

MAKE IT YOUR BUSINESS:

How Ireland can ensure businesses respect human rights and the environment

Annex 2: Company Responses

In the preparation of this report, the companies mentioned in the case studies throughout the report were given the opportunity to respond to the content of what has been outlined in each case study. A number of companies engaged in this research provided a response when contacted, and their full detailed responses are published here in full.

Case Study : Poisoned air and violent evictions – ESB and Coal Marketing Company’s links with the Cerrejón mine in Colombia

Response received from Cerrejón:

We thank you for the opportunity to offer our views regarding the Case Study – ESB and Cerrejón and we hope that this letter helps to clarify, and, in some instances, correct the information mentioned therein. We note that the report has as its main source the Christian Aid Report “Undermining Human Rights: Ireland, the ESB and Cerrejón coal” we would like to refer you to the public responses we have previously provided to Christian Aid and other NGOs regarding the same accusations quoted in the case study. Many of them are published on our website as well as in the Business and Human Rights Resource Centre portal.

Firstly, at Cerrejón we are aware of our duty to develop an operation respectful of Colombian legislation and recognized international standards. We are committed to respecting the rights of workers, the environment and neighbouring communities, which is why we make on-going efforts to constantly improve in identifying, preventing and lessening the impacts produced by our operation.

Through our human rights due diligence system and the continuing engagement that we have with local communities and other stakeholders, we seek to better understand and manage our human rights risks as well as understand the legitimate concerns expressed by community members regarding any real or perceived impacts or risks caused by our operation. We take their concerns seriously and strive to minimize any impacts that could affect their rights. We also make continuous efforts to contribute to improving the living conditions of the communities and the surroundings by aligning with Sustainable Development Objectives.

Cerrejón is an integrated operation comprising of a mine, 150 Km railway operations as well as a port and has been operating for more than 30 years in this area. It is the main private sector employer in the region, with more than 10,000 workers (direct and indirect). Of these, more than 60% are originally from La Guajira. Cerrejón uses only 0.8% of the land in La Guajira, a much smaller figure than the 69,000 hectares that are included in the mining titles. The operational footprint represents 15,323 ha of which 10,922 ha are active and 4,401 ha have been rehabilitated (representing 88.3% of the areas no longer being mined).

The Company is a major economic contributor to the region representing 45% of La Guajira's GDP and the Company has paid around USD \$8 billion over the past 19 years in taxes and royalties.

Cerrejón invested USD \$3.9 million in social programs in 2020 alone. These voluntary and culturally appropriate programs aim to enhance the living conditions of communities, by, for example providing: access to water, educational strengthening, capacity building, programs to promote livelihood projects, and employment opportunities, among others. These programs have benefitted approx. 400 communities in our area of influence (urban and rural) near the mine, railway and port. In 2020, Cerrejón also invested USD \$43 million in environmental management programs including impact management (air and water quality, waste management, land rehabilitation, biodiversity protection, environmental offsets, etc).

Regarding the allegations mentioned in the case study we would like to mention the following:

Forced displacement and the Roche Community

- Throughout our history, any purchase of property from the communities in the area was made lawfully and in good faith.
- Since adopting the International Finance Corporation's social and environmental performance standards in 2006, we have applied these standards to land purchases and resettlement processes to ensure participatory and dialogue-based processes to identify and manage impacts; determine the properties for transfer; design houses and villages; deliver new dwellings; provide access to basic services; purchase land for agricultural work; provide technical support; and, introduce programs for educational and psychosocial development as well as initiatives which support the elderly. These standards did not exist when Cerrejón first started operating.
- In respect of the expropriation that occurred in 2016 at Roche, it is important to clarify that Cerrejón and this community began negotiations in 2003 and reached agreements after 12 years of conversations. Despite having reached agreements with 100% of the families, the expropriation of one family took place on 24 February 2016 due to the non-compliance by the family with the agreements reached voluntarily in October of 2015. The expropriation was carried out pursuant to a court order; the proceedings were led by a judge from the municipality of Barrancas accompanied by officials from the Public Ombudsman's Office, the Public Prosecutor's Office, the Colombian Institute of Family Welfare, and the Barrancas Family Services Agency.
- This family, as well as the other 24 families from Roche are currently living in the new site and received the agreed upon compensations and are benefitting from post-resettlement programs.

Hazardous mine: Nearby communities exposed to poisonous dust, air, soil and water pollution

- Cerrejón has a robust Environmental Management Plan that complies with Colombian legislation and aligns with international standards for environmental management. It is certified ISO 14001. This Plan is also aligned with the environmental permits granted by the ANLA (National Environmental Licensing Authority) and Corpoguajira (regional environmental authority), which monitor Cerrejón's compliance on an ongoing basis.

Air quality

- We acknowledge that it is in the nature of an open-pit mining operation to emit a certain level of particulate matter emissions into the air. Cerrejón is committed to the ongoing mitigation of impacts on air quality in La Guajira, controlling emissions and avoiding health impacts on our employees and neighbouring communities. We strive to apply the best commercially available tools for air quality control.
- There are several factors unrelated to Cerrejón's operations which exacerbate air quality issues in La Guajira. These include both natural and anthropogenic factors such as marine aerosols, desert sands, open unvegetated / dust-producing areas, and forest fires. Cerrejón measures these regional background conditions at recording stations located upwind from its operations (meaning that

these stations do not record emissions from Cerrejón's operations) to understand how they are impacting air quality.

- Cerrejón complies with applicable Colombian standards on air quality and we consistently monitor particulate matter PM10 and PM2.5.
- Since 2017 Cerrejón has developed and employed an air monitoring mechanism, TARP (Trigger Actions Response Plan), which complements the real-time air quality forecasting system we have put in place to implement preventive or reactive actions based on the actual probability of risk according to the prevailing wind direction.
- Among other measures, we water roads with low-quality water to lower the particles in the air, use barriers as well as a network of spray cannons above pits and landfills to reduce the volume of particulate matter, wet and compact the coal in train cars, reduce and even suspend operations when necessary, rehabilitate lands intervened by mining to establish plant cover and prevent the emission of particles from wind erosion, and control coal combustion events at the pits.

Water volume and quality

- At Cerrejón we are aware of the challenges that exist in La Guajira due to the water deficit in the region. This is why we have long been in a process to reduce our consumption of higher-quality water (coming from the Ranchería River and its aquifer) and have managed to reduce this by half over the past 10 years.
- The data from stations located before, inside and after the mining operation show that the flow rate of the Ranchería river increases by up to 30% as it passes through the mining area.
- Results from monthly lab samples show that our operation complies with all water quality parameters imposed by Colombian legislation. In relation to heavy metals, we take monthly measurements of over 60 parameters including iminium, arsenic, barium, beryllium, boron, cadmium, calcium, cobalt, copper, iron, lithium, manganese, magnesium, mercury, molybdenum, nickel, lead, selenium, sodium, zinc, chrome, and cyanide. Results show that the levels are significantly below the regulatory limits (in compliance with the standard) for water consumption for domestic use.
- We make continuous efforts to reduce the consumption of higher-quality water in our operation. Currently only 11% of the water consumed by Cerrejón is taken from the Rancheria river and is used mainly for human consumption (high quality water). The rest of the water used (89%), is low-quality water - not suitable for human or animal consumption or to irrigate crops- which is utilized to control particulate matter and maintain air quality in order to prevent any health impacts on employees, contractors and these neighbouring communities.

We hope that this information is useful and helps you take a balanced view in the case study and report you are working on.

Should it be of assistance, we are willing to engage with you in a meaningful and constructive engagement on this occasion and in the future.

ESB Response to The Irish Coalition for Business and Human Rights

[Introduction](#)

The Irish Coalition for Business and Human Rights provided a draft report to ESB on 18.09.21 to which ESB subsequently responded. From our reading of the final report, we do not see any significant changes or a willingness to accept our comments. For these reasons, we welcome the opportunity to put our responses on the record.

Our critique of the The Irish Coalition for Business and Human Rights document revolves around their claims regarding:

1. Role of Bettercoal
2. ESB's adherence to the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights
3. ESB Human Rights policies

Context

ESB is fully committed to supporting the delivery of the national greenhouse gas reduction targets. As a consequence of that it is Government policy that coal burning in electricity generation will cease in 2025. It is anticipated that coal fired generation will continue to decline in the future.

Role of Bettercoal

In the period between 2013–2018, coal purchased by ESB from Cerrejón mine amounted to between 2.2% - 3.5% of the total coal produced at the mine. ESB joined Bettercoal in 2014 as part of our commitment to use responsibly sourced coal. Bettercoal is working towards a globally responsible coal supply chain. The Irish Coalition for Business and Human Rights' **assertion, that Bettercoal is an industry funded assessment initiative is misleading**. It was established by a group of major European coal buyers, including utilities, rather than the coal mining industry.

Given the relatively small percentage of annual production that ESB has purchased from the Cerrejón mine, membership of Bettercoal enables ESB to act in co-operation with other entities through the Bettercoal organisation, with a view to the collective leverage of those entities being combined and increased so as to exert greater influence on the owners of the Cerrejón mine.

Its mission is to promote continuous improvement in the mining and sourcing of coal for the benefit of all the people impacted by the industry – including workers and their communities. It carries out its assessments using [ten key principles](#).

These are Legal Compliance, Policies and Systems, Business Ethics (both disclosure/transparency and fraud/corruption), Human Rights, Workers Rights, Community Engagement, Environment, Pollution Prevention and Biodiversity. Bettercoal commenced its first assessment of the Cerrejón mine in Q3 of 2016. The assessment included background research, the completion of a questionnaire by the owners and managers, and visits to the site between 3rd and 13th of July 2018. This included interviews with senior management and other important stakeholders such as community representatives, trade unions, Government, and NGOs. Senior management representatives of the company, operating the mine, were offered the opportunity to comment on the assessment's findings prior to its finalisation.

The Bettercoal assessment indicated that the mine's current operating principles, including how it conducts its business, treats its staff, and works with its neighbours are essentially in line with the Bettercoal best practice code.

Of the 31 assessment criteria used by it across the 10 principles outlined previously, BetterCoal's report indicated that it considers that Cerrejón:

- *Meets Requirements* in relation to 15 of the criteria,
- *Substantially Meets* the requirements in relation to a further 12 criteria, and
- *Partially Meets* the requirements on further four.
- The assessment does not record any Misses [Fails] for any of the criteria.

The table at Appendix 1 outlines these findings against the 10 principles.

As part of the assessment process, the independent assessor drafted a Continuous Improvement Plan for Cerrejón mine. This detailed the actions required to enhance compliance with the 10 principles of the Bettercoal code. Progress against this plan is being assessed by Bettercoal on an ongoing basis. Bettercoal will keep its members, including ESB, updated on the progress that is being made.

For the reasons set out above , we do not accept The Irish Coalition for Business and Human Rights' criticisms of the Bettercoal organisation and process.

We would particularly encourage The Irish Coalition for Business and Human Rights - or any other interested NGOs - to join the Bettercoal Technical and Advisory committee of experts. In this way, NGOs like The Irish Coalition for Business and Human Rights could further enhance both its operations and assure themselves of the efficacy of the Bettercoal assurance process.

[ESB's adherence to the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights](#)

In your document, you make the statement that: "The OECD Due Diligence Guidance clearly states that participation in an initiative does not shift responsibility from the enterprise to the initiative for adverse impacts..." [as described in Paragraph A12].

However you fail to note that the OECD's guidance in this regard goes on to state: "Meeting the expectation in paragraph A.12 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact." See clause 20, page 24 of the OECD Guidelines for Multinational Enterprises.

Being an active member of Bettercoal has enabled ESB to ensure that the mine from which it has purchased coal has been subject to an independent assessment, carried out in accordance with the Bettercoal Code. This is consistent with both the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. Bettercoal membership and assessment enables ESB to leverage our influence on the mine's operations while also ensuring that regular, high-quality assessments are carried out.

This is entirely consistent with the approach favoured by both the UN and the OECD (see, for example, Paragraph B(2) of Chapter II of the OECD Guidelines, page 20). **Given that an industry collaboration has been established, with a code substantively aligned with both the Guidelines and the UN Guiding Principles and which is the subject of a process of continual refinement and improvement, it is clear that the obligations arising from the Guidelines have been met.**

ESB also notes the due diligence requirements of the OECD Guidelines. ESB refers to **paragraph 10 of Chapter II, which notes the purpose of due diligence as being to ‘identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed’**. In other words, the Guidelines identify that Enterprises ought to have in place a process by which potential adverse impacts can be identified and either prevented or mitigated.

That is what is achieved by way of the Bettercoal assessments, which lead to the implementation of monitored Continuous Improvement Plans. The implementation of those Plans results in specific changes and improvements in the operation practices of mines from which Bettercoal members purchase coal and allows for an on-going measurement of the standards being implemented by these mines.

Your document also asserts that the better coal initiative is “a flawed, industry funded initiative...” This is a misleading characterisation of the Bettercoal process. As pointed out above, it is not funded by the coal mining industry it is a utility industry funded entity. **Given its consistency with both the UN and the OECD guidance on these matters, we do not understand how Bettercoal can be dismissed as being ‘flawed.’ We believe that The Irish Coalition for Business and Human Rights’ criticisms are unwarranted.**

In The Irish Coalition for Business and Human Rights’ document it is asserted that ‘Had ESB... been obliged under Irish law to undertake a meaningful and adequate human rights and environmental due diligence process, it would have been required to assess risks in its business relationships, engage with stakeholders, and take measures to prevent or mitigate impacts on the communities...’.

The Irish Coalition for Business and Human Rights’ critique is not in accord with the reality that ESB has done precisely what is envisaged by the Guidelines and acted in cooperation with other entities to exercise leverage on Cerrejón. It follows that ESB rejects this assertion.

ESB Human Rights policies

Contrary to what has been alleged by The Irish Coalition for Business and Human Rights, ESB has published and adheres to, a suite of detailed documents covering the range of aspects of human rights, both in the conduct of its business and in its supply chains. These policies include:

- i. Anti-Bribery Corruption and Fraud Policy
- ii. Cultural Diversity Policy
- iii. ESB Code of Ethics
- iv. ESB Code of Ethics and Way We Work
- v. ESB Equal Opportunities and Diversity Code of Practice
- vi. Environment and Sustainability Policy
- vii. Health and Safety Policy
- viii. Group Procurement Policy
- ix. Modern Slavery Policy
- x. Whistleblowing and Protected Disclosures Policy

For convenience, these policies are publicly available on page eight of ESB Annual Report 2020 and are accessible on ESB’s website.

Given this extensive list of publications, their availability on our website, and references to and discussion of them in our Annual Report, it is incorrect and misleading to assert that ESB ‘does not have a human right’s policy’ or that ESB has not made a public commitment or has not established processes in respect of these matters.

Furthermore, in accordance with section 42 of the Irish Human Rights and Equality Commission Act, 2014, ESB is required to set out an assessment of the human rights and equality issues relevant to its functions

and the policies, plans and actions in place or proposed to be put in place to address those issues. In compliance with this obligation, a human rights assessment is presented in our Sustainability (Corporate Social Responsibility) Report 2020, which was published in summer 2021 and is available on ESB's website.

This identifies where it considers risks to human rights may exist in ESB's business, including in supply chains and the measures taken to address these risks.

In addition, ESB's Environment and Sustainability Policy aligns with the EU Sustainable Grid Charter and incorporates policies on compliance with relevant human rights obligations.

ESB has remained engaged with the Cerrejón mine notwithstanding the fact that it has not used coal from it since late 2018 and that it is Government policy that Ireland will cease generating electricity from coal fired generating plants by 2025. ESB considers that it is appropriate for it to remain engaged with the continuous improvement process with a view to ensuring that the standards implemented at the Cerrejón mine are improved and any allegations of adverse impacts are addressed.

Conclusion

In summary, a more balanced review of the issues, would recognise that

1. ESB has used the pooled leverage arising from its membership of Bettercoal to deliver better outcomes via the Bettercoal Assessment process in Cerrejón.
2. The Bettercoal process is fully in accord with international best practice as set out in both the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.
3. ESB has a comprehensive suite of detailed documents covering the range of aspects of human rights freely available on our website and discussed in publications, including our annual report.

For these reasons, we disagree with The Irish Coalition for Business and Human Rights' assertion that ESB has failed to take the necessary actions to appropriately address matters associated with the Cerrejón mine.

Appendix 1	
Bettercoal Principle	Assessment Finding
<i>Principle 1</i> – General Implementation – Laws and Regulations	Meets
<i>Principle 2</i> –General Implementation – Policies and Procedures General Whistle-blowing Mine Closure	Partially Meets Substantively Meets Substantively Meets
<i>Principle 3</i> – Business Ethics – Disclosure and Corruption	Meets
<i>Principle 4</i> – Business Ethics – Bribery and Corruption	Meets
<i>Principle 5</i> – Human Rights General Indigenous and Tribal People Use of Security Personnel Conflict Affected and High Risk Areas	Meets Substantially Meets Meets Meets
<i>Principle 6</i> Worker’s Rights General Employment Terms Child Labour Forced Labour and Freedom of Movement Freedom of Association and Collective Bargaining Discrimination Discipline Working Hours Remuneration Health and Safety	Substantially Meets Meets Meets Meets Meets Substantially Meets Substantially Meets Meets Substantially Meets
<i>Principle 7</i> Community Engagement and Development	Substantially Meets
<i>Principle 8</i> Use of Natural Resources	Substantially Meets
<i>Principle 9</i> Pollution Prevention General Waste and Effluents Emissions to Air	Meets Partially Meets Partially Meets
<i>Principle 10</i> Biodiversity & Ecosystem Services General Protection and Conservation of Biodiversity World Heritage Sites, IUCN Protected Sites, Protected Species Legally Protected Areas Invasive Alien Species: Flora and Fauna Integrated Land Management Cultural Heritage	Meets Meets Meets Substantially Meets Substantially Meets Substantially Meets Partially Meets

Case Study : TotalEnergies in Uganda

Response received from TotalEnergies:

TotalEnergies thanks The Irish Coalition for Business and Human Rights for the opportunity to respond to its report. TotalEnergies would like to comment on certain matters and correct some details.

Background

TotalEnergies EP Uganda is currently operating an upstream oil project known as Tilenga which is part of the Lake Albert development project which also includes the Kingfisher upstream oil project (operated by CNOOC). The oil produced will be transported from the oilfields in Uganda to the port of Tanga in Tanzania via the East African Crude Oil Pipeline (EACOP), a cross-border pipeline which will be owned and operated by a separate company in which TotalEnergies will be one of the shareholders.

The Tilenga and EACOP projects were designed in such a way as to limit the impact on local populations to the greatest extent possible, by limiting relocations and supporting the people concerned. The Tilenga project will involve the relocation of around 210 households (“Project Affected Persons”), and for the EACOP project around 600 households along the pipeline’s route of 1,444 km.

The projects aim to improve the living conditions of the communities concerned, such as by facilitating access to education, health and water, and by offering training.

Accusations of Human Rights Issues

TotalEnergies EP Uganda categorically states that it has played no part in acts of intimidation and threats of members of the community. More generally, TotalEnergies EP Uganda condemns and will not contribute to intimidation, attacks, or physical or legal threats, against those who lawfully exercise their rights to freedom of expression, peaceful protest or assembly in relation to its projects, including where they are acting as human rights defenders.

All allegations received by Total EP Uganda are systematically investigated. No evidence has been found that Total EP Uganda or its contractors personnel have exercised pressure on Project Affected Persons in the resettlement process.

According to the IFC Performance Standards, Total EP Uganda has put in place grievance procedures where complaints can be lodged and are systematically investigated and treated.

Oxfam and FIDH Reports

The case study seems to be based primarily on two Community-based Human Rights Impact Assessments carried out by Oxfam and FIDH. These assessments are familiar to us and indeed we have provided links to the studies, and our responses and action plans. You will find links to these

documents below, along with several other studies published by TotalEnergies as part of a transparency initiative in relation to the projects: <https://totalenergies.com/info/tilenga-eacop-two-projects-rigorously-researched-and-assessed>

Litigation under the French Duty of Vigilance Law

The case study mentions a legal case filed by Friends of the Earth France, Survie and 4 Ugandan civil society organisations against TotalEnergies SE under the French Law on the Duty of Vigilance, in relation to the Tilenga and EACOP projects in Uganda. TotalEnergies SE considers that it fully complied with the Law on the Duty of Vigilance, as is for instance namely supported by third-party reviews and reports published by TotalEnergies as part of its transparency initiative. The case is now pending before the French Supreme Court on procedural matters.

Case Study : Booking holidays in an occupied territory – Airbnb Ireland in the West Bank

Airbnb Ireland responded to the opportunity to comment referring to this public statement that Airbnb has published on the matter:

Update on Listings in Disputed Regions - April 9, 2019

<https://news.airbnb.com/update-listings-disputed-regions/>

Today, Airbnb is announcing that we have settled all lawsuits that were brought by hosts and potential hosts and guests who objected to a policy the company recently announced concerning listings in disputed areas.

Under the settlement terms, Airbnb will not move forward with implementing the removal of listings in the West Bank from the platform. We understand the complexity of the issue that was addressed in our previous policy announcement, and we will continue to allow listings throughout all of the West Bank, but Airbnb will take no profits from this activity in the region. Any profits generated for Airbnb by any Airbnb host activity in the entire West Bank will be donated to non-profit organizations dedicated to humanitarian aid that serve people in different parts of the world. Airbnb will also implement the same approach for listings in South Ossetia and Abkhazia, two other disputed areas where the company has previously announced that we would take action.

Airbnb has always opposed the BDS movement. Airbnb has never boycotted Israel, Israeli businesses, or the more than 20,000 Israeli hosts who are active on the Airbnb platform. We have always sought to bring people together and will continue to work with our community to achieve this goal.

Airbnb recognizes that there are many other disputed territories around the world. The company will rely upon our previously identified framework to evaluate these areas. If Airbnb determines homes — the core of our business — are central to ongoing tensions, we will adopt the same approach of allowing listings and donating Airbnb's profits generated by Airbnb host activity in the region to non-profit organizations dedicated to humanitarian aid that serve people in different parts of the world.