



## Center for International Environmental Law and Human Rights Watch Submission on the EBRD's Environmental and Social Policy Review

*May 30, 2013*

We appreciate the Bank's efforts to solicit and consider comments on the review of its 2008 Environmental and Social Policy (ESP) and the relevant Performance Requirements. The review and update of the ESP provides a critical opportunity for the Bank to enhance and strengthen its policies to ensure that it does not contribute to or exacerbate human rights violations in its operations.

The Bank has already expressed a commitment to human rights. Underscoring its express political mandate, the preamble to the Agreement Establishing the EBRD sets forth the Bank's commitment "to the fundamental principles of multiparty democracy, the rule of law, respect for human rights, and market economics."<sup>1</sup> Article 1 mandates the Bank to ensure that the countries it supports are committed to the principles of multiparty democracy, pluralism, and market economics, an assessment of which includes human rights compliance.<sup>2</sup> Moreover, in its ESP, the Bank has committed to "not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to environmental protection, human rights, and sustainable development, as identified during project appraisal,"<sup>3</sup> in addition to other human rights obligations embedded in the Performance Requirements.<sup>4</sup>

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<sup>1</sup> Agreement Establishing the European Bank for Reconstruction and Development, Article 1 (stating Bank's purpose) and Article 8 (providing that "the resources and facilities of the Bank shall be used exclusively to implement the purpose and carry out the functions set forth, respectively, in Article 1 and 2 of this Agreement").

<sup>2</sup> EBRD, *Political Aspects of the Mandate of the European Bank for Reconstruction and Development*, (stating that in assessing political progress, "emphasis is often placed on human rights . . . only those rights which, in accordance with international standards, are essential elements of multiparty democracy, pluralism and market economics should be considered when evaluating a country's progress" and including, as examples of factors considered, equal protection under the law, including for minorities; free elections; independence of judiciary; freedom of conscience and religion; and freedom of movement).

<sup>3</sup> ESP, para. 9.

<sup>4</sup> See e.g., EBRD Performance Requirement 5 on Land Acquisition, Involuntary Resettlement and Economic Displacement, para. 3 (the "[a]pplication of 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," explicitly referencing the Universal Declaration of Human Rights (1948) and International Covenant on Economic, Social and Cultural Rights (1966)).

This review and update provides an opportunity to strengthen and enhance operationalization of these human rights commitments. This review comes on the heels of the Bank's decision to expand its geographical mandate to the Southern and Eastern Mediterranean region (SEMED), including in the first instance Egypt, Morocco, Tunisia, and Jordan. Ongoing, serious human rights abuses continue in these countries, as in others in which the EBRD operates. It is essential that the Bank strengthens the implementation of its commitment to human rights in order to ensure that it does not contribute to or exacerbate rights violations.

We urge the Bank to reaffirm and strengthen its commitment to human rights and to ensure that communities and the environment are adequately protected from the adverse impacts of Bank-financed operations. Specifically, we urge the Bank to:

- **Ensure that political assessments fairly and accurately articulate human rights challenges in member countries; articulate concrete benchmarks that need to be achieved to work toward Article 1 principles; and call on governments to undertake concrete and measurable reform steps, making clear that their fulfillment will determine the Bank's level of engagement in the country.** We are encouraged that the EBRD requires a commitment from EBRD members to respect democracy and human rights as a condition of membership and borrowing. In particular, in the Bank's assessment of a country's political progress and in developing operational policies, it must conduct a comprehensive and accurate assessment of the human rights record in-country in order to gauge the respective commitments to the principles evinced in Article 1. This should include analysis of the existence and enforcement of laws that require businesses to respect human rights and remedy violations, and report the due diligence measures they undertake to ensure they do so.

Based on this assessment, the Bank should articulate clear and concrete benchmarks for reform that support its political mandate and are grounded in international standards governing the protection of human rights and the environment, as well as a clear system for monitoring progress. And, where it assesses there is lack of progress in these areas of human rights and democracy, it is critical that the Bank send a strong message by restricting or suspending lending accordingly.<sup>5</sup> We urge the Bank to unequivocally articulate that its level of (ongoing) engagement is predicated on the borrower countries' progress towards the Article 1 principles. Further, as discussed below, the Bank should lead by example and commit to this principle in practice by not supporting activities that will contribute to or exacerbate human rights violations.

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<sup>5</sup> Current assessment criteria explicitly include: the right to form trade unions and to strike; and rights of ethnic minorities.

- **Expressly commit not to support activities that will contribute to human rights violations or exacerbate human rights problems and to respect international human rights in all of the Bank’s projects, programs, and activities under them.** This will complement the EBRD’s existing commitment not to contravene a country’s human rights obligations and its stated endeavor to ensure that the projects it finances respect the rights of affected workers and communities. As a development institution, the EBRD should go beyond this existing commitment to ensure that it will respect international human rights in all of its activities, irrespective of whether the country involved has ratified the relevant treaty.
- **Explicitly undertake human rights due diligence to ensure that the Bank does not support activities that will contribute to or exacerbate human rights violations.** Currently, the EBRD’s human rights due diligence is only to the extent assumed within the environmental and social processes, which risks an understanding that consideration of human rights impacts other than those expressly captured within the PR’s is discretionary. The EBRD should explicitly integrate a human rights appraisal into its overall project appraisal, with the nature of the appraisal being commensurate to the human rights risks of the project. This requires acknowledging the realities of the environment in which the Bank is working, analyzing the risks, and taking the necessary measures to avoid or mitigate the risks while maximizing positive impacts. The policy should include a provision that the EBRD will refrain from financing a project on human rights grounds, for example when a proposed project fails to address human rights risks to the extent necessary to ensure that it will not contribute to or exacerbate human rights violations.
- **Explicitly require consideration of all human rights issues when considering social issues.** As the ESP currently stands, it refers only to environmental and social issues without expressly confirming that human rights issues are included, with one exception when it refers to the need to describe key environmental, social and human rights issues in country strategies. The ESP should explicitly refer to human rights. To illustrate, this would involve, amongst other things:

  - (a) Assessing human rights risks in Initial Environmental and Social Examinations.
  - (b) Assessing a financial intermediary’s human rights policies and procedures when considering its environmental and social policies.
  - (c) Assessing human rights issues associated with the EBRD’s project portfolio in its Sustainability Report.
  - (d) Including human rights issues relating to EBRD investments in EBRD’s Project Summary Documents.

- (e) Including projects which may result in significant adverse human rights impacts to local communities or other project affected parties in Appendix 1: Category A projects.
- **Require businesses the EBRD finances to undertake human rights due diligence.** The Bank should require the businesses that it finances to implement best practice for human rights due diligence, as reflected in the UN Framework and Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in June 2011. The Framework requires robust human rights due diligence, including:
  - (a) A human rights policy;
  - (b) A human rights impact assessment;
  - (c) Tracking and reporting on implementation; and
  - (d) Access to effective remedies.<sup>6</sup>

A human rights impact assessment (HRIA) enables a business to identify and assess the full range of human rights impacts of its activities, mitigate or avoid adverse impacts, and maximize positive impacts. The HRIA should explicitly incorporate international human rights standards and norms as guidance for the process of conducting the impact assessment and understanding the substance of rights in question. The HRIA could be part of the integrated environmental and social impact assessment. It is worth noting that a HRIA is distinct from the environmental or social impact assessment/appraisal, which the Bank currently undertakes. The World Bank's Nordic Trust Fund of the World Bank has delineated ways in which a HRIA provides added value. For instance, HRIAs, unlike other impact assessments, are anchored in a universally recognized legal framework and thus draw upon human rights jurisprudence.<sup>7</sup>

Under a HRIA, the proposed project is examined against human rights standards, measuring the degree to which the substance of the project itself complies with human rights standards, as well as the degree to which the process of crafting and implementing the project meets these standards. It should cover all factors that might provoke or exacerbate human rights risks.<sup>8</sup> Instrumental concerns for "vulnerability" are replaced by an emphasis on "discrimination," requiring consideration of patterns of exclusion and

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<sup>6</sup> For discussion of human rights due diligence, please see the UN Framework, Guiding Principle 17.

<sup>7</sup> Nordic Trust Fund, World Bank, "Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development," February 2013,

[http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA\\_Web.pdf](http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf) (accessed April 15, 2013).

<sup>8</sup> Ibid, p.19.

multiple forms of discrimination. It does not automatically accept that the project is legitimate. Such a conclusion is only arrived at after an analysis of the rights impact, adequate mitigation of negative impacts consistent with international law, and development of a system for effective monitoring and supervision, which includes a grievance mechanism. It should involve an analysis of accountability mechanisms to consider the potential for, and barriers to entry against, access to remedy should rights be violated, which few social impact assessment do.<sup>9</sup> And it should be developed in consultation with human rights organizations and NGOs.<sup>10</sup>

All human rights are part and parcel of sustainable and inclusive development. A HRIA would enable the Bank to comprehensively and systematically assess the impacts on, and ensure respect for, all human rights. It would avoid the parsing out of specific human rights over others, as denial of one right necessarily impedes the enjoyment of other rights. Human rights should be understood to mean that all fundamental freedoms—whether economic, social, cultural, political or civil in nature—are indivisible, interdependent, and interrelated. As a final point, an undertaking of human rights due diligence presents an effective way to manage and mitigate financial and reputational risks.

- **Commit to work to dismantle all forms of discrimination and address inequality in all of its activities.** The EBRD should systematically assess the environment for discrimination and marginalization, including obstacles to substantive equality, when analyzing the risks related to and the impacts of proposed projects or programs. It should commit to uphold the rights of peoples with disabilities and ensure that all activities are disability-inclusive. Human rights law prohibits discrimination on the basis of a wide range of grounds, including disability.<sup>11</sup> The Bank should also strengthen data collection and analysis along grounds of discrimination to increasingly identify barriers to poverty eradication in individual projects. It may not be feasible to disaggregate data by all potential grounds of discrimination, but at a minimum the Bank should collect data

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<sup>9</sup> Ibid.

<sup>10</sup> World Bank, “OP 4.01 - Environmental Assessment,” April 2013, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (accessed April 30, 2013), para. 19. The World Bank recognizes importance of civil society consultation in Environmental processes.

<sup>11</sup> This includes on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth disability, gender identity, sexual orientation, marital status, descent or ethnic origin, nationality, age, economic position, geographical residence, health status. Human rights law also protects against discrimination on the basis of gender identity, family status, health status (e.g. HIV status), homelessness, or because they engage in sex work. Children are to be protected against discrimination on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

disaggregated by gender, marital status, demographic group (i.e. ethnic background, language, religion), locale (rural/urban/slum household, state/territory), age, and disability. The Bank should ensure that its systems for measuring results determine the extent to which projects reach marginalized communities and incorporate their inputs and perspectives, including the most poor, women, people with disabilities, and ethnic, linguistic, and religious minorities.

The aforementioned recommendations present a means to operationalize the Bank's commitment to human rights, enabling the Bank to more effectively ensure Article 1 compliance, assisting countries in fulfilling their human rights obligations, and actively ensuring that the Bank itself is not contributing to or exacerbating rights violations.

Thank you for your consideration of our concerns. We welcome an opportunity to answer any questions you may have.

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