

PUBLIC

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

**PROJECT COMPLAINT MECHANISM
ELIGIBILITY ASSESSMENT REPORT**

**COMPLAINT: ALTAIN KHUDER DEBT & EQUITY
REQUEST NUMBER: 2015/01**

PUBLIC

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EXECUTIVE SUMMARY

On 30 December 2014 the PCM received a Complaint regarding Altain Khuder's Tayan Nuur iron ore mining Project (both debt and equity) at an existing facility in Tseel soum, Mongolia. The Complaint was presented by Mongolian non-governmental organization OT Watch and seven residents of Tseel soum. The Complaint is supported by CEE Bankwatch Network in the Czech Republic and the Centre for Research on Multinational Corporations (SOMO) in The Netherlands. The Complaint seeks a Problem-solving Initiative and a Compliance Review.

On 15 January 2015 the Complaint was registered pursuant to PCM Rules of Procedure 11-13, and was subsequently posted on the PCM website, pursuant to PCM RP 20. PCM Expert Neil Popović was appointed as an Eligibility Assessor to conduct an Eligibility Assessment jointly with the PCM Officer in accordance with PCM RP 22. In determining the eligibility of the present Complaint, the Eligibility Assessors examined the requirements of the PCM RPs to determine if the Complaint is eligible for a Problem-solving Initiative, a Compliance Review, or both. Based on RPs 24-26 and 28-29, the Complaint is found *ineligible* for a Problem-solving Initiative; based on RPs 24-25 and 27-29, the Complaint is found *eligible* for a Compliance Review.

I. BACKGROUND

1. The Tayan Nuur iron ore mine is located in Tseel soum, Gobi Altai aimag, Mongolia. The mine is located 168 km from the Mongolian-Chinese Burgastai post and approximately 800 km from the target markets in Xinjiang, Gansu and Inner Mongolia in the People's Republic of China. One hundred percent of the ore produced at the Tayan Nuur mine is intended for export to China.
2. Tseel soum hosts the mine and camp, as well as two water abstraction wells and roads. Tseel soum has a population of 2,000. The mine also affects Bugat soum, population 2,122, site of the Burgastai border post and Project post; Tugrug soum, population 2,029, which is traversed by the Project road; and Altai soum, population 2,076, which hosts a 4 km section of the Project road and the well, used to supply the Burgastai border post.
3. The mine is operated by Altain Khuder LLC, a Mongolian company established in November 2006. Mining operations commenced in July 2008. The expected life of the mine is twelve years.
4. The involvement of the European Bank for Reconstruction and Development (EBRD or the Bank) in the Project comprises a loan of US\$ 30 million for balance sheet restructuring and an equity investment in the amount of US\$ 12.245 million. The Project consists of the development of the Tayan Nuur mine through the purchase of mining equipment, balance sheet restructuring and the provision of working capital. The total projected financing for the mine was US\$ 100 million. The Project was assigned Category B under the EBRD's Environmental and Social Policy 2008 (the 2008 Policy).
5. The Bank's involvement in the Project is part of a broad approach in support of sustainable development of the Mongolian mining sector. Key objectives of the Bank's involvement include setting standards for corporate governance and business conduct. In particular, the Project was intended to improve standards in various areas of corporate and industry life, including:
 - 1) A corporate governance plan for Altain Khuder and its parent company with specific measures to improve transparency and disclosure;
 - 2) Require Altain Khuder to comply with the disclosure process under the EITI (Extractive Industries Transparency Initiative) in Mongolia;
 - 3) Improve corporate, environmental and social management practices through the introduction of appropriate covenants in financing documents;
 - 4) Introduce the first IFRS (International Financial Reporting Standards) financials in the iron ore sector in Mongolia;
 - 5) Introduce the first internationally audited iron ore reserves in accordance with JORC (Joint Ore Reserves Committee) reserves standards; and
 - 6) Introduce an advanced mine management software.

The Project was expected to have a significant demonstration effect on other producers. Throughout the financing, the Bank intended to continue supporting Altain Khuder in establishing itself as a successful domestically grown company in Mongolia.

Environmental and Social Review and Action Plan

6. An independent consultancy was commissioned to conduct an environmental and social review and to prepare an Environmental and Social Action Plan (ESAP) “to bridge gaps between current operations and the EBRD’s Environmental and Social Performance Requirements”¹ set forth in the 2008 Policy. The environmental and social review was conducted by the consultancy from 8-12 August 2011, and from 10-15 October 2011. The final ESAP is dated 13 December 2011.
7. The consultancy considered the following EBRD Performance Requirements (PRs):
 - PR 1: Environmental and Social Appraisal and Management
 - PR 2: Labour and Working Conditions
 - PR 3: Pollution Prevention and Abatement
 - PR 4: Community Health, Safety and Security
 - PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement
 - PR 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources
 - PR 10: Information Disclosure and Stakeholder Engagement
8. The consultancy deemed the following EBRD PRs inapplicable:
 - PR 7 (Indigenous Peoples): According to the consultancy, no indigenous groups were identified.
 - PR 8 (Cultural Heritage): According to the consultancy, there are no cultural heritage sites within the footprint of the Project.
 - PR 9 (Financial Intermediaries): According to the consultancy, the Project does not involve financial intermediaries.

The ESAP includes proposed Corrective Actions for PRs 1, 2, 3, 4, 5, 6 and 10.

¹ Environmental and Social Review and Action Plan, Tayan Nuur Iron Ore Mine, Gobi Altai, Mongolia (13 Dec. 2011), prepared by Environmental Resources Management (Shanghai) Limited (ERM).

II. STEPS TAKEN IN THE ELIGIBILITY ASSESSMENT

9. In conducting this Eligibility Assessment, the Eligibility Assessors have reviewed the Complaint, including Exhibits, as well as the following Project-related documents:²

- The ESAP dated 13 December 2011 prepared by the independent consultancy.
- Financing Agreements, dated 3 February 2012.³
- “Impacts of the global iron ore sector, Case Study Altain Khuder in Mongolia,” prepared by Tim Steinweg & Anne Schuit, of Stichting Onderzoek Multinationale Ondernemingen (SOMO), including a draft version dated October 2014, and the final version dated December 2014 (SOMO Report).
- Altain Khuder’s responses to the draft SOMO Report.
- “Tayan Nuur Iron Ore Mine Project Mongolia, Fact-Finding Mission Report,” prepared by OT Watch (Mongolia), SOMO, CEE Bankwatch Network (Czech Republic) and Lawyers for Environment (Mongolia), for the period 10/08/2014 – 16/08/2014 (Fact-Finding Mission Report).
- Altain Khuder’s responses to the Fact-Finding Mission Report, dated 19 October 2014.⁴
- “Investment Summary for the proposed US\$100 million Debt Facility,”⁵ dated 28 March 2012, prepared by Altain Khuder, including attachments.
- The Bank’s response to the Complaint, dated 17 February 2015.
- Various correspondence among Complainants, Client and the Bank.

10. Upon registration, the Complaint was transmitted to the Bank and to Altain Khuder. The Bank provided a “Management response” as noted above. On 16 January 2015,

² PCM RP 63 provides: When conducting an Eligibility Assessment, Problem-solving Initiative, or Compliance Review, the PCM Officer and/or PCM Experts will have full access to relevant Bank staff and files, including electronic files, cabinets and other storage facilities. Bank staff will be required to fully cooperate with the PCM. However, the PCM Officer’s and PCM Expert’s use and disclosure of information gathered during their respective activities will be subject to the Bank’s Public Information Policy and any other applicable requirements to maintain sensitive information confidential. No PCM staff member, PCM Expert, consultant, researcher, interpreter, translator and other technical expert engaged by the PCM may release a document, or information based on that document without the express written consent of the party who has provided such document and /or the Bank.

³ Consistent with the Bank’s Public Information Policy, this EAR treats the contents of the Loan Agreement, Share Purchase Agreement, Shareholders Agreement and Investment Summary as confidential.

⁴ As Client’s response, Eligibility Assessors considered Altain Khuder’s comments on the SOMO Case Study: Altain Khuder in Mongolia, dated October 2014 (SOMO draft Report), and the Tayan Nuur Iron Ore Mine Project, Mongolia, Fact-Finding Mission Report prepared by OT Watch (Mongolia), SOMO CEE Bankwatch Network and Lawyers for Environment (Mongolia) for the period 10 August 2014–16 August 2014 (Fact-Finding Report). As the reports have not been created by the Bank or the PCM, they have not been publicly disclosed (in accordance with EBRD Public Information Policy).

⁵ See footnote 3.

the PCM Officer requested the Client's official response. On 10 February 2015, Altain Khuder responded that it had previously sent its response to the Case Study prepared by SOMO, as noted above.

11. The Eligibility Assessors have engaged in further communications with the Bank and with representatives of the Complainants, both via telephone/skype and via email.

III. SUMMARY OF THE RELEVANT PARTIES' POSITIONS

Position of the Complainants

12. The Complaint alleges multiple violations of the Bank's PRs under the 2008 Policy resulting from adverse social and environmental impacts. In broad terms, the Complaint alleges inadequate compensation for involuntary resettlement, dust pollution and animal and human health impacts, water depletion and contamination, and inadequate stakeholder engagement.

Inadequate Compensation

13. According to Complainants, land ownership in Mongolia is largely based on customary arrangements. In many places pastureland is common property, and only a small percentage of herders have formal legal title to the land they use. Mongolian herders may have licenses for land possession or land use for specified periods of time. Soum and bagh administrations play an important role in allocating land rights. Herders live a nomadic life, migrating with their livestock for much of the year, but they usually have a fixed winter location where they build permanent structures to protect their animals from the cold. Herders may have land rights to their winter camps, but those rights do not include surrounding pastures.
14. When Altain Khuder first began its activities in the period 2007-2011, the company resettled herder families (the company claims 22) who had some form of land rights to their winter camps. Others without formal land rights but who had used land affected by the mine Project were displaced, but were not resettled. Some herders contend that displacement and resettlement continue.
15. Complainants allege they received inadequate compensation. According to Complainants, the company's resettlement programme included cash compensation, but not allocation of new land. The company negotiated with individual herders, with no involvement from local authorities. The soum administration was unsure of its role, and individual herders did not have sufficient information to negotiate in an informed and equal manner.
16. According to Complainants, the payment of cash instead of land compensation is inherently inadequate because herders cannot use cash to obtain replacement land. On the one hand, accepting cash compensation for land is seen as wrongfully selling communally owned land to the company, and on the other hand, herders cannot simply purchase new land, both because land is allocated at periodic bagh meetings where other herders may object, and because suitable land may be unavailable.

Dust Pollution

17. Complainants allege that dust pollution as a result of transportation of ore along the 168 km dirt and gravel roads from the mine to the Burgastai border post pollutes grass and water resources used by herders and their livestock, including goats, sheep, cattle, camels, yaks and horses, causing illnesses to animals and herders.
18. Herders with camps near the transportation route claim increases in livestock illnesses since the mine began operations. They also report skin rashes, chronic sneezing and sinus infections among them and their families.
19. Complainants allege that tests conducted at the request of Altain Khuder confirm that lung diseases were caused by dust pollution. Complainants indicate that Altain Khuder has challenged the tests and relies instead on another test that the company says indicates no fatal disease or illness is attributable to the dust. The company reportedly says it submitted the test results to local authorities, but Complainants contend they have not been informed about results, despite requests.
20. Herders contend they cannot migrate to other locations to avoid pollution because there are no vacant fertile pastures and because they have historical ties to land they currently use for winter, spring and autumn camps.

Impacts of Construction of Paved Road

21. Complainants alleged in the Complaint that Altain Khuder was constructing a paved road from the mine to the Burgastai border post. Transportation of ore on the paved road did reduce dust, but Complainants report continued use of the dirt road when driving empty trucks back to the mine.
22. Complainants also complain about the construction of the paved road, alleging that construction has been implemented without consulting the herders, whose needs have not been taken into account, despite the fact that the road cuts through their pastures. Herders allege a lack of passageways, causing inconvenience and stress for their animals, as well as dust and disruption to grazing land due to quarries used for the production of gravel to build the road.

Water Depletion and Contamination

23. Complainants allege that Altain Khuder's water use negatively affects the herders' access to water. Altain Khuder constructed its own well, which it reportedly uses only for domestic consumption, and not for industrial purposes. Although the ESAP calls for monitoring of water abstraction by installing water meters and sharing consumption data with local authorities and the public, herders say they are unaware of any such measures.
24. Complainants further allege the existence of contaminated water in pit lakes (from road construction) which are not fenced off, causing animals to get sick.

Inadequate Stakeholder Engagement

25. Complainants allege that herders and local authorities were not consulted prior to the start of the mining Project, and that they are unaware of any action by Altain Khuder or the Bank to assess the impact of the mine on their livelihoods. Herders were also unaware of the Bank's involvement and the social and environmental requirements that flow from the Bank's involvement.
26. Complainants allege that Altain Khuder has filed up to seven lawsuits against people who openly criticised the company or expressed grievances, charging them with "organised crimes of defamation" under Mongolian law. The company allegedly sued bagh governors, healthcare workers and citizens' representatives. According to Complainants, the cases were resolved against the company, but the company continued to pursue the cases in higher courts, at significant expense and inconvenience to the defendants. The cases reportedly were finally disposed of in May 2014, and the seven defendants are pursuing countersuits to recover their expenses and for reputational damages.
27. Complainants allege that herders have been intimidated and harassed by the mine's security personnel when trying to speak with representatives of Altain Khuder about their grievances.

Alleged Violations of Relevant EBRD Policies

28. Based on the foregoing alleged conduct attributed to Altain Khuder, Complainants allege multiple violations of the 2008 Policy by the Bank. In particular, Complainants allege: inadequate environmental and social appraisal and management (PR 1); inadequate pollution prevention and abatement (PR 3); inadequate mitigation of impacts on community health, safety and security (PR 4); inadequate resettlement and displacement (PR 5); failure to recognise indigenous peoples (PR 7); and failure to disclose information and engage with stakeholders (PR 10).

Inadequate Environmental and Social Appraisal and Management (PR 1)

29. Complainants allege that EBRD failed to ensure that Altain Khuder fully assessed, disclosed and managed the adverse impacts of the Project. Complainants assert that Altain Khuder's Environmental Impact Assessments (EIAs) do not meet the Bank's PRs with respect to ecological impact assessment, disclosure of Project information and consultation, impacts of the Project's water use and measures to minimise water use, and social impacts.
30. Complainants consider that the ESAP "ignores a large stakeholder group especially at risk to negative impacts of the Project." According to Complainants, the absence of adequate appraisal measures to mitigate impacts has resulted in serious adverse impacts on the quality of air, soil/vegetation and water, and with that, the livelihoods of herders in Tseel soum.
31. Complainants allege Altain Khuder's capacity to comply with the PRs was "far from certain," and that the Bank failed to ensure compliance with PR 1, as evidenced by the

company's failure to fully assess, disclose and manage negative impacts of the mine Project on the herders.

Inadequate Pollution Prevention and Abatement (PR 3)

32. Complainants allege that the Bank did not ensure that Altain Khuder complied with the provisions of PR 3. Complainants assert that it is unclear whether the EBRD has assessed compliance of the mine with European Union (EU) environmental standards, as required under PR 3. In Complainants' view, that the herders are impacted by pollution of soil and water indicates that the Bank has not lived up to its obligations to ensure that Altain Khuder is acting in compliance with the Bank's 2008 Policy.

Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR 4)

33. Complainants allege that negative impacts of the mine and associated road on air, soil, water and vegetation, plus that Altain Khuder's security personnel behave in an inappropriate manner towards herders and their representatives who approach the mining site, demonstrates that the Bank has failed to ensure compliance with PR 4.

Inadequate Resettlement and Displacement (PR 5)

34. Complainants allege that EBRD did not ensure that Altain Khuder complied with the provisions of PR 5 because herders were not adequately informed or consulted about resettlement, and their right to free, prior and informed consent (applicable to Indigenous Peoples) was not respected. Complainants assert that even if the herders are not considered indigenous peoples, their rights have not been respected because Altain Khuder failed to take measures to ensure meaningful participation of herders in resettlement planning and to assist them in fully understanding their options for resettlement and compensation.
35. Complainants allege that no information is available regarding the existence of a "Resettlement Action Plan and Livelihoods Restoration Framework," as called for in the ESAP. Complainants assert the Bank has failed to ensure that Altain Khuder complies with the requirements of PR 5.

Failure to Recognise Indigenous Peoples (PR 7)

36. Complainants allege that Mongolia's nomadic herders qualify as indigenous peoples under the Bank's definition of Indigenous Peoples, as set forth in PR 7.10.⁶ According

⁶ PR 7.10 defines Indigenous Peoples as possessing the following characteristics in varying degrees:

- self-identification as members of a distinct indigenous ethnic or cultural group and recognition of this identity by others;
- collective attachment to geographically distinct habitats, traditional lands or ancestral territories in the project area and to the natural resources in these habitats and territories;
- descent from populations who have traditionally pursued non-wage (and often nomadic/transhumant) subsistence strategies and whose status was regulated by their own customs or traditions or by special laws or regulations;
- customary cultural, economic, social, or political institutions that are separate from those of the dominant society or culture;
- a distinct language or dialect, often different from the official language or dialect of the country or region.

to Complainants, herders identify themselves as traditional nomadic pastoralists with an ancient culture, they are recognised as indigenous by others, they maintain an intimate attachment to distinct ancestral territories, they have pursued traditional, non-wage subsistence strategies for centuries, they are separated from mainstream culture by distinct cultural and economic customs, and they use words and phrases not used in mainstream Mongolian language—all of which are part of the Bank’s definition of Indigenous Peoples.

37. Complainants allege that neither the Bank nor Altain Khuder undertook any analysis to determine whether the herders should be recognised as Indigenous Peoples under PR 7. As a result, Complainants allege, the Bank and Altain Khuder failed to obtain the herders’ free, prior and informed consent and to fulfil other requirements of PR 7, including efforts to minimise the amount of indigenous land to be used.

Failure to Disclose Information and Engage with Stakeholders (PR 10)

38. Complainants allege that herders lack information about Altain Khuder, its financiers and the mining Project. Affected people also lack information about the possible and actual environmental and social impacts of the mine Project. Herders have not been engaged in identifying impacts of the Project or consulted in connection with efforts to manage the impacts.
39. Although the company reportedly placed a suggestion box at the Tseel soum centre, only one interviewed resident knew about it, and the herders allege their grievances have not been addressed promptly and without retribution. According to Complainants, that Altain Khuder has not adequately consulted and engaged with stakeholders shows that the EBRD has not lived up to its obligations under PR 10.

Position of EBRD Management

40. The Bank provided a formal response to the Complaint on 17 February 2015 pursuant to PCM Rules of Procedure, paragraph 19. Bank Management framed the Management response with reference to the EBRD 2008 Policy and “relevant Policy Requirements.”
41. First, Management notes that the Project involves an existing facility, not a new facility, meaning the site was developed and impacts occurred before EBRD became involved. It was recognised, therefore, that the Project was not compliant with all PRs at the time of financing, and that the Bank’s client (Altain Khuder) would be required to adapt and implement an ESAP to achieve compliance with the EBRD’s requirements within a time frame acceptable to the Bank.
42. Management reports that the Bank monitored progress and received updates through the first half of 2013. However, in mid-2013, the Bank stopped receiving information or communications regarding environmental and social issues, rendering the Bank unable to monitor ESAP progress after mid-2013. According to Bank Management:

EBRD has not received required environmental and social reporting on the investment since mid-2013, as required by the legal documentation and is therefore not in a position to comment on the status of the individual issues in the Complaint.

43. According to the Bank, the change in relationship marks a clear end point to its access to information. Bank Management's response thus does not purport to address any factual assertions after the middle of 2013: "The client appeared to be making good progress on their commitments and had developed plans to deal with the paving of the road, as of mid-2013 when [Altain Khuder's] communication with the Bank deteriorated. Following this point in time, the Bank has been unable to monitor the environmental and social performance or commitments of the client."

Inadequate Environmental and Social Appraisal and Management Plan (PR 1)

44. According to Management's response, actions developed to address gaps in work done prior to the Bank's involvement in the Project were included in the ESAP agreed by Altain Khuder and included in the Loan Agreement. As a result, the company was legally bound to implement the ESAP. The Management response also states that notwithstanding the lack of a heading in the ESAP titled "Vulnerable Stakeholder Groups," the herders were not overlooked. According to Management, several of the action items in the ESAP are specifically focused on the herders, including all of the action items under PR 5.
45. Management notes further that the need for Altain Khuder to add staff and resources to address environmental health and safety and social issues in order to satisfy EBRD requirements was addressed by the independent consultancy in August 2011, and the consultant's report of December 2011 notes that Altain Khuder hired an Environmental Manager in September 2011 to address the recommendation to add staff and resources.
46. The consultant indicated that management from the mine site made a commitment to follow up on environmental issues, including fuel and lubricants storage, paving the maintenance area, dust deposition monitoring and improvements to solid waste management. The Bank's environmental and social team working on the Project also concluded based on its observations that the resources of the company were adequate.

Inadequate Pollution Prevention and Abatement (PR 3)

47. According to the Management response, the Bank addressed concerns about dust pollution in ESAP items 11 (occupational exposure to dust), 18 (dust from processed ore piles), and 21 (lack of information disclosure giving rise to "likely unfounded" concerns about dust). The Management response identifies the planned construction of a paved road for export as a measure to address concerns about dust pollution. The Bank reports that further information on the status of environmental and social issues was not forthcoming from Altain Khuder, but issues related to dust were included as part of the Bank's due diligence and in the ESAP for the Project.

Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR 4)

48. The Management response notes that the ESAP and discussions with Altain Khuder addressed dust pollution. Management is not aware of scientific studies linking elevated levels of magnesium and iron to the Altain Khuder Project, as alleged by Complainants, or to adverse effects on animals. The Management response says the Bank has not previously heard allegations of Altain Khuder's security personnel intimidating local people.

Inadequate Resettlement and Displacement (PR 5)

49. The Management response states that the Project was operational prior to EBRD involvement, and therefore resettlement and compensation associated with the mining operations were completed before Altain Khuder was aware of the Bank's requirements. The independent consultancy noted the gap and included a series of corrective actions in the report, which also were included in the ESAP. According to the Bank, Altain Khuder initiated corrective actions, starting with a post-resettlement survey conducted in November 2011. A livelihood restoration framework was to be implemented and supplemental assistance would be provided if the survey identified households that were worse off (in terms of living standards and income) post displacement. The company also agreed to prepare a land acquisition and resettlement planning framework for potential future physical or economic displacement. The Bank states that these items are included in items 24 through 28 of the ESAP (identification of displaced households, compensation, livelihood restoration, standard of living, and land acquisition and resettlement planning framework).

Failure to Recognise as Indigenous Peoples (PR 7)

50. The Bank does not believe that Mongolian herders meet EBRD's definition of Indigenous Peoples. According to Management, herders are not distinct from a dominant national group in a country where herding provides 40% of employment and accounts for 20% of GNP. Herders are "attached" to the land they live on, but the land is not distinct from the land inhabited by other Mongolians, and it may change over time. Herders' descent from populations who have traditionally pursued non-wage subsistence strategies "applies to all Mongolians equally". Herders are regulated by the same laws and institutions as other Mongolians. And finally, according to the Bank, herders do not have a distinct language or dialect. In the Bank's view, PR 7 does not apply.

Failure to Disclose Information to Stakeholders (PR 10)

51. The Management response notes that PR 10 requires a summary of environmental and social issues associated with the Project and a summary of the commitments in the action to be disclosed. In addition, the client is required to have and implement a stakeholder engagement plan, including a public grievance mechanism. According to the Bank, those requirements are addressed in ESAP actions 3 (lack of documented procedures for social performance), 6 (disclosure of environmental impacts and monitoring results), 21 (lack of information regarding environmental impacts giving rise to likely unfounded concerns about health effects of dust), 31 (inadequate disclosure of environmental impacts, including about health effects of dust) and 32 (grievance mechanisms need to be formalised).

Client's Position

52. The Complaint was formally transmitted to the Client on 16 January 2015, requesting the Client's response to the issues raised therein. Altain Khuder responded by email to the PCM on 10 February 2015, stating that it had already responded to SOMO by providing comments on the *SOMO Case Study: Altain Khuder in Mongolia*, dated October 2014 (SOMO Report), and the *Tayan Nuur Iron Ore Mine Project*,

Mongolia, Fact-Finding Mission Report prepared by OT Watch (Mongolia), SOMO CEE Bankwatch Network and Lawyers for Environment (Mongolia) for the period 10 August 2014–16 August 2014 (Fact-Finding Report).

SOMO Report

53. Altain Khuder's responses to the SOMO Report include comments about background information (e.g. the company's corporate structure), as well as responses to the report's assertions about environmental and social aspects of the Tayan Nuur mine. Along with its response to the SOMO Report, Altain Khuder included four additional reports:

- Report of Veterinary Institution, dated 12 December 2013 (livestock autopsies).
- Letter from Research Institute of Veterinary Medicine to Altain Khuder, dated 27 September 2013 (critique of report by State Central Veterinary Laboratory).
- Conclusion of the State Senior Inspector for National Inspection Office of Mongolia, dated 4 October 2013 ("Measurement and analysis of air pollution along the road of concentrate transportation").
- Report of Meteorological Office of Govi Altai Province, dated 16 October 2013 (fine grain dust measurement).

54. For purposes of the eligibility assessment, the Eligibility Assessors focused on the Client's comments about environmental and social issues. In that regard, Altain Khuder challenges the SOMO Report's discussion of dust pollution impacts on grass and water sources, as well as grazing animals, and suggests reviewing dust measurement assessments completed by Mongolian government authorities.

Fact-Finding Report

55. Altain Khuder's responses to the Fact-Finding Report are more extensive. According to Altain Khuder, the report "is full of inaccurate facts and misrepresentations". The company asserts that the report is based on "word-of-mouth type" sources, and that in contrast, the company has archival records of its environmental compliance.

Dust Pollution

56. According to the company, third party investigations of dust from transportation conducted five times by multiple entities "concluded that the dust being created were within limits". The company states that road construction work is in progress, and that they discussed possible passageway points with Bayangol and Derstei bags of Tseel soum. All passages were located based on consultation with Tseel soum authorities and local herders. Altain Khuder states that it obtained gravel site land permits from the Tugrug soum authority. According to the company, the paved road will "completely remove dust creation."

57. Altain Khuder states that it purchases livestock from local herders, and it has not noticed any evidence of lung disease among the animals. According to the company, tests on animals were conducted by relevant administrative bodies, with local herders and NGOs present during the inspection process. Reports were submitted to local

authorities, and Altain Khuder asserts it has not received any requests for the reports from local herders. Altain Khuder challenges the basis for statements that dust pollution adversely affects the quality of wool and cashmere. The company states that no inspections on the road or the mine site have found any adverse environmental effects caused by dust pollution.

Water

58. According to the company, it does not use any water for industrial purposes, and it has a state-of-the-art wastewater treatment facility. The mine's water is "constantly monitored," consumption data are sent to local authorities and made available to citizens of Tseel soum through the company's information board at the Tseel soum governor's office. Altain Khuder states that hydrogeological surveys were done on each aquifer, that the company obtains all necessary permits for water extraction and usage, and all water consumption is in accordance with its water usage agreements with local authorities. The company is not aware of any pit lakes or contaminated water in any area where the company's operations take place. The company claims its activities have no impact on surface water.

Stakeholder Engagement

59. Altain Khuder alleges it provides quarterly environmental reports to the Gobi-Altai Environmental Agency and section authorities, and it provides Annual Environment reports to the Ministry of Environment. The company states that all the stakeholder engagement actions identified in the ESAP have taken place.
60. The company asserts that it has not received any Complaints regarding inadequate stakeholder engagement. The company further contends that serious allegations were made against the company regarding pollution and damage to land, and the company "had no other choice but to seek legal actions". According to the company, for safety reasons, no one can enter the mine site without a prior request.
61. With respect to the company grievance mechanism, Altain Khuder states that all requests are duly processed, and the company's public relations representative is in regular communication with local authorities and herders.

Resettlement

62. Altain Khuder states that all resettlement compensation was paid based on negotiations with local herders in accordance with Mongolian law. According to Altain Khuder, local herders requested relocation of their spring and winter camps, and the company negotiated and paid related expenses and compensation. In addition to monetary compensation, the company conducted social support activities, including opening mountain passages for the herders to move, allowing herders to stay temporarily at their old camps (with water supplied), and in 2011 and 2012, the company transported the food supply for livestock during harsh winter conditions.
63. The company claims it provides tuition scholarships for students from local families, jobs and training for relocated families, and other social responsibility programs. The company hired Sanity Watch LLC to conduct a comparative analysis of livelihoods of relocated families before and after resettlement. Some social programs were based on

the results of the assessment, which incidentally did not reveal any loss of assets. According to Altain Khuder, all actions related to resettlement are complete.

64. The company states that Tseel soum land officials and bagh governors were present during the relocation program. The Tseel soum governor has the authority to issue new land permits. Relocated herders “are more than able to provide requests for new land to the local governor”. The company received numerous Complaints from local herders that local authorities are hesitant to issue new land permits. Local authorities stated that relocated families do not need new land. Altain Khuder approached the Bayangol bagh governor with requests to provide new land, but the governor refused to provide new land for relocated families.

IV. DETERMINATION OF ELIGIBILITY

65. In determining the eligibility of the present Complaint, the Eligibility Assessors examined the requirements of PCM RPs 24(a), 25 and 26 to determine if the Complaint is eligible for a Problem-solving Initiative, and the requirements of PCM RPs 24(b), 25 and 27 to determine if the Complaint is eligible for a Compliance Review. The Eligibility Assessors also assessed the Complaint against the requirements of PCM RP 28, which sets out general criteria that disqualify a Complaint for a review by the PCM, and considered the Bank Management response and the Client’s response to the Complaint, in accordance with PCM RP 29.

General Eligibility Criteria

Criteria that the EBRD Management agreed are satisfied for the purpose of this Eligibility Assessment

66. To be held eligible for a *Problem-solving Initiative*, the Complaint must: (i) be filed by an individual or individuals located in an Impacted Area or who has or have an economic interest, including social and cultural interests in an Impacted Area; and (ii) raise issues covered by a Relevant EBRD Policy.⁷ The Bank agrees that the Complainants qualify as individuals located in an Impacted Area. Further, the Bank agrees that the Complaint raises issues covered by a Relevant EBRD Policy.
67. Thus, the Bank agrees that the Complaint raises issues covered by PR 1 (Environmental and Social Appraisal and Management), PR 3 (Pollution Prevention and Abatement), PR 4 (Community Health, Safety and Security), PR 5 (Land Acquisition, Involuntary Resettlement and Economic Displacement), PR 7 (Indigenous Peoples) and PR 10 (Information Disclosure and Stakeholder Engagement).
68. To be held eligible for a *Compliance Review*, the Complaint must: (i) be filed within 24 months after the date on which the Bank ceased to participate in the Project, and (ii) must relate to a Relevant EBRD Policy.⁸
69. The Bank agrees that the Complaint was filed within the prescribed timeframe. The Bank’s views about the 2008 Policy are as stated above with respect to a Problem-solving Initiative.

⁷ PCM RP 24(a), RP 1.

⁸ PCM RP 24(b), RP 1.

PCM Functions Requested

70. In accordance with PCM RP 25(a) the Eligibility Assessors take note that the Complainants are seeking a Problem-solving Initiative and Compliance Review.

Indication of the Outcome Sought

71. In determining the eligibility of the Complaint and in accordance with PCM RP 25(b), the Eligibility Assessors also considered the outcome that the Complainants are seeking in bringing the Complaint to the PCM. The Complaint includes demands directed at Altain Khuder and demands directed at the EBRD.

72. Complainants recommend that *Altain Khuder*:

- Assess the impacts of the mine and its associated facilities on the herder communities, and address their concerns and demands.
- Prepare and implement an ESAP that is compliant with EBRD standards.
- Complete the black top road, and ensure that company trucks only use this road, and that the road is accessible and available for use by the herders without paying tax. Also construct sufficient passageways, in consultation with the herder communities. Cease all transportation of ore until a road that meets relevant standards is completed.
- Ensure resettled herders are properly compensated for loss of their camps and structures, and relocated to new land in accordance with their wishes and demands.
- Implement a comprehensive livelihood restoration program in consultation with all stakeholders involved.
- Restore all land altered, degraded and polluted by the mine and its associated facilities. Fence off all contaminated water sources and gravel pits.
- Make publicly available all animal testing, ensure independent animal testing, and compensate for the loss of animals and medical expenses as a result of dust pollution and water contamination.
- Ensure independent water use monitoring and disclose the results, restore lost wells and other water access points no longer available or sufficient to sustain the herders and their livestock.
- Abstain from all forms of conflict with affected people and their representatives, and stop all forms of judicial actions against them. Ensure an effective form of stakeholder engagement and act upon Complaints and grievances by communities.
- Use Best Available Technology to reduce dust pollution from dry processing of ore.
- Develop in consultation with local communities a mine exit-plan which includes reclamation plans and clean-up, and is in compliance with EBRD standards.

73. Complainants recommend that the *Bank*:

- Monitor and assess the implementation of the above recommendations by Altain Khuder.
- Assist Altain Khuder with conforming to the PRs under the 2008 Policy.

- Monitor and ensure the company's compliance with the requirements set forth in the ESAP.
- Ensure all stakeholders, including herders and local authorities, are made aware of the EBRD PRs under the 2008 Policy.

Copies of Correspondence

74. PCM RP 25(c) states that a Complaint should include, if possible, copies of all correspondence, notes, or other materials related to previous communications with the Bank or other Relevant Parties. The Complaint here includes copies of previous correspondence between Complainants and Altain Khuder, and between Complainants and the Bank. The correspondence includes transmission of the Fact-Finding Mission Report prepared by OT Watch, along with the Bank's and Altain Khuder's responses thereto.

Disqualifying criteria

75. Pursuant to PCM RP 28, a Complaint will not be eligible for either a Problem-solving Initiative or a Compliance Review if it falls under any of the following:
- *PCM RP 28(a): it was filed fraudulently or for a frivolous or malicious purpose.* There has been no suggestion that the Complaint was filed fraudulently or for a frivolous or malicious purpose.
 - *PCM RP 28(b): its primary purpose is to seek competitive advantage through the disclosure of information or through delaying the Project.* There has been no suggestion that the primary purpose of the Complaint is to seek competitive advantage.
 - *PCM RP 28(c): in the case of a request for a Problem-solving Initiative, the subject matter of the Complaint has been dealt with by the accountability mechanism of any co-financing institution and the PCM Officer is satisfied that the Complaint was adequately considered by such accountability mechanism, unless there is new evidence or circumstances not known at the time of the previous Complaint. In the event that a Complaint is seeking a Compliance Review, a review by another accountability mechanism will not disqualify the Complaint from being processed under these rules.* The subject matter of the Complaint has not been and is not being considered by the accountability mechanism of any co-financing institution.
 - *PCM RP 28 (d): it relates to the obligations of a third party, such as an environmental authority and the adequacy of their implementation of national requirements, or relating to the obligations of the country under international law or treaty, rather than to issues that are under the control of the Client or the Bank.* The Complaint does not relate to the obligations of a third party, or to the obligations of Mongolia under international law or treaty.

Eligibility for a Problem-solving Initiative

76. The Eligibility Assessors do not judge the merits of the allegations in the Complaint and do not make a judgement regarding the truthfulness or correctness of the Complaint.⁹
77. As noted above, the Complaint was filed by eligible stakeholders, and that it raises issues under the 2008 Policy. According to PCM RPs 26(a) and (b), the Eligibility Assessors will also consider whether a Problem-solving Initiative would assist in resolving the dispute, or is likely to have a positive result. The Eligibility Assessors considered whether:
- (a) the Complainant has raised the issues in the Complaint with the Client's dispute resolution or grievance mechanism, or with the Complaint or accountability mechanism of a co-financing institution, or before a court, arbitration tribunal or other dispute resolution mechanism and, if so, what is the status of those efforts; and
 - (b) whether the Problem-solving Initiative may duplicate, or interfere with, or may be impeded by, any other process brought by the same Complainant (or where the Complainant is a group of individuals, by some members of the group) regarding the same Project and/or issues.
78. The Eligibility Assessors consider that Complainants have attempted to raise the issues in the Complaint with Altain Khuder, but those efforts have not adequately addressed Complainants' concerns. The Eligibility Assessors have also considered that a Problem-solving Initiative would not duplicate or interfere with any other process brought by Complainants.
79. Nevertheless, the Eligibility Assessors have concluded that a Problem-solving Initiative, with PCM involvement, is not likely to be successful. Although the Complaint may satisfy the technical requirements for a Problem-solving Initiative and while the objective of the Problem-solving Initiative is to restore a dialogue between the Complainant and the Client, the Complainants continue to assert that the Client refuses to engage with them, in some cases purportedly pursuing legal action against them. Additionally, the deterioration of the relationship between the Bank and the Client is a serious indication that the PCM would not be viewed as a suitable forum for dialogue between the Complainants and the Client. This is compounded by the Bank's inability to obtain social and environmental monitoring reports on the Project. **Under the circumstances, the Eligibility Assessors find that the Complaint is not eligible for a Problem-solving Initiative.**

Eligibility for a Compliance Review

80. As discussed above, the requirements of PCM RP 24(b) are satisfied. According to PCM RP 27(a), (b) and (c), where the Complaint raises issues appropriate for a Compliance Review, the Eligibility Assessors will also consider whether the Complaint relates to:
- (a) actions or inactions that are the responsibility of the Bank;
 - (b) more than a minor technical violation of a Relevant EBRD Policy unless such technical violation is alleged to have caused harm; and

⁹ PCM RP 24.

(c) a failure of the Bank to monitor Client commitments pursuant to a Relevant EBRD Policy.

81. In the present case, the Complaint alleges that the Bank failed to fulfil its responsibilities to ensure compliance with multiple PRs under the 2008 Policy in connection with the Project. Complainants have alleged specific failures by the Bank to ensure that its client Altain Khuder complied with PRs 1, 3, 4, 5, 7 and 10.
82. As a general matter, the Bank “will require clients to structure Projects so that they meet all applicable PRs.”¹⁰ With respect to “existing facilities that do not meet the PRs at the time of Board approval, the client will be required to adopt and implement an ESAP, satisfactory to the EBRD, that is technically and financially feasible and cost-effective to achieve compliance of these facilities with EBRD’s requirements within a time frame acceptable to the EBRD.”¹¹ As set forth in the 2008 Policy:

*The Bank’s role is: (i) to review the clients’ assessment; (ii) to assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimise, mitigate or offset, or compensate for adverse social and environmental impacts consistent with the PRs; (iii) to help identify opportunities for additional environmental or social benefits; and (iv) to monitor the Projects’ compliance with its environmental and social covenants as long as the Bank maintains a financial interest in the Project.*¹²

The Bank’s obligations continue:

*In order to verify proper implementation of ESAPs and adherence to agreed environmental and social covenants, the Bank will monitor Projects on an ongoing basis as long as the Bank maintains a financial interest in the Project, and share with the client the results of its monitoring.*¹³

83. Under PR 1, the Bank and the client must agree on the areas of influence for each Project, as well as the nature of due diligence studies required, and the Bank may require that existing facilities be subject to an audit to assess environmental and social impacts of past and current operations.¹⁴ Under PR 3, the Bank must “identify and agree with the client the relevant applicable environmental requirements.”¹⁵ Similarly, the Bank must agree with the client how the requirements of PR 4 will be addressed as part of the client’s overall ESAP.¹⁶ The agreements called for by PRs 1, 3 and 4 are reflected in covenants in the financial documents.

84. The applicability of PR 5 must be determined by the Bank during the environmental and social appraisal process, and where involuntary resettlement has occurred prior to

¹⁰ 2008 Policy, p. 7 ¶ 28.

¹¹ *Id.* at 7 ¶ 29.

¹² *Id.*, at 2 ¶ 3.

¹³ *Id.*, at 8 ¶ 36.

¹⁴ PR 1, ¶¶ 6, 8, 10.

¹⁵ PR 3, ¶ 9.

¹⁶ PR 4, ¶ 5.

the Bank's involvement, "due diligence will be carried out to identify a) any gaps and b) the corrective actions that may be required to ensure compliance."¹⁷

85. The Bank also has an obligation to determine the applicability of PR 7 during the environmental and social appraisal process, and it may seek expert advice in doing so.¹⁸ In addition, as part of its due diligence, "the Bank will assess the level of information disclosure and consultation conducted by the client against the requirements of" PR 10.¹⁹ "The need for and nature of any specific consultation will be agreed with the EBRD based on the stakeholder identification, analysis and detailed Project description, and depending on the nature and magnitude of current and potential adverse impacts on workers and affected communities."²⁰
86. Based on the above, the Eligibility Assessors have concluded that, in accordance with PCM RP 27, "the Complaint relates to actions or inactions that are the responsibility of the Bank" and "the Complaint relates to a failure of the Bank to monitor Client commitments pursuant to" the 2008 Policy. Given the serious nature of the alleged harm stated in the Complaint, including severe impacts on the livelihood of the affected population, the Eligibility Assessors have concluded that the Complaint raises more than minor technical violations of the 2008 Policy. **Based on the foregoing, the Eligibility Assessors find the Complaint is eligible for a Compliance Review.**

V. CONCLUSIONS

87. On the basis of the assessment set out above, the Eligibility Assessors determine that the Complaint satisfies the requirements of PCM RPs 24, 25 and 27, but not RP 26, and that none of the provisions of PCM RP 28 are applicable to the current Complaint. **Therefore, the Complaint is found *ineligible* for a Problem-solving Initiative and *eligible* for a Compliance Review.**

¹⁷ PR 5, ¶ 10.

¹⁸ PR 7, ¶¶ 8, 12.

¹⁹ PR 10, ¶ 7.

²⁰ *Id.*, ¶ 15.

COMPLAINT: Altain Khuder Debt (39581) & Equity (43804)

Request Number: 2015/01

Terms of Reference for the Compliance Review

Application

1. These Terms of Reference apply to any inquiry, action or review process undertaken as part of the Compliance Review, with a view to determining, as per PCM RP 41 if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has resulted in non-compliance with a Relevant EBRD Policy, in the present case the EBRD's 2008 Environmental and Social Policy, and, if in the affirmative, to recommend remedial changes in accordance with PCM RP 44.
2. Activities carried out as part of the Compliance Review and subject to these Terms of Reference are subject to modifications which the Compliance Review Expert and the PCM Officer may, at any time, expressly agree upon, except modification that may prejudice the interests of any Relevant Party or is inconsistent with accepted review practice.

Compliance Review Expert

3. In accordance with PCM RP 40 the PCM Officer appoints PCM Expert Albab Akanda as the Compliance Review Expert for this Compliance Review.
4. The Compliance Review Expert shall conduct the Compliance Review in a neutral, independent and impartial manner and will be guided by principles of objectivity and fairness giving consideration to, *inter alia*, the rights and obligations of the Relevant Parties, the general circumstances surrounding the Complaint and due respect for EBRD staff.

Time Frame

5. The Compliance Review will commence as soon as possible following the posting of the Eligibility Assessment Report containing these Terms of Reference in the PCM Register on the EBRD website.
6. Every effort shall be made to ensure that the Compliance Review is conducted as expeditiously as circumstances permit, and it is intended that the Compliance Review shall be concluded within 60 Business Days of its commencement. On request of the Compliance Review Expert, the PCM Officer may extend this time period for as long as necessary to ensure full and proper conduct of the Compliance Review. Any such extension shall be promptly notified to all Relevant Parties.

Scope of Compliance Review

7. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of each of the relevant provisions of the 2008 Policy and the PRs therein, in respect of which the Complaint alleges non-compliance. Relevant provisions of the 2008 Policy may include:
 - 2008 Policy § B: *EBRD's Commitment* (¶¶ 3, 7, 9)
 - 2008 Policy § C: *Project Appraisal Process* (¶¶ 14-16, 19); *Stakeholder Engagement* (¶ 25); *Performance Requirements* (¶ 28); *Monitoring* (¶¶ 34-37)
 - PR 1 (¶¶ 5-6, 8, 10, 13-15, 17-18, 20-24)
 - PR 3 (¶¶ 5-12, 15-16)
 - PR 4 (¶¶ 5, 7-9, 12-14, 16, 23, 25)
 - PR 5 (¶¶ 12-42)
 - PR 7 (¶¶ 8, 10-12, others as applicable)
 - PR 10 (¶¶ 6-16, 21-25)
8. The Compliance Review process will examine the core compliance issues in the context of the 2008 Policy and in all cases limited to matters raised in the Complaint, in particular:

Inadequate Environmental and Social Appraisal and Management (PR 1)

- a. Whether the assessment, disclosure and management of the adverse impacts of the Project on herders was adequate, including assessment of ecological impacts, disclosure of Project information, consultation, impacts of water use and measures to monitor and minimize water use, and social impacts.

Inadequate Pollution Prevention and Abatement (PR 3)

- b. Whether EBRD required that the Project was structured to meet EU environmental standards relating to air emissions and impacts to soil, and the protection of nature. In particular, the Compliance Review process should consider whether EBRD assessed the effects of dust from ore stockpiles, the mine pit, processing and transportation on the health of herders and livestock, as well as local vegetation.
- c. Whether the Bank required adequate mitigation measures for road impacts with regard to construction impacts, dust and safety, and whether these were monitored appropriately.

Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR 4)

- d. Whether EBRD adequately assessed and monitored compliance with the requirements of PR 4, including mitigation of human and animal health problems resulting from dust pollution, water depletion, and whether the conduct of the

Client's security personnel with regard to herders and their representatives was in accordance with the EBRD requirements in PR 4 (articles 23-25).

- e. Whether EBRD adequately assessed and monitored consideration of community impacts and results of consultation in connection with construction of a paved road for transportation of ore from the mine, including location of passageways and the sourcing and storage of materials for road construction.

Inadequate Resettlement and Displacement (PR 5)

- f. Whether EBRD adequately assessed and monitored whether herders would be (and were) informed and consulted about resettlement.
- g. Whether EBRD adequately assessed and monitored the implementation of Altain Khuder's Resettlement Action Plan and Livelihood Restoration Framework, including consideration of land rights, levels of compensation and livelihood standards.

Failure to Recognise Indigenous Peoples (PR 7)

- h. Whether EBRD properly applied the 2008 Policy's definition of Indigenous Peoples, including whether EBRD undertook adequate analysis to determine whether the herders should be recognized as Indigenous Peoples.
- i. Depending on the answer to the preceding question, whether EBRD failed to ensure that the herders were afforded the protections provided to Indigenous Peoples under PR 7, including free, prior and informed consent, avoidance or minimization of use of indigenous peoples' land, adequate compensation and culturally appropriate development opportunities. If not considered Indigenous Peoples, whether EBRD afforded adequate consideration of the herders as a vulnerable group.

Failure to Disclose Information and Engage with Stakeholders (PR 10)

- j. Whether EBRD adequately assessed and monitored compliance with the requirements of PR 10.
9. Although the Compliance Review Expert retains the final authority to frame and/or consolidate the core Compliance Review questions as he deems appropriate, he should give due consideration to those as set forth by the Eligibility Assessors in these Terms of Reference.

Procedure: Conduct of the Review

- 10. The Compliance Review Expert may conduct the Compliance Review process in such a manner as he considers appropriate, taking into account the Rules of Procedure of the PCM, the concerns expressed by the Complainants as set out in the Complaint, and the general circumstances of the Complaint.

11. Specifically, the Compliance Review Expert may:

- a. Review the Complaint to frame the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with the 2008 Policy;
- b. Review all documentation relevant to the Complaint;
- c. Consult extensively with EBRD staff involved in the Project, including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;
- d. Solicit additional oral or written information from, or hold meetings with, the Complainant, any other Relevant Party and, further, any interested person or party as may be appropriate for the conduct of the Compliance Review;
- e. If necessary to ascertain relevant facts, conduct a visit to the Project site accompanied by such officials of the Bank, the Complainants, the Client or other persons as he may consider necessary and appropriate;
- f. Request the PCM Officer to retain additional expertise if needed;
- g. Identify any appropriate remedial changes in accordance with PCM RP 41, subject to consideration of any restrictions or arrangements already committed to by the Bank or any other Relevant Party in existing Project-related agreements; and
- h. Take any other action as may be required to complete the Compliance Review within the required timeframe and in consultation with the PCM Officer, as appropriate.

Procedure: General

12. The Compliance Review Expert shall enjoy, subject to the provision of reasonable notice, full and unrestricted access to relevant Bank staff and files, and Bank staff shall be required to cooperate fully with the Compliance Review Expert in carrying out the Compliance Review.
13. The Compliance Review Expert shall take care to minimise the disruption to the daily operations of all involved parties, including relevant Bank staff.
14. Generally, all Relevant Parties shall cooperate in good faith with the Compliance Review Expert to advance the Compliance Review as expeditiously as possible and, in particular, shall endeavour to comply with requests from the Compliance Review Expert for obtaining access to sites, submission of written materials, provision of information and attendance at meetings. The Compliance Review Expert will advise the PCM Officer of situations where the actions or lack of action by any Relevant Party hinders or delays the conduct of the Compliance Review.
15. Access to, and use and disclosure of, any information gathered by the Compliance Review Expert during the Compliance Review process shall be subject to the Bank's Public Information Policy and any other applicable requirements to maintain sensitive commercial and/or other information confidential. The Compliance Review Expert may not release a document, or information based thereon, which has been provided on a

confidential basis without the express written consent of the party who owns such document.

Compliance Review Report

16. In accordance with PCM RP 42, the Compliance Review Expert shall prepare a Report. The Report may include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review. The Relevant Parties shall be provided an opportunity to comment on the draft Report, and the Compliance Review Expert shall consider the comments of the Relevant Parties when finalising the Report. In addition, in cases of non-compliance, the Report shall include recommendations according to PCM RP 44.
17. The recommendations and findings of the Compliance Review Report shall be based only on the circumstances relevant to the present Complaint and shall be strictly impartial.
18. Prior to submitting the Compliance Review Report to the Relevant Parties and to the Board in accordance with PCM RP 43, or sending the draft Compliance Review Report to the Bank's Management and the Complainant in accordance with PCM RP 45, the PCM Officer will verify that there are no restrictions on the disclosure of information contained within the Report, and will consult with the Relevant Parties regarding the accuracy of the factual information contained therein.

Exclusion of Liability

19. Without prejudice to the privileges and immunities enjoyed by PCM Experts, the Compliance Review Expert shall not be liable to any party for any act or omission in connection with any Compliance Review activities undertaken pursuant to these Terms of Reference.

ANNEXES

Annex 1: Complaint

Annex 2: Management Response

Annex 3: Client's Response (undisclosed)

Annex 1 – Complaint (41 pages)

COMPLAINT PRESENTED TO THE PROJECT COMPLAINT MECHANISM (PCM)

Re: European Bank for Reconstruction and Development Project No. 39581 (debt financing to Altain Khuder) and Project No. 43804 (equity financing to Altain Khuder) regarding the Tayan Nuur mining project in Tseel soum, Mongolia.

Presented by:

7 individuals affected by the Tayan Nuur iron ore mining project in Tseel soum, Mongolia.

Requesting:

- Problem Solving Initiative. Complainants: 7 individuals affected by the project
- Compliance Review. Complainants: 7 individuals affected by the project, OT Watch and CEE Bankwatch Network

Points of Contact:

OT Watch	Amibuh
Sukhgerel Dugersuren, Executive Director	Ulaanbaatar / Tseel soum
Ulaanbaatar	+976 99082601
otwatch@gmail.com	(Mongolian language only)
+976 99185828	
+976 98905828	

With the support of:

(advisers to the complainants, please include in all communication)

Centre for Research on Multinational Corporations (SOMO)	CEE Bankwatch Network
Anne Schuit, Researcher	Fidanka Bacheva-McGrath, Bankwatch EBRD coordinator
Sarphatistraat 30	Na Rozcesti 1434/6
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**TAVAN NUUR MINING PROJECT COMPLIANT
COMPLAINT TO EBRD PROJECT COMPLIANCE MECHANISM**

10 November 2014

SECTION 1 COMPLAINT

For complainants to fill in

- Issues related to the adverse impacts from project and claims of complaint:
 1. Unregulated use of roads
 2. Dust – from concentrate and transportation – black dust contamination
 3. No road crossings for human and animal at necessary points alongside the road
 4. Road is built in close proximity to biodiversity migration path and habitat area
- Winter and spring shelters and pastureland – social impact:
 1. 22 herders households involved in the relocation could not acquire winter shelters that are permitted and licensed, thus suffer losses
 2. Herders households located near to mining area are chased out without being covered by the relocation and compensation program
 3. Increased illness cases among population affect the growth
 4. Traditional use of natural recourses' is lost: food, mineral water, plants are lost, wild animals fled away
 5. Drunkenness, theft, disease, many negative impacts on social relations
- Water:
 - Herders' 150 meter deep wells are drying up – water in the wells in Buurtiin Am drained out thus the right to water is in breach
 - Springs and ponds in Suhant are dried up
 - Well in Tovgor is still out of water
 - Well in Khukh Ereg: promised to provide a motor but gave a motor with less power

Pastureland quality is diminished:

- Dust build up from mining and road, plants are contaminated and stopped growing due to lack of water
- No grass growing in hay field
- No pasture for camels and horses
- Cultural heritage:
 1. Nomadic herders are losing their assets, winter shelters and livestock to inherit to next generation
 2. Horse racing path and long distance training area for racing horses are cut off by paved road route

3. Traditional food item is out of menu – lungs and liver are no more part of five internal organs
4. No pastureland to live on herding livestock
5. The cemetery has been destroyed by mining
6. Dump built on 3 ancient graves
Biodiversity: medical plants and vegetation used for food that are disappeared or become rare: desert cistanche, licorice, nitrebush, zygophyllum potanini (potanin's beancaper), zygophyllum pterocarpum bunge (winged fruit beancaper), saxaul, and tamarisk

PROPOSED SOLUTIONS:

To reduce road impacts:

1. To assess and compensate damages caused to households residing in the road impact area
- A\ pasture fragmentation, no crossings
2. Use one road, prohibit creating many roads
3. Use wet method, road rehabilitation, road maintenance, and garbage removal
4. No consultation held with local community – no crossings in much needed places – need to conduct consultation to build crossings
5. To address an issue related to crossings for herds and animals to Sukhant river oasis

To reduce mining impact:

1. To resolve the issues related to households located in the mining impact area – to assess the damages
2. To carry out an audit on compensation provided to impacted households and compensate the damages
3. To conduct a necessary study in order to resolve the issues related to households that are no longer able to earn living from livestock herding
4. To assess the impact on health of population living in the impacted area
5. To conduct an assessment on social impact
6. To disclose programs related to social responsibility and regional development, and to consult with local community
7. To develop and implement a program to protect nomadic way of life and its culture from going extinct

To require the implementation of formal orders of the Ministry of Environment and Green

Development (MoEGD)

- Complainants and their contact information:
Nomadic herders residing in Khar Buudal, Ulaan Chuluu, Shivee 1-15, Zalaagiin am, Khariin Zavsar, Byatskhan Us, Khar Tsagaanii Zaag dahi Buudal of Tseel soum, Gobi-Altai province:
- Confidentiality:
Would like to require to keep confidential the names of complainants' except ... and Because, since 2013 Altain Khuder Company filed court claims against the herders who expressed criticism about the adverse impacts thus putting them into a trouble.

- Type of Complaint:
 - List of herders' names who are filing a Complaint, in case of filing through representative please provide information about the representative and a document witnessing the agreement on the conditions of representation etc. The advisory parties to this Complaint are: Oyu Tolgoi Watch NGO, Bank Accountability and SOMO – and all need to be included in any formal letters and documents.

SIGNATURES OF COMPLAINANTS:

Signatures

OT Watch

TO USE EBRD COMPLIANT MECHANISM

11 November 2014

No.	Name, surname	Name of organization	Occupation	e-mail, phone	Signature
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TAYAN NUUR MINING PROJECT COMPLAINT

Annex 1: Analysis of Policies and Procedures¹

23 December 2014

This Annex provides the factual background of the project, the social and environmental impacts of the Tayan Nuur mining project, the applicable policies that the EBRD has breached through its financing of the Tayan Nuur mining project, and arguments to show that this complaint meets the admissibility criteria set out in EBRD's Rules of Procedures for the Project Complaint Mechanism (PCM).

1. FACTUAL BACKGROUND OF THE PROJECT

1.1 Project description

The Project: Tayan Nuur iron ore mine

In January 2012, the EBRD approved a debt financing of up to USD \$30 million and equity financing of up to USD \$25 million to Mongolian private mining company Altain Khuder LLC for the development of its Tayan Nuur iron ore mine. The Tayan Nuur mine is located in the Tseel soum area of the Gobi Altai aimag in Mongolia.² Altain Khuder holds a license for 162 hectares of land and exports the iron ore from the mine in Tseel soum to China via the Burgastai border post, a distance of approximately 168 kilometers. The mine has a lifespan of approximately 12 years.³ The Tayan Nuur project was labelled "Category B" under the assumption that environmental and social risks could be mitigated through appropriate commitment to good environmental and social practices. The project was justified on the grounds that it is part of a broader approach to support sustainable development of the Mongolian mining sector and would contribute to 'key transition impacts' such as corporate and industry standard setting, including transparency and disclosure as well as corporate, environmental and social management practices.⁴

The Client: Altain Khuder

Altain Khuder LLC was established in November 2006 with the primary objective to survey, explore, develop and mine iron ore at the Tayan Nuur mine and to sell, store, transport and export iron ore

¹ This Annex was prepared by Anne Schuit at the Centre for Research on Multinational Corporations (a.schuit@somo.nl), with support of Sukhgerel Dugersuren at OT Watch (otwatch@gmail.com), Fidanka Bacheva-McGrath at CEE Bankwatch Network (fidankab@bankwatch.org), and Kris Genovese at the Centre for Research on Multinational Corporations (k.genovese@somo.nl).

² Mongolia is divided in 21 aimags (provinces). Aimags are divided in soums (districts) which consist of Baghs (smallest administrative units).

³ ERM (2013), Environmental and Social Review & Action Plan, p. 2.

⁴ EBRD website, Project Summary Documents, Altain Khuder, no date, <http://www.ebrd.com/pages/project/psd/2011/43804.shtml> (2-11-2014)

products to steel mills in China.⁵ According to a company presentation, the Tayan Nuur project has an annual production capacity of 2.3 million tons, a six fold increase during the course of five years, and total reserves of 91.7 million tons with a content of 38% iron ore.⁶ Its iron ore exports account for 33% of the total iron ore exports of Mongolia.

The Location: Mongolia

Mongolia is a country of approximately 2.6 million people, of which 43% of the population is rural and two-thirds is engaged in livestock herding. The country has a total land area of 156 million hectares, of which most is pastureland (126 hectares), making Mongolia's pastures the world's largest contiguous area of common grazing land. Over 21% of Mongolia's GDP is produced by herders.⁷

Traditionally, Mongolian society consisted primarily of nomadic herders herding horses, camels, cattle, sheep and goats, while land use was governed by customary law among herders. During Communist times land was state owned and pastures allocated by collectives. With the end of the Soviet rule in the 1990s, Mongolian transitioned towards a market economy which led to privatization of land, but private ownership was only realized fully in 2003.⁸ According to 2008 estimations, 7% of Mongolia's population held privatized land in that year, with only 1% of total land in rural areas privately owned.⁹

Mongolia's Land Law recognizes three categories of land tenure: ownership, possession and use. Land ownership rights include the right to manage and sell land. Land possession rights are in the form of licenses for possession of land for periods of 15-60 years, which can be extended as well as transferred by inheritance. The right cannot be sold. Land use rights give a right to use land, for terms of five years which can be extended. For land use rights, Soum and Bagh administrations have the authority to regulate pasture-use and allocate property. The process to allocate winter and spring camps varies per soum.¹⁰ While land tenure systems have developed towards individual land tenure, in many places in Mongolia pastureland continue to be held and managed as common property.¹¹ For Mongolian herders,

5 Altain Khuder website, About Us, "Altain Khuder LLC", no date, <http://www.altainkhuder.mn/content/24.html> (02-11-2014).

6 MRC Mongolian Resources Corporation, Powerpoint Presentation presented at Mines and Money Hong Kong 2014, 25-27 March 2014, <http://www.minesandmoney.com/hongkong/wp>

7 USAID Country Profile Mongolia. Property Rights and Resource Governance, p. 2. Available at: http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Mongolia_Profile.pdf

8 USAID Country Profile Mongolia. Property Rights and Resource Governance, p. 5. Available at: http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Mongolia_Profile.pdf

9 "Some commentators speculate that either rural residents have not considered land privatization to be valuable, or that information about land titling was not widely disseminated in rural areas". USAID Country Profile Mongolia. Property Rights and Resource Governance, p. 6. Available at:

http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Mongolia_Profile.pdf

10 USAID Country Profile Mongolia. Property Rights and Resource Governance, p. 8. Available at: http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Mongolia_Profile.pdf

11 Fernandez-Gimenez, M. (2006). Land use and land tenure in Mongolia: a brief history and current issues. USDA

mobile and flexible grazing arrangements and strategies are exactly fitted to cope with the harsh conditions in the areas they live in, and therefore are key to their survival.¹² According to the National Human Rights Institute of Mongolia, herders who practice a nomadic lifestyle 'are [...] bearers of Mongolia's traditional culture heritage'.¹³



Tseel soum, where the Tayan Nuur mine is located, is in the southwest of Mongolia, approximately 1,300 kilometers from Ulaanbaatar, Mongolia's capital. Tseel soum has a population of around 2100 people, consisting predominantly of nomadic herders. The communities closest to the mine and its associated facilities (including roads) are Derstei and Bayangol Baghs. Derstei Bagh consist of approximately 139.000 hectares of land and has a population of about 539 people, while Bayangol Bagh consists of approximately 108.000 hectares and has a population of about 501 people. Apart from Tseel soum, the mining project effects three other soums. In Bugat soum the Burgastai border post with China is located, as well a part of the project road. Also Tugrug soum hosts part of the project road that leads to the Burgastai border post. In Altai soum a short section of the project road is located, as well as a water well that is used to supply the border post with drinking water.¹⁴ The project area is characterised by mountains, outcrops and flat valleys, with sparse and fragile vegetation.¹⁵

1.2 Social and Environmental Impacts

This section describes the social and environmental impacts of Altain Khuder's Tayan Nuur mining project on herders in Tseel soum.

Forest Service, p. 1. Available at: http://www.fs.fed.us/rm/pubs/rmrs_p039/rmrs_p039_030_036.pdf

12 Idem.

13 National Human Rights Commission of Mongolia (2013). 12th Report on Human Rights and Freedoms in Mongolia, p. 18

14 ERM (2013), Environmental and Social Review & Action Plan, p. 2.

15 Idem

1.2.1 Involuntary resettlement at the mine's impact area

As described in part 1.1, land ownership in Mongolia is largely based on customary arrangements that are well attuned to the nomadic lifestyle and land based livelihoods of herders. In many places pastureland is common property, and only a small percentage of the herders have formal legal ownership over land. Some have licenses for land possessions or land use, which gives them the right to use but not sell the land for a certain period of time. Soum and Bagh administrations play an important role in allocating and regulating land and pasture, and the exact processes for this vary across administrations.

Although Mongolian herders live a nomadic life and migrate with their livestock and ger (traditional tent), they usually have a fixed winter location to which they return in the winter in order to survive the harsh weather conditions. This winter camp is where herders build permanent structures to protect their animals from the cold, and is key for their survival. Most land or user rights are therefore for the winter camp location, which contains 0.7 hectares where herders set up their ger and build structures. The land right does not include the pasture that corresponds to the camp. The size of a pasture needed to herd livestock varies from 5 to 30 kilometres, depending on the type of animal and the weather conditions.

During the first phases of Altain Khuder's activities between 2007 and 2011, a number of herder families who had some form of land rights to their winter camps at the site of the proposed mine were resettled by the company. According to Altain Khuder, a total of 22 families were resettled and received compensation for the loss of their winter camp. An unknown number of herders who once had grazing lands in the area where the mine is now located are also displaced. Some herders said that resettlement continues to this day to make way for the mine's expansion.

Inadequate compensation

Altain Khuder's resettlement programme includes cash compensation but not allocation of new land. Despite the highly complex, customary and collective land system, negotiations took place on an individual basis without involvement of the soum or aimag, while compensation was paid directly to individual herders. Altain Khuder asserts that the relocation program included stakeholder engagement, but herders and Bagh governors contest this. As for the Tseel soum authorities, the governor explained that the soum administration was unsure of its role, as they had never faced issues of resettlement before.

Without the involvement of local governments and with bilateral negotiations, herders were unable to negotiate in an informed and equal manner as the individual character of how this process was designed was not suited to the customary nature of their decision making processes and collectively managed land system. One resettled herder indicated that she was not fully aware of her property rights and the value of her land when the company started the negotiation. She thought she had no other option but to hand over her property rights and was unaware of the exact implications. The herder was asked by the company to bring her permit and she would receive a cash payment in exchange.

Cash instead of land based compensation

Regardless of whether the compensation amounts reflected the true value of the herders' camps, a different issue is that cash payments are not effective means of compensating and resettling herders in the first place. As described above, land tenure in Mongolia is highly complex and land is often managed under customary arrangements, often collectively. Soum and Bagh administrations play an important role in land and pasture allocation and management, the procedures of which vary per administration. In Tseel soum, available land is democratically appointed at quarterly Bagh meetings and cannot be purchased. This means that resettled herders cannot use the compensation to purchase new land to construct alternative winter camps. Cash compensation thus does not enable resettled herders to find new land. One interviewed herder said that her applications for new land were rejected by the other herders at Bagh meetings, as they consider all land to be communally-owned and thus allocated by Bagh decision. Accepting cash compensation for lands is therefore seen as wrongfully selling communally-owned land to the company.

The Tseel soum government does not consider itself responsible for providing alternative land to the resettled herders. The soum has a general procedure for issuing new land permits every year, and the soum government stated that there is enough land available to relocate the herders. However, the herder communities disagree, explaining that land with sufficient pasture to sustain their animals is already occupied. Vacant land often remains unused because it is not suitable for grazing. This leaves resettled herders in a position where they cannot use the cash compensation to buy new land for winter camps, while remaining unable to obtain new land as other herders refuse to grant them access. As neither the soum government nor the company has undertaken any action to relocate these herders and provide new land for them, they have nowhere to go.

1.2.2 Impacts of the road: dust pollution and animal and human health impacts

Altain Khuder exports iron ore from its mine in Tseel soum to China via the Burgastai border post, a distance of approximately 168km. The roads that are used for the transportation of the ore are dust and gravel roads, which create dust pollution as a result of the heavy trucks transporting ore. Dust pollution as a result of the transportation of ore pollutes grass and water resources used by the herders and their livestock (goats, sheep, cattle, camels, yaks and horses), and allegedly causes illnesses to both livestock and herders.

Animal and human health impacts

Herders whose camps are near the transportation route or in the mine impact area have been suffering increases in livestock illnesses since the Tayan Nuur mine started its operations, and lost up to several dozen animals, mainly goats and camels, allegedly due to dust-related illnesses.¹⁶ Animals suffer from mucus and diarrhea, slaughtered animals have had dark spots on their lungs, and the number of birth defects and congenital disorders has reportedly increased. Herders observe that their animals return from grazing with black mouths from the dust that sticks to vegetation.

¹⁶ FFM March Report, FFM August Report

In response to complaints from herders about the health impacts of ore transportation on their animals, a series of veterinary and laboratory tests have been administered to the animals, with mixed outcomes. Several herders from Derstei Bagh reported that their animals were tested on multiple occasions, once on the initiative of the Council of Natives¹⁷ and at least twice on the initiative of Altain Khuder. According to the herders, the company agreed to compensate herders for animal losses if it was proven that this was caused by the company's actions. The results from the first test were published in various newspapers, confirming that lung diseases were caused by the dust pollution.¹⁸ Altain Khuder seems to have challenged this test and requested a review of the legitimacy of the assessment process. Tests initiated by Altain Khuder itself on sheep and goat in Bayanghol Bagh in 2013 indicate that no fatal disease or illness originated from the dust. According to the company, the results of this test have been submitted to local authorities while they haven't received any requests for the report from local herders.¹⁹ Herders contest this however, stating that the company has not publicly disclosed the test results and that they have not been informed about the findings despite their requests.²⁰ One herder reported that a lab officer informally confirmed during a telephone call that dust pollution was the reason for his animals' sickness.

Herders report that they and their families have experienced skin rashes, chronic sneezing and sinus infections. The high cost of seeking medical assistance prevents them from consulting a doctor, meaning that these reports of illness cannot be confirmed by medical records.

Despite the risks to human and animal health, the affected herders continue to use the contaminated pastures. Pastures that are sufficiently fertile to sustain a herder's livestock are scarce in desert areas like the Gobi Altai region,²¹ and therefore herders cannot easily migrate to other locations. Finding alternative pastures is difficult; there are no vacant fertile pastures with adequate water resources and migrating to occupied pastures has implications for the herders and their livestock already inhabiting the area. Land areas not in use are of inferior grazing quality, and migrating to those areas would result in loss of herds and reduced quality of animal products which are at the basis of the herders' livelihoods. In addition, herders are attached to their seasonal camps and corresponding pastures because of their strategic location and favorable climate conditions, and because of the fact that they have used these camps for generations. As noted in the 2013 report by the National Human Rights Commission of Mongolia, "herder view their winter, spring, and autumn camps as their property inherited from the

¹⁷ The Council of Natives is a representative body for Tseel soum inhabitants and is located in Ulaanbatar.

¹⁸ Unuudur, Undesnii shuudan, and Niigmiin toil newspapers published articles about this, with the titles (translated from Mongolian) "Are Tayannuur's Interests more Important than those of 2800 Residents?", "Promises not Kept", "It Would Have been Great if Altain Khuder Apologized".

¹⁹ Report of the Fact Finding Mission in August 2014, available at: <http://bankwatch.org/publications/when-dust-settles-impacts-tayan-nuur-iron-ore-mine-nomadic-herders-lives-mongolia>

²⁰ Idem

²¹ The National Human Rights Commission of Mongolia also takes note of the water scarcity in the Gobi region. "Surface-water is scarce in the Gobi region due to the unequal distribution of water resources. Despite this, the mining industry, which is considered key pillar of the country's development, is concentrated in the Gobi region where there is a serious lack of surface-water", See National Human Rights Commission of Mongolia (2013). 12th Report on Human Rights and Freedoms in Mongolia, p. 12

ancestors”.²²

Impacts of the construction of a paved road

Altain Khuder is currently constructing a paved road, which will allow it to export iron ore to China faster and at a lower cost. A paved road is also expected to reduce the dust pollution and noise. The governor of Tseel soum confirmed that 30 km of the black top road has been constructed and 59 km of it is expected to pass through the soum. While the new road might reduce dust pollution once completed, it remains unclear whether it will be used for two way traffic. If the road is only used to transport the ore to the border, the returning trucks might continue to use the existing road, with associated dust and noise pollution.

Although a paved road may under the right conditions be a positive step forward, its construction has also resulted in additional problems. The construction has been implemented without consulting the herders and their needs have not been taken into account, despite the fact that the road cuts through their pastures. The main problem herders face is a lack of passageways. The new road is slightly elevated, and without accessible and safe passageways, the animals are obstructed from grazing as they normally would. In addition, herders have difficulties crossing roads as they migrate to their seasonal camps with their animals. They are forced to make detours of several miles in order to bypass the road, which costs additional fuel and time and creates stress for the animals. This is especially difficult during the harsh winter months. According to Altain Khuder the construction of the road includes four passages, and soum authorities and herders have been consulted about this. Herders contest this. The company is constructing several slopes for animals, but these are too steep for safe passage.

Another issue is the that the construction of the road requires significant amounts of gravel. The raw materials for the gravel are retrieved from a number of stone, gravel and sand quarries alongside the road. The company has also created a gravel production site. These quarries not only create a lot of dust, but are also located at what used to be fertile grazing land. The size and quantity of these quarries has impacted the amount of grazing land available, affecting animal health and the quality of their products.

1.2.3 Water depletion and contamination

The company's water use negatively affects the herders' access to water. In the initial phase of its activities, Altain Khuder used the soum's public water sources as per its agreement with the Tseel soum government. With the completion of its own well, the company now uses its own water sources for the mine operations, which according to Altain Khuder is only for domestic consumption and not for industrial purposes. The 2011 Environmental and Social Review & Action Plan states that comprehensive hydrogeological information on the aquifers from which water is abstracted (such as total capacity and connectivity between aquifers) is not available and considered it unlikely that robust assessment of the potential impacts of the mine's water use on water resources, water users and the environment had

²² National Human Rights Commission of Mongolia (2013). 12th Report on Human Rights and Freedoms in Mongolia, p. 18

been conducted. As part of the Action Plan, Altain Khuder committed to installing water meters at each extraction point and disclose information to the community on water use, including the volume of extracted water and measures to minimise water use. According to the company, water consumption is monitored and consumption data shared with local governors and disclosed to the public via the information board at the Tseel soum governor office. Herders are unaware of such measures.

In addition to water depletion, herders reported contaminated water in the pit lakes that are not fenced off. These pits are ponds where wastewater collected during the road construction and is causing animals to get sick.

1.2.4 Inadequate stakeholder engagement

Although the company asserts that engagement with the community in Tseel soum was initiated from the early stages of the project, the Tayan Nuur mining projects is characterized by a serious lack of transparency, engagement and consultation. Herders and local authorities lack information about Altain Khuder and the Tayan Nuur mining project and its impacts. They have not been consulted prior to the start of the mining project, and are unaware of any action on behalf of the company or the EBRD to assess or survey the impact of the mine on their livelihoods. Information about dust pollution and water use is not disclosed. Herders are also unaware about the involvement of the EBRD in financing the mining project, and are unaware of the responsibilities that arise from the EBRD's investment.

Among the people in Tseel soum, Altain Khuder has become notorious for intimidating those criticizing its activities. The company has filed up to seven lawsuits against people who openly criticized the company or expressed their grievances, and charged them with '*organized crimes of defamation*'.²³ This is a serious crime in Mongolia which can result in up to 22 years of imprisonment. Bagh governors, healthcare workers and citizens' representatives were sued and had to appear in front of the Gobi Altai court. When the charges were dropped on the grounds of lack of substance, the company continued to pursue the case at higher instance courts in Ulaanbaatar, leading to high travel expenses and reputational damage for the people involved. In May 2014 the final stage court acquitted the case. The seven defendants are currently preparing to file a counterclaim for cost incurred and reputational damages.

Herders are intimidated and harassed by the mine's security personnel when trying to approach the mining site to talk to representatives about their grievances. The Council of Natives reported similar treatment by the company, including one experience where their camera equipment and mobile phones were seized and never returned.

²³ Report of the Fact Finding Mission in March 2014.

2. PCM ADMISSIBILITY CRITERIA

The complainant meets all of the admissibility criteria for both a Problem-solving Initiative (PSI) and Compliance Review (CR) of the Project Complaint Mechanism Rules of Procedures, as approved by the Board of Directors at its meeting on 7 May 2014 and which entered into force in November 2014.

Affected parties

Problem-solving Initiative: According to para. 1 of the Rules of Procedures individuals located in an impacted area, or who have an economic interest, including social and cultural interests, in an impacted area may submit a complaint seeking PSI. The complainants all live in Tseel soum and are directly impacted by the Tayan Nuur project, either by the mine itself or by its associated facilities such as the road transporting the iron ore from the mine to the Chinese border. The complainants are supported by OT Watch, SOMO and CEE Bankwatch Network.

Compliance Review: According to para. 2, individuals and organizations may submit a complaint seeking CR. In this case, the CR is requested by the complainants who also request the PSI as well as by OT Watch and CEE Bankwatch Network. The complainants are supported by SOMO.

EBRD's financial relationship

Problem-solving Initiative: Para. 12, sub b, determines that when PSI is requested, the complaint must relate to a project where the EBRD maintains a financial interest in the project. As long as the Bank has equity funding such a financial interest exists. In January 2012 the EBRD approved a debt financing of up to \$30 million (project number 39581) and equity financing of up to USD\$25 million (project number 43804) for Altain Khuder. According to our information the last disbursement of the USD\$30 million loan was transferred in 2012. The EBRD has not sold or exited from its equity investment, and thus continues to have a financial interest in the Tayan Nuur project.

Compliance Review: Para. 13 determines that for CR, the complaint must relate to a project that has been approved for financing by the EBRD's Board or by a body which has been delegated authority to give approval to the financing of the project. Based on the project information on the EBRD's website, it can be assumed that the financing of Altain Khuder for its Tayan Nuur mining project was approved by the EBRD's Board.²⁴

Issues covered by EBRD policy

Problem-solving Initiative: Para. 24, sub a, requires that the complaint must be filed by individuals located in the impact area or who have an interest in the impacted area, and raise issues covered by a relevant EBRD policy. As indicated above the complainants are living in Tseel soum and are directly impacted by the Tayan Nuur project. Furthermore, the issues in the complaint are the direct result of the Tayan Nuur project which the EBRD is financing, and are covered by the EBRD 2008 Environmental and Social Policy, as is explained in Part 3.

Compliance Review: Para. 24, sub b, requires that requests for CR must be filed within 24 months after

²⁴ The Project Summary Document states that the 'target Board date' for signing the debt and equity financing was on 31 January 2012. See: <http://www.ebrd.com/pages/project/psd/2011/43804.shtml>.

the date on which the EBRD ceased to participate in the project and that the complaint must relate to a relevant EBRD policy. Since the EBRD continues to have a USD\$25 million equity investment in the Tayan Nuur mine and has not withdrawn since this investment in 2012, the Bank is still participating in the project. Furthermore, the issues in the complaint are the direct result of the Tayan Nuur project which the EBRD is financing, and are covered by the EBRD 2008 Environmental and Social Policy, as is clear from Part 3.

Good faith efforts

Problem-solving Initiative: Para. 12, sub c, requires that complaints requesting PSI should describe the good faith efforts of the complainants to address the issues in the complaint with the EBRD and/or its client, in this case Altain Khuder. The complainants as well as the organizations advising them in this complaint have undertaken the following efforts to inform the EBRD and Altain Khuder about the issues and address them in a constructive way:

Issues raised with the EBRD

- Tuesday 23 September 2014: draft report of the Fact Finding Mission by SOMO, Bankwatch and OT Watch in August 2014 sent to the EBRD Mongolia office, EBRD Environmental and Sustainability Department, and the EBRD CSO department (see Annex 2, nr. 1).
- Wednesday 3 September 2014: report of the Fact Finding Mission by OT Watch in March 2014 sent to the EBRD Mongolia office (see Annex 2, nr. 3)
- Friday 22 August 2014: OT Watch and SOMO (Sukhgerel Dugersuren and Anne Schuit) met with the EBRD Mongolia office [REDACTED]
- Friday 21 March 2014: e-mail from CEE Bankwatch to EBRD Environmental Sustainability Department forwarding the 14 March letter and requesting a meeting (see Annex 2, nr. 6).
- Friday 14 March 2014: letter handed over by OT Watch to the EBRD Office in Ulaanbataar about access to water, as well as a petition by local herders requesting that Altain Khuder should fix a broken well and photos from the field (in person, but see Annex 2, nr. 5 and nr. 7).

Issues raised with Altain Khuder:

- Tuesday 23 September 2014: draft report of the Fact Finding Mission by SOMO, Bankwatch and OT Watch in August 2014 sent to Altain Khuder. The company acknowledged the receipt of the report on Monday 6 October 2014, and provided written comments on Tuesday 21 October 2014 (see Annex 2, nr. 8 for email chain).
- Tuesday 19 August: email from SOMO to Altain Khuder requesting additional information for the report of the Fact Finding Mission in August 2014 (see Annex 2, nr. 9).
- Friday 8 August: email from SOMO to Altain Khuder requesting a meeting for the Fact Finding Mission in August 2014 (see Annex 2, nr. 10).
- As documented in the 2011 Environment and Social Action Plan & Review commissioned by Altain Khuder and conducted by consultancy firm ERM, residents of Tseel soum have raised concerns to Altain Khuder about the following issues: volume of water being abstracted from the two wells in the soum centre, dust and its effect on human health, possible soil contamination from the mine

(see Annex 2, nr. 11).

- As documented in the report of the Fact Finding Mission by OT Watch in March 2014, herders on several occasion approached the developers of the Tayan Nuur mine to address their grievances. In all cases, the developers were unresponsive (see Annex 2, nr. 12).

Parallel proceedings

Problem-solving Initiative: According to para. 26, upon deciding on eligibility of a complaint requesting PSI, the PCM also takes into consideration whether the complainants have raised the issues in the complaint with the company's dispute resolution or grievance mechanism, or before a court or other dispute resolution mechanism, and, if so, whether PSI may duplicate, interfere or be impeded by any other process brought by the same complainants. Complainants have in the past tried to raise their concerns with Altain Khuder (see above), but this have proven to be unsuccessful and for some even resulted in legal cases against them filed by the company (see Part 3). In response to these legal cases, which Altain Khuder lost, several of the complainants have taken the company to court to demand compensation for cost they incurred as a result of the lawsuit. These judicial processes do not address the impacts of the Tayan Nuur mine on the complainants, nor do they address the violations of the EBRD's policies, and should thus not be considered as parallel proceedings. A contrary finding by the PCM would frustrate the purpose of the mechanism to hold the EBRD accountable to its own policies.

Compliance Review: Para. 27 states that in determining the eligibility for CR, the PCM also considers whether the complaint relates to actions or inactions that are the responsibility of the EBRD, more than a minor technical violation of a relevant EBRD policy, and a failure of the EBRD to monitor the commitments of the client pursuant to a relevant EBRD policy. As is clear from Part 3, the environmental and social impacts of the Tayan Nuur project on the complainants relate to a failure of the EBRD to provide guidance to its client, to ensure that its client will design effective mitigation measures and, finally, to adequately monitor the implementation of Altain Khuder's commitments arising from the Performance Requirements of the 2008 Environmental and Social Policy.

3. VIOLATIONS OF EBRD POLICIES

This section assesses the violation of the EBRD's 2008 Environmental and Social Policy, which is the Policy that applies to Altain Khuder.²⁵ PRs stipulate the respective roles and responsibilities of the EBRD's client in ensuring environmental and social sustainability of projects financed by the Bank. PRs outline standards that Altain Khuder is expected to meet and the EBRD should provide guidance on in order to ensure adequate implementation of mitigation measures in relation to, amongst others, environmental and social management, labour conditions, pollution prevention and abatement, community health and safety, resettlement and displacement, information disclosure and stakeholder engagement.

²⁵ The 2008 Environmental and Social Policy applies to projects initiated after 12 November 2008. The 2014 Environmental and Social Policy which entered into force on 7 November 2014 applies to projects initiated after this date.

3.1 Inadequate Resettlement and Displacement (PR 5)

PR 5 aims to mitigate the impacts of involuntary resettlement as a result of land acquisition and restrictions on use of and access to land. This includes demonstrated decreases in livestock resulting from project-related disturbance or pollution. Involuntary resettlement is defined as both: 1) physical displacement related to relocation or loss of shelter, and 2) economic displacement related to loss of assets resulting in loss of income sources or livelihoods. 'Displacement' applies both to those who have legally recognizable rights or claims to land, as well as those with customary claims to land, users of land with no title or claim, and seasonal resource users such as herders. The EBRD did not ensure that its client Altain Khuder complied with the provisions of PR 5, as described below.

Resettlement and the Rights of Indigenous Peoples

PR 5, in combination with PR 7, provides special protection to project-affected persons who belong to Indigenous Peoples, which is the case for the herders, as will be established in part 3.2. Most significantly, as an Indigenous Peoples, herders have a right to free, prior and informed consent (FPIC), which is also enshrined in the UN Declaration on the Rights of Indigenous Peoples. Consequently, Altain Khuder is obliged to obtain herders' FPIC before undertaking any resettlement activities, by entering into culturally appropriate good faith negotiations with herders and allowing sufficient time for collective decision-making processes.²⁶ As described in part 1.2.1 and 1.2.4, herders have not been adequately informed nor consulted about resettlement, let alone has their right to FPIC been respected. Negotiations on compensation have not been conducted in a manner that respects herders' culture and decision making processes, leaving them without appropriate compensation that would allow them to sustain their livelihoods in a new location.

Resettlement and compensation

Even if the herders are not considered as Indigenous Peoples, their rights as project affected people have not been respected as Altain Khuder has failed to comply with the requirements of PR 5. In order to meet these requirements, Altain Khuder should amongst other things consult with affected persons and facilitate informed participation in decision making regarding displacement and resettlement. Given the complex land arrangements and customary nature of land use in Mongolia, consultation and engagement are especially important, as there is no other way for Altain Khuder to be informed about suitable and appropriate resettlement and compensation processes. In line with PR 5, affected people should have the opportunity to participate in negotiation of compensation packages, resettlement assistance and suitability of the proposed resettlement sites. For those herders without title to land, Altain Khuder should have offered a suitable alternative site with security of tenure. In relation to affected people belonging to vulnerable groups, Altain Khuder should have paid particular attention to ensure their meaningful participation in resettlement planning as well as assist them to full understand their options for resettlement and compensation. Vulnerable groups are groups of people who for example by virtue of their economic disadvantage may be more adversely affected by displacement than

²⁶ PR 7.4, 7.24 and 7.35

others, such as 'natural resource dependent communities'.²⁷ Given the land based livelihoods of the herders and their dependence on natural resources such as vegetation to sustain their herds and with that their livelihoods, herders are especially at risk for the adverse impacts of the mine and should therefore be considered a vulnerable group. Altain Khuder should also develop a Resettlement Action Plan to mitigate, monitor and evaluate impacts of resettlement on both resettled herders and on communities at the site where herders are resettled to, as well as a Livelihoods Restoration Framework for economically displaced herders.

As documented in the Part 1, Altain Khuder has not provided the herders with options for a suitable resettlement site, nor have the herders been adequately informed and consulted about the process.²⁸ Regarding the type of compensation, PR 5 specifically states that monetary compensation is only appropriate in contexts where livelihoods are not land-based, or when the land taken for the project is a small fraction of their land and the residual land is economically viable.²⁹ Where livelihoods are land-based, compensation should also be land-based.³⁰ In violation of this requirement, Altain Khuder only offered cash compensation. For herders, whose livelihoods are entirely land based, cash compensation is not an appropriate means of compensation, all the more so because of the customary land arrangements which does not allow land to be purchased. Cash compensation thus does not enable resettled herders to find new land, and since Altain Khuder also failed to provide this the resettled herders currently have no land rights. While herders still have their gers and are therefore not considered homeless by the company, without adequate land and pasture this is precisely what they are.

No Resettlement Action Plan and Livelihood Restoration Framework

No information is available on the existence of a Resettlement Action Plan and The Livelihoods Restoration Framework. As per the Environmental and Social Review & Action Plan, Altain Khuder agreed to a number of actions related to resettlement: 1) identify the number of displaced household at each project site (mine, camp, road, etc), 2) undertake a survey of the resettled herder to demonstrate that sufficient compensation was paid for loss of assets, 3) undertake a post-resettlement survey to evaluate whether resettled herders had equal or higher livelihood standards than before resettlement. Altain Khuder asserts that in 2011 a company specialized on post-resettlement surveys assessed the livelihoods of the resettled households before and after resettlement, which did not reveal loss of assets. Herders are not aware of this survey. Additionally, they report that since the start of the mining project their lives have changed for the worse.³¹ One resettled herder indicated that her herd is now half the size as before resettlement, and that she is now dependent on relatives, sharing their land so her herd can graze in their pasture.

Impact of mining on access to land and pasture in Mongolia was also noted by the UN Working Group on

²⁷ PR 5.12

²⁸ See also the survey taken by OT Watch from 45 respondents in the mine impact area in Tseel soum during a fact-finding mission in March 2014. See Annex 3.

²⁹ PR 5.30 and 5.35

³⁰ PR 5.30

³¹ See also the survey in Annex 3.

Business and Human rights, which in October 2012 conducted a country visit to Mongolia.³² In its report, the Working Group notes that '... mineral, exploration and extraction has resulted in herders losing access to their traditional herding lands, and that pastureland and surface water resources have been destroyed. As a result, the herders enjoyment of the rights to an adequate standard of living and to take part in cultural life through farming and animal husbandry has been impacted. [...] Finally, the expert was informed that mineral exploration has required herders to move their herds to more remote regions, for longer periods of time, limiting their access to education, health care and social welfare services'.³³

As is clear from the above, the EBRD failed to ensure that the requirements of PR 5 are complied with. The fact that herders have not been adequately resettled nor compensated, and are experiencing the negative consequences of displacement to this date, in and by itself means that the EBRD has not lived up to its obligations to ensure that its client is acting in compliance with the Environmental and Social Policy.

3.2 Failure to Recognize as Indigenous Peoples (PR 7)³⁴

PR 7 has the objective to ensure the rights of indigenous peoples, who have the right to free, prior and informed consent. According to PR 7.10, the term 'Indigenous Peoples' is used in a technical sense to refer to a social and cultural minority group who are distinct from dominant groups within national societies and posse the following characteristics in varying degrees: "1) self-identification as members of a distinct indigenous ethnic or cultural group and recognition of this identity by others; 2) collective attachment to geographically distinct habitats, traditional lands or ancestral territories in the project area and to the natural resources in these habitats and territories; 3) descent from populations who have traditionally pursued non-wage (and often nomadic/transhumant) subsistence strategies and whose status was regulated by their own customs or traditions or by special laws or regulations; 4) customary cultural, economic, social, or political institutions that are separate from those of the dominant society or culture; 5) a distinct language or dialect, often different from the official language or dialect of the country or region".

Mongolia's nomadic herders are indigenous peoples under this definition. The herders identify themselves as traditional, nomadic pastoralists with an ancient culture,³⁵ which fits within the EBRD's description of indigenous peoples.³⁶ They are also recognized as indigenous by others.³⁷ Additionally,

³² Report of the UN Working Group on Business and Human Rights visit to Mongolia. A/HRC/23/32/Add.1, p. 15

³³ Report of the UN Working Group on Business and Human Rights visit to Mongolia. A/HRC/23/32/Add.1, p. 15

³⁴ The argumentation in this part is based on the PCM complaint against Oyu Tolgoi, which deals with issues of nomadic herders in Mongolia also. See:

http://www.ebrd.com/downloads/integrity/OT_addition_to_the_complaint_4.2014.pdf

³⁵ See also the survey in Annex 3, which shows that 91.11% of the respondents identify themselves as being part of an indigenous community.

³⁶ See PR 7.9, which recognizes that 'Indigenous Peoples' may be referred to in different countries by different terms.

³⁷ See for example Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2011 Mongolia*, 2011. This report states that 'Mongolian herders, mostly minorities and indigenous peoples, were

they maintain an intimate attachment to distinct ancestral territories in and surrounding the mining area. This centuries-old collective attachment is displayed in a seasonal and cyclical migration from one traditional location to the next. Also, the herders descend from, and are themselves, nomadic pastoralists who have pursued traditional, non-wage subsistence strategies for centuries. Furthermore, herders are separated from mainstream culture by distinct cultural and economic customs, namely a nomadic lifestyle rooted in a natural-resource based livelihood that is tied to the geographic area they inhabit. Finally, the herders' use of words and phrases not heard in the mainstream Mongolian language distinguishes them from the rest of the country. This particularized dialect plays a significant role in the nomadic pastoralist identity. Moreover, the nomadic herders demonstrate precisely the type of identity PR 7 intends to protect. They will suffer unique impacts because of their ties to the land,³⁸ and must be regarded as more than simply 'vulnerable' affected communities. Yet, despite the herders' distinct nomadic pastoralist identity, neither Altain Khuder nor the EBRD undertook any analysis to determine whether the nomadic herders should be recognized as indigenous peoples under PR 7.³⁹

As a result of this failure, Altain Khuder has failed to afford the herders the protections provided for by PR 7. For example, where a project is proposed to be located on indigenous peoples' customary land, PRs 7.31 and 7.33 require that free, prior and informed consent is obtained, that the indigenous peoples are given an opportunity for informed participation, that efforts are made to avoid or at least minimize the size of indigenous land to be used and that indigenous peoples are provided with compensation, whether in cash, land or in kind, as well as culturally appropriate development opportunities.⁴⁰ In this case, as a result of Altain Khuder's and the EBRD's failure to identify the nomadic herders as indigenous peoples, they failed to fulfill these requirements in relation to the project.

confronted with severe drought and a harsh winter, forcing thousands of them to abandon their nomadic life'.

Available at: <http://222.unhcr.org/refworld/docid/4e16d36711.html>.

38 See PR 7.32, which recognizes that 'Indigenous Peoples' are often closely tied to their customary lands and its forests, water, wildlife, and other natural resources, and therefore special considerations apply if the project affects such ties.

39 PR 7.11 specifically provides that the EBRD may seek expert advice in ascertaining whether a particular group is considered as indigenous peoples for the purpose of PR 7.

40 See PR 7.31, which states that: 'As Indigenous Peoples may be particularly vulnerable in the project circumstances described below, the following special requirements will also apply, in addition to the General Requirements above. Common to these requirements is the need for the client to: enter into good faith negotiation with Indigenous Peoples, ensure the Indigenous Peoples' informed participation, obtain the free, prior and informed consent of Indigenous Peoples before starting with an activity described in paragraphs 32–37. See also PR 7.33, which states that: 'If the client proposes to locate the project on, or commercially develop natural resources located within, customary lands under use, and adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual uses that define the identity and community of the Indigenous Peoples, the client will respect their use as follows: 1) The client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation; 2) The client will document its efforts to avoid or at least minimize the size of land used, occupied and/or owned by Indigenous Peoples which is proposed for the project; [...] The affected communities of Indigenous Peoples will be informed of their rights with respect to these lands under national laws, including any national law recognizing customary rights or use; The client will offer affected communities of Indigenous Peoples at the minimum compensation and due process available to those with full legal title to land in the case of commercial development of their land under national laws, together with culturally appropriate development opportunities; land-based compensation or compensation-in-kind will be offered in lieu of cash compensation, where feasible.'

The EBRD thus failed to ensure that the requirements of PR 7 are complied with. The fact that herders have not been recognized as indigenous peoples and the negative consequences hereof, in and by itself means that the EBRD has not lived up to its obligations to ensure that its client is acting in compliance with the Environmental and Social Policy.

3.3 Inadequate Pollution Prevention and Abatement (PR 3)

PR 3 has the objective to avoid or minimize adverse impacts on human health and the environment, by avoiding or minimizing pollution arising from the project.⁴¹ According to the EBRD, *'pollution prevention and abatement are key ingredients of a sustainable development agenda and EBRD-financed projects must meet good international practice in this regard'*.⁴² In this PR, the EBRD commits itself to requiring compliance with relevant EU environmental standards.⁴³ To meet the requirements of this PR, adverse impacts on the environment should be addressed by avoiding or, when this is not feasible, minimizing or reducing the release of pollutants, including addressing impacts of the mining project on the surrounding environment and taking into account cumulative impacts with uncertain consequences.⁴⁴ The EBRD did not ensure that its client Altain Khuder complied with the provisions of PR 3, as described below.

Dust pollution and the environment

The Tayan Nuur mining project causes significant dust pollution as a result of processing and transportation including on the project's ambient environment. Considering the fact that this is a semi-desert area, dust pollution of this environment and its vegetation can have severe consequences, including desertification.⁴⁵ Additionally, the dust pollution has a detrimental effect on human and animal health. It is unclear if the EBRD has assessed compliance of the Tayan Nuur mining project with EU environmental standards. No evidence hereof is available, despite the fact that the Bank in PR 3 states that it is committed to compliance with EU environmental standards in particular those related to air and soil pollution, and the protection of nature, where these standards can be applied at the project level, and otherwise good international practice apply such as the World Bank Group Environmental Health and Safety Guidelines.⁴⁶

Dust pollution affecting animals and herders' livelihoods

As noted in Part 1, herders have noted that the transportation of iron ore causes dust pollution that affects soil and water resources and causes illnesses to animals and the herders.⁴⁷ Already in 2011, the Environmental and Social Review & Action Plan commissioned by Altain Khuder identified ore stockpiles,

⁴¹ PR 3.3

⁴² PR 3.1

⁴³ PR 3.2, 3.7

⁴⁴ PR 3.11, 3.16

⁴⁵ Change in vegetation composition is one cause for desertification. See for example: Millennium Ecosystem Assessment (2005). Ecosystems and Human Well-Being, p. 4. Available at: <http://www.unep.org/maweb/documents/document.355.aspx.pdf>

⁴⁶ PR 3.2, 3.7

⁴⁷ See also the survey in Annex 3

the mine pit, processing and the road between the mine and the Chinese border as significant sources of 'fugitive dust', while noting that existing controls include speed limits (20 km/h) for trucks travelling to the border.⁴⁸ These speed limits are however not adhered to.⁴⁹

The negative impacts of the transportation of ore are also documented by the National Human Rights Commission of Mongolia. In its 2013 report the Commission notes that as a result of transportation associated with mining, human and animals are finding it increasingly hard to live in mining areas, as the transportation causes soil and pasture deterioration and dusts in the air. It specifically notes that soil and air pollution is also a problem at the Tayan Nuur mining project.⁵⁰ The report also highlights the potential detrimental effects to human health, stating that in several mining areas chest infections have grown rapidly among citizens due to the dust and other pollutants resulting from mining activities.⁵¹ According to the report: "Particle emitted from these sources tend to cause respiratory diseases and can damage internal organs which ultimately can lead to cancer".⁵²

As stated in Part 1, Altain Khuders administered several tests to measure the level of dust pollution and its impact on the herders' livestock, but the results of these inspections have not been disclosed to the herders despite their various attempts to obtain this information. The test by the Council of Natives as well as the informal phone call by the lab officer however confirmed that the dust negatively impacts the animals.

Based on the above, it is clear that the EBRD failed to ensure that the requirements of PR 3 are complied with. The fact that herders are impacted by pollution of soil and water resources indicates that the EBRD has not lived up to its obligations to ensure that its client is acting in compliance with the Environmental and Social Policy.

3.4 Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR 4)

PR 4 has the objective to avoid or minimize a project's risk and impact on the health, safety and security of local communities. To meet this PR, risks and impacts to health and safety of affected communities should be identified and evaluated, and information disclosed in order to enable the affected communities to understand the risk.⁵³ Affected communities should be consulted and engaged with in order to mitigate the risks. PR 4 also recognizes that '*communities may also be affected by impacts on their natural resources, exposure to diseases, and the use of security personnel*'.⁵⁴ Adverse impacts due to project activities on air, soil, water, vegetation and fauna in use by the affected communities should be

48 ERM (2013), Environmental and Social Review & Action Plan, p. 16

49 Report of the Fact Finding Mission in August 2014, available at: <http://bankwatch.org/publications/when-dust-settles-impacts-tayan-nuur-iron-ore-mine-nomadic-herders-lives-mongolia>

50 National Human Rights Commission of Mongolia (2013). 12th Report on Human Rights and Freedoms in Mongolia, p. 11

51 Idem

52 Idem, p. 16

53 PR 4.8

54 PR 4.2

avoided or minimized.⁵⁵ Community exposure to hazardous materials released by the project must be prevented or minimized.⁵⁶

Human and animals health problems

Herders report several negative impacts of the mine and the associated road on air, soil, water and vegetation, including access to water animal and human health problems as a result of the dust pollution.⁵⁷ As described in Part 1, herders report that their pasture soil is contaminated by the dust resulting from iron ore transportation, which causes health problems both for their livestock and themselves. That mining in Mongolia has a detrimental impact on the right to a healthy and safe environment was also noted by the UN Working Group on Business and Human rights. In its report, the Working Group notes that ‘... informed of serious impacts on the right to a healthy and safe environment, as provided for in the Mongolian Constitution, linked to the contamination of soil and water, destruction of land and depletion of ground and surface waters’.⁵⁸

Water depletion

Herders also report water depletion and contamination. Scarcity of water is a well-known issue in Mongolia, and also the National Human Rights Commission of Mongolia reports that surface-water is scarce in the Gobi region.⁵⁹ On 30 September 2013 the State Environmental Inspection carried out water quality tests in four Tseel soum community wells. In well nr. 1 the level of magnesium was higher than permitted by water quality standards and therefore found not compliant with Mongolian National Standard, while wells nr. 2 and 4 were found not compliant with this standard due to higher levels of magnesium and iron ion in the water. Additionally, herders reported contaminated water in the pit lakes which are not fenced-off. These ponds with wastewater have been created as a result of the road construction. As they are not fenced-off animals drink the water and get sick.

Security personnel: intimidation and harassment

Other violations of PR 4 relate to the company’s security personnel, which should behave in an appropriate way towards local communities while they in fact behave in an intimidating manner towards those herders and their representatives that approach the mining site, as described in Part 1.2.4.

As is clear from the above, the EBRD failed to ensure that the requirements of PR 4 are complied with. The fact that herders face negative health impacts for themselves and their animals shows that the EBRD has not lived up to its obligations to ensure that its client is acting in compliance with the Environmental and Social Policy.

⁵⁵ PR 4.16

⁵⁶ PR 4.12

⁵⁷ See also the survey in Annex 3

⁵⁸ Report of the UN Working Group on Business and Human Rights visit to Mongolia. A/HRC/23/32/Add.1, p. 15

⁵⁹ National Human Rights Commission of Mongolia (2013). 12th Report on Human Rights and Freedoms in Mongolia, p. 12

3.5 Failure to Disclose Information and Engage with Stakeholders (PR 10)

PR 10 emphasizes the importance of information disclosure and stakeholder engagement in order to successfully manage environmental and social impacts on communities. Stakeholder engagement is regarded as an ongoing process of information disclosure, consultation with affected parties and the establishment of a grievance mechanism. In order to meet this PR, Altain Khuder should, amongst other things, provide information about the project and the implementation of the Environmental and Social Action Plan, and receive feedback on how it is implementing this.

As is also evident from the previous parts, and the above assessment of the other PRs, the company is breaching this PR in several ways. Herders that were interviewed during two separate fact finding missions stressed the complete lack of information about the company, its financiers and the mining project, which was also confirmed by a survey.⁶⁰ The possible and actual environmental and social impacts of the mine and its associated facilities are unclear to the impacted people. Herders have not been engaged in identifying impacts or consulted in how manage them in order to find an acceptable way for all parties involved to reconcile various interests.

In fact, at least seven people who complained about the mining project were confronted with criminal cases against them. An effective grievance mechanism has not been established, violating the requirement that the company should establish a grievance mechanism process to receive and facilitate resolution of concerns and grievance which the mechanism should address promptly and without retribution. Based on the EBRD guidance on implementing the PRs, an independent and objective appeal mechanism should also have been established. The company placed a suggestion box at the Tseel soum center, but only one of the interviewed knew about this, and his complaint was never followed up by the company.

As is clear from the above, the EBRD failed to ensure that the requirements of PR 10 are complied with. The fact that Altain Khuder has not adequately consulted and engaged with stakeholders shows that the EBRD has not lived up to its obligations to ensure that its client is acting in compliance with the Environmental and Social Policy.

3.6 Inadequate Environmental and Social Appraisal and Management (PR 1)

PR 1 has the objective to ensure a systematic approach to managing environmental and social impacts and monitoring hereof on an ongoing basis, and emphasizes the importance of engaging with stakeholders. In order to comply with this standard, Altain Khuder should conduct appraisal activities such as an environmental and social impact assessment, in consultation with relevant stakeholders.⁶¹ This includes a due diligence process whereby Altain Khuder should *'identify and assess any potential future impacts associated with the proposed project, identify potential improvement opportunities, and*

⁶⁰ See annex 3

⁶¹ PR 1.13

*recommend any measures needed to avoid, or where avoidance is not possible, minimize, and mitigate adverse impacts’.*⁶² Based on the environmental and social appraisal an Environmental and Social Action Plan (ESAP) should be developed and implemented, which should outline differentiated measures for stakeholder groups identified as disadvantaged or vulnerable.⁶³ On organizational level, sufficient organizational capacity and commitment to achieve effective social and environmental performance should be ensured.⁶⁴

Appraisal and Management of Impacts

EBRD failed to ensure that Altain Khuder fully assessed, disclosed and managed the adverse impacts. Although Altain Khuder allegedly conducted various Environmental Impact Assessments (EIAs),⁶⁵ these EIAs were found to be inadequate by external consultant ERM which was commissioned by Altain Khuder to conduct an environmental and social review and delivered its report in December 2011. According to the consultant, the EIAs did not meet the PRs with respect to ecological impact assessment, disclosure of project information and consultation, impacts of project’s water use and measures to minimize water use, and social impacts.⁶⁶ As the EIAs do not assess social impacts, which is not required by Mongolian law, it remains unclear if social impacts have been assessed at all. Furthermore, the Environmental and Social Action Plan (ESAP) does not contain differentiated measures for vulnerable stakeholder groups, thereby essentially disregarding the herders in Tseel soum. While herders are highly resilient people who are able to survive in harsh conditions, their land-based livelihoods and customary and flexible land arrangements so crucial to their survival also makes them particularly vulnerable to large scale industrial activities.

This means that the EBRD finances a company whose due diligence assessment was found inadequate with respect to several key issues, and possibly lacks a social impact assessment, and whose ESAP ignores a large stakeholder group especially at risk to negative impacts of the project. Facts on the ground confirm that the absence of adequate appraisal and measures to mitigate impacts have resulted into a project that causes serious impacts on the quality of air, soil/vegetation and water and with that the livelihoods of the herders living in Tseel soum, as is clear from Part 1.

Additionally, herders impacted by the mine as well as local authorities report a lack of consultation and stakeholder engagement by Altain Khuder regarding the impacts of the mining project on their lives, both prior to the start of the project as well as during its operations. No engagement with the herders has been undertaken by Altain Khuder to collect information about these impacts, let alone to act on the feedback of stakeholders and improve its performance. Instead, herders have been confronted with intimidation and harassment when they voice their concerns or try to have the company address their grievances, and critics have been confronted with legal action by the company against them (see below).

⁶² PR 1.10

⁶³ PR. 1.14

⁶⁴ PR 1.17

⁶⁵ ERM (2013), Environmental and Social Review & Action Plan, p. 4

⁶⁶ Idem

Organizational capacity and commitment

As is documented in a case study on Altain Khuder and the impacts of iron ore, the suitability of Altain Khuder as a recipient of EBRD financing is questionable. Given the high debts of the company, the short lifespan of the mine, and the price volatility in the iron ore sector, the company's capacity and commitment to operate in accordance with the Environmental and Social Performance Requirements was far from certain.⁶⁷

As is clear from the above, the EBRD failed to ensure that the requirements of PR 1 are complied with. The fact that Altain Khuder has not fully assessed, disclosed and managed the negative impacts of the mine on herders, shows that the EBRD has not lived up to its obligations to ensure that its client is acting in compliance with the Environmental and Social Policy

4. DEMANDS

Recommendations for Altain Khuder:

- Assess the impacts of the mine and its associated facilities on the herder communities, and address their concerns and demand.
- Prepare and implement an Environmental and Social Review & Action Plan that is compliant with EBRD standards.
- Complete the black top road, and ensure that company trucks only use this road, and that the road is accessible and available for use by the herders without paying tax. Also construct sufficient passageways, in consultation with the herder communities. Cease all transportation of or until such a road that meets relevant standards is completed.
- Ensure resettled herders are properly compensated for loss of their camps and structures, and relocated to new land in accordance with their wishes and demands.
- Implement a comprehensive livelihood restoration program in consultation with all stakeholders involved.
- Restore all land altered, degraded and polluted by the mine and its associated facilities. Fence off all contaminated water sources and gravel pits.
- Make publicly available all animal testing, ensure independent animal testing, and compensate for the loss of animals and medical expenses as a result of dust pollution and water contamination.
- Ensure independent water use monitoring and disclose the results, restore lost wells and other water access points no longer available or sufficient to sustain the herders and their livestock.
- Abstain from all forms of harassment and intimidation of affected people and their representatives, and stop all forms of judicial actions against them. Ensure an effective form of stakeholder engagement and act upon complaints and grievances by communities.

⁶⁷ SOMO (2014), Impacts of the global iron ore sector. Case study: Altain Khuder in Mongolia, p. 30, 31.

- Use Best Available Technology to reduce dust pollution from dry processing of ore.
- Develop in consultation with local communities a mine exit-plan which includes reclamation plans and clean-up, and is in compliance with EBRD standards.

Recommendations for the EBRD:

- Monitor and assess the implementation of the above recommendations by Altain Khuder. Assist Altain Khuder with conforming to the Performance Requirements. Monitor and ensure the company's compliance with the requirements.
- Ensure all stakeholders, including herders and local authorities, are aware about the EBRD Performance Requirements.

5. CONCLUSIONS

For the preceding reasons, the complainants expect that the PCM by facilitating a problem-solving initiative will ensure the rights of the complainants are respected and their demands addressed. The complainants also expect that the a compliance review will show that the project is not in compliance with the Bank's policies, will outline steps to bring the project into compliance with the EBRD's policies, as well as provide recommendations to prevent non-compliance in the future.

ANNEX 2 GOOD FAITH EFFORTS – Covers previous communication with EBRD and the Client (not disclosed).

ANNEX 3 SURVEY OF TSEEL SOUM HERDERS

Survey taken by OT Watch from 45 respondents in the mine impact area in Tseel soum.

GAT Community Survey Final - English		
Q1 What country do you live in?		
Answered: 45 Skipped: 0		
Answer Choices	Responses	
Mongolia	100.00%	45
Total		45
#	Other (please specify)	Date
	There are no responses.	

GAT Community Survey Final - English		
Q2 What development project are you affected by?		
Answered: 45 Skipped: 0		
Answer Choices	Responses	
5. Mongolia: Altain Khuder LLC's Gold Mine (Tseel Sum, Govi Altai Aimag)	100.00%	45
Total Respondents: 45		

GAT Community Survey Final - English

Q6 How would you describe yourself?
Please check all that apply about you.

Answered: 45 Skipped: 0

Answer Choices		Responses
I belong to an indigenous community	91.11%	41
Registered resident	17.78%	8
I am a citizen of the country where I live	6.67%	3
I am a member of a religious or ethnic minority	2.22%	1
I am a refugee	2.22%	1
I am a temporary migrant from another province, state or city	0.00%	0
I am a temporary migrant from another country	0.00%	0
I am a permanent immigrant from another country	0.00%	0
None of these apply	0.00%	0
Total Respondents: 45		
#	What is the name of your indigenous, ethnic or religious minority group?	Date
1	khalkh	4/10/2014 7:19 AM
2	native of this town	4/9/2014 4:16 AM
3	native	4/9/2014 4:07 AM
4	Khalkha	4/6/2014 3:27 AM
5	I was born here and live here ever since	4/6/2014 2:54 AM
6	We are natives of Tseel and Tugur soums	4/6/2014 1:49 AM
7	buddizm	4/5/2014 3:37 AM
8	buddhism	4/4/2014 6:03 AM
9	hative of tugrug sum and deel sum	4/4/2014 3:41 AM

GAT Community Survey Final - English

Q8 Have you been displaced or resettled by this project?

Answered: 45 Skipped: 0

Answer Choices		Responses	
Yes		26.67%	12
Not yet, but we will have to move soon		51.11%	23
No, I am not affected by displacement or resettlement from this project		22.22%	10
Other		0.00%	0
Total			45
#	Other (please specify)	Date	
1	not yet moved but if the dust and noise continues it will be difficult to stay here	4/9/2014 4:16 AM	
2	we leave our motherland	4/9/2014 4:07 AM	
3	If this operation and its dust continues then it will not be possible to live here any longer	4/6/2014 2:54 AM	

Q9 If you have been displaced or are threatened with displacement from this project, how would you describe this move?

Answered: 44 Skipped: 1

Answer Choices		Responses
We are being moved as part of a resettlement program, with some form of compensation and/or other assistance.		9.09% 4
The project is making it impossible for us to stay in our current home, so we have to move, but we are not part of any resettlement program and we are not receiving any official assistance.		54.55% 24
Not applicable. I haven't been displaced yet.		36.36% 16
Other		0.00% 0
Total		44

#	Other (please specify)	Date
1	Lost pasture and herd	4/10/2014 7:07 AM
2	When the mine carry out explosion it frightens an adds to stress	4/9/2014 6:33 AM
3	it is impossible to live at the winter camp	4/9/2014 4:28 AM
4	received and spend a certain amount of money at the time now no job, no animals	4/9/2014 4:19 AM
5	explosion cause turbulence influence and closer to soum there is possibility they cause home breakage	4/9/2014 4:12 AM
6	they must give legel compensation gor us we faced so dangerous situations	4/9/2014 4:07 AM
7	Mine dust and other negative impact may force to relocate.	4/6/2014 3:39 AM
8	When they blast land closer to the soum these explosions cause serious turbulence which could cause destruction to housing.	4/6/2014 3:25 AM
9	Received some cash which was expended at the time. No have no job, no animals.	4/6/2014 2:30 AM
10	We have not been relocated but will be in poor condition because of dust contamination	4/6/2014 1:49 AM
11	No compensation granted!	4/6/2014 1:31 AM
12	Used to live 4.7 km from Altain Khuder but had to relocate because of noise, dust and transportation that destroyed the pasture vegetation.	4/5/2014 11:06 PM
13	A situation will arise for soum public offices to have to relocate from the mining impact	4/5/2014 10:26 PM
14	Cannot live in the winter camp now	4/5/2014 10:21 PM
15	we may more due to dust	4/4/2014 6:40 AM

16	when explosion there is a lot of noise its so hard	4/4/2014 4:54 AM
17	we have not been relocated but the dust in pastares will make live aifficult here	4/4/2014 3:41 AM

GAT Community Survey Final - English

Q17 If you were displaced, or are facing displacement, what was/is forcing you to move? (Choose all that apply)

Answered: 45 Skipped: 0

Answer Choices	Responses	
Our living situation became very unhealthy due to project impacts, and we had to move.	31.11% 14	
Not applicable/ I have not been threatened with displacement.	31.11% 14	
My source of livelihood was destroyed, and we had to move because we had no other option.	26.67% 12	
They used bulldozers, intentional flooding or explosions, or other means to scare us into moving.	8.89% 4	
They used coercion and intimidation, such as saying we would not get compensation, would lose our job or experience another such consequence.	8.89% 4	
We lost access to services like water and electricity, and we had to move because there was no other option.	8.89% 4	
They used physical violence to injure me or other people in my community, to force us to move.	6.67% 3	
There was no physical force or violence or threat of either. We willingly accepted the compensation and resettlement options because they looked much better than our current status.	6.67% 3	
They threatened us with force and violence to scare us to move.	4.44% 2	
Total Respondents: 45		
#	Please describe your experiences. It is very important that we collect strong quotes and examples on this topic, so please take time to write about your experience of displacement.	Date
1	was relocated because there is no water	4/10/2014 7:11 AM
2	In the future there may be threat to move	4/9/2014 4:25 AM
3	herder camps near the mine sites were cheated for small money and bulldozed. there are no pastures around the mine, if people and animals come near, they are chased to leave. when they employ local people they don't provide housing and don't offer rides back home	4/9/2014 4:21 AM
4	while not relocated now it is becoming difficult to live here	4/9/2014 4:17 AM
5	we can't say anything because they said they will put in jail	4/9/2014 4:09 AM
6	sum relocation air pollution noisiness	4/9/2014 3:55 AM
7	we have to move from place covered with dust	4/9/2014 3:39 AM

8	we moved after 4-5 goats died of suffocating from swallowing dust from guamies	4/9/2014 3:02 AM
9	A large number of herder camps were cheated from them for small amounts of cash and bulldozed. They chase us away and threaten if herders are found near the mine because of lack of pasture. Locals employed by the mine are not provided living quarters at the mine site but transported back home, which is very often not available. Poor working conditions.	4/6/2014 2:38 AM
10	Not yet but high probability of facing a need to relocate in future.	4/6/2014 2:17 AM
11	Because of dust we are losing our pastures. Time is coming when people and animals will have sick organs because of it.	4/6/2014 1:55 AM
12	We have not been relocated but had to move because of dust with no compensation offered. We have a claim of damage.	4/6/2014 1:39 AM

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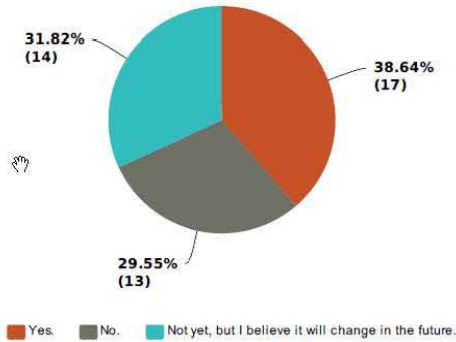
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	have a claim of damage.	
13	And due to dust contamination	4/6/2014 1:23 AM
14	We lived in the mine impact zone asking for compensation for 4 years. They will not let us in when we come with petitions for assistance. The Community relations person Undrakh claimed that a private company is not responsible for a relocation program.	4/5/2014 11:35 PM
15	Winter camps where cheated out for small amounts of money. Have not provided any means for future livelihood; Some winter and springs camps were not issued land certificates. Without a certificate they do not compensate.	4/5/2014 10:43 PM
16	road dust in contaminating pasture leading to damage to the health of animals and people	4/4/2014 4:01 AM

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Q21 Has your source of livelihood changed due to the project?

Answered: 44 Skipped: 1



#	Please describe what your livelihood was before the project, and what it is now:	Date
1	altain huder company didn't keep their promises	4/10/2014 7:20 AM
2	before we have got pastures pleasant and no noise, but now has completely changed	4/9/2014 4:25 AM
3	there is no benefit for us, citizens and development of soum a few people working there to improve their life	4/9/2014 4:14 AM
4	it is difficult to continue livestock breeding	4/9/2014 3:51 AM
5	we had a herd of some 700 elite bread sheep and goats, we bought a car and life was good now i work for altain khuder work from sun to dark, when inspection comes we are ordered to go in pairs slow and far from one another if we don't then they rednee salary	4/9/2014 3:02 AM
6	Life improved	4/6/2014 3:57 AM
7	Altain Khuder's promises are not being implemented in reality.	4/6/2014 3:32 AM
8	For a soum that has a developed mine there has been not a bit of light for the people, for soum development. We are just losing our wealth. Only a few people are employed at the mine and live on salaries.	4/6/2014 3:25 AM
9	Before this project we lived in a clean environment with fresh air, good grass in the pastures, quiet tranquil life without dust and noise. Now we have no grass in pastures, live under dust and noise	4/6/2014 2:17 AM
10	Because of dust the pastures have degraded leading to lower livelihood income.	4/6/2014 1:55 AM
11	We used to live with our children herding animals and benefitting from sales of wool cashmere, milk and dairies. But now we are too old and forced by life to operate a small shop to survive. We had 600-700 animals and spun off our children to a successful life with livestock but a company with empty promises came to dig our land to damages that cause big emotional stress on us.	4/5/2014 11:35 PM
12	Nothing changed	4/5/2014 10:43 PM
13	our quality of life improved a little	4/4/2014 6:25 AM
14	air pollution causes degraobtion of pasture leading to cower living standard	4/4/2014 4:01 AM

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Q22 Has your quality of life changed as a result of displacement from your home, land, or source of livelihood, or a threat of future displacement?

Answered: 45 Skipped: 0

Answer Choices		Responses	
	My quality of life was made worse.	24.44%	11
	My quality of life has remained the same.	20.00%	9
	I haven't been displaced yet, but I believe my quality of life will become worse.	20.00%	9
	I haven't been displaced yet, but I believe my quality of life will improve.	17.78%	8
	My quality of life was made much worse.	6.67%	3
	I haven't been displaced yet, but I believe there will be no change to my quality of life.	6.67%	3
	My quality of life was greatly improved.	2.22%	1
	My quality of life improved.	2.22%	1
Total			45
#	Please describe.	Date	
1	they don't rehabilitate land	4/9/2014 4:25 AM	
2	when i was hercing i had plentiful life now working for other lost independence with no support, not even gloves or toilet paper	4/9/2014 3:02 AM	
3	Pasture has decreased because of lack of reclamation due to which even relatives started fighting over pasture	4/6/2014 2:17 AM	
4	My life will never improve now!!!	4/6/2014 1:39 AM	
5	Altain Khuder, at its first meeting promised to build a railroad, 10.000 Kwt power station. Planes will land here, you will fly or travel with no cost. They took our trust with these false promises.	4/5/2014 11:35 PM	

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Q23 Have you been negatively affected by this project in other ways? (Choose all that apply)

Answered: 45 Skipped: 0

Answer Choices	Responses
Members of my family or I have become ill, or have worse health.	31.11% 14
My environment has been destroyed.	26.67% 12
I have to travel farther now to reach my work place.I commute longer hours.	22.22% 10
I lost access to forest, grazing lands, river or other common areas that I used for my livelihood.	20.00% 9
I have noticed increased traffic accidents.	20.00% 9
I have not been affected negatively.	20.00% 9
I lost my animals, livestock or fish.	17.78% 8
I lost my land that I owned.	15.56% 7
My sacred territory was ruined.	15.56% 7
My family members or I are now in debt.	13.33% 6
My family members or I experience more stress or worry than before or are suffering worse mental health.	13.33% 6
I have noticed increased alcoholism and substance abuse.	13.33% 6
I have noticed increased domestic violence.	11.11% 5
I lost my job.	8.89% 4
I pay more for transportation.	8.89% 4
My family was separated.	6.67% 3
My children had to drop out of school.	6.67% 3
I have a new house that is designed in a way that does not fit our traditions or culture.	6.67% 3
I have to pay too much for housing in a new location.	6.67% 3
My family members or I have lost access to safe drinking water and/or sanitation.	4.44% 2
I have noticed more stress and conflict in family relationships.	4.44% 2
The location of my new house is unsuitable.	4.44% 2

I have noticed increased corruption.	4.44%	2
I lost my house.	2.22%	1
My family members or I have lost access to electricity.	2.22%	1
I have a new house that does not provide enough space or privacy for my family.	2.22%	1
I lost access to land that I farmed, but that I did not own.	0.00%	0
Other	0.00%	0
Total Respondents: 45		

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#	Other (please specify)	Date
1	we can't move our camp cause there is no way	4/9/2014 3:39 AM
2	there is a lot of human rights violation. drivers have known to get stuck on the road with broken vehicle, they do no send rescue upon our call for help. they were stuck for 4-5 days without food	4/9/2014 3:02 AM
3	There is too much dust because of not constructing a road The concentrator technology should switch to wet processing	4/6/2014 3:57 AM
4	When Natives' Council members came, they were not allowed in. Their phones and cameras were robbed off. To date there has been no report of animal lung testing. They violate human rights but pay people to say good things about them on TV.	4/5/2014 11:35 PM
5	Lost access to pasture. Had to move from winter camp	4/5/2014 10:21 PM
6	pastures beyond useable, winter camp site relocacet	4/4/2014 4:02 AM

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Q26 Did you or your family receive money or other compensation for your home, land or other resources? (Check all that apply.)

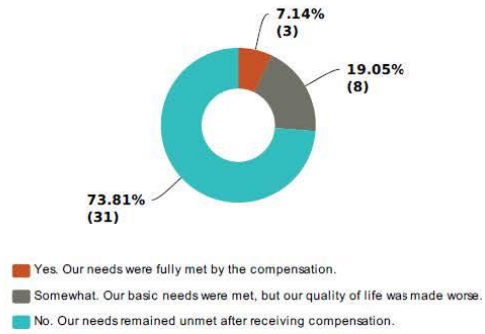
Answered: 43 Skipped: 2

Answer Choices		Responses
We did not receive any compensation, nor did our community.		76.74% 33
We received cash compensation.		13.95% 6
We received a new home.		2.33% 1
We received land for a house-plot.		2.33% 1
We received access to resources in a new location.		2.33% 1
We did not receive compensation directly, but our community as a whole received compensation.		2.33% 1
We received land for farming.		0.00% 0
Total Respondents: 43		
#	Comment: If you received land, please describe whether it is better, worse or equivalent to the land you had before.	Date
1	Not relevant	4/10/2014 7:21 AM
2	About Ninety family were affected	4/10/2014 7:11 AM
3	not displaced	4/9/2014 3:28 AM
4	What was provided was not enough for anything.	4/6/2014 3:44 AM
5	We are in worse position now!	4/6/2014 1:40 AM
6	People receive scholarship support, we have not been able to access this compensation.	4/5/2014 10:47 PM
7	they gave low compensation	4/4/2014 6:48 AM
8	few cash were given, no other activity implemented, we realized too late that we have been fooled	4/4/2014 6:10 AM

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Q27 If you received compensation, was it adequate for your needs?

Answered: 42 Skipped: 3

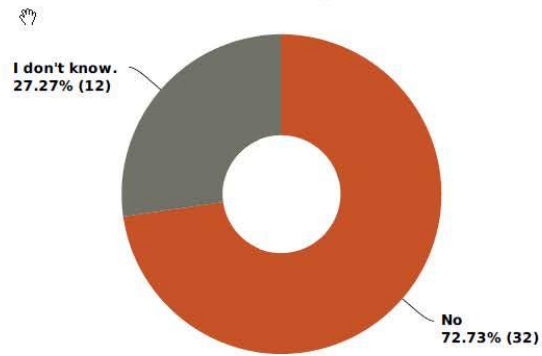


#	Please explain.	Date
1	we didn't receive compensation	4/9/2014 3:55 AM
2	not received compensation	4/9/2014 3:28 AM
3	Interested in getting a job rather than a compensation	4/6/2014 2:18 AM
4	Our camp was valued at 15-20 million MNT but Undrakh changed that to almost nothing. People like her should be held accountable and fired from this job.	4/5/2014 11:40 PM
5	Compensation should not be taken.	4/5/2014 10:47 PM

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Q34 Did you have the information you needed to be able to provide informed opinions and ideas about the project plans?

Answered: 44 Skipped: 1



Annex 2 - Management Response

Project	39581 Mongolia: Altain Khuder (debt) 43804 Mongolia: Altain Khuder (equity)
Project Team	Operation Leader Debt: [REDACTED] Operation Leader Equity: [REDACTED] Office of General Counsel (Banking): [REDACTED] OGC (Corporate, Recovery and Litigation after transfer to CR in September 2013): [REDACTED] Environment and Sustainability: [REDACTED], [REDACTED]
To: PCM Officer	[REDACTED]
Via: VP Risk	[REDACTED]
From: Managing Director, Environment and Sustainability Director, Natural Resources Director, Corporate Recovery	[REDACTED] [REDACTED] [REDACTED]
Date of issue to PCM Officer	17 February 2015

A. INTRODUCTION

A complaint was received by EBRD on 30 December 2014, which was submitted by two NGOs, OT Watch and Amibuh, both of Ulaanbaatar, Mongolia. The complaint was submitted on behalf of seven individuals who believe they have been affected by the Tayan Nuur iron ore Project in Tseel soum, Mongolia. The complaint requests that the PCM undertake a Problem Solving Initiative and a Compliance Review.

This document comprises the “Management Response” to the complaint as outlined in the PCM Rules of Procedure paragraph 19 (2014). Management deems that the Project was structured to comply with the EBRD 2008 Environmental and Social Policy and relevant Performance Requirements. The first part of this response briefly summarizes the Project and the Complaint, and the second part presents a response to the general issues raised in the Complaint.

The Project

On 31 January 2012, the EBRD Board approved two Projects for Altain Khuder LLC (the “company” or “Altain Khuder” or “AK” or the “client”) as follows:

- Project number 39581 for debt of up to 30 million USD and,
- Project number 43804 for equity of up to 25 million USD.

The Tayan Nuur Mine is located in Tseel soum, Gobi Altai aimag in western Mongolia. The mine is located approximately 170 km from the Mongolian-Chinese border and Burgastai post and is approximately 800 km from the target markets for the ore, which is within the Inner Mongolia region of the Peoples' Republic of China. The area of the site is typified by basin and range topography, with rocky mountainous outcrops separating flat valleys.

Operations at the Tayan Nuur mine started in April 2008, and by mid-2011 when EBRD began looking at this Project, the operations included four production lines operating at a total concentrate production capacity of up to 130,000 tonnes per month (1.6mtpa). By February 2012, line 5 was added and the total designed concentrate production was reaching 210,000 tonnes per month (2.6 mtpa).

Operations at the site include excavation of the ore from a relatively shallow excavation, crushing and screening, and magnetic (dry) separation of the iron-bearing concentrate (approximately 60% iron).

The process efficiencies (reducing double handling of excavated ore) in mining equipment were required to serve the capacity of the processing, which had recently expanded through installation of line 5 which became operational in the beginning of 2012.

Approximate production capacities (ore throughput) of the processing units (as indicated by the client) on site in December 2011 are listed below:

Line 1	150 t/hr	1.2m tpa
Lines 2 and 3	300 t/hr each	1.7m tpa each
Line 4	600 t/hr	3.3m tpa
Line 5	750 t/hr	4.2m tpa

The Project utilises a gravel export road to the Chinese border. Between the years 2008 and 2010, the company upgraded this road. At the time of EBRD's investment this road was reportedly one of the better roads in rural western Mongolia. It was recognised that, eventually, the export road would probably require further upgrading and paving. This use of funds (road upgrades) was not envisioned as part of the EBRD financed Project at that time, and was considered to be an option for future expansion of the mine, if implemented.

Given that the Project regarded investment in an operating mine, ESD assigned the Project as category B, given the issues were readily identifiable and able to be mitigated. The client retained an international consulting company with an office, based in Beijing, to complete the environmental review required for this loan (Environmental and Social Review, Tayan Nuur Iron Ore Mine, 13 December 2011). ESD had discussions with the consultants about the scope or work required for this Project to meet EBRD requirements, and was given the opportunity to review a draft version of the report before publication of the final version. As part of these discussions, EBRD and the consultant agreed on the scope of actions and associated time frame for the Environmental and Social Action Plan (ESAP) which was part of the report. As presented in this report, the main areas for improvement were the following:

- There was a lack of some environmental and social data and monitoring capabilities
- Sustainable use of water
- Dust control measures
- Disclosure of information and local consultation

These items were fully addressed in the ESAP for the Project as presented in the ERM report and included in the loan documentation. As part of the Project appraisal, ESD completed a

visit to the site to evaluate management capabilities of the company and to verify the items identified by the consultant.

As part of monitoring the EBRD Project, in August 2012, EBRD attended a meeting with Altain Khuder and the international consultant to discuss additional financing to cover an additional high output production line (line 6) and for the upgrading and paving of the export road. The consultant prepared an Environmental and Social Impact Assessment for this Project that included an update of the ESAP for the existing Projects. ESD reviewed and provided comments to the consultant on this report and ESAP update. Shortly after this meeting, the relationship with the client became difficult and further talks involving environmental and social monitoring were suspended.

EBRD has not received required environmental and social reporting on the investment since mid 2013, as required annually by the legal documentation and is therefore not in a position to comment on the status of the individual issues in the complaint. Management therefore will explain in this response how the issues were identified and dealt with in due diligence and up until the first half of 2013.

B. MANAGEMENT RESPONSE TO THE COMPLAINT

The Complaint requests a compliance review based on the following:

1. Inadequate Resettlement and Displacement (PR5);
2. Failure to Recognize as Indigenous Peoples (PR7);
3. Inadequate Pollution Prevention and Abatement (PR3);
4. Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR4);
5. Failure to Disclose Information with Stakeholders (PR10);
6. Inadequate Environmental and Social Appraisal and Management (PR1).

The responses to these issues are presented below. However, before providing the specific responses on these items, Management would like to stress a few general points which we believe are relevant to this complaint. Firstly, the Project that was financed was not a new facility. As pointed out above, production rates prior to EBRD involvement were as high as 250,000 tonnes per month (3mtpa). As such, the site was developed and impacts happened before EBRD involvement. The Bank assigned this Project a *B category*, recognising that this was not a green field development, but rather an operating mine and the impacts would not significantly change/increase with the investment, except for increases in efficiency and implementation of the agreed action plan. It was recognised through due diligence on the Project, and through the review by the independent environmental and social consultant, that the Project was not compliant with all of the PRs at the time of the investment. This is common for financing of existing operations and is clearly anticipated in the 2008 ES Policy, in paragraph 29 where it is stated *“If a proposed business activity to be financed by the EBRD relates to existing facilities that do not meet the PRs as the time of Board approval, the client will be required to adopt and implement an Environmental and Social Action Plan (ESAP), satisfactory to the EBRD, that is technically and financially feasible and cost effective to achieve compliance of these facilities with EBRDs requirements within a time frame acceptable to the EBRD.”*

Many of the issues raised in the PCM complaint were identified in due diligence, included in the consultant report and addressed in the action plan, which was designed to enable them to meet the PRs within a reasonable time frame. The ESAP was agreed with the client and included as part of the loan documentation. These items were monitored, and updates were

provided by the consultant on behalf of the company through the first half of 2013. Given the change in relationship with the client and the lack of reporting information or communication on environmental and social issues, the Bank's ability to monitor the ESAP progress ceased in mid 2013.

1. Inadequate Resettlement and Displacement (PR5)

The Complaint alleges that EBRD did not ensure Altain Khuder complied with provisions of PR5 in relation to a) resettlement and the rights of indigenous peoples, b) resettlement and compensation, and c) preparation of a resettlement action plan and livelihood restoration framework.

EBRD does not believe that Mongolian herders meet EBRD's definition of Indigenous Peoples (IPs) in Performance Requirement 7 (PR7), which requires the following characteristics:

- a. *Self-identification as members of a distinct ethnic or cultural group and recognition of this identity by others:*
Mongolian herders are not 'distinct' from 'a dominant national group' ethnically or culturally. Of Mongolia's total population of approximately 2.9 million, 37% live in rural areas and are nomadic or semi-nomadic herders. Herding still provides 40% of employment and accounts for about 20% of GNP. Herders may self-identify as 'indigenous' as likely would over 85% of Mongolians, who are of the same Khalkh ethnic background.
- b. *Collective attachment to geographically distinct habitats, traditional lands or ancestral territories (...) and to natural resources in these habitats and territories:*
Herders are indeed 'attached' to the land they live on and the natural resources that form the basis of their livelihoods, but this land is not 'distinct' from the homeland of all Mongolians and it may indeed change over time. Mongolian herders have undergone 4 major land tenure and livelihood shifts in less than 100 years with fundamentally differing livelihood strategies (ie splits between subsistence and yield-focused economies), entailing periodic relocation of many herders across Mongolia, changes in administrative boundaries, and associated erosion of customary pasture rights and institutions.
- c. *Descent from populations who have traditionally pursued non-wage subsistence strategies (...) and whose status was regulated by their own customs or traditions or by special laws or regulations:*
This applies to all Mongolians equally (in the 1950s, only 15% of the population was urban). As noted above, however, these 'traditions' have undergone many changes over the past 100 years and production was not always focused on subsistence strategies
- d. *Customary cultural, economic, social, or political institutions that are separate from those of the dominant society or culture:*
This is not applicable in the Mongolian context as herders are regulated by the same laws and institutions as are all Mongolians.
- e. *A distinct language or dialect, often different from the official language or dialect of the country or region:*
This is not applicable in the Mongolian context.

PR7 aims to provide specific protections to IPs, as defined by the UN, because it recognizes that "IPs, as a social group with identities that are distinct from dominant groups in national societies, are often among the most marginalized and vulnerable segments of the population". In Mongolia, herders are neither distinct, nor are they marginalized. The

vulnerability of herders is not caused by their distinctiveness, but is linked to their dependency on scarce natural resources and socio-economic status. In this context, the Bank's view is that PR7 does therefore not apply.

The principle of self-determination of IPs is reflected in key international conventions (ILO 169 of 1989) and declarations (UNDRIP 2007) and is aimed at groups that are separate and distinct from larger, dominant groups within a given country. Again, this does not apply to Mongolia and until several generations ago, the vast majority of Mongolians were herders. Herding is part of Mongolia's national identity and pride, and while it is currently declining in economic importance in the country, it is still central in terms of defining Mongolia as a nation.

Secondly, in terms of compliance with EBRD requirements for resettlement and compensation, as mentioned above, the Project was operational prior to EBRD involvement, and therefore resettlement and compensation associated with this operation was completed before the client was aware of our requirements, and before we were aware of the Project. This gap was recognised by EBRD and included in the consultant report. The consultant report indicates that there was physical and economic resettlement conducted prior to the Bank's consideration of the Project, and while this was conducted in accordance with National requirements (Article 41 of the Minerals Law of Mongolia), there were gaps when compared to EBRD requirements. The consultant presented a series of corrective actions to address the gaps between what was completed and EBRD requirements in the report, and these were also included in the agreed ESAP for the Project. The client initiated corrective actions starting with the "Post resettlement survey" conducted in November 2011. The results of this survey informed many of the other correction actions agreed by the client.

To address the lack of a resettlement action plan, and given that resettlement had already been completed, the Bank agreed several actions: for resettlement that had already taken place, it was agreed to conduct a post resettlement survey to develop an inventory of all displacement. This inventory would then be used to evaluate full replacement value in accordance with PR5 and any required additional compensation would be paid by the client. Further, a livelihood restoration framework would be implemented to ensure displaced households are not worse off (in terms of income and living standards) post displacement. Supplemental assistance would be provided if the survey identified discrepancies.

In terms of potential future physical or economic displacement, it was agreed that the client would prepare a land acquisition and resettlement planning framework.

These items are included in items 24 through 28 of the agreed ESAP for the Project.

2. Failure to Recognize as Indigenous Peoples (PR7)

A comprehensive response to this item is included above as this is also mentioned in the Complaint section on resettlement and the rights of indigenous peoples.

3. Inadequate Pollution Prevention and Abatement (PR3)

The complaint alleges that EBRD did not ensure the client's compliance with the provisions of PR 3 in relation to:

- Dust pollution and the environment
- Dust pollution affecting animal health and therefore, the herders' livelihoods

Issues arising from dust, generated from mineral processing and from transportation are covered in the consultant report (in sections on PR1, PR3 and PR4) and addressed in the ESAP items 11, 18 and 21. The Bank understands that the client had plans to provide a paved road for export as part of Project expansion, and this was included in a Project ESIA

for subsequent Project development activities that were not associated with the EBRD funds, and which were prepared by the consultant for the expansion of the mine. In August of 2012 Bank environmental and social staff met with the client and consultant about this work and understood that the client's plans at that time were to provide this paved road. Further information on the status of the environmental and social issues associated with the Bank's investment, as well as any future activities were not forthcoming. Nonetheless, issues related to dust were included as part of our due diligence and monitoring of the Project, as shown by the inclusion of items in the consultant report and the ESAP for the Project (items 11, 18 and 21).

4. Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR4)

The complaint makes allegations of impacts on community health, safety and security based on impacts to human and animal health, water depletion and intimidation and harassment by security personnel.

The allegations about health impacts appear to be linked primarily to dust pollution. As set forth above, sources of dust pollution were included as part of our review of the Project, and there were three items in the ESAP to address this issue. Further, there were discussions with the client about long term plans to provide a paved surface for the road, as not only would this reduce dust but this would make export of the iron ore to China much more efficient.

Regarding the allegations of water contamination by magnesium and iron, we are not aware of scientific studies linking this to the Altain Khuder Project, nor are we aware of scientific studies linking elevated levels (if present) to adverse effects on animals. It is unclear if the values mentioned in the document are drinking water standards and if so, if these are the same as standards for livestock. Given that there is an iron ore deposit in this area, it is reasonable to consider that local background levels of certain metals may be elevated naturally, and further scientific studies would need to be done to clarify the situation.

The Bank has not previously heard allegations of the client's site security personnel having intimidated local people.

5. Failure to Disclose Information with Stakeholders (PR10)

This Project was assigned a category B by the Bank in accordance with the 2008 Environmental and Social Policy. While stakeholder engagement and public disclosure is always a good practice and therefore endorsed by EBRD, the requirements for such in PR 10 of the 2008 Policy require a summary of the environmental and social issues associated with the Project and a summary of the commitments in the action plan to be disclosed. Furthermore, the client is required to have and to implement a stakeholder engagement plan, including a grievance mechanism for the public. The ESAP agreed with the client has several action items to address disclosure of information and public consultation (ESAP actions 3, 6, 21, 31 and 32 deal with these issues).

6. Inadequate Environmental and Social Appraisal and Management (PR1)

The complaint alleges that the appraisal and management of impacts and the organisational capacity of the company was inadequate.

As mentioned in the Complaint (and mentioned above), the original work completed by Altain Khuder for the Project was reviewed by EBRD and by the consultants. Gaps were identified in the work that was done prior to the Bank's involvement on the Project and the EBRD requirements in the 2008 PRs. Actions developed to address these gaps were included in the ESAP which was agreed by the client and included as part of the loan agreement. Therefore, AK was legally bound to implement the ESAP. The ESAP contained items to

address all gaps and is considered to be complete and comprehensive. The lack of a heading in the ESAP titled “Vulnerable Stakeholder Groups” does not mean the herders were overlooked. Several of the action items in the ESAP are specifically focussed on the herders, including all of the PR5 actions (items 24 through 28). The only people impacted by resettlement were herders.

Regarding the capacity of the client to address requirements of the PRs with the existing staff and resources, EBRD notes that the first site visit completed by the consultant was in August of 2011. A clear finding of this visit was that AK required additional staff and resources to address environmental, health and safety and social issues (EHSS) in order to meet EBRD requirements for financing. The consultant report of December 2011 states that AK hired an Environmental Manager in September 2011 to address this recommendation. The consultant commented positively on many aspects of AK EHSS capacity and their responsiveness to address the consultant’s recommendations on these items quickly following the August 2011 site visit including:

- levelling and paving the fuel storage depot and lubricants store,
- paving the maintenance area,
- dust deposition monitoring
- improvements to solid waste management through the segregation of recyclables and containerising waste stored onsite.

The consultant indicated that management from the mine site made a commitment to follow up on several recommendations and that observations made during a follow up visit demonstrated action had been taken to address the recommendations and indicated a progressive approach to environmental and social performance.

These statements were consistent with observations made by the EBRD environmental and social team working on the Project, and based on this we were convinced that the resources of the company were adequate given the size of operations and associated risks at the time of our investment.

C. CONCLUSION

The Altain Khuder Project was properly assessed and requirements included in legal documentation, in accordance with the requirements in the 2008 Environmental and Social Policy. The client appeared to be making good progress on their commitments and had developed plans to deal with the paving of the road, as of mid-2013 when AK’s communication with the Bank deteriorated. Following this point in time, the Bank has been unable to monitor the environmental and social performance or commitments of the client. We are therefore unable, as stated above, to clarify the current status of these issues or the actions implemented to address the issues.

Annex 3 – Client’s Response (undisclosed)

As Client’s response, Eligibility Assessors considered Altain Khuder’s comments on the SOMO Case Study: Altain Khuder in Mongolia, dated October 2014 (SOMO draft Report), and the Tayan Nuur Iron Ore Mine Project, Mongolia, Fact-Finding Mission Report prepared by OT Watch (Mongolia), SOMO CEE Bankwatch Network and Lawyers for Environment (Mongolia) for the period 10 August 2014–16 August 2014 (Fact-Finding Report). As the reports have not been created by the Bank or the PCM, they have not been publicly disclosed (in accordance with EBRD Public Information Policy).