



**Nenskra HPP Compliance Review Report  
EBRD Project Complaint Mechanism  
Case 2018/08  
July 2020**

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## ABBREVIATIONS

| Abbreviation   | Long Form  |
|----------------|--|
| ADB            | Asian Development Bank   |
| ADB CRP        | Asian Development Bank Compliance Review Panel                       |
| AIIB           | Asian Infrastructure Investment Bank                                 |
| AIP            | EBRD Access to Information Policy                                    |
| BCRC           | Board Compliance Review Committee of the Asian Development Bank      |
| CIA            | Cumulative Impact Assessment   |
| CIC            | Client's International Consultant                                    |
| CRP            | Compliance Review Panel  |
| CSO            | Civil Society Organisation   |
| EAR            | Eligibility Assessment Report for the Nenskra HPP Complaint          |
| EIB            | European Investment Bank   |
| EIB CM         | European Investment Bank Complaint Mechanism                         |
| EPC Contractor | Engineering, Procurement and Construction                            |
| E&S            | Environmental and Social   |
| ESD            | Environment and Sustainability Department of the EBRD                |
| ESIA           | Environmental and Social Impact Assessment                           |
| ESMP           | Environmental and Social Management Plan                             |
| ESP            | EBRD Environmental and Social Policy                                 |
| GEL            | Georgian Lari  |
| GIP            | Good International Practice  |
| HPP            | Hydropower Project   |
| IFC            | International Finance Corporation                                    |
| IFI            | International Financial Institution                                  |
| IPOE           | Independent Panel of Experts   |
| JSCNH          | JSC Nenskra Hydro  |
| LALRP          | Land Acquisition and Livelihood Restoration Plan                     |
| Lenders        | ADB, EBRD and EIB  |
| LTA            | Lenders' Technical Advisor   |
| MAP            | Management Action Plan   |
| PCM            | Project Complaint Mechanism  |
| PCM RPs        | 2014 Project Complaint Mechanism Rules of Procedure                  |
| PPA            | Power Purchase Agreement   |
| PR             | Environmental and Social Policy Performance Requirement              |
| SEP            | Stakeholder Engagement Plan  |
| SIA            | Social Impact Assessment   |
| SPS            | Safeguard Policy Statement   |
| ToR            | Terms of Reference   |
| UNESCO         | The United Nations Educational, Scientific and Cultural Organization |
| USD            | US dollars   |
| WBIP           | World Bank Inspection Panel  |

## EXECUTIVE SUMMARY

### 1. The Project

The Nenskra Hydropower Project (**Nenskra HPP** or the **Project**) proposes a large dam with an installed capacity of 280 Megawatts, to be located in the upper reaches of the Nenskra and Nakra valleys in Georgia. It is being developed by JSC Nenskra Hydro, a special purpose vehicle established for the sole purpose of constructing the Project (**JSCNH** or the **Client**). The Project is being developed by JSCH and would be owned by K-Water (75%) – a Korean state-owned utility; the Government of Georgia's Partnership Fund (15%) and the European Bank for Reconstruction and Development (**EBRD**) (10%). The EBRD would provide a loan of up to USD 214 million and make a portage equity investment of up to USD 15 million. EBRD and ADB are lead arrangers of the Lender group which also includes the European Investment Bank (**EIB**), the Korean Development Bank (**KDB**), the Korea Trade Insurance Corporation (**K-Sure**) and potentially the Asian Infrastructure Investment Bank (**AIIB**).

### 2. The Complaint Submitted to PCM

The EBRD's Project Complaint Mechanism (**PCM**) received a Complaint from community members of Chuberi, Georgia, co-submitted with civil society organisations (**CSOs**) CEE Bankwatch Network and Green Alternative (the **Complainants**), relating to the Nenskra HPP. The Complaint alleges Bank non-compliance with its 2014 Environmental and Social Policy (**2014 ESP**), in relation to the following ESP Performance Requirements (**PRs**):

- PR 7 - *Indigenous Peoples*, in relation to the absence of categorisation of the Project-affected Svan community as Indigenous Peoples for the purposes of the Project as defined under the 2014 ESP;
- PR 1 - *Assessment and Management of Environmental and Social Issues*, in relation to the assessment of Project alternatives, cumulative impacts, associated facilities and gender considerations;
- PR 5 - *Land Acquisition, Involuntary Resettlement and Economic Displacement*, in relation to the reparation of economic displacement;
- PR 8 - *Cultural Heritage*, in relation to potential impacts of the Project on the Svan culture and community well-being; and
- PR 10 - *Information Disclosure and Stakeholder Engagement*, in relation to the consultation process undertaken in consideration of the Project scale.

The Complaint was deemed eligible for a PCM Compliance Review under the criteria outlined in the 2014 PCM Rules of Procedure (**PCM RPs**).

### 3. Complaints Submitted to Peer IFIs

In addition to the Complaint filed with the EBRD PCM, four additional complaints have been filed with the ADB Compliance Review Panel (**ADB CRP**) and EIB Complaint Mechanism (**EIB CM**) in relation to the Project, alleging non-compliance with their respective environmental and social safeguard policies.

### 4. Compliance Review Methodology

The Compliance Review involved a range of methodological approaches, in consideration of the nature and the complexity of Complaint. These included:

- (i) an in-depth review of internal and external Project-related documents;
- (ii) direct engagement with all parties to the Complaint;
- (iii) a six-day field visit to Georgia in February 2019, conducted jointly with the EIB CM;
- (iv) the commissioning of an internationally-recognised Indigenous Peoples specialist by to support the assessment of PR7 compliance, appointed jointly by the PCM and EIB CM;
- (v) consideration of additional documentation provided by the parties in the months following, both in response to the site visit and to the PCM Expert's requests; and
- (vi) the consideration of comments and documentation provided by Bank Management, the Complainants and the Client on the draft Compliance Review Report issued to the parties for comment.

## 5. Compliance Review Framework

As per the 2014 PCM RPs, the objective of the Compliance Review is to determine if the Bank's conduct with respect to the Nenskra HPP resulted in non-compliance with the 2014 ESP (and if so, how and why). To provide a basis for this assessment, the Compliance Review begins by providing a framework that:

- (i) looks at the extent of the Bank's obligations in the application of the 2014 ESP PRs, which differ from those of the Client. Based on paras. 4, 5, 6 and 36 of the 2014 ESP, the assessment of the Bank's compliance in this case examines the diligence employed by Bank Management in:
  - identifying any gaps and corrective actions that needed to be undertaken by the Client in order to fulfil the 2014 ESP PRs; and
  - employing ongoing, meaningful review and monitoring of the implementation of those corrective actions.
- (ii) outlines the Project's gap analysis and Bank Management's subsequent environmental and social due diligence, undertaken between 2015 and 2017.

The Compliance Review then undertakes a detailed analysis of the Bank's compliance with the 2014 ESP. Where non-compliance is identified, the Compliance Review recommends Project-specific and systemic/procedural remedial actions, to address said non-compliance.

## 6. Findings

The Compliance Review Report identifies Bank non-compliance in relation to:

- PR 7 - Indigenous Peoples;
- PR 1 - the Assessment and Management of Environmental and Social Impacts and Issues (with respect to cumulative impacts, Project alternatives and gender);
- PR 5 - Land Acquisition, Involuntary Resettlement and Economic Displacement;
- PR 8 - Cultural Heritage; and
- PR 10 - Information Disclosure and Stakeholder Engagement.

The key Complaint allegations and findings of the Compliance Review are summarised below.

## 6.1 PR 7: Indigenous Peoples

**Allegation:** the Complaint alleges that Bank Management failed to establish the applicability of PR 7 during the environmental and social assessment process, as it did not properly categorise Svans (the impacted group) as Indigenous Peoples. According to the Complaint, this did not provide the Svans with the right to determine their development, or to identify further adverse impacts to their communities.

**Findings:** the Compliance Review assessed the robustness of the process Bank Management used to determine the inapplicability of the PR 7 eligibility criteria, not the validity of the determination itself, as to whether the PR 7 eligibility criteria were correctly or incorrectly applied. In other words, the Report assesses whether the Bank's methodological approach fulfilled the ESP requirements, but does not make any assessment or determination as to whether the Svans should be considered Indigenous Peoples under the 2014 ESP eligibility criteria.

As the Bank commits to 'seek to ensure' that its social appraisal processes are in compliance with good international practice (**GIP**) under para. 6 of the 2014 ESP, the Compliance Review identifies what constitutes GIP methodologies for determining Indigenous Peoples' policy applicability in the international financial institution (**IFI**) space, further validated through expertise from an internationally-recognised Indigenous Peoples specialist (appointed jointly with the EIB CM). The Indigenous Peoples' specialist stresses that what is common among the published IFI GIP is:

- i. the quest for best possible information in assessing whether a group qualifies for consideration as an Indigenous People; coupled with
- ii. consulting the pertinent groups themselves as to whether they meet the applicable criteria of indigeneness.<sup>1</sup>

The Compliance Review determines Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 7, as Bank Management did not adequately appraise the Client's examination of the potential application of the PR 7 eligibility criteria. While Bank Management correctly identified the need for the Client to employ GIP in assessing the PR 7 eligibility criteria, Bank Management did not subsequently seek to ensure that those requests were fulfilled. Specifically, the EBRD approved the Client's analysis of PR 7 eligibility, despite evidence that:

- the analysis did not ensure that best possible information was sought, as it did not include diverse views and expertise in the assessment of the eligibility criteria applicability; and
- the Client did not consult Project-affected communities on the applicability of all 2014 ESP eligibility criteria.

## 6.2 PR 1: Assessment and Management of Environmental and Social Impacts and Issues

### Cumulative Impacts:

**Allegation:** the Complainants argue that the environmental and social impact assessment for the Project lacked an assessment of cumulative impacts, in light of i) the plans to develop no less than 35 hydropower projects in the Svaneti region, and ii) the existence of natural resources licenses bordering the Project area.

**Findings:** the Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (cumulative impacts), as Bank Management correctly identified the need for a Cumulative Impact Assessment (**CIA**) to be undertaken during the gap

<sup>1</sup> Indigenous Peoples Expert Opinion, dated 24 August 2019, p. 7.



analysis, but did not seek to ensure that the CIA met the PR 1 requirements. Bank Management ultimately approved the Project without adequate research to ensure the identification of all reasonably foreseeable extractive or forestry activities.

#### **Associated Facilities:**

**Allegation:** the Complaint asserts that the impacts of the Project's associated facilities were not adequately assessed.

**Findings:** the Compliance Review finds Bank Management to be compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1, para. 9 (associated facilities), as the Bank adequately sought to ensure that the Client fulfilled the ESP requirements for the assessment of associated facilities.

#### **Project Alternatives:**

**Allegation:** the Complaint argues that the Project lacked an examination of the technically and financially feasible alternatives given the Project's environmental and social impacts.

**Findings:** The Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (Project alternatives) as the 2015 Environmental and Social Impact Assessment (**2015 ESIA**) and the Supplementary Environmental and Social Studies (**Supplementary E&S Studies**) did not provide an analysis of alternatives with due consideration to environmental and social impacts as required by PR 1 para. 10. In addition, the Compliance Review finds that the Bank failed to seek to ensure that the Client attempted to collaborate with the relevant third party (i.e., the Government of Georgia) to meet the alternatives assessment requirements set out in PR 1, as outlined in para. 39 of the 2014 ESP.

#### **Gender Issues:**

**Allegation:** the Complaint raises concerns over the adequacy of the gender impact assessment undertaken for the Project and the mitigation measures it established. It also argues that appropriate consultations with local women to identify gendered impacts or measures were not undertaken. In particular, the Complaint raises concerns that the Project did not adequately identify or consider the gender-related risks resulting from the large influx of (predominantly) male workers into the community as a result of the Project.

**Findings:** the Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (gender), as Bank Management did not seek to ensure that the Client: fulfilled the 2014 ESP requirements on gender, neglecting to identify material shortcomings in the Project approach; or undertook meaningful, gender inclusive engagement during stakeholder consultation, as required by PR 10 paras. 10 and 12.

### **6.3 PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement**

**Allegation:** the Complainants argue that the Client failed to design an adequate Land Acquisition and Livelihood Restoration Plan (**LALRP**) that effectively mitigates economic displacement caused by the Project through the loss of resources, assets, income and livelihoods.

**Findings:** the Compliance Review finds the Bank to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 5, as Bank Management did not seek to ensure that PR 5 requirements related to livelihood restoration were met, and allowed an arbitrary threshold for livelihood restoration to be established (i.e., where those incurring losses >10% would not be



eligible for restoration measures, despite PR 5 requirements to restore livelihoods and standards of living).

#### 6.4 PR 8: Cultural Heritage

**Allegation:** the Complaint invokes PR 8 to allege that the Project poses a threat to Svan culture and the well-being of the community, stating that the environmental and social impact assessment does not address potential Project impacts to the Svan culture and language (i.e., elements of intangible cultural heritage).

**Finding:** the Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP, as Bank Management approved the Client's environmental and social impact assessment without seeking to ensure that the Project met important community consultation requirements under PR 8. Bank Management did not identify these areas as needing further corrective action and therefore did not request or monitor their implementation. As a result, the Bank did not seek to ensure that important potential impacts to Project-affected people were adequately identified and mitigated, in accordance with paras. 10 and 15 of PR 8.

#### 6.5 PR 10: Information Disclosure and Stakeholder Engagement

**Allegation:** the Complainants argue that the Project failed to comply with PR 10, as the consultation of Project-affected people was not proportional to the nature and scale of the Project or its potential impacts on communities.

**Findings:** the Compliance Review finds that significant progress was made in strengthening the Project's stakeholder engagement as a result of consistent efforts by EBRD Bank Management, as well as other Lenders. Bank Management did make commensurate efforts to seek to ensure that the Client met its obligations under PR 10, and these efforts are commendable; Bank Management should be recognised for its efforts to ensure compliance with PR 10. Despite these efforts, the Compliance Review finds that there are important issues relating to the capacity and commitment of the Client to execute stakeholder engagement that Bank Management did not address, as it is required to do under para. 30 of the 2014 ESP. Therefore, the Compliance Review finds the Bank to be compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to the application of PR 10, but non-compliant with para. 30 of the 2014 ESP.

### 7.0 Recommendations

Under the 2014 PCM RPs, the Compliance Review Expert is mandated to provide procedural, systemic, and Project-specific recommendations to Bank Management to a) resolve existing non-compliance with the 2014 ESP; and b) avoid future non-compliance with this policy.

#### Systemic and Procedural Recommendations to Address EBRD Non-compliance

**Recommendation 1:** establish a systemic tracking tool for EBRD requests to its Clients, allowing Bank Management to better ensure that Project-specific requests in relation to ESP adherence are effectively implemented.

**Recommendation 2:** develop clear, step-by-step policy Guidance to direct Clients in the effective assessment of the ESP PR 7 Indigenous Peoples eligibility criteria (for the 2014 ESP as well as other ESP iterations). The Guidance should be developed through a participatory process involving multiple, recognised Indigenous Peoples Experts, civil society and industry representatives, and

should be informed by GIP employed by both IFIs and the private sector. This Guidance should include (i) specific recommendations from GIP methodologies that ensure PR 7 eligibility criteria are robustly assessed; and (ii) specific processes and measures that guide Clients in the application of PR 7 in instances where indigeneity is not recognised at the national level.

**Recommendation 3:** where third parties are responsible for Project siting, design and alternatives assessment, require Clients to consistently approach relevant third parties to request that these decision-making processes include environmental and social considerations. Bank Management should document these Bank and Client requests.

**Recommendation 4:** strengthen capacity of the EBRD Environment and Sustainability Department (ESD) on gender issues, and ensure the use of external consultants with strong experience and capabilities in this area.

### **Project-specific Recommendations to Address EBRD Non-compliance**

**Recommendation 5:** take steps to ensure that an expanded assessment of the PR 7 eligibility criteria is conducted for the Nenskra Project, which incorporates all IFI GIP methodologies outlined in the Compliance Review Report, including a) a diversity of views and expertise and b) community consultation regarding each ESP PR 7 eligibility criterion.

**Recommendation 6:** address the gaps identified in the CIA (i.e., ensuring the assessment of potential cumulative impacts of planned or reasonably foreseeable mining and forestry developments in the Project area).

**Recommendation 7:** address the identified gaps in the analysis of the Project Alternatives, collaborating with the Client and the Government of Georgia to develop and disclose more detailed analysis of the Project site selection and design to Project-affected communities in a robust and meaningful way. Disclosure should detail the rationale and value of the Project site selection and design from both social and environmental perspectives over other options considered, and providing justification of the projected financial benefits and costs of the Project.

**Recommendation 8:** facilitate an additional layer of gender impact assessment i) to evaluate issues not comprehensively addressed through the Client's environmental and social impact assessment and ii) to ensure the establishment of sufficient mitigation measures, with particular emphasis on the mitigation of gender-specific risks related to the influx of a large (predominantly) male workforce.

**Recommendation 9:** engage with the Client to address gaps in the LALRP, including the removal of the arbitrary threshold for livelihood restoration eligibility.

**Recommendation 10:** facilitate a further layer of cultural heritage impact assessment, in order to identify potential impacts to intangible cultural heritage in the Project area not fully reflected in the Client's environmental and social impact assessment, establishing appropriate mitigation measures in consultation with Project-affected people.

**Recommendation 11:** ensure that in accordance with para. 30 of the 2014 ESP, all members of the Client's environmental and social team possess the necessary competencies and abilities to manage the complexities and sensitivities of the Project in a manner consistent with the Bank's environmental and social standards.

# 1. Case Introduction

Section 1 of this Compliance Review Report provides an introduction to the case, summarising:

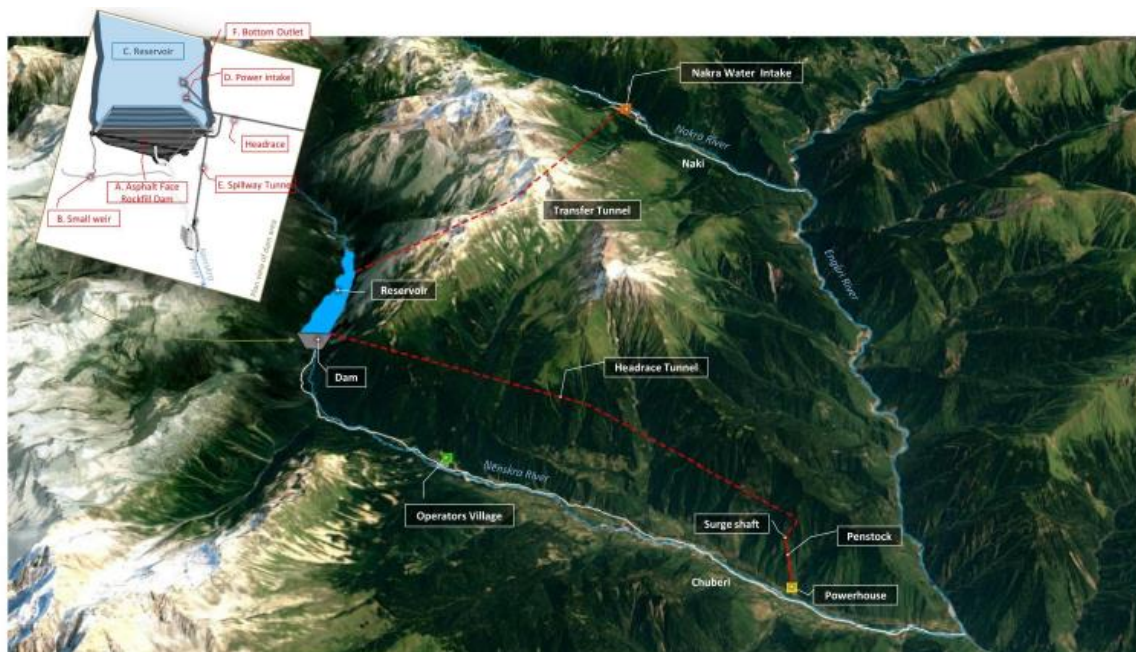
- 1.1 the Project cited in the case;
- 1.2 the parties to the case;
- 1.3 the Complaint submitted to the EBRD PCM; and
- 1.4 peer IFI accountability complaints.

## 1.1. The Project Cited in the Complaint

The Nenskra HPP is a greenfield high head hydropower project, with an installed capacity of 280 megawatts. The Project will use the available discharges from the Nenskra and Nakra Rivers, developing a maximum available head of 725 m down to the powerhouse located 17 km downstream from the dam.

Key Project components include a 125m high, 870m long asphalt face rockfill dam on the upper Nenskra River, which creates a live storage of 176 million cubic metres of water. It also involves a reservoir of 267 ha at full supply level. Part of the Nakra River will be diverted into the Nenskra reservoir through a 12.25 km transfer tunnel. The power waterway comprises a headrace tunnel of 15.1 km, a pressure shaft, and an underground penstock. The above-ground powerhouse is located on the left side of the Nenskra River and will house three vertical Pelton turbines. A 220-kV transmission line will also be required to connect the powerhouse gas insulated station yard to a new substation in the Nenskra valley (see Figure 1).<sup>2</sup>

Figure 1: Project Site



The Project area principally encompasses the two neighbouring river valleys where the Project facilities and structures will be constructed: the Nenskra valley to the west and the Nakra valley to

<sup>2</sup> Supplementary Environmental and Social Studies. Volume 2 "Project Definition," dated November 2017, p. 1.

the east, as well as the area between them. This area is mountainous, relatively remote, and sparsely populated.

The Nenskra and the Nakra valleys are home to 1,448 people comprising 353 households:

- 1,148 permanent residents (268 households) in the Nenskra valley; and
- 300 permanent residents (85 households) in the Nakra valley.<sup>3</sup>

The majority of residents were born in the Nenskra and Nakra valleys.

All Project components will be located in the Municipality of Mestia:

- the Nenskra dam, reservoir, powerhouse and penstock will be located in the community of Chuberi;
- the Nakra water intake will be located in the community of Naki;
- the access road to the Nakra water intake will cross the communities of Naki and Lakhamula; and
- the transmission line and access road to the Nenskra dam will cross Chuberi and Khaishi.<sup>4</sup>

The Project will also influence the Enguri valley and communities both upstream and downstream of the confluence of the Nenskra River, namely Mestia (the main town within the Municipality of Mestia, upstream from the confluence), Khaishi (at the confluence) and Zugdidi and its surrounding villages (downstream from the confluence). These areas can be considered the wider area of influence and will be affected predominantly by the Project's construction traffic along the Zugdidi-Mestia road.<sup>5</sup>

EBRD was approached by the Client to provide a senior secured loan of USD 214 million to finance the development of the Nenskra HPP. In addition to the EBRD, the ADB, the EIB, the Korean Development Bank, the Korea Trade Insurance Corporation and the AIIB were approached to finance the Project. The EBRD and ADB worked particularly closely to undertake the environmental and social impact assessment for the Project. For the purposes of this Compliance Review only, these two institutions will be referred to as the "Lenders."<sup>6</sup>

## 1.2. The Parties to the Case

- **The Complainants:** four Project-affected community members and two CSOs, CEE Bankwatch and Green Alternative. Project-affected Complainants requested confidentiality in their Complaint submission, citing concerns of retaliation.<sup>7</sup>
- **The Bank:** EBRD.
- **The Client:** the Project is being developed by JSCNH, a special purpose vehicle established to construct the Project, and would be owned by K-Water (75%) – a Korean state-owned utility; the Government of Georgia's Partnership Fund (15%) and the European Bank for Reconstruction and Development (EBRD) (10%). The EBRD would provide a loan of up to USD 214 million and make a portage equity investment of up to USD 15 million. EBRD and ADB are lead arrangers of the Lender group, which also includes the European

<sup>3</sup> Supplementary Environmental and Social Studies. Volume 3 "Social Impact Assessment," dated November 2017, pp. 15-20.

<sup>4</sup> Supplementary Environmental and Social Studies. Volume 2 "Project Definition," dated November 2017, p. 1.

<sup>5</sup> Supplementary Environmental and Social Studies. Volume 3 "Social Impact Assessment," dated November 2017, p. 15.

<sup>6</sup> The Compliance Review understands that the group of IFIs working together in the environmental and social assessment of the Project changed over time but that EBRD and ADB remained throughout the process and their environmental and social policies served as the main reference point for the assessment of the Project.

<sup>7</sup> Request to the EBRD's PCM on the Nenskra HPP (*the Complaint*), dated 30 May 2018, para. 1.5.

Investment Bank (EIB), the Korean Development Bank (KDB), the Korea Trade Insurance Corporation (K-Sure) and potentially the Asian Infrastructure Investment Bank (AIIB).

### 1.3. The Complaint

The Complaint alleges Bank non-compliance with its 2014 ESP in respect of the Nenskra Project, in relation to the following ESP PRs:

- PR 7 on *Indigenous Peoples*, in relation to the absence of categorisation of the Project-affected Svan community as Indigenous Peoples;
- PR 1 on the *Assessment and Management of Environmental and Social Issues*, in relation to the assessment of Project alternatives, cumulative impacts, associated facilities and gender considerations;
- PR 5 on *Land Acquisition, Involuntary Resettlement and Economic Displacement*, in relation to the remediation of economic displacement;
- PR 8 on *Cultural Heritage*, in relation to potential impacts of the Project on the Svan culture and community well-being; and
- PR 10 on *Stakeholder Engagement*, in relation to the consultation process undertaken in consideration of the Project scale.

A detailed description of the Complainants' positions with respect to each PR is provided in Section 4, when analysing EBRD's compliance with the 2014 ESP.

### 1.4. Peer IFI Accountability Complaints

In addition to the Complaint filed with the EBRD PCM, four additional complaints have been filed with the ADB and EIB accountability mechanisms in relation to the Project, alleging non-compliance with their respective environmental and social safeguard policies. While the issue of Indigenous Peoples is common to all submissions, each complaint differs regarding the other issues raised.

#### 1.4.1. Complaint Filed with the ADB Compliance Review Panel

A first complaint was filed with the ADB CRP in December 2017. The CRP determined that it was eligible for a compliance review, finding *prima facie* basis evidence of the Project's non-compliance with ADB's Safeguard Policy Statement.<sup>8</sup> The ADB CRP identified a number of concerns in its report on eligibility (**ADB CRP Report**), related to:

- the methodological process undertaken by the ADB for the categorisation of Indigenous Peoples and potential risks to the Svan culture;<sup>9</sup>
- the assessment of Project alternatives;<sup>10</sup>
- the potential noise, vibration, pollution, and community health and safety impacts;<sup>11</sup>
- the completeness of the Environmental and Social Management Plan (**ESMP**), resulting from the omission of some potential environmental and social impacts and corresponding mitigation measures;<sup>12</sup> and

<sup>8</sup> ADB, Policy Paper, Safeguarding Policy Statement, dated June 2009 and its accompanying Operations Manual (OM) Bank Policies (BP), Section F1, issued on 01 October 2013 available at <https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf> and <https://www.adb.org/sites/default/files/institutional-document/31483/om-f1-20131001.pdf>, respectively.

<sup>9</sup> ADB, Compliance Review Panel, Report on Eligibility, dated 8 February 2018, pp. 7-8, available at: <https://lnadbg4.adb.org/dir0035p.nsf/alldocs/JABM-ATX46V?OpenDocument>

<sup>10</sup> ADB, CRP Report, pp. 8-9.

<sup>11</sup> ADB, CRP Report, pp. 17-18.

<sup>12</sup> ADB, CRP Report, pp. 20-22.



- the LALRP, which did not, in the view of ADB CRP, account for:
  - compensation measures for the long-term impacts of the permanent loss of pasture land; or
  - the need to update the LALRP as the Project design progressed, to consider potential resettlement impacts once all components of the Project were fully designed.<sup>13</sup>

Finally, the ADB CRP Report found that while the ADB was in broad compliance with the requirements of the Safeguard Policy Statement on consultation and participation, it reflected that it would be important for further consultation to be conducted to assess Project impacts and develop mitigation measures for environmental and social issues not yet laid out in the ESMP.<sup>14</sup>

The ADB CRP Report on Eligibility was submitted to the ADB Board Compliance Review Committee (BCRC), which recommended to ADB's Board of Directors that instead of a full compliance review, a more efficient approach would be to adopt an action plan to address the findings of the ADB CRP Report in the development of the Project (which had not yet been approved by the ADB Board of Directors). The BCRC noted that such an approach would likely be more responsive to the concerns of Project-affected people because it would facilitate the inclusion of ameliorative measures in the Project's design and implementation.<sup>15</sup>

As the ADB and EBRD closely collaborated in their environmental and social appraisal of the Project, including the use of a common technical advisor, the ADB CRP Report on Eligibility findings were invoked on numerous occasions in the Complaint submitted to PCM.

#### 1.4.2. Complaints Filed with the EIB Complaint Mechanism

The EIB CM has received three complaints concerning their involvement in the Nenskra HPP. In January 2017, a first complaint was submitted by Green Alternative on behalf of affected community members of the Nakra valley, raising concerns around the Client's natural hazards risk assessment. In March 2018, a second complaint was submitted to the EIB CM by CEE Bankwatch Network, concerning the disclosure of Project-related documents. In June 2018, a third complaint was submitted, presenting issues of overlap with the PCM Complaint. Consequently, in the interest of efficiency and collaboration enshrined in the 2014 PCM RPs, the EIB CM and EBRD PCM coordinated case processing to the extent feasible; in particular, by jointly conducting the field visit to Georgia and appointing the same Indigenous Peoples specialist to support their respective proceedings.

<sup>13</sup> ADB, CRP Report, pp. 22-24.

<sup>14</sup> ADB, CRP Report, pp. 24-26.

<sup>15</sup> Report of the Board Compliance Review Committee and Compliance Review Panel's Report on Eligibility of the Compliance Review Request for Project Number 49223-001 Nenskra Hydropower Project (Georgia), available at: [https://lnadbg4.adb.org/dir0035p.nsf/attachments/GEO-Nenskra Report%20of%20BCRC%20&%20CRP%20Eligibility%20Report-21March2018.pdf/\\$FILE/GEO-Nenskra Report%20of%20BCRC%20&%20CRP%20Eligibility%20Report-21March2018.pdf](https://lnadbg4.adb.org/dir0035p.nsf/attachments/GEO-Nenskra%20Report%20of%20BCRC%20&%20CRP%20Eligibility%20Report-21March2018.pdf/$FILE/GEO-Nenskra%20Report%20of%20BCRC%20&%20CRP%20Eligibility%20Report-21March2018.pdf)

## 2. Case Processing and Compliance Review Methodology

Section 2 of this Compliance Review Report provides an overview of:

- 2.1 the Compliance Review objectives;
- 2.2 PCM case processing prior to the Compliance Review; and
- 2.3 the methodology used to develop the Compliance Review Report.

### 2.1. Compliance Review Objectives

As per the 2014 PCM RPs,<sup>16</sup> the objective of this Compliance Review is to determine if the Bank's conduct with respect to the Project has resulted in non-compliance with its 2014 ESP (and if so, to determine how and why). The Compliance Review focuses on the Bank's compliance with the 2014 ESP rather than the Client's compliance, and therefore, *only* considered the Client's conduct where it was necessary to evaluate the Bank's adherence to its own ESP commitments.

Where non-compliance is identified, the purpose of the Compliance Review is to recommend Project-specific and systemic/procedural remedial actions, to address the non-compliance.<sup>17</sup>

### 2.2. PCM Case Processing Prior to the Compliance Review

- **Complaint registered:** June 2018, in accordance with paras. 11-13 of the 2014 PCM RPs.
- **Bank/Client Responses received:** June 2018, where formal Bank and the Client responses to the Complaint were provided to PCM.
- **Eligibility Expert assigned:** June 2018, an external PCM Expert was appointed to co-assess Complaint eligibility.
- **Eligibility Assessment Report (EAR) published:** October 2018, the Complaint was found eligible for a Compliance Review.<sup>18</sup> Terms of Reference (ToR) for the Compliance Review were included in the EAR.
- **Compliance Review Expert appointed:** October 2018, the EBRD Board of Directors appointed an external PCM Expert to assess Bank compliance with the 2014 ESP.

### 2.3. Compliance Review Methodology

In consideration of the nature of the Complaint, and the diversity and complexity of the issues raised, the Compliance Review Report was developed in two phases through the following methodological approaches:

#### *Phase 1*

- **Document Review:** the Compliance Review involved an extensive, in-depth review of Project documents and secondary sources. The Project document review covered the voluminous environmental and social impact assessment documentation available to the public, as well as internal Bank and Client documents relating to the Project. The review of secondary sources included extensive desktop research on relevant topics such as GIP relative to hydropower projects and Indigenous Peoples' eligibility assessments.

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<sup>16</sup> PCM RPs, para. 41.

<sup>17</sup> PCM RPs, para. 44.

<sup>18</sup> EAR is available at <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>.



Documents reviewed are referenced as appropriate throughout the Compliance Review Report, in line with the EBRD's 2019 **Access to Information Policy (AIP)**.

- **Engagement with the Parties:** the Compliance Review included numerous exchanges with the relevant parties via written communications, in-person interviews and video and telephone interviews. The Expert engaged with the Complainants; the EBRD Banking and ESD departments; the Client; and the environmental and social expert appointed under the Project's Independent Panel of Experts (IPOE). The Complainants and Bank Management were given equivalent opportunities to engage with the PCM Expert.
- **Field Visit:** the Compliance Review included a six-day field visit to Georgia in February 2019, conducted jointly with the EIB CM. The field visit involved engagement with a wide range of stakeholders, including the Complainants, the Client, Project-affected community members, academic experts and government representatives from various levels of government, in order to inform the review of the respective EBRD and EIB complaints.
- **Joint Appointment of Indigenous Peoples Specialist:** The EBRD PCM and EIB CM jointly appointed an internationally-recognised Indigenous Peoples' specialist to support the assessment of PR 7 compliance.<sup>19</sup> The specialist was asked to identify GIP methodologies in the IFI space, employed to assess whether a group should be considered Indigenous Peoples under PR 7 eligibility criteria.

## *Phase 2*

- **Consideration of comments on the Draft Compliance Review Report:** following the issuance of the draft Compliance Review Report in March 2020, Bank Management, the Complainants and the Client were provided an opportunity to comment. All comments and associated documentation provided by the parties were carefully considered and where deemed appropriate, were integrated into the final Compliance Review Report.

Through the document review, engagement with the parties and the field visit referenced above, the Compliance Review Expert has had access to sufficient information to assess the Bank's alleged non-compliance with the 2014 ESP in respect of the Nenskra HPP.

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<sup>19</sup> The EIB Complaint Mechanism commissioned the same expert to support the analysis of the complaint under the EIB relevant policies.

### 3. Compliance Review Framework

Section 3 of this Compliance Review Report provides an overview of:

- 3.1 the Bank's obligations in the application of the 2014 ESP PRs: this section provides the basis for the analysis of the Bank's compliance with the PRs, this section looks at the extent of the Bank's obligations in the application of the 2014 ESP PRs, which differ from the Client's obligations.
- 3.2 the Project's gap analysis and the Bank's subsequent environmental and social due diligence: before entering into the specific analysis of each PR raised in the Complaint, this section outlines the Project gap analysis and the subsequent environmental and social due diligence undertaken by Bank Management from 2015 to 2017.

#### 3.1. The Bank's Obligations in the Application of the 2014 ESP PRs

The 2014 ESP outlines the way in which the environmental and social impacts of Bank projects should be addressed, by defining the respective roles and responsibilities of both the EBRD and its Clients in designing, implementing and operating projects in line with the 2014 ESP and its PRs.

According to para. 4 of the 2014 ESP, “[a]ll projects financed by the EBRD shall be structured to meet the requirements of this Policy.” In addition, under para. 6 of the 2014 ESP, EBRD “...will **seek** within its mandate **to ensure** through its environmental and social appraisal and monitoring processes that projects are designed, implemented and operated in compliance **with applicable regulatory requirements and GIP**” (emphasis added).

In order to help Clients comply with the requirements of the 2014 ESP, and to seek to ensure that projects meet GIP relating to environmental and social sustainability, EBRD has defined ten PRs, covering key environmental and social issues to be addressed in project development.<sup>20</sup> These PRs set out detailed requirements which Clients are expected to meet. Para. 5 of the 2014 ESP states: “The EBRD has adopted a comprehensive set of PRs that projects are expected to meet. Bank Management expects its Clients to manage the environmental and social issues associated with the projects to meet the PRs over a reasonable period of time.”

The 2014 ESP is not explicit in all cases in terms of what the Bank's specific commitment is relative to the PRs. Nevertheless, what is clear is that as part of its commitments under paras. 4, 5, 6 and 36, Bank Management should – at a minimum – **seek to ensure** that the PRs are met by its Clients. To do so, Bank Management needs to comply with the requirements of the environmental and social assessment and monitoring processes enshrined in the 2014 ESP. Notably, para. 29 provides that “[t]he [environmental and social] appraisal will assess whether the project is capable of being implemented in accordance with this Policy and its PRs.” The 2014 ESP details EBRD's role and requirements for such an appraisal, including:

- The appraisal will be appropriate to the nature and scale of the project, commensurate with the level of environmental and social impacts and issues and with due regard to the mitigation hierarchy (para. 29).
- The EBRD's environmental and social appraisal includes consideration of three key elements: (i) the environmental and social impacts and issues associated with the project; (ii) the capacity and commitment of the Client to implement the project in accordance with the relevant PRs; and (iii) to the extent appropriate, the facilities and activities that are associated with the project but not financed by the EBRD (para. 30).
- Where the EBRD is approached to finance a project that is under construction, or where the project has received its permits from the host country, including the approval of local environment and

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<sup>20</sup> 2014 ESP, para. 36.

social impact assessments, the Bank's appraisal will include a gap analysis of the project design and implementation against the PRs to identify whether any additional studies and/or mitigation measures are required to meet the EBRD's requirements (para. 33).

- The EBRD's appraisal requires the Client to identify stakeholders potentially affected by and/or interested in the projects, disclose sufficient information about the impacts and issues arising from projects and consult with stakeholders in a meaningful and culturally appropriate manner. In particular, the EBRD requires its Clients to engage with relevant stakeholders, in proportion to the potential impacts associated with the project and level of concern. Such stakeholder engagement should be carried out bearing in mind the spirit and principles of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (para. 34).

The observance of these requirements should enable Bank Management to “*seek to ensure*” that Clients fulfil the PRs and that projects are ultimately structured to meet the requirements of the 2014 ESP.

It is important to note that the Bank's commitment to “*seek to ensure*” the Client's fulfilment of the PRs **is distinguished from** a responsibility to “*ensure*” the fulfilment of the PRs. The responsibility to “*seek to ensure*” reflects the Bank's conduct with respect to the Client's efforts to meet the PRs.

This is not to say that “*seek to ensure*” is a meaningless standard. On the contrary, this responsibility requires more than a superficial exercise to check that procedural and operational requirements are met in name. “*Seek to ensure*” implies that Bank Management make reasonable efforts to:

- identify any gaps in the Client's environmental and social policies and practices;
- present the steps the Client needs to take to close those gaps and ultimately fulfil the 2014 ESP requirements; and
- meaningfully review and monitor the Client's efforts and performance in meeting the 2014 ESP requirements on an ongoing basis.

Therefore, the assessment of the Bank's compliance in this case involves the examination of the diligence employed by Bank Management in:

- identifying any gaps and corrective actions that must be undertaken by the Client in order to fulfil the 2014 ESP PRs; and
- employing ongoing, meaningful review and monitoring of the implementation of those corrective actions.

### 3.2. Overview of the Project's Gap Analysis and the Bank's Subsequent Environmental and Social Due Diligence

The Project's pre-feasibility study was prepared in 2010. The original environmental and social impact assessment was developed in 2011, and a second environmental and social impact assessment was prepared in 2015 for the purposes of obtaining national environmental permits through the Georgian Ministry of Environmental Protection and Natural Resources, obtained in October of that year (2015 ESIA).<sup>21</sup>

#### 3.2.1. The Project Gap Analysis

When EBRD was approached by the Client regarding support for the Project, the 2015 ESIA had already been prepared. Consequently, as explained by Bank Management as their standard

<sup>21</sup> Supplementary E&S Studies, Annexes to Volume 2 “Project Definition” refer to “Project History,” dated November 2017, pp. 1-4. The Supplementary E&S Studies are available at <http://nenskra.ge/en/reports/>

approach, the “first stage of the [environmental and social due diligence] was to undertake a Gap Analysis of the [2015 ESIA] against the EBRD’s PRs and to set out the requirements of a Supplementary Disclosure Package to ensure that the Project [was] structured to meet EBRD’s ESP.”<sup>22</sup>

On advice from the Lenders, the Client appointed an international consultant, (the **Client’s International Consultant**, or **CIC**) to review the environmental and social impact assessment work carried out prior to the Lenders’ involvement and undertake an environmental and social gap analysis.

In order to support the gap analysis and other aspects of the Bank’s environmental and social due diligence, EBRD also appointed an international consulting firm to advise the Lenders<sup>23</sup> throughout the environmental and social due diligence process, as the **Lenders’ Technical Advisor** (the **LTA**).

The CIC undertook a first gap analysis that was presented to the LTA and the Lenders in July 2015. The CIC analysis assessed the 2015 ESIA and the Stakeholder Engagement Plan (**SEP**), which involved a field visit, interviews with Project-affected people and local authorities; and working sessions with the Client’s Project team and engineering firm.

The LTA undertook a second gap analysis, which reviewed the work undertaken by the CIC. The LTA also visited the Project site and met with the Client, the CIC and Project-affected community members, to determine the extent of the consultation up to that point and discuss local priorities and issues of concern.

The LTA assessed the 2015 ESIA against the requirements of i) the 2014 EBRD ESP, ii) the ADB Safeguard Requirements and iii) the International Finance Corporation (**IFC**) Performance Standards, identifying that additional work would be required to align the Project with these respective environmental and social safeguard policies in order to be considered for Lenders’ financing. The gap analyses touched on issues relevant to the Complaint, including cumulative impacts, Project alternatives, additional facilities, gender issues, cultural heritage, land acquisition, stakeholder engagement and the Indigenous Peoples eligibility criteria.

The LTA gap analysis provided extensive recommendations to:

- prepare Supplementary E&S Studies;
- conduct additional community consultation, in order to inform local populations of potential impacts;
- develop robust mitigation measures; and
- identify the environmental and social actions required to manage Project activities from 2016 onwards.

### 3.2.2. Additional Supplementary Environmental and Social Studies

Following the results of the gap analyses, the Client and the Lenders initiated additional work in order to meet the IFIs’ requirements. In its response to the Complaint, Bank Management explained that:

[t]he... environmental and social due diligence covered an extensive appraisal, which included detailed review of the development and output of these studies which culminated in the disclosure of the environmental and social impact assessment in March 2017, bringing together three years of detailed studies and input in order to ensure that the Project is structured to meet EBRD’s requirements.<sup>24</sup>

<sup>22</sup> Bank Management Response, p. 41.

<sup>23</sup> As stated in Section 1 above, for the purposes of the Compliance Review the Lenders include EBRD and ADB.

<sup>24</sup> Bank Management Response, p. 48.

The Lenders considered that given the “*complex and sensitive nature of the [P]roject*,”<sup>25</sup> it would be beneficial to establish an IPOE, in order that an independent panel of experts could provide additional oversight and transparency to the Project, including on environmental and social issues.<sup>26</sup>

The CIC was tasked with preparing the Supplementary E&S Studies, subject to comment from the LTA and the Lenders, both of which closely followed their preparation. Input was also provided by the IPOE. The timeline for the preparation of the Supplementary E&S Studies is detailed below.

- **December 2015:** two public information meetings were held in Chuberi and Naki respectively, to a) present the preliminary findings of the Supplementary E&S Studies, b) identify proposed mitigation measures and c) gather feedback from Project-affected communities.<sup>27</sup>
- **March to September 2017:** the draft Supplementary E&S Studies were disclosed to the public to gather further feedback from Project stakeholders and fulfil the Lenders’ public disclosure requirements. A number of stakeholder engagement events were organised during that period.<sup>28</sup>
- **November 2017:** the final version of the Supplementary E&S Studies was published, having been deemed by the LTA to adequately address the material gaps that had been identified in previous analyses in order to meet the Lenders’ standards.
- **January 2018:** the EBRD Board of Directors approved the Project.

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<sup>25</sup> Bank Management Response, p. 42.

<sup>26</sup> Bank Management Response, p. 42.

<sup>27</sup> Supplementary E&S Studies, Volume 7 “Stakeholder engagement plan,” dated November 2017, p.9, para. B.

<sup>28</sup> Supplementary E&S Studies, Volume 7 “Stakeholder engagement plan,” dated November 2017, p.9. A detailed description of the public consultation process is provided in the Public Consultation Report.

## 4. Analysis of the EBRD's Compliance with the 2014 ESP

Section 4 of this Compliance Review Report provides a detailed analysis of the Bank's compliance with the PRs presented in the ToR, in the order raised in the Complaint:

- 4.1 PR 7: Indigenous Peoples;
- 4.2 PR 1: Assessment and Management of Environmental and Social Impacts and Issues;
- 4.3 PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement;
- 4.4 PR 8: Cultural Heritage; and
- 4.5 PR 10: Information Disclosure and Stakeholder Engagement.

For each PR, the subsection describes:

- (i) the Parties' positions;
- (ii) the specific requirements of the PR; and
- (iii) the determination on the Bank's compliance.

### 4.1. PR 7: Indigenous Peoples

#### 4.1.1. Parties' Positions

##### *The Complainants' Position*

The Complaint alleges that Bank Management “*failed to establish applicability of PR 7 during the environmental and social assessment process,*” resulting in a failure to “*properly categorise Svans, the impacted community as Indigenous Peoples and in consequence has failed to ensure our right to determine our development, including the right to taking part in decision making on a project situated in our traditional lands.*”<sup>29</sup> The Complaint further alleges that adverse impacts and potential harm to the community were not identified through the environmental and social due diligence process. The Complaint invokes several arguments to underpin this allegation:

- that the environmental and social impact assessment concluded the ineligibility of the Svans for PR 7 consideration, without “*either detailed field work and focus group research with Svans, or by robust and objective analysis of existing academic opinions,*”<sup>30</sup>
- that Bank Management “*did not seek wider opinion of independent, external to the environmental and social impact assessment team, qualified Indigenous Peoples experts, but relied primarily on the promoter's environmental and social impact assessment and Lenders' own social experts.*”<sup>31</sup> In particular, they raise concerns that the assessment of Indigenous Peoples was conducted “*by one Georgian consultant, an anthropologist from the Institute of History and Ethnology of [blank] the State University of Tbilisi;*”<sup>32</sup>
- the Complainants believe that the Svans fulfil the eligibility criteria set out in PR 7, and provide a detailed explanation of their view regarding the applicability of each of the five criteria outlined in para. 3 of PR 7.<sup>33</sup> In particular, the Complaint states that:

Svans are an ethnic (social and cultural) group of Georgia, approximately 1% of the Georgian population, with our own distinct cultural and religious traditions, unique

<sup>29</sup> Complaint, para. 4.8.2.

<sup>30</sup> Complaint, para. 4.1.

<sup>31</sup> Complaint, para. 4.2.

<sup>32</sup> Complaint, para. 4.4.

<sup>33</sup> For the full text of para. 3 of PR 7, see the section of the PR requirements at Section 4.1.2 below.



language and law, which runs in communities and the region. We recognize ancestors' rules and customs on land ownership and we carry on the traditional activities, such as agricultural production and livestock breeding, wood processing, crafts etc.<sup>34</sup>

- the Complaint asserts that the environmental and social impact assessment “*wrongly concluded that Svans do not possess customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture*” and that Svans “*do not descen[d] [sic] from populations which have traditionally pursued non-wage (and often nomadic) subsistence strategies and whose statues [were] regulated by their own customs or traditions or by special laws or regulations.*”<sup>35</sup>

The Complainants requested that the PCM appoint a panel of experts on Indigenous Peoples and that the PCM “*review if the EBRD applied this criteria properly and if the formulation in the EBRD policy requires improvement, to ensure the objective of PR 7 is kept and it is in line with international law on Indigenous Peoples.*”<sup>36</sup>

### **The Bank’s Response**

Bank Management considers that “*PR 7 does not apply in the case of Nenskra and can confirm that this issue has been reviewed by multiple Indigenous Peoples independent experts who have come to the same conclusion.*”<sup>37</sup> Bank Management explained in their formal written response:

Through the environmental and social supplementary studies, the Project assessed whether Lenders’ “Indigenous Peoples” policies apply. In addition to various social experts who worked on the environmental and social supplementary studies for the Sponsor, an anthropologist from the Institute of History and Ethnology of Iv. Javkhishvili State University of Tbilisi was engaged by the Project to study the Svan’s identity, language, history, customs, traditions, way of living, and livelihoods. The study also reviewed the set of characteristics from the potential Lenders’ policies. An additional review of the findings was provided by an independent international social expert appointed as part of the International Panel of Experts. Furthermore, the Lender’s social experts reviewed the output of the environmental and social impact assessment as did an Independent Environmental & Social Consultant all of who confirmed that the Indigenous Peoples chapter in the environmental and social impact assessment was sufficient and that PR 7 did not apply. Prior to EBRD Board Approval, this was re-reviewed by USAID’s social specialists and latterly by ADB’s compliance function. All parties conclude that PR 7 does not apply [...] In addition, the environmental and social impact assessment disclosure to the general public did not raise any additional concerns on the applicability of PR 7, other than to the Complainant.<sup>38</sup>

Bank Management indicates that for a cultural group to be considered Indigenous Peoples under PR 7 for the purposes of a project, **all** of the criteria outlined in para. 3 of PR 7 in the 2014 ESP must be fulfilled. Bank Management also provided detailed explanation on the analysis of each of the Indigenous Peoples criteria, and their conclusion that “*only one of the five characteristics defined under PR 7 applies in full, two do not apply and two partially apply.... [i]n order for PR 7 to be triggered, all of the characteristics should apply, which is clearly and justifiably not the case.*”<sup>39</sup>

Finally, Bank Management considers the demands “*for revaluations of the status and recognition of the Svans as Indigenous Peoples using alternative criteria is a matter to be raised by the Complainants with the Government of Georgia and is outside the jurisdiction of the Nenskra*

<sup>34</sup> Complaint, para. 4.8.1.

<sup>35</sup> Complaint, para. 4.8.4.

<sup>36</sup> Complaint, para. 4.8.10.

<sup>37</sup> Bank Management Response, p. 40.

<sup>38</sup> Bank Management Response, p. 44.

<sup>39</sup> Bank Management Response, p. 47.



*Project, the EBRD and the wider [L]ender group, and – in the opinion of Bank Management – outside the function of the PCM.”<sup>40</sup>*

### **The Client’s Response**

The Client also considers the Complaint’s assertion that the Project did not comply with PR 7 to be incorrect. It is the Client’s view that:

[t]he process used by the Project was comprehensive and involved multiple consultants including ... a highly qualified Tbilisi-based anthropological researcher [who] undertook desktop research, which together with national and international experts, was examined to determine if the lender’s Indigenous Peoples policies applied. [The researcher] used more than 50 different sources . . . to write [the] report and in addition, worked with different experts from the University.

The consultants reviewed the lender policies regarding Indigenous Peoples and reached the conclusions that lender policies do not apply to Svans. In addition, [the LTA] and Independent Panel of Experts also reviewed the analysis and agreed with the conclusions made by the experts.<sup>41</sup>

The Client further considers that *“it is not up for the Project to determine whether Svans are Indigenous Peoples but rather examine lender policies and determine whether they apply to the Project or not...”*<sup>42</sup> Finally, the Client questions the timing of the request, as the issue of Indigenous Peoples is one that had not been raised before the Complaint, as *“Svans are Georgians and have always been part of the Georgian ethos.”*<sup>43</sup>

### **4.1.2. Policy Obligations: Requirements under PR 7**

The 2014 ESP identifies that relevant social and cultural groups must be assessed to determine if they trigger the PR 7 eligibility criteria and therefore the application of PR 7. Importantly, the 2014 ESP establishes a clear division of responsibility around PR 7. Under paras. 9 and 10, the **Client** is expected to identify whether a group is considered as an Indigenous People **for the purposes of EBRD Project**, stating that *“this PR will apply when a project is likely to affect Indigenous Peoples. In ascertaining whether a particular group is considered as an Indigenous People for the purpose of this PR, the Client may be required to seek expert advice.”*<sup>44</sup> Bank Management is then required to review the Client’s approach, to ensure the project is structured to meet the 2014 ESP requirements.

PR 7, para. 3 sets out the characteristics that define a social and cultural group as “Indigenous Peoples” for the purposes of an EBRD project as follows:

In the Policy and this PR, the term “Indigenous Peoples” is used in a technical sense to refer to a social and cultural group, distinct from dominant groups within national societies, **possessing all of 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;

<sup>40</sup> Bank Management Response, p. 47.

<sup>41</sup> Client’s Response, Annex 3 to the EAR, dated 10 July 2018, (*Client’s Response*), pp. 53-54.

<sup>41</sup> Client Response, p. 54

<sup>43</sup> Client’s Response, p. 54.

<sup>44</sup> 2014 ESP, PR 7, para. 9.

- 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; and
- a distinct language or dialect, often different from the official language or dialect of the country or region.<sup>45</sup> (Footnotes omitted)

#### 4.1.3. Compliance Assessment

Considering the extent of the issues raised with respect to PR 7, this section will be divided into two parts: first, Section 4.1.3.1 clarifies the scope of the PR 7 compliance assessment. Second, Section 4.1.3.2 subsequently analyses the Bank's conduct to assess compliance with its commitments under the 2014 ESP.

##### 4.1.3.1. Scope of the Compliance Review Assessment for PR 7

In relation to PR 7, the Compliance Review ToR includes two questions for assessment:

- whether Bank Management adequately analysed the applicability of the eligibility criteria for triggering PR 7; and
- whether Bank Management adequately appraised whether the Client examined the potential application of PR 7.

Considering these two questions in alignment with the 2014 PCM RPs, **the Compliance Review ToR does not purport to assess:**

- whether the Svans could or should be considered an Indigenous People under the 2014 ESP for the purposes of the Project. PCM's mandate is to assess the Bank's conduct and determine whether the EBRD is in compliance with its own 2014 ESP in respect of a project, rather than seek to *apply* the 2014 ESP on the Bank's behalf (2014 PCM RPs, p.1). The 2014 PCM RPs is clear when indicating that the objective of the Compliance Review will be "*to establish if (and so, how and why) any EBRD action, or failure to act ... has resulted in non-compliance with a Relevant EBRD Policy*" (para. 41). The ToR further reflects this mandate, seeking an assessment of whether Bank Management "*adequately analysed the applicability*" and whether it "*adequately appraised*" the actions of the Client: not whether Bank Management adequately *applied* the eligibility criteria itself.<sup>46</sup> These subtle differences are material.
- the compatibility of EBRD PR 7 with international law as requested by the Complainants. In this case, PCM's mandate is to assess compliance with the 2014 ESP, not to review or comment on the adequacy of the EBRD policies or commitments, in accordance with the 2014 PCM RPs, para. 14, which provides that the PCM will not register a Complaint if it "*relates to the adequacy or suitability of EBRD policies.*"

<sup>45</sup> 2014 ESP, PR 7, para. 3.

<sup>46</sup> An additional argument to consider in this respect is the change introduced by the 2014 ESP that no longer refers to the Bank's responsibility in "applying" the PR but assigns this responsibility to the client. In fact, the 2008 policy stated that "[t]he applicability of this PR will be determined by the Bank during the environment and social appraisal process" (2008 ESP PR 7 para. 8) and that "*in ascertaining whether a particular group is considered as Indigenous Peoples for the purposes of this PR, the Bank may seek expert advice*" (2008 ESP PR 7 para. 12). The relevant paragraphs in the 2014 ESP in turn provide that this "*PR will apply when a project is likely to affect Indigenous Peoples. In ascertaining whether a particular group is considered as an Indigenous Peoples for the purpose of this PR, the client may be required to seek expert advice . . . The applicability of this PR will be established during the environmental and social assessment process according to the criteria outlined in paras. 2-7 below*" (2014 ESP PR 7 paras. 9-10). Emphasis added. Consequently, if it is not for the Bank to apply PR 7, *a fortiori*, it would not be for the PCM or the Compliance Review to apply the eligibility criteria of PR 7.

The Compliance Review will consider whether the EBRD took appropriate steps to assure itself that the applicability of the PR 7 eligibility criteria was adequately assessed, in light of the Bank's own commitments under the 2014 ESP. **In other words, the Compliance Review considers the robustness of the process Bank Management used to analyse the applicability of the PR 7 eligibility criteria, and *not* whether the criteria themselves were correctly or incorrectly *applied* in deeming that the Svans should not be considered Indigenous Peoples under the 2014 ESP, for the purposes of this Project.**

The 2014 ESP provides very limited guidance on *how* Clients should assess the applicability of the PR 7 criteria, simply indicating that the applicability of PR 7 (and therefore the consideration of a group as Indigenous Peoples) “*will be established during the environmental and social assessment process*”<sup>47</sup> and that “*the Client may be required to seek expert advice.*”<sup>48</sup> The supplementary EBRD Guidance Note on Indigenous Peoples<sup>49</sup> also makes only passing reference to the methodologies for assessing communities or groups against the Bank's PR 7 eligibility criteria, rather than providing more comprehensive guidance to Clients to assist them in navigating this sensitive issue. The EBRD Guidance assumes that PR 7 is only relevant in Russia “*as it has been assessed that no other group in other EBRD countries of operations is known to meet the five criteria set out in para. 10 of PR 7.*”<sup>50</sup> It adds, however, that “*specificities of certain groups in Mongolia and the Western Balkans that have not been extensively studied in the past may, for example, warrant a specific expert review and consultation to check whether they meet the criteria of PR 7.*”<sup>51</sup>

At the broader policy level, the 2014 ESP states that:

- EBRD “*will seek within its mandate to ensure through its environmental and social appraisal and monitoring process that projects are designed, implemented and operated in compliance with applicable ... good international practice;*”<sup>52</sup> and
- projects “***are expected to meet GIP related to environmental and social sustainability.***”<sup>53</sup>

**In this way, Bank Management chooses GIP as a reference point for directing Bank Management and Client actions. This offers an authoritative source of interpretation for the commitments enshrined in PR 7.**

Consequently, the Compliance Review presents what constitutes GIP methodologies for determining Indigenous Peoples policy applicability in the IFI space. Specifically, the IFC, the ADB, and the World Bank Inspection Panel (WBIP) have developed guidance on appropriate methodologies they expect their staff and Clients to employ in determining whether a group should be considered Indigenous People under their respective environmental and social safeguard policies.

<sup>47</sup> It should be noted that para. 10 also provides that the applicability should be established “*according to the criteria outlined in paras. 2-7 below.*” The reference to paras. 2-7 appears, however, mistaken as the paras. below are numbered 11 onwards. If paras. 2-7 were considered, they include other than the eligibility criteria itself the rationale for the protections provided by PR 7 to Indigenous Peoples but do not refer to the methodology for how the determination should be made. Paras. 11 onwards refer to the event when a determination has been made that the project affects Indigenous Peoples and requires to “*carry out an assessment of impacts on Indigenous Peoples.*”

<sup>48</sup> EBRD Guidance Note on Indigenous Peoples, dated November 2010, p. 4, available at: <https://www.ebrd.com/documents/comms-and-bis/pdf-guidance-note-on-indigenous-peoples.pdf> References to the 2014 ESP Guidance are used in this Report as a way of clarifying the scope of the obligations under the 2014 ESP (as identified by the EBRD) rather than reflecting any new obligations of the Bank.

<sup>50</sup> EBRD Guidance Note on Indigenous Peoples, p. 4.

<sup>51</sup> EBRD Guidance Note on Indigenous Peoples, p. 4.

<sup>52</sup> 2014 ESP, p.1 para. 6.

<sup>53</sup> 2014 ESP, para. 3.

- IFC's Guidance Note on PR 7 states:

Clients will need to exercise judgment in determining whether a group or communities should be considered "indigenous" for the purpose of Performance Standard 7. In making this determination, the Client may undertake a number of activities, **including investigation of the applicable national laws and regulations (including laws reflecting host country obligations under international law), archival research, ethnographic research (including documentation of culture, customs, institutions, customary laws, etc.), and participatory appraisal approaches with the Affected Communities of Indigenous Peoples. Both legal recognition and precedents in recognition of a group or community as indigenous** should be given due consideration but are not determining factors for triggering Performance Standard 7. The Client should **retain competent experts** to assist in this work.<sup>54</sup> (Emphasis added.)

- The ADB Good Practice Sourcebook on Indigenous Peoples Safeguards provides that **"[m]eaningful consultation is essential to appropriately identify Indigenous People"** and recommends **"[i]nvolving a qualified social science expert, Indigenous Peoples representative organization, or a local scholar in this field early in project preparation"** to help to identify those to whom the Indigenous Peoples policy will apply."<sup>55</sup> Notably, this conclusion relates not to actual project implementation, but to the process for identifying peoples who could be deemed Indigenous under their Policy in a project area.

- The WBIP notes:

Panel cases have shown that the classification of groups as Indigenous Peoples is a complex process; **the failure to identify Indigenous Peoples when present often stems from inadequate screening exercises, domestic resistance to the concept of IPs, and the lack of specialized expertise.** It is often difficult to ascertain whether a certain group possesses the distinguishing characteristics under the policy. **Qualified social scientists with expertise in social and cultural groups and Indigenous Peoples' rights should be consulted alongside the PAPs to make the technical judgment of whether they are Indigenous Peoples under Bank policy.** Anthropologists with knowledge of the specific histories, cultures and politics of indigenous groups can supplement the Bank's work and assist in determining whether Indigenous Peoples are present in the Project area.<sup>56</sup> (Emphasis added.)

According to this guidance, the process of determining if a group should be considered Indigenous for the purposes of the relevant environmental and social performance requirements is a multi-faceted approach that includes:

- retaining anthropologists, qualified social scientists or other specialists with expertise in social and cultural groups and Indigenous Peoples;
- conducting ethnographic research;
- investigating applicable laws and regulations;
- investigating legal recognition and precedent in recognition of a group or community as Indigenous;
- involving Indigenous Peoples' representative organisations; and
- consulting with Project-affected people, using participatory appraisal approaches with affected communities.

<sup>54</sup> International Finance Corporation Guidance Note 7 on Indigenous Peoples, dated July 2007, p. 4, available at: [https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7\\_English\\_2012.pdf?MOD=AJPERES&CVID=meSDVgT](https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7_English_2012.pdf?MOD=AJPERES&CVID=meSDVgT).

<sup>55</sup> ADB Good Practice Sourcebook on Indigenous Peoples Safeguards, dated 2013, p.7 and p.9, available at: <https://www.adb.org/sites/default/files/institutional-document/33748/files/ip-good-practices-sourcebook-draft.pdf>. Emphasis added.

<sup>56</sup> World Bank Inspection Panel, Indigenous Peoples, October 2016, pp.5-6, available at <http://documents.worldbank.org/curated/en/447361478156710826/pdf/109710-REVISED-PUBLIC-IP-lessons-text-10-31-16web-links.pdf>. Emphasis added.

In order to validate what constitutes GIP methodologies for determining the applicability of PR 7 (and parallel IFI provisions), additional expertise was commissioned by the PCM and EIB CM from an internationally-recognised Indigenous Peoples specialist.<sup>57</sup> The specialist was specifically asked to identify what constitutes GIP methodologies for assessing whether a group or community should be considered Indigenous Peoples under PR 7 eligibility criteria.

**The Indigenous Peoples specialist confirmed that the IFC, ADB and WBIP guidance described above represents GIP in the assessment of the applicability of PR 7 and similar IFI provisions.** After analysing the relevant guidance, the specialist concluded:

The Consultant sees as GIP the methodologies provided in the IFC and ADB policy guidance documents, and the lessons learned guidance published by the WBIP, concerning the methodological approaches in determining whether a group should be considered Indigenous People under IFI environmental and social safeguard policies that are built on criteria-based identification.<sup>58</sup>

As to the elements comprising that GIP, the specialist further noted that:

**What emerges as common for the good practice approaches of the IFC, the WBIP and the ADB is:**

- i. the quest for best possible information in assessing whether a group qualifies for consideration as an Indigenous People; coupled with
- ii. consulting the pertinent groups themselves as to whether they meet the applicable criteria of indigenouness.<sup>59</sup>

This good practice approach is also reflected in the EIB Environmental and Social Standards. Standard 7, para. 12, which states:

Determining whether a particular group is considered Indigenous Peoples normally requires reference to the concerned country's own legislation. However, as Indigenous People may sometimes not be recognized by their own national context, **attention should be paid to evidence of self-identification as Indigenous People, to the activity of Indigenous People's representative organisations and institutions, to relevant international or regional intelligence, and to shared IFI knowledge and practice.** Finally, the technical judgment of qualified social scientists should be sought.<sup>60</sup>

In sum, GIP is an important reference point for Bank Management in analysing the applicability of the PR 7 eligibility criteria and appraising the actions of the Client. As such, Bank Management should seek to ensure that the Client follows the approaches outlined in the IFI space as GIP. GIP with respect to determining the applicability of PR 7 requires a multi-faceted approach and engagement with Project-affected communities specifically on the PR 7 Indigenous People criteria. Given the initial finding that the Svans did not meet the PR 7 criteria, the need for consultation with Project-affected people on the applicability of PR 7 would have been a necessary step.

#### 4.1.3.2 Analysis of the Bank's Conduct

This section describes the process Bank Management followed to appraise the Client's examination of PR 7 applicability, in order to establish if the approach was sufficient to meet the Bank's

<sup>57</sup> The EIB Complaint Mechanism commissioned the same expert to support the analysis of the complaint under the EIB relevant policies.

<sup>58</sup> Indigenous Peoples Expert Opinion, dated 24 August 2019, p. 7.

<sup>59</sup> Indigenous Peoples Expert Opinion, dated 24 August 2019, p. 7.

<sup>60</sup> EIB Environmental and Social Standards. Standard 7, para. 12.



commitments under the 2014 ESP. Specifically, the Compliance Review will establish if the Bank's conduct was sufficient to 'seek to ensure' the Client's compliance with PR 7, guided by IFI GIP.

The applicability of PR 7 was considered in the Project's gap analysis. The CIC considered that Project-affected people fully identified as Georgians and spoke a dialect of Georgian, concluding therefore that PR 7 did not apply in the Project-affected area and that no additional action was required on this question.

However, during the second revision of the Supplementary E&S Studies, the LTA and the Lenders identified the need for additional information on the inapplicability of PR 7. Interest regarding these issues was also raised on the ground, when in 2016 *"a group of potentially Project-affected people and civil society organizations publicly demanded that the multilateral development banks considering investment in the Nenskra HPP apply their Indigenous Peoples policies to the Svan people..."*<sup>61</sup>

As a result, the Client commissioned a report from a renowned professor and doctor of sciences in history at the Institute of History and Ethnology of Iv. Javakhishvili State University in Tbilisi. This report provided a historical and anthropological overview of the Svans, based on desktop research and inclusive of a long list of references, predominantly from Georgian sources. The professor was subsequently asked to respond to a series of questions raised by the Lenders, and to provide a view on the applicability of each Indigenous Peoples eligibility criterion set out in the Lenders' policies.

Using the professor's report and responses, the CIC prepared a summary for inclusion in the Supplementary E&S Studies. The summary explained that Svans met only *some* of the Lenders' eligibility criteria, and others only partially. Since the Svans did not meet *all* of the PR 7 eligibility criteria, the summary concluded that PR 7 was not applicable. This summary was submitted to the Lenders and the LTA in November 2016 and was integrated into the Supplementary E&S Studies.<sup>62</sup>

In alignment with the IFI GIP described in Section 4.1.3.1, Lenders identified the need for a stronger assessment of the Indigenous Peoples question in the Supplementary E&S Studies, including additional anthropological and ethnographic research. Notably, the Lenders required that feedback from consultations with local people be included in the Supplementary E&S Studies.

The Compliance Review found no additional anthropological or ethnographic research was produced or reviewed by the Client or the various social advisors involved following the Lenders' request for their incorporation. The LTA and the social specialist of the IPOE did not conduct their own independent research or assessment of the applicability of the PR 7 criteria, but rather only commented on the analysis presented by the Client. The USAID Report referenced by Bank Management also limited itself to a review of the documents submitted by the Client and the opinion of the IPOE social expert, but it did not undertake any separate analysis of the applicability of the eligibility criteria.<sup>63</sup>

The ADB CRP's assessment of complaint eligibility found that there was additional academic research that provided an alternate view of the Svans and their customary cultural, economic, social and political institutions as being different from that of the other Georgian groups, differing from the views presented in the Client's position paper. The ADB CRP noted that:

... based on academic research reviewed – there is body of opinion which presents Svan legal traditions and cultural practices as distinctly different from other Georgian groups, and as distinct from the mediation processes exercised through elders in other Georgian mountain

<sup>61</sup> Pre-Approval Field Report by USAID, dated August 2017 p. 20-21, available at: [https://ewsddata.rightsindevelopment.org/files/documents/32/AIIB-000032\\_hJnzs1Z.pdf](https://ewsddata.rightsindevelopment.org/files/documents/32/AIIB-000032_hJnzs1Z.pdf)

<sup>62</sup> Supplementary E&S Studies, Vol. 3 "Social Impact Assessment," pp. 24-26.

<sup>63</sup> Pre-Approval Field Report by USAID, pp. 20-22, available at: [https://ewsddata.rightsindevelopment.org/files/documents/32/AIIB-000032\\_hJnzs1Z.pdf](https://ewsddata.rightsindevelopment.org/files/documents/32/AIIB-000032_hJnzs1Z.pdf)

valleys. In academic writings, Svan legal practices are a topic of research. The research presents a legal system with binding value for the Svan community, which exists in parallel to Georgian national legal norms and processes. Based on the body of academic literature there are also continued traditions which prevail only in the Svan community and can be classified as cultural and social institutions.<sup>64</sup>

The ADB CRP further expressed its concerns with the process of categorisation of Indigenous Peoples and indicated that ***“due process in the scoping stage of categorization would have required ADB staff to consult not only with a local scholar but also with a qualified social science expert and an Indigenous Peoples representative organization.”***<sup>65</sup> There is no evidence that such additional views were considered in the assessment of PR 7 eligibility, or that consultations with any Svan representative organisation or any Indigenous Peoples organisation took place.

In addition, available records do not provide evidence that Project-affected people were consulted regarding the applicability of the criteria presented in PR 7. Questions about the existence of traditional socio-cultural practices and beliefs relevant for assessment of the applicability of the PR 7 eligibility criteria (e.g., in relation to customary governance and cultural institutions), were responded to only by the professor and subsequently elaborated on by the CIC in the preparation of the Client’s summary for the Lenders, without input from communities. Neither the Client’s summary nor the Supplementary E&S Studies make reference to information gathered from affected communities for the assessment of PR 7. Notably, section 2.2.6, Vol. 3 of the Social Impact Assessment (SIA) indicates:

The Consultants conducting the Supplementary E&S Studies have assessed whether the “Indigenous Peoples” policies of the potential Lenders apply to this Project. In addition to various social experts who have worked on the Supplementary E&S Studies, an anthropologist from the Institute of History and Ethnology of Iv. Javakhishvili State University of Tbilisi was engaged by the Project to study the Svan’s ethnic identity, language, history, customs, traditions, way of living, and livelihoods. The study also reviewed the set of criteria used by the potential Lenders’ policies. An additional review of the Supplementary E&S Studies’ findings was provided by an independent international social expert appointed as part of IPOE. The conclusions of the assessment are presented hereafter.<sup>66</sup>

Moreover, questions on the Svans’ status raised by community members and CSOs during the consultation of the Supplementary E&S Studies were addressed by restating the analysis of the eligibility criteria included in Volume 3 of the Supplementary E&S Studies,<sup>67</sup> with no evidence in the Studies or the Public Consultation Report of efforts made to engage local community members in meaningful dialogue on this subject.<sup>68</sup> At the end of the environmental and social due diligence process, the final version of the Client’s assessment of the applicability of the PR 7 eligibility criteria in the Supplementary E&S Studies (Vol. 3 SIA) did not include a diversity of anthropological and ethnographic research or any reference to consultation with Project-affected people.

The Compliance Review finds it difficult to reconcile the PR 7 eligibility assessment approach used for the Nenskra HPP with IFI GIP on two bases:

- i. ultimately, the applicability of the PR 7 eligibility criteria was based on a single academic report – that even though produced by a very prominent academic – does not provide the range of views and expertise required under GIP (e.g., as the ADB cites differing academic views on the Svans), and does not fulfil the need to seek the best possible information, as identified through GIP and the Indigenous Peoples specialist; and
- ii. Bank records do not provide evidence that Project-affected people were consulted regarding the applicability of the criteria presented in PR 7, as described above.

<sup>64</sup> ADB CRP Report, para. 19.

<sup>65</sup> ADB CRP Report, para. 19.

<sup>66</sup> Volume 3 of the Supplementary E&S Studies, section 2.2.6, p. 22-26, p. 24.

<sup>67</sup> Volume 3 of the Supplementary E&S Studies, section 2.2.6, p. 22-26.

<sup>68</sup> Public Consultation Report, p.12 questions 39, 40.



The Indigenous Peoples Specialist appointed by the PCM and EIB CM stated that:

a failure to engage in meaningful and comprehensive consultations with an affected community to gather information and feedback on each Indigenous Peoples eligibility criterion, as part of [an] assessment of whether [a] group meets the applicable eligibility conditions for being considered an Indigenous People, would not reflect GIP. It is GIP to consult a self-proclaimed Indigenous community concerning the application of any eligibility criteria that will be used in the determination of whether the group constitutes an Indigenous People. Such consultation would be part of project due diligence, and will demonstrate good faith in the question of determining whether the eligibility conditions are met.<sup>69</sup>

Even though the important recommendations made by the Lenders and the LTA were not implemented during the environmental and social due diligence process, the Client's position on the inapplicability of PR 7 was subsequently validated by the Lenders, and deemed compliant with the EBRD's 2014 ESP policy requirements.

#### 4.1.4. Compliance Review Finding

The Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 7, as Bank Management did not adequately appraise the Client's examination of the potential application of the PR 7 eligibility criteria. As noted in Section 3.1 above, the assessment of Bank Management's compliance with its commitments under the 2014 ESP must include both an analysis of:

- the steps Bank Management has taken to identify gaps and corrective actions needed by its Clients; and
- Bank Management's process of meaningfully reviewing and monitoring the implementation of those corrective actions.

While Bank Management correctly identified the need for the Client to employ GIP in its assessment of the PR 7 eligibility criteria, Bank Management did not subsequently seek to ensure that those requests were fulfilled. Specifically, the EBRD approved the Supplementary E&S Studies, including the Client's analysis of PR 7 eligibility, despite evidence that:

- the analysis did not ensure that best possible information was sought, as it did not include diverse views and expertise in the assessment of eligibility criteria applicability; and
- the Client did not consult Project-affected communities on the applicability of all 2014 ESP eligibility criteria.

While requesting that the Client enhance its approach is certainly an important part of 'seeking to ensure' that the obligations under the 2014 ESP were met, the Bank's role in accordance with its commitments under the 2014 ESP – especially with respect to paras. 4, 5, 6 and 36 – cannot stop there: to do so would devoid the commitment of meaning.

The Compliance Review recognises that the question of the Svans' status for the purposes of the Lenders' policies is very sensitive. The Compliance Review field visit and stakeholder engagement have demonstrated that there is genuine confusion over the IFI characterisation of Indigenous Peoples, versus their characterisation under national or international law. It is reasonable to assume that this could have impacted the Client's capacity to conduct consultations on these issues. However, the challenges of conducting consultations do not eliminate the need or rationale for such consultations, which is true across IFI project development. On the contrary, sensitive contexts require an *additional* level of diligence on the part of Bank Management and the Client. In this case, the potential risks associated with consulting Project-affected population on the PR 7 eligibility criteria could have been appropriately identified and managed.

<sup>69</sup> Indigenous Peoples Expert Opinion, p. 9.

## 4.2. PR 1: Assessment and Management of Environmental and Social Impacts and Issues

### 4.2.1. Parties' Positions

#### *The Complainants' Position*

**Cumulative Impacts and Associated Facilities:** the Complaint invokes PR 1, para. 10 to raise concerns regarding the CIA and consideration of associated facilities, identifying that the environmental and social impact assessment lacks an *“assessment of the cumulative impacts and Svan’s attitude to the plans to develop no less than 35 HPP in Svaneti, as well as existing mining licences bordering the Project area.”*<sup>70</sup>

**Project Alternatives:** the Complaint also invokes PR 1, para. 10 in relation to Project alternatives to assert that technically and financially feasible Project alternatives were not examined. The Complaint also refers to: a) the EBRD’s Environmental and Social Guidance Note for Hydropower Projects (**EBRD Guidance for HPPs**), which elaborates on the assessment of alternatives; and b) the findings of the ADB CRP, which noted in their 2018 Report on Eligibility that the decision for the Nenskra HPP *“was not subject to any alternatives assessment as the location choice is only politically driven.”*<sup>71</sup>

The Complaint further alleges that the concerns of the Svans were not taken into account during the Project scoping or alternatives assessment, and that it was not clear *“if any social considerations were taken into account at all.”*<sup>72</sup>

**Gender Assessment:** the Complaint invokes para. 10 of the 2014 ESP and PR 1, para. 8 (as well as the EBRD Guidance for HPPs), which speak to the need for the identification and consideration of gender-specific risks. It points to EBRD expectations that its Clients *“identify any potential gender-specific and disproportionate, adverse impacts, and undertake to develop mitigation measures to reduce these.”*<sup>73</sup>

The Complaint asserts that the environmental and social impact assessment does not contain *“gender disaggregated data and some analysis of gender relations, dynamics and inequalities in the Project area.”*<sup>74</sup> The Complaint notes that while the environmental and social impact assessment identifies some potential gender-specific impacts related to the vulnerability of women-led households and gender-based employment opportunities, that the assessment *“does not assess all specific risks and impacts in relation to gender.”*<sup>75</sup> Concerns relate to the expectation that 75% of workers will come from outside the Project-affected area, meaning that at least 800 workers will arrive to an area with a local population of approximately 1,400 people. The Complaint then refers to ADB CRP Report on Eligibility, which acknowledges the risks related to the “massive influx of workers,” namely:

- challenge to the social cohesion and values of the Svan communities;
- potential health and safety risks for local women due to the influx of a predominantly male workforce; and
- the insufficiency of the mitigation measures proposed, including the finding that the proposed mitigation measures are more targeted to the protection of workers than the protection of women in local communities.<sup>76</sup>

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<sup>70</sup> Complaint, para. 6.6.

<sup>71</sup> Complaint, para. 6.4.

<sup>72</sup> Complaint, para. 6.5.

<sup>73</sup> Complaint, para. 3.6.

<sup>74</sup> Complaint, para. 7.2.

<sup>75</sup> Complaint, para. 7.2.

<sup>76</sup> Complaint, para. 7.5; ADB, CRP Report, p. 19, paras. 50-51.

The Complainants state that the EBRD did not “ensure proper gender impact assessment and mitigation measures, as well as proper consultations with local stakeholders, and especially local women, on these impacts and the[ir] mitigation.”<sup>77</sup>

### **The Bank’s Response**

In its response, Bank Management indicates that the environmental and social impact assessment includes a detailed alternative analysis and gender assessment. As with other aspects of the environmental and social impact assessment, Bank Management affirms that these assessments “ha[ve] [sic] been reviewed by a range of specialists and advisors all of whom have confirmed that Performance Requirement 1 ... as [it] relate[s] to these issues, [has] been met in full.”<sup>78</sup> With respect to the gender assessment, Bank Management notes that “EBRD has worked with a range of stakeholders to go beyond compliance with [the 2014] ESP and EBRD has developed a Technical Cooperation project to support the Project to improve equal opportunities through development and [the] implementation of a Gender Action Plan.”<sup>79</sup>

Bank Management did not comment on the allegations regarding the assessment of cumulative impacts or associated facilities.

### **The Client’s Response**

The Client strongly objects to the argument that the Project did not assess Project alternatives or cumulative impacts. The Client asserts that the 2015 ESIA “included a section on alternatives, review[ing] hydro, solar, wind and geothermal options. In addition, it evaluated different HPP alternatives.”<sup>80</sup> The Client further notes that “[t]his review was also undertaken in 2017” and that Volume 10 of the Environmental and Social Supplementary Package “is specifically meant to assess and address the Project’s cumulative impacts.”<sup>81</sup> The Client did not provide comments relating to their position on associated facilities.

The Client also asserts that the environmental and social impact assessment does include sufficient gender data, citing the document and the gender-related measures that have been established (or are in the process of being established therein), namely that:<sup>82</sup>

- 15% of Project jobs will be allocated to women;
- labour policies featuring equal opportunities will apply;
- gender-specific measures are included in the Community Health and Safety Management Plan (within the ESMP); and
- a Community Investment Program has been established that addresses gender issues and ensures that women are represented in fair numbers in Community Investment Program committees.

## **4.2.2. Policy Obligations: Requirements under PR 1**

### **4.2.2.1. Cumulative Impacts and Associated Facilities**

Several PRs address the need to assess cumulative impacts. PR 1 para. 9 identifies that “the assessment process will consider cumulative impacts of the project in combination with impacts

<sup>77</sup> Complaint, para. 7.5.

<sup>78</sup> Bank Management Response, p. 49.

<sup>79</sup> Bank Management Response, p. 49.

<sup>80</sup> Client’s Response, p. 52.

<sup>81</sup> Client’s Response, p. 52.

<sup>82</sup> Client’s Response, p. 53.

*from other relevant past, present and reasonably foreseeable developments as well as unplanned but predictable activities enabled by the project that may occur later or at a different location.”<sup>83</sup>*

PR 3 (Resource Efficiency and Pollution Prevention and Control) para. 19 provides that the Client will “*need to consider the potential cumulative impacts of water abstraction upon third party users and local ecosystems,*<sup>84</sup> and PR 6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources) refers to cumulative impacts in para. 8, by requiring that the Client “*should also consider direct, indirect and cumulative impacts and evaluate the effectiveness and feasibility of the mitigation measures to be applied to the project.*”<sup>85</sup>

PR 1, para. 9 defines associated facilities as “*activities or facilities which are not part of the project, but which may be directly or indirectly influenced by the project, exist solely because of the project or could present a risk to the project.*”<sup>86</sup> It states that the environmental and social assessment process should identify and characterise, to the extent appropriate, potentially significant environmental and social issues related to the associated facilities. PR 1 para. 9 further notes that:

[t]hese associated activities or facilities may be essential to the viability of the project, and may either be under the control of the Client or carried out by or belong to third parties. Where the Client cannot control or influence these activities or facilities, the environmental and social assessment process should identify the corresponding risks they present to the project. Where potentially significant adverse environmental and/or social risks relating to third party activities or facilities are identified, the Client should collaborate with those relevant third parties to manage and mitigate risks [...]<sup>87</sup>

#### 4.2.2.2. Project Alternatives

Para. 10 of PR 1 provides that environmental and social impact assessments for Category A projects “*will include a scoping stage to identify the potential future environmental and social impacts associated with the project. The environmental and social impact assessment will include an examination of technically and financially feasible alternatives to the source of such impacts, including the non-project alternative, and document the rationale for selecting the particular course of action proposed.*”<sup>88</sup> Given the content of this provision, it is implicit that the analysis of alternatives shall consider the environmental and social impacts identified during the environmental and social impact assessment process.

The EBRD Guidance for HPPs<sup>89</sup> provides further clarification on what Bank Management deems to be the appropriate implementation of the PR 1 alternatives requirements. First, the Guidance suggests that site identification and the assessment of alternative locations be done at the project concept stage. Second, the Guidance suggests that the alternatives assessment address both:

- the energy production alternatives to the proposed scheme, (including both hydro and non-hydro projects, as well as the non-project alternative); and
- the alternatives and options that were envisaged and discussed between the technical and environmental and social teams during project preparation when optimising the location, size, structural design, construction principles and operation of the scheme.<sup>90</sup>

In addition, with respect to the optimisation of hydropower schemes, the EBRD Guidance for HPPs indicates that:

<sup>83</sup> 2014 ESP, PR 1, para. 9.

<sup>84</sup> 2014 ESP, PR 3, para. 19.

<sup>85</sup> 2014 ESP, PR 6, para. 8.

<sup>86</sup> 2014 ESP, PR 1, para. 9.

<sup>87</sup> 2014 ESP, PR 1, para. 9.

<sup>88</sup> 2014 ESP, PR 1, para. 10.

<sup>89</sup> References to the ESP Guidance are used in this Report as a way of clarifying the scope of the obligations under the 2014 ESP (as identified by the EBRD) and not to define any new obligations for the Bank.

<sup>90</sup> EBRD, Environmental and Social Guidance Note for Hydropower Projects, pp. 9 -10.

The optimisation of hydropower schemes implies an early dialogue between the technical and environmental and social specialists involved in the preparation of the project. Such dialogue should take place early on in project development and be documented, particularly the consideration of different alternatives [...] Where the EBRD's requirements are applied late in the planning or construction phases of a project, the coordination of technical and environmental and social assessments in the earlier phases should be reviewed.<sup>91</sup>

#### 4.2.2.3. Gender Assessment

Para. 10 of the EBRD 2014 ESP outlines the Bank's expectations of Clients with respect to gender issues:

The EBRD expects its Clients to identify **any** potential gender-specific and disproportionate, adverse impacts, and undertake to develop mitigation measures to reduce these. Where relevant, Clients will be requested to enhance the positive gender impact of projects by promoting equality of opportunity and women's socio-economic empowerment, particularly with respect to access to finance, services and employment.<sup>92</sup>

PR 1 para. 8 also indicates more broadly that *"it may be appropriate for the Client to complement its environmental and social assessment with further studies focusing on specific risks and impacts, such as ... gender."*<sup>93</sup> The EBRD Guidance for HPPs<sup>94</sup> provides further direction to help Clients implement their obligations under PR 1. First, the Guidance suggests that gender gaps be identified in the conceptual phase of a project.<sup>95</sup> Second, during the feasibility stage, the EBRD Guidance for HPPs suggests that the environmental and social due diligence include:

- the "socio-economic condition and composition of population, including sex-disaggregated data;" and
- an "analysis of potential socio-economic impact on the population's existing activities and conditions (such as access to employment and skills, finance, services), **differentiated by ... gender and vulnerable groups.**"<sup>96</sup>

Finally, the Guidance notes that *"all potential gender-specific risks and opportunities associated with hydropower schemes development...or operation should also be clearly and systematically identified within the frame of their assessment."*<sup>97</sup>

PR 10, para. 10 also requires that Clients adopt specific measures to promote the effective participation of women in stakeholder engagement activities — be they different and/or separate forms of engagement<sup>98</sup> — where they may be differentially or disproportionately affected by the project due to a disadvantaged or vulnerable status. PR 10 para. 12 additionally requires that SEPs should document *"how consultation will be carried out with different groups in the community, identifying what measures will be implemented to remove barriers from participation,"* including barriers based on gender considerations.<sup>99</sup>

<sup>91</sup> EBRD's Environmental and Social Guidance Note for Hydropower Projects, p. 10.

<sup>92</sup> 2014 ESP, para. 10.

<sup>93</sup> 2014 ESP, PR 1, para. 8.

<sup>94</sup> References to the ESP Guidance are used in this Report as a way of clarifying the scope of the obligations under the 2014 ESP (as identified by the EBRD) and not to define any new obligations for the Bank.

<sup>95</sup> EBRD's Environmental and Social Guidance Note for Hydropower Projects, p. 10.

<sup>96</sup> EBRD's Environmental and Social Guidance Note for Hydropower Projects, p. 6.

<sup>97</sup> EBRD's Environmental and Social Guidance Note for Hydropower Projects, p. 9.

<sup>98</sup> Footnote 8 to para. 11 of the 2014 ESP provides that for the purposes of the 2014 ESP *"vulnerable groups refer to people who, by virtue of gender identity, sexual orientation, religion, ethnicity, indigenous status, age, disability, economic disadvantage or social status may be more adversely affected by project impacts than others and who may be limited in their ability to claim or take advantage of project benefits."*

<sup>99</sup> 2014 ESP, PR 10 para. 10.

### 4.2.3. Compliance Assessment and Findings

The Compliance Review ToR includes the following questions to assess the EBRD's compliance with PR 1:

- Did Bank Management ensure that the Client undertook adequate environmental and social assessment of the Nenskra HPP, commensurate with and proportional to the potential Project impacts, including:
  - cumulative Project impacts and issues specified in PR 1 para. 7 (*basis and general requirements of the environmental and social impact assessment*);
  - *proportionality of the environmental and social assessment* (PR 1, para. 8);
  - *assessment of additional facilities and cumulative impacts* (PR 1 para. 9);
  - *requirements for Category A projects* (PR 1 para. 10);
  - *environmental and social management systems* (PR 1 para. 15); and
  - additional requirements on the assessment of cumulative impacts as found in PR 3 para. 19 (*cumulative impacts on water abstraction*) and PR 6 para. 8 (*cumulative impacts on biodiversity*).
- Did Bank Management ensure that there was an assessment of the environmental impacts of associated facilities in line with:
  - Annex 2 of the 2014 ESP (*Category A projects*);
  - PR 1 para. 7 (*basis and general requirements of the environmental and social impact assessment*); and
  - PR 1 para. 9 (*assessment of additional facilities and cumulative impacts*).
- Did Bank Management satisfy its obligations to ensure that Project alternatives were sufficiently assessed in the environmental and social impact assessment, in line with PR 1 para. 10?
- Did Bank Management satisfy its obligations to ensure that a gender impact assessment was conducted as part of the environmental and social assessment on the Nenskra HPP, in line with PR 1 para. 8 (*proportionality of the environmental and social assessment*) and paras. 17-20 (*ESMP*)?

The compliance assessment will look at the Bank's appraisal of the Client's environmental and social impact assessment approach, as it relates to cumulative impacts; associated facilities; Project alternatives; and gender issues. The Compliance Review evaluates whether the Bank:

- identified gaps and corrective actions to be undertaken by the Client to fulfil PR 1 requirements; and
- employed ongoing, meaningful review and monitoring of the implementation of those corrective actions by the conclusion of the environmental and social due diligence process.

#### 4.2.3.1. Cumulative Impacts

The CIC and LTA each identified the need to assess cumulative impacts of the Project through the Supplementary E&S Studies, both to ensure Project alignment with the 2014 ESP and to respond to concerns raised during the 2015 ESIA consultations; community members raised concerns regarding the cumulative impacts of multiple projects on dam safety, flooding and landslide risks in the region. The Lenders required the Client to prepare a CIA as Volume 10 of the Supplementary Package.

The Supplementary E&S Studies state that the overall goal of the CIA is to “*identify environmental and social impacts and risks associated with the Nenskra Project that, in the context of existing, planned, and reasonable predictable developments, may generate cumulative impacts that could*



*jeopardize the overall long-term environmental, social and economic sustainability of the Project and the Enguri watershed.*"<sup>100</sup> The Supplementary E&S Studies further note:

The existing, planned, and reasonable[y] predictable developments, that could generate cumulative impacts with the Nenskra Project and which are addressed in this report comprise the following:

- i. the Khudoni HPP, which is situated downstream from the Nenskra at the confluence of the Nenskra and Enguri Rivers;
- ii. the existing Enguri reservoir;
- iii. the various small run-of-river hydropower schemes that are planned in the Enguri watershed; and
- iv. the Nenskra transmission line that will evacuate the power generated by the Project (and which is an associated facility).

Also taken into consideration are the external activities – forestry, mining, tourism, and environmental stressors – including climate change and natural hazards.<sup>101</sup>

In order to identify other existing, planned and reasonably predictable developments in the Enguri watershed, the Client consulted with the Georgian Ministry of Energy.<sup>102</sup>

Their identification of forestry, tourism, mining and quarrying activities, however, was derived from a 2015 feasibility study completed for a protected area in Racha, Lechkhumi and Svaneti, prepared by Kreditanstalt für Wiederaufbau, an organisation focused on climate finance activities.<sup>103</sup> While the CIA stakeholder engagement activities refer to meetings with the Ministry of Energy and the directors of regional hydropower projects to discuss potential cumulative impacts, the CIA does not provide any other source or evidence that the Client consulted the relevant public authorities or the lease holders to verify the information in the Kreditanstalt für Wiederaufbau report, or to identify and discuss reasonably predictable developments of reasonably predictable extractive or natural resource projects.<sup>104</sup>

While the approach to identify the HPP developments is adequate, as it looked to confirm the available public information with the relevant authorities, the same cannot be said of the other natural resource development activities, where there is no evidence that the Client sought to verify and update publicly available information. The activities in question – mining, quarrying, and forestry – are not low-impact activities. These activities can fundamentally impact water supply, create geological risks, restrict access to land resources and cause impacts resulting from increasing airborne dust, noise pollution and other disturbances. Moreover, the introduction of multiple construction workforces to the Project area, could have high magnitude social impacts, given the size of the existing local population. Given the heavy footprint of mining and quarrying activities, the CIA should have taken a more comprehensive approach to identify what was 'reasonably foreseeable' in terms of such activities.

In addition, climate change was identified as an "environmental stressor" in the assessment of cumulative impacts. As the Project's climate change risk assessment was ongoing at the time of CIA preparation,<sup>105</sup> it is not clear how the assessment of cumulative impacts could have adequately reflect the potential effects of climate change. Given that "*CIA is evolving and there is no single*

<sup>100</sup> Supplementary E&S Studies, Vol. 10 "Cumulative Impact Assessment," p. ii.

<sup>101</sup> Supplementary E&S Studies, Vol. 10 "Cumulative Impact Assessment," p. ii.

<sup>102</sup> Supplementary E&S Studies, Vol. 10 "Cumulative Impact Assessment," p. ii.

<sup>103</sup> Supplementary E&S Studies, Vol. 10 "Cumulative Impact Assessment," p. 22.

<sup>104</sup> Supplementary E&S Studies, Vol. 7 "Stakeholder Engagement Plan," p. 12.

<sup>105</sup> Supplementary E&S Studies, Vol. 5 on "Hydrology and water quality impact assessment" states that "*a Climate Change Risk Assessment in alignment with best international practice has been commissioned by the Project and is currently being undertaken*," Supplementary E&S Studies Vol. 5 "Hydrology and water quality impact assessment," p. 124.



*accepted state of global practice,”*<sup>106</sup> GIP standards for the treatment of climate change in the context of the CIA do not seem to be available, preventing the analysis of the Bank’s compliance under the 2014 ESP. Since climate change was one of the main concerns raised by the Project-affected communities, this issue requires particular attention on the part of Bank Management going forward, in order to ensure that the CIA is updated once the climate risk assessment has been completed.

### Compliance Review Finding

The Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (cumulative impacts), as Bank Management correctly identified the need for a CIA to be undertaken during the gap analysis, but did not seek to ensure that the CIA met the PR 1 requirements. Bank Management ultimately approved the Project without adequate research into the identification of all reasonably foreseeable extractive or forestry activities.

#### 4.2.3.2. Associated Facilities

The Supplementary E&S Studies define associated facilities as those “[i]nfrastructures and activities which are not funded by the Lenders as part of the Project and whose viability and existence depend exclusively on the Project and whose goods or services are essential for successful operation of the Project.”<sup>107</sup>

The Supplementary E&S Studies identify one associated facility for the Project: a 220 kV transmission line, which will connect the Project’s powerhouse to a new substation, located in the Nenskra Valley, intended to evacuate the electricity produced by the Nenskra scheme and allow a tie-in to the national grid.<sup>108</sup> The Georgian State Electrosystem (the government electricity company) will design, construct, install, commission, own, operate and maintain this transmission line and its connection facilities.

Following the LTA and Lenders request, the Client confirmed that Georgian State Electrosystem would undertake the environmental and social impact assessment and the land acquisition processes for this proposed transmission line, taking due consideration of the EBRD and other Lenders’ environmental and social safeguard policies. In addition, following Bank and LTA requests, the Project CIA included a high-level assessment of the transmission line’s direct and cumulative impacts.<sup>109</sup>

The transmission line is an associated facility that the Client does not control. Therefore, ensuring that the Georgian State Electrosystem would undertake an environmental and social impact assessment and land acquisition process that meets the EBRD’s environmental and social standards constitutes reasonable efforts to collaborate with the third party to manage and mitigate the potential environmental and social risks, as required by PR 1 para. 9. The inclusion of the transmission line in the CIA also constitutes an adequate approach to identifying potential impacts that the transmission line could pose to the Project, in accordance with the same provision of the 2014 ESP, and reflects the EBRD’s efforts to ensure that this associated facility was effectively addressed.

<sup>106</sup> IFC Good Practice Handbook. Cumulative Impact Assessment and Management: Guidance for the Private Sector in Emerging Markets, August 2013, p. 21.

<sup>107</sup> Supplementary E&S Studies Vol. 2 “Project Definition,” p.31.

<sup>108</sup> While Volume 2 of the Supplementary E&S Studies on Project Definition, includes - in a table that summarises the Project and the associated facilities - the temporary infrastructure as part of the associated facilities and the access roads for construction and maintenance, the same Volume refers to these infrastructure as “*project components*” and when referring to the additional facilities, Volume 2 only mentions the grid connection and power transmission line and Volume 3 of the Supplementary E&S Studies on the environmental and social impact assessment only mentions the Transmission Line. Vol. 2, p. 82; Vol. 3, p. 5.

<sup>109</sup> Supplementary E&S Studies, Vol. 10 “Cumulative Impact Assessment,” p. 16-13. According to Vol. 10, the cumulative impacts of the TI are expected to be in relation to forest resources, avian species, land acquisition, employment, and public infrastructure. Vol. 10, pp. 16-13.

## Compliance Review Finding

The Compliance Review finds Bank Management to be compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1, para. 9 (associated facilities), as the Bank adequately sought to ensure that the Client fulfilled the ESP requirements for the assessment of associated facilities.

### 4.2.3.3. Project Alternatives

Volume 2 of the Supplementary E&S Studies (Project Definition) presents an analysis of the Project alternatives, summarising the approach and rationale. The Supplementary E&S Studies note that “[d]uring the earlier stages of the Project preparation, the environmental and social aspects were taken into consideration by the Engineering Team while selecting the dam location, type and height,”<sup>110</sup> and that the alternatives analysis was documented in two technical feasibility studies conducted by an international engineering firm. Volume 2 further that the two technical studies in which the alternatives analysis are documented are confidential: however, it indicates that the 2015 ESIA summarises the analysis that was conducted in those early stages.<sup>111</sup>

Therefore, by the time the Supplementary E&S Studies were undertaken, the selection of the proposed Project site (i.e., in the Nenskra and Nakra valleys), the technology (i.e., hydropower with reservoir storage), and initial design (i.e., a rockfill dam, 125m high) were already made. In its discussion of alternatives, the Project Description volume of the Supplementary E&S Studies explains that:

[t]he objective of the present chapter is not to justify, a posteriori, why the proposed Nenskra HPP is the least-impact alternative to achieve the power production objectives required by the Government. **There are other considerations such as [sic] politics preference (e.g. reducing dependence on import of electricity and fossil fuels necessary for operation of thermal power plants) which have - and will - prevail.** The objectives of the present alternative analysis are to:

- describe the basis for selection of the preferred alternatives (technology, location, design);
- where alternatives have been selected that are sub-optimal from an environmental perspective, document justification for their selection; and
- provide the information that reviewers of the analysis will need if they wish to check its conclusions or apply their own methods to compare alternatives.<sup>112</sup>

These statements from the Supplementary E&S Studies warrant the following observations from a compliance perspective:

- it is not explained how “*environmental and social aspects were taken into consideration by the Engineering Team while selecting the dam location, type and height,*” during either earlier stages of Project preparation or the feasibility studies. The revision of the 2011 and the 2015 ESIA and the gap analysis conducted by the LTA confirmed that **environmental and social indicators were not captured in the original analysis of alternatives**. While the Supplementary E&S Studies have provided considerable information on the environmental and social impacts of the Project and have influenced some important aspects of Project design (e.g., the layout of the powerhouse and dam orientation), potential environmental and social impacts were not considered when making major decisions such as the dam location, type or height; nor were they considered when analysing the energy production alternatives.
- the analysis of alternatives presented in the Supplementary E&S Studies justifies sub-optimal alternatives **only through an evaluation of environmental considerations, omitting social considerations as required under the 2014 ESP**. Social impacts represent a

<sup>110</sup> Supplementary E&S Studies Vol. 2 “Project Definition”, p. 7.

<sup>111</sup> Supplementary E&S Studies Vol. 2 “Project Definition”, p. 7.

<sup>112</sup> Supplementary E&S Studies Vol. 2 “Project Definition”, p. 7.

fundamental component of the environmental and social impact assessment, and should have informed the selection of alternatives as well.

Finally, given the PR 1, para. 10 requirement around ‘technical *and financial feasibility*,’ it is also of note that the IFC and the World Bank have both published cost analysis reports with differing conclusions in that regard.

The Government of Georgia engaged the IFC as a transaction advisor for the Nenskra Project. The IFC commissioned an international consultant to perform a cost-benefit analysis of the Project, which was published in 2017 and concluded:

Our analysis shows that the Project is cost benefit justified. The negotiated tariff in the Power Purchase Agreement (**PPA**) in real terms in 2019 is US\$79.75/MWh, which is US\$5.48/MWh less than estimates of the long run marginal cost of power in Georgia in 2019 prices. The tariff is also lower than the price Georgia pays to import power in winter months from neighbours, including Russia. The Nenskra Project will also benefit Georgia by increasing net downstream power by 1,922,000 MWh across the life of the Project because of the additional storage that the Project will build. Georgia will also benefit because tax payments to the Government will be higher because the Project will pay corporate income tax, withholding tax, and land taxes to the Government [...] the net effect of this is quantifiable net benefits of US \$136 million in Present Value terms. This does not include the non-quantifiable benefits of increased energy independence in a region in which control of energy flows has been used as a tool of geopolitical influence.<sup>113</sup>

In 2018, the World Bank published a second cost-benefit analysis report, the “Assessment of Fiscal Costs and Tariff Impacts of Power Purchase Agreements,” questioning the benefits of the Nenskra Project from a financial perspective. The report states that the Nenskra HPP is “*expected to create financial costs given that it would create unnecessary surplus energy into the power system.*”<sup>114</sup> It also notes that the Project’s financial feasibility will also be further impacted by the exchange rate of the Georgian Lari (GEL) to the US Dollar (USD):

The estimated fiscal cost and tariff impact from the [PPAs] is sensitive to the exchange rate of the GEL to the USD because the PPA tariffs are set in US cents. Therefore, depreciation of the GEL against USD would impact the fiscal cost from PPAs. The analysis includes stress tests to evaluate the impacts under various assumptions for depreciation of the GEL against USD. Those scenarios were agreed with the Ministry of Finance. The annual fiscal cost may increase from GEL 350 million in 2023 to more than GEL 500 million by 2026, depending on the deprecation scenario for GEL.<sup>115</sup>

No additional information was identified considering these opposing views or explaining the rationale for relying on the IFC rather than the World Bank assessment, with respect to the justification of the Project’s financial feasibility.

### Compliance Review Finding

The Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (Project alternatives), as the 2015 ESIA and the Supplementary E&S Studies did not provide an analysis of alternatives with due consideration to environmental and social impacts as required by PR 1 para. 10.

<sup>113</sup> “Economic Cost-Benefit Analysis of Nenskra Hydropower Project: Summary Report” by Castalia Strategic Advisors, July 2017, p. 1, available at <https://bankwatch.org/wp-content/uploads/2017/12/Nenskra-costbenefitanalysis-Jul2017.pdf>

<sup>114</sup> “Assessment of Fiscal Costs and Tariff Impacts of Power Purchase Agreements” by the World Bank, February 2018, p. 7-9, 12, available at [http://greenalt.org/wp-content/uploads/2018/09/Assessment\\_of\\_HPP\\_Cost\\_2018.pdf](http://greenalt.org/wp-content/uploads/2018/09/Assessment_of_HPP_Cost_2018.pdf)

<sup>115</sup> Assessment of Fiscal Costs and Tariff Impacts of Power Purchase Agreements” by the World Bank, February 2018, p. 9, 12, available at [http://greenalt.org/wp-content/uploads/2018/09/Assessment\\_of\\_HPP\\_Cost\\_2018.pdf](http://greenalt.org/wp-content/uploads/2018/09/Assessment_of_HPP_Cost_2018.pdf).

However, the question for the Compliance Review regarding the scope of Bank Management's responsibility under the 2014 ESP — is complex. When the Client entered the Project, its development and key characteristics (location, type and height) had already been determined during prior feasibility analysis. Under these circumstances, the Project's ability to meet the obligations under this PR seems to be dependent on third party activities.

The 2014 ESP provides in para. 39 that in these events, “[t]he EBRD seeks to ensure that the projects it finances achieve outcomes consistent with the PRs even if the outcomes are dependent upon the performance of third parties.” In addition, para. 39 provides that “[w]hen the third party risk is high and the Client has control or influence over the actions and behaviour of the third party, the EBRD will require the Client to collaborate with the third party to achieve outcomes consistent with the PRs.”

Given that the Government is an equity investor in the Client through the participation held by the JSC Partnership Fund, the question arises as to the level of collaboration that the Client could have established with the Government to address the alternatives assessment. **From the Bank's compliance perspective, the question is then whether Bank Management required the Client to attempt such collaboration as per para. 39 of the 2014 ESP. There is no evidence that Bank Management made such a request, nor is there evidence that any other action was expected from the Client to ensure compliance with the requirements of PR 1 para. 10.**

This is of particular concern in this case, given local opposition to the Project and differing views from two reputable IFIs (i.e., the IFC and the World Bank) with respect to the benefits and financial justifications of the Project. This scrutiny would suggest the need for additional due diligence from Bank Management when considering waiving any requirements around alternatives analyses. The Compliance Review concludes that Bank Management did not comply with its commitments to seek to ensure the Client's compliance with PR 1, in accordance with paras. 4, 5, 6 and 36 of the 2014 ESP.

#### 4.2.3.4. Gender Assessment

The socio-economic baseline prepared for the 2015 ESIA included gender-disaggregated data on socio-economic conditions and population composition, which was reinforced by the Supplementary E&S Studies. Gender issues were considered as part of the socio-economic impact assessment, by recognising women-led households as a “vulnerable group.”<sup>116</sup> The Supplementary E&S Studies also identified gender-specific opportunities with respect to employment and participation in the Community Investment Program Advisory Committee. Additionally, Bank Management developed a Technical Cooperation initiative to support the Project and improve equal opportunities through a Gender Action Plan. The gap analysis conducted prior to the Supplementary E&S Studies did not identify concerns with these proposed approaches to gender issues.

The Compliance Review analysis identifies the following concerns in the identification and mitigation of gender-related Project risks and impacts, which do not meet the para. 10 of the 2014 ESP requirements:

- i) **Impact Assessment and Mitigation:** the analysis of potential gender-based socio-economic impacts is too narrow, as it considers gender vulnerability mainly in relation to women-headed households. While the analysis also considers gender vulnerabilities with regard to employment and the registration of customary lands, this narrow focus does not fulfil the 2014 ESP requirements. The result is that other relevant gender-

<sup>116</sup> Footnote 8 to para. 11 of the 2014 ESP provides that for the purposes of the 2014 ESP “vulnerable groups refer to people who, by virtue of gender identity, sexual orientation, religion, ethnicity, indigenous status, age, disability, economic disadvantage or social status may be more adversely affected by project impacts than others and who may be limited in their ability to claim or take advantage of project benefits.”

related vulnerabilities and socio-economic impacts (i.e., those not based on being the head of a household or related to employment or customary property) are excluded.

In particular, there is insufficient assessment of, or mitigation identified, in relation to potential gender-specific impacts of the influx of (predominantly male) workers. The Supplementary E&S Studies indicate:

Project-induced in-migration is unlikely to occur during construction, but any such in-migration could induce risks of anti-social behaviour, pressure on social services, increase in sexually transmitted diseases, local inflation. These risks are still relevant for the workforce that will be brought from other regions of Georgia to work on the Project.<sup>117</sup>

While some risks were identified in connection with worker influx and some mitigation measures were proposed, they lacked explicit consideration of gender dynamics. For example, the identification of risks of “*anti-social behaviour*” does not identify sexual harassment or sexual violence, which requires mitigation measures such as the training of police and local health staff to adequately manage such issues, particularly in areas where women do not hold equivalent societal positions to men. It also requires confirmation of appropriate procedures for reporting and responding to any allegations of abuse, which carry a heavy social stigma for those who come forward. There is also no mention of risks related to human trafficking and forced prostitution, which are known phenomena with the arrival of important numbers of male workers who have disposable income and are living away from home for extended periods of time, particularly given that Georgia is identified as a source, transit, and destination country for women and girls subjected to sex trafficking.<sup>118</sup>

Mitigation measures established through the environmental and social impact assessment and the ESMP include: housing workers in camps; adopting a code of conduct (applying to contractors, suppliers and visitors to the Project); and offering awareness raising campaigns and health screening. In addition, the engineering, procurement and construction (EPC) contractor is to prepare and implement a

<sup>117</sup> Supplementary E&S Studies Vol. 1 “Non-Technical Summary,” p. 21 and Vol. 3 “Social Impact Assessment,” pp. xi-xii. With respect to the influx of Project workers, the SIA estimates that 1,100 workers will be employed during the construction phase, in an area with a local population of only 1,448. The project targets recruitment rates as follows (Vol. 3, p. xi, xii):

- 100% unskilled workers from the Nenskra and Nakra valleys (i.e., from local, Project-affected communities);
- 50% semi-skilled workers from Mestia Municipality;
- 75% total workers within Georgia; and
- The Project will aim at minimum 80% of all recruited workers (including skilled, semiskilled and unskilled) are Georgian citizen (approximately 20-25% of foreign workers)

However, given that only 54.1% of the population is of working age (19 to 60) and given the gender-based roles within these communities, these local employment targets are likely to prove difficult to reach and the influx of workers can be larger than estimated in the SIA.

<sup>118</sup> The risk of sex-trafficking and prostitution has been identified in Georgia by the US State Department: “As reported over the past five years, Georgia is a source, transit, and destination country for women and girls subjected to sex trafficking and men, women, and children subjected to forced labor . . . The majority of identified trafficking victims are young, foreign women seeking employment. Women and girls from Georgia are subjected to sex trafficking within the country, in Turkey, and, to a lesser extent, in China and the United Arab Emirates. Georgia is also a transit country for women from Kyrgyzstan, Tajikistan, and Uzbekistan exploited in Turkey. Women from Azerbaijan and Central Asia are subjected to forced prostitution in the tourist areas of the Adjara region and larger cities like Tbilisi and Batumi in saunas, brothels, bars, strip clubs, casinos, and hotels . . . No information was available about the presence of human trafficking in the separatist regions of Abkhazia and South Ossetia; however, the government and NGOs consider internally displaced persons from these occupied territories particularly vulnerable to trafficking.” United States Department of State, 2018 Trafficking in Persons Report - Georgia, 28 June 2018, available at: <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf>.



Community Safety Plan that will include health awareness campaigns for settlements close to camps and its associated facilities. However, the proposed mitigation measures are primarily focused on workers and do not evidence the consideration and inclusion of gender dynamics.<sup>119</sup>

Finally, the Compliance Review notes that while the efforts to enhance the economic benefits of the Project for women are commendable, meeting the expectations laid out in para. 10 of the 2014 ESP, they do not replace the need to adequately identify potential gender-based impacts and develop effective mitigation measures.

- ii) **Stakeholder Engagement Approach:** while the Public Consultation Report and Volume 7 of the Supplementary E&S Studies each refer to concerns expressed by women during the stakeholder engagement program, this does *not* equate to identifying gender-specific impacts. The identification of gender-specific impacts is not evident, which is typical in the absence of specific consultation activities that offer a safe space for women to share gender-specific concerns. While the Public Consultation Report and Volume 7 do refer to focus groups with women being conducted, neither document provided any data on the discussions that were conducted; whether they were led by female or male Community Liaison Officers; or whether participation was designed in a manner to ensure meaningful exchange, where the participants felt free to express gender-specific concerns. This is particularly important in a context where the role of women is subordinated to men and where women are considered vulnerable.<sup>120</sup>

### Compliance Review Finding

The Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP in relation to PR 1 (gender issues), as Bank Management did not seek to ensure that the Client:

- fulfilled the 2014 ESP requirements on gender, neglecting to identify material shortcomings in the Project approach to gender issues through the environmental and social due diligence process; and
- undertook meaningful, gender inclusive engagement during stakeholder consultation, as required by PR 10 paras. 10 and 12.

<sup>119</sup> The ADB CRP Report also considers that the mitigation measures proposed to address the influx of male workers are designed to “protect the workers, not the local population.” ADB CRP Report, p. 23, para. 51.

<sup>120</sup> As stated in Supplementary E&S Studies Vol. 3 “Social Impact Assessment”, “[t]he women’s role in the local community is important, though subordinate to the men’s.” See Vol. 3, p. v. Additionally, the Client counted women headed households as vulnerable, which is apparently based on the idea that women in the society are generally disadvantaged in terms of power relationships to men and the property follows the patriarchal line and that only in some special circumstances can an inheritance pass to a woman. Moreover, a recent report by UN Women also shows that domestic violence and non-partner physical and sexual violence are prevalent in Georgia and that there is a “high degree of tolerance and acceptance towards the use of physical violence against women in relationships, and they also share inequitable views on sex and sexual violence.” UN Women, “One in seven women in Georgia experiences domestic violence, new national study finds,” 6 March 2018, available at <https://georgia.unwomen.org/en/news/stories/2018/03/one-in-seven-women-in-georgia-experiences-domestic-violence-new-national-study-finds>



### 4.3. PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement

#### 4.3.1. Parties' Positions

##### *The Complainants' Position*

The Complaint invokes PR 5 paras. 1 and 3 to allege that the Project infringes on the customary land rights of the Svans. It asserts that the LALRP does not adequately remediate economic displacement caused by loss of assets, resources, income and livelihoods.

The Complainants consider that local communities have not been adequately compensated. The Complainants relay that they believe the issues with PR 5 adherence stem largely from the Client's failure to consult meaningfully with Project-affected people (as required by PR 5, para. 12).

##### *The Bank's Response*

Bank Management asserts that PR 5 has been met in full, as the LALRP was drafted and disclosed after extensive consultation with Project-affected people. Bank Management notes that the LALRP will compensate for loss of land at full replacement cost, even for non-legalisable lands used by affected people, despite the lack of formal private ownership by affected community members. Finally, Bank Management indicates that the LALRP is an evolving process and stakeholders will continue to be consulted widely throughout the Project life cycle.

##### *The Client's Response*

The Client asserts that a Livelihood Restoration Programme has been proposed and that Project-affected people will be consulted extensively on the Programme. They highlight the Project's commitment to pay for the loss of residential and arable land at full replacement cost, regardless of land registration. For the permanent loss of pasture areas, the Client also reiterates its commitment to pay for land at full replacement cost, although it notes that "*most of this land is [formally] state land.*"

#### 4.3.2. Policy Obligations: Requirements under PR 5

PR 5 provides comprehensive requirements for Clients with respect to land acquisition, involuntary resettlement and economic displacement. Those relevant to the Compliance Review ToR are summarised below:

- **Physical and Economic Displacement:** para. 6 outlines commitments to address the loss of physical assets or natural resources resulting from physical and economic displacement (i.e., be it full, partial, permanent or temporary) as a result of the Project.
- **Consultation:** para. 12 describes the necessity for early informed participation of affected people in the decision-making processes related to resettlement.
- **Socio-economic Assessment and Census:** Paras. 14 to 17 cover the detailed census and socio-economic assessment that must be completed to log losses incurred due to the Project. Clients must carry out a socio-economic baseline assessment for people affected by the Project that:
  - identifies impacts related to land acquisition and restrictions on land use within the project's social contexts, and the needs and rights of affected people; and
  - develops adequate measures to minimise and mitigate resettlement impacts.

Para. 15 requires Clients to carry out a detailed census to “*identify persons who will be displaced by the project; (ii) determine who will be eligible for compensation and assistance [with cut-off dates identified as per para. 16]; and (iii) take inventory of affected land and property.*” **The census must also address the needs of seasonal resource users who may not be present in the project area at the time of the census.**

- **Compensation for losses:** para. 17 provides that displaced persons **should be offered compensation for their loss of assets at full replacement cost** and other assistance with the intention:

**... to restore, and potentially improve, their standards of living and/or livelihoods of displaced persons to pre-displacement levels.** The measures can be based on land, resources, wages and/or business activities. Standards for compensation will be transparent and consistent within the project... Where livelihoods of displaced persons are land-based, or where land is collectively owned, the Client will offer, where feasible, land-based compensation, taking into account seasonal and agricultural timing requirements. The Client will provide opportunities to displaced persons and communities to derive appropriate development benefits from the project.<sup>121</sup>

Para. 37 also requires compensation for economic displacement resulting from expropriation, negotiation or the restrictions on land rights that “*causes temporary or permanent loss of income or livelihood... regardless of whether the affected people are physically displaced.*”<sup>122</sup> It states that the Client will:

provide assistance that will offset any loss of a community’s commonly held resources [such as commonly held pasture lands]. This could take the form of initiatives that enhance the productivity of the remaining resources to which the community has access, in-kind or cash compensation for loss of access or provision of access to alternative sources of the lost resource.<sup>123</sup>

- **Resettlement and/or Livelihood Restoration Framework:** PR 5 para. 22 requires the development of a Resettlement and/or Livelihood Restoration Framework providing the basis for a LALRP, in cases where the magnitude of land acquisition or land use restrictions is unknown given a project’s development stage.

Para. 36 further emphasises that such compensation should be undertaken in a transparent, consistent and equitable manner.

#### 4.3.3. Compliance Assessment

The Compliance Review ToR included the following questions to assess EBRD’s compliance with PR 5:

- Did the EBRD satisfy its obligation to ensure that the Client is properly applying PR 5, paras. 6 [physical and economic displacement], 10 [encouraging negotiated settlements], 12 [involvement of affected people to foster informed decision making] and 13 [additional protections for disadvantaged or vulnerable people], with regards to early and continuous consultations with affected men and women, as well as disadvantaged or vulnerable groups?
- Did the EBRD satisfy its obligation to ensure that the Client carried out a socio-economic baseline assessment for people affected by the Project in line with PR 5, paras. 14 [socio-economic baseline assessment within the project’s social context], 15 [detailed census of impacts, including seasonal users or owners], 16 [established cut-off dates] and 17 [compensation for losses], including impacts related to land acquisition and restrictions on

<sup>121</sup> 2014 ESP, PR 5, para. 17.

<sup>122</sup> 2014 ESP, PR 5, para. 37.

<sup>123</sup> 2014 ESP, PR 5, para. 37.

pasture land use by the local population, in line with PR 5 para. 37 [compensation for economic displacement irrespective of physical displacement]? Were the impacts on pasture areas mitigated and minimized?

- Did EBRD satisfy its obligation to ensure that the Client carried out an adequate Livelihood Restoration Framework, in line with PR 5 paras. 22 [livelihood restoration framework], 36 [provision of compensation for economic displacement in a transparent, consistent and equitable manner], 37 [compensation for economic displacement irrespective of physical displacement], 38 [public disclosure of the LALRP] and 39 [regarding Indigenous Peoples], and a Livelihood Restoration Plan in line with PR 5 para. 22 [livelihood restoration framework], to include the nature or magnitude of the land acquisition or restrictions on land use, considering the customary land rights of Svans?

#### 4.3.3.1. Contextual Background to the Assessment of PR 5 Compliance

In order to frame the compliance assessment, this section provides an overview of:

- the existing land and resource use activities in the Project area;
- the existing land tenure challenges in the Project area; and
- the existing LALRP.

#### Overview of Land and Resource Use by Project-affected Communities

Agriculture, animal husbandry and logging<sup>124</sup> are recognised economic activities of the local populace. These land and resource use activities are largely practiced for home consumption, with approximately 7% of households depending exclusively on subsistence farming. Pasture areas are rotated: first, in the spring, hay is grown in high mountain pastures and animals are kept in fields close to the villages. Then in the summer, livestock are sent to the mountain pastures to allow hay to grow near the villages, where it is subsequently collected and stored for the winter. Summer highland pastures are shared between neighbours and families from one or several communities, who join together to organise these rotations.<sup>125</sup>

The Supplementary E&S Studies identify that among the Project-affected area's 1,448 residents:

- 80-86% of families own cows;
- 80% of families keep hay fields to produce animal fodder for the winter months; and
- 64% of households use summer pastures to raise over 1,250 animals.<sup>126</sup>

The land and resource use data above underscores the importance of communal pasture lands for families' ability to feed themselves, but also highlights the social and cultural importance of communal pasture practices, integral to the way of life in the Nenskra and Nakra valleys.

The Project has identified the proportion of land use affected by land take in Figure 2 as follows:

<sup>124</sup> The Government of Georgia has issued a ban on logging in the Project area, but it remains practiced by some members of Project-affected communities.

<sup>125</sup> Supplementary E&S Studies Vol. 3, "Social Impact Assessment" Nov 2017 pp. 24, 30-47.

<sup>126</sup> Supplementary E&S Studies Vol. 3, "Social Impact Assessment" Nov 2017 pp. 39-47.

Figure 2: Proportion of Land Use Affected by Land Take

| Village (valley)         | Type of land use                | Total area (ha) <sup>a</sup> | Proportion of the type of land included in the land take area (permanent and temporary) | Proportion of the type of land included in the permanent land take area |
|--------------------------|---------------------------------|------------------------------|---|---|
| Chuberi (Nenskra valley) | Residential and built-up areas  | 420                          | ---   | ---   |
|                          | Arable land (cultivated or not) | 490                          | 5.2%  | 0.75%   |
|                          | Pasture area                    | 695                          | 2%  | 0.8%  |
| Naki (Nakra valley)      | Residential and built-up areas  | 104                          | ---   | ---   |
|                          | Arable land (cultivated or not) | 120                          | ---   | ---   |
|                          | Pasture area                    | 549                          | 1.1%  | 0.16%   |

<sup>a</sup> Estimates based on interpretation of aerial photographs (dated 2010).

In terms of economic stability, 150 households (42%) in the Nenskra and Nakra valleys are deemed to be ‘vulnerable,’<sup>127</sup> 80 of which use summer pastures. At the state level, 22% of Project-affected households receive a poverty allowance and are registered as being under the national poverty line.<sup>128</sup> This data points to the vulnerability of those communal pasture users who will lose access as a result of the Project, experience economic losses, and apply under the 2014 ESP for livelihood restoration.

The Supplementary E&S Studies identify that 89 households will be impacted by the loss of arable, forest or pasture lands required for the various Project components, defined by the date of the baseline study.

### Overview of Land Tenure

Volume 3 of the Supplementary E&S Studies describes complex land tenure in the Project study area:

[L]egal and formalized land tenure was introduced in 2008 and coexists and sometimes overlaps with customary land tenure, which is well recognized by the local communities. However, there have been reports of difficulties for people wishing to register traditionally owned land. This is a factor that has needed to be taken [sic] account in the land acquisition and livelihood restoration planning.<sup>129</sup>

Volume 9 on the LALRP further indicates that:

Almost all the land in both valleys is officially State Land, and all the land is categorized as Agricultural Land. Outside of the settlements, the land is almost everywhere registered as Forest Fund Land. The registering of land is a complex process, as ownership has to be proven often without existing document [sic]. Some people succeeded to [sic] officially register [sic] some residential land plots as their private land, but this is still categorized as Agricultural Land. In these cases, the land is registered under the name of the current owner.

Customary land tenure is well recognized informally between the villagers. Within the settlements, individual land plots are well demarcated, and almost always fenced. Outside the settlements, in the forested areas, customary ownership is also most of the time well defined. Specific areas are

<sup>127</sup> Supplementary E&S Studies Vol. 3, “Social Impact Assessment” Nov 2017 p. 59.

<sup>128</sup> Supplementary E&S Studies Vol. 3, “Social Impact Assessment” Nov 2017 p. 60.

<sup>129</sup> Supplementary E&S Studies Vol. 3, “Social Impact Assessment” Nov 2017 p. iv.

owned by groups of families sharing the same ancestry and customary right of use of these areas are inherited.<sup>130</sup>

This customary ownership and right of use is not recognised by the Georgian legal system. However, as referred to above, the Studies identify that residents of the Mestia municipality who have sought to register their traditionally-owned land plots (which cover approximately 80% of the district) have encountered difficulties, as the two grounds for land registration that exist under Georgian legislation —“arbitrary occupation” and “lawful possession”— do not conform to the “traditional possession” common among Svaneti communities.<sup>131</sup>

### Scope of the LALRP

The 2017 LALRP covers the defined Project facilities at the time of publication, namely:

- the dam and reservoir area;
- the powerhouse area;
- the Nakra diversion weir area;
- the operator’s village; and
- the Nenskra access road upgrading works.

Project components unknown at the date of the LALRP’s publication that will have to be integrated into a future iteration of the LALRP include:

- the upgrading of the Nakra road;
- the spoil disposal areas at the powerhouse;
- the construction of the 35 kV electric service line between the powerhouse and the dam site; and
- the 110 kV power supply line from the future substation to the Powerhouse.<sup>132</sup>

While the LALRP identifies that no physical displacement will be necessary, livelihood restoration measures are applicable.

#### 4.3.3.2. Analysis of the Bank’s Conduct

The Project gap analysis identified that the land acquisition process was a key area where material action was required in order to fulfil the 2014 ESP. The economic displacement impacts expected to result from the loss pasture and forest access had not yet been identified or quantified, and therefore, it was confirmed that an LALRP was needed to address impacts to agriculture, animal husbandry and logging activities.

The Lenders requested extensive revisions during the development of the LALRP to align it with their policies. The Compliance Review finds that Bank Management made numerous efforts in this respect and generated several material improvements during those years of work. However, the Compliance Review finds that the PR 5 requirements ultimately were not met due to the establishment of an arbitrary threshold for livelihood restoration.

As presented below, Bank Management did not reject the establishment of an arbitrary threshold, below which livelihood restoration was not to be provided to Project-affected people, despite this being inconsistent with the spirit and the letter of PR 5, requiring Clients *“to restore, and potentially improve, their standards of living and/or livelihoods of displaced persons to pre-displacement*

<sup>130</sup> Supplementary E&S Studies Vol. 9, LALRP, Nov 2017 p. 17.

<sup>131</sup> Supplementary E&S Studies Vol. 3, “Social Impact Assessment” Nov 2017 p. 21.

<sup>132</sup> In addition, an LALRP for the 220 kV transmission line, identified as an additional facility, linking the powerhouse switchyard to the future new substation located in the Nenskra valley, will be prepared and implemented by Georgian State Electrosystem (GSE).

levels.”<sup>133</sup> While LALRP clearly lays out the process through which land owners and land users can claim loss of land and seek compensation for those lands, **it also identifies that those who experience losses of less than 10% of their productive assets will be deemed ineligible for livelihood restoration measures.** This is done by establishing three categories of loss:

- low/not significant (up to 10%);
- medium/significant (between 10 - 20 %); and
- high/severe (20% or more).

While this categorisation itself is not problematic, excluding those in the “low” category from livelihood restoration measures is inconsistent with the requirement to restore the standards of living or livelihoods under PR 5.

For both legalisable and non-localisable land claims, the LALRP identifies: **“For significantly and severely affected households, the Memorandum of Understanding will also indicate the Livelihood Restoration Measures package proposed by the Project.”**<sup>134</sup> The LALRP Workplan (Figure 3) also reflects that Livelihood Restoration Measures are contemplated for those “significantly” or “severely” impacted Project-affected people.<sup>135</sup>

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<sup>133</sup> 2014 ESP, PR5, para. 17.

<sup>134</sup> Supplementary E&S Studies Vol. 9, LALRP Nov 2017 p. 88.

<sup>135</sup> See Workplan Figure 17, LALRP November 2017, p. 103.



Figure 3: LALRP Workplan – Implementation of Livelihood Restoration

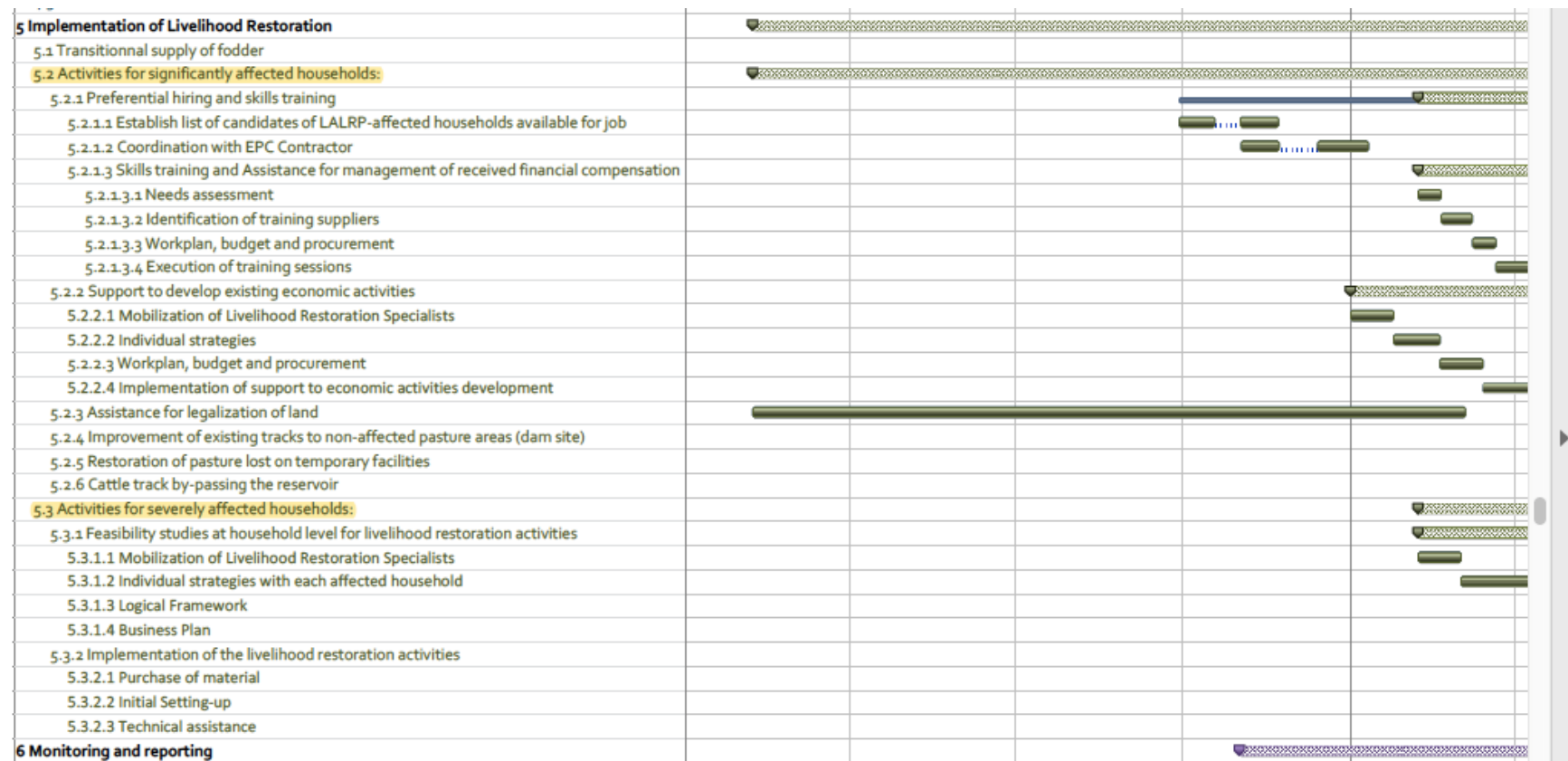


Figure 4 of the LALRP Workplan reflects that the creation of this threshold excludes 60 of the 89 impacted households (67%) from LALRP Livelihood Restoration measures.<sup>136</sup>

**Figure 4: LALRP Workplan – Distribution of Impact by Significance and Project Component**

| Area/ facility   | Number of households affected | Low impact / not significant | Medium / significant | High / Severe  |
|--|-------------------------------|------------------------------|----------------------|----------------|
| Nenskra dam and reservoir  | 25                            | ---                          | 16 <sup>c</sup>      | 9 <sup>d</sup> |
| Powerhouse site  | 5                             | 1                            | ---                  | 4              |
| Operators village  | 1                             | 1                            | ---                  | ---            |
| Nenskra road   | 35 <sup>a</sup>               | 32 <sup>b</sup>              | ---                  | ---            |
| Nakra weir and transfer tunnel intake channel  | 27                            | 27                           | ---                  | ---            |
| Total  | 89                            | 60                           | 16                   | 13             |
| <sup>a</sup> Includes 4 households also affected by other project components.<br><sup>b</sup> Includes one household also affected by Nakra weir.<br><sup>c</sup> Includes 1 household also affected (not significantly) by the Nenskra road.<br><sup>d</sup> Includes 2 households also affected (not significantly) by the Nenskra road. |                               |                              |                      |                |

The Bank's tolerance for a loss of up to 10% of productive assets before livelihood restoration would be offered is concerning, particularly given the existing economic vulnerabilities within the Project-affected area, where a loss of >10% may be material to the wellbeing of some vulnerable households and result in adverse impacts.<sup>137</sup>

This methodology is especially disadvantageous to seasonal users, who were not consulted during the income inventory and were all deemed to have “*no significant loss of productive assets.*” While Bank Management asked the Client to better assess the losses to the absentee households and to consult with absentee owners, no evidence is offered that this was completed: the only reference to absentee owners as Project-affected people is in the LALRP, where the Client identifies five households of “*seasonal residents*” who were not interviewed (see Figure 5). The LALRP then concludes that seasonal residents face a 0% loss of productive assets, and consequently, are ineligible for livelihood restoration measures.<sup>138</sup>

<sup>136</sup> Supplementary E&S Studies Vol. 9, LALRP, Table 5, p. ix.

<sup>137</sup> Supplementary E&S Studies Vol. 9, LALRP, p. ix.

<sup>138</sup> Supplementary E&S Studies Vol. 9, LALRP, Table 22 p. 50.

Figure 5: Identification of Economic Displacement Caused by Project Components

| HH#  | Total members | Male members | Female members | Loss of Land (m <sup>2</sup> ) | Land Registration status | Structures affected | Crops affected | Trees Lost (Num.)<br><i>Walnut trees</i> | % of productive assets lost | Source of income declared during interviews | Use of walnuts as income source (yes/no) | Vulnerable house hold | Permanent/ Temporary | Impact Magnitude / Significance |
|------|---------------|--------------|----------------|--------------------------------|--------------------------|---------------------|----------------|--|-----------------------------|---|--|-----------------------|----------------------|---------------------------------|
| HH03 | 1             | 1            |                | 81                             | unregistered             |                     | no             |  | 0% (seasonal Resident)      | NA  |  | no                    | Permanent            | Low/ not significant            |
| HH12 | 1             | 1            |                | 2037                           | Unregistered             | 1 fence             | no             | 136                                      | 0% (seasonal Resident)      | NA  | no                                       | no                    | Permanent            | Low/ not significant            |
| HH20 | 1             | 1            |                | 60                             | Registered               | 1 fence             | no             |  | 0% (seasonal Resident)      | NA  |  | no                    | Permanent            | Low/ not significant            |
| HH33 | NA            | NA           | NA             | 1679                           | Partially registered     | 1 fence             | No             | 88                                       | 0% (seasonal Resident)      | NA  | no                                       | no                    | Permanent/ Temporary | Low/ not significant            |
| HH34 | NA            | NA           | NA             | 1542                           | Unregistered             | —                   | no             | 11                                       | 0% (seasonal Resident)      | NA  | no                                       | no                    | Permanent            | Low/ not significant            |
|      |               |              |                |                                |                          |                     |                |  |                             |   |  |                       |                      |                                 |

The LALRP provides an incongruous rationale for the exclusion of livelihood restoration measures for Project-affected people with productive asset losses of >10%, by arguing that the threshold is consistent with the ADB's Safeguard Requirement 2.<sup>139</sup> However, the ADB Requirement cited identifies this threshold of “significant impacts” *solely* for the purpose of categorising projects, not for the purpose of determining compensation or livelihood restoration.<sup>140</sup> Furthermore, even if ADB allowed such an approach, this alone would not justify the application of an ADB standard rather than the 2014 ESP requirement, as it results in non-compliance with the 2014 ESP.

<sup>139</sup> ‘As per ADB’s Safeguard Requirement 2 on Involuntary Resettlement, which defines the threshold for being significantly affected as the loss of 10% or more of productive (income generating) assets.’ Footnote 3 on p. ix Supplementary E&S Studies Vol. 9, LALRP.

<sup>140</sup> See para. 9. of the ADB OPERATIONS MANUAL BANK POLICIES (BP) regarding involuntary resettlement: “A project’s involuntary resettlement category is determined by the category of its most sensitive component in terms of involuntary resettlement impacts. The involuntary resettlement impacts of an ADB-supported project are considered significant if 200 or more persons will experience major impacts, which are defined as (i) being physically displaced from housing, or (ii) losing 10% or more of their productive assets (income generating). The level of detail and comprehensiveness of the resettlement plan are commensurate with the significance of the potential impacts and risks.”

The Compliance Review could find no evidence that PR 5 allows the protections it enshrines to exclude those who experience losses of >10% of productive assets. **On the contrary, para. 5 of PR 5 clarifies that an objective of PR 5 is to “restore or, where possible, improve the livelihoods and standards of living of displaced persons to pre-displacement levels.”** PR 5 does not provide for any situation or acceptable threshold whereby Project-affected people are meant to absorb losses resulting directly from a Project’s development.

By accepting a threshold designed in contravention to PR 5, Bank Management approved an explicit non-compliance with the 2014 ESP, one which may exacerbate existing economic and social vulnerabilities. The Client’s socio-economic baseline assessment reflects that more than 20% of Project-affected households are below the poverty line, and 42% of affected households are “vulnerable” (even within the Client’s limited definition).<sup>141</sup> Should poor and vulnerable populations be required to absorb a loss of up to 9.99% of their productive assets, this could have material consequences in their household contexts.

Importantly, if the LALRP is accepted as-is, it will not only adversely impact Project-affected people experiencing asset losses below the set 10% threshold, but it would also set the precedent for the approach to livelihood restoration for future iterations of the LALRP, when all Project components have been defined.

#### 4.3.4. Compliance Review Finding

The Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 5 (LALRP), as Bank Management did not seek to ensure that PR 5 requirements related to livelihood restoration were met, and allowed an arbitrary threshold for livelihood restoration to be established (i.e., where those incurring losses >10% would not be eligible for restoration measures, despite PR 5 requirements to restore livelihoods and standards of living).

### 4.4. PR 8: Cultural Heritage

#### 4.4.1. Parties’ Positions

##### *The Complainants’ Position*

The Complaint asserts that the Project poses a threat to Svan culture and community well-being, noting that it “*may impact the Svan language [recognised by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as an endangered language] if it undermines cohesive values and traditions of the Svans.*”<sup>142</sup> The Complaint considers the Project’s cultural heritage impact assessment to be inadequate.

Moreover, the Complaint cites the ADB CRP Report on Eligibility findings, which state that the Svan culture “*will be seriously threatened by this Project... and will be very seriously impacted by the massive inflow of workers into the narrow valley during at least 5 years of construction period.*”<sup>143</sup> The Complaint also refers to the ADB CRP finding that “*workers coming in from other parts of Georgia will have different values and traditions which will clash with the cohesive values and traditions of the Svan families who have lived long in these mountain valleys,*” and that “[t]he large inflow of workers will fundamentally challenge the social cohesion and values of the Svan communities in the Nenskra River valley.”<sup>144</sup>

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<sup>142</sup> Complaint, para. 10.2, p. 24.

<sup>143</sup> ADB CRP, para. 20, p.7; Complaint, para. 10.5, p. 25.

<sup>144</sup> ADB CRP, para. 50, p.19; Complaint, para. 10.6, p. 25.

### The Bank's Response

Bank Management asserts that the Project's environmental and social impact assessment assessed potential impacts to cultural heritage, and that as with all other aspects of the assessment, the issue of cultural heritage *"has been reviewed by a range of specialists and advisors, all of whom have confirmed that Performance Requirement...8, [has] been met in full."*<sup>145</sup>

### The Client's Response

The Client considers that an assessment of tangible and intangible cultural heritage has been undertaken. The Client also cited the preparation of a "Chance Find Procedure" to be shared with all workers, guiding the management of unknown cultural sites should they be found during construction. The Client further explains that the Community Investment Program could be used (if its Advisory Committee agrees) to develop initiatives supporting the preservation and promotion of local intangible cultural heritage.

With respect to the influx of workers, the Client recognises that this represents a risk and that control of traffic, people and workers' behaviour will be important throughout the Project. The Client explains that the Project will accommodate all external workers in Project-specific housing and will establish an employee code of conduct that will need to be respected. The Client indicates that it will monitor and enforce this code of conduct, and take disciplinary action when required.

#### 4.4.2. Policy Obligations: Requirements under PR 8

The 2014 ESP states that the aim of PR 8 is to protect cultural heritage and guide Clients in avoiding or mitigating adverse impacts on cultural heritage in the course of their business operations.<sup>146</sup> Para. 1 of PR 8 also indicates that Clients *"are expected to be precautionary in their approach to the management and sustainable use of cultural heritage."*

Para. 2 further underlines that *"[b]oth tangible<sup>147</sup> and intangible<sup>148</sup> cultural heritage are important assets for economic and social development, and are an integral part of the continuity of cultural identity and practices (including traditional skills, knowledge, beliefs and/or minor dialects and languages)."*<sup>149</sup> (Emphasis added)

Para. 5 indicates that the Client *"will, as part of its environmental and social assessment process, identify the relevant requirements of this PR, and how they will be addressed as an integral part of [its] overall Environmental and Social Management System and/or the project's ESMP."*

During the environmental and social assessment process, PR 8 requires that Clients:

- **screen the project for impacts on cultural heritage at an early stage of the environmental and social impact assessment:** PR 8 requires that the Client *"identif[ies] if any cultural heritage is likely to be adversely affected by the project ... In doing so, the Client will consult with relevant authorities, experts, local communities and other stakeholders as appropriate;"*<sup>150</sup>

<sup>145</sup> Bank Management Response, p. 49.

<sup>146</sup> 2014 ESP, PR 8, para.1.

<sup>147</sup> Physical cultural heritage refers to movable or immovable objects, sites, groups, structures as well as cultural or sacred spaces associated therewith, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic or other cultural significance.

<sup>148</sup> Intangible cultural heritage refers to practices, representations, expressions, knowledge and skills that communities, groups, and in some cases, individuals recognise as part of their cultural heritage, and which are transmitted from generation to generation.

<sup>149</sup> 2014 ESP, PR 8, para. 2.

<sup>150</sup> 2014 ESP, PR 8, para. 8.

- **avoid impacts on cultural heritage:** based on the outcomes of the screening process, the Client will “*design the project so as to avoid significant impacts on cultural heritage;*”<sup>151</sup> and
- **assess impacts that cannot be avoided:** where impacts cannot be avoided, the Client will “*undertake studies and consultation to assess potential impacts... The studies will be conducted by qualified and experienced cultural heritage specialists, either as part of the overall environmental and social assessment process or separately.*”<sup>152</sup>

PR 8 also requires that Clients develop appropriate measures for minimising and mitigating adverse impacts on cultural heritage:

The mitigation measures will address the results of the field surveys, expert assessment of the significance of the cultural heritage, national legislation and relevant international conventions, and the result **of consultations with affected communities and other relevant stakeholders**. Such mitigation measures should be included in the Client’s overall Environmental and Social Management System and project-specific ESMP, or in a specific Cultural Heritage Management Plan that will also include an implementation timeline and a resource need estimate for each of the mitigation measures. The Client will also ensure that trained and qualified personnel are available to oversee the implementation of mitigation measures, and that any third parties, such as contractors working on the project have the necessary skills and expertise and are managed and monitored in accordance with PR 1.<sup>153</sup> (Emphasis added)

PR 8 further requires that Clients consult affected communities and other stakeholders:

who use or have used the cultural heritage within living memory for longstanding cultural purposes to identify cultural heritage of importance, and to incorporate into the Client’s decision-making process the views of the affected communities on such cultural heritage [...] Consultation will also involve other relevant stakeholders such as national or local authorities entrusted with the protection of cultural heritage, cultural heritage experts and non-governmental and civil society organisations. Impacts on cultural heritage will be appropriately mitigated with the free prior and informed participation of the affected communities.<sup>154</sup>

#### 4.4.3. Compliance Assessment

The Compliance Review ToR included the following questions to assess EBRD’s compliance with PR 8 on Cultural Heritage:

- Did Bank Management satisfy its obligation to ensure that the environmental and social assessment process identified relevant requirements of PR 8?
- Did Bank Management satisfy its obligation to ensure that potential Project impacts on the Svan’s tangible and intangible cultural heritage (including) language are being adequately assessed and addressed as part of the Client’s ESMP, in line with relevant provisions of PR 8 and PR 1?

The Compliance Review assesses whether the process Bank Management followed to appraise the Client’s implementation of PR 8 requirements was sufficient to ‘seek to ensure’ Client compliance with PR 8, with respect to potential Project impacts to the Svan’s tangible and intangible cultural heritage.

The gap analysis confirmed that tangible cultural heritage sites in the Project area had been adequately identified; that all identified sites were outside of the immediate Project area; and that consequently, these sites were not threatened by Project construction activities or reservoir impoundment. National authorities were also consulted and indicated that the likelihood of finding

<sup>151</sup> 2014 ESP, PR 8, para. 9.

<sup>152</sup> 2014 ESP, PR 8, para. 10.

<sup>153</sup> 2014 ESP, PR 8, para. 12.

<sup>154</sup> 2014 ESP, PR 8, para. 15.



tangible cultural heritage in the Project area was very unlikely, however a “Chance Find Procedure” had already been established in such cases. Consequently, it was concluded that no further actions were required to protect cultural heritage, apart from verifying that the EPC contractor’s technical specifications included provisions for the Chance Find Procedure.<sup>155</sup>

This analysis, while robust, focused only on *tangible* cultural heritage, and was silent on potential impacts to *intangible* cultural heritage. Bank Management highlighted the need for an intangible cultural heritage assessment during the preparation of the Supplementary E&S Studies, inclusive of potential impacts to Svan culture, belief systems and traditions, both due to the 2014 ESP requirements and given that questions had been raised during the stakeholder engagement program regarding the Project’s potential impact on the Svan’s culture, way of life, belief systems and traditions.

As a result of the Bank’s requests, the Supplementary E&S Studies included a section on intangible cultural heritage in Volume 3 (Social Impact Assessment). The section indicates that the Georgian National Agency for Cultural Heritage Preservation of Georgia had identified 174 intangible cultural heritage elements in the Zemo Svaneti region, including the ancient Svan musical instrument “Chuniri”; the tradition of cutting on the wood; the technology of producing Svan hats and Khachapuri with millet; Svan salt; and local women’s dancing.<sup>156</sup> The section further refers to the complex polyphony singing common in Svaneti, which was inscribed on UNESCO’s Representative List of Intangible Cultural Heritage of Humanity in 2008. The section acknowledges that polyphony singing, dances, and many rituals and ceremonies specific to Svaneti are important elements of the Svans’ intangible cultural heritage.

As to the potential impacts to intangible cultural heritage, the SIA analysis noted that:

Communal knowledge and belief systems (p.ex. oral history and rituals) are often embodied within the tangible manifestations of a culture (p.ex. a cemetery or a church), so direct impacts to physical objects or places may also have impacts on intangible cultural values. As described in the previous section on material cultural heritage, there is not any known material cultural heritage element located inside the Project footprint, except 9 private old graves that will be displaced as part of the LALRP implementation (see Vol.9 LALRP). Therefore, **it is not anticipated that any of the Project activities could have any direct impact on the local intangible cultural heritage. The Project construction and operation in itself will not affect any local social practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith. In the same way, the Project will not affect the transmission of these local social practices, representations, expressions, knowledge, skills.**<sup>157</sup> (Emphasis added)

While the SIA did not predict that Project activities would have any direct impact on local intangible cultural heritage, it acknowledged that the Project “*might to some extent induce social change and outside cultural influence*” given the number of workers that were expected to come from other parts of Georgia, or from abroad.<sup>158</sup> The SIA noted that “*the presence of workers could create social encounters and possibly social tensions between villagers and outsiders.*”<sup>159</sup> However, the SIA explained that “*the Nenskra and Nakra valleys are an integral part of the Georgian culture and nation*” and that “[a]s in other parts of Georgia, the local communities are opened to the cultural trends and to mass media.” The SIA therefore concluded that “[a]ny impacts on these elements [traditions, customs and beliefs] would be unlikely.”<sup>160</sup>

The SIA predicts that potential impacts derived from an influx of workers on intangible cultural heritage can be mitigated by measures defined to (i) minimise Project-related in-migration and (ii)

<sup>156</sup> Supplementary E&S Studies, Vol. 3 “Social Impact Assessment”, p. 159.

<sup>157</sup> Supplementary E&S Studies, Vol. 3 “Social Impact Assessment”, p. 160.

<sup>158</sup> Supplementary E&S Studies, Vol. 3 “Social Impact Assessment”, p. 160.

<sup>159</sup> Supplementary E&S Studies, Vol. 3 “Social Impact Assessment”, p. 160.

<sup>160</sup> Supplementary E&S Studies, Vol. 3 “Social Impact Assessment”, p. 160.

address the impacts to social cohesion in-community.<sup>161</sup> Only one of the proposed measures referred explicitly to cultural heritage, requiring that “[a]ll workers be provided awareness training with regard to the Project’s Code of Conduct, and which will include information on local customs and belief.” Finally, the SIA noted that beyond mitigation measures, the Client’s Community Investment Programme could include initiatives supporting the preservation of local intangible cultural heritage.<sup>162</sup>

The SIA does not meet the requirements of PR 8, para.15 as it does not include conclusive evidence that Project-affected communities were consulted as part of the intangible cultural heritage assessment - during the identification of the intangible heritage elements, during the assessment of potential impacts, or during the development of mitigation measures (particularly with respect to addressing outside cultural influence that could result from the influx of workers). There is consequently no evidence that the views of affected communities were considered in the Project decision-making around intangible cultural heritage.

#### 4.4.4. Compliance Review Finding

The Compliance Review finds Bank Management to be non-compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 8, as Bank Management approved the Supplementary E&S Studies without seeking to ensure that the Project met important community consultation requirements under PR 8. Bank Management did not identify this area as needing further corrective actions and therefore did not request nor monitor corrective action implementation. As a result, Bank Management did not seek to ensure that important potential impacts to Project-affected people were adequately identified and mitigated, in accordance with paras. 10 and 15 of PR 8.

Finally, it is important to note that sharing the Project’s benefits through the Community Investment Programme “*is not a compensation for negative impacts.*”<sup>163</sup> References to intangible cultural heritage being addressed through the Community Investment Programme (which sits outside of the environmental and social impact assessment’s mitigation of direct, indirect, induced and cumulative impacts) does not constitute an appropriate avenue through which to address potential Project impacts. The Community Investment Programme does not replace the need for Bank Management to have sought to ensure that a more participatory assessment of potential impacts to intangible cultural heritage was undertaken.

### 4.5. PR 10: Information Disclosure and Stakeholder Engagement

#### 4.5.1. The Parties’ Positions

##### *The Complainants’ Position*

As outlined in Section 1.3 above, the Complaint asserts that the Project is non-compliant with PR 10 based on the view that the consultation of Project-affected people was not proportional to the nature and scale of the Project and its potential adverse impacts.

##### *The Bank’s Response*

In its response, Bank Management asserts that the Lenders,<sup>164</sup> the Lenders’ advisors and the IPOE believe meaningful consultation had been achieved. Bank Management notes that the 2017 environmental and social impact assessment open house information sessions were well attended

<sup>161</sup> Section 6.8 of the SIA refers to the health and safety risks of Project-induced in-migration and section 6.9 to social cohesion and health & safety risks.

<sup>162</sup> Supplementary E&S Studies, Vol. 3 “Social Impact Assessment”, p. 137.

<sup>163</sup> Supplementary E&S Studies, Vol. 8 ESMP, p. 92.

<sup>164</sup> As stated in Section 1 above, for the purposes of this Compliance Review, the Lenders refer to ADB and EBRD.

by the local community and conducive to open and frank discussions, with engagement continuing outside of the disclosure process.

### ***The Client's Response***

The Client asserts that the Supplementary E&S Studies were accompanied by extensive consultation and information disclosure. They cite the use of a multi-modal approach, which sought to ensure that the maximum number of people would be informed of the existence of the Studies, allowing them to raise concerns, questions and make recommendations. The multi-modal approach included:

- [the hosting of] large public consultation meetings in Tbilisi and in the [P]roject area;
- distribution of USBs to community members with the Supplementary E&S Studies and issue-based brochures;
- provision of physical copies [of the Supplementary E&S Studies] at the Mestia Municipality and in the [P]roject information centres in Georgian and in English;
- focus group meeting with vulnerable people;
- [the publication of] the Supplementary E&S Studies on the JSCNH website and potential lenders website;
- conducting surveys to determine level of understanding of information requests;
- disclosing information through social media and press releases; and
- open house focusing on the key issues raised by communities.<sup>165</sup>

The Client further notes that community feedback was taken into account in the revision of the Supplementary E&S Studies, the Project design and Project plans (e.g. the introduction of the Community Investment Program). The Client considers that it was responsive to the Lenders' requests for greater Project consultation and to stakeholder comments, stating that the level of efforts to inform and consult stakeholders "*far exceeded the potential Lender requirements.*"<sup>166</sup>

### **4.5.2. Policy Obligations: Requirements under PR 10**

PR 10 recognises "*the importance of an open and transparent engagement between the Client, its workers, local communities directly affected by the project and, where appropriate, other stakeholders as an essential element of [GIP].*" In order to meet GIP, PR 10 states that stakeholder engagement should begin at the earliest stages of project planning and occur as an ongoing process throughout the project lifecycle.<sup>167</sup> It characterizes GIP stakeholder engagement as involving:

- public disclosure of appropriate information;
- **meaningful** consultation with stakeholders; and
- an effective procedure or mechanism by which stakeholders can make comments or raise grievances.<sup>168</sup>

Requirements set out in PR 10 relevant to the compliance analysis include:<sup>169</sup>

#### **General requirements:**

- Clients will conduct stakeholder engagement on the basis of providing local communities that are directly affected by the project and other relevant stakeholders with access to

<sup>165</sup> Client's Response, p. 51.

<sup>166</sup> Client's Response, p. 51.

<sup>167</sup> 2014 ESP, PR 10, para. 2.

<sup>168</sup> 2014 ESP, PR 10, para. 2.

<sup>169</sup> While the text below is not presented as a quote, it closely follows the 2014 ESP in an attempt to summarise the key issues.

timely, relevant and accessible information, in a culturally appropriate manner, and free of manipulation, interference, coercion and intimidation.<sup>170</sup>

- The nature and frequency of stakeholder engagement will be proportionate to the nature and scale of the project and its potential adverse impacts on the affected communities, the sensitivity of the environment and the level of public interest.<sup>171</sup>
- The Client will define clear roles, responsibilities and authority as well as designate specific personnel to be responsible for the implementation and monitoring of stakeholder engagement activities.<sup>172</sup>

#### During Project preparation:

- **Stakeholder Identification:** the Client will identify and document the various individuals or groups who (i) are affected or likely to be affected (directly or indirectly) by the project (the affected parties); (ii) may have an interest in the project (other interested parties); and (iii) may be differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status.<sup>173</sup>
- **Stakeholder Engagement Plan:** the Client will develop and implement an SEP appropriate to the nature and scale of the risks, impacts and development stage of the project.<sup>174</sup> The SEP should document how consultation will be carried out with different groups in the community, identifying what measures will be implemented to remove barriers from participation.<sup>175</sup>
- **Information Disclosure:** the Client will provide stakeholders with access – in the local languages and in a manner that is accessible and culturally appropriate – to information that helps stakeholders understand the risks, impacts and opportunities of the project, including the purpose, nature and scale of the project; the risks to and potential impacts on stakeholders and the proposed mitigation plans; the envisaged stakeholder engagement process; the time and venue of envisaged public consultation meetings; and the process to deal with grievances.<sup>176</sup>
- **Meaningful Consultation:** meaningful consultation is defined as a two-way process whereby the Client provides stakeholders with opportunities to express their views on project risks, impacts and mitigation measures, and allows the Client to respond and to consider them. The Client will inform those who have participated in the public consultation process in a timely manner of the final decisions regarding the project, the associated environmental and social mitigation measures and any benefits of the project for the local communities, along with the reasons and considerations on which the decision(s) have been based. Meaningful consultation will be carried out in a manner that is inclusive and culturally appropriate, and on an ongoing basis, as the nature of the issues, impacts and opportunities evolves. The Client will ensure that the consultation will be free of external manipulation, interference, coercion or intimidation.<sup>177</sup>
- **Formalised Participatory Environmental And Social Impact Assessment Process:** for Category A projects, PR 10 requires the Client to carry out a formalised, participatory environmental and social impact assessment process,<sup>178</sup> where disclosure and consultation are built into each stage of the assessment process, and where stakeholder

<sup>170</sup> 2014 ESP, PR 10, para. 5.

<sup>171</sup> 2014 ESP, PR 10, para. 7.

<sup>172</sup> 2014 ESP, PR 10, para. 8.

<sup>173</sup> 2014 ESP, PR 10, paras. 9-10.

<sup>174</sup> 2014 ESP, PR 10, para. 11.

<sup>175</sup> 2014 ESP, PR 10, para. 12.

<sup>176</sup> 2014 ESP, PR 10, para. 16.

<sup>177</sup> 2014 ESP, PR 10, paras. 18, 19, 20.

<sup>178</sup> 2014 ESP, PR 10, para. 21.

feedback is subsequently incorporated into the Client's decision-making processes (where matters affect stakeholders directly). This includes the consideration of stakeholder feedback in the development of mitigation measures, the equitable sharing of project benefits and in relation to implementation issues.<sup>179</sup>

#### During Project implementation and external reporting:

- **Ongoing Information Disclosure:** the Client will need to inform identified stakeholders, on an ongoing basis, appropriate to the nature of the project and its adverse environmental and social impacts and issues, and the level of public interest throughout the life of the project.<sup>180</sup>
- **Establishment of Project-level Grievance Mechanism:** the Client will need to establish an effective grievance mechanism, process or procedure to receive and facilitate resolution of stakeholders' concerns and grievances, in particular, regarding the Client's environmental and social performance. The mechanism should be scaled to the risks and potential adverse impacts of the project.<sup>181</sup>

#### 4.5.3. Compliance Assessment

The following section assesses the EBRD's compliance with the PR 10 requirements identified in sections 4.2.2 and 4.5.2 above. The Compliance Review has already identified EBRD non-compliance with specific aspects of stakeholder engagement under PR 1 on gender-related stakeholder engagement (section 4.2.2) and PR 8 on the assessment of intangible cultural heritage (section 4.4.2), and therefore, those aspects of stakeholder engagement will not be considered again here.

The ToR included the following questions to assess the EBRD's compliance with PR 10:

- Did the EBRD satisfy its obligation to ensure that the Client properly identified affected stakeholders and adequately engaged with them as an integral part of the Client's overall environmental and social management system, the Project's environmental and social assessment process and the ESMP, as outlined in PRs 1 and 10?
- Did Bank Management satisfy itself that the environmental and social assessment included a public disclosure and meaningful consultation process with affected communities required for Category A projects under PR 1 and PR 10?

The PR 10 compliance analysis considers i) the Project's gap analysis and environmental and social due diligence; ii) the Lenders' requests to the Client to strengthen the stakeholder engagement approach; and iii) the implementation of Lenders' requests.

The gap analysis identified the need for material adjustments to be made to the Project's stakeholder engagement programme in order to align it with the 2014 ESP requirements (i.e., to ensure meaningful consultation, sufficient information disclosure and the development of an SEP, and the development of an operational grievance mechanism). **EBRD and other Lenders consistently raised the concerns regarding the Project stakeholder engagement approach during the preparation of the Supplementary E&S Studies.** Bank Management strongly and constructively emphasised the importance of stakeholder engagement and the requirements of the 2014 ESP to the Client.

<sup>179</sup> 2014 ESP, PR 10, para. 21.

<sup>180</sup> 2014 ESP, PR 10, para. 26.

The Lenders asked that the Client adopt comprehensive measures to align the Project with the 2014 ESP. As documented in the Supplementary E&S Studies and explained during the Compliance Review field visit,<sup>182</sup> the Client implemented the requirements by:

- **establishing an Environmental and Social Team**, headed by an Environmental and Social Team Leader and reporting to an executive committee comprised of JSCNH's senior management. The Team includes a Community division (comprised of 8 members, including both social and LALRP functions) and a Health, Safety and Environment division (comprised of six members). Both divisions are supported by consultants.
- **strengthening the SEP**, presenting a revised SEP in Volume 7 of the Supplementary E&S Studies to comply with the Lenders' requirements. The revised SEP:<sup>183</sup>
  - identifies key Project stakeholders, including vulnerable groups;
  - describes (i) stakeholder engagement activities undertaken up to year end 2016; (ii) the consultation activities undertaken for the public disclosure of the Supplementary E&S Studies (March - September 2017); and (iii) the stakeholder consultation program planned for construction and operation;
  - details the consultation activities undertaken up to the disclosure of the Supplementary E&S Studies, identifying activity dates, locations, stakeholders groups engaged, number of participants, the purpose of each meeting, stakeholder feedback, and responses provided to address their concerns;
  - provides additional information on targeted, subject-specific consultation activities (e.g., on land acquisition);
  - explains the Project's grievance mechanism;
  - describes the monitoring and reporting procedures for SEP implementation; and
  - details the resources allocated and management functions responsible for stakeholder engagement.
- **operationalising the grievance mechanism**, through the establishment of a Grievance Redress Mechanism that includes three successive tiers of non-judicial review: (i) an internal review by the Client; (ii) a review by a valley-level Grievance Resolution Committee (comprised of representatives of local government, the Client and affected communities); and (iii) a review involving the participation of the central government's Ministry of Economy and Sustainable Development.<sup>184</sup> Information about the Grievance Redress Mechanism was made available to Project-affected communities during engagement activities, on the Client's website and in the Project Newsletter, which is delivered door to door in the affected area.<sup>185</sup>
- **improving information disclosure**, the Client:
  - **disclosed the Supplementary E&S Studies in full**, the draft version from March to September 2017 and the final version in November 2017. The ten volumes are available in Georgian and English on the Project website, and in information centres established in the Mestia Municipality Office and the Client's office in Tbilisi. <sup>186</sup>
  - **distributed additional consultation materials**, including materials on dam safety and natural hazards, environmental and social issues. These videos, brochures and

<sup>182</sup> The mission team included an EBRD PCM staff member and Compliance Review Expert as well as the two representatives of the EIB CM.

<sup>183</sup> Supplementary E&S Studies, Vol. 7, SEP, p. 4.

<sup>184</sup> A Memorandum of Cooperation was signed in January 2019 with the Georgian Ministry of Economy and Sustainable Development for the operationalisation of the GRM. Supplementary E&S Studies, Vol. 7, SEP, p. 39-44.

<sup>185</sup> Newsletter No. 2 and Volume 7.

<sup>186</sup> Public Report on Consultation available at Supplementary E&S Studies, Vol. 7, SEP, p. 26.



PowerPoint presentations were available at community engagement activities, at the Project's Public Information Centre in Chuberi, at the Client's office in Tbilisi, and online. These materials were prepared in Georgian and English.

- **committed to disclose semi-annual public Project reports**, during the construction phase and the first three years of operation, available at the Project's information centre in Chuberi; in Chuberi and Naki town halls, in the Mestia Municipality town hall, and on the Project's website. The first three semi-annual reports are already available on the Project's website.<sup>187</sup>
- **provided Project information on social media** (Facebook and LinkedIn), and through periodic newsletters distributed door to door in the Project area and online. Community Liaison Officers were appointed in both valleys, providing an additional channel for information sharing and communication.

The SEP and the Public Report on Consultation describe a process of engagement that seeks to obtain feedback from Project-affected people. The SEP and Public Report on Consultation also document the way stakeholder feedback has been considered. While the procedures were put in place to allow for a "two-way process" as required by PR 10, the Compliance Review identifies concerns with the effectiveness of the stakeholder engagement program.

#### 4.5.4. Compliance Review Findings

The Compliance Review finds Bank Management to be compliant with paras. 4, 5, 6 and 36 of the 2014 ESP with respect to the application of PR 10, but finds Bank Management to be non-compliant with para. 30 of the 2014 ESP.

It is clear that significant progress was made in strengthening the Project's stakeholder engagement. This progress was derived from consistent efforts by EBRD Bank Management, as well as other Lenders. This demonstrates the extent of the Bank's ability to "seek to ensure" that its Clients meet the 2014 ESP PRs. Bank Management did make commensurate efforts to seek to ensure that the Client met its obligations under PR 10, and these efforts are commendable; Bank Management should be recognised for its efforts to ensure compliance with PR 10.

Despite these efforts, the Compliance Review finds that there are important issues relating to the capacity and commitment of the Client to execute stakeholder engagement that Bank Management did not address, as it is required to do under para. 30 of the 2014 ESP.<sup>188</sup> During the field visit, the Compliance Review Expert interacted with most members of the Project Environmental and Social team. The discussions with the team and observance of their approach to stakeholder engagement raised fundamental questions as to whether the team had the appropriate level of experience and whether their work was carried out with the appropriate level of rigor in relation to the most sensitive challenges presented by the Project. While Bank Management required that the organisational structure and governance was in place, Bank Management did not identify further concerns with the capacity and commitment of the Environmental and Social team to manage the complexities and sensitivities of this Project in a manner consistent with the para. 30 requirements, which should have been evident through the Bank's regular Project monitoring activities.

<sup>187</sup> Project Website, available at: <http://nenskra.ge/en/reports/>

<sup>188</sup> Para. 30 of the 2014 ESP states that "[t]he EBRD's environmental and social appraisal includes consideration of three key elements . . . (ii) the capacity and commitment of the Client to implement the project in accordance with the relevant PRs . . ."

## 5. Recommendations

The Compliance Review Report has identified that Bank Management is non-compliant with paras. 4, 5, 6, 30 and 36 of the 2014 ESP in relation to:

- PR 7 - Indigenous Peoples;
- PR 1 - Assessment and Management of Environmental and Social Impacts and Issues (with respect to cumulative impacts, project alternatives and gender);
- PR 5 - Land Acquisition, Involuntary Resettlement and Economic Displacement;
- PR 8 - Cultural Heritage; and
- PR 10 - Information Disclosure and Stakeholder Engagement.

Where non-compliance has been identified, para. 44 of the 2014 PCM RPs requires that the Compliance Review Report provide recommendations to:

- i. address the findings of non-compliance at the level of EBRD systems or procedures... to avoid a recurrence of such or similar occurrences; [and]
- ii. address the findings of non-compliance in the scope or implementation of the Project.

Following careful consideration, the PCM Expert makes the following systemic and Project-specific recommendations to Bank Management to resolve the different instances of non-compliance identified in this case:

### 5.1. Systemic and Procedural Recommendations to Address EBRD Non-compliance

**Recommendation 1: Establish a systemic tracking tool for EBRD requests to Clients, allowing Bank Management to better ensure that Project-specific requests in relation to ESP adherence are effectively implemented.**

*Purpose: to address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to all relevant PRs.*

In several instances addressed in this Compliance Review, Bank Management *did* recognise early occurrences where the Project did not meet the 2014 ESP PRs, and made clear recommendations to resolve these issues. However, the process Bank Management followed to ensure that their requests and recommendations were subsequently implemented is not clear. It is not evident how Bank Management ultimately concluded that specific Project approaches and measures were compliant, when their earlier recommendations - intended to assist the Client in meeting the various 2014 ESP PRs - had not been fulfilled. Ultimately, in most cases, by the finalisation of the environmental and social due diligence, the PR requirements remained unfulfilled.

Moving forward, in order to ensure the Bank's compliance with the commitments under paras. 4, 5, 6 and 36 of the 2014 ESP, Bank Management should:

- i. formally and systemically document its requests to Clients seeking to ensure compliance with relevant aspects of each PR; and
- ii. identify a tiered strategy of escalation through which to ensure ESD's recommendations are fulfilled, including, but not limited to, formal requests to the Client; and direct interventions of Bank Management — which in the case of PR 10, proved to be effective in assuring that Bank Management sought to ensure compliance as appropriate.

Where in Bank Management's view, 2014 ESP adherence cannot be resolved sufficiently to meet PR requirements, Bank Management should document the rationale and seek EBRD Board

approval to waive the requirement as a derogation, rather than allow a gap in PR adherence to remain. Derogations should be requested as exceptional measures and in no way should these undermine the integrity of the broader application of the ESP.

**Recommendation 2:** Develop clear, step-by-step policy Guidance to direct Clients in the effective assessment of the ESP PR 7 Indigenous Peoples eligibility criteria (for the 2014 ESP as well as other ESP iterations). The Guidance should be developed through a participatory process – involving multiple recognised Indigenous Peoples Experts, and CSO and industry representatives – and should be informed by GIP employed by both IFIs and the private sector. This Guidance should include (i) specific recommendations from GIP methodologies that ensure PR 7 eligibility criteria are robustly assessed; and (ii) specific processes and measures to guide Clients in the application of PR 7 in instances where indigeneity is not recognised at the national level.

*Purpose: to address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 7.*

This PCM case has illustrated two major challenges when assessing the applicability of PR 7 eligibility criteria:

- the 2014 ESP lacks clear guidance for Clients on the process necessary to ensure the appropriate assessment of PR 7 eligibility criteria; and
- in contexts where the identification of Indigenous Peoples is contested, and indigeneity is politicised, the assessment of the PR 7 eligibility criteria can easily exacerbate existing tensions and create vulnerabilities for communities involved, generating reputational risks for Bank Management in Indigenous Peoples' identification.

These two issues must be urgently addressed in the 2019 ESP Guidance, and provided to all Clients where a Project may raise questions regarding indigeneity, regardless of which version of the ESP the Project is subject to.

In particular, the Guidance needs to:

- i. **outline specific GIP methodologies that Clients are expected to use in order to ensure that the PR 7 eligibility criteria are robustly assessed. In all EBRD projects where issues of indigeneity could be relevant, Bank Management should expect Clients to adhere to IFI GIP (outlined in Section 4.1.3), demonstrating they have:**
  - sought to gather the best possible information in assessing whether a group qualifies for consideration as an Indigenous People, from multiple experts with a range of relevant expertise; and
  - consulted the pertinent groups themselves around the applicability of the various PR 7 criteria.

As per GIP established by the IFC, ADB, WBIP and EIB, Bank Management should expect Clients to demonstrate the adoption of a multi-faceted approach, which involves:

- consultation with diverse, qualified Indigenous Peoples experts, anthropologists and ethnologists;
- consultation with Indigenous Peoples representative organisations (e.g., regional, national or multilateral-level bodies);
- extensive research of relevant academic resources and materials, which does not neglect to identify and assess any contrasting views;

- a review of existing legal precedence and other IFI or international organisation assessments, as applicable; and
  - ethnographic and other relevant field research.
- ii. **outline specific processes and measures to guide Clients in applying PR 7 in instances where indigeneity is not recognised at the national level, in a manner that fulfils the Bank's 2014 ESP (or the relevant ESP) commitments and assists Clients in mitigating potential risks associated with such inquiries.**

The development of the Bank's Guidance on PR 7, and specifically, the guidance on issues i) and ii) identified above needs to be:

- participatory, including input from recognised and experienced Indigenous Peoples experts and social scientists; relevant civil society representatives and industry stakeholders; and
- Informed by GIP from the IFI sector (e.g. the established guidance of the IFC, ADB and WBIP) and state-of-the-art industry practice (e.g., from the mining sector).

**Recommendation 3:** Where third parties are responsible for Project siting, design and alternatives assessment, **consistently require Clients to approach relevant third parties to request that these decision-making processes include environmental and social considerations. Bank Management should document these Bank and Client requests.**

*Purpose: to address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to with respect to PR 1 (project alternatives).*

Looking forward to lessons learned, it must be recognised that it is likely that the EBRD will continue to be approached for investment in projects a) at a suboptimal stage of Project development, after the key window for alternatives analysis has passed; and b) where other strategic considerations have guided past decisions around Project design and siting, environmental and social impacts notwithstanding. Given these realities, it is strongly recommended that the Bank:

- i. make a formal request for Clients to engage with third parties who control Project design, location and alternatives decisions, in all instances where this applies, and **document** said requests in writing; and
- ii. where PR 1 para. 10 is not and cannot be fulfilled by the Client, highlight this in the Project approval documents and consider whether a derogation is required. Derogations should be requested as exceptional measures only, and in no way should these undermine the integrity of the broader application of the relevant ESP.

**Recommendation 4:** Strengthen capacity of the EBRD ESD team on gender issues, and ensure the use of external consultants with strong experience and capabilities in this area.

*Purpose: to address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (gender).*

Project-related gender issues go well beyond the identification of women-led household vulnerabilities or the effort to establish equal participation of women in consultation meetings. Gender issues require a clear understanding of gender structures and societal dynamics that result in vulnerabilities, in order to appropriately assess and mitigate those risks. This is especially important on projects where large construction workforces are being introduced relative to the local population, as there is a well-established body of work that documents adverse gender impacts to

health and safety. It also requires the creation of accessible, conducive consultation spaces that enable women to identify and communicate potential impacts and contribute to the development of culturally appropriate mitigation measures.

The EBRD ESD team should receive additional training from environmental and social impact assessment gender specialists to promote the robust application of gender-related commitments and ensure robust consultation of Project-affected women, which facilitates their protection and participation in EBRD projects.

## 5.2. Project-specific Recommendations to Address EBRD Non-compliance

While Bank Management actions at the procedural or systemic level are essential to avoid similar issues of non-compliance on other existing or future EBRD projects, it is critical that issues of non-compliance be resolved in relation to the EBRD Project for which concerns have been raised. Bank Management should therefore implement the recommendations below on the Nenskra Project pre-construction:

**Recommendation 5:** Take steps to ensure that an expanded assessment of the PR 7 eligibility criteria is conducted for the Nenskra Project, which incorporates all IFI GIP methodologies outlined in the Compliance Review Report, including a) a diversity of views and expertise and b) community consultation regarding each ESP PR 7 eligibility criterion.

*Purpose: to address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 7 (Indigenous Peoples).*

The methodologies employed to determine the applicability of PR 7 should fulfil all elements of GIP. In particular, it is necessary that the expanded assessment:

- i. provides for meaningful consultation of Project-affected communities that is respectful of their relevant traditions and customary laws and involves their legitimate representative bodies (for example, the council of elders or village councils). It is strongly recommended, in view of the Compliance Review findings, that a third party specialising in anthropological stakeholder consultation design such activities to ensure that they are conducted in line with the EBRD's expectations for meaningful, free consultation; and
- ii. ensures that the best possible information is sought, which includes a diversity of views and expertise on the applicability of the eligibility criteria. This should include:
  - consultation with diverse, qualified Indigenous Peoples experts, anthropologists and ethnologists;
  - the involvement of Indigenous Peoples representative organisations (e.g., regional, national or multilateral-level bodies);
  - extensive research of relevant academic resources and materials, which identifies and assesses contrasting and differing views (e.g., such as those identified through the ADB accountability process); and
  - ethnographic / other relevant field research.

The additional research, analysis and consultation conducted by anthropological, Indigenous Peoples and ethnological experts should include, among others:

- i. the identification of traditions and customary laws relevant for the consultation; and the identification of legitimate representative bodies for the Svan community. Consideration should be given in this analysis to the institution known as *Lalkhore*, which during the

Compliance Review field visit, was consistently identified by different stakeholder groups as the traditional local council with the capacity to represent the Svan community and act as a communal decision-making and dispute resolution body; and

- ii. clarification of the meaning and scope of the term “Indigenous Peoples,” when translated into Georgian, Svan and Russian, to help dissipate the confusion among Project-affected people as to the designation of “Indigenous Peoples” under the ESP.

In addition, given the sensitivities that the question of the Svan’s status raises with respect to national identity, the expanded assessment process needs enhanced due diligence on the part of the Client and the Bank. It is paramount that both the Client and Bank Management ensure that the expanded assessment process does not exacerbate existing tensions affecting Project-affected people or others involved with the process. This enhanced due diligence requires at a minimum that:

- i. Bank Management offers capacity-building support to the Client’s environmental and social team, to foster the necessary competencies and abilities to manage the complexities and sensitivities of the Project in a manner consistent with the Bank’s environmental and social standards (see also recommendation No. 11);
- ii. Bank social staff attend consultation activities with Project-affected people to ensure that they are conducted in line with the EBRD’s expectations for meaningful, free consultation;
- iii. additional measures are put in place to ensure the integrity of the PR 7 expanded assessment process, involving Project-affected people and local and international experts. The Voluntary Principles on Security and Human Rights<sup>189</sup> should be considered a reference to guide in the development of such measures; and
- iv. Bank Management closely monitors the conduct of any field research by local and international experts.

#### **Recommendation 6: Address the identified gaps in the Cumulative Impact Assessment.**

*Purpose: address EBRD’s non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (CIA).*

In order to comply with the requirements of PR 1 para. 9, further due diligence is required to confirm whether:

- there are any planned or reasonably foreseeable mining or forestry activities overlapping the Project area. Should any new projects be identified which overlap the Project area, a robust assessment of the potential cumulative impacts should be undertaken, identifying relevant mitigation measures; and
- any consequent modifications to the CIA must be disclosed to Project-affected people through additional consultation events in-community.

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<sup>189</sup> The Voluntary Principles on Security and Human Rights are a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. While developed initially to guide companies in the extractive sector, the Voluntary Principles have become reference for GIP for companies in all sectors.



**Recommendation 7: Address the identified gaps in the analysis of the Project Alternatives.**

*Purpose: to address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (project alternatives).*

In accordance with para. 39 of the 2014 ESP, Bank Management should have required the Client to collaborate with the Government of Georgia to provide an analysis of the Project alternatives with due consideration to environmental and social impacts as required by PR 1 para. 10. In particular, the analysis of alternatives should have:

- been informed by both the potential environmental and social impacts and constraints, when assessing the dam location, type and height, as well as energy production alternatives;
- demonstrated the value of the selected Project site and design from a social perspective; and
- justified the projected benefits and financial costs.

However, given the status of the Project (i.e., immediately pre-construction), it is unfortunately impractical to suggest that a comprehensive alternatives assessment would be able to be undertaken at this juncture and result in a legitimate reconsideration of another Project design.

Nevertheless, it is recommended that Bank Management collaborate with the Client and the Government of Georgia to develop and disclose more detailed analysis of the Project site selection and design to Project-affected communities in a robust and meaningful way, detailing:

- the rationale and value of the Project site selection and design from both social and environmental perspectives over other options considered; and
- a justification of the projected financial benefits and costs.

This is a key issue of Project opposition, and would be valuable to all stakeholders to address this prior to the initiation of construction.

**Recommendation 8: Facilitate an additional layer of gender impact assessment to evaluate issues not comprehensively addressed through the Client's environmental and social impact assessment and to ensure the establishment of sufficient mitigation measures.**

*Purpose: address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 1 (gender).*

To comply with the requirements of paras. 10 and 12 of PR 10, Bank Management should collaborate with the Client to seek to ensure that:

- meaningful engagement of Project-affected women is achieved on gender-specific issues. Specific, female-led and female-only consultation activities geared towards ensuring a safe space for women to identify and share gender concerns should be undertaken to ensure gender-related vulnerabilities are comprehensively identified (beyond the condition of women as head of households, employment opportunities or property ownership). These consultations should work to ensure that potential gender-specific socio-economic impacts are more comprehensively assessed and that necessary mitigation measures are adopted, in accordance with GIP;
- existing mitigation measures (including those related to the influx of workers, community health, etc.) should be explicit in the way gender dynamics have been considered, and clearly require the integration of a gender-based approach during implementation (by the Client or the EPC contractor as the case may be). In particular, the following measures

should be strengthened and clarified to ensure the integration of a gender approach: (i) police and local health staff capacity to adequately manage and respond to situations of sexual harassment or sexual violence should be assessed, followed by training as required; and (ii) culturally-appropriate and effective procedures should be developed to respond to gender-related issues. The Project's grievance mechanism should also be equipped to appropriately handle gender-related complains – ensuring the safety and integrity of affected women – and when necessary, providing guidance and support to approach local authorities; and

- risks related to the potential introduction of trafficking and forced prostitution should be assessed and if necessary, appropriate measures should be adopted to mitigate such risks.

**Recommendation 9: Engage with the Client to address gaps in the LALRP.**

*Purpose: address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 5 (LALRP).*

Bank Management should collaborate with the Client to seek to ensure that the LALRP is revised to bring the Project into compliance with PR 5. Specifically, Bank Management should seek to ensure that the LALRP:

- eliminates the arbitrary threshold for livelihood restoration eligibility;
- develops adequate livelihood restoration measures and compensation for those who will lose less than 10% of their productive assets due to economic displacement;
- appropriately consults with seasonal land users / absentee owners in accordance with PR 5, para. 15 and identifies and mitigates relevant Project impacts to them; and
- enhances monitoring of LALRP implementation to ensure effectiveness. Monitoring should track impacts on social cohesion to ensure that the livelihood restoration measures are being implemented successfully, as an unsuccessful LALRP is likely to generate more personal hardship for Project-affected people and ultimately instigate opposition to this and other hydropower projects in the region.

**Recommendation 10: facilitate a further layer of cultural heritage impact assessment, in order to identify potential impacts to the intangible cultural heritage in the Project area not fully reflected in the Client's environmental and social impact assessment, and establish appropriate mitigation measures, in consultation with Project-affected people.**

*Purpose: to address EBRD's non-compliance with commitments under paras. 4, 5, 6 and 36 of the 2014 ESP with respect to PR 8 (cultural heritage).*

In order to comply with the requirements of PR 8, in particular paras. 2, 6, 8, 10 and 15, Bank Management should collaborate with the Client to seek to ensure that potential impacts on intangible elements of the Svan culture (including the Svan language and pasturing practices) are appropriately identified, and that appropriate mitigation measures are developed in consultation with Project-affected communities, including through a specialised plan or instrument to ensure implementation.

**Recommendation 11: Ensure that in accordance with para. 30 of the 2014 ESP, all members of the Client's environmental and social team possess the necessary competencies and abilities to manage the complexities and sensitivities of the Project in a manner consistent with the Bank's environmental and social standards.**

*Purpose: to address EBRD's non-compliance with commitments under para. 30 of the 2014 ESP with respect to PR 10 (stakeholder engagement).*

Given the importance that Bank Management attaches to stakeholder engagement under the 2014 ESP, and given the significance this issue has for the viability of a Project, it remains critical for Bank Management to maintain its robust stance on constructive stakeholder engagement with the Client. **It would be recommended that Bank Management give particular attention to the following issues in its ongoing monitoring of the Project:**

- **social fracture in Project-affected communities:** the Project is operating in a very fragile context, where extreme care and diligence is required to manage ongoing relationships with and among Project-affected communities. Enhanced Bank support to the Project with respect to appropriate Project messaging, stakeholder engagement activities and community interventions would help ensure that the Project does not exacerbate the fragilities of this context or contribute to further social conflict; and
- **continued information sharing with Project stakeholders:** important studies, such as those on climate change are still to be produced. It is important that Bank Management ensure that ongoing technical, environmental and social information and studies be meaningfully shared with affected communities, and that Project-affected stakeholders have an opportunity to participate in the identification of potential impacts and mitigation measures, as per the SEP commitments.

Finally, the COVID-19 pandemic began during the finalisation of this Compliance Review Report. Consequently, all recommendations relating to stakeholder engagement and consultation should consider and integrate measures to reflect the new reality imposed by the pandemic, and should be conducted with due regard to necessary health and safety requirements to ensure the health and well-being of all participants.