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THE AMULSAR GOLD MINE: LEGAL ISSUES AND BIODIVERSITY OFFSETS

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ECORIGHT

Table of Contents

1. Introduction and methodology

Lydian International's Amulsar gold mine exploitation project is going to be operated in central Armenia. The excavated ore is planned to be processed by use of cyanide, according to the project. After receiving the mining right to exploit the deposit in 2009, the operating company modified its mining project twice in 2014 and 2016. All three projects have been approved by the relevant state bodies and mining right was awarded. In fact, the mining right for the Amulsar project has been granted three times since 2009. Each time the company presented an amended project, which was mainly conditioned with the change of the increasing volume of mining deposit. Each time the new deposit was confirmed by the state authorities and the mining permit was awarded once again. Current project life is declared to be over 13 years, including two years of construction and 11 years of active mining and processing, followed by closure.

Importantly, the EBRD and IFC are shareholders in the Lydian International CJSC, and the company announced that its operations are based on the IFC Performance Standards and the EBRD Performance Requirements. The principle of rule of law is declared to be respected by both of these financial institutions.

However, the legality of the project is disputable. More than ten members of the affected Gndevaz community and two environmental organizations filed a lawsuit against the government litigating the legality of awarding the mining right given in 2014 to exploit Amulsar. It is worth to emphasize that currently the legality of the latest project is also being discussed in the court, as the latest one was approved during the period of judicial litigation in 2016. It is a quite tricky legal situation because the two mining permits are being litigated simultaneously since the company has two mining rights for the same mining deposit. In fact, the national legislation allows for this.. Among other social and environmental aspects, there are legal restrictions for the implementation of the project, including the direct ban of the Mining Code to conduct mining operations in the **area** of habitation of rare or endangered species of biodiversity.

There are other legal boundaries that the project has ignored as Amulsar is located in close proximity to infrastructure of strategic importance, such as massive water reservoirs, strategic tunnels for delivery of water to Lake Sevan. The very area that the Amulsar mountain itself occupies is the water catchment area for Lake Sevan, which contains 35 billion cubic meters of potable water.
As it is stated in the Social and Environmental Impact Assessment (SEIA) developed by the company, the Spandaryan Reservoir is linked to Kechut Reservoir by an underground tunnel, and Kechut Reservoir is in turn linked to Lake Sevan by two tunnels or aqueducts. The system of tunnels was designed to ensure a constant supply of water to the strategically important Lake Sevan. However, the Spandaryan-Kechut tunnel has never been put into operation; the intake at Spandaryan Reservoir is

closed. Nevertheless, about 190 liters per second of water flows out of the tunnel into Kechut Reservoir. The water discharging from the tunnel has the quality characteristics of groundwater rather than surface water, and is interpreted to have infiltrated the tunnel somewhere along its length[1].

In addition to other vulnerabilities related to the location of Amulsar, the area of the supposed open-pit mine is situated at the sources of two trans-boundary rivers, Arpa and Vorotan, and at a 10km distance from the country's best spa resort Jermuk. The development project of Jermuk town is regulated by another legal act, the Government Decree n.1064-N from 18 September 2008 on the "Announcement of the town of Jermuk as a touristic center". The Jermuk development strategy and investment plan were adopted by the government. Interestingly, one of the prime objectives of the aforementioned decree is the ensuring of cooperation of Jermuk spas with the European spa's association, including qualification of Jermuk spas by the European spa Association in line with the criteria of the latter.

Thus, the scope of the current research encompasses the legal and institutional analysis of the mining right awarding process for the Amulsar gold mine, as well as the assessment of actions where corruption risks may be present. The relevant details of judicial proceedings against the government will be discussed within the scope of legal actions. The issues of access to justice and complaint procedure in the Aarhus Convention Compliance Committee of the UN Economic Council for Europe will be addressed within the scope of the Amulsar judicial case.

The three main methods were used during the research: desk research, examination of the court case on Amulsar, and examination of the Communication ACCC/C/2016/138 Armenia presented to the Aarhus Convention Compliance Committee. The corresponding legislation and related regulatory framework were examined to identify the legal scope of awarding mining rights for the Amulsar project specifically. Moreover, the donations to the state and community development funds have been examined. The change of position about the exploitation of Amulsar mine by the officials affiliated with those funds has also been addressed.

[1]The Amulsar gold project, Social and Environmental Assessment, Non-Technical Summary.

2. Regulatory framework on nature and biodiversity protection

3a. Country Context

Environmental and social regulation of the mineral sector consists of a number of laws and sub-regulatory acts, among which are the Mining Code (2011), the Law on Environmental Impact Assessment and Expert Expertise (2014), the Forest Code (2005), the Land Code (2001), the Law on Flora (1999), the Law on Fauna (2000), the Law on Specially Protected Areas of Nature (2006), etc. Some laws are applicable only for certain projects depending on the location of proposed mining projects and other special features. An example of such law is the Law on Lake Sevan (2001).

There is, however, a general lack of secondary legislation and/or guidelines to serve the enforcementof laws. Although the issue of further development of EIA assessment methodology is consistently voicedby civil society, academic institutions and other stakeholders, the practical regulations and guidelines for assessment have not yet been adopted[2]. Gaps of secondary legislation leave huge discretion for the authorized administrative bodies when awarding mining permits.

Overall, in accordance with the World Bank's research, the environmental management in mining is critical. In this regard, there is a lack of understanding and data, and also a lack of knowledge among regulatory authorities and decision-makers about best practices and technology in modern mining activities[3].

3b. Scope of legislation relevant to the Amulsar project

The issues of impacts on Lake Sevan and underground water resources, as well as the impacts on biodiversity are the main topics of independent expertise. There are several laws regulating theese issues, among which are the Law on Lake Sevan and the Law on Flora.

The Law on Lake Sevan foresees additional responsibilities for those who launch the economic activity within the protection area of the lake. In accordance with the corresponding legal requirements, aSpecial Expert Commission was established within the structure of the National Academy of Sciences to make decisions concerning the activities with potential harmful impact on the Lake. It is a legal requirement to discuss the project with a special commission on the protection

[2]World Bank report, Sustainable and Strategic Decision Making in Mining & Enhancing Environmental and Social Sustainability of Mining, 2016, P.9.

[3]World Bank Armenia, First thematic paper: Sustainable and Strategic Decision-Making in Mining, 2014.

of Lake Sevan. Although the initial position of this commission was against the project of exploitation of Amulsar, it later presented a positive expert conclusion on the permissibility of exploitation of the mine after the rezoning of Lake Sevan protection zones and change of the project design and the location of the cyanide leach pad.

Hence, one of the main concerns with regard to Amulsar project is the impact on the unique ecosystem of Lake Sevan. The area of the supposed open-pit mine is situated in the water catchment area of Lake Sevan, which is a specially protected area. The detailed introduction of the water catchment area and the protection regime of the lake are regulated by a separate law on "Lake Sevan", as well as Government Decree n.1787-N from 11 December 2003 on "Affirmation of territorial planning project of Sevan Lake" and its amendment, Government Decree n.746-N from 18 July 2013. Pursuant to the current Amulsar mining project, the Expert Commission on Protection of Lake Sevan approved a disputed Positive Conclusion regarding the issue of impact of the project on the ecosystem of Sevan Lake in its session on 17 October 2014.

According to Article 3 of the RA Law on Lake Sevan, the Kechut and Spandaryan reservoirs, as well as the catchment basins of Rivers Arpa and Vorotan all the way up to the Ketchut reservoir belong to the catchment basin of Lake Sevan. Article 10 of the Law on Sevan Lake states that *"Any kind of activity prone to damage the ecosystem of Lake Sevan is prohibited in zones of central, direct and indirect impact".* The following activities are forbidden in the zone of direct impact:

a) *Application of ecologically harmful technologies that generate emissions and wastewater exceeding the identified permitted norms;*
b) *Production, utilization, storage and installation of radioactive materials and waste matter, as well as those of other materials that are hazardous or toxic to the environment and human health;*
c) *Allocation of ore processing objects;*
d) *Exploitation of thermal energy sources with the capacity of over 10 megawatts operating on the basis of coal and liquid fuel."*

Concerning the disputed factors of the Amulsar project, article 25 of the Law on Lake Sevan envisages that business entities enacting within the area of influence of Lake Sevan are committed to presenting a corresponding declaration prior to the start of the economic activity or even any change of technology if a project is already in its operational phase. Within a month, the liable authority(e.g. Sevan Lake Preservation Expert Commission) adopts the decision on the permission or denial of the economic activity based on the results of expertise implemented in line with the legislation. Notably, articles 19-21 of the Law on Lake Sevan regulate the scope of activity and legal status of said Expert Commission. According to the aforementioned law, the Commission supplies conclusions related to the economic or other activities that can negatively affect Lake Sevan. Those conclusions must be taken into consideration for any action pertinent to the Lake.

In its Conclusion n. E-09/2012 of 14 June 2012, the Commission issued a negative conclusion for the exploitation of the project of Amulsar gold mine. Although the Conclusion of the Sevan Lake Protection Commission is legally required to be taken into consideration, there was no word about it in the EIA positive conclusion granted on 17 October 2014, which was later affirmed by the Ministry of Nature Protection. However, the position of the same Commission changed, and the Amulsar project was considered to be in line with the protection regime of the lake, even though it is still located in the water catchment area of the lake, which is a zone of primary impact, as stipulated by the Law on Lake Sevan.

Currently, the revision of the state environmental expertise regarding the impact of the Amulsar project on Lake Sevan is one of the key disputable factors. During the judicial process, an independent expertise on the impact of the mining project on Lake Sevan was requested to be conducted in accordance with the requirements of independent expertise on the impact on biodiversity.

Technical evaluations of Lydian Amulsar documents were carried out by three experienced independent international mining consultants from Australia, the USA and Canada. The independent experts thoroughly reviewed the English version of the Amulsar project documents concerning the issues of Water Treatment and Acid Rock Drainage (ARD) of the mining project[4]. Acid Rock Drainage is considered to be one of the most serious and potentially enduring environmental problems for the mining industry. The specialists found that if left unchecked, it can result in such long-term impacts on water quality that it could very well become this industry's most harmful legacy. Effectively dealing with acid drainage is a formidable challenge as indicated by the high liability cost carried by many mining companies.

The independent experts also found that, "The mine plan and the ESIA contain many questionable assumptions that require additional investigation before a mining permit should be considered. Although the exploitation will certainly create acid mine drainage and leach and generate contaminants of concern, no active treatment plant is proposed during operation or closure. Mines such as the Amulsar Project have a higher likelihood of adversely affecting water quality because of its high acid-generation and contaminant leaching potential and close proximity to water resources … The Amulsar Project falls short of leading practice in the industry because it does not propose

[4]Amulsar ESIA, 2016: Chapter 3. Project Description, Chapter 4.6. Geology and Seismicity, Chapter 4.8. Groundwater, Appendix 4.8.5. Groundwater Quality, Appendix 4.8.7. Drawings, Appendix 8.1.9. Acid Rock Drainage Management Plan Report

additional mitigation measures to minimize the effects of acid drainage or treatment of any type during operations but instead assumes that the wastes will be "resistant" to the production of severe acid drainage and active treatment will not be needed."[5]

The independent international experts revealed that Lydian got a permit to operate without any consideration of ARD and its treatment system. It means that the mining company does not have an Acid Rock Drainage environmental management plan. Moreover, the company has not even started working on the final design of it. Referring to the project documents prepared by Lydian, the experts concluded that to date, no studies have been performed to ascertain the performance of Passive Treatment System (PTS) methods on Amulsar ARD. Furthermore, additional studies are required to verify predictive models that were used within the water balance, while the process verification studies are long-duration tests that will start during the final design and continue into production, according to the project documents of the company.

The noted independent expert conclusions indicate that, "There is a broader concern that, with the current proposed mine plan, ARD will be generated for centuries after the mine is closed. The Amulsar project is the first of its kind in Armenia. Everyone involved with this project should ensure that it leaves a positive legacy for the country, rather than a negative legacy of long-term ARD generation."[6]

Hence, due to Acid Rock Drainage there is a high risk of contamination of Vorotan, Darb and Arpa Rivers, Ketchut and Spandaryan reservoirs, Spandaryan tunnel, which takes the water to Sevan Lake, as well as a number of springs, Jermuk mineral water and Lake Sevan itself.

Article 17 of the Law on Flora states, "*Any form of activity resulting in the reduction of the number of species registered with the Republic of Armenia Red Book or deterioration of their areas of occupancy shall be prohibited.*" Accordingly, ***Article 18 of the Law on Fauna states,*** "*Any form of activity resulting in the reduction of the number of animals registered with the Republic of Armenia Red Book or deterioration of their areas of occupancy shall be prohibited.*"

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[5] "Evaluation of Hydrogeochemical Issues Related to Development of the Amulsar Gold Project, Armenia: Key Assumptions and Facts", Buka Environmental, PhD. Ann Maest, June 19, 2017

[6] "Review of water treatment at the proposed Amulsar Gold project", André Sobolewski, Clear Coast Consulting, Inc., June 13, 2017

Data provided by WWF-Armenia asserts that the occupancy area of one particular sort of plant, the Potentilla porphyrantha, as well as four species of reptiles, more than 30 species of birds and 4 species of mammals are within the map of the Amulsar project[7]. The Social and Environmental Impact Assessment report of the Amulsar project presented by the Lydian also highlights that the project area has inhabitants registered in the Armenian Red Book of endangered and critical habitats, as well as in the Red List of IUCN. Migration routes of a number of endangered species cross through the Amulsar area. Therefore, in terms of impact on biodiversity the opencast mining project of Amulsar is in direct contradiction with the Mining Code, Laws on Flora and Fauna, as the area of interest includes species registered in the Armenian Red Book and Red List of IUCN. The restricting provisions within the aforementioned legal acts are of imperative nature and do not foresee any exceptions or conditions, such as biodiversity offsetting and other mitigation measures.

3c. Biodiversity offsets

Among a variety of legal boundaries to implement the mining project, the issue of protection of adversely impacted biodiversity is one of the most unfavorable ones for the company. Amulsar is the area of habitation or migration of endangered species of flora and fauna. On December 12, Lydian Armenia and the Ministry of Nature Protection signed the Memorandum of Understanding on establishing the Jermuk National Park. For this reason, Lydian will allocate 5.7 million USD within 5 years. Actually, the mentioned amount is regarded as a contribution towards biodiversity offsetting for the damage caused as a result of the Amulsar project, which is mentioned in the Biodiversity Action Plan for Amulsar prepared by Lydian International[8].

According to Lydian, the Amulsar project is committed to compliance with IFC PS6 and EBRD PR6, both titled "Biodiversity Conservation and Sustainable Management of Living Natural Resources". Additionally, IFC PS6 and EBRD PR6 are broadly equivalent in terms of their objectives but do have some differences. Notably the fact that EBRD PR6 requires the Project to comply with the spirit or intent of the European Union (EU) Habitats Directive. The Business and Biodiversity Offset Programme standard[9]was also claimedto have been used as the basis for the design and implementation of offsets required to compensate for residual adverse effects.

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[7]WWF Armenian Branch, Expert opinion on biodiversity offsetting of Amulsar gold mining project presented in the EIA Report of the and its supplements, 12 May 2017.

[8]Memorandum of Understanding between the Ministry of Nature Protection of Armenia and Lydian Armenia with the objective to establish "Jermuk" national parkhttp://www.mnp.am/?aid=5841

[9] Business and Biodiversity Offset Programme, Standard on Biodiversity Offsets www.forest-trends.org

There are no criteria for the industrial assessment and compensation for social and environmental damage caused by mining activities. Government decisions have somewhat defined procedures for the impact assessment of economic activities on the atmosphere, land and water resources. These procedures, however, are not sufficient during the assessment of economic/industrial damage caused by mining. In practice, calculations for the economic damage are done randomly and without any professional approach. For the calculation of economic costs, the mining company "Armenian Copper Program" CJSC and the "Institute of Mining and Metallurgy" CJSC (the organization, which developed the EIA for the mentioned mining company) used the methods described in *Methodological Guidelines* published in the Russian Federation in 1992, which is completely outdated. The value coefficient of the mentioned methodology corresponds to the Soviet price level of 1984 which was not used even in Russia (the mentioned methods were revised and new Methodical Guidelines adopted in 1998)[10]. As a means of "compensation", the noted company committed to planting twice as more forest area than there was before the deforestation for mining purposes. The relevant agreement was signed between the company and the Ministry of Nature Protection.

The first attempt to conduct an independentalternative expertise and calculate the losses caused by mining was done for the Teghut mine project. The alternative assessment was based on the same data reflected in the mining project and showed that the assessment of economic damage was done in a strictly arbitrary way (economic damage was estimated at a 300 times lower level)[11].

Similarly, a thorough assessment of the biodiversity impact of the Amulsar project was implemented by the Armenian Branch of World Wild Fund (WWF). According to theexpert opinion of the WWF presented to the Administrative Court of Armenia on 12 May 2017, a number of habitats listed in Armenian Red Book and the IUCN List will be eliminated because of the project. Overall, the mining project will leave permanent and irreversible impact on the environment of subalpine and mountain meadows of Amulsar, insists the WWF. The WWF also stated that no compensation measure, including the establishment of Jermuk National Park or restoration of any degraded area willable to create the natural environment with the typical biodiversity and the complex interrelation between the species.

[10]Methodological Guidelines for the Environmental Impact Assessment in Cases of Choosing Location, Drafting Technical-Economic Justifications and Construction Projects for Mining Enterprises, Sankt-Peterburg-Moscow, 1992.

[11]The economic damage calculation is reflected in the 2006 "Environmental Impact Assessment of Teghut Mining Plant" by experts Hrachik Avagyan (engineer, geologist, PhD), Knarik Hovhannisyan (engineer, hydro-technician, candidate of technical sciences), Pavel Ghambaryan (Botanist, candidate of biological sciences), Martin Adamyan (Birdologist, PhD) and EditaVardgesyan (Economist, lecturer at the State University of Economics).

In order to outline the entire scope of assessment of the Amulsar project, it is an issue of critical importance to assess the general policy framework of awarding the mining permits. There is an interesting aspect with regard to the affirmation of deposit in Amulsar, having in mind the low level of concentrates of gold in the ore. According to the Amulsar project, the grade of gold concentrate in the ore in Amulsar is 0.9 grams per ton[12]. At the same time, the Amulsar is located in an extremely vulnerable area, where the affirmation of a mining deposit shall be done through "special technical-economic calculations", constituted by the Government Decree n. 274-N.

Overall, Armenian legislation does not envisage regulations on biodiversity offsetting. This fact is directly emphasized even in the Biodiversity Action Plan for Amulsar presented by Lydian International[13]. Even though the Law on Environmental Impact Assessment and Expertise requires the assessment of "Economic Damage" and setting up a regime for compensation, the following sub-regulatory legislation does not properly manage the process and methods of such a calculation[14]. Moreover, the same law demands that cumulative impact assessment be conducted, but again, there is no detailed regulatory framework to do it.

In the Government Decree n. 274-N from 14 March 2013, on the "Affirmation of the classification of solid natural resources and forecast resources" the approval of the deposit is based on the "Industrial Valuation" of the mining deposit. According to this Decree, the industrial value of the deposit must be assessed based on the consideration of the market value of the existing ore in the deposit and the costs of processing through certain technologies. More importantly, there is a special requirement for the assessment of costs and benefits before the deposit is affirmed: while deciding the industrial value of the deposit, the costs for social and environmental losses shall be included and calculated in the cost price of the ore. Hence, the matters of impact on biodiversity shall be taken into consideration in the initial phase of issuing the mining right.

Furthermore, according to the same Decree, the deposit shall be affirmed based on special technical and economic calculations if it is located near residential areas, strategic buildings, agricultural

[12]World Bank report, Sustainable and Strategic Decision Making in Mining & Enhancing Environmental and Social Sustainability of Mining, 2016, P.10

[13]Natural and Critical Habitat Assessment for Amulsar, Armenia" (Jo Treweek, Pete Carey, Peter Adriaens and Bill Butcher, 2016.

[14]"Procedure for the assessment of the impact on the atmosphere due to economic activities" defined by the H91-N decision of 25/Jan/2005 of the RA Government;
"Procedure for the assessment of the impact of economic activities on land resources" defined by the h92-N decision of 25/Jan/2005 of the RA Government;
"Procedure for the assessment of economic activities on water resources" defined by the h1110-N of 14/Aug/2003 of the RA Government.

objects, sanctuaries, natural, historic or cultural monuments, water catchment areas of big water reservoirs or water-flows.

However, besides the general legal requirement to assess the biodiversity loss in the cost price of the ore, there is no particular legal framework and methodology for the calculation or consideration of the social and environmental costs. Therefore, regardless of the requirement to assess the overall cost and benefit of a potential deposit during the geological expertise, there is no mechanism to do it.

Consequently, the required "Industrial Valuation" of the project is performed only for the assessment of cost-effectiveness from the point of view of private entities but not that of the country's economy, social well-being or the environment.

Thus, though the legislation generally requires that industrial valuation of the mining deposit is conducted, there are no instruments of comprehensive cost-benefit assessment of the project. According to the Armenian Mining Code, the initial phase of receiving the mining permit is the process of affirmation of the mining deposit. The application for awarding the mining permit can be submitted by the mining company only after the mining deposit is affirmed as a result of state Geological Expertise.

Based on the above-mentioned regulations, the state authorized body (Mining Agency of the Ministry of Energy Infrastructures and Natural Resources) shall reject the affirmation of the mining deposit if the cost of social and environmental losses along with the costs for excavation and processing exceed the supposed income of the company. This assessment shall be done during the Geological Expertise when assessing the industrial value of the deposit. In fact, the provision on industrial valuation can viewed as a type of regulation on biodiversity offsetting. At least, it imperatively requires conducting an assessment of biodiversity loss when calculating the cost price of the deposit. If this is done properly, the affirmation shall be rejected in the case when the costs, including biodiversity loss, are higher than the anticipated benefit.

3d. Legal amendments concerning the IFC and EBRD-financed Amulsar mining project

As mentioned above, article 26 of the Armenian Mining Code states that "*The exploitation of certain parts of the earth is prohibited … if the area includes … plants or animal shelters, dwellings registered in the Red Book of the Republic of Armenia, as well as animal migration paths*". At the same time, the laws on Flora and Fauna state that any form of activity resulting in the reduction of the number of animals registered with the Republic of Armenia Red Book or deterioration of their areas of occupancy shall be prohibited.

Thus, the mining project of Amulsar was permitted by adjusting the legislation to the mining project and not the other way around. We consider the mentioned environmental solutions of the project to be absolute green-washing with high corruption risks. No adequate assessment and compensation of biodiversity loss was conducted also due to the lack of relevant regulatory frameworks (laws, guidance, methodologies, etc). Currently, the permits are being litigated in national administrative court. Furthermore, a communication was launched in the Aarhus Convention Compliance Committee addressing a number of violations of the Convention in the process. The current overstatement is done in view of the serious studies done by respected international and Armenian biodiversity experts noted above.

Aiming to shirk the indicated imperative provisions of legislation, on 31 July 2014, less than a month before the main public hearings on Amulsar mine in Gndevaz village of Armenia, on 25 August 2014, the Government adopted Decree No. 781-N on "Establishing the procedure of utilization of items of flora for their protection and reproduction in natural conditions", which allowed for the transfer of rare, endangered and Red Book species of biodiversity to other places (botanical gardens or specially protected areas). This decree unlawfully by passes the provisions of the current Mining Code and other environmental laws, which prohibit mining exploitation in areas where those species live[15].

The aforementioned regulation was adopted with a flagrant violation of Article 26 of Armenia's Mining Code, as well as Article 17 of the Law on Flora. In fact, the mentioned Decree was adopted to evade the legal barrier prohibiting mining activity in the areas where endangered species of flora grow. It is an issue of serious corruption risks when mining laws are amended to serve the needs of a private project. At the same time, this manner of legal amendments undermines the mining project and investments therein, as the governmental decree has a lower legal force than the Law on Flora and the Mining Code. **In case of judicial proceedings, the court may decide to directly use the prohibiting regulation stipulated in Laws rather than the Decree.**

With another Decree (N. 244-N) adopted by the government on March 10, 2015 "On grading of pit ramps for haul roads", Lydian was allowed to save more than 100 million USD just by changing the technical parameters of mining operations[16]. Under the new regulation, the permissible slopes have been increased to 10 percent from 7 percent in the past[17]. The company emphasizes the

[15]Government Decree 781-N from 31 July, 2014 on "Establishing the procedure of utilization of items of flora for their protection and reproduction in natural conditions" and related analytical article of Investigative Journalists.(http://hetq.am/eng/news/57011/armenian-environmentalists-in-uproar-over-government-plan-to-replant-endangered-flora-at-amulasr-gold-mine.html).
[16]Government decree of 10 March, 2015 "On grading of pit ramps for haul roads"

[17]Article in www.media.com web portal, "Lydian shares pop after Armenia's $100m gift" http://www.mining.com/lydian-shares-pop-armenias-100m-gift/

environmental benefits of this change that will decrease the waste rock removed from the pit. The goal, however, was ultimately to significantly reduce the operating costs of the project. It can also be seen in light of the industrial valuation of the deposit, as the operational costs shall be calculated during the geological expertise.

To conclude, in favor of the Amulsar project public officials have influenced the regulatory framework of the mining sector for the benefit of the mining company as opposed to the public interest.

By frequent and discretionary regulatory interference the government has crucially influenced the decision making process. Such discretion negatively affects human rights, as people who will be influenced by the awarding decision will suffer from abuse of liabilities of public officials who pursue private gain of the mining companies instead of the public interest.

3. Legal action against mine exploitation projects

4a. Judicial litigation

There is a large public concern with regard to the legality of the mining permit for exploitation of the Amulsar mine. Non-governmental organizations and citizens from impacted Gndevaz community filed a lawsuit disputing the main document, which encompasses the assessment of social and environmental impacts of the project. Particularly, on 17 October 2014 the Ministry of Nature Protection of the Republic of Armenia (RA) issued the BP-76 Affirmative Conclusion of the Environmental Impact Assessment for the exploitation of the Amulsar open-pit mine near Gndevaz community. A year and a half later, on 29 April 2016, the new expert conclusion BP-35 was issued, which did not essentially differ from the previous one. In accordance with the national legislation, the RA Ministry of Nature Protection is the responsible authority to conduct the state environmental expertise ("expertiza" in OVOS system countries) of the mining projects submitted by the mining company. In particular, the EIA Expert Conclusion is adopted by the "Center for Environmental Impact Expertise", which is a state body within the structure of the Ministry of Nature Protection of Armenia. It is necessary to emphasize that the indicated Center is not an independent expert organization but a state body in the structure of the Public Authority responsible for making decisions on environmental matters. The status of the mentioned Center is also clearly defined by the Law on Environmental Impact Assessment and Expertise as a body with administrative liabilities.

Currently the Amulsar mining permit is being challenged in Armenia's Administrative Court. Two environmental NGOs and more than ten members of affected Gndevaz community of Armenia filed a

lawsuit against the Armenian government disputing the legality of the Social and Environmental Impact Assessment (SEIA) expert conclusion and other permitting documents, allocated after the expert conclusion. In the current phase of judicial proceedings, the plaintiffs demanded the court to initiate an alternative independent expertise on the most critical impacts of Amulsar, namely water and biodiversity. The court allowed the plaintiffs to present independent expert opinions concerning these issues to dispute the position of state's environmental experts. In fact, if the Administrative Court rules that state environmental expertise was done in violation of legislation, then the implementation of the project will be terminated as the mining permit was issued based on the SEIA expert conclusion, in breach of national legislation.

The Ruling of April 9, 2015 by Armenia's Administrative Court stated that the SEIA Expert Conclusion followed by the state environmental expertise was just an opinion of specialists and not a permitting administrative act and therefore did not directly generate legal consequences[18]. The court's findings on the issue of legal meaning of the SEIA conclusion significantly affected administrative practice, as the Ministry of Nature Protection has already referred to the mentioned findings as its official position to a request of information[19]. To sum up, the main point of the Court's ruling is that the SEIA Expert Conclusion is not an administrative act but just an opinion of experts, which means that other independent experts have the same liabilities to present their own conclusions during the litigation, if any. The interim ruling of the court was disputed at the Aarhus Convention Compliance Committee, which discussed the admissibility of the Communication on the issue brought by the environmental NGO "Ecological Right" in its 53rd meeting in June 2016 and found it admissible[20].

Therefore, the Court's ruling factually means that state environmental expertise is not the exclusive liability of state bodies and consequently, the Affirmation of the Expert Conclusion is not a legally binding act but just an opinion of specialists, and so the awarding of mining right will be legally vulnerable and will become the subject of conflicts and litigations.

4b. Communication with the Aarhus Convention Compliance Committee

At the same time, a Communication is launched by the Aarhus Convention Compliance Committee of the UN Economic Commission for Europe (UNECE), arguing the relevance of water and

[18]The Decision of the RA Administrative Court VD/1049/05/15.

[19]Official written answer of the RA Ministry of Nature Protection to the Environmental Non-Governmental Organization.

[20]Official website of the UN Economic Commission for Europe (http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/preacccc2016138-armenia.html

biodiversity assessment matters of state expertise of the Amulsar SEIA. It will result in international measures applied to the Armenian government with regards to the compliance of state environmental expertise to the international commitments set up by the Aarhus Convention.

Provisions of the Convention alleged to be in non-compliance

The claim has been related to a failure by the Armenian authorities to implement a range of provisions of the Convention. In particular, the following provisions have not been complied with:

- Article 9 par. 2 in conjunction with article 6 par. 8;
- Article 9 par. 2 in conjunction with article 6 par. 2 (c);
- Article 9 par. 2 in conjunction with article 2 par. 2 (a);
- Article 9 par. 3 in conjunction with article 2 par. 2 (b);
- Article 9 par. 3 in conjunction with article 2 par. 3 (1);

1. Article 9 par. 2 in conjunction with article 6 par. 8 of the Convention were violated by finding that plaintiffs have no legal standing to sue the BP-76 Affirmative Conclusion of the Environmental Impact Assessment for the exploitation of Amulsar open-pit mine provided by the RA Ministry of Nature Protection.

Provisions relating to taking due account of the outcome of public participation can be found in all three articles related to public participation. Thus, public authorities must ensure that the decisions takes due notice of the outcome of public participation, and so public comments in relation to environmental matters must be taken into account. In fact, through dismissing the claim, the RA Administrative Court rejected the opportunity to protect the position of the public concerned regarding the admissibility and thoroughness of its comments presented to the public authorities in relation to the Amulsar mining project.

2. Article 9 par. 2 in conjunction with article 6 par. 2 (c) was violated by the RA Administrative Court's finding that EIA Affirmative Conclusion of the RA Ministry of Nature Protection is not the "final administrative act," and thus the legality of the EIA Expert Conclusion cannot be subject to litigation in the Administrative Court.

More importantly, the public concerned shall be informed of the public authority responsible for making the decision. In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the OVOS and the state environmental expertiza should be considered jointly as a decision-making process involving a form of an EIA procedure and that the conclusions of the state environmental expertiza should be considered as a decision on whether to permit an activity.

3. Article 9 par. 2 in conjunction with article 2 par. 2 (a) was violated, as the RA Administrative Court Ruled that the EIA Affirmative Expert Conclusion of the RA Ministry of

Nature Protection is not the "final administrative act." The "Public authority" refers to the government at national, regional and other levels. The final stage of the EIA procedure is the State Environmental Expertise and further Affirmation of the EIA Expert Conclusion by the Minister of Nature Protection, in line with Armenian legislation and practice. Armenian legislation does not foresee no other state body responsible for environmental policy and decision-making or ensuring the public participation but the RA Ministry of Nature Protection. Therefore, the Court's Ruling factually means that the RA Ministry of Nature Protection is not the state liable Public Authority, and its Affirmative Expert Conclusion is not a legally binding act but rather an opinion of specialists.

4. Article 9 par. 3 in conjunction with article 2 par. 2 (b) was violated by the finding, according to which plaintiffs have no legal standing to challenge the Positive Conclusion of the Expert Commission on Protection of Lake Sevanin court with regards to the issue of impact of the Amulsar mining project on Lake Sevan.

According to the Law on Lake Sevan, the Decision of the Lake Sevan Protection Expert Commission is obligatory if the corresponding activity is planned to be conducted in the area of enforcement of the Law on Lake Sevan. In line with article 3 of the Law on Lake Sevan, the Amulsar mine is located in the lake's water catchment area, and the Expert Commission is committed to adopt the Decision on Permission or Rejection of the mentioned mining project, based on article 25 of the mentioned Law.

Although, the Expert Commission on Protection of Lake Sevan is not the public authority, the analysis of legislation makes it evident that this Commission has certain legally defined liabilities to make Decisions on the Permission or Rejection of industrial projects pertaining to the issues of Lake Sevan's ecosystem based on the environmental assessment. In fact, the Decision of this Commission is the same Affirmative Expert Conclusion, as the Law on Lake Sevan does not stipulate any other legal definitions regarding the procedure of adoption of Decisions.

Meanwhile, the legislation does not directly regulate the public participation procedure regarding decision-making issues of the Expert Commission on Protection of Lake Sevan. The position of this Commission does not even affect the final EIA conclusion approved by the liable public authority because the RA Ministry of Nature Protection is not committed to taking into account the conclusions and decisions adopted by Expert Commission on Protection of Lake Sevan, whereas the BP-76 Affirmative Conclusion of the Environmental Impact Assessment refers to the position of the Expert Commission on Protection of Lake Sevan. Thus, the Expert Conclusion of the Expert Commission on Protection of Lake Sevan does not have any relation with the Expert Conclusion of the RA Ministry of Nature Protection.

Moreover, the Lake Sevan area includes more than 40 surrounding communities, which can directly be affected by any impact on the lake's ecosystem. In addition to that, the lake is of a vital importance tothe whole country and the Caucasus region as well, with its 35 billion cubic meters of spring water

and unique ecosystem. None of the surrounding communities participated in the decision-making process. In fact, the Decision of the Expert Commission on Protection of Lake Sevan is supposed to be based on the assessment and consideration of general impacts and the impact on the mentioned communities.

Having in mind that public participation in environmental decision-making in Armenia is done on environmentally sound issues through the EIA procedure, the Expert Conclusion of the Expert Commission on Protection of Lake Sevan must ensure full public participation in accordance with the national legislation, as its Decisions entail the right to generate industrial activities with potential impact on Lake Sevan.

Thus, article 9 par. 3 in conjunction with article 2 par. 2 (b) of the Convention was violated when the court dismissed the claim of the plaintiffs to litigate the substance of the Affirmative Conclusion of the Expert Commission on Protection of Lake Sevan. In fact, under the national law, this Commission is a Legal Entity performing specific public administrative functions in relation to the environment.

5. Pursuant to the problems of judiciary revealed in the current Communication, the enforcement is surely linked to access to justice, and the access to justice pillar indeed contributes to the enforcement of the other two pillars in certain ways. However, any provisions of the Convention not directly enforceable through article 9, as well as the access-to-justice provisions themselves, require mechanisms for their enforcement. Paragraph 1 clearly states the link between having a clear, transparent and consistent framework for implementing the Convention and properly enforcing it. Article 3, paragraph 1, requires each Party to establish and maintain a "clear, transparent and consistent framework" to implement the Convention.

The violation of article 9 par. 3 in conjunction with article 2 par. 3 (1) already has a persistent character in Armenian legal practice. Since 2001, when Armenia ratified the Convention, three Communications were launched concerning non-compliance of different provisions of the Convention. During all three Communications, the Compliance Committee found that there was non-compliance with a number of provisions. As we can see, blatant infringements of the Convention continue, and no substantive progress is made at least with respect to the issues presented in the current Communication.

Overall, the Communication emphasized the fundamental problem of permanent and total inobservance of the provisions of the Convention by the Party concerned, which is reflected in the absolute ignorance of the regulations of the Convention by the judicial authority. It means that no tangible efforts were applied by state bodies and other liable entities aimed at improving the level of knowledge of the judiciary regarding the conventional regulations. It seems that all progress reports

presented to the Secretariat of the Convention were just imitations of activity and not actual work with substance.

4c. Chronological list of legal activities in relation to the project of exploitation of the Amulsar open-pit mine

First process of complaint on the Environmental Impact Assessment and public hearings on Amulsar project

- 05.06.2012 – Expert Commission on Protection of Lake Sevan adopted a negative (rejecting) expert Conclusion concerning the Amulsar open-pit mine exploitation project.
- 31.07.2012 – Center of Environmental Impact Assessment of the RA Ministry of Nature Protection adopted a ppositive conclusion of the Environmental Impact Assessment BP-65 concerning the Amulsar open-pit mine exploitation project without paying attention to the grounds of the negative conclusion of the Expert Commission on Protection of Lake Sevan.
- 14.12.2012 – community members of Jermuk town Victoria Grigoryan and Makedon Aleksanyan, as well as the inhabitant of the town of Sevan Anna Shahnazaryan petitioned the Prime Minister to take corresponding measures on the recognition of the towns of Jermuk, Martuni and Sevan as the concerned (affected) communities in relation to the exploitation of Amulsar open-pit mine, which is located near Jermuk and directly on the water catchment basin of Lake Sevan. The initiative of recognition of indicated communities as the concerned (affected) communities would grant the population of those communities the right to participate in the decision-making procedure with regard to the mining operations, and the relevant responsible bodies would be committed to involve the population of those communities in public hearing processes during the Environmental Impact Assessment of the project.
- 28.12.2012 – Expert Center of Environmental Impact Assessment of the RA Ministry of Nature Protection responded that Jermuk, Martuni and Sevan towns could not be recognized as the communities concerned.
- 13.05.2013 –Jermuk resident Victoria Grigoryan filed an appeal at the Administrative Court of Vayots Dzor Province against the RA Ministry of Nature Protection demanding to recognize the town of Jermuk as the concerned (affected) community in relation to the exploitation of Amulsar open-pit mine.
- 16.05.2013 – the Administrative Court of Vayots Dzor Province ruled that the applicant didnot have legal standing to litigate the issue in the court because the exploitation of the mine didnot directly interfere with her rights and liberties.
- 27.07.2013 – the Administrative Court of Appeal dismissed the appeal against the Ruling of the RA Administrative Court, as the court of higher instance.

- 31.07.2013 – the Court of Cassation dismissed the appeal against the Ruling of the RA Administrative Court of Appeal, as the court of supreme instance.
- 22.07.2013 –Gndevaz resident Tehmine Yenoqyan petitioned the RA Prime Minister to invalidate the positive conclusion on the Environmental Impact Assessment BP-65 concerning the Amulsar open-pit mine exploitation project. Her request was denied.

Protest activities related to the promotion of Amulsar project by the international bodies

- 18.10.2013 –Open Letters were sent to the Permanent Under Secretary and Head of the Diplomatic Service of the Foreign & Commonwealth Office, UK, Sir Simon Fraser and the Secretary of State of the United States of America, Mr. John Kerry **on the Matter of Diplomatic Interference in Private Mining Processes in Armenia to** draw attention to the actions of the ambassadors of the United States and Great Britain to Armenia regarding the Amulsar project. The letter particularly pointed out that these actions were in conflict with Article 41 of the Vienna Convention on Diplomatic Relations, and the norms and diplomatic code of conduct stipulated therein. In response, Simon Fraser refused to discuss the fact of interference by the British Ambassador in Amulsar issue. No answer was ever received from Secretary John Kerry.
- 24.10.2014 – members of Gndevaz community applied to the EBRD Ombudsman with the request to stop financing the Amulsar project. 209 members of the community signed the letter. Communication is still in the process.

Second process of complaint on the Environmental Impact Assessment and public hearings on Amulsar project

- 17.10.2014 - Ministry of Nature Protection of the Republic of Armenia approved the new BP-76 positive (affirmative) Conclusion of the Environmental Impact Assessment for the exploitation of Amulsar open-pit mine.
- 17.10.2014 - Expert Commission on Protection of Lake Sevan approveda positive Conclusion regarding the issue of impact of the Amulsar mining project on the ecosystem of Lake Sevan.
- 02.04.2015 - more than ten members of the affected community (Gndevaz), as well as two environmental non-governmental organizations ("Ecoera" and "Ecological Right" NGO's) filed a claim at the RA Administrative Court against the RA Ministry of Nature Protection and the Expert Commission on Protection of Lake Sevan litigating their Affirmative Expert Conclusions.
- 09.04.2015 - a Ruling of the RA Administrative Court was adopted, according to which the plaintiffs did not have legal standing to sue both the EIA Positive Expert Conclusion and the Expert Conclusion of the Expert Commission on Protection of Lake Sevan in the Administrative Court.

- 27.04.2015 - the plaintiffs brought an appeal against the Ruling of the RA Administrative Court to the RA Administrative Court of Appeal (court of higher instance in administrative judiciary).
- 12.06.2015 - the Administrative Court of Appeal rejected the appeal and affirmed the legal position of the Administrative Court.
- 23.06.2015 - the appeal was brought to the Court of Cassation (court of higher instance).
- 22.07.2015 - the Court of Cassation refused to admit the appeal into proceeding.
- 22.10.2015 - the judicial proceeding was restarted only regarding the issues of documentation issued by the Ministry of Energy and Natural Resources and is still in motion.

- 10.02.2016 – "Ecological Right" environmental Non-Governmental Organization launched a Communication at the UN Economic Commission for Europe, Aarhus Convention Compliance Committee on non-compliance by Armenia with the rights foreseen by the Aarhus Convention, with regard to the court rulings on Amulsar case.
- 24.06.2016 – The Compliance Committee of the Aarhus Convention defined the Communication on Amulsar mine as admissible and subject for review.

4. Activities related with corruption risks

As common practice, relatively big mining companies have affiliated development funds, through which they primarily perform social mitigation projects. However, the social and environmental projects often went out of corporate social responsibility because of disproportionately significant payments to some social institutions where public officials had affiliations.

Prior to receiving the permit, Lydian allocated significant financial resources to funds that are controlled by community leaders or state officials. Clearly, such charities affect the position and the decisions of mayors of the affected communities and other respective officials. In particular, Lydian allocated almost half a million USD to "Luys" foundation[21] and "Jermuk town development" fund[22]. The president of Armenia and the former prime minister have led the steering committee of "Luys" foundation. Meanwhile, the son of the Mayor of Jermuk is the head of "Jermuk town development" fund. Following the financial contribution to "Jermuk town development fund" by Lydian, theMayor of Jermuk – one of the affected communities- received direct financial assistance from the mentioned fund led by his son. Afterwards, the mayor, contrary to his previous position, "suddenly" understood that the gold mine project near his town is not that harmful.

[21]Report of "Luys" foundation on its activities in 2014

[22]Report of "Jermuk town development" fund on its activities in 2013

5. Conclusion

To summarize the above-analyzed issues, both general and project based conclusions can be done. Surely, the Amulsar project is being operated in a very poor legal and institutional environment with lots of legal gaps and incompetent state institutions. Even though the general legislation regulates the issues of mining permits, the comprehensive assessment of costs and benefits of mining projects is impossible mainly due to the lack of methodology and sub-legal regulations.

The absence of a regulatory framework for biodiversity offsetting has led to random and arbitrary decision-making, which does not reflect the real picture of risks and impacts on environment. The lack of confidence towards the system of mining permits stimulates judicial litigations, where alternative expert opinions are being presented and discussed during the court sessions.

The system of calculation of biodiversity loss is missing. According to current regulations, the assessment shall be done through the method of industrial valuation of the deposit, where the intended value of environmental items can be calculated in the initial phase of the affirmation of the deposit. If performed properly, it can be a good preventive measure to avoid the approval of small and medium-sized mining deposits that cause significant damage without essential industrial benefits. However, there is no system for valuation of environmental items and biodiversity in particular. Hence, a legal requirement to consider the social and environmental aspects during the geological expertise and calculation of industrial value of the deposit is practically impossible. None of the mining projects assessed have been in line with this requirement, including Amulsar. Taking into account that the area of Amulsar is located in a zone where almost all vulnerable items exist, the industrial valuation of Amulsar deposit shall be the subject for "special technical and economic calculation" required by the legislation. Meanwhile, this seems to be impossible because there are no criteria for valuation, as discussed above.

The most distinctive features of Amulsar mining project are the legal amendments to serve the needs of the project. Environmental legislation and mining regulations have been amended solely for this purpose. The dates of legal amendments entirely correspond with the dates of public hearings of the project or the modification of it. the aforementioned Government Decree No. 781-N on "Establishing the procedure of utilization of items of flora for their protection and reproduction in natural conditions" was adopted by the government to allow the company to transfer the endangered species of biodiversity to national parks or botanical gardens as a means of biodiversity offsetting. The mentioned legal amendments did in fact relieve the government of the legal obstacles it had for awarding the mining right. The noted amendments are not in line with the principle of respect of rule of law and national legislation or with the Performance Requirements and Standards of EBRD and IFC. The legal amendments cause concern about the rule of law and raise public suspicions of corruption.

Obviously, the "project-based" legal amendments along with the so called "charity" allocations are in outright confrontation with the principle of Rule of Law. It is very important to highlight that both IFC and EBRD committed to obey the rules of national legislation in their performance standards and requirements. Therefore, the actions of pleasing the public officials and community leaders through charity contributions contain very grave corruption risks.

The contribution by Lydian Armenia to the establishment of Jermuk National Park is hard to vie was biodiversity offsetting simply because the extermination of the area of endangered biodiversity cannot be compensated or rehabilitated, as addressed by the expert opinion of WWF Armenia Branch. According to the WWF expert opinion, "The EIA also repeats another misleading claim, according to which, "Land use changes and violations pertinent to the Project will impact different bird species, however, **since many of them are mobile and capable of adapting, they will be able to move to alternative areas,**" /Table 5.7.7 and 5.7.8/. This is a baseless and unrealistic claim because there are no such things as empty "alternative areas." If there are nearby areas conducive to that particular species, then they are already occupied by the same species. If the nesting pair will be forced to leave the area due to the elimination of its habitat, then it is very likely that the pair can be deemed lost on the national level."

More importantly, the legislation speaks about protection of the area, where the species of endangered biodiversity grow, live or migrate but not the habitat itself. Therefore, even randomly adopted government decrees or offsetting memorandums are incapable of overcoming the legal boundaries to prohibit mining in the mentioned areas.

While summing up the issue regarding biodiversity offsetting, it is worth pointing out to the conclusion of WWF on the entire assessment of the biodiversity protection aspects of the Amulsar project: "Overall, a poor research has been done on a number of species of national importance registered in the Red Book of Armenia, the significance of the Amulsar project area for birds on the national level has been underestimated, the negative impact of the project has been seriously underestimated (or not estimated at all) for many species, and no measures have been proposed for offsetting their losses. Data received from the research is often misinterpreted and both the reports and the EIA have not used or have ignored published scientific data on various species. Proposed measures for the conservation of impacted species require serious expert discussions. Therefore, measures proposed in the biodiversity offsetting program are incomplete and need to be discussed and reconsidered."

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