

DARIALI HPP

REQUEST NUMBER: 2014/05

COMPLIANCE REVIEW REPORT – February 2017

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

For more information about PCM, contact us or visit www.ebrd.com.

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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 PCM received a complaint on 22 November 2014 from Association “Green Alternative” and “Stepantsminda,” in the Republic of Georgia relating to the EBRD investment in the Dariali Hydropower Plant, Georgia. EBRD formally responded to the Complaint according to the PCM Rules of Procedure on 12 January 2015. The PCM commissioned an eligibility assessment of the Complaint and based on the eligibility criteria in the PCM Rules of Procedure the Eligibility Assessors found the Complaint eligible for a compliance review. In September 2015, Neil A.F. Popović was appointed as the PCM Compliance Review Expert.

The PCM compliance review has included a review of public domain project information and EBRD internal documents. The Compliance Review Expert participated in conference calls with EBRD environmental and social and investment staff. In April 2016, the Compliance Review Expert, accompanied by a representative of the PCM Officer, conducted a site visit to Georgia. The site visit included meetings with local office representatives of the Bank in Tbilisi, meetings with Complainant Green Alternative in Tbilisi, a tour of the facilities at the Dariali Hydropower Plant in Stepantsminda with representatives of Client and the Bank, a private meeting with Client, a tour of the area near the project site with Complainants Green Alternative and Stepantsminda, and a meeting with a local geologist in Kazbegi, arranged by Complainants.

The project includes the funding of a senior A/B loan to JSC Dariali Energy of up to USD 80 million (EUR 57 million equivalent), against a project cost of USD 123 million (EUR 92 million) for the financing of the development, construction and operation of the Dariali HPP, a hydroelectric power plant located on the Tergi river in northeastern Georgia (the “Project”). Dariali HPP will have installed capacity of 108 MW with expected electricity output of 510 GWh at P50 scenario (implied load of 54%).¹

The Complaint alleges inadequate assessment of the environmental and social impacts of the project, with eight (8) overlapping areas of concern—

1. Complainants allege inadequate assessment of social and environmental impacts, including improper site selection, failure to consider the risk of a glacier break from the Devdoraki glacier, and inadequate consideration of alternative sites. The Compliance Review Expert has concluded that the ESIA adequately considered technically and financially feasible alternatives, including documentation of the rationale for selecting the particular course of action proposed.
2. Complainants allege improper assessment of “geodynamic risks,” including changing water and solid flows, as well as the risk of development of geodynamic processes independent of the Project that might have an impact on the Project.² The Compliance Review Expert has concluded that, in contrast to the requirements of EBRD Performance Requirement (PR) 1.9, the ESIA did not adequately consider certain geotechnical risks independent of the Project that might have an impact on the Project. The Compliance Review Expert has also concluded that the Bank did not comply with PR 1.5 because the ESIA does not include sufficient, timely baseline data regarding river flow.

¹ P50 scenario indicates a 50% likelihood expected output will be reached.

² The Complaint uses the term “geodynamic risk” to encompass a range of geological phenomena, including seismic risk, as well as erosion, landslides, rock falls, debris flow and sedimentation. The Compliance Review Expert understands geodynamics to mean geological phenomena that relate to the earth’s interior, such as plate tectonics, volcanoes and seismic activity. Phenomena such as landslides, when not linked to seismic activity, are more properly considered under the rubric of geotechnical risks.

3. Complainants allege the project poses risks to the Stepantsminda settlement because increased sedimentation could lead to flooding in the Kuro Valley. Complainants allege the Bank violated PR 1.6 because the ESIA failed to study the impacts of the Project on Stepantsminda. The Compliance Review Expert has concluded that the ESIA adequately considered risks to the Stepantsminda settlement, including flood risks.

4. Complainants allege the Project involves hydropower plant construction in a protected area in violation of Georgian law and PR 1.5 and PR 6.8. The Project does involve land that was previously part of Kazbegi National Park, but was transferred to Dariali Energy for use in connection with the Project. Complainants challenged the land transfer in Georgian courts, but the courts rejected their challenge. The Compliance Review Expert has concluded that the Bank confirmed the validity of the land transfer under Georgian law, and that the Bank and the Client considered the biodiversity value of offset land transferred into national park ownership as compensation for land transferred to Dariali Energy for use in the Project.

5. Complainants allege there are problems with the quality of additional biodiversity studies provided to the Bank, in particular the “Expert Advice on Terrestrial Biodiversity Conservation Land Take and Compensation Report” (Expert Report) released in 2013. The Compliance Review Expert has concluded that the additional studies satisfy the requirements of PR 1 and PR 6.

6. Complainants allege violations in the decision making process, specifically that the Bank approved the Project notwithstanding that the Georgia Ministry of Environmental Protection (MOE) approved the EIA report prior to the deadline for interested parties to submit comments. Complainants allege violation of PR 10.7, which requires the Bank to ensure compliance with national law and host country obligations under international law. The Compliance Review Expert has concluded that the Bank complied with PR 10.7 inasmuch as Complainants submitted comments, and their comments were considered prior to the Bank approving the Project.

7. Complainants allege Client commenced construction prior to the issuance of necessary permits. Complainants raised this issue in domestic court proceedings in Georgia, and the Georgian courts ruled against them. The Compliance Review Expert has concluded that the Bank assured itself prior to approval of the Project that Client had the necessary construction permits.

8. Finally, Complainants allege that the Bank ignored the findings of the PCM in connection with the Paravani HPP (Request Number 2012/01). According to Complainants, the Project suffers from some of the same deficiencies identified by the PCM in connection with the Paravani HPP. The Compliance Review Expert has concluded that, while compliance review reports in other cases may inform the compliance review here, the Bank’s alleged failure to consider the Paravani HPP Compliance Review Report would not in and of itself establish non-compliance with the Bank’s 2008 Environmental and Social Policy (ESP).

A. BACKGROUND

On 7 May 2014 the Board of Directors of the European Bank for Reconstruction and Development (EBRD) approved financing of the Dariali Hydropower project (HPP), providing a loan of up to USD 80 million, against a total project cost of USD 123 million for the construction of a run-of-the-river hydroelectric power plant with installed capacity of 108 MW in the Tergi River in the Republic of Georgia, near the town of Stepantsminda.

Project proponent JSC Dariali Energy (Dariali Energy or Client) is a special purpose entity established in Georgia for the sole purpose of constructing the Dariali HPP. The Project involves a diversion type power generation facility, including water intake, a sedimentation diversion water channel, a tunnel entrance portal with spillway, a diversion pipeline, surge shaft, underground pressure tunnel, dam underground building and open substation. The headrace is located 1725 meters above sea level; and the tailrace is located 1345 meters above sea level, a drop of 380 meters over a distance of 8 kilometers. The power unit is located approximately 1.2 kilometers away from the State Border checkpoint for the Russia-Georgia border.

The Dariali HPP will be connected to the Georgia and Russia power network via a 110 kW power transmission line supplied by the Georgian State Electrosystem (GSE), with possible construction of a new 220 or 500 kV power transmission line, also by GSE.

On 22 November 2014, Association Green Alternative and “Stepantsminda,” both of Georgia, registered a complaint relating to the Project with the EBRD Project Complaint Mechanism (PCM). Complainants allege that the Bank’s approval of the Project violates the Bank’s 2008 Environmental and Social Policy (ESP). EBRD formally responded to the Complaint on 12 January 2015. The Bank contends that each of the issues raised in the Complaint was duly addressed prior to approval of the Project, that compliance with the Project’s Environmental and Social Action Plan (ESAP) will be monitored by the Bank during project implementation, and that the Bank was in compliance with the ESP.

Client responded to the Complaint on 13 January 2015. Client denies there was any non-compliance with national law or the ESP. Client asserts that the Complaint is based on false and unproven information, and contends that the Complaint should not be regarded as eligible under the PCM Rules of Procedure.

The Eligibility Assessors issued an Eligibility Assessment Report on 28 August 2015, in which they found the Complaint eligible for a compliance review, and a Compliance Review Expert was appointed to undertake the review.

B. SCOPE OF REVIEW

1. The Complaint

The specific issues raised by the Complaint are:

ISSUE 1: Whether environmental and social impacts were adequately assessed, including whether improper site selection contributed to impacts caused by the 2014 landslides.³

³ The Complaint frames the question as whether improper site selection led to the deaths of six workers and four truck drivers as a result of landslides. The causes of worker and truck driver fatalities were the subject of official

Complainants allege that improper site selection resulted in the death of workers around the worksite of the Project and drivers parked on the public road after two consecutive landslides at the Devdoraki glacier in May and August 2014.

According to Complainants, the Minister of Energy decided to increase the hydro capacity of the Project from 50 MW, eventually up to 110 MW (actual capacity was ultimately 108 MW), and “that decision was not based on a detailed study,” and the option chosen was not proven to be the most technically viable, all in violation of PR 1.9. As a Category A project, the Project required “special formalised and participatory assessment processes including an environmental and social impact assessment.” According to Complainants, the ESIA “was only partial” and failed to include “an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed.”

ISSUE 2: Whether geotechnical risks were adequately assessed, and proper mitigation measures put in place.

Complainants allege JSC Dariali was provided with information about the improper assessment of the risks of geological occurrences such as landslides, but failed to correct the deficiencies.⁴ According to Complainants, “[t]he risks of geodynamic processes independently from the project and their impact on the project was not studied at all.” Complainants assert that by approving the Project under these circumstances, the EBRD violated PR 1.9, which requires “a comprehensive environmental and/or social impact assessment, to identify and *assess the potential future environmental and social impacts* associated with the proposed project, identify potential improvement opportunities, and *recommend any measures needed to avoid, or where avoidance is not possible, minimise and mitigate adverse impacts.*” (Emphasis in Complaint)

Complainants further allege that the ESIA lacks sufficient contemporary data concerning river flow.

ISSUE 3: Whether the EIA studied the impacts of the Project on the Stepantsminda settlement, including the impacts on the rivers Tergi, Kuro and Chkheri.

Complainants allege the EIA failed to study the impacts of the Project on the settlement of Stepantsminda, located upstream from the water intake site of the Project. According to Complainants, by approving the Project, the Bank violated PR 1 because “the project area of influence has not been determined in accordance with the policy,” which requires: “6. Environmental and social impacts and issues will be appraised in the context of the project’s area of influence. This area of influence may include one or more of the following, as appropriate: . . . [¶] (vi) Areas and communities potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location.”

ISSUE 4: Whether construction of the HPP occurred in a protected area, namely Kazbegi National Park.

Complainants allege that Georgian legislation prohibits construction of a hydro power project on the territory of a protected area, including national parks, yet Dariali Energy requested and

investigation; they are beyond the scope of this Compliance Review, which assesses the Bank’s compliance with its Environmental and Social Policy (2008).

⁴ According to the Bank, it did not receive communications about this issue.

obtained a permit for the Dariali HPP that includes operations within Kazbegi National Park. The ESIA specifies that, according to the “HPP working draft design,” the diversion pipeline, sedimentation basin and entrance portal of the diversion pipeline all “will be located in Kazbegi National Park traditional usage territory,” covering a total of 2.64 hectares within the park.⁵ According to Complainants, by approving the Project under these circumstances, the EBRD violated PR 1.5, which states: “The appraisal should also identify applicable laws and regulations of the jurisdictions in which the project operates that pertain to environmental and social matters, including those laws implementing host country obligations under international law (for example commitments related to land use planning and protected area management).”

ISSUE 5: Whether additional studies were carried out adequately, including biodiversity studies.

Complainants allege that zoological investigations (ornithological and herpetological) were not carried out properly in that insufficient time was allowed and weather conditions were not appropriate. According to Complainants, these deficiencies violate PR 6 and PR 1. PR 6.6 requires: “In planning and implementing impact assessments where biodiversity issues are a key focus, clients should refer to best practice guidelines on integrating biodiversity into impact assessments.” PR 1.5 requires: “The appraisal process will be based on recent information, including an accurate description and delineation of the client’s business or the project, and social and environmental baseline data at an appropriate level of detail.”

ISSUE 6: Whether the Bank failed to ensure adequate information and stakeholder engagement prior to decision making.

Complainants allege the Georgian Ministry of Environmental Protection (MOE) approved the Project prematurely, without affording Green Alternative an adequate opportunity to review and comment on the ESIA, all in violation of Georgian legislation and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). According to Complainants, by approving the Project, the Bank violated PR 10 regarding Information Disclosure and Stakeholder Engagement. Paragraph 7 of PR 10 provides: “As part of its own due diligence, the Bank will assess the level of information disclosure and consultation conducted by the client against the requirements of this PR and may require additional engagement. The requirements of national law with respect to public information and consultation, including those laws implementing host country obligations under international law [for example, the Aarhus and Espoo Conventions] must always be met.”

ISSUE 7: Whether the Bank permitted Dariali Energy to commence construction before it had a construction permit.

Complainants allege Dariali Energy started construction before it received a construction permit. Upon learning that Dariali Energy had commenced construction, Green Alternative inquired with the MOE. According to Complainants, the MOE subsequently (although not promptly) responded that required permits had been issued, but never addressed the issue whether construction had begun prior to issuance of permits. Complainants allege the MOE and Ministry of Energy and Natural Resources should have been required to suspend illegal construction under Georgian

⁵ The ESIA further states: “With a special land usage form 2.64 hectare of the land of Kazbegi National Park and traditional usage zone where HPP infrastructure arrangement is considered, will be handed to ‘Dariali Energy’ LLC.” ESIA, § 7.8.4, p. 142.

law, and that EBRD violated its commitment that all projects “are designed and operated in compliance with applicable regulatory requirements and good international practice.”⁶

ISSUE 8: Whether the Bank repeated mistakes and non-compliance identified in the Paravani HPP project PCM case.

Complainants allege that despite the PCM finding noncompliance with the EBRD’s environmental and social policies in connection with the Paravani HPP project (Request No. 2012/01) in connection with the selection of the flow regime, the EBRD ignored the findings in Paravani and “accepted a similar practice in Dariali HPP by signing the project with the same conditions as it was in case of Paravani.”

Complainants requested a compliance review of the Dariali HPP project to examine whether the Project complies with the PRs and “general commitments of the EBRD’s Environmental and Social Policy and provide recommendations for how to resolve or mitigate the issues raised.”

2. Eligibility Assessment and Terms of Reference

The PCM Eligibility Assessors determined based on analysis of the relevant documentation that the Complaint was eligible for a compliance review, and Terms of Reference for that review were included in the Eligibility Assessment Report (EAR).

Based on the **Terms of Reference**, the scope of the compliance review should encompass the following:

- (a) In accordance with PR 1, were the Environmental and Social Due Diligence (ESDD) and Environmental and Social Impact Assessment (ESIA) adequate, including verification of compliance with national laws, addressing site selection, off-set selection, river flow and alternatives considerations? With regard to site selection and geo-dynamic risk, did the Bank adequately assess these issues in technical due diligence and was the summary in the ESIA adequate for public comment?
- (b) In accordance with PR 1 and PR 6 as appropriate, did the ESIA and Environmental and Social Action Plan (ESAP) address adequate measures to avoid, minimise and mitigate the potential future environmental and social impacts associated with the Project, and was implementation carried out in line with the 2008 Policy?
- (c) In accordance with PR 1, did the Bank appropriately determine the scope of the environmental and social impacts to be assessed in the context of the Project’s area of influence, and was the determination in relation to Stepantsminda settlement made in accordance with PR 1?
- (d) Was the Bank’s due diligence regarding the Project land take and off-set conducted in accordance with PRs 1 and 6?
- (e) Was information disclosure and stakeholder engagement carried out in accordance with PR 10?

⁶ EBRD Social and Environmental Policy (2008), EBRD’s Commitment, at p. 2.

As set forth in paragraph 8 of the EAR: “Although the Compliance Review Expert retains the final authority to frame and/or consolidate the core Compliance Review questions as he deems appropriate, he should give due consideration to those as set forth by the Eligibility Assessors in these Terms of Reference.” The Compliance Review Expert has given due consideration to the compliance review questions set forth in the Terms of Reference, as well as the questions set forth in the Complaint.

C. *PROCESS CONSIDERATIONS*

The key activities identified and undertaken by the expert assigned to conduct the compliance review are as follows—

- a. Preliminary review of public domain project documentation, including Complaint, Bank’s response to Complaint and Client’s response to Complaint.
- b. Telephonic meeting with EBRD staff to discuss the Complaint, request project documentation and discuss procedural issues.
- c. Preliminary review of additional and internal documentation, including:
 - Dariali Hydro Power Plant Construction and Operation Project, Environmental and Social Impact Report, prepared by “Gamma” Scientific Research Firm and Stucky Caucasus LLC, 2011
 - Sale and Purchase Agreement between Ministry of Economy and Sustainable Development of Georgia and Dariali Energy, dated November 16, 2011
 - Sale and Purchase Agreement between Ministry of Economy and Sustainable Development of Georgia and Dariali Energy, dated June 5, 2012
 - Dariali Hydropower Plant Project, Expert Advice on Terrestrial Biodiversity Conservation, Land Take and Compensation Report, prepared by Dr. Mariam Kimeridze and David Chelidze, 2013
 - Letter dated 23 October 2013 re: Court Cases Involving Dariali Energy JSC, prepared by Georgian law firm Begiashvili & Co. Limited
 - Dariali Hydropower Plant Project, Advice on Aquatic Biodiversity Conservation, prepared by Ove Arup and Partners Ltd., 16 January 2014
 - Loan Agreement between Dariali Energy and EBRD, dated 12 August 2014
 - Amendment Agreement No. 1 to the Loan Agreement dated 12 August 2014 between Dariali Energy and EBRD, dated 19 December 2014
 - Project “Development and Implementation of Aquatic Biodiversity Action Plan,” Quarterly report # 1, 20 Jan. 2015 - 31 March 2015, prepared by Blue Rivers Environmental Consulting
 - Debt Service Account Agreement among Joint Stock Company Dariali Energy, Deutsche Bank AG (London Branch) and EBRD, dated 10 September 2015

- Dariali Hydropower Project, Environmental and Social Monitoring Visit 2, 12-13 October 2015, report prepared by Lenders' Environmental and Social Monitoring Consultant Environmental Solutions ER2M LLC, dated 30 November 2015
 - Correspondence from Green Alternative to EBRD, dated 24 May 2016
 - Detailed map of Project provided by Client;
 - Timeline of permits and government approvals provided by Client, undated
 - Description of Georgian court proceedings provided by Client, undated
 - Statement of local Stepantsminda geologist regarding proposed Dariali HPP Project, undated
 - Report on Legislative process for permitting of the Dariali HPP Project, prepared by AMEC Environment and Infrastructure UK Limited, undated
 - "Energy Projects and Corruption in Georgia," Green Alternative, 2013
- d. Meetings with Complainants in Tbilisi and Stepantsminda, Georgia on 18 April 2016 and 21 April 2016, respectively.
- e. Meeting with Client in Stepantsminda, Georgia on 20 April 2016.
- f. Site visit in Stepantsminda, Georgia with Client and EBRD representatives on 20 April 2016.
- g. Final Review of project documents and report preparation.
- h. Draft report provided to EBRD Management.
- i. Meeting to discuss EBRD Management comments and receipt of written comments.
- j. Preparation of Management Action Plan
- k. Submission of comments by Complainants
- l. Approval by Board
- m. Final Report.

Each component of the Complaint is addressed from the following perspectives:

1. The Complaint
2. EBRD Policy and Performance Requirements
3. EBRD responses (including documentation provided by EBRD)
4. Client responses (including documentation provided by Client)
5. Observations and conclusions
6. Finding(s)

Where a particular issue or piece of documentation has already been discussed or analyzed in connection with one element of the Complaint, only key parts are re-presented for subsequent elements of the Complaint, to avoid repetition.

The Compliance Review process has included review of internal EBRD documentation. Pursuant to the EBRD Public Information Policy, documents intended for internal purposes only are confidential.

D. ANALYSIS

Under the PCM Rules of Procedure the objective of a compliance review “will be to establish if (and if so, how and why), any EBRD action or failure to act in respect of an approved project has resulted in non-compliance with a relevant EBRD Policy and, in the affirmative, to recommend remedial changes in accordance with Paragraph 44 of these [PCM] Rules.”⁷

1. Whether environmental and social impacts were adequately assessed, including whether improper site selection led to the deaths of workers and members of the public as a result of landslides.

a. The Complaint

Complainants assert that although the Project was categorized as A, it did not undergo a special formalized and participatory assessment process, as required by PR 1.9, including the failure to document the rationale for selecting the proposed course of action in favor of other alternatives.

Complainants allege that improper site selection resulted in worker and public fatalities from two landslides on the Devdoraki glacier in May and August 2014.

b. EBRD Policy and Performance Requirements (PR 1.9)

PR 1.9 provides:

9. Projects categorised by EBRD as “A” will require special formalised and participatory assessment processes. An indicative list of such projects is provided in Appendix 1 to the Policy. Greenfield developments, or major expansions of activities, with potentially significant and diverse adverse environmental or social impacts, such as those listed in Appendix 1, will require a comprehensive environmental and/or social impact assessment, to identify and assess the potential future environmental and social impacts associated with the proposed project, identify potential improvement opportunities, and recommend any measures needed to avoid, or where avoidance is not possible, minimise and mitigate adverse impacts. This assessment will include an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed. The Environmental Impact Assessment (EIA)/Social Impact Assessment (SIA) shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws. In exceptional circumstances, a regional, sectoral or strategic assessment may be required. Projects involving involuntary resettlement or impacts on Indigenous Peoples or cultural heritage will require an assessment in accordance with PRs 5, 7 and 8 respectively, in addition to any other environmental or social due diligence studies that may be required.

The Dariali HPP project was categorized as A.

⁷ PCM Rules of Procedure ¶ 41.

c. EBRD Response (Including Documentation)

The Bank contends it complied with PR 1. According to the Bank, technical engineering aspects of the Project location were assessed by Client and its consultants, and were independently reviewed by the Bank's consultants. Based on the adequacy of the alternatives analysis in the EIA and the design of the Project, the Bank deemed the project siting analysis to have met the requirements of PR 1. The Bank notes that tunneling works and land acquisition activities had already commenced when the Bank was first approached about possible funding of the Project. Based on the adequacy of the alternatives analysis in the EIA, and the design of the Project, the siting and alternatives analysis were deemed by the Bank to have met the requirements of PR 1 (and, by implication, PR 10).

According to the Bank, the landslide on 17 May 2014 was investigated by an EU delegation of disaster response experts, and the delegation's report concluded that "a rock/ice/snow mass collapsed in the Dariali Gorge on 17 May, blocking the Tergi River. The disaster was a result of the intensive movement of the Devdoraki glacier located at the 5047-meter high peak." The EU investigation did not attribute the incident to project activities.

The Bank reports that the EU investigation team, working in collaboration with the Georgian government, confirmed that the landslide and debris flow, while unfortunate, were not related to seasonal mudflow in the Tergi River, nor to Project-related activities. The majority of the impacts and accidents resulting in fatalities linked to the landslide were at the public highway that runs along the left bank of the Tergi, whereas the Project is on the opposite side of the river. The Bank acknowledges that debris entering the river did result in floodwater entering into the Project footprint, resulting in the death of two workers in the underground powerhouse. The Bank characterizes the incident as a force majeure event "rather than the known impacts of seasonal mudflow which were taken into consideration during project location selection and technical design parameters."

According to the Bank, the Georgian and EU investigation concluded that the presence of the Dariali HPP tailrace tunnel actually alleviated the pressure of water buildup, providing additional time to reroute the water course without causing further risks to downstream communities, including across the border in Russia. "Without the presence of the HPP infrastructure, a major transboundary issue might have occurred." Looking ahead, the Bank notes that the EU investigation did not confirm that the reduced flow in the river will contribute to future natural disasters like the landslide.

d. Client Response (Including Documentation)

Client does not directly address alternatives in its response to the Complaint.

With respect to site selection, Client responds that "all rational publishers regarded Dariali Energy as the savior of the situation" relating to landslides. According to Client, if not for the "derivation tunnel" through which the river was diverted, "there would have been unavoidable disaster in the Region."

e. Observations and Conclusions

The Bank states in its response to the Complaint that tunnel boring had already begun before the Bank became involved in the Project, and that "the Project siting and alternatives analysis was deemed to have met the requirements of PR 1." The Bank does not suggest that pre-existing

construction work on the Project obviates the need to undertake a site analysis. Indeed, the ESP does not allow any relaxation of social or environmental standards just because the Bank gets involved in a project after project activities have begun. If the location of a project is effectively predetermined before the Bank becomes involved, the Bank nonetheless retains the ability to decline approval if it determines that proceeding with the project at the chosen site would lead to unacceptable social or environmental impacts.

In this case, the ESIA considered multiple alternatives for the Project, including a no-action alternative, a seasonal regulation HPP construction alternative, a riverbed type HPP construction alternative, and a diversion type HPP construction alternative. The ESIA recommended a one-stage run of the river HPP at the location ultimately chosen, in part for “full utilization of hydropower potential.” Although the ESIA does not consider a run of the river HPP at any other location, the Bank did examine technically and financially feasible alternatives.⁸

f. Findings

The Compliance Review Expert has concluded that with respect to consideration of alternative sites, the Bank’s environmental and social appraisal of the Project complied with PR 1. PR 1.9 provides that the ESIA must “include an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed.” The ESIA here included ample consideration of other technical alternatives. It also explains that the location selected for the Project is intended to maximize hydropower potential.

The Compliance Review Expert further addresses the assessment of geotechnical risks, including the risk of a landslide, in the context of Issue #2 below.

2. Whether geodynamic risks were adequately assessed, and proper mitigation measures put in place, and whether the ESIA included sufficient baseline data regarding river flow.

a. The Complaint

Complainants allege that Client relied on inadequate assessment in the ESIA of the risks of geodynamic processes, despite having been warned by geological experts and Green Alternative. Complainants assert that the risks of geodynamic processes were not studied or considered. Complainants focus, at least in their Complaint, not on geodynamic risks created by the Project (which Complainants seem to acknowledge were adequately assessed), but rather on independently existing *geotechnical* risks—mainly the risk of landslides—that might affect the Project depending on the Project’s location.

With respect to river flow (which is outside the scope of and therefore separate from “geodynamic risks” or geotechnical risks), according to Complainants, Project calculations for suspended solid flows of the Chkheri and Kuro rivers (which flow into the Tergi), were based on data from 1928-1940. Complainants and a local geologist contend that the 10% river flow discussed in the ESIA does not account for the impact of other hydropower facilities affecting the Tergi River and other nearby rivers that flow into the Tergi. In particular, Complainants expressed

⁸ The Compliance Review Expert notes that consideration of alternative project sites is a separate issue from whether the ESIA adequately assessed risks associated with the chosen site. The latter subject is addressed below.

concern that the Larsi HPP, located near the tailrace of the Project, in combination with the Project, will leave less than 10% of the Tergi's natural river flow. The geologist stated that in his observation, the existing power plants on the Tergi and nearby rivers and tributaries are not in fact releasing 10%, and that whatever amount they are releasing does not appear sufficient to maintain enough water for fish to survive, or to properly wash sediments down the river.

Complainants allege violation of PR 1.9.

b. EBRD Policy and Performance Requirements (PR 1.5 and PR 1.9)

While Complainants allege non-compliance with PR 1.9, the Compliance Review Expert also considers PR 1.5 relevant to this aspect of the Complaint. PR 1.5 provides as follows:

5. Through appraisal activities such as risk assessment, auditing, or environmental and social impact assessment, the client will consider in an integrated manner the potential environmental and social issues and impacts associated with the proposed project. The information gained will inform the EBRD's own due diligence related to the client and project and will help to identify the applicable PRs and the appropriate measures to better manage risk and develop opportunities, in accordance with the applicable PRs. The appraisal process will be based on recent information, including an accurate description and delineation of the client's business or the project, and social and environmental baseline data at an appropriate level of detail. The appraisal should also identify applicable laws and regulations of the jurisdictions in which the project operates that pertain to environmental and social matters, including those laws implementing host country obligations under international law⁹ (for example commitments related to land use planning and protected area management).

PR 1.9 is quoted above.

c. EBRD Response (Including Documentation)

The Bank recognizes that the 2014 landslide and ensuing debris flow have impacted the sediment flow and hydrogeological characteristics of the river in the area where the HPP is to be located. The Bank asserts that measures such as "appropriate sediment flushing operating procedures regarding sediment flow in the river" have been designed to address altered sediment loading and its impact on the HPP operation. The Bank states: "The residual risk of alterations of sediment flow in the river Tergi to biodiversity are considered to be low, and no additional risk to community health and safety from the Project was identified."

According to the Bank, the risk identified by Complainants was based on sedimentation; it was not based on mountain movement, which was the cause of the landslides that occurred. The slides that occurred were, according to the Bank, very unusual, unexpected and rare events. In any event, after the slides, Client had to dig a new access tunnel to the powerhouse to mitigate the risk.

The Bank addresses alleged inadequate assessment of environmental and social impacts relating to hydrology, hydrodynamics and minimum environmental flow. According to the Bank, the Project will reduce the amount of water in a five-kilometer stretch of the Tergi River between the headworks and the tailrace structure. With respect to river flow, the Bank states that a

⁹ For example, the Aarhus, Espoo and Biodiversity Conventions.

minimum environmental flow is necessary to allow the river to function as habitat, and “competent authorities” allow a flow level of 10% of the mean annual flow. According to the Bank, this amount will be exceeded in times of high flow, and will normally only be experienced during the four dry winter months.

At the Bank’s request, and consistent with the precautionary approach, an independent geomorphology and biodiversity consultant reviewed the 10% flow value. Taking into account specific characteristics of the Tergi River and the species it supports, as well as EU practices on similar rivers, the consultant concluded that 10% was reasonable, and that flow will have to be “monitored carefully” to confirm the actual impacts are as predicted in the EIA, and mitigation measures are adequate. The Project includes a four-year monitoring program, and if needed, the ecological data from monitoring will be used to adapt mitigation measures or to define additional corrective measures. According to the Bank, “[t]he resulting adaptive management plan will be implemented by the operator of the HPP, and this is a legal commitment that has been agreed with the EBRD, and which will be closely monitored by the Bank.”

According to the Bank, the assessment of impacts to the aquatic environment, using the “building block” methodology, made direct comparisons between the Project and other similar projects within the EU. The Bank and (according to the Bank) Client recognize that temporary adjustments to flow levels may be required to support seasonal migration of trout between April and October. The original ESIA Report prepared by Scientific Research Firm “Gamma” and Stucky Caucasus LLC included consideration of hydrology, ichthyofauna and impacts on aquatic ecology. The original ESIA is dated 2011.

d. Client Response (Including Documentation)

Client asserts that all recommendations and warnings of geological experts were included in the EIA “and were duly carried by the Dariali Energy.”

Client does not directly address the flow regime in its written response to the Complaint. However, Client commissioned international consultants Ove Arup & Partners Ltd. (Arup) to “review the appropriateness of the proposed minimum environmental flow required to support the aquatic ecosystem between the headrace and tail race and support and sustain populations of the native fish *Salmo trutta fario* [brown trout].” Arup produced a report titled “Advice on Aquatic Biodiversity Conservation,” dated 16 January 2014 (“Arup Report”). The Arup Report states:

There is currently insufficient scientific information available on the river ecology and particularly on the specific environmental flow requirements for *Salmo trutta fario*. In addition, the Tergi river environment is changing under the influence of two recent run-of-river hydropower schemes immediately downstream from the proposed Dariali HPP: Larsi HPP, Georgia, under completion and Ezminskiaia HPP Russia (completed). It has therefore been decided to adopt the precautionary approach through a monitoring driven adaptive management plan.¹⁰

e. Observations and Conclusions

¹⁰ Ove Arup & Partners Ltd, “Advice on Aquatic Biodiversity Conservation,” p.2 (16 January 2014); see also id., p. 51 (“More detail regarding the baseline habitat is also required to understand the impact of any changes likely to be caused by the Dariali HPP scheme.”).

Geotechnical Risks. Complainants have stated on multiple occasions that they do not contend the Project caused or contributed to the occurrence of either of the landslides. Rather, they contend that the location of the Project meant that project infrastructure, project-affiliated workers and non-project-affiliated individuals might be in the path of a landslide if one were to occur. The Bank takes the position that localised landslips were assessed in due diligence, but the more major landslides (and their location some 10 kilometers and 2,500 meters vertical distance away from the Project) could not have been predicted, whereas Complainants assert that while the precise location, type and severity of risks might not have been predictable, the possibility of some form of geological event associated with the Devdoraki glacier, and the general location, were predictable, especially in light of accelerated glacial melting caused by climate change.¹¹

The Compliance Review Expert need not express an opinion about the cause of the landslides, including whether glacial melting was accelerated due to climate change, or whether glacial melting caused or contributed to the slides. Rather, the question for current purposes is whether the ESIA adequately addressed the possible impacts of climate change on the Project, including the risk of glacial melting that might have an impact on the Project. See PR 6.6 (“The appraisal also needs to take into account climate change and adaptation issues.”). The ESIA notes: “Recently, warming has been observed in this region, which caused the reduction of glaciers.” The ESIA does not, however, link that observation to increased risk that an event such as the fracture of the Devdoraki glacier might endanger the Project or nearby areas.

The ESIA includes extensive consideration of geodynamic risks in the Project area, as well as the potential for the Project itself to create or contribute to geodynamic risks. The ESIA does not, however, address the impact of independently existing geotechnical risks, including the risk of landslides, on the Project itself. Some such risks are addressed in the “Lender’s Engineering for EBRD – Technical Due Diligence on Dariali HPP” prepared by Fichtner (“Technical Due Diligence”), which the Bank provided to the Compliance Review Expert, but they are not included in the publicly disseminated ESIA.

Water Flow. The Arup Report addresses water flow data from 1928 to 1940, and from 1953 to 1990, noting also that the ESIA addressed data only up to 1986. As stated in the Arup Report: “The lack of a recent record, from 1990 to the present day, is of importance for proposing an environmental flow regime, as this is the period where climate change signals have become apparent in other regions.”¹² The Bank’s Technical Due Diligence characterizes the flow data as reliable, although data collection ceased after 1990. The Technical Due Diligence further suggests that possible results of climate change should be monitored, but that no major risk is seen for the next 20 years.

The Arup Report notes that the Montana-Tennant method, from which the 10% flow rate is derived, “itself states that 10% of the average flow would support poor habitat conditions, and a 20%-30% of average flow or higher would be needed to support the optimum range for aquatic organisms [¶] It also seems that, in this case, the method has been applied considering the minimum flow to provide for short-term survival, rather than the flow to support acceptable or

¹¹ According to the Bank, glacial melt of glaciers at 5000 metres elevation is not currently thought to be impacted by climate change. The Bank further notes the EU investigation of the landslide triggered by a break in the Devdoraki glacier concluded that the slide was caused by glacial shift, and not by climate change impacts.

¹² Arup Report, p. 14. See also PR 6.6 (ESIA “also needs to take into account climate change and adaptation issues”).

favourable conditions.”¹³ Noting that the proposed flow regime entails “significant risks” that the Project “will negatively impact the river ecosystem,” the Arup Report recommends “inclusion of a sluice gate directly adjacent to the fish pass that can be used specifically for the purpose of adjusting and regulating pass forward environmental flows.”¹⁴ The Bank notes that the Arup Report’s recommendation was superseded by reports from Blue Rivers Environmental Consulting, which include recommendations regarding fish pass design and operation, as well as environmental flow.

Pursuant to the precautionary approach, the Bank planned conservatively, including provisions for a monitoring programme to confirm that the proposed minimum environmental flow is sufficient to support seasonal migrations of brown trout around April and October. However, it appears the Bank approved funding of the Project before the Bank had all the necessary baseline data regarding such migrations, including up-to-date data regarding river flow. The flow may be adequate, the Bank assumed the presence of brown trout, and the Bank did require monitoring of flow rate and fish numbers, but the ESP requires sufficient baseline data prior to approving a project.¹⁵ As recognized in the Compliance Review Report for Boskov Most Hydro Power, post hoc monitoring cannot make up for insufficient pre-approval baseline data.¹⁶

f. Findings

Assessment of Geotechnical Risks. Pursuant to PR 1.9, the ESIA must: “identify and assess the potential future environmental and social impacts associated with the proposed project, identify potential improvement opportunities, and recommend any measures needed to avoid, or where avoidance is not possible, minimise and mitigate adverse impacts.” Although the ESIA identified and assessed geodynamic risks that might be caused by the Project, the ESIA did not identify or assess the potential future environmental and social impacts of independently existing geotechnical risks, such as the risk of a landslide that might affect the Project infrastructure, workers at the Project, or others who might be in the vicinity of the Project.¹⁷ Moreover, the ESIA does not (at least not explicitly) consider whether alternative sites might mitigate the risk of independently occurring geotechnical processes adversely affecting the Project areas. The Bank points out that the EU investigation of the landslides characterized them as force majeure events which, in the Bank’s view, could not have been foreseen. However, a Project Risk Register that included not just the Project site, but also other areas that might pose potential risks to the Project site would facilitate a more complete risk analysis.¹⁸

¹³ Arup Report, p. 43.

¹⁴ Arup Report, p. 49.

¹⁵ Notably, EU Directive 2011/92/EU (13 December 2011) on the assessment of the effects of certain public and private projects on the environment provides, at Article 5(1)(b) that EU Member States shall adopt measures to ensure that the developer of a covered project supplies information “having regard, inter alia, to *current* knowledge and methods of assessment.” (Emphasis added.) The information to be provided by the developer “shall include at least: . . . [¶] (c) the data required to identify and assess the main effects which the project is likely to have on the environment.” *Id.* art. 5(3) (c).

¹⁶ See *generally* Compliance Review Report, Boskov Most Hydro Power, Request Number 2011/05. The Compliance Review Expert recognizes that in the case of Boskov Most, the project was approved without knowing whether brown trout were present, whereas in this case, the Bank knew of and accounted for the presence of brown trout.

¹⁷ In addition, pursuant to PR 6.6, the appraisal “also needs to take into account climate change and adaptation issues.” See *generally* Bjørn Petter Kaltenborn, Christian Nellemann & Ingunn Ims Vistnes, *High mountain glaciers and climate change – Challenges to human livelihoods and adaptation* UNEP (2010). The ESIA here does not appear to have considered the impact of climate change on the likelihood of a glacier break at the Devdoraki Glacier based on increased glacial melting attributable to climate change.

¹⁸ See, e.g., American Society of Civil Engineers, *Geotechnical Baseline Reports for Construction – Suggested Guidelines* (ASCE 2007); J.M. Reynolds, *Natural disaster for hydropower development in high mountain environments*

The Compliance Review Expert considers that independently existing geotechnical risks that might affect the Project are among the “potential environmental and social impacts associated with the proposed project” that a client should consider, and that the Bank should consider before approving a project. The ESP does not prescribe a formula for how likely a possible event must be to warrant inclusion in the ESIA, but the more significant the hazard, the less likely its occurrence need be. Given the potentially disastrous impact of a landslide, the ESIA should have considered the possibility, even if it ultimately concluded that the risk was too remote to warrant rejection of or changes to the Project.¹⁹

River Flow. Among other things, PR 1.5 requires the ESIA to be “based on recent information, including an accurate description and delineation of the client’s business or the project, and social and environmental baseline data at an appropriate level of detail.” In this case, the ESIA’s consideration of river flow was based on data from 1990 and earlier. That data could not include changes in flow attributable, for example, to post-1990 hydropower projects elsewhere on the river—whether upstream, downstream or on tributaries that flow into the river—or post-1990 effects of climate change. The ESIA’s suggestion to adopt a precautionary approach and undertake monitoring is prudent and commendable, but it does not substitute for ensuring that sufficient baseline data are in hand prior to the Bank approving the funding of a project.²⁰

3. Whether the EIA studied the impacts of the Project on the Stepantsminda settlement, including the impacts on the Tergi, Kuro and Chkheri rivers.

a. The Complaint

Complainants allege the EIA does not adequately consider the risks to the Stepantsminda settlement, and that in its current form, the Project will cause sedimentation from tributaries of the Tergi River, resulting in rise in the riverbed. Complainants assert that the Project could cause accumulation and filling of the Kuro valley, posing a threat of flooding to the Stepantsminda settlement.

Complainants allege violation of PR 1.6.

b. EBRD Policy and Performance Requirements (PR 1.6)

PR 1.6(vi) provides:

6. Environmental and social impacts and issues will be appraised in the context of the project’s area of influence. This area of influence may include one or more of the following, as appropriate:

* * * *

(Reynolds Int’l Ltd. 2014); Nepal Hydropower Association, *Assessment of Disaster Risk Management in Hydropower Sector in Nepal* (World Bank 2015).

¹⁹ Compare PR 1.5 (requiring assessment of potential environmental and social issues and impacts “associated with” project) & 1.9 (requiring “comprehensive environmental and/or social impact assessment, to identify and assess the potential future environmental and social impacts associated with the proposed project”) with PR 6.6 (requiring assessment of potential impacts on biodiversity “likely” to be caused by project).

²⁰ As noted above, the Technical Due Diligence prepared by Fichtner deems the flow data sufficiently reliable, but that conclusion is not “based on recent information.” The insufficiency of baseline data also implicates PR 6.6, including the following requirements: “The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders.”

(vi) Areas and communities potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location. The area of influence does not include potential impacts that would occur without the project or independently of the project.

c. EBRD Response (Including Documentation)

The Bank states that Stepantsminda is located approximately one kilometer away from the headworks location, on a raised bank 25 meters above the Tergi river and the intake structure from the point where the diversion of flow will first occur. According to the Bank, Stepantsminda is technically not project-affected because the community was not subject to risks from flooding, sedimentation or other direct effects of the Project. Recognizing that Stepantsminda may be affected by the Project in other ways, the Bank acknowledges that the settlement may be considered within the Project Area of Influence, and states that “no modifications to river morphology attributable to the Project will be observed at this point or within the proximity of Stepantsminda.”

d. Client Response (Including Documentation)

According to Client, the EIA includes all the risk factors that may affect the region, “particularly Stepantsminda settlement.” Client asserts that the information provided by Complainants on this issue “is false and lacking evidences.” Client stated in meetings with the Compliance Review Expert that it considered possible flooding of tributaries, as well as management of sediment.

e. Observations and Conclusions

The ESIA includes the following passages:

According to feasibility study of the project and preliminary design solutions of perspective HPPs, all dams will be diversion type and correspondingly cumulative impact related with change of solid sediment movement, is not expected (planned low level dams in heavy flow period will completely discharge solid sediment flow). Correspondingly during HPP operation phase cumulative impact on solid sediment movement is not expected.

Hydrological changes of the river will take place in its downstream during operation phase. Considering that headworks of designed Dariali HPP and perspective Larsi HPP will be located on riv. Dariali, definite cumulative impact will occur during operation period, namely: significant hydrological changes are expected on section of the riv. Tergi, from Stepantsminda borough till state border. Impact will be considerably high for Larsi HPP, as in some hundred meters from dam of Dariali HPP, rivers Chkheri and Kuro connect to Dariali river and as for Larsi HPP – there are no significant tributaries downstream the design headwork. Main mitigation measure for the mentioned cumulative impact is proper calculation of ecological flow and control on its systematic discharge. Otherwise significant negative impact on the river bio-environment will be inevitable.²¹

Although not entirely clear to the Compliance Review Expert, the quoted passages appear to discount the risk of cumulative sedimentation and other hydrological changes to the Tergi river

²¹ ESIA, pp. 165-66.

based on the ability to monitor and control the flow. The ESIA also addresses a related question raised by an unidentified participant in the public comment proceedings:²²

Information regarding Comments and Suggestions Received during Public Discussions

Authors of comments and suggestions	Content of comments and suggestions	Reply
“ _____ ”	“Exit” (term used by locals describing high water period) of rivers Kuro, Tergi and Chkheri does not coincide, so how will this affect sediment movement? I’m interested whether it will be necessary to transport sediment mechanically, i.e. by transport, or not?	Sediment flow is characteristic to high-water periods, where volume of water ensures sediment transportation. Therefore need of artificial involvement in sediment movment [sic] is not expected.

In connection with the consideration of a seasonal regulation power plant alternative, which would include a dam and reservoir, the ESIA explicitly recognized that excessive amounts of sediment would accumulate in the Tergi riverbed, potentially increasing flood risks for adjacent areas, including Stepantsminda.²³ However, the ESIA did not recommend a seasonal regulation power plant, and the Project instead involves a run-of-river HPP, with no dam or reservoir.

Based on the foregoing, the Compliance Review Expert has concluded that the ESIA did consider potential impacts on Stepantsminda associated with the accumulation of sediment in the Tergi, Kuro and Chkheri rivers. The ESIA concluded that such impacts were unlikely and could be mitigated by monitoring and controlling flow.

The Environmental and Social Action Plan appended to the Loan Agreement between Client and the Bank includes the following action: “Undertaking of a detailed geomorphological monitoring (focused on immediate channel continuity, fine sediment flushes, geomorphological response to the altered regime and extent of freezing) to inform adaptive management and ecological monitoring.”²⁴

f. Findings

The Compliance Review Expert has concluded that the Bank complied with PR 1 with respect to the consideration of impacts the Project might have on Stepantsminda. The ESIA addresses the accumulation of sediment and the risk of flooding, and the ESAP requires “detailed geomorphological monitoring.” According to the ESIA and the ESAP, such monitoring should include attention to flow and sediment accumulation.

²² ESIA, p. 194.

²³ ESIA, p. 33.

²⁴ Loan Agreement, Schedule 2, p. S2-9.

4. Whether construction of the HPP occurred in a protected area, namely Kazbegi National Park.

a. The Complaint

Complainants allege that construction of the diversion pipeline, sedimentation basin and entrance to the diversion pipeline are located within the territory of Kazbegi National Park, in violation of Georgian legislation, which therefore violates PR 1.5 as well. Complainants further claim that the offset land already had the status of protected land owned by the State, and that the area should have been declared as “natural monuments” irrespective of the Project. According to Complainants, this also puts the Project in violation of PR 6.8.

b. EBRD Policy and Performance Requirements (PR 1.5 and PR 6.8)

PR 1.5 is quoted above. PR 6.8 provides as follows:

8. The client will need to identify measures to avoid, minimise or mitigate potentially adverse impacts and, where appropriate and as a last resort, propose compensatory measures, such as biodiversity offsets, to achieve no net loss or a net gain of the affected biodiversity. See table above.²⁵

c. EBRD Response (Including Documentation)

In response to Complainant’s assertion that the land take involving Kazbegi National Park violated Georgian national laws (responding also to Complainant’s allegation that the Project was not properly permitted), the Bank notes that the domestic courts of Georgia “found that due legal process had been followed during granting of permits.” The Bank also references an “independent legal opinion regarding the legal permitting process ” obtained by the Bank that “confirmed that the courts acted appropriately and according to the Laws of Georgia.” The Bank

²⁵ The table referenced in PR 6.8 is copied here:

Biodiversity Mitigation Hierarchy	
Action	Response
1. Avoid	The client will seek to avoid adverse impacts on biodiversity.
2. Minimise	Where significant impacts on biodiversity cannot be avoided, the client should identify ways in which project can be modified to minimise impacts on biodiversity.
3. Mitigate	Where significant impacts on biodiversity can neither be avoided nor minimised, the client should identify measures to mitigate those impacts.
4. Offset	Where significant residual impacts on biodiversity remain, in spite of all reasonable attempts to avoid, minimise and mitigate those impacts the client will identify actions or projects to offset those impacts. Any offset projects must be structured and agreed with EBRD.

further states that, “ESDD also confirmed that due process has been followed in all aspects of land acquisition and obtaining necessary permits.”²⁶

With respect to offset selection, the Bank states that flora and fauna studies commissioned by Client “have confirmed that the offset area is of greater biodiversity value than . . . the area removed from the park boundaries, and this will ensure no net loss of natural habitats in accordance with PR 6, and will result in an overall positive impact to the terrestrial ecology.” The Bank further states that independent due diligence confirmed that the flora and fauna studies undertaken were completed in accordance with the Bank’s PRs.

The Bank states that the land required for the headworks of the Project was acquired from authorities responsible for national parks. According to the Bank, the land removed from the national park was designated “mixed use,” and had previously been modified through livestock grazing, pipeline and transmission routing and other human activity over the years. “Biodiversity baseline surveys identified no critical habitat in accordance with PR6.”

Although Complainants contend that the offset land was independently qualified for protected status, the Bank notes that, at the very least, the land was designated for protection because of the Project. The Bank further notes that “many” of the impacts on the former park land will be temporary, and Client has committed to develop a comprehensive and extensive restoration plan following the completion of construction.

d. Client Response (Including Documentation)

Client requested permission from the government of Georgia to use three plots of land previously within Kazbegi National Park for the Project. According to Client, the government of Georgia asked the legislature to change the status of eight hectares of land, and the land was transferred to Client for use in the Project. In exchange, the government designated 300 hectares of other land for protected status. The government selected the land to be changed, which was already government-owned; and the exchange did not involve payment of any compensation by Client to the government.²⁷

Client asserts that the information provided by complainants regarding construction in a protected area is “false and lacking evidences,” because “the status of the land plots required for construction of the derivation tunnel was changed on the basis of the special law before transferring them to Dariali Energy.” Client notes that Green Alternative initiated an Administrative Claim in the Civil Court of Tbilisi on 21 December 2012, challenging the approval of the transfer to Dariali Energy of land plots that were in a protected area (Kazbegi National Park). According to Client, that case is still pending at the first instance court. Client asserts that submission of the PCM Complaint under these circumstances indicates the PCM Complaint was filed for “frivolous and/or malicious purposes.”

²⁶ The report titled “Legislative Process for permitting of the Dariali HPP Project,” prepared by AMEC Environment & Infrastructure UK Limited (AMEC Report), states that a total of 20 hectares of previously protected land was allocated to Dariali Energy for construction of the Project under the State Forest Fund. The AMEC Report recommended obtaining an independent legal opinion regarding the land transfer and permitting. The Bank duly obtained a legal opinion from Georgian law firm Begiashvili & Co. Limited. The Compliance Review Expert has reviewed the legal opinion and confirms that the Georgian law firm found that land used for the Project was no longer subject to a special regime pursuant to an amendment of the law of Georgia. Neither the AMEC Report nor the legal opinion evaluates whether the redesignation of land was legally valid under Georgia law. Nor does such a determination fall within the purview of the Compliance Review Expert here.

²⁷ This information comes from an in-person meeting between the Client and the Compliance Review Expert in April 2016 in Georgia, and was confirmed by reviewing the Purchase Agreement effecting the transfer of ownership.

e. Observations and Conclusions

The additional study titled Expert Advice on Terrestrial Biodiversity Conservation, Land Take and Compensation Report includes a comparison of the biodiversity value of the land removed from Kazbegi National Park for use in the Project and three “Compensation Sites” that were designated for protection. The Expert Report concludes “that those sites of Dariali Hydropower Plant which were located in the Traditional Use Zone of Kazbegi Protected Area before the beginning of construction of Dariali Hydropower Plant, represent the sites of much lower conservation value as compared with the Compensation sites.”²⁸ Annex I of the Expert Report, titled “Dariali HPP Project Area and Compensation sites Comparative Analysis Botanical Component” concludes that, “in the context of sensitive habitats and communities as well as rare species populations the Compensation Sites represent the habitats of much higher conservation value.”²⁹ After reviewing the flora in the Project Corridor and the Compensation Sites, the Expert Report concludes that the offset land “is more than sufficient compensation from the qualitative and quantitative context.”

Both Complainants and Client stated in meetings with the Compliance Review Expert that Georgian courts have rejected Complainants’ legal challenge to the transfer of land that was previously part of Kazbegi National Park.³⁰ The Compliance Review Expert is not in a position to question the conclusions of the Georgian courts on matters of domestic Georgian law.

f. Findings

The Compliance Review Expert has concluded that the Bank complied with PR 1.5 and PR 6.8 with respect to the use of protected land. Although land used for the Project was previously within Kazbegi National Park, the land was transferred to Client prior to construction.

5. Whether additional studies were carried out adequately, including biodiversity studies.

a. The Complaint

Complainants allege that ornithological and herpetological studies carried out as additional studies for the ESIA did not take account of weather conditions, did not allow data collection and do not comply with PR 1.5 and PR 6. According to Complainants—

It turns out that for a supposedly detailed study the experts had only 4 days and because of the bad weather conditions they conducted the study only in one day showing the quality of additional studies. This violates PR6, which requires “In planning and implementing impact assessments where biodiversity issues are a key focus, clients should refer to best practice guidelines on integrating biodiversity into impact assessments. The appraisal also needs to take into account climate change and adaptation issues. When requirements of paragraphs 13, 14 and 15 apply, the client will retain qualified and experienced external experts to assist in conducting the appraisal.”

²⁸ Expert Advice on Terrestrial Biodiversity Conservation, Land Take and Compensation Report, Introduction.

²⁹ Expert Report, Annex I, p. 57.

³⁰ Complainants also contend that Client commenced construction on the Project prior to the land transfer. As noted, the Independent Legal Opinion obtained by the Bank reached a different conclusion. Although the Compliance Expert would not countenance premature approval of the Project by the Bank, or premature construction by the Client, there is no dispute that the land in question was transferred to Client—November 2011 at the earliest, and March 2012 at the latest.

Complainants also allege violation of PR 1.5 (mistakenly referred to as PR 1.58), which provides: “The appraisal process will be based on recent information, including an accurate description and delineation of the client’s business or the project, and social and environmental baseline data at an appropriate level of detail.”

b. EBRD Policy and Performance Requirements (PR 1.5, PR 6.13, PR 6.14 and PR 6.15)

PR 1.5 is quoted above. PR 6 addresses Biodiversity Conservation and Sustainable Management of Living Resources. PR 6.13 and PR 6.14 address critical habitat; PR 6.15 addresses protected and designated areas.

PR 6.13 provides:

13. Irrespective of whether it is natural or modified, some habitat may be considered to be critical by virtue of (i) its high biodiversity value; (ii) its importance to the survival of endangered or critically endangered species; (iii) its importance to endemic or geographically restricted species and sub-species; (iv) its importance to migratory or congregatory species; (v) its role in supporting assemblages of species associated with key evolutionary processes; (vi) its role in supporting biodiversity of significant social, economical or cultural importance to local communities; or (vii) its importance to species that are vital to the ecosystem as a whole (keystone species).

PR 6.14 provides:

14. Critical habitat must not be converted or degraded. Consequently, in areas of critical habitat, the client will not implement any project activities unless the following conditions are met:

- Compliance with any due process required under international obligations or domestic law that is a prerequisite to a country granting approval for project activities in or adjacent to a critical habitat has been complied with. [3]³¹
- There are no measurable adverse impacts, or likelihood of such, on the critical habitat which could impair its ability to function in the way(s) outlined in paragraph 13.
- Taking a precautionary perspective, the project is not anticipated to lead to a reduction in the population of any endangered or critically endangered species or a loss in area of the habitat concerned such that the persistence of a viable and representative host ecosystem be compromised.
- Notwithstanding the above, all other impacts are mitigated in accordance with the mitigation hierarchy.

PR 6.15 provides:

15. Areas may be designated by government agencies as protected for a variety of purposes, including to meet country obligations under international conventions. Within

³¹ “3. For example, countries may have to demonstrate that no plausible alternatives exist or that the project is in the national interest.”

defined criteria, legislation may permit development in or adjacent to protected areas. In addition to the applicable requirements of paragraph 14, the client will:

- consult protected area sponsors and managers, local communities and other key stakeholders on the proposed project in accordance with PR 10;
- demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable, and the client; and that the development follows the mitigation hierarchy (avoid, minimise, mitigate, offset) appropriately; and
- implement additional programmes, as appropriate, to promote and enhance the conservation aims of the protected area.

c. EBRD Response (Including Documentation)

The Bank appointed a team of international consultants to assist in the first stage of ESDD. According to the Bank, ESDD comprised a review of all existing data, a visit to the Project location, meeting with Project stakeholders, and discussions with Client. The ESDD report concluded that additional studies were needed, for example to address aquatic and terrestrial biodiversity, and that the Project could be structured to satisfy the Bank's Performance Requirements.

Additional studies were completed prior to ESIA disclosure, and a process of public consultation was, according to the Bank, completed prior to Bank approval of the Project. The additional studies were reviewed by the independent consultants and by the Bank, and deemed adequate to satisfy the Bank's PRs. Additional stakeholder engagement activities were carried out by Client to communicate the findings of the additional reports and to hear public comments.

d. Client Response (Including Documentation)

Client did not specifically address the additional studies, except to say that it carried out all additional studies required by the Bank.

e. Observations and Conclusions

The Expert Advice on Terrestrial Biodiversity Conservation, Land Take and Compensation Report (Expert Report) was prepared in 2013 to address "the key data gap existing in ESIA of Dariali HPP Project from Biodiversity standpoint."³² The Expert Report describes a field survey of areas of proposed construction, as well as "compensation sites" conducted on 4-8 October 2013. As quoted by Complainants, the Expert Report includes the following statement:

The zoological (in particular, ornithological and herpetological) investigations on 4-7 October 2013 were carried out in not proper time and in not favourable weather conditions. During all

³² The data gap likely existed because the ESIA was prepared pursuant to Georgian law, and thus did not conform to the requirements of the Bank's ESP.

working days the weather was changeable, mainly windy, cold +5 - +15° C, cloudy, with snow at night and light rains during the day time. Only, 5th October was sunny day.³³

The Expert Report further describes field surveys conducted by a group of zoologists, including a theriologist, an ichthyologist, an ornithologist, a herpetologist and an entomologist. They concluded as follows: “In result of an analysis of the published issues and field visits, the extracted sites are not defined as those having an important significance from the mammals’ biodiversity preservation standpoint.”³⁴ The Expert Report concludes that under PR 6, the impact area of the Project “can be referred as a natural habitat just conventionally. Character of vegetation (secondary meadows and bushes) and still continuing grazing of livestock are forcing ones to consider it rather as a modified habitat, than as a natural.” The Expert Report thus concludes:

In case of proper mitigation measures, the negative impact on populations of the protected by law species could be minimized to the acceptable level and will not lead to irreversible changes in biodiversity of the region.³⁵

Although the passage of the Expert Report quoted by Complainants could be construed, as Complainants suggest, to mean that some of the zoological investigations did not involve sufficient time or appropriate weather conditions, the Expert Report in fact describes extensive observations by multiple scientists. That field conditions might not have been ideal does not mean the Bank must disregard the survey results. In any event, it does not appear, as Complainants suggest, that the experts “conducted the study only in one day.”³⁶

f. Findings

The Compliance Review Expert has concluded that the additional biodiversity studies satisfy the requirements of PR 1.5, as well as PR 6.13, PR 6.14 and PR 6.15.

Pursuant to PR 1.5, the additional studies upon which the Bank relied are based on recent information, including “social and environmental baseline data at an appropriate level of detail.”

Pursuant to PR 6.13 and PR 6.14, the additional studies adequately addressed critical habitat in the Project area, finding no instances of critical habitat in land to be used for the Project.

Pursuant to PR 6.15, and as discussed above, the Project did not involve construction in a protected area.

6. Whether the Bank failed to ensure adequate information and stakeholder engagement prior to decision making.

a. The Complaint

³³ Expert Report, Annex II (Report on Survey and Comparative Analysis of Fauna of Dariali Hydropower Plant Project Corridor and Compensation Sites), p. 36.

³⁴ Expert Report, Annex II (“Report on Survey and Comparative Analysis of Fauna of Dariali Hydropower Plant Project Corridor and Compensation Sites”), p. 54.

³⁵ Expert Report, Annex II, p. 61.

³⁶ See Expert Report, Annex II, pp. 35-52 (describing field surveys). Complainants question the independence of one of the Expert Report’s authors based on the author’s work on other projects in Georgia and with EBRD. The Compliance Review Expert does not find any evidence that lack of independence influenced the Expert Report.

Complainants allege they were not allowed sufficient time to comment on the ESIA because the ESIA was approved by the Georgian Ministry of Environmental Protection before the end of the required consultation period under Georgian law and under the Aarhus Convention.

Complainants do not identify specific provisions of Georgia law or the Aarhus Convention that they contend were violated. Complainants nonetheless assert that the Bank violated PR 10.7 by approving the project notwithstanding Client's violation of Georgian law and the Aarhus Convention.

b. EBRD Policy and Performance Requirements (PR 10.7)

PR 10.7 provides as follows:

7. The nature and frequency of stakeholder engagement will vary from project to project, depending on the risks to and adverse impacts on the affected communities, the sensitivity of the sector and environment, and the level of public interest. . . . The requirements of national law with respect to public information and consultation, including those laws implementing host country obligations under international law [for example, the Aarhus and Espoo Conventions] must always be met.

c. EBRD Response (Including Documentation)

According to the Bank, stakeholder engagement activities associated with the ESIA disclosure were completed and Client has a grievance mechanism in place that allows affected people to raise complaints.³⁷ The ESIA includes a description of stakeholder engagement activities, including opportunities for the public to comment on the Project. The ESIA states that during the period of July-August 2011, "information has been collected and interviews have been held with potentially affected stakeholders."³⁸ Information about the date and place of public discussion was published in the 5 August 2011 edition of local newspaper "24 Hours" and meetings were held 12 August 2011 and 8 November 2011 in Stepantsminda.

The ESIA includes a table of "Information regarding Comments and Suggestions Received during Public Discussions," listing 34 numbered comments and suggestions by author, comment and reply. The list includes Green Alternative and Stepantsminda, with their submission described as "Notes on non-governmental organizations and comments of EIA group is given in appendix of Public Discussion Protocol."³⁹ The ESIA does not include any further description of Complainants' submission, or a reply thereto.

d. Client Response (Including Documentation)

According to Client, it had a grievance mechanism in place that allows people to send a complaint to Client or to the local municipality Stepantsminda, or to the MOE. Client reports that it has not ever received any complaints about the Project.

Client provided the Compliance Review Expert with a timeline regarding stakeholder engagement.⁴⁰ The ESIA was prepared in June 2011. Beginning in July 2011, stakeholders were identified and a summary of planned activities was prepared. Client states that it prepared a

³⁷ Bank's Written Response to Complaint, p. 7.

³⁸ ESIA, p. 188.

³⁹ ESIA, pp. 189-95.

⁴⁰ The timeline is set forth below in connection with Issue #7.

stakeholder engagement program that ensures involvement of the public and all potential stakeholders in the assessment process. Thus—

At the initial stage of the project, the local government and licensing agencies have been informed and consulted. Information has been provided through private meetings, consultations and mass media. During the audit, conducted in July-August 2011, information has been collected and interviews have been held with potentially affected stakeholders. Information on the planned activities, as well as the date and place of public discussion has been published in newspaper-“24 Hours”. Public discussion on Environmental and Social Impact Assessment of Dariali HPP construction operation project was held on 8 November, 2011 at 14:00 in Administrative Building on Kazbegi Municipality.⁴¹

Client asserts that Green Alternative and Stepantsminda were involved in project preparation from an early stage, including providing comments on project materials, “which were duly considered in final documents prepared for implementation of the project.” Client asserts further that complainants’ recommendations were taken into account in conformity with Georgian law, including Article 6 of the “Law of Georgia on Environmental Impact Permit.” According to Client, any possible violation of Georgia law regarding public participation was conclusively ruled out by the Georgian court system’s rejection of Green Alternative’s administrative claim to the Civil Court of Tbilisi, which was initiated 30 January 2012. The ruling against Green Alternative became final based on the final ruling of the Supreme Court of Georgia on 18 April 2014.

e. Observations and Conclusions

Complainants acknowledge that they provided input and were otherwise aware of and involved in discussion of the Project. Nevertheless, they contend that the Ministry of Environment violated Georgian legislation and the Aarhus Convention, including requirements “ensuring public participation in the process of making environmental decisions.”

Article 6(3) of the Aarhus Convention provides:

The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.⁴²

Article 6 of the Law of Georgia on Environmental Impact Permit specifies that a project developer shall, after duly announcing the project, receive and consider public comments “within 45 days after announcing about planned activity,” and must “organize public hearing about the planned activity no earlier than 50 days and not later than 60 days after announcing about planned activity.”⁴³ As a matter of Georgia law, the MOE should not issue a permit unless the developer has complied with domestic law.

⁴¹ See email dated 22 April 2016 from Legal Adviser, Dariali Energy JSC, to PCM Adviser.

⁴² Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 25 June 1998, art. 6(3). Paragraph 2 of article 6 sets forth the type of information that must be provided to the public.

⁴³ The Law of Georgia on Environmental Impact Permit, art. 6 (unofficial translation).

Complainants initiated a legal challenge to the issuance of a permit to Dariali Energy in the domestic courts of Georgia. Client reports, and Complainants acknowledge, that the courts rejected Complainants' challenge, ultimately including the Supreme Court of Georgia. As noted above, the Bank procured an independent legal opinion from a Georgian law firm, which confirmed that the courts of Georgia rejected Complainants' legal challenge to the Government of Georgia's issuance of a permit to Client. The Compliance Review Expert considers it beyond the scope of a compliance review to reevaluate the legal sufficiency of the Georgian courts' determination of an issue of domestic Georgian law.

f. Findings

The Compliance Review Expert has concluded that the Bank complied with PR 10.7 with respect to the adequacy of stakeholder engagement and dissemination of information prior to making a decision to approve the Project. The Bank confirmed prior to approving the Project that the courts of Georgia had considered and rejected Complainants' legal challenge to the issuance of a permit by the MOE of Georgia. Nor have Complainants identified a violation of the Aarhus Convention that would in turn indicate a violation of PR 10.

7. Whether the Bank permitted Dariali Energy to commence construction before it had a construction permit.

a. The Complaint

Complainants allege that Client began construction on the Project before it received a construction permit. According to Complainants, the Director of Dariali Energy confirmed to the Mskheta-Mtianeti Information Center in September 2011 that construction on the Project had commenced. Complainants claim they made inquiries with the MOE and the Ministry of Energy and Natural Resources about illegal construction. According to Complainants, the government agencies delayed responding to them until after a permit had been issued, and the agencies never provided information about construction activities that allegedly took place prior to issuance of the permit.

According to Complainants, the Bank therefore failed to ensure that the Project was "designed and operated in compliance with applicable regulatory requirements and good international practice."

b. EBRD Policy and Performance Requirements (Introduction)

The EBRD Environmental and Social Policy (2008) provides in its introduction as follows:

3. The EBRD will seek to ensure through its environmental and social appraisal and monitoring processes that the projects it finances:

* * *

- and are designed and operated in compliance with applicable regulatory requirements and good international practice.⁴⁴

c. EBRD Response (Including Documentation)

⁴⁴ ESP, p. 2.

According to the Bank, the issue of land take, permitting and granting of permits was raised by Green Alternative in legal proceedings in the courts of Georgia, and the complaint was rejected. As stated by the Bank: “During Project Appraisal, EBRD obtained an independent legal opinion regarding the legal permitting process which confirmed that due process has been followed in all aspects of land acquisition and obtaining necessary permits. Furthermore, independent ESDD confirmed that the construction works did not commence prior to obtaining necessary permits.”⁴⁵ The Bank states that construction did not commence prior to obtaining necessary permits and that ESDD “also confirmed that due process has been followed in all aspects of land acquisition and obtaining necessary permits.”

d. Client Response (Including Documentation)

Client asserts that the decision making process for the Project did not violate national law, as established by the failure of Green Alternative’s court cases, which did not reveal any “legal violations of any national entities.”

Client provided the Compliance Review Expert with a timeline of permits and government approvals, as follows:

- 3 February 2011: Dariali Energy expressed interest to the Ministry of Energy of Georgia regarding the construction of an HPP in Stepantsminda and presented the preliminary HPP parameters;
- 11 March 2011: The Government of Georgia issued a decree approving the expressed interest of Dariali Energy and ordered the Ministry of Energy to submit a draft Implementation Agreement;
- 21 April 2011: The Government of Georgia issued a decree approving the proposed Implementation Agreement;
- 19 May 2011: The Government of Georgia (represented by the Ministry of Energy), Dariali Energy JSC, Energotrans LTD, and Electricity System Commercial Operator signed the Implementation Agreement;
- 27 June 2011: The ESIA for the construction and operation of the Dariali HPP was prepared by the Scientific-Research Firm “Gamma”;
- July-August 2011: ESIA Report and stakeholder activities, including notification of stakeholders, collection of information from stakeholders, notification of public discussion to be held;
- 8 November 2011: Public discussion of ESIA in Kazbegi municipality;⁴⁶
- 28 November 2011: Environmental Expertise Conclusion on the Project № 29, by MOE;
- 30 November 2011: Issuance of Construction Permit № 193, Technical and Construction Inspection of the Ministry of Economy and Sustainable Development of Georgia;

⁴⁵ Bank’s Response to Complaint, Issue 4.

⁴⁶ Kazbegi municipality and Stepantsminda are used interchangeably to refer to the same settlement.

- February 2012: HPP construction commenced.

Client states that “delaying receipt of information due to bureaucracy does not mean that the construction works were launched illegally,” and asserts that Complainants did not indicate the dates on which construction commenced and when the permit was obtained. According to Client, it did not commence construction without a duly issued construction permit.

e. Observations and Conclusions

As discussed above, the Bank relied on ESDD and the opinion of a Georgian law firm in concluding that construction on the Project did not commence prior to issuance of a permit.

The ESDD included a review of the general procedure for obtaining a construction permit in Georgia, as well as a description of the proceedings undertaken by Client for obtaining the construction permit for the Dariali HPP. The proceedings included publishing notice of a public hearing about the Project (in a local newspaper, and in electronic form on the respective websites of MOE and Aarhus), conducting a public hearing and gathering comments. On 16 November 2011, the government issued an administrative act “on Approval of Conditions of 108MW Hydro Power Plant Construction Land Use at Terji River in Dariali Gorge of Kazbegi Region.”⁴⁷

After further input, including an inquiry from Complainant Green Alternative, the government conducted its Ecological Expertise assessment. On 30 November 2011, the government issued a construction permit “on the basis of the positive Ecological Expertise Conclusion and resolution #57 of the government of Georgia ‘on Rule of Issuance of Construction Permit and Permit Conditions.’”⁴⁸ The ESDD report states that, according to Client, after receiving the construction permit in November 2011, construction work commenced in December 2011.⁴⁹

As noted, the Bank also engaged Georgian legal counsel to assess the legality of the permitting of the Project. The ensuing legal opinion concluded that the Georgian court rejected Green Alternative’s challenge to the issuance of the Project’s construction permit. According to the legal opinion, the construction permit was issued in compliance with Georgian law and the Aarhus Convention. The lower court’s decision was affirmed by the Tbilisi Appellate Court, and the Supreme Court of Georgia refused to review the decision further. The legal opinion found no basis for reversal of the decision of the Supreme Court.⁵⁰

f. Findings

The Compliance Review Expert has concluded that the Bank did not violate its obligation to ensure that projects are designed and operated in compliance with applicable regulatory requirements and good international practice. The Bank obtained adequate assurances that Client did not commence construction prior to issuance of a construction permit.

⁴⁷ AMEC Report, pp. 5-7.

⁴⁸ AMEC Report, p. 8.

⁴⁹ The construction commencement date in the ESDD report (December 2011) differs from the commencement date in the timeline provided by Client (February 2012), but the Compliance Review Expert has not been presented with any concrete evidence that construction preceded issuance of a permit.

⁵⁰ Legal Opinion, pp. 2-4.

8. Whether the Bank repeated mistakes and violations from the Paravani HPP.

a. The Complaint

Complainants assert that the Bank ignored the findings of the PCM Compliance Review in connection with the Paravani HPP (Request No. 2012/01) regarding the selection of the river flow regime. Complainants quote two separate passages from the Paravani Compliance Review Report. First:

In the case of the Paravani River, the selection of a flow regime model such as the ‘Tennant’ methodology was not in itself flawed, but that the %AAF to be adopted should have been validated through calibration against local conditions established through an appropriate baseline assessment of the River ecology, morphology and flow rates in advance of the EBRD investment decision, at least to the point where EBRD could be confident that the plant could operate at sanitary flow rates which would not irreversibly damage the river ecosystem.⁵¹

And second:

That EBRD is therefore in breach of Performance Requirement 6.6 with respect to the potential impact on biodiversity in that it did not fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders in advance of the EBRD Board decision to invest. It is also in breach of Performance Requirement 1.5 in that at the time of board decision the appraisal was not based on an accurate delineation and description of the environmental baseline data at an appropriate level of detail.⁵²

b. EBRD Policy and Performance Requirements (PR 1.5 and PR 6.6)

The text of PR 1.5 is set forth above.⁵³ PR 6.6 provides as follows:

6. Through the environmental and appraisal process, the client will identify and characterise the potential impacts on biodiversity likely to be caused by the project. The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders. Suitably experienced and qualified experts may need to be engaged in this process. In planning and implementing impact assessments where biodiversity issues are a key focus, clients should refer to best practice guidelines on integrating biodiversity into impact assessments. [2]⁵⁴ The appraisal also needs to take into account climate change and adaptation issues. When requirements of paragraphs 13, 14 and 15 apply, the client will retain qualified and experienced external experts to assist in conducting the appraisal.

⁵¹ Paravani Compliance Review Report (“Paravani CRR”), p. 24.

⁵² Paravani CRR, p. 26.

⁵³ See *supra*, p. 12.

⁵⁴ “2 Best practice guidelines on integrating biodiversity into impact assessment include:

– ‘*Voluntary Guidelines on Biodiversity-inclusive Environmental Impact Assessment* (Contained in the CBD Decision VIII/28 from COP8 in 2006).

– *Biodiversity in Impact Assessment* – (IAIA Special Publication Series No. 3).

– Various products of *The Energy and Biodiversity Initiative*.”

Paragraphs 13 and 14 of PR 6 address critical habitat; paragraph 15 addresses protected and designated areas.

c. EBRD Response (Including Documentation)

The Bank did not directly address Paravani in its written response to the Complaint. However, in communications with the Compliance Review Expert, the Bank stated that from its perspective, the Dariali HPP and the Paravani HPP do not raise the same issues. According to the Bank, in the Paravani case, the Bank did not yet know the number of species of affected fish before it approved the project, whereas in the Dariali case, the Bank knew there were brown trout in the Tergi river, and the only issue was where they were, which would not change the nature of the Project.

d. Client Response (Including Documentation)

Client asserts that the Paravani HPP is neither connected nor relevant to the Dariali HPP, nor may it be used as precedent.

e. Observations and Conclusions

Because the PCM does not have a formal system of precedent, the alleged failure of the Bank to heed the findings of a Compliance Review in a separate case does not in and of itself indicate a violation of the ESP. Notwithstanding the lack of binding precedent, the Compliance Review Expert does regard it as appropriate to consider the results and reasoning of other PCM cases.

As quoted by Complainants, the Paravani HPP Compliance Review Report addresses the requirements for “an appropriate baseline assessment of the River ecology, morphology and flow rates in advance of the EBRD investment decision.” The Dariali HPP also raises issues about the sufficiency of baseline data regarding river flow. The Compliance Review Expert has considered the Compliance Review Report in the Paravani HPP case, as well as other relevant PCM cases. Those reports inform, but do not dictate the conclusions of the Compliance Review Expert here.

f. Findings

The Compliance Review Expert has concluded that the Bank’s alleged failure to heed the Compliance Review Report from the Paravani HPP does not constitute an independent basis to find a violation of the ESP. The Compliance Review Expert has addressed the sufficiency of the Bank’s consideration of the flow regime in other aspects of this Compliance Review Report.

E. CONCLUSIONS AND RECOMMENDATIONS

Conclusions. As set forth above, the Compliance Review Expert has concluded that the Bank did not comply with the ESP in the following two respects:

- The Bank did not comply with PR 1.9 inasmuch as the ESIA did not identify or assess the potential environmental and social impacts of independently existing geotechnical risks, including the risk of a landslide caused by something other than the Project itself.
- The Bank did not comply with PR 1.5 because the ESIA did not include up-to-date data regarding river flow.

The Compliance Review Expert has concluded that the Bank otherwise complied with the ESP.

Recommendations. Pursuant to Paragraph 44 of the Rules:

If the Compliance Review Expert concludes that the Bank was not in compliance with a Relevant EBRD Policy, the Compliance Review Expert will issue a Compliance Review Report which will include 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
- c) monitor and report on the implementation of any recommended changes.

The Compliance Review Expert makes the following recommendations:

1. In order to enhance compliance with PR 1.9, the Bank should ensure that the identification and assessment of potential future environmental and social impacts associated with a proposed project includes not just impacts the project might have on the environment and society, but also impacts that the environment and society might have on the project. This should include identification in the ESIA—and not just the Bank’s due diligence—of environmental and social phenomena that might have an impact on the project, bearing in mind both the severity, likelihood and foreseeability of particular risks.
2. In order to enhance compliance with PR 1.5, the Bank should ensure that baseline data include up-to-date information about relevant environmental conditions, including conditions such as river flow that may be affected by other projects and/or the effects of climate change. The Bank should consider whether the ESIA accounts for recent effects of climate change on baseline data.
3. In connection with the Dariali HPP, the Bank should work with Client to compile and publicly disclose current information about river flow in order to ensure as soon as possible, and preferably before the Project goes into operation, that there is sufficient flow to support aquatic biodiversity, specifically including brown trout.

ANNEX 1: ABBREVIATIONS

Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 June 1998
AMEC Report	“Legislatory Process for permitting of the Dariali HPP Project,” prepared by AMEC Environment & Infrastructure UK Limited
Arup Report	Dariali Energy, Dariali Hydro Power Project, Advice on Aquatic Biodiversity, Dariali/Rep/01 Rev A, prepared by Ove Arup & Partners Ltd., 16 January 2014
CBD	Convention on Biological Diversity, done at Rio de Janeiro, 5 June 1992
CRR	Compliance Review Report
EAR	Eligibility Assessment Report
EBRD	European Bank for Reconstruction and Development
EIA	Environmental Impact Assessment
ESAP	Environmental and Social Action Plan
ESDD	Environmental and Social Due Diligence
ESIA	“Dariali Energy” LLC, Dariali Hydro Power Plant construction and Operation Project, Environmental and Social Impact Assessment, prepared by Scientific Research Firm “Gamma” and “Stucky Caucasus” LLC, 2011
Espoo Convention	Convention on Environmental Impact in a Transboundary Context, done at Espoo, Finland, 25 February 1991
ESP	European Bank for Reconstruction and Development, Environmental and Social Policy, 2008
EU	European Union
EU Directive 2011/92/EU	Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment
Expert Report	Expert Advice on Terrestrial Biodiversity Conservation Land Take and Compensation Report, Tbilisi 2013
GWh	Gigawatt hour
HPP	Hydro Power Project
JSC	JSC Dariali Energy
kV	Kilovolt

kWh	Kilowatt hour
MOE	Ministry of Environment of the Republic of Georgia
MW	Megawatt
Mwh	Megawatt hour
Paravani CRR	European Bank for Reconstruction and Development, Project Complaint Mechanism, Compliance Review Report, Complaint: Paravani HPP, Request Number: 2012/01
PCM	Project Complaint Mechanism
PR	Performance Requirement
SIA	Social Impact Assessment
UNECE	United Nations Economic Commission for Europe