

SOUTH-WEST CORRIDOR ROAD PROJECT

REQUEST NUMBER: 2014/04

Compliance Review Report - September 2016

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 from Mr. Yuri Pavlovich Krivodanov, Head of the national non-governmental organisation Blago (NGO Blago) on October 2014, raising concerns regarding the section of the South-West International Transport Corridor financed by the European Bank for Reconstruction and Development (EBRD or the Bank) in Kazakhstan (the Complaint). The Complaint, registered on 24 November 2014 under the 2014 PCM Rules of Procedure (PCM RPs), sought both a problem-solving initiative and a compliance review. The Eligibility Assessment Report for Compliance Review (EAR), released on 2 October 2015, concluded that the Complaint was eligible for a Compliance Review. The Eligibility Assessment Report for a Problem-Solving Initiative (EAR for PSI) found the Complaint eligible for a problem-solving initiative and, on 20 November 2015, the President of the Bank accepted the recommendation of the Eligibility Assessors for the problem-solving initiative.

The Complaint alleges that the Bank has failed to comply with the 2003 Environmental Policy (2003 EP) and relevant public information policies on a total of three grounds.

First, the Complaint alleges that the Bank failed to properly carry out its monitoring and supervision responsibilities according to its policies and that this failure resulted in shortcomings in project design and implementation that purportedly harmed the residents of six villages along the transport corridor. The Compliance Review Expert has determined that the monitoring programme put in place by the Bank, although commensurate with the level of risks and the nature of the Project, had not been properly implemented by the Bank Management. The Compliance Review Expert identified two main shortcomings in the monitoring process. First, unclear assignment of responsibilities for submitting the annual environmental and social reports; and secondly, communication shortcomings among the different departments and officers in the Bank relevant to the monitoring process. This amounts to a failure of the Bank to comply with the obligations under paragraphs 27 and 28 of the 2003 EP for the environmental monitoring of the Project.

Secondly, the Complaint alleges that the Bank failed to do enough, according to its policies, to address structural issues, root causes and systemic problems linked to infrastructure project challenges in Kazakhstan, specifically those confronting the Project such as the absence of adequate national norms regulating public engagement and consultation. The Compliance Review Expert has determined that paragraph 10 of the 2003 EP does not create a normative obligation for the Bank in this respect and therefore an analysis of compliance has not been undertaken.

Thirdly, the Complaint alleges that the Bank failed to respond to the Complainant's communications, enable dialogue and engage in cooperative relationship with the Complainant and civil society organisations and that this failure negatively affected village residents along the road corridor as well as harming the reputation of the non-governmental organisations engaged in monitoring the progress of the South-West Corridor Road Project. The Compliance Review Expert has determined that the Bank has complied with its obligations under the 2003 EP and 2011 Public Information Policy (PIP) to enable dialogue with the Complainant and respond to its communications.

Therefore, the Compliance Review Expert has made a finding of non-compliance in respect of one of the grounds set out in the Complaint. This Compliance Review has determined that the Bank has failed to adequately implement the environmental monitoring programme in accordance with paragraphs 27 and 28 of the 2003 EP.

Part I: The Facts

1. Factual background

The Government of Kazakhstan has been working to improve transit corridors for trade with China, Russia and Europe. One of the most important corridors is the South-West International Transport Corridor which runs from Moscow and Kazan and enters Kazakhstan near the city of Aktobe, running 2,800 km across the country through Kyzylorda, Shymkent, Almaty and Horgos and into China (the South-West Corridor). This corridor would provide the shortest road transport link from the Central Asian countries to Europe, as well as a transit link between China, Uzbekistan, Kyrgyzstan, Russia and Europe. Improvement of this corridor would facilitate the transit of goods and passengers and contribute to develop regional integration.

On 11 November 2008, the Board of Directors of the Bank approved the financing of US\$180 million to rehabilitate and upgrade 102 km of the South-West Corridor, corresponding to the road section between the Russian border and the city of Aktobe. Other road sections of this corridor have been rehabilitated by attracting parallel financing from the World Bank, Asian Development Bank, Islamic Development Bank and Kazakhstan. The rehabilitation and upgrading works commenced in April 2011 and were completed in September 2013.

On 20 October 2014, the PCM received a complaint from Mr. Yuri Pavlovich Krivodanov, Head of the NGO Blago, raising concerns regarding the section of the South-West Corridor financed by the EBRD which, according to him, had resulted in significant harm to the residents of six villages along the road corridor. The Complainant sought both a problem-solving initiative and a compliance review. The Complaint was registered with the PCM on 24 November 2014, in accordance with the 2014 PCM RPs. Notification of registration was sent to the Complainant and the relevant parties pursuant to the PCM RPs 10 and 11 and the Complaint was noted on the PCM Register as well as posted on the PCM website in accordance with PCM RP 20¹.

PCM Expert Susan Wildau was appointed Eligibility Assessor to conduct an Eligibility Assessment jointly with the PCM Officer, in accordance with the PCM RP 20. The Bank formally responded to the Complaint on 19 January 2015². The EAR was submitted on 2 October 2015. The PCM eligibility assessor determined that the complaint was eligible for a compliance review and terms of reference (ToRs) for that review were included in the EAR. The PCM Officer appointed PCM Expert Andrea Saldarriaga to be the Compliance Review Expert.

2. The Parties

- **The Complainant:** Yuri Pavlovich Krivodanov, Head of Administrative Office, National Expert Council on Transparency and Sustainable Development, Director, NGO Blago, Chairman, Kazakhstan Aarhus Committee Not-for Profit Organisation.
- **The Bank:** European Bank for Reconstruction and Development.

¹ EAR, para 2.

² The EAR can be found at <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>

- **The Client:** The Republic of Kazakhstan. The Ministry of Finance was the Authorised Representative under the Loan Agreement while the Ministry of Transport (Committee of Roads) submitted the response to the Complaint.

3. The Project

The South-West Corridor Road Project, comprising rehabilitation and upgrading of the 102 km section of the road between the Russian border and the city of Aktobe in Kazakhstan.

4. The Complaint

The Complainant in the Complaint, as registered with the Bank in the first instance, alleged that the Project has resulted in significant harm to:

- A. Residents of the population centres adjoining the South-West Transit Corridor.
- B. The establishment of a Network of Expert Councils on Transparency and Sustainable Development (ECTSD), a project being implemented under the terms of a Memorandum of Understanding and Cooperation signed on 14 January 2012 between the RK Ministry of Transport and Communications Highways Committee, companies participating in the implementation of the South-West Transit Corridor Reconstruction Project and the Association of NGOs represented by NGO Blago.
- C. The image of the NGOs monitoring the progress of the South-West Road Project.³

The Complaint indicates that this harm is the result of the Bank's ignoring the Complainant's communications regarding the defects in implementation of the Project and provides a detailed list of the harm caused to residents in six villages adjoining the South-West Transit Corridor.⁴

As noted in the EAR, in subsequent meetings with the Eligibility Assessor, the Complainant provided further details on the issues identified in the Complaint and the results sought. The EAR discusses the scope of the Complainant's allegations in the following terms:

- Failure of the Bank to properly carry out its monitoring and supervision responsibilities according to its policies. This failure resulted in shortcomings in Project design and implementation that purportedly resulted in significant harm to the residents of six villages along the road corridor.⁵
- Failure of the Bank to do enough, according to its policies, to address structural issues, root causes and systemic problems linked to infrastructure project challenges in Kazakhstan, specifically those confronting the Project such as the absence of adequate national norms regulating public engagement and consultation.⁶
- Failure of the Bank to respond to the Complainant's communications and engage in cooperative relationship with the civil society organisations in violation of the Bank's requirements that set out how the Bank engages with its stakeholders. This failure allegedly resulted in harm to village residents and to the establishment of the ECTSD,

³ Complaint at 6.

⁴ EAR, para 45.

⁵ EAR, paras 7- 8.

⁶ EAR, para 13.

including damage to the reputation of the non-governmental organisations engaged in monitoring the progress of the South-West Corridor Road Project.⁷

The Complaint indicates that the outcome sought by submitting the Complaint to the PCM is the “[p]roper and full implementation by the Bank of the provisions of its own policies.”⁸ The EAR lists the following five outcomes expected from the Compliance Review:

- (i) remedies to issues raised by villagers wherever feasible;
- (ii) an opportunity to identify and address structural and systemic issues related to the South-West Corridor Road Project with involved partners, to achieve environmentally and socially sound and sustainable development;
- (iii) increased engagement and cooperation between civil society groups and the Bank around this Project in line with the Bank’s commitment to enabling dialogue with its stakeholders, listening and being receptive to stakeholder comments, including those from civil society, as set forth in paragraphs 11 and 43 of the Environmental Policy;
- (iv) proper and full implementation by the Bank of its policy provisions, including greater attention to and oversight of project implementation;
- (v) lessons learned from this Project for all stakeholders, including civil society, aimed at improved performance that adheres more closely to the ESAP (e.g. mitigation measures across project phases; enhancement and offset recommendations; monitoring measures for each issue, impact or opportunity).⁹

Part II: Steps Taken to Conduct the Compliance Review

1. **Document review:** having regard to the ToRs for this Compliance Review prepared by the Eligibility Assessors and included in the EAR¹⁰, the Compliance Review Expert conducted a thorough review of all relevant Project documentation, relevant internal Bank correspondence and documents submitted by the Complainant. Documents are referenced throughout the Compliance Review Report. When information that is not in the public domain has been reviewed, the source of information is referenced to allow the Bank staff to cross check. The nature of the document or source of communication is also mentioned for the benefit of the readers indicating that the documents or communications referenced are not available for public review.
2. **Meetings with the Parties:** the Compliance Review Expert met via conference call with the Bank Environmental and Sustainability Department (ESD) on 11 December 2015 and via video conference call with the Complainant on 14 December 2015.
3. **Site visit:** the Compliance Review Expert did not find it necessary to conduct a site visit as the PCM Expert serving as Eligibility Assessor had visited the site and conducted extensive meetings with the Client, the Complainant and the communities allegedly affected by the Project.

⁷ EAR, paras 11 -12.

⁸ Complaint at 13.

⁹ EAR, para 35.

¹⁰ EAR, pp 16-20.

4. **Opportunity to comment on the Draft Compliance Review Report:** in accordance with 2014 PCM RP 42, the Compliance Review Expert gave the parties the opportunity to provide comments on the Draft Compliance Review Report.
5. **Submission and opportunity to comment on the Management Action Plan (MAP):** in accordance with 2014 PCM RP 45, the Bank Management submitted the MAP addressing the recommendations contained in the Compliance Review Report on 11 July 2016. The MAP was sent to the Complainant for comments on 14 July 2016. Comments from the Complainant were received on 8 August 2016.

The Compliance Review Expert is of the opinion that she has had access to sufficient information to consider the Bank's alleged non-compliance with the requirements of the 2003 Environmental Policy (2003 EP) and the relevant public information policies as regards the present Project.

According to 2014 PCM RP 41, the objective of this Compliance Review will be to establish (and if so, determine how and why), the Bank's conduct with respect to the Project has resulted in non-compliance with a Relevant Bank Policy, as defined in the 2014 PCM RPs. If non-compliance is found, the Compliance Review will recommend remedial changes in accordance with 2014 PCM RP 44.

The next part of this Compliance Review report will address each of the three allegations identified in the EAR and detailed in the ToRs of the EAR.

Part III: Discussion of the Issues and Analysis of Compliance

1. Environmental appraisal and monitoring of the Project

According to the ToRs, the Compliance Review should consider whether the Bank failed to adequately assess the Project's environmental and social impacts, and as a result failed to agree to adequate prevention and mitigation measures, and/or failed to monitor the implementation of the Project according to the requirements of the 2003 EP, including monitoring the provisions contained within the ESAP; more specifically:

- (i) Did the Bank fail to monitor the environmental and social impact of the Project, including the proper timely implementation of the Environmental and Social Action Plan by the Client and the Client's adherence to agreed social and environmental covenants;
- (ii) Did the Bank fail to establish an adequate monitoring programme in accordance with paragraphs 27 and 28 of the Environmental Policy, to ensure risks and impacts were appropriately identified, communicated and addressed; and
- (iii) Did the Bank fail to assess and monitor adequate public information and consultation by the client, in accordance with the 2003 EP and the ESAP.

1.1 Parties' positions

1.1.1 The Complainant's position

The Complaint alleges that the Project suffered from design and implementation shortcomings that allegedly resulted in significant harm to the residents of six villages along the road corridor. The Complaint presents a detailed list of the issues that allegedly affected these residents,

including amongst others: lack or inadequate crossings for pedestrians, cattle and agricultural machinery; absence of off-ramps for convenient access to the road; inadequate measures for snow retention and snowdrifts; lack of lighting along certain sections of the road and absence of toilet facilities at bus stops; and damage to public property.¹¹

In subsequent meetings with the PCM Expert who conducted the eligibility assessment, the Complainant further elaborated on this ground, asserting that the Bank had failed to properly carry out its monitoring and supervision responsibilities and consequently the Bank failed to:

- Ensure early detection and redressal of the shortcomings identified in the Complaint.¹²
- Identify shortcomings in the public consultation and information disclosure programme, including whether the programme was adequately designed and implemented according to the Bank's policies. The Complainant also indicates that insufficient information was made available to community residents as to how to participate in the decision-making process during different stages of the Project, as well as how to raise a complaint.¹³

The Complainant indicates that these issues were identified through the public monitoring programme carried out by the "Association Azamatty Kuryltay – Civil Assembly" to which the NGO Blago, that the Complainant leads, is an active member.¹⁴

1.1.2. The Bank's response

The Bank Management asserts that the Project was structured to comply with the requirements of the 2003 EP that are applicable to a category B1 Project. The Project therefore required an environmental analysis and audit. The environmental and social due diligence was carried out by an independent consultant appointed by the Bank. The due diligence established detailed baseline environmental and social conditions concerning the Project site, assessed the potential environmental and social impacts and drafted an Environmental and Social Management Plan (ESMP). The ESMP included the Environmental and Social Action Plan (ESAP).¹⁵

The Bank indicates that the ESAP was developed and agreed with the Client and that it identified *"environmental and social impacts and provided mitigation measures for both impacts which were common to most roadway projects, such as land use change, noise, atmospheric and water pollution, as well as those that were specific to EBRD-financed project."*¹⁶

The Bank appointed an internationally renowned construction and supervision consultant to carry out the monitoring function of the Project (Construction Consultant). In addition, the Bank also appointed another internationally renowned consultant as Project Management Consultant (PM Consultant) to assist the Client in managing the World Bank and the EBRD-financed sections of the road, including environmental and social issues. The PM Consultant also served as an independent supervisor to ensure implementation of the ESMP.¹⁷

¹¹ Complaint at 6.

¹² EAR, para 8.

¹³ EAR, para 10.

¹⁴ EAR, para 8. According to the EAR the "Association Azamatty Kuryltay – Civil Assembly" is a multilateral group of civil society organisations, government agencies, project management and supervision consultants and contractors involved in the Western-Europe-Western China Transit Corridor Project. See EAR, footnote 8.

¹⁵ Bank's response, p 2.

¹⁶ *ibid*, p 6.

¹⁷ *ibid*, p 2.

Considering the low-risk nature of the Project and the significant expertise of the consultants assigned to the Project, the Bank Management stated that it elected to undertake a “passive monitoring approach”¹⁸ through the review of annual environmental and social reports.

Following the filing of the Complaint in November 2014, the Bank also appointed an independent monitoring consultant to review the status of the ESAP and the issues raised in the Complaint. The independent consultant undertook a monitoring visit to the Project in December 2014. The review of the ESAP implementation concluded that most actions in the ESAP had been implemented. According to information included in the Project Summary Documents (PSD) of the Project, the review did not identify any major problems regarding the issues raised in the complaint and concluded that the design requirements had been fulfilled as per the applicable regulations.¹⁹ The Bank’s response provides detailed responses to each of the specific concerns raised in the Complaint with respect to the alleged harm to six villages along the road based on the findings of the independent consultant’s assessment.²⁰

1.1.3. The Client’s response

In its written submission, the Client provided responses to each of the specific issues raised in the Complaint in relation to the alleged harm suffered by the six villages along the road. In further conversations held with the PCM Expert who prepared the EAR, the Client indicated that the Project was designed and implemented in accordance with the international standards set out in the social and environmental policies of the International Financial Institutions and the relevant national standards of Kazakhstan.²¹ Moreover, the Client asserts that its approach for developing projects is consistent with the principle of “do no harm” and that it routinely engages with civil society groups who have an interest in infrastructure projects.²²

1.2. The Bank’s policy obligations

The Project was approved by the Board of Directors on November 2011 and the 2008 Environmental and Social Policy entered into force in October 2011. However, as the Project passed Concept Review on 9 May 2008, it was prepared and assessed according to the rules in force at the time, that is, the 2003 EP. Therefore, it is against the obligations contained in the 2003 EP that the review of the compliance will be undertaken. It should be noted that the 2003 EP was an ‘environmental’ policy and did not contain the detailed social requirements that were incorporated in the later 2008 ESP. Nonetheless, the term ‘environment’ in the 2003 EP was used in a broad sense *“to incorporate not only ecological aspects but also worker protection issues and community issues, such as cultural property, involuntary resettlement, and impacts on indigenous peoples.”*²³ This section will briefly present the obligations under the 2003 EP on the Bank when appraising and monitoring a project while it was in force.

The 2003 EP provided for a clear separation of responsibilities for each of the different relevant phases and activities for a potential project; in particular, the Bank’s responsibilities with regard to the environmental appraisal process (provisions 4 and 14-19) and the monitoring of the project implementation (provisions 27 and 28). As per the 2003 EP, public consultation and

¹⁸ *ibid.*

¹⁹ PSD, at <http://www.ebrd.com/work-with-us/projects/psd/southwest-corridor-road-project.html>

²⁰ Bank’s response, pp 7-16.

²¹ EAR, para 19.

²² EAR, paras 20-21.

²³ 2003 EP, para 3.

information disclosure was the responsibility of the project sponsor.²⁴ Further public consultation and information disclosure had to be conducted in accordance with the national norms for consultation of the project sponsor and in line with the Bank's relevant public consultation requirements for the specific project category. However, the Bank retained a responsibility to review the fulfilment of these obligations by the project sponsor in line with its policy commitments (provisions 27 and Annex 2). In particular, when consultation was part of the measures for preventing and mitigating negative environmental and social impacts and integrated into the environmental and social management plans, this responsibility fell within the monitoring obligations of the Bank under the 2003 EP.

1.2.1. Obligations concerning the environmental appraisal of a project

The environmental appraisal of a project had two objectives: (i) to help the Bank determine if an activity should be financed; and (ii) if so, the way in which environmental issues should be incorporated in project financing, planning and implementation.²⁵ According to the 2003 EP, there were three key steps in the environmental appraisal procedure.

- **Screening:** the objective of this phase was to identify potential environmental issues and environmental benefits or enhancements. It was also intended to assist in the identification of the information required in order to “assess environmental risks, liabilities, regulatory compliance, any adverse environmental impacts and other concerns.”²⁶ The outcome of the screening process determined the categorisation of a project.
- **Categorisation of a project:** this step determined the scope of monitoring required to be undertaken by the Bank with respect to a particular project and it depended on the type, location, sensitivity and scale of the project, as well as the nature and magnitude of its potential environmental impact. The categorisation (Categories A, B and C) determined the type of environmental impact assessment or analysis to be undertaken and also whether or not an audit was required (Category 1 or 0). For a project categorised B1 (as the one subject to the current compliance review), the 2003 EP required that an Environmental Analysis and Environmental Audit be conducted to “*assess any potential future environmental impacts associated with the proposed project, identify potential environmental improvement opportunities, and recommend any measures needed to prevent, minimise, and mitigate adverse impacts.*”²⁷
- **Development of an environmental action plan (EAP):** the purpose of this plan was to document key environmental issues, the actions to be undertaken to address them adequately, the implementation schedule and an estimate of the associated costs. Importantly, the project sponsor – or client – had to agree with the EAP, and the EAP became part of the legal agreement with the Bank.²⁸ Sometimes other similar terms

²⁴ For the purposes of the Project, the Project sponsor corresponds to the Client, being the entity receiving EBRD financing.

²⁵ 2003 EP, para 14.

²⁶ 2003 EP, para 15.

²⁷ 2003 EP, para 16.

²⁸ 2003 EP, para 17.

like the Environmental Management Plan (EMP), or monitoring plan were also utilised to refer to an EAP.²⁹

The results of the environmental appraisal processes had to be then reflected in the legal documentation. In particular, the legal documentation had to include specific provisions reflecting obligations to adhere with the Bank's environmental requirements such as compliance with the EAP, provisions for environmental reporting and periodic environmental audits by independent experts.

1.2.2. Obligations concerning the monitoring of a project

Once the appraisal process had been completed, and the decision had been made to finance the project, the monitoring of the project was an important component of the implementation process of a project. According to the 2003 EP, monitoring was meant to serve the following two purposes:

- to ensure that applicable environmental standards and various environmental obligations for the project included in legal agreements, such as the implementation of an EAP, were complied with by the project sponsor; and
- to keep track of the ongoing environmental impacts associated with the project and the effectiveness of mitigation measures as a "feedback" mechanism.³⁰

The Bank had to define a monitoring programme for each project and, in this regard, had to specify the 'appropriate monitoring tools.' The 2003 EP provided an indication of the type of monitoring tools or mechanisms to which the Bank could take recourse for fulfilling its monitoring obligations. These may have included one or more of the following:

- review of periodic environmental reports and other progress reports;
- monitoring visits by Bank's environmental specialists or consultants; and
- conducting periodic third-party audits.³¹

The important point is that the mechanisms or tools ensured that the project sponsor or client was "*implementing agreed programmes, policies, and actions as defined in the legal agreements.*"³² The choice of mechanisms or tools by the Bank depended on the results of the due diligence and public consultation, as well as the framework of legal agreements concluded with the client.

While the Bank had a margin of discretion in determining the appropriate monitoring mechanism for ensuring the client's compliance, the 2003 EP required that, to ensure compliance with the EAPs and loan covenants, the Bank had to request that the client submit "*periodic reports on the implementation of EAPs and any other environmental requirements.*"³³ Specifically, the 2003 EP required that reports should be submitted annually to the Bank.³⁴ In this respect, the Bank could also undertake other optional measures including environmental monitoring missions.

²⁹ The terms EAP and EMP are used indistinctively to refer to the same document.

³⁰ 2003 EP, para 27.

³¹ *ibid.*

³² *ibid.*

³³ 2003 EP, para 28.

³⁴ 2003 EP, para 28.

The Operation Team (Banking Department) and the ESD of the Bank were responsible for environmental monitoring and it was an ongoing commitment until the loan had been repaid.³⁵

1.3. Analysis of compliance

After extensive document review and exchanges with the Bank and the Complainant and in consideration of the EBRD policy obligations described above, the Compliance Review will now determine whether the Bank had fulfilled the requirements of the 2003 EP for the appraisal and monitoring of the Project.

1.3.1. Environmental appraisal of the Project

The Compliance Review Expert finds that the Bank conducted a thorough environmental appraisal that enabled the Bank to make a decision regarding the financing of the Project as well as integrating the environmental issues in the project financing, planning and implementation. In particular:

- the ESAP identified the potential environmental impacts, including those mentioned in the Complaint, and provided for detailed prevention and mitigation measures, including a comprehensive consultation process with communities along the road corridor to be conducted by the Client; and
- the Loan Agreement incorporated the covenants to ensure compliance with the environmental standards resulting from the environmental appraisal. In particular, the Loan Agreement required the Client to submit Annual Environmental and Social Reports (AESR) including information on the implementation of the ESAP.

1.3.1.1. Screening, categorisation of the Project and development of the ESAP

The work of the Bank to screen the Project encompassed “*significant environmental and social due diligence*,”³⁶ including the conducting of a ‘Road Sector Specialist Assessment’ and consideration of the ‘Feasibility Study’, undertaken by the Kazakhstan Roads Committee to describe project area baseline conditions.³⁷ The technical, environmental and social preliminary review conducted by the external road sector expert concluded that any potential adverse future environmental and social impacts were site-specific, limited in number, and could readily be identified, assessed and mitigated.

Although the Project was initially categorised as A/1, during the Concept Review stage the Project was reclassified as B/1, due to the restructuring of the technical concept that reduced the length of the section to be widened from 20 km to only 9.5 km. This categorisation took into considered the fact that that the majority of the works involved only reconstruction and improvements of an existing road within its present alignment and the capacity of the Client to manage the Project. Consequently, the Project was required to undergo Environmental and Social Analysis (ESA), including an environmental and social baseline review, in accordance with the 2003 EP requirements for B/1 category projects.³⁸

³⁵ 2003 EP, para 27.

³⁶ Environmental and Social Analysis (ESA), p 4. Not publicly available.

³⁷ ESA, p 4.

³⁸ Final Review, 12 September 2008. Not publicly available.

In consideration of the Client's capacity to implement the Project, it was agreed that the World Bank would hire a consulting firm to assist the Client during the implementation of all projects on the entire corridor. In addition, the other financial institutions participating in the road corridor works, including EBRD, would hire independent experienced supervising engineers.

The Bank assigned an internationally renowned PM Consultant to assist the Client for the management of the Project and serve as an independent supervisor for the implementation of the environmental and social action plan. In addition, the Bank assigned a Construction Consultant to monitor the Project and an Environmental Consultant to conduct the ESA. In accordance with the 2003 EP and in consideration of the Environmental Assessment Review Framework (EARF),³⁹ the key objectives of the ESA were set as follows:

- [to] identify and determine the potential environmental and social impacts (both positive and negative) associated with the construction of the new sections and the rehabilitation of the existing road;
- [to] assist the Government and EBRD to structure the Project so that national and EU environmental, health and safety standards as well as EBRD specific social (involuntary resettlement, cultural property and indigenous people) requirements would be met;
- [to] assist the GoK and EBRD in the development of an Environmental and Social Action aimed at preventing and mitigating potential adverse environmental and social impacts during the construction and operation of the road, providing environmental benefits and improving environmental and social quality as well as improving information flow with the affected communities.⁴⁰

Although there were no consultation requirements for the Bank in the case of Category B projects, the Environmental Consultant carried out a number of informal consultations with potentially affected groups along the Project road during the environmental and social assessment between July and August 2008. The team put together by the Environmental Consultant, travelled to Aktobe City, the capital of Aktyubinsk Oblast, where they toured the entire roadway alignment twice and met with numerous stakeholders, including, residents, government and non-governmental organisations, to collect more or confirm existing information. The ESA identified the six villages allegedly affected by the Project in the Complaint and it included a description of the local social environment of each of the villages.⁴¹ In particular, the Environmental Consultant team met with government representatives of the villages of Martuk, Zhaysan and Kuraily, three of the six allegedly affected villages. They also met with various environmental NGOs based in Aktobe and/or Aktyubinsk Oblast, including "Generation M", "Aru Ana" and "Elit-Agro". In addition, the Environmental Consultant indicated that:

In the villages, the team attempted to meet with Akimat representatives and some residents in order to collect additional data and confirm existing data, and to get an impression of the residents' level of knowledge of the proposed roadway improvements and their general feeling or attitude towards it. Furthermore these meetings were used to identify and distinguish groups of stakeholders and discuss vis-à-vis any issues raised

³⁹ The EARF was a framework developed by the Asian Development Bank to provide a framework to ensure that the methodology, content and form of the ESA reports be consistent for all segments of the proposed West China to West Europe Corridor, regardless of the entity that provides the funding. See ESA, p 4.

⁴⁰ ESA, p 3.

⁴¹ ESA, pp 17-19.

regarding the project. This includes issues related to tradeoffs between a better roadway and potential impacts during construction and of more traffic after construction in general and in particular between frequent informal access and less frequent but more structured access across the roadway.⁴²

Finally, the Consultants list the documents reviewed and indicated that:

[a]t the end of the site visit, the team held debriefings in Aktobe City with the Regional Roads Committee and in Astana with the National Roads Committee and the EBRD. During these debriefings, the more significant potential environmental and social impacts and mitigation measures were discussed and follow-up arrangements were made regarding collection of missing data.⁴³

On these bases, the ESA established detailed baseline environmental and social conditions of the project site, assessed the potential environmental and social impacts of the Project and proposed an Environmental and Social Action Plan (ESAP) comprising mitigation and monitoring measures. Importantly, the ESA identified as potential impacts the issues that were raised in the Complaint and contemplated mitigation measures to address these, including with respect to noise pollution, adequate crossings for pedestrians, cattle and agricultural machinery, measures for snow retention and snowdrifts and other safety issues like appropriate access to the road.

The activities and indicators that were recommended for monitoring by the Environmental Consultant were presented in a detailed ESAP that:

... is presented in a stand-alone format in Appendix I of this report. Two tables are provided in the ESAP, one summarising the proposed environmental and social mitigation measures and one summarising the proposed environmental and social monitoring measures. For each environmental impact issue in each project stage (pre-construction, construction and operation), recommended mitigation or monitoring measures are detailed in terms of necessary actions (including clauses to include in the construction contract), location, timing, responsible party and oversight party.⁴⁴

Importantly, the ESA also included a “public disclosure plan.” This plan was designed to meet EBRD public disclosure requirements and the legal requirements under Kazakhstan law.⁴⁵ Accordingly, the plan included two phases of public hearings. A first phase was to be organised in early 2009, prior to the finalisation of detailed design stage, in every affected community (i.e. Kurayly, Khlebodarovka, Saranzhay, Kensahara, Martuk and Zhaysan) with the participation of representatives of the design team, local authorities, representatives of the affected community and all other interested parties.

The plan included detailed provisions for publicising and conducting the meetings as well as making relevant information available in both Russian and Kazakh languages. It also provided that some standard issues needed to be addressed, including local access and provisions for road crossing by people, cars, domestic livestock and wildlife during construction and operation,

⁴² ESA, p 5.

⁴³ *ibid.*

⁴⁴ ESA, p 48.

⁴⁵ The Consultant considered the “Ecological Code of Republic of Kazakhstan”, and “Instruction on How to Conduct Environmental Impact Assessment during Elaboration of Pre-Feasibility, Feasibility Studies, Pre-Detailed and Detailed Designs” Number 204-“п” approved by the Minister of Environment Protection on 28 June 2007. The Order of Minister of Environment Protection Number 135-o from 07.05.2007 prescribes the “Rules on Conducting Public Hearing”.

as well as control of roadway dust and mud, as well as vehicle air and noise emissions. The plan stipulated that mitigation and monitoring measures should be proposed, agreed and recorded in the meeting minutes and on the large-scale drawings of each village.⁴⁶ Finally, this first phase also provided an opportunity for everyone to provide their comments and suggestions in writing.

The second consultation phase included a formal public hearing in Aktobe, concerning the final stage of the detailed design process. In the public hearing, the designer was required to present any potential negative impacts of the Project and corresponding detailed proposals for mitigation and monitoring, including those which had been presented at the individual town meetings, those presented by the road designer since the first consultation on those issues and any other additional issues that the designers identified on their own.

The plan included indications to ensure that the comments and suggestions gathered during consultations were properly considered and integrated by the design team and to revise the ESAP accordingly.⁴⁷

Finally, the ESAP also required the design team to consult with the Ministry of Environmental Protection (MOEP) and to develop best practice measures for the management of various issues including, resident and livestock road-crossing, provision of agricultural lands and provision of step-by-step guidance on environmentally acceptable bridge and culvert replacement methods.⁴⁸

1.3.1.2. Legal documentation

The corresponding environmental covenants were incorporated into the Loan Agreement. In particular, section 3.04 on the “Environmental and Social Compliance Covenants” included the obligation for the Client to “diligently implement and adhere to the Environmental and Social Management Plan (ESMP).”⁴⁹ The ESMP was defined in the Loan Agreement in terms of a reference to the ESAP, prepared by the Environmental Consultant. Section 3.06 included the obligation for the Client to submit to the Bank annual reports on environmental and social matters, including information on the implementation of the ESMP.⁵⁰ The Loan Agreement was signed on 30 March 2009. In September 2009, a letter signed by the Deputy Chairman of the Roads Committee of the Client, confirmed that the Road Committee had approved the ESAP.⁵¹ This approval was a condition precedent for the effectiveness of the agreement.

It should be noted that the obligation to submit the annual environmental and social reports was assigned to the “Borrower”, as defined in the Loan Agreement – in this case – the Republic of Kazakhstan. The Loan Agreement indicates that the ‘Borrower’s Authorised Representative’ is the Ministry of Finance and that the ‘Implementing Agency’ is the Ministry of Transport and Communication. It is not clear though which of the two would be responsible for the submission of the annual environmental and social reports. This may well have impacted the monitoring process as will be discussed below in section 1.3.2.

The Compliance Review confirms, therefore, that the Bank fulfilled its obligations under the 2003 EP to adequately appraise the Project’s environmental and social impacts, and agree to adequate

⁴⁶ ESA, p 50.

⁴⁷ ESA, p 51.

⁴⁸ ESAP, at 1.5.

⁴⁹ Loan Agreement. Not publicly available.

⁵⁰ *ibid.*

⁵¹ Information contained in an internal email, dated 25 September 2009. Not publicly available.

prevention and mitigation measures to avoid and minimise negative environmental and social impacts resulting from the Project.

1.3.2. *Environmental monitoring of the Project*

The Compliance Review Expert finds that the Bank has failed to comply with the obligations under paragraphs 27 and 28 of the 2003 EP for the environmental monitoring of the Project. In particular, the Compliance Review Expert finds that:

- The monitoring programme put in place by the Bank, although commensurate with the level of risks and the nature of the Project, was not properly implemented by the Bank Management. The Compliance Review Expert identified two main shortcomings in the monitoring process. First, unclear assignment of responsibilities for submitting the AESRs; and secondly, communication shortcomings among the different divisions in the Bank relevant to the monitoring process.

The failure in implementing the monitoring programme resulted in the Bank's inability to ensure that the Client was complying with the EAP, in particular, with respect to the consultation process, or to evaluate whether the mitigation measures were being effective.

1.3.2.1. *Lack of compliance with ESAP commitments and impact on villages along the road corridor*

The independent monitoring consultant appointed by the Bank to review the status of the ESAP following the submission of the Complaint in late 2014, confirmed that during the planning and construction periods a number of measures had been undertaken to fulfil the ESAP and addressed the identified environmental and social impacts of the Project. However, the independent monitoring consultant also found a number of uncompleted ESAP measures that are relevant to the issues raised in the Complaint, including:⁵²

- The Environmental and Social Assessment Report and the ESAP were not translated into the local languages. Consequently, the bid documents and contracts and the Environmental Protection Chapter of Feasibility Study did not include the ESAP requirements. Neither was the ESAP available to the MOEP inspectors.
- The MOEP was not consulted by the design team during the detailed designed period and snowdrift prevention measures were not developed using best practice means.
- No public disclosure report was compiled, so no information on media coverage or the copies of newspaper articles in which consultation meetings were announced was available, as required by the ESAP. Moreover, minutes of the public hearings were not prepared.
- The grievance redressal mechanism had several shortcomings, like errors in delegation of responsibilities, absence of complaint records, (though there was a traditional informal complaint collection) and the absence of a system for regular reports by the local councils.

The lack of translation of the ESAP into the local languages, Russian and Kazakh, raises doubts about the capacity of the Client to engage the relevant authorities and stakeholders and to follow implementation of the ESAP. Specifically, there is doubt as to whether the Client had created the

⁵² Report on ESAP implementation status, December 2014, pp 17 and 22. Not publicly available.

conditions for the MOEP to play its designated role in providing the necessary information for the Client's compliance with some of the ESAP commitments, including the development of snowdrift prevention measures.

The flaws identified in the consultation process are also of concern. It is not clear whether the detailed measures of the public disclosure plan were followed. The absence of records of the meetings makes it difficult to assess the extent of participation of the local communities, the nature of issues raised or the measures proposed. The absence of records also makes it difficult to assess if the design for the project had adequately integrated the issues raised by the local communities or whether the design and construction team had provided reasons for the non-integration of local community concerns. It is also not clear whether the ESAP was a part of the bid document and binding legal commitments for the contract with the construction company.

Finally, the shortcomings regarding the grievance redressal mechanism, including the lack of a formal record of complaints, makes it difficult to determine whether the local communities raised concerns relating to the Project and the authorities' response to these concerns.

In addition, the interviews conducted by the PCM Expert who prepared the EAR and the EAR for the problem-solving initiative (EAR for PSI) with residents of Project-impacted communities⁵³ provides information on their experience with the Project. These include elaboration on the numerous benefits of the road, including increased safety, faster and more efficient transportation and a comfortable ride without dust. Residents from the village of Khlebodarovka expressed appreciation for the animal crossing arrangements and expressed satisfaction with the road and residents from Kuraily acknowledged the timely removal of snow during the winter of 2014. This is indicative that the Project managed to provide positive outcomes and also dealt with a number of environmental and social impacts.⁵⁴

However, the interviewed residents also confirmed the issues with project design and implementation and also corroborated a number of issues raised in the Complaint. They noted that *"they communicated their proposed remedies previously to the designed consultants, engaged by the Client"*⁵⁵ and requested explanations when a particular proposed remedy was considered to be possible. Finally, the EAR for PSI includes a table summarising the key issues the village residents sought resolution for, their perspectives on each alleged claim, and the remedies they have proposed.⁵⁶

There is therefore sufficient evidence that some of the ESAP measures were not completed and that communities along the road corridor have, as a result, suffered from the negative impacts of the Project.

While the appraisal of the Project successfully identified environmental and social impacts of the Project and developed a comprehensive ESAP to address these impacts, the monitoring programme put in place by the Bank failed to ensure that the ESAP was properly implemented and failed to ensure that the mitigation measures included in the ESAP were being effective.

⁵³ Site visit to Kazakhstan from 8-12 June 2015 where the PCM Expert held separate meetings with the NGO Complainant, residents of project-impacted communities (including residents of five villages referenced in the Complaint), the Client and members of the Project Team. See EAR for PSI, para 5.

⁵⁴ EAR for PSI, paras 15-16.

⁵⁵ EAR for PSI, para 17.

⁵⁶ EAR for PSI, paras 17-19.

1.3.2.2. *The Bank's monitoring programme and implementation failures*

As stipulated in the 2003 EP, the Bank defined a monitoring programme for the Project. As explained by the Bank in its response:

Considering the nature of the project (refurbishment of roads with minor realignments) and the expertise of consultants engaged to monitor the project and assisting the client with the implementation of the ESAP, the project was deemed a low-risk and accordingly, passive monitoring of the project through review of annual environmental and social reports was deemed as adequate.⁵⁷

The decision of the Bank was based on the due diligence conducted and the nature of the Project. The monitoring programme included as monitoring tools:

- the appointment of renowned international consultants to monitor the Project and assist the Client in the Project implementation, including implementation of the ESAP; and
- the review of annual environmental and social reports.

Appointment of consultants: as noted above, in addition to a Construction Consultant to monitor the implementation of the Project, the Bank also assigned a special PM Consultant to specifically assist the Client in managing environmental and social matters and serve as an independent supervisor to ensure the implementation of the ESAP. As will be explained below, the extent of the PM Consultant involvement in the preparation and submission of the annual environmental and social reports was unclear.

Review of annual environmental and social reports: as noted above, the obligation to submit annual environmental and social reports (AESRs), including information on the implementation of the ESAP, was a legal obligation under the Loan Agreement. Section 3.06 of the Loan Agreement specifies that reports should be submitted within 90 days after the end of the year being reported on. As already indicated, the Loan Agreement does not identify the responsible agency from the Borrower for the submission of the AESRs. According to the internal monitoring reports of the Bank, it was clear that: matters relating to the loan, disbursements and repayments were the responsibility of the Ministry of Finance and matters related to project implementation were the responsibility of the executing agency that is the Ministry of Transport and Communication.⁵⁸ However, whether the Borrower also shared this understanding is not ascertainable.

The extensive review of relevant documents and conversations with the Bank Management provided confirmation that that the 'Borrower' did not submit the AESRs as required by the Loan Agreement. In addition, the revision of documents and the timeline provided by the Bank Management on the evolution of the Project, allowed the identification of a number of other reports on environmental and social issues, including a report filed by the PM Consultant. The relation between these reports and the process by which the Bank dealt with these reports as part of the monitoring process remain unclear.

First, the PM Consultant submitted a 2010 AESR that was transferred by the Operational Leader (OL) of the Project to ESD on 27 October 2011. ESD considered that the report was informative but that it did not provide information on all of the required components of such a report. In

⁵⁷ Bank's response, p 2.

⁵⁸ Monitoring report for period 30/03/2020 - 11/11/2009. Not publicly available.

particular, the report did not provide information on the status of the ESMP as defined in the Loan Agreement. ESD asked the OL to require the “Client” to submit the report on the implementation of the ESMP and to provide details as per the Bank’s Annual E&S Report template.⁵⁹ On 28 March 2012, the OL confirmed that the AESR from the “Client” had been submitted and transferred it to ESD. The transferred document, however, again did not contain a full AESR but rather the Annual E&S Report template that ESD had requested to be filled out in October 2011. This document also included a cover letter from the Construction Consultant. The information in the template was limited to the environmental and social issues and notably did not provide information on the ESAP and other key issues, such as the consultation process.

In this regard, it is not clear whether the 2010 AESR submitted by the PM Consultant was submitted on behalf of the Client or on its own behalf, as part of its duties as independent monitor for the implementation of the environmental and social commitments of the Project. Nor is it clear why the additional information submitted in the Annual E&S template came from the Construction Consultant and was reported to be submitted by the Client. The email exchanges between parties of the Bank Management referred indistinctively to the “Client” regardless of the author of the document submitted.

Secondly, there are a series of internal annual monitoring reports prepared by the OL that provide an overview of the Project and the implementation status in various aspects, including environmental and social aspects. From the distribution list included at the end of the monitoring reports of the Project it appeared that these reports were not sent to ESD.

Internal annual monitoring reports provided useful information on the reporting obligation. For example, the 2009/2010 report informed that the AESR from the Borrower was due by the end of May and that delay was to be expected given the staff shortage that the Borrower was facing. Subsequent reports indicate that the Borrower was delayed in submitting the AESRs and the report dated 20 May 2015 mentions that a ‘historical breach had been actioned’ as the Borrower had not provided the AESR for the year.⁶⁰ However, there is no evidence that the Bank Management took action with the Borrower to ensure compliance.

To summarise, the Bank did not adequately follow-up on the submission of the AESRs by the Borrower. Consequently, the Bank did not receive any information about the implementation of the ESAP, as the only AESR (that is, the 2010 AESR) that was allegedly submitted did not provide information in this respect. The failure in implementing the monitoring programme resulted in the Bank’s inability to ensure that the Client was complying with the ESAP, in particular with respect to the consultation process, or to evaluate whether the mitigation measures were being effective.

While a “passive monitoring approach” that relies on the expertise of the Consultants assigned by the Bank and on the review of the AESRs seems reasonable in light of the due diligence and the nature of the Project, such an approach demands that there exist robust processes to ensure that the Client submits the reports and that these are effectively reviewed. The PCM Expert identifies the following shortcomings in the Bank’s processes with respect to the Project:

- **Unclear assignment of responsibilities as regards the submission of AESRs:** there are two relevant aspects in this respect. First, although the Loan Agreement assigned the

⁵⁹ Internal Bank’s emails of 27 October 2011 and 4 November 2011. Not publicly available.

⁶⁰ Internal annual monitoring reports. Not publicly available.

responsibility to file the AESRs to the Borrower, it did not specify the agency within the Borrower that was responsible for this submission. The Project documentation did not seem to provide this information either. This could have created uncertainty on the Borrower's side as to the responsible agency for submitting the AESRs and complicated the identification by the Bank of the contact agency for requesting timely compliance with this legal obligation. Secondly, the role of the Consultants with respect to the submission of the AESRs was unclear. Was the PM Consultant supposed to file the AESR on behalf of the Borrower? Or was its role to provide an independent report on the implementation of the ESAP, or to support the Borrower on the preparation of the AESR? What was the role of the Construction Consultant and why was it providing information filled out in the Bank's Annual E&S Report template? This lack of clarity impacted the monitoring of the Project as there was uncertainty as to whether and how the obligation under the Loan Agreement to submit the AESRs had to be fulfilled.

- **Communication shortcomings to ensure proper and timely receipt of AESRs:** different Bank departments and officers play diverse roles with respect to the submission of the AESRs. In the case at hand, the communication and coordination among these departments and officers for ensuring the submission of the AESRs was unclear. There is no evidence that there was a standardised procedure to communicate on the timely submission of reports. It was not clear either how the relevant departments or officers could have been aware of the timeline or approaching deadlines in terms of the legal requirements for the submission of the AESRs. Finally, relevant information on the compliance with the obligation to submit the AESRs like the internal annual reports was not distributed to all relevant departments and officers.

The Compliance Review Expert therefore concludes that the Bank has failed to comply with the obligations under paragraphs 27 and 28 of the 2003 EP for the environmental monitoring of the Project.

2. Promotion of structural change

According to the ToRs the Compliance Review should consider whether EBRD sufficiently met any obligations it may have to promote structural change in accordance with paragraph 10 of the 2003 EP.

2.1. Parties' positions

2.1.1. The Complainant's position

According to the EAR, the Complainant raised questions regarding the impact of the Project, in connection with structural issues, root causes and systemic problems linked to infrastructure projects in Kazakhstan. These problems include the absence of adequate national norms for regulating public engagement and consultation.⁶¹

In conversations with the PCM Expert the Complainant identified the following issues that required structural changes at the national level to address issues at the local level:

⁶¹ EAR, para 13.

- government engagement and consultation with stakeholders and project information provision to affected communities;
- accountability of construction firms and other companies engaged in infrastructure projects;
- the incorporation of principles of sustainable development;
- a compensation framework at the national level for damages related to requisition of land, demolition of structures, or loss of business as a result of project activities;
- the requirement for a participatory monitoring system;
- the requirement for project-level grievance mechanisms.⁶²

The Complainant considered the Bank should play a role in supporting the efforts of civil society to ensure that structural changes be introduced in the country.

2.1.2. The Bank's response

The Bank Management explained its position concerning these issues during the conference call with the Compliance Review Expert on 11 December 2015 and in a document submitted via email on 18 December 2015. The Bank Management considered that this argument relates to the aspirational aspects of the 2003 EP, that is, principles and beliefs to guide the Bank's decisions regarding the environmental policy to be pursued by it. The aspirational goals of paragraph 10 of the EP do not form part of the Bank's obligations in the context of specific project requirements and are therefore not subject to the Compliance Review.

2.1.3. The Client's response

The Client did not provide a response to this ground of complaint.

2.2. The Bank's policy obligations

The Compliance Review Expert is of the view that paragraph 10 of the 2003 EP is of an aspirational nature. It spells out the beliefs of the Bank as to the manner in which countries can achieve "environmentally sound and sustainable development". This aspirational nature is clear from the wording of the provision that uses the formulation the 'EBRD believes' in contrast to language in other provisions signalling a normative obligation like 'EBRD is committed to' or 'EBRD will' engage in a specific activity.

Further, a normative obligation on the Bank cannot be inferred by linking the aspirational goals expressed in paragraph 10 of the 2003 EP with the issues addressed in relevant documents and objectives of the Project such as the PSD and the transition objectives of the Project. The PSD is an informative document that provides a factual summary of the main elements of the Project and fulfills the disclosure obligations of the Bank under the public information policy. It is therefore not a document in which the Bank assumes obligations or makes commitments with respect to the Project. The transition objectives of the Project as spelled out in the PSD,⁶³ are very

⁶² EAR, footnote 28.

⁶³ The transition objectives of the Project as identified in the PSD are: (i) the preparation and launching of the first road sector PPP following international best practices; and (ii) in the area of routine and winter maintenance, the contracting, introduction of service level agreements to promote further the development of client – supplier relationships in the road sector, and preparation of the sector for the introduction of performance-based maintenance contracts. See PSD for the Project at: <http://www.ebrd.com/work-with-us/projects/psd/southwest-corridor-road-project.html>

specific in nature and do not relate to the general issues identified by the Complainant that need to be addressed at the national level in Kazakhstan. They also express the intentions or goals that the Bank pursues through the Project and, as regards the current Compliance Review, is outside the scope of the PCM review.

The Compliance Review concludes that paragraph 10 of the 2003 EP does not create a normative obligation for the Bank and therefore an analysis of compliance need not be undertaken.

3. Enabling dialogue and responding to communications

According to the ToRs, the Compliance Review should consider whether the Bank adequately fulfilled its commitment of enabling dialogue and engaging with the Complainant in accordance with paragraphs 11 and 43 of the 2003 EP; and whether the Bank satisfied its obligations under Section D.3.4 and Annex to 2011 PIP.

3.1. Parties' positions

3.1.1. The Complainant's position

According to the Complainant, the Bank failed to respond to his communications and engage in a cooperative relationship with civil society organisations. These failures resulted in alleged harm to village residents and to the establishment of the ECTSD and damaged the reputation of the non-governmental organisation engaged in monitoring the progress of the South-West Corridor Road Project.

The Complainant further indicates that the Bank failed to comply with paragraph 3 of the Public Information Policy, which provides that *“through its commitment to open communication, the Bank demonstrates its willingness to listen to third parties so as to benefit from their contributions to its work in fulfilling its mandate.”*⁶⁴ The Complainant additionally refers to paragraph 15 of the Environmental Policy according to which the Bank is committed to the principles of *“transparency, accountability and stakeholder engagement”* and to *“participate in meaningful dialogue with the Bank's stakeholders in accordance with the Public Information Policy.”*⁶⁵

The Complainant refers to four instances of communication with the Bank. The first one is a communication dated 22 October 2012 from the Complainant to the Bank regarding a proposal for the Bank to work with the network of NGOs, led by the Complainant, to monitor the section of the road financed by the Bank. It encloses a monitoring report on the progress of the Western Europe China International Transit Corridor prepared by the Complainant and his network of NGOs, urging the Bank to cooperate with the network of NGOs. The Bank responded to this communication and, as requested in it, met with the Complainant in November 2012. However, the Complainant alleges that the remaining three instances of communications remained unanswered by the Bank.

⁶⁴ Complaint at p 9.

⁶⁵ Complaint at p 9. The Complainant in the Complaint is utilising provisions from the ESP 2008 and ESP 2014 while referring to the 'Environmental Policy'. However, the usage of the word 'participate' is presumably the Complainant's interpretation of the provisions of 2008 and 2014, since neither the environmental and social policies of 2008 nor 2014 uses this word in this context of meaningful dialogue.

The remaining three instances where the Bank allegedly failed to respond are:

- (i) A note of 31 May 2013 seeking to inform the Bank of the publication of the report regarding monitoring results of the Aktyubinsk Province.⁶⁶
- (ii) A telephone message from the RK Ministry of Transport and Communication Highways Committee.⁶⁷
- (iii) A note of 23 January 2014, complaining that the Bank had ignored the findings of the Complainant's report on the shortcomings identified in six villages in the Aktyubinsk Province, urging the Bank to agree to parameters of cooperation with the Complainant as well as asking for the contact details of a Bank employee with whom agreement for cooperation could be executed.⁶⁸

In addition to the above correspondence, there were several additional instances of interaction between the Complainant and the Bank. The Complainant referred to these other instances of interaction during the video-conference with the Compliance Review Expert and subsequently sent a list summarising these instances to the Compliance Review Expert.⁶⁹ These instances included the Complainant's participation in at least four annual meetings of the Bank where he had the opportunity to interact with the Bank specialists, the members of the Board of Directors and the President of the Bank, to present his proposal for establishing a cooperation agreement to monitor the Project and discuss a number of issues related to the Bank's operations in Kazakhstan, beyond the Project. These instances also included several personal meetings with members of the ESD, principal economists and senior bankers at the Bank and participation at working meetings with Bank staff members.

According to the Complainant, the inaction of the Bank in not establishing a cooperative relationship with the Complainant and his network organisation has harmed the reputation of the ECTSD and the image of the NGOs that undertook the monitoring of the works of the transport corridor Western Europe-Western China.

3.1.2. *The Bank's response*

The Bank's response to this ground of complaint was provided to the Compliance Review Expert during the conference call held with members of ESD on 11 December 2015. Thereafter, relevant documents were provided by an email on 18 December 2015.

First, the documents provided by the Bank included a list of its interactions with the Complainant. This list contains records of at least 12 interactions with the Complainant, including written exchanges with the Bank's Civil Society Engagement Team and ESD and meetings with Bank staff, the President and members of the Board of Directors. According to the Bank, there has been only one instance where the Bank did not respond to the Complainant's communication.⁷⁰

Secondly, regarding the Bank's inaction in not establishing a cooperative relationship with the Complainant's network of civil society organisations, the Bank informed that the Complainant

⁶⁶ Complaint, reply to question 7, p 5.

⁶⁷ Complaint, reply to question 7, p 6.

⁶⁸ *ibid.*

⁶⁹ Video-conference call with Complainant of 14 December 2015; document sent by email on 16 December 2015. Not publicly available.

⁷⁰ Document transmitted by ESD to the Compliance Review Expert by email on 18 December 2015. Not publicly available.

requested the Bank to enter into an agreement to provide funding for the Complainant and his network organisations to monitor the Project. The Bank explained that it had, in agreement with the Client, already appointed internationally renowned project management consultants to monitor the Project. The Bank further stated that it had no objection to the Complainant's separate initiative of public monitoring of the roads in this region and welcomed any comments in this regard.

Finally, the Bank contends that it is the 2006 Public Information Policy that applies to the information disclosure and requests for information related to this Project as the Bank's approval for the Project took place on 11 November 2008,⁷¹ that is before the current Public Information Policy of 2011 (2011 PIP) came into force. Further, the Bank contends that, in case the 2011 PIP is applicable, only non-compliance with section D3 of the 2011 PIP is subject to the PCM Compliance Review. Since the current Complaint relates to section F of the PIP 2011, the current ground of complaint is outside the competence of the PCM.

3.1.3. *The Client's response*

The Client did not provide a response to this ground of complaint.

3.2. **The Bank's policy obligations**

The Compliance Review will first determine the extent of the commitment to enable dialogue and to engage with the Complainant in accordance with paragraphs 11 and 43 of the 2003 EP.

To begin, the Compliance Review Expert finds that paragraph 43 of the 2003 EP referred to in the EAR is not relevant to the current Complaint as it relates to the instances in which the Bank is seeking to "*build partnerships to address regional and global environmental issues*". In particular, paragraph 43 refers to the Bank's efforts to address economic and environmental sustainability challenges in its region. Given that the Complaint does not deal with environmental issues that would be significant on a regional or global level, the Compliance Review Expert considers that this provision is not applicable to the Complaint.

With respect to paragraph 11 of the 2003 EP, it expresses the Bank's commitment to "*enabling dialogue with its stakeholders, including project sponsors and other project stakeholders, governments and business partners and, other international institutions and civil society at large.*" This obligation to "*enable dialogue with stakeholders*" has further evolved in the 2008 and 2014 ESPs to ensure the Bank not only "*enables*" dialogue but that it "*engages in meaningful dialogue*" with the Bank's community of stakeholders.⁷² This evolution weighs for a more substantive approach to the way in which the Bank relates to stakeholders. That said, the obligation to "*enable dialogue*" should not be seen as a mere procedural requirement to provide for channels of communication with stakeholders as this provision needs to be understood in light of the larger context of the 2003 EP and the public information policies of the Bank. Particularly, the interpretation of this commitment should consider the principle of 'willingness to listen and receptivity to comment' as enumerated in paragraph 11 of the 2003 EP that the Bank undertake to promote in fulfilment of its obligation of public information and consultation.

⁷¹ EAR, para 3.

⁷² 2008 ESP, para 7; 2014 ESP, para 15.

The willingness to listen and to be receptive to comment are further elaborated in the various public information policies of the Bank. The enunciation of these principles in the 2006 and the 2011 PIPs are very similar. In this regard, the Bank acknowledges that “[t]hrough its commitment to open communication, the Bank demonstrates its willingness to listen to third parties, with the purpose of [so as to] benefiting from their contributions to its work in fulfilling its mandate.”⁷³ The 2006 PIP indicates that this commitment of the Bank “does not diminish the Bank’s ultimate responsibility to decide its own strategies and to choose its own operational activities.”⁷⁴ The 2011 PIP adds that the interaction with external stakeholders will be flexible, given their diverse interests, large numbers and global spread.

Therefore, the commitment to “enable dialogue” requires that the Bank ensure openness in its interactions with stakeholders and that third parties be effectively listened to. This Compliance Review will therefore determine whether the Bank enabled dialogue with the Complainant in observance of these requirements.

The second issue the Compliance Review will consider under this ground of complaint is the extent of the obligation of the Bank to respond to the Complainant’s communications in accordance with Section D3.4 and the Annex to the 2011 PIP.

According to the EAR, the obligation of the Bank in this respect is triggered by the fact that the Complainant’s communications, although not explicitly requesting information, sought a prompt response from the Bank regarding the monitoring of the Project. In this respect, the EAR considers that the provisions of Section D3.4 and the Annex to the 2011 PIP are applicable to the Complainant’s communications as they addressed disclosure of project-related information.

The first issue that this Compliance Review has to consider is the version of the Public Information Policy that would be applicable to the Complainant’s alleged requests for information. For the procedural aspects of the public information policies, that is the procedure to handle the information requests and appeals, the applicable public information policy should be that which is in force at the time in which the specific request is submitted. For the substantive aspects of the public information policies, that is those that define the scope of the Bank’s obligations, the applicable policy is the public information policy in force at the time that the Project was approved. Therefore, for example, for a request of information filed in February 2016 regarding the elements disclosed in the PSD of the Project under review, the Bank has to follow the existing procedure to handle the procedural aspects of this request, in particular the Annex to the 2014 PIP. However, the issue whether the Bank had fulfilled its disclosure obligations regarding the PSD will be evaluated against the requirements of the PIP in force at the material time the PSD was to be disclosed, that is the 2006 PIP.

Consequently, the Bank’s response to the alleged requests for information will have to be assessed in light of the 2011 PIP. This is because the communications forming the basis of the Complaint on this specific issue were submitted between October 2012 and January 2014, when the 2011 PIP was applicable.

The next question for this analysis is to establish the scope of the PCM competence to apply the 2011 PIP for the compliance review. The 2014 PCM RPs provide that only the “project specific

⁷³ This is principle 1.4 and 3 in the PIP of 2006 and 2011, respectively. The only difference in the text of the principle is the use of the terms “with the purpose of” in the 2006 PIP and “so as to” in the 2011 PIP.

⁷⁴ 2006 PIP, para 1.4.

*provisions of the 2014 Public Information Policy and previous Public Information Policies*⁷⁵ constitute a “Relevant EBRD Policy” for the purposes of a compliance review. Further, the 2011 PIP provides that it is for the Secretary General, assisted by the General Counsel and other Members of the Executive committee of the Bank, to oversee and verify compliance with the policy.⁷⁶ Thus the general competence to apply the PIP lies with the Secretary General. The PCM has only a residual and alternative competence to that of the Secretary General when the requests relate to “*project specific provisions*” of the PIP.

Therefore, the scope of “*project specific provisions*” will determine whether the current issue is within the competence of the PCM. The 2011 PIP refers to the term “project specific provisions” when describing the scope of review of the PCM.⁷⁷ Otherwise, the 2011 PIP uses the term “project related information” and “project specific information”. The use of these diverse terms raises questions of interpretation, in particular, whether project specific provisions relate to the limited set of information included in the provisions on ‘project related information’ section of the 2011 PIP or whether it has a broader scope.

Article 6.5 of the 2006 PIP can be useful in making sense of these different provisions and in understanding the scope of the PCM competence. Article 6.5 provides that:

The Bank has an Independent Recourse Mechanism (IRM) to receive complaints from groups who are, or are likely to be, directly and adversely affected by a Bank-financed project to determine whether there has been material non-compliance by the Bank with specified policy requirements. The IRM's focus is to examine project-related issues. If appropriate, a group filing a complaint with the IRM may indicate that, in their opinion, the Bank has failed to comply with a project-specific requirement of the Public Information Policy. In this context, the Independent Recourse Mechanism may consider issues relating to possible non-compliance with the project-specific requirements, particularly as set out in Part 4 above, of the Public Information Policy.

Thus, the competence of the PCM (formerly the IRM under the 2006 PIP) relates to project-specific requirements that includes “particularly”, but not only, those set out in part 4 of the 2006 PIP that are identified as “project related information”. So the competence of the PCM is not restricted to the information covered by part 4; it includes this and other information related to project specific requirements.

This explanation militates for providing a broad interpretation to the term “project specific provisions”, to include in the competence of the PCM the requests relating to the “project related information” section of the 2011 PIPs as well as those relating to information that is related to a specific project.

It is against these obligations under the 2003 EP and the 2011 PIP that the compliance of the Bank as regards the current issue will be evaluated in this Compliance Review.

3.3. Analysis of compliance

⁷⁵ 2014 PCM RPs, Definitions and abbreviations, p 2.

⁷⁶ 2006 PIP, para 6.1; 2011 PIP Section F, para 1.

⁷⁷ 2011 PIP section F, para 7.

The Compliance Review Expert finds that the Bank has complied with its obligations under the 2003 EP and 2011 PIP to enable dialogue with the Complainant and respond to his communications.

3.3.1. *Enabling dialogue with the Complainant*

It is worth noting that both the Bank and the Complainant acknowledged a long history of interaction between them that included several instances of written communications, attendance of various annual meetings of the Bank as well as meetings with the Bank's staff, including members of ESD, the President and members of the Board of the Bank. The extent and diversity of the interactions and the conversations that the Complainant was able to establish with the Bank indicates the openness with which the Bank engaged with the Complainant. In these interactions, the Bank addressed the issues raised and thoroughly discussed the Complainant's concerns.

In addition, these instances offered ample opportunity for the Complainant to present his views including the Complainant's proposal to collaborate in the monitoring of the Project (including through the Memorandum of Understanding and Cooperation (MoUC)⁷⁸), and for the Bank to listen to and consider these. Although the Bank decided not to directly be a party to MoUC for the implementation of the monitoring of the South-West Transit Corridor, both the construction and the PM consultants assigned by the Bank to the Project were parties to the MoUC and therefore the Project benefited from the work undertaken pursuant to the MoUC. The decision of the Bank not to accept the proposal of the Complainant to collaborate in the monitoring of the Project cannot be seen as a refusal to enable dialogue and engage with civil society as required under the provisions of the 2003 EP, or an affront to the reputation of the ECTSD or the Complainant's NGO.

Therefore, the Compliance Review Expert concludes that the Bank fulfilled its obligation under the EP 2003 as regards enabling dialogue with the Complainant. In addition, as noted by the 2006 PIP with respect to the commitment to open communication, the Bank retains "ultimate responsibility to decide its own strategies and to choose its own operational activities." In this respect, it was the Bank's prerogative to decide how to monitor the Project and to assume the consequences of that decision, as discussed in section 1 above.

3.3.2. *Response to Complainant's communications*

To begin, it is important to point out that, in none of the communications or interactions referred to by the Complainant, was he expressly seeking the disclosure of any documents or information. Therefore, as the communications did not request the disclosure of information, the allegation regarding the non-provision of information and consequently the non-compliance with the applicable public information policy is not made out.

In fact, in substance, the Complainant is not alleging that the Bank failed to provide or disclose information that it was requesting, but alleging that the Bank did not respond to some of his communications requesting the Bank to engage with the Complainant in a cooperative monitoring

⁷⁸ Memorandum of Understanding and Cooperation signed on 14 January 2012 between the RK Ministry of Transport and Communications Highways Committee, companies participating in the implementation of the South-West Transit Corridor Reconstruction Project and the Association of NGOs represented by NGO Blago. See EAR, footnote 10, p 5.

of the Project.⁷⁹ Therefore, even though the Complaint is not regarding procedural aspects of information provision, for the sake of ensuring a thorough review, this Compliance Review will assess the Bank's compliance with the obligation to respond to some of the specific communications of the Complainant.

The Bank has acknowledged that it did not respond to one of the twelve instances of interaction with the Complainant that it had recorded.⁸⁰ This was the letter of 23 January 2014 that has also been included in the list of three instances that, according to the Complainant, remained unanswered by the Bank. In this letter, the Complainant expresses disappointment for the reluctance of the Bank to establish a "constructive cooperation" and insists on the need to establish cooperation between the Bank and his civil society organisation, requesting the name of a Bank staff member in order to set up a cooperation agreement for the purposes of joint-monitoring.

Of the other two unanswered instances indicated by the Complainant in the Complaint, the email communication of 31 May 2013 was only informing about the publication of the report on reconstruction of the Aktyubinsk Province section of the Western Europe – Western China International Transit Corridor. Although this communication was not formally requiring the Bank to provide a response or take a specific way of action, it was providing the Bank with information relevant to an ongoing project. There is no evidence that this information reached the relevant Bank officers in charge of monitoring the Project or that it prompted any reaction with respect to the lack of information on the implementation of the Project due to the absence of AESRs. This situation can therefore be identified as an additional shortcoming of the monitoring process carried out by the Bank.

The second instance mentioned a telephone message from the RK Ministry of Transport and Communications Highways Committee. This refers to a call from the Client and therefore is not an attempt by the Complainant to reach out to the Bank.

The question remains, therefore, whether the lack of response pursuant to the 23 January 2014 letter constitutes an event of non-compliance. First, strictly speaking, the letter was not requesting the disclosure of information or documents. Even if the request of the name of a contact person was to be considered a request for information, the Bank had already addressed this request when it declined to enter into an agreement with the Complainant for collaborating in the monitoring of the Project. Moreover, by the time the communication was received, the Project had already been completed and, in substance, the letter was urging the Bank to engage in cooperation with the Complainant in view of the Bank's intention to participate in future infrastructure works in Kazakhstan. This request goes beyond the competence of the Compliance Review, which is limited to review allegations in relation to the Project.

The Compliance Review Expert therefore concludes that the Bank has complied with its obligations under the 2003 EP and 2011 PIP to enable dialogue with the Complainant and respond to his communications.

⁷⁹ EAR, p 9, para 28.

⁸⁰ EAR, p 9, para 27.

Part IV: Recommendations

Since the Compliance Review Expert concludes that the Bank was in non-compliance with a Relevant EBRD Policy, the PCM RP 44 requires the Compliance Review Report to provide recommendations to:

- a. 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
- b. 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; and
- c. monitor and report on the implementation of any recommended changes.

1. Recommendations to address the findings of non-compliance at the level of EBRD systems or procedures

1.1. Recommendations regarding the unclear assignment of responsibilities

The Bank Management should include in the Management Action Plan appropriate measures to address the need to:

- Identify in the Loan Agreement or in the relevant project documentation the agency within the Borrower that is responsible for the submission of the AESRs, the contact details of this agency and the contact department within the Bank responsible for the receipt of the AESRs.
- Clarify the role of the different consultants assigned to a project in the preparation and submission of the AESRs and ensure this information is included in the consultancy agreements and other relevant legal documentation.
- Clarify the specific roles played by the different Bank departments and officers with respect to following up and ensuring the submission of the AESRs.

1.2. Recommendations regarding the communication shortcomings

The Bank Management has indicated that they have already identified some of the communication shortcomings with respect to monitoring low-risk projects and in particular the submission of AESRs. Consequently, the Bank Management has informed that a number of measures have been implemented to address these shortcomings. In particular, the Bank has created an automated system that replaced the old manual system and automatically alerts Bank officers regarding existing breaches of covenants. In addition to this the Bank has introduced information management measures.

The Compliance Review Expert welcomes these efforts and calls on the Bank to ensure that adequate coordination systems are put in place to provide clear channels for the different Bank departments and officers involved in the monitoring of the AESRs to communicate, obtain and exchange information on: (i) the timing of the legal requirements to submit the AESRs; (ii) the reception of the AESRs; (iii) the communication with the Borrower as to the fulfilment of the obligation to submit the AESRs; and (iv) any information provided by third parties regarding the environmental and social impacts of the project, the clients' management of environmental and social issues, including implementation of environmental and social actions plans (or management systems in the nomenclature used in the Bank's 2014 Environmental and Social

Policy) and the monitoring of the implementation of such plans or systems. Consequently, the Management Action Plan should include measures to ensure that:

- The automated system gathers and distributes the information identified in (i) and (ii) above to all relevant Bank officers.
- There are formal procedures for communicating with the Borrower regarding the non-compliance with the submission of the AESRs.
- Any information provided by third parties to the Bank regarding item (iv) above be timely communicated to the Bank officers relevant to the monitoring of the environmental and social performance of the project.
- Any internal monitoring reports relating to or containing information on the implementation of the environmental and social performance of a project, including the submission of AESRs be sent to ESD in a timely manner.

The Compliance Review Expert therefore requires that the Bank includes in the Management Action Plan the details of the changes that have already been introduced to address the communication shortcomings identified in the Compliance Report and those that need to be introduced to address the recommendations made in this Report.

2. Monitoring and reporting on the implementation of any recommended changes

The Bank Management should (i) report on the changes introduced to address the unclear assignment of responsibilities; and (ii) monitor the implementation of the changes made to address the communication shortcomings to evaluate their effectiveness and report on the results to assess the need to introduce further changes.

Finally, since the Compliance Review Report has acknowledged that residents of villages along the road corridor have been affected by the Project, the Compliance Review Expert encourages the Bank to continue its efforts to addressing such concerns through its ongoing relationship with the Client and the processes of the problem-solving initiative currently underway.

List of Abbreviations

2003 EP: 2003 Environmental Policy

2006 PIP: 2006 Public Information Policy

2008 ESP: 2008 Environmental and Social Policy

2011 PIP: 2011 Public Information Policy

AESRs: Annual Environmental and Social Reports

ARC: Automated Record of Compliance

EAP: Environmental Action Plan

EAR: Eligibility Assessment Report for compliance review

EAR for PSI: EAR for the problem-solving initiative

EARF: Environmental Assessment Review Framework

ECTSD: Network of Expert Councils on Transparency and Sustainable Development

EMSP: Environmental and Social Management Plan

ESAP: Environmental and Social Action Plan

ESD: Environmental and Sustainability Department

MoUC: Memorandum of Understanding and Cooperation

OAD: Operations Administration Department

OL: Operational Leader

PCM: Project Complaint Mechanism

2014 PCM RPs: PCM Rules of Procedure

PSD: Project Summary Document

ToRs: Terms of reference