attention. We hope our suggestions will be helpful in finalizing of the revised Good Governance Policies. These policies, if solidly grounded in human rights, will no doubt play a significant role in preventing human rights abuses.

We stand to provide further support to the review process and look forward to continuing a constructive dialogue around issues of shared concern.

Yours sincerely,

Raquel Rolnik

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Alexandra Guáqueta

Chairperson

Working Group on the issue of human rights and transnational corporations and other business enterprises

Alfred De Zayas

Independent Expert on the promotion of a democratic and equitable international order

Maria Magdalena Sepúlveda Carmona

Special Rapporteur on extreme poverty and human rights

Olivier De Schutter

Special Rapporteur on the right to food

Cephas Lumina

Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Anand Grover

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

James Anaya

Special Rapporteur on the rights of indigenous peoples

Catarina de Albuquerque
Special Rapporteur on the human right to safe drinking water and
sanitation

Patricia Arias
Chair-Rapporteur of the Working Group on the use of mercenaries

cc:
Mr. Alistar Clark,
Corporate Director,
Environment and Sustainability