

PUBLIC



Project
Complaint
Mechanism

CMI OFFSHORE

REQUEST NUMBER: 2017/10

COMPLIANCE REVIEW REPORT – February 2019

PUBLIC

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.

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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>

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

EXECUTIVE SUMMARY

The Project Complaint Mechanism (PCM) received a Complaint in October 2017 in relation to EBRD's financing of the CMI Offshore Project, Turkmenistan.

The Compliance Review Expert finds that the oil extraction operations in the Cheleken oil field serviced by the Client ought to have been regarded as related or associated facilities or activities in respect of the present Project and, further, that, by failing to include consideration of direct, indirect or cumulative impacts likely to be associated with such oil extraction operations in the environmental and social assessment process for the present Project, the Bank failed to comply with the requirements of ESP PR 1.9.

Despite the finding that the direct, indirect or cumulative impacts likely to be associated with the related oil extraction operations ought to have been considered in the environmental and social assessment for the present Project, the Compliance Review Expert has determined that the CMI Offshore Project was correctly categorised as a Category B project in compliance with ESP Paragraphs 23-25.

Therefore, the PCM Compliance Review Expert finds that the Bank is in non-compliance with ESP PR 1.9.

I INTRODUCTION

Background

1. On 13 October 2017 the PCM received a Complaint regarding the CMI Offshore Project.¹ The Complaint was submitted by the Turkmenistan Working Group of the Civic Solidarity Platform (hereinafter “the Complainants”), comprising the Centre for the Development of Democracy and Human Rights (Russia), Crude Accountability (USA), Freedom Files (Russia), and a number of civic activists from inside Turkmenistan. The Complainants requested that the PCM undertake a Compliance Review.
2. The Project was approved by the Board on 18 October 2017, five days after receipt of the Complaint, categorising it as a Category B Project under the 2014 Environmental and Social Policy (ESP). The PCM registered the Complaint on 20 October 2017 in accordance with Paragraphs 11-13 of the PCM Rules of Procedure (PCM RPs). The Complaint was subsequently posted on the PCM Register pursuant to Paragraph 20 of the PCM RPs. On 1 November 2017 Ms. Susan Wildau was appointed as an Eligibility Assessor to conduct the Eligibility Assessment jointly with the PCM Officer, in accordance with Paragraph 22 of the PCM RPs. On 16 February 2018 the Eligibility assessors determined that the Complaint was eligible for Compliance Review on several of the grounds alleged therein².
3. The Project involves a senior loan of up to USD 21 million to be provided for 5 years to enable CMI Offshore Ltd. to continue its growth programme in Turkmenistan and Kazakhstan. The Bank's loan will be used to support the Company's balance sheet restructuring and in acquiring new vessels. CMI Offshore provides marine transportation and logistics services to the offshore oil and gas sector in the Caspian Sea region.
4. Among the compliance issues raised by the Complainants, the following concerns in relation to the Project have been found eligible for Compliance Review by the Eligibility Assessors:
 - allegations about incorrect project categorisation;
 - allegations that the project is an associated facility of an oil extraction project and directly impacts an internationally protected area; and
 - as a consequence of alleged improper project categorization, a related claim that EBRD failed to conduct an Environmental and Social Impact Assessment in line with its policies.³
5. On 1 March 2018 Prof Owen McIntyre was appointed to serve as the Compliance Review Expert for the present Complaint. On 30 May 2018 the duration of the Compliance Review Expert's assignment was extended to 30 June 2018.

Positions of the Relevant Parties

Complainants

6. Of relevance to the present Compliance Review, in the Complaint and supporting documentation the Complainants allege that EBRD has failed to comply with the requirements of the ESP by incorrectly categorising the Project as Category B, rather than Category A, and has consequently failed to conduct an Environmental and Social Impact

¹ Complaint No. 2017/10, annexed to this report and available at: <https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>

² Eligibility Assessment Report, annexed to this report and available at: <https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>

³ See Eligibility Assessment Report, at 10-11.

Assessment, as required in the case of Category A projects.⁴ In support of this position, the Complainants claim that the Project is an associated facility of an oil extraction project, and directly impacts an internationally protected area, the Hazar State Nature Reserve.⁵

Bank Management

7. In its written response to the PCM, Bank Management argues that the Project has been correctly categorised as Category B in accordance with Paragraph 23 of the ESP, having regard to the fact that the Client is not directly involved in the exploration, extraction or transportation of oil or gas, and that the Project involves the acquisition of an existing vessel already being operated by the Client under a hire-purchase contract.⁶ Bank Management also points out that the independent Environmental and Social Audit, commissioned as part of the Bank's due diligence for the Project, confirmed that no special nature protection areas exist within CMI Offshore's area of operations. The Bank also received formal assurances from the Administration for the Hazar State Nature Reserve that 'the operations maintained by the CMI Offshore's vessels to service the objects offshore do not represent a threat to its flora and fauna and other allied areas under protection'.

The Client

8. Though the Compliance Review Expert was not in direct contact with the Client, the Client did enter into earlier written communications with the PCM to share correspondence from the Complainants and to explain that it had also received assurances from the Administration for the Hazar State Nature Reserve similar to those received by Bank Management.⁷

Steps Taken in the Conduct of the Compliance Review

9. The Compliance Review Expert has undertaken a detailed examination of the Complaint and all additional information provided by the Complainants, as well as all relevant Project information provided by Bank Management, including the independent Environmental and Social Audit of the company and all relevant correspondence with the Client and Complainants, in order to determine if the Bank has met all relevant requirements under the 2014 Environmental and Social Policy.
10. In addition, the Compliance Review Expert travelled to EBRD Headquarters on 5 September 2018 to inspect the documents associated with the environmental and social appraisal of the Caspian offshore oil extraction project operated by Dragon Oil, which the Client services with the vessels which are the subject of the present Project. In the circumstances of the present Complaint, a site visit would not have been useful and so the Compliance Review has been conducted primarily on the basis of a desktop review of relevant documentation.
11. The Compliance Review Expert has engaged with the Complainants and Bank Management as necessary, including a conference call with the Complainants on 21 May 2018 to seek clarification of several matters, and a conference call with Bank Management on 7 June 2018 to discuss a number of matters arising during the course of the Compliance Review process.

⁴ See Complaint No. 2017/10 and Annex A.

⁵ In addition to the Complaint, see the letter from many of the Complainants to EBRD Board of Directors, dated 20 January 2017, and the letter from many of the Complainants to EBRD Director, Central Asia, dated 20 March 2017.

⁶ Bank Management Response, at 2 (annexed to this report).

⁷ See Eligibility Assessment Report, at 6.

II RELEVANT EBRD POLICY OBLIGATIONS

Responsibility to Categorise the Project Correctly

12. As the eligible elements of the present Complaint are primarily concerned with the alleged incorrect categorisation of the CMI Offshore Project under EBRD's 2014 Environmental and Social Policy (ESP) - as Category B, rather than Category A - it is necessary to examine the requirements relating to project categorisation set out under Paragraphs 23-25 and 29 and Appendix 2 of the ESP.
13. It is quite clear from the wording of Paragraph 23⁸ that determination of whether a project falls within Category A or B is largely dependent upon 'the nature, location, sensitivity and scale of the project, and the significance of its potential adverse future environmental and social impacts'. Therefore, the Bank is required to have due regard to these key criteria in making such a determination. Any categorisation of a project which would ignore, or appear irrational in the light of, these criteria would be likely to amount to non-compliance with Paragraph 23.
14. It should be remembered that Paragraph 23 also stipulates that '[p]ast and present environmental and social issues and risks associated with *project-related existing facilities* will be subject to environmental and social appraisal *regardless of the categorisation*'.⁹ This suggests that the correct formal categorisation of a project as either Category A or B may not be the key objective of Paragraph 23, but rather the conduct of an appropriate environmental and social appraisal of the project, including the risks associated with existing project-related facilities. This is reiterated by Paragraph 29 on the 'Overall approach to project appraisal', which provides that
- 'All projects undergo environmental and social appraisal ... The appraisal will be appropriate to the nature and scale of the project, commensurate with the level of environmental and social impacts and issues, and with due regard to the mitigation hierarchy.
15. Paragraph 24 of the ESP further elaborates on the type of project which should be categorised "A", *i.e.* one which
- 'could result in potentially significant adverse future environmental and/or social impacts which, at the time of categorisation, *cannot readily be identified or assessed*, and which, therefore, require a formalised and participatory environmental and social impact assessment process'.¹⁰
- Therefore, in order to require categorisation as an "A" project, it appears that, in addition to being significant, presumably having regard to the factors identified in Paragraph 23,¹¹ the potential adverse impacts associated with the project must be uncertain at the time of its initial categorisation. Paragraph 24 expressly links such uncertainty regarding a project's potential adverse impacts to a requirement for 'a formalised and participatory environmental

⁸ Para. 23 of the 2014 ESP provides in full:

'The EBRD categorises each project to determine the nature and level of environmental and social investigations, information disclosure and stakeholder engagement required. This will be commensurate with the nature, location, sensitivity and scale of the project, and the significance of its potential adverse future environmental and social impacts. Past and present environmental and social issues and risks with project-related existing facilities will be subject to environmental and social appraisal regardless of the categorisation.'

⁹ Emphasis added.

¹⁰ Emphasis added.

¹¹ Namely 'the nature, location, sensitivity and scale of the project, and the significance of its potential adverse future environmental and social impacts'.

and social impact assessment process'.¹² This linkage is borne out by subsequent provisions of the ESP. For example, PR 1.10 expressly stipulates, *inter alia*, that such an 'ESIA process will include a scoping stage to identify the potential future environmental and social impacts associated with the project'. In other words, uncertainty must be addressed regarding the potential significant adverse environmental and social impacts of a project, including 'risks associated with project-related existing facilities',¹³ and this can only be achieved by means of 'a formalised and participatory environmental and social impact assessment process'.¹⁴ This strongly suggests that potentially harmful project-related activities that are not otherwise subjected to some appropriate and commensurate form of appraisal ought to be categorised "A" and subjected to such 'a formalised and participatory environmental and social impact assessment process', as this represents 'the nature and level of environmental and social investigations, information disclosure and stakeholder engagement required'.¹⁵ Therefore, it is necessary to determine whether the activities envisaged by the CMI Offshore Project, or those involving associated facilities, have previously been subjected to some appropriate and commensurate form of appraisal or assessment.

16. This understanding of the requirement for EBRD to consider other, related assessments corresponds with established practice in the implementation of the new EU EIA Directive,¹⁶ from which important lessons may be learned.¹⁷ For example, national guidance on screening and scoping for EIA advises that authorities should consider 'the extent to which other assessments may address some types of effects adequately and appropriately', and specifically mentions assessments carried out to support separate consent requirements for closely related projects and activities.¹⁸ This guidance further advises that environmental appraisal 'should avoid duplication of assessment covered by these [other assessments] but should incorporate their key findings as available and appropriate'.¹⁹ Such guidance suggests that in determining the environmental and social assessment required, and thus the appropriate categorisation of a project, EBRD should consider other existing assessments relating to project-related or associated facilities and activities in order 'to form an overall understanding of the likely effects – direct, indirect and cumulative – that will arise because of a decision to permit [or fund] a project'.²⁰

17. Paragraph 24 also points out that a 'list of indicative Category A projects is presented in Appendix 2 to this policy', and this list expressly includes several categories of oil-related projects,²¹ most notably including '[e]xtraction of petroleum and natural gas for commercial purposes'.²² The express inclusion of several categories of oil-related facility suggests that

¹² Similarly, PR 1.10 identifies Category A projects as those which 'could result in potentially significant adverse future environmental and/or social impacts *which cannot readily be identified or assessed* and will require the client to carry out a comprehensive Environmental and Social Impact Assessment (ESIA)' (emphasis added).

¹³ Para. 23, ESP.

¹⁴ Para. 24, ESP.

¹⁵ This is stated to be the overarching purpose of the requirement for categorisation set out under Para. 23 ESP.

¹⁶ Directive 2014/52/EU.

¹⁷ Under ESP para. 7, EBRD 'is committed to promoting the adoption of EU environmental principles, practices and substantive standards', including those contained in EU secondary legislation. In addition, ESP para. 6 guarantees that EBRD's environmental and social appraisal process shall be 'operated in compliance with applicable regulatory requirements and good international practice (GIP)'.

¹⁸ See Environmental Protection Agency, *Guidelines on Information to be Contained in EIA Reports* (EPA, Dublin, August 2017), at 26, available at:

<https://www.epa.ie/pubs/advice/ea/EPA%20EIA%20Guidelines.pdf>

¹⁹ *Ibid.*, at 27.

²⁰ *Ibid.*, at 26.

²¹ The relevance of Appendix 2 to categorisation of a Project as "A" is also highlighted in PR 1.10.

²² ESP, Appendix 2, para. 15.

the ESP recognises the ‘potentially significant adverse future environmental and/or social impacts’ of such facilities for the purposes of categorisation under ESP Paragraph 24. At the same time, Appendix 2 recognises the risks associated with maritime / ship transport projects by expressly including ‘[l]arge-scale sea ports as well as inland waterways and ports for inland waterway traffic; trading ports, piers for loading and unloading connected to land, and outside ports (excluding ferry piers)’.²³ In addition, Appendix 2 highlights the risks associated with projects which are liable to impact protected areas by including

‘Projects which are planned to be carried out or are likely to have a perceptible impact on sensitive locations of international, national or regional importance, even if the project category does not appear in this list. Such sensitive locations include, inter alia, nature protected areas designated by national or international law, critical habitat or other ecosystems which support priority biodiversity features ...’²⁴

18. Paragraph 25, on the other hand, stipulates that a project should be categorised B ‘when its potential adverse future environmental and/or social impacts are typically site-specific, and/or readily identified and addressed through mitigation measures’. However, like Paragraph 23, it also suggests that categorisation as A or B may not be key, but rather that adequate and appropriate environmental and social appraisal must be conducted having due regard to the relevant circumstances pertaining to each project:

‘Environmental and social appraisal requirements may vary depending on the project and will be determined by the EBRD on a case-by-case basis.’

19. It is necessary, therefore, to examine whether the CMI Offshore Project, either alone or in combination with related / associated facilities and activities, warranted categorisation as an “A” project, either due to its ‘nature, location, sensitivity and scale’ and the resulting significance of its environmental and social impacts, or due to the fact that such impacts could not ‘readily be identified or assessed’ at the time of categorisation.

Responsibility to Consider Risks Presented by Project-Related or Associated Activities or Facilities

20. Despite the fact that the ESP defines the term “project” quite restrictively,²⁵ several provisions of the ESP refer to ‘project-related facilities’ or to ‘associated facilities and activities’, suggesting that such facilities or activities should also be considered under environmental and social appraisal.

21. Notably, Paragraph 23 on ‘Categorisation’ provides that

‘Past and present environmental and social issues and risks associated with *project-related existing facilities* will be subject to environmental and social appraisal regardless of the categorisation.’²⁶

Similarly, among several provisions on the ‘Overall approach to project appraisal’, Paragraph 30 provides that

‘The EBRD’s environmental and social appraisal includes consideration of three key elements: ... [including] ... (iii) to the extent appropriate, *the facilities and activities that are associated with the project*, but are not financed by the EBRD.’²⁷

²³ ESP, Appendix 2, para. 8.

²⁴ ESP, Appendix 2, para. 27.

²⁵ In particular, Performance Requirement (PR) 1.5 provides that

‘For the purposes of the PRs, the term “project” refers to the defined set of business activities for which EBRD financing is sought by a client, or where EBRD financing has already been committed, the set of business activities defined in the financing agreements, and as approved by the EBRD Board of Directors or other decision-making body.’

²⁶ Emphasis added.

²⁷ Emphasis added.

Unfortunately, little guidance is provided anywhere in the ESP regarding the extent to which it would be appropriate to include such consideration of related or associated facilities and activities.

22. Of potentially greater significance, Performance Requirement (PR) 1.9 on the general requirement for ‘environmental and social assessment’ states in relation to such activities or facilities that

‘The environmental and social assessment process will also identify and characterise, to the extent appropriate, potentially significant environmental and social issues associated with *activities or facilities which are not part of the project, but which may be directly or indirectly influenced by the project*, exist solely because of the project or could present a risk to the project. These *associated activities or facilities may be essential for the viability of the project*, and may either be under the control of the client or carried out by, or belong to, third parties. Where the client cannot control or influence these activities or facilities, the environmental and social assessment process should identify the corresponding risks they present to the project.’²⁸

This suggests that the scope of the environmental and social assessment required in respect of ‘all projects directly financed by the EBRD’,²⁹ whether categorised as “A” or “B”, ought to be expansive and generally inclusive of associated activities or facilities.

23. Though PR 1.10 provides, in respect of the content of an ESIA conducted in relation to a Category A project, that ‘[t]he assessment of environmental and social impacts will consider potential direct, *indirect and cumulative impacts* related to the project’,³⁰ it seems reasonable to assume that this requirement applies to environmental and social assessment generally, including in respect of a Category B project. For example, PR 1.9 further requires, in relation to the content of environmental and social assessment generally, that the process shall additionally

‘consider cumulative impacts of the project in combination with impacts from *other relevant past, present and reasonably foreseeable development* as well as unplanned but predictable activities *enabled by the project* that may occur later or at a different location.’³¹

Thus, the potential impacts of other relevant or related facilities or activities ought to be included in consideration of the cumulative impacts of a project, whether such a project is deemed Category A or Category B. Of course, the need to assess the cumulative impacts of different projects doesn’t imply that all such projects must be covered by the same assessment process. Each may be covered by different assessments, though there should be some consideration of their cumulative effects.³²

24. However, PR 1.12 suggests, at least as regards ‘existing facilities’, that environmental and social assessment should focus on those project-related or associated activities or facilities that are actually under the control of the Client. PR 1.12 provides that

‘For Category A and B projects which involve existing facilities, an assessment of the environmental and social issues of past and current operations will be required. The

²⁸ Emphasis added.

²⁹ PR 1.4. The ‘environmental and social assessment process’ referred to in PR 1.9 is a generic term which includes the ‘Environmental and Social Impact Assessment (ESIA)’ required in respect of Category A projects under PR 1.10, as well as the proportionate ‘environmental and social assessment’ required in respect of Category B projects under PR 1.11.

³⁰ PR 1.10, fn. 6 (emphasis added).

³¹ Emphasis added.

³² See, for example, Case 3507/2013, Judgment of the Supreme Court (Spain), 13 July 2015, concerning a number of wind farm projects independently and successively developed in the same general location. See further, A. Enriquez-de-Salamanca, ‘Project-Splitting in Environmental Impact assessment’, (2016) 34/2 *Impact Assessment and Project Appraisal* 152-159, at 154.

purpose of this assessment is to identify potential risks, liabilities and opportunities associated with the existing facilities and operations, *to confirm the current status of regulatory compliance and to assess the client's existing management systems and overall performance against the PRs*. Any investigations of existing facilities must be carried out by experts that are independent from the facility that is being investigated.³³

By identifying, as a central purpose of such environmental and social assessment, the confirmation of regulatory compliance and assessment of a client's management systems and performance, PR 1.12 implies the exclusion of *existing* project-related or associated facilities or activities which are not under the direct or indirect control of the Client. At the very least, PR 1.12 suggests that, in a case involving existing facilities, such as the present Project, environmental and social assessment should prioritise and focus upon facilities or activities controlled by the Client.

In light of the lack of guidance or established practice on what might be included among project-related or associated facilities or activities, it is useful to look at established practice in respect of national implementation of the EU environmental impact assessment (EIA) regime.³⁴ For example, national guidance on implementation of the new EU EIA Directive³⁵ distinguishes between "principal" and "secondary" projects, and it is clear that the present Project involving service vessels would be understood to be "secondary" to the "principal" project of oil extraction. In determining that separate projects ought to be assessed jointly, European Courts have stressed the notion of "functional interdependence" and have even disregarded the fact that each project was governed by a separate permitting requirement.³⁶ There does not appear, however, in EU EIA law and practice to be an appetite amongst regulators or courts to impose an obligation upon the proponent of a secondary project to conduct a full assessment of the larger related project.³⁷ Nevertheless, where the larger "principal project" has already undergone assessment, subsequent assessment of a "secondary project" should certainly take account of the results of such assessment in order to understand better its potential relevant indirect or cumulative effects.

25. The question therefore arises whether the oil extraction activities and facilities which the vessel(s) in question is servicing can be regarded as 'project-related facilities' or 'associated activities or facilities', so that the risks associated therewith ought to have been considered as part of the present Project's environmental and social appraisal.
26. If such oil extraction activities and facilities can be so regarded, it will be necessary to determine whether the risks associated therewith were in fact considered, either as direct or indirect impacts associated with the present Project or among the cumulative impacts linked to the present Project.

³³ Emphasis added.

³⁴ Under ESP para. 7, EBRD 'is committed to promoting the adoption of EU environmental principles, practices and substantive standards', including those contained in EU secondary legislation. In addition, ESP para. 6 guarantees that EBRD's environmental and social appraisal process shall be 'operated in compliance with applicable regulatory requirements and good international practice (GIP)'.

³⁵ Directive 2014/52/EU.

³⁶ *An Taisce v. An Bord Pleanála (Edenderry)* (2015 IEHC 633).

³⁷ Environmental Protection Agency, *Guidelines on Information to be Contained in EIA Reports*, (EPA, Dublin, August 2017), at 40

III ANALYSIS

Responsibility to Categorise the Project Correctly

27. Examining, first of all, whether the CMI Offshore Project warrants categorisation as an “A” project due to ‘the nature, location, sensitivity and scale of the project, and the significance of its potential adverse future environmental and social impacts’, it is useful to have careful regard to the types of projects listed as Category A Projects in Appendix 2 of the ESP. Appendix 2 clearly states that the types of projects listed therein are ‘indicative’, and so they provide a useful indication of the nature, location, sensitivity and scale of project considered likely to ‘result in potentially significant adverse future environmental and/or social impacts’. Regarding the nature of such projects, it appears unlikely that a maritime transportation and logistical services project, like the CMI Offshore operations directly financed by EBRD, would be included. Paragraph 8 of Appendix 2 focuses on large-scale ports, piers and inland waterways, rather than on vessels using such facilities. Also, it is instructive that Paragraph 8 expressly excludes ‘ferry piers’, suggesting that the activities of ferry vessels present less risk than those associated with cargo vessels.³⁸ The maritime transportation and logistical services provided by CMI Offshore can be likened to those provided by a ferry operator.
28. Regarding the location and sensitivity of the present Project, it is quite clear that the Hazar State Nature Reserve qualifies among the ‘sensitive locations of international, national or regional importance’ capable of causing any category of project to be categorised “A” pursuant to Paragraph 27 of Appendix 2 of the ESP. Paragraph 27 explains that ‘[s]uch sensitive locations include, *inter alia*, nature protected areas designated by national or international law, critical habitat or other ecosystems which support priority biodiversity features’.³⁹ However, Paragraph 27 only includes projects planned to be carried out within such a sensitive location or likely to have a perceptible impact thereon and, as the CMI Offshore vessels in question will not operate in or near to the Hazar State Nature Reserve, these activities are unlikely to be captured by Paragraph 27.⁴⁰

³⁸ For example, Paragraph 8 expressly includes ‘trading ports, piers for loading and unloading’.

³⁹ According to the Bank Management Response, ‘[t]he Hazar Nature Reserve has been registered as a Ramsar Convention site (under the Convention on Wetlands of International Importance) since 1976’. Such designated status has been continued after independence with Turkmenistan designating “Turkmenbashy Bay” as its first wetland of international importance on its accession to the Ramsar Convention on 3 July 2009. “Turkmenbashy Bay” is described as ‘(267,124 hectares, 39° 48’N 053° 22’E) comprising several bays of the Caspian Sea that are separated from the open sea by the Krasnovodskiy and North Cheleken spits’. According to the Ramsar Bulletin Board, 20 April 2009:

‘The coastal shallow waters are part of the largest flyway, and also the largest wintering area, of waterbirds nesting in Western Siberia, Kazakhstan and other regions of central and northern Asia.

The site also supports 1% of the biogeographical population of the Caspian seal, *Phoca caspica*.

The strictly protected Hazar State Reserve covers most (72%) of the Ramsar site ...’.

For further information on the Turkmenbashy Bay Ramsar Site, see: <https://rsis.ramsar.org/rsis/1855>
In addition, on 16 March 2009 Turkmenistan submitted the Hazar State Nature Reserve to the Tentative List of Natural Heritage Sites under the UNESCO World Heritage Convention. See further: <http://whc.unesco.org/en/tentativelists/5437>

⁴⁰ Though it is not found to be definitive on the matter, the State Committee on Environment Protection and Land Resources of Turkmenistan / Khazar State Nature Reserve has provided an official statement (dated 15 February 2017) confirming that (a) the Cheleken Contract Area does not comprise the territory of the Nature Reserve, and (b) the operations maintained by the CMI Offshore vessels in question do not represent a threat to flora, fauna and other areas under protection. See further Bank Management Response.

29. Similarly, the scale of the CMI Offshore Project, comprising the (re)financing of (up to) three tug supply vessels already in service between the port of Hazar and the Cheleken oil field, would be unlikely to give rise to an “A” categorisation.
30. Regarding whether the potentially significant adverse future environmental and/or social impacts could ‘readily be identified or assessed’,⁴¹ it is clear that impacts associated with the CMI Offshore operations directly financed by EBRD can be so identified and assessed, thereby suggesting that such operations should be categorised “B”. It is important to note that EBRD funds will merely be used to finance the buy-out of one tug supply vessel and the partial re-financing of two other vessels, all three of which are currently in use with CMI Offshore. Therefore, a great deal was already known about the operation and performance of these vessels at the time of categorisation, and the Environmental and Social Audit conducted of the Client’s environmental and social management systems and operating performance adequately identified and assessed such impacts.⁴²
31. There can be little doubt, however, that the oil extraction operations and facilities that CMI Offshore services on behalf of its principal client, should these be considered ‘project-related existing facilities’⁴³ or ‘associated activities or facilities’,⁴⁴ would fall within a class of projects capable of being categorised as Category A, as envisaged by Paragraph 15 of Appendix 2, which refers to projects for ‘[e]xtraction of petroleum and natural gas for commercial purposes’.⁴⁵ Similarly, the oil extraction operations and facilities that the CMI Offshore vessels service, should these be considered ‘project-related existing facilities’ or ‘associated activities or facilities’, are likely to be of a scale requiring such categorisation.
32. In addition, there is clearly a possibility that the oil extraction operations and facilities that the CMI Offshore vessels service, should these be considered ‘project-related existing facilities’ or ‘associated activities or facilities’, may be ‘likely to have a perceptible impact on’ the Hazar State Nature Reserve, as a sensitive location of international, national or regional importance. However, this risk could only be determined by means of a careful examination of assessments conducted in order to approve, permit or fund, such facilities.
33. The key issue, therefore, having regard to ESP Paragraph 24, is that of whether these associated or related operations and facilities have previously been adequately assessed, in order that their potentially significant adverse future environmental and/or social impacts could readily be identified or assessed at the time of categorisation.
34. There can be no doubt that these, potentially associated or related, oil extraction operations and facilities have been subjected to various regimes of environmental and social assessment,⁴⁶ at both the strategic and/or project level, in order to obtain the required operating licences and permits,⁴⁷ as well as an ESIA conducted in accordance with EBRD’s (then) environmental and social requirements.⁴⁸ Therefore, at the time of categorisation all of the potentially significant adverse future environmental and/or social impacts associated with the Project could readily be identified or assessed by EBRD without having to resort to

⁴¹ ESP para. 24 requires that for categorisation of a Project as “A” that such impacts ‘at the time of categorisation, cannot readily be identified or assessed’.

⁴² EcoSocio Analysts LLC, *Circle Maritime Investment: Desktop Environmental and Social Audit* (May 2017).

⁴³ ESP, para. 23.

⁴⁴ ESP, PR 1.9

⁴⁵ In addition, para. 7 of Appendix 2 refers to ‘[p]ipelines, terminals and associated facilities for the large-scale transport of gas, oil and chemicals’, while para. 16 refers to ‘[i]nstallations for storage of petroleum, petrochemical or chemical products with a capacity of 200,000 tonnes or more’.

⁴⁶ Conference call with EBRD ESD, 7 June 2018.

⁴⁷ See, Environmental Solutions International, *Environmental Impact Statement for Offshore Production/Appraisal Drilling, LAM Field, Wells LAM-22/101, 102, 103* (Ashgabad, 2000).

⁴⁸ Environmental Resources Management, *Dragon Oil Block II Field Development Project* (October 1999).

any additional ‘formalised and participatory environmental and social impact assessment process’ required for Category A projects under ESP Paragraph 24. The Compliance Review Expert has determined that the existing environmental and social assessments carried out in respect of the potentially related oil extraction activities and facilities have identified all significant potential environmental and/or social impacts as well as appropriate mitigation measures. Indeed, the Environmental and Social Audit for the present Project notes that the oil spill response services provided by CMI Offshore for these offshore oil and gas facilities comprise one such mitigation measure.⁴⁹ This suggests that the decision to categorise the Project as “B” was correctly taken.

35. It should be noted that, while the Bank was correct to categorise the Project “B”, it ought to have reviewed the results of the existing environmental and social assessments relating to the project-related / associated activities or facilities concerned with oil extraction, as it could by this action have ensured that the impacts associated with such activities or facilities could readily be identified or assessed. This action would have avoided any doubt regarding categorisation of the Project squarely within the scope of Paragraph 25, which characterises Category B projects as those whose ‘potential adverse future environmental and/or social impacts are typically site-specific, and/or *readily identified and addressed through mitigation*’.⁵⁰ It is fortunate that the existing environmental and social assessments carried out in respect of the related oil extraction activities and facilities have identified all significant potential environmental and/or social impacts as well as appropriate mitigation measures. Indeed, the Environmental and Social Audit for the Project notes that the oil spill response services provided by CMI Offshore for offshore oil and gas facilities comprise one such mitigation measure.⁵¹ As regards the CMI Offshore operations directly financed by EBRD, it is quite clear that these fall within the scope of Paragraph 25, as the environmental and social impacts are likely to be site-specific and confined to the sea-route(s) between the port of Hazar and the Cheleken offshore developments Lam and Zhdanov, and can be readily identified and addressed through appropriate mitigation measures.⁵²

⁴⁹ See EcoSocio Analysts LLC, *Circle Maritime Investment: Desktop Environmental and Social Audit* (May 2017), which notes, at 5, that

‘The [development] associated with the Company (CMI Offshore) services [sic] may require impact assessment and public consultation, the need for which is decided by the State Environmental Expertise. Adherence to these requirements are beyond the Company (CMI Offshore) control but the developer may extend some of its responsibility on the Company (CMI Offshore) to enable its own compliance.’

The Environmental and Social Audit further notes, at 26, that

‘By virtue of providing oil spill response services for offshore O&G installations in Turkmenistan sector of the Caspian Sea, the Company helps protect the biodiversity.’

⁵⁰ Emphasis added.

⁵¹ See EcoSocio Analysts LLC, *Circle Maritime Investment: Desktop Environmental and Social Audit* (May 2017), at 5. The Environmental and Social Audit further notes, at 26, that

‘By virtue of providing oil spill response services for offshore O&G installations in Turkmenistan sector of the Caspian Sea, the Company helps protect the biodiversity.’

⁵² The Environmental and Social Audit, *ibid.*, conducted in respect of the Project provides a detailed and thorough analysis of all likely environmental and social impacts associated with CMI Offshore operations directly financed by the Bank, which it seeks to address by means of appropriate mitigation measures. For example, it provides, at 26-27, in relation to ESP PR6: Biodiversity Conservation and Sustainable Management of Living Natural Resources, that:

‘Operations Order-003-14 from 05/01/2014 has established initiative aimed to reduce adverse effect the COC (Caspian Offshore Construction) may have on the indigenous Caspian Seal population during the winter breeding season. Throughout the year vessels use only established routes, but during winter deviations from the route occur when seals are on the way and it is required to bypass them at a safe distance. Information on seals’ location is passed to the operating vessels in this area. Vessels are equipped with thermal imagers and for Winter time the company employs a designated person to observe seals, monitor their location, prevent collision and plan the route to avoid seals.’

36. Therefore, the Compliance Review Expert finds that the CMI Offshore Project was correctly categorised “B”, which amounts to compliance by the Bank with ESP Paragraphs 23-25.

Responsibility to Consider Risks Presented by Project-Related or Associated Activities or Facilities

37. In determining whether the issues associated with the related oil extraction facilities and activities which CMI Offshore services ought to have been considered within the environmental and social assessment process for the present Project, it is useful to consider the functional interdependence of both projects, as stressed by European Courts in EU and national EIA practice. Clearly, the related oil extraction activities rely to a very considerable extent upon the transportation and logistical services provided by the Client, as well as the oil spill response and other emergency services. At the same time, the Client’s business activities which are supported by the present Project, are completely dependent upon these same oil extraction operations. The functional interdependence of both sets of activities could not be clearer.

38. Though PR 1.12 suggests, as regards ‘projects which involve existing facilities’, such as the present Project, that environmental and social assessment should focus on those facilities or activities that are under the effective control of the Client. However, PR 1.9, which applies to both Category A and B projects and appears more generally applicable to the process of environmental and social assessment, refers to ‘environmental and social issues associated with activities or facilities which are not part of the project’ which may be ‘carried out by, or belong to third parties’. It further states unequivocally that

‘Where the client cannot control or influence these activities or facilities, the environmental and social assessment process should identify the corresponding risks they present to the project.’

More specifically, PR 1.9 expressly requires identification and characterisation of ‘potentially significant environmental and social issues associated with activities or facilities which are not part of the project, but which may be directly or indirectly influenced by the project ... [and which] ... may be essential for the viability of the project ... [even though these may be] ... carried out by or belong to third parties.’

PR 1.9 additionally requires that the process should ‘consider cumulative impacts of the project in combination with impacts from *other* relevant past, present and reasonably foreseeable development’.⁵³ It is quite clear that the CMI Offshore Project is intrinsically linked to the oil extraction operations that it services, particularly as regards environmental performance and risk management, as the Client will provide essential oil spill response services for these facilities and activities.⁵⁴

39. In order to get a full sense of the intrinsic linkages and “functional interdependence” between the present Project and the ongoing oil extraction operations which it services, it is useful to examine the EIA conducted in respect of the original oil extraction project, along with related supporting documentation. This illustrates the extent to which environmental and social assessment for the “principal” project included consideration of the potential environmental and social impacts associated with maritime service vessels, such as those operated by the Client:

⁵³ Emphasis added.

⁵⁴ See EcoSocio Analysts LLC, *Circle Maritime Investment: Desktop Environmental and Social Audit* (May 2017), at 5, 26 and 29.

- i. Although the 2000 Environmental Impact Assessment for Dragon Oil's principal oil extraction project, undertaken in accordance with the legislative requirements of Turkmenistan,⁵⁵ does not focus on the potential impact of service vessels, the 1999 EIA conducted by ERM in accordance with EBRD's (then applicable) environmental and social requirements⁵⁶ did consider the impacts of service vessels such as those now operated by CMI Offshore Ltd. For example, among the 'Ancillary Facilities' listed in the Project Description, it includes the 'marine fleet [which] comprises various vessels from the Turkneftflot fleet (e.g. crane barge, tugs, coastal supply tanker)',⁵⁷ in relation to which it considers, *inter alia*, airborne 'emissions from the diesel engines of construction and support vessels'.⁵⁸ Among the Offshore Mitigation Measures included in the 1999 EIA is the commitment that 'construction and support vessels will discharge wastes to Turkmen standards'.⁵⁹ The Environmental Action Plan (EAP) for the Dragon Oil Project notes that '[s]anitary effluent from ... the marine fleet is currently discharged to sea ... which is not permitted', and further refers to the requirements of Annex VI of the MARPOL 73/78 Convention, which 'will require that sewage is biologically treated prior to discharge within 12 nautical miles of land or within "special areas"'.⁶⁰ It proposes the 'collection of effluent from ... boats and disposal in an onshore biological treatment plant'.⁶¹
- ii. It is significant in the context of the current Project that the 2000 EAP reported that the current vessels were 'out of class' and had little in terms of emergency fire-fighting and oil spill response capabilities, and noted that '[w]estern vessels [should] be brought in as part of Full Field Development'.⁶² Due diligence for the Dragon Oil project also identified the risk posed by 'ship collision' among the major accident hazards associated with the project,⁶³ while the EAP commits to the aim that '[i]nternational standards of navigation [are] to be adopted'.⁶⁴
- iii. More significantly, the 1999 EIA highlights the operator's commitment to 'implement an Oil Spill Contingency Plan to address existing and future risks of spills and their consequences',⁶⁵ which today appears largely to rely upon CMI Offshore's vessels. In respect of offshore spill response, the 2000 Dragon Oil EAP notes that '[o]ffshore standby vessels are not always present and those vessels which are used are not capable of providing an adequate spill response capability'. Setting out the action urgently required, the EAP further explains that 'The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 lays down the principles of prompt and effective action in the event of an oil spill and requires that all offshore installations should establish emergency plans. Although Turkmenistan is not a

⁵⁵ Environmental Solutions International, *Environmental Impact Statement for Offshore Production/Appraisal Drilling, LAM Field, Wells LAM-22/101, 102, 103* (Ashgabad, 2000).

⁵⁶ Environmental Resources Management, *Dragon Oil Block II Field Development Project* (October 1999).

⁵⁷ *Dragon Oil Block II Field Development Project: Non-Technical Summary to the Environmental Impact Assessment* (October 1999), at vii.

⁵⁸ *Ibid.*, at xxviii.

⁵⁹ *Ibid.*, at xxvix.

⁶⁰ Dragon Oil Environmental Action Plan (October 2000).

⁶¹ *Ibid.*

⁶² The EAP explains further, at 8, that

'A review of TMNF fleet will be made after Western vessel arrives. Only selected vessels will be retained. All operated vessels will be put into class.'

⁶³ See, for example, Dragon Oil, *Environmental Protection Plan for Wells LAM-22/101, 102, 103 Drilling Operations* (August 2000), at 6-3; Dragon Oil, *HSE Plan* (October 2000); Dragon Oil, *HSE Improvement Plan* (2000), at 23 and 24.

⁶⁴ EAP, at 9.

⁶⁵ Environmental Resources Management, *Dragon Oil Block II Field Development Project: Non-Technical Summary to the Environmental Impact Assessment* (October 1999), at xxvix and xxxi-xxxiii.

signatory to this Convention, this agreement represents western standards which are clearly not currently met’.

This issue is once again highlighted in the 2000 HSE Improvement Plan,⁶⁶ thereby suggesting the central role of CMI Offshore in meeting this key requirement in respect of the Dragon Oil operations, and especially the need ‘[i]f a serious spillage incident occurred ... to mobilise a suitable vessel’.⁶⁷

- iv. It is important to note that the Information Package (Scoping Report), prepared by ERM in order to support the scoping exercise to be carried out prior to the full EIA of Dragon Oil’s planned project, identified among the ‘Key EIA Issues’, *inter alia*, detrimental impacts on water quality due to discharges to the marine environment by support vessels, as well as disturbance and other impacts on fish, marine mammals, birds, benthic environment and other components of the marine ecosystem.⁶⁸ It further highlighted airborne emissions from support vessels, impacts on water quality and aquatic ecosystems from sanitary effluents and ballast discharges, and disruption to commercial fishing and navigation.⁶⁹ Of course, the Information Package also stressed the potential impact of ‘[a]quatic and terrestrial pollution including threats to marine mammals, sea and shore birds from chronic and catastrophic oil spills’,⁷⁰ a threat which the CMI Offshore Project will continue to serve to address.
- v. In addition, the stakeholder consultation conducted in August-September 1999 in order to support the ERM EIA process further highlighted a number of issues regarding support vessels to be considered in the EIA.⁷¹ These included concerns regarding ‘safety certification of all vessels used for operation and development’,⁷² regarding the Caspian Sea’s ‘significance as a fishing area’,⁷³ regarding the vessels to be used ‘for oil spill clean up, rescue facilities/equipment and work safety provisions’,⁷⁴ regarding ‘accident prevention and contingency response measures’,⁷⁵ and regarding the urgent need to ‘fund the repair works for Turkmenneftflot’s ships [which are leased by Dragon]’.⁷⁶

40. All of the above indicates both the interconnectedness of the present Project and the oil extraction operations which it services, and the thorough nature of the ‘formalised and participatory environmental and social impact assessment process’⁷⁷ originally conducted in respect of these oil extraction operations.

41. The examination outlines above also makes it quite clear that the present Project is secondary or ancillary to the primary oil extraction activities, which it services. Whilst it would be unusual in corresponding EU or national EIA law for a requirement to arise to assess a larger primary activity as part of the approval process for a secondary project, such a process

⁶⁶ Dragon Oil, *HSE Improvement Plan* (2000), at 37-38.

⁶⁷ *Ibid.*

⁶⁸ Environmental Resources Management, *Dragon Oil Block II Field Development Project: Information Package* (1999), Table 4.1.

⁶⁹ *Ibid.*, Table 4.2.

⁷⁰ *Ibid.*

⁷¹ Environmental Resources Management, *Scoping Consultation Report* (November 1999).

⁷² Dashkovuz Ecological Guardians.

⁷³ Khazarskiy Nature Reserve, Turkmenbashi.

⁷⁴ Turkmen Association of Nature Protection, Turkmenbashi Branch; Fisheries Inspectorate in Cheleken.

⁷⁵ Yuzhnocaspiskiy Stationar (YCS); Caspecocontrol (Caspian Sea Environmental Authority); Ecological Fund of Turkmenistan; Catena Ecological Club of Ashgabat.

⁷⁶ R. Abbasov, Ship’s Captain Turkmenneftflot.

⁷⁷ See ESP Para. 24, regarding the assessment process required in respect of a Category A project.

would certainly be expected to take account of the results of any existing assessment(s) of the larger primary project or activity. Unfortunately, there is no evidence of these having been considered by EBRD in the environmental and social appraisal of the present Project.⁷⁸

42. On balance, therefore, the Compliance Review Expert concludes that the oil extraction operations in the Cheleken oil field serviced by the Client can be regarded as related / associated facilities or activities of the present Project and, thus, that direct, indirect or cumulative impacts likely to be associated therewith ought to have been considered in the environmental and social assessment process for the present Project. This amounts to non-compliance with ESP PR 1.9.
43. This finding of non-compliance centres around the fact that there is no evidence that EBRD considered the findings of the EIA(s) conducted in respect of the oil extraction facilities and activities being serviced by CMI Offshore.⁷⁹ This is not to suggest that due diligence for the CMI Offshore Project would have required a full appraisal of the oil extraction activities and facilities in the area serviced by the Client, but merely that EBRD should have informed itself fully of the associated risks by reviewing the relevant EIA(s) and associated documents for these related / associated activities and facilities.

⁷⁸ See generally, EcoSocio Analysts LLC, *Circle Maritime Investment: Desktop Environmental and Social Audit* (May 2017).

⁷⁹ It is important to note that though the Environmental and Social Audit, *ibid.*, conducted in respect of the Project, purports (at 2) to include 'a desktop review of available information', it fails to refer to the relevant findings and recommendations of any EIA conducted in respect of these related / associated oil extraction activities and facilities. Instead, it focuses exclusively on CMI Offshore's environmental and social management systems and operating performance. This is a particularly worrying as CMI Offshore appears to be tasked with a key role in ensuring the environmental compliance of such activities and facilities. See, Environmental and Social Audit, at 5, 26 and 29.

IV RECOMMENDATIONS

44. Pursuant to Paragraph 44 of the 2014 PCM Rules of Procedure (RPs), the Compliance Review Expert, on finding the Bank in non-compliance with a Relevant EBRD Policy, makes the following recommendations, which are specifically intended to
- ‘address the findings of non-compliance at the level of EBRD systems or procedures in relation to a Relevant EBRD Policy, to avoid a recurrence of such or similar occurrences, and/or
 - address the findings of non-compliance in the scope or implementation of the Project, taking account of prior commitments by the Bank or the Client in relation to the Project’.⁸⁰
45. At the level of systems or procedures, the Bank should develop detailed guidance to clarify the normative implications of the related requirements under the ESP to identify and characterise potentially significant environmental and social issues associated with project-related facilities or activities, and to consider direct, indirect and cumulative impacts related to a project. Such guidance should have regard to best practice identified in the implementation of the environmental and social safeguard policies and accountability standards of other multilateral development banks, as well as in national and regional implementation and application of EIA rules. Of course, the current, ongoing review of the ESP offers an opportunity for clarification of the environmental and social appraisal requirements applying to functionally-related projects.
46. At the level of the scope or implementation of the present Project, the Bank should without delay review the relevant environmental impact assessment(s) conducted in respect of the oil extraction operations serviced by the Client with a view to identifying any critical issues arising for the Client’s operations. Where any such issues arise, the Bank should consider agreement of an Environmental and Social Action Plan (ESAP) to ensure these are effectively addressed. The Bank should have particular regard to any risk of direct, indirect or cumulative impacts to the Hazar State Nature Reserve, and any appropriate measures to mitigate such risk which might be taken within the scope of the present Project.

⁸⁰ PCM RPs, para. 44(a) and (b).