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FOR RECONSTRUCTION AND DEVELOPMENT**

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**INDEPENDENT RECOURSE
MECHANISM:**

**COMPLIANCE REVIEW REPORT
RELATING TO THE VLORË THERMAL
POWER GENERATION PROJECT**

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COMPLIANCE REVIEW REPORT

VLORE THERMAL POWER GENERATION PROJECT

Executive Summary

1. In April 2007, the IRM received a Complaint relating to the above Project, which was approved by the Board of EBRD on 8 June 2004. The Affected Group, comprising three local businessmen from Treport Beach, claim that the Project has or is likely to have direct, adverse and material impacts on their common interest and allege that EBRD has failed to comply with Relevant EBRD Policy on a total of four grounds. In October 2007, the Board of EBRD approved the Eligibility Assessment Report (EAR), declaring the Complaint eligible and warranting a Compliance Review. The Board also approved the appointment of a Compliance Review Expert.

2. The Affected Group contends that EBRD failed to comply with Section I, paragraphs 1-3 of the Environmental Policy, alleging that the Project is inconsistent with the requirements of sustainable development and that, in attempting to fulfil current needs, it compromises future needs. On the basis of an examination of international practice, the Compliance Review Expert determined that these general principles contained under the Environmental Policy do not create binding obligations *per se* but need to be ‘operationalised’ through more specific procedural requirements which, in the context of a specific project, comprise a process of environmental impact assessment (EIA). To the extent that compliance with Section 1, paragraphs 1-3 of the Environmental Policy can only be determined by means of an examination of the adequacy of the EIA process, the Compliance Review Expert did not find that EBRD failed in its obligation to ensure that an adequate EIA was carried out by the Project Sponsor.

3. The Affected Group also alleges that the Project violates the requirement under Section II, paragraph 6 of the EBRD Environmental Policy that the Bank must apply a precautionary approach to its actions and operations. Once again, practical application of the precautionary principle to decision-making in respect of a proposed project is usually associated with the conduct of a process of EIA. The Compliance Review Expert did not find that EBRD failed in its obligation to ensure that an adequate EIA was carried out in accordance with the requirements of the precautionary principle.

4. Furthermore, the Affected Group claims that EBRD’s actions have violated Section II, paragraph 11 and Section III, paragraph 26 of the Environmental Policy on information disclosure and public consultation. Annex 2 of the Environmental Policy sets out specific requirements for public consultation in respect of “A” level projects and it is also clear that any public consultation exercise must meet the standards established under the UNECE Aarhus Convention. The Compliance Review Expert found that EBRD failed to ensure full compliance with these requirements in that it failed to take appropriate steps in order to satisfy itself that the Project Sponsor had given people potentially affected an adequate opportunity to express views on the location of the

Project. Further, the Compliance Review Expert determined that this failure constitutes a material violation of the Environmental Policy warranting remedial changes to the Bank's practices and procedures so as to avoid a recurrence of the same or similar violation in the future but not one warranting any remedial changes in the scope or implementation of the Project..

5. Finally, the Affected Group contends that the Project contravenes EBRD policy on cultural property. World Bank Operational Policy Note (OPN) No. 11.03 applies to EBRD-funded projects and requires the Bank to assist in the preservation of cultural property and to seek to avoid its elimination. However, little evidence is provided in the Complaint to assist the Compliance Review Expert in making a determination as to the accuracy of the claims made for the historic and religious value of the site and EBRD were only made aware of such claims at a very late stage. Therefore, the Compliance Review Expert finds that in the circumstances it is appropriate to leave it to the World Bank Inspection Panel to complete its ongoing investigation as to whether the Project complies with the requirements of OPN 11.03. In any event,, the Compliance Review Expert is of the view that any failure on the part of EBRD to comply with OPN 11.03, if established, would constitute a material violation of the Environmental Policy warranting at most remedial changes to the Bank's practices and procedures so as to avoid a recurrence of such violation in the future, but not warranting any remedial changes in the scope or implementation of the Project.

6. In the presence of certain findings of material violations of the Bank's Environmental Policy and as contemplated at IRM R.P. 34(c)(i), it is the recommendation of the Compliance Review Expert that the Bank consider implementing the following remedial changes to its practices and procedures in order to avoid the recurrence of such or similar violations of the Bank's Environmental Policy in the future:

- (i) the deferred entry into force of any new Environmental Policy in order to permit timely recruitment of all necessary personnel and the taking of any other measures appropriate to ensure its successful implementation;
- (ii) the introduction of detailed guidance or procedures on practical implementation of OPN 11.03 on cultural property;
- (iii) that EBRD Country Strategies address the capacity of countries to meet the requirements of key environmental conventions and EC measures;
- (iv) obtaining independent legal advice with respect to the applicability and adequacy of national compliance with international legal obligations during the preparation of an EIA;
- (v) the introduction of detailed requirements for Project Sponsors to maintain comprehensive records of public consultation meetings (including announcements, and attendance lists);
- (vi) developing comprehensive guidance notes on all aspects of its environmental and social policy including guidance on the conduct of an EIA
- (vii) the establishment of a formal mechanism to ensure effective inter-institutional communication in co-financed projects;

- (viii) consideration of ways to improve communication between the Resident Offices and the Environment Department, including specific training for RO staff on the Bank's environment and social policy.

7. Management appreciates the opportunity to respond to the recommendations and to indicate the range of resources needed and an approximate schedule of implementation of the recommendations. In general, the recommendations for the revision and implementation of the Environmental and Social Policy, including lead time prior to going into force, guidance notes, and cooperation with other co-financiers are all welcomed. With regard the recommendation to consider obtaining independent legal advice in each project with respect to a country's compliance with international legal obligations, we believe that this is beyond the scope of EBRD's Environmental Policy. Management acknowledges that the public's ability to comment meaningfully on an Environmental Impact Assessment while options are still open should include an assessment of alternatives, such as the location of the site on which the facility(ies) will be placed; however, it should be noted that some decisions, such as siting, may have pre-dated the Bank's and even the client's involvement in the project. We would propose that the Bank will have to use best efforts in this regard, and to summarise results of these inquiries to the Board, with any deficiencies in information presented as potential project risks.

COMPLIANCE REVIEW REPORT

VLORE THERMAL POWER GENERATION PROJECT

I. Introduction

1. The European Bank for Reconstruction and Development (“EBRD”) was requested by Korporata Elektroenergjetike Shqiptare (“KESH”), the State owned power utility of Albania, to participate, along with the IBRD and the EIB, in the funding of the construction of a Combined Cycle Generation Facility in Vlore (“the Project”). This is a sovereign guaranteed loan of up to 40 million Euros.

2. On 19 April 2007, the IRM received a Complaint (“the Complaint”) relating to the Project from a group of local businessmen from Treport Beach (“the Affected Group”). The Affected Group includes Mr. Gani Mezini, Mr. Muhamet Lazaj and Mr. Stefan Thanasko. They are represented by Mr Lavdosh Ferunaj who originally submitted the Complaint on the Affected Group’s behalf to the Bank’s Resident Office in Tirana on 10 April 2007. The Affected Group has complained that the Project has or is likely to have direct, adverse and material impacts on their common interest, in that the project will allegedly adversely impact tourism at Treport Beach and fishing in the waters of Vlore Bay. The Affected Group has requested that the IRM launch both a process of Compliance Review and a Problem-solving Initiative.

3. On 12th October 2007, the Board of Directors of the EBRD approved the EAR prepared in respect of the Complaint and declared the Complaint eligible and warranting a Compliance Review. (The Terms of Reference of the Compliance Review are contained in the EAR).

4. The Complaint sets out those elements of Relevant EBRD Policy which the Affected Group considers to have been violated by EBRD in connection with its involvement in the Project. In accordance with paragraphs 3 and 11 of its Terms of Reference,¹ this Compliance Review has confined itself to an examination as to whether, or not, the EBRD has complied with those elements of Relevant EBRD Policy which the Affected Group alleges in the Complaint to have been materially violated. However, the pertinent provisions of the Relevant EBRD Policy will be construed in the context of the policy document as a whole in order that issues arising under the Complaint are not overlooked by virtue of a minor error, such as poor citing or referencing in the text of the Complaint (or the translation of the Complaint). For example, in considering the requirements of the precautionary approach, set out under Section II, paragraph 6 of the

¹ ToR, para. 3 provides that ‘The Compliance Review shall remain within the scope of the original Complaint. It shall not go beyond the parameters of the Complaint to address other issues.’ Similarly, in making it clear that the Compliance Review would not consider certain suggestions made in the Complaint, such as the one at Complaint, page 6, para. 2, that ‘EBRD has been under strong pressure by the World Bank to become a co-lender in this project’, ToR, para. 11 provides that ‘Any elements which are beyond the scope of the Compliance Review will be excluded.’

Environmental Policy and invoked in the Compliant, the Compliance Review Expert will also consider Section III, paragraph 14 of the Environmental Policy, which elaborates on the significance of the precautionary approach for the EBRD environmental appraisal process.

II. Notion of Material Violation

5. As the principal purpose of a Compliance Review is to determine whether or not any EBRD action, or failure to act, in respect of a Bank operation has involved a material violation of a Relevant EBRD Policy, a brief discussion as to what may be considered a material violation is warranted. Whilst the concept is not defined or elaborated upon in the IRM's Rules of Procedure, some guidance can be drawn from the established practice of international environmental law.² For example, in the context of the generally accepted duty to prevent significant harm, State practice and the case law of international tribunals generally require that the harm be sufficiently serious or significant.³

6. Similarly, taking international law relating to shared freshwater resources as an example, a survey of relevant international treaties and State practice supports the existence in customary international law of a threshold above which harm is prohibited.⁴ The significance threshold can be regarded as having codified the so-called *de minimis* rule, derived from the general principle of good neighbourliness and involving 'the duty to overlook small, insignificant inconveniences'⁵ whilst at the same time providing a flexible standard, lying somewhere between the most serious and irreparable harm and minor and trivial interference, which facilitates the adoption of standards and measures appropriate for a particular project.

7. For the purposes of the present Complaint, the notion of a 'material violation' may be informed by the general understanding in international environmental law of the

² See, EBRD Environmental Policy, Section II, para. 8, which provides that 'The EBRD will actively seek, through Bank-financed projects, to contribute to the implementation of relevant principles and rules of international environmental law.'

³ In the Trail Smelter arbitration between the US and Canada (Trail Smelter Arbitration (U.S. v. Canada), (1941) 3 RIAA 1911, at 1965), the tribunal felt the need to satisfy itself that the 'case is of a serious consequence' on account of the reduced economic value of affected property, while, in the Peyton Packing Company and Causco case (6 (1968) Whiteman, Digest of International Law, 258), Mexico was keen to establish that the transfrontier movement of pollutants from the United States caused 'serious injury' to the population of Ciudad Juarez. According to the US/Canada International joint Commission in the Pollution of the Rainy River and the Lake of the Woods case (ICJ, Report on the Pollution of the Rainy River and Lake of the Woods, (1965), at 16, 'injury' within the meaning of Article IV of the 1909 Boundary Water Treaty (USTS No. 548) includes prevention of the recreational utilisation of the watercourses concerned.

⁴ See further, C. B. Bourne, 'The Right to Utilize the Waters of International Rivers' (1965) 3 *Canadian Yearbook of International Law* 187, at 208-213; H. Smith, *The Economic Uses of International Rivers* (King & Son, London, 1931), at 151; G. Gaja, 'River Pollution in International Law' (1973) *Recueil des Cours* 354, at 370; A. P. Lester, 'River Pollution in International Law' (1963) 57 *American Journal of International Law* 828, at 851; E. J. de Arechaga, 'International Legal Rules Governing the Use of Waters of International Watercourses' (1960) 2 *Inter-American Law Review* 329, at 332; I. Brownlie, 'A Survey of Customary Rules of Environmental Protection' (1973) 13 *Natural Resources Journal* 179, at 180.

⁵ E. J. de Arechaga, 'International Law in the Past Third of a Century', (1978-I) 159 *Recueil des Cours* 9, at 194.

threshold of significant harm. **Accordingly, the potential seriousness of any possible consequences of a breach of EBRD procedures will be taken into account in determining whether that breach amounts to a material violation of a Relevant EBRD Policy along with whether, in the event of a finding of non compliance, the violation is so critical so as to warrant remedial changes to the scope or implementation of the Project or remedial changes to the Bank's practices and procedures so as to avoid recurrence of such or similar violations in the future.**

8. Before proceeding to make a determination as to whether any material violation has occurred, each of the obligations concerned will be examined in order to better understand the precise nature of the substantive and procedural requirements involved. The EBRD's environmental appraisal process is expected to be pivotal in determining effective discharge of the various obligations set down in the Environmental Policy as it is the key means of implementing the Bank's environmental standards and safeguards.⁶

III. EBRD Policy Obligations

Environmental Policy Section I, Paragraphs 1-3 (Sustainable Development)

9. The Complaint states the Affected Group's belief that 'the Project violates EBRD's environmental policies and sustainable development because while attempting to fulfil current needs, it seriously compromises those of the future'.⁷ Article 2.1vii of the Agreement Establishing the European Bank for Reconstruction and Development clearly directs the Bank to 'promote in the full range of its activities environmentally sound and sustainable development', a commitment repeated in Section I, para. 1, of the EBRD Environmental Policy.⁸

10. The Environmental Policy gives further support to the proposition that the concept of sustainable development is a central requirement of all Bank activities by stating, in Section I, para. 2, that 'The EBRD recognises that sustainable development is a fundamental aspect of sound business management and that the pursuit of economic growth and a healthy environment are inextricably linked. The EBRD further recognises that sustainable development must rank among the highest priorities of the EBRD's activities'.

11. The Complaint reflects the broad understanding of the term "environment" as used in the EBRD Environmental Policy in respect of the general obligation to promote environmentally sound and sustainable development, which encompasses 'not only

⁶ According to EBRD, *Environmental Policy* (29 April 2003), Section II, para. 4 'The EBRD will seek to ensure *through its environmental appraisal process* that the projects it finances are environmentally sound, designed to operate in compliance with applicable regulatory requirements, and that their environmental performance is also monitored'.

⁷ Complaint, at 4-5, Part B, para. 1.

⁸ EBRD, *Environmental Policy* (29 April 2003). As the Vlore Thermal Power Station Project did not undergo EBRD Concept Review until 13 June 2003 and was not approved by the EBRD Board until 8 June 2004, the second revised EBRD *Environmental Policy*, approved by the EBRD Board on 29 April 2003, clearly applies to any EBRD action or failure to act in respect of this Project.

ecological aspects but also worker protection issues and community issues, such as cultural property, involuntary resettlement, and impacts on indigenous peoples'.⁹ More specifically, the Complaint focuses on one of the constituent principles of sustainable development,¹⁰ that of 'inter-generational equity'.¹¹

12. Therefore, one of the compliance issues to be addressed is whether any EBRD actions in respect of the Project violates the objective of sustainable development and/or of the related principle of inter-generational equity. The main difficulty in examining compliance with the concept of sustainability is that it is usually expressed in general terms as a compromise between protection of the natural environment and the requirements of economic development.

13. The requirements of sustainable development are often considered by means of an environmental impact assessment ("EIA"),¹² and this is the approach taken under the EBRD Environmental Policy.¹³ The classification of the Project as a Category A project under the Environmental Policy recognises the fact that the project 'could result in potentially significant adverse future environmental impacts' and as such an environmental impact assessment is required and constitutes the key environmental safeguard measure.¹⁴ Therefore, any determination as to whether a Bank action or failure to act in respect of the Project amounts to a violation of the objective of sustainable development, is necessarily bound up with, and dependent upon, an examination of the adequacy of the EIA carried out.

⁹ EBRD, *Environmental Policy* (29 April 2003), Section I, para. 3. The Complaint refers, at 5, to the various environmental components or uses, which the Affected Group alleges might be adversely impacted by the Project, including 'tourism, fishing, natural habitat, ecosystems, cultural heritage and property, all within the broader meaning of "environment" adopted by the Bank'.

¹⁰ For example, the 1992 Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, sets out the key substantive and procedural elements involved in the achievement of sustainable development, including Principle 3, which provides that 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'

Similarly, the 1992 Convention on Biological Diversity, which was simultaneously adopted by States at Rio, introduced the concept of sustainable development as 'the use of components of biological diversity in a way and at a rate that does not lead to the long term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.

¹¹ EBRD, *Environmental Policy* (29 April 2003), Section I, para. 2 in the EBRD Environmental Policy, which provides that The EBRD will endeavour to ensure that its policies and business activities promote sustainable development, meeting the needs of the present without compromising those of the future'

¹² See, for example, F. N. Botchway, 'The Context of Trans-Boundary Energy Resource Exploitation: The Environment, the State and the Methods' (2003) 14 *Colorado Journal of International Environmental Law and Policy* 191, at 205.

¹³ The integration of environmental considerations into the project cycle is listed, under Section III, para. 13, first among four strategic directions to be pursued by EBRD in order to comply with its environmental mandate, policy objectives and general principles. Further, Section III, para. 14 expressly links environmental appraisal of EBRD-funded projects to the integration of environmental considerations into the project cycle.

¹⁴ EBRD, *Environmental Policy* (29 April 2003), Section III, para. 16 further provides that 'An Environmental Impact Assessment (EIA) is therefore required to identify and assess the future environmental impacts associated with the proposed project, identify potential environmental improvement opportunities, and recommend any measures needed to prevent, minimise and mitigate adverse impacts.'

14. The same is true of the requirements of the principle of inter-generational equity raised in the Complaint. The principle's leading proponent describes it as providing that 'each generation has an obligation to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy to the present generation'¹⁵ whilst, at the same time, acknowledging that the obligations to future generations 'represent in the first instance a moral protection of interests, which must be transformed into legal rights and obligations'.¹⁶

15. Consistent with practice in international environmental law, under the EBRD Environmental Policy the principle of intergenerational equity, and thus the interest of future generations, is treated as intrinsically linked to the goal of sustainable development. For example, the 1987 Brundtland Report, produced by the World Commission on Environment and Development, described sustainable development as 'development which meets the needs of the present generation without compromising the ability of future generations to meet their needs'.¹⁷ Though it may not give rise to substantive obligations in its own right, intergenerational equity may be taken into account in any consideration of sustainable development.¹⁸ Leading commentators have similarly concluded that certain other existing or emerging substantive principles of international environmental law embody an inter-generational dimension, including, *inter alia*, the concept of sustainable development and the precautionary principle.¹⁹

16. Therefore, as with the issue of sustainable development, questions as to effective compliance with the principle of intergenerational equity are necessarily bound up with examination of the adequacy of the EIA carried out in relation to the Project.

Findings on Compliance with respect to the obligations set out under Environmental Policy Section I, Paragraphs 1-3.

17. From an examination of the relevant documentation, it is clear that, at a general level, the EBRD invested a great deal of staff time and effort in assuring itself that the

¹⁵ E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, (UNU, Tokyo/New York, 1989), at 37-38. See further, E. Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Ecology Law Quarterly* 495; E. Brown Weiss, 'Conservation and Equity Between Generations' in T. Buergenthal (Ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn* (Kehl, 1984); E. Brown Weiss, *Proceedings of the American Society of International Law*, 81st Meeting (1987), at 126-133.

See also, C. Redgwell, *Intergenerational Trusts and Environmental Protection* (University of Manchester Press, 1999); J. C. Wright, *Future Generations and the Environment*, (Centre for Resource Management, Canterbury, New Zealand, 1988).

¹⁶ E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, (UNU, Tokyo/New York, 1989), at 30.

¹⁷ World Commission on Environment and Development, *Our Common Future* (Oxford, 1987),

¹⁸ *Gabcikovo-Nagymaros* I.C.J. Rep. (1997) 7, Separate Opinion of Vice President Weeramantry, at 1. See further, O. McIntyre, 'Environmental Protection of International Rivers: Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)', (1998) 10 *Journal of Environmental Law* 79, at 87.

¹⁹ See, for example, C. Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester, 1999) at 126-127.

EIA process complied fully with the requirements as set out in the EBRD Environmental Policy.²⁰

18. For example, the independent SEETAC review of the October 2003 Final EIA document²¹ concluded that ‘the final version of the environmental impact study prepared by MWH Consulting meets the major international lending agencies standards’.²² Despite this, the EBRD required the preparation of an Addendum to the Final EIA to address certain of the shortcomings identified in the SEETAC review as well as certain of its own concerns regarding the adequacy of the Final EIA for the purposes of compliance with EBRD policy requirements.

19. Consequently, in November 2003, an EIA Addendum containing more detailed information was released. This addendum contained information on the monitoring and public consultation, the anticipated impacts on protected areas and red-listed species, an environmental study of the transmission line route, the seismicity and floodplain issues, as well as the disposal of construction wastes.

20. It is clear that the Project Sponsor and the Albanian authorities responsible for environmental regulation felt confident that the EIA process satisfied all of the requirements of Albanian legislation. For example, in its response to a letter of complaint from the Committee for Ecological Protection of the Region of Vlora,²³ KESH stated that ‘The [Environmental Impact Assessment] study was based on the enforcement of rules and standards of both the Albanian, and European legislation, and on the guidelines of the World Bank on the environmental impact of the project, and meeting these rules and standards.’²⁴

21. Similarly, it would appear that the Vice Minister of Environment was sufficiently satisfied with the contents of the Final EIA. In a letter to KESH in October 2003 he stated that ‘the final draft contains all the necessary issues’ and ‘we express our approval for the final draft of the study about the evaluation on the environmental impact of the construction of a new Vlora TPP.’²⁵

²⁰ See, Compliance Review ToR, para. 4.

²¹ MWH Consulting, *Final Environmental Impact Assessment – Vlore Combined*, (6 October 2003).

²² SEETEC (Southeastern Europe Electrical System Technical Support Project), *Review of the Harza Vlore TPP Environmental Impact Assessment Study: Analysis of the MWH EIA Study* (October 2003), Section 4, at 7.

²³ Letter from Mr. Luan Muhameti, Committee for Ecological Protection and Vital Spaces to H.E. Alfred Moisiu, President of the Republic, H.E. Servet Pellumbi, Albanian Parliament and H.E. Fatos Nano, Government of Albania: re *On the Construction of the Thermal Power Plant, Oil Deposits, Refinery etc. in Vlora and its Bay* (21 February 2005).

²⁴ Translation of the reply sent by Mr. Andis Harasani, General Director, KESH to Committee for Ecological Protection for the Region of Vlora, *Re: Construction of the new Thermal Power Plant in Vlora* (3 March 2005).

²⁵ Letter from Mr. Besnik Baraj, Vice-Minister of Environment, Albania, to Mr. Andis Harasani, General Director of KESH: *Comments regarding the final draft of the study which deals the evaluation of the environmental impact of new Vlora Thermal Power Plant*, (15 October 2003).

22. The EBRD had every reason to expect that all issues identified in the Final EIA and in the EIA Addendum would be addressed and that all measures to avoid or mitigate environmental impacts would be implemented. For example, in response to the Addendum, the Albanian Government, on behalf of the Project Sponsor, provided clear assurances, stating, ‘As we have already expressed in our previous approval to the Environmental Impact Assessment Study, let us confirm that the Albanian Government undertakes to implement all the recommendations given in the Addendum to the Environmental Assessment and the actions specified in the Environmental Management Plan, as specified in the study submitted by MWH Consulting.’²⁶

23. Further, the EBRD took active and practical steps to obtain assurances in respect of environmental protection measures identified in the EIA and EIA Addendum. For example, the EBRD sought and received assurances from KESH that it had taken steps to ensure that the construction contractor would be contractually required, inter alia, to ‘Review, approve and follow up the execution of [the] environmental protection plan during [the] construction phase’ and to ‘Review the EPC Contractor’s terms of reference for the various follow up studies identified in the Addendum to the Environmental Assessment that are to be performed by the EPC Contractor and to review the contractor’s reports on those studies’.²⁷

24. In terms of the actual adequacy of the Final EIA and EIA Addendum and of the combined contents of both documents, it must be borne in mind that the EIA is but a legally mandated procedural technique for integrating environmental considerations into the decision-making processes regarding certain development projects. Its purpose is to provide a system whereby decision-makers are provided with material information with respect to the likely environmental consequences of a certain proposed project and their alternatives and, in so doing, it facilitates the participation of potentially affected persons or interested groups in the decision-making process.

25. The EIA, therefore, generally involves procedural requirements rather than substantive rules or environmental standards and provides a formal route by which information is to enter decision-making procedures, but it does not determine the outcome of those procedures. Further, the information relevant to this process is necessarily context-dependent, with the nature of the particular project in question dictating what information ought to be included.

26. The Bank’s Environmental Policy, Section III, para. 16, provides in respect of Category A Projects that ‘An Environmental Impact Assessment is therefore required to identify and assess the future environmental impacts associated with the proposed

²⁶ Letter from Mr. Viktor Doda, Minister of Industry and Energy, Albania to Mr. Iftikhar Khalil, Programme Team Leader, Infrastructure and Energy Department, Europe and Central Asia Region, World Bank: re *Addendum to Environmental Impact Assessment Study* (19 December 2003).

²⁷ E-mail from Mr. Brian Copley, EBRD to Mr. Fatmir Hoxha, KESH: re EBRD PSGRP Consultant Status (19 July 2004), Tasks 33 and 35 [confirmed by F. Hixha, 20 July 2004 and approved by B. Copley 2 August 2004].

project, identify potential environmental improvement opportunities, and recommend any measures needed to prevent, minimise and mitigate adverse impacts.’

27. In the absence of detailed EBRD guidance on the minimum essential contents of an EIA, reference is made to other provisions of the Policy which require that ‘projects be structured so as to meet (i) applicable national environmental law; and (ii) EU environmental standards, insofar as these can be applied to a specific project. Where such standards do not exist or are inapplicable, the EBRD shall identify other sources of good international practice, including relevant World Bank Group guidelines ... and require compliance with the selected standards.’²⁸ As noted earlier, there were reasonable grounds for Bank officials to accept that the EIA satisfied the requirements of Albanian Law, to the extent that such requirements were clearly elaborated under Albanian legislation.²⁹

28. In addition, the Environmental Policy commits the EBRD to ‘support the spirit, purpose and ultimate goals of the UNECE (Espoo) Convention on Environmental Impact Assessment in a Transboundary Context’³⁰ and ‘support through investments the implementation of the Convention on Environmental Impact in Transboundary Context.’³¹

29. The requirements of EU Law and of the Espoo Convention correspond very closely. The minimum EU requirements are set down in Article 5(3) of the amended EIA Directive³² and include a description of the project and of the measures proposed to avoid, reduce or remedy significant environmental effects, the data required to identify and assess the main effects, an outline of the main alternatives to the proposed project, the main reasons for the final conclusions taking account of the environmental effects, and a non-technical summary.³³

30. Annex II of the Espoo Convention, which is widely regarded as identifying certain minimum core components of a good EIA,³⁴ sets out the required ‘Content of the Environmental Impact Assessment Documentation’ as follows:

- i. A description of the proposed activity and its purpose;

²⁸ EBRD, *Environmental Policy* (29 April 2003), Section III, para. 21.

²⁹ See in particular, Letter from Mr. Besnik Baraj, Vice-Minister of Environment, Albania, to Mr. Andis Harasani, General Director of KESH: *Comments regarding the final draft of the study which deals the evaluation of the environmental impact of new Vlora Thermal Power Plant*, (15 October 2003). See also, Translation of the reply sent by Mr. Andis Harasani, General Director, KESH to Committee for Ecological Protection for the Region of Vlora, *Re: Construction of the new Thermal Power Plant in Vlora* (3 March 2005).

³⁰ EBRD, *Environmental Policy* (29 April 2003), Section II, para. 11.

³¹ EBRD, *Environmental Policy* (29 April 2003), Section III, para. 42.

³² Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, [1985] OJ L175/40, as amended by Directive 97/11, [1997] OJ I73/5.

³³ Further detail is provided in Annex IV of the amended EIA Directive and in EU Commission Guidance, *Guidance on EIA / EIS Review* (June 2001).

³⁴ See, for example, P. N. Okowa, ‘Procedural Obligations in International Environmental Agreements’ (1996) 67 *British Yearbook of International Law* 275, at 282-285.

- ii. A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the non-action alternative;
- iii. A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
- iv. A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
- v. A description of mitigation measures to keep adverse environmental impact to a minimum;
- vi. An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
- vii. An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
- viii. Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
- ix. A non-technical summary including a visual presentation as appropriate (maps, graphs, *etc.*).

31. The requirements of the EU EIA Directive and of the Espoo Convention are entirely consistent with EBRD guidance on ‘scoping’ for Category A projects which, provides a clear indication of what an adequate EIA is expected to address.³⁵

32. It is apparent from an examination of the information included in the Final EIA of October 2003 and in the EIA Addendum of December 2003, that the Bank took active steps to ensure that the overall EIA process met the requirements of its Environmental Policy including, by reference, those arising under EU Law and the Espoo Convention, which can be regarded as more strict than those arising under World Bank OP 4.01 Annex B. This is apparent from the greatly expanded discussion of locational and technological alternatives in the EIA Addendum³⁶ and from the EBRD insistence on the inclusion of photographs and maps from the Albanian National Agency of Energy which had been absent from the EIA.

33. Further, the Complaint does not specify in what way the EIA should be regarded as inadequate, except to allege that ‘misrepresentation played a major role in presenting a “rosy” Environmental Impact Assessment (EIA). Contrary to the requirements for such Category A Project, EIA’s authors avoided several factors such as tourism (its beach location), safe fisheries, coral colonies, cultural property, proximity with the Narta Lagoon, which per se would simply represent “fatal” flaws to the Project’.³⁷

³⁵ EBRD Environment Department, *EBRD Consultation and Disclosure Requirements: Guidance for Category A Projects on Scoping* (July 2003).

³⁶ MWH Consulting, *Final EIA Addendum* (December 2003), Section 6, at 18-25, which includes excerpts from the MWH Consulting, *Final Siting Study* (21 October 2002) relating to the evaluation of the different sites and technologies, including the site-by-site summary of the environmental evaluation and information on the development recommendation for each site, see EIA Addendum, at 18.

³⁷ Complaint, Part B, para. 2, at 5. It might be noted that this lack of detailed criticism of the EIA, which could point to the specific requirements that the EIA failed to meet, has been a feature of the various correspondence received by the Project Sponsor and international financial institutions from parties

34. In the view of the Compliance Review Expert, this allegation does not stand up to scrutiny. For example, in respect of the potential for tourism of the site due to its beach location, the Final EIA records that ‘The tourism sector in Albania has reportedly rebounded during the past two years as significant numbers of Albanians have returned to seaside resorts for the first time since the civil insurrection of 1997 and 1998.’³⁸ The EIA also acknowledges the rich cultural legacy of the area, though noting that detailed information is unavailable.³⁹ In addition, the EIA Addendum reports that the city of Vlore ‘is a tourist destination’ and that ‘A variety of museums and national monuments exist in Vlore, and many hotels and recreational areas are situated along its beaches.’⁴⁰

35. Further, certain elements of the revised Environmental Management Plan (“EMP”) are aimed at minimising the aesthetic impacts of the plant, acknowledging that ‘Aesthetically displeasing appearance may affect the tourist appeal of the coast’ and provides assurances that ‘The plant will be shielded by trees and set back from the ocean. Landscaping will be used to enhance the appearance of the generation facility.’⁴¹ Other elements of the EMP might be considered an implicit recognition of the area’s tourism potential. For example, it provides assurances that ‘Borrow areas will be reworked to blend into the surroundings. Revegetation will be performed using local plants.’⁴²

36. In respect of fisheries, both the EIA and EMP go to quite considerable lengths to highlight risks to the marine and freshwater environments and to outline the measures necessary to avoid and mitigate such risks. For example, the EIA Addendum discusses the risk of the thermal impacts of the cooling water discharge on the marine environment

opposed to the Project. For example, the letter of 6 February from Dr. Anna Kohen to the President of the World Bank merely states ‘In any event, we have serious concerns on the EIA content. We find that in many respects, the EIA is ambiguous, contradictory and incomplete. As such, it cannot constitute a valid legal document supportive and/or in compliance with the Loan Agreement contractual requirements. We have serious concerns that, in fact, “the entire process has NOT been carried out in accordance with Albanian Laws and in compliance with applicable EU and World Bank guidelines”.’ See, Letter from Dr Anna Kohen, President, Albanian-Jewish Committee to Mr. Paul Wolfowitz, President, World Bank Group: re *Cancellation of the World Bank Project of Vlora Power Plant* (6 February 2006).

³⁸ MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 5.5.1, at 49.

³⁹ MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 5.5.3, at 54. It should be noted that, although World Bank Management state, in the context of World Bank safeguard policies, that ‘the issue of tourism potential is not covered directly by bank safeguard policies, but only indirectly through related issues such as potential impacts on cultural property and natural habitats’ the Compliance Review Expert would accept that tourism potential would come within the scope of the socio-economic impacts inherent in ‘the term “environment” ... used ... in a broad sense’, per EBRD Environmental Policy, Section I, para. 3. See further, World Bank Inspection Panel, Report No. 40213-AL: *Report and Recommendation - Albania: Power Sector Generation and Restructuring Project* (IDA Credit No. 3872-ALB) (2 July 2007), para. 29, at 7.

⁴⁰ MWH Consulting, *Final EIA Addendum* (December 2003), Section 6.1, at 23-24.

⁴¹ MWH Consulting, *Final EIA Addendum* (December 2003), Table A.6, at 30.

⁴² MWH Consulting, *Final EIA Addendum* (December 2003), Table A.5, at 26.

in the Bay of Vlore, and includes a discussion of the Cornell Mixing Zone Expert System (CORMIX) used to perform the thermal impact modelling.⁴³

37. In addition, the revised EMP deals with a wide range of potential effects and mitigation measures, including ‘disturbance of aquatic resources’, ‘interference to coastal fishing’, ‘interference to navigation’, ‘sediment release’, ‘entrapment of larval fish, shellfish and other marine fauna’, ‘impingement of adult and juvenile fish and shellfish’, ‘thermal effects on marine fauna’, ‘discharge of nutrients and other contaminants to waterways’, ‘fuel oil spill that would impact the aquatic and coastal environment’, and a ‘pipeline rupture [which might] impact the aquatic and coastal environment’.⁴⁴

38. Whilst coral colonies are not specifically discussed in either document⁴⁵ it is clear that the EMP measures relating to fisheries and protection of the marine environment noted above would equally apply to coral colonies, should the existence of such colonies be established. There is nothing to suggest that the list of threatened species identified needs to be considered definitive.

39. In respect of the proximity of the Narta Lagoon, both the EIA and the EIA Addendum deal with this concern extensively. For example, the Final EIA discusses the risks to the Narta Lagoon in the context of water resources⁴⁶ and of biological resources,⁴⁷ as well as in the context of threatened and endangered species.⁴⁸

40. The EIA Addendum discusses the Narta Lagoon further in the context of proposed Protected Landscapes under the National Strategy on Biodiversity, threatened or endangered species, the impacts of ‘the construction or operation of the proposed facility on the Narta Lagoon vegetation or ecosystem’, and water quality.⁴⁹ The EIA Addendum also discusses the proximity and significance of the Narta Lagoon in the context of its discussion of alternative sites.⁵⁰

⁴³ MWH Consulting, *Final EIA Addendum* (December 2003), Section 2.2.2, at 7 and Section 2.2.3, at 10. See further, MWH Consulting, *Final EIA Addendum* (December 2003), Section 5.3, at 16 and MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 6.2.3 on Ground and Surface Water, at 60-61 and Sections 6.2.5, at 62-63 and 6.4.5, at 78-86, both on Marine Environment.

⁴⁴ MWH Consulting, *Final EIA Addendum* (December 2003), Tables A.5 and A.6, at 28-30.

⁴⁵ MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 5.4.3, at 46-49.

⁴⁶ MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 5.3.2, at 38-39.

⁴⁷ MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 5.4.1, at 43-45.

⁴⁸ MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 5.4.3, at 46-49.

⁴⁹ MWH Consulting, *Final EIA Addendum* (December 2003), Sections 3 and 4, at 12-14.

⁵⁰ MWH Consulting, *Final EIA Addendum* (December 2003), Section 6.1, at 24.

41. Finally, the Final EIA makes mention of the rich historical and cultural legacy of the Vlore area while noting that ‘Detailed information and data concerning cultural resources and any potential archaeological sites in the Vlore area are not available.’⁵¹ The question of adequate consideration and protection of cultural property is more fully addressed below, in the context of the Affected Group’s allegation that the Project violates Section III.21 of the Environmental Policy and IFC OPN 11.03 on cultural property which applies to EBRD operations.

Conclusion

42. Therefore, to the extent that compliance with Section I, paragraphs 1-3 of the Environmental Policy can only be determined by means of an examination of the adequacy of the EIA process, the Compliance Review Expert does not find that the EBRD failed in its obligation to ensure that an adequate EIA was carried out by the Project Sponsor.

43. The Final EIA of October 2003, combined with the EIA Addendum of December 2003, addressed the issues and contained more than the minimum of information required under the EBRD Environmental Policy. Consequently, in respect of the EIA process and Section I, paragraphs 1-3 of the Environmental Policy, the conclusion of the Compliance Review Expert is that the EBRD’s actions have not involved one or more material violations of a Relevant EBRD Policy within the ambit of IRM RP 23 and 24.

Environmental Policy Section II, Paragraph 6 (Precautionary Approach)

44. The Affected Group considers that the Project violates the requirement under the EBRD Environmental Policy for the Bank to apply a precautionary approach to its actions and operations.⁵² Section II, paragraph 6 of the Environmental Policy unequivocally states that ‘The EBRD supports a precautionary approach to the management and sustainable use of natural biodiversity resources (such as wildlife, fisheries and forest products), and will seek to ensure that its operations include measures to safeguard and, where possible, enhance natural habitats and the biodiversity they support.’

45. Once again, the difficulty in determining compliance with the precautionary principle as articulated under Section II, paragraph 6 relates to uncertainty as to the principle’s practical requirements. The precautionary principle is generally understood as a means of overcoming the problem of scientific uncertainty concerning the environmental impacts of particular activities. Scientific uncertainty regarding, *inter alia*, evidence of causal linkages between activities and impacts, thresholds at which damage becomes significant or irreversible, long-term cumulative or combined effects of pollutants, or the nature of any scientific methodology used and data collected, has

⁵¹ MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003), Section 5.5.3, at 54.

⁵² Complaint, at 5, Part B, para. 3.

historically impeded the setting of rules and standards for the protection of the environment.

46. The precautionary approach has its conceptual origins in the rejection of the assumptions inherent in the traditional ‘assimilative capacity approach’ which was based on the assumption that science could accurately determine the assimilative capacity of the environment and that, once determined, sufficient time for preventive action would remain. Failures of this approach, with conclusive scientific proof of the detrimental effects of activities or substances coming too late, have led, on a sector by sector basis, to the adoption of a precautionary approach.

47. The precautionary approach, now widely employed in international instruments for environmental protection,⁵³ generally requires that, where there is a risk of serious environmental damage, the relevant authorities must take measures to anticipate, prevent or minimise such damage despite a lack of full scientific certainty as to its cause, seriousness or inevitability. Any formulation of the precautionary approach is, therefore, a ‘tool for decision-making in a situation of scientific uncertainty’ which effectively ‘changes the role of scientific data’.⁵⁴ This understanding of the precautionary approach suggests that, in practice, it is closely associated with the conduct of an EIA.

48. From an examination of various formulations of the precautionary principle in international law and of the means by which States have sought to have it applied, it is possible to identify three common classes of obligation which would appear to be the most appropriate for, and commonly utilised means of, applying the principle in customary international law.⁵⁵

49. Obligations relating to the application of clean production methods or the setting of precautionary environmental standards are almost always associated with the application of the precautionary principle in international instruments⁵⁶ as are precautionary environmental assessment procedures to assess planned projects, policies and measures.⁵⁷

⁵³ See, for example, Principle 15 of the 1992 Rio Declaration, which provides that ‘In order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ Also, though it is not defined under EC law, since 1992 all EC law-making on the environment must now be based on the precautionary principle pursuant to Article 174(2) (ex Article 130r(2)).

⁵⁴ D. Freestone, ‘The Road to Rio: International Environmental Law After the Earth Summit’ (1994) 6 *Journal of Environmental Law* 193, at 211.

⁵⁵ See, for example, O. McIntyre and T. Mosedale, ‘The Precautionary Principle as a Norm of Customary International Law’ (1997) 9 *Journal of Environmental Law* 221, at 236-240.

⁵⁶ For example, 1991 Bamako Convention, Article 4(3)(f); 1992 OSPAR Convention, Article 2(3)(b)(ii) and Appendix I; Baltic Convention, Article 23(3) and Annex II; 1979 Long-Range Transboundary Air Pollution Convention, Article 6, 1988 Nitrogen Oxides Protocol, Article 2(2)(a) and 1991 Volatile Organic Compounds Protocol, Article 3(3); 1991 UNGA Res. 46/215 on Large-Scale Pelagic Drift-Net Fishing and its Impact on the Living Marine Resources of the Worlds Oceans and Seas; 1995 Fish Stocks Agreement, Article 5(e).

⁵⁷ For example, 1974 Nordic Environmental Protection Convention, Article 6; 1980 Convention on the Conservation of Antarctic Marine Living Resources, Article XV(2)(d); 1982 UN Convention on the Law of the Sea, Article 206; 1985 ASEAN Agreement on Nature and Natural Resources, Article 14(1); 1988

50. Therefore, it is clear that compliance with the requirements inherent in the precautionary principle could be effectively achieved in respect of the present Project by means of an adequate EIA process. Judge Weeramantry clearly considered that the requirement for environmental impact assessment is ancillary to the precautionary principle and, in his highly influential opinion appended to the International Court of Justice judgment in the *Gabcikovo-Nagymaros* case, he expressly describes the environmental impact assessment procedure as ‘a specific application of the larger general principle of caution’.⁵⁸

51. This approach is found in the EBRD Environmental Policy, where Section III, paragraph. 14, setting out the function of the environmental appraisal process, provides that ‘The EBRD supports a precautionary approach to the assessment of environmental impacts’. Arguably, the precautionary approach interacts with the environmental impact assessment procedure required under the EBRD Environmental Policy in at least two ways. On the one hand, environmental impact assessment procedures are generally regarded as a means of giving practical effect to the precautionary principle and, on the other, the precautionary principle may determine when a proposed project is likely to have a significant impact on the environment and therefore require an EIA.

52. Application of the precautionary principle to the question of the likelihood of harm would suggest that only a relatively low threshold of risk is required for an EIA to be warranted. When carrying out an EIA, the precautionary principle might be interpreted as requiring that the broadest possible range of potential impacts are studied and considered, even those which might be regarded as less obvious, imminent or directly relevant to any particular interests.

53. The question raised by the Affected Group concerning violation of the precautionary approach required under the EBRD Environmental Policy can only be addressed by determining whether the EIA process was adequately carried out having regard to the requirements of the precautionary principle.

*Findings on Compliance with the obligations set out under Environmental Policy
Section II, Paragraph 6.*

54. The findings outlined above with regard to the adequacy of the EIA process for the purposes of determining compliance with Section I, paragraphs 1-3 of the Environmental Policy are equally valid for the purposes of this element of the Affected Group’s Complaint.

Convention on the Regulation of Antarctic Mineral Resource Activity, Articles 2(1)(a) and 4; 1991 Protocol on Environmental Protection to the Antarctic Treaty, Article 8 and Annex I; 1991 UN ECE Convention on Environmental Impact Assessment in a Transboundary Context; 1992 Climate Change Convention, Article 4(1)(f); 1992 Biodiversity Convention, Article 14(1)(a); 1992 UN ECE Convention on the Transboundary Effects of Industrial Accidents, Article 4(4) and Annex III;

⁵⁸ I.C.J. Rep. (1997) 7, Separate Opinion of Vice President Weeramantry, at, at 21.

55. By alleging that the Project violates ‘the precautionary approach in natural biodiversity resources’, the Affected Group is suggesting that the EBRD failed in its duty to ensure that the Project Sponsor took appropriate measures to anticipate, prevent or minimise the risk of a particular form of environmental damage due to a lack of full scientific certainty as to its cause, seriousness or likelihood.

56. However, the Complaint provides no further information as to what particular risks the EIA failed to address. If the Affected Group had in mind those ‘factors’ listed above in the context of compliance with the requirements of Section I, paragraphs 1-3 of the Environmental Policy, *i.e.* tourism, fisheries, coral, cultural property, and proximity to the Narta Lagoon,⁵⁹ then the findings outlined in paragraphs 23- 53 above would refute the alleged violation of Section II, paragraph 6.

57. Further, the EBRD exercised considerable caution at the stage of screening the Project by identifying it as a Category A project, with the result that an EIA was required. The proposed plant would have an electrical output of 97 megawatts, corresponding to a thermal output of just under 300 megawatts, which is the threshold at which Annex 1 of the Environmental Policy requires such a facility to be categorised as Category A.⁶⁰ This categorisation went beyond that which was strictly required under Annex I, apparently due to the proximity of the site to the proposed Protected Landscape at Narta Lagoon.

58. This approach to the screening of the Project exemplifies the implementation of ‘a precautionary approach to the assessment of environmental impacts’, in accordance with Section III, paragraph 14 of the Environmental Policy.

59. More generally, the concerns raised by the EBRD in relation to the Final EIA of October 2003 and the preparation of the EIA Addendum in order to provide additional information on the process of site selection,⁶¹ the protection of protected areas,⁶² and the risk of potential mercury release from dredging activity,⁶³ can clearly be regarded as taking a precautionary approach to the conduct of an EIA, ensuring that the broadest possible range of potential impacts are studied and considered.

Conclusion

60. Consistent with the understanding that compliance with Section II, paragraph 6 of the Environmental Policy can only be determined by means of an examination of the conduct of the EIA process, the Compliance Review Expert does not find that the EBRD failed in its obligation to ensure that an adequate EIA was carried out in accordance with the requirements of the precautionary principle.

⁵⁹ See, Complaint, Part B, para. 2, at 5.

⁶⁰ See, EBRD, *Environmental Policy* (29 April 2003), Annex 1: *Environmental screening categories*, para. 2 of which includes among “A” level projects ‘Thermal power stations and other combustion installations with a heat output of 300 megawatts or more’.

⁶¹ MWH Consulting, *Final EIA Addendum* (December 2003), Section 6.1, at 18-24.

⁶² MWH Consulting, *Final EIA Addendum* (December 2003), Sections 3 and 4, at 12-14.

⁶³ MWH Consulting, *Final EIA Addendum* (December 2003), Section 5.4, at 16-17.

61. Consequently, in respect of Section II, paragraph 6 of the Environmental Policy, the conclusion of the Compliance Review Expert is that the EBRD's actions have not involved one or more material violations of a Relevant EBRD Policy within the ambit of the IRM, RP 23 and 24.

Environmental Policy Sections II.11 and III.26 (Information Disclosure and Public Consultation)

62. The Affected Group alleges that the EBRD's actions have violated Section II, paragraph 11 and Section III, paragraph 26 of the Environmental Policy on 'information disclosure and public consultation'.⁶⁴ Section II, paragraph. 11 of the Environmental Policy sets out the EBRD's general commitment to 'enabling dialogue with stakeholders, including civil society at large' in line with its *Public Information Policy*. In so doing, Section II, paragraph. 11 expressly commits the EBRD to support 'the spirit, purpose and ultimate goals of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the UNECE Convention on Environmental Impact Assessment in a Transboundary Context.'

63. Further Section III, paragraph. 26 of the Environmental Policy commits the EBRD to meaningful public consultation and provides 'In the case of projects which have been classified as Category A and thus require an Environmental Impact Assessment, those people potentially affected will have the opportunity to express their concerns and views about issues such as project design, including location, technological choice and timing, before a financing decision is made by the EBRD.'

64. Therefore, before deciding whether to lend, the Bank must be satisfied that the project sponsor has given people, potentially affected by the intended project, the opportunity to express views on a range of aspects of the project, including its location.⁶⁵ This paragraph further requires that any national requirements for public consultation and the EBRD's public consultation requirements under Annex 2 of the Environmental Policy must be respected.⁶⁶

65. Annex 2 sets out a number of specific requirements in respect of "A" level projects, including:

- i. that 'consultation requirements are built into each stage of the EIA' and that '[T]he Bank will evaluate the sponsor's public consultation programmes for adequacy and advise the sponsor accordingly';⁶⁷

⁶⁴ Complaint, at 5, Part B, para. 4.

⁶⁵ See further, EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section I, which provides that 'Public consultation and information disclosure is the responsibility of the project sponsor, and will be reviewed by the Bank, in line with its Policy commitments.'

⁶⁶ The requirement to comply with national and EBRD requirements for public Consultation is reiterated in EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section II, para. 1.

⁶⁷ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 1 (emphasis added). It is worth noting that Section III, para. 2 defines "the affected public" as 'the potentially affected public and interested non-governmental organisations', which would appear to expand on Section III, para. 26 of the Environmental Policy, which refers to '*people* potentially affected', in terms of those entitled to

- ii. that the affected public are notified of the nature of the project;⁶⁸
- iii. that the ‘scoping process will involve contact by the project sponsor with representatives of the affected public, government agencies, local authorities and other organisations’;⁶⁹
- iv. that a draft Public Consultation and Disclosure Plan (PCDP) be prepared on which the public should be able to provide comments and recommendations, and that the final PCDP should meet the Bank’s requirements;⁷⁰
- v. that the EIA should be made publicly available for comment and that, where necessary, material additional to the core EIA document should be released.⁷¹

66. It should be noted that, according to the Introduction to Annex 2, ‘Public consultation and information disclosure is the responsibility of the project sponsor, and will be reviewed by the Bank, in line with its Policy commitments.’⁷² However, Annex 2 does impose a number of obligations on the Bank in addition to that of reviewing compliance by the project sponsor with the EBRD public consultation requirements. Specifically, the Bank must ensure that once the EIA documents have been released into the public domain, a copy will be provided to the Bank’s Business Information Centre (“BIC”) in London and made available in the EBRD Resident Office (“RO”), and that a notice of the availability of the document in the BIC and RO is posted on the Bank’s website.⁷³ A copy of the EIA must also be provided to the Board of Directors.⁷⁴

67. In the case of a public sector project, such as the present Project, the Bank must ensure a minimum public consultation period of 120 days, between the date that the EIA is made available to the Board of Directors and the date of Board consideration of the project, although a longer consultation period may be required by the Bank for more complex projects.⁷⁵

68. Following completion of the public consultation period, Annex 2 also requires that ‘Environmental staff of the EBRD will summarise public comment brought to the Bank’s attention along with the report on public consultation from the project sponsor ... [in order that] ... when considering whether to approve a project, the Board of Directors will take into account the comments and opinions expressed by consultees and the way these issues are being addressed by project sponsors.’⁷⁶

information, and is more consistent with Section II, para. 11 of the Environmental Policy, which refers to ‘civil society at large’.

⁶⁸ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 2.

⁶⁹ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 3.

⁷⁰ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 3.

⁷¹ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 4.

⁷² EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section I

⁷³ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 6.

⁷⁴ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 6.

⁷⁵ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 7.

⁷⁶ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 9.

69. Express reference in the EBRD Environmental Policy to the two UNECE Conventions⁷⁷ makes it clear that the procedures and standards contained therein are to inform any determination as to the adequacy of the EBRD's actions in respect of information disclosure and public consultation. Indeed, in respect of "A" level projects, Annex 2 to the Environmental Policy states categorically that 'For all projects involving Environmental Impact Assessments according to the Bank's requirements, the Bank will take guidance from the principles of the UNECE Convention on Access to Information Public Participation in Decision-making and Access to Justice in Environmental Matters, as committed in the EBRD Public Information Policy.'⁷⁸

Findings on Compliance with the obligations set out under Environmental Policy Section II, Paragraph 11 and Section III, Paragraph 26.

70. In relation to the EBRD's compliance with the requirements for public consultation, it is necessary, as a preliminary issue, to consider the timing of the Bank's involvement with the Project. At the time the Project passed Concept Review on 13 June 2003, the site selection study regarding the construction of the plant in Vlora had already been completed⁷⁹ and the initial public consultation meeting on the siting of the plant, convened by the Albanian Ministry of Energy and Industry, had been held on 31 October 2002.⁸⁰ Indeed, the relevant Albanian authorities had approved the siting of the plant in Vlora in December 2002⁸¹ and February 2003.⁸²

71. In addition, the EIA process and the attendant public consultation were well underway under the auspices of the World Bank; a public meeting held on 2 April 2003 to review the scope of the EIA is recorded as having been attended by more than 100 people.⁸³

72. That the EBRD sought to rely on these public consultations which it believed had been carried out in accordance with Albanian legislation and the World Bank's environmental guidelines (comparable to the EBRD EIA requirements) is not surprising.⁸⁴ In considering whether such reliance was reasonable for the purposes of

⁷⁷ EBRD, *Environmental Policy* (29 April 2003), Section II, para. 11.

⁷⁸ EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 10.

⁷⁹ MWH Consulting, *Final Siting Study* (21 October 2002).

⁸⁰ It should be noted that, due to the paucity of records available in respect of this meeting, the Aarhus Convention Compliance Committee were unable to establish definitively the precise date on which it was held and could only determine that it took place on either 28 or 31 October 2002. See, ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), (UN Doc. No. ECE/MP.PP/C.1/2007/4/Add.1), para. 76, at 18.

⁸¹ Vlora Council of Territorial Adjustment / Arrangement (Vlora County Council), *Decree No. 4, 'To approve the Construction Site for "Construction of TPP according to Vlora B version" (21 December 2002).* [Local Site Permit]

⁸² Council of Territorial Adjustment / Arrangement of the Republic of Albania, *Decree No. 20, 'To approve the Construction Site (19 February 2003).* [Government Site Permit]

⁸³ See, ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 43(b), at 11.

⁸⁴ This would appear to be the position put forward by EBRD in its response of 25 October 2006 to a letter from the Aarhus Convention Compliance Committee. See, ECE Aarhus Convention Compliance

ensuring the Bank's compliance with the general requirement to facilitate public participation in the decision-making processes underlying the various decisions taken by the Albanian authorities in regard to the Project, it is helpful to have regard to the recent findings⁸⁵ of the Aarhus Convention Compliance Committee (ACCC)⁸⁶ and to the Eligibility Report issued by the World Bank Inspection Panel in respect of the same project.⁸⁷

73. In relation to the meeting in October 2002, which was to have facilitated public consultation in respect of the decision to site the plant in Vlore, the ACCC, in its report of June 2007, has concluded that Albania 'failed to comply with the requirements for public participation set out in paragraphs 3, 4 and 8 of Article 6 of the [Aarhus] Convention'.⁸⁸ The ACCC reached this conclusion on the basis of the 'unclear circumstances surrounding the meeting in October 2002, and the failure of the Party concerned to provide anything to substantiate the claim that the meeting was duly announced and open for public participation, as well as concerns about the quality of the meeting records.'⁸⁹

74. In reaching the aforesaid conclusion the ACCC compared the minutes and list of participants of the October 2002 meeting with those of the meeting of 30 September 2003 and found an extraordinary degree of overlap in respect of the questions put forward by the participants, the replies offered and general interventions made by the public officials, and the participants in attendance. According to the ACCC 'The results of this comparative analysis raise serious concerns regarding the extent to which the report of the meeting can be relied upon as an accurate record of the proceedings as well as regarding the genuine nature of the questions and concerns raised, recorded and subsequently taken into account in the decision-making process.'⁹⁰

75. The ACCC expressed further concern about the meetings of 2 April 2003 and 3 September 2003, as well as the October 2002 meeting, in terms of the manner in which

Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 22, at 6-7.

⁸⁵ It is worth noting that IRM RP 15 provides that 'Where a complaint, grievance or request has been filed by an Affected Group, or part thereof, with another international financial institution or entity, the Bank and IRM Officers shall work in close cooperation with such international financial institution or entity to avoid duplication of efforts in the investigation or processing of a Complaint.'

⁸⁶ ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007).

⁸⁷ World Bank Inspection Panel, Report No. 40213-AL: *Report and Recommendation - Albania: Power Sector Generation and Restructuring Project* (IDA Credit No. 3872-ALB) (2 July 2007).

⁸⁸ Article 6, paragraph 3 provides 'The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public ... and for the public to prepare and participate effectively during the environmental decision-making.'

Article 6, paragraph 4 provides 'Each Party shall provide for early public participation, when all options are open and effective public participation can take place.'

Article 6, paragraph 8 provides 'Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.'

⁸⁹ ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 78, at 18.

⁹⁰ ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 77, at 18.

they were publicly announced and in which interested participants were identified and invited. Not surprisingly, the ACCC reached a finding of serious shortcomings by virtue of the fact that these meetings did not identify the strong local opposition to the project which had become apparent in the interim period.⁹¹

76. The ACCC points out that ‘No information has been provided by the party concerned to demonstrate that the meetings in April and September 2003 were publicly announced, so as to allow members of the public opposing the project to actively take part in the decision-making. Nor has the party concerned been able to give any reasonable explanation as to why the rather strong local opposition to the project, indicated by the 14,000 people calling for a referendum, was not heard or represented properly at any of these meetings. This gives rise to concerns that the invitation process also at this stage was selective and insufficient.’⁹²

77. Of central significance to the question of the EBRD compliance with its requirements for public consultation⁹³ is the clear determination by the ACCC to the effect that ‘once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, [of the Aarhus Convention] to provide “early public participation when all options are open”. This is the case even if a full environmental impact assessment is going to be carried out. Providing for public participation only at that stage would effectively reduce the public’s input to only commenting on how the environmental impact of the installation could be mitigated, but precluding the public from having any input on the decision on whether the installation should be there in the first place, as that decision would already have been taken.’⁹⁴ This view is also consistent with the position stated previously by the ACCC in respect of Article 6, paragraph 4.⁹⁵

78. The ACCC’s understanding of the need for early public consultation is reflected in the EBRD Environment Department’s own detailed guidance, which provides that ‘EBRD believes that people who are potentially affected by a project should be meaningfully consulted and have the opportunity to express their concerns and views

⁹¹ Of course, this line of reasoning would raise some questions about the adequacy of the public consultation measures taken subsequent to EBRD’s involvement in the Project as Annex 3 to the EBRD Eligibility Assessment Report issued in respect of this Complaint records, at 37, that ‘No comments were received by the World Bank or EBRD from any member of the Affected Group during the public consultation periods held in 2003 and 2004.’ However, for the purposes of this Compliance Review, the public consultation arrangements associated with the December 2002 and February 2003 decisions to locate the plant at the Vlore B site raise the most serious questions regarding the Bank’s compliance with the requirements of its policies.

⁹² ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 81, at 19.

⁹³ See, EBRD, *Environmental Policy* (29 April 2003), Section II, para. 11 and EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section III, para. 10.

⁹⁴ ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 79, at 18-19.

⁹⁵ See, ECE/MP.PP/C.1/2005/2/Add.4, para.11 and ECE/MP.PP/C.1/2006/2/Add.1, para.29.

about proposed projects and issues such as project design, including location, technological choice and timing. Consultation should start prior to and continue throughout the EIA process.’⁹⁶

79. In the case of a project, co-financed by a number of international financial institutions, with lenders becoming involved at different stages in the project’s planning and each institution employing broadly comparable safeguard policies and procedures, it becomes necessary to consider the extent to which EBRD, may rely on the adequacy of the public consultation measures overseen by another institution prior to its participation in the project.

80. It is useful to note that the Environmental Policy anticipates inter-institutional cooperation and expressly provides that ‘The EBRD will work with other international financial institutions, the European Union, bilateral donors, UN agencies and other organisations in promoting a coordinated approach to effective environmental interventions’.⁹⁷ Central to this issue is the degree to which the EBRD should take active steps to determine whether measures overseen by another institution were adequate for the purposes of compliance with the EBRD policies.

81. In a document disclosed in February 2004 regarding the EBRD’s public consultation requirements, the Bank stated ‘The public was well engaged in a dialogue concerning the project early on in the EIA process. Public announcements were thorough, transparent, and well distributed. In accordance with a Public Disclosure and Consultation Plan, direct invitations to attend public meetings were also sent to institutions and individuals.’⁹⁸ Generally, the summary report indicates that the Bank was satisfied in respect of its compliance with its public disclosure and consultation requirements.⁹⁹

82. However, with regard to the October 2002 meeting concerning the siting of the plant, the EBRD’s summary document does not provide a precise date for this meeting, as it does for the second meeting on scoping and the third meeting to discuss the draft EIA. It merely states that ‘The first meeting was held in Vlore in autumn 2002 to introduce the project to the public and begin the public consultation process’.¹⁰⁰

⁹⁶ EBRD Environment Department, *EBRD Consultation and Disclosure Requirements: Guidance for Category A Projects* (July 2003), at 2.

⁹⁷ EBRD, *Environmental Policy* (29 April 2003), Section II, para. 9.

⁹⁸ EBRD, *Summary of Environmental Impacts associated with the Vlore Thermal Power Station*, (disclosed on EBRD website 6 February 2004), para. 3, at 2.

⁹⁹ See, for example, EBRD, *Summary of Environmental Impacts associated with the Vlore Thermal Power Station*, (disclosed on EBRD website 6 February 2004), para. 3, at 3, which concludes that ‘Throughout the public disclosure process, meetings were well attended by a varied group of people, and the Public provided input on any major concern or issue. The public was able to provide concerns or issues either in general or with respect to specific effects of the proposed plant. Comments were received and incorporated further into the EIA process.’

¹⁰⁰ EBRD, *Summary of Environmental Impacts associated with the Vlore Thermal Power Station*, (disclosed on EBRD website 6 February 2004), para. 3, at 3.

83. The December 2003 Addendum prepared in light of the EBRD's concerns about the adequacy of the EIA was equally vague with regard to the siting meeting, referring only to '[T]he first meeting, held in the fall of 2002'.¹⁰¹ It further reports that 'No minutes were available for the first meeting [whereas] Minutes of the second and third meetings are provided in Appendix E of the Final EIA along with a copy of the presentations given and a partial list of attendees.' Further, the December 2003 Addendum notes the lack of information available about how the meetings were announced and publicised and states 'In addition, it is unclear how the public announcement for these meetings was handled. Repeated attempts to gain this information resulted in no information.'¹⁰²

84. In a similar vein, the ACCC Report points out that 'the document does not go into detail as to who was notified or invited to which meeting, and information concerning the first [i.e. October 2002] meeting is particularly sparse.'¹⁰³

85. Whereas the National Agency for Energy promised to provide a detailed account of the public disclosure and consultation process,¹⁰⁴ no evidence has been provided that such a report was ever received.

86. It is clear from the summary document that the EBRD relied very heavily on information received from the World Bank.¹⁰⁵ Therefore, the EBRD ought to have had concerns about the adequacy of public consultation generally, particularly in connection with the decisions on the location of the power plant.¹⁰⁶

87. A letter of complaint of February 2005¹⁰⁷ suggests that there were deficiencies in public consultation on the siting of the plant. The complainant's asked:

- i. 'does Albanian public opinion count for anything in such important decision-making? and
- ii. Do you think that the publication of a KESH (the Albanian Power Corporation) paper in two or three newspapers soliciting discussion of the TEP, after the decision of the Albanian KRTT (Territorial Adjustment Council) had already been taken, is what is required to implement international conventions ratified by the Albanian Parliament, as well as

¹⁰¹ See, MWH Consulting, *Final EIA Addendum* (December 2003), Section 2.4 on 'Public Consultation', at 11.

¹⁰² MWH Consulting, *Final EIA Addendum* (December 2003), Section 8, at 36.

¹⁰³ ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 43(f), at 11.

¹⁰⁴ EBRD, Back-to-Office Report – visit to Vlore Power Station Project, 10-13 November 2003 (21 November 2003), para.1, at 1-2.

¹⁰⁵ The introductory section of the document providing 'Background' makes it clear that 'It is based on the Environmental Impact Assessment and makes, to a large extent, use of materials prepared by the World Bank for public disclosure and consultation.' See, EBRD, *Summary of Environmental Impacts associated with the Vlore Thermal Power Station*, (disclosed on EBRD website 6 February 2004), para. 0, at 1.

¹⁰⁶ Indeed they did, as did their counterparts in the European Investment Bank.

¹⁰⁷ Open Letter from Environmental Associations and Representatives of Civil Society in Albania to World Bank, Tirana and EBRD, Tirana: re *Energy Park, Vlora* (18 February 2005).

Albanian legislation, on public information and public participation in decision-making?’¹⁰⁸

88. Further, it is quite clear that pursuant to Section III, paragraph 26 of the EBRD Environmental Policy, the public consultation measures ought to have been reviewed by the Bank¹⁰⁹ in order to ascertain whether the Project Sponsor met the applicable national requirements for public consultation.¹¹⁰

89. Notwithstanding the fact that the National Agency of Energy and the Ministry of Environment had asserted that national requirements regarding public disclosure and consultation had been met,¹¹¹ the ACCC concluded to the contrary and found that Decision No. 20 of 19 February 2003 on the siting of the plant amounted to a failure on the part of the Albanian government to comply fully with the requirements of paragraphs 3, 4 and 8 of Article 6 of the Aarhus Convention.¹¹²

90. Indeed, the lack of any clear legislative requirements for public consultation under Albanian law was one of the central problems. According to the ACCC ‘By failing to establish a clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation, the Party concerned was not in compliance with article 3, paragraph 1 of the Convention.’¹¹³ More specifically, the Committee concluded ‘In particular, there is no clear procedure of early notification of the public (by public announcement or individual invitations, before a decision is made), identification of the

¹⁰⁸ Indeed, whilst well after the event objectors’ correspondence received by the international financial institutions which have supported this project and by Albanian public officials has consistently challenged the adequacy of public consultation, particularly in respect of the initial decision to locate the plant at the Vlore B site. For example, see also, Letter from Dr Anna Kohen, President, Albanian-Jewish Committee to Mr. Paul Wolfowitz, President, World Bank Group: re *Cancellation of the World Bank Project of Vlore Power Plant* (6 February 2006), which states ‘Moreover, please note that the information regarding public participation provided in the [World Bank’s] January 30th 2006 response is inflated and incorrect. The people of Vlore feel that they have been completely ignored, misled and not consulted on the matter.’ See also, Letter from Mr. Luan Muhameti, Committee for Ecological Protection and Vital Spaces to H.E. Alfred Moisiu, President of the Republic, H.E. Servet Pellumbi, Albanian Parliament and H.E. Fatos Nano, Government of Albania: re *On the Construction of the Thermal Power Plant, Oil Deposits, Refinery etc. in Vlore and its Bay* (21 February 2005).

¹⁰⁹ See, EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section I, para. 1.

¹¹⁰ The requirement to comply with national and EBRD requirements for public Consultation is reiterated in EBRD, *Environmental Policy* (29 April 2003), Annex 2, Section II, para. 1. See, more generally, EBRD, *Environmental Policy* (29 April 2003), Section III, para. 16, which provides ‘In addition, projects supported by the Bank must always meet the requirements under the applicable legislation.’

¹¹¹ EBRD, Back-to-Office Report – visit to Vlore Power Station Project, 10-13 November 2003 (21 November 2003), para.1, at 1. Though it should be noted that the Vice-Minister of Environment appeared to express concerns in October 2003 as to whether the Final EIA had been checked for full compliance with all of the relevant provisions of Albanian environmental legislation. See, Mr. Besnik Baraj, Vice-Minister of Environment, Albania: *Comments regarding the final draft of the study which deals the evaluation of the environmental impact of new Vlore Thermal Power Plant*, (15 October 2003).

¹¹² Albania ratified the Aarhus Convention on 27 June 2001.

¹¹³ ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 94, at 22.

public concerned, quality of participation, or taking the outcome of public meetings into account.’¹¹⁴

Conclusion

91. After due consideration of all of the relevant facts and circumstances, the Compliance Review Expert finds that the EBRD failed to ensure full compliance with its obligations under Section II, paragraph 11 and Section III, paragraph 26 of the EBRD Environment Policy. More specifically, before deciding whether to lend, the Bank failed to take appropriate steps in order to satisfy itself that the project sponsor had given people potentially affected by the project the opportunity to express views on the location of the Project in accordance with Bank policy and with national legal requirements.

92. That said, it is acknowledged that the Bank did ensure that an additional public consultation period of 120 days was held with regard to the EIA Addendum, and it is worth noting that during this period no submissions were received in respect of the siting of the Project. Further, the ultimate location selected for the siting of the Project would not likely have been greatly influenced by information received in the course of a more satisfactory public consultation exercise, as the decision on siting was based on a rational, objective and thorough study of the available options.¹¹⁵

93. Also, while it might be argued that deficiencies in public consultation in respect of the siting of the Project may have contributed to the alleged failure to take adequate steps to protect cultural property, such steps as might reasonably have been expected can still be taken during the construction of the plant.¹¹⁶

94. In the circumstances, the Compliance Review Expert is of the view that the aforesaid failure of the Bank to ensure full compliance with its obligations under Section II, paragraph 11 and Section III, paragraph 26 of the EBRD Environment Policy constitutes a material violation of the Environmental Policy warranting remedial changes to the Bank’s practices and procedures so as to avoid a recurrence of such or similar violations in the future but not one warranting any remedial changes in the scope or implementation of the Project.¹¹⁷

¹¹⁴ ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 87, at 20.

¹¹⁵ MWH Consulting, *Final Siting Study* (21 October 2002).

¹¹⁶ Memorandum from Mr. Charles M Feinstein, Section manager, ECSIE, World Bank, to Mr. Henk Busz, Lead Advisor, ECSIE, ECA (Consultant), Ms. Arlene Fleming, Cultural Resource Specialist and Safeguards Advisor (Consultant), and Mr. Artan Guxho, Project Officer, ECSIE, World Bank, of 27 July 2006, re: *Albania: Power Sector Generation and Restructuring Project Cultural Resources [P077526] – Back to Office Report for Supervision Mission – July 9 – 15, 2006*, para. 3, at 2.

¹¹⁷ This determination is made in light of the discussion of the concept of a ‘material violation’ above (para 7) and having regard to the spirit and intent of IRM RP 34 (c).

Environmental Policy Section III, Paragraph 21 (Safeguard of Cultural Property)

95. Section III, paragraph 21 of the Bank's Environmental Policy requires that EBRD financed projects must meet (i) applicable national environmental law; and (ii) EU environmental standards, insofar as these can be applied to a specific project. In respect of national environmental requirements, the Policy further requires that the Bank 'will not finance projects that would contravene country obligations under relevant international environmental treaties and agreements', such as the Aarhus Convention.

96. In the present Complaint, the Affected Group contends that the Project violates EBRD Environmental Policy Section III., paragraph 21 because it contravenes Albania's obligations under the Aarhus Convention.¹¹⁸

97. Section III, paragraph 21 of the Policy, also provides that, where such national or EU standards do not exist or are inapplicable, the EBRD shall identify, and require that projects comply with other standards representing good international practice, such as those adopted by the World Bank or other IFIs. More specifically, this provision additionally instructs that 'projects will also be structured to meet IFC Safeguard Policies on indigenous peoples, involuntary resettlement and cultural property, if they involve potential impacts related to such matters.'

98. The EBRD Environmental Policy makes it quite clear that the Bank subscribes to IFC OPN 11.03 on cultural property¹¹⁹ and, in the present Complaint, the Affected Group alleges that the Project contravenes IFC OPN 11.03.¹²⁰

99. In general terms IFC OPN 11.03 requires the Bank to assist in the preservation of cultural property and to seek to avoid its elimination.¹²¹ More specifically, it requires that the Bank:

- i. 'normally declines to finance projects that will significantly damage non-replicable cultural property, and will assist only those projects that are sited or designed so as to prevent such damage';¹²²
- ii. 'will assist in the protection and enhancement of cultural properties encountered in Bank-financed projects', by, for example, ensuring that relevant structures are 'relocated, preserved, studied, and restored on alternate sites' and that 'such projects should include the training and strengthening of institutions entrusted with safeguarding a nation's cultural patrimony';¹²³ and
- iii. may only justify deviating from this policy 'where expected benefits are great, and the loss of or damage to cultural property is judged by

¹¹⁸ Complaint, at 5, Part B, para. 5.

¹¹⁹ World Bank Operational Policy Note No. 11.03, *Management of Cultural property in Bank-Financed Projects* (September 1986). See, EBRD, *Environmental Policy* (29 April 2003), Section I, para. 3 (footnote 2) and Section III, para. 21 (footnote 3).

¹²⁰ Complaint, at 5, Part B, para. 5.

¹²¹ IFC OPN 11.03 (September 1986), para. 2.

¹²² IFC OPN 11.03 (September 1986), para. 2(a).

¹²³ IFC OPN 11.03 (September 1986), para. 2(b).

competent authorities to be unavoidable, minor, or otherwise acceptable'.¹²⁴

100. While management of cultural property remains primarily the responsibility of the government, IFC OPN 11.03 clearly stipulates that 'before proceeding with a project which prima facie entails the risk of damaging cultural property Bank staff must:

- i. determine what is known about the cultural property aspects of the proposed project site. The government's attention should be drawn specifically to that aspect and appropriate agencies, NGOs or university departments should be consulted;
- ii. if there is any question of cultural property in the area, a brief reconnaissance survey should be undertaken in the field by a specialist.'¹²⁵ A technical paper is appended to IFC OPN 11.03 which includes a survey form and sets down, inter alia, the procedures to be followed in the event of a positive survey.

Findings on Compliance with the obligations set out under Environmental Policy Section III, Paragraph 21.

101. The question of compliance with national measures, if any, has largely been dealt with above. For example, in making a determination as to whether the EIA process was adequate, this Review has examined the extent to which it satisfied national, EU and international standards. In relation to some sectoral areas, the Albanian law was only emerging and so the more developed EU and international standards were applied.¹²⁶

102. Similarly, the nature and significance of the obligations for public consultation arising under Albanian law by virtue of the Aarhus Convention have also been considered at length. This has necessarily involved an examination of whether the Project 'would contravene country obligations under relevant international environmental treaties and agreements', pursuant to Section III, paragraph 21.

103. It is clear that the claims made for the Vlore B site by the Affected Group and other opponents of the Project bring it within the scope of IFC OPN 11.03, which defines "cultural property" to include 'sites having archaeological (prehistoric), paleontological, historical, religious, and unique natural values. Cultural property, therefore, encompasses both remains left by previous human inhabitants (for example, middens, shrines, and battlegrounds) and unique natural environmental features such as canyons and waterfalls'.¹²⁷

¹²⁴ IFC OPN 11.03 (September 1986), para. 2(c).

¹²⁵ IFC OPN 11.03 (September 1986), para. 3.

¹²⁶ For example, in a discussion of the Law on Protected Areas, adopted by the Albanian Parliament in June 2002, the EIA Addendum notes that 'The Albanian law on protected areas is still in development' [and that] 'The details of the law and its impact are still being developed by the MOE'.

See, MWH Consulting, *Final EIA Addendum* (December 2003), Sections 3 and 4, at 13.

¹²⁷ IFC OPN 11.03 (September 1986), para. 1.

104. The site in question would have historical and religious value if it could be established to be the precise location where Sephardic Jews escaping the Spanish Inquisition in 1492 landed before settling in Vlore. (A historical landing site could clearly be said to be analogous to an historical battleground.) However, little evidence has been provided in the Complaint to assist the Compliance Review Expert in making a determination as to the likely accuracy or veracity of these claims.¹²⁸

105. Neither is there any indication that such evidence was presented to EBRD staff or even that the concerns about the protection of cultural property were made known to EBRD staff. Correspondence sent to the World Bank from persons opposed to the siting of the plant at Triport Cape on grounds of the cultural significance of the site¹²⁹ was not copied to any EBRD official. The correspondence provided very little detail to support the belief that this was the exact spot at which Sephardic Jews landed in 1492 or to explain what, if any, ‘non-replicable cultural property’, might be damaged.¹³⁰

106. Dr. Anna Kohen, writing both as President of the Albanian American Women’s Organisation and President of the Albanian-Jewish Committee, asserts that ‘Illyrians, Romans, Greeks, Normans, Venetians and Ottomans have used the Triport Cape site. In 1492 thousands of Jews escaping from the Spanish Inquisition landed there and settled in the nearby city of Vlora’.¹³¹ Dr Kohen further suggests that ‘Triport Cape is an ancient Mediterranean port that should be turned into a protected National Historical Park [and that] Triport Cape should therefore become an international historical centre dedicated to the rescue of all persecuted people in the Mediterranean’.¹³²

107. On the other hand, the site was not considered by the Ministry of Environment for inclusion in the Category V Protected Landscape for the Narta Lagoon, proposed for designation under the National Strategy on Biodiversity in accordance with the Law on Protected Areas, approved by the Albanian Parliament in June 2002. In fact, ‘the issue of

¹²⁸ In fact, objective scientific analysis would appear to suggest otherwise as the experts’ report from July 2006 concludes that ‘the project complies with OPN 11.03 and the relevant Albanian laws and obligations governing protection of cultural heritage. Aside from monitoring excavation during the construction of the plant and its related structures, no further actions related to cultural heritage are required for this Project.’ See, memorandum from Mr. Charles M Feinstein, Section manager, ECSIE, World Bank, to Mr. Henk Busz, Lead Advisor, ECSIE, ECA (Consultant), Ms. Arlene Fleming, Cultural Resource Specialist and Safeguards Advisor (Consultant), and Mr. Artan Guxho, Project Officer, ECSIE, World Bank, of 27 July 2006, re: *Albania: Power Sector Generation and Restructuring Project Cultural Resources [P077526] – Back to Office Report for Supervision Mission – July 9 – 15, 2006*, para. 4, at 2. Reproduced at Annex 3 to the World Bank Management Response to the Inspection Panel, at: <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelAlbaniaVloreManagementResponseAnnexes3to6May252007.pdf>

¹²⁹ See, Letter from Dr Anna Kohen, to Mr. Paul Wolfowitz, President, World Bank Group: re *Power Sector generation and Restructuring Project* (12 January 2006) and Letter from Dr Anna Kohen, President, Albanian-Jewish Committee to Mr. Paul Wolfowitz, President, World Bank Group: re *Cancellation of the World Bank Project of Vlora Power Plant* (6 February 2006).

¹³⁰ See, IFC OPN 11.03 (September 1986), paras. 1 and 2.

¹³¹ *Critique of the World Bank’s Power Plant project, Vlora, Albania*, appended to Letter from Dr Anna Kohen, President, Albanian-Jewish Committee to Mr. Paul Wolfowitz, President, World Bank Group: re *Cancellation of the World Bank Project of Vlora Power Plant* (6 February 2006).

¹³² *Ibid.*

the cultural significance of Triporte Cape had not been raised at the scoping sessions or at any other stage during the preparation of the environmental assessment for the project'.¹³³ Accordingly, cultural property was not dealt with, in terms of consideration of alternatives sites or mitigation measures, in either the final EIA document¹³⁴ or the EIA Addendum.¹³⁵

108. Further, considerations of cultural property did not feature at all in the Final Siting Study, which ranked the seven sites evaluated on the basis of 10, primarily technical, criteria. Indeed, no mention whatsoever was made of the existence of, or need to preserve, cultural property in the Siting Study's discussion of the Vlorë B site.¹³⁶

109. It is now known that in response to Dr Kohen's correspondence of 6th February 2006, the World Bank wrote to the Albanian government, (although it did not copy the EBRD), requesting that it 'would like to be informed if the Government or the Vlore Municipality:

- i. has any information about the actual site of the 1492 landings in relation to the site of the Vlore Power Plant, and/or
- ii. has any plans under consideration to designate any specific area in the vicinity of the site of the Vlore Power Plant as a historical park or other culturally significant landmark.'¹³⁷

110. According to the World Bank Inspection Panel's report of the World Bank Management's Response to the Request for Inspection, 'Management agrees that there was insufficient coverage in the EA on the matter of the review of potential cultural property. Management indicates that when this issue was subsequently raised, it carried out a supervisory visit in July 2006.'¹³⁸

111. The Inspection Panel's report goes on to report that 'Management notes that as a result of the visit, it concluded "that the site is not of archaeological significance due to the known locations of the ancient city sites in the Vlore Bay region and the lack of any

¹³³ Letter from Ms. Greta Minxhozi, Acting Country Manager, World Bank to H.E. Genc Ruli, Minister of Economy, Trade and Energy, Albania: *re DR. Cohen's Letter of February 6, 2006 on the Vlore Thermal Power Plant* (23 February 2006).

¹³⁴ The final EIA reported that 'Detailed information and data concerning cultural resources and any potential archaeological sites in the Vlore area are not available. MWH Consulting, *Final Environmental Impact Assessment Report – Vlore Combined*, (6 October 2003) Section 5.5.3, at 54.

¹³⁵ Though it might be argued that this is in part due to the deficiencies identified above in the public consultation process, and, in particular public consultation in respect of the decision to locate the plant at the Vlore B site, for the purposes of this review of EBRD compliance with its policy requirements the issue of public consultation is dealt with definitively and exhaustively above in the findings on compliance with Section II, para. 11 and Section III, para. 26 of the EBRD Environmental Policy.

¹³⁶ MWH Consulting, *Final Siting Study* (21 October 2002), Section 7.2.7, at 117-121.

¹³⁷ Letter from Ms. Greta Minxhozi, Acting Country Manager, World Bank to H.E. Genc Ruli, Minister of Economy, Trade and Energy, Albania: *re DR. Cohen's Letter of February 6, 2006 on the Vlore Thermal Power Plant* (23 February 2006).

¹³⁸ Back-to-Office Report on Cultural Property Issues, July 2006, included as Annex 3 to management Response, cited in World Bank Inspection Panel, Report No. 40213-AL: *Report and Recommendation - Albania: Power Sector Generation and Restructuring Project* (IDA Credit No. 3872-ALB) (2 July 2007), para. 27, at 7. See, *supra*, n.

evidence of humans habitation during digging for the adjacent fishing harbour in the early 1980s and beyond. Consequently a surface survey of the selected site prior to the start of construction is neither necessary nor justifiable”.¹³⁹ In addition, the Inspection Panel noted that ‘Management also states that “monitoring of excavations during construction of the plant and related civil works to identify and protect ‘chance finds’ was deemed the only action that needed to be taken, consistent with established Bank practice, and this is provided in the EPC contract.”¹⁴⁰

112. Notwithstanding, in finding the Request for Inspection eligible and recommending an investigation of the matters raised therein, the World Bank Inspection Panel noted in respect of the cultural property claims that ‘Local archaeological experts reiterated and provided further information about these claims to the Panel Team during its visit to the Project area’.¹⁴¹

Conclusion

113. In the circumstances it is appropriate to leave it to the World Bank Inspection Panel to complete its ongoing investigation.

114. Correspondingly, it would be inappropriate for the Compliance Review Expert to make a determination regarding EBRD compliance when no evidence has been presented that the EBRD was informed of concerns in respect of cultural property until receipt of the IRM Complaint in April 2007.

115. Consequently any IRM finding regarding EBRD compliance with IFC OPN 11.03 would necessarily be based on an incomplete knowledge of the facts and would risk prejudicing the deliberations of the Inspection Panel, contrary to the general spirit and intent of the IRM Rules of Procedure.¹⁴² In regard to same, it is noted that IRM RP 15

¹³⁹ World Bank Management’s Response to the Request for Inspection (1 June 2007), para. 56/57, cited in World Bank Inspection Panel, Report No. 40213-AL: *Report and Recommendation - Albania: Power Sector Generation and Restructuring Project* (IDA Credit No. 3872-ALB) (2 July 2007), para. 27, at 7 and para.60, at 13 .

¹⁴⁰ World Bank Management’s Response to the Request for Inspection (1 June 2007), para. 44, cited in World Bank Inspection Panel, Report No. 40213-AL: *Report and Recommendation - Albania: Power Sector Generation and Restructuring Project* (IDA Credit No. 3872-ALB) (2 July 2007), para.60, at 13.

¹⁴¹ World Bank Inspection Panel, Report No. 40213-AL: *Report and Recommendation - Albania: Power Sector Generation and Restructuring Project* (IDA Credit No. 3872-ALB) (2 July 2007), para. 59, at 13. Though the Back to Office Report relating to the World Bank Management site visit to investigate cultural resources, *supra*, n, para. 2, at 2, notes that ‘The mission held extensive discussions with principal Albanian archaeologists, including those with national responsibility for protecting and managing the country’s physical cultural resources. Mission members also reviewed the archaeological literature related to Vlore Bay, and visited the project site selected for construction of the thermal power plant. Based on this investigation, the mission concluded that the site is not of archaeological significance ...’.

¹⁴² See, for example, IRM RP 43(f), which applies to the IRM’s complementary problem-solving function and requires that ‘In considering whether a Problem-solving Initiative should be recommended, the Chief Compliance Officer ... shall take into consideration:

- f. whether the Problem-solving Initiative may duplicate, or interfere with, or may be impeded by, any other process pending before a court, arbitration tribunal or review body

provides that ‘Where a complaint, grievance or request has been filed by an Affected Group, or part thereof, with another international financial institution or entity, the Bank and IRM Officers shall work in close cooperation with such international financial institution or entity to avoid duplication of efforts in the investigation or processing of a Complaint.’

116. Further, and in any event, in the absence of a social protection expert on its staff with responsibility for, *inter alia*, cultural property, prior to 2005, it is clear that the EBRD heavily relied on the World Bank in terms of the assessment of cultural property issues. Arguably, any ultimate finding by the World Bank Inspection Panel of non-compliance with OPN 11.03 requirements on the part of World Bank Management, might apply equally to the EBRD, as both institutions are required to apply the same policy to the Project.

117. Notwithstanding, the Compliance Review Expert is of the view that any failure to comply with OPN 11.03 on the part of EBRD, if established, would not amount to a material violation warranting any remedial changes to the scope or implementation of the Project given that such a failure, if established, would not have had any significant implications for the scope or implementation of this Project in the absence of any structures or of any evidence of human habitation on the Project site. Further, any such measures as might reasonably be expected to be taken, including the monitoring of excavations in order to salvage and document any chance finds, have been agreed.¹⁴³

IV. Recommended Remedial Changes to EBRD Systems or Procedures

118. The Compliance Review Expert has determined the breach of a Relevant Policy identified in paragraph 94, as well as the possible violation identified in paragraph 117, should be addressed by the Bank by the adoption of the following recommended remedial changes to the Bank’s practices and procedures so as to avoid the recurrence of such or similar violations in the future.¹⁴⁴

119. Consequently, the Compliance Review Expert hereby recommends the adoption by the Bank of the following remedial changes to the Bank’s current practices and procedures:

(such as an equivalent mechanism at another co-financier) in respect of the same matter or a matter closely related to the same Complaint’.

¹⁴³ Memorandum from Mr. Charles M Feinstein, Section manager, ECSIE, World Bank, to Mr. Henk Busz, Lead Advisor, ECSIE, ECA (Consultant), Ms. Arlene Fleming, Cultural Resource Specialist and Safeguards Advisor (Consultant), and Mr. Artan Guxho, Project Officer, ECSIE, World Bank, of 27 July 2006, re: *Albania: Power Sector Generation and Restructuring Project Cultural Resources [P077526] – Back to Office Report for Supervision Mission – July 9 – 15, 2006*, para. 3, at 2.

¹⁴⁴ In order for the Compliance Review Expert to be in a position to recommend remedial changes, IRM RP 34 (c) merely requires that ‘the Compliance Review Expert concludes that *any EBRD action*, or failure to act, in respect of a Bank Operation has involved *one or more material violations* of policies ‘(emphasis added), and such a violation has been determined above in respect of EBRD requirements on public consultation on siting.

(i) Generally, it is recommended that, in developing a new Environmental Policy, EBRD include in the text of such new policy a deferred date for entry into force of the Policy which would provide a reasonable lead time to permit recruitment of all appropriate personnel and the taking of any and all other measures to ensure its successful implementation.

(ii) In relation to cultural property, it is recommended that detailed guidance or procedures be introduced to assist in the practical implementation of OPN 11.03 and to facilitate closer cooperation with other international financial institutions (IFIs) on the protection of cultural property in co-financed projects (possibly involving an express power to delegate assessment of a Project to another IFI).

(iii) Having regard to the requirement under the Environmental Policy, Section III, Para. 21(i) to meet applicable national environmental law, it is recommended that EBRD Country Strategies address the capacity of the particular country to meet the requirements of the Aarhus and Espoo Conventions and of relevant EU Environmental Law.

(iv) When addressing legislative, regulatory and policy considerations during the preparation of an EIA; it is recommended that the EBRD should consider obtaining independent legal advice with respect to the applicability, and adequacy, of national compliance with international legal obligations.

(v) The EBRD should develop guidance setting out detailed requirements for project sponsors to maintain copies and records of advertisements and other forms of announcements publicising public consultation meeting in accordance with the requirements of the Aarhus Convention. Such requirements should be expressed so as to apply retrospectively to co-financed projects in which the EBRD only becomes involved once another international financial institution has commenced, or even substantially completed, the relevant public consultation exercises. In other words, the EBRD should be under a clear obligation to revisit such past public consultation exercises and to highlight any apparent deficiencies in the appropriate Board documents, in order that the EBRD Board may take such concerns into account when deciding whether or not to approve the particular project concerned.

(vi) Generally, it is recommended that the EBRD should consider the development of a comprehensive, coherent, and up-to-date set of guidance notes covering all aspects of its environmental and social policy. Such guidance might include, for example, new guidance on the conduct of an EIA to inform all stages of the process, updated guidance for preparation of a Public Consultation and Disclosure Plan covering the requirements for siting decisions, and the new guidance suggested above on public consultation and protection of cultural property.

(vii) As well, it is recommended that the EBRD should explore the feasibility of establishing a formal mechanism to ensure effective inter-institutional communication in co-financed projects on matters related to environmental and social safeguards, including the timely circulation of external correspondence and responses and other material information. This may require the inclusion of a statement among co-financiers in respect of such exchange of information, as well as confidentiality undertakings.

(viii) The EBRD may wish to consider ways to improve the lines of communication between the Resident Offices (ROs) and the Environment Department, possibly including the provision of specific training on environmental and social policies, in recognition of the fact that the ROs are critical stakeholders in the implementation of such policies.

V. Assessment by Bank department as to appropriateness of Recommendations

120. The Bank's assessment as to the appropriateness of the aforementioned recommendations of the Compliance Review Expert and the timetable and estimate of human and financial resources to implement such recommendations is set out in Annex 1 of this report.

Annex 1

COMPLIANCE REVIEW REPORT

VLORE THERMAL POWER GENERATION PROJECT

In accordance with section 34(d) of the Rules of Procedure, the Environment and Sustainability Department, in consultation with Banking, Office of the General Counsel, and Office of the Chief Economist has developed the following assessment of implementation of the recommendations, the resources needed, and a timetable, to include in the final report. Please note that some Recommendations cover more than one topic, so have been separated by row so that the management response can address each specific issue.

Environmental and Social Policy		
Recommendation	Management Response	Resources/Timetable
(i) Generally, it is recommended that, in developing a new Environmental Policy, EBRD include in the text of such new policy a deferred date for entry into force of the Policy which would provide a reasonable lead time to permit recruitment of all appropriate personnel and the taking of any and all other measures to ensure its successful implementation.	The Bank is currently revising its 2003 Environmental Policy, and the 2008 Draft Environmental and Social Policy includes a 6 month interim period following Board Approval, before the Policy will enter into force. This time period is exactly for the purpose of the recommendation.	No additional resources needed. Schedule: 6 months following Board approval of new policy (Policy approval anticipated May 2008).
Cultural Property		
Recommendation	Management Response	Resources/Timetable
(ii) In relation to cultural property, it is recommended that detailed guidance or procedures be introduced to assist in the practical implementation of OPN 11.03 and...	ESD plan a range of guidance notes under the new Environmental and Social Policy, and a note on cultural property should be available—EBRD will also draw on other institutions' guidance notes, as available, so as not to duplicate efforts.	No additional resources needed. Schedule: 6 months following Board approval of new policy (Policy approval anticipated May 2008).
...to facilitate closer cooperation with other international financial institutions (IFIs) on the protection of cultural property in co-financed projects (possibly involving an express	When financing projects with other international financial institutions, EBRD will cooperate with other international financial institutions to agree on a common approach to project	

power to delegate assessment of a Project to another IFI).	<p>appraisal, project requirements, and monitoring.</p> <p>EBRD has a duty of care to evaluate each project against the relevant EBRD policies. It should, however, take full advantage of work already undertaken and readily available by other IFIs prior to setting additional requirements.</p>	
Due Diligence on National Law Compliance under International Conventions and Treaties		
Recommendation	Management Response	Resources/Timetable
(iii) Having regard to the requirement under the Environmental Policy, Section III, Para. 21(i) to meet applicable national environmental law, it is recommended that EBRD Country Strategies address the capacity of the particular country to meet the requirements of the Aarhus and Espoo Conventions and of relevant EU Environmental Law.	<p>Country strategies currently contain an environmental section that summarises the various environmental agreements to which the country is party. They have not, to date, evaluated the capacity of the country to meet the requirements of the Aarhus and Espoo Conventions. With regard to EU environmental law, for EU countries and potential EU countries, a general statement on the agreements with the EU would be included and progress reports on implementation from EU agencies, where available, could be cited in the Strategy. For non-EU countries, there currently is no statement to this effect.</p> <p>In order to independently assess the ability of a country to meet requirements under any international environmental law would be onerous and beyond the existing capacity of the Bank. In our opinion this is beyond the scope and objective of the Bank's country strategies.</p>	Significant resources would be needed to assess 28 countries' capacity to implement international legal agreements every three years. This would not be practical.
(iv) When addressing legislative, regulatory and policy considerations during the preparation of an EIA; it is recommended that the EBRD should consider obtaining independent legal advice with respect to the applicability, and adequacy, of national compliance with international legal obligations.	<p>Section 21 of the 2003 Environmental Policy provides that "[t]he EBRD will not finance project that would contravene country obligations under relevant international environmental treaties and agreements, as identified during the environmental appraisal".</p> <p>Management do not think that Section 21 of the Environmental</p>	No changes proposed.

	<p>Policy should be interpreted to require EBRD to conduct extensive legal due diligence in each project whether or not a country has duly complied with its international legal obligations, but rather to ensure that EBRD does not finance a project that on the face of it clearly contravenes any international legal obligations.</p> <p>In practice, EBRD focuses on sponsor compliance with requirements under relevant EBRD policies and with EU and national legal requirements, as identified during due diligence. On a case-by-case basis, depending on the complexity of the project issues and regulatory requirements, the Bank has in the past occasionally sought legal advice on specific issues.</p> <p>Where the Bank identifies possible gaps in process or requirements during due diligence, these will also be brought to the management and Board's attention as potential risk factors associated with the project.</p> <p>ESD will consider a guidance note in 2008 for environmental consultants preparing EIAs to include more detail on legal and regulatory compliance.</p>	<p>Some additional resources needed to draft additional guidance notes.</p>
Preparation of Guidance on Public Consultation Meetings		
Recommendation	Management Response	Resources/Timetable
(v) The EBRD should develop guidance setting out detailed requirements for project sponsors to maintain copies and records of advertisements and other forms of announcements publicising public consultation meeting in accordance with the requirements of the Aarhus Convention.	<p>ESD plan a range of guidance notes under the new Environmental and Social Policy, and public consultation is one of the key areas where sponsors want more clarification.</p> <p>Guidance documents and procedures for EIAs will specify siting</p>	<p>No additional resources needed. Guidance notes to be rolled out as needed. This guidance note will be prepared in</p>

	<p>as a fundamental part of the EIA process that needs to have public input prior to final decisions on location being taken.</p>	<p>the first series, within 6 months of Board approval of the new Policy.</p>
<p>Such requirements should be expressed so as to apply retrospectively to co-financed projects in which the EBRD only becomes involved once another international financial institution has commenced, or even substantially completed, the relevant public consultation exercises. In other words, the EBRD should be under a clear obligation to revisit such past public consultation exercises and to highlight any apparent deficiencies in the appropriate Board documents, in order that the EBRD Board may take such concerns into account when deciding whether or not to approve the particular project concerned.</p>	<p>EBRD evaluates all project information, regardless of whether other co-financers are involved and whether information is provided directly by the client or via a co-financer. Projects are assessed by EBRD against EBRD Policy requirements, and any gaps identified.</p> <p>For some projects, the siting and permitting decisions may pre-date EBRD's involvement by many years. Initial public consultation on siting or permitting could also have pre-dated the client's involvement with the project as well, and therefore be beyond the ability of the client to provide.</p> <p>Due diligence assesses the consultation to date, and an action plan is often needed to bring the project in line with the spirit and principles of the Convention as detailed in EBRD Environmental Policy. If management believes that the benefits of the project outweigh the project risks and decide to present the project to the Board of Directors, then any gaps in requirements and proposed actions would need to be brought to the attention of the Board of Directors as project risk issues, and made public in the Bank's Project Summary Document.</p>	<p>Resources could be significant in tracking down dated information. If good records are not kept of public meetings, the information is very difficult to reconstruct. The approach taken and how limits to due diligence were set will be communicated to the Board on a project-by-project basis.</p>

Preparation of Comprehensive Guidance on Environmental and Social Policy Requirements		
Recommendation	Management Response	Resources/Timetable
(vi) Generally, it is recommended that the EBRD should consider the development of a comprehensive, coherent, and up-to-date set of guidance notes covering all aspects of its environmental and social policy. Such guidance might include, for example, new guidance on the conduct of an EIA to inform all stages of the process, updated guidance for preparation of a Public Consultation and Disclosure Plan covering the requirements for siting decisions, and the new guidance suggested above on public consultation and protection of cultural property.	ESD plan a range of guidance notes under the new Environmental and Social Policy. EBRD will also draw on other institutions' guidance notes, as available, so as not to duplicate efforts.	Some additional resources needed, depending on the number of guidance notes and consultants to draft. Schedule: on-going basis, starting following Board approval of new policy (Policy approval anticipated May 2008).
Formal Mechanism for Sharing Information in Co-financing		
Recommendation	Management Response	Resources/Timetable
(vii) As well, it is recommended that the EBRD should explore the feasibility of establishing a formal mechanism to ensure effective inter-institutional communication in co-financed projects on matters related to environmental and social safeguards, including the timely circulation of external correspondence and responses and other material information. This may require the inclusion of a statement among co-financiers in respect of such exchange of information, as well as confidentiality undertakings.	<p>A statement will be included in preliminary information provided to potential clients and co-financiers to the following effect:</p> <p>“EBRD is sometimes the recipient of communications, including complaints, from civil society on environmental, safety, social, and other aspects of projects, both before Board approval and during project implementation. EBRD will share this external communication and its responses with the client and potential and existing co-financiers, insofar as any of this information is not covered by any confidentiality agreement, in order to ensure consistency in approach and messages to the public. EBRD encourages its client and co-financiers to likewise share external communication, including complaints, and their responses with the EBRD.</p>	<p>No additional resources needed. Draft statement can be agreed within the Bank within 2Q 2008.</p> <p>Training on the 2008 Environmental and Social Policy for ESD specialists and Banking will include this issue.</p>

Training of Resident Offices		
Recommendation	Management Response	Resources/Timetable
(viii) The EBRD may wish to consider ways to improve the lines of communication between the Resident Offices (ROs) and the Environment Department, possibly including the provision of specific training on environmental and social policies, in recognition of the fact that the ROs are critical stakeholders in the implementation of such policies.	This is wider than the Environmental and Social Policy, but includes training on the Public Information Policy and general Bank outreach in the region. As part of the implementation of the proposed 2008 Environmental and Social Policy and Public Information Policy, a training programme is being planned that will include the Resident Offices.	Travel/expenses for trainer (to be organised as efficiently as possible). 2008-2010