

EnBW-Report on “Buying Coal from Colombia – Taking stock of 6 years of engagement 2012–2018” published in July 2019. Comments by MISEREOR, PAX and urgewald

Purpose and conclusions of the EnBW report

The explicit objective of the report¹ was to assess “improvements that Colombian coal producers have achieved in the area of due diligence, human rights, working conditions and environmental protection.” It is not however a serious report on EnBW’s own human rights due diligence. The starting point is not, as international standards like the UNGP’s prescribe an analysis of impacts and risks, how they are connected to companies and how they should be mitigated. This is reflected in the preface that states: “We started this project by looking for hard evidence of progress.” In short, EnBW aimed to showcase what it and the mining companies saw as improvements. As a result, the report reads as PR-document aimed at correcting the “negative picture” that “media and NGO reports from Western Europe” have painted.

By choosing such a one-sided focus, the report fails to meet international human rights standards. The UN Guiding Principles on Business and Human Rights (UNGPs) require companies to assess actual and potential negative impacts of their activities and business relationships on human rights. Such an impact assessment, which would have been a necessary basis for assessing progress, is missing from the report. The report also fails to analyse EnBW’s links to the human rights impacts of coal mining activities and the concrete steps EnBW should take to mitigate these impacts.

The report concludes that “the results presented underline the fact that it is not so much the threat of the termination of supply relationships that is most effective, rather it is the continuous contact with the mining companies and the constant addressing of shortcomings and development issues on-site.” However, throughout the whole report, no concrete proof of this assumption is provided. While the report argues – based mainly on the views of the mining companies themselves – that companies had achieved progress in the areas of health and safety, environment, relationships with trade unions, resettlements, living conditions, and conflict, it does not analyse the factors that eventually led to such progress. It does not assess the impact of social protest, litigation, public awareness raising, and the termination of business relationships between some European energy providers and mining

¹ EnBW: Buying Coal from Colombia – Taking stock of 6 years of engagement 2012–2018, July 2019: <https://www.enbw.com/media/konzern/images/nachhaltigkeit/buying-coal-from-colombia.pdf>

companies, but simply assumes that continuous dialogue with mining companies resulted in such progress. It is obvious that EnBW seeks mainly to legitimate its own approach and does so without any scientific assessment of the specific impact of its own mitigation measures or the impact of other approaches.

Furthermore, in “assessing” progress in the abovementioned areas, the report mainly replicates the perspectives and arguments of the mining companies, without adequately taking into account the views of civil society organisations, affected people, or court rulings. MISEREOR, PAX Holland, and Urgewald strongly disagree with the positive picture of the current situation and with the conclusion that EnBW’s strategy is the most effective one in dealing with the problems at hand. We would also like to clarify that we never provided detailed feedback on the report, as insinuated in the imprint of the report. We offered to provide detailed written feedback on condition that EnBW would incorporate it into the report. EnBW did not, however, agree to this condition. This confirmed our overall impression that EnBW is not ready to reflect the views of civil society in an adequate manner in its report. EnBW is still far from meeting the requirements on human rights due diligence as described in the UNGPs. EnBW has never reported in a transparent manner on either the impacts or the effectiveness of its own measures. The new report basically defends the behaviour of EnBW and of Colombian mining companies without formulating clear expectations about the measures mining companies should take in order to address existing problems.

Environmental and health impacts²

The EnBW report claims that mining companies have significantly improved control measures for dust, water use and discharge, and others. According to the Colombian NGO Tierra Digna, however, mining companies are still failing to meet legal obligations regarding epidemiological studies on health impacts.

In accordance with the modified Environmental Management Plans and Environmental Licenses granted for the development of mining projects, mining companies are obliged to finance an epidemiological study. The obligation was introduced in order to assess the extent to which impacts on the health of the affected populations are being generated by the particles emitted by the mining activity.

According to the Colombian NGO Tierra Digna, the mining companies have failed to meet this obligation. In 2016, the National Environmental Licensing Authority (ANLA, to use its

² For comments on the issues of trade unions, resettlement, health and environment we consulted experts and local partners: Sara Sofia Moreno from Tierra Digna, Dr. Kristina Dietz, Freie Universität Berlin, Stephan Suhner, ask Schweiz

Spanish acronym) enacted the environmental monitoring and control reports 0031, 0032 and 0033 of 2016 through which mining companies were required to comply immediately with their obligation to conduct the epidemiological study.

In addition, during a meeting on 30 March 2017 of the agreement committees that had to be set up for the resettlement process of Boquerón, the members of the committee set out some commitments for mining companies. On the one hand, the community must be informed about the status of compliance with the obligation to carry out the epidemiological study. On the other, the mining companies and the ANLA must promote participation spaces where the aspects that will guide the epidemiological study can be discussed.

Tierra Digna reports that according to information provided by mining companies, in the first half of 2019 – approximately 9 years after the introduction of the obligation – the companies were in the first phase of disclosure and participation of the terms of reference of the epidemiological study. As for the Boquerón communities, they are still waiting to receive information and participate in the design and implementation of the study.

EnBW claims that negative impacts of mining activities have diminished significantly in recent years. However, it does not assess the potential impact of the massive expansion of coal mining in Cesar in the coming years. According to the EnBW report, “there are seven mines in production, 41 in construction and 260 in exploration. The 308 mining titles awarded cover an area of 275,000 hectares, approximately 12.19% of the department, yet today, only about 1% of the mining titles represent coal mining that are effectively in operation.” If we consider the 41 mines under construction alone, the number of coal mines in Cesar is set to increase from 7 to 48 in the coming years. It is obvious that this massive expansion bears a high risk of a massive increase in air and water pollution in Cesar. However, this risk is not even mentioned – let alone assessed – in the chapter on environmental impacts in the EnBW report.

Trade unions

The report states that “Drummond has run a number of court cases in which it could show that it did not order any killings [...]”. It would have been correct to say that Drummond has not been sentenced in the court cases, but it is misleading to say that it could demonstrate that it did not order any killings. The court did not confirm that Drummond did not order the killings neither. It simply rejected the cases because, based on the so-called 'touch-and-concern' criterion, it could not be proven that the decision to kill the Colombian trade union leaders had been taken by executives of Drummond in Birmingham, Alabama.

The report states: "As can be expected from the history of trade unions in Colombia, coal companies did not embrace the idea of strong trade unions in the past. The relationships with trade unions have been very strained, which resulted in a number of strikes and intense legal conflicts as the mining companies called into question the lawfulness of strikes. Companies showed particularly limited understanding for the concerns of trade unions when employees damaged the property of mining companies as part of the strike activity."

This passage provides a very biased and negative description of trade unions, while at the same time painting a very positive picture of the mining companies. It disregards the fact that such allegations against trade unions increase the risks for their members and leaders.

In May 2019, IndustriALL wrote an official letter to Drummond CEO Mike Tracy and the Colombian Minister of Labour complaining about Drummond's anti-union campaign in Colombia. Even though EnBW was informed about this letter at the company's 2019 AGM, it is not mentioned in the report (<http://www.industrialunion.org/drummond-wages-anti-union-campaign-in-colombia>).

It is also a big problem that the mining companies work with many contract workers and temporary staff who cannot be organised or be members of a trade union – as is the case in Prodeco. This weakens the negotiation power of the workers. Prodeco favours collective negotiations instead of negotiations with the trade unions.

There is information from the trade unions that great pressure is put on workers to continue working even when they are sick or on doctors to change their diagnoses and medical certificates. Nevertheless, Prodeco is seen as more open and more positive about dialogue than other mining companies.

Resettlements

The descriptions of resettlement processes in EnBW's report reflect almost exclusively the views of the coal mining companies. The report omits the fact that the companies have been suing unsuccessfully against the ministry's resolution on the resettlement of the three communities from day one. The companies have not shown any interest in a participative process based on human rights that gives people a short- to medium-term perspective. According to Colombian NGOs, the companies are taking no responsibility for negative impacts on people in the areas of health and social and economic consequences. While companies claim to fulfil their social and human rights responsibilities, in reality they instead seek to shirk their responsibilities and do not shy away from spending money to that end.

Details of the two outstanding resettlement processes:

El Hatillo:

The PAR (Resettlement Action Plan) has been signed, but there has been no decision as to where the community should be resettled. The more time passes, the more people decide to resettle by themselves, which is in the interest of the companies. Three new areas (all in El Paso) are being discussed, but none of them has so far been purchased by the companies. At least one other company has mining concessions for one of the potential areas.

Relocating to this location is contrary to the Ministry's resolution and would be a serious violation of the rights of the people of El Hatillo who, after years of uncertainty, may face a similar problem in a few years.

All these outstanding issues will further delay the process, to the detriment of the community.

In addition, the PAR has many shortcomings: there is no comprehensive socio-economic collective development plan. Impoverishment after resettlement cannot be avoided.

In addition, the lengthy negotiation process (8 years instead of 2) has demoralised the community. The community is divided, and local leaders had to make many concessions to the mining companies, due to the humanitarian crisis in the community and hard negotiation strategies of the company. For example, the members of the community receive less land than initially claimed, and the framework for compensation is not sufficient. Although the compensation includes the impact of resettlement, it does not include the impact of resettlement on health and livelihood.

Boquerón:

The three companies are passing the responsibility to the community and the administrative committee. The companies were able to get some committee members to side with them. As a result, the committee has become almost incapable of action.

Moreover, there are serious doubts as to whether Socya is a competent company that can take over the process in Boquerón. The balance of power is demonstrated by paternalistic speeches made by Socya regarding the committee as well as by a disregard for rights and, above all, targeted disinformation or non-information.

The legitimate negotiating group (Committee de Concertación) has no definite position.

There is no communication at eye level. Nor are there any serious guarantors of the process.

It seems that the companies do not want to relocate Boquerón for financial reasons and not because the fine dust pollution is so low. They recently asked ANLA to exclude Boquerón from the resolution.

Yet the living conditions in Boquerón are miserable, mostly due to the nearby coal mine. This has also been sufficiently documented. The perceived fine dust pollution is extremely high, the water supply (drinking water) is a daily problem and there is insufficient access to water for agricultural purposes.

The fact that the community is recognised as a “comunidad Afro” is not taken seriously. That the planned "Censo" pursues a so-called ethnically differentiated approach is the result of tough and laborious negotiations with the companies.

Living conditions and social development

In the report, the authors argue that they tried to find robust data about the economic situation in the Cesar region, because “the individual cases often cited in the media and in NGO reports [...] give the impression that the majority of the population, especially near mines, benefitted little or not at all from the economic activities [...]”

However, in its attempt to counter this impression, the EnBW report does not cite its own “robust data” correctly. The report argues that poverty rates went down in Cesar from 49.7 percent in 2002 to 28 percent in 2016. But these figures relate to the country as a whole; poverty in Cesar fell from 61.9 to 41.9 % over the same period. This means, that poverty rates fell by 43.67 percent at national level, but only by 32.31 percent in Cesar. In fact, the data cited in the report show a poverty rate that was much higher than the national average. And they show that the reduction of poverty in Cesar was slower than at the national level. In the relevant period (2002–2016), the companies expanded their coal mining operations. One general shortcoming in the report is that it does not address the question of future prospects of people living in coal mining areas. While coal mining is currently still expanding in Cesar, it is clear that the worldwide energy transition will have a major impact on the coal sector in Colombia in the future. However, the report does not address the question of the extent to which declining financial distributions, possible job losses, and long-term environmental impacts will jeopardise the future economic development of the region. When talking about a future coal phase-out, it would be important to think about both alternatives for the coal mining region and the mining companies’ closure plans. For example, how much money have they reserved for the renaturation of the open pits? The

mining companies are still not transparent on this issue. What could be the social and economic future of the region considering climate change and sustainability?

Impact of the armed conflict

The report also lacks a proper analysis of the political situation and conflict dynamics in Colombia. It paints many dots, but does not join them up. It states that coal mining was set up in a conflict zone, mentions paramilitaries killing and displacing people, paramilitaries infiltrating local authorities and coordinating with the army, and about the mining companies coordinating with the army. It mentions the endemic corruption and impunity. There is, however, no analysis of how these factors interact. It does not however define the core problem that mining multinationals started to operate in such a fragile conflict area. No questions are asked about how the decision of mining multinationals to operate in such a fragile conflict area might have exacerbated the violence, what the consequences were of the army coordinating with both the paramilitaries and the mining companies, what the mining companies did or did not do to prevent violence and how they might have profited from the violence (by the suppression of the union movement, for example).

On the contrary, the authors of the report argue that the “rate of displaced persons in Cesar alone is as high as in a dozen other areas in Colombia, irrespective of whether raw materials are mined in the respective region”, thus dismissing the link between land displacement and mining in Cesar. However, the graph used shows Cesar ranks 6th of 32 departments in the matter of forced displacement. In departments with a higher rate of forced displacement, the conflict has ignited around raw materials such as coca, oil and/or gold. Each region has specific issues, and in every major study, massive forced displacements have been linked to the main land-related economic activities for that region. In Cesar that economic activity was coal mining. The National Center for Historical Memory, a government institution, has recently published two authoritative studies on exactly this question. The study *Land and coal in the vortex of the Great Magdalena* concludes: "Multinationals and other economic actors must evaluate the human rights liabilities of their predecessors and/or themselves, in order to remedy and repair them in light of international business standards on human rights and the rights of victims." EnBW has been informed about these studies, but the authors of the report have chosen not to include them.

Finally, the report plays down the responsibility of the mining companies for human rights impacts during the conflict (and thereby of companies like EnBW, which are linked via the supply chain) by quoting the defence of the mining companies and mentioning that these companies have not been sentenced in a court of law. This narrative is problematic on a number of levels. Firstly, it is not relevant in terms of human rights diligence based on international standards. Nowhere is a judicial verdict mentioned as a condition for companies

to mitigate or remediate severe impacts in their supply chain. Secondly, there has not been an acquittal. Instead, the cases against Drummond in the US have been rejected because, based on the so-called 'touch-and-concern' criterion, it could not be proven that the decision to kill the Colombian trade union leaders had been taken by executives of Drummond in Birmingham, Alabama.

Thirdly, most victims have not sought justice via the judicial system in Colombia, because of the prevalent culture of impunity there. EnBW has every reason to take legacy issues seriously, especially since it was already a customer at the time that atrocities took place. Instead of scrutinising the effects of mining in a conflict zone to which EnBW is linked, the authors of the report have opted to scrutinise the critics of both energy and mining companies.

Throughout the report, the voice of (victim) communities and union activists is almost totally absent, which is an incredible feat in itself. There is not a single quote from them compared with the pages and pages of narrative from the mining companies. To illustrate the biased nature of the authors, we would like to point to the reporting on the joint fact-finding mission of EnBW, MISEREOR, PAX Holland and Urgewald in 2015, where EnBW representatives spent over ten hours listening to the plight of union members and victim communities, all of whom raised very critical issues relating to the mining companies. EnBW's take-out from this joint mission focuses solely on what mining companies are doing and does not give voice to the input of victims and communities.

Limited focus of the report on Cesar

EnBW has chosen to limit the regional focus of its report on Cesar even though it has also purchased coal from the other important coal mining region "La Guajira". The MISEREOR partner and recognised lawyer association CAJAR (Colectivo de Abogados José Alvear Restrepo) has recently compiled a report about human rights impacts of coal mining in this

region.³ CAJAR has accompanied several Afro-Colombian and indigenous Wayuú communities in the south of La Guajira that are affected by coal mining in one of the world's largest open-cast mining areas.

The legal support of communities, as well as communication and the exertion of influence have provided evidence of the negative human rights impacts suffered by people. The

consequences for the communities have been documented in the form expert opinions, documents and video clips, scientific and community forums and legal action against the mining company Carbones el Cerrejón and the Colombian government. The subsequent court rulings protected the rights of the communities and condemned the company and the state. Other legal claims were also analysed, including the right of the municipalities to prior and informed consent.

On the basis of the communities' reflection processes to date, the factors outlined above can be summed up as follows:

- Health: malnutrition in children / inadequate nutrition / inadequate health care / respiratory diseases / vomiting / diarrhoeal diseases / skin rashes
- Territory: landscape changes / impairment of the entire food chain
- Environment: air, soil, and water pollution (main and secondary waters) / damage to flora and fauna / lack of vegetation (loss of medicinal plants) / noise pollution
- Shortage of drinking water: use of waters by the mining company
- Climate change
- Change in traditional economic bases: destruction of wildlife / damage to animals intended for human consumption and game / loss of agriculture and, as a result, in particular of exchange opportunities / loss of grazing land for goats and sheep: restriction of grazing land / losses of crops / miscarriages of goats / loss of animals due to their migration to open-cast mining areas
- Damage to infrastructure caused by explosions and landslides (river banks)
- Uneven distribution of power in the relationship between enterprises, the state, and municipalities / lack of governance
- Personal security issues
- Loss of freedom of movement on the territory
- Impairment of the procedures for prior consultation / non-recognition of the relevant right / improper conduct of consultation processes

³ CAJAR: Menschenrechtsverletzungen durch den Kohleabbau in El Cerrejón. Bericht über La Guajira, June 2019, published by MISEREOR.

- Cultural losses: loss of customs and traditions, sacred sites, autonomy / cultural subjugation.

We annex the full report for your information and to show the ongoing negative impact of coal mining in this coal-mining region on health, the environment, agriculture, and the well-being of local communities.