1 February 2017

Board of Directors
European Bank for Reconstruction and Development
One Exchange Square
London EC2A 2JN
United Kingdom

Re: Complainants' response to Management Action Plan in the Case of ALTAIN KHUDER

Dear Members of the Board of Directors:

We would like to share with you our response to the Management Action Plan (MAP) in the Altain Khuder case. Before doing so, we would first like to express our significant concerns with the process and outcome of the compliance review.[1] In contrast to experience with other PCM experts, complainants here were not kept informed of the status of the case during repeated and unexplained delays in the process, were not consulted or requested to provide additional information, and their multiple requests for a site visit were declined. The Compliance Review Report (CR Report) applies an inappropriate standard of review, relying on assertions made by Management and/or the client despite the inability to verify them and in the absence of a site visit by the PCM expert to substantiate them. Further, the CR Report misinterprets and, at times, distorts EBRD policy and international law. Concerns raised by complainants regarding intimidation and harassment by EBRD's client have been ignored. As a result of these deficiencies, the MAP is insufficient to address the harm to complainants. More broadly, it calls into question the utility of using the PCM.

Throughout the CR Report, an inappropriate burden of proof is placed on the complainants to demonstrate non-compliance by the EBRD, despite the fact that the PCM's Rules of Procedure only require that the complaint "describe the harm" the project has caused or is likely to cause and not the submission of irrefutable proof.[2] As a result, complainants concerns are dismissed for failure to provide evidence or on the unverified information provided by Management and/or the client. In several instances,[3] the CR Report extensively questions the assertions made by complainants, again, in the absence of a site visit or even any attempts to consult with or seek additional information from them.

In, perhaps, the most serious example, the CR Report dismisses the allegations of intimidation and harassment by EBRD's client, claiming that complainants did not provide sufficient evidence,[4] though no additional information was requested from them. The CR Report further justifies its refusal to address the issue by asserting that it cannot comment on pending lawsuits against community members, which complainants had referenced as partial evidence of the harassment by the company. An analysis of the merits of the lawsuits under Mongolian law is unnecessary. That the lawsuits were filed and their underlying facts are relevant to the compliance review in order to determine whether the engagement with the affected communities was "free of manipulation, interference, coercion, and intimidation."[5] EBRD, through its equity investment, is a shareholder in the company. It would have been EBRD funds that

[1] These concerns were described in our response to the draft CR Report, submitted to the PCM on 8 September 2016. The final CR Report is largely unchanged from the draft.
[2] PCM Rules of Procedure (RoP), para 11(d).
[3] See also para 14, 58, 107, 184-185, 192 and 198.
[4] Paragraph 192.
[5] PR10 para. 6.

partially financed the lawsuits against these individuals. If the lawsuits were, as complainants claim, used to intimidate them and stop them from raising concerns about the project, then that would be a very grave violation of EBRD's policies. Indeed, a recent report found that judicial harassment is the most common form of targeting human rights defenders in Asia, with cases documented in Mongolia, among other countries in the region.[6]

In stark contrast, the Report repeatedly accepts assertions by the Bank and its client without any substantiation. For example, the CR Report accepts the client's assertions that it maintained communications with the herders, even though the Report admits that it has no documentation to verify that communication.[7] Instead, the CR Report justifies its acceptance of the client's assertions because, "it does seem unlikely that Altain Khuder could have established mining operations in the area without some measure of communication with the local communities."[8] That is an inappropriate assumption for a compliance review to make. In light of the inequitable approach taken in the compliance review process, we believe that CR Report has not adequately assessed EBRD's compliance with its policies, and thus many issues remain unaddressed in the MAP.

While we are aware of the breakdown in communication between the EBRD and Altain Khuder since mid-2013 and are cognizant of the challenges this inevitably poses to the EBRD's ability to fulfill its obligations in relation to the project, it is unacceptable to absolve the Bank from any responsibilities on that basis. There are no grounds for finding EBRD has met its obligations when, "technically there would have been non-compliance by EBRD with the provisions of the Policy."[9] EBRD should not rely solely on information from its client to fulfill its commitments, which continue as long as the project is active.[10] EBRD can conduct or commission its own studies and ensure that affected people are informed of relevant developments. At a minimum, EBRD should have changed the status of the projects on its website, which still shows them as active. This would seem to be inconsistent with the EBRD's Public Information Policy which requires the EBRD remove Project Summary Documents (PSDs) for projects that are "cancelled, rejected, or if inactive for a year."[11] As a result of the deficient analysis in the CR Report, the MAP does not make any commitments to deliver on its obligations to affected communities or develop procedures for future cases.

Finally, the CR Report misinterprets the definition of indigenous peoples in Performance Requirement 7, ignoring some criteria and adding others. As a result of this misinterpretation, Performance Requirement 7 was deemed not applicable to this project, and therefore, no recommendations were made. Paragraphs 111 and 170 of the CR Report assume incorrectly that the existence of a context of isolation, marginalization, and exclusion is a requirement for recognition as an indigenous people. Discrimination and marginalization may, in part, explain the need for special protection for indigenous peoples, but they are not part of the definition. If it were part of the definition, then once the discrimination is eliminated, the protected group of people would cease to be indigenous. Ultimately, adding this requirement would undermine and unjustifiably narrow the definition of indigenous peoples in PR7. Furthermore, evidence of complainants' self-identification as indigenous peoples, which is the first criteria listed in paragraph 10 of PR7, is dismissed as "perception."[12] Perhaps as troubling is the CR Report's conclusion that national law is

[6] Frontline Defenders, *Annual Report on Human Rights Defenders at Risk in 2016* (2016), available at: www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2016.
[7] Paragraph 185.
[8] Paragraph 185.
[9] Paragraph 197.
[10] ESP, para. 3.
[11] PIP, para. 3.3.
[12] Paras. 171-173.

dispositive on the topic of indigenous peoples.[13] The CR Report reasons that because national law does not recognize herders as indigenous they are not indigenous. If all multilateral development banks (MDBs) adopted this definition of indigenous peoples, governments could defeat the application of MDB policies on indigenous peoples merely by failing to recognize them in national law. At worst, it provides an incentive to governments to further discriminate against indigenous peoples by refusing them protection under national law. In sum, the analysis in this CR Report sets a very bad precedent for the EBRD. We recommend that Management commission expert advice, as provided for in PR7, to assess whether the requirements of that policy apply here.

In light of the significant analytical shortcomings in the CR Report, many of the concerns raised in the complaint remain unanswered. As a result, the MAP does not respond to the needs of complainants nor ensure that EBRD is in compliance with its policies. Complainants continue to face the continuous and unmitigated impacts of the Tayan Nuur mining project, including involuntary resettlement, loss of livestock, health problems, and water contamination and depletion.

To address the outstanding issues ignored or dismissed by the CR Report, we have identified several follow-up measures that we encourage Management to incorporate in the MAP:

- Project Level Recommendations:
    - **Communication Breakdown with Client**. In cases where there is a breakdown of communication with the client, it is not sufficient to respond to stakeholder questions only when contacted, as described in Management Action 1. It is incumbent on the EBRD to, at a minimum, communicate with affected communities so that they understand that EBRD can no longer ensure that the PRs will be met. The status on the EBRD website should be changed accordingly. We would also suggest that EBRD commission an exit assessment in the current case to determine whether there are impacts that remain unaddressed. In particular, EBRD should commission a post-resettlement survey, which should have been completed by the client prior to the breakdown in communications. Should the survey find that there are households that are worse off, the EBRD should develop and fund a livelihood restoration programme.
    - **Harassment and Intimidation**. The EBRD should also publicly denounce threats and intimidation of any kind against those affected by activities it funds. In the current case, because the compliance review failed to address these issues, [14] EBRD should commission an assessment to determine whether the client's engagement with affected communities was "free of manipulation, interference, coercion, and intimidation" as required by PR5. Should the inquiry confirm complaints' allegations of harassment, EBRD should publicly denounce the actions taken by its client, communicate its concerns to the Government of Mongolia, and address these risks in the next revision of the country strategy for Mongolia.
    - **Indigenous Peoples.** The Bank should commission external expert advice to determine whether the provisions of PR7 apply to the project.

- Institutional Level Recommendations
    - EBRD should establish a Sustainability Fund that could be accessed: 1) following the successful conclusion of a dispute resolution process when there are outstanding needs of the complainants; or 2) if the relationship between EBRD and the client ends prematurely and there are adverse impacts left unaddressed. There are several models for the

[13] Paras. 173-176.
[14] See CR Report, paras. 14, 107, and 192.

governance and financing of such a fund that could be explored through a public consultation or seminar, and;

- EBRD should launch a review of the PCM's structure and Rules of Procedure. Our experience in this and other cases has demonstrated a profound lack of consistency in the approach and quality of work, depending on the PCM expert assigned to the case. This lack of consistency calls into question the ability of complainants to receive equal treatment, undermining the predictability, equability and legitimacy of the PCM. The review should consider whether the roster model is fit for purpose.

We thank you in advance for taking note of our concerns in relation to the Compliance Review Report, as well as outstanding problems faced by the community as a result of the Tayan Nuur mining project. Please do not hesitate to contact us if we can provide any additional information.

Sincerely,

Ts. Amibuh (point of contact for herders)
Sukhgerel Dugersuren, Executive Director OT Watch
Fidanka Bacheva-McGrath, CEE Bankwatch Network
Kris Genovese & Lydia de Leeuw, Center for Research on Multinational Corporations (SOMO)