

**EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT**

**PROJECT COMPLAINT MECHANISM**

**COMPLIANCE REVIEW REPORT**

**COMPLAINT: TBILISI RAILWAY BYPASS**

**REQUEST NUMBER: 2011/01, 2011/02, 2011/03**

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## I. Executive Summary

The Tbilisi Railway Bypass Project is a Category A project being undertaken by Georgia Railway LLC, the Georgian state-owned railway company. It involves the construction of a 28 kilometre double track electrified railway bypass that will enable Georgia's main east-west railway line to go around rather than through the city of Tbilisi. On March 9, 2010, the European Bank for Reconstruction and Development (EBRD or the Bank) Board of Directors approved a senior loan of up to EUR 100 million (equivalent in Swiss Francs) for the project, which accounts for about one third of the total project cost.

In late February and early March 2011, three complaints seeking compliance review were filed with the Project Complaint Mechanism (PCM) about the project. All three complaints were found to be eligible for Compliance Review by the PCM. All the substantive issues raised in the three complaints relate to specific aspects of the Performance Requirements (PR) set out in the EBRD's May 2008 Environmental and Social Policy (ESP). The matters raised in the three complaints can be grouped into:

- 1) Issues relating to the adequacy of the assessment of the project's social impacts,
- 2) Issues relating to the adequacy of the assessment of the project's environmental impacts, and
- 3) Issues relating to the adequacy of the assessment of the procedural aspects of the Client's engagement with project stakeholders.

In November 2011, before any funds had actually been disbursed by EBRD, Georgia Railway withdrew its request for EBRD funding. In the opinion of the PCM, this development did not obviate the need for a compliance review. The PCM appointed Professor Daniel Bradlow as an *ad hoc* Expert to conduct the compliance review. This report constitutes the findings of his compliance review.

### A. *Adequacy of the Assessment of Social Impacts:*

The complainants contend that the EBRD did not comply with PR1 of the ESP (dealing with environmental and social assessment and management); PR4 (dealing with community health, safety and security); and PR5 (dealing with land acquisition, involuntary resettlement and economic displacement) because it failed to ensure that:

- The project planning involved an adequate assessment of the risk of accident along the railway route and of how to safeguard the population from the consequences of such accidents (complaint 1);
- The project plans incorporated an adequate assessment of the cumulative effects of all the railway's impacts on the living conditions of the Avchala population (complaint 1);
- The impacts of the project on the property values in Avchala were adequately accounted for in the project planning. (complaint 2).

- The project ESIA paid adequate attention to the gap between the “public goods” being created by the project and the “private bads” that the project was imposing on the project-affected people (complaint 2).
- The third complainant, Mr. Asatiani, received adequate compensation for his land and appurtenant structures that will be lost due to the construction of this project (complaint 3).

#### *Findings Regarding First Two Complaints*

**The Bank staff and management complied with all the applicable requirements in PRs 1, 4 and 5 in regard to the social impacts of the project.**

#### *Finding Regarding Third Complaint*

**Despite the fact that Complainant number 3 has not obtained the compensation to which he would have been entitled under EBRD policies, it is not possible to make a definitive finding of Bank non-compliance. This necessarily follows from the fact that the Bank withdrew from the project before the Resettlement Action Plan (RAP) and land compensation scheme were fully implemented or before the Complainant actually lost access to his land. Therefore, in the absence of clear evidence to the contrary, it is to be expected that in the course of time the Client would have complied with its obligations under the applicable EBRD policies and compensated the Complainant.**

#### *Assessment and Mitigation of Environmental Impact*

The complainants contend that the EBRD failed to comply with PR 1 (dealing with environmental and social assessment and management); PR3 (dealing with pollution prevention and abatement); PR4 (dealing with community health, safety and security); and PR6 (dealing with biodiversity conservation and sustainable management of living natural resources) by failing to adequately assess whether:

- The project Environmental and Social Impact Assessment (ESIA) appropriately addressed the need for measures to avoid contamination of the Tbilisi reservoir and central pipeline. (complaints 1 and 2)
- The project ESIA and Environmental and Social Action Plan (ESAP) had a satisfactory plan for waste management. (complaint 1)
- The ESIA included adequate information on the location of the project’s construction corridors and power supply units. (complaint 1)
- The ESIA adequately accounted for the environmental and health risks that may be created by the materials to be used in the project. (complaint 1)
- The ESIA adequately evaluated and dealt with the consequences of the project’s encroachment onto the Tbilisi National Park, a protected nature reserve. (complaint 1)

- The ESIA paid adequate attention to the environmental and social risks, including safety risks, created by the truck traffic and other activities associated with the construction of a project of this magnitude. (complaint 2)
- The ESIA paid adequate attention to the impact of the project on the ecosystem in the project area and to the natural resources that exist in this area. (complaint 2)

### *Finding*

**The Bank staff and management complied with all the applicable requirements in PR 1, 3, 4 and 6 in regard to the environmental impacts of the project.**

### *Procedural Issues*

The complainants contend that the EBRD failed to comply with PR 1 (dealing with environmental and social assessment and management); and PR10 (dealing with information disclosure and stakeholder engagement) by failing to ensure that:

- The ESIA adequately assessed all technically and financially feasible alternatives to the proposed route, including that proposed by the residents of Avchala. (complaint 1)
- The Client conducted adequate and meaningful consultations with all stakeholders and made adequate efforts to keep these stakeholders informed about all the relevant aspects of the project. (complaint 1)
- The RAP was made available at an appropriate time to the people adversely affected by the project. (complaint 1)
- The Client paid adequate attention to the concerns about the project raised by the complainant. (complaint 2)
- The Client addressed the complainants concerns that the information they were being given by GR was not completely trustworthy and that studies the Client was doing to support the project were not reliable. (complaint 2)
- The Client complied with all applicable Georgian law. In particular, it failed to address allegations that the project violated the national law requiring the project sponsor to provide regular reports to the Ministry of Environment and Natural Resources. (complaint 1)

### *Finding*

**The Bank staff's acceptance of a problematic ESIA scoping exercise that did not provide a meaningful consultation opportunity to all stakeholders, while not technically a case of non-compliance with Bank policy, is troubling.** While it is clear that the staff's motivation in acquiescing in the Client's problematic scoping consultation was to work with the Client to enhance its overall compliance with Bank policy, their actions created a significant risk of adverse consequences for the Bank.

The reason is that it increased the risk of the ESIA process being deficient, in the sense of not identifying all social and environmental impacts, and therefore of the project not dealing effectively with all these impacts. In addition, the staff, by engaging with the Client about the scoping exercise, helping the Client to procure the services of a consultant to support its ESIA process, and then accepting a problematic scoping exercise that, despite the requirements of PR10, did not provide a meaningful opportunity for all stakeholders to engage with the Client during the scoping exercise, risked compromising its ability to maintain the distance needed to objectively and carefully undertake the type of project assessment that is envisaged by the ESP and that is the primary obligation of the Bank under the policy. There is no evidence that the Bank's actions in this regard caused harm to the complainants. **Thus, the primary significance of this finding is that it should alert the Bank management to the risks inherent in accepting consultations that are not fully consistent with the applicable EBRD requirements and that they should draw the appropriate lesson from this experience.**

**Second, the Bank's agreement to the 2-step public disclosure of the draft ESIA amounts to a technical non-compliance with PR1 and PR10, which envisage the full disclosure of the required documents at one time and do not provide for disclosing them in stages. However, the records of the extensive consultations that took place after the public disclosure indicate that all stakeholders had a fair opportunity to present their concerns to the Client during these consultations. Consequently, the complainants did not suffer any harm as a result of this instance of Bank non-compliance and it can be regarded as *de minimus*.**

#### *Recommendations*

First, when the Bank is concerned about the Client's capacity to comply with its obligations under Bank policies, it needs to carefully balance the conflicting pressures arising from assisting the Client to develop the requisite capacity and protecting its own ability to comply with its obligation to conduct independent, objective assessments of the Client and the project. This suggests that the Bank should carefully evaluate the existing division of responsibilities between those Bank staff who work with the Client during the project design and planning phase and those who conduct the project appraisal so as to mitigate the risk of undermining the Bank's ability to meet its primary due diligence obligations under the ESP. This division of responsibilities is independent of whatever division there is between the staff involved in project appraisal and the monitoring of project implementation.

Second, the Bank staff needs to make more of an effort to ensure that the Client understands the function of consultation and the importance of fully respecting all procedural aspects of the Bank's consultation requirements. In this regard, EBRD staff should take all necessary measures to work with the Client to ensure that it understands all the purposes of consultation and that it implements a full and meaningful consultation process.

## **II. Overview**

The Tbilisi Railway Bypass Project is a Category A project being undertaken by Georgia Railway LLC, the Georgian state-owned railway company. It involves the construction of a 28 kilometre double track electrified railway bypass that will enable Georgia's main east-west railway line to go around rather than through the city of Tbilisi. A second, future stage of this project, which was not part of the project appraised by EBRD and is not part of this investigation, will involve the renewal of Tbilisi's central railway station area and the reintegration of the land on which the current railway lies, making it available for redevelopment.

The estimated total cost of the Project was EUR 300 million at the time of Bank appraisal. On March 9, 2010, the European Bank for Reconstruction and Development (EBRD or the Bank) Board of Directors approved a senior loan of up to EUR 100 million (equivalent in Swiss Francs) for the project. Georgian Railway (GR), the Bank's client, expected to raise the balance of the funds from Eurobonds issued by Georgia Railway, and from its own resources.

In late February and early March 2011, four complaints were filed with the Project Complaint Mechanism (PCM) about the project. All four requested problem solving and three of the four also requested compliance review. The three complaints seeking compliance review, which are the focus of this compliance report, raised a number of issues relating to the environmental and social aspects of the planning, design, construction and operation of the project. All three complaints were found to be eligible for Compliance Review by the PCM.

In November 2011, Georgia Railway withdrew its request for EBRD funding and decided to fund the entire project either from its own resources or from other sources. In the opinion of the PCM, this development did not obviate the need for a compliance review. The reason is that the Compliance Review only relates to the conduct of the EBRD in connection with the project and useful lessons can be learned from reviewing the Bank's conduct even if Georgia Railway has withdrawn its request for EBRD funding. The PCM appointed Professor Daniel Bradlow as an *ad hoc* Expert to conduct the compliance review. This report constitutes the findings of his compliance review.

## **III. Structure of the Report**

This report is divided into four sections. The first section is a brief overview of the three complaints that are the focus of this Compliance Review and of the Compliance Review process. The second section provides a detailed history of the EBRD's involvement in the project. The third section discusses the issues raised in the three complaints and the findings of the compliance review. The fourth section is the conclusion.

## **IV. The Three Requests for Compliance Review and the Compliance Review Process**

### *A. The Three Complaints<sup>1</sup>*

On February 28, 2011, the first complaint relating to this project, Request Number 2011/01, was filed by Mr. David Chipashvili, International Financial Institutions Monitoring Program Coordinator at Green Alternative. On 14 March, 2011 the Complaint was registered by the PCM Officer according to Rule 10 of the PCM Rules of Procedure (RP) and, pursuant to PCM RP 12, notification of registration was sent to the Complainant, Bank Management and to Georgia Railway, the EBRD's client. The Complaint was posted on the PCM website and noted on the web-based PCM Register, pursuant to PCM RP 13. This complaint alleges that there were deficiencies in the appraisal of the project's environmental and social risks and, as a result, the mitigation measures in the project's Environmental and Social Impact Assessment (ESIA) and Environmental and Social Action Plan (ESAP) were inadequate. It also contends that there were a number of procedural inadequacies, including a failure to adequately consider all feasible alternatives to the present project and shortcomings in the public consultations relating to the project.

The second complaint, Request Number 2011/02, was filed on 2 March 2012. The Complainants, represented by Mr. Chipashvili, are ten affected families who live in the Avchala settlement, which is one of the areas to be traversed by the new railway line. The PCM Officer officially registered the Complaint on 14 March 2011 and a notification of registration was sent to all relevant parties on the same date. This complaint alleges that, because of the plan to construct a new railway section that will transport hazardous materials through Avchala, a densely populated community, the Complainants will be exposed to a number of intolerable social and environmental risks related to the construction or operation of the project. They also contend that they were not adequately consulted about the project and its impacts on their community.

On March 8, 2011 Mr. Aleksandre Asatiani, a resident of Avchala settlement, filed the third complaint, Request Number 2011/03. He is also represented by Mr. Chipashvili. The Complaint was registered, pursuant to PCM PR10, and notification of registration was sent to the Authorized Representative of the Complainant and the other relevant parties pursuant to PCM RP 12. It was posted on the PCM website and noted on the web-based PCM Register, as required by PCM RP 13. The Complainant claims that Georgia Railway took 123 sq meters of his land plot in Avchala for the construction of the Project and refuses to compensate him for this loss. The 123 sq meters is part of a 930 sq meters land plot that Mr Asatiani and his family have used

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<sup>1</sup> The fourth complaint, which requested a problem solving exercise from the PCM but not a Compliance Review was filed on 16 March 2011 and registered on 24 March 2011. The complainant was a single person who was seeking compensation for the harm that the construction of a tunnel for the railway in Avchala would cause to her property. The Complainant was included in the Problem-solving Initiative process, which terminated due to the cancellation of the Project.

since 1988, although he does not have formal title to the land. Mr. Asatiani would like the PCM to assist him in receiving compensation for the full value of his property. He believes it will not be possible for the family to continue living on the land, once the project is operational.

#### *B. The Compliance Review Process*

The Compliance Review is being conducted pursuant to Paragraphs 35-44 of the PCM Rules of Procedure which deal with the conduct of a compliance review. In addition, it is shaped by the terms of reference for the Compliance Review spelled out in an Annex to the Eligibility Assessment Report, the first complaint received for this project.

In conducting this Compliance Review, the Compliance Review Expert met with the EBRD staff who worked on the project and visited Tbilisi where he met with the primary Complainant, Mr. Chipashvili, current and former officials of Georgia Railway, and representatives of some of the consulting firms used in the preparation and auditing of the ESIA process. He also visited the Avchala settlement to see the impact of project construction on the settlement.

There are two important points that should be kept in mind in regard to this Compliance Review. First, it focuses on the conduct of the EBRD and on whether or not its staff and management complied with the applicable policies in their work on this project. The conduct of the Georgia Railway and of the various companies involved in the preparation of the project's ESIA, ESAP, and Resettlement Action Plan (RAP) is only relevant to the extent that it sheds light on the conduct of the EBRD staff and management.

Second, this Compliance Review is complicated by the fact that Georgia Railway has withdrawn its request for funding from the EBRD for this project. This means that the Bank currently has no continuing role in the project. Thus, the primary purpose of this review is to help the Bank management and staff to learn lessons about compliance with its ESP.

### **V. History and Participants**

In 2008 Georgia Railway (GR or "the Client") signed a contract with KievGiproTrans, a Ukrainian company, to prepare the technical designs for the Tbilisi Railway Bypass Project. It also began discussions with the EBRD about funding for the project. In early 2009, the Bank's Environment and Sustainability Department (ESD) was officially invited by the EBRD's Banking Department to classify the project and in March that year, following a site visit and interaction with the Client, it determined that the project was a category A project. The department also prepared a concept review for the project, which facilitated the development of the terms of

reference for the project's Environmental and Social Impact Assessment (ESIA). In May 2009, GR signed a mandate letter with EBRD confirming its intention to borrow money from EBRD to fund the project.

As a result of the mandate letter, it was clear that the EBRD's Environmental and Social Policy (ESP) and its Performance Requirements (PR) would apply to the project. Since KievGiproTrans did not know this policy, it signed a sub-contract with a local Georgian company, Caucasus Environmental Network (CENN), which had had experience working with the ESP, to undertake the environmental and social studies required for the planning and design of the project. The EBRD also helped GR to hire a German company (ERM Germany) with Technical Cooperation funding from Germany to support the ESIA process.

On 21 July 2009, GR held public consultations to discuss the scope of the ESIA. These consultations, to which local non-governmental organizations, political parties, and local authorities but very few individuals were invited, were conducted by GR with the assistance of CENN and ERM. In addition, GR consulted with the Aarhus Centre in Tbilisi to ensure that it complied with Aarhus requirements in these consultations. EBRD was invited to observe and if appropriate, participate in the consultations, but, while it did confer with GR about the consultations, it chose not to participate. Although GR did not invite the public to the scoping consultations, it utilized public TV and the media to inform the public about the project.

Even though the best practice in EBRD-funded projects is to invite affected parties and individuals to the scoping consultations and Paragraph 10 of PR10 requires the Client in a Category A project to engage in a "scoping process with identified stakeholders", the EBRD staff, based on their assessment of the situation, acquiesced in the GR approach. One indication of the potential problems arising from GR's approach was that, at the scoping consultations, representatives of one of the invited NGOs, Green Alternative, questioned the failure to include the affected population in the scoping consultations.

By 3 September 2009 the draft ESIA was completed. That day the non-technical summary in English only was made publicly available on the EBRD website. This was done even though the ESP requires disclosure of the ESIA in the local language. Finally, on 16 October 2009, the non-technical summary of the ESIA, the ESIA itself, the stakeholder engagement plan, and the land acquisition and compensation framework, were disclosed in both English and Georgian on the Bank's website, locally in Tbilisi, and to the EBRD Board of Executive Directors. The decision to disclose the documents as they became available, rather than to disclose them all at one time, created some confusion about the date on which the required disclosure period began. Pursuant to Paragraph 3.4.1 of the EBRD's Public Disclosure Policy, the ESIA in a category A private sector project must be disclosed 60 days before Board consideration of the project. The disclosure date also determines the starting date for the public consultation period and it was unclear whether the date of the disclosure of the English language non-technical summary or of the full ESIA in Georgian and English language was being treated as the beginning of the consultation period. This confusion resulted in the NGO, Green Alternative submitting a complaint letter to the EBRD, to which the EBRD responded, explaining that the disclosure period started on 16 October 2009, not on 3 September 2009.

GR conducted three public consultations, which were open to the public, on the draft ESIA during December 2009. Each of these consultations, which were well attended, was conducted at the location in an area that would be affected by the project. In addition to these meetings, GR held a separate meeting with those NGOs that had expressed an interest in the project. During these meetings, participants raised concerns about compensation for land to be taken for the project, and about the various environmental and social impacts that both the construction and operation of the project would have on the affected communities. In addition, the NGO, Green Alternative, submitted a letter complaining about inadequate consultations during the ESIA scoping exercise, inadequate consideration of project alternatives, and about the potential risks that the project created for the Tbilisi Sea, the reservoir that provides water to a significant portion of Tbilisi.

It should be noted that EBRD officials knew about these issues and had been trying to meet with the NGOs to discuss their concerns. The officials had also helped GR to raise funding from the European Union to fund two studies of these issues and for some work to mitigate some of the potential adverse impacts of the project on the Tbilisi Sea.

Following these consultations, the EBRD, on 11 December 2009, began its formal review of the project. This resulted, following project appraisal and a structural review, in the Operations Committee approving the Project at the Final Review stage on 19 February, 2010.

In March 2010, the Resettlement Action Plan (RAP), which included a plan for payment of compensation to those who would lose land to the project was completed by a Georgian company called Geographics and submitted to the EBRD. The company was responsible for developing a matrix for determining compensation for loss of property to the project, although actual property valuations were done by another company. Based on this matrix, Geographics held discussions with the affected property owners about compensation. During these discussions Geographics had no authority to change the compensation price being offered to individual property owners by GR. In addition, if the compensation offer was not accepted by any particular property owner, GR was empowered to expropriate the property, subject to applicable Georgian substantive and procedural law. It is important to note that in the course of this process, and after the EBRD staff pointed out that the EBRD's policy required compensation to be for the replacement value of the property<sup>2</sup>, GR increased the compensation it was offering by 30-50%.

Prior to the Project being submitted to the EBRD Board of Directors, the staff and the Client agreed on an ESAP. The EBRD Board of Directors approved the project on 9 March 2010. On 17 March 2010, the Bank signed a loan for 100 million Euros (denominated in Swiss Francs) with GR. Four months later GR issued a Eurobond to raise another portion of the funds for the project).

In September 2010, the Bank began to receive complaints about the project. These related to the social impacts of the project on the communities living along the railway bypass route, the compensation being provided to adversely affected property

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<sup>2</sup> Paragraph 30, Performance Requirement 5 (Land Acquisition, Involuntary Resettlement and Economic Displacement), Environmental and Social Policy, May 2008).

owners, and to the environmental impacts of the project. The EBRD began to investigate these complaints and to work with GR to address them. However, before they could be resolved, project construction began in November 2010.

In early 2011, because the ESIA was prepared at a time when not all construction details were known, both GR and EBRD were concerned that there were “gaps” in the ESIA. Consequently, GR commissioned GAMMA to do some further environmental studies and to update the ESAP so that it was more responsive to the final design of the project. In the course of this work, GAMMA identified a number of environmental issues relating to the impact of the project that required further elaboration. They sought to address them in an updated ESAP. These issues included the project-created risks to the Tbilisi Sea, the Gladani Lake, and protection of flora and fauna in the project area. GAMMA sought to address these risks in the ESAP through the development of management and monitoring plans, technical solutions for noise, vibrations, emergency response plans, spill management plans, a traffic management plan, and a plan to deal with top soil and soil erosion. The ESAP also included proposals for improving the existing GR grievance mechanism.

In March 2011, EBRD decided that there was a need for an audit of the resettlement and land compensation issues of the project. As a result, GR commissioned an international company, Intersocial, to conduct an audit of these issues and of the RAP.

On 4 November 2011, GR withdrew its request for funding from the EBRD. This was before the PCM was due to begin its problem solving activities. As a result these activities were called off. It is important to note that GR’s actions occurred before the Bank had disbursed any funds to GR.

## **VI. Discussion of Issues Raised in the Complaints**

All the substantive issues raised in the three complaints relate to specific aspects of the Performance Requirements (PR) set out in the EBRD’s May 2008 Environmental and Social Policy (ESP). The matters raised in the three complaints can be grouped into:

- 1) Issues relating to the adequacy of the assessment of the project’s social impacts,
- 2) Issues relating to the adequacy of the assessment of the project’s environmental impacts, and
- 3) Issues relating to the adequacy of the assessment of the procedural aspects of the client’s engagement with project stakeholders.

Each of these sets of complaints is discussed in more detail below.

A. *Adequacy of the Assessment of Social Impacts:*

The Complainants contend that the EBRD did not comply with ESP PR1 (dealing with environmental and social assessment and management); PR4 (dealing with community health, safety and security); and PR5 (dealing with land acquisition, involuntary resettlement and economic displacement) because it failed to ensure that:

- The project planning involved an adequate assessment of the risk of accident along the railway route and of how to safeguard the population from the consequences of such accidents. (complaint 1)
- The project plans incorporated an adequate assessment of the cumulative effects of all the railway's impacts on the living conditions of the Avchala population. (complaint 1)
- The impacts of the project on the property values in Avchala were adequately accounted for in the project planning. The impacts that were inadequately assessed include the challenges created in regard to access to the properties from the main road during project construction, the impact on the country-like atmosphere in Avchala, and the effect on the community of the high embankment being built for the project. (complaint 2)
- The project ESIA paid adequate attention to the gap between the "public goods" being created by the project and the "private bads" that the project was imposing on the project-affected people. (complaint 2)
- The third Complainant, Mr. Asatiani, received adequate compensation for his land and appurtenant structures that will be lost due to the construction of this project. (complaint 3)

*Applicable Policies*

PR1 stipulates that in the case of a Category A project, such as the Tbilisi Railway Bypass Project, the client, pursuant to Paragraphs 6 and 7 of ESP PR1, is expected to analyse the environmental and social issues that could arise at each stage of the project cycle in the project's "area of influence". The "area of influence" includes the areas and communities that both will be affected by and could potentially be affected by unplanned but predictable developments caused by the project. Paragraph 9 of PR1 stipulates that the Client will have a formal and participatory process for assessing the environmental and social impacts of the project and that this process must satisfy the requirements of PR10. Pursuant to Paragraph 4 of this PR, this assessment process should begin at an early stage in the project. Paragraph 14 of PR1, requires the client, in a category A project, to develop a program of action for dealing with the environmental and social issues, impacts, and opportunities arising from the project.

Paragraph 7 of PR4, dealing with community health, safety and security, stipulates that the Client is responsible for identifying and evaluating the risks and adverse impacts on community health, safety and security that may arise during project construction and operation. According to PR4, these risks include potential exposure to hazardous materials, adverse impacts on air, soil, water, vegetation, and fauna and other natural resources. Pursuant to Paragraph 8 of PR4, the Client has a duty to

disclose to affected communities the information they need to understand the risks and their potential impacts and to consult with them before finalizing its prevention, mitigation and emergency response measures.

PR5, dealing with land acquisition, involuntary resettlement and economic displacement, is applicable to both physical and economic displacement and to full, partial, permanent and temporary displacement. Paragraph 3 of the PR states that it must be applied in a way that is “consistent with the universal respect for, and observance of, human rights and freedoms and specifically the right to adequate housing and the continuous improvement of living conditions”. Paragraph 5 indicates that land rights should be acquired through negotiated settlements wherever possible and, pursuant to paragraph 12, the Client should ensure that it discloses all relevant information to the affected people so that they can participate in the decision-making process relating to the project and their land. Pursuant to Paragraph 13, the Client should also establish a grievance mechanism to receive and address complaints about compensation.

It is important to note in regard to the Third Complaint that PR5 Paragraph 18 stipulates that the RAP associated with the project, should specially take into account the needs of disadvantages and vulnerable individuals and, pursuant to Paragraph 19, should ensure that such individuals are provided with legal assistance if necessary to establish their claims to property. Paragraphs 30 and 32 deal with standards of compensation and clarifies that the standard of compensation should be full replacement cost but that those with only informal claims to the land should at least receive compensation for the improvements they have made to the property at full replacement cost.

All three PRs that are applicable to these complaints envisage a clear division of responsibility between the EBRD and the client. As can be seen from the above description, the Client is responsible for meeting the substantive requirements in the PRs. The EBRD is responsible for adequately assessing the Client’s compliance with these substantive requirements.<sup>3</sup>

### *Discussion of Complaints One and Two*

The basic thrust of the first two complaints is that the EBRD staff and management failed to conduct an adequate evaluation of how well GR complied with its obligations in regard to identifying and addressing the adverse social impacts of the project. These adverse social impacts include the risk of accidents, and the impact both during construction and operation of the project on the quality of life of the residents of the Avchala settlement and on the value of their properties.

The second complaint also alleges that the Bank did not ensure that GR paid adequate attention to the gap between the “public goods” being created by the project and the “private bads” that the project was imposing on the particular project-affected people.

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<sup>3</sup> A useful summary of the responsibilities of each party is set out in the box entitled “A summary of Key Institutional Responsibilities During Project Appraisal” on p7 of EBRD’s Environmental and Social Procedures (April 2010).

While the complaint does not define with any precision what it means by “public goods” and “private bads”, it would seem that the import of this complaint is that the project would result in the Avchala community having to bear an undue portion of the social costs of a project that would primarily benefit the wider Georgian society rather than itself.

As indicated above, the purpose of this Compliance Review is only to evaluate the EBRD’s compliance with the ESP. In this regard, it is important to note that the ESP establishes a clear division of responsibility in its policy. The Client is expected to undertake the studies and actions to ensure that the project complies with all the substantive requirements of the ESP. The EBRD is required to carefully and objectively assess and later monitor whether or not the Client meets its obligation. This means, the borrower’s compliance with its substantive obligations is only relevant to this Compliance Review to the extent it indicates that there were compliance gaps that the Bank should have identified and addressed in its due diligence appraisal of the Client’s project planning and implementation.

This clear division of responsibility between the Bank and the Client is more easily stated than implemented. This is particularly true when the Client, as in the case of GR, has not had experience working with the EBRD and its policies. In such situations the Client is likely to turn to the EBRD for guidance on how to understand and meet its obligations under the applicable EBRD policies. This, in turn, can result in the Bank becoming an active participant in the Client’s efforts to comply with the applicable Bank policies, regardless of the potential impact of this development on the Bank’s ability to conduct its own due diligence. This project is a good example of how this process works.

In this case, the Client recognized that it was inexperienced in dealing with the EBRD and its policy requirements and was willing to work with the Bank to mitigate the risk of non-compliance with these policy requirements. As a result, it consulted with the Bank early in its planning of the project and continued such discussions throughout the planning process. GR also hired the services of consultants who knew and had had experience working with EBRD policies to undertake the environmental and social impact assessment for the project. In addition, the Bank helped GR procure the services of an additional consultant, ERM Germany, to support the ESIA process. Later, when the Client needed help in doing additional studies to address some of the social impacts of the project, it sought the help of Bank staff to arrange EU financial support for these studies and some related project work.

Despite the clear intention of the Client to comply with the policies, and the efforts of the Bank to assist it in meeting this objective, it appears that there were problems relating to GR’s compliance with the applicable performance requirements. One example of this is the consultations that the Client held during the development of the scope of the ESIA. Pursuant to Paragraphs 6 and 7 of ESP PR1, the Client in a Category A project is expected to analyze the environmental and social issues that could arise at each stage of the project cycle. Moreover, in Category A projects, the PR requires that the Client disclose all relevant information to project affected communities and individuals and other stakeholders and, pursuant to Paragraph 9 of PR1, engage in “special formalized and participatory assessment processes”. This paragraph also stipulates that the ESIA process should comply with PR10, which

requires active and meaningful engagement with all stakeholders in the project. However, in this case, the Client only invited a select group of stakeholders to participate in the consultations it held to discuss the scope of the project ESIA. This group included NGOs, governmental agencies, and other corporate stakeholders but did not include all potentially adversely affected individuals.

From the EBRD staff's perspective this approach to scoping consultations seemed reasonable because it included representatives of the public interest even though it failed to include the adversely affected individuals themselves. Consequently, the EBRD staff accepted the Client's approach. One reason for the EBRD's decision may have been that the Client had taken other steps to inform the affected communities about the project. In fact, GR conducted an extensive public information campaign in the media to inform the public about the project. This campaign, while informative, did not offer these project-affected individuals the same opportunity to engage in discussions with GR about the project that they would have had at the scoping consultation meetings. The failure to include adversely and potentially adversely affected individuals in the consultation process during the scoping phase of the ESIA increased the risk that GR would not identify and fully appreciate the impact that the project would have on the Avchala community and so would not adequately address their concerns in the ESIA. The possible impacts on the members of the community could include a reduction in their quality of life, reduced property values, and an increased risk of accidents, due to the presence of a railway carrying potentially hazardous cargo through their community.

The significance of these problems in the ESIA scoping process and its implications for the project is further underscored by the fact that the Client, in consultation with the EBRD, decided to hire two additional consultants. One of these new consultants was hired to prepare the project's RAP and the methodology for the calculation of the compensation to be paid to individuals whose land was being taken for the project. The second consultant was hired, *inter alia*, to review and update the ESIA, identify and address gaps in this study, and to develop the ESAP. While most of the second study dealt with environmental issues, it did suggest, for example, that the ESIA had not fully appreciated the impact of the embankment to be built for the project on local communities like the Avchala community. That the embankment would have a substantial and adverse impact on the quality of life of the Avchala community was evident to the *ad hoc* Compliance Review Expert from a short visit to Avchala. The embankment constitutes a barrier that divides the community, creating a visual and physical division between the two parts of the community. This situation is also likely to adversely affect property values in Avchala. One result of these new studies was that they, together with pressure from the EBRD, helped convince the Client to increase the amount of compensation it offered to the affected persons by 30-50%.

Another problematic area was the negotiations for compensation for land taken from members of the Avchala community for the project. The consultants hired to develop the RAP developed a matrix for determining compensation for loss of property to the project, although actual property valuations were done by another company. The consultants, relying on the matrix, discussed compensation with the affected property owners. However, during these discussions the consultants had no authority to change the compensation price being offered to individual property owners by GR. In addition, if the consultant could not reach agreement with any particular property

owner, GR had the option, under the applicable Georgian substantive and procedural law, of seeking a Court order to expropriate the property. Thus, in effect, the negotiations between the consultant, GR's agent in these negotiations, and the landowners consisted of the landowner being given a compensation offer and being told that if they did not accept the offer, the land would, in any event, be taken from them through legal process. This form of forced negotiations is not consistent with at least the spirit of PR5 which stipulates in Paragraph 1 that the PR must be applied in a way that is "consistent with the universal respect for, and observance of, human rights and freedoms" and Paragraph 5 which states that "clients are ... encouraged to acquire land rights through negotiated settlements wherever possible, even if they have the legal means to gain access to the land without the seller's consent." As noted above the EBRD sought to address this problem by agreeing with the Client to increase the compensation amount being offered by 30-50%.

Both of these examples suggest that the Client was experiencing compliance problems in this project. However, the focus of this Compliance Review is on the performance of the Bank and not of its Client. In this regard, the examples demonstrate that the Bank staff understood that there were problems and that they worked closely with the borrower to identify and fill the compliance gaps between the Client's design and preparation of the project and the Bank policies.

These efforts are noteworthy and are indicative of the Bank staff's respect for the Bank's policies. Nevertheless, they do not demonstrate that the EBRD has fully complied with its obligations under the policy. The reason is that the primary Bank obligation relates to the adequacy of its appraisal of the project. In this case, despite the Client's compliance problems, the Bank Management, following the staff's appraisal of the project, recommended that the Board of the EBRD approve the proposed loan to GR for this project. This situation raises the difficult question of whether Bank staff can become so over-involved in projects that their ability to conduct the independent compliance reviews envisaged and mandated by the Bank's ESP is compromised.

Despite the importance of this question, the social impacts of the Tbilisi Railway project are not an appropriate occasion for answering it. The reason is that the GR withdrew its request for EBRD funding before all the consequences of the Bank's engagement with the project were clear. In fact, the EBRD withdrew before project implementation had advanced sufficiently to see if the Bank's project assessment had missed or under-estimated the severity of any important project impacts and if the remedial measures that the Bank supported, such as the additional studies, were sufficient to address the adverse impacts it had identified.

One additional issue raised by the first two Complainants is that the Bank failed to pay adequate attention to the gap between the "public goods" being created by the project and the "private bads" that the project was imposing on the Avchala community. The question of the overall distribution of the public benefits and burdens associated with a project is always a complex and difficult one. The applicable PRs do not explicitly address how the Bank should evaluate this issue in the case of a specific project. However, it does require the Bank, in its assessment of the project, to determine if the Client has adequately identified and assessed all the significant impacts of the project and has taken appropriate measures to address the adverse

social impacts of the project. Consequently, the ESP does not require the Bank to make an overall judgement about the general distribution of the social and environmental benefits and burdens of the project. Instead, it requires it to make an assessment of how well the Client has dealt with each of the specific impacts of the project. The Bank appears to have done so through its engagement with the Client during the planning stage of this project and in its assessment of the project.

### *Finding*

**Based on the above, the Bank staff and management complied with all the applicable requirements in PRs 1, 4, and 5 in regard to the social impacts of the project.** To the extent that there were any incidents of Bank non-compliance, they had not become clear by the time the Bank's involvement in the project ended. While the client's approach to the social impacts of the project post-Bank involvement suggest that there could be instances of non-compliance, it is impossible to show that these instances of non-compliance are due to the acts or omissions of the Bank staff and management.

### *Third Complaint*

There is general agreement that the third Complainant, Mr. Asatiani, will lose at least some of the land he occupies to the project. In addition, there is general agreement that he does not have clear title to this land. It is also clear that under Georgian law, without clear title he is not entitled to compensation for his lost land. However, it is also evident that, under Paragraphs 31-32 of PR 5 of the EBRD's ESP, people who occupy land without clear title are entitled to compensation for the structures that they own and the improvements they have made to the land. There is no debate that the Complainant has occupied the land for a number of years, and has made some improvements to it. Consequently, he would be entitled to compensation at least for these improvements under the EBRD policy. However, because the EBRD is no longer involved in the project, the policy is no longer applicable and this issue must be resolved under Georgian law.

The Complainant would also appear to have been eligible for additional assistance from the Bank, if the Bank had remained involved in the project. Pursuant to Paragraph 18 of PR5, the RAP should pay particular attention to individuals who are vulnerable. Given the complainant's poor health and other family problems, he could qualify for this particular attention. Moreover, Paragraph 19 states that the RAP should ensure that displaced people are provided with legal assistance to complete the administrative requirements to establish their **right to compensation prior to land acquisition. There is no evidence to suggest that the complainant received such attention or assistance.**

Based on the available facts, it cannot be determined whether or not the EBRD failed to comply with its policy in regard to the complainant. When the EBRD's involvement in the project ended, the RAP and compensatory scheme had not been

fully implemented. Consequently, it is possible that the Complainant would eventually have obtained the compensation due to him once the status of his claim in terms of the EBRD's standards had been fully investigated. However, this possibility disappeared once EBRD's involvement ended and its policies stopped being applicable to the project.

### *Finding*

Based on the available information, the Bank's obligation, during the time of its involvement in the project, was to assess the client's plans for compensating all qualified and adversely affected landholders and occupiers. If the Bank had remained involved with the project, it would have had an obligation to at least ensure a fair, impartial and adequate investigation of any grievance that came to light during project implementation. It would also have had an obligation to ensure that the standards of compensation applied by the borrower complied with those set out in PR5. However, once the Client withdrew its request for Bank funding, the Bank's obligations and ability to uphold its compensation standards disappeared. **Consequently, despite the fact that Complainant number 3 has not obtained the compensation to which he would have been entitled under EBRD policies, it is not possible to make a definitive finding of Bank non-compliance. This necessarily follows from the fact that the Bank withdrew from the project before the RAP and land compensation scheme were fully implemented or before the Complainant actually lost access to his land. Therefore, in the absence of clear evidence to the contrary, it is to be expected that in the course of time the Client would have complied with its obligations under the applicable EBRD policies and compensated the Complainant.**

### *B. Assessment and Mitigation of Environmental Impact*

The complainants contend that the EBRD failed to comply with Performance Requirements 1 (dealing with environmental and social assessment and management); PR3 (dealing with pollution prevention and abatement); PR4 (dealing with community health, safety and security); and PR6 (dealing with biodiversity conservation and sustainable management of living natural resources) by failing to adequately assess whether:

- The project ESIA appropriately addressed the need for measures to avoid contamination of the Tbilisi reservoir and central pipeline. (complaints 1 and 2)
- The project ESIA and ESAP had a satisfactory plan for waste management. (complaint 1)
- The ESIA included adequate information on the location of the project's construction corridors and power supply units. The first complainant notes that this is of particular concern because of the risks arising from the fact that at least some of the construction sites will be in the city. (complaint 1)

- The ESIA adequately accounted for the environmental and health risks that may be created by the materials to be used in the project. (complaint 1)
- The ESIA adequately evaluated and dealt with the consequences of the project's encroachment onto the Tbilisi National Park, a protected nature reserve. (complaint 1)
- The ESIA paid adequate attention to the environmental and social risks, including safety risks, created by the truck traffic and other activities associated with the construction of a project of this magnitude. (complaint 2)
- The ESIA paid adequate attention to the impact of the project on the ecosystem in the project area and to the natural resources that exist in this area. (complaint 2)

### *Applicable Policies*

Paragraph 2 of PR1, dealing with environmental and social appraisal and management, states that the Client must develop a “systematic approach” to managing the environmental and social risks and opportunities associated with their projects. Paragraph 3 elaborates that the Client’s responsibilities in regard to “appraising, managing and monitoring” the environmental and social aspects of its project should include engagement with the project stakeholders. Paragraph 6 stipulates that this appraisal should include all those areas and communities that can be affected by predictable developments caused by the project. Paragraph 5 of this PR stipulates that the information the Client gains in this environmental and social impact assessment informs the Bank’s own due diligence. The PR, therefore, makes clear that the primary substantive obligations arising from the PR fall on the borrower and that the EBRD’s most important obligation is to carefully assess the Client’s compliance with these obligations as part of its project due diligence.

PR3, dealing with pollution prevention and abatement, makes clear that the Client is required to address the generation of pollutants and hazardous and non-hazardous waste materials (Paragraphs 11 and 12); release of hazardous substances into the air, water and land during the project (Paragraph 13); to deal with emergency situations (Paragraph 14); and to deal with the adverse project impacts on the existing ambient conditions (Paragraph 16). The EBRD’s responsibilities are to work with the Client to determine and to satisfy its obligations in the environmental and social action plan (Paragraph 4); to agree with the Client on the relevant applicable environmental requirements and guidelines (Paragraph 9); and to assess the client’s compliance with its obligations.

Paragraph 2 of PR4, dealing with community health, safety and security, requires the Client to identify and either “avoid or minimize the risks and adverse impacts on community health, safety and security” that may arise during project construction and operation. Paragraph 7 of this PR stipulates that the responsibility to identify and evaluate these risks and then to address them belongs to the client. Paragraph 8 adds that the Client has a duty to disclose to affected communities the information they need to understand the risks and their potential impacts and to consult with them before finalizing its prevention, mitigation and emergency response measures. Paragraph 12 stresses that the Client should prevent or minimize the potential

exposure of the community to hazardous materials that may be released by its project. Paragraph 5 of PR4 indicates that while the primary responsibility for compliance with the PR falls on the client, the EBRD must exercise appropriate due diligence in assessing the client's compliance with the PR.

Paragraph 8 of PR6, dealing with biodiversity conservation and sustainable management of living natural resources, specifies that the Client must identify the measures needed to avoid, minimize, or mitigate potentially adverse impacts on natural resources and habitats. Paragraphs 5 and 7 of PR6 indicate that the EBRD's responsibility is to adequately assess the Client's compliance with this requirement. In so doing, pursuant to Paragraph 7, the EBRD should consider the "the nature, extent, duration, and intensity of potential impacts, assess the probability of impact occurring and determine the significance of those impacts." Pursuant to Paragraph 2 of PR6, the Bank should be guided by "applicable international law and conventions and relevant EU directives" in fulfilling the objectives of PR6.

### *Discussion*

These complaints, like those relating to social impacts, amount to a claim that the EBRD failed to adequately assess whether the Client satisfactorily complied with all the requirements of the applicable PRs under the ESP. In particular, the complainants allege that the EBRD staff failed to adequately assess whether GR, in its project planning, had appropriately assessed and determined how to deal with a range of adverse environmental impacts including on the Tbilisi reservoir, on waste management, on the Tbilisi National Park, and those relating to the smells, noise, vibrations etc. arising from the construction and operation of the project.

The ESP establishes a clear division of responsibility in its policy. The Client is expected to undertake the studies and actions to ensure that the project complies with all the substantive requirements of the ESP. The EBRD is required to carefully and objectively assess and later monitor whether or not the Client meets its obligation. This clear division is more easily stated than implemented because some client's lack either the experience or the capacity to easily comply with the requirements of the ESP. As a result, the EBRD is often drawn into helping the Client understand and develop the ability to meet its obligations, regardless of the potential impact of this activity on the Bank's ability to conduct its own due diligence.

Pursuant to Paragraphs 6 and 7 of ESP PR1, the Client in a Category A project is expected to analyse the environmental and social issues that could arise at each stage of the project cycle in the project's "area of influence". This suggests that the time when these problems should first be identified by the Client is during the ESIA scoping process. Moreover, the PR requires that the Client in a Category A project disclose all relevant information to project affected communities and individuals and other stakeholders and, pursuant to Paragraph 9 of the PR, engage in consultations with these groups.

In this case, the Client was aware of the need to analyse the project's environmental from the beginning of the project. It recognized that it was inexperienced in dealing

with the EBRD and its policy requirements and was willing to work with the Bank to mitigate the risk of non-compliance with these policy requirements. As a result, GR, with the support of the EBRD, hired the services of consultants who knew and had had experience working with EBRD policies to undertake the environmental and social impact assessment for the project. Later, when the Client needed help in doing additional studies to address some of the social and environmental impacts of the project, it sought the help of Bank staff to arrange EU financial support for these studies and some related project work.

Despite the efforts of the Client to comply with the policies and those of the Bank to assist it in meeting this objective, it appears that there were problems. First, during the course of the planning of the project, it became clear that the client's assessment of the environmental impacts of the project was not complete and needed updating. As a result, it hired a new consultant to review and update the ESIA; and, if applicable, identify and address gaps in this study; and to further develop the ESAP. In the course of this assignment, the consultant discovered a number of environmental issues relating to the impact of the project that, although discussed in the original ESIA, needed further study and assessment. These included the project-created risks to the Tbilisi Sea, the Gladani Lake, and protection of flora and fauna. This second consultant sought to address these risks in the ESAP. It did so through the inclusion of a management and monitoring plan; emergency response plans; spill management plans; a traffic management plan; a plan to deal with top soil and soil erosion; and of technical solutions for project related noise and vibrations. Thus, this additional study should have helped the Client correct some of the compliance problems arising from the ESIA. However, whether or not this will be the case will only become clear in the course of project implementation, which has continued after the Bank withdrew from the project.

One noteworthy aspect of this situation, however, was that the ESIA and the ESAP were being developed before the project design was finalized. While this may not be unusual in complex projects, it does create a risk of non-compliance with Bank policy. The reason is that even relatively small changes in the project's final design can result in environmental impacts that have not been adequately assessed in either the ESIA or ESAP. In principle, and as provided for in Paragraph 39 of PR1, the Client and the EBRD can agree a strategy for dealing with this problem. In this Project, the Bank agreed with the Client to deal with this issue in the ESAP. In fact, as indicated above, the original ESAP needed to be revised in light of the second round of assessments undertaken for the ESIA. Nevertheless, it is important to note that there is no evidence that new adverse environmental impacts had occurred as a result of modifications in the project design prior to the Bank's withdrawal from the project.

As indicated above, the purpose of this Compliance Review is only to evaluate the EBRD's compliance with the ESP. Thus, the borrower's compliance with its substantive obligations is only relevant to this Compliance Review to the extent it indicates that there were compliance gaps that the Bank should have identified and addressed in its due diligence appraisal of the client's project planning and implementation. In this case, it is clear that the Bank made considerable efforts to ensure that the project was in compliance with the ESP at the time it was presented to the Board for approval. In so doing, it had worked closely with the borrower to identify and fill any compliance gaps between the reality of the project and the Bank

policies. These efforts are indicative of how hard the Bank staff, in this case, worked to ensure Client compliance with the applicable policies.

The Bank staff's substantial efforts to work with the Client to ensure compliance with Bank policies raises the difficult question of whether Bank staff can become so over-involved in projects that their ability to conduct the independent compliance reviews envisaged and mandated by the Bank's PRs is compromised. Despite the importance of this question, the environmental impacts of the Tbilisi Railway project are not an appropriate occasion for answering it. The reason is that the GR withdrew its request for EBRD funding before all the consequences of the Bank's engagement with the project were clear and before the implementation of the project had advanced sufficiently to see if the Bank's project assessment had missed or under-estimated the severity of any important project impacts and if the remedial measures that the Bank had supported, such as the additional studies, were sufficient to address the adverse impacts it had identified.

### *Finding*

**Based on the above, the Bank staff and management complied with all the applicable requirements in PR 1, 4, and 6 in regard to the environmental impacts of the project.** To the extent that there were any incidents of non-compliance by Bank staff, they had not become clear by the time the Bank's involvement in the project ended. While the environmental impacts of the project post-Bank involvement might suggest that there could be instances of non-compliance, it is impossible to trace the lines of causation of these instances of non-compliance back to the specific acts or omissions of the Bank staff and management.

### *C. Procedural Issues*

The complainants contend that the EBRD failed to comply with PR 1 (dealing with environmental and social assessment and management); and PR10 (dealing with information disclosure and stakeholder engagement) by failing to ensure that:

- The ESIA adequately assessed all technically and financially feasible alternatives to the proposed route, including that proposed by the residents of Avchala. (complaint 1)
- The Client conducted adequate and meaningful consultations with all stakeholders and made adequate efforts to keep these stakeholders informed about all the relevant aspects of the project. (complaint 1)
- The RAP was made available at an appropriate time to the people adversely affected by the project. (complaint 1)
- The Client paid adequate attention to the concerns about the project raised by the complainant. (complaint 2)
- The Client addressed the complainants concerns that the information they were being given by GR was not completely trustworthy and that studies the Client was doing to support the project were not reliable. (complaint 2)

- The Client complied with all applicable Georgian law. In particular, it failed to address allegations that the project violated the national law requiring the project sponsor to provide regular reports to the Ministry of Environment and Natural Resources. (complaint 1)

### *Applicable Policies*

Pursuant to Paragraphs 6 and 7 of ESP PR1, the Client, in a Category A project, is expected to analyse the environmental and social issues and their impacts that could arise at each stage of the project cycle in the project’s “area of influence”. Pursuant to Paragraph 9, the ESIA should include “a special formalized and participatory process”. The paragraph also specifies that in greenfield projects the assessment must include an “examination of technically and financially feasible alternatives” and that the ESIA should include “documentation of the rationale for selecting the particular course of action proposed”. The participatory process should conform to the applicable provisions of PR 10, dealing with information disclosure and stakeholder engagement. Finally, Paragraph 10 of PR1 requires that if stakeholders are identified as vulnerable or disadvantaged, the Client should incorporate measures to ensure that adverse project impacts do not fall disproportionately on them.

While PR1 focuses primarily on the obligations of the Client, it requires the EBRD to exercise due diligence in ensuring the Client meets these obligations.

PR10 deals with information disclosure and stakeholder engagement. It makes clear, in Paragraph 2, that the EBRD supports the approach of the UNECE Aarhus Convention “which identifies the environment as a public good.. [and]...affirms the public’s right to be informed as to the state of the environment... the right to meaningful consultation on proposed projects...that might affect the environment...and the right to complain if they believe the environment is not being adequately taken into account.” Thus, the PR requires the Client to ensure that there is meaningful and ongoing stakeholder engagement that includes public disclosure of all appropriate information, an opportunity for discussion about the project, and a procedure through which people can make complaints about the project (Paragraph 3). Paragraph 15 states that if the project has significant or adverse impacts, the consultations must be “meaningful” which means, *inter alia* that they should begin early in the process and should be carried out on an ongoing basis. Paragraphs 16 and 17 require that the consultations be inclusive and conducted in a manner that involves a dialogue which results in the incorporation of the affected parties views into the decision-making process on matters that directly affect them. Paragraphs 24 and 25 require the Client to establish a grievance mechanism that facilitates prompt and effective resolution of stakeholder concerns and grievances on the environmental and social aspects of the project. Finally, in Paragraph 7, PR10 mandates that the EBRD, as part of its due diligence, is required to assess the information disclosure and consultation practices of the client.

## *Discussion*

This category of complaints deals with the EBRD staff and management's failure to adequately assess the client's compliance with its obligations relating to the substance of EBRD policy. The complainants allege that the EBRD staff failed to comply with PR1 and PR10 because it did not ensure that the Client had adequately assessed all technically and financially feasible alternatives to the project; had not adequately and meaningfully consulted with all relevant stakeholders; had not made adequate effort to ensure that they were kept informed about project developments; and had not adequately responded to the concerns raised by the complainants during the consultations between GR and the stakeholders. The complainants also expressed general concerns about the compliance of the project with Georgian law alleging that the Client did not submit all requisite reports to the government. Finally, they complained that they did not have faith in the client.

The Bank understood early in its engagement with the project, that the Client did not have experience in dealing with EBRD and its policy. Consequently, it tried to help the Client take actions to ensure that it complied with its consultation obligations under the applicable Bank policies.

Pursuant to PRs1 and 10, a critical obligation of the Client is to ensure that it identifies all stakeholders in the project area of influence, keeps these stakeholders informed about the project and engages in a meaningful consultation process with them. In this case the Bank staff helped the Client to try and meet this obligation. For example, the Bank worked with the Client in arranging the consultations regarding the scoping of the ESIA. It ensured that the Client was assisted by a consultant who was knowledgeable about EBRD rules and procedures in organizing and managing the scoping consultation process. The Client also consulted with the Aarhus Convention Centre in Tbilisi to get advice on structuring the scoping consultations. Nevertheless, the Client only invited NGOs, governmental agencies, and other corporate stakeholders to the consultations. It invited very few private individuals to these public consultations about the scope of the ESIA. This meant that adversely and potentially adversely affected communities and individuals were not directly consulted during the scoping stage, which would have been best practice. The Client attempted to address this deficiency by conducting an information campaign in the media. However, such a campaign cannot serve as a substitute for a process in which the affected parties can directly inform the Client of their concerns about the project and about the scope of the ESIA. This means that the complainants did not have a meaningful and timely opportunity to inform the Client about any alternative project design proposals that they may have had and to learn the client's views on their feasibility.

The Bank agreed to this approach even though it was not consistent with the requirement, under Paragraph 9 of PR1 of the ESP, for meaningful consultation with all stakeholders in Category A projects. The deficiencies in this approach did not pass unnoticed. At the scoping consultations, one of the NGOs, Green Alternatives, questioned the failure to include the affected population in the scoping consultations. It should be noted that the EBRD staff would have been aware of this complaint

because Client kept the staff informed about the consultations on the scope of the ESIA.

The importance of this finding is further underscored by the fact that the client's approach to consultation in general appears to be inconsistent with Bank policy. The Client seems to have viewed consultation as more of an opportunity for it to inform technically knowledgeable stakeholders about its project than as an opportunity to engage in meaningful dialogue about the project. Thus, the staff's failure to correct the deficiencies in the consultations allowed the Client to persist in its erroneous belief about the purpose of consultation. It also reduced the likelihood of the Client learning about any proposed project alternatives that the complainants may have had and adequately responding to them. This in turn could have contributed to the lack of trust that, the complainants allege, affected their relationship with the Client.

The Bank staff's acquiescence in the client's approach to the scoping consultations raises a number of problems. First, it suggests that it, at least implicitly, the staff were complicit in the client's non-compliance with Paragraph 9 of PR1. Second, it increased the possibility of the ESIA being less comprehensive than it should have been because it excluded some project impacts and alternatives. The reason for this is that without adequate and meaningful consultations with all affected stakeholders it is possible that the Client would not be fully informed about all the potential impacts of the project and so would agree to a scope for the ESIA that excluded some potentially important social and environmental impacts. Given that the Client was ultimately required to hire a second round of consultants to review the ESIA and further develop the RAP, this risk was not insignificant. In addition, as indicated in Complaint 1, the Client, because it did not include all the stakeholders in the scoping consultations, also ran the risk of not knowing about and excluding from the scope of the ESIA, some technically and financially feasible alternatives to the proposed route. Finally, the Bank staff's engagement with GR about the consultations, while facilitative in many ways, resulted in it being more invested in the project than the ESP seems to anticipate, given that it places the obligation to conduct the consultations on the Client. This in turn risked undermining the ability of the Bank to meet its primary obligation under the ESP, which is to carefully and objectively assess the client's compliance with its obligations under the ESP.

A second procedural problem arose in regard to the disclosure of the draft ESIA. In this case, the Bank posted the non-technical summary of the ESIA in English on its website on 3 September 2009; while it only placed the Georgian language version of the full text on the website on 16 October 2009. The reason for the Bank staff agreeing to this deviation from its statutory requirements was that the full texts would later be made publicly available and it thought that the earlier disclosure of the documents in English might be useful for many of the stakeholders in the project. The failure to fully disclose all documents initially created confusion. One reason for this was that, under the applicable Bank policies, the public consultation period begins from the date of disclosure of the ESIA and it was unclear whether the date of the partial or the full disclosure of the documents was being treated as the beginning of the consultation period. In fact, this 2-step process resulted in the NGO, Green Alternative submitting a letter of complaint to the EBRD. As might be expected the failure to follow the procedure spelled out in the policy led to speculation about the reasons for this change in normal procedure and could have contributed to the loss of

trust between the Client and some project stakeholders. It should be noted, however, that, in fact, the EBRD considered October 16 as the starting date for the consultation period.

While it is obvious that the process followed did cause some concerns, it is not clear that the failure to follow the stipulated procedure, in fact, did result in any adverse consequences for the complainants. The reason is that GR did undertake meaningful consultations with project affected people over the draft ESIA. It held three meetings with affected communities and a fourth meeting with NGOs to discuss the draft ESIA and the project. Based on the transcripts from these consultations, it is clear that most of the key concerns raised by the Complainants were also raised during these consultations. The EBRD staff again participated as observers in these consultations.

A third area in which the Bank appears to have accepted a less than optimal situation is in regard to the grievance procedure. The Client's grievance process was initiated through complaints placed in boxes located in affected communities and at its headquarters, through calling a complaints hotline, or through personal visits to the GR headquarters. Given the lack of confidence that many stakeholders had in the Client, it is not clear that they would be willing to utilize these mechanisms, especially given that they contend that often the Client was not responsive to these complaints. It should be noted that the second group of consultants, who were hired with the encouragement of the EBRD staff, did recommend improvements in the grievance process. However, the Bank's involvement in the project ended before these new mechanisms were implemented and tested. Consequently, it is difficult to draw any conclusions about Bank compliance with its due diligence obligations under the applicable policies in this regard.

There are a number of conclusions that can be drawn about Bank compliance with the ESP from the above. First, due to the Client's inexperience, the Bank staff was drawn into working with the Client to help it meet its obligations under EBRD policies early in the process. On the one hand, the Bank's efforts to help the Client comply with Bank policies were impressive. They were clearly designed to improve the project's social and environmental performance by helping the Client comply with the applicable Bank policies, which imposed a higher standard on the project than the applicable local law. In fact, Bank staff went so far as to arrange EU financial support for some studies and some related project work. On the other hand, in the course of this engagement, the Bank staff acquiesced in some measures that were not consistent with applicable Bank policy. This could indicate that the Bank staff's efforts to help the Client resulted in them becoming so involved in the client's efforts to address the social and environmental dimensions of the project, that their ability to undertake an objective assessment of the project's compliance with the policies was undermined and that they developed too great a tolerance for non-compliance by the client.

### *Finding*

**The Bank staff's acceptance of a problematic ESIA scoping exercise that did not provide a meaningful consultation opportunity to all stakeholders, while not technically a case of non-compliance with Bank policy, is troubling.** While it is

clear that the staff's motivation in acquiescing in the Client's problematic scoping consultation was to work with the Client to enhance its overall compliance with Bank policy, their actions created a significant risk of adverse consequences for the Bank. The reason is that it increased the risk of the ESIA process being deficient, in the sense of not identifying all social and environmental impacts, and therefore of the project not dealing effectively with all these impacts. In addition, the staff, by engaging with the Client about and then accepting a problematic scoping exercise that, despite the requirements of PR10, did not provide a meaningful opportunity for all stakeholders to engage with the Client during the scoping exercise, risked compromising its ability to maintain the distance needed to objectively and carefully undertake the type of project assessment that is envisaged by the ESP and that is the primary obligation of the Bank under the policy. There is no evidence that the Bank's actions in this regard caused harm to the complainants. **Thus, the primary significance of this finding is that it should alert the Bank management to the risks inherent in accepting consultations that are not fully consistent with the applicable EBRD requirements and that they should draw the appropriate lesson from this experience.**

**Second, the Bank's agreement to the 2-step public disclosure of the draft ESIA amounts to a technical non-compliance with PR1 and PR10 because they envisage the full disclosure of the required documents at one time and do not provide for disclosing them in stages. However, the records of the extensive consultations that took place after the public disclosure indicate that all stakeholders had a fair opportunity to present their concerns to the Client during these consultations. Consequently, the complainants did not suffer any harm as a result of this instance of Bank non-compliance and it can be regarded as *de minimus*.**

## VII Conclusion and Recommendations

It is clear from the above that the staff of the EBRD worked diligently and professionally to comply with the applicable Bank policy. However, as is to be expected in a complex Category A project like the Tbilisi Railway Bypass Project, achieving full compliance has proven to be very difficult. As a result the Bank staff did not fully comply with the applicable EBRD policies. While these few instances of non-compliance cannot be ignored, it is not clear that they contributed to the problems that concern the Complainants. In addition, given that the Bank is no longer involved with this project, it is not possible for anything to be done to correct these instances of non-compliance. Consequently, the following two recommendations are offered as lessons that the Bank staff and management can draw from this project and apply in other projects.

First, when the Bank is concerned about the Client's capacity to comply with its obligations under Bank policies, it needs to carefully balance the conflicting pressures arising from assisting the Client to develop the requisite capacity and protecting its own ability to comply with its obligation to conduct independent, objective assessments of the Client and the project. This suggests that the Bank should carefully

evaluate the existing division of responsibilities between those Bank staff who work with the Client during the project design and planning phase and those who conduct the project appraisal prior to the Bank's final decision on whether to lend to the project or not to see if there is a need to make this division clearer so as to mitigate the risk of undermining the Bank's ability to meet its primary due diligence obligations under the ESP. This division is independent of whatever division there is between the staff involved in project appraisal and the monitoring of project implementation.

Second, the Bank staff need to make more of an effort to ensure that the Client understands the function of consultation and the importance of fully respecting all procedural aspects of the Bank's consultation requirements. In this regard, EBRD staff should take all necessary measures to work with the Client to ensure that it understands all the purposes of consultation and that it implements a full and meaningful consultation process.