

SUTTONS

SOLICITORS

STEPHEN D. SUTTON

Assistant Solicitors:

ISABEL M. WILLIAMS
EMILIE K. BLADON

Consultants:

CAROLINE D. GRACE
BRIAN B. HARRIS

OUR REF 5/EKB/S088
YOUR REF

[REDACTED]
[REDACTED]

TELEPHONE: [REDACTED]
International: [REDACTED]

[REDACTED]
International: [REDACTED]

31st January 2018

[REDACTED]
PCM Officer
Project Complaint Mechanism
EBRD
One Exchange Square
London, EC2A 2JN

BY EMAIL AND BY POST
[\(\[pcm@ebrd.com\]\(mailto:pcm@ebrd.com\)\)](mailto:pcm@ebrd.com)

Dear [REDACTED],

OUR CLIENT: MR ALOIS SCHONBERGER
RE: PROJECT NO. 39390 / AGROINVESTBANK TAJIKISTAN

We wish to submit a Complaint regarding the EBRD's equity investment in Agroinvestbank ("AIB") (Project No 39390) ("the Project") on behalf of our client Mr Alois Schonberger (an Austrian national). Mr Schonberger is the owner of a company called Super Perfect Investments Limited ("Super Perfect"). We are Mr Schonberger's authorised representative. Please see the enclosed letter dated 31st January 2018 ("**Enclosure 1**") from Mr Schonberger confirming our appointment as his representative.

As a direct result of AIB's conduct Mr Schonberger and the shareholders and employees of Super Perfect have suffered a significant financial loss, details of which are set out below in paragraph 1. The EBRD has failed to ensure that AIB conducts itself in an acceptable and appropriate manner.

According to the limited information available on the EBRD's website the EBRD's equity investment in AIB (Project No 39390) was intended to "**strengthen the capital base and support the growth and development of one of the largest and most successful banks in Tajikistan**". The Project was expected to have high transition impact and was also intended to enhance AIB's reputation and the aim was to

"Provide guidance, institution building and set the standards of practice for local banks through improved corporate governance and business conduct".

The Project document ("Enclosure 2") goes on to state

"Agroinvestbank has been a recipient of Technical Cooperation under the Tajik Micro and Small Enterprise and Financing Facility...It is envisaged that the equity investment will be supported by comprehensive Technical Cooperation in the amount of USD 1.5 million for Institutional Building. The Technical Cooperation assignment will focus on corporate governance, strategic review and organisational restructuring, business development, HR (including gender equality), operations review and risk management; the main objective being the development of Agroinvestbank into a modern, efficient bank."

It is understood that technical cooperation was provided by the EBRD (pursuant to the Project) to, inter alia, improve corporate governance at AIB.

The PCM is requested to initiate a Problem Solving Initiative to assist in the settlement of the outstanding dispute (described in detail below in paragraph 1) between AIB and Super Perfect as it is mandated to do by the PCM Rules of Procedure. If a Problem Solving Initiative will not be successful, the PCM is requested to conduct a Compliance Review to determine whether or not the EBRD has complied with the relevant EBRD policies in respect of its equity investment in AIB.

1. Background

Super Perfect Investments Limited (a company incorporated in Hong Kong) entered into a contract with [REDACTED] (a Tajik company) for the purchase of [REDACTED] of cotton on 11th February 2013 and paid [REDACTED] [REDACTED]. The said contract was brokered by the [REDACTED] [REDACTED] following meetings with him on 6th December 2012 and 6th February 2013 in Tajikistan. At the suggestion of [REDACTED] the contract provided that a bank owned by the

Government of Tajikistan, Agroinvestbank would guarantee up to [REDACTED] in respect of [REDACTED] contractual obligations to deliver the cotton. [REDACTED] advised that AIB would be an excellent choice as guarantor given that it is the second largest bank in Tajikistan. He also advised that the EBRD was an active board member of AIB and a 25% shareholder in AIB. It was only due to the fact that the EBRD was actively involved in running AIB that Super Perfect agreed to proceed with the transaction. [REDACTED] breached its contractual obligations and failed to deliver the cotton or return the money paid.

The bank guarantees were called but AIB has steadfastly refused to pay the amounts due under the aforementioned guarantees. Arbitration proceedings were commenced on 6th November 2014 in Geneva, Switzerland pursuant to the arbitration clause in the bank guarantees. AIB initially refused to participate in those proceedings. On 17th July 2017 the Swiss Arbitration Tribunal issued the enclosed award ("**Enclosure 3**") in favour of Super Perfect. As at 31st January 2018 the sum of [REDACTED] is outstanding. AIB has failed to pay either all or any part of the sum due to Super Perfect notwithstanding that the enclosed formal request for payment dated 20th July 2017 has been made ("**Enclosure 4**").

[REDACTED]. The actions of [REDACTED] are to be attributed to the Government of Tajikistan (see Articles 5 and 8 of the Articles on Responsibility of States for International Wrongful Acts).

2. The EBRD's Country Strategy for Tajikistan

The EBRD's Country Strategy for Tajikistan emphasises, inter alia, the need to expand private enterprise in Tajikistan and also to improve the business environment in that country. In addition, there are numerous references in the Country Strategy to the objective of developing agribusiness. Cotton is the largest single export from Tajikistan. The overarching objective referred to in the Country Strategy is to improve corporate governance in that country.

3. Super Perfect's attempts to resolve these issues with AIB

Before approaching the EBRD our client has made several attempts to solve these issues by liaising with [REDACTED] and AIB. Those efforts were rebuffed and, as a result, arbitration proceedings were initiated in Switzerland.

- At paragraph B9 it is also stated that **“the EBRD will not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to...human rights”**.
- At Paragraph B11 of the aforementioned Policy the EBRD commits to **“promoting sustainable business practices and corporate responsibility”** through its technical cooperation activities;
- The EBRD requires companies such as AIB to adhere to the OECD Guidelines for Multinational Enterprises which Guidelines are intended to promote responsible business practices (see further paragraph 6 below);
- The EBRD’s policy regarding corporate governance and banks states

“..good corporate governance at banks is particularly important because they are the most significant (and in some cases only) providers of credit and difficulties in their operations could disrupt the entire economy. In turn, this circumstance puts banks in a unique position to influence governance practices of, their corporate borrowers, thereby reducing risk in their own operations and becoming promoters of better corporate governance practices for all other companies.”

- At paragraph C3 of the Policy the EBRD is required to monitor the performance of projects. The purpose of monitoring is to (a), inter alia, **“ensure that the applicable standards...are being substantially met”** and (b) **“...to keep track of the ongoing...social impacts associated with investments...”**.
- At paragraph C14 it is stipulated that all EBRD financed projects are to be subject to an appraisal to determine if financing should be provided to a particular project. In particular the EBRD’s project appraisal is to include **“the assessment of financial and reputational risks”**. C14 goes on to state that **“the appraisal will ascertain whether activities to be supported by EBRD finance are capable of being implemented in accordance with this Policy.”**

- At C15 it is stated that the EBRD’s appraisal will include consideration of “***the capacity and commitment of the client to address [social impacts] and issues in accordance with this Policy***”.
- At C24 the EBRD is mandated to “***conduct due diligence on the FI and its portfolio to assess (i) the FI’s existing environmental and social policies and procedures vis-à-vis the bank’s PR9 and its capacity to implement them and (ii) environmental and social issues associated with FI’s existing and likely future portfolio***”.
- Paragraph C35 states that monitoring “***is carried out by both the client and the [EBRD]. The extent of the monitoring will be commensurate with the project’s issues, impacts and compliance requirements, and with the ability of the client...to adequately monitor and manage these issues and impacts***”. C35 goes on to provide that the EBRD is to implement a monitoring programme in conjunction with the client.
- At C37 it is stated that the EBRD is able to take any action it deems appropriate if the client fails to comply with its commitments.

It is evident that numerous provisions of the EBRD’s Environmental and Social Policy have been breached by AIB including, in particular, those cited above. The EBRD continues to have an equity investment in AIB and yet notwithstanding the matters that have been brought to the EBRD’s attention by this firm on behalf of Mr Schonberger no efforts appear to have been made to either investigate AIB’s conduct or indeed sanction AIB for its somewhat unhelpful approach to “sound banking” as extolled in paragraph A1 of the Policy. There has also been a failure on the part of the EBRD to properly monitor the actions of its joint venture partner, AIB.

Elsewhere on the EBRD’s website reference is made to the EBRD helping its clients to “***improve corporate governance by supporting efficient operations, better risk management, and increase the accountability and transparency***”. Regrettably this does not appear to have happened in respect of Project 39390.

Not only is it apparent that the EBRD has failed to comply with each and every one of the aforementioned policies there has also been a lack of disclosure, inadequate consultation, appraisal and monitoring of Project Number 39390.

5. Performance Requirement Number 9 (“PR 9”)

The obligations of AIB are dealt with, inter alia, by reference to PR 9 which governs the responsibility of financial intermediaries. Paragraph 2 of PR 9 requires the EBRD to assess and monitor whether the **“social risks associated with the FI’s business activities are adequately addressed by the FI”**. The modalities of the EBRD oversight is according to PR 9 dependent, inter alia, on the **“business environment of the country”**. It would no doubt have been clear to the EBRD that the business environment in Tajikistan and in particular within AIB was both precarious and unconventional at the time the equity investment was made. The EBRD was therefore on notice that an enhanced oversight role should have been adopted by the EBRD in relation to this project. The enclosed extract from the IMF’s Financial System Stability Assessment dated 15th May 2015 (**“Enclosure 6”**) evidences the difficulties that the EBRD were facing when investing in AIB.

Paragraph 9 of PR 9 requires the FI to **“adopt and implement...social due diligence and monitoring procedures...commensurate with...[the] social risks associated with its business activities. These Procedures will be agreed with the EBRD”**.

Paragraph 24 of PR 9 requires AIB to **“follow best practices in sustainability management in their entire lending and investment operations”**. PR 9 also encourages Financial Intermediaries to join existing international initiatives that promote best practices in the financial sector including the Equator Principles and the Principles for Responsible Investment (“PRI”). The Equator Principles comprises an agreement to assess and manage environmental and social risks applying internationally accepted standards and international laws and regulations. Environmental and social risks include human rights issues. The PRI comprises 6 principles based on a notion that environmental, social and governance issues can affect the performance of investment portfolios.

It is apparent that neither the EBRD or AIB have complied with either the Equator Principles, the Principles for Responsible Investment or indeed many of the provisions of PR9 of the Policy insofar as Project Number 39390 is concerned.

6. OECD Guidelines for Multinational Enterprises (“the Guidelines”)

These Guidelines are incorporated in the EBRD’s Environmental and Social policy (May 2008) and constitute principles and standards for responsible business conduct. The Preface to the Guidelines states that the aim of the Guidelines

“is to encourage positive contributions that multinational enterprises can make to make economic, environmental, social progress...”.

The Guidelines establish principles covering a broad range of issues in business ethics. The Guidelines were designed to prevent misunderstanding and build an atmosphere of confidence and predictability between business, labour, government and society as a whole.

The Guidelines incorporate the OECD Declaration on International Investment and Multinational Enterprises (“the Declaration”). The Declaration promotes a balanced approach for governments’ treatment of foreign direct investment.

The Guidelines recommend disclosure on all material matters regarding enterprise such as its performance and ownership. They are also intended to combat bribery and passive and active corruption. For the avoidance of any doubt it is not the intention of the Complainant to raise allegations of fraud or corruption in this Complaint.

As is set out in this Complaint at paragraph 8 below these issues have been raised with the EBRD on numerous occasions but the EBRD has refused to investigate matters or enter into any substantive correspondence with this firm or our client. In short the EBRD has “pulled down the shutters” and refused to enter in to a dialogue with either Mr Schonberger, Super Perfect or this firm. It has also refused to disclose any information or documentation regarding its investment in AIB.

What does the EBRD’s commitment to comply with the OECD Guidelines for Multinational Enterprises really mean? In what way has the EBRD implemented those commitments insofar as AIB is concerned given AIB’s refusal to honour both the bank guarantees and the subsequent arbitration Award issued more than 7 months ago by the Swiss Arbitration Tribunal?

7. [REDACTED]

There is also the somewhat uncomfortable issue of [REDACTED] involvement in brokering the initial contract whilst [REDACTED] [REDACTED] [REDACTED], and, of course [REDACTED] [REDACTED] [REDACTED] he is the individual at AIB that directed AIB to renege on its obligations vis-à-vis both the bank guarantees and the Swiss arbitration award.

All of these factors point to [REDACTED] clear conflict of interest. Notwithstanding the serious issues that have been raised in this Complaint and in our previous correspondence the EBRD has taken no steps that we are aware of to investigate and deal with these issues even though there is a requirement on the EBRD's part and on the part of AIB (not to mention the Government of Tajikistan) to comply with OECD Guidelines and the EBRD's own Policy.

8. The Agreement Establishing the EBRD

Whilst we are aware of the fact that somewhat oddly the remit of the PCM does not extend to a review of whether the EBRD and AIB have complied with the Agreement Establishing the EBRD nevertheless we refer to Article 2 of the Agreement Establishing the EBRD.

Article 2 (i) states

“To promote, through private and other interested investors, the establishment, improvement and expansion of productive, competitive and private sector activity, in particular small and medium sized enterprises.”

(ii)

“To mobilise domestic and foreign capital and experienced management to the end described in (i)”

Article 8 is also relevant where it is stated

“In cases where a member might be implementing policies which are inconsistent with Article 1 of this Agreement, or in exceptional circumstances, the Board of Directors shall consider whether access by a member to Bank resources should be suspended or otherwise modified and may make recommendations accordingly for the Board of Governors.”

It is submitted that the aforementioned Articles when read in conjunction with the factual matrix set out above require the Board to either suspend further loans to Tajikistan or at the very least condition those loans in order to ensure that the EBRD is not in breach of the Agreement Establishing the EBRD and / or generally accepted principles of public international law which principles bind the EBRD (see in particular paragraph B9 of the Policy).

9. Efforts to communicate Mr Schonberger's concerns to the EBRD

Rigorous efforts have been made to engage in a dialogue with the EBRD regarding the abovementioned issues. The EBRD's reaction to our approach has been both unprofessional and discourteous. The EBRD was unwilling to meet with representatives of Mr Schonberger for over a year. Mr Sutton also offered to travel to Kiev to meet with the EBRD representative responsible for Project Number 39390, but that offer was rejected. We enclose a copy of the following communications evidencing our attempts to engage in a dialogue with the EBRD:-

1. Email exchanges between Suttons Solicitors and [REDACTED] and [REDACTED] of the EBRD between September and October 2016 ("**Enclosure 7**");
2. Telephone attendance notes recording Mr Sutton's attendance on [REDACTED] on 5th October 2016 and 31st August 2017 ("**Enclosure 8**");
3. Email exchanges between Suttons Solicitors and [REDACTED] and [REDACTED] the EBRD between August 2017 and October 2017 ("**Enclosure 9**");
4. Attendance note of meeting with [REDACTED] and [REDACTED] in London on 19th October 2017 ("**Enclosure 10**");

10. The EBRD's Public Information Policy

Mr Schonberger lacks information about the Project, information about how to communicate with those at the EBRD responsible for the Project and general information about the implementation of the Project. We enclose a copy of the following correspondence:-

1. Our letters dated 5th and 8th December 2017 addressed to the office of the Secretary General ("**Enclosure 11**");
2. The Secretary General's email dated 20^h December 2017 ("**Enclosure 12**");
3. Our response dated 23rd January 2018 ("**Enclosure 13**").

The EBRD has refused to supply any documents or further information in respect of its equity investment in AIB notwithstanding its commitment to transparency and accountability and the principles enshrined in the OECD Guidelines referred to at paragraph 6 above.

Surprisingly the EBRD has not only refused to supply any information in respect of its investment (and directorship) in AIB it has also refused to respond to perfectly straightforward generic questions such as “what is a social risk” (paragraph 2 of PR 9) and or “what is a social business practice” (paragraph 3 of PR 9). We also enquired whether the equity investment in Project Number 39390 is to be characterised as “project finance” but the EBRD declined to answer this perfectly reasonable enquiry.

There is a presumption on the part of the EBRD that information requested is to be made available. The PIP policy states that the mandate of the EBRD (Article 1) is transparency and accountability. These principles are fundamental to fulfilling the EBRD’s mandate and strengthening public trust in the EBRD. We are of the opinion that the EBRD is in breach of its Public Information Policy.

In addition, Article E 1.8 of the PIP states that if information that is considered confidential by the EBRD is requested then that information will not be supplied unless permission is given by the entity concerned, in this case AIB. Has such an approach been made by the EBRD to AIB and if so what was AIB’s response? If no approach was made, we would like to know why, and we would respectfully request that AIB be approached for permission to disclose the information and documentation requested.

11. Result Mr Schonberger hopes to achieve by submitting this complaint to the PCM

Given the events that have transpired during the course of the past two years our client requires the suspension or conditioning of all loans to Tajikistan until the sums owing have been paid over in accordance with Article 8 of the Agreement Establishing the EBRD. Such a request is reasonable in all the circumstances and in accordance with the principles of public international law which principles bind the EBRD.

In this regard we refer to the enclosed World Bank Operational Policy 7.40 (“**Enclosure 14**”) which deals with disputes over defaults on external debt, expropriation and breach of contract. It is stated therein that

“When there are disputes over expropriations that, in the opinion of the Bank, the member country is not making reasonable efforts to settle and that are substantially harming the country’s international credit standing, the Bank considers whether to continue making new loans or guarantees to the member country. Further the Bank

may decide not to appraise proposed projects / programs in such a country unless it has good grounds for believing that the obstacles to lending will soon be removed.”

It is unclear whether the EBRD has a policy on expropriation although it implicitly does as it is bound by the principles of public international law pursuant to the Agreement Establishing the EBRD. Public international law provides that property expropriated from foreign nationals should be compensated “promptly, adequately and effectively” (the so called Hull Rule).

12. The responsibilities of the EBRD as a shareholder in AIB

The directors of a company are responsible for acting in the best interests of a company for the benefit of shareholders. Shareholders in turn empower directors to lead the company in a fiduciary capacity whilst maintaining a degree of decision making and control. The EBRD had a 25% plus 1 shareholding in AIB (subsequently diluted). Clearly the overriding purpose of that equity investment was to ensure that AIB adopted good governance practices. We understand that the EBRD was also represented at Board level when the guarantees presently under discussion were issued by AIB. The EBRD’s ownership of shares in AIB carries with it certain responsibilities over and above those responsibilities that the EBRD already has in its unique capacity as a development bank. Institutional shareholders such as the EBRD play a significant role in the corporate governance of companies that it invests in. The EBRD’s significant equity investment in AIB carries with it the power to implement good corporate governance. The EBRD as an institutional shareholder has a responsibility to exercise its ownership rights and play a role in ensuring good corporate governance. This it has conspicuously failed to do, at least in the present circumstances.

13. Conclusion

It is clear from publicly available documents and information that the EBRD was on notice that AIB was a problematic bank (see, for example, the IMF’s Financial System Stability Assessment dated 15th May 2015, **Enclosure 6**). It is also apparent from the only information that is available on the EBRD’s website that the raison d’être for the EBRD entering into an equity investment in AIB was to assist a troubled bank. It is readily apparent that the EBRD did not properly appraise or monitor the performance of this project as is required by paragraph C3 of the Policy.

The EBRD states that it ***“will not knowingly finance, directly or indirectly, projects involving the following (a) the production of or trade in any activity deemed illegal under host country***

(that is national) laws or regulations or international conventions and agreements”¹. The EBRD should not have financed this Project (or at the very least should have taken remedial action once the issues referred to above came to light) because the actions of its equity investment partner AIB violate the basic principles of public international law and are prohibited by the contents of Appendix 2, paragraph A.

The EBRD has actively (or possibly passively) condoned inappropriate courses of action taken by AIB. The EBRD has assumed the duty of ensuring the compliance of AIB with the EBRD’s Environmental and Social Policy.

14. Desired Outcomes

The Complainant hereby requests that the EBRD Project Complaint Mechanism experts perform both a Compliance Review in respect of the relevant EBRD policies, namely the Environmental and Social Policy and the Public Information Policy as well as a Problem Solving Initiative. We request that the Problem Solving Initiative be carried out initially followed by a Compliance Review in the event that the Problem Solving Initiative does not resolve the issues complained of in this Complaint.

In order to ensure the possibility of future foreign investment in Tajikistan we also expect the project sponsor (AIB) to pay the monies it owes [REDACTED] promptly as is required by public international law.

Please do not hesitate to contact Stephen Sutton or Emilie Bladon of this firm should you require any further information or documentation.

We look forward to hearing from you.

Yours faithfully

SUTTONS SOLICITORS

cc. [REDACTED]
President of the EBRD

¹ EBRD Social and Environmental Policy, Appendix 2

- cc. [REDACTED]
EBRD Austrian Executive Director
- cc. [REDACTED]
Chair of the EBRD Audit Committee
- cc. [REDACTED]
Vice Chair of the EBRD Audit Committee
- cc. [REDACTED]
EBRD Audit Committee
- cc. [REDACTED]
EBRD Audit Committee
- cc. [REDACTED]
EBRD Audit Committee
- cc. [REDACTED]
EBRD Audit Committee
- cc. [REDACTED]
EBRD Alternate Director for USA
- cc. Bankwatch