

**ALTAIN KHUDER DEBT & EQUITY**

REQUEST NUMBER: 2015/01

**COMPLIANCE REVIEW REPORT – February 2017**

The Project Complaint Mechanism (PCM) is the independent accountability mechanism of the EBRD. PCM provides an opportunity for an independent review of complaints from one or more individual(s) or organisation(s) concerning an EBRD project, which allegedly has caused, or is likely to cause harm. PCM may address Complaints through two functions: Compliance Review, which seeks to determine whether or not the EBRD has complied with its Environmental and Social Policy and/or the project-specific provisions of the Public Information Policy; and Problem-solving, which has the objective of restoring a dialogue between the Complainant and the Client to resolve the issue(s) underlying a Complaint without attributing blame or fault. Affected parties can request one or both of these functions.

For more information about PCM, contact us or visit [www.ebrd.com](http://www.ebrd.com).

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 <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html>

### How to submit a complaint to the PCM

Complaints about the environmental and social performance of the EBRD can be submitted by email, telephone or in writing at the above address, or via the online form at:

 <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/submit-a-complaint.html>

## Contents

Executive summary.....	9
I. Eligibility Assessment and Basis for Compliance Review.....	9
II. The Complaint.....	14
III. Management Response .....	17
IV. Compliance Review: The Constraints.....	20
V. The Issues.....	22
VI. Performance Requirements PR1, PR3, PR4 .....	34
VII. PR5: The Land Acquisition and Resettlement Issue .....	41
VIII. PR7: The Question of Indigenous Peoples .....	44
IX. PR10: Disclosure and Public Consultations.....	50
X. Conclusion .....	54
XI. Recommendations to Management .....	57
References.....	60

*NOTE: Unless otherwise defined, capitalised terms used in this Compliance Review Report refer to terms as defined in the PCM Rules of Procedure.*

## Acronyms and Abbreviations

ADB	-	Asian Development Bank
EBRD	-	European Bank for Reconstruction and Development
EA	-	Eligibility Assessment
ESAP	-	Environmental and Social Assessment
ESP	-	EBRD Environmental and Social Policy 2008
EU	-	European Union
PCM RPs	-	Project Complaint Mechanism Rules of Procedure

*This Complaint was registered in accordance with the PCM Rules of Procedure approved by the EBRD Board of Directors in November 2014. For the purpose of this Report, all references to the PCM RPs are to the PCM RPs 2014, unless specified otherwise.*

PR	-	EBRD Performance Requirement
RAP	-	Resettlement Action Plan
UN	-	United Nations
WHO	-	World Health Organization

Aimag - Highest administrative level, equivalent to province

Soum - Second tier administrative level, equivalent to district

Bagh - Lowest tier administrative level, equivalent to subdistrict

Altain Khuder and Client are used interchangeably in this Report

**Note**

This Compliance Review has been undertaken in compliance with Project Complaint Mechanism (PCM) Rules of Procedure (RPs) 35-44, and in accordance with the Terms of Reference set out in the Eligibility Assessment of the Complaint (Request No. 2015/01). The conduct of the Compliance Review Report has been constrained by the lack of or inability to obtain scientific data on air, water and noise impacts, and thus focuses on the broader principles related to the conduct of mandated procedures, coverage of issues and EBRD performance. The Compliance Review Report has been prepared using available information and feedback from EBRD, the Complainant, the Client (Altain Khuder), and public sources.

## **Executive summary**

A Compliance Review of the Complaint regarding Altain Khuder Debt and Equity, the proceeds of which were used to finance equipment and working capital for the Tayaan Nuur Iron Ore Mine (the Project), was undertaken in response to Complaint No. 2015/01, registered with the Project Complaint Mechanism (PCM) on 15 January 2015. In accordance with PCM RP32, the Terms of Reference for a Compliance Review were prepared as part of the Eligibility Assessment (EA), and were followed in the conduct of the Compliance Review and the preparation of the Compliance Review Report.

The Compliance Review Report (the Report) has carefully considered the circumstances under which the Project was developed and monitored, noting a few aspects of particular importance. First, the Project was operational prior to EBRD financing, and hence what was required was a detailed review of the environmental and social impact assessments of the mining operations, noting gaps in analysis and areas in which the Client (Altain Khuder/Client) would have to respond to be able to conform to the requirements of EBRD's Environmental and Social Policy (ESP) 2008.

Second, owing to a situation beyond the scope of this Report, communications between EBRD and the Client broke down in mid-2013, which has now led to legal proceedings, thereby making it impossible for EBRD to continue monitoring progress of implementation of the commitments agreed by the Client with EBRD on environmental and social issues associated with the Project. The customary project monitoring activities that could have been expected of EBRD in normal circumstances was not possible – at the time, EBRD expected to field a mission in 2013.

Third, mining in Mongolia is the subject of much continuing discourse and debate, especially from the perspective of the impacts that economic transition is seen to be having on traditional pastoralists, the herders, especially with changes in land laws and property rights. This Report focuses on the specific situation of the Project, the compliance of EBRD with the 2008 Environmental and Social Policy (ESP), and the obligation by EBRD to ensure the development and monitoring of the Project in accordance with relevant Performance Requirements (PRs). While this Report is constrained by paucity of information on some issues owing to both the inability to access archival material held by the Client and the lack of scientific data on health impacts claimed by local population, it considers that there is enough material to come to a conclusion regarding compliance by the Bank with the ESP.

Finally, despite the breakdown of relations between EBRD and the Client in 2013, there is enough evidence to demonstrate that the intent of the Client to comply with EBRD PRs on environmental and social issues was clear. That commitment was demonstrated, among others, in the implementation of a generally sound environmental management system that involved monitoring by the Client of key indicators using appropriate technical instrumentation.

This Report considers that EBRD has largely complied with the 2008 Environmental and Social Policy. Non-compliance has been in the areas of effective communication to the affected communities of potential impacts and stakeholder consultation documentation, grievance redress and project monitoring, owing to unforeseen circumstances. The Compliance Report considers that while technically there would have been non-compliance by EBRD with the provisions of the Policy in continued monitoring of the Project had it not gone into legal proceedings, those circumstances would appear to have made it impossible for EBRD to have fulfilled that responsibility.

In the context of the Project, with its 2008 Environmental and Social Policy (ESP) and the requirements of the PRs, this Report concludes the following:

- EBRD has partially complied with the provisions of the ESP with regard to the implementation of PR1
  - o Technical experts were engaged to conduct reviews and gap analyses, which were documented.
  - o Environmental and social impacts were reviewed and assessed in detail, and appropriate corrective measures recommended in the ESAP.
  - o Corrective measures were monitored up to the issuance of the ESAP Update.
  - o EBRD has been unable to comply with monitoring requirements since 2013 owing to the breakdown of relations between EBRD and Altain Khuder.
- EBRD has complied with the provisions of the provisions of the ESP with regard to the implementation of PR3 and PR4
  - o Potential impacts were carefully assessed, areas identified in which corrective measures were needed, and relevant environmental management recommendations made for the Client to implement.
- EBRD has partially complied with the provisions of the ESP with regard to the implementation of PR5
  - o With resettlement activities having taken place prior to EBRD financing, due diligence was carried out by EBRD to confirm that Altain Khuder identified those affected, assessed losses, paid for loss of assets, and provided support services to facilitate the relocation of affected herders.
  - o EBRD has been unable to comply with monitoring requirements, including progress of implementation of the agreed post-resettlement survey<sup>1</sup> since 2013 owing to the breakdown of relations between EBRD and Altain Khuder.
- The provisions of PR7 do not apply to the Project
- EBRD has partially complied with the provisions of the ESP with regard to the implementation of PR10
  - o Consultations were held with affected communities as part of the resettlement and impact awareness processes, with local authorities in obtaining relevant operational permits, and local residents in communicating on issues of concern, although all issues may not have been resolved to the point at which EBRD-Client relations broke down.

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<sup>1</sup> In 2011, Sanity Watch LLC was engaged by Altain Khuder to conduct a post-resettlement survey. However, those findings were not available for the Compliance Review Report.

- o Environmental and social impacts were not formally communicated to communities and documented appropriately. EBRD could have ensured Client compliance with that requirement.
- o There is no documentation that an EBRD-agreed structured Grievance Mechanism was established and implemented, with arrangements to record complaints and document resolutions consistent with international good practice.
- o A Stakeholder Engagement Plan was not prepared as soon as possible after the ESAP recommendations, although a commitment was made by the Client.



## I. Eligibility Assessment and Basis for Compliance Review

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

2. On 15 January 2015, the Complaint was registered pursuant to PCM Rules of Procedure 11-13, and was subsequently posted on the PCM website, pursuant to PCM RP 20. An Eligibility Assessment was conducted jointly by the PCM Officer and the Expert in accordance with PCM RP 22.

3. In determining the eligibility of the present Complaint, the Eligibility Assessors examined the requirements of the PCM RPs to determine if the Complaint was eligible for a Problem-solving Initiative, a Compliance Review, or both. Based on RPs 24-26 and 28-29, the Complaint was found *ineligible* for a Problem-solving Initiative; based on RPs 24-25 and 27-29, the Complaint was found *eligible* for a Compliance Review. A Compliance Expert was appointed on 31 August 2015.

4. To be eligible for a Problem-solving Initiative, a Complaint must have (i) been filed by an individual or individuals located in an Impacted Area or who had or has an economic interest, including social and cultural interests in an Impacted Area; and (ii) raised issues covered by a Relevant EBRD Policy. EBRD agreed that the Complainants qualified as individuals located in an Impacted Area. Further, EBRD agreed that the Complaint raised issues covered by a Relevant EBRD Policy.

5. EBRD agreed that the Complaint raised issues covered by Performance Requirement (PR)1 (Environmental and Social Appraisal and Management), PR3 (Pollution Prevention and Abatement), PR4 (Community Health, Safety and Security), PR5 (Land Acquisition, Involuntary Resettlement and Economic Displacement), PR7 (Indigenous Peoples) and PR10 (Information Disclosure and Stakeholder Engagement).

6. To be held eligible for a Compliance Review, the Complaint must have been (i) been filed within 24 months after the date on which the Bank ceased to participate in the Project, and (ii) related to a Relevant EBRD Policy. EBRD agreed that the Complaint was filed within the prescribed timeframe, and related to the PRs mentioned above.

7. In accordance with PCM RP 25(a) the Eligibility Assessors noted that the Complainants were seeking a Problem-solving Initiative and Compliance Review.

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

9. The Complainants recommended that Altain Khuder:

- Assess the impacts of the mine and its associated facilities on the herder communities, and address their concerns and demands

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

10. The Complainants recommended that EBRD:

- Monitor and assess the implementation of the above recommendations by Altain Khuder
- Assist Altain Khuder with conforming to the PRs under the 2008 Policy
- Monitor and ensure the company's compliance with the requirements set forth in the ESAP
- Ensure all stakeholders, including herders and local authorities, are made aware of the EBRD PRs under the 2008 Policy.

11. In accordance with PCM RP 25(c), the Eligibility Assessors reviewed all available correspondence, notes, or other materials related to previous communications with the Bank or other Relevant Parties. The Complaint here includes copies of previous correspondence between Complainants and Altain Khuder, and between Complainants and the Bank. The correspondence

includes transmission of the Fact-Finding Mission Report prepared by OT Watch, along with the Bank's and Altain Khuder's responses thereto.

The Eligibility Assessors noted the following:

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

### **Eligibility for a Problem-solving Initiative**

12. The Complaint was filed by eligible stakeholders, and raised issues under the Environmental and Social Policy 2008 (ESP 2008). According to PCM RPs 26(a) and (b), the Eligibility Assessors were required to consider whether a Problem-solving Initiative would assist in resolving the dispute, or is likely to have a positive result. The Eligibility Assessors considered whether:

- (a) the Complainant had raised the issues in the Complaint with the Client's dispute resolution or grievance mechanism, or with the Complaint or accountability mechanism of a co-financing institution, or before a court, arbitration tribunal or other dispute resolution mechanism and, if so, what is the status of those efforts; and
- (b) whether the Problem-solving Initiative might duplicate, or interfere with, or might be impeded by, any other process brought by the same Complainant (or where the

Complainant was a group of individuals, by some members of the group) regarding the same Project and/or issues.

13. The Eligibility Assessors considered that Complainants had attempted to raise the issues in the Complaint with Altain Khuder, but those efforts had not adequately addressed Complainants' concerns. The Eligibility Assessors also considered that a Problem-solving Initiative would not duplicate or interfere with any other process brought by Complainants.

14. Nevertheless, the Eligibility Assessors concluded that a Problem-solving Initiative, with PCM involvement, is not likely to be successful. Although the Complaint might satisfy the technical requirements for a Problem-solving Initiative, and while the objective of the Problem-solving Initiative would be to restore a dialogue between the Complainant and the Client, the Complainants continued to assert that the Client refused to engage with them, in some cases purportedly pursuing legal action against them. Additionally, the deterioration of the relationship between the Bank and the Client was a serious indication that the PCM would not be viewed as a suitable forum for dialogue between the Complainants and the Client. This was compounded by EBRD's inability to obtain social and environmental monitoring reports on the Project. **In those circumstances, the Eligibility Assessors found that the Complaint would not be eligible for a Problem-solving Initiative.**

#### **Eligibility for a Compliance Review**

15. According to PCM RP 27(a), (b) and (c), where the Complaint raised issues appropriate for a Compliance Review, the Eligibility Assessors considered whether the Complaint related to:

- (a) actions or inactions that are the responsibility of EBRD;
- (b) more than a minor technical violation of a Relevant EBRD Policy unless such technical violation is alleged to have caused harm; and
- (c) a failure of EBRD to monitor Client commitments pursuant to a Relevant EBRD Policy.

16. The Complaint alleged that EBRD failed to fulfil its responsibilities to ensure compliance with multiple PRs under ESP 2008 in connection with the Project. Complainants alleged specific failures by the Bank to ensure that its client, Altain Khuder, complied with PRs 1, 3, 4, 5, 7 and 10.

As a general matter, EBRD would "require clients to structure Projects so that they meet all applicable PRs," and with respect to "existing facilities that do not meet the PRs at the time of Board approval, the client will be required to adopt and implement an ESAP, satisfactory to the EBRD, that is technically and financially feasible and cost-effective to achieve compliance of these facilities with EBRD's requirements within a time frame acceptable to the EBRD." As set forth in the 2008 Policy:

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

17. EBRD's obligations continue:

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

18. Under PR1, EBRD and the Client were required to agree on the areas of influence for each Project, as well as the nature of due diligence studies required, and EBRD could require that existing facilities be subject to an audit to assess environmental and social impacts of past and current operations. Under PR3, EBRD was required to "identify and agree with the client the relevant applicable environmental requirements." Similarly, the EBRD was required to agree with the client how the requirements of PR4 would be addressed as part of the client's overall ESAP. The agreements called for by PRs 1, 3 and 4 were reflected in covenants in the financial documents.

19. The applicability of PR5 would have to be determined by EBRD during the environmental and social appraisal process, and where involuntary resettlement had occurred prior to the Bank's involvement, "due diligence will be carried out to identify a) any gaps and b) the corrective actions that may be required to ensure compliance."

20. EBRD also had the obligation to determine the applicability of PR7 during the environmental and social appraisal process, and it could seek expert advice in doing so. In addition, as part of its due diligence, "the Bank will assess the level of information disclosure and consultation conducted by the client against the requirements of" PR10. "The need for and nature of any specific consultation would be agreed with the EBRD based on the stakeholder identification, analysis and detailed Project description, and depending on the nature and magnitude of current and potential adverse impacts on workers and affected communities."

21. Based on the above, the Eligibility Assessors concluded that, in accordance with PCM RP27, "the Complaint relates to actions or inactions that are the responsibility of the Bank" and "the Complaint relates to a failure of the Bank to monitor Client commitments pursuant to" the 2008 Policy. Given the serious nature of the alleged harm stated in the Complaint, including severe impacts on the livelihood of the affected population, the Eligibility Assessors concluded that the Complaint raises more than minor technical violations of the 2008 Policy. **Based on the foregoing, the Eligibility Assessors found that the Complaint was eligible for a Compliance Review.**

22. In sum, on the basis of the assessment set out above, the Eligibility Assessors determined that the Complaint satisfied the requirements of PCM RPs 24, 25 and 27, but not RP 26, and that none of the provisions of PCM RP28 were applicable to the current Complaint. **Therefore, the Complaint was found ineligible for a Problem-solving Initiative and eligible for a Compliance Review.**

## **II. The Complaint**

23. The Complaint alleges multiple violations of EBRD's PRs under the 2008 Policy resulting from adverse social and environmental impacts.

### **Inadequate Compensation**

24. Complainants allege they received inadequate compensation. According to Complainants, the company's resettlement program included cash compensation, but not allocation of new land. The company negotiated with individual herders, with no involvement from local authorities. The *soum* administration was unsure of its role, and individual herders did not have sufficient information to negotiate in an informed and equal manner.

### **Dust Pollution**

25. Complainants allege that dust pollution as a result of transportation of ore along the 168 km dirt and gravel roads from the mine to the Burgastai border post pollutes grass and water resources used by herders and their livestock, including goats, sheep, cattle, camels, yaks and horses, causing illnesses to animals and herders. Herders with camps reportedly near the transportation route claim increases in livestock illnesses since the mine began operations. They also report skin rashes, chronic sneezing and sinus infections among them and their families.

26. Complainants also complain about the construction of the paved road, alleging that construction has been implemented without consulting the herders, whose needs have not been taken into account, despite the fact that the road cuts through their pastures. Herders allege a lack of passageways, causing inconvenience and stress for their animals, as well as dust and disruption to grazing land due to quarries used for the production of gravel to build the road.

### **Water Depletion and Contamination**

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

### **Inadequate Stakeholder Engagement**

28. Complainants allege that herders and local authorities were not consulted prior to the start of the mining Project, and that they are unaware of any action by Altain Khuder or EBRD to assess the impact of the mine on their livelihoods. Herders were also unaware of EBRD's involvement and the social and environmental requirements that flow from EBRD's involvement.

29. Complainants allege that herders have been intimidated and harassed by the mine's security personnel when trying to speak with representatives of Altain Khuder about their grievances.

### **Alleged Violations of Relevant EBRD Policies**

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

#### **Inadequate Environmental and Social Appraisal and Management (PR 1)**

31. Complainants allege that EBRD failed to ensure that Altain Khuder fully assessed, disclosed and managed the adverse impacts of the Project. Complainants assert that Altain Khuder's Environmental Impact Assessments (EIAs) do not meet the Bank's PRs with respect to ecological impact assessment, disclosure of Project information and consultation, impacts of the Project's water use and measures to minimize water use, and social impacts.

32. Complainants consider that the ESAP *"ignores a large stakeholder group especially at risk to negative impacts of the Project."* According to Complainants, the absence of adequate appraisal measures to mitigate impacts has resulted in serious adverse impacts on the quality of air, soil/vegetation and water, and with that, the livelihoods of herders in Tseel soum.

33. Complainants allege Altain Khuder's capacity to comply with the PRs was "far from certain," and that EBRD failed to ensure compliance with PR1, as evidenced by the company's failure to fully assess, disclose and manage negative impacts of the mine Project on the herders.

#### **Inadequate Pollution Prevention and Abatement (PR3)**

34. Complainants allege that EBRD did not ensure that Altain Khuder complied with the provisions of PR3. Complainants assert that it is unclear whether the EBRD has assessed compliance of the mine with European Union (EU) environmental standards, as required under PR 3. In Complainants' view, that the herders are impacted by pollution of soil and water indicates that EBRD has not lived up to its obligations to ensure that Altain Khuder is acting in compliance with EBRD's 2008 Policy.

#### **Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR4)**

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

#### **Inadequate Resettlement and Displacement (PR5)**

36. Complainants allege that EBRD did not ensure that Altain Khuder complied with the provisions of PR 5 because herders were not adequately informed or consulted about resettlement, and their right to free, prior and informed consent (applicable to Indigenous Peoples) was not respected. Complainants assert that even if the herders are not considered indigenous peoples, their rights have not been respected because Altain Khuder failed to take measures to ensure meaningful participation of herders in resettlement planning and to assist them in fully understanding their options for resettlement and compensation.

37. Complainants allege that no information is available regarding the existence of a “Resettlement Action Plan and Livelihoods Restoration Framework,” as called for in the ESAP. Complainants assert EBRD has failed to ensure that Altain Khuder complies with the requirements of PR5.

#### **Failure to Recognize Indigenous Peoples (PR7)**

38. Complainants allege that Mongolia’s nomadic herders qualify as indigenous peoples under EBRD’s definition of Indigenous Peoples, as set forth in PR7.10.6 According to the Complainants, herders identify themselves as traditional nomadic pastoralists with an ancient culture, they are recognized as indigenous by others, they maintain an intimate attachment to distinct ancestral territories, they have pursued traditional, non-wage subsistence strategies for centuries, they are separated from mainstream culture by distinct cultural and economic customs, and they use words and phrases not used in mainstream Mongolian language—all of which are part of EBRD’s definition of Indigenous Peoples.

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

#### **Failure to Disclose Information and Engage with Stakeholders (PR10)**

40. Complainants allege that herders lack information about Altain Khuder, its financiers and the mining Project. Those herders are also alleged to lack information about the possible and actual environmental and social impacts of the mine Project. Herders have not been engaged in identifying impacts of the Project or consulted in connection with efforts to manage the impacts.

41. Although the company reportedly placed a suggestion box at the Tseel *soum* center, only one interviewed resident knew about it, and the herders allege their grievances have not been addressed promptly and without retribution. According to Complainants, that Altain Khuder has not adequately consulted and engaged with stakeholders shows that the EBRD has not lived up to its obligations under PR10.



### **III. Management Response**

42. EBRD provided a formal response to the Complaint on 17 February 2015 pursuant to PCM Rules of Procedure, paragraph 19. EBRD Management framed the Management response with reference to the EBRD 2008 Policy and “relevant Policy Requirements.”

43. Management noted that the Project involved an existing facility, not a new facility, meaning the site was developed and impacts occurred before EBRD became involved. The project was categorized as B, and did not require an EIA/ESIA. It was recognized, therefore, that the Project was not compliant with all PRs at the time of financing, and that EBRD’s client (Altain Khuder) would be required to adapt and implement an ESAP to achieve compliance with the EBRD’s requirements within a time frame acceptable to EBRD.

44. Management reports that EBRD monitored progress and received updates through the first half of 2013. However, in mid-2013, the Bank stopped receiving information or communications regarding environmental and social issues, rendering EBRD unable to monitor ESAP progress after mid-2013.

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

#### **Inadequate Environmental and Social Appraisal and Management Plan (PR1)**

46. According to Management’s response, actions developed to address gaps in work done prior to the Bank’s involvement in the Project were included in the ESAP agreed by Altain Khuder and included in the Loan Agreement. As a result, the company was legally bound to implement the ESAP. The Management response also states that notwithstanding the lack of a heading in the ESAP titled “Vulnerable Stakeholder Groups,” the herders were not overlooked. According to Management, several of the action items in the ESAP are specifically focused on the herders, including all of the action items under PR5.

47. Management notes further that the need for Altain Khuder to add staff and resources to address environmental health and safety and social issues in order to satisfy EBRD requirements was addressed by the independent consultancy in August 2011, and the consultant’s report of December 2011 notes that Altain Khuder hired an Environmental Manager in September 2011 to address the recommendation to add staff and resources.

48. The consultant indicated that management from the mine site made a commitment to follow up on environmental issues, including fuel and lubricants storage, paving the maintenance area, dust deposition monitoring and improvements to solid waste management. EBRD’s environmental and social team working on the Project also concluded based on its observations that the resources of the company were adequate.

#### **Inadequate Pollution Prevention and Abatement (PR3)**

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

#### **Inadequate Mitigation of Impacts on Community Health, Safety and Security (PR4)**

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

#### **Inadequate Resettlement and Displacement (PR5)**

51. The Management response states that the Project was operational prior to EBRD involvement, and therefore resettlement and compensation associated with the mining operations were completed before Altain Khuder was aware of EBRD’s requirements. The independent consultancy noted the gap and included a series of corrective actions in the report, which also were included in the ESAP. According to EBRD, Altain Khuder initiated corrective actions, starting with a post-resettlement survey conducted in November 2011. A livelihood restoration framework was to be implemented and supplemental assistance would be provided if the survey identified households that were worse off (in terms of living standards and income) post displacement.

52. The company also agreed to prepare a land acquisition and resettlement planning framework for potential future physical or economic displacement. EBRD states that those items are included in items 24 through 28 of the ESAP (identification of displaced households, compensation, livelihood restoration, standard of living, and land acquisition and resettlement planning framework).

#### **Failure to Recognize as Indigenous Peoples (PR7)**

53. The Bank does not believe that Mongolian herders meet EBRD’s definition of Indigenous Peoples. According to Management, herders are not distinct from a dominant national group in a country where herding provides 40% of employment and accounts for 20% of GNP. Herders are “attached” to the land they live on, but the land is not distinct from the land inhabited by other Mongolians, and it may change over time. Herders’ descent from populations who have traditionally pursued non-wage subsistence strategies “applies to all Mongolians equally”. Herders are regulated by the same laws and institutions as other Mongolians. And finally, according to the Bank, herders do not have a distinct language or dialect. In the Bank’s view, PR7 does not apply.

#### **Failure to Disclose Information to Stakeholders (PR10)**

54. The Management response notes that PR10 requires a summary of environmental and social issues associated with the Project and a summary of the commitments in the action to be disclosed. In addition, the Client is required to have and implement a stakeholder engagement plan, including a public grievance mechanism. According to EBRD, those requirements are addressed in ESAP actions 3 (lack of documented procedures for social performance), 6 (disclosure of environmental impacts and monitoring results), 21 (lack of information regarding environmental impacts giving rise to likely unfounded concerns about health effects of dust), 31 (inadequate disclosure of environmental impacts, including about health effects of dust) and 32 (grievance mechanisms need to be formalized).

#### IV. Compliance Review: The Constraints

55. There are several constraints that have had implications for the conduct of the Compliance Review. The principal constraint is in the lack of documentation during project implementation, largely stemming from the deterioration of relations between EBRD and the Client, Altain Khuder. Since mid-2013, EBRD has been unable to engage in any meaningful dialogue with the Client, which has not provided any information on environmental and social updates. The major constraint for the Compliance Review is its inability to determine the progress made in implementing the ESAP beyond 2013, and access to archival records maintained by Altain Khuder.<sup>2</sup>

56. The Interim Environmental and Social Impact Assessment Report (Interim ESIA Report)<sup>3</sup> identifies gaps in the baseline knowledge base that include several key areas: physical environment [geology, geomorphology; air, climate and meteorology (especially pre-mining ambient air quality); hydrogeology; noise, vibrations, light emissions]; ecology [protected flora and fauna; daily or season movements of migratory ungulates (important for road passageways); migratory ungulate spatial locations]; social/socio-economic environment [regional socioeconomic profile; incomes and livelihoods; physically resettled households (including grievance redress records; economically displaced households (including public consultation and disclosure measures); vulnerable groups; cultural heritage and protected areas]. While it is true that ESIA's may not capture all the facets of the project socioeconomic environment, having as comprehensive a knowledge base as possible does allow for an informed response to complaints and grievances.

57. The Complainants have made several allegations, for the most part unsupported by documentation and scientific or medical evidence. The health-related claims are hard to substantiate without such evidence, which makes causality between reported Client activities and population and livestock impacts impossible. In some cases, there is outright denial of the cause of supposed impacts by the Altain Khuder, e.g., pit lakes that the company states do not exist, or passageways across the mine-border road that the herders allege are non-existent.

58. Given that situation, and the inability to review Altain Khuder documentation or corroborate Complainant health-related claims on the basis of scientific and medical tests that establish causality, the Compliance Review is constrained in an assessment that would have taken account of the most recent developments in the project. Hence, in accordance with the PCM RPs, this Report will focus on issues on which a more informed opinion might be provided, consistent with PCM RP 41, *“to establish if (and if so, how and why), any EBRD action, or failure to act, in respect of an approved Project has resulted in non-compliance with a relevant EBRD Policy ...”* In that way, the Compliance Review believes it is able to respond in some measure to the allegations of and actions demanded by the Complainants.

59. There are also some areas in which the Compliance Review has limitations in the scope of its assessment. For example, land and property rights in Mongolia are covered by not only national laws, principally the Mongolian Land Law of 1994 updated in 2012, but also a complex

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<sup>2</sup> In its comments on the Fact-Finding Mission conducted by OT Watch et al., Altain Khuder responds that it *“maintains the archives of all its environmental compliance documentation ... [that] ... can be shown as evidence.”* OT Watch, SOMO, CEE. *Tayan Nuur Iron Ore Project: Fact-Finding Mission Report*. 2014. Page 1.

<sup>3</sup> ERM. *Interim Environmental and Social Impact Assessment Report – Tayan Nuur Iron Ore Mine and Associated Infrastructure, Mongolia*. Draft. 26 December 2012. Table 5.9. Pages 99-100.

set of customary arrangements that would require far more detailed analysis than the Review to come to any policy conclusions, which in any event would be beyond the mandate of a compliance review. Much has been written on the introduction of privatization of lands and the impact on pastoralists and the historical status of herders, but this Review draws on current research only to point out both facts and uncertainties in interpretation in relation to the Complaint.

60. Again, the question of indigenous peoples continues to be debated, and there may be unique situations for particular groups of Mongolians; nonetheless, given that there is no universally-accepted definition, it would appear that there are no “indigenous peoples” in the country, that is, those who have characteristics significant enough and beyond simple ethnicity to warrant categorization as indigenous peoples as defined by the United Nations and international financing agencies.

## V. The Issues

61. Recapitulating, the principal issues raised in the Complaint cover six themes:

- Land Acquisition and Compensation
- Air Pollution
- Water Abstraction Levels
- Animal Passageways
- Stakeholder Engagement and Disclosure
- Indigenous Peoples
- Grievance Redress Mechanism

62. This section will deal with the background to the resettlement, air pollution, water abstraction and animal passageway issues.

### A. Land Acquisition and Compensation<sup>4</sup>

63. The complexity of land ownership in Mongolia reflects the gradual transition to privatization and the attendant challenges it presents for coexistence with traditional pastoralist lifestyles and customary landholding arrangements.

64. A concise description of the legal framework reads:

*The basic legislative framework for land acquisition and resettlement under the existing regime consists of the Constitution (1992), the Land Law (2006) and the Law on Allocation of Land to Private Citizens (2003), as well as the Civil Code. The Land Law specifies three kinds of private land tenure: (i) ownership, which may be granted only to citizens of Mongolia; (ii) possession, granted under license, to Mongolian citizens, economic entities and organizations, for terms of 15 to 60 years, extendable up to 40 years at a time; and (iii) use, granted under contract or lease to foreign countries and legal entities ... In the absence of legal provisions regulating land acquisition and resettlement in the context of local scale infrastructure facilities, including roads and sewerage networks, the Civil Code provides a legal framework which place land acquisition and resettlement in the context of negotiated settlement. This implies that the State or its legally appointed agents and affected persons engage with each other contractually as equal and autonomous legal persons and participants in a civil legal relationship (Article 1). Citizens and organizations, as well as aimags, the capital city, soums and districts are able to enter into civil legal relations with regard to objects of material and non-material wealth and their acquisition and possession (Articles 6, 7 and 8).<sup>5</sup>*

65. The Constitution of Mongolia and the Law of Mongolia on Land (Land Law 1994, revised 2002, updated in 2012)<sup>6</sup> recognize private ownership of land by Mongolian citizens, but there are varying practices in implementation and interpretation. Private ownership of land is in the

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<sup>4</sup> The discussion on land and property rights draws on a number of articles that may be found in the section, References, but draws largely on T. Hanstad and J. Duncan, "Land Reform in Mongolia: Observations and Recommendations," RDI Reports on Foreign Aid and Development #109. Rural Development Institute. 2001.

<sup>5</sup> Drawn from Asian Development Bank. Ulaanbaatar Urban Services and Ger Areas Development Investment Program. Draft Resettlement Framework. July 2013. Page 5.

<sup>6</sup> Land Law of Mongolia (updated in June, 2012) was amended in 2002, 2003, 2004, 2005, 2006 and 2009.

form of ownership (*gazar umchlukh*),<sup>7</sup> possession rights (*gazar ezemshikh*),<sup>8</sup> or use rights (*gazar ashiklakh*).<sup>9</sup> Possession rights give far more protection of rights to the land than use rights, including a degree of continuity of tenure. In general, holders of possession rights (citizens, economic entities, and organizations of Mongolia) may lease, but not sell their rights. Use rights to state-owned land may be held by citizens, economic entities, and organizations pursuant to the specific purposes, duration, and conditions established by contract and in accordance with legislation. Holders of use rights cannot sell or lease their rights. Use rights may be obtained directly from *soum* or *duureg* governors, or by contract from those who hold possession rights. Developed freehold property (urban and arable lands) can be bought and sold, by both foreigners and Mongolians, but as a lease, recorded in an Immovable Property Ownership Certificate.

66. The principal responsibility for implementing the Land Law rests with the local governments at *aimag* and *soum* levels. As one study notes, “Some *s[ou]ms* ... have begun to allocate possession rights to winter pastures to herders, while others have allocated only the land within winter camps, and still others have not allocated possession rights for winter camps or pastureland.”<sup>10</sup>

67. A useful way of looking at the legal status of various lands is presented below:

**Table 1: Land Categories in Mongolia**

Land Category		Current Legal Regime
Agricultural and Grazing Lands	Cultivated	No restrictions on private ownership
	Pasturelands	No private ownership
	Hay-making lands	No private ownership
Lands occupied by cities, villages, other settlements	Lands under buildings and constructions	Owned by the States or leased to the owner of the construction
	Lands allocated for mining activities	Leased under a “possession” contract
	Public common use lands	No private ownership or leases
Lands for roads and communication		Owned by the State
Lands covered by forest		Owned by the State
Lands covered by water		No legal restrictions on private ownership
Reserved lands		No legal restrictions on private ownership
Lands for State special needs	Borderlands	May not be individually owned
	Lands allocated for state security and defense	
	Other sub-categories	

Adapted from O. Myadar. Nomads in a Fenced Land: Land in Post-Socialist Mongolia. *Asian-Pacific Law and Policy Journal*. Volume II, Issue 1. 2009.

<sup>7</sup> Defined as “legitimate control of land with the right to dispose of that land.” Ownership is restricted to Mongolian citizens, who can own land other than pastures, common-use land, and land for special state needs. Ownership of lands in *soums* is restricted to 0.5 ha per citizen (not household).

<sup>8</sup> Defined as “legitimate control of land in accordance with the purpose of its use and terms and conditions specified.” Land possession contracts can range from 10 to 60 years, and such licenses can be extended once for no longer than 40 years. Possessors have the right to use the land and enjoy its “fruits.”

<sup>9</sup> Right to possess and use property belonging to another person.

<sup>10</sup> Hanstad and Duncan (2001). Page 18.

68. This discussion is important in developing an approach to the land acquisition issue. The EA states that, “When Altain Khuder first began its activities in the period 2007-2011, the company resettled herder families (the company claims 22) who had some form of land rights to their winter camps. Others without formal land rights but who had used land affected by the mine Project were displaced, but were not resettled. Some herders contend that displacement and resettlement continue...” According to Complainants, the payment of cash instead of land compensation is inherently inadequate because herders cannot use cash to obtain replacement land. On the one hand, accepting cash compensation for land is seen as wrongfully selling communally owned land to the company, and on the other hand, herders cannot simply purchase new land, both because land is allocated at periodic *bagh* meetings where other herders may object, and because suitable land may be unavailable.

69. An interpretation of pastoral rights to land has been offered by one author that provides an alternative way of viewing the resettlement issue from the perspective of market reforms introduced into “deeply ingrained practices” of non-market state-organized institutional structures. From that perspective, land acquisition is less an issue of individual rights than it is a reflection of traditional collective user rights, in which case the authority to manage the lands would have rested with the local authorities:

*“... a number of indigenous Mongolian constructions could be deemed ‘custodial’ in that agencies have a different type of rights over objects, and always within a wider socio-political order. A particularly good example is the nature of rights to land. Pastoralism (as opposed to ranching or mixed farming) has long offered a model of rights over resources that was an alternative to individuated private property ...Pastoralism is an activity that entails a very different relationship between humans and resources than does agriculture. This relationship has usually entailed flexible access to large areas of grazing land, and this meant a different configuration of rights over resources. Rather than absolute individual ownership, pastoral operations usually depended upon public access to resources under the jurisdiction of an authority that regulated their use.”<sup>11</sup>*

70. The key questions, then, are: (i) what type of lands were held by the herders prior to acquisition by Altain Khuder for the mine; (ii) whether the lands that were given over to Altain Khuder could be transferred by an individual herder in exchange for cash compensation; (iii) whether the transaction should have been more appropriately (that is, “legally”) conducted between Altain Khuder and the *soum* or Governor’s office; and (iv) by disposing of those lands to Altain Khuder, whether the herders precluded from winter camp habitation, which would be allocated by the Governor at *bagh* meetings. Herders are not precluded from purchasing new lands in the *soum* subject to the provisions of the Land Law, but availability of “privatized” lands may be limited. Given the lack of clarity on the issues of land ownership and the practices that differ across the land, this Report will not offer an opinion on the correctness of the payments, but rather whether making such payments reflected genuine intent in ensuring the continued the welfare of the herders, or that there were adverse effects that may have contravened the provisions of PR5.

## **B. Air Pollution**

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<sup>11</sup> D. Sneath, “Mongolia in the ‘Age of the Market’: Pastoral Land-use and the Development Discourse” in Ruth Mandel and Caroline Humphrey. Eds. *Markets and Moralities Ethnographies of Postsocialism*. 2002. Chapter 10. Pages 190-210.



71. The mine is located some 18km from the nearest habitation, Tseel Soum. The sources of air emissions are essentially fugitive dust from overburden, ore and dry tailings stockpiles at mine pit (processing plant crushers and screens), and unsealed road sections. The Complainants themselves identify the sources of dust as: (i) transportation of ore along the 168.3km road from the mine to the Burgastai Border Post; (ii) explosions at the mine; and (iii) processing of iron ore.

72. At the mine, dust suppression measures were put in place that have resulted in ambient dust levels from the processing plants at 40-70% below those measured at all dust deposition monitoring stations in January-April 2012, and perceptibly higher levels at mine site in January-April 2013.<sup>12</sup> H the monitoring station in Tseel soum records well below acceptable levels, reflecting the fact that mine-generated dust does not travel far enough to have any impacts on the soum.

73. The main issue in the Complaint relates to the mine-border road, then a temporary gravel road that with improvement (paving) was expected to cater to truck convoys with a maximum of 10 10-truck convoys (1000 trucks) per week in each direction with 9 planned truck stops. The gravel road was expected to be replaced with a two-lane road with a 7m wide asphalt surface and 1.5m gravel shoulders, excluding the Dry Riverbed section and the Shar Sair mountain pass sections that would remain unpaved. The maximum truck speed was set at 100km/hr except for the approximately 12km Shar Sair mountain pass stretch, which was set at 50-70km/hr. The number of trucks would be halved with the acquisition of higher-capacity trucks (140t capacity). Given that there were no permanent settlements along the road, including spring and winter shelters, the main sensitive receptors would be road users, herders and passers-by.

74. On an unpaved road, the customary method of dust suppression is through watering.<sup>13</sup> However, control efficiency depends on the application rate of water, elapsed time between applications, traffic volume and meteorological conditions. Hence, given the length of the project road and expected traffic levels, sealing the road presented a better long-term option.

75. According to information available to EBRD as of December 2014, 50.7km of asphalt paved road and 20.3km concrete hardening base had been completed.

76. The Complainants noted that transportation of ore on the paved road had indeed reduced dust. However, Complainants allege that tests conducted at the request of Altain Khuder confirmed that lung diseases were caused by dust pollution. Complainants state that Altain Khuder had challenged those tests and relied instead on another test that appeared to indicate that no fatal diseases or illnesses were attributable to the dust. Altain Khuder had reportedly submitted the test results to local authorities, but Complainants contended that they had not been informed about results, despite requests.

77. Altain Khuder has responded to the issues raised in relation to road traffic-induced dust by specifically referring to quarterly tests that demonstrate that levels are within prescribed limits, and include tests on local livestock, which do not display any of the illnesses claimed, especially as it purchases meat from local herders that are subject to health inspections. It claims that

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<sup>12</sup> *Interim ESIA Report*. ERM December 2012. Page 24. *Implementation of Environmental Protection Plan and Environmental Monitoring Program: First Half of 2103*. Altain Khuder Department of Environment. 2013.

<sup>13</sup> Chemical stabilization also offers a suppression method for fugitive dust. However, anticipated environmental and health impacts rank high in decisions not to use chemical stabilizers. See, for example, *Unpaved Road Dust Management: A Successful Practitioner's Handbook*, and *Unpaved Road Chemical Treatments: State of the Practice Survey*. US Federal Highway Administration. 2013.

there have been no requests from herders for the results of tests, which were conducted in the presence of local herders and an NGO.

78. The issue for the Compliance Review is in establishing whether EBRD met its commitments under PR1 in monitoring and providing guidance with respect to the Client's management of dust pollution. That, in turn, presents the issue of whether the road produces dust to the extent that herders suffer lung diseases, both herders and animals, that can be attributable to such dust, and what remedial measures could have been set in place by the Client or commitments made to reduce that dust consistent with its obligation to meet PR1. Related to that, of course, is compliance with national standards that are applicable to such situations.<sup>14</sup>

79. That EBRD fulfilled its role is evidenced in its assessment of air pollution issues, the preparation of the ESAP, and the commitment by the Client to continue paving the road as a substantive way of reducing ore transportation-induced dust.

80. There appears to be no evidence available to suggest that skin rashes, chronic sneezing and sinus infections suffered by herders are directly attributable to road-induced fugitive dust as the Complainants claim medical assistance is too costly to access and hence tests cannot be carried out that could allegedly prove the causality.

81. The claim of lack of access for financial reasons does not seem to be borne out by the structure of health services delivery in Mongolia. A recent WHO Report notes that, "Health service delivery is organized according to which might have provided preliminary information on the incidence and severity of alleged illnesses and the basis for any establishing causality and identifying potential mitigative actions *to the administrative divisions and Mongolian citizens are required by law to register and have annual check-ups ...*"

82. The Report also notes that, "*Mongolia has more than twice the average number of hospitals than that of the EU and other transition countries ...*" and that "*... the poor, retired, children, disabled persons and other disadvantaged groups are exempt from co-payments and some official user charges.*"<sup>15</sup>

83. Which is not to say there are not inequities; as the same Report notes, "*Formerly nomadic households that have settled around urban centres also experience inequities in health... Overall, equity is influenced by geographic distance, harsh weather conditions, unregistered populations, and low-income groups.*"<sup>16</sup>

84. A later WHO report also observes that, "*Environmental factors such as air pollution in urban areas, poor access to water and sanitation especially in rural areas, significant incidents*

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<sup>14</sup> An ADB report notes, "There has been no comprehensive epidemiological study conducted in Mongolia to assess the impact of air pollution on public health mainly due to poor hospital and air quality information." *Mongolia: Country Synthesis Report on Urban Air Quality*. Discussion Draft. 2006. Page 9.

<sup>15</sup> WHO and Mongolian Ministry of Health. *Health Service Delivery Profile: Mongolia 2012*. Pages 2-4.

<sup>16</sup> *Ibid.* Page 7.

of foodborne illness, food contamination and chemical safety due to increasing formal and informal mining are of concern to public health.”<sup>17</sup>

85. Despite the fact that levels of healthcare across Mongolia may vary, especially in mine-intensive areas, initial medical advice appears to be available to herders that would have helped to have quantified the incidence of illnesses claimed. The following table shows the services available to Mongolian citizens, with primary care for herders at *bagh* and *soum* levels available free of cost, and other levels subsidized.

**Table 2: Summary of Service Packages at Each Level of Care in Mongolia 2012**

Provider	Services delivered
<b>Primary Level – Paid by Government</b>	
Bagh feldsher <sup>18</sup> (rural)	Trained mid-level health personnel that work and live in their own ger (traditional house). Home visits; antenatal and postnatal care; health promotion and education; early detection; disease surveillance and epidemiological monitoring; referral of cases to <i>soum</i> hospitals; prescribe essential drugs; public health services
274 <i>Soum</i> Health Centers and 37 inter- <i>soum</i> hospitals (rural)	Average 15-30 beds; provide 24 hour services with doctors (primary care, family medicine specialists or generalists), nurses, midwives, and support staff; cover 2,000-15,000 population.
219 Family Health Centers (urban, private practices)	Health promotion and education; preventive care (e.g. immunizations and screening); disease surveillance and epidemiological monitoring; outpatient services including prescriptions; inpatient services including normal delivery; minor surgery; diagnostic tests, home visits; emergency care; public health services; palliative care; rehabilitative care Staffed by family physicians and nurses during working hours. Outpatient services including prescriptions, preventive care (e.g. immunizations and cancer screening), disease surveillance and epidemiological monitoring, diagnostic tests, home visits, emergency care (limited), public health services, palliative care; rehabilitative care

From: WHO and Mongolian Ministry of Health. *Health Service Delivery Profile: Mongolia 2012*. Page 2.

86. Dust and dust storms are, for lack of a better word, an integral part of the Mongolian environment. The sources of dust are many and interlinked – including natural causes (erosion),<sup>19</sup> traditional *gers*, transport, thermal power plants – with dust storms originating according to location, precipitation levels, weather conditions, land cover, soils, etc.<sup>20</sup> Trying to isolate causal factors, especially in a rural area (that, too, in the Gobi Desert region), to human diseases would require detailed modeling and monitoring, which is very limited. The effects of

<sup>17</sup> WHO. *Mongolia: Country Cooperation Strategy: At a Glance*. 2014.

<sup>18</sup> Community nurses.

<sup>19</sup> Evidence shows that the cashmere goat is a major contributor to conversion of grasslands to dustbowls.

<sup>20</sup> The World Bank notes, “Sources of air pollution include emissions from motor vehicles; stationary sources—CHP, heat-only boilers (HOB), and industry; and area sources—household stoves, refuse burning, road dust, and sandstorms.” World Bank. *Mongolia Environment Monitor 2004*.

particulates are well known, “PM10 (particles up to 10µm in aerodynamic diameter) deposit in the nasal passages or larger airways; PM2.5 (particles smaller than 2.5µm in aerodynamic diameter) can reach the alveoli [sacs in lower lungs].”<sup>21</sup> However, the focus of most studies are urban centers – one study distinguished high concentrations of particulate matter (PM10, PM2.5) in dust storms from that in calm weather, the latter most likely attributable to anthropogenic aerosols in population centers from activities such as fossil fuel burning in vehicles, power plants, and home stoves.<sup>22</sup>

87. Altain Khuder has installed dust deposition gauges at six impact locations, including one at Tseel Soum, which are monitored monthly. For the 2012 Environmental Monitoring Report, the dust deposition devices measured ambient air dust levels at Tseel Soum below the Mongolian National Standard 4585:2007,<sup>23</sup> which appears to indicate that mine-generated dust did not travel far enough to affect local residents in Tseel soum, a conclusion<sup>24</sup> that was corroborated in a 2013 survey, “responding to repeated requests and complaints from local residents ... in the territory of Tseel Soum ...,” conducted by the National Inspection Office (NIO).<sup>25</sup>

88. Referring to the applicable standards,<sup>26</sup> the NIO concluded that the air dust content exceeded approved levels at only one instance at a point 5m from the mine-border road 117km from the mine itself, with “dust content near the winter and autumn place of local residents of Derstai Bagh in Tseel Soum, was within the approved level.” Nonetheless, the agency did recommend that the road be sprayed, the hard surface be finalized in a short time, and conduct regular air quality monitoring on a daily, weekly, monthly and annual basis.

89. This Report is unable to determine the veracity of the claim that all plant operations were stooped several days prior to inspection, thus not recording the “usual state” of emissions. However, the air quality data from monitoring stations as recorded in the environmental monitoring reports cover year-round emissions; hence, it appears that that data does not support

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<sup>21</sup> National Institutes of Health (NIH). “Perspective: Ambient air pollution: inflammatory response and effects on the lung’s vasculature.” *Pulmonary Circulation*. Volume 4(1). March 2014. See also, “An assessment of air pollution and its attributable mortality in Ulaanbaatar, Mongolia,” NIH. *Air Quality, Atmosphere and Health*. Volume 6(1). March 2013.

<sup>22</sup> Dulam Jugder et al. “Spatial and temporal variations of dust concentrations in the Gobi Desert of Mongolia.” *Global and Planetary Change* 78 (2011) 14–22.

<sup>23</sup> A problem here is that Mongolian National Standard 4585:2007 is intended for urban areas, rather than remote rural areas: An IFC report observes that, “This standard applies to reconnaissance, assessment and monitoring of the quality of indoor and outdoor air during planning and utilisation of town and settlements, residential housing, offices, entertainment and public service facilities and civil constructions.” (page 5). The report goes on to note that “IFC General EHS Guidelines (2007) state that in the absence of applicable national ambient air quality standards (and in this case, national standards are considered to apply to urban areas), internationally recognised standards should be applied. EU ambient air quality standards are cited in the IFC General EHS Guidance as recognised international standards” (page 6). In Table 2.4, the EU 24-hour standard for PM10 is 50µm and annual standard for PM2.5 is 25µm, the latter equivalent to MNS 4585:2007 and the former twice as stringent as MSN 4585:2007. IFC. *Oyu Tolgoi Environmental and Social Impact Assessment*. Section D. Chapter D2. Atmospheric Emission Construction Management Plan. Pages 5-6. The applicability of the EU standards is recognized in the Altain Khuder Implementation Report 2012.

<sup>24</sup> Altain Khuder. *Implementation Report of 2012 Environmental Protection, Reclamation, and Monitoring: Tayan Nuur Mine in Tseel Soum, Govi-Altai Province*. Page 22. The readings for the first half of 2013 were also below acceptable level of 100-150µm/m<sup>3</sup> at 88µm/m<sup>3</sup> in January and 76µm/m<sup>3</sup> in February 2013. During May-June, the readings averaged 60µm/m<sup>3</sup>.

<sup>25</sup> General Agency for Specialized Inspection. Conclusion of the State Senior Inspector for National Inspection Office of Mongolia. No. 04/091/905. 4 October 2013. The inspection of March 2013 by the same office concluded that failure to seal the road had contributed to high levels of dust, but no details on air quality readings are available.

<sup>26</sup> MNS 5105-2001. General Requirements and Size of Health and Safety Protection Zones.

the allegation that plant operations suspension prior to a single inspection<sup>27</sup> would have shown a distinct perceptible variation.<sup>28</sup>

### C. Water Abstraction

90. It is reported that Altain Khuder intended to extract groundwater from up to six boreholes.<sup>29</sup> At the time of the Complaint, water for drinking and domestic use was being transported by road from two wells, Buurt Well (potable) and Bore 202 (non-potable),<sup>30</sup> the former located 15km south of the mine, and the latter 15km to the east, both within the jurisdiction of Tseel Soum.<sup>31</sup> The bores are installed to a depth of 200m for Buurt Well, and 121m for Bore 202. In 2011, Altain Khuder entered into a contract with Tseel Soum for the abstraction of up to 150m<sup>3</sup>/day (4,500m<sup>3</sup>/month) from the two wells. In 2012, the agreement was renewed to increase the abstraction level to 250m<sup>3</sup>/day to meet increased water demands and contingency requirements for peak supply periods.

91. The 2013 water abstraction agreement with Tseel Soum was concluded in accordance with Mongolian laws and procedures under Sections 28.4, 28.6 and 28.7 of Article 28 of the Mongolian Water Law, and Opinion #7/1643 (11 April 2013) of the Policy Implementation Coordination Department of the Ministry of Environment and Green Development (MEGD), and Resolution #1/11 (16 April 2013) of the Department of Environment and tourism in Govi-Altai Province.<sup>32</sup>

92. The ESAP 2011 noted that “a robust assessment of the potential impacts on ... water users and the environment from the project’s water use has not been conducted.” Nonetheless, at the time of the report, “additional water exploration activities were continuing, both due to the request by local herders for new wells, and also to secure water resources for the Tayan Nuur mine, or other future Altain Khuder projects.”<sup>33</sup>

93. In April 2012, a firm engaged to conduct water balance studies<sup>34</sup> noted that a total of 484m<sup>3</sup>/day was being abstracted from the two water supply wells.<sup>35</sup> In 2014, an individual herder was cited as having observed that 1000m<sup>3</sup>/day was being abstracted by Tseel Soum, and

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<sup>27</sup> Nine inspections were conducted during the first half of 2013.

<sup>28</sup> See *Implementation Report of 2012*.

<sup>29</sup> *Interim ESIA Report*. ERM. December 2012. Page 112.

<sup>30</sup> Borehole 202 water has hardness levels higher than limits specified for drinking water, and is used for boiler and non-drinking purposes MNS 090:2005. Altain Khuder. *Implementation Report of 2012*. Pages 31, 34. A list of all MNSs is provided in the same report. ESIA Regulatory Context, EBRD and Corporate Requirements, Referenced Standards and Guidelines Pages F16-F20.

<sup>31</sup> Two other bores were installed near the mine site to provide a drinking water supply (bore depth of 200m and yield of 3.9L/s) and for dust suppression (bore depth of 70m and yield of 1.7L/s). Aquaterra. *Internal Memorandum*. 12 January 2012.

<sup>32</sup> Altain Khuder. *Implementation of the Environmental Protection Plan and Environmental Monitoring Program for the First Half of 2013*. The Report also mentions (page 11) that water abstraction contracts were signed to use five boreholes in 2013 for drinking and domestic water, road construction, and water sprinkling systems. Aside from Buurt and Bore 202, the other boreholes would be used for road construction (two) and for domestic and drinking water for camp employees at the border.

<sup>33</sup> ESRAP. Page 15.

<sup>34</sup> *Ibid*. The scope of the water balance studies included: water supply to meet minesite operational demands (Stage 1 – Dry Processing); minesite (camp, construction, dust suppression etc.); road upgrade; potential areas of water-related environmental and social impacts as identified by ERM; and mine water management including the identification and quantification of potential mine dewatering and surface water management requirements.

<sup>35</sup> *Ibid*. The same memorandum also adds that, “it is noted that permitted allocation for both bores is only 10m<sup>3</sup>/d and as such has been identified as a risk (low) to operations.” This must refer to the first water abstraction agreement with Tseel Soum of 1 January 2011, increased to 150m<sup>3</sup>/day 1 October 2011.

the Governor was cited as having observed that the static water level of community wells had dropped by 3-4 meters since the mine commenced activities.

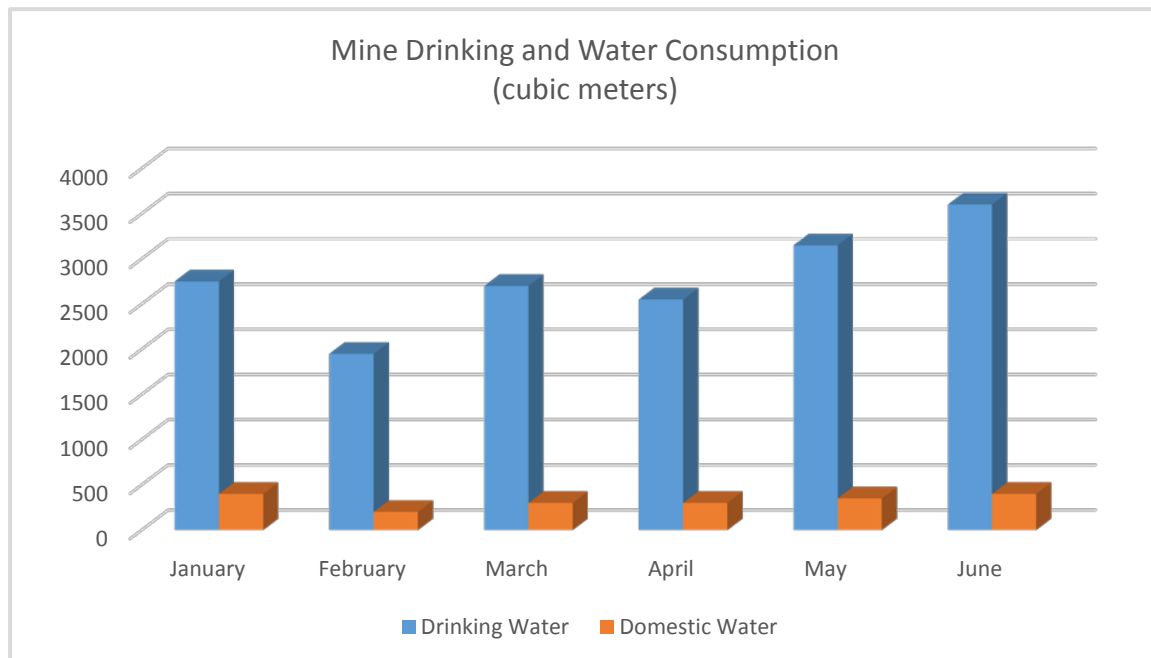
94. Altain Khuder reported that during the first half of 2013, the water consumption levels were well below the agreed abstraction levels.<sup>36</sup>

95. The communities were kept informed of water abstraction levels through quarterly postings on the bulletin board of the Governor’s Administrative Office in Tseel Soum. It is reported that Altain Khuder had complied with the requirements to install water meters and had inspectors check water levels regularly, but that “herders were unaware of such measures.”<sup>37</sup>

96. The issues, then, appear to be four: (i) whether adequate investigation was done to justify the location of the mine in terms of water availability for both the mine and the communities; (ii) whether agreed water abstraction levels were appropriate; (iii) whether abstraction levels exceeded the amounts agreed with the Governor of Tseel Soum; (iv) whether abstraction levels exceeded the amounts needed to support soum communities for their domestic uses, herders to maintain their herds, and any minor agricultural practices.

97. As part of the ESIA, extensive tests were carried out to determine that the abstraction of water for mine and road construction purposes would not affect the availability of adequate water supplies to local populations. Those tests, and subsequent abstraction, appear to have confirmed that conclusion. The levels of water abstracted have also been noted in regular monitoring reports to have been within agreed limits, and that information shared with local authorities as part of routine monitoring.

**Table 3: Water Consumption Levels: January-June 2013**



<sup>36</sup> *Ibid.* Page 11.

<sup>37</sup> OT Watch Et al. *Fact-Finding Mission Report*. Page. 12.

#### D. Animal Passageways along the Mine-Burgastai Border Post

98. As described in the Interim Environmental and Social Impact Assessment Report<sup>38</sup> (Interim ESIA) Altain Khuder considered two alternatives, upgrading the road to the border or constructing a new railway line. The former (Project road) was chosen for economic reasons, and the original distance shortened from 255km to 168.3km with the construction of a new border post some 55km to the north of the previous border post location. The Project road was originally a temporary gravel road, and the upgrade was to be a heavy-duty asphalt road 50m parallel to the existing road, with merged sections within mountain pass (12km; km 106-124 at Shar Sair) and dry river bed (3-4km, just north of the mountain pass) areas where there were space restrictions. Vegetation along the road is typical of a semi-desert environment. Only two sections (km 446-56 at Sukhait Oasis; and km 103-107 at Alig Nuur Lake) had more flora and fauna in the vicinity of the road.

99. The road, which does not pass through any settlements or soum centers, crosses four soum administrative areas of Govi Altai aimag:

- Tseel soum, km 0-51
- Tugrig soum, km 51-69
- Altai soum, km 69-78, 129-131
- Bugat soum, km 78-126, 131-163

100. The Project road was expected to be completed by 2013. As of July 2012, preparatory works had commenced along approximately 80km of the road. A number of livestock ramps with 1:4 slope were to be constructed at selected locations to allow camel herds to cross the Project road.<sup>39</sup> This Compliance Review Report is not intended to prescribe an acceptable sideslope for camel crossings, but, road design literature generally indicates that 1:4 is the maximum cross slope for an accessible route for humans without guardrails. However, camels do navigate steep slopes, and the suggested gradient is likely convenient for camel crossings.

101. Based on the latest (unverified) information,<sup>40</sup> Altain Khuder had completed 50.7km of the asphalt paved road, and a further 20.3km of concrete hardening base as of December 2014. Altain Khuder had reported that it had constructed two-way animal and livestock passageways in 12 locations.<sup>41</sup> There is no report available on the design of those crossings.

102. The Interim ESIA also noted that to facilitate fauna crossing, the Project road, which was elsewhere built up to a height of 1.2m, would be levelled to ground level, with fauna fenced channels, at the following locations: Sukhait Oasis (1); Alig Nuur (2); and Urtiin Gol (2). Other levels crossing could be constructed in consultation with herders and local stakeholders.<sup>42</sup> The road includes provision for construction of 312 culverts for drainage that could offer crossing mechanisms for small animals, including eight causeways to be built at riverbed level.

103. Overall, it has been noted that owing to limited data on ungulate movements, the options of having underpasses or overpasses for large wildlife crossings along the road will not be justified until further research is conducted. However, with speed restrictions and signage for

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<sup>38</sup> *Interim Environmental and Social Impact and Associated Infrastructure, Mongolia*. Draft. 26 December 2012.

<sup>39</sup> *Ibid.* p.38.

<sup>40</sup> Obtained by EBRD.

<sup>41</sup> Communication to EBRD.

<sup>42</sup> *Interim ESIA*. Page 151 *et seq.*

vehicle drivers that would reduce the likelihood of strikes, the environmental impact was determined to be of minor significance.<sup>43</sup>

## **E. Grievance Mechanism, Stakeholder Engagement and Disclosure**

104. The stakeholder engagement process under the Project has involved Altain Khuder, herders in the vicinity of the mine, government agencies, and local authorities. Given the communal nature of land tenurial arrangements, Altain Khuder worked principally with the *soum* and *bagh* authorities to ensure that those structures were fully on board in the development and implementation processes, especially as they were expected to be representative of local communities.

105. The Complainants recognize that Altain Khuder has responded to its commitment to setting up a grievance mechanism by placing a complaint and suggestion box at the Tseel *Soum* administrative building. However, it is reported that aside from one herder (who claimed he had submitted a complaint to which there had been no response), none of the herders interviewed as part of the 2014 Fact Finding Mission were aware of the complaint box.<sup>44</sup> This has been held up as an example of the ineffectiveness of Altain Khuder's grievance redress mechanism. Altain Khuder has responded that its public relations representative was in "*regular communication with the local authorities and local herders*" and that "*all requests are duly processed and resolved*"<sup>45</sup> (which implies that there may have been several grievances submitted).

106. Intimidation has been raised as a distinctly negative aspect of stakeholder engagement. It is claimed that Altain Khuder has "*become notorious for intimidating ... individuals criticizing its activities.*"<sup>46</sup>

107. Complainants allege that Altain Khuder has filed up to seven lawsuits against people who openly criticized the company or expressed grievances, charging them with "*organised crimes of defamation*" under Mongolian law. The company allegedly sued *bagh* governors, healthcare workers and citizens' representatives. According to Complainants, the cases were resolved against the company, but the company continued to pursue the cases in higher courts, at significant expense and inconvenience to the defendants. The cases reportedly were finally disposed of in May 2014, and the seven defendants are pursuing countersuits to recover their expenses and settlements for reputational damages.

108. The issue of the adequacy of the grievance mechanism structure is explored in Section IX. However, the utilization of the process and responsiveness of the Client could not be confirmed owing to the lack of information and access to Client records as part of the compliance review. Nonetheless, given the outreach of the Client and the feedback to local populations, especially in communications with the local administrations, notably the Governors, this Compliance Review Report believes that it seems unlikely that the herders would have been unaware of the mechanism.

## **F. Indigenous Peoples**

109. The principal indigenous peoples issue of determination that the herders truly represent

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<sup>43</sup> *Interim ESIA*. Page 154.

<sup>44</sup> OT Watch. *Fact-Finding Mission Report*. 2014. Page 14.

<sup>45</sup> *Ibid.* Page 14

<sup>46</sup> *Ibid.* Page 13.



“indigenous peoples” is complicated by the sources of definition, the somewhat imprecise practice of international financing institutions, and the seemingly tenuous distinctiveness of a collective of peoples who actually represent a significant part of the Mongolian population. While none can deny that herders have a distinct way of life pursued for centuries, they represent an integral part of the modern nation-state that is Mongolia rather than statehood having imposed a deliberate attempt to bring together those peoples into a modern political construct with disregard for their ways of life.

110. The Complainants contend that the herders identify themselves as traditional nomadic pastoralists that have pursued non-wage subsistence strategies for centuries with an ancient culture involving distinct cultural and economic customs, and attachment to ancestral territories; hence, they must be seen as distinct from “mainstream” populations.

111. The term “indigenous peoples” in the common language of development is set in the context of isolation and marginalization from the benefits of economic progress; hence, it is a negative connotation describing situations for which explicit recognition and economic and political remedies are sought. The issue, then, is whether that perspective is relevant in the Altain Khuder case. This is explored further in Section VIII.

## VI. Performance Requirements PR1, PR3, PR4

### A. Policy Framework

112. EBRD's Environmental and Social Policy sets out a clear commitment:

*"The EBRD will seek to ensure through its environment 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 accordance with applicable regulatory requirements and good international practice"*<sup>47</sup>

113. The PRs are intended to translate that commitment into "successful practice outcomes" by setting out the requirements of a structured environmental and social assessment process. The ESIA, then, represents the principal tool to conduct that process. In financing an existing facility, the Policy noted that:

*"If a proposed business activity to be financed by the EBRD relates to existing facilities that do not meet the PRs as the time of Board approval, the client will be required to adopt and implement an Environmental and Social Action Plan (ESAP), satisfactory to the EBRD, that is technically and financially feasible and cost effective to achieve compliance of these facilities with EBRDs requirements within a time frame acceptable to the EBRD."*<sup>48</sup>

114. The policy also specifies that monitoring be carried out by both EBRD and the Client, including periodic reports, monitoring missions and periodic third party monitoring following observations and recommendations set out in the ESAP.<sup>49</sup>

115. The PRs primarily relevant to the Complaint are PR1, PR3, PR4 and PR10. The objectives of each PR are:

**Table 4: Relevant EBRD PRs**

<b>Environmental and Social Appraisal and Management (PR1)</b>	<b>Information Disclosure and Stakeholder Engagement (PR10)</b>	<b>Pollution Prevention and Abatement (PR3)</b>	<b>Community Health, Safety and Security (PR4)</b>
<ul style="list-style-type: none"> <li>• To identify and assess environmental and social impacts and issues, both adverse and beneficial, associated with the project</li> <li>• To adopt measures to avoid, or where</li> </ul>	<ul style="list-style-type: none"> <li>• To identify people or communities that are or could be affected by the project, as well as other interested parties.</li> <li>• To ensure that such stakeholders are appropriately engaged on</li> </ul>	<ul style="list-style-type: none"> <li>• To avoid or, where avoidance is not possible, minimize adverse impacts on human health and the environment by avoiding or minimizing pollution directly arising from projects</li> </ul>	<ul style="list-style-type: none"> <li>• To avoid or minimize risks to and impacts on the health and safety of the local community during the project life cycle from both routine and non-routine circumstances</li> </ul>

<sup>47</sup> EBRD. *Environmental and Social Policy*. Para. 3.

<sup>48</sup> *Ibid.* Para. 29.

<sup>49</sup> *Ibid.* Paras. 34-37.

<p>avoidance is not possible, minimize, mitigate, or offset/compensate for adverse impacts on workers, affected communities, and the environment.</p> <ul style="list-style-type: none"> <li>• To identify and, where feasible, adopt opportunities to improve environmental and social performance</li> <li>• To promote improved environmental and social performance through a dynamic process of performance monitoring and evaluation.</li> </ul>	<p>environmental and social issues that could potentially affect them through a process of information disclosure and meaningful consultation</p> <ul style="list-style-type: none"> <li>• To maintain a constructive relationship with stakeholders on an ongoing basis through meaningful engagement during project implementation.</li> </ul>	<ul style="list-style-type: none"> <li>• To assist clients in identifying project-related opportunities for energy and resource efficiency improvements</li> <li>• To promote the reduction of project-related greenhouse gas emissions</li> </ul>	<ul style="list-style-type: none"> <li>• To ensure that the safeguarding of project-related personnel and property is carried out in a legitimate manner that avoids or minimizes risks to the community's safety and security</li> </ul>
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116. This section will look at the provisions of PR1, PR3, and PR4 relevant to the Complaint.

117. There are several observations in PR1 that are relevant to assessing whether EBRD was compliant with the ESP consistent with the general guiding statement:

*“A successful and efficient environmental and social management system is a dynamic, continuous process, initiated and supported by management, and involves meaningful communication between the client, its workers, and the local communities affected by the project or the client company ...*

*Due diligence should identify and assess any potential future impacts ... and recommend any measures needed to avoid, or where avoidance is not possible, minimise, and mitigate adverse impacts ...*

*The ESAP will document key environmental and social issues, the actions to be taken to address them adequately, as well as any actions to maximise environmental and social benefits, the schedule and person/unit responsible for implementation and monitoring, and an estimate of associated costs ...*

*The client will need to establish, maintain, and strengthen as necessary an organisational structure that defines roles, responsibilities, and authority to implement the ESAP and associated management system ...”*

118. Project performance monitoring (PR1, Paras. 20-24) covers the establishment of procedures, content of monitoring reports, including “feedback from stakeholders,” use of monitoring data, implementation of monitoring report recommendations, and periodicity of reports.

119. PR3 states that as a signatory to the European Principles for the Environment,<sup>50</sup> EBRD not only addresses environmental damage at source, but also requires “*compliance with relevant EU environmental standards, in particular those related to industrial production, water and waste management, air and soil pollution, occupational health and safety, and the protection of nature, where these can be applied at the project level.*”<sup>51</sup>

120. PR3 goes on to note that, “*where EU environmental requirements do not exist, the client will apply other good international practice, such as the World Bank Group Environmental Health and Safety Guidelines.*”<sup>52</sup> The rest of PR3 sets out conditions that should be noted and the obligations of the client with respect to various aspects of pollution prevention and abatement.

121. Recognizing that projects can have unintended adverse impacts on communities that need to be assessed and addressed is the message of PR4. The PR “*addresses the client’s responsibility to identify and to avoid or minimise the risks and adverse impacts to community, health, safety and security that may arise from project impacts.*”<sup>53</sup> The client is required to “*avoid or minimise adverse impacts due to project activities on air, soil, water, vegetation and fauna and other natural resources in use by the affected communities, “ as well as “prevent or minimise the potential for worker and community exposure to **vector-borne and other communicable diseases** that could result from project activities.*”[emphasis added]<sup>54</sup>

122. In dealing with the issue of relations between the community and security staff, PR4 notes that “*... in making [security] arrangements, the client will ... ensure that they are trained adequately in ... **appropriate conduct** toward ... the local community ...*”<sup>55</sup> [emphasis added]. This Report understands that Altain Khuder security arrangements are not contracted out.

123. From an organizational perspective, EBRD *Environmental and Social Procedures* (2010)<sup>56</sup> set out detailed procedures for appraising and monitoring investment projects. Among the key responsibilities of ESD are:

- the appraisal of each potential project (both investment and TC projects) including identifying the environmental and social due diligence required for each project and the relevant PRs;
- assisting Banking teams and clients in the structuring of environmental and social due diligence including, for example, the preparation of Terms of Reference for Environmental and Social Impact Assessments (ESIAs), audits and stakeholder engagement programs;
- drafting Environmental and Social Summaries (ESSs);
- agreeing Environmental and Social Action Plans (ESAPs) with clients;

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<sup>50</sup> Articles 11 and 191 to 193 of the Treaty on the Functioning of the European Union (1958). EU environment policy rests on the principles of precaution, prevention and rectifying pollution at source, and on the ‘polluter pays’ principle.

<sup>51</sup> Para. 2.

<sup>52</sup> Para. 7.

<sup>53</sup> Para. 2.

<sup>54</sup> Para. 17.

<sup>55</sup> Para. 23.

<sup>56</sup> EBRD. *Environmental and Social Procedures*. April 2010. This has now been superseded by *Procedures for Environmental and Social Appraisal and Monitoring of Investment Projects*, July 2015.

- evaluating environmental and social due diligence information provided to the Bank and discussing necessary actions with the Operation (project) Team and the client; and
- monitoring the environmental and social performance on the project during implementation.<sup>57</sup>

124. The Procedures go on to note that there are “two dimensions to environmental and social monitoring”:

- monitoring activities undertaken by the client, consultants and/or other stakeholders in accordance with the ESMP;
- monitoring undertaken by Bank staff through review of reports received, site visits by ESD staff and internal Bank driven project monitoring and evaluation activities.

125. The Procedures add: “In accordance with the ESMP, monitoring will be risk driven, with higher risk projects subject to more intensive monitoring.”<sup>58</sup>

126. The sections cited above reflect the two perspectives to consider in determining whether EBRD followed its own policies, the first in compliance with its environmental and social requirements and appraisal procedures, the other in compliance with its environmental and social monitoring procedures.

127. At the time of due diligence in 2011, from the perspective of EBRD and the Client, a local DEIA was in place, approved by the Government of Mongolia, and what was needed to ensure environmental compliance was to revisit the environmental and social parameters to ensure that there were no significant deviations, and set out an implementation and monitoring structure in the ESAP.

## **B. Policy Applications**

128. It is useful to remember that the scope of activities financed under the loan from EBRD included the purchase of mining equipment, balance sheet restructuring, and the provision of working capital. The mine was operational at the time EBRD approved its loan, with five lines of production and the total designed concentrate production had reached 210,000 tonnes per month (2.6 mtpa). The border road had been upgraded by Altain Khuder during 2008-2010, and the use of funds (road upgrades) was not envisioned as part of the EBRD financed project at that time. Given that the investment would be in an already operating mine with an approved EIA, EBRD determined that the Project was Category B, and conducted environmental and social reviews to understand the scope and status of current E&S activities, identify gaps, and provide recommendation in an ESAP.

129. In terms of subsequent activities, EBRD’s Management Response reads, “... in August 2012, EBRD attended a meeting with Altain Khuder and the international consultant to discuss additional financing to cover an additional high output production line (line 6) and for the upgrading and paving of the export road. The consultant prepared an Environmental and Social

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<sup>57</sup> *Ibid.* Page 7.

<sup>58</sup> *Ibid.* Page 25.

*Impact Assessment for the project that included an update of the ESAP for the existing projects. ESD reviewed and provided comments to the consultant on this report and ESAP update. Shortly after this meeting, the relationship with the client became difficult and further talks involving environmental and social monitoring were suspended.”<sup>59</sup>*

130. As part of EBRD’s initial due diligence, an Environmental and Social Review and Action Plan (ESRAP)<sup>60</sup> was prepared that was intended to review the site conditions and compliance with EBRD’s PRs and develop recommendations to address any gaps in compliance for the category B project being financed (purchase of mining equipment and balance sheet restructuring). The ESRAP noted that Altain Khuder had undertaken DEIAs for the site facilities that had been approved by MEGD.<sup>61</sup> The ESRAP also noted that, at the time, the EIAs lacked the following (which would have been required if EBRD had financed the original mine development): (i) an ecological baseline, particularly along the border road; (ii) documentation on disclosure of project information and consultation; (iii) assessment of the impacts of the project’s water use and measures to minimize water use; (iv) social impact assessment (not a part of the Mongolian EIA process).

131. While the ESRAP noted other project environmental management systems improvements that needed to be made to bring the existing project into compliance with EBRD requirements, it did note that Altain Khuder demonstrated a sound understanding of environmental management issues.

132. Any adverse impacts that stakeholders might have experienced prior to the breakdown in communications between EBRD and Altain Khuder may be addressed in this Compliance Review Report. This section will deal with air pollution, water abstraction, and animal passageways.

## **B.1 Air Pollution**

133. Most studies of air quality deterioration in iron ore mines focus on the impact on workers in the mine area, which is not the subject of the Compliance Review Report. The causality of illnesses in adjoining communities attributable to iron ore mining has not been linked definitively.<sup>62</sup> Air quality monitoring in reports provided to EBRD has shown that pollution levels were well within acceptable standards, and that with the nearest *soum* some 18km away, it was not likely that there would have been any dust impacts that far away from the mine. A detailed discussion of air quality has been presented in Section V.B.

134. There are studies that show the transportation of ores has led to perceptible deterioration of air quality in the immediate vicinity of those routes, particularly important in built-up areas or settlements along the roads.<sup>63</sup> However, the transportation route for the Tayan Nuur mine to the border does not pass through any settlement, typically semi-desert character with sparse vegetation that does not appear to be entirely suitable for sustained pastoral activities.<sup>64</sup> Hence, it is unlikely that there are any perceptible impacts on air quality that would affect any passing

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<sup>59</sup> *Management Response*. Pages 2-3.

<sup>60</sup> ERM. *Environmental and Social Review and Action Plan; Tayan Nuur Iron Ore Mine*. 13 December 2011.

<sup>61</sup> Established in August 2012 in place of the former Ministry of Nature, Environment and Tourism (MNET).

<sup>62</sup> See References for various articles.

<sup>63</sup> See, for example, G. Singh and A. Parwez, *Depreciation in Ambient Air Quality in Iron Ore Mining Region of Goa*. *Current World Environment*. Vol. 10(1), 149-160 (2015)

<sup>64</sup> Seven households were recorded as having land “possession” certificates in the Km110-125 section of the road, but as at the time, there were no structures or facilities in those areas, those certificates appear to have been revoked.

populations. As to the vegetation on which herds may feed, the general area through which the project road passes is arid and does not support substantive grazing activities. While there would certainly be dispersion of fugitive dust from an unpaved road, which is noted by the environmental studies carried out as part of due diligence, given the general character of the dust-laden environment through which the road passes, and the fact that a considerable section has now been paved,<sup>65</sup> it appears unlikely that any the transportation of ore would have the type of effects on animals that has been claimed.

135. This Compliance Review Report understands that aside from the three tests specifically directed toward animals, several tests were also conducted with the participation of an NGO, residents of Tseel *soum*, the Tseel *soum* veterinarian, and Governor of Derstai *bagh*, all of whom observed that the dust generated was within acceptable limits.<sup>66</sup> It is understood that reports incorporating all test results are submitted to the local governments on a quarterly basis.

136. Of course, as part of general environmental management, adequate measures should be taken to minimize any ore dust dispersion from the transportation trucks, with proper coverings and wash-downs. This Report has been unable to find references to that activity in mine and campsite management documentation.

137. On the claim of air quality deterioration at Tseel *soum* as a consequence of mine operations, both modelling and data have shown that any elevations in PM10 and TSP would occur within 1-2.5 km of the mine, with maximum concentrations within 50m of the source. Hence, it is unlikely that mine operations would have had the effect on community human health that has been claimed.

138. This Report finds (i) lack of causality between fugitive dust dispersal and illnesses of humans and animals claimed; (ii) lack of evidence of air quality deterioration at the mine and along the transportation route leading to alleged illnesses; and (iii) the inability to seek medical advice owing to high costs appears to be unsubstantiated as any preliminary investigations could have been conducted free of cost at the clinics at *bagh* level.

## **B.2 Water Abstraction**

139. Section V.C has pointed out that Altain Khuder had concluded agreements with the local government on the levels of water to be abstracted at wells for mine and road construction activities. While the levels that were agreed would have left sufficient water for herders and settlements, the data on water usage indicates that abstraction has been less than the levels agreed.

140. This Report has no documentation to verify whether there are any water pit lakes as claimed by the Complainants. It appears unlikely that there would have been any ponds or water bodies deliberately constructed as borrows are not required and as Altain Khuder specifically notes, all water for road construction, sourced as grey water from the mine, is delivered by truck.<sup>67</sup>

## **B.3 Summation**

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<sup>65</sup> In a communication to MEGD of 7 June 2013, Altain Khuder requested that the completion of the road be extended: 20-40km before end-2013; 50-80km before end-2014; and remaining in 2015.

<sup>66</sup> OT Watch. *Fact-Finding Mission Report*. 2014. Page 2. Altain Khuder Response 1.

<sup>67</sup> *Ibid*. Page 12.

141. This Report considers that EBRD has partially fulfilled the obligations set out in PR1 with respect to the conduct of the environmental appraisal in undertaking the review, providing recommendations and then establishing a monitoring process. Reflecting the categorization of the Project as B, a detailed environmental and social review was conducted, impacts identified, and an ESAP developed. This Report recognizes that the project was properly categorized and assessed, with a comprehensive action plan, aimed at achieving compliance over time, and that until mid-2013, the Client repeatedly demonstrated a willingness to implement actions, either contained in the ESAP or required to properly implement the project.

142. The recommendations of the ESAP appear to have been in the process of implementation, with several steps having been taken, up until the breakdown in relationship between EBRD and Altain Khuder. There were some lapses that could have been expedited, such as the post-resettlement review, that would have confirmed implementation of those recommendations, but the current situation has precluded any updates.

143. While the initial monitoring process appears to have reflected some delays,<sup>68</sup> the deterioration in relations between EBRD and the client in 2013 precluded the possibility of following up on any pending actions identified in the ESAP, and maintaining a dialogue that would obviously also involve outreach to stakeholders.

144. Given the lack of communications between EBRD and Altain Khuder since 2013, progress in the implementation of environmental management recommendations cannot be determined, and EBRD is not in a position to identify and address any shortcomings that may have occurred or to be able to monitor progress formally. Thus, EBRD has been unable to comply with the monitoring requirements of the ESP with regard to the Client's implementation of PR1.

145. This Compliance Review Report considers that EBRD has complied with the obligations of PR3 and 4 of having assessed potential impacts carefully, identified areas in which corrective measures were needed, and made relevant and appropriate environmental management recommendations. This Report believes that adequate scientific measurements have been conducted, verified by government inspections, to establish that air pollution and water abstraction impacts on local communities as a consequence of mining operations are not of the scale claimed.

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<sup>68</sup> Internal communication. EBRD.



## VII. PR5: The Land Acquisition and Resettlement Issue

146. To reiterate Section V.A, the key issues were: (i) what type of lands were held by the herders prior to acquisition by Altain Khuder for the mine; (ii) whether the lands that were given over to Altain Khuder could be transferred by an individual herder in exchange for cash compensation; (iii) whether the transaction should have been more appropriately (that is, “legally”) conducted between Altain Khuder and the *soum* or Governor’s office; and (iv) by disposing of those lands to Altain Khuder, whether the herders precluded from winter camp habitation, which would be allocated by the Governor at *bagh* meetings.

147. Altain Khuder’s socioeconomic report<sup>69</sup> describes livelihood activities in the project area covered by the four soums of Tseel, Guhat, Tugrug and Altai being primarily agricultural – livestock herding and animal husbandry. Of the 18 households within the mine area<sup>70</sup> and eligible for resettlement, all were relocated during 2009 and 2012 in accordance with their expressed agreement to be resettled. No compensation was provided for land as there were no privately-owned properties within the mine area; hence, compensation was entirely for assets, disturbance and reconstruction of shelters.

148. Despite the lack of legal coverage for compensation of lost assets along the road right-of-way, Altain Khuder cited Articles 4 and 134 of the *Civil Code*,<sup>71</sup> and Article 41 of the *Mineral Law*<sup>72</sup> to be able to offer such compensation. Eight households had claimed holdings within road area of influence, none of whom had structures or livestock shelters that had existed prior to the Project.<sup>73</sup> As no households had requested compensation, the Governor of Bugat *soum*, at a Citizen’s Representative Meeting (*Khural*), decided that that section would be declared a “special” use area and fiscal funds could be used to provide certificates for a different area.

149. Section VI.A has described the landholding situation in Mongolia, which in transitioning to partial private ownership, still remains unclear on tenurial arrangements in the vast majority of continuing communally-held land. However, this report understands that even with the 10 winter camps claimed in the mine area, there was no private ownership and that with the issuance of the mining license by the Government, the *soum* Governors would have had to redistribute lands in their area of governance according to customary negotiations in the community. The funds received for loss of assets could not have been used to purchase new lands as the local landholdings would have been held in communal trust. Altain Khuder states that the local

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<sup>69</sup> *Survey Report of Altaai Soum*. Public Relations Department. Altain Khuder. January 2011. Cited in *Interim ESIA*. ERM. December 2012.

<sup>70</sup> There appears to be some contradiction in the number of households in the mine area, whether 16 or 18.

<sup>71</sup> Although this is cited in the *Interim ESIA* (p. 95), Article 134 together with other relevant Articles in Sub-Chapter 4 of the *Civil Code* also applies in recognizing and compensating neighboring properties. Article 1 of the *Civil Code* stipulates that state and affected persons engaged with each other contractually as equal and autonomous legal bodies in civil legal relationship; Chapter 10 of the *Civil Code* defines property and assets including land and other; immovable property; Chapter 11 describes the possession by legal acquisition; and Chapter 12 for property ownership by individuals and other legal entities. Article 101, 109 and 112 provides provisions on possession, use and disposal of property.

<sup>72</sup> “Article 41. Compensation for damages to property: 41.1. License holders shall fully compensate owners and users of private and public residential dwellings, wells, winter animal shelters, other structures, and historic and cultural landmarks for the damages caused by exploration or mining operations, including, if necessary, relocation costs.”

<sup>73</sup> *ESRAP*. Page H4.

authorities did not believe that lands needed to be distributed as sufficient lands were available to accommodate the few herders who had been relocated from the mine site.<sup>74</sup>

150. Those herders who were compensated and resettled in 2010-2012 were assisted by the Governor of Tseel *soum* in negotiating settlement compensation at market prices for all assets.<sup>75</sup> During the resettlement process, Altain Khuder provided support services (water, transportation, food supply) and phased the relocation to allow for easier transition by the resettlers to new locations.<sup>76</sup> Given that there were only a few families involved in the resettlement exercise, they must have been fully informed and cooperative to have been able to have taken the compensation that was offered and participated in the support activities.<sup>77</sup> Among the issues, it would have been useful to have confirmed that the compensation paid to affected households in the mine area had been based on replacement cost without depreciation as required under resettlement good practices.

151. It is important to note that in the compensation process Altain Khuder demonstrated a genuine intent to compensate for loss of assets in keeping with EBRD PR5. For its part, EBRD ensured that the Client was fully informed of its obligations under PR5, and assessed and made recommendations in a detailed ESAP. As there were no resettlement activities to be conducted with EBRD's involvement in the Project, the preparation of a formal Resettlement Action Plan was not relevant nor required.

152. In an effort to determine that there were no outstanding resettlement issues, EBRD required that a post-resettlement survey be carried out, an activity that was agreed with the Client. However, there are no records of quality of life restoration as the detailed post-resettlement survey agreed with Altain Khuder and set out in the ESAP has not been carried out, and there has been no opportunity to initiate that activity with the state of the current EBRD-Client relations. However, it has to be noted that Altain Khuder has stated that data is available in Mongolian that includes *"ownership/livelihood details of PAPs pre and post-resettlement; maps of locations; consultation records; and socioeconomic information."*<sup>78</sup> Altain Khuder also stated that retrospective data was available and documentation was being translated to be made available for review and gap analysis. This Compliance Review Report has not obtained that information.

153. Recognizing that the Project was operational prior to the involvement of EBRD, this Report considers that EBRD was substantially in compliance with PR5 in reviewing the conditions under which resettlement and compensation activities were carried out by Altain Khuder, and providing recommendations in an ESAP to ensure that good resettlement principles were applied. The only failing is that, owing to the breakdown in relations between EBRD and the Client, it has not been possible to have followed up on the commitment by Altain Khuder to post-resettlement monitoring and corrective actions, if any. In that respect, despite its stated intentions to continue

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<sup>74</sup> Altain Khuder response. *Fact-Finding Mission Report*. 2014. Page 10.

<sup>75</sup> *"The right of a landowner to dispose of owned land through sale 'according to relevant procedures' (notarized contract) is guaranteed in Article 27 of the Law on Allocation of Land to Private Citizens. Possessors, according to Articles 35 and 38 of the Land Law, are also entitled to transfer their possession licenses via a notarized contract, but need to seek the approval of the governor of the soum or district."* ADB. *Ulaanbaatar Urban Services and Ger Areas Development Investment Program. Draft Resettlement Framework*. July 2013. Page 5.

<sup>76</sup> Response by Altain Khuder. *Fact-Finding Mission Report*. 2014. Page 9.

<sup>77</sup> *Ibid*. Page 10. Altain Khuder mentions that there are written reports evidencing that local herders, Tseel *soum* officials, and *bagh* governors were present during the relocation process.

<sup>78</sup> *Implementation Report of 2012*.

mandated monitoring, EBRD has been unable to comply with the monitoring requirements of the ESP with regard to the Client's implementation of PR1 and PR5.

## VIII. PR7: The Question of Indigenous Peoples

154. Defining and identifying indigenous peoples is a complex task that involves significant understanding of the economic circumstances and social, political, and cultural norms prevalent in the countries in which such groups may be present. This Report does not purport to present an expert opinion on the issue, but will use generally-accepted principles, country definitions, multilateral approaches, and the provisions of EBRD PR7 to consider, from the viewpoint of the Expert, whether the Complainants as Mongol pastoralists<sup>79</sup> can be considered Indigenous Peoples in the context of the Complaint and from the perspective of EBRD in applying the definitional parameters set out in the ESP.

155. PR7 states that:<sup>80</sup>

*“There is no universally accepted definition of “Indigenous Peoples”. Indigenous Peoples may also be referred to in different countries by different terms.*

In the Policy and this PR, the term “Indigenous Peoples” is used in a technical sense to refer to a social and cultural minority group, distinct from dominant groups within national societies, possessing the following characteristics in varying degrees:

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

156. PR7 goes on to note: *“The fact that a group, or members of a group, lead a nomadic or transhumant way of life, live in mixed or urban communities and/or only visit their traditional lands on a seasonal basis, having experienced forced severance, is no prima facie bar to the application of this PR.”*<sup>81</sup>

157. PR7 adds another dimension to the issue of being indigenous:

*“This PR recognises, however, that Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies, are often among the most marginalised and vulnerable segments of the population. Their economic, social and legal status often limits their capacity to defend their interests in, and rights to, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. They are particularly vulnerable if their lands and resources are*

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<sup>79</sup> One scholar notes that Mongolia is “... a nation that continues to construct its identity with reference to ancient traditions of mobile pastoralism.” D. Sneath. *Notions of Rights over Land and the History of Mongolian Pastoralism*. Cambridge. 2000.

<sup>80</sup> Paras. 9, 10.

<sup>81</sup> Para. 11.

*transformed, encroached upon by those who are not members of their communities, or significantly degraded.”<sup>82</sup>*

158. Other relevant references against which to understand the indigenous nature of the Complainants in the context of the Complaint are contained in ILO Convention 169<sup>83</sup> and the UN Declaration on the Rights of Indigenous Peoples.<sup>84</sup>

159. ILO Convention 169 notes that:

*“1. This Convention applies to:*

*(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*

*(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*

*2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”<sup>85</sup>*

160. Further clarification is provided in Table 5:

**Table 5: Criteria under ILO Convention 169**

	<b>Subjective criteria</b>	<b>Objective criteria</b>
<b>Indigenous peoples</b>	Self-identification as belonging to an indigenous people	Descent from populations, who inhabited the country or geographical region at the time of conquest, colonization or establishment of present state boundaries. They retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status.
<b>Tribal peoples</b>	Self-identification as belonging to a tribal people	Their social, cultural and economic conditions distinguish them from other sections of the national community. Their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

ILO. *Handbook for ILO Tripartite Constituents. Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*. 2013. Page 2.

<sup>82</sup> Para. 2.

<sup>83</sup> ILO. *Indigenous and Tribal Peoples Convention 1989 (No. 169)*

<sup>84</sup> UN General Assembly. *United Nations Declaration on the Rights of Indigenous Peoples*. Resolution adopted 2 October 2007.

<sup>85</sup> ILO Convention 169. Part 1. Article 1.

161. Recognizing that applying a universal definition to the wide, diverse and complex social and political structures of indigenous peoples might not be possible, the UN declined to develop such a definition and relies for practical purposes on an approach to identifying indigenous peoples that was proposed by Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>86</sup> That approach emphasizes a number of characteristics which may be present when identifying indigenous peoples, including historical continuity with pre-invasion societies, a non-dominant position, occupation of ancestral lands (or part of them), distinct languages and distinct cultures (means of livelihood and other manifestations of culture).

162. The UN has concluded that *“the prevailing view today is that no formal universal definition of the term is necessary”* and observed that, *“The lack of formal definition of “peoples” or “minorities” has not been crucial to the Organization’s successes or failures in those domains nor to the promotion, protection or monitoring of the rights recognized for these entities.”*<sup>87</sup>

163. The UN Declaration on the Rights of Indigenous Peoples reinforces those principles. The Declaration recognizes indigenous peoples’ right to own and control their lands and, to differing degrees, recognize their rights to own, use and manage the natural resources on those lands. According to the Declaration, States should establish mechanisms to guarantee those rights, with the right to development understood to imply for indigenous peoples their right to decide the kind of development that takes place on their lands and territories in accordance with their own priorities and cultures. The Declaration calls upon States to consult with indigenous peoples to obtain their free, prior and informed consent prior to approval of any project affecting their lands and resources.

164. Both the ILO Convention and UN Declaration highlight issues of vulnerability, marginalization, discrimination and neglect of indigenous communities, and stress the right of those peoples to determine their own destiny. Article 3 of the Convention 169 reads,

*“1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.*

*2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.”*

165. The UN Declaration reads,

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<sup>86</sup> *Study on the Problem of Discrimination against Indigenous Populations*. UN Doc. E/CN.4/Sub.2/1986/7 and Addendums 1-4. The study was launched in 1972 and completed in 1986. The study used the “working definition”: *“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”*

<sup>87</sup> *The Concept of Indigenous Peoples*. Workshop on Data Collection and Disaggregation for Indigenous Peoples. UN. PFI/2004/WS.1/3. 2004.

*“Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.” (Article 2)*

*“Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.” (Article 8)*

166. From a human rights perspective, reference has been made to the doctrine of the “margin of appreciation” that is contained in the European Convention of Human Rights (1950), and which allows the state “a certain measure of discretion ... when it takes legislative, administrative or judicial action in the area of a Convention right.”<sup>88</sup> It has been suggested that differential treatment of minorities may be justified with respect to that doctrine and the welfare of society as a whole. However, in the context of Mongolia, the reference to the doctrine presupposes a measure of restriction in the exercise of rights and freedoms that does not appear to have been inflicted by the state on individual herders or pastoralists as a distinct group, presumably because basic pastoral traits are shared among all populations, and between local and urban populations even across the physical divide that characterizes urban growth.

167. The World Bank and IFC use much the same language in the former’s OP 4.10 and the latter’s PS7. As with the UN and ILO, their safeguards emphasize discrimination and vulnerability. The World Bank’s OP 4.10 reads:

*“Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of “Indigenous Peoples,” this policy does not define the term. Indigenous Peoples may be referred to in different countries by such terms as “indigenous ethnic minorities,” “aboriginals,” “hill tribes,” “minority nationalities,” “scheduled tribes,” or “tribal groups.”*

*For purposes of this policy, the term “Indigenous Peoples” is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:*

- (a) *self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;*
- (b) *collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories<sup>7</sup>*
- (c) *customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and*
- (d) *an indigenous language, often different from the official language of the country or region”<sup>89</sup>*

*“Because indigenous peoples have historically been excluded and marginalized, they are often unable or reluctant to participate in defining national, regional, or even local development policies, programs, and projects.”<sup>90</sup>*

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<sup>88</sup> D.J. Harris et al. *Law of the European Convention on Human Rights*. Oxford. 2014. Page 14. See also, O. de Schutter. *International Human Rights Law*. Cambridge. 2014. Pp. 388-389.

<sup>89</sup> OP 4.10. Paras. 3-4.

<sup>90</sup> *Ibid.* Para. 2

168. IFC's Guidance Note for PS7 points out that:

*"Clients will need to exercise judgment in determining whether a group or communities should be considered "indigenous" for the purpose of Performance Standard 7. In making this determination, the client may undertake a number of activities, including investigation of the applicable national laws and regulations (including laws reflecting host country obligations under international law) ..."*<sup>91</sup>

169. This is not so say that the debate on IPs has ended. As a recent World Bank publication notes:

*"The definition of who is and who is not indigenous has become increasingly relevant and controversial in recent decades, not only because of the reemergence of groups thought to be extinct, but also because in the wake of a new set of legal frameworks, covenants, and international agreements safeguarding indigenous rights, indigenous peoples often rely on their official recognition to be protected from or included in aspects of decision making that could affect their lives, assets, and cultures. As a result, the resurgence of indigenous forms of belonging and indigenous peoples' increasing visibility in the regional arena have brought about old and new debates on the definition of indigeneity, and thus on the rights that derive from their recognition as indigenous."*<sup>92</sup>

170. Given that there is no universal definition of indigenous peoples, it is important to look across the spectrum of defining factors. It is clear, then, that the elements that define an indigenous peoples lie not simply in self-identification, but in a range of characteristics that set them apart from other groups in a particular nation. Of those characteristics, an important aspect to note is there is often a sense of discrimination in not having the inclusion of those peoples in "mainstream" economic, social or political activities. Such exclusion may be deliberate or benign neglect. However, the notion of exclusion does not appear to apply to Mongolia, where it is commonly agreed that the country *"remains one of the world's more homogenous countries culturally and linguistically"*.<sup>93</sup>

171. The issue of establishing whether the Complainants represent indigenous peoples appears to relate more to the *perception* of distinctiveness than the *reality* of a group to which the definition set out under the PR and generally accepted principles apply. There are several aspects to consider in understanding that approach. With almost 40% of the population engaged in herding and general pastoralist living, and close connections between urban populations and the lands to which they may be attached, it would appear that the predominant national identity is pastoral. Hence, there is no apparent firm social dividing line between herders who derive their living from pastoral activities and urban populations who together with their physical residence, maintain close cultural ties with their pastoral roots. In that sense, the distinction between urban and rural populations is in largely physical agglomerations that do not detract from the socio-cultural linkages to rural roots. In Mongolia, the largest urban setting is Ulan Baatar, in which almost half the population of the country resides, and with increasing internal migration to the city, that figure is increasing fairly rapidly. As in most of the world, the propensity to migrate to urban areas in Mongolia is largely an issue of escape from poverty to the greater economic

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<sup>91</sup> IFC. *International Finance Corporation's Guidance Notes: Performance Standards on Environmental and Social Sustainability*. Guidance Note PS7. 2012.

<sup>92</sup> World Bank. *Indigenous Latin America in the Twenty-First Century: The First Decade*. 2015

<sup>93</sup> Minority Groups International. *World Directory of Minorities and Indigenous Peoples*.



opportunities that cities provide. However, the interdependencies of kinship systems that allow rural social worlds to continue to exist within city systems – as opposed to urban assimilation – appear to be characteristic of today’s Mongolia. The area in which the mine is located exhibits among the highest out-migration rates in the country.

172. While allowing for that *perception* of distinctiveness, the differences in dialect and turns of phrases – which are more local variations among rural populations than clearly distinguishable languages – do not appear to represent the complete linguistic distinction that would, say, distinguish separate peoples. In Mongolia, the homogeneity of the population and their linguistic commonalities do not appear to justify a distinction based on generally perceived variations in dialect from the official *Khalka*.

173. In Mongolia, the recognized minority groups include Kazakh, Durbet Mongol, Bayad, Buryat Mongol, Dariganga Mongol, and Chinese and Russian.<sup>94</sup>

174. The final perspective from which to view the issue is the position of the Mongolian government. As a recent Asian Development Bank document notes, “*The Government of Mongolia has no specific law related to Indigenous Peoples or ethnic minority concerns and issues. As such there is no specific branch of government designated to be responsible for addressing ethnic and indigenous peoples concerns. However, in Article 20.3 of 2006 Parliament Law, a standing committee has been designated to formulate state policies on ethnic minorities’ language, culture and tradition.*”<sup>95</sup>

175. Using the national definition is also important from the World Bank’s perspective on the issue, reflected in the general observation made at a 2015 presentation on IPs, in which it points out that “*Definitional clauses and legal frameworks included in national constitutions, statutes and relevant legislation ... provide a preliminary basis for identifying IPs*”<sup>96</sup> While “preliminary” may imply that further investigation of guiding characteristics may be required to conclude that a group may or may not be indigenous, the choice of the word does set a standard of application, and in keeping with customary legal understanding, makes the national legal framework the primary basis for recourse.

176. In sum, given national laws, the conclusions in generally available literature on the Mongolian peoples, and the linguistic and socioeconomic character of the Mongolian populations, this Compliance Review Report believes that EBRD’s position on IPs as defined in EBRD PR7 and explained by Management is relevant and applicable. Hence, this Report, consistent with the perspective of EBRD as set out in the ESP, considers that the provisions of PR7 do not apply to the Project.

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<sup>94</sup> *Ibid.*

<sup>95</sup> ADB. *Mongolia: Western Regional Road Corridor Investment Program: Indigenous Peoples Planning Framework*. Draft. October 2011. The document was prepared to guide the preparation of future investment tranches which might affect any Indigenous Peoples located on other road sections under the Program.

<sup>96</sup> V. Mosoti. *An Overview of the Legal Aspects in the Application of the Bank Policy on Indigenous Peoples*. World Bank. 2015. Citation from General Counsel Legal Memo 2004.

## IX. PR10: Disclosure and Public Consultations

### A. The Policy

177. As Table 4 shows, PR10 requires EBRD to identify issues that may affect stakeholders, inform those stakeholders, and engage them in a meaningful relationship that allows them to understand their situation more clearly and enable them to be able to deal with any impacts in as practicable a way as possible.

178. PR10 outlines several steps that reflect EBRD's commitment to the Aarhus Convention<sup>97</sup> and the right of stakeholders to knowledge and management of the environmental and social consequences of the Project. It also clearly requires that stakeholder engagement be "*free of manipulation, interference, coercion and intimidation ...*"<sup>98</sup>

179. In terms of disclosure, EBRD is required to ensure that affected communities are informed of the purpose nature and scale of the Project, environmental and social risks associated with the Project, and set out an effective consultation process<sup>99</sup>. The consultation process should be structured in a way that affected parties are able to express their view and allow the client to consider and respond to those views.<sup>100</sup>

180. Paragraphs 24-26 of PR10 deal with the establishment and conduct of a grievance mechanism "at no cost and without retribution." The key issues here are whether the grievance mechanism set in place – commensurate with the expected impacts of the Project – was accessible and effective, and whether the client had arrangements to respond adequately during the initial stages of implementation of the Project.

181. It is important to refer to PR5, which in the context of resettlement, also requires that EBRD takes measures to ensure that that the grievance mechanism is set up early in the project process, and that it is adequate 'to receive and address in a timely fashion specific concerns about compensation and relocation that are raised by displaced persons and/or members of host communities'.<sup>101</sup> Although resettlement occurred prior to EBRD's involvement in the Project, such a structure ought to have been reviewed and agreed by EBRD for its adequacy as a mechanism expected to remain operational throughout the life of the Project.

182. As reiterated in several places in this report, with the breakdown in communications between EBRD and Altain Khuder in 2013, it has not been possible to engage the Client in continued discussions on the progress of implementation of the ESAP after the update of the document by ERM in December 2012 (which noted considerable progress in implementation of the recommendations), and its relations with the communities. From that perspective, it has not been possible to apply the requirements set out in paras. 21-23 of PR10 after the initial period of engagement that ended in mid-2013.

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<sup>97</sup> The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was negotiated in 1998 within the framework of the UN Economic Commission for Europe, signed by 35 of its member states and by the European Community at the "Environment for Europe" ministerial conference, and entered into force in 2001. Currently, it has 47 contracting parties, including the European Community and all its individual member states, with the exception of Ireland. Mongolia has indicated interest, but has yet to accede to the Convention.

<sup>98</sup> PR10. Para. 6.

<sup>99</sup> *Ibid.* Para 12.

<sup>100</sup> *Ibid.* Para 15.

<sup>101</sup> PR 5. Para. 13.

## B. Policy Application

183. In the Project's area of influence, government policies are applied by the local authorities, represented by the Governors of the *soums*.<sup>102</sup> Hence, while outreach to communities is an essential aspect of compliance with PR10, the role of formal channels of communications must be kept in mind.<sup>103</sup>

184. The participatory activities required under the PRs was followed by EBRD, which initiated stakeholder dialogue with the local communities as part of the due diligence process in October 2011. At the time, the Client had already appointed a Public/Community Relations Manager who had disclosed project information to the surrounding community, conducted consultation and feedback surveys with community representatives, and set up a suggestion box in Tseel *soum*. Aside from the suggestion box, there had been several exchanges between Altain Khuder and the communities both at Tseel *soum* and those through which the mine-border road passed as part of the resettlement and environmental and social assessment activities. It is claimed that none of herders knew about the suggestion box, and that the sole complainant to Altain Khuder had never received a response from the company.<sup>104</sup>

185. For its part, Altain Khuder asserted that the public relations team had maintained communications with the herders and local authorities through phone calls, face-to-face meetings and in written form.<sup>105</sup> This Report does not have documentation that demonstrates such communications, but it does seem unlikely that Altain Khuder could have established mining operations in the area without some measure of communication with the local communities. Indeed, that would have been highlighted in the educational tour to South Gobi that was sponsored by Altain Khuder for herders to expose them to the experiences of communities affected by other mining projects. In continuing its relationship with the community, Altain Khuder conducted a *Forum on Cooperation and Contribution of the Extractive Industries Transparency Initiatives in the Sustainable Development of Local Communities*, Altai Town, 7 June 2013.

186. Stakeholder engagement has been reflected in Altain Khuder's corporate social responsibility initiatives, which have included tuition scholarships, jobs and training for relocated families. It has not been possible to verify the progress of implementation other outreach programs that were supposed to have included livelihood activities, improvements to grazing capacity and construction of a herd reserve. It is understood that as of September 2011, Altain Khuder had contributed about \$486,000 (MNT609 million) to Gobi Altai Province and the four *soums*. Subsequent outreach activities have included street improvements (Aimag), vegetable

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<sup>102</sup> The *baghs* also have a term for their "governors," *Zasag Dargas*, who represent the families in a *soum* to the Governor of that *soum*.

<sup>103</sup> "In most mining projects in Mongolia, the *soum* government is the most immediate and influential local stakeholder. In the case of small and medium size mining operations, a single *soum* (county) is generally regarded as 'the host community'. Effectively the chief executive officer of the *soum* government, the *soum* governor is nominated by a majority in the *soum's* Citizens' Representatives Khural (CRK) and endorsed by the *aimag* (provincial) governor. In turn, the CRK of the *aimag* nominates the *aimag* governor, who is endorsed by the Mongolian Prime Minister." From B. Dalaibuyan. *Mining, "Social License" And Local-Level Agreements in Mongolia*. University of Queensland. 2015.

<sup>104</sup> OT Watch. *Fact-Finding Mission Report*. Page 14.

<sup>105</sup> Response by Altain Khuder. OT Watch. *Fact-Finding Mission Report*. Page 14.

tractors (Bugat), potato digging machine (Bugat), bear food (Tsogt), donations for Burenkhairkhan mountain sacrifice (Tseel),<sup>106</sup> and reusable waste materials supplied weekly (Tseel).<sup>107</sup>

187. In dealing with information disclosure, the ESAP recommended that dust deposition monitoring be undertaken at 10 points, important for data collection, but not enough specificity in setting out how those results would be communicated to the communities. The ESAP also recommended the preparation of a Stakeholder Engagement Plan (SEP) that would have identified a process to which the company would adhere as part of a structured process of consultations with stakeholders. True, Altain Khuder did provide results and reports to *soum* authorities, but not as part of a structure agreed with EBRD. Although the SEP had not been prepared by the time there had been disengagement by the Client, the intervening period could have been used to have made that a priority, with documentation of the process.<sup>108</sup>

188. As noted earlier in this Report, there is no documentation on the structure and appropriateness of the grievance mechanism that is said to have been developed by the Client and to which EBRD may have agreed. It is understood that the arrangements involved a suggestion box at Tseel *soum* administrative office, of which herders may or may not have been fully aware. It appears that non-documentation routes were also available in communications with Altain Khuder. However, accessibility appears to have been an issue as it has been reported that herders were unable to approach the mine to discuss their issues. While the security of mining operations has to be recognized, EBRD should have ensured more outreach by the Client to the herders to assure them that their concerns would be noted formally and that there would be a structured process of redress and resolution.

189. The lack of formal procedures for logging complaints and resolving issues was noted in the Interim ESIA and ESAP.<sup>109</sup> However, Altain Khuder asserted that all “requests” (which may include complaints) were “*duly processed and resolved,*”<sup>110</sup> and that it had “*implemented a documentation procedure to receive, respond and track grievances.*”<sup>111</sup>

190. In its ESAP Update of 2012, Altain Khuder states that the documentation procedure had been completed, within recording, resolution in 10 days, and documentation of grievance resolutions. With that, it concluded with the comment, “*Item closed.*”<sup>112</sup> This Compliance Review Expert has had no documentation to review, and is unable to comment given the current relations between EBRD and Altain Khuder.

191. This Compliance Review Report considers that EBRD should have reviewed and monitored the Client’s development and implementation of an effective (and formally documented) grievance mechanism – an “*independent, objective appeal mechanism*”<sup>113</sup> – that would have covered not only access to the judicial system, but also allowed for resolution at the community

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<sup>106</sup> Extractive Industries Transparency Initiative. *Mongolia Eighth EITI Reconciliation Report*. 2014. Various tables.

<sup>107</sup> *Implementation of EPP and EMP for the First Half of 2013*. Altain Khuder. Department of Environment. Page 23. *Implementation Report of 2012 Environmental Protection, Reclamation, and Monitoring: Tayan Nuur Mine in Tseel Soum, Govi-Altai Province*. Altain Khuder. Environment Department. 2012, p. 13.

<sup>108</sup> *2012 Implementation Report*. ESAP Update. Item 31. EBRD’s Mining Operations Policy (2012) states that, “Best practice will be to work with local communities on the Stakeholder Engagement Plan so that they can advise on the best means of communication for their needs” Page 47.

<sup>109</sup> *ESRAP*. Page 25 and Appendix A.

<sup>110</sup> OT Watch. *Fact-Finding Mission Report*. Page 14.

<sup>111</sup> *2012 Implementation Report*. ESAP Update. Table 1.1. Item 3

<sup>112</sup> *Ibid.* Item 32

<sup>113</sup> PR10. Para. 25.

level,<sup>114</sup> as required under PR10 and PR5. That requirement was not reflected in the recommendations set out in the ESAP, and not available as part of EBRD due diligence data.

192. Intimidation and harassment of herders has been alleged. However, there has been no evidence submitted to confirm specific instances of such actions, which would have been in contravention of the requirements of PR10 that “*stakeholder engagement will be free of manipulation, interference, coercion, and intimidation.*”<sup>115</sup> This Compliance Review Report cannot comment on the lawsuits that are currently being considered in the Mongolian courts.

193. This Compliance Review Report considers that while EBRD had partially fulfilled the provisions of PR10 in ascertaining that consultations had been initiated by Altain Khuder, with EBRD itself having participated in community discussions, and general project information disclosure had been undertaken, there appears to have been a lack of formal documented disclosure, in accordance with the requirement under PR10 for stakeholder engagement on potential environmental and social impacts, to local communities on the environmental impacts of the project and how those were to be managed. It is recognized that the preparation of a Stakeholder Engagement Plan had been recommended by EBRD, but that plan had not been prepared with the involvement of stakeholders by the time EBRD-Client relations had deteriorated in mid-2013. Given the outreach of AK with the communities and the relatively few affected persons, steps toward preparation of the SEP could have strengthened stakeholder relations and allayed fears or addressed concerns that the herders might have had as well as ensured greater access to the Client.

194. While the degree and extent of those environmental impacts have been identified in various environmental reports, and it appears that based on scientific tests, the impacts are not as extensive as claimed by the Complainants, it is nonetheless a failing by EBRD not to have required Altain Khuder to have disclosed at the outset of the EBRD financing all potential environmental and social impacts in a formal document to the communities that would have reassured them of the true extent of those impacts and the environmental management practices being initiated by the Client. It should be noted that under Mongolian EIA laws and procedures, although public consultation is mandatory, there appears to be no requirement for public disclosure of the contents of an EIA. During project implementation, though, Altain Khuder appears to have complied with the ESAP recommendation to provide MNET/MNGD with environmental monitoring results, which were also posted in the *soum*.

195. This Report considers that EBRD did not fully comply with monitoring the Client's implementation of PR10 in (i) ensuring as part of due diligence and through formal documentation, the disclosure of the environmental and social impacts of the Project, and (ii) ensuring and documenting that the public grievance mechanism was structured in accordance with customary good international practices and the intent of PR10; and (iii) ensuring that the Stakeholder Engagement Plan was prepared soon after the ESAP recommendations.

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<sup>114</sup> The Land Law refers disputes over land to the governors of administrative units and eventually the courts (Article 60). The Civil Code and Law on Allocation of Land to Private Citizens refer various types of disputes to the courts.

<sup>115</sup> PR10, Para. 6.

## X. Conclusion

196. This Compliance Review Report has carefully considered the circumstances under which the Project was developed and monitored, noting four aspects of particular importance. First, the Project was operational prior to EBRD financing, and hence what was required was a detailed review of the environmental and social impacts of the mining operations, noting gaps in analyses and areas in which the Client would have to respond to be able to conform to the requirements of EBRD's Environmental and Social Policy 2008. The recommendations and corrective measures required by EBRD were set out in an Environmental and Social Action Plan (ESAP) to which the Client agreed and commenced implementation.

197. Second, owing to a situation beyond the scope of this Report, communications between EBRD and the Client broke down in mid-2013, and has now led to legal proceedings, thereby making it impossible for EBRD to continue monitoring progress of implementation the recommendations made by EBRD on environmental and social issues associated with the Project; hence, while technically there would have been non-compliance by EBRD with the provisions of the Policy in continued monitoring of the Project had it not gone into legal proceedings, those circumstances would appear to have made it impossible for EBRD to have fulfilled that responsibility. The customary project monitoring activities that could have been expected of EBRD in normal circumstances was not possible – at the time, EBRD expected to field a mission in 2013 and to continue receiving routine reporting information from the Client. Nonetheless, there are some areas that this Report has identified on actions that should have been taken at due diligence and in the intervening time between the recommendations and the breakdown in relations between EBRD and the Client.

198. Third, mining in Mongolia is the subject of much continuing discourse and debate, especially from the perspective of the impacts that economic transition is seen to be having on traditional pastoralists, the herders, especially with changes in land laws and property rights. While this Report is constrained by paucity of information on some issues owing to both the inability to access archival material held by the Client and the lack of scientific data on health impacts claimed by local population, it considers that there is enough material to come to a general conclusion.

199. Fourth, despite the breakdown of relations between EBRD and the Client in 2013, there is enough evidence to demonstrate that the intent of the Client to comply with EBRD PRs on environmental and social issues was clear, and that that commitment was demonstrated, among others, in technical reports, implementation of an environmental management system, communications with communities and local authorities, work toward completion of a paved road from the mine to the border, and several corporate social responsibility initiatives. That intent reflected EBRD's expectation, in normal circumstances, of progress toward ensuring that there was compliance with the PRs. The environmental management techniques that were envisaged as part of project development were generally sound, and as an evolving process with close monitoring, could have formed the basis of more effective consultations among stakeholders had there not been the breakdown of relations between EBRD and Altain Khuder in mid-2013.

200. Finally, the issues raised by the Complainants were considered against the backdrop of not only the specific areas in which actions were initiated, but also the socioeconomic structures prevailing in the country relevant to the Complaint. The Compliance Review Expert finds it

unfortunate that the possibility of continuing an effective dialogue with all stakeholders has been interrupted with the breakdown in EBRD-Client relations, and that current legal proceedings preclude customary project monitoring activities.

201. Project monitoring and oversight has been problematic in this Project, especially in review of the progress of implementation of the Project. Prior to 2013, EBRD followed the customary steps in project supervision. However, it has been unable to monitor the Project since mid-2013 owing to deterioration of EBRD-Client relations, the reasons for which are beyond the mandate of this inquiry. Thus, it has not been possible to verify to any substantive degree, the progress of implementation of the recommendations of the ESAP beyond 2013.<sup>116</sup> Nonetheless, this Report considers that there is a reasonable amount of information available to draw conclusions about the compliance of EBRD with the Environmental and Social Policy on the issues raised in the Complaint.

202. The Compliance Review Report concludes the following:

- EBRD has partially complied with the provisions of the ESP with regard to implementation of PR1
  - Technical experts were engaged to conduct reviews and gap analyses, which were documented
  - Environmental and social impacts were reviewed and assessed in detail, and corrective measures recommended in the ESAP
  - Corrective measures were monitored up to the issuance of the ESAP Update
  - EBRD has been unable to comply with monitoring requirement since 2013 owing to the breakdown of relations between EBRD and Altain Khuder
- EBRD has complied with the provisions of the ESP with regard to implementation of PR3 and PR4
  - Potential impacts were carefully assessed, areas identified in which corrective measures were needed, and relevant environmental management recommendations made for the Client to implement.
- EBRD has partially complied with the provisions of the ESP with regard to implementation of PR5
  - With resettlement activities having taken place prior to EBRD financing, due diligence was carried out by EBRD to confirm that Altain Khuder identified those affected, assessed losses, paid for loss of assets, and provided support services to facilitate the relocation of affected herders
  - EBRD has been unable to comply with monitoring requirements, including progress of implementation of the agreed post-resettlement

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<sup>116</sup> This was also communicated to representatives of supportive organizations in the Complaint (OT Watch, SOMO, Bankwatch) during a conference call on 18 May 2016.

survey<sup>117</sup> since 2013 owing to the breakdown of relations between EBRD and Altain Khuder

- The provisions of PR7 do not apply to the Project
- EBRD has partially complied with the ESP with regard to implementation of the provisions of PR10
  - Consultations were held with affected communities as part of the resettlement and impact awareness processes, with local authorities in obtaining relevant operational permits, and local residents in communicating on issues of concern, although all issues may not have been resolved to the point at which EBRD-Client relations broke down
  - Environmental and social impacts were not formally communicated to communities and documented appropriately
  - There is no documentation that an EBRD-agreed structured Grievance Mechanism was established and implemented, with arrangements to record complaints and document resolutions consistent with international good practice.
  - A Stakeholder Engagement Plan was not prepared as soon as possible after the ESAP recommendations, although a commitment was made by the Client.

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<sup>117</sup> In 2011, Sanity Watch LLC was engaged by Altain Khuder to conduct a post-resettlement survey. However, those findings were not available for the Compliance Review Report.



## XI. Recommendations to Management

203. This Report considers that in light of the current relations between EBRD and Altain Khuder, there are no substantive recommendations that can be made with respect to actions that the Bank may take in ensuring full compliance with the PRs. However, given that there were instances of partial non-compliance, and consistent with the PCM RP44, a few recommendations may be made for the consideration of Management in drawing on lessons from the conduct of due diligence for the Project that may inform similar projects.

204. Of particular importance is the need to engage at the outset, more actively in community consultations that would work toward not only ensuring successful project outcomes, but also developing closer affinity with development projects by local communities. Under the Project, the awareness and responsiveness of Altain Khuder to environmental management issues was particularly noteworthy. However, given the sensitivity of mining operations in Mongolia, and the effect of industrialization on the largely pastoral character of Mongolia, greater effort should have been taken by EBRD in engaging the communities, including civil society organizations, on aspects of project development and monitoring particularly relevant to them, especially properly disclosing environmental impacts that might have allayed their fears of impacts on health and general welfare.

205. This Report recognizes that the Project was operational prior to its involvement, and that EBRD had assessed relevant aspects of project development retrospectively to ensure that there would be full compliance with its PRs. However, there were shortcomings in formal disclosure of environmental and social impact information, and the grievance redress mechanism that should have been addressed by EBRD as part of its due diligence.

Topic	Recommendation	Comment
1. Breakdown in communications between EBRD and a client during project implementation	Review EBRD systems and procedures to identify actions that could be taken by EBRD, including continuing involvement in project-impacted communities, in the event that there is a breakdown in relations between EBRD and a client that precludes progress in project implementation and monitoring activities	This route is intended to address two aspects. First, it serves to clarify EBRD's position in situations in which it is unable to continue monitoring projects for any reason. Second, it provides reassurance to stakeholders that while there may be extenuating circumstances for lack of monitoring and oversight of projects, the concerns of those who may be affected by project impacts are not ignored or disregarded. However, the exact course of any action must be determined by Management.
2. Restoration of relations between EBRD and Altain	In the event that working relations between EBRD and Altain Khuder are restored, review the progress of	This aspect is beyond the scope of the Report, but the recommendation is made to highlight the priority that

Topic	Recommendation	Comment
Khuder	implementation of ESAP recommendations; suggest corrective measures if needed; monitor Altain Khuder's implementation of corrective measures; and establish a consultative framework with the communities to ensure that any concerns are recognized and addressed.	should be given to monitoring progress on environmental and social issues associated with the Project.
3. Community engagement	Recognize more fully that community involvement during project development, as much in private sector initiatives as in the public sector, is an obligation in development activities in which EBRD should be closely involved to ensure that clients are aware of responsibilities	While this is generally an integral part of EBRD project processing, the sensitivities in special situations should be highlighted and more effort taken to address any concerns that communities may have early in the project cycle. The need for effective stakeholder engagement has been recognized in EBRD's <i>Mining Operations Policy</i> 2012.
4. Accountability and grievance mechanisms	As this aspect is mandated for all EBRD operations, and although circumstances may vary considerably, structured processes should be agreed, fully documented and made available to all parties.	While recourse to the judicial system is of course available to all complainants, the existence of an objective and structured project-based mechanism to which all stakeholder agree allows for more effective resolution of issues. In the resolution of some grievances, it may not be possible to establish causality in perceived project impacts. However, that implies it is critical to initiate a dialogue so that all parties are able to express opinions and reach understanding on approaches to resolution. It is as much the process as the outcome that is important in accountability.
5. Local socioeconomic and political	Although socioeconomic studies form an essential part of project processing and supervision, particular care	In traditional societies that are impacted by development activities, there are often mores and customs that

Topic	Recommendation	Comment
structures	should be taken to ensure that projects are more clearly informed, where relevant and important, by insight into local laws, customs and procedures, particularly with respect to land tenure, to ensure that PRs are followed substantively.	should be considered in setting out project parameters. That aspect is particularly important in countries in transition, where new legal and policy frameworks have not been fully captured in local-level structures. Appropriate adaptations should be reflected in devising approaches to project development and implementation.
6. Project documentation	In the event that environmental appraisal, and associated documentation are not made available for public disclosure, ensure that there are ways of disseminating and recording formal communication (summaries) to affected communities on environmental and social impacts of projects in a form that is understood by those communities.	There may need to be more attention to more effective outreach documentation by EBRD on environmental and social impacts of projects.

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