

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

PROJECT COMPLAINT MECHANISM

ELIGIBILITY ASSESSMENT REPORT

**COMPLAINT: ENERGY RESOURCES PHASE II & OYU TOLGOI
REQUEST NUMBER: 2013/01**

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EXECUTIVE SUMMARY

On 2 July 2013, fourteen Mongolian herders and two Mongolian civil society organizations (OT Watch and Shuteen Gaviluut) submitted a Complaint to EBRD's Project Complaint Mechanism (PCM), seeking a Problem-solving Initiative and a Compliance Review¹ concerning EBRD loans to two separate Projects: the Ukhaa Khudag/Energy Resources Phase II Project operated by Energy Resources LLC, and the Oyu Tolgoi Mine Project operated by Oyu Tolgoi LLC. On 5 August 2013, PCM received related Complaints from five herders residing in Manlai soum, and on 9 August 2013, four additional herders from Javkhlant *bagh* submitted similar Complaints. On 1 April 2014, OT Watch submitted a letter to the PCM that supplements the previous Complaints. As requested by the Complainants, these submissions comprise the Complaint and will be assessed collectively, according to the 2009 PCM Rules of Procedure (RP).

The Energy Resources Phase II Project involves the expansion of coal-mining operations, including the open-pit mine and additional infrastructure development around the mine site, as well as the development of a coking coal-handling and preparation plant, among other features². Originally, the Project also included funding for feasibility studies for the construction of a rail link to and from the mine to the Chinese border. Due to political developments, all new rail construction has been centralized under a newly created state-owned company. The Oyu Tolgoi Mine Project involves the development, construction and operation of an open pit and underground mine and ore processing facility at the Oyu Tolgoi copper, gold, silver and molybdenum deposit³. Both Projects are located in the southern Gobi region of Mongolia.

¹ The initial Complaint did not specifically request a Compliance Review; however, in face-to-face meetings with PCM, Complainants explicitly asked for a Problem-solving Initiative and a Compliance Review, providing further details about issues and outcomes associated with each procedure. On 1 April 2014, OT Watch submitted a letter, supplementing earlier Complaint documents, that offered additional details related to Complainants' request for a Compliance Review. This letter, the initial Complaint submitted by nomadic herders of Javhlant *bagh* and two Mongolian NGOs, Complaints from herders in Manlai *soum*, and four Complaints from individual herders, along with supporting material (e.g., Complaint cover letter, assorted correspondence, Oyu-Tolgoi-Gashuun Sukhait Copper Concentrate Road Construction Work Observation Report, Manlai-OT road photos, Responses to PCM Questions regarding Oyu Tolgoi and Energy Resources Projects) in addition to documents referenced by Complainants, and information drawn from the interviews, inform the Complainants' position, issues for Problem-solving Initiative and the scope for the Compliance Reviews.

² Draft Non Technical Summary (NTS): UHG Phase II at 1.

³ Project Summary Document – Oyu Tolgoi Mine Project.

Complainants argue that the network of roads, planned railroad and associated infrastructure form part of the Projects' area of influence and are therefore subject to a vigorous appraisal of related social and environmental impacts, as well as robust due diligence and ongoing supervision by the Bank, in accordance with Bank policy. They allege, however, that EBRD failed to adequately evaluate the full set of impacts associated with this transportation network and related infrastructure on local herders' livelihood and health; develop salient prevention and mitigation measures; or engage in sufficient due diligence and ongoing supervision regarding impacts of, and mitigation for, these roads, railway and infrastructure, thereby breaching EBRD policy⁴. The impacts, they contend, include loss, fragmentation, and contamination of pastures; loss of access to water resources and deteriorating water quality; loss of natural living resources; and the proliferation of dust and noise from the network of paved and unpaved roads. As a result of these impacts, Complainants claim degradation of their health and the well-being of the animals they depend upon for their livelihood and traditional lifestyle. Further, they allege insufficient mitigation and compensation measures commensurate with the risks and impacts from these EBRD-funded projects.

In addition, Complainants assert that the local population was not provided with a full understanding of impacts and associated mitigation measures, according to Bank requirements related to information disclosure and meaningful stakeholder consultation⁵. Finally, the Complaint contends that EBRD failed to adequately consider impacts and violations of EBRD policy that occurred prior to the Bank's involvement, in deciding whether to provide financing for both Projects.⁶

The PCM Eligibility Assessment is based upon the following documentation: the original Complaint documents submitted in 2013; more recent material submitted in 2014, including information specific to Complainants' request for a Compliance Review; Management's original response; an updated response prepared by Management based on more recent Complainant submissions; Oyu Tolgoi's original and revised responses; and Energy Resources original and revised responses. All noted Complaint documents and responses from Management and the Clients are annexed to the report.

This Eligibility Assessment Report covers various issues associated with a Compliance Review for two distinct Projects funded by EBRD. Further, the issues raised in the Complaint are complex and reference almost all the Performance Requirements. These

⁴ Supplemental Complaint letter from OT Watch prepared with support from Accountability Counsel, dated 1 April 2014 (hereinafter "Supplemental Complaint letter") at 1-2; Complaint documents; interviews with Complainants.

⁵ Complaint by 23 herders from Khanbogd and Manlai *soums*, and two civil society organizations – OT Watch and Shuteen Gaviluut.

⁶ Supplemental Complaint letter at 2.

factors, among others, account for the extensive length of the report and the noted repetition, as the EAR is, in many respects, the functional equivalent of two separate assessment reports.

Regarding the Energy Resources Phase II Project, the PCM Eligibility Assessors find the Complaint does not satisfy the PCM criteria for a Problem-solving Initiative because the Complaint was filed more than 12 months after disbursement of the loan to the Client, contrary to the permissible time frame stipulated in the Project Complaint Mechanism (PCM) Rules of Procedure (RP); however, PCM finds that the Complaint does satisfy the criteria for a Compliance Review of the Project, as set out under the Project Complaint Mechanism.

Concerning the Oyu Tolgoi Project, the PCM Eligibility Assessors find the Complaint does satisfy the PCM criteria for a Compliance Review, as set out under the Project Complaint Mechanism.

In accordance with the criteria for eligibility, the Complaint alleges shortcomings in the process of assessing and mitigating environmental and social risks and in project supervision of both Projects, and describes potential harms as a result of these alleged violations.

Consistent with PCM Rules of Procedure, Terms of Reference (TORs) for two separate Compliance Reviews have been prepared. The two TORs have been included in Section III of the Report. The focus of a Compliance Review is whether or not EBRD complied with its own policy provisions. The PCM does not audit EBRD's clients; consequently, the PCM will not pose judgment on the performance of Energy Resources LLC or Oyu Tolgoi LLC.

INTRODUCTION

1) On 2 July 2013, fourteen Mongolian herders from Javkhlant *bagh* submitted a Complaint dated 1 July 2013, to the European Bank for Reconstruction and Development (EBRD) Project Complaint Mechanism (PCM), with regard to EBRD's loans to help finance the Ukhaa Khudag (UHG) coal mine, operated by Energy Resources LLC (ER), and the nearby Oyu Tolgoi copper, gold and silver mine, operated by Oyu Tolgoi LLC (OT). Both mines are located in Mongolia. Two Mongolian civil society organizations (CSOs), OT Watch and Shuteen Gaviluut, joined as Co-Complainants. On 6 September 2013 via electronic mail, PCM received related Complaints (dated 5 August 2013) from five herders residing in Manlai *soum*, and four individual herders from Javkhlant *bagh* (one dated 28 July 2013 and three dated 9 August 2013). On 1 April 2014, OT Watch submitted a letter to the PCM that supplements the previous complaints and provides additional information related to the request for a Compliance Review. As requested by the Complainants, these submissions will be assessed collectively, according to the 2009 PCM Rules of Procedure (RP).

The Complaint alleges risks and impacts from both projects on herders' livelihood and health, livestock, and natural ecosystems, due to the ongoing proliferation of dust, traffic and project infrastructure – including the extensive network of paved and unpaved roads (export roads and routes resulting from construction of mine-supporting infrastructure), railway, transmission lines, airports, pipelines, and quarries. Complainants are requesting a Problem-solving Initiative (PSI) and a Compliance Review (CR)⁷ for each Project. The request for PSI in relation to the Oyu Tolgoi part of the Complaint is addressed in a separate Eligibility Assessment Report.

2) Underlying the Complaint are concerns related to EBRD's due diligence pursuant to its 2008 Environmental and Social Policy (ESP). Complainants allege the project appraisal process failed to adequately evaluate the full set of project impacts on local herders from transportation and infrastructure, over the life cycle of the project, or to

⁷ The initial Complaint did not specifically request a Compliance Review; however, in face-to-face meetings with PCM, Complainants explicitly asked for a Problem-solving Initiative and a Compliance Review in reference to both Projects and provided further details about issues and outcomes associated with each procedure. On 1 April 2014, OT Watch submitted a letter, supplementing earlier Complaint documents, that provided additional details related to Complainants' request for a Compliance Review. This letter, the initial Complaint submitted by nomadic herders of Javhlant *bagh* in Khanbogd *soum* and two Mongolian NGOs, Complaints from herders in Manlai *soum*, and four Complaints from individual herders, along with supporting material (e.g., Complaint cover letter, assorted correspondence, Oyu-Tolgoi-Gashuun Sukhait Copper Concentrate Road Construction Work Observation Report, Manlai-OT road photos, Responses to PCM Questions regarding Oyu Tolgoi and Energy Resources Projects) in addition to documents referenced by Complainants, and information drawn from the interviews, inform the Complainants' position, issues for problem solving and the scope for the Compliance Reviews.

develop salient mitigation measures in accordance with EBRD policy. Consequently, they claim the local population was not provided with a full understanding of impacts and associated mitigation measures, according to Bank requirements related to information disclosure and meaningful stakeholder engagement. Complainants expressed a desire to know whether EBRD has complied with its own policies and procedures in preparing and assessing the Projects.

3) Complainants are therefore seeking redress in the form of a Compliance Review (in addition to the PSIs) to determine (a) whether the project ESIA correctly assessed the transportation-related impacts on livelihoods, health, safety, ecosystem, environment, culture of herding, etc.; and (b) whether the proposed mitigation measures effectively prevent possible environmental and social damage by the Projects, according to Bank requirements.

4) The Complaint was registered with the PCM Officer pursuant to PCM RP 10. The PCM Officer requested additional information and clarifications from the Complainants, which delayed the registration process of the Complaint. Notification of registration was sent to the Complainants and Relevant Parties pursuant to PCM RP 12, and the Complaint was posted on the PCM website and listed on the on-line PCM Register, in accordance with the PCM RP 13. PCM Expert Susan Wildau was appointed as an Eligibility Assessor to conduct an Eligibility Assessment of the Complaint jointly with the PCM Officer, pursuant to PCM RP 17.

5) Following registration of the Complaint, the PCM Officer notified the Compliance Advisor/Ombudsman Office (CAO)⁸ of the Registration of the Complaint. The CAO is the accountability mechanism for the International Finance Corporation (IFC), which is co-financing the Oyu Tolgoi Project. The PCM Officer confirmed PCM's intention to communicate and cooperate with the CAO in order to avoid duplication of efforts and/or disruption or disturbance to common parties, according to PCM RP 16.

6) The Eligibility Assessment Report is divided into three sections. Part I assesses whether or not the Complaint is eligible for a Compliance Review (CR) with regard to the Oyu Tolgoi Mine Project. Part II examines eligibility for a Compliance Review

⁸ The CAO has received two Complaints (October 2012 and February 2013) from a group of nomadic herders in the Oyu Tolgoi Project's area of influence. These Complaints raise concerns related to the Project's use of land and water; compensation and relocation decisions; impacts linked to the diversion of the Undai River; and the Project's due diligence. The CAO has established a dispute resolution process to address Complainants' issues. http://www.cao-ombudsman.org/cases/case_detail.aspx?id=191.

concerning the Energy Resources Project. Part III presents the relevant Terms of Reference for the two Compliance Reviews.

PART I: OYU TOLGOI

I Factual Background

7) On 26 February 2013, EBRD approved financing of the Oyu Tolgoi copper and gold mine project, providing up to a US\$400 million Category A Project finance loan, together with a Category B loan of up to US \$1 billion, to be syndicated to international commercial banks. The loans are part of a larger financing package that includes an assortment of international financial institutions and commercial banks. Closing of the transaction has not yet occurred and is conditional on OT Board approval. Oyu Tolgoi is a Category A Project, which defines the EBRD requirements under the 2008 ESP and sets the standard by which the appraisal is assessed.⁹

8) The Oyu Tolgoi copper-gold mine is a “greenfield mining” Project located in the South Gobi Region of Mongolia, in the Gobi Desert. It consists of an open pit mine; concentrator; processing plant and associated processing facilities; an underground mine and related infrastructure; temporary and permanent airports and access roads; an export road from the mine site to China and associated quarries; a 220 km, 255 kV overhead power transmission line from Hailutu in Inner Mongolia to the Project site; and worker accommodations outside the Mine License Area (MLA).¹⁰

9) As explained by Oyu Tolgoi LLC (OT), “There is a strong cultural pride in the environment in Mongolia. The southern Gobi region is economically and culturally sustained by the natural environment: this is because the majority of people and income generation is based on a primary relationship with natural resources. Singular amongst these is herding: historically deep and spatially extensive, the Oyu Tolgoi Project is essentially overlaid onto this pre-existing land use.”¹¹

10) OT is a joint venture between Turquoise Hill Resources (66 per cent) and Erdenes Oyu Tolgoi (34 per cent), a company wholly owned by the Government of Mongolia. Rio Tinto (RT) is a major shareholder in Turquoise Hill Resources and since 2010 is formally managing the Project on behalf of all shareholders.

⁹ Oyu Tolgoi Mine (41158) Bank Management Response (“Oyu Tolgoi Management Response”) at 2.

¹⁰ Oyu Tolgoi Mine Environmental and Social Assessment (ESIA) – Section A: Introduction and Background, Chapter A4: Project Description at 4.

¹¹ Oyu Tolgoi LLC Biodiversity Strategy – December 2011 at 14.

11) The stated goals of the Project are to:¹²

- a. Positively impact the economic development of Mongolia and the South Gobi region (e.g., provide a significant increase in the national GDP as well as greater tax revenues, royalties and dividends), while setting high standards of transparency, corporate governance, environmental, health and safety practices;
- b. Serve as an example to other private sector investors in the Mongolian mining sector;
- c. Catalyze the development of supporting infrastructure and utilities in the region and contribute to the development of necessary vocational skills; and
- d. Generate employment and skill transfer.

12) According to the company's Stakeholder Engagement Plan, the Project 'Area of Influence' includes the *direct area of influence* in Khanbogd *soum*, comprised of the Khanbogd *soum* centre, the Mine License Area, the temporary and permanent airports, Gunii Hooloi aquifer area and water supply pipeline, the OT to Gashuun Sukhait road, and the infrastructure/power corridor; and the *indirect area of influence*, defined as Manlai *soum*, Bayan-Ovoo *soum*, and Dalanzadgad *soum* centre.¹³

13) Prior to EBRD's involvement in the Project, OT engaged a range of Mongolian experts and organisations to complete a series of Detailed Environmental Impact Assessments (DEIAs) for the development of the Project, as required by Mongolian law. EBRD subsequently required the company to prepare an integrated ESIA that drew together previous studies, closed gaps to satisfy Bank requirements, and established OT commitments and plans for the construction and operation of the mine.¹⁴ The ESIA is the core environmental and social document that sets out the Project's impacts and is used in securing international financial backing.

14) EBRD's Environmental and Social Department (ESD) has been involved in a social and environmental appraisal of the Project since 2010. ESD has reviewed Project documents and monitored company performance on a regular basis, including conducting more than fifteen site visits, interviewing affected people, governmental

¹² Project Summary Document at 1-2.

¹³ Stakeholder Engagement Plan (SEP) at 12.

¹⁴ Non-Technical Summary at 18-19.

officials, and the Client, and undertaking a detailed review of the ESIA prior to disclosure and consultation.¹⁵

15) The ESIA was disclosed in August 2012.¹⁶ It was posted on the Client's website in Mongolian and English. Also posted on the website are the Non-technical Summary (NTS), Supplemental Information, Operation Management Plans, and independent audit reports.

16) In addition to EBRD, other Project lenders, including IFC, were involved in appraising the Project. As part of their due diligence, the lending institutions appointed Environmental Resources Management (ERM), a global provider of environmental and social consulting services, to serve as the Independent Environmental and Social Consultant (IESC) to undertake a review of the ESIA process and conduct site audits during the construction phase. ERM served in this capacity from August 2010 – April 2013. D'Appolonia S.p.A is now undertaking the role of IESC for compliance monitoring on behalf of the Senior Lenders group.¹⁷

17) The ERM team made multiple monitoring visits to the site beginning in 2010 and has noted continual improvement based on progress against Environmental and Social Management Plan (ESMP) commitments.

18) At the same time, IESC has identified areas of non-conformance in which the Project was not following ESIA commitments and/or the intent of Lender Requirements or prior recommendations, particularly in the areas of water and biodiversity. The Project Summary Document also notes shortcomings in the ESIA process associated with the alignment of the power line, which crosses an area of critical habitat, indicating it did not fully comply with EBRD's social and environmental requirements with regard to biodiversity. In light of these shortcomings with the ESIA process, EBRD has identified derogations related to PR 1 and 6.¹⁸

¹⁵ Project Summary Document; Management Response at 5.

¹⁶ Oyu Tolgoi Construction Phase Environmental, Social, Health & Safety Audit, April 2013 Audit Report at 1. http://ot.mn/sites/default/files/documents/ESIA_Audit_report_October2013_EN.pdf

¹⁷ Report of the Independent Environmental and Social Consultant, Environmental & Social Compliance Monitoring, Oyu Tolgoi Mine Project, Mongolia Site Visit: October 2013 at 8. http://ot.mn/sites/default/files/documents/ESIA_Audit_report_October2013_EN.pdf

¹⁸ The power line traverses an area designated as an Important Bird Area (IBA) in the ESIA. The alignment decision was taken prior to 2009, as part of the local Detailed Environmental Impact Assessment (DEIA) and agreed to by the government; however, according to the Project Summary Document, the appraisal was not based on an appropriate level of baseline data, nor did it adequately apply the mitigation hierarchy, according to PRs 1 and 6. Nevertheless, EBRD states it is confident that the final approach for addressing biodiversity on the Project is acceptable and "precautionary", in line with EBRD requirements.

19) ERM's April 2013 audit report was released in September 2013. The report focused on the construction phase of the project. It appears to have identified some of the same issues highlighted in the Complaint (e.g., lack of conformance in the areas of biodiversity and vegetation rehabilitation, stakeholder engagement, dust and health related issues). EBRD and ERM have been working with OT to address these issues. Operation Management Plans were posted during the last quarter of 2013 and into the first quarter of 2014, including a revised Environmental and Social Action Plan (ESAP) publicised 8 October 2013.

20) D'Appolonia S.p.A, in its capacity as the current IESC, released its first audit report in February 2014. The audit evaluated activities with a focus on health, safety, environment and social aspects, according to the environmental and social commitments made for the project operation phase that began in July 2013.¹⁹

21) According to the latest ESAP, an updated Resettlement Action Plan (RAP) will be provided by OT to IESC at the end of 2014. The plan will consider factors such as the latest information on the Project and its impacts, the updated compensation procedure, the Pastureland and Livelihood Improvement Strategy, stakeholder engagement outcomes, the Cooperation Agreement and an audit of the compensation program to be completed in 2014.²⁰ It does not appear that any requirement for the Resettlement Action Plan was included in the ESAP dated 2 August, 2012,²¹ although Chapter D15: Resettlement Action Plan, of Section D: Environmental and Social Construction Management Plans, forms part of the ESIA.

22) OT commenced shipment of copper concentrate to China on 9 July 2013. At the time, the permanent road was not yet operational, and the shipments proceeded on the temporary gravel road permitted by the Government of Mongolia (GoM). OT had previously agreed it would not initiate any shipments to China until the paving was complete. In March 2011, OT concluded agreements with families living along the road to compensate them for construction-related impacts. Pursuant to the Contract, several Complainants have submitted written requests to have their situation reviewed again, in

¹⁹ Report of the Independent Environmental and Social Consultant, Environmental & Social Compliance Monitoring, Oyu Tolgoi Mine Project, Mongolia Site Visit: October 2013 at 8.
http://ot.mn/sites/default/files/documents/ESIA_Audit_report_October2013_EN.pdf

²⁰ ESAP, September 2013 at 5.

²¹ ESAP, 2 August 2012.

light of recent project activities on the temporary road.²² OT reports that the permanent road is now complete and paved to high specification standards.²³

II Steps Taken in Determining Eligibility

23) The Eligibility Assessor and PCM Officer have examined the Complaint to determine whether it satisfies the applicable eligibility criteria of the PCM Rules of Procedure. They studied the complaint documents and checked the availability of the material cited in the Complaint for the purposes of PCM RP 20c. They reviewed the Responses received from Bank Management and the Client as well as various Project documents, materials and correspondence provided by the parties. In addition, they held separate in-person conversations with the Complainants, EBRD Country Director for Mongolia, and the Client.

III Summary of the Parties' Positions

Complainants' Position²⁴

24) Complainants are 18 individual herders from Khanbogd *soum* and 5 herders from Manlai *soum*. Co-Complainants include two civil society organizations, Oyu Tolgoi Watch and Shuteen Gaviluut. All Complainants emphasize they are equal participants in the Complaint process.

25) Complainants claim that Oyu Tolgoi relies on or impacts an extensive network of roads, which includes roads resulting specifically from its operations, as well as existing roads. Complainants maintain that these roads and dirt tracks, situated within the windy, arid South Gobi desert, combined with the construction and placement of OT facilities

²² Interview with Complainants.

²³ "Oyu Tolgoi LLC comments on OT Watch letter to European Bank on Reconstruction and Development – alleging policy violations committed by Oyu Tolgoi" submitted to the PCM on June 6, 2014 (hereinafter referred to as "OT comments") at 2.

²⁴ Complainants' positions are drawn from a number of sources including in-person interviews, Complaint documents, and materials referenced by Complainants to further clarify their position [hereinafter "Complaint documents"]. These materials include a review of Oyu Tolgoi's Environmental and Social Impact Assessment (ESIA), "A Useless Sham," December 14, 2012, <http://bankwatch.org/sites/default/files/a-useless-sham-OT-ESIA-review-14Dec2012.pdf>; February 15, 2013 Letter from civil society organizations to EBRD President, Sir Suma Chakrabarti, re: Ongoing concerns and key recommendations regarding the Oyu Tolgoi copper and gold mine in Mongolia, <http://bankwatch.org/sites/default/files/letter-EBRD-OT-15Feb2013.pdf>; February 26, 2013 Reply to OT LLC and the IFC, <http://www.bicusa.org/wp-content/uploads/2013/02/CSO-Reply-to-OT-LLC-and-IFC.pdf>; and Civil Society Review of the Oyu Tolgoi audit and Operational Management Plans, November 13, 2013 <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/CSO-review-of-the-OT-OMPs.pdf>.

and infrastructure, and the heavy traffic from OT and contractor vehicles, have posed significant social and environmental risks and impacts to local communities and caused damage to herders and their livestock. According to Complainants, the construction and use of project-related, create significant fugitive dust, jeopardize the fragile South Gobi ecosystem, destroy and fragment pastureland into small grazing areas inadequate for large herds, restrict movement of the herds, reduce livelihoods and makes it difficult for safe, productive grazing on sufficiently large enough areas of undisturbed good quality pasture to support livestock production. Complainants are deeply concerned that rapid development from the Project threatens the herding culture, traditions and nomadic way of life that has existed in the area for generations.²⁵

26) Underlying the Complaint are concerns related to EBRD's due diligence pursuant to its 2008 ESP. Complainants allege a number of Bank policy violations associated with company roads and related infrastructure and the impacts outlined in the Complaint. Complainants have expressed a desire to know whether EBRD has complied with its own policies and procedures in preparing, appraising and supervising the Project.

27) EBRD's 2008 ESP, including general policy commitments as well as specific performance requirements, provides a useful framework to help organize Complaint issues and their details. Complainants suggest that many of the problems they hope to resolve through a PSI with the Company stem from a spectrum of unattended impacts that were improperly identified, analyzed and mitigated, as a result of an inadequate and untimely project appraisal process, contrary to PR 1 (Environmental and Social Appraisal and Management). Other relevant requirements include: PR 3 (Pollution Prevention and Abatement), PR 4 (Community Health, Safety and Security), PR 5 (Land

²⁵ The Complainants clarify that the Complaint does not apply to one single OT road, such as the one from Oyu Tolgoi to Gashuun Sukhait; nor does it pertain to a specific area of operation or a particular infrastructure feature. More precisely, it includes project infrastructure, planned rail routes, and the vast array of roads used by OT – dirt, gravel, paved, temporary, informal and permanent – that crisscross traditional pasturelands, water access points and herding enterprises located in the vicinity. This roads network is comprised of supply roads, such as those connecting the Project site with Ulaanbaatar and Khanbogd, as well as local roads and routes used by OT vehicles to transport personnel, equipment and materials or access mine-supporting infrastructure (e.g., water pipelines, quarries, airports, power plant, camps, water stations, water storage and treatment units, water monitoring boreholes). The Complaint references the following roads: OT – Gashuun Sukhait, OT – Ulaanbaatar gravel/earth road which goes through Khanbogd *soum*, Manlai *soum* and Choir, and the Oyu Tolgoi-Ulaanbaatar gravel/earth road, which goes through Mandalgovi, Oyu Tolgoi-Khanbogd earth road, OT – Gunii Hooloi gravel road, the diversion road from Tsagaan Khad to the Gashuun Sukhait border, all formal and informal roads leading to and from various project facilities such as water stations (around 56), river diversions, electricity lines, OT – International and OT – Temporary Airports, OT – Zamuun Uud, OT – Big Ger, OT – Tavan Tolgoi, OT – Water Lagoon, OT – South Camp, OT – Water Camp, roads to every quarry and water monitoring borehole (over 70), and local roads that will be impacted by increased traffic as a result of population influx and commercial activity associated with OT. The Complainants question whether the due diligence process truly assessed cumulative and aggregated impacts from the construction, use and placement of current and future roadways and related project infrastructure; whether it considered current and future volumes of traffic; and whether it properly identified potential risks, impacts and corresponding mitigation measures, according to the ESP. Response to PCM Questions – OT Section at 1. Supplemental Complaint letter at 2-3.

Acquisition, Involuntary Resettlement and Economic Displacement), , PR 7 (Indigenous Peoples), PR 8 (Cultural Heritage), and PR 10 (Information Disclosure and Stakeholder Engagement). Complainants indicate they would like the problem-solving process to incorporate proper studies or assessments where necessary, to ensure resolution measures are based upon a comprehensive analysis of the issues and impacts.

28) Complaints principally cite four categories of social and environmental impacts associated with project-related roads, which they maintain significantly affect herder livelihoods and well-being. These include:

- a. Loss of, fragmentation, and contamination of pastures, and access to water resources;
- b. Proliferation of dust and noise from the network of paved and unpaved roads;
- c. As a result of the above, degradation of the health and well-being of herders and their animal herds on which the herder's traditional lifestyle and livelihood rely; and
- d. Insufficient mitigation and compensation measures commensurate with risks and impacts.

29) Interviews with Complainants have expanded upon these baseline Complaints. An inventory of these is necessary to obtain a fuller grasp of the frustrations herders claim to be experiencing as their livelihoods undergo significant change. This is also an attempt to cull from that inventory pertinent themes and topics appropriate for a Problem-solving process. They are organized under the relevant EBRD requirement.

Issues related to PR 1: Environmental and Social Appraisal and Management

(These issues principally relate to what Complainants perceive to be unattended impacts and inadequate prevention and mitigation measures as a result of what they allege were shortcomings in the environmental and social appraisal process.)

Road impacts on pastures and access to water resources

30) Complainants maintain that the vast network of roads and infrastructure constructed for mining and transport purposes across traditional, nomadic pastures carve pastureland into fragments; separate wells and pastures, requiring animals to cross the busy road to access water; block traditional herding corridors; disrupt grazing patterns leading to more time and effort for herding animals, such as when livestock return to areas with dry wells or pastures that are now contaminated; reduce the quantity of pastureland available for herding; and generally degrade community pastureland.

Exacerbating these problems is the fact that export roads run from north to south, while animal migratory and grazing routes go from east to west. Complainants maintain that OT has not put in adequate passages in the road to accommodate access to water and pastures for livestock and wildlife. Complainants also report that construction and transport workers pump water from community wells for their own use.²⁶ Looking to the future, herders are concerned the Ukhaa Khudag-Tsagaan Khad railroad will increase fragmentation and related problems, particularly given their understanding that the entire length of the railway will be fenced, with the exception of the railway stations. They allege the construction of the railroad started prior to an adequate assessment of the impacts on local herders.²⁷

31) Complainants believe that impacts from roads and infrastructure may be fragmenting pastureland more than was initially anticipated in the ESIA, and observe that the effects of trucks driving on desert soils further exacerbate this problem, and is destructive in its own right in such a fragile ecosystem, causing damage to the micro-crust and plant life used for forage by livestock. Off-road driving is practiced as a safety and convenience measure. As a result, multiple tracks parallel the original road, creating a type of road creep. According to Complainants, traffic monitors and signage have not eliminated the problem. Herders believe more work is needed to find sustainable solutions to these problems. This issue also relates to PR 6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources).²⁸

32) Complainants maintain the impacts described above and throughout the Complaint are all tied into the critical theme of sustainable herder livelihoods. Complainants want to better understand how and what economic, social and environmental impacts are affecting herder social and economic conditions.²⁹ Complainants claim that, to date, neither Oyu Tolgoi nor Energy Resources has conducted adequate assessments of the impacts of the roads referenced in the Complaint on the livelihoods of herders in the

²⁶ Response to PCM Questions, OT Section at 2.

²⁷ For now, the Ukhaa Khudag-Tsagaan Khad Railroad will only be used to transport coal and will run from ER's Ukhaa Khudag coal mine to the Chinese border. Supplemental Complaint letter at 6.

²⁸ Complaints by a group of 23 herder Complainants from Khanbogd and Manlai *soums* and two Co-Complainant civil society organizations, OT Watch and Shuteen Gavilut, to the EBRD's Project Complaint Mechanism, including EBRD Complaint Cover Letter and July 1, 2013 Complaint from 14 herders and two Mongolian civil society organizations submitted to Mr. Phillip Bennet, First Vice President, EBRD on 1 July 2013; Formal Complaint Cover Letter to PCM Officer, 2 July 2013; August 5, 2013 Complaint from five herders residing in Manlai *soum*; Individual Complaints from four herders residing in Khanbogd *soum*, submitted by electronic mail on 6 September 2013; EBRD Complaint Form; Response to PCM Questions – OT Section; Oyo Tolgoi-Gashuun Sukhait Copper Concentrate Road Construction Work Observation Visit, 6 July 2013; Photos of Manlai to Oyu Tolgoi Road, 5 August 2013; In-person interviews with Complainants and Co-Complainants in October 2013; map of Complainants winter camps in relation to OT and ER roads and infrastructure, prepared by Complainants during meetings with PCM; Supplemental Complaint letter dated 1 April 2014, submitted by OT Watch. Hereinafter these collective documents will be referred to as the "Complaint"

²⁹ Id.

region. Consequently they contend that the full extent of the economic impacts on them is unclear.³⁰

Dust/Particulate Impacts on Herder Health, Safety and Ecology

33) Complainants claim that large quantities of dust generated by roads and traffic, including off-road driving, is a chronic problem that impacts health, safety and ecology. Complaints point to negative impacts to air quality, the local environment (its flora and fauna), soil health, vegetation, pastureland quality, animal and human health³¹, including increased stress, loss of sleep and incidence of respiratory diseases, noting that doctors in Khanbogd do not have the capacity to monitor or address dust-related health issues.³² They claim there is less vegetation on pastures along the roads and adjacent to mine infrastructure facilities than before these facilities existed, due to the prevalence of dust. In addition to the quantity of the dust, Complainants are worried about its composition and whether it is toxic for humans and livestock. Furthermore, Complainants claim that poor visibility from the dust creates safety hazards and causes traffic accidents involving injury and loss of life to both people and livestock. According to the Complaint, the father and brother of one of the Complainants died in traffic accidents caused by low visibility due to dust along Oyu Tolgoi-associated roads.³³ Dust impacts also relate to PR 3 (Pollution Prevention and Abatement) and PR 4 (Community Health and Safety Requirements).

34) Complainants suggest that an adequate health Impact assessment be conducted that considers impacts from dust and other sources to mobile, land-based people, followed by the development of a health protection plan based on findings.

Impacts on Animal Health from Dust, Noise and Pasture Fragmentation

35) *Impacts to animal organs.* Herders allege that 80% of animals slaughtered have degraded internal organs. Complainants claim that degradation of the lungs of animals, allegedly due to dust pollution, renders useless the meat that is part of the local diet. Complainants would like to (1) better understand the source of the problem; (2) carry out a proper animal health assessment; and (3) develop a health protection plan based on findings. Complainants appreciate OT's offer of laboratory testing for their animals.

³⁰ Supplemental Complaint letter at 6.

³¹ For example, Complainants indicate that out of 80 herding households living close to an Oyu Tolgoi road, 60-80 percent of animal slaughtered indicate "contaminated or sick lungs" that are black or discolored. Response to PCM Questions – OT Section at 2.

³² Supplemental Complaint letter at 5.

³³ August 5 Complaint.

36) *Safety hazards.* Complainants argue that herding animals in the proximity of roads is not safe for their livestock. They claim safety for their animals is compromised due to increased traffic speed and volume as well as construction and road-related open pits and unfenced or unreclaimed quarries, leading to increased livestock deaths. Stress on livestock from traffic and related noise is another source of concern. Complainants have requested that a ban be enacted on truck drivers honking at animals on the road. Further, Complainants explain that unmindful drivers carelessly dump trash, refuse, plastic bags and other waste from vehicles, causing additional health and safety hazards for herds.

37) *Emotional stress.* Herding in the South Gobi is often tough, Complainants report. The conditions are challenging, even during a good year. Attrition from cold winters or lack of resources has been part of the history of the traditional herders of the Gobi, but in the past, Complainants note that their herds have been resilient and recovered by the next season. However, Complainants now observe that the additional stress brought into their lives by the boom in the natural resource sector throughout the region has further exacerbated the fragility of this lifestyle.

Increased Competition over Scarce Resources

38) Complainants believe that the Project exacerbates competition for scarce water resources and high quality pastures, increasing potential for conflict among herders. Complainants attribute the problem, in part, to relocation and economic displacement factors. Some families who have been resettled or displaced have had to encroach upon the pastureland and water resources used by other families. In addition, more herder households are moving into the area from other regions of Mongolia. As a result, more people must share less land and more inhibited access to water. Complainants suggest that EBRD has failed to properly assess and mitigate this social issue according to Bank requirements.³⁴

Employment

39) Complainants note that for some herders, the job of road monitoring and picking up garbage is insulting to their dignity and fails to meet employment expectations. “It is an insult to move from a dignified identity and way of life to picking up garbage.”³⁵

³⁴ In-person interviews with Complainants;. Complaint documents.

³⁵ Interview with Complainants.

40) Complainants acknowledge that people are getting jobs, but not new skills, training or opportunities that lead to good jobs. “When herders think of jobs that are adequate, they think of work as operators of heavy trucks and equipment in the open pits where they can learn skills, gain capacities and receive training to obtain even better jobs and an improved livelihood.”³⁶. Some herders give their animals to relatives to tend with the expectation of receiving a meaningful job; they claim they are often disappointed.

Issues related to PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement, with regard to alternative project design, the Resettlement Action Plan and the Livelihood Restoration Framework. (These also relate to the claim of inadequate social and environmental assessment under PR 1.).

Livelihood and Economic Impacts, Compensation and Mitigation Measures

41) *Alternative project design to avoid or minimise physical and/or economic displacement.* Complainants underscore that losses, as a result of project-related disturbance and pollution from roads, have made herding much more difficult and significantly threaten the sustainability of herding enterprises as their means of livelihood. However, they allege the Project has not considered feasible, alternative road placement or other design features (e.g., alternative schemes to enhance road safety or mitigate dust pollution) to avoid or minimise displacement caused by dust pollution, fragmentation of pastures, etc.

42) *Inadequate compensation framework.* Complainants maintain that the current compensation framework fails to address the real and significant damage to herder livelihoods, or account for the true package of losses that affect their livelihood. They contend it is inadequate in several respects: (1) it fails to properly identify all physically or economically displaced Complainants and provide adequate compensation or resettlement; (2) it improperly defines the “impact zone” which is central to defining who is eligible for compensation or mitigation; (3) it does not sufficiently consider the many interconnected factors that are required to sustain herder businesses and a traditional way of life; (4) it does not apply the proper metrics to fairly calculate mitigation or compensation based on actual loss. For example, according to Complainants, those who live a few meters beyond the designated impact zone are not eligible for mitigation assistance or compensated for damages to health and livelihoods, despite alleged impacts. Citing another example, Complainants claim the framework

³⁶ Id.

excludes compensation for loss of livestock from impacts associated with project-related roads.³⁷

43) *Updated compensation framework.* Complainants believe a comprehensive assessment of the current compensation framework would be useful to provide a sound basis for updating the framework as well as informing corresponding mitigation plans and programs. Complainants assert the assessment should examine, among other factors:

- a. The sizable physical dimensions of pastureland taken away to accommodate company roads, infrastructure, and other project facilities;
- b. Loss of healthy pastures due to contamination;
- c. Loss of access to critical living natural resources, including clean air and water – all of which are essential for maintaining healthy herds;
- d. The area of pasture that is no longer useable, having been degraded due to its proximity to the road;
- e. Losses and impacts on summer, spring and reserve pastures in addition to winter camps;
- f. The effects from traffic and roads, including dust and noise, on herder and animal health and well-being;
- g. Impacts related to fracturing wide open prairie into fragmented parcels;
- h. How restructuring pastures, impeding access to water and disrupting grazing patterns impacts livestock productivity, quality and health, and herder livelihoods.³⁸

44) Complainants recommend that mitigation plans and compensation programs should then be redefined based upon a proper assessment framework. All herders should be monitored for project impacts to livelihood, not only those who are relocated or economically displaced.³⁹

Issues related to PR 7: Indigenous Peoples

45) Complainants contend that herders from the South Gobi are Indigenous Peoples, under the definition of PR 7, rather than ‘vulnerable’, as the Bank maintains. They claim that neither the Bank nor Oyu Tolgoi took the steps necessary to properly determine

³⁷ Id.; Complaint documents.

³⁸ Response to PCM Questions – OT Section at 4.

³⁹ Id.

whether or not PR 7 applied; and consequently, excluded them from receiving the corresponding protections to which they are entitled under the requirement.⁴⁰

Issues related to PR 8: Cultural Heritage

46) *Intangible cultural heritage.* Complainants highlight the importance of their cultural identity as herders, including their strong ties to the land, the ecosystem upon which they depend for their livelihood, and their traditions, values, and way of life. They suggest their identity as nomadic herders is under threat and is not being properly protected and conserved in accordance with PR 8 (Cultural Heritage). PR 8.2 notes, for example, “Cultural heritage is important as a source of valuable historical and scientific information, as an asset for economic and social development, and as an integral part of a people’s cultural identity, practices, and continuity.” Complainants underscore their desire to remain in the “motherland”, despite feeling that the company is pushing them to leave the area. They question whether EBRD has appropriately guided its Client to “avoid or mitigate adverse impacts on cultural heritage in the course of their business operations” as required by PR 8.1.⁴¹

47) Complainants’ concerns about cultural heritage and identity appear to refer to intangible heritage, as defined in PR 8.7: “Intangible cultural heritage means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage and which are transmitted from generation to generation.” PR 8.11 points out “Although potential impacts on intangible cultural heritage might be less obvious than impacts on tangible cultural heritage, they may be of equal significance. If the environment is crucial for maintaining traditional skills, knowledge and beliefs, any relocation or detachment could trigger the loss of traditional knowledge, beliefs ...and ultimately result in the disintegration of a community.”

48) As an example, one Complainant observed that the system of compensation is perhaps unintentionally creating a crisis in identity. “The compensation program creates ‘haves and have-nots’. Even those who have succeeded in growing a successful business are experiencing a crisis of identity. The plains, the desert and the pastures have spawned a tradition of independence, self-reliance, resilience, a way of looking at the world and a strong and proud identity. Now we are trying to find out who we are, if not herders. If I am a grocer or have a small store and my animals are with my relatives, does it mean I am no longer a herder? If we have animals but my relatives are caring for

⁴⁰ Id.

⁴¹ Interview with Complainants; Complaint documents.

them, am I a herder? If I am spending most of my time monitoring an OT road and picking up garbage, am I a herder? Who am I?” Complainants note there is, indeed, confusion about identity. In the past, being a herder provided a strong identity and sense of belonging. Now when people have to fill out forms, they are not sure what to check. They check ‘jobless’ if they are now people without animals or with very small herds. Or they may refer to themselves as ‘former herder’. “Before we were herders. We had a very strong identity; now I think we are not quite sure who we are. We are just starting a long journey of remaking ourselves. A large number of people are impacted in this way.”⁴²

49) Complainants suggest an assessment be conducted that examines the loss of cultural values and traditional livelihoods due to loss of pastures, to be carried out by an independent expert.

Issues related to PR 10: Information Disclosure and Stakeholder Engagement

Meaningful Consultation and Information Disclosure

50) Complainants claim the company routinely failed to consult herders about the siting of its transport routes or about appropriate mitigation measures prior to constructing new roads or using existing ones. Herders further report they infrequently received advance notice of project activities with the potential to impact them and company follow-up of expressed concerns was often missing.

51) The Complaint further alleges that no evidence exists of consultations with herders along the Oyu Tolgoi-Gashuun Sukhait road prior to road use, and further states that the ESIA does not refer to consultations in relation to other project-related roads.⁴³

52) Complainants also note that insufficient information has been disclosed about project-related activities for them to understand the full extent of the Project’s material health and safety risks, and potential impacts.

Ensuring an Adequate Grievance Mechanism

⁴² Interview with Complainants.

⁴³ Supplement Complaint at 10.

53) Complainants appreciate the opportunities they have had to meet with OT personnel, including company leadership and the community relations office; however, they state they are unaware of the community grievance procedure and that when they have raised complaints more informally, the Company is generally unresponsive, contrary to PR10.⁴⁴

54) Complainants acknowledge having approached company leadership and the community relations office on numerous occasions in person and in writing with “written petitions and demands”, but failed to arrive at any satisfactory agreements.⁴⁵ OT Watch reports accessing the formal grievance mechanism in 2011 without any results.⁴⁶

55) The Complaint notes that no formal grievances were made to OT at the point of submitting documentation to PCM; however, according to the Complaint, “individual herders filed Complaints with Project grievance mechanisms with little to no effect, especially in easing/mitigating continuous harm from the Project.”⁴⁷

56) Complainants find the company largely unresponsive to their concerns and are frustrated they have been unable to achieve long term, tangible and satisfactory results to the issues raised in the Complaint. As the Complaint documentation noted, “Herders claim that complaints ‘disappear like stone thrown in deep water’.”⁴⁸

57) Complainants emphasize the need for international accountability mechanisms such as the PCM and the CAO to help resolve problems after so many unsuccessful attempts to negotiate directly with the company.⁴⁹

58) Complainants also observe that the company’s style is to ‘tell’ rather than ‘listen and show’. At the same time, Complainants recognize the Company is subject to structural constraints. “They have to do certain things according to the ESIA or the

⁴⁴ Response to PCM Questions, OT Section at 3.

⁴⁵ Id.

⁴⁶ Id. “In 2011 OT Watch completed the company complaint form regarding the closure of the community road to Bayan-Ovoo *soum* without signage or direction for detour. In this complaint we also demanded that we be compensated for lost time and fuel for taking a long detour. No reaction from the company has been documented. This incidence proves the fact that herders’ claims that their complaints ‘disappear like stone thrown in deep water’. This expression is used to express something disappearing forever.”

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Interview with Complainants.

Concession Agreement, but at the same time, they are leaving the community out to get things done faster, feeding suspicion and losing an opportunity to build trust.”⁵⁰

59) Complainants stress they are not against the mine and would like to have a good relationship with the Company. While committed to working with OT to solve their problems, they underscored their wish to be treated better by Company people. “We want to be treated as human beings - with respect and as equals. We want good relations with the Company. Treated as human beings also means being given information, having leverage and power in the negotiations with the company and to be taken seriously when we raise concerns...instead, what we often hear is, ‘we will send our response later’ ”.⁵¹

More Recent Complaints

60) *Complaint related to concentrate shipments on gravel road.* Complainants argue that OT made a commitment to transport its concentrate via a paved road and would not initiate any shipments to China until the paving was complete. In March 2011, OT concluded agreements with families living along the road to compensate them for construction-related impacts; however, beginning in July 2013, the company began shipping copper concentrate to China via the gravel road, as a temporary measure until the Oyu Tolgoi - Gashuun Sukhait road was completed. Herders maintain that the company is in violation of these compensation contracts and point to negative impacts to their health and to their animals, as a result of this unexpected change in plans. Shipments have continued for more than six months along an unfinished road, report Complainants, with no effort to compensate families for these impacts. Complainants are asking the company to transport the concentrate on the paved road as agreed, and to consult with herders to assess and address impacts that have occurred as a result of company activities. Noting the breach of the agreement and based on recent impacts from dust and noise related to OT truck traffic along the gravel road, Complainants have made a request to the Company to have their cases reviewed again and compensated appropriately, pursuant to terms of their contracts from March 2011.

61) *UB-Manlai-OT road-complaint.* In recent correspondence with the PCM, Complainants from Manlai *soum* report that OT is not using the UB-Manlai-OT road any longer as a transportation route. They contend the local OT office has told the herders it is no longer responsible for any issues related to the road. Complainants acknowledge that OT is not directly causing new impacts from the road; however, they argue that pre-existing damages, especially those related to the road design, which

⁵⁰ Id.

⁵¹ Id.

“cut[s] between pasture, winter camp and water wells,” should be addressed by OT, as they are unrelated to the change in road use.

62) *Possible expansion of OT roads, allegedly without due process.* Complainants also report that 132 hectares of land was requested by OT and approved by the local *hural* in its 2014 land use plan. Local herders are concerned there was not a social and environmental assessment for this particular project. They are upset about OT's process of putting in roads without due process and then refusing to reclaim or pay due compensation for damages caused.⁵²

Issues Related to EBRD's Due Diligence

63) Complainants allege the project appraisal process occurred late in the project development cycle, particularly in light of the Project's Category A classification and the associated likelihood of significant adverse environmental and social impacts, noting the ESIA was published after construction was well advanced.

64) They further claim the appraisal process was incomplete, failing to adequately evaluate the full set of potential Project impacts from the roads on local herders over the Project life cycle, or to develop salient prevention and mitigation measures, including alternative road placement and project design, to avoid negative impacts in the first place in accordance with EBRD policy. For example, Complainants question whether health impacts to people and animals were sufficiently investigated through proper baseline studies and other analysis in advance of EBRD's decision to invest. Further, they maintain that the full extent of economic impacts on Complainants is unclear, as adequate assessments of the impacts of roads on herder livelihoods in the region have not been conducted, either as part of the ESIA or through subsequent studies. They suggest that the tardy and incomplete ESIA meant that OT was able to create and use roads before potential risks and impacts were known or corresponding prevention and mitigation measures were in place.

65) Complainants highlight a number of additional shortcomings in the ESIA, including (a) an overly narrow, compartmentalized and unnuanced process that analyzed impacts and their sources in isolation; (b) an incomplete set of studies to bolster the analysis; (c) gaps in Company commitments for the operations phase, including timely management plans that address the full scope of the problem; (d) a fundamental lack of understanding regarding herding practices and needs; and (e) a failure to consider impacts from the entire road and infrastructure network more holistically, in a multidimensional framework that more adequately accounted for current and future

⁵² Correspondence from Complainants, 3 February 2014. Additional details are needed from Complainants to ensure full understanding of the circumstances of the Complaints.

planned development and more fully appreciated the relationship and interconnectivity among impacts (e.g., impacts on health and safety, on pastureland and livelihoods, on access to water, and on the ecosystem, environment and living natural resources as a connected system); (f) a failure to include any provision for minimizing the construction of new roads.

66) The alleged inadequacies described above have prompted Complainants to question what the Bank knew and did not know in advance of its decision to invest; and whether purported gaps in knowledge about the potential risks and impacts of the Project and associated mitigation measures were based upon incomplete information, in violation of Bank policy, and therefore constitute a breach of the 2008 ESP.

67) Complainants also query how impacts and violations they allege occurred from the beginning of the project were factored into the Bank's decision to provide project financing.

68) As a result of the above shortcomings, Complainants contend the local population was not provided with a full understanding of impacts and associated mitigation measures, according to Bank requirements related to meaningful stakeholder engagement.

69) In short, Complainants claim significant damage to their livelihood and health, and contend that EBRD improperly identified the impacts resulting from the Project and failed to ensure that mitigation and compensation measures protected the local population from social and environmental harm. Complainants expressed a desire to know whether EBRD has complied with its own policies and procedures in preparing and assessing the Project. Consequently, they have asked PCM to verify: (a) whether the project Environmental and Social Impact Assessment (ESIA) and associated documents correctly assessed road-related environmental and social impacts in a timely manner; and (b) whether the proposed mitigation measures effectively prevent possible environmental and social damage by the project.

EBRD's Position

70) EBRD recognizes the Project will catalyze significant socio-economic and cultural change in Khanbogd *soum* primarily related to land acquisition, pasture fragmentation, population influx and impacts to the environment. The Bank maintains that given herder needs for large sweeps of pastureland on which to graze their animals, it is inevitable that project-related infrastructure will have to cross some pastureland.⁵³

⁵³ Project Summary Document.

71) At the same time, EBRD highlights many positive impacts from the project, including in the areas of employment, skill building and economic growth, and stresses that its participation and significant efforts in the project are aimed at raising the bar for environmental and social risk management in Mongolia. EBRD maintains that the Company is well aware of its impacts and quite capable of addressing them in line with the mitigation hierarchy and other Bank requirements. EBRD points to the fragmentation issue as an example, noting the significant actions OT has taken to mitigate related impacts in consultation with herders (e.g., construction of animal crossing points, supplying herders with water wells to prevent separation of shelters from access to water, the provision of forage, the construction of livestock shelters).⁵⁴

72) *With respect to the goals of the Complaint*, EBRD was uncertain initially about why Complainants were requesting a Compliance Review. EBRD claimed the Complaint documents submitted in 2013 lacked details, noting the absence of documentation in reference to a Compliance Review. According to the Bank, none of the 2013 Complaint documentation provided specific information about which Bank policies were at issue; nor did the Complaint specify particular areas of non-compliance. Without more details, the Bank stated it was unable to present a more targeted response.

73) Following the submission of the Supplemental Complaint letter dated 1 April 2014 by OT Watch, which offered additional details about the Complainants' request for a Compliance Review, the Bank revised its response to include issues raised in the letter. It was received by the PCM expert on 10 June 2014. The Bank maintained that in many cases, the statements and assumptions presented in the letter appeared to be unsubstantiated.⁵⁵

74) *Concerning the appraisal of the Project*, EBRD believes the Project was appropriately appraised to meet the requirements of the 2008 ESP and Mongolian permitting requirements. EBRD observes that the detailed ESIA was prepared by an international team of experts in environmental and social matters, and includes a suite of documents consisting of baseline studies, impact assessments, a Non-Technical Summary, supplemental information, and management plans (e.g., RAP, SEP, ESAP), developed according to EBRD's policies and procedures.⁵⁶ Further, the Bank maintains the ESIA represents "the culmination of nearly 10 years of independent work and research, carried out by international and Mongolian experts."⁵⁷ ... and that it "draws heavily on the Detailed Environmental Impact Assessments (DEIA) reports...prepared

⁵⁴ Management Response at 4.

⁵⁵ Management Response; Revised Management Response.

⁵⁶ Id. at 5.

⁵⁷ Non-Technical Summary at 16.

by a range of Mongolian experts and organisations”⁵⁸ according to Government requirements.

75) *With regard to an incomplete ESIA*, EBRD disagrees with Complainants and maintains the ESIA is comprehensive, claiming that issues raised in the Complaint were properly identified in the ESIA, with appropriate mitigation strategies provided.⁵⁹ Further, EBRD states that the Bank and other financial institutions have spent extensive amounts of time carefully reviewing the documents. On the contrary, EBRD argues the ESIA presents a detailed and complete discussion of a broad array of potential impacts and mitigation measure for all phases of the project, from construction to closure.⁶⁰

76) *With respect to Complainants’ concerns that the ESIA did not include the Operations Phase Management Plans*, the Bank maintains that the content of the plans are not new, as these commitments to action for the operations phase were already contained within the ESIA. Further, the Bank claims it is standard practice to complete and disclose the plans before the start of commercial operations at the mine. The management plans only formalise the methods that will be used to incorporate the procedures into operations.⁶¹ Operation Management Plans are available on the Oyu Tolgoi Website, <http://ot.mn/en/node/2679>.

77) *Regarding the adequacy of the ESIA in considering adverse impacts of roads and infrastructure* on the local herding community, EBRD maintains both the ESIA process and the Bank’s evaluation of the ESIA have fully considered the project infrastructure impacts to herding activities from an array of minor and major roads, power lines, pipelines, etc. Further, EBRD and the Company have consulted widely with local herders on infrastructure impacts, and mitigation measure have been implemented along with a monitoring program, presumably in line with EBRD requirements.⁶²

78) *In reference to the delay of the ESIA, including the alleged failure to assess impacts from roads at an early stage of project development*, EBRD concedes the timing of its publication was not ideal as construction for the above ground operations was close to 70% complete.⁶³ However, EBRD defends its due diligence and is confident the ESIA is in line with EBRD policies. EBRD underscores its substantial involvement with the Client for several years – actively reviewing all project documents, conducting a gap

⁵⁸ Id. at 18.

⁵⁹ Management Response at 5.

⁶⁰ Summary of EBRD Consultation Activities, Post Disclosure of ESIA, Oyu Tolgoi Copper-Gold Mine Project available at <http://www.ebrd.com/pages/project/eia/41158ehsdisclsum.pdf>, at 1.

⁶¹ Id. at 10.

⁶² Ibid. at 9.

⁶³ Id. at 2.

analysis to ensure OT's compliance with ESP requirements, assuring availability of adequate information for public consultation and monitoring company performance through regular field visits and ongoing engagement. Since early 2010, EBRD states it has spent over 260 days on the Project, and over 60 days in country with over 15 site visits.⁶⁴ Further, EBRD references the involvement of the Independent Environmental and Social Consultant (IESC) who has conducted regular site visits to monitor site performance since 2010. Audit reports prepared by the IESC are released publically and available on the Company website.⁶⁵

79) *Concerning pasture fragmentation*, the Bank states that the entire area between the OT site and the Chinese border is available for grazing (excluding the special protected area). Consequently, it is impossible to build roads or any other linear infrastructure without fragmenting pastureland. The Bank further claims the OT Project did not develop any significant new roads and therefore, did not result in additional pastureland fragmentation; rather, it improved an existing road. Moreover, EBRD argues that by selecting the pre-existing national highway as the export route, following an in-depth review of alternatives, as required by PR 1.5, OT made every reasonable effort to avoid further fragmentation of pastures. According to EBRD, the selection of the export road, including the application of the mitigation hierarchy⁶⁶ was consistent with its requirements. The approach was agreed to by the Government of Mongolia and designed in consultation with herders. EBRD explains that OT has upgraded the road to an engineered paved road to prevent dust generation during transportation, and even mitigated pre-existing problems to ensure wells and animals were not separated. The Bank states the road will remain a state highway that can be used by anyone, but that rail export may ultimately become the preferred transport option for concentrate. According to EBRD, the government of Mongolia is in the process of constructing a railway for export of resources from the South Gobi to China, and is engaged in discussions with OT about providing a rail spur to the OT site.⁶⁷

80) *Regarding loss of access to water sources*, EBRD is not aware of any road outside the OT mine license area that impedes access to the Undai River as noted in the Supplemental Complaint letter. The Bank requests a more specific reference within the referenced USAID report to allow it to further investigate the claim.⁶⁸

⁶⁴ Id. at 1.

⁶⁵ Id.; Revised Management Response at 7.

⁶⁶ EBRD notes that the road **avoids** herder camps and community facilities that are within 500m of the road, a standard agreed to by the Compensation Working Group that is stricter than the one published by USEPA which shows that 98% of total air-borne dust returns to the ground surface within 250m of the emission source; **minimizes/mitigates** dust impacts through use of water trucks and other measures; and adequately **compensates** affected stakeholders via a fair and transparent compensation mechanism when avoiding and mitigating were not possible. Management Response at 3.

⁶⁷ Management Response (Oyu Tolgoi) at 3.

⁶⁸ Revised Management Response at 5.

81) *In reference to traffic safety and accidents*, EBRD acknowledges the importance of road safety and reports the Bank takes the issue seriously in its due diligence and monitoring activities. EBRD states that while it would be important to clarify whether any OT vehicles were involved in accidents referenced in the Complaint, OT is unable to provide this information as the incident remains under police investigation. Nevertheless, the Bank understands that the local authorities have completed an investigation into the accidents; however, the Bank has not seen the report.⁶⁹

82) *Regarding noise pollution from traffic*, the Bank maintains that these impacts were identified in the ESIA and have been avoided or minimised through measures such as ensuring a safe distance between winter shelters and the export route, training drivers to behave respectfully, etc.

83) *In reference to health and safety impacts and adequate mitigation measures*, EBRD claims the potential risks associated with dust generation from all roads were appropriately assessed in the ESIA. Further, the Bank highlights a number of prevention and mitigation measures related to health and safety impacts, including the establishment of a setback distance from the road, developed in consultation with the herders and based on guidance developed by USEPA for the USA; construction of a paved export road that includes livestock warning signs and grade crossings for herders; mitigation and management actions to address all roads as presented in different OMPs; and a dust monitoring program adopted by the company which has confirmed results consistent with levels presented in the ESIA. With regard to increased respiratory illness from project-related dust, the Bank is unfamiliar with any studies verifying this relationship and welcomes clarification on the source of such studies or statements that demonstrates a relationship.⁷⁰

84) *Concerning the health impact assessment*, EBRD disagrees with Complainants' argument that the Bank has failed to require an adequate assessment of the impacts of dust on people and animals. EBRD maintains the ESIA acknowledges that dust is a potential source of health impacts as a result of Project activities and points to a number of dust mitigation and monitoring measures that are presumably in line with performance requirements.⁷¹

85) *With regard to impacted animals, including livestock health and impacts to quality of meat*, EBRD is aware of a recent investigation conducted by the chief veterinarian in Mongolia who determined, "the health impacts in local herds that are affecting the

⁶⁹ Revised Management Response at 5.

⁷⁰ Id. at 6-8.

⁷¹ Id.

quality of internal organs is a bacterial infection and unrelated to dust issues.”⁷² The Bank understands that the report is expected to be released soon. EBRD also observes that there has been a significant increase in the number of livestock in the region since 2012, suggesting this could be a related factor to consider. EBRD does not comment on possible reasons for the increase (e.g. an upsurge in productivity of existing herds, an influx of more herders and their livestock into the region, additional purchases of livestock).⁷³

86) *Concerning livelihood and economic impacts, compensation and adequate mitigation measures*, the Bank acknowledges that economic displacement could not be completely avoided, but claims that OT appropriately applied the mitigation hierarchy to address the issues, including its decision about the route to Gashuun Sukhait, selected to minimise further displacement; the determination that all herders using summer pastures in KB *soum* are impacted and consequently qualify for the communal compensation program through the Pastureland and Livelihood Improvement Strategy (well rehabilitations, capacity building for veterinarian services, pasture improvement initiatives, provision of fodder, among other measures); direct compensation approaches for herders whose winter camps were located near project facilities, etc. EBRD also maintains the methodology for determining eligibility and the entitlements framework for compensation is in line with PR 5 requirements. The Bank further notes that a multi-stakeholder Compensation Working Group was established, with herder participation, to design the compensation framework, in addition to an extensive consultation process with herders themselves, other expert groups and stakeholders, thereby meeting Bank consultation requirements. Regarding economic impacts mentioned by Complainants related to a decline in the number of livestock, as indicated above, the Bank understands herd size has generally increased in the region, and is unclear regarding the source of the statement in the Complaint alleging a decrease in livestock quality and quantity.⁷⁴

87) *Regarding the application of PR 7 on Indigenous Peoples*, EBRD maintains that herders do not meet the definition for Indigenous Peoples under this requirement and therefore PR 7 does not apply.⁷⁵ Instead, the Bank suggests that their specific needs are more appropriately assessed under requirements related to social assessment (PR 1), resettlement (PR 5), and stakeholder engagement (PR 10), including elements that discuss protections for vulnerable groups. The Bank does not discuss the process used to determine whether PR 7 is applicable, including whether it engaged a suitably experienced, independent expert to provide advice.

⁷² Id. at 4.

⁷³ Management Response at 5.

⁷⁴ Management Response at 5; Revised Management Response at 6.

⁷⁵ Summary of EBRD Consultation Activities Post Disclosure of ESIA Oyu Tolgoi Copper-Gold Mine at 2-4; Revised Management Response at 10.

88) *Concerning the alleged inadequacy of measures to preserve the nomadic herding culture and traditions*, the Bank disagrees with the Complainants' position, citing numerous safeguards undertaken by the company to strengthen the nomadic herding lifestyle, including OT's Pastureland and Livelihoods Improvement Strategy which the Bank claims is actually aimed at "preserving the pasture and livestock sector and nomadic culture" rather than promoting a more sedentary approach as argued by the Complainants; the presence of various design features associated with the OT-GS road which allows access to pastures where possible and prevents impacts on tangible heritage; the preparation of a significant field study, unparalleled in scope, documenting local customs and oral history, etc.⁷⁶ Further, the Bank suggests that the economic viability of nomadic herding was threatened prior to the Project's early beginnings for various reasons unrelated to the Project, and speculates it may have actually increased opportunities to support and promote a traditional lifestyle through its various targeted mitigation measures and proactive initiatives.⁷⁷

89) *Concerning alleged deficiencies in the consultation process* as noted by Complainants, EBRD argues the company put in place a well documented, extensive consultation process focused on road impacts and reports that all matters raised during the consultations by herders and other residents of Khanbogd *soum* were considered during the finalization of the ESIA. Further, EBRD believes the Company meets its standards for meaningful consultation under the ESP and PIP.⁷⁸ The Bank maintains that Client operations are well managed and the Company has developed an extensive stakeholder engagement program that promotes ongoing communication and dialogue with the local herders and the Khanbogd *soum*, in an interactive and consultative manner. The Bank disagrees with the Complainants that the Company grievance mechanism is unknown and unresponsive to the local population, claiming it is fit-for-purpose and compliant with EBRD policies.⁷⁹ EBRD claims that all the herders along the transportation corridor are familiar with the grievance mechanism and know how to use it. EBRD states that several of the Complainants have used the procedure. According to the Client, none of the 14 Complainant signatories have raised complaints through OT's established grievance mechanism.⁸⁰

90) *Regarding the need for further studies*,⁸¹ EBRD suggests this is already part of the monitoring and assessment programme currently being undertaken or planned by OT.

⁷⁶ Revised Management Response at 10-11.

⁷⁷ Revised Management Response at 11.

⁷⁸ Id. at 4.

⁷⁹ Management Response at 1.

⁸⁰ Oyu Tolgoi's Formal Response to EBRD's PCM Team, October 2, 2013 (hereinafter referred to as "Client Response") at 8.

⁸¹ Complainants have requested studies as follows: adequate health Impact assessment that considers impacts from dust and other issues to mobile, land-based people and corresponding implementation protection plan; study to assess the economic and social impacts that are affecting herder social and

91) *Concerning the Bank's due diligence*, EBRD reports it has worked closely with the OT team over multiple years, visiting the site on numerous occasions, meeting with local and regional authorities as well as herders, driving the unpaved roads, participating in meetings with interested stakeholders, consistently monitoring Project performance and reviewing all Project documents. EBRD concludes it has fully complied with the ESP and undertaken all activities reasonably expected to ensure OT is in compliance with its Performance Requirements.⁸²

Client's Position

92) In general, OT acknowledges that its activities, including transportation infrastructure and the use of roads, have the potential to impact the local community, and accepts that some of the negative impacts cited in the Complaint are valid.⁸³ At the same time, OT claims that many allegations noted in the Complaint are either outdated or unsupported, and argues that the Complaint fails to recognise mitigation measures carried out by the company or compensation delivered to affected herders. Further, OT strongly contests that it alone bears full responsibility for unmitigated impacts it contends are largely due to rapid economic development of the region, including increased vehicle traffic from many sources. In a nutshell, the company claims "OT's share of dust generation, road use and pasture disturbance has been moderate, mitigated, compensated and is declining relative to other road users."⁸⁴ Nevertheless, OT states it is committed to cooperating with the PCM process for the purpose of finding common ground with the Complainants, and highlights its desire to be a good neighbor in the region.⁸⁵

93) *Regarding the assessment of environmental and social impacts on local herders from air, dust, noise, roads and other mine infrastructure and activities*, the Client does not address the Bank's compliance with EBRD policies under the ESP. However, it claims to be in compliance with all norms and standards, and confirms its own compliance with the ESIA, including its commitments referenced in the RAP, the Transportation Management Plan, the Community Health, Safety and Security

economic conditions; study applying international standards to an evaluation of impacts on livelihoods of affected communities; adequate livelihood/social impact assessment that considers true impacts to livelihoods of mobile, land-based people, and in the process, examines and considers related impacts on herder pastures, water and air resources; evaluation of the current compensation framework followed by an updated version based upon a fairer, more appropriate methodology; animal health assessment that includes lab testing and a health protection plan. Complaint Documents.

⁸² Revised Management Response at 20-21.

⁸³ OT Comments at 1.

⁸⁴ OT comments at 7.

⁸⁵ Client Response at 1.

Management Plan, and the SEP, and maintains all plans were developed in accordance with international lender standards. OT states it has identified potential impacts to the local community, including those related to transportation infrastructure and use of roads. Further, it has carried out numerous programmes to mitigate, manage and fairly compensate for transportation-related impacts within the Project Area of Influence, and has consulted widely with concerned stakeholders and engaged *soum* authorities in key decisions. It claims to continually assess and adapt programs to ensure potential impacts are considered.

94) *OT states it would appreciate an opportunity for further communication* with the herder households associated with the Complaint, to gain a fuller understanding of the specific issues herders would like to resolve, and to identify the potential sources of impacts herders believe are related to OT activities. While the Company understands the Complainants have raised a number of transportation-related concerns, OT is less clear about how some of the issues are linked to its activities. The Client notes, for example, that the locations of the Complainants' camps appear to be adjacent to the ER road, rather than the OT-GS road. Further, OT suggests that impacts from more general sources, such as increased transportation in the region or increased population of herders in the area, could be a factor.⁸⁶ Given the general nature of the Complaint from OT's perspective, the Company would welcome a conversation aimed at further defining the issues and concerns presented in the Complaint documentation.

95) *Regarding the OT-GS road*, OT has been paving it since 2011 and states it intended to complete the road prior to initiating the shipment of concentrate. However, due to permitting delays, the road was not finished by the time shipments commenced in July 2013. According to OT, the road is now paved to high specification standards, and claims the statements in the Complaint documents related to the status of the road are erroneous and out of date. OT notes that compensation was paid in 2011-2012 to all herders who graze along the OT-GS route, based upon a compensation formula that was widely consulted.⁸⁷ OT maintains it has taken adequate measures, such as controlling speed limits and installing animal crossing points, to ensure adverse impacts on communities and the environment were mitigated and managed as much as possible.⁸⁸ As mentioned above, OT cannot comment on the tragic death of a local man in a 2013 traffic accident, as the incident remains under police investigation.

96) *Regarding other road infrastructure*, OT acknowledges the need for and existence of a more extensive road network and recognizes it has had to build new roads to build

⁸⁶ Id. at 2.

⁸⁷ OT comments at 2.

⁸⁸ Client Response at 5.

necessary infrastructure, in addition to using existing regional and local roads for construction and operations purposes. Formal divergences from the existing state road to the Chinese border have also been negotiated and permitted by the proper authorities, as noted in the Supplemental Appraisal: Diversion Road and Realignment Road, released 8 October 2013.⁸⁹ These roads were not part of the original plan to utilize the existing state road; however, OT maintains little livestock grazing occurs along the diversion road. OT claims the ESIA process appropriately identified impacts from roads, and reports that it has implemented effective mitigation and management measures, including road upgrades, road maintenance, a reduction in OT traffic post construction, technical and vegetation rehabilitation along certain routes, rehabilitation of roads no longer in use, etc. As discussed above, OT further notes that impacts, which could not be avoided or mitigated, were identified and fairly compensated according to the Resettlement Action Plan (RAP).⁹⁰

97) *Regarding dust impacts*, OT reports it has applied an enhanced EPA standard for dust to direct its dust dispersion policy and inform its physical and economic resettlement program, determining that proximities for herder camps, wells, and community facilities should be at least 500m from the source of the impact.⁹¹ OT does not comment on whether the enhanced EPA standard was informed by previous site analysis or how it is known that the guidance standard is appropriate for this mine in this environment. However, OT points out that dust-monitoring equipment has been installed, and the Company is actively monitoring dust throughout its area of influence. Further, the April 2013 IESC audit confirms that a Dust Monitoring Action Plan is in place, developed jointly with herders and other stakeholders.⁹² In addition, according to a slide presentation prepared by OT on its Participatory Environmental Monitoring Programs, the Participatory Dust Monitoring Program was initiated in August 2013. Herders and *soum* administration staff participated in a training program. Fourteen monitoring points have been selected, in consultation with local people, and the first samples were collected and sent to a laboratory for testing in 2013.⁹³ OT also notes additional dust mitigation measures to reduce traffic-related dust, including spraying during road upgrading and paving. OT reports that according to a 2013 livestock epidemiology study commissioned by OT in KG *soum*, there are no livestock diseases caused by dust.⁹⁴

⁸⁹ <http://ot.mn/en/node/2679>

⁹⁰ Client Response at 5; OT comments at 2-3.

⁹¹ "Selection of this distance considered USEPA Report AP-42 which shows that 98% of total air-borne dust returns to the ground surface within 250m of the emission source. Therefore, it is anticipated that there is little chance for impacts caused by air-borne dust at a distance of 500m, and this was agreed to by local herders as part of early consultation." Management Response at 3.

⁹² Oyu Tolgoi Construction Phase Environment, Social, Health and Safety April 2013 Audit Report by the Independent Environmental and Social Consultant at 50.

⁹³ Participatory Environmental Monitoring Presentation, September 20, 2013 at 18.

⁹⁴ OT comments at 3.

98) *Regarding air quality*, the April 2013 IESC audit details the fact that pollution from the mine is in exceedance of air quality standards and notes that dust from ongoing project activities is a primary source, according to the Client.⁹⁵ The October 2013 IESC audit prepared by D'Appolonia S.p.A confirms that exceedances of ambient air quality Project Standards continue to occur. OT is working to develop suitable mitigations to address these exceedances.⁹⁶

99) *Concerning fragmentation of pastures and local rivers and streams*, Oyu Tolgoi argues that this claim is not supported by evidence.⁹⁷

100) *With regard to loss of pastureland*, Oyu Tolgoi acknowledges OT facilities and construction of roads have resulted in the unavoidable loss of pastureland. However, OT maintains that the loss was reduced wherever possible and the residual losses were assessed and fairly compensated in line with Bank requirements, as set out in the RAP. OT reports a number of related assessments are planned to determine the adequacy of the economic displacement compensation framework and to identify the extent and cause of overall pasture loss in the region. According to the company, a key cause of the loss appears to be due to drought conditions and overgrazing.⁹⁸

101) *Concerning loss of access to water resources*, Oyu Tolgoi disagrees that there is a loss of water resources in the area as a result of OT's presence. OT argues that the water shortages are due to natural drought conditions, and alleges that access to water has actually improved locally, as a result of company initiatives undertaken in collaboration with herders and local authorities (e.g., refurbished wells, trialing a new design of herder wells that should recharge at a faster rate, discovery of a mid-level ground water basin that will supply the Khanbogd *soum* center). Furthermore, OT asserts that improved water access is something most herders recognise and positively acknowledge.⁹⁹

102) *Regarding health impacts and health monitoring*, OT maintains there are no links between OT's activities and respiratory ailments or any other human health issues in Khanbogd *soum*. Further, the company indicates that to establish a monitoring system to assess the influence of local economic conditions on herders' health, in accordance with Company commitments in the Community Health Safety and Security Management Plan

⁹⁵ Oyu Tolgoi Construction Phase Environment, Social, Health and Safety April 2013 Audit Report by the Independent Environmental and Social Consultant at 73.

⁹⁶ Report of the Independent Environmental & Social Consultant, Oyu Tolgoi Mine Project, prepared by D'Appolonia S.p.A – Oyu Tolgoi Mine Project – IESC Report Site Visit: October 2013 at 10.

⁹⁷ OT comments at 3-4.

⁹⁸ OT comments at 4.

⁹⁹ Id. at 5.

(CHSSMP)¹⁰⁰, it must first establish baseline data on the health of the local population, as no prior baseline had been conducted. In 2013 OT commissioned a research study on herder health and received permission from the Ministry of Health to conduct a “Herders’ livelihood and health status” survey. OT reports that the survey will be publically released shortly. Once a baseline is established, OT states it will develop a health monitoring system.¹⁰¹

103) *Regarding impacts to local soil and flora from windblown dust*, OT acknowledges that topsoil is prone to erosion by wind and water, given the fragile environment of the South Gobi. It observes that this susceptibility is exacerbated in areas where overgrazing reduces the protection provided by vegetation, where vehicles drive on unsealed tracks, and in areas of earthworks. OT also points to the common practice of off-road driving, resulting in multiple parallel tracks that continue to expand over ever-widening areas, causing damage to local soils and flora. OT states it has established a number of actions to address the problem of windblown dust during construction and operations, presumably in conformance with EBRD requirements, including dust control methods and measures to avoid off-road driving by Company and contractor vehicles.¹⁰²

104) *Regarding off-road driving outside the MLA*, OT acknowledges there have been issues with driver behavior in the past, but notes it has seen improvement based on its efforts to provide one-on-one training to each driver.¹⁰³ The April 2013 IESC audit also observed some improvement in handling these problems due to the installation of a GPS enforcement program.¹⁰⁴

105) *Regarding compensation under the Resettlement Action Plan (RAP)*, OT claims the compensation agreement for addressing physical and economic displacement was designed according to EBRD’s and IFC’s performance requirements, as well as Rio Tinto’s Community Standard. According to OT, it is comprehensive in nature and based on an extensive consultative process that included the formation of the Compensation Working Group, comprised of herders, local authorities and other interested stakeholders, who were tasked with designing the framework. The agreement also involves ongoing monitoring of impacted households.¹⁰⁵

¹⁰⁰ Community Health, Safety and Security Management Plan at 19.

¹⁰¹ Oyu Tolgoi Construction Phase Environment, Social, Health and Safety April 2013 Audit Report by the Independent Environmental and Social Consultant at 85; OT comments at 6.

¹⁰² Section C: Impact Assessment, Chapter C4: Topography, Landscape, Geology, Topsoils at 2.

¹⁰³ In-person Interview with OT staff.

¹⁰⁴ Oyu Tolgoi Construction Phase Environment, Social, Health and Safety April 2013 Audit Report by the Independent Environmental and Social Consultant at 40.

¹⁰⁵ Client Response at 7. OT comments at 2.

106) *Regarding eligibility for compensation*, OT mapped the location of the initial fourteen Complaint signatories and concluded that none were eligible for compensation under OT's economic displacement program, as a result of transportation related impacts, according to the compensation criteria contained in the RAP and agreed to by the Compensation Working Group. Two Complainants received compensation for economic displacement associated with impacts not related to the GS-OT road or transportation activities. According to OT, none of the signatories are in the impact zone of the OT-GS road or other OT roads, although they appear to be adjacent to the ER road.¹⁰⁶

107) *With regard to concerns about the employment opportunities for local herders*, OT maintains it has tried to find employment opportunities for the local population that also accommodate their interest in continuing to herd. OT has developed the road monitor position, for example, bearing this point in mind.

108) *Regarding meaningful consultation and engagement with Complainants under the PIP and ESP requirements*, OT disagrees with Complainants' claim that affected persons have not been consulted. The company reports they have a strong stakeholder engagement program that promotes extensive consultation with local people and authorities. OT maintains these numerous activities are well documented and the company acts upon the feedback it receives.¹⁰⁷

109) *With regard to the community grievance mechanism*, OT reviewed whether any of the Complainants had accessed the company mechanism or otherwise approached the Company indirectly through a local office. Based on its assessment, OT concludes that none of the fourteen signatories have registered complaints with OT's formal grievance mechanism or raised complaints related to transportation. One of the signatories is involved in an ongoing complaint process through the Compliance Advisor/Ombudsman process regarding an unrelated complaint.¹⁰⁸

Client's position on Problem-solving Initiative is covered in a separate Eligibility Assessment report.

IV Determination of Eligibility

¹⁰⁶ Id.

¹⁰⁷ OT comments at 7.

¹⁰⁸ Id. at 8.

Determination of Eligibility for a Compliance Review

110) The Eligibility Assessors have concluded the Complaint **is eligible for a Compliance Review** under PCM Rules of Procedure (RPs) 16-29.

111) The Complainants have standing to make the Complaint according to PCM RP 2.

112) The Complaint relates to a Project that was approved for financing by the EBRD Board of Directors on 26 February 2013, satisfying PCM RP 19 (a).

113) As outlined in the detailed summary of the Complainants' position, the Complaint describes environmental and social harm that they argue could result from the Project, pursuant to PCM RP 19(b).¹⁰⁹

114) The Complaint seeks a Problem-solving Initiative and a Compliance Review, in conformance with PCM RP 20 (a).¹¹⁰ Specifically, the Complaint requests the following outcomes from a Compliance Review, pursuant to PCM RP 20 (b), which states a 'Complaint should also include, if possible ... an indication of the outcome(s) sought as a result of use of the PCM process.' Complainants seek:

- a. At the broadest level, outcomes that will allow Complainants to remain in their 'motherland' and continue their herding traditions and lifestyle in a sustainable way – meaning opportunity for an adequate livelihood, good health and well-being for people and animals, and access to clean water, clean air and adequate pastureland.
- b. More specifically, an independent assessment regarding whether EBRD has complied with its own policies and procedures in preparing, assessing and supervising the Project, including (i) whether the ESIA was based on detailed, timely information that reflected a keen understanding of herding practices and needs; (ii) whether the appraisal and analysis process was sufficiently comprehensive and robust; (iii) whether EBRD fully recognized the potential project risks and impacts and communicated them to the Board and local herders in advance of its decision to invest; and (iv) whether EBRD had a high degree of confidence that project impacts on herder health,

¹⁰⁹ For a list of alleged harms caused, or likely to be caused by the Project, also see paragraph 119.

¹¹⁰ The 2013 written Complaint does not directly request a Compliance Review. However, Complainants unequivocally expressed a desire for a Compliance Review (in addition to a Problem-solving Initiative) during field visit interviews with PCM, and provided references to related materials. Further, Complainants identified issues related to the Bank's due diligence that may be more appropriately addressed through a Compliance Review than through a PSI. In addition, OT Watch specified details regarding the Compliance Review in its letter to PCM dated 1 April 2014

livelihood, pastures, and culture could be mitigated prior to the investment decision.

- c. An independent assessment and assurance that (i) the corresponding mitigation measures set out in the ESIA, and subsequently included in project documents, including the ESAP, RAP, OMPs, and Livelihood Restoration Framework, adequately addressed the full range of social and environmental impacts from the network of roads and related infrastructure facilities associated with the Project; (ii) the mitigation measures and compensation framework were calculated according to methodology in conformance with the intent of PR 5 and other relevant policies; (iii) EBRD has ensured that social and environmental commitments have been suitably implemented; and (iv) outcomes of mitigation and compensation measures have satisfactorily addressed Project risks and impacts, according to the intent of EBRD policy.
- d. Verification that EBRD's supervision of OT is adequate and sufficiently proactive to ensure proper compliance with EBRD policies and requirements.

115) The Complainants have provided 'copies of correspondence, notes or other materials related to communications with the Bank or other Relevant Parties', thereby conforming with PCM RP 20 (c).

116) Compliance issues are presented below with reference to the most relevant EBRD requirements at issue, pursuant to PCM RP 20(d). The issues are drawn from interviews with the Complainants, as well as from the Complaint and documentation provided or referenced by Complainants.

Compliance Issues Related to PR 1: Environmental and Social Appraisal and Management

117) *Inadequate project appraisal.* Complainants claim the social and environmental appraisal process was late, incomplete, improperly designed and inadequate to protect health, livelihoods, traditional lifestyles and the ecosystems upon which herders depend to sustain their way of life. They argue the assessment process failed to provide a full understanding of impacts from roads, along with adequate mitigation measures to safeguard herders and their animals from harm associated with an extensive and ever-expanding project infrastructure, contrary to EBRD's ESP. They believe that, consequently, it failed to capture the precariousness of the herding enterprise, resulting

in significant gaps between the impacts anticipated in the ESIA ‘on paper’ and the actual harm experienced by herders ‘in practice’.¹¹¹ Specifically, they claim:

- a. All project-related roads associated with Oyu Tolgoi activities should be considered part of the Project’s area of influence and subject to the Bank’s due diligence and ongoing supervision regarding the impacts of, and appropriate mitigation for, the roads.
- b. The environmental or social risks and impacts should have been assessed at a much earlier stage of project development and continually managed.
- c. An overly narrow, compartmentalized, fragmented appraisal process considered road-related impacts in isolation of each other, without sufficiently analyzing their cumulative and interactive effects on herders, pastures, water, livestock, health and livelihoods.
- d. The ESIA was prepared without a sound understanding of how herding works in practice and the conditions required to succeed; nor does it reflect an appreciation of the nuanced interaction between livelihood, geography, seasons and biology.¹¹²
- e. A failure on the part of EBRD to ensure that major work on critical baseline conditions and impact assessments related to roads (e.g., livelihoods, pastures, health of people and animals, access to water, biodiversity and critical habitat), in addition to operations phase commitments from management, were available at an appropriate level of detail, sufficiently analyzed and understood by the community and the Bank, prior to the decision to invest.
 - i. As a result of the above, Complainants allege the local population did not receive adequate information about the risks and impacts from roads in time to clearly understand how these Project components might

¹¹¹ Complainants state, “Mongolian herders are nomadic pastoralists - dependent on pastures for their livelihoods. We would like the EBRD to demonstrate that it has evaluated its impacts on pastures and water resource access before designing the Oyu Tolgoi mine, its infrastructure and other facilities such as the power plant and international airport. Impact on pastures needs to be evaluated for measuring real impact on livelihoods of nomadic herders. We would like the EBRD to demonstrate that it has evaluated the impact of coal and road dust on human and livestock health. If these assessments have been done in compliance with EBRD requirements, and not disclosed we would like consultation.” Response to PCM Questions - OT Section at 4.

¹¹² For example, Complainants note that “sustainable pasture management or sustainable livelihood plans geared toward intensive livestock breeding or other settled forms of activity are unacceptable alternatives” and inconsistent with the traditions of a nomadic pastoralist lifestyle which herders want to maintain. Complaint of July 1, 2013 at 3.

adversely affect them; nor was the baseline data sufficient for monitoring and tracking impacts to health, livelihood, etc., going forward. They want to know, for example: 1) was an appropriate health baseline study conducted in order to properly monitor herder health over time; 2) was an adequate health impact assessment prepared that considered impacts from dust and other sources on herder and livestock health; 3) did the ESIA contain a suitable health mitigation and protection plan informed by adequate studies, assessments and investigative work.

- ii. In addition, Complainants claim the ESIA was retroactive, as it principally focused on the construction phase of the project when, in their view, construction was more than 94% complete. Further, Complainants understand that Operational Management Plans were not part of the documentation but would be developed concurrently with the operations phase. Consequently, Complainants believe that financing decisions were made without the availability of essential information as required by Bank policy, and without fully understanding Client commitments agreed to for the operations phase of the project.
- f. Complainants allege that gaps in the information gathered and analyzed, in addition to other shortcomings in the appraisal process as described above, have resulted in an inadequate RAP and compensation methodology.
- g. Consequently, Complainants have requested that a number of studies be conducted to fill in critical information gaps. Complainants are worried that the Project is advancing before sufficient technical information is available about the possible environmental and social impacts of the Project, raising further concern about the effectiveness of the proposed mitigation measures.
- h. If such studies and assessments have been prepared according to EBRD requirements, Complainants are requesting information disclosure and meaningful consultation.

118) Relevant aspects of PR 1 follow:

- a. **Para. 4:** “This PR applies to projects with potential environmental or social risks and impacts that should be assessed in the early stages of project development, and managed on an ongoing basis.”
- b. **Para. 5:** “Through appraisal activities...the client will consider in an integrated manner the potential environmental and social issues and impacts associated with the proposed project. The information gained will inform the

EBRD's own due diligence related to the client and project and will help to identify the applicable PRs...to better manage risk and develop opportunities, in accordance with the applicable PRs. The appraisal process will be based on recent information,...and social and environmental baseline data at an appropriate level of detail“

- c. **Para. 6:** “Environmental and social impacts and issues will be appraised in the context of the project’s area of influence. This area of influence may include one or more of the following, as appropriate
- (iii) Associated facilities or businesses that are not funded by the EBRD as part of the project and may be separate legal entities yet whose viability and existence depend exclusively on the project and whose goods and services are essential for the successful operation of the project
 - (v) Areas and communities potentially impacted by: cumulative impacts from further planned development of the project or other sources of similar impacts in the geographical area, any existing project or condition, and other project-related developments that can realistically be expected at the time due diligence is undertaken.”
 - (vi) Areas and communities potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location.”
- d. **Para. 7:** “Environmental and social issues and impacts will also be analysed for the relevant stages of the project cycle... Where relevant, the appraisal will also consider the role and capacity of third parties, such as...contractors and suppliers, to the extent that they may influence the project ...”
- e. **Para.8:** “The nature of due diligence studies undertaken will be commensurate with the risks and issues involved. It will be an adequate, accurate, and objective evaluation and presentation of the issues, prepared by qualified and experienced persons...”
- f. **Para.9:** “Projects categorised by EBRD as “A” will require special formalised and participatory assessment processes...Greenfield developments, or major expansions of activities, with potentially significant and diverse adverse environmental or social impacts... will require a comprehensive environmental and/or social impact assessment, to identify and assess the potential future environmental and social impacts associated with the proposed Project, identify potential improvement opportunities, and recommend any measures needed to avoid, or where avoidance is not possible, minimise and mitigate adverse impacts... The Environmental Impact

Assessment (EIA)/Social Impact Assessment (SIA) shall meet PR 10... Projects involving involuntary resettlement or impacts on Indigenous Peoples or cultural heritage will require an assessment in accordance with PRs 5, 7 and 8 respectively, in addition to any other environmental or social due diligence studies that may be required.”

General Policy Considerations

119) Relevant aspects of EBRD’s general policy follow, including EBRD’s commitment and Integrating environmental and social considerations into the project cycle:

- a. **Para. B.3:** establishes EBRD’s commitment, roles and responsibilities under the ESP. “The EBRD will seek to ensure through its environmental and social appraisal and monitoring processes that the projects it finances:
 - are socially and environmentally sustainable
 - respect the rights of affected workers and communities
 - and are designed and operated in compliance with ... good international practice...

The Bank’s role is: ... (i) to review the clients’ assessment; (ii) to assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimise, mitigate or offset, or compensate for adverse social and environmental impacts consistent with the PRs; (iii) to help identify opportunities for additional environmental or social benefits...”

- b. **Para. B.5:** “The Bank will seek to finance projects that have the potential to realise additional environmental and social benefits, such as socio-economic benefits to project-affected communities and, where appropriate and feasible, equitable access amongst project- affected parties to those benefits. Particular attention will be given to projects which include elements that focus upon priority environmental and social issues facing the region and which promote implementation of relevant EU strategies, such as climate change mitigation and adaptation, desertification, biodiversity conservation, energy and resource efficiency, poverty alleviation, promotion of decent work, reducing social exclusion, access to basic services, gender equality, transparency, and social development...”

- c. **Para. C.14:** “All EBRD-financed projects undergo environmental and social appraisal both to help the EBRD decide if an activity should be financed and, if so, the way in which environmental and social issues should be addressed in

planning, financing, and implementation. The EBRD's social and environmental appraisal is integrated into the EBRD's overall project appraisal... This appraisal will be appropriate to the nature and scale of the project, and commensurate with the level of environmental and social risks and impacts. The appraisal will ascertain whether activities to be supported by EBRD finance are capable of being implemented in accordance with this Policy and its Performance Requirements (PRs). It is the responsibility of the client to ensure that the required due diligence studies, information disclosure and stakeholder engagement are carried out in accordance with PRs 1 through 10, and submitted to the EBRD for review as part of its own appraisal. The EBRD will review the information provided, and provide guidance to the client on how the project can meet the Bank's requirements."

- d. **Paras. C.15-16:** *The Project Appraisal Process – Overall approach*
- e. **Para. C.20:** "A proposed project is classified as Category A when it could result in potentially significant and diverse adverse future environmental and/or social impacts and issues which, at the time of categorisation, cannot readily be identified or assessed and which require a formalised and participatory assessment process carried out by independent third party specialists in accordance with the PRs."
- f. **Para. C.28-29:** *Performance Requirements*

Compliance Issues Related to PR 3: Pollution Prevention and Abatement

120) Complainants have raised issues related to dust pollution, concerns about air quality, including the potential for cumulative impacts, and problems associated with waste, which they fear may be impacting their health, safety and ecology, and the Bank's actions or inactions in this regard. Applicable PR 3 requirements include:

- a. **Para. 2:** "the EBRD is committed to supporting, through the activities it finances, the precautionary principle, the prevention principle, the principle that environmental damage should as a priority be rectified at source, and that the polluter pays principle."
- b. **Para. 3:** "The objectives...are: to avoid, or where avoidance is not possible, minimise adverse impacts on human health and the environment by avoiding or minimising pollution directly arising from projects."
- c. **Para. 10:** *Pollution prevention, resource conservation and energy efficiency*
- d. **Para. 12:** *Wastes*
- e. **Para. 16:** *Ambient considerations*

Compliance Issues Related to PR 4: Community Health, Safety, and Security

121) The Complainants identify health, safety and security impacts, from dust, noise, influx of people and traffic, including increased social conflict and diminished physical health and mental peace of mind and well-being, for both local herders and their livestock. They allege that the company has failed to adequately prevent or mitigate dust pollution or properly implement road safety measures, in breach of PR 4.

122) By implication, they suggest that the Bank has not satisfactorily monitored the project to ensure the Client is following through with the measures developed and that the measures are, indeed, working. Complainants would like the Compliance Review to establish whether EBRD's supervision has been adequate, and whether EBRD has been effective in helping OT develop and implement appropriate and efficient measures to prevent or mitigate these health and safety impacts in a manner commensurate with the risks, as required by Bank policy.

123) Complainants also claim that the Bank failed to comprehensively scope the risks and impacts from dust and other sources on the health and safety of mobile, land-based people and animals. As a result, Complainants claim there has been a lack of project-related information disclosed to project affected people about health and safety risks and impacts, including evidence of a robust and timely health impact assessment. Consequently local people are more anxious about their well-being because they do not fully understand the risks and impacts involved; nor do they feel the current prevention and mitigation measures are adequate to deal with the harm they allegedly have experienced. Complainants also contend that, in the absence of an adequate health impact assessment and baseline study, it is difficult to monitor changes in their own health and well-being and that of their animals, or to know whether the changes are due to project activities.

124) Complainants would like the Compliance Review to assess whether the due diligence documents and management plans (ESIA, OMPs) are adequate: (a) in addressing the full scope of health and safety risks and impacts from dust and other sources on the health and safety of mobile, land-based people and animals; and (b) in establishing reasonable mitigation measures that are capable of addressing related impacts during different phases of the project, including construction, according to the intent of the policy.

125) Relevant aspect of PR 4 requirements include:

- a. **Paras. 7-9:** *Community health and safety requirements*
- b. **Paras. 12-14:** *Hazardous materials safety*

- c. **Para. 16:** *Environmental and natural resource issues*
- d. **Para. 17:** *Community exposure to disease*

Compliance Issues Related to PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement

126) Complainants claim they have sustained losses of assets and access to assets that have adversely affected their livelihoods, as a result of cumulative and interactive impacts from roads, traffic and infrastructure. These impacts, they claim, have resulted in economic and physical displacement that has not been properly recognized, prevented, mitigated or compensated, as required under PR 5. Complainants would like the Compliance Review to investigate whether the Bank properly considered feasible, alternative road design or road placement to avoid or minimise physical and economic displacement caused by fragmentation of pastures, dust pollution, etc.

Further, Complainants have requested that the Compliance Review assess whether the Compensation Framework properly identifies all physically or economically displaced Complainants and provides adequate compensation or resettlement according to a fair methodology that takes into account the actual damages and losses to herder livelihoods, in line with EBRD policy. A related issue is whether Complainants should be treated as a small-scale business rather than as a family unit, which would require more substantial benefits to replace herders' lost income and business opportunities.¹¹³

127) Complainants further claim possible unintended consequences associated with the application of the mitigation hierarchy, whereby some people who perhaps should have been resettled, were not (e.g., households exposed to significant health and safety risks that can't be mitigated), contrary to the intent of PR 5. Complainants would like the Compliance Review to consider whether the Company may inadvertently be putting some herder households in harms way in an effort to avoid physically relocating families.¹¹⁴

128) Relevant aspects of PR 5 follow:

- a. **Paras. 1-2:** sets out the broad definition of involuntary resettlement, including the concept of physical versus economic dislocation
- b. **Para. 3:** notes the universal respect for human rights, particularly the right to adequate housing and the 'continuous improvement of living conditions...'
- c. **Para. 4:** establishes the obligation to follow the mitigation hierarchy

¹¹³ Materials from civil society organizations, including OT Watch, referenced by Complainants.

- d. **Para. 6:** *Objectives*
- e. **Para. 7-8, 10:** *Scope*
- f. **Para. 11:** relates to feasible alternative project design to avoid or at least minimize physical and/or economic displacement, while balancing environmental, social and financial costs and benefits
- g. **Para. 12:** *Consultation*
- h. **Para 13:** *Grievance mechanism*
- i. **Para 14:** Addresses resettlement planning and implementation, including the need for an adequate census and socio-economic baseline assessment
- j. **Paras. 15-23:** *Resettlement Action Plan (RAP)*
- k. **Paras. 24-29:** *Livelihood Restoration Framework*
- l. **Paras. 30-39** *Compensation and benefits for displaced persons*

Compliance Issues Related to PR 7: Indigenous Peoples

129) Complainants contend that herders from the South Gobi are Indigenous Peoples, under the definition of PR 7, rather than ‘vulnerable’, as the Bank maintains. They claim that neither the Bank nor Oyu Tolgoi took the steps necessary to determine whether herders of the South Gobi are Indigenous Peoples as defined in PR 7 and consequently, failed to afford them the corresponding protections provided for by the requirement.¹¹⁵

130) Compliance issues include whether EBRD failed to properly identify nomadic herders as Indigenous Peoples; and if so, whether EBRD failed to afford the corresponding protections as required by PR 7. In addition, Complainants wish to know whether EBRD took the steps necessary to make the determination, according to the intent of the policy.

131) Relevant sections of PR 7 include paragraphs 9-12 (*Scope of application*) and other sections as appropriate, such as paragraphs 13-14 (*Requirements*); 20 (*Avoidance of adverse impacts*); 31-33 (*Special requirements*).

PR 8: Cultural Heritage

132) Complainants highlight the importance of their cultural identity as herders, including their strong ties to the land, the ecosystem upon which they depend for their livelihood, and their traditions, values, and way of life. They suggest their identity as nomadic herders is under threat, with not enough attention to its protection and

¹¹⁵ In-person interview with Complainants.

conservation, in accordance with PR 8. They question whether EBRD has appropriately guided its Client to “avoid or mitigate adverse impacts on cultural heritage in the course of their business operations”, as required in PR 8.1. Further Complainants suggest that compensation, livelihood, and other special programs offered by the mine, may not have been designed with enough attention to strengthening cultural identity. As a result these “benefits” may inadvertently undermine cultural heritage.¹¹⁶

133) Relevant elements from PR 8 follow:

- a. **Para. 1:** establishes the “Bank’s support of a precautionary approach to the management and sustainable use of cultural heritage...”
- b. **Para. 2:** notes that: “Cultural heritage is important as a source of valuable historical and scientific information, as an asset for economic and social development, and as an integral part of a people’s cultural identity, practices, and continuity.”
- c. **Para. 7:** defines cultural heritage and notes that it “encompasses tangible (physical) and intangible heritage...”
- d. **Para. 11:** *Impacts on intangible heritage*
- e. **Para. 12:** *Avoiding impacts*
- f. **Para. 13:** *Assessing impacts that cannot be avoided*
- g. **Para. 15:** *Managing impacts on cultural heritage*

Compliance Issues Related to PR 10: Information Disclosure and Stakeholder Engagement

134) Complainants maintain the consultation process was based on deficient and partial information of potential risks, impacts and mitigation measures; for example it is not clear whether affected communities were consulted on roads not identified as impact zones. Further, the engagement process did not sufficiently enable affected communities to understand the project’s material health and safety risks and impacts or corresponding safeguard measures prior to constructing new roads or using existing ones.. As a result of what Complainants perceive are critical gaps in the ESIA and associated problems related to the timing of project information disclosure, they suggest that EBRD failed to

¹¹⁶ Id. and Complaint documents.

satisfy its policy requirements for information disclosure, and meaningful consultation, under PR10, particularly in light of the fact the Project is classified as Category A.¹¹⁷

135) Details of relevant aspects of PR 10, follow:

- a. **Para. 6:** EBRD requires that the client undertakes stakeholder engagement which is ‘free of manipulation, interference, coercion and intimidation, and is conducted on the basis of timely, relevant, understandable and accessible information, in a culturally appropriate format.’
- b. **Para. 10:** indicates that the client must then engage in a “scoping process with identified stakeholders to ensure identification of all key issues to be investigated as part of the ESIA process...”
- c. **Paras. 12-14:** *Information disclosure*
- d. **Para. 15-16:** *Meaningful consultation*
- e. **Paras. 17,19-20:** *Disclosure and consultation on Category A projects*
- f. **Paras. 18:** Required for category A projects the “information disclosed must include a full EIA/SIA report in accordance with the Banks requirements”
- g. **Para. 24:** Grievance mechanism

136) In the case of a Compliance Review, PCM RP 23 (a) requires the Eligibility Assessors to consider, among other matters, whether the Complaint relates to **actions or inactions that are the responsibility of the Bank**. Complainants identify a number of issues of alleged non-compliance with EBRD policy, as follows:

- a. A failure to adequately appraise the project;
- b. A failure to provide sufficient baseline and other project information in critical areas in a timely and comprehensive manner, in conformance with the ESP;
- c. A failure to properly classify nomadic herders as Indigenous Peoples, unreasonably denying them associated rights and benefits;

¹¹⁷ In-person interviews with Complainants; A Useless Sham, December 14, 2012, at 2, 14-15.
<http://bankwatch.org/sites/default/files/a-useless-sham-OT-ESIA-review-14Dec2012.pdf>

- d. A subsequent failure to adequately assess and address the Project's impacts, including a failure to establish an adequate compensation framework, in conformance with EBRD policy;
- e. A related failure, for the same reason, to capture the precariousness of the herding enterprise, leading to significant gaps between the impacts expected and planned for in the ESIA 'on paper' and the actual harm experienced by herders 'in practice';
- f. A further failure, for the same reason, to require adequate consultation based on a full understanding of project risks, impacts and mitigation measures, in a timely and culturally appropriate manner, under the ESP.¹¹⁸

137) Pursuant to PCM RP 23 (b), the Eligibility Assessors have concluded the alleged violations of EBRD's policies in the Complaint are more than technical, particularly in light of this being a Category A project.

138) The Complaint alleges a failure by the Bank to monitor Client commitments pursuant to Bank policy, contending that EBRD should have "conducted due diligence and performed ongoing supervision regarding the impacts of, and appropriate mitigation for, these roads and railroad".¹¹⁹ Further, the Complaint questions whether the Bank "is being sufficiently proactive in engaging with Oyu Tolgoi to ensure that the project complies with the PRs."¹²⁰ Thus, PCM RP 23 (c) appears to be relevant.

139) The allegations are specific to the Project, rather than concerning EBRD policies in general, thereby satisfying the mandate of PCM RP 24(e).

140) The Complaint does not fall under any of the exclusion categories provisioned in PCM RP 24(a)-(d) and 24(f).

141) As required by PCM RP 25, the Assessors have considered the Complaint documents, the Bank's Responses, the Client's Responses, key documents, correspondence between the Complainant and Bank and Client representatives, internal correspondence and relevant EBRD policies, etc. The PCM Assessors have also consulted with the Complainants and the Client in the process of determining whether the Complaint satisfies the criteria for a Compliance Review under the PCM RPs.

¹¹⁸ Complaint-related documents and in-person interviews with Complainants.

¹¹⁹ Supplemental Complaint letter at 2.

¹²⁰ Id. at 7.

142) Consequently, based on an evaluation of the eligibility criteria set out in the PCM RPs 17-24, and on the analysis of the relevant documents, the Eligibility Assessors declare the Complaint **eligible** for a **Compliance Review**.

143) The Compliance Review should assess whether and, if so, which EBRD policy or policies may have been violated and if harm has been or may be caused due to action or inaction on the part of the Bank. In line with PCM RP 28(b), the Terms of Reference for a Compliance Review are set forth in Part III, Terms of Reference, of the document.

PART II: ENERGY RESOURCES

I Factual Background

1) In May 2010, the European Bank for Reconstruction and Development (EBRD) approved financing for the Ukhaa Khudag (UHG) Energy Resources Phase II Project, referred to in some project documentation as Energy Resources Phase II.¹²¹ The Phase II loan was approved for up to USD \$180million. The Project is considered Category A under EBRD Environmental and Social Policy. The mine involves shallow open pit coal mining operations from the Uhkaa Khudag deposit in Southern Mongolia.¹²²

2) The Project is operated by Energy Resources LLC (ER), an independent Mongolian mining company owned by the Mongolian Mining Corporation (MMC). ER is the largest private high-quality coking coal producer and exporter in Mongolia. The Company owns and operates two open-pit mines - Ukhaa Khudag and Baruun Naran, both located in the Ömnögovi province of Mongolia. It holds the mining license MV-11952 for the UHG coking coal deposit and its subsidiaries and their respective responsibilities are as follows:

- Energy Resources Rail LLC: responsible for the implementation of the construction of the railway base infrastructure. (Note: MMC is no longer involved in the construction of the railway.)
- Energy Resources Mining LLC: responsible for the mining and technical operations of the UHG deposit.
- Enreotechnology LLC: responsible for owning and operating of the coal handling and processing plant of the UHG deposit.
- Ukhaa Khudag Water Supply LLC: responsible for the water exploration and supply of the UHG deposit.
- United Power LLC: responsible for construction and operation of the power plant.
- Transgobi LLC: responsible for the coal transportation of the UHG deposit.
- Tavan Tolgoi Airport LLC: responsible for the operation and management of the airport in Tsogttsetsii *soum* serving the miners' camp with several Mongolian commercial airlines.

¹²¹ Project Summary Document

¹²² Id.

- Energy Resources Road LLC: responsible for the coal transportation and road construction.
- Gobi Road LLC: responsible for the construction of a new road for transportation of coal extracted from the UHG deposit.
- Public Service LLC: responsible for holding a special permit required for provision of public utility services at the UHG deposit.¹²³

3) In the initial phase, the UHG mine was developed to produce coking coal (important in the production of steel), to be transported for further treatment and processing in China. Phase II of the Ukhaa Khudag (UHG) Project (hereafter, the Project) expands upon existing Phase I mining operations and involves the expansion of the open-pit mine, further infrastructure development around the mine-site and the miners' camp, as well as the construction and development of ER's coking coal handling and preparation plant (CHPP), a small power plant, a water supply system, and an air strip. The coal washing plant, opened in June 2011, is said to be the first of its kind in Mongolia, and one of the most advanced in Asia.¹²⁴ The Project was also to include a coal export railway to China;¹²⁵ however, all new rail development is now centralized under a recently established state-owned enterprise. Consequently, the railway will not go forward as part of ER operations.¹²⁶

4) The UHG mine is located in Tsagaan-Ovoo *bagh* of Tsogttsetsii *soum* in Umnogovi *aimag* (South Gobi region) of Mongolia, approximately 4km north of the undeveloped Tavan Tolgoi coal deposit and 220km from the Mongolia-China border. The UHG mine license area comprises a total of 2,962 hectares (ha.), of which 1,050 ha. is proposed to be mined in an expanded open pit over approximately 20 years. Tsogttsetsii *soum* has a population of approximately 2,245. The Tsogttsetsii *soum* centre is located approximately 1km northeast of the mine camp and contains basic administrative and social infrastructure, including a hospital, secondary school, dormitory, culture centre, stores and a post office. This *soum* centre is connected to the *aimag* centre, Dalanzadgad, via an unpaved road.¹²⁷

5) The UHG mine began production in April 2009. Phase II of the Project commenced in 2010. The existing regional road was upgraded to a paved road and completed in October 2011.¹²⁸

¹²³ Mongolian Mining Corporation Website, <http://www.mmc.mn/about-company-branches.html>

¹²⁴ <http://www.energyresources.mn/news/show/id/17>.

¹²⁵ NTS at 1.

¹²⁶ Management Response at 3.

¹²⁷ Id. at 2.

¹²⁸ Project Summary Document

6) An ESIA, Non-technical Summary, Public Consultation and Disclosure Plan (PCDP), and additional Environmental and Social Management Plans (ESMP) have been prepared for the Project. The Phase II ESIA was disclosed October 16, 2009.¹²⁹

7) EBRD's Environmental and Social Department (ESD) has been involved in reviewing documents and monitoring Company performance for five years.¹³⁰

8) At the time of the Project's initial development, the export road was an unpaved national highway frequented by the local population and other mining operations to export their mineral products to China. ER paved the 245 km road at its own expense. Anyone can use the road; however, they must pay a toll to do so. Local citizens are exempted from the toll. Many trucks transporting coal from other mines drive on dirt tracks that parallel the export road or create new ones, to save the expense of the toll. The road is now in the process of reverting or has reverted to state ownership.¹³¹

9) Energy Resources is one of several mines in the area transporting coal through the Khanbogd *soum* to the Chinese border.

II Steps Taken in Determining Eligibility

10) The Eligibility Assessor and PCM Officer have examined the Complaint to determine whether it satisfies the applicable eligibility criteria of the PCM Rules of Procedure. They checked the availability of the documents cited in the Complaint for the purposes of PCM RP 20c. They reviewed the Responses received from Bank Management and the Client as well as various Project documents, materials and correspondence provided by the parties. In addition, they held separate in-person conversations with the Complainants, EBRD Country Director for Mongolia, and the Client.

III Summary of the Parties' Positions

Complainants' Position

¹²⁹ Project Summary Document

¹³⁰ Management Response at 1.

¹³¹ Id. at 3; In-person interview with ER; Revised Management Response at 13.

11) Complainants are 18 individual herders from Khanbogd *soum* and 5 herders from Manlai *soum*. Co-Complainants include two civil society organizations, Oyu Tolgoi Watch and Shuteen Gaviluut. All Complainants emphasize they are equal participants in the Complaint process.

12) Complainants are located in the general vicinity of the ER export road which runs from the Ukhaa Khudag open pit mine to Tsagaan Khad port at the Mongolian border with China. Complainants note the 245 km paved road serves as the primary infrastructure for the transport and delivery of ER coal products.

13) Complainants claim the ER export road passes less than 50 meters from the Javkhlant *bagh* centre and cuts through the pastures of herders residing in winter camps located in East & West Hachivch, Baga Huuvur, East Hanan Ulaan Tolgoi, Aman Us, Zurkh Salaa, Govvin Shine Us, Malyn Shine Us, Ulziit, Tsatsagt.¹³² According to Complainants, between 400-500 one-hundred ton double-trailer trucks navigate the road to and from China, 24 hours per day, 365 days per year. Complainants claim ER began transporting large volumes of coal on the gravel road beginning in 2009 and subsequently paved the road in 2011.¹³³ Complainants explain that the road was temporarily closed in 2011 due to violation of national legislation and severe negative impacts on the environment and human health.¹³⁴

14) Complainants note that ER also uses multiple other unsealed roads, such as the unsealed roads from Choir to the mining site, to transport fuel, and another road used to transport personnel and supplies for the mine and mine camp.¹³⁵

15) Complainants further state that ER will use the Ukhaa Khudag-Tsagaan Khad railroad, currently under construction, to transport coal from the mine to the Chinese border. Although the railroad is being constructed by the Samsung Corporation and is reportedly being financed by the Government of Mongolia, Complainants argue that it should be considered an associated facility of the EBRD-funded project and therefore within the Project's area of influence.¹³⁶

16) Also of concern is the planned coal road from Tavan Tolgoi to Oyu Tolgoi. Although its status is uncertain, Complainants argue that it will be a facility associated with both the OT and ER projects, will pose similar road concerns to those described in

¹³² Id.

¹³³ In-person interview with Complainants.

¹³⁴ In-person interview with Complainants; OT Watch Report, "A Useless Sham," December 14, 2012, at 30.

¹³⁵ Supplemental Complaint letter at 3-4.

¹³⁶ Supplemental Complaint letter at 4.

this report, and should therefore be considered within the area of influence associated with both projects.¹³⁷

17) The Complaint encompasses signatories who allege health and livelihood impacts from coal transport and transportation infrastructure, including dirt and gravel roads, quarries, the planned railroad and the paved export road, as described above. They claim the project appraisal process, including the ESIA, Resettlement Action Plan (RAP) and compensation framework, failed to adequately consider the full set of social and environmental impacts on affected herders from the planned railroad, roads and other routes frequented by ER, and their interactive and cumulative effects. Further, the Complaint maintains that prevention and mitigation measures to address project risks are neither commensurate with the harm experienced by Complainants nor sufficiently protective against future harm.¹³⁸ They suggest that the ESIA was prepared without a proper and sound grounding in herding practices and needs, including a fundamental understanding of how herding works and an appreciation of the nuanced interaction between livelihood, geography, seasons and biology.

18) Underlying the Complaint is a core question about EBRD's due diligence, including the adequacy of the project appraisal process and suitability of its ongoing client supervision with regard to the impacts of, and appropriate mitigation for, ER-related roads and railroad. Complainants also question how impacts and violations they allege occurred from the beginning of the project were considered in EBRD's decision to provide financing.¹³⁹ In short, Complainants expressed a desire to know whether EBRD has complied with its own policies and procedures in preparing, assessing and supervising the Project.¹⁴⁰

19) Complainants principally cite four categories of social and environmental impacts associated with project-related roads, which they maintain significantly affect herder livelihoods and well-being. These include:

- a. Loss of, fragmentation, and contamination of pastures, and reduced access to water resources;
- b. Proliferation of dust and noise from the network of paved and unpaved roads;
- c. As a result of the above, degradation of the health and well-being of herders and their animal herds on which the herder's traditional lifestyle and livelihood rely; and

¹³⁷ Supplemental Complaint letter at 4.

¹³⁸ PCM Energy Resources Additional Information (PCMERAI) at 1; Supplemental Complaint letter at 4-5.

¹³⁹ Supplemental Complaint letter at 2.

¹⁴⁰ In-person interviews with Complainants.

- d. Insufficient mitigation and compensation measures commensurate with risks and impacts.

20) Interviews with herders have expanded upon these baseline complaints. An inventory of these is necessary to obtain a full grasp of the frustrations the herders claim to be experiencing as their livelihoods undergo significant change. This is an attempt to cull from that inventory relevant and related complaints, organized under the relevant EBRD requirement.

Issues Related to PR 1: Environmental and Social Appraisal and Management

21) The following issues principally relate to what Complainants perceive to be unattended risks and impacts and inadequate mitigation measures concerning transportation activities, as a result of what they allege were shortcomings in the environmental and social appraisal process. They claim the Bank has failed to ensure these unattended impacts are avoided, minimised, mitigated or compensated according to EBRD policy.

Fragmentation, and loss of pastures and access to water resources

22) These issues form a set of complex problems for the local herders as well as for the mines in the area. Pasture loss can be seen simply as fragmentation by a network of roads through the project area, a preordained and necessary aspect designed to move product from the ER mines to processing facilities in China. However, herders claim the prevalence of dirt roads, in addition to the export road and the high volume of traffic, has created adverse consequences and challenges. The paved road has closed traditional nomadic tracks, negatively impacting movement between *baghs* and the *soum*, and made herding more difficult by hindering passage to pastures.¹⁴¹

23) Complainants contend that the losses they have experienced (e.g., losses and fragmentation of winter, spring, summer and reserve pastures, inhibited access to wells/water) have led to reduced livestock health and productivity and diminished quality and marketability of animal products, directly impacting their livelihood and threatening the sustainability of herding enterprises. They claim these impacts are a result of project-related disturbance and pollution.

24) Further, Complainants observe early signs of potential conflict over grazing land and violation of long-held traditions which have governed herding patterns over time, as land increasingly becomes a scarce resource. Complainants contend that herders who

¹⁴¹ PCMERAI at 3.

have lost access to traditional pastures are forced to move into other herders' traditional land. Herders may also find themselves "encroaching" upon land traditionally used by another family in order to safely cross the paved road.¹⁴² Complainants blame the road as a primary cause of the increase in tensions with other herding units. They argue that the road has put families in a position where they have had to violate traditional herding practices to access pastures for their animals.¹⁴³ With regard to water, Complainants maintain that ER has obstructed their access to rivers and streams, including the Undai river, by failing to construct flood culverts along the paved road that are adequate to allow the free flow of water sources. They further allege that in some cases, the road route has separated at least one herder's pasture from the well.¹⁴⁴

25) Herders have also had to travel longer distances to move between winter camps, pastures and livestock, expending more gasoline and time on the road than was the case previously.¹⁴⁵

26) Complainants believe that these factors, taken together, have directly or indirectly reduced their livelihood. They further allege that ER failed to adequately mitigate pasture fragmentation, including proper consideration of feasible, alternative project design to avoid or at least minimise these impacts, contrary to PR 5.11.¹⁴⁶

Prevalence of dust and noise from network of paved and unpaved roads

27) Complainants maintain that dust generated from the use of unpaved roads combined with the fugitive dust from the mine area create health concerns for both the herders and their livestock. They argue that dust in the atmosphere, related to project activities, enters the lungs and internal organs of their animals and impacts human health as well. (See the next section for a more detailed discussion of health and safety issues related to dust.).

28) Complainants contend that despite the presence of the paved road, dust and noise remain significant issues. The paved road was completed in 2011, but heavy transport from the mine began in 2009. Complainants assert that in the past, ER trucks used dirt roads rather than sticking to the gravel route. Complainants claim they are able to recognize who is using dirt roads, and among these trucks were ER trucks. They contend that dirt tracks used to access ER facilities are also used by ER trucks.¹⁴⁷

¹⁴² In-person interviews with Complainants. Complaint documents.

¹⁴³ PCMERAI at 4.

¹⁴⁴ PCMERAI at 4, referring to the case of herder Ser-Od.

¹⁴⁵ Supplemental Complaint Letter at 14.

¹⁴⁷ Id.

¹⁴⁷ Id.

29) Complainants argue that the potential to maximize the carrying capacity of the Tavan Tolgoi-Gashuun paved road has not been realized, due to weight limit requirements and toll fees established by ER for vehicles wishing to use the road. As a result, Complainants maintain that many trucks from other companies drive along side the ER road on multiple, parallel dirt tracks, generating significant quantities of dust that affects local nomadic herders and their animals. Complainants report these vehicles wish to avoid payment of the toll; and/or do not meet the weight limits established for the ER road.¹⁴⁸

30) Complainants note that the toll expense discourages other truckers from transporting their product on the ER road. According to an article in Eurasianet's Weekly Digest, ER charges a toll of 180,000 tugriks per load (approximately \$130) for third-party users.¹⁴⁹ Consequently, these drivers are dis-incentivized to use the road, as paying the toll leaves very little compensation for the drivers. A driver explains that he is "given 200,000 tugriks to deliver our load and come back. If we pay the toll there's nothing left for us".¹⁵⁰ Consequently, Complainants wish there would be a way to make the toll road more affordable to encourage its use by all coal transport drivers.¹⁵¹

31) Complainants also allege safety issues due to poor visibility from the dust. They maintain there have been accidents on dirt and paved roads where livestock and people have been harmed.

Degradation of health and well-being of herders and their livestock - relates to PR 3 (Pollution Prevention and Abatement) and PR 4 (Community Health, Safety and Security)

32) Alleged impacts from dust, noise, and fragmentation on animal herd well-being are of primary concern to the local communities that rely on traditional herding for subsistence, income, and their cultural heritage. Herders report that their entire livelihood is based on the quality of their livestock.

33) Complainants report negative impacts from livestock ingesting excessive particulates on the health and viability of their herds. They claim that ingesting dust has degraded the lungs of animals and renders useless the meat that is part of the local diet. Complainants report that 80% of animals slaughtered have degraded internal organs.

¹⁴⁸ In-person interviews with Complainants.

¹⁴⁹ Mongolia: Environment Pays Price for Infrastructure Inefficiencies, October 5, 2012, by Pearly Jacob. EurasiaNet's Weekly Digest. <http://www.eurasianet.org/node/66014>.

¹⁵⁰ Id.

¹⁵¹ In-person interview with Complainants.

They allege that internal organs show clear effects of these pollutants through discoloration and malformation. They also contend that animal weights are decreasing from these effects, as well as from diminished availability of water and forage, and, perhaps, stress.¹⁵² In addition, they report that ER and local government administrators have refused to carry out inspections of unhealthy livestock.¹⁵³

34) Further, Complainants expressed frustration from ongoing difficulties related to making safe passage across the ER road. They allege that no underpasses are present; therefore all crossing must be over the paved road, leading to livestock deaths and stress from traffic and related noise. They also perceive that animal safety is further compromised, due to high speed traffic and construction and road related open pits and quarries.¹⁵⁴

35) Complainants maintain that families, in the vicinity of coal transport and ER transportation infrastructure, have serious concerns about their health and the health of their livestock, but no evidence appears to be available about the likely impacts and mitigation plans. They contend that between 2009 – 2011, ER transported coal on the dirt/gravel road. They claim, however, that ER has not carried out an appropriate health and safety impact assessment concerning roads, or presented information or training regarding potential health effects of coal and road dust, noise, and stress on their lives. According to Complainants, effective mitigation measures commensurate with the level of health and safety impacts, including alternative project design, are lacking. This is particularly concerning to herders, given ER's heavy use of earth roads, particularly the Tavan Tolgoi-Gashuun Sukhait road – both before and after this road was paved.¹⁵⁵

Issues related to PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement, with regard to the Resettlement Action Plan and the Livelihood Restoration Framework. (These also relate to the claim of inadequate assessment according to PR1) *Insufficient prevention, mitigation and compensation measures to address livelihood impacts*

36) Complainants question whether the Company considered feasible alternative project design to avoid or at least minimise the physical or economic displacement of herders, caused by fragmentation of pastures by roads, used or relied on by the company. They allege the paved road has made it more difficult and time consuming to access pastures and travel between *baghs* and the *soum*. They further claim the road prevents the free flow of rivers and streams, impeding water access from these sources

¹⁵² In-person interviews with Complainants.

¹⁵³ PCMERAI at 2.

¹⁵⁴ Id. at 3.

¹⁵⁵ Supplemental complaint letter at 13.

for livestock. They also allege a lack of safe road crossing. They contend these problems could have been remedied through project design features such as adequate underpasses/safe crossings for herds and people, flood culverts, or alternative schemes to avoid obstruction of movement between *baghs* and the *soum*.¹⁵⁶

37) Complainants also believe they were unreasonably denied compensation commensurate with the losses sustained to their herding enterprises.

38) Complainants contend that roads and project infrastructure have replaced higher quality pastureland, resulting in diminished livelihoods for herders. Complainants claim that (a) loss of good pastureland and dust from roads reduces weight and quality of livestock, affecting marketability; (b) reduced values of livestock are compounded when additional time and money is necessary to transport herds around the impediments of noise and dust pollution, heavy traffic, raised road structures, etc.; and (c) road accidents affect herders and animals.

39) Complainants further allege a failure by the company to properly identify all physically or economically displaced Complainants as a result of transport infrastructure, including the planned railroad, and provide adequate compensation or resettlement. They assert that compensation has been provided to very few families and that the compensation provided was insufficient. They maintain that even ER's ESIA recognized flaws in the methodology applied to identify impacted herders.¹⁵⁷

40) Additionally they state that the compensation framework failed to yield compensation packages that considered the full impacts to herders living and herding in the vicinity of ER roads or compensated Complainants commensurate with the losses they experienced. They dispute the methodology underlying the compensation framework, alleging that the methodology for identifying impacted herders and the metrics used to calculate entitlements were flawed. They argue that the:

- a. Compensation was inappropriately calculated based on the distance of herder winter camps from the source of the impact.¹ Complainants claim that some families living only 50m outside the eligibility zone have received no compensation, but their pastures may be impacted to the same extent, or even more so than the families entitled to compensation. Complainants suggest that the compensation framework should have calculated compensation based on losses not distance from the road

¹⁵⁶ Supplemental Complaint letter at 14.

¹⁵⁷

- b. Methodology did not measure losses incurred from fragmented and contaminated pastures;
- c. Methodology did not consider losses related to the spring and summer camps, or reserve pastures; the quality of the pasture lost; loss of pastures due to contamination; loss of access to critical economic resources such as clean air and water –metrics Complainants consider essential to measure, in order to properly gauge and mitigate effects on livelihoods;
- d. Methodology did not factor in areas of pasture converted to roads or infrastructure features which Complainants consider to be sizable;
- e. Methodology did not consider loss of livestock from the winter cold or the long, dry spring in cases related to insufficient weight gain and weakness, or illness linked to a reductions in pasture quality and/or quantity, a shift in grazing patterns, further distances to travel to access water.
- f. Methodology should have treated herders as a small-scale business rather than as a family unit.
- g. Methodology as noted in the ESIA did not reference EBRD’s standards regarding appropriate compensation levels.¹⁵⁸

Issues related to PR 7: Indigenous Peoples

41) Complainants contend that herders from the South Gobi are Indigenous Peoples, under the definition of PR 7, rather than ‘vulnerable’, as the Bank maintains. They claim that neither the Bank nor ER took the steps necessary to properly determine whether or not PR 7 applied; and consequently, excluded them from receiving the corresponding protections to which they are entitled under the requirement. Further they claim the company failed to properly prevent or mitigate impacts on their culture, and traditions.¹⁵⁹

Issues related to PR 10: Information Disclosure and Stakeholder Engagement, with regard to ensuring meaningful consultation, adequate information disclosure and an adequate grievance mechanism to respond to community concerns.

42) Complainants allege that ER has failed to properly consult and inform local people and government authorities about the associated health and safety risks, potential impacts and safeguard measures linked to the roads it constructs and/or uses, contrary to EBRD requirements.¹⁶⁰ They maintain that even now, the local population is unaware of what health impacts are possible from coal mining and transport activities, as well as

¹⁵⁸ Supplemental Complaint letter at 15.

¹⁵⁹ In-person interview with Complainants; Supplemental Complaint letter at 15.

¹⁶⁰ Supplemental Complaint document at 15.

what mitigation plans are in place to protect herder and livestock health. Complainants also claim to be unaware of ER's formal grievance procedure; however, they have been able to communicate their concerns to the community-relations officer. In addition, Complainants maintain that road blockades were sometimes used when local people felt that was the only way to get the Company's attention.¹⁶¹ This has come to be seen as a de facto means for filing a grievance.¹⁶²

Additional impacts and problems gleaned through PCM interviews with Complainants:

43) Complainants report the following additional concerns:

- Reduction of water levels in wells
- Grazing routines have been disrupted, leading animals to return to areas that are now contaminated or to rangeland with dry wells
- Honking at animals on the roads is upsetting to livestock. Complainants request that a honking ban be enacted.

Redress

44) The complainants seek redress in the form of an adequate analysis and mitigation of impacts on livelihoods, health and the culture of herding. The herders feel that the ESIA, NTS and other submitted documents fail in their evaluation of potential risks and impacts, and that implementation of salient measures has simply fallen short of effective management.

45) Complainants stress that they want to have a positive relationship with the company and acknowledge that ER does provide support to herders in some important ways.¹⁶³

EBRD's Position

46) EBRD concedes that given herder needs for large amounts of acreage on which to graze their animals, it is inevitable that building any linear infrastructure will fragment some pastureland, and acknowledges there may be situations where herders' pastures have been interrupted by the export road. The Bank also recognises that dust generated from a dirt road can be a nuisance for local people.¹⁶⁴ At the same time, the Bank

¹⁶¹ In-person interviews with Complainants.

¹⁶² *Id.*

¹⁶³ In-person interview with Complainants.

¹⁶⁴ Management Response at 5.

maintains that ER has implemented effective mitigation measures to address adverse impacts caused by its transport operations in the region, including upgrading roads from dirt to gravel, construction of a 245 km paved road, and initial studies for the implementation of a rail link project.¹⁶⁵

47) The Bank notes the export road was a pre-existing state road developed before the Project and the Bank's involvement, whose route could not be changed by the project.¹⁶⁶ According to the Bank, ER relied on an existing route to transport its product to the Chinese border, and did not create any new roads or contribute to further fragmentation of pastures.

48) Indeed, the Bank contends the upgrade of this road to a modern, industrial-purpose paved highway is one of the Project's benefits. EBRB maintains that ER improved the road at its own expense to address dust problems and to manage the increased ER traffic flow, given the planned expanded production. The Bank claims the road is available to anyone for a nominal fee, and that all Energy Resources traffic through Khanbogd *soum* utilise this route.¹⁶⁷ Further, the Bank maintains that local people are exempt from the toll, and highlights other important benefits of the Project, including the promotion of economic vitality in the region and diversification of the traditional herding economy.

49) *With regard to the scope*, EBRD claims the Complaint is broad and unspecific without precisely indicating which issues apply to Energy Resources. In EBRD's view, the Complaint appears to be more related to cumulative regional impacts, due to extensive mining activities in the area and years of transporting mineral products to the Chinese border along a network of every-expanding dirt tracks.¹⁶⁸ Further, EBRD claims that it is unaware of any supporting evidence regarding many of the allegations contained in the Complaint.

50) *With respect to the goals* of the Complaint, EBRD was initially uncertain why Complainants were requesting a Compliance Review. EBRD believed the Complaint lacked details, noting the absence of documentation in reference to a Compliance Review. It claimed that none of the original Complaint documentation provided specific information about which Bank policies were at issue; nor did the Complaint specify particular areas of non-compliance. Without more details, the Bank stated it was unable to present a more targeted response. The Bank requested the opportunity to provide comments later, should specific details about compliance be made available.¹⁶⁹

¹⁶⁵ Revised Management Response at 12.

¹⁶⁶ Id. at 18.

¹⁶⁷ Id. at 5.

¹⁶⁸ Id. at 2. Revised Management Response at 13.

¹⁶⁹ Id. at 1.

51) *Concerning Client operations*, EBRD is confident that ER is employing good practices with regard to managing the Project's impacts. EBRD believes that ER has maintained positive levels of communication with the herders, and that site operations are well managed. EBRD is satisfied with existing complaint and grievance procedures. Further, EBRD maintains that the Company is aware of the risks associated with herding livestock in the vicinity of the road export routes, as well as the fragmentation issue, and has taken significant actions to mitigate related impacts, including the construction of animal crossing points, the supply of water wells to prevent separation of shelters from access to water, the provision of forage, the construction of livestock shelters – all in consultation with local herders for the purpose of supporting and promoting their traditional lifestyle and livelihood.

52) *Concerning project appraisal*, EBRD believes the Project was appropriately appraised to meet the requirements of the Bank's ESP and disclosed according to the relevant sections of the Public Information Policy (PIP). EBRD observes that the ESIA was prepared by an international team of experts, and includes a Non-Technical Summary, Resettlement Action Plan, Public Consultation and Disclosure Plan (PCDP), Environmental and Social Action Plan (ESAP), assorted management plans, developed in conformance with EBRD policy. EBRD claims that all issues raised in the Complaint were identified in the ESIA, such as the identification, assessment, management and mitigation of dust and associated potential health impacts. However, the Bank does acknowledge that rapid changes requiring ER to quickly adapt to new constraints, such as the government's change of mind with regard to the rail link, have created gaps between the original ESIA package and implementation.¹⁷⁰ Nevertheless, the Bank is confident that the ESIA has provided the tools and procedures to adequately identify, assess and address new impacts such as air pollution and road safety issues that emerged from interim use of the unpaved road.

53) *Concerning the Bank's due diligence*, EBRD reports it has worked closely with the ER team over multiple years, visiting the site on numerous occasions, meeting with local and regional authorities as well as herders, driving the unpaved roads, participating in meetings with interested stakeholders, consistently monitoring Project performance and reviewing all Project documents. EBRD concludes it has fully complied with the ESP and undertaken all activities reasonably expected to ensure ER is in compliance with Bank Performance Requirements.

54) *Regarding pasture fragmentation from construction of roads*, the Bank re-emphasizes that ER activities did nothing to further fragment any pastures, as the entire area along the export road used by ER is available for grazing. Therefore, according to EBRD, it would be impossible to build any linear infrastructure, such as a road, without

¹⁷⁰ Revised Management Response at 18.

fragmenting pastureland. Further, the Bank argues that ER's export road existed as a state-owned route before the mine and is consequently not a new road, and thus the fragmentation was pre-existing. The Bank claims that ER paved an already existing road, thereby not contributing to additional pasture fragmentation, and worked with herders to mitigate the consequences of fragmentation.¹⁷¹ EBRD also contends that ER is aware of the issue of pasture fragmentation as discussed earlier in this section..¹⁷²

With regard to dust, EBRD concedes that dust from traffic is indeed a nuisance but is unaware of any link between dust caused by the ER Project and health issues for people or animals.¹⁷³ The Bank further maintains that dust impacts are not connected with ER activities. EBRD explains that paving the export road significantly reduced (if not eliminated) the potential for dust generation from traffic movements which utilise this route. Further, EBRD stresses that no truck owned or operated by ER uses any of the dirt roads for the export of coal. Nevertheless, EBRD recognizes that numerous trucks from other companies in the region still drive along gravel/dirt tracks, generating significant volumes of dust. EBRD argues, however, that the concentration of such dust generally dissipates significantly with distance from the road. Consequently, EBRD believes these impacts are quite limited and apply only to those areas in the immediate vicinity of the road itself. EBRD maintains there are very few herder shelters within 500m of the export road. EBRD did not comment regarding whether ER uses dirt tracks or gravel roads for other purposes.

55) *Regarding the planned railroad*, EBRD reports that one of the major features of ER Phase II was a proposed railway from KH to the border. EBRD claims the railway was expected to be a major strategy for mitigating some of the effects of coal transport more widely, including dust and traffic, by basically eliminating truck haulage altogether.¹⁷⁴ However, all new rail development has been centralized under a recently created state-owned enterprise, a factor EBRD describes as being beyond the Company's control and political in nature.¹⁷⁵

56) *Concerning impacts to animals*, EBRD is not aware of issues related to livestock health (e.g., infected lungs, black organs) and impacts to quality of meat. Stakeholders have not approached the Bank about this issue and consequently, EBRD does not have a detailed account of the problem. EBRD understands, based on recent information from a veterinary study, that the problems are related to a bacterial infection.¹⁷⁶ EBRD also claims that there has been a significant increase in the number of livestock in the region

¹⁷¹ Revised Management Response at 13.

¹⁷² Id. at 14.

¹⁷³ Id at 20.

¹⁷⁴ NTS at 16.

¹⁷⁵ Id. at 7.

¹⁷⁶ Revised Management Response at 15.

since 2012, suggesting this could be a related factor to consider. EBRD does not comment on possible reasons for the increase (e.g. an upsurge in productivity of existing herds, an influx of more herders and their livestock into the region, additional purchases of livestock).

57) *Regarding proper consultation, information disclosure, and management of community grievances*, EBRD reports that information about potential impacts related to roads was adequately covered in the ESIA and suitably presented via a comprehensive public consultation process.¹⁷⁷ In addition, all issues raised during the consultations by herders and other residents of Khanbogd, were considered during the finalization of the ESIA. The Bank further notes that ER's consultation and communication system is ongoing rather than a one-time opportunity and includes communication activities around the mine site and along the road, meetings in the *soums*, informal meetings with herders, and a company grievance mechanism that allows affected people to raise complaints. EBRD reports it has reviewed the grievance mechanism and concludes it is in compliance with EBRD requirements. EBRD claims that all the herders along the transportation corridor are familiar with the mechanism and know how to use it. In fact, several of the Complainants have used the procedure in the past, observes EBRD.¹⁷⁸

58) *Concerning the adequacy of measures to prevent, mitigate and compensate for physical and economic displacement*, the Bank maintains that ER quickly engaged in a process to identify risks for potentially impacted herders; consulted with local people; put in place a framework of entitlements and compensation measures; and reported to the Bank after the process had been completed. The Bank acknowledges there were some gaps in the approach; however, its experts concluded the process and accompanying measures provided an appropriate basis for managing displacement impacts from the paved road.¹⁷⁹ Further, the Bank points to the many on-going programs ER has developed to support herders' traditional livelihoods, including hay and fodder programs to help livestock survive harsh Mongolian winters and assistance to sustain an adequate water supply throughout the year.

59) *Regarding livelihood and economic impacts*, the Bank is not clear about the basis for claims by Complainants that there has been a documented decline in the quality and quantity of livestock. In contrast, the Bank understands that herd size has largely increased in the area. The Bank would appreciate more specific evidence supporting this claim.¹⁸⁰

¹⁷⁷ Id. at 19.

¹⁷⁸ Management Response at 7-8

¹⁷⁹ Revised Management Response at 19.

¹⁸⁰ Id. at 17.

60) *Regarding the application of PR 7 on Indigenous Peoples*, EBRD disagrees with Complainants' position that PR 7 applies to local herders and highlights the assessment of the issue provided in the ESIA, but contends that many could be considered as vulnerable and therefore handled according to requirements for social assessment (PR 1); resettlement (PR 5) and stakeholder engagement (PR 10).¹⁸¹ EBRD does not discuss the process used to determine the application of PR 7, including whether the Bank engaged a suitably experienced, independent expert to provide advice.

61) *Concerning local culture and traditions*, EBRD states the ESIA properly identified both risks and opportunities to traditional lifestyles and adequately addressed the needs of local herders through those requirements specific to protecting vulnerable groups. The Bank further claims that ER operations and activities appropriately respect and protect local culture and traditions.¹⁸²

Client's Position

62) *With regard to the scope*, ER claims the Complaint is broad and unspecific without precisely indicating which issues apply to Energy Resources. In the Company's view, the Complaint appears to be more related to cumulative regional impacts due to extensive mining activities in the area, and years of transporting mineral products to the Chinese border along a network of ever-expanding dirt tracks.¹⁸³ The Company suggests its activities are unrelated to the impacts alleged in the Complaint, and claims it is the neighboring mines that are the source of the problem, as the export gravel road and parallel dirt tracks, which generate significant dust, are used by other companies.¹⁸⁴ Further, the company stresses that from the beginning, it has committed to respect the rights of its host communities and to conduct its operations and activities accordingly. ER believes it has followed through on this commitment, complied with all lender requirements, and been accountable for preventing or mitigating the social and environmental risks from its operations, which potentially or actually may have impacted the rights of affected herders.¹⁸⁵

63) Nevertheless, the Company indicates it has tried to address the specific concerns of the Complainants. ER contends it has conscientiously assessed the socio-economic baseline in the affected area since the early phases of the road project, identified likely

¹⁸¹ Id. at 20.

¹⁸² Revised Management Response at 20.

¹⁸³ Energy Resources Response to PCM complaint, dated October 21, 2013 (hereinafter referred to as "Client Response") at 2. Energy Resources response to PCM complaint, dated May 30, 2014 (hereinafter referred to as "Revised Client Response") at 8.

¹⁸⁴ In-person interview with Complainants.

¹⁸⁵ Revised Client Response at 8.

environmental and social impacts that could occur at any stage of the project, and developed measures and taken steps to mitigate harm to herders' health, safety and livelihood, according to Mongolian law and EBRD standards.

64) *Regarding the mitigation of health, safety and livelihood impacts of unpaved roads*, ER argues it took early and significant measures to consider and address the harmful impacts associated with coal transportation on the unpaved road since initiating its coal transport operations in 2009. ER notes it formed a joint venture with three other entities to upgrade and maintain the existing 254 km export road to the Chinese border. The company constructed the 245 km UGH - GS paved road at its own expense. ER explains that the toll system was allowed by the government to help the company recover some of its investment costs. The paved road began operations in October 2011. According to ER's research findings, its investment significantly contributed to reducing negative impacts associated with unpaved roads, including land erosion, dust, road accidents, damage to property, degradation of vegetation in the region and fuel consumption.¹⁸⁶

65) *Regarding the mitigation of health, safety and livelihood impacts associated with the construction and use of the paved export road*, ER stresses it took significant measures, including (a) compensation and resettlement of herder families in the area of impact as defined by Mongolian law; (b) establishment of numerous livestock crossings and traffic signs in consultations with herders, giving right of way to livestock; (c) the replacement, refurbishment and construction of wells; (d) the planting of vegetable plots; and (e) the building of winter and spring camps affected by coal transport. ER further states that these activities are presented in the project Resettlement Action Plan, developed according to Bank policy. ER also contends that to its knowledge, no water wells belonging to herders within the company's area of influence is separated from their shelters by the paved road.¹⁸⁷ ER notes that, in addition, it has developed an extensive livelihood support program to address adverse impacts on herder livelihoods and promote and support the traditional way of livestock herding.¹⁸⁸

66) *Regarding Complainants' view that dirt tracks are also used by ER vehicles*, the Company reports the paved road was completed in 2011, but heavy transport from the mine began in 2009 and the gravel road was used in this period. However, since the completion of the paved road, ER maintains it does all of its coal transporting on the paved road.¹⁸⁹

¹⁸⁶ Revised Client Response at 4.

¹⁸⁷ Id. at 5.

¹⁸⁸ In-person interview with Complainants; Revised Client Response at 5.

¹⁸⁹ In-person interview with Complainants.

67) *In reference to the UHG – Tsagaan Khad railroad*, ER is unaware of any company sponsored rail link planned for construction between UGH mine and Tsagaan Khad. The government of Mongolia will build and manage the rail links and the routes will serve the transportation needs of all companies operating in the Tavan Tolgoi coal formation.¹⁹⁰ ER suggests that information regarding its capacity, impact management and plan for maintenance should be taken up with appropriate authorities.

68) *Concerning significant losses to livestock and nomadic traditions* noted in the Complaint, ER disputes this claim, arguing that, in fact, the livestock population growth rate is thriving. Based on reports from the National Statistical Office, ER states that the livestock population more than quadrupled in the Umnogobi *aimag* in the first half of 2013. ER also pointed to increases of almost 20,000 livestock in Khanbogd *soum* for the same period. ER did not discuss the factors underpinning these upsurges.¹⁹¹

69) *Regarding Complainants’ concerns about fragmentation of pastures* due to the ER road, ER claims that adequate passages have been installed along the road, "... the paved road has around 25 livestock-crossings and more than 50 traffic signs that give priority for livestock to cross, all agreed-upon by the affected herder communities and intended to minimize the disturbance to the pasture land."¹⁹²

70) *Regarding the dust impacts*, the Company contends it has taken adequate corrective measures and the dust issue is much improved since the paving of the road. ER notes it paved the export road at its own expense and disputes the claim by OT Watch that the 245 kilometers of paved road to the Chinese border was built by a consortium of mining companies. ER also clarifies that in February 2014, control of this road, along with operation and maintenance responsibilities, was transferred to a state-owned company. ER now unitizes the paved road for its coal transportation along with other users, paying the road usage tariff as required by legislation.¹⁹³ Further, since commissioning the paved route in October 2011, the Company reports that all trucks owned or operated by ER have consistently adhered to the paved export road for all coal transport activities. In addition, ER states that it has tried to persuade other mining companies to use the paved road, but has only been able to arrive at a road-use agreement with one other company.¹⁹⁴ ER asserts it has also taken measures to further

¹⁹⁰ Energy Resources response to PCM complaint, dated May 30, 2014 (hereinafter referred to as “Revised Client Response”) at 3.

¹⁹¹ Client Response at 3.

¹⁹² *Id.* at 2.

¹⁹³ Revised Client Response at 3.

¹⁹⁴ *Id.* at 3.

reduce dust generated in the vicinity of the mine site as well as the coal haul road, according to its Dust Management Plan.¹⁹⁵

71) *With regard to human health issues*, ER suggests it has taken a progressive approach to addressing health concerns that exceeds legislative or other requirements. It reports organizing trainings and awareness campaigns designed to address the specific health problems reported by impacted herding communities. Further, ER maintains it has initiated programs consisting of free health check-ups and screenings, as well as treatments and medicines provided free-of-charge. These programs are directed at problems well beyond respiratory or other particulate-related ailments, including vaccinations, pediatrics, gynecology and oncology, among others. ER reports another initiative is directed toward "the capacities of local health professionals to deliver quality service to the public and to enable community members to protect their own health by increasing their knowledge and awareness of maintaining a healthy lifestyle."¹⁹⁶ All of these activities, it contends, are in line with its commitment to invest in community health as reflected in management plans aimed at mitigating any adverse impact associated with UHG project activities.¹⁹⁷

72) *Regarding the alleged deterioration of livestock health*, ER does not directly address these concerns; however, it does discuss a number of proactive collaborative efforts with the local authorities and herder community to engage the cooperation of other mining companies and urge them to use the paved road.¹⁹⁸ ER agrees with the goal of promoting use of the paved export road by all coal transport companies.¹⁹⁹ ER restates its view that it can no longer be held responsible for dirt-road related complaints as it only transports coal on the paved road whose dust impacts are marginal.

73) *With regard to the Complainants and their relationship with ER*, the Company notes that seven out of the 14 herders from Khanbodg *soum* reside and herd their livestock within 1 km of the UHG-Gashuun Sukhait export route. They are employed by ER as contract-based road monitors to promote road safety and keep herders and livestock safe. ER also notes that many of the Complainants are couples or related and have received some form of additional compensation from the company to accommodate impacts. The Company believes that the remaining Complainants are outside the impact area.

¹⁹⁵ Revised Client Response at 6.

¹⁹⁶ Client response at 3.

¹⁹⁷ Id. at 3.

¹⁹⁸ Id. at 4.

¹⁹⁹ Id.

74) *Concerning stakeholder engagement, community consultation, and grievance handling aimed at preventing and mitigating adverse impacts associated with the construction and use of the paved road*, ER cites numerous examples of cooperative and proactive initiatives to promote positive relationships with the community, go beyond what is required to address herder needs, and ensure concerns are managed in a respectful, timely manner that provides appropriate redress. ER stresses its ongoing dialogue with local authorities and herder representatives to consult and address problems before they arise; its employment of local herdsmen to monitor road safety; and its willingness to engage with NGOs in joint consultative meetings, even when others from the mining sector choose not to attend.²⁰⁰

75) *Concerning participating in a Problem-solving Initiative*, ER contends that to solve the broader problems related to dust impacts in a sustainable, comprehensive way, other actors must be willing to engage. In fact, ER points out that it has tried to convene such discussions with other key actors on a number of occasions. They observe:

- Neighbor companies who drive on dirt tracks to the Chinese border that parallel the paved road, create part of the problem, if not most of it.
- It is not clear whether there is a will to solve the problem by these state-owned enterprises or on the part of the government.
- The paved road is reverting back to state ownership, expected to happen in early 2014. The government will need to develop a policy and strategy to require mines in the area to use the paved road. ER will no longer be involved.

76) ER reemphasized its commitment to respect the rights of communities and to work in conformance with lender performance requirements.

IV Determination of Eligibility

Determination of Eligibility for a Problem-solving Initiative

77) The PCM Eligibility Assessors find the Complaint **does not satisfy the PCM criteria for a Problem-solving Initiative (PSI)** due to a technical requirement under the Project Complaint Mechanism (PCM) Rules of Procedure (RPs). PCM RP 18 (b ii) states that to be eligible for a PSI, the Complaint must relate to a Project where...”the Bank maintains a financial interest in the Project in which case, the Complaint must be

²⁰⁰ Revised Client Response at 8.

filed within twelve (12) months following the last disbursement date of EBRD funds;” The Complaint was filed after this deadline and therefore, PCM must find it ineligible for a Problem-solving Initiative.

Determination of Eligibility for a Compliance Review

78) The Eligibility Assessors have concluded the Complaint **is eligible for a Compliance Review** under PCM Rules of Procedure (RPs) 17-29.

79) The Complainants have standing to make the Complaint according to PCM RP 2.

80) The Complaint relates to a Project – the Ukhaa Khudag Energy Resources Phase II Project – that was approved for financing by the EBRD Board of Directors in May 2010, thus satisfying PCM RP 19 (a).

81) As outlined in the summary of the Complainants’ position, the Complaint describes environmental and social harm that they argue could result from the Project, pursuant to PCM RP 19(b). A short summary appears below:

- a. *Diminished livelihoods and declining quality of life.* Shortcomings in defining project impacts and mitigation measures through the project appraisal process, and unattended harm and damage caused by coal transport-related activities could enable and exacerbate environmental and social harm to local herders, their livestock and natural ecosystems from the Client’s transportation infrastructure, including the paved export road and a multitude of routes resulting from the construction of mine-supporting infrastructure. Of primary concern are what Complainants describe as their diminished livelihoods, deteriorating health and declining quality of life underpinned by a traditional nomadic herding culture under threat.
- b. *Loss of, fragmentation and contamination of pastures and access to water resources.* Complainants maintain that the network of project-related roads carve up vast spaces of pastureland; separate wells and pastures, requiring animals to cross roads to access water; block traditional herding corridors; disrupt grazing patterns leading to more stressed animals and more time for herding them; reduce the quantity of pastureland available for herding (e.g., loss of the summer pastures to roads and infrastructure); and generally degrade the quality of community pastureland. These factors, taken together, reduce livestock productivity and diminish herder livelihoods.
- c. *Degradation of soil and vegetation from dust* in such a fragile ecosystem could be further exacerbated by the common practice of off-road driving.

Complainants argue that trucks driving on desert soils damage the micro-crust and plant life used for forage by livestock, and intensify dust problems, also claimed to be a source of harm. Dust could degrade the quality and quantity of their living natural resources, including soil, vegetation, pastures, medicinal plants, etc. The composition of the dust could also be a factor, if it contains toxic elements in sufficient quantities to affect people, animals or the environment.

- d. *Degradation of air quality and harm to animal and herder health from coal and road dust.* Dust generated by coal transport, road use and traffic, could degrade air quality and damage the health of herders and their livestock. Herders report an increase in respiratory illnesses and allege the dust is contaminating the internal organs of their livestock, such as the lungs, allegedly making them unfit for human consumption. Complainants argue this could undermine the marketability of animal products and potentially diminish the worth of their herds, as well as reduce food security, given that these animal parts form an important element of the traditional diet.
- e. *Increased stress for animals and people and difficulty in sleeping* potentially could be caused by increased traffic volume, speed and noise.
- f. *Safety for animals and people could be compromised* as a result of increased traffic speed and volume, leading to more collisions with animals or herders on or near the roadways. Injury and death to people and animals allegedly from increased truck traffic, vehicle speed and visibility issues related to dust could and have resulted in more frequent and in some cases, fatal accidents. Waste, including plastic bags, carelessly dumped along the roads by unmindful drivers, could potentially cause additional health and safety hazards for herds, including choking.
- g. *Conflict among herders undermining social harmony and pasture traditions* could be exacerbated by increased competition over scarce water resources and high quality pastures, as herders who lost access to pastures are forced to move into other herders' traditional land.
- h. *Well water impacts.* Complainants report cases where road construction water trucks have pumped water from the Community wells.
- i. *Living with uncertainty about health status.* Herders are concerned about health impacts from coal mining, including impacts from coal and road dust. They do not know what health problems are associated with the Energy Resources mining and coal transport activities, nor how to protect themselves from associated health problems. They have similar concerns about health impacts on their animals.

82) The Complaint seeks a Problem-solving Initiative and a Compliance Review, in conformance with PCM RP 20 (a). Specifically, the Complaint requests the following outcomes from a Compliance Review, pursuant to PCM RP 20 (b):

- a. At the broadest level, outcomes that will allow them to remain in their ‘motherland’ and continue their herding traditions and lifestyle in a sustainable way that provides an adequate livelihood, good health and wellbeing, and access to clean water, clean air and adequate pastureland.
- b. An independent assessment regarding whether EBRD has complied with its own policies and procedures in preparing and assessing the project, including (a) whether the project appraisal process properly defined the project ‘area of influence’; (b) whether the ESIA was adequate in identifying and assessing health and livelihood impacts from the Energy Resources coal export road and network of transport routes frequented by ER; (c) whether the analysis process was sufficiently timely, comprehensive and robust, based on adequate information presented at the appropriate level of detail and reflecting a keen understanding of herding practices and needs; (d) whether EBRD fully recognized the potential project risks and impacts and communicated them to local herders in advance of its decision to invest; and (e) whether EBRD had a high degree of confidence prior to the investment decision, that project impacts on herder health, livelihood, pastures, and culture could be mitigated.

83) The Complainants have provided ‘copies of correspondence, notes or other materials related to communications with the Bank or other Relevant Parties’, thereby conforming with PCM RP 20 (c).

84) Compliance issues are presented below with reference to details of the relevant EBRD Policy at issue in the complaint, pursuant to PCM RP 20(d). The issues are drawn from interviews with the Complainants, as well as from the Complaint and documentation provided or referenced by Complainants.

Compliance Issues Related to General Policy Considerations: EBRD’s Commitment/Integrating Environmental and Social Considerations into the Project cycle: EBRD’s Role and Responsibilities

85) Complainants argue that impacts and violations arising from the beginning of the ER Project are relevant and question whether EBRD properly considered them in its decision to provide project financing, according to its policies.

86) Applicable requirements include:

a. **Paras. C.14-16:** *The Project Appraisal Process – Overall approach*

b. **Paras. C.28-29:** *The Performance Requirements*

Compliance Issues related to PR 1: Environmental and Social Appraisal and Management

87) *Short comings in the environmental and social appraisal process* Complainants claim the social and environmental appraisal process failed to provide a full understanding of health and livelihood impacts or present adequate mitigation measures to safeguard herders and their animals from harm associated with coal transport impacts, as required by EBRD's ESP. They suggest that EBRD failed to ensure that major work on health and livelihood baselines and impact assessments, with regard to coal transportation and the broader network of roads, was available, sufficiently analyzed, and understood prior to the Bank's decision to invest. As a result, this information was not available to influence project design parameters, including the Resettlement Action Plan and compensation framework. Complainants argue that EBRD should have recognised at an earlier stage that critical issues had not been dealt with in the ESIA, to the required level of detail, according to EBRD's policy. Further, they maintain the assessment failed to properly identify the project's area of influence or sufficiently analyse, the cumulative and interactive effects from roads, traffic, noise, coal and road dust pollution, etc. Consequently, Complainants have requested that a number of studies be conducted to fill in critical information gaps. Complainants are worried that the project is expanding before sufficient technical information is available about the possible environmental and social impacts of the mine, raising further concern about the effectiveness of the proposed mitigation measures.

88) If such studies and assessments have been prepared according to EBRD requirements, Complainants are requesting information disclosure and consultation.

89) Relevant aspects of PR 1 follow:

a. **Para. 5** "Through appraisal activities such as risk assessment, auditing, or environmental and social impact assessment, the client will consider in an integrated manner the potential environmental and social issues and impacts associated with the proposed project. The information gained will inform the EBRD's own due diligence...The appraisal process will be based on recent information, including... social and environmental baseline data at an appropriate level of detail."

- b. **Para. 6** “Environmental and social impacts and issues will be appraised in the context of the project’s area of influence.” See 1.6 (iii).
- c. **Para. 8** “The nature of due diligence studies undertaken will be commensurate with the risks and issues involved....“
- d. **Para. 9** “Projects categorised by EBRD as “A” will require special formalised and participatory assessment processes... to identify and assess the potential future environmental and social impacts associated with the proposed Project, identify potential improvement opportunities, and recommend any measures needed to avoid, or where avoidance is not possible, minimise and mitigate adverse impacts... ”
- e. **Paras. 14-15** *Environmental and Social Action Plan (ESAP)*

Compliance Issues Related to PR 3: Pollution Prevention and Abatement

90) Complainants have raised issues related to coal and dust pollution, concerns about air quality, and problems associated with waste, which they fear may be impacting their health, safety, ecology and livelihoods. Applicable PR 3 requirements include:

- **Para. 2:** “the EBRD is committed to supporting, ... the precautionary principle, the prevention principle, the principle that environmental damage should as a priority be rectified at source, and that the polluter pays principle.”
- **Para. 3:** “The objectives...are: to avoid, or where avoidance is not possible, minimise adverse impacts on human health and the environment by avoiding or minimising pollution directly arising from projects.”
- **Para. 10:** *Pollution prevention, resource conservation and energy deficiency*
- **Para. 12:** *Wastes*
- **Para. 16:** *Ambient considerations*

Compliance Issues Related to PR 4: Community Health, Safety, and Security

91) The Complainants identify health and safety impacts from dust, noise, influx of people, traffic, and increased competition over scarce resources Herders allege measures taken by the company to avoid, minimise, mitigate or compensate these impacts have been inadequate.

92) By implication, they suggest that EBRD has not properly overseen the Project to ensure community health and safety impacts have been adequately prevented or mitigated. Complainants would like the Compliance Review to establish whether

EBRD's supervision has been adequate, and whether the Bank has been effective in helping ER inform the community about potential health impacts and develop an appropriate plan to address actual or potential harm. Applicable PR 4 requirements include:

- **Paras. 7-9:** *Community health and safety requirements*
- **Paras. 12-14** *Hazardous materials safety*
- **Para. 16:** *Environmental and natural resource issues*
- **Para. 17:** *Community exposure to disease*

Compliance Issues Related to PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement

93) Complainants claim they have sustained losses of assets and access to assets that have adversely affected their livelihoods, as a result of cumulative and interactive impacts from roads, traffic, noise and dust, resulting in harm that has not been properly recognized, prevented, mitigated or compensated as required under PR 5. Further they contend that the Company did not fully consider alternative project design features that could have avoided or at least minimised the physical or economic displacement caused by pasture fragmentation from roads.

94) Relevant aspects of PR 5 follow:

- **Paras. 1-2:** sets out the broad definition of involuntary resettlement, including the concept of physical versus economic dislocation
- **Para. 3:** notes the universal respect for human rights, particularly the right to adequate housing and the 'continuous improvement of living conditions...'
- **Para. 4:** establishes the obligation to follow the mitigation hierarchy
- **Para. 6:** *Objectives*
- **Para. 7-8, 10:** *Scope*
- **Para. 11:** relates to feasible alternative project design to avoid or at least minimize physical and/or economic displacement, while balancing environmental, social and financial costs and benefits
- **Para. 12:** *Consultation*
- **Para 13:** *Grievance mechanism*
- **Para 14:** Addresses resettlement planning and implementation, including the need for an adequate census and socio-economic baseline assessment

- **Paras. 15-23:** *Resettlement Action Plan (RAP)*
- **Paras. 24-29:** *Livelihood Restoration Framework*
- **Paras. 30-39** *Compensation and benefits for displaced persons*

Compliance Issues Related to PR 7: Indigenous Peoples

95) Complainants contend that herders from the South Gobi are Indigenous Peoples, under the definition of PR 7, rather than ‘vulnerable’ as the Bank asserts. They claim that neither the Bank nor the company took the steps necessary to determine whether herders should be considered Indigenous Peoples as defined in PR 7; and consequently, failed to afford them the corresponding protections provided for by the requirement.²⁰¹

96) Relevant sections of PR 7 include paragraphs 9-12 (*Scope of application*) and other sections as appropriate, such as paragraphs 13-14 (*Requirements*); 20 (*Avoidance of adverse impacts*); 31-33 (*Special requirements*).

Compliance Issues Related to PR 8: Cultural Heritage

97) Complainants highlight the importance of their cultural identity as herders, including their strong ties to the land, the ecosystem upon which they depend for their livelihood, and their traditions, values, and way of life. They suggest their identity as nomadic herders is under threat and is not being properly protected and conserved in accordance with PR 8: Cultural Heritage.

98) Relevant elements from PR 8 follow:

- **Para. 1:** establishes the “Bank’s support of a precautionary approach to the management and sustainable use of cultural heritage...”
- **Para. 2:** notes that: “Cultural heritage is important as a source of valuable historical and scientific information, as an asset for economic and social development, and as an integral part of a people’s cultural identity, practices, and continuity.”
- **Para. 7:** defines cultural heritage and notes that it “encompasses tangible (physical) and intangible heritage...”
- **Para. 11:** *Impacts on intangible heritage*

²⁰¹ In-person interview with Complainants.

Compliance Issues Related to PR 10: Information Disclosure and Stakeholder Engagement

99) Complainants maintain the consultation process was based on deficient and partial information of potential risks, impacts and mitigation measures related to health and livelihood impacts from transport roads and activities. As a result of what Complainants perceive are gaps in the ESIA, the consultation process and project information disclosure, they suggest that EBRD failed to satisfy its policy requirements for information disclosure and meaningful stakeholder engagement under PR10, particularly in light of the fact the Project is classified as Category A.

100) Further, Complainants state they are unaware of the Company's community grievance mechanism. To date they have been unable to resolve grievances related to the coal road.

101) Details of additional, relevant aspects of PR 10, follow:

- **Para. 6:** EBRD requires that the client undertakes stakeholder engagement which is ‘...conducted on the basis of timely, relevant, understandable and accessible information, in a culturally appropriate format’
- **Para. 10:** indicates that the client must then engage in a “scoping process with identified stakeholders to ensure identification of all key issues to be investigated as part of the ESIA process...”
- **Paras. 12-14:** *Information disclosure*
- **Para. 15:** *Meaningful consultation*
- **Paras. 17,19-20:** *Disclosure and consultation on Category A projects*
- **Paras. 18:** Required for category A projects the “information disclosed must include a full EIA/SIA report in accordance with the Banks requirements”
- **Para. 24:** *Grievance mechanism*

102) In the case of a Compliance Review, PCM RP 23 (a) requires the Eligibility Assessors to consider, among other matters, whether the Complaint relates to **actions or inactions that are the responsibility of the Bank**. Complainants identify a number of issues of alleged non-compliance with EBRD policy, as follows:

- a. A failure to adequately appraise the project;
- b. A failure to properly define the ‘area of influence’.

- c. A failure to provide sufficient baseline and other project information in critical areas of health and livelihood, in a timely and comprehensive manner, that specifically analyzed impacts from the export road and other transport routes, in conformance with the ESP;
- d. A subsequent failure to adequately assess and address the Project's impacts due to gaps in critical information. As a result, the ESIA failed to provide a full understanding of health and livelihood impacts, along with adequate mitigation measures, to safeguard herders, their animals and the ecosystem, contrary to EBRD's ESP.

103) A related failure, for the same reason, to capture the precariousness of the herding enterprise, leading to significant gaps between the impacts expected and planned for in the ESIA 'on paper' and the actual harm experienced by herders 'in practice'.

104) A further failure, for the same reason, to require adequate consultation based on a full understanding of project risks, impacts and mitigation measures, in a timely manner, under the ESP.

105) Pursuant to PCM RP 23 (b), the Eligibility Assessors have concluded the alleged violations of EBRD's policies in the Complaint are more than technical, particularly in light of this being a Category A project.

106) The Complaint alleges a failure by the Bank to monitor Client commitments pursuant to Bank policy, contending that EBRD should have "conducted due diligence and performed ongoing supervision regarding the impacts of, and appropriate mitigation for, these roads and railroad".²⁰² Thus, PCM RP 23 (c) appears to be relevant.

107) The allegations are specific to the Project, rather than concerning EBRD policies in general, thereby satisfying the mandate of PCM RP 24(e) that a Complaint cannot relate to 'the adequacy or suitability of EBRD policies'.

108) The Complaint does not fall under any of the exclusion categories provisioned in PCM RP 24(a)-(d) and 24(f).

²⁰² Supplemental Complaint letter at 2

109) As required by PCM RP 25, the Assessors have considered the Complaint, the Bank's Response, the Client's Response, key documents such as the Project ESIA, the Non-technical Summary of the ESIA, the ESAP, the SEP, the RAP, correspondence between the Complainant and Bank and Client representatives, internal correspondence and relevant EBRD policies, etc. The PCM Assessors have also consulted with the Complainants and the Client in the process of determining whether the Complaint satisfies the criteria for a Compliance Review under the PCM RPs.

110) Consequently, based on an evaluation of the eligibility criteria set out in the PCM RPs 18-24, and on the analysis of the relevant documents, the Eligibility Assessors declare the Complaint **eligible** for a **Compliance Review**.

111) The Compliance Review should assess whether and – if so, which – EBRD policy or policies may have been violated and if harm has been or may be caused due to action or inaction on the part of the Bank. In line with PCM RP 28(b), the Terms of Reference for a Compliance Review are set forth in the following section, Part III Terms of Reference.

PART III: TERMS OF REFERENCE

Terms of Reference (TOR) for the Compliance Review

Energy Resources Phase II Project

Compliance Review Expert

1. In accordance with PCM, RP 35, the PCM Officer appoints PCM Expert Dr Owen McIntyre as the Compliance Review Expert for this Compliance Review.
2. The Compliance Review Expert shall conduct the Compliance Review in a neutral, independent and impartial manner and will be guided by principles of objectivity and fairness giving consideration to, *inter alia*, the rights and obligations of the Relevant Parties, the general circumstances surrounding the Complaint and due respect for EBRD staff.

Scope

3. These Terms of Reference apply to any inquiry, action or review process undertaken as part of the Compliance Review, with a view to determining, as per PCM RP 36 if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has resulted in non-compliance with a relevant EBRD Policy – in this case Environmental and Social Policy 2008 – and, if in the affirmative, to recommend remedial changes in accordance with PCM RP 40.
4. These Terms of Reference are limited to reviewing actions or inactions by the EBRD in relation to the relevant EBRD policy, and do not cover any actions or inactions by the Client, Energy Resources LLC.
5. In conducting the Compliance Review, the Compliance Review Expert will examine any relevant documents and consult with the Relevant Parties. The Compliance Review Expert may also carry out a site visit, and employ such other methods as the Expert may deem appropriate, as per PCM RP 37.
6. Upon completion of the Compliance Review, the Compliance Review Expert will prepare a Compliance Review Report setting out his or her findings. The Compliance Review Report will include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review, as per PCM RP 38.

7. Such processes shall be conducted in accordance with these Terms of Reference subject to modifications which the Compliance Review Expert and the PCM Officer may, at any time, expressly agree upon, except modification that may prejudice the interests of any Relevant Party or is inconsistent with accepted review practice.
8. The Compliance Review shall confine itself to the Compliance Review issues raised in the present Complaint. It shall not go beyond the parameters of the Complaint to address other issues.²⁰³

Time Frame

9. The Compliance Review will commence when the Eligibility Assessment Report containing these Terms of Reference is publicly released and posted on the PCM website.
10. Every effort shall be made to ensure that the Compliance Review is conducted as expeditiously as circumstances permit and it is intended that it shall be concluded within sixty (60) Business Days of its commencement, within which period a draft Compliance Review Report will be prepared and sent to the Bank's Management, pursuant to PCM RP 41. However, the PCM Officer may extend this time period for as long as is strictly necessary to ensure full and proper implementation of the Compliance Review. Any such extension shall be promptly notified to all Relevant Parties.

Procedure: Identification of Core Compliance Issues

11. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of each of the relevant provisions of the ESP and of the Performance Requirements contained therein, in respect of which non-compliance is alleged or implied by the Complainants. Relevant provisions of the ESP may include: ESP PR 1 (5-6, 8-9,), PR 3 (2-3, 10, 12, 16), PR 4 (7-9, 12-14, 16-17), PR 5 (1-4, 6-8, 10, 12-39), PR 7 (paragraph 10 particularly, and other relevant sections as appropriate), PR 8 (1-2, 7, 11), PR 10 (6, 8-10, 12-20, 24), B.3, 5, 7 (*EBRD's Commitment*), C 14 (*Project Appraisal Process*), C 25 (*Stakeholder Engagement*), C 28 (*Performance Requirements*).

²⁰³ Request No. 2013/01, Ukhaa Hudag/Energy Resources Phase II and Oyu Tolgoi Mine. This Compliance Review will be limited to issues related to the Energy Resources Phase II Project.

12. The Compliance Review process will examine the questions of compliance raised in the Complaint,²⁰⁴ including (but without limitation):

Shortcomings in the environmental and social appraisal process – PR 1 (Environmental and Social Appraisal and Management)

- a. Whether the project appraisal process properly defined the project's area of influence according to PR 1.6. In particular:
- i. Whether the planned Ukhaa Khudag-Tsagaan Khad railroad that will be used to transport coal and will run from ER's Ukhaa Khudag coal mine to the Chinese border should be considered an associated facility of the ER Bank funded project, and therefore, within the Project's area of influence, according to PR 1.6; and if so, whether an adequate environmental and social assessment has been conducted in conformance with PR 1, and other relevant requirements.
 - ii. Whether additional unsealed roads, constructed or used by ER, such as the unsealed roads from Choir to the mining site used to transport fuel, the unpaved Dalangzadgad-Tsogttsetsii and the Ulaanbattar-Tsogtsetsii roads used to transport personnel and supplies from the mine and mine camp – are or should be considered within the Project's area of influence); and if so, whether an adequate environmental and social assessment has been conducted in conformance with PR 1, and other relevant requirements.
 - iii. Whether the planned coal road from Tavan Tolgoi to Oyu Tolgoi is or should be considered a facility associated with the ER project and within the Project's area of influence; and if so, whether an adequate environmental and social assessment has been conducted in conformance with PR 1, and other relevant requirements.
- b. Whether the environmental and social appraisal process adequately assessed the full set of potential environmental or social risks and impacts from project-related roads, planned railroad and associated infrastructure, including current

²⁰⁴ The compliance issues have been drawn from PCM in-person interviews with the Complainants, the Complaint documents, and materials referenced by Complainants.

and future planned development, on herder and animal health and safety, livelihoods, and tradition and culture, in sufficient detail and commensurate with project risks and impacts, as required by PR 1.5, 1.6, 1.7, 1.8, and 1.9.

- c. Whether EBRD has conducted due diligence and performed appropriate, ongoing supervision and monitoring regarding the impacts of and appropriate mitigation for the project-related roads and transport routes considered part of the ER project's "area of influence", as required by Bank policy, including paragraphs C. 34-37 of the 2008 ESP.
- d. Whether the Bank adequately considered impacts and possible violations arising from the already built facilities or executed activities which are associated with the Project, in its decision to provide project financing, in accordance with paras. 14-16 and 28-29 of the 2008 ESP.
- e. Whether the ESIA includes an adequate assessment of potential impacts of the Project in the context of the existing roads, as described in the Complaint, and the planned railroad (if found to be within the project's area of influence) on the livelihood of herders in the region, as required by PR 1.

Failure to adequately assess health and safety impacts of roads

- a. Whether EBRD failed to ensure that the Client satisfactorily assessed the health and safety impacts of its use of the Tavan Tolgoi-Gashuun Sukhait earth road, in conformance with PR 4.7;
- b. Whether the ESIA for Phase II sufficiently considers the impacts of transportation by trucks on unpaved coal road, and adequately explores possible mitigation measures.

Failure to mitigate adverse health and safety impacts

- a. Whether the Project related to the existing Tavan Tolgoi-Gashuun Sukhait earth road and if so, whether EBRD failed to ensure that the Client adopted and implemented within a time frame acceptable to EBRD and consistent with its policies, appropriate measures that adequately prevented or mitigated the health and safety impacts of the Tavan Tolgoi-Gashuun Sukhait earth road which it allegedly used after the initiation of mining operations in 2009 and continued to use after the expansion of mining activities in 2011, contravening PR 4;
- b. Whether the Project relates to the Tavan Tolgoi-Gashuun Sukhait paved road, and if so, whether it is in compliance with PR 4.7, despite an alleged lack of safe crossings for people, community vehicles or animals, and related road accidents

that have injured or killed people and animals;

- c. Whether the project ESIA adequately assesses and addresses potential future adverse impacts from other additional new project-related roads and risks from the existing project-related roads, including prevention and mitigation measures commensurate with risks and impacts, according to PRs 1 and 4.

Failure to maximize capacity of Tavan Tolgoi-Gashuun Sukhait paved road

- a. Whether EBRD has a responsibility under its 2008 ESP, to ensure the Client maximized the capacity of the Tavan Tolgoi-Gashuun Sukhait paved road to be used by other interested companies as much as was feasibly possible, so as to reduce dust pollution and adverse health and safety impacts in the area of the project; and if so, whether EBRD took reasonable steps toward this end.

Failure to implement adequate dust pollution and road safety measures

- a. Whether EBRD failed to ensure that the Client implemented adequate dust pollution and road safety measures to avoid adverse impacts to livelihoods due to the alleged harm caused to herder livestock, in violation of PR 5, and including PR 5.11.

Failure to mitigate pasture fragmentation

Whether EBRD failed to ensure that the Client appropriately considered and implemented feasible, alternative project design (e.g., adequate underpasses/safe crossings for herds and people, culverts; alternative design to avoid obstruction of movement between *baghs* and the *soum*) to avoid or at least minimise physical or economic displacement caused by fragmentation of pastures by roads it has constructed or relies on as part of the Project.

Failure to identify all physically or economically displaced complainants and provide adequate compensation or resettlement

- a. Whether the ESIA, RAP and/or Livelihood Restoration Framework (LRF) failed to properly identify Complainants who would be physically or economically displaced; and consequently, denied persons experiencing economic or physical displacement, due to project-related roads and transport routes, eligibility for the company's compensation and resettlement package, in violation of PR 5, including:
 - i. whether compensation and resettlement measures limited to only those herders who live within a fixed proximity of the Tavan Tolgoi-Gashuun Sukhait paved road, violated the requirements of PR 5.7;

- ii. whether, as a result of taking a more limited approach, herders whose livelihoods have suffered equal or greater harm due to the road, have been excluded from the resettlement and compensation scheme, in violation of PR 5.
 - iii. whether herders impacted by other roads or transport routes used by the Client which are associated with the Project, in addition to those impacted by the Tavan Tolgoi-Gashuun Sukhait paved road, should have been eligible for resettlement or compensation packages, as a result of physical or economic displacement, according to PR 5;
- b. Related to point a., whether the system for identifying impacted herders for purposes of providing resettlement and compensation was inadequate and contrary to PR 5, including:
 - i. whether the ESIA's map failed to identify all herder households that regularly use the project area; and if so, whether herder households who should have been compensated, were excluded;
 - ii. whether herder households that were in other *soums* at the time of the field surveys failed to be properly included;
 - iii. whether the basis for compensating physically or economically displaced households, as presented in the ESIA, failed to reference EBRD standards regarding appropriate compensation levels; and consequently, whether the compensation framework failed to deliver fair compensation packages to impacted people in line with EBRD requirements.

Failure to prevent or mitigate adverse impacts on Complainants' culture and tradition

- a. Whether EBRD failed to properly identify nomadic herders as Indigenous Peoples according to the definition in PR 7.10; and if so, whether EBRD failed to afford the herders the corresponding protections, as provided in PR 7 and elsewhere in the Bank's ESP.
- b. Whether EBRD has taken reasonable steps and engaged in sufficient analysis to ascertain that nomadic herders of the Gobi are not Indigenous Peoples, according to PR 7.
- c. Whether the ESIA or other management plans properly assessed impacts to cultural heritage caused by project-related roads and provided adequate prevention and mitigation measures to protect and preserve nomadic herders' intangible cultural heritage from road-related impacts, in accordance with PR 8.15 (and other relevant requirements).

Failure to consult and inform affected complainants

- a. Whether the information disclosure and consultation process related to impacts from project-related roads conforms to PR 10.17 which requires consultation to be built into each stage of a Category A project;
 - b. Whether EBRD ensured that the Client properly disseminated information about the health and safety impacts of the roads it constructed, in sufficient detail for affected communities and relevant government agencies to understand the project's material health and safety risks and impacts, as well as proposed protective measures, in conformance with PR 4.8.
13. The Compliance Review Expert retains the authority to identify and frame the precise compliance questions to be addressed in the course of the Compliance review. However, any elements which are beyond the scope of the Complaint will be excluded.

Procedure: Conduct of the Review

14. The Compliance Review Expert may conduct the Compliance Review process in such a manner as she or he considers appropriate, taking into account the Rules of Procedure of the PCM, the concerns expressed by the Complainants as set out in the Complaint, and the general circumstances of the Complaint. PCM recommends that as part of the Compliance Review, the PCM expert meet with Complainants to verify compliance issues, among other objectives.
15. Specifically, the Compliance Review Expert may:
- a. Review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with its Environment and Social Policy 2008;
 - b. Review all documentation, including internal memos and e-mail exchanges relevant to the Complaint;
 - c. Consult extensively with EBRD staff involved in the Project, including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;
 - d. Solicit additional oral or written information from, or hold meetings with, the Complainants and any Relevant Party;

- e. Conduct a visit to the Project site to verify compliance issues, ascertain disputed facts accompanied by such officials of the Bank, the Complainants or their representatives, or the Client, or other persons, as she or he may consider necessary and appropriate;
- f. Request the PCM Officer to retain additional expertise if needed; in this case PCM will engage an expert in Indigenous Peoples in order to ensure adequate expertise to review related compliance issues.
- g. Identify any appropriate remedial changes in accordance with PCM RP 40, subject to consideration of any restrictions or arrangements already committed to by the Bank or any other Relevant Party in existing Project-related agreements;
- h. Take any other action as may be required to complete the Compliance Review within the required timeframe.

Procedure: General

- 16. The Compliance Review Expert shall enjoy, subject to the provision of reasonable notice, full and unrestricted access to relevant Bank staff and files, and Bank Staff shall be required to cooperate fully with the Compliance Review Expert in carrying out the Compliance Review.
- 17. Access to, and use and disclosure of, any information gathered by the Compliance Review Expert during the Compliance Review process shall be subject to the Bank's Public Information Policy and any other applicable requirements to maintain sensitive commercial information confidential. The Compliance Review Expert may not release a document, or information based thereon, which has been provided on a confidential basis without the express written consent of the party who has provided such document.
- 18. The Compliance Review Expert shall take care to minimise the disruption to the daily operations of all involved parties, including relevant Bank staff.
- 19. Generally, all Relevant Parties shall cooperate in good faith with the Compliance Review Expert to advance the Compliance Review as expeditiously as possible and, in particular, shall endeavour to comply with requests from the Compliance Review Expert obtaining access to sites, submission of written materials, provision of information and attendance at meetings.

Compliance Review Report

20. In accordance with PCM RP 38, the Compliance Review Report shall include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review.
21. The recommendations and findings of the Compliance Review Report shall be based only on the facts relevant to the present Complaint and shall be strictly impartial.
22. If considered necessary following the Compliance Review, arrangements for monitoring and implementation of any recommended changes pursuant to PCM RP 40 (c) shall be included in the Compliance Review recommendations.
23. Prior to submitting the Compliance Review Report to the Relevant Parties and to the Board in accordance with PCM RP 39, or sending the draft Compliance Review Report to the Bank's Management, in accordance with PCM RP 41, the Compliance Review Expert shall ensure that all factual information relating to the Relevant Parties is verified with them.

Exclusion of Liability

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

Terms of Reference (TOR) for the Compliance Review

Oyu Tolgoi Mine Project

Compliance Review Expert

1. In accordance with PCM, RP 35, the PCM Officer appoints PCM Expert Dr Owen McIntyre as the Compliance Review Expert for this Compliance Review.
2. The Compliance Review Expert shall conduct the Compliance Review in a neutral, independent and impartial manner and will be guided by principles of objectivity and fairness giving consideration to, *inter alia*, the rights and obligations of the Relevant Parties, the general circumstances surrounding the Complaint and due respect for EBRD staff.

Scope

3. These Terms of Reference apply to any inquiry, action or review process undertaken as part of the Compliance Review, with a view to determining, as per PCM RP 36 if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has resulted in non-compliance with a relevant EBRD Policy – in this case Environmental and Social Policy 2008 – and, if in the affirmative, to recommend remedial changes in accordance with PCM RP 40.
4. These Terms of Reference are limited to reviewing actions or inactions by the EBRD in relation to the relevant EBRD policy, and do not cover any actions or inactions by the Client, Oyu Tolgoi LLC.
5. In conducting the Compliance Review, the Compliance Review Expert will examine any relevant documents and consult with the Relevant Parties. The Compliance Review Expert may also carry out a site visit, and employ such other methods as the Expert may deem appropriate, as per PCM RP 37.
6. Upon completion of the Compliance Review, the Compliance Review Expert will prepare a Compliance Review Report setting out his or her findings. The Compliance Review Report will include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review, as per PCM RP 38.
7. Such processes shall be conducted in accordance with these Terms of Reference subject to modifications which the Compliance Review Expert and the PCM Officer may, at any time, expressly agree upon, except modification that may prejudice the interests of any Relevant Party or is inconsistent with accepted review practice.

8. The Compliance Review shall confine itself to the Compliance Review issues raised in the present Complaint. It shall not go beyond the parameters of the Complaint to address other issues.²⁰⁵

Time Frame

9. The Compliance Review will commence when the Eligibility Assessment Report containing these Terms of Reference is publicly released and posted on the PCM website.
10. Every effort shall be made to ensure that the Compliance Review is conducted as expeditiously as circumstances permit and it is intended that it shall be concluded within sixty (60) Business Days of its commencement, within which period a draft Compliance Review Report will be prepared and sent to the Bank's Management, pursuant to PCM RP 41. However, the PCM Officer may extend this time period for as long as is strictly necessary to ensure full and proper implementation of the Compliance Review. Any such extension shall be promptly notified to all Relevant Parties.

Procedure: Identification of Core Compliance Issues

11. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of each of the relevant provisions of the ESP and of the Performance Requirements contained therein, in respect of which non-compliance is alleged or implied by the Complainants. Relevant provisions of the ESP may include: ESP PR 1 (4-9, 14-15), PR 3 (2-3, 10, 12, 16), PR 4 (7-9, 12-14, 16-17), PR 5 (1-4, 6-8, 10-39), PR 7 (9-14, 20, 31-33 and other relevant sections as appropriate), PR 8 (1-2, 7, 11-13, 15), PR 10 (6, 8-10, 12-20, 24), B.3-5, 7 (*EBRD's Commitment*), C 14 -16 (*Project Appraisal Process*), C 20, C 28-29 (*Performance Requirements*).
12. The Compliance Review process will examine the core questions of compliance raised in the Complaint,²⁰⁶ including (but without limitation):

Shortcomings in the environmental and social appraisal process – PR 1 (Environmental and Social Appraisal and Management)

²⁰⁵ Request No. 2013/01, Energy Resources Phase II and Oyu Tolgoi Mine. This Compliance Review will be limited to issues related to the Oyu Tolgoi Mine.

²⁰⁶ The compliance issues have been drawn from PCM in-person interviews with the Complainants, the Complaint documents, and materials referenced by Complainants.

- a. Whether the environmental and social appraisal failed to assess impacts from roads at the early stages of project development, in breach of PR 1.4, particularly given the project's Category A classification and considering the ESIA was not disclosed until July 2012 when construction was well advanced.
- b. Whether the disclosure of the ESIA, at a time when construction was well advanced, led to a situation whereby the Client created and used roads prior to identifying the actual and potential environmental and social risks and impacts or corresponding opportunities for preventive or mitigation measures to be applied, without meaningful consultation of stakeholders potentially affected by the Project, contravening PRs 1 and 10; and if so, whether EBRD failed to properly consider the timing of the ESIA in relation to its due diligence responsibilities, as set out in PR1.
- c. Whether the project appraisal process properly defined the project's area of influence according to PR 1.6, and accordingly, assessed the full set of potential environmental or social risks and impacts from the roads and associated infrastructure, including current and future planned development, on herder and animal health and safety, on pastureland and livelihoods, on access to water, on tradition and culture, and on the ecosystem, environment, and living natural resources – as a connected system and for the relevant stages of the project cycle – as required by PRs 1.5, 1.7, 1.8, and 1.9. For example,
 - i. Are (or should) the networks of roads²⁰⁷ constructed, relied upon or used by the project (e.g., formal, informal, and local roads), the Oyu Tolgoi-Gunii Hooloi roads, etc., be identified as within the project's area of influence, and therefore subject to the environmental and social appraisal process, according to the requirements of the 2008 ESP?
- d. Whether the proposed mitigation measures set out in the ESIA, and subsequently included in the ESAP, RAP, and Livelihood Restoration Framework (LRF) (i) were based on a proper and timely analysis of the potential risks and impacts; (ii)

²⁰⁷ "Network of roads", "Project-related roads", "Project-roads network" refer to the set of roads and associated infrastructure constructed and/or used by OT and its contractors, suppliers, etc. for Project-related activities.

addressed project road-related impacts in a way that was commensurate with the levels of environmental and social risks; and (iii) effectively prevented possible environmental and social damage by the Project.

- e. Whether EBRD violated its 2008 Environmental and Social Policy by presenting this Project to the Board for approval if there were critical gaps in knowledge about potential Project risks, impacts and mitigation measures, even if the Client and Bank intended to address those information gaps subsequent to Board approval of the Project, including:
 - i. Whether EBRD adequately ensured that critical baseline evaluations, due diligence studies and impact assessments related to roads, were carried out in a timely manner, at an appropriate level of detail, according to Bank policy (PRs 1.5, 1.8 and 4.7, among other requirements), including proper investigations of pasture and livelihoods, health of people and animals, access to water, etc.
 - ii. Whether financing decisions were made without fully understanding the potential impacts and Client commitments for the operations phase of the project;
 - iii. Whether the social and environmental issues were adequately understood at the time of the investment decision, with an appropriate level of confidence that EBRD policies had been met;
 - iv. Whether project impacts and violations that may have occurred from the beginning of the project, were appropriately considered in EBRD's decision to provide financing, according to the 2008 ESP, paras. 14-16, 28-29;
 - v. Whether EBRD assured that the potential project risks and impacts had been fully and meaningfully communicated to the local population in advance of its decision to invest.
- f. Whether EBRD has conducted due diligence and performed appropriate, ongoing supervision and monitoring regarding the impacts of the project and appropriate mitigation measures for the multitude of Project roads that are, or should have been, considered part of the Oyu Tolgoi Project's "area of influence", as required by Bank policy, including paragraphs C. 34-37 of the 2008 ESP.

Inadequate health and safety measures – PR 3 (Pollution Prevention and Abatement), and PR 4 (Community Health Safety and Security)

- a. Whether the ESIA and relevant management plans adequately assessed the full range of problems associated with dust impacts from the multitude of roads on livelihood, and on the mental and physical health and safety of herders and their livestock;
- b. Whether the ESIA, relevant management plans or other due diligence documents, adequately address the full scope of potential health and safety impacts to people and animals from roads, through specific mitigation measures for the multitude of roads constructed or used by OT, that are proportional to impacts and risks identified, in accordance with the relevant requirements of PRs 3 and 4, including PR 4.7.
- c. Whether EBRD took reasonable and proactive steps to assure that measures undertaken by the Client to safeguard herder and animal health and safety, including methods to prevent or mitigate dust pollution from Project-related roads²⁰⁸ and actions to achieve road safety, are adequate and proportional to impacts and risks, as required by PR 4.7.
- d. Whether the ESIA properly considered the Project's impact on the potential for increased social conflict among herders, due to competition over scarce water resources and rangeland among herds, people and wildlife, according to PR 4.

Inadequate measures to prevent, mitigate, and compensate for the physical and economic displacement of complainants – PR 5 (Land Acquisition, Involuntary Resettlement and Economic Displacement)

- a. Whether EBRD failed to ensure that the Client appropriately considered and implemented feasible, alternative road placement, road design or other project design measures (e.g., wildlife passages and flood culverts) to prevent, minimise or mitigate impacts of pasture fragmentation on herder livelihoods, contravening PR 5.11.
- b. Whether EBRD failed to ensure that the Client implemented adequate dust pollution and road safety measures to avoid adverse impacts to livelihoods due to the harm caused to herder livestock, in violation of PR 5, and including PR 5.11.

²⁰⁸ “Project-roads network” refers to the set of roads and associated infrastructure constructed and/or used by OT and its contractors, suppliers, etc. for Project-related activities.

- c. Whether the ESIA, RAP and/or LRF failed to properly identify Complainants who would be physically or economically displaced due to impacts from Project-related roads; and consequently, denied them eligibility for the company's compensation and resettlement package, in violation of PR 5, including:
- i. whether the "impact zone" defined in the LRF and/or ESIA should have included other roads relied on or impacted by the Client, in addition to the Oyu-Tolgoi – Gashuun Sukhait Road, as a project component relevant to an "impact zone"²⁰⁹, contravening PR 5.7;
 - ii. whether herders living or herding in the vicinity of roads and project infrastructure, but considered outside the "impact zone", were unreasonably denied compensation commensurate with the losses sustained to their herding enterprises, as a result of economic displacement;
 - iii. whether the livelihood losses experienced by Complainants as a result of impacts from Project-related roads, fulfill PR5's definition of economic displacement; and if so, should be compensated;
- d. Whether the RAP and LRF incorporated a fair and adequate methodology for valuing the loss of assets or access to assets, according to PR 5. For example:
- i. Whether the methodology used to calculate "impact zone" and compensation packages was based primarily upon the distance of a herder's winter camp from the source of the impact; and if so, whether this metric is consistent with PR 5.
 - ii. Whether the compensation methodology considered or should have considered additional factors in computing the loss of assets or access to assets from impacts associated with Project-related roads, in accordance with PR5, for instance:

²⁰⁹ "Impact zones" describe the relationship between the Project and affected parties and are used to determine community and household-level entitlements for livelihood restoration and other assistance. OT ESIA, "Chapter C10: Land Use and Displacement," July 31, 2012, available at http://ot.mn/sites/default/files/documents/ESIA_OT_C10_Land_EN.pdf, at 6 and 15.

- loss of areas of summer, winter, spring and reserve pastureland to roads and infrastructure, and the quality of the rangeland lost;
 - losses from fragmenting pastures;
 - loss of access to water from separation of pastures and wells;
 - loss of winter camp animal shelters;
 - loss of healthy pasture due to contamination;
 - loss of natural living resources and other critical economic assets such as clean air and water;
 - losses related to competition over habitat - more animals and wildlife sharing less rangeland;
 - reduced livestock health and productivity;
 - loss of livestock from impacts associated with project-related roads;
 - diminished quality and marketability of animal products; and
 - adverse health impacts to herders.
- e. Whether EBRD should have treated herders as a business unit, rather than as a family unit, and therefore denied them compensation to which they should be entitled.
- f. Whether there are possible unintended consequences in the application of the mitigation hierarchy, whereby some people who perhaps should have been resettled (*e.g.*, households exposed to significant health and safety risks that can't be mitigated), were not physically relocated, contrary to PR 5.
- g. Whether the Herders Livelihood Improvement Program for herders in Khanbogd *soum* considered impacted, but not located within the 'impact zone', is adequate, timely, and commensurate with impacts incurred, in conformance with PRs 1.14 – 1.16 and PR 5.

Failure to prevent or mitigate adverse impacts on Complainants' culture and tradition

- a. Whether EBRD failed to properly identify nomadic herders as Indigenous Peoples according to the definition referenced in PR 7.10; and if so, whether EBRD failed to afford the herders the corresponding protections, as provided in PR 7 and elsewhere in the 2008 ESP.
- b. Whether EBRD has taken reasonable steps and engaged in sufficient analysis to ascertain that nomadic herders of the Gobi are not Indigenous Peoples, according to PR 7.
- c. Whether the ESIA or other management plans (ESAP, OMPs) properly identified potential impacts to cultural heritage caused by Project-related roads and provided adequate prevention and mitigation measures to protect and preserve nomadic herders' intangible cultural heritage from road-related impacts,

in accordance with PR 8.15 (and other relevant requirements).

- d. Whether the location and design of the Project-roads network was adequately informed by the requirement to avoid harming the herders' nomadic pastoralist tradition, in compliance with PR 8.12.
- e. Whether EBRD has appropriately guided its Client to "avoid or mitigate adverse impacts on cultural heritage in the course of their business operations", consistent with PR 8.1.

Failure to adequately consult and inform affected people or properly address community grievances – PR 10 (Information Disclosure and Stakeholder Engagement); PR 4 (Community Health, Safety and Security)

- a. Whether the information disclosed to the local population provided a full understanding of potential road-related impacts and associated mitigation measures at each stage of the project, at a sufficient level of detail, and in a timely manner, as required by Category A projects according to PR10.17;
- b. Related to point a. above, whether relevant Project-related information was available and disclosed to enable the affected communities and relevant government agencies to understand the Project's material health and safety risks and potential impacts, as well as its proposed protective measures, in accordance with PR 4.8;
- c. Whether public consultation undertaken by the Client can constitute meaningful public consultation for the purposes of PR 10 of the 2008 ESP, if the consultation on the siting of company transport routes and corresponding mitigation measures failed to be conducted prior to constructing new roads or using existing ones;
- d. Whether meaningful consultation and information disclosure according to PR 10, requires communities be consulted about Project-related roads not identified as impact zones, and if so, whether such consultations were carried out;
- e. Whether public consultation undertaken by the Client can constitute meaningful public consultation for the purposes of PR 10, if the project appraisal process is found to be flawed as alleged by the Complainants, including the timing of the ESIA in the project cycle and alleged gaps in knowledge about potential road-related risks, impacts and corresponding protection measures;
- f. Whether opportunities for meaningful consultation were provided to the local population in a culturally appropriate manner, according to Bank requirements (e.g, consultation that promotes in-depth, participatory discussions and allows community concerns to influence the design of the Project and related mitigation and compensation plans);

- g. Whether the grievance mechanism is well known and understood, trusted, accessible, responsive and adequate in practice, as well as on paper, in conformance with PR 10.24.
13. The Compliance Review Expert retains the authority to identify and frame the precise compliance questions to be addressed in the course of the Compliance review. However, any elements which are beyond the scope of the Complaint will be excluded.

Procedure: Conduct of the Review

14. The Compliance Review Expert may conduct the Compliance Review process in such a manner as she or he considers appropriate, taking into account the Rules of Procedure of the PCM, the concerns expressed by the Complainants as set out in the Complaint, and the general circumstances of the Complaint. PCM recommends that as part of the Compliance Review, the PCM expert meet with Complainants to verify compliance issues, among other objectives.
15. Specifically, the Compliance Review Expert may:
- a. Review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with its Environment and Social Policy 2008;
 - b. Review all documentation, including internal memos and e-mail exchanges relevant to the Complaint;
 - c. Consult extensively with EBRD staff involved in the Project, including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;
 - d. Solicit additional oral or written information from, or hold meetings with, the Complainants and any Relevant Party;
 - e. Conduct a visit to the Project site to verify compliance issues, ascertain disputed facts accompanied by such officials of the Bank, the Complainants or their representatives, or the Client, or other persons, as she or he may consider necessary and appropriate;
 - f. Request the PCM Officer to retain additional expertise if needed; in this case PCM will engage an expert in Indigenous Peoples in order to ensure adequate expertise to review related compliance issues.
 - g. Identify any appropriate remedial changes in accordance with PCM RP 40, subject to consideration of any restrictions or arrangements already committed to by the Bank or any other Relevant Party in existing Project-related agreements;
 - h. Take any other action as may be required to complete the Compliance Review within the required timeframe.

Procedure: General

16. The Compliance Review Expert shall enjoy, subject to the provision of reasonable notice, full and unrestricted access to relevant Bank staff and files, and Bank Staff shall be required to cooperate fully with the Compliance Review Expert in carrying out the Compliance Review.
17. Access to, and use and disclosure of, any information gathered by the Compliance Review Expert during the Compliance Review process shall be subject to the Bank's Public Information Policy and any other applicable requirements to maintain sensitive commercial information confidential. The Compliance Review Expert may not release a document, or information based thereon, which has been provided on a confidential basis without the express written consent of the party who has provided such document.
18. The Compliance Review Expert shall take care to minimise the disruption to the daily operations of all involved parties, including relevant Bank staff.
19. Generally, all Relevant Parties shall cooperate in good faith with the Compliance Review Expert to advance the Compliance Review as expeditiously as possible and, in particular, shall endeavour to comply with requests from the Compliance Review Expert obtaining access to sites, submission of written materials, provision of information and attendance at meetings.

Compliance Review Report

20. In accordance with PCM RP 38, the Compliance Review Report shall include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review.
21. The recommendations and findings of the Compliance Review Report shall be based only on the facts relevant to the present Complaint and shall be strictly impartial.
22. If considered necessary following the Compliance Review, arrangements for monitoring and implementation of any recommended changes pursuant to PCM RP 40 (c) shall be included in the Compliance Review recommendations.
23. Prior to submitting the Compliance Review Report to the Relevant Parties and to the Board in accordance with PCM RP 39, or sending the draft Compliance Review Report to the Bank's Management, in accordance with PCM RP 41, the Compliance Review Expert shall ensure that all factual information relating to the Relevant Parties is verified with them.

Exclusion of Liability

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

ANNEXES

a. Complaint

- i. 1 July 2013 Complaint submitted by nomadic herders of Javhlant *bagh* in Khanbogd *soum*, Mongolia, and 2 Mongolian NGOs (OT Watch and Shuteen Gaviluut) to the Project Complaint Mechanism on 2 July 2013;
- ii. 5 August 2013 Complaint, submitted by nomadic herders of Jargalant, Uekhii *bagh* in Manlai *soum*, Mongolia, submitted electronically on 6 September 2013;
- iii. Individual Complaints from herders, 3 of which are dated 28 July 2013 and one of which is dated 9 August 2013, submitted electronically on 6 September 2013;
- iv. Supplemental Complaint letter from OT Watch prepared with support from Accountability Counsel, dated 1 April 2014;
- v. Response by Complainants to questions from the EBRD PCM regarding OYU Tolgoi-related roads, submitted by electronic mail on 6 September 2013 by OT Watch to the PCM Officer;
- vi. Document titled “5 August 2013 Photos From Manlai To Oyu Tolgoi Road” submitted by electronic mail on 6 September 2013 by OT Watch to the PCM Officer.

b. Management’s Response

- i. Energy Resources and Oyu Tolgoi Management Responses submitted 23 October 2013 – “Excom No Objection: Mongolia Mining Corporation 39829 and Energy Resources 39957; Excom No Objection: Oyu Tolgoi Project (41158)”;
- ii. Revised Management Response received by PCM Expert on 10 June 2014 – “Management Response to PCM Complaint on Oyu Tolgoi Project (41158) & Energy Resources (39957)”.

c. Client’s Response – Oyu Tolgoi

- i. Oyu Tolgoi response to PCM complaint, dated 2 October 2013;
- ii. “Oyu Tolgoi LLC comments on OT Watch letter to European Bank on Reconstruction and Development – alleging policy violations committed by Oyu Tolgoi” submitted to the PCM on 6 June 2014.

d. Client’s Response – Energy Resources

- i. Energy Resources response to PCM complaint, dated 21 October 2013;
- ii. Response Letter to NGOs: “Goviin Gazar Shoroo”, “Tsetsiinutag”, “Khil Hyazgaargui Alkham”, “Oyu Tolgoi Watch”, dated 30 August 2012;
- iii. Information on Complained Herders submitted by Energy Resources, 26 November 2013;
- iv. Energy Resources response to PCM complaint, dated 30 May 2014.

Map of Complainants’ winter camps in relation to OT and ER roads and infrastructure, prepared by Complainants during October 2013 meetings with PCM.