



Project  
Complaint  
Mechanism

**ENERGY RESOURCES PHASE II**

REQUEST NUMBER: 2013/01 (b)

**COMPLIANCE REVIEW REPORT – March 2017**

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

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

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### How to submit a complaint to the PCM

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

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## **EXECUTIVE SUMMARY**

The present Complaint alleges non-compliance on the part of the Bank with a number of safeguard requirements arising under the 2008 Environmental and Social Policy (ESP), due to an alleged failure on the part of the Bank to ensure the identification and avoidance or mitigation of a range of adverse impacts upon herders' health, livelihoods and cultural heritage resulting from the construction and use of roads and a railway, road traffic accident hazards and road-related dust associated with the Energy Resources Phase II Project.

Having examined the Project Environmental and Social Impact Assessment (ESIA) in detail, along with a wide range of supporting documents, the Compliance Review Expert has concluded that EBRD was compliant with PR 1 and related performance requirements. Specifically, the Compliance Review Expert has found that the ESIA was adequate in terms of its description of the Project, its identification of the likely environmental and social impacts, the measures set out therein for addressing road-related dust impacts, its mitigation of potential road safety impacts, and the arrangements set out therein for stakeholder identification and consultation.

In addition, the Compliance Review Expert has determined that EBRD has complied fully with the requirements of ESP PR 5 on Land Acquisition, Involuntary Resettlement and Economic Displacement, of PR 8 on Cultural Heritage and PR 10 on Information Disclosure and Stakeholder Engagement.

Therefore, the Compliance Review Expert concludes that the Bank was in compliance with the Relevant EBRD Policy.

## INTRODUCTION

### Factual Background to Project and Complaint<sup>1</sup>

1. In May 2010, the European Bank for Reconstruction and Development (EBRD) approved financing of up to USD \$180 million for the Ukhaa Khudag (UHG) Energy Resources Phase II Project. The Project is classified Category A under the 2008 EBRD Environmental and Social Policy. The Project involves shallow open-pit coal mining operations from the Uhkaa Khudag deposit in Southern Mongolia and is operated by Energy Resources LLC (ER), an independent Mongolian mining company owned by the Mongolian Mining Corporation (MMC). ER is the largest private, high quality coking coal producer and exporter in Mongolia. The Company owns and operates two open-pit mines - Ukhaa Khudag and Baruun Naran, both located in the Ömnögovi province of Mongolia. It holds mining license MV- 11952 for the UHG coking coal deposit and the respective responsibilities of ER and its subsidiaries are as follows:
  - Energy Resources Rail LLC: responsible for the implementation of the construction of the railway base infrastructure. (Note: MMC is no longer involved in the construction of the railway.)
  - Energy Resources Mining LLC: responsible for the mining and technical operations of the UHG deposit.
  - Enreotechnology LLC: responsible for owning and operating of the coal handling and processing plant of the UHG deposit.
  - Ukhaa Khudag Water Supply LLC: responsible for the water exploration and supply of the UHG deposit.
  - United Power LLC: responsible for construction and operation of the Project power plant.
  - Transgobi LLC: responsible for the coal transportation of the UHG deposit.
  - Tavan Tolgoi Airport LLC: responsible for the operation and management of the airport in Tsogttsetsii soum serving the miners' camp with several Mongolian commercial airlines.
  - Energy Resources Road LLC: responsible for the coal transportation and road construction.
  - Gobi Road LLC: responsible for the construction of a new road for transportation of coal extracted from the UHG deposit.
  - Public Service LLC: responsible for holding a special permit required for provision of public utility services at the UHG deposit.
2. The UHG mine is located in Tsagaan-Ovoo bagh of Tsogttsetsii soum in Umnogovi aimag (South Gobi region) of Mongolia, approximately 4km north of the undeveloped Tavan Tolgoi coal deposit and 220km from the Mongolia-China border. The UHG mine

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<sup>1</sup> See further PCM, *Eligibility Assessment Report: Energy Resources Phase II & Oyu Tolgoi*, Complaint No. 2013/01, at 51-53, available at: <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>

license area comprises a total of 2,962 hectares (ha.), of which 1,050 ha is proposed to be mined in an expanded open pit over approximately 20 years. Tsogttsetsii soum has a population of approximately 2,245. The Tsogttsetsii soum centre is located approximately 1km northeast of the mine camp and contains basic administrative and social infrastructure, including a hospital, secondary school, dormitory, cultural centre, stores and a post office. This soum centre is connected to the aimag centre, Dalanzadgad, via an unpaved road.

3. In Phase I of the Project, the UHG mine was developed to produce coking coal to be transported for further treatment and processing in China. Phase II of the Ukhua Khudag (UHG) Project (hereafter, the Project) expands upon existing Phase I mining operations and involves the expansion of the open-pit mine, further infrastructure development around the mine-site and the miners' camp, as well as the construction and development of ER's coking coal handling and preparation plant (CHPP), a small power plant, a water supply system, and an air strip. The Project was also to include a coal export railway to China. However, all new rail development is now centralized under a recently established state-owned enterprise, and so the railway will not go forward as part of ER operations. The UHG mine began production in April 2009. Phase II of the Project commenced in 2010. The existing regional road used to export coal to the border with China was upgraded to a paved road, with upgrading work completed in October 2011.
4. An Environmental and Social Impact Assessment (ESIA), Non-technical Summary, Public Consultation and Disclosure Plan (PCDP), and additional Environmental and Social Management Plans (ESMP) have been prepared for the Project. The Phase II ESIA was disclosed on October 16, 2009. EBRD's Environmental and Social Department (ESD) has been involved in reviewing Project documents and monitoring the Client's environmental and social performance for five years. At the time of the Project's initial development, the export road was an unpaved national highway used by a number of other mining operations to export their mineral products to China, as well as by the local population. ER paved the 245 km "Coal Road" at its own expense and anyone can use it, though they must pay a toll to do so. Local citizens are exempted from the toll. The road has now reverted to state ownership and Energy Resources is one of several mining companies in the area using it to transport coal to the Chinese border.
5. The Complainants comprise 18 individual herders from Khanbogd soum and 5 herders from Manlai soum, while Co-Complainants include two civil society organizations, Oyu Tolgoi Watch and Shuteen Gaviluut. All Complainants emphasize they are equal participants in the Complaint process. The Complainants are located in the general vicinity of the ER export road and/or the proposed railway which runs from the Ukhua Khudag open-pit mine to Tsagaan Khad port at the Mongolian border with China.

## **Positions of Relevant Parties**

### **- Complainants**

6. Essentially, the Complaint alleges four areas of non-compliance. Firstly, it claims that the Project adopted inadequate health and safety measures, due to (a) a failure to adequately assess health and safety impacts of roads, (b) a failure to mitigate adverse health and safety impacts of roads, and (c) a failure to maximise the capacity of the paved “Coal Road”. Secondly, it alleges that the Project employed inadequate measures to prevent, mitigate and compensate for the physical or economic displacement of affected persons, due to (a) a failure to implement adequate dust pollution and road safety measures, (b) a failure to mitigate pasture fragmentation, and (c) a failure to properly identify all physically or economically displaced persons and provide adequate compensation or resettlement. Thirdly, it alleges a failure to consult and inform affected persons, particularly as regards the road-related risks to public health and safety and regarding the Project’s mitigation plans. Finally, the Complaint alleges a failure to prevent or mitigate adverse impacts on affected persons’ culture and tradition, including a failure to identify and protect local herders as indigenous peoples.

- **EBRD Management<sup>2</sup>**

7. Concerning project appraisal, EBRD believes the Project was appropriately assessed to meet the requirements of the Bank’s 2008 ESP and observes that the ESIA was prepared by an international team of experts, and includes a Non-Technical Summary, Resettlement Action Plan, Public Consultation and Disclosure Plan (PCDP), Environmental and Social Action Plan (ESAP), and assorted management plans, all developed in conformance with EBRD policy. EBRD claims that all issues raised in the Complaint were identified in the ESIA, such as the identification, assessment, management and mitigation of dust and associated potential health impacts. The Bank acknowledges the challenges to the appraisal process presented by governmental policy changes, such as that regarding the rail link, but is confident that Project appraisal has provided appropriate procedures to identify, assess and address new impacts, such as the dust and road safety issues that emerged from interim use of the unpaved road.
8. Concerning the adequacy of measures to prevent, mitigate and compensate for physical and economic displacement, the Bank maintains that ER engaged early in a process to identify risks for potentially impacted herders, consulted with local people, put in place a framework of entitlements and compensation measures, and reported to the Bank after the process had been completed. The Bank further points to the many on-going programs ER has developed to support herders’ traditional livelihoods.
9. Regarding proper consultation and information disclosure, EBRD claims that information about potential impacts related to roads was adequately covered in the ESIA and suitably presented via a comprehensive public consultation process. Further, all issues raised during the consultations by herders and other residents of Khanbogd were considered during the finalization of the ESIA. The Bank further notes that ER’s consultation and communication system is ongoing rather than a one-time opportunity and includes communication activities around the mine site and along the road, meetings in the soums, informal meetings with herders, and a company grievance mechanism that allows affected people to raise complaints.

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<sup>2</sup> See further, Eligibility Assessment Report, at 62-67.

10. Regarding the application of PR 7 on Indigenous Peoples, EBRD disagrees with the Complainants' contention that PR 7 applies to local herders and highlights the assessment of the issue provided in the ESIA, but contends that many could be considered as vulnerable. Concerning local culture and traditions, EBRD claims that the ESIA properly identified and addressed both risks to and opportunities for protection of cultural heritage and that ER operations and activities appropriately respect and protect local culture and traditions.
11. Concerning the Bank's due diligence more generally, EBRD reports that it has worked closely with the ER team over many years, visiting the site on numerous occasions, meeting with local and regional authorities, as well as herders driving the unpaved roads, participating in meetings with interested stakeholders, consistently monitoring Project performance and reviewing all Project documents. EBRD argues that it has fully complied with the ESP and undertaken all activities that can reasonably be expected to ensure the Client's compliance with Bank Performance Requirements.

- **Client<sup>3</sup>**

12. The Client stresses that, from the beginning, it has committed to respecting the rights of its host communities and to conducting its operations and activities accordingly. It believes it has followed through on this commitment, complied with all lender requirements, and been accountable for preventing or mitigating the social and environmental risks from its operations, which potentially or actually may have impacted the rights of affected herders. ER suggests that its activities are unrelated to the impacts alleged in the Complaint, and claims that it is the neighbouring mines that are the source of these problems. It further argues that the Complaint is broad and unspecific and fails to indicate precisely which issues apply to Energy Resources.
13. Nevertheless, the Company indicates that it has tried to address the specific concerns of the Complainants. ER contends it has conscientiously assessed the socio-economic baseline in the affected area since the early phases of the road project, identified likely environmental and social impacts that could occur at any stage of the project, and developed measures and taken steps to mitigate harm to herders' health, safety and livelihoods, according to Mongolian law and EBRD standards. Regarding the mitigation of health, safety and livelihood impacts of unpaved roads, ER argues it took early and significant measures to consider and address harmful impacts since initiating its coal transport operations in 2009.

### **Steps Taken in Conducting Compliance Review**

14. The Compliance Review Expert, Prof Owen McIntyre, has conducted a detailed investigation of the environmental and social appraisal and management processes conducted in respect of the Energy Resources Phase II Project, as well as an examination of the Bank's role in overseeing these processes in order to ensure their compliance with the requirements of the 2008 ESP. He has also investigated the factual circumstances on the ground in relation to the failings alleged in the Complaint. In addition to detailed examination of the Project documentation and various correspondence, communications and background documents relating to

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<sup>3</sup> See further, Eligibility Assessment Report, at 67-71.



environmental and social appraisal, the Compliance Review Expert has conducted numerous meetings with the Relevant Parties, including:

- A meeting with EBRD Environment and Sustainability Department (ESD) at EBRD Headquarters on 3 March 2015;
- A meeting with representatives of the Complainants at EBRD Headquarters on 17 April 2015;
- A meeting with ESD at EBRD Headquarters on 21 August 2015;
- A meeting with ESD at EBRD Headquarters on 4 February 2016.

The Compliance Review Expert has also held conference calls with a representative of the Complainants on 30 July 2015 and with the relevant ESD staff on 4 December 2015.

15. In addition, the Compliance Review Expert, accompanied by the PCM Officer, conducted a site visit to the South Gobi region of Mongolia on 1- 8 August 2015 to investigate conditions in the vicinity of the coal export road, the export railway and the mine, and to meet with Complainants and other affected local herders. The Compliance Review Expert and the PCM Officer also met with representatives of the Client in Ulaan Baatar.
16. Pursuant to Paragraph 42 of the PCM Rules of Procedures (RPs), the Parties to the Complaint have been afforded an opportunity to comment on a draft version of the current Compliance Review Report in order that these comments could be considered in finalising the Report. Comments were received from the Bank on 22 September 2016 and from the Complainants on 9 January 2017.

## RELEVANT EBRD POLICY OBLIGATIONS

### Applicable EBRD Policy

17. As the Complaint relates to a Project approved for financing by the EBRD Board of Directors on 23 March 2010, the relevant and applicable EBRD policy is the 2008 Environmental and Social Policy,<sup>4</sup> which was adopted in May 2008 and entered into force six months later in November 2008,<sup>5</sup> until it was replaced by the 2014 Environmental and Social Policy, which was adopted in May 2014 and entered into force in November 2014.<sup>6</sup>

### Implications of Relevant Policy Provisions

18. This Complaint is essentially concerned with a range of alleged adverse impacts on the health and livelihoods of local herders of roads used in the operation of the Energy Resources coal mine at Tsogttsetsii. The original Complaint<sup>7</sup> simply refers to the fact that a number of mining companies, including the Client, have engaged in ‘building roads of various types through the pastures of Khanbog soum to the mine sites and their facilities such as airports, power plants, water storage and treatment units, waste storage and construction material mines’, as well as roads on which they ‘transport products and goods from Ulaanbaatar to the mines and from the mine to the Chinese Border’, all of which ‘cut through and fragment pastures of nomadic pastoralists ...[and] ... raise huge amounts of dust ... causing severe health damage to the nomads living along these roads and their animals’. The Supplemental Complaint<sup>8</sup> prepared with support from Accountability Counsel in turn explains that ‘[t]he main route of concern associated with this project is the Tavan Tolgoi – Gashuun Sukhait coal road leading from the coal mine to Gashuun Sukhait border crossing’.<sup>9</sup> The Complainants claim that, ‘[a]s of early 2011, 300 coal trucks per day from the Ukhua Khudag coal mine used the earth road’, but explain that this road now consists of a 245 kilometer paved road built by a consortium of coal mining companies, including Energy Resources.<sup>10</sup> The Supplemental Complaint also claims that Energy Resources uses a number of unsealed roads, including, for example:

- approximately 400 kilometers of unsealed roads from Choir to the mining site, which are used to transport fuel; and
- the unpaved Dalangzadgad-Tsogttsetsii and Ulanbaatar-Tsogttsetsii roads, which are used to transport personnel and supplies for the mine and mine camp.<sup>11</sup>

In addition, the Supplemental Complaint refers to the impacts of the Ukhua Khudag – Tsagaan Khad railroad, which is currently under construction and is intended to be used to transport coal from Energy Resources’ Ukhua Khudag coal mine to the

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<sup>4</sup> See Project Summary Document, available at <http://www.ebrd.com/work-with-us/projects/esia/energy-resources-phase-ii.html>

<sup>5</sup> In accordance with para. 49 of the 2008 ESP.

<sup>6</sup> In accordance with para. 52 of the 2014 ESP.

<sup>7</sup> Dated 1 July 2013, hereinafter Original Complaint.

<sup>8</sup> Dated 1 April 2014, hereinafter Supplemental Complaint.

<sup>9</sup> Supplemental Complaint, at 3.

<sup>10</sup> Supplemental Complaint, at 3.

<sup>11</sup> Supplemental Complaint, at 3-4.

Chinese border, and to 'the planned coal road from Tavan Tolgoi to Oyu Tolgoi [which] is also of concern to the complainants, although its status is uncertain at this time'.<sup>12</sup> In relation to both the project-related roads and the railroad, the Supplemental Complaint alludes to 'large quarries ... created alongside roads for construction purposes, which are also of concern to the complainants'.<sup>13</sup>

19. The Supplemental Complaint then proceeds to set out in detail the specific provisions of EBRD's 2008 Environmental and Social Policy (ESP) which the Complainants allege have been violated by failures on the part of the Bank. The ESP provisions allegedly violated include:
- (i) PR 4.7, due to an alleged failure 'to take adequate health and safety measures in relation to its heavy use of earth roads', an alleged failure to provide 'safe crossings for people, community vehicles or animals' along the paved Tavan Tolgoi – Gashuun Sukhait road, and an alleged failure to maximise the capacity of the paved Tavan Tolgoi – Gashuun Sukhait road.<sup>14</sup>
  - (ii) PR 5.7, due to an alleged failure to identify and compensate or resettle all complainants physically or economically displaced as a result of the paved Tavan Tolgoi – Gashuun Sukhait road and the Ukhaa Khudag – Tsagaan Khad railroad.<sup>15</sup>
  - (iii) PR 5.11, due to an alleged failure to take adequate measures to prevent, mitigate and compensate for the physical or economic displacement of complainants caused by dust pollution and road safety problems and by fragmentation of pastureland.<sup>16</sup>
  - (iv) PR 10.17 and PR 4.8, due to an alleged failure adequately to consult and inform affected complainants.<sup>17</sup>
  - (v) PR 7.8 and PR 7.12, due to an alleged failure to identify and protect the project-affected herders as indigenous peoples.<sup>18</sup>
  - (vi) PR 8.12 and PR 8.15, due to an alleged failure properly to prevent or mitigate impacts on the project-affected herders' culture and tradition.<sup>19</sup>
20. In an attempt to rationalise the various grounds of non-compliance put forward in the Supplemental Complaint, the Eligibility Assessment Report reorders,<sup>20</sup> in the light of further communication with the Complainants, the alleged violations of the ESP performance requirements in the following terms:
- (i) *Issues related to PR 1: Environmental and Social Appraisal and Management*, including alleged failures regarding:

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<sup>12</sup> Supplemental Complaint, at 4.

<sup>13</sup> Supplemental Complaint, at 4.

<sup>14</sup> Supplemental Complaint, at 13.

<sup>15</sup> Supplemental Complaint, at 14-15.

<sup>16</sup> Supplemental Complaint, at 14.

<sup>17</sup> Supplemental Complaint, at 15.

<sup>18</sup> Supplemental Complaint, at 15 and 11-12.

<sup>19</sup> Supplemental Complaint, at 15 and 12.

<sup>20</sup> See EAR (Energy Resources), paras. 20-44, at 56-62.

- a. *Fragmentation and loss of pastures and access to water resources;*
  - b. *Prevalence of dust and noise from network of paved and unpaved roads;*
  - and
  - c. *Degradation of health and well-being of herders and their livestock.*
- (ii) *Issues related to PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement, including alleged failures regarding:*
- a. *Insufficient prevention, mitigation and compensation measures to address livelihood impacts.*
- (iii) *Issues related to PR 7: Indigenous Peoples, including an alleged failure properly to prevent or mitigate impacts on their culture and traditions, and*
- (iv) *Issues related to PR 10: Information Disclosure and Stakeholder Engagement.*

### PR 1: Environmental and Social Appraisal and Management

21. Despite the express identification by the Complainants of the particular PRs set out above<sup>21</sup> as having been potentially violated by the issues raised in the Complaint, it occurs to the Compliance Review Expert that the overwhelming majority of the alleged grounds of non-compliance can be addressed by means of an examination of the Bank's compliance with the requirements of PR 1 on *Environmental and Social Appraisal and Management*. Quite apart from the necessity, having regard to the inevitable time, resource and logistical restraints facing the PCM, to rationalise the Compliance Review process for such a wide-ranging and multi-faceted Complaint in order to focus on the key areas of alleged Bank failure, PR 1 is clearly intended to comprise a cross-cutting obligation, stipulating 'a dynamic, continuous process, initiated and supported by management',<sup>22</sup> which 'outlines the client's responsibilities in the process of appraising, managing and monitoring environmental and social issues associated with projects proposed for EBRD financing'.<sup>23</sup> It is worth remembering that PR 1.5 provides that

'Through appraisal activities such as ... 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*'.

This strongly suggests that environmental and social impact assessment (ESIA) under PR 1 comprises the primary tool under the ESP for the identification, avoidance and mitigation of environmental and social impacts associated with Category A Bank-financed projects, and that PR 2 to PR 8, which each addresses a particular type of environmental and social impact, will normally function to inform the specific

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<sup>21</sup> *Supra*, para. 19.

<sup>22</sup> PR 1.1.

<sup>23</sup> PR 1.3.

standards of identification, avoidance and mitigation required in the conduct of the ESIA in respect of each type of impact arising.

22. For example, the central concerns of the Complainants regarding the alleged failure to take adequate health and safety measures in relation to the use of roads, contrary to PR 4.7, ought to have been adequately addressed under the ESIA and the ESAP and ESMP to which it gave rise. Indeed, the Complainants expressly allude to a failure to assess and to *mitigate* the health and safety impacts of project-related roads.<sup>24</sup> Also, in relation to the alleged '[f]ailure to maximize the capacity of the Tavan Tolgoi – Gashuun Sukhait paved road', the Complainants refer to the resulting 'dust pollution and the other adverse health and safety impacts', which one might reasonably expect to be addressed under PR 1.<sup>25</sup> The Eligibility Assessment Report similarly recognises that the alleged violations of PR 4 outlined in the Supplemental Complaint ought to have been addressed under PR 1.<sup>26</sup> Therefore, while PR 4<sup>27</sup> is centrally relevant to determination of the standards of community health, safety and security protection that project-affected persons can reasonably expect, the ESIA conducted under PR 1 is intended to identify potential adverse impacts relevant to such standards and the appropriate measures for their avoidance or mitigation.
23. It is necessary, therefore, in the course of this Compliance Review process to determine whether the ESIA carried out in respect of the Energy Resources II Project, as well as the ESAP and ESMP to which it gave rise, was adequate in order to assess and address the alleged impacts highlighted in the present Complaint. This involves, examination of the appropriateness of the ESIA in terms of, *inter alia*, the area of influence identified for the Project,<sup>28</sup> the range of potential environmental and social impacts analysed for all relevant stages of the project cycle,<sup>29</sup> the nature and intensity of the due diligence studies undertaken,<sup>30</sup> and the suitability of measures identified as necessary to avoid, minimise or mitigate adverse impacts.<sup>31</sup> In addition, it is necessary to determine whether the Bank has overseen the development and implementation of an adequate ESAP and ESMP containing 'a programme of mitigation and performance improvement measures and actions that address the identified social and environmental issues, impacts and opportunities'.<sup>32</sup> It is also

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<sup>24</sup> Supplemental Complaint, at 12-13.

<sup>25</sup> Supplemental Complaint, at 13.

<sup>26</sup> See EAR (Energy Resources), para. 35, at 59.

<sup>27</sup> PR 4.1 expressly recognises that

'projects can also increase the potential for community exposure to risks and impacts arising from temporary or permanent changes in population; *transport of raw and finished materials*; construction, operations and decommissioning; *accidents*, structural failures, and releases of hazardous chemicals' (emphasis added).

According to PR 4.4, a key objective PR 4: *Community Health, Safety and Security* is

'to avoid or minimise risks to or impacts on the health and safety of the local community during the project life cycle from both routine and non-routine circumstances'.

<sup>28</sup> PR 1.6.

<sup>29</sup> PR 1.7.

<sup>30</sup> PR 1.8 provides that

'The nature of due diligence studies undertaken will be commensurate with the risks and issues involved. It will be an adequate, accurate, and objective evaluation and presentation of the issues, prepared by qualified and experienced persons.'

<sup>31</sup> PR 1.9.

<sup>32</sup> See PR 1.14, which also sets down a hierarchy of such measures and actions:

'The measures and actions to address identified impacts and risks will favour the avoidance and prevention of impacts over minimisation, mitigation, or compensation, where technically and financially feasible.'

PR 1.15 generally provides that

'The level of detail and complexity of the ESAP and the priority of the identified measures and actions will reflect the project's risks, impacts and opportunities.'

necessary to determine whether adequate procedures have been established to monitor and measure compliance with the environmental and social safeguards set out in the ESAP and ESMP and in the relevant ESP PRs.<sup>33</sup> Finally, it is necessary to establish whether the process of developing and implementing the ESIA met the information disclosure and stakeholder engagement requirements arising under PR 10.<sup>34</sup>

## PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement

24. Even in the case of issues related to PR 5 of the ESP on *Land Acquisition, Involuntary Resettlement and Economic Displacement*, the EAR expressly acknowledges that '[t]hese also relate to the claim of inadequate social and environmental assessment under PR 1'.<sup>35</sup> This is borne out by an examination of the individual issues raised. For example, in claiming a violation of PR 5.11,<sup>36</sup> the Complaint alleges that 'there is no evidence that Energy Resources has *considered* feasible alternative project designs to *avoid* or at least *minimise* the physical or economic displacement caused by the fragmentation of pastures by the roads it has constructed or relies on' and, further, that 'Energy Resources has also failed to *mitigate* the fragmentation caused by the roads by constructing safe crossings for herders and their livestock ... [and] ... flood culverts that are adequate to allow the free flow of the Undai river'.<sup>37</sup> Consideration of alternative project design and mitigation measures would ordinarily be understood to fall within the requirements of 'Environmental and Social Appraisal and Management' arising under PR 1. The Complainants further allege a '[f]ailure to properly *identify* all physically or economically displaced complainants and provide adequate compensation or resettlement'<sup>38</sup> in violation of PR 5.7.<sup>39</sup> Indirectly questioning the area of influence identified for the Project for the purposes of appraisal,<sup>40</sup> the Complainants argue that '[t]he new Ukhaa Khudag - Tasagaan Khad railroad ... should be considered an associated facility of the EBRD-funded Ukhaa Khudag mine' and, further that the allegedly 'faulty system for identifying impacted herders was described in Energy Resources' ESIA'.<sup>41</sup> These grounds suggest the centrally critical role of the ESIA process conducted under PR 1 for the effective realisation of the safeguards intended under PR 5, and the central relevance of PR 5

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<sup>33</sup> PR 1.20 – PR 1.24.

<sup>34</sup> PR 1.9. See also PR 1.24 regarding the requirement to ensure that 'Stakeholder engagement during project implementation, including external reporting on progress with implementing the ESAP, will be undertaken in accordance with PR 10.'

<sup>35</sup> EAR (Energy Resources), para. 35, at 59.

<sup>36</sup> PR 5.11 requires that

'The client will consider feasible alternative project designs to avoid or at least minimise physical and/or economic displacement, while balancing environmental, social, and financial costs and benefits.'

<sup>37</sup> Supplemental Complaint, at 14 (emphasis added). It also alleges that Energy Resources failed to foresee that herders would be separated from their wells and would have to drive further to move between winter camps, pastures and animal herds.

<sup>38</sup> Supplemental Complaint, at 14 (emphasis added).

<sup>39</sup> PR 5.7 sets out the scope of application of PR 5, and provides that

'This PR applies to physical or economic displacement, that can be full, partial, permanent, or temporary, resulting from the following types of transactions: ...

- Imposition of restrictions that result in people experiencing loss of access to physical assets or natural resources irrespective of whether such rights of restriction are acquired through negotiation, expropriation, compulsory purchase, or by means of government regulation.'

<sup>40</sup> Pursuant to PR 1.6.

<sup>41</sup> Supplemental Complaint, at 14-15.

in informing the scope of the ESIA and the nature of the impacts to be identified and addressed thereunder.

25. Further stressing the role of the environmental and social appraisal and management processes under PR 1 in giving effect to the safeguards in PR 5, PR 1.14 expressly provides that

‘[t]he ESAP shall focus on avoidance of impacts, and where this is not possible, mitigation measures to minimise or reduce possible impacts to acceptable levels ... [including] ... compensation for involuntary resettlement ... in accordance with PR 5’.

26. Of course, PR 5 also stipulates certain requirements which cannot be addressed under the framework of PR 1, including the establishment of a grievance mechanism,<sup>42</sup> the development of a Resettlement Action Plan (RAP)<sup>43</sup> and the development of a Livelihood Restoration Framework (LRF).<sup>44</sup> However, the Complainants do not directly raise concerns in the Complaint about the effective operation of the grievance mechanism operated by Energy Resources.<sup>45</sup> Neither does the Complaint directly allege any non-compliance with the requirements arising under PR 5 requiring an examination of the adequacy of the RAP and the LRF.<sup>46</sup> Thus, examination of compliance with PR 5 can be included under the examination required as part of this Compliance Review process of the adequacy of the ESIA, which is expected to identify all project-related impacts including physical or economic displacement. Indeed, the Complainants suggest as much by arguing that ‘Energy Resources’ ESIA anticipated compensating physically displaced households ... without reference to EBRD standards regarding appropriate compensation levels’.<sup>47</sup>

27. Therefore, it is necessary to examine the ESIA, and the ESAP and ESMP to which it gave rise, to determine whether the likely impacts of the project-related roads and railroad related to involuntary resettlement were adequately assessed and addressed. It may also prove necessary to examine the adequacy of the compensation arrangements provided for in the RAP and LRF.

### PR 7: Indigenous Peoples and PR 8: Cultural Heritage

28. The Complainants contend that, ‘as is the case with Oyu Tolgoi, Energy Resources has failed to identify and protect the herders as indigenous peoples and has failed to properly prevent or mitigate impacts on their culture and tradition’.<sup>48</sup>

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<sup>42</sup> PR 5.13.

<sup>43</sup> PR 5.15.

<sup>44</sup> PR 5.24.

<sup>45</sup> Although the EAR does record reports of problems with the operation of the project grievance mechanism, such reports are based entirely on ‘in-person interviews with Complainants’ and have no basis in the Complaint. According to EAR (Energy Resources), para. 42, at 62, the

‘Complainants also claim to be unaware of ER’s formal grievance procedure; however, they have been able to communicate their concerns to the community-relations officer.’

<sup>46</sup> In contrast with the grounds of non-compliance put forward by the same Complainants in respect of the Oyu Tolgoi Project. See Supplemental Complaint, at 9-10, where the Complainants explicitly allege violation of PR 5.39 on ‘economic displacement’.

<sup>47</sup> Supplemental Complaint, at 14-15. The Complaints further contend, *ibid.*, that

‘The ESIA also unduly minimized the impacts of economic displacement caused by pasture fragmentation ...’.

<sup>48</sup> See Supplemental Complaint, at 15, which refers to Section II.A.5 of the Supplemental Complaint where the Complainants’ allegations of non-compliance with PR 7 and PR 8 are set out in detail in relation to the Oyu Tolgoi Project.

29. Regarding PR 7, the Complainants claim that ‘despite the herders’ distinct nomadic pastoralist identity, neither Oyu Tolgoi nor the EBRD undertook any analysis to determine whether the nomadic herders should be recognized as indigenous peoples under PR 7’ and, thus, that they ‘failed to afford the herders the protections provided for by PR 7’, including such requirements as

‘that free, prior and informed consent is obtained, that the indigenous peoples are given an opportunity for informed participation, that efforts are made to avoid or at least minimize the size of the indigenous land to be used and that indigenous peoples are provided with compensation, whether in cash, land or in kind, as well as culturally appropriate development opportunities.’<sup>49</sup>

30. As regards the difficult question of whether the herders of the South Gobi fall within the definition of “Indigenous Peoples” provided in the ESP,<sup>50</sup> the Complainants point out that they ‘self-identify as traditional, nomadic pastoralists with an ancient culture’, and that ‘they maintain an intimate attachment to distinct ancestral territories in and surrounding the project area’ which ‘is displayed in a seasonal and cyclical migration from one traditional location to the next’ and ‘by the sacred status of various sites’.<sup>51</sup> In addition, they note that the herders ‘descend from, and are themselves, nomadic pastoralists who have pursued traditional, non-wage subsistence strategies for centuries’ and ‘are separated from mainstream culture by distinct cultural and economic customs, namely a nomadic lifestyle rooted in a natural-resource based livelihood that is tied to the geographic area they inhabit’.<sup>52</sup> Finally, the Complainants argue that the herders possess a ‘particularized dialect’ involving ‘use of words and phrases not heard in the mainstream Mongolian language [which] distinguishes them from the rest of the country’.<sup>53</sup>

31. However, while these characteristics correspond closely with those listed in the ESP as relevant for the identification of “Indigenous Peoples”,<sup>54</sup> it should be noted that, under the particular formulation of the definition provided in the ESP, such relevance only becomes pertinent once the project-affected persons in question have been established to be ‘a social and cultural minority group, distinct from dominant groups within national societies’.<sup>55</sup> It appears doubtful that herders could be considered such

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<sup>49</sup> Supplemental Complaint, at 11, where the Complainants refer to the additional safeguards provided under PR 7.31 and 7.33.

<sup>50</sup> PR 7.10.

<sup>51</sup> Supplemental Complaint, at 11.

<sup>52</sup> Supplemental Complaint, at 11.

<sup>53</sup> Supplemental Complaint, at 11.

<sup>54</sup> PR 7.10.

<sup>55</sup> PR 7.10 provides in full:

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

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



a ‘minority group’ within Mongolia, and especially in the South Gobi region, and thus as “Indigenous Peoples” for the purposes of PR7.<sup>56</sup> For example, UN figures from 2013 suggest that approximately 40 percent of all Mongolians are currently involved in herding for their primary livelihood.<sup>57</sup> Moreover, Mongolia’s traditional pastoralist lifestyle based upon nomadic livestock herding continues to provide the predominant cultural identity nationally.<sup>58</sup> It is instructive in this regard that Minority Rights Group International lists no ‘minorities’ in Mongolia,<sup>59</sup> and no ‘peoples under threat’.<sup>60</sup> This situation certainly appears to be at odds with the spirit and intent of PR 7, which recognises ‘that Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies, are often among the most marginalised and vulnerable segments of the population’.<sup>61</sup> This statement suggests that “Indigenous Peoples” are afforded special protection on account of their inherent vulnerability due to their minority status, their cultural distinctiveness from dominant groups, and their resulting marginalisation within national society. This is a widely held view among mining concerns. For example, the latest practice guidelines issued by the International Council on Mining and Metals, a mining industry body, explains that ‘Indigenous Peoples have historically been disadvantaged, discriminated against and dispossessed of their land, and continue to be disadvantaged relative to most other sections of society’.<sup>62</sup>

The position in international law would appear to support the requirement that, in order to comprise “Indigenous Peoples”, a group should comprise a minority which has been colonised or otherwise subjugated and which faces the risk of discrimination at the hands of a dominant majority.<sup>63</sup> For example, the 1989 International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples,<sup>64</sup> the leading international treaty instrument on the rights of indigenous peoples, defines such groups having regard to their being either:

(i) ‘tribal peoples in independent countries whose social, cultural and economic conditions *distinguish them from other sections of the national community*, and whose

- 
- a distinct language or dialect, often different from the official language or dialect of the country or region.

<sup>56</sup> Ethnic groups traditionally recognised as “Indigenous Peoples” in Mongolia include Durbet, Bayad, Buryat and Dariaganga Mongols, as well as Turkic-speaking minorities such as Uyghurs, Uzbeks, Tuvinians, Urianhais and Hotons. Others include the Tuninian-speaking Tsaatan (Dukha) and the Tungusic-speaking Evenk. See

<http://minorityrights.org/country/mongolia/>

the Oirats of Western Mongolia.

<sup>57</sup> UN Stats., *2013 World Statistics Pocketbook Country Profile: Mongolia*(2013), available at:

<http://unstats.un.org/unsd/pocketbook/PDF/2013/Mongolia.pdf>

<sup>58</sup> See, for example, Asia-Pacific Network for Global Climate Change, *Can Traditional Livelihoods and Mining Co-exist in a Changing Climate: Strengthening Public-Private Partnerships in Mongolia to Reduce Risk and Address Loss and Damage* (Final Report, 2014), at 8, available at: <http://www.apn-gcr.org/resources/items/show/1938>

<sup>59</sup> See <http://minorityrights.org/country/mongolia/>

<sup>60</sup> See <http://peoplesunderthreat.org/>

<sup>61</sup> PR 7.2.

<sup>62</sup> International Council on Mining & Metals (ICMM), *Good Practice Guide – Indigenous Peoples and Mining* (2<sup>nd</sup> ed., 2015), at 10.

<sup>63</sup> It should be noted, however, that PR 7.9 takes the position adopted by the UN-system, *i.e.* that

‘There is no universally accepted definition of “Indigenous Peoples”’.

<sup>64</sup> Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169)

status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'<sup>65</sup> or

(ii) native to a country at 'the time of *conquest or colonisation* or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'.<sup>66</sup>

In addition, ILO Convention 169 also identifies as one of the key principles guiding the application of the Convention that indigenous peoples 'shall enjoy the full measure of human rights and fundamental freedoms *without hindrance or discrimination*',<sup>67</sup> which once again suggests strongly that they would normally comprise an oppressed or disadvantaged minority. Similarly, the United Nations (UN) Declaration on the Rights of Indigenous Peoples,<sup>68</sup> adopted by the UN General Assembly in 2007, notably avoids the inclusion of any definition of "Indigenous Peoples",<sup>69</sup> but instead stresses the right to be free from discrimination.<sup>70</sup>

32. Given the lack of clarity surrounding the definition and scope of "Indigenous Peoples", and the resulting uncertainty over whether Mongolian herders might be covered by PR 7, it would be inappropriate, on the facts of the present Complaint, for the Compliance Review Expert to consider the alleged '[f]ailure to properly identify nomadic herders as indigenous peoples' for the purposes of establishing non-compliance on the part of the Bank. Though PR 7.8 expressly provides that '[t]he applicability of this PR will be determined by the Bank during the environmental and social appraisal process according to the criteria outlined', the RAP considered the issue and had little difficulty in concluding that 'it is anticipated that there will be no issues related to ethnic minorities or indigenous people'.<sup>71</sup> This position was accepted, quite reasonably, by EBRD and the Compliance Review Expert has determined that it was not necessary in this instance to retain an Indigenous Peoples expert as suggested in the Eligibility Assessment Report<sup>72</sup> and requested in subsequent comments received from the Complainants.<sup>73</sup>

33. In such circumstances, the Bank must be permitted some margin of discretion in deciding whether to apply PR 7. However, this does not mean that the standards of

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<sup>65</sup> Article 1(a) (emphasis added). It should be noted that a 'tribe' usually refers to a group that is distinct from and not integrated into mainstream national society. See, for example, S. Corry, *Tribal Peoples for Tomorrow's World* (Freeman Press, 2011).

<sup>66</sup> Article 1(b) (emphasis added).

<sup>67</sup> Article 3(1), (emphasis added).

<sup>68</sup> Available at: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>69</sup> The UN Permanent Forum on Indigenous Issues explains that '[c]onsidering the diversity of indigenous peoples, an official definition of "indigenous" has not been adopted by any UN-system body'. See UNPFII Fact Sheet: *Indigenous Peoples, Indigenous Voices*, available at: [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf)

<sup>70</sup> See Article 2 which provides:

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

See also Preamble, para. 4.

<sup>71</sup> ERM, *Resettlement Action Plan: UHG Phase II* (26 February 2010), at 18. Similarly, in relation to the Oyu Tolgoi Project, the ESIA Gap Analysis concluded quite unequivocally that

'[b]ased on the IFC and EBRD definitions, there are no Indigenous Peoples in the Project Area. Pastoralists and nomadic herders within the Project Impact Area will be considered as a "vulnerable group" for the purposes of the ESIA.'

See Citrus, *Oyu Tolgoi Project ESIA Gap Analysis* (30 March 2010), at 18, para. 6.2.1.

<sup>72</sup> EAR ToRs, para. 15(f).

<sup>73</sup> Complainants' Comments on the Draft Compliance Review Report (9 January 2017), at 9-10.

protection provided under PR 7 are irrelevant. The defining objective of PR 7 is to address the particular and special vulnerability of certain communities due to the nature of their ‘natural resource-based livelihoods’.<sup>74</sup> Therefore, regardless of whether or not the Mongolian herders affected by the present project formally qualify as “Indigenous Peoples” for the purposes of PR 7, the safeguard standards set out therein ought to inform the nature and scope of the ESIA required under PR 1, and any further protection provided under other relevant and applicable PRs,<sup>75</sup> to the extent that the herders share any of the characteristics and vulnerabilities commonly associated with “Indigenous Peoples”. To deny non-qualifying herders all such protection would involve the interpretation and application of the ESP in an arbitrary and inequitable manner. For example, the safeguards set out in PR 8 regarding the conservation and protection of cultural heritage should apply having particular regard to the special nomadic pastoralist identity of the herders, regardless of whether or not they qualify as “Indigenous Peoples” under PR 7.<sup>76</sup> It should be noted that, when faced with difficult determinations of the indigenesness of project-affected persons, it has often been the practice of the World Bank to apply a “functional equivalent” methodology and, though the Inspection Panel has expressed concerns about such an approach, it’s application in the current Complaint would not give rise to the potential instances of non-compliance which have been associated with a functional equivalence approach.<sup>77</sup>

34. Indeed, rigorous application of the safeguards afforded to herders under the ESP, in light of the inherent vulnerability to project impacts of a nomadic pastoralist community, should mean that the vexed question of their qualification as “Indigenous Peoples” less central to the effective protection of their interests. The requirement under PRs 7.31 and 7.33 that free, prior and informed consent (FPIC) is obtained in the case of Indigenous Peoples<sup>78</sup> is commonly understood to mean that there should be ‘no coercion, intimidation or manipulation’ of indigenous communities and that Client engagement with such communities should involve significantly enhanced consultation and participation.<sup>79</sup> It is instructive in this regard that the World Bank

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<sup>74</sup> PR 7.3. See also PR 7.2 which notes that such groups ‘are particularly vulnerable if their lands and resources are transformed, encroached upon by those who are not members of their communities, or significantly degraded.’

<sup>75</sup> Indeed, PR 7.8 expressly advises that ‘Implementation of the actions necessary to meet these requirements is to be managed in accordance with this PR, and PRs 1, 5, 8 and 10 as appropriate.’

<sup>76</sup> This is the case even though conservation of cultural heritage under the ESP is closely linked to the protection afforded to “Indigenous Peoples”. For example, PR 8.3 includes among the relevant national laws that might apply to cultural heritage ‘laws relating to the protection of Indigenous Peoples’, while PR 8.8 includes within the scope of application of PR 8 projects that ‘may have an adverse impact on the culture, knowledge and practices of Indigenous Peoples’.

<sup>77</sup> World Bank Inspection Panel, *Indigenous Peoples* (Emerging Lessons Series No. 2, October 2016) at 6. As regards potential pitfalls, this guidance document outlines, at 8, that:

‘Panel investigations have found particular instances of non-compliance with the policy with respect to: (i) consulting with individuals or segments of the community who are not the legitimate representatives chosen by the indigenous community; (ii) not providing information to Indigenous Peoples in a culturally appropriate manner, form and language, thereby reducing their opportunities to influence project design and implementation; and (iii) assuming that an agreement to discuss the project and an early interest in it constitutes broad community support.’

<sup>78</sup> Emphasised in Supplemental Complaint, at 11.

<sup>79</sup> Department of Economic and Social Affairs of the United Nations, *Resource Kit on Indigenous Peoples’ Issues* (United Nations, New York, 2008), at 18, available at:

[http://www.un.org/esa/socdev/unpfii/documents/resource\\_kit\\_indigenous\\_2008.pdf](http://www.un.org/esa/socdev/unpfii/documents/resource_kit_indigenous_2008.pdf)

See also, *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent*, UN Doc E/C.19/2005/3 (2005), which states that

Inspection Panel's recent guidance on Indigenous Peoples extols 'Free, Prior and Informed Consultations', as

'An effective and extended consultation process provides Indigenous Peoples with opportunities to actively participate in decision making for projects that may impact them negatively or positively, and to have their views reflected in project design and implementation arrangements.'<sup>80</sup>

One might reasonably expect that all consultations with project affected persons, and especially particularly vulnerable persons, should be conducted in this manner.

35. That the interests of vulnerable groups should be assessed and addressed by means of the environmental and social appraisal and management processes under PR 1 is clearly established by PR 1.14, which sets out in detail the issues to be covered by the ESAP. It provides, *inter alia*, that

'Where stakeholder groups were identified as disadvantaged or vulnerable during the appraisal process, the ESAP will include differentiated measures so that adverse impacts do not fall disproportionately on them, and they are not disadvantaged in sharing any development benefits and opportunities resulting from the project.'<sup>81</sup>

36. Therefore, it is necessary to examine the adequacy of the ESIA, and of the ESAP and ESMP to which it gave rise, to determine whether the measures intended to assess and address the potential impacts of the project-related roads and railroad took appropriate account of the particular vulnerability of herders and their natural resource-based lifestyle and livelihood.
37. As regards PR 8, there can be no doubt that the traditional knowledge, skills and practices of nomadic pastoralism practised by the herders of the South Gobi qualify as cultural heritage under PR 8 of the ESP.<sup>82</sup> For the purposes of PR 8, "cultural heritage" is defined as 'a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions'.<sup>83</sup> Of particular relevance to the present Complaint, one category, "intangible cultural heritage", is understood to mean

'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage and which are transmitted from generation to generation.'<sup>84</sup>

38. Helpfully, PR 8 makes it quite clear that the safeguards contained therein are to be given effect by means of environmental and social appraisal under PR 1 and

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'Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation'.

<sup>80</sup> World Bank Inspection Panel, *Indigenous Peoples* (Emerging Lessons Series No. 2, October 2016) at 7-8.

<sup>81</sup> PR 1.14 elsewhere provides that

'compensation for ... impacts on Indigenous Peoples will be carried out in accordance with PR 7'.

See also, PR 10.9 regarding the requirement to identify such disadvantaged or vulnerable individuals or groups.

<sup>82</sup> See Supplemental Complaint, at 12 and 15; EAR (Oyu Tolgoi), at 19-20, paras. 46-49.

<sup>83</sup> PR 8.7.

<sup>84</sup> PR 8.7.

consultation with affected communities under PR 10. Though the present Project could not easily be regarded as falling within any of the three specific categories enumerated under PR 8.8, PR 8.9 goes on to provide that

‘The applicability of this PR in other cases will be determined by the Bank during the environmental and social appraisal process. ... If applicable, the Bank will agree with the client how the requirements of this PR will be addressed and managed as part of the client’s overall Environmental and Social Action Plan (ESAP) ... The environmental and social appraisal and management requirements are outlined in PR 1 and PR 10.’

As regards screening for risks to cultural heritage, PR 8.10 dictates that, ‘[a]t an early stage of the environmental and social appraisal (see PR 1), the client will identify if any cultural heritage is likely to be adversely affected by the project’. Where the screening suggests that impacts on cultural heritage cannot be avoided, PR 8.13 requires that

‘the client will ... undertake studies to assess potential impacts and, if necessary, the required changes in design. The scope of these studies will be agreed with the EBRD on a case-by-case basis. The studies will be conducted by qualified and experienced cultural heritage specialists, either as part of the overall environmental and social assessment in accordance with PR 1, or separately.’

Regarding management of the impacts identified in the course of such studies, PR 8.15 provides that

‘the client will be required to develop appropriate mitigation measures in order to reduce and mitigate any adverse impacts on the cultural heritage ... [which] ...might be included in the Environmental and Social Action Plan for the project or in a specific Cultural Heritage Management Plan.’

Likewise, PR 8.17 emphasises the requirement for the Client to consult with affected communities in order to identify and ensure effective safeguarding of cultural heritage of importance and further stipulates that ‘[s]uch consultation must follow the requirements of PR 10 and could be a part of a wider consultation process on the projects’ environmental and social impacts in accordance with PR 10’. PR 8.18 further requires that the client must enter into a good faith negotiation with the affected communities and document their informed participation and the successful outcome of the negotiation

‘Where a project may significantly damage cultural heritage, and its damage or loss may endanger the cultural or economic survival of communities within the country of operation, who use the cultural heritage for longstanding cultural purposes’.

39. It is therefore necessary to examine whether the potential impacts of the Energy Resources II Project on the cultural heritage of herders were adequately assessed and addressed in the environmental and social appraisal process conducted in accordance with PR 1 and whether adequate consultation took place with the affected communities regarding the outcomes of that process related to cultural heritage. In addition, it is necessary to determine whether PR 8.18 was applicable having regard to

the facts of the present Project and, if so, whether good faith negotiations were successfully concluded with the informed participation of the affected communities.

## PR 10: Information Disclosure and Stakeholder Engagement

40. The Complainants list a range of alleged failures regarding PR 10: *Information Disclosure and Stakeholder Engagement*, which they contend amount to breach of PR 10.17 and PR 4.8.<sup>85</sup> Specifically, they claim that ‘Energy Resources has failed to properly disseminate information about the health and safety impacts of the roads it constructs’ and, further, that ‘health risks associated with the Energy Resources project were not discussed in enough detail during public consultations to ensure that the affected community would understand them sufficiently’.<sup>86</sup>
41. It is quite clear from the text of PR 10 that ‘the process of stakeholder engagement is an essential component of the appraisal, management and monitoring of environmental and social issues’ and thus, that PR 10 ‘should be read in conjunction with PR 1.’<sup>87</sup> Indeed, stressing the close functional linkages between PRs 1 and 10, PR 10.5 explains that ‘the relevant requirements of this PR will be addressed as part of the client’s overall environmental and social appraisal process, Environmental and Social Action Plan (ESAP) and/or Management System (outlined in PR 1)’. Highlighting the integrated nature of the various PRs in the ESP, PR 10.19 provides that, ‘[i]n the case of projects involving involuntary resettlement, affecting Indigenous Peoples or cultural heritage, the client will also apply the special requirements of PR 5, PR 7 and PR 8’ in the conduct of its stakeholder engagement activities.
42. Generally, for Category A projects PR 10 requires a community engagement process comprising ‘a formalised and participatory assessment process’ and ‘organised and iterative consultation’,<sup>88</sup> and including the provision of ongoing information ‘commensurate to the nature of the project and its associated environmental and social impacts’,<sup>89</sup> as well as an effective grievance mechanism.<sup>90</sup> Such engagement practices must be adequate ‘to receive feedback on the effectiveness of the implementation of the mitigation measures in the ESAP as well as the affected communities’ ongoing interests and concerns about the project’.<sup>91</sup> Once again, ‘[v]ulnerable people may need special attention and could require resources to understand the impacts and to allow meaningful input’.<sup>92</sup> In case of any doubt regarding the supervisory nature of the Bank’s obligations under PR 10, PR 10.7 explains that ‘[a]s part of its own due diligence, the Bank will assess the level of

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<sup>85</sup> Supplemental Complaint, at 15. PR 4.8, which relates to *Community Health, Safety and Security*, sets out the requirement for the client

‘to disclose relevant project-related information to enable the affected communities and relevant government agencies to understand these risks and potential impacts, as well as the client’s proposed prevention, mitigation and emergency response measures, as appropriate.’

<sup>86</sup> Supplemental Complaint, at 15. In support of this contention, the Complainants cite the findings of an earlier report by CEE Bankwatch *et al: Spirited Away – Mongolia’s mining boom and the people development left behind*, December 2011, at 22, available at: <http://bankwatch.org/sites/default/files/spirited-away-mongolia-mining.pdf>

<sup>87</sup> PR 10.4.

<sup>88</sup> PR 10.17.

<sup>89</sup> PR 10.21.

<sup>90</sup> PR 10.24 – PR 10.25.

<sup>91</sup> PR 10.21.

<sup>92</sup> PR 10.17.

information disclosure and consultation conducted by the client against the requirements of this PR and may require additional engagement.'

43. As regards the specific steps stipulated under PR 10, the Client is first of all required to identify stakeholders including, as a priority, 'the various individuals or groups who ... are affected or likely to be affected (directly or indirectly) by the project ("affected parties")'.<sup>93</sup> More particularly, as part of this stakeholder identification process the Client is subject to the express requirement to 'identify individuals and groups that may be differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status', and to identify the nature and extent of such potential impacts.<sup>94</sup> For Category A projects, the client must

'engage in a scoping process with identified stakeholders to ensure identification of all key issues to be investigated as part of the Environmental and Social Impact Assessment (ESIA) process ... [which] ... will also facilitate development of a Stakeholder Engagement Plan for the project.'<sup>95</sup>

The Stakeholder Engagement Plan (SEP) is intended to set out in detail the arrangements for effective communication with identified stakeholders throughout project preparation and implementation, including those for the establishment and operation of a suitable grievance mechanism.<sup>96</sup> PR 10.11 once again stipulates special consideration of vulnerable groups in the SEP by specifically providing that

'Where stakeholder groups are identified as disadvantaged or vulnerable, dedicated approaches and an increased level of resources may be needed for communication with such stakeholders so that they fully understand the issues that are potentially affecting them.'

44. Secondly, regarding information disclosure, PR 10 requires that the Client discloses to stakeholders a comprehensive range of information concerning environmental and social risks and impacts associated with the project 'in a manner that is accessible and culturally appropriate, taking into account any vulnerable people'.<sup>97</sup> For a Category A project this involves disclosure of the ESAP to the affected parties.<sup>98</sup>
45. Thirdly, PR 10 requires the client to engage in meaningful consultation with stakeholders 'in a manner that provides the affected parties with opportunities to express their views on project risks, impacts and mitigation measures, and allows the client to consider and respond to them'.<sup>99</sup> The consultation process must be inclusive and culturally appropriate and tailored to 'the needs of any disadvantaged or vulnerable groups'.<sup>100</sup> Such consultation should begin early in the assessment process and continue 'on an ongoing basis as the nature of issues, impacts and

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<sup>93</sup> PR 10.8.

<sup>94</sup> PR 10.9.

<sup>95</sup> PR 10.10.

<sup>96</sup> PR 10.11.

<sup>97</sup> PR 10.12 and PR 10.13.

<sup>98</sup> PR 10.14.

<sup>99</sup> PR 10.15

<sup>100</sup> PR 10.16.

opportunities evolves'.<sup>101</sup> Ongoing consultation involves providing identified affected communities

'with periodic reports on progress with implementation of the ESAP, on issues that involve ongoing risk to or impacts on them, and on any issue that the consultation process or grievance mechanism has identified as of concern to those communities. These reports will be in a format accessible to the affected communities.'<sup>102</sup>

46. Therefore, it is necessary in the course of the present Compliance Review process to determine whether the stakeholder identification process correctly identified all affected parties, as well as the nature and extent of the potential adverse impacts arising from road use associated with the Energy Resources II Project and from the Ukhaa Khudag – Tasagaan Khad railroad. It is also necessary to examine whether adequate information regarding the adverse impacts of project road and rail use was disclosed to the affected parties in an appropriate manner. This Compliance Review process must also examine whether adequate consultation took place with the affected parties, including ongoing reporting and consultation regarding road and rail use and the associated impacts.

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<sup>101</sup> PR 10.15.

<sup>102</sup> PR 10.22.



## ANALYSIS OF COMPLIANCE ISSUES

### PR 1: Environmental and Social Appraisal and Management

47. It is quite clear from an examination of the project documentation for Energy Resources (UHG) Phase II that the Project underwent very extensive project appraisal as required under ESP PR 1.9 for projects categorised by EBRD as “A”. The 2010 ESIA<sup>103</sup> report for the project was prepared by an extensive team of reputable international consultants,<sup>104</sup> runs to more than 500 pages, and consists of nine sections:
- a. Section 1: *Introduction*
  - b. Section 2: *Operational Framework*
  - c. Section 3: *Project Description*
  - d. Section 4: *Environmental Design Basis*
  - e. Section 5: *Baseline Description*
  - f. Section 6: *Assessment of Impacts and Mitigation Measures*
  - g. Section 7: *Cumulative Impacts Analysis*
  - h. Section 8: *Conclusions*
  - i. Section 9: *References*
48. The Terms of Reference for the ESIA purport to incorporate all aspects of the Project’s environmental and social performance relevant as regards EBRD’s Performance Requirements, while also making reference to ADB Safeguard Policies and various IFC standards, as applicable and appropriate.<sup>105</sup> The ESIA expressly recognises the relevance and applicability of the EBRD PRs. For example, in relation to PR 4 on *Community Health, Safety and Security*, it acknowledges the risks presented by, *inter alia*, ‘transport of raw and finished materials; construction, operations and decommissioning; accidents’ and confirms that

‘This performance requirement addresses the project proponent’s responsibility to identify and to avoid or minimize the risks and adverse impacts to community health, safety and security that may arise from project activities.’<sup>106</sup>

The ESIA also seeks to build upon a range of earlier studies, licence and permit application processes, and stakeholder consultation exercises required under Mongolian law.<sup>107</sup>

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<sup>103</sup> Energy Resources LLC, *Environmental and Social Impact Assessment: UHG Phase II Project*, dated 26 February 2010 (Environmental Resources Management / Sustainability East Asia LLC), hereinafter ESIA Report.

<sup>104</sup> For details, see ESIA Report, at 1-5 – 1-6.

<sup>105</sup> ESIA Report, at 1-3 – 1-4 and 2-22 – 2-32.

<sup>106</sup> ESIA Report, at 2-25.

<sup>107</sup> ESIA Report, at 2-1 – 2-2.

49. In addition, consistent with PR 1.9,<sup>108</sup> the ESIA refers to several plans designed specifically to address the requirements of PRs 5, 7, 8 and 10, namely the Resettlement Action Plan (RAP), the Cultural Heritage Management Plan (CHMP) and the Stakeholder Engagement Plan (SEP), as well as to the various Detailed Environmental Impact Assessments (DEIAs) conducted in respect of the Project in order to comply with the requirements of Mongolian national law.<sup>109</sup>
50. The general *Introduction* included in Section 1 of the ESIA does not provide much detail, but instead outlines the purpose and scope of the ESIA process, explains the terms of reference for the process and the division of responsibilities between the two firms of international consultants (ERM and Sustainability), outlines the structure of the ESIA Report, and identifies the members of the ESIA development team and their individual areas of responsibility. The *Operational Framework* set out in Section 2 explains the national and international legal framework within which implementation of the Project must occur, along with the additional international environmental and social requirements applicable, including those set out in the EBRD's 2008 Environmental and Social Policy.<sup>110</sup> Section 2 also provides an overview of the public consultation and disclosure activities carried out in respect of the Project.

#### *Dust Impacts of Road Use*

51. The *Integrated Project Description* contained in Section 3 of the ESIA includes, among the 'Project Components', a brief overview of the 'Railway to China', which was then expected to be operational 'by late 2011 or early 2012'.<sup>111</sup> It does not include any direct reference to road transportation, except to explain that '[d]uring the initial stages of coal production expansion, the coal products will continue to be trucked to China via the Gashuun Sukhait border crossing point using the existing unsealed coal road' pending the opening of the proposed railway.<sup>112</sup> In describing in detail the 'Mine Expansion' component of the Project, however, the ESIA explains that a number of mining companies (including ER) were at that time exporting coal from the Tavan Tolgoi deposit to China via the existing unpaved road to Gashuun Sukhait, noting that '[a]s many as 500 trucks per day travel along this route and consequently, the road is in a very poor state of repair'.<sup>113</sup> The Report details the deep ruts, dust and other environmental damage resulting from the use of roads entirely inadequate for handling this volume of coal export traffic.<sup>114</sup> Further, the ESIA notes that, at that time, ER was utilising approximately one hundred 85-tonne capacity coal trucks operated by TransGobi, along with another eighty 120-tonne capacity trucks operated by other contractors, but planned by the end of 2009 'on acquiring additional trucking resources such that its fleet size reaches between 350 and 400 trucks'.<sup>115</sup>

<sup>108</sup> PR 1.9 stipulates, *inter alia*, that

'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. ... 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.'

<sup>109</sup> See ESIA Report, at 2-1.

<sup>110</sup> ESIA Report, at 2-21 – 2-27.

<sup>111</sup> See ESIA Report, at 6-109.

<sup>112</sup> ESIA Report, at 3-2.

<sup>113</sup> ESIA Report, at 3-28.

<sup>114</sup> ESIA Report 3-28 – 3-29, including indicative photographs of such damage, at Figures 3.15 – 3.17.

<sup>115</sup> ESIA Report, at 3-28.

Consequently, the ESIA reports that ‘ER commenced upgrading of the access road for increased coal traffic in late 2008. ER will continue to maintain the access road until such time as the railway replaces the road transport requirement.’<sup>116</sup>

52. The ESIA proceeds to set out in detail ER’s plans to upgrade the unsealed road, as an interim measure, in order to minimise the adverse impacts of road-related dust. It explains that ‘[t]he road upgrade will involve dust reducing road cover technologies trialled in 2009 that have proven to work well in the Project area’s desert steppe region’.<sup>117</sup> More specifically,

‘The road surface will be comprised of a 150mm layer of crushed gravel of 5-40mm diameter, mixed with 25%-30% of locally sourced clay material. The road upgrade technology will involve a soil stabilizing substance, *Earthzyme*, that will be sprayed on the existing road surface with the mixture of soil, clay and small stones.’<sup>118</sup>

It also provides assurances that, in order to meet the Client’s aim ‘to reduce the social and environmental impacts of dust from coal haul traffic ... the road will be upgraded to meet the requirements set out in the Mongolia Standard on Roads, as a “fourth technical category road”.’

53. In its *Analysis of Alternatives*, where it considers the relative merits of rail transport vs road transport, the ESIA Report points out that

‘This trucking volume would have the potential of increasing within the next five years to over 1,000 trucks per day to meet expected coal production volumes from the UHG project and other operations within the Tavan Tolgoi coal basin.’<sup>119</sup>

It then proceeds to outline the ‘significant disadvantages from an environmental and social perspective’ of continuing to use the (then existing) unsealed road, including:

- Increased dust emissions from vehicle use on unsealed roads;
- Increased risk of livestock losses from vehicle accidents; and
- Increased public safety risk from co-existence of local traffic on coal truck access roads.<sup>120</sup>

In the light of such disadvantages, the ESIA Report explains ER’s plans to pursue ‘road upgrade activities to improve the conditions of the existing coal haul road as an interim measure prior to railway construction’.<sup>121</sup>

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<sup>116</sup> ESIA Report, at 3-28. It also notes, *ibid.*, that

‘The original proposal for the road upgrade was assessed in a separate DEIA report prepared by ENCO for ER in October 2008.’

<sup>117</sup> ESIA Report, at 3-30.

<sup>118</sup> ESIA Report, at 3-30. Elsewhere the ESIA Report notes the volumes of water that will be required to apply *Earthzyme* during the road upgrade works.

<sup>119</sup> ESIA Report, at 3-93.

<sup>120</sup> ESIA Report, at 3-93. Conversely, in outlining the relative advantages of rail transport, the Report notes, at 3-94, that this option would result in ‘reduced dust emissions during construction’.

<sup>121</sup> ESIA Report, at 3-93.

54. However, the ESIA also notes the ‘conceptual proposal by the Government of Mongolia to construct a sealed road between the Tavon Tolgoi coal basin and the Chinese border’.<sup>122</sup> While it cautions that little detail (on finance, timetable for construction and engineering design) was then available about such a sealed road, it provisionally concludes that

‘While a sealed road would doubtless offer operational benefits over the existing unsealed road, it is unlikely that a road of any form could produce the same operational integrity, safety and cost efficiencies of a railway. Moreover, construction of a sealed road would have similar environmental and social impacts as railway construction, with fewer long-term operational benefits to the environment and society.’<sup>123</sup>

55. In relation to the *Environmental Design Basis* for the Project, however, the ESIA appears almost to disregard dust impacts associated with Project-related road traffic. For example, in considering ‘dust suppression’ measures, it only refers to ‘[m]ine roads, stockpiles, materials handling facilities and dry tailings beaches’ and anticipates that ‘[d]epending on the level of dust generation, some control may be required to meet *occupational* health and safety standards’.<sup>124</sup> Similarly, in considering ‘air quality’, it acknowledges that ‘[a] parameter of concern for the Project will be dust’, but proceeds to explain that ‘[d]ust is currently problematic during wind storms and dust generation is expected to increase with the increase in disturbed and unvegetated areas’.<sup>125</sup> This demonstrates concern regarding dust generated from the mine site itself, but disregards the dust likely to be generated by the increase in road traffic associated with coal export anticipated elsewhere in the ESIA Report.<sup>126</sup>

56. The discussion on ‘Air Quality’ contained in the *Baseline Description* section of the ESIA Report concedes that ‘[t]he current use of the coal road by trucks from various mines has led to increased dust levels along the coal haul road route’, and recognises that use of an unsealed road, in combination with local conditions, ‘allows individual trucks and truck convoys to raise large clouds of dust’.<sup>127</sup> It also explains that ‘[d]uring Phase II surveys conducted by ERM, [dust-related] complaints from herders living alongside the coal haul road were noted’.<sup>128</sup> This section sets out the dust monitoring activities of the Client, explaining that ‘UHG mine staff maintain a series of monitoring locations along the coal road at 50 kilometre increments from the mine, from which they collect monthly samples with a number of DusTrak real-time dust samplers’.<sup>129</sup> However, somewhat disappointingly, due to certain technical and methodological limitations with the monitoring and sampling regime employed, ‘[i]t is further noted that the contribution of coal road traffic to these data (versus that of

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<sup>122</sup> ESIA Report, at 3-93. Despite a lack of detailed information, the ESIA Report explains, at 3-94, that ‘it is understood that various road users would be responsible for constructing and paying tolls to use this sealed road’, with ER being ‘responsible for the first 86km of the sealed road originating at the nearby Tavan Tolgoi mine’.

<sup>123</sup> ESIA Report, at 3-94.

<sup>124</sup> ESIA Report, 4-6 (emphasis added).

<sup>125</sup> ESIA Report, at 4.10. Similarly, the discussion on ‘air quality’ in the ‘Baseline Description’ section of the ESIA Report places considerable emphasis, at 5-15, on the regularity of dust storms in the South Gobi and on ‘dust from natural sources’.

<sup>126</sup> See, for example, ESIA Report, at 3-93.

<sup>127</sup> ESIA Report, at 5-15.

<sup>128</sup> ESIA Report, at 5-16.

<sup>129</sup> ESIA Report, at 5-15.

natural sources) is unknown'.<sup>130</sup> Once again, for the purpose of addressing the acknowledged problem of road-related dust, the ESIA seeks to rely, in the short-term, on upgrading the unsealed road and, in the long-term, on entry into service of the railway. According to the ESIA, '[i]t is noted that Project activities to upgrade the existing earthen coal haul road are underway as an interim mitigation measure for reducing environmental and social impacts from coal transportation until the railway is built'.<sup>131</sup>

57. However, it is clear from the ESIA that the likely effectiveness of the coal haul road upgrade in terms of reduction of dust emissions remained largely uncertain at the time of the ESIA. Section 6 of the ESIA Report on *Impact Assessment and Mitigation Measures* explains:

'Current monthly 30 minute Dust Trak sampling does not provide suitable data for direct comparison against all averaging period standards under Mongolian guidelines or World Bank guidelines, and *does not provide a comprehensive baseline to allow a check of the efficacy of the works to reduce dust*. It is expensive and logistically difficult to install permanent real time monitors such as Dust Traks in a remote site such as the coal road, so instead it is proposed to install paired static dust gauges 50 metres from either side of the coal road at the current monitoring location 50, 100, 150 and 200 kilometres from the mine. These simple, sturdy and inexpensive devices allow for a month long sample period, and placing them on either side of the coal road will ensure capture of dust samples from road haulage irrespective of prevailing winds. Prompt *installation of these gauges will allow collection of data to allow a consideration of the dust from existing haulage, proposed roadworks, and the expected reduction in dust levels after coal road reconstruction*.<sup>132</sup>

Therefore, it appears that the effective reduction in the generation of road-related dust that could be expected from upgrade of the coal road, the sole mitigation measures upon which the Project relied in the short to medium-term, was entirely unclear. Indeed, the ESIA elsewhere suggests the inadequacy of the then-existing dust monitoring arrangements, and thus of the data upon which the dust mitigation measures proposed in respect of Phase II of the Project were based:

'As the assessment produced in this report is based upon assumed data (rates, operational cycles, locations, etc.), it is essential that the site operator fully understands the nature and extent of potential impacts. To achieve this, it is essential that the operator implements a thorough and technically defensible air monitoring program that is capable of determining ... background concentrations of TSP, PM10 and deposited dust ... over an extended monitoring campaign'.<sup>133</sup>

58. The discussion of 'Traffic' issues in the *Baseline Description* section of the ESIA Report acknowledges the true extent of the 'dust pollution and environmental damage ... [a]s a result of continuous heavy (average 85 tonne) truck movements along this coal haul road' and of the 'serious human health and community safety impacts that arise from

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<sup>130</sup> ESIA Report, at 5-16.

<sup>131</sup> ESIA Report, at 5-16.

<sup>132</sup> ESIA Report, at 6-42 – 6-43 (emphasis added).

<sup>133</sup> ESIA Report, at 6-46 – 6-47.

current road conditions'.<sup>134</sup> It reports that, with 11 companies using this road to transport coal by truck, the volume of traffic had increased to an average of 380 daily truck movements in 2009 and was expected to continue to increase, with Project-related truck haulage expected to peak in 2010 at 3.4 million tonnes per annum.<sup>135</sup> Specifically, the ESIA Report notes that

'The existing road has a negative impact on the local environment and herder livelihoods – especially in Bayan Ovoo and Khanbogd soums. The unpaved and multitrack road condition, is contributing to ambient dust which has both environmental and human / livestock health impacts. In addition there is a safety aspect, with reports of occasional collisions between trucks and livestock / wild animals. In addition research conducted for this ESIA identified allegations from several sources that truck drivers from existing operators were in some cases drunk, often speeding and frequently overloading their 85 tonne trucks with loads of up to 120 tonnes.'<sup>136</sup>

Thus, the Client was fully aware of the impacts on herders' health, livelihoods and safety associated with use of the unsealed coal export road, and with the related concerns expressed by herder communities.

59. In addition, in several places the ESIA Report suggests the huge volume of materials that will need to be transported to the Project site by means of unsealed roads, thus adding to the adverse environmental and social impacts of such road use. For example, in providing a description of the 'Expanded Mine Camp', the ESIA notes that 'prefabricated housing units will be transported to the site by truck once assembled in Ulaanbaatar'.<sup>137</sup>
60. These concerns have prompted ER to conduct 'further investigations along the coal haul road to assess road conditions', on the basis of which 'an environmental protection plan was developed and implemented to manage coal road maintenance activities' including 'road repair, dust maintenance, and traffic safety activities'.<sup>138</sup> However, the activities outlined appear underwhelming. In relation to 'Road Repair Activities', the ESIA Report explains that '[t]he road upgrade that was planned in Phase I did not occur due to technical challenges and a lack of agreement from other mine operators' and, therefore, that '[i]n order to try to address the poor state of the coal road, road maintenance and repair activities were conducted by the Project in 2008 and 2009'.<sup>139</sup> However, during this time 'no asphalt or chemicals were used for road maintenance except for 1.5km of road upgraded to test appropriate dust reduction technologies'.<sup>140</sup> Similarly, in relation to 'Maintenance Activities to Reduce Dust', the ESIA notes that

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<sup>134</sup> ESIA Report, at 5-54.

<sup>135</sup> ESIA Report, at 5-54 – 5-55. The ESIA Report goes on to explain that Project-related truck haulage is expected to reduce after 2010 when the coal handling and preparation plant (CHPP) was due to become operational, thus reducing the amount of shipped coal, and later again, as the railway was commissioned.

<sup>136</sup> ESIA Report, at 5-54, though the ESIA adds the qualification that

'These allegations, especially the more serious allegation of drunk driving, were not substantiated in the research for the ESIA.'

<sup>137</sup> ESIA Report, at 3-85 – 3-86.

<sup>138</sup> ESIA Report, at 5-55.

<sup>139</sup> ESIA Report, at 5-55.

<sup>140</sup> ESIA Report, at 5-56.

'The lack of reliable watering points along the coal haul road does not allow for efficient road watering by water carts to reduce dust. As a result, dust suppression activities along the existing coal road have been costly and challenging. The current earthen road requires significant volumes of water to manage dust and sections degrade quickly as a result of the high volumes of traffic.'<sup>141</sup>

Thus, despite the fact that '[i]n 2009, six wells were drilled and six water trucks were purchased for dust suppression', dust suppression activities were severely limited that year.<sup>142</sup>

61. Once again, the *Baseline Description* section of the ESIA expresses confidence that '[t]he road upgrade will reduce dust and environmental degradation from vehicle movements',<sup>143</sup> largely on the basis that '[t]he road upgrade testing proved that dust could be reduced with appropriate upgrades'.<sup>144</sup> It reports that '[t]he use of a Canadian soil stabilizing substance, *Earthzyme*, proved to be the most effective and is planned to be used in the road upgrade', planned to commence in March 2010.<sup>145</sup>
62. It is also notable that the account of 'Community Health, Safety and Security' contained in the *Baseline Description* section of the ESIA lists, as the foremost cause of mortality among the public in Mongolia 'respiratory disease (such as pneumonia and bronchitis)',<sup>146</sup> and as the leading cause of morbidity 'respiratory diseases (31 percent of the total number of reported diseases)'.<sup>147</sup> The ESIA Report further notes that medical experts raised specific concerns about 'a rise in asthma and bronchitis cases associated with increasing dust' and that '[i]nterviews with local herders also attributed many of their health concerns to dusty conditions'.<sup>148</sup> Regarding the 'Determinants of Health', the ESIA reports that '[a]nalysis of interview responses from local herder households showed that the majority of those who reported illness amongst the herder households also reported high levels of ambient dust' and stressed, in particular, 'health concerns associated with fugitive dust from the coal road and/or desert tracks (depending on where the herder was located)'.<sup>149</sup> In addition, it acknowledges concerns that '[i]njury from traffic accidents such as vehicle on vehicle, single vehicle accidents and vehicles and animals, are becoming increasingly more common as vehicle traffic increases with mining activities'.<sup>150</sup> Further, as regards 'Women and Vulnerable Groups', the ESIA notes that '[d]ue to the nomadic nature of the herder lifestyle, and remote locations of their households, they are particularly vulnerable to changes in their environment and associated impacts on their health'.<sup>151</sup> In addition to the fact that low-income groups are less able to afford treatment from a doctor and/or medicine to treat their illness, 'interviews showed that local herders are less able to self-mitigate risks associated with fugitive dust'. More generally, the ESIA found that '[l]iving conditions in the Project area increase the risk

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<sup>141</sup> ESIA Report, at 5-56.

<sup>142</sup> ESIA Report, at 5-56.

<sup>143</sup> ESIA Report, at 5-55.

<sup>144</sup> ESIA Report, at 5-56.

<sup>145</sup> ESIA Report, at 5-56 – 5-57.

<sup>146</sup> ESIA Report, at 5-120.

<sup>147</sup> ESIA Report, at 5-121.

<sup>148</sup> ESIA Report, at 5-122.

<sup>149</sup> ESIA Report, at 5-128 – 5-129.

<sup>150</sup> ESIA Report, at 5-129.

<sup>151</sup> ESIA Report, at 5-130.

of health conditions associated with ... air quality'.<sup>152</sup> Not surprisingly, concerns about an increase in dust levels featured most prominently among the negative perceptions identified in interviews with regional health officials and local physicians.<sup>153</sup> Once again, therefore, the ESIA highlights the extent to which the Client was aware of the health impacts of increased dust, including dust associated with road use, and of the related concerns of herders, making clear the need for appropriate dust mitigation measures.

63. Section 6 of the ESIA Report, on *Impact Assessment and Mitigation Measures*, is of central importance to determination of this Compliance Review, as it 'describes in detail each of the potential impacts identified, structured in terms of Project attainment of EBRD Performance Requirements'.<sup>154</sup> As regards 'Air Quality', Section 6 considers Mongolian National Standards (including national standards for dust) and World Bank Guidelines on Air Quality, as well as meteorological data on average monthly wind speeds and average monthly number of days when dust storms occur, and relevant features of the surrounding topography,<sup>155</sup> before listing the key air quality impacts associated with the Project. The construction activities listed giving rise to air quality impacts of relevance to the present Complaint include:

- Material import and export, including the movement of cut and fill, and the movement of construction materials;
- Construction of new on-site facilities, including access roads, infrastructure and temporary construction buildings and structures; and
- Vehicle movements along the coal haul road as well as during Project construction activities.

Generally, the assessment predicts impacts of major significance, as regards both total suspended particulates (TSP)<sup>156</sup> and particulate matter (PM10),<sup>157</sup> from road-related sources of dust.

64. As regards dust generated from the coal haul road specifically, which was at the time understood to be merely the interim solution pending completion of the railway, the ESIA expresses questionable confidence that '[f]ollowing the coal road upgrade, dust emissions from truck haulage are expected to drop significantly from existing and construction levels'.<sup>158</sup> While the ESIA concedes that no data on dust reduction rates are available from the manufacturers for *Earthzyme*, it draws upon the findings of a number of studies<sup>159</sup> of reductions in road aggregate loss from road surfaces treated with what it implies are functionally similar substances, such as lignosulphonate, calcium chloride and magnesium chloride, to support 'anecdotal observations that dust was not apparent from the short *Earthzyme* trial sections of the coal road'.<sup>160</sup> In

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<sup>152</sup> ESIA Report, at 5-130.

<sup>153</sup> ESIA Report, at 5-131 – 5-132.

<sup>154</sup> ESIA Report, at 6-1 (emphasis added).

<sup>155</sup> ESIA Report, at 6-15 – 6-19.

<sup>156</sup> ESIA Report, at 6-31 – 6-33 and Appendix E-4, Figures 2 and 5.

<sup>157</sup> ESIA Report, at 6-33 – 6-35 and Appendix E-4, Figures 8 and 11.

<sup>158</sup> ESIA Report, at 6-39.

<sup>159</sup> Stevenson (2004); Sanders, *et al* (1997).

<sup>160</sup> ESIA Report, at 6-39. While the ESIA claims that '[a]ggregate loss is closely related to dust emissions', it concedes that 'none of these substances share an active ingredient with *Earthzyme*'.



addition, in an exercise that raises a number of questions and concerns, the ESIA employs a formula borrowed from the Australian National Pollutant Inventory Emission Estimation Manual for Mining to estimate a very significant reduction in dust after treatment and upgrading of the road:

'The above formula predicts a total daily dust emission of 843 tonnes for 380 truck movements along the whole coal road, under existing conditions. Modification of the coal road as planned would drop this daily emission to a predicted 139 tonnes.'<sup>161</sup>

On this somewhat questionable basis the ESIA concludes that '[t]he road upgrade will improve the road surface, thereby facilitating faster and more reliable coal transport and will substantially reduce dust emissions from haulage, although these reductions from the existing case are unquantified'.<sup>162</sup>

65. The ESIA also takes account of the dust impacts associated with the upgrading works themselves, noting that '[r]oad reconstruction during the planned eight to ten month works period, if unmitigated, will generate dust additional to the ambient and coal truck emissions'.<sup>163</sup> It identifies a range of activities likely to contribute to additional dust impacts, including quarrying, transport of aggregate to work sites, actual road works such as grading and realignment, and construction plant and light vehicle movements, as well as basic mitigation measures, including the use of water carts on access roads and the roadworks themselves and the fitting of dust suppression devices on drill rigs and crushing and screening plant employed at the quarries.<sup>164</sup> Further, as regards the duration of increased dust emissions in any single location during the course of the staged road works, the ESIA suggests that 'it is reasonable to assume that on average works will occur for two to three months at most in each road section'.<sup>165</sup>
66. It is quite clear, therefore, that the ESIA recognised the risks to herders' health and livelihoods presented by road transport-related dust emissions, that it undertook serious efforts to study the nature, scope and extent of these risks, and that it identified a range of dust mitigation measures specifically designed to reduce dust emissions from haulage along the coal road, including:
- Incorporation of a stabilising agent into the uppermost wearing layer of the new aggregate pavement;
  - Ongoing maintenance grading, rolling, re-sheeting and watering;
  - Dust suppression devices such as cyclones on all drill rigs;
  - Dust suppression water sprays fitted on all crushing and screening plants;
  - Regular watering of haul roads to each work site; and

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<sup>161</sup> ESIA Report, at 6-40 – 6-41.

<sup>162</sup> ESIA Report, at 6-42.

<sup>163</sup> ESIA Report, at 6-41.

<sup>164</sup> ESIA Report, at 6-41.

<sup>165</sup> ESIA Report, at 6-42.

- Regular watering of the work site manoeuvring areas and roadways.<sup>166</sup>

However, it is not at all clear that these mitigation measures were adequate, at least as regards the continued (short-term or medium-term) use of the coal haul road. As we have determined above, the likely effectiveness of the coal road upgrade for reducing dust generation was not ascertained. There was little, if any, data to support the effectiveness of the *Earthzyme* stabilising agent<sup>167</sup> and no ‘thorough and technically defensible air monitoring program’ to ‘provide a comprehensive baseline to allow a check of the efficacy of the works to reduce dust’.<sup>168</sup> These deficiencies in the process of environmental and social appraisal and management for the Project are all the more serious when one considers the established susceptibility of vulnerable herder communities to respiratory diseases, especially ‘asthma and bronchitis cases associated with increasing dust’,<sup>169</sup> as well as the projected increases in coal output. For example, the proposed phasing for the mine development was estimated in 2009 as follows:

- Year 1 – 2Mt (ROM coal, unwashed, and transported by truck to the border);
- Year 2 – 3Mt (ROM coal, unwashed, and transported by truck to the border);
- Year 3 – 5Mt (ROM coal, unwashed, and transported by truck to the border);
- Year 4 – 10Mt (ROM coal, washed, and transported by rail to the border);
- Year 5 – 15Mt (ROM coal, washed, and transported by rail to the border).<sup>170</sup>

Thus, the ESIA anticipated an increase in Project coal production and exports from 2 million tonnes per annum to 5 million tonnes per annum while still relying on the coal haul road. Within two more years it anticipated a further three-fold increase to 15 million tonnes, though it expected the railway to be operational during Years 4 and 5. It is at all times perfectly clear that ‘[t]he principal mitigation measure to address impacts of truck haulage of coal is the construction of the railway’, and that ‘coal road upgrade activities are underway as an interim measure to address truck haulage impacts’.<sup>171</sup> There does not, however, appear to have been any meaningful consideration of the contingency that construction of the railway would not go ahead as planned, at least immediately, and the consequent need to continue to use the coal haul road in either an unsealed or sealed condition. Uncertainty and/or delay regarding construction of the railway could not have been entirely unforeseen. For example, the ESIA Report itself reports the ‘conceptual proposal by the Government of Mongolia to construct a sealed road between the Tavon Tolgoi coal basin and the Chinese border’.<sup>172</sup> Though the ESIA notes a lack of detailed information, it was at

<sup>166</sup> ESIA Report, at 6-42. Further details are provided, at 6-45 – 6-46, regarding both construction phase mitigation and operational phase mitigation.

<sup>167</sup> See, *supra*, para. 64.

<sup>168</sup> ESIA Report, at 6-47 and 6-42. See, *supra*, para. 57.

<sup>169</sup> ESIA Report, at 5-122. See, *supra*, para. 62.

<sup>170</sup> ESIA Report, at 6-20, citing Leighton Asia Ltd (2009), *UHG Mine Plan and Cost Estimate*, Section 6.2.

<sup>171</sup> ESIA Report, at 6-110. Similarly, the ESIA states, at 6-109, that

‘Although the ultimate Project plan will be (by late 2011 or early 2012) to initiate coal shipments via railway, thus virtually eliminating truck haulage of coal by UHG, this ESIA has considered the interim impacts of truck traffic as a result of the increasing production output from the UHG mine prior to railway commissioning.’

<sup>172</sup> ESIA Report, at 3-93. See, *supra*, para. 54.

that time already ‘understood that various road users would be responsible for constructing and paying tolls to use this sealed road’, with ER being ‘responsible for the first 86km of the sealed road originating at the nearby Tavan Tolgoi mine’.<sup>173</sup> It would appear, therefore, that some information existed regarding the utility of developing a sealed coal export road and, by implication, regarding the possibility of impediments to the construction of the railway.

67. As regards dust-related impacts from Phase II activities, Section 6 of the ESIA does not provide great detail, only identifying the following specific mitigation measures:

- Implementation and Compliance with the Traffic Management Plan, specifically the chapter on dust suppression, which identifies the strategies used to manage dust on the road during execution of the Project;
- Implementation and Compliance with the Dust Management Plan;
- Communicate project risk to local communities and address concerns accordingly; and
- Monitor any complaints filed (via grievance mechanism) from local stakeholders as an additional tool to monitor dust management measures.<sup>174</sup>

This is somewhat disappointing in light of the study’s findings in the same Section regarding the likely dust-related impacts due to transport activities during operation, in particular vehicle traffic on unpaved roads:

‘Fugitive dust will have the greatest potential impacts on local herder residents along the coal road, especially during dry periods when there is heavy truck traffic. This could result in respiratory impacts for the local community, ranging from minor irritation of the throat, eyes, nose to chronic irritation, asthma and other respiratory effects. There is a particular risk for residents living in proximity to roads with high vehicle traffic especially children, the elderly and those with existing respiratory conditions. If not managed, long term exposure to particulate matter could generate long term respiratory effects. Scientific studies have linked particulate pollution (especially fine particles) to a variety of problems including irritation of the airways, coughing, aggravated asthma, and chronic bronchitis.’<sup>175</sup>

68. The original Dust Management Plan (DMP) for the Project was revised following the June 2009 monitoring report and further updated following the March 2010 monitoring report,<sup>176</sup> and aims to pursue its primary objective ‘to reduce dust emissions from the Project to the extent practicable, in an effort to prevent Project activities from contributing to ambient dust levels exceeding Mongolian standards’.<sup>177</sup> For this purpose, it provides the basis for detailed mitigation measures for dust from

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<sup>173</sup> ESIA Report, at 3-94.

<sup>174</sup> ESIA Report, at 6-161.

<sup>175</sup> ESIA Report, at 6-156 – 6-157.

<sup>176</sup> See, for example, *Draft Evaluation Report: Environmental and Social Management Plan – Ukhaa Khudag Project* (ERM, 3 November 2010) at 14.

<sup>177</sup> *Environmental and Social Management Plan: UHG Phase II* (26 February 2010), at 18.

railway construction, road haulage and light vehicle movements, as well as for dust monitoring and reporting.<sup>178</sup>

69. Despite the rather limited mitigation measures outlined in the ESIA, it is now clear that ER has undertaken various measures to address the problem of traffic-related dust. For example, in response to the findings of the 2009 monitoring inspection of ‘regular unconfined light vehicle movements around the mine, the mine camp, the soum centre, the airstrip, and areas in between’ and to ERM’s resulting recommendation that ‘a series of dedicated roadways be designed, built and maintained’, in spring 2009 ER completed building ‘a single main roadway, linking the airport, the mine camp and the mine’ intended to ‘substantially mitigate those issues noted around dust and traffic through the soum centre’.<sup>179</sup> Of course, this action would also appear to contradict the Complainants’ allegation that ER had failed to take measures to avoid or minimise the fragmentation of pastures by roads upon which the Project relies.<sup>180</sup> Also, though ER expected to be in a position to rely on the railway from 2011 for transport of all coal exports, in 2009 it conducted detailed trials of various methods of road upgrade in order to identify the best option for upgrading the Coal Road to reduce dust emissions in lieu of the rail transport option. After detailed investigations, ER commenced work with other road users in 2010 to upgrade the Coal Road to a bitumen surfaced sealed road, expected to alleviate the dust problems associated with coal transport and to confine vehicle traffic to a single improved surface.<sup>181</sup> ERM recommended a dust monitoring regime to confirm the beneficial effect of the Coal Road upgrade.<sup>182</sup>
70. ER also responded to concerns arising from the March 2010 evaluation regarding deficiencies in the maintenance of the Dust Trak monitoring devices, including improper filter cleaning, impactor plate cleaning and oiling and calibration, by returning the machines to the manufacturer and developing a maintenance schedule to ensure they are kept in proper working order.<sup>183</sup> Though the November 2010 evaluation also concludes that ‘the current dust monitoring approach still does not facilitate a robust analysis of impacts’,<sup>184</sup> it must be remembered that the technical difficulties in establishing a suitable dust monitoring system are widely acknowledged<sup>185</sup> and work on the sealed Coal Road had already commenced in 2010. Monitoring of dust continues to the satisfaction of EBRD with, for example, PM2.5 measurements conducted 264 times during 2014 against the national MNS 4585 2007 standard at certain points at UHG mine site, Tsodttsetsii soum and Tsagaan Khad.<sup>186</sup>
71. As an integral component of the Project at the time of its appraisal, the dust-related impacts of construction of the railway were also considered. In its *Analysis of*

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<sup>178</sup> See, for example, ERM, *Draft Evaluation Report: Environmental and Social Management Plan – Ukhaa Khudag Project* (ERM, 3 November 2010) at 23-29.

<sup>179</sup> See *Draft Evaluation Report* (November 2010) at 21.

<sup>180</sup> Supplemental Complaint, at 14.

<sup>181</sup> *Draft Evaluation Report* (November 2010) at 20.

<sup>182</sup> *Draft Evaluation Report* (November 2010) at 23.

<sup>183</sup> *Draft Evaluation Report* (November 2010) at 22.

<sup>184</sup> *Draft Evaluation Report* (November 2010) at 22.

<sup>185</sup> See *Environmental and Social Management Plan: UHG Phase II* (26 February 2010), at 27-28, which discusses, *inter alia*, the lack of dedicated and uninterrupted mains power, the delicacy of micro-volume air samplers, the need for regular maintenance and calibration, and the need for third-party quantification and data download.

<sup>186</sup> See EBRD, *Annual Environmental & Social Report 2014* (28 February 2015), at 5.

*Alternatives*, where it considers the relative merits of rail transport vs road transport, the ESIA Report includes among the advantages of rail transport

- Reduced potential for conflict with local traffic and therefore improved public safety;
- Construction of defined crossing points via overpasses and underpasses, removing the potential for livestock and wildlife traffic accidents; and
- Reduced dust emissions during operations.<sup>187</sup>

Though the Client's preferred option was an unfenced rail corridor in order to avoid impeding the movement of migratory animals, the ESIA assumes fencing of the line which would enclose the track along its entire length, consistent with the contemporary requirements of Mongolian law.<sup>188</sup>

72. Regarding construction of the railway, Section 6 provides a detailed analysis of the quantities of the various construction materials required, including those extracted from quarries and required for construction of the auxiliary earth road,<sup>189</sup> and assesses air quality impacts using three different modelling scenarios:

- An assessment of the sphere of influence of the operation of a sub-grade quarry (with associated infrastructure) as a stand-alone source;
- An assessment of the sphere of influence of the operation of a ballast quarry (with associated infrastructure) as a stand-alone source; and
- An assessment of the construction of a (typical 1km length) railway section (with associated infrastructure) as a stand-alone source.<sup>190</sup>

The assessment took account of a wide range of factors which might influence the scale and character of any resulting air quality impacts, including such factors as:

- Sensitivity of the receiving environment;
- Proximity of migratory receptors;
- Prevailing meteorology; *etc.*<sup>191</sup>

The assessment concludes, as regards total suspended particulates (TSP) concentration, which was likely to cause the most significant dust impacts 'due to the nature of the material being used in the construction of the railway', that 'the area of exceedances of the Mongolian air quality standard ... is limited to within 50m of the track location, and the area causing an impact of major significance is limited to within 430m of the track alignment'.<sup>192</sup> As regards PM10 impacts, the assessment concludes that '[i]t is not predicted that the railway construction will cause any

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<sup>187</sup> ESIA Report, at 3-94. This suggests that the Client placed considerable reliance on the operation of the railway in place of the coal road as a means of limiting the fragmentation of herders' grazing land and avoiding traffic accidents and dust-related health impacts.

<sup>188</sup> ESIA Report, at 3-95.

<sup>189</sup> ESIA Report, at 6-21 – 6-23.

<sup>190</sup> ESIA Report, at 6-24. For further detail on the assessment procedures, see ESIA Report, Appendix E-3.

<sup>191</sup> ESIA Report, at 6-24 – 6-25.

<sup>192</sup> ESIA Report, at 6-25. See further, ESIA Report, Appendix E-3, Figure 1.

exceedances of the Mongolian air quality standard'.<sup>193</sup> Further, it concludes that 'it is anticipated that the air quality impact associated with the operation of subgrade and ballast quarries [providing material for construction of the railway] will also be negligible in significance'.<sup>194</sup>

73. The Environmental and Social Management Plan (ESMP) also contains a chapter setting out the Environmental and Social Expectations for the railway construction component of the Project, which includes a second, specific Dust Management Plan. The performance expectations contained therein include, *inter alia*, contractor environmental training, the establishment and use of designated road traffic routes, active dust suppression on all excavation, roads and ground clearance, the covering of all construction phase vehicles carrying fine particulate matter, minimising material drop heights and use of chutes and enclosures where possible, dust suppression for all crushing and screening operations at quarries, and the establishment and enforcement of traffic management systems, including speed limits.<sup>195</sup>
74. Therefore, as regards road-related dust impacts, it appears that the ESIA, and especially the related action and management plans, correctly identified the range of potential environmental and social impacts, that they identified the best, and possibly the only available mitigation measures in the light of the facts as they then stood, and that EBRD has actively overseen the development and implementation of a programme of mitigation and performance improvement measures and actions which have proven largely adequate in the light of the changing circumstances in which the Project has had to operate. While the taking over of the railway element of the Project by the Mongolian authorities, and the resulting delay in its construction and entry into operation, raised serious challenges for the Client and the Bank in terms of the management of environmental and social impacts associated with road transport, the upgrading of the Coal Road to a sealed road was then the only realistic option. This upgrading work was implemented with care and commenced without undue delay from 2010.

#### *Traffic Impacts and Community Health*

75. The community safety impacts associated with use of the coal haul road for coal exports, including safety risks associated with reduced visibility due to dust generated by mine-related traffic, are noted throughout the ESIA.<sup>196</sup> The limited resources in the region to deal with traffic accidents are also, acknowledged, for example, where the ESIA notes that 'emergency response capacity is limited (lack of responders, transportation and equipment). Hence, response time to potential accidents is unlikely to be rapid'.<sup>197</sup> Section 6 of the ESIA Report notes that '[i]n 2009, local traffic police conducted a road inspection to assess road safety conditions', which led to a number of measures designed to improve road safety, including
- The erection of 277 road signs to improve traffic safety;

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<sup>193</sup> ESIA Report, at 6-25. See further, ESIA Report, Appendix E-3, Figure 3.

<sup>194</sup> ESIA Report, at 6-27.

<sup>195</sup> *Environmental and Social Management Plan: UHG Phase II* (26 February 2010), at 192-193.

<sup>196</sup> See for example, ESIA Report, at, 3-93, 5-54 and 5-129. See further, *supra*, paras. 58 and 62

<sup>197</sup> ESIA Report, at 6-155.

- The appointment of 13 security staff with three vehicles and three stations along the coal haul road, to patrol and check that coal trucks use the designated road;
- The development in 2008-2009 with local traffic police of an official guideline on road use; and
- The development of a coal transportation road use procedure to improve truck driver behaviour on the coal haul road (involving, since August 2009, the recording of incidents and violations and the sending of letters to the companies responsible demanding resolution of the matters raised).<sup>198</sup>

As regards the road safety impacts due to dust generation, the ESIA expresses confidence that '[t]he upgrade of the road will improve traffic safety in Tsogttsetsii, Bayan-Ovoo and Khanbogd soums', and notes in support of this conclusion that '[t]raffic controls implemented in 2009 in response to accidents and community complaints have helped to reduce dust generation, improving visibility conditions on the road.'<sup>199</sup> As regards further mitigation of road safety risks, the ESIA contains a commitment that '[t]he Project also intends to continue to work with local traffic police to improve traffic safety conditions'.<sup>200</sup>

76. More specific mitigation measures were to be set out in a Traffic Management Plan 'comprising strategies to manages vehicles and equipment', including *inter alia* measures requiring the Client to:

- Provide appropriate traffic safety training to all drivers (employees and contractors) as part of their induction and on an ongoing basis;
- As part of pre-construction engagement activities, ensure that traffic safety and "rules of the road" are discussed with local communities and, possibly, with special sessions for particularly vulnerable groups such as children;
- Use the grievance mechanism and other means to monitor driver conduct;
- Continue to support traffic police controls on the coal haul road;
- Implementation and compliance with the Community, Health and Safety Management Plan.<sup>201</sup>

77. Once again, the ESIA places considerable reliance on the entry into operation of the railway to improve road safety. Acknowledging that '[v]ehicle traffic, particularly heavy trucks, will increase as a direct result of the mine expansion and railway development', which presents 'a risk of accidents that could result in anything from minor injury to serious injury or death', the ESIA provides reassurance that 'once the railway is in operation, this will significantly decrease the frequency of truck movements on the coal haul road'.<sup>202</sup>

78. The Community Health and Safety Management Plan (CHSMP) lists first and second among the potential risks identified:

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<sup>198</sup> ESIA Report, at 6-109.

<sup>199</sup> ESIA Report, at 6-109.

<sup>200</sup> ESIA Report, at 6-110.

<sup>201</sup> ESIA Report, at 6-160.

<sup>202</sup> ESIA Report, at 6-155.

- Increased risks of accidents from road traffic around the mine site, along the coal road and unmanaged desert tracks; and
- Increased health risks associated with fugitive dust and particulate matter.<sup>203</sup>

Regarding the risk of traffic accidents, it stipulates a range of measures concerning, *inter alia*, vehicle standards and inspection, the licensing and training of all drivers, night time hauling procedures, alcohol checks, random supervisor observation of driver behaviour, and the provision of relevant information to communities regarding Project traffic and traffic safety measures.<sup>204</sup> The November 2010 evaluation of implementation of the CHSMP reports that ‘no serious incidents have occurred as yet (7 September 2010)’.<sup>205</sup> The evaluation also notes that driver safety training and the erection of road safety signs have also been effective in this regard.<sup>206</sup> In contrast, the Annual Environmental & Social Report from the Client to EBRD for 2014 reports one fatality ‘as the result of a collision between two coal transportation trucks travelling in opposite directions’.<sup>207</sup> However, it also reports that detailed company and police investigations have been conducted to determine root causes and contributing factors and that corrective actions have been identified, including new controls for driver fatigue management, amendment of drivers work procedures, increased traffic inspections along the coal transportation road, and calls for a change to speed limits.<sup>208</sup>

79. Regarding dust-related health risks, the CHSMP commits ER to full compliance with the Dust Management Plan and to a process of communicating risks to the community and to addressing concerns which arise from this process.<sup>209</sup> Therefore, the Client’s Corporate Social Responsibility and Community Relations (CSR&CR) Team has been involved in the establishment and functioning of a multi-stakeholder Health Equity Impact Working Group,<sup>210</sup> which pursues as its principal aim the development and implementation of a Health Equity Impact Assessment Methodology in the Mongolian Mining Sector.<sup>211</sup>

80. Therefore, as regards the community health impacts of Project traffic, it appears that the ESIA, and the related action and management plans, accurately identified the range of potential concerns and identified adequate mitigation measures in the light of the facts as they then stood. It is also clear that EBRD has actively overseen the development and implementation of a programme of adequate mitigation and performance improvement measures in the light of the changing circumstances in which the Project has had to operate.

<sup>203</sup> *Environmental and Social Management Plan: UHG Phase II* (26 February 2010), at 88.

<sup>204</sup> *Environmental and Social Management Plan*, at 91-92.

<sup>205</sup> ERM, *Draft Evaluation Report: Environmental and Social Management Plan – Ukhaa Khudag Project* (3 November 2010), at 66. However, it also cautions that

‘Although the absence of serious incidents to date should be taken as encouraging evidence of effective management of road risks, the likelihood of a serious incident remains. Steps to minimise this risk, such as improved driver training, spot checks by supervisors and slow night time driving have to-date been effective, but continued vigilance is required to maintain this safety record.’

<sup>206</sup> *Draft Evaluation Report* (November 2010), at 66.

<sup>207</sup> See EBRD, *Annual Environmental & Social Report 2014* (28 February 2015), at 2.

<sup>208</sup> EBRD, *Annual Environmental & Social Report 2014* (28 February 2015), at 2.

<sup>209</sup> *Environmental and Social Management Plan*, at 90.

<sup>210</sup> ERM, *Draft Evaluation Report: Environmental and Social Management Plan – Ukhaa Khudag Project* (3 November 2010), at 62.

<sup>211</sup> *Draft Evaluation Report* (November 2010), Annex E.



## PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement

81. The ESIA suggests that similar arrangements would be implemented as regards economic displacement for Phase II of the Project as were put in place for Phase I,<sup>212</sup> and then proceeds to explain the reasoning behind and the operation of such arrangements.<sup>213</sup> It includes among the displacement events which have occurred in the Project Area in recent years, '[e]conomic displacement ... as a result of truck transportation via the existing coal haul road',<sup>214</sup> which it characterises as involving interference with:

- o access to grazing lands; and
- o *ownership* of permanent winter corals.<sup>215</sup>

Therefore, in order better to understand the extent of such displacement and to establish the baseline conditions against which any displacement can be measured, the ESIA studied regional and seasonal variations in how far herders travel on a daily basis to graze their herds. This study found that

'a herder household from Khanbogd could be reasonably determined to be in an area of influence if it was located within 12km of an area directly impacted by the Project. Trends of greater herder movement have been observed in Bayan-Ovoo, which cover an average distance of as much as 22km per day'.<sup>216</sup>

In addition, investigations conducted in the course of the ESIA concluded that '[t]o construct a [winter] corral to an acceptable standard, from locally available materials, typically costs \$800 - \$1,000'.<sup>217</sup>

82. The ESIA explains that, in determining appropriate measures for the mitigation and compensation of economic and physical displacement, the Client sought to identify local best practice among mining operations in Mongolia, including the EBRD-funded Oyu-Tolgoi (OT) Project, stating that '[t]he baseline of community expectations regarding how these assets are valued and compensated for is determined to a large extent by the past practices of other mining companies in the area'.<sup>218</sup> The ESIA takes OT as a benchmark, as '[t]he land acquisition conducted for this project was based on a thorough socio-economic survey which established a "fair market price" for herder

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<sup>212</sup> See, for example, ESIA Report, at 6-171.

<sup>213</sup> It notes, at 5-140, that

The Phase I UHG project ESIA established that no physical resettlement would occur as a result of Phase I of the Project. The ESIA did conclude that approximately ten herder households (approximately 45 persons) would be "economically displaced" (to varying extents).'

However, it further notes, at 5-141, that

'Following the submittal of the Phase I ESIA, 13 herder households (approximately 55 persons) were assessed by ER and the Tsogtsetsii soum governor to be economically displaced to varying extents by the Phase I Project.'

<sup>214</sup> ESIA Report, at 5-136 - 5-137.

<sup>215</sup> ESIA Report, at 5-137 (original emphasis). The ESIA explains, at 5-138, that

'It is these physical structures, as well as access to grazing lands at all times during the year, that form the main basis for economic and physical displacement of herders in the Project area of influence' (original emphasis).

<sup>216</sup> ESIA Report, at 5-137 and Table 5.46, at 5-138. On account of such variation in distances travelled, the ESIA suggests that 'communication and engagement with herders will be a cornerstone of stakeholder engagement for the Project'.

<sup>217</sup> ESIA Report, at 5-138.

<sup>218</sup> ESIA Report, at 5-138.

incomes that were affected by the exclusion of grazing lands'.<sup>219</sup> This "fair market price" was equated at the time (2003-2006) to approximately US\$4,000 per affected household and 'included construction of permanent "conventional" (i.e. modern) housing outside the mine area and cash settlement payments'.<sup>220</sup> Though largely based on anecdote, it is clear that this figure was highly influential in consultations and negotiations with affected herders regarding compensation, with the ESIA explaining that '[h]erder interviews conducted in Khanbogd and Tsogttsetsii soums have identified that this figure was widely discussed amongst herders and formed the basis for claimant expectations for Phase I of the UHG Project'.<sup>221</sup>

83. The *Baseline Description* section of the ESIA proceeds to set out past practices regarding resettlement during Phase I of the Project, explaining that the Phase I ESIA had estimated that 'ten herder households (approximately 45 persons) would be "economically displaced" (to varying extents)', but that '13 herder households (approximately 55 persons) were assessed by ER and the Tsogttsetsii soum governor to be economically displaced'.<sup>222</sup> It then outlines the Economic Displacement Plan submitted to EBRD, including the four key principles applied to the management of economic displacement in Phase I:

1. Minimise economic displacement by reducing the area of excluded land;
2. Mitigate adverse economic impacts by compensating for loss, especially by improving water access in surrounding areas;
3. Improve long term economic outcomes by creating new economic opportunities and by restoring grazing areas once the mine has finished activities; and
4. Enhance livelihoods through improved social infrastructure and employment, including the creation of Small and Medium Sized Enterprises and the localisation of supply chains.<sup>223</sup>

Summarising the nature of the compensation provided to the 13 households identified as economically displaced in Phase I, the Phase II ESIA Report notes that '[t]he levels of compensation varied according to the degree of economic displacement, but typically consisted of providing a new well for the herder to use, providing a new winter shelter for livestock and offering the possibility of jobs at the camp'.<sup>224</sup> As regards the degree of compensation provided, '[t]he total value of compensation varied, but averaged approximately \$1,000 per household. Additional grazing areas were also made available in consultation with the governor of Tsogttsetsii soum'.<sup>225</sup>

The ESIA also stresses that, as regards economic displacement in Phase I, '[a]ffected households were heavily involved in negotiations to determine their compensation'<sup>226</sup>

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<sup>219</sup> ESIA Report, at 5-139.

<sup>220</sup> ESIA Report, at 5-137. The ESIA does caution, however, that 'These data are based on herder interviews and not on official disclosure from the OT project.'

<sup>221</sup> ESIA Report, at 5-139.

<sup>222</sup> ESIA Report, at 5-140 – 5-141. The Phase II ESIA Report also explains, at 5-140, that 'The Phase I UHG ESIA established that no physical resettlement would occur as a result of Phase I of the Project.'

<sup>223</sup> ESIA Report, at 5-140 – 5-141. It is worth noting that these principles generally cohere with the objectives set out under ESP PR 5.39 for measures addressing economic displacement.

<sup>224</sup> ESIA Report, at 5-141.

<sup>225</sup> ESIA Report, at 5-141.

<sup>226</sup> ESIA Report, at 5-141.

and, further, that 'new grazing areas were decided upon based on consultation with the Tsogttsetsii soum governor, the affected household, ER's community liaison team and households located in the newly designated grazing area'.<sup>227</sup>

84. As regards the arrangements in the ESIA for resettlement in respect of physical and economic displacement caused by Phase II, it was anticipated on the basis of surveys conducted during July-August 2009 that, in total, '30-40 herder households will be physically or economically displaced by the railway, and 5-10 herder households economically displaced by the mine expansion'.<sup>228</sup> These figures are based on assumptions employed in Phase I of the Project. For example, in the case of railway-related displacement, '[p]hysical displacement is defined as herder households who will need to have their winter dwelling re-constructed in a new area, if it lies within 500m of the railway alignment and if the household wishes to move'.<sup>229</sup> As regards railway-related economic displacement,

'The railway affected households are those assumed to have either a summer or winter dwelling (or both) within 5km of the railway alignment. These households will need to be compensated for permanent impacts on the siting of their winter dwellings and/or loss of access to grazing areas.'<sup>230</sup>

Similarly, in estimating that only 5-10 herder households will be economically displaced in Phase II relating to mine expansion, the ESIA Report explains that

'Mine affected households include those living within 5km of mine facilities (currently 3-5 families) as well as other households who are unduly affected by mine activities outside of the 5km exclusion zone, such as the borefield, which may have an impact on herder livelihoods.'<sup>231</sup>

However, while the ESIA includes a map containing the locations of all affected households relative to the railway alignment and the mine lease site,<sup>232</sup> it concedes that, '[b]ecause the location of herder households depends heavily on the quality of pasture and availability of water, this map does not identify, all herder households that regularly use this area'.<sup>233</sup> In fact, in its concluding section, the ESIA reports that '[f]urther survey work conducted during January 2010 identified an actual 17 households considered to be physically displaced and 54 households considered to be economically displaced as a result of the Project'.<sup>234</sup> This illustrates that the identification by means of targeted surveys of those physically and economically displaced was ongoing into 2010 in order to develop as complete a picture as possible.

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<sup>227</sup> ESIA Report, at 5-142.

<sup>228</sup> ESIA Report, at 6-165.

<sup>229</sup> ESIA Report, at 6-165.

<sup>230</sup> ESIA Report, at 6-165.

<sup>231</sup> ESIA Report, at 6-165 (emphasis added), which might be understood to include road traffic-related dust impacts on herder livelihoods.

<sup>232</sup> Figure 6.11, ESIA Report, at 6-167.

<sup>233</sup> ESIA Report, at 6-166.

<sup>234</sup> ESIA Report, at 8-11, which also explains that

'Updates to the profiles of physically and economically displaced households, in addition to resettlement plans and outcomes of resettlement activities will be captured in the RAP.'

85. As regards the compensatory measures envisaged, the ESIA accepts that '[p]hysically displaced households will need to have new winter corrals constructed for them' and explains that '[t]he compensation for this will be based on negotiation, to be conducted by ER's community relations managers and in consultation with local soum and bagh governors'.<sup>235</sup> For the herder families involved, originally estimated to number approximately 30, the ESIA acknowledges that the Project will place additional pressures on nearby water resources and thus envisages the need for general community improvement programmes in addition to individual settlements.<sup>236</sup> It also recognises the likelihood of partial economic displacement caused by access problems due to the railway

'for an estimated ten additional households near to the railway alignment, but not living within 5 km of the route, especially in areas where culvert distances are significantly above the 1 per 2.25km average for the route [resulting in] greater travel times to access pasture lands and wells and minor inconvenience in finding suitable railway crossing points'.<sup>237</sup>

Further, the ESIA expressly recognises herders' concerns regarding the risk of 'increases in herding density from reduced access to herding areas' due to increased road traffic:

'Based on interviews conducted, herders in Tsogtsetsii soum expressed concern that, with increased vehicle traffic and roads (construction activities), fewer pasture areas may be suitable for herding, causing increases in herder density in better pasture areas which will put pressure [on] the quality of pasture untainted by construction activities. This may result in more pasture degradation in moved-to areas and may have a minor negative impact on herder livelihoods on a regional scale.'<sup>238</sup>

Therefore, it would appear that the Ukhaa Khudag – Tsagaan Khad railroad was 'considered an associated facility of the EBRD-funded Ukhaa Khudag mine', despite contrary assertions by the Complainants.<sup>239</sup> The findings outlined above also contradict the concern expressed in the Complaint that '[o]nly the 39 nomadic families whose winter camps are located closest to the planned route are being considered impacted by the project, without regard to impacts on herders located further away'.<sup>240</sup> It appears, therefore, that the compensatory measures envisaged under the ESIA were also designed to address economic displacement due to fragmentation caused by the railway,<sup>241</sup> even though the construction of the railway was not ultimately the responsibility of the Client or the Bank.<sup>242</sup>

86. The ESIA includes a comprehensive list of mitigation and enhancement measures to mitigate the adverse effects of potential physical and economic displacement due to Phase II, including:

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<sup>235</sup> ESIA Report, at 6-168.

<sup>236</sup> ESIA Report, at 6-168.

<sup>237</sup> ESIA Report, at 6-168.

<sup>238</sup> ESIA Report, at 6-168.

<sup>239</sup> Supplemental Complaint, at 14.

<sup>240</sup> Supplemental Complaint, at 14.

<sup>241</sup> Though the Complainants only raise the matter of fragmentation of pastures caused by Project roads, see Supplemental Complaint, at 14.

<sup>242</sup> See ESIA Report, at 6-168.

- Ensuring that physical resettlement and compensation for economic displacement are conducted in accordance with internationally recognised standards and in line with practices developed in Phase I of the Project;
- Conducting further hydro-geological studies in order to understand fully the extent of water availability in the affected area and associated economic displacement;
- Conducting consultation with local herders in order to identify appropriate measures to ensure no net loss in water availability as a result of the project;
- Designating and monitoring travel routes of construction vehicles to minimise pasture degradation;
- Implementing dust and noise mitigation measures to reduce the impact of the Project on local herders;
- Reclaiming land utilised by the Project in accordance with the Reclamation Plan, in order to restore native vegetation and conditions;<sup>243</sup> and
- Providing detailed and regular information to local community members about Project activity in order to mitigate community concerns.

In addition, the ESIA includes commitments on providing economic benefits to those who may be indirectly impacted by Project activities, including:

- Continued investments in social infrastructure;
- General development of improved wells and water access for herders; and
- The use of local procurement, where possible, to enhance herder livelihoods.<sup>244</sup>

87. In a very comprehensive Resettlement Action Plan (RAP) presented to EBRD in February 2010, the Client sets out the principles governing entitlement to and calculation of compensation including, for example, the preference for in-kind compensation, the open and transparent negotiation of arrangements for access to grazing in newly designated (compensatory) grazing areas, and the central role of the soum Governor.<sup>245</sup> The RAP also refers to the arrangements for the restoration of grazing land<sup>246</sup> and details additional livelihood restoration measures, including support to Project displaced people, support to the host community, and support to vulnerable groups.<sup>247</sup> The RAP also outlines the relevant organisational arrangements, including establishment of the inter-institutional Resettlement Working Group, the Resettlement Plan Implementation Unit, and the Community Development Advisory Committee.<sup>248</sup> The overall budget for the resettlement process, including compensation, resettlement activities and administrative costs, is estimated at USD

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<sup>243</sup> It should be noted that, during the site visit by the Compliance Review Expert in August 2015, the Complainants raised the issue of failure to reclaim work-camps used by workers / contractors engaged in construction of the sealed coal export road. However, this issue has not been examined in this Compliance Review as construction of the sealed coal export road was not a component of the original Project (but became necessary due to the unforeseen delay in construction of the railway), and the revised Mine Closure and Reclamation Plan (MCRP) for the Project, which would detail the requirements for such reclamation, was not due to be completed until 2015. See further, EBRD, *Annual Environmental & Social Report 2014* (28 February 2015), at 23.

<sup>244</sup> ESIA Report, at 6-171 – 6-172.

<sup>245</sup> *Resettlement Action Plan: UHG Phase II* (26 February 2010), at 56-57.

<sup>246</sup> Detailed in the *UHG Mine Closure and Reclamation Management Plan* (November 2010).

<sup>247</sup> Resettlement Action Plan, at 59-61. A complete Livelihood Restoration Action Plan detailing the relevant measures and benefits is set out at 62-63.

<sup>248</sup> Resettlement Action Plan, at 64-70.

\$493,569<sup>249</sup> and a detailed schedule and timetable for all resettlement activities is also provided.<sup>250</sup> Detailed arrangements are set out for both internal and external monitoring of implementation of the RAP, along with a monitoring and evaluation methodology and a comprehensive set of performance and impact indicators.<sup>251</sup> Crucially, the RAP contains detailed, state-of-the-art provisions on public consultation, participation and grievance redress in respect of resettlement activities.<sup>252</sup>

88. In the November 2010 evaluation of implementation of the RAP, ERM noted that, 'due to delays in railway construction, the Project has focused on economic and physical displacement activities as a result of the coal haul road' and, further, that

'In order to inform the development of a road-focused RAP, the Project conducted a socio-economic study of road-affected herders during 1<sup>st</sup> quarter 2010. Based on the findings of the survey, a road-focused RAP was developed and approved by Gobi Road. This RAP will be submitted to the EBRD by the end of 2010.'<sup>253</sup>

In view of the delays facing construction of the railway, the Client proceeded to make what would appear to be appropriate alternative arrangements, in a manner generally consistent with the requirement under PR 1.4 that risks and impacts should be 'managed on an ongoing basis'. According to the November 2010 evaluation

'Negotiations with affected herders on entitlements are in progress, and resettlement contracts are being concluded with herder families. CDACS [Community Development Advisory Committees] have also been established in Tsogtsetsii, Bayan-Ovoo and Khanbogd soums and have been invited to *monitor the implementation of the road-focused RAP*.'<sup>254</sup>

As regards livelihood enhancement activities, the November evaluation notes, *inter alia*, that '[a]s of August 2010, local people (from Umnugobi) represent 30% of overall Project employment', as well as improved social infrastructure.<sup>255</sup> It also provides details of a range of activities and events hosted by the Project intended to support local SMEs and to localise supply chains.<sup>256</sup>

89. Adaptive management involving proactive monitoring of implementation of the RAP has continued, with the possibility of it being revised in the light of the changing circumstances of the Project.<sup>257</sup> For example, the 2011 Annual Environmental & Social Report submitted to EBRD specifies in respect of the RAP that the Client will '[c]onduct additional consultation with local herders to identify herder wells along the

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<sup>249</sup> Resettlement Action Plan, at 71. A detailed breakdown of costs is provided in Table 8-1, at 72-73.

<sup>250</sup> Resettlement Action Plan, at 74-77.

<sup>251</sup> Resettlement Action Plan, at 78-81.

<sup>252</sup> See Resettlement Action Plan, at 45-54.

<sup>253</sup> See, for example, *Draft Evaluation Report: Environmental and Social Management Plan – Ukhaa Khudag Project* (ERM, 3 November 2010) at 58.

<sup>254</sup> Draft Evaluation Report, at 58 (emphasis added).

<sup>255</sup> Draft Evaluation Report, at 59.

<sup>256</sup> Draft Evaluation Report, at 60.

<sup>257</sup> It is important to note that para. 15 of the 2008 ESP provides, *inter alia*:

'Recognizing the dynamic nature of the project development and implementation process, the ESAP will be responsive to changes in project circumstances, unforeseen events, and the results of monitoring.'

coal transport road and proposed railway alignment. ... [and] ... If required, revise the existing RAP.’<sup>258</sup>

90. Therefore, on the basis of the findings set out above, it is not possible to conclude that the Bank failed to ensure adequate measures to prevent, mitigate and compensate for the physical or economic displacement of complainants, as alleged in the Complaint.<sup>259</sup>

## PR 7: Indigenous Peoples and PR 8: Cultural Heritage

91. As regards cultural heritage, the *Baseline Description* section of the ESIA Report outlines the importance of ovoos and stupa ritual worship to local cultural identity, as well as the significance of the Nadaam festival celebrated by the vast majority of Mongolians.<sup>260</sup> It further notes that Umnogovi aimag is located in an archaeologically and paleontologically rich region and that a number of Special Protected Areas (SPAs), designated for their historical and cultural significance, are located in the Project area of influence.<sup>261</sup> The ESIA makes a general commitment to the protection of cultural heritage. For example, though pointing out that ‘no significant cultural sites are located within the mine licence area’, it notes that ‘in the Phase I ESAP, ER states that it is committed to protecting cultural heritage sites and to ensuring that cultural heritage sites (tangible and intangible) are protected from damage’.<sup>262</sup>

92. As in the case of economic displacement, the ESIA section on *Baseline Description* then proceeds to outline the measures taken in respect of Phase I. For example:

‘In support of Phase I activities, archaeological investigation was conducted prior to mining (in 2008) by the Archaeological Institute of the Mongolian Academy of Sciences. The Archaeological Institute identified 28 sites within the entire 3,000 ha licence area, including two sites in the Phase I mining area. These two sites were deemed to be of high archaeological value and were excavated to preserve cultural heritage.’<sup>263</sup>

Of more direct interest to the Project at issue (Phase II), and to the present Complaint, the ESIA notes that

‘The Project has also conducted pre-construction surveys to assess any areas of cultural sensitivity along the railway route to reduce the risk of affecting cultural heritage. Archaeological surveys were conducted by the Mongolian Academy of Sciences, Institute of Archaeology in 2009 to identify any potential historical sites

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<sup>258</sup> EBRD, *Annual Environmental & Social Report 2011* (20 February 2012), at 20. See also, EBRD, *Annual Environmental & Social Report 2014* (28 February 2015), at 24.

<sup>259</sup> Supplemental Complaint, at 13.

<sup>260</sup> ESIA Report, at 5-144. Elsewhere, at 6-173, the ESIA acknowledges earlier mistakes regarding the protection of cultural heritage:

‘For example, during the construction of the airstrip near Tsogttsetsii soum centre, many community members and herders were angered with the development of a quarry beneath the soum centre’s worshipped ovoos, Tsagan Ovos. In order to avoid such a mistake in the future, it is important to understand the potential risks of impacting cultural heritage during construction activity, which is why pre-clearance surveys are now conducted for the Project.’

<sup>261</sup> ESIA Report, at 5-146. For a detailed list of such SPAs, see Table 5.48, at 5-146 – 5-147.

<sup>262</sup> ESIA Report, at 5-147.

<sup>263</sup> ESIA Report, at 5-147.

along the railway route. A total of 44 sites were identified from the Bronze Age and Medieval Age.<sup>264</sup>

It goes on to detail the nature and significance of these sites and reports that, prior to the commencement of construction activity, 'a total of 46 tombs and burials were excavated along the railway alignment and collected for scientific research by the Archaeology Institute of the Mongolian Academy of Sciences in October 2009'.<sup>265</sup> While the ESIA concludes, on the basis of the 2009 Phase II Archaeological Survey, that 'there is not expected to be any negative impact on tangible cultural heritage', it acknowledges the risks of chance finds during railway construction and mine expansion and commits to 'training contractors to adhere to ER's existing chance find procedures'.<sup>266</sup> The ESIA further notes that '[a]rchaeological surveys were also conducted along the water pipeline route in February 2009' and that excavation work would be conducted in March 2010 prior to construction activity.<sup>267</sup>

93. In relation to intangible cultural heritage, the ESIA points out that '[i]n 2008, ER financed the construction of a new Nadaam stadium for Tsogttsetsii soum, which was well received by the local community'.<sup>268</sup> Elsewhere, the ESIA highlights the fact that

'the UHG project made – and continues to make – financial contributions to cultural groups in the area. This includes scholarships for local residents to study in Ulaanbaatar, funding for travel and equipment for a local children's cultural group, as well as providing support for the Tsogttsetsii soum Cultural Centre and Tsogttsetsii school'.<sup>269</sup>

It further accepts that such measures as 'camp management procedures and efforts to reduce population influx are important in reducing the effect of the Project on intangible cultural heritage'.<sup>270</sup>

94. Generally, the ESIA includes a comprehensive list of mitigation and enhancement measures for the protection of cultural heritage.<sup>271</sup> Mitigation measures include appropriate stakeholder engagement activities, policies to minimise unacceptable behaviour by Project workers, and the provision of cultural heritage training for ER workers and contractors. Enhancement measures include the provision of financial contributions to cultural groups and of support to the 'nadaam' festivals in Tsogttsetsii, Bayan-Ovoo and Khanbogd soums.
95. At the level of practical implementation, the Cultural Heritage Management Plan commits ER to monitoring performance against the Chance Finds Procedure and to continuing to promote intangible cultural heritage.<sup>272</sup> The November 2010 evaluation notes that, as expected, '[t]o date (7 September 2010) no chance finds had occurred

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<sup>264</sup> ESIA Report, at 5-147.

<sup>265</sup> ESIA Report, at 5-147 – 5-148.

<sup>266</sup> ESIA Report, at 6-172. The chance find procedure is set out in Section 8 of the Cultural heritage Management Plan and requires an immediate cessation of work and archaeological investigation in the case of any find (or suspected find) of an archaeological site.

<sup>267</sup> ESIA Report, at 5-148.

<sup>268</sup> ESIA Report, at 5-144.

<sup>269</sup> ESIA Report, at 6-172.

<sup>270</sup> ESIA Report, at 6-172.

<sup>271</sup> ESIA Report, at 6-173 – 6-174.

<sup>272</sup> *Environmental and Social Management Plan: UHG Phase II* (26 February 2010), at 87.



or were reported to have occurred'.<sup>273</sup> It also notes that, with a view to promoting local customs and traditions, in the previous year ER had made financial contributions to support a range of community-based events and activities, including:

- Construction of the Tsogttsetsii Soum Nadaam stadium;
- Construction of the Tsogttsetsii Soum Buddhist Temple; and
- Support to the Cultural Long Song Competition.<sup>274</sup>

The evaluation also notes that 'ER has developed a Population Influx Management Framework to focus on managing the impacts of a rapidly increasing and changing demographic', including the potential impacts on cultural heritage.<sup>275</sup>

96. Monitoring of the implementation and effectiveness of the Cultural Heritage Management Plan continues, with the Annual Environmental & Social Report for 2014 noting, for example, that during that year the Client had organised Tsetsii Jonon horse fiddle training and the 'Gobi Shankhi' long song contest, and had supported the initiative by the Kalachakra Culture Centre NGO to translate the Kangyur and Tengyur sutras into Cyrillic. It had also established, in collaboration with the Paleontological Institute of the Mongolian Academy of Sciences, a display area at the Tsogttsetsii soum museum showing paleontological objects found in the vicinity of the Project.<sup>276</sup>
97. In addition, the Environmental and Social Management Plan (ESMP) also contains a chapter setting out the Environmental and Social Expectations for the railway construction component of the Project, which includes a second, specific Population Influx Management Plan intended, *inter alia*, to reduce the cultural impacts from population influx associated with the construction of the railway. This Plan stipulates a range of measures, including measures to minimise "camp followers" and to prevent illegal commercial activities, as well as enhanced engagement with the local community to better understand how to manage such adverse impacts from population influx.<sup>277</sup>
98. Therefore, on the basis of the findings set out above, it is not possible to conclude that, under supervision of the Bank, the Client 'has failed to properly prevent or mitigate impacts on their [herders] culture and tradition'.<sup>278</sup>

## PR 10: Information Disclosure and Stakeholder Engagement

99. Generally, the level of stakeholder engagement achieved by the Project appears to have been effective and compliant with EBRD Performance Requirements.<sup>279</sup> A comprehensive Stakeholder Engagement Plan (SEP) was prepared which has sought to implement stakeholder engagement according to the requirements of the Project lenders.<sup>280</sup> Having regard to the stakeholder identification process employed in Phase

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<sup>273</sup> Draft Evaluation Report: *Environmental and Social Management Plan – Ukhaa Khudag Project* (ERM, 3 November 2010) at 55.

<sup>274</sup> Draft Evaluation Report (November 2010), at 55-56.

<sup>275</sup> Draft Evaluation Report (November 2010), at 55.

<sup>276</sup> EBRD, *Annual Environmental & Social Report* (28 February 2015), at 11.

<sup>277</sup> *Environmental and Social Management Plan: UHG Phase II* (26 February 2010), at 200-201.

<sup>278</sup> Supplemental Complaint, at 15.

<sup>279</sup> See, for example, Draft Evaluation Report (November 2010), at 7.

<sup>280</sup> *Environmental and Social Management Plan: UHG Phase II* (26 February 2010), at 13.

I and to feedback from the various “Open House / Ger” sessions and social studies conducted for Phase II, the SEP identified and ranked stakeholders according to their anticipated degree of interest in the Phase II Project, as follows:

- Herders whose livestock graze, or whose winter corrals are located, within 500m within either side of the railway route (physically displaced);
- Herders whose livestock graze within 10km on either side of the railway route (economically displaced);
- Herders whose livestock graze within 50km of the mine site itself;
- Residents of the Tsogttsetsii soum centre;
- Residents of the Bayan-Ovoo and Khanbogd soum centres;
- Herders residing within the three affected soums who are near the proposed temporary construction camps for the railway;
- Project employees, contractors, subcontractors, and potential suppliers;
- Relevant government officials and local authorities;
- Community based organisations in Umnugobi as well as Ulaanbaatar based Non-Governmental Organisations (NGOs);
- Scientific and research organisations, especially those focused on the environment and in particular migratory ungulates; and
- Other concerned or interested parties.<sup>281</sup>

Detailed ‘Methods of Engagement’ are set out in the SEP for each category of stakeholder.<sup>282</sup> In addition to clear objectives and monitoring and reporting procedures, the SEP sets out quite demanding Key Performance Indicators for stakeholder engagement. For example, it stipulates that

‘At least 75 percent of *most affected* groups (herders whose livestock graze or whose winter corrals are located within 5km of the railway, herders whose livestock graze within 10km of the railway, and herders whose livestock graze within 50km of the mine) are contacted by the CRM team at least once a year and that 30% of the households to be contacted by the CRM team should be female headed households.’<sup>283</sup>

100. A number of ‘core principles’ were identified to inform implementation of the SEP<sup>284</sup> and, as of September 2010, the following information (relevant to the present Complaint) was made available to the public:

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<sup>281</sup> Environmental and Social Management Plan, at 14.

<sup>282</sup> Environmental and Social Management Plan, at 15.

<sup>283</sup> Environmental and Social Management Plan, at 16.

<sup>284</sup> *Draft Evaluation Report* (November 2010) at 7, para. 4.1.1. These ‘core principles’ dictate

- That public information on the Project is a right of the local community;
- That meaningful consultation, in which the Project is open to adapting its plans, will be entered into without coercion or deception;
- That a grievance and complaints mechanism will be established; and
- That stakeholder engagement will be on-going throughout the Project life.

- Non-technical Summary (NTS) of the Phase II ESIA (posted on ER and EBRD websites in Mongolian and English languages);
- NTS and Detailed Environmental Impact Assessments (DEIAs) (available in hard-copy at ER headquarters in UB and at the soum governors' offices in affected soums);
- Phase II Public Consultation and Disclosure Plan (posted on ER website in Mongolian and English languages);
- Phase II ESIA with accompanying appendices (available in hard-copy at ER headquarters in UB and on ER website in Mongolian and English languages);
- Phase II Environmental and Social Management Plan (ESMP) (posted on ER website in Mongolian and English languages);
- UHG Newsletters containing important Project information (available at ER headquarters in UB and at governors' offices, schools and cultural centres in the Project area of influence; and
- UHG Brochures containing important information about Project activities and community development activities, including dates and invitations for annual public consultation events (distributed to bagh gogernors for circulation among rural households and distributed by the ER Community Relations Team to interested parties).

In addition, bulletin boards in Khanbogd, Bayan-Ovoo and Tsogttsetsii soum centres post the following information:

- News and photos regarding cultural events supported by the Project;
- Information regarding the scholarship application process; and
- Job listings and application details.<sup>285</sup>

101. The November 2010 evaluation established that the Project had successfully implemented the specific commitments included in the September 2009 Public Consultation and Disclosure Plan including, for example, the holding since 2008 of annual public consultation and disclosure activities ("Open House / Ger" events).<sup>286</sup> In addition, Community Development Advisory Councils (CDACs) have been established in each of the affected soums, in order to ensure effective liaison between the local communities and the ER Community Relations Team.<sup>287</sup> CDACs are community-run councils with voluntary membership made up of diverse community members, including herders, teachers and women, which each meet with the ER Community Relations Team on a monthly basis. Further ongoing stakeholder engagement activities were found to include:

- Periodic visits by members of the Project Community Relations Team to the homes of the most at-risk groups;

<sup>285</sup> *Draft Evaluation Report* (November 2010) at 8-9, para. 4.1.2.

<sup>286</sup> *Draft Evaluation Report* (November 2010) at 9, para. 4.1.3. Details on the 2010 "Open Ger" event (3-7 September 2010) are contained in ER's Report to EBRD, *Monitoring and Evaluation Report: Public Consultation and Disclosure – Ukhaa Khudag Phase II* (October 2010).

<sup>287</sup> *Draft Evaluation Report* (November 2010) at 9, para. 4.1.3.

- Regular meetings with bagh governors – who act as a conduit for information in the rural Gobi; and
  - Making available grievance forms at governors’ offices in soum centres and at established Project information centres.<sup>288</sup>
102. Generally, as regards the Project’s overall approach to public consultation,<sup>289</sup> the November 2010 evaluation found that ‘[s]takeholder engagement remains a strength of the Project and dedicated staff as well as upper management are engaged in this to a high degree’.<sup>290</sup> It notes that the CDACs ‘have strong support and participation of community members’, while
- ‘The Project Corporate Social Responsibility (CSR) and Community Relations (CR) Department is made up of skilled and committed staff who are taking on increased levels of responsibility for social performance. Staff contribute to working group sessions, attend trainings, work with NGOs and regularly engage with project stakeholders effectively’.<sup>291</sup>
103. An October 2010 monitoring and evaluation report on public consultation and disclosure details all the public consultation and disclosure activities conducted by the Client between August 2009 and September 2010, including three series of “Open House / Ger” events held in August 2009, October 2009 and September 2010, and an exhibition of local SMEs.<sup>292</sup> This Report details how the events were publicised, the presentations made, community participation, materials distributed and, most importantly, a detailed list of local community concerns received during these public consultation exercises and of the relevant company responses. Such concerns included concerns relating to dust management, road quality and safety, and public health impacts due to the Project.<sup>293</sup> This clearly indicates the effectiveness of public consultation undertaken by the Client, contrary to the Complainants’ unsubstantiated claims that ‘[t]here is evidence that consultation either did not include all affected herders or were not conducted to a high enough standard to achieve “meaningful consultation”’.<sup>294</sup>
104. Monitoring of implementation of the ESP continues with each Annual Environmental & Social Report containing an expansive account of meetings held with members of the relevant public or public organisations during the reporting period. During 2014, for example, in addition to regular ongoing community engagement activities, such as periodic visits by the Community Engagement Team to the homes of the most at risk groups and resettled households, monthly meetings with the CDACs, regular meetings with local officials, and company participation in a wide range of public policy discussions and initiatives, the Client had joined the Extractive Industry Transparency Initiative (EITI) and had participated in a related public information disclosure event. It had also hosted a consultative meeting at the UHG site, inviting

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<sup>288</sup> *Draft Evaluation Report* (November 2010) at 12, para. 4.1.5.

<sup>289</sup> Detailed in *Draft Evaluation Report* (November 2010) at 11, Table 4-1 and at 13, Table 4-2.

<sup>290</sup> *Draft Evaluation Report* (November 2010) at 5, para. 3.0.

<sup>291</sup> *Draft Evaluation Report* (November 2010) at 5, para. 3.0.

<sup>292</sup> *Monitoring & Evaluation Report: Public Consultation and Disclosure – UHG Project* (Report to European Bank for Reconstruction and Development) (26 October 2010).

<sup>293</sup> *Monitoring & Evaluation Report: Public Consultation and Disclosure*, at 20-23.

<sup>294</sup> Comments on Energy Resources Draft Compliance Review Report (9 January 2017), at 9.

environmental land specialists from all over Mongolia and representatives from the Mongolian Ministry of Environment and Green Development.<sup>295</sup>

105. The Environmental and Social Management Plan (ESMP) also contains a chapter more specifically setting out Environmental and Social Expectations for the railway construction component of the Project, which includes a Community Liaison Plan intended to improve relations with the local community on the basis of frequent and open communication, and to reduce the negative community health, safety, security and cultural impacts from Project activities associated with construction of the railway. This Plan sets down community engagement standards for the contractor and requires that all community interaction should occur in the presence of a qualified and authorised company representative, that the contractor implements training procedures in cultural awareness, and that the contractor institute an acceptable community grievance procedure and a process for identifying negative impacts and potential risks.<sup>296</sup>

106. In the light of the findings set out above it is not possible to determine that ER has failed

‘to disclose relevant project-related information to enable the affected communities and relevant government agencies to understand the project’s material health and safety risks and potential impacts, as well as its proposed protective measures.’<sup>297</sup>

Therefore, the Compliance Review Officer finds the Bank in compliance with PR 10.

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<sup>295</sup> EBRD, *Annual Environmental & Social Report 2014* (28 February 2015), at 9.

<sup>296</sup> Environmental and Social Management Plan, at 202-203.

<sup>297</sup> See Supplemental Complaint, at 15, which also alleges that

‘Energy Resources has failed to properly disseminate information about the health and safety impacts of the roads it constructs.’

## **CONCLUSION**

The Compliance Review Expert finds EBRD to be in compliance with the relevant requirements arising under the 2008 Environmental and Social Policy in respect of each and every ground of alleged non-compliance raised in the present Complaint.