

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

PROJECT COMPLAINT MECHANISM

COMPLIANCE REVIEW REPORT

COMPLAINT: BOSKOV MOST HYDRO POWER

REQUEST NUMBER: 2011/05

Executive Summary

The PCM received two closely related Complaints from a single Complainant concerning the Boskov Most HPP Project in FYR Macedonia on 7th November 2011 and 30th December 2011, respectively. The Complaints were registered according to PCM Rules of Procedure on 14th November 2011 and 10th January 2012, respectively, and on 14th May 2012 the Eligibility Assessment Report (EAR) was publicly released, declaring the Complaints eligible and warranting a Compliance Review. Also on 14th May 2012, PCM Expert Dr. Owen McIntyre was appointed as the Compliance Review Expert.

The Complainant alleges that the Project has failed to comply with the EBRD's 2008 Environmental and Social Policy (ESP) on a total of five grounds. First of all, the original Complaint contends that the appraisal of the environmental risks in the Environmental and Social Impact Assessment (ESIA) is inadequate in that it fails to properly assess the impacts of the Project on mammals, birds and landscapes and that it does not provide a proper analysis of the cumulative impacts or a proper analysis of alternatives. Setting aside the question of the adequacy of the assessment of impacts upon biodiversity contained in the ESIA, which was considered separately, the Compliance Review Expert has determined that the ESIA has adequately considered the availability of alternatives to the present Project, its likely cumulative impacts, and its potential impacts on landscape.

Secondly, the original Complaint alleges that the biodiversity assessment conducted in accordance with PR 6.6 of the ESP is incomplete by virtue of missing data, which is central to such an assessment. The Compliance Review Expert has determined that the particular requirements for ongoing bio-monitoring stipulated in the Environmental and Social Action Plan (ESAP) for this Project amounted to more than mere mitigation measures, and were intended to address weaknesses in the baseline data relating to biodiversity impacts presented in the ESIA. This amounts to a failure on the part of the Bank to comply with the precautionary standards required in the conduct of a comprehensive and conclusive biodiversity assessment required under PR 6.6.

Thirdly, the original Complaint claims that the Project will result in destruction of natural, critical or protected habitats in a manner inconsistent with the requirements of PR 6 of the ESP. Taking the view that the safeguards stipulated in PR 6 related to natural, critical or protected habitats rely primarily on the carrying out of a rigorous biodiversity assessment, the Compliance Review Expert has determined that consideration of this element of the Complaint should form part of the examination of the adequacy of the biodiversity assessment required under PR 6.6.

Fourthly, the original Complaint contends that Strategic Environmental Assessment (SEA) has not been carried out in respect of the relevant strategy on renewable energy or the new Management Plan for the Mavrovo National Park, which is due to be adopted shortly. The Compliance Review Expert accepts the assurances given by the national authorities that SEA of a higher-level strategy suffices for the purposes of the requirements of FYR Macedonian law, and finds that the question of SEA does not arise

in respect of the forthcoming National Park Management Plan as a draft Plan has not yet been proposed.

Finally, the additional Complaint alleges that the Environmental Impact Assessment (EIA) process for the Project is incomplete and, thus, that national legal requirements in this respect have not been met. The Compliance Review Expert accepts that the ESAP, and thus the loan agreement, commits the Bank to making any changes that might prove necessary on final approval of the EIA by the national authorities and, further, that the ESAP and the Stakeholder Engagement Plan (SEP) envisage ongoing communication with stakeholders which may easily facilitate any additional stakeholder consultation made necessary by such changes. The Compliance Review Expert accordingly declines to make a finding of non-compliance in respect of this alleged breach of the ESP.

Therefore, the Compliance Review Expert has made a finding of non-compliance in respect of only one of the grounds set out in the present Complaints. This Compliance Review has determined that the assessment of the Project's potential impacts on biodiversity and living natural resources is not sufficiently comprehensive and conclusive to satisfy the requirements of Performance Requirement 6 of the 2008 ESP.

I - Introduction

Factual Background

1. On 8th November 2011, the EBRD Board of Directors approved the provision of a sovereign guaranteed loan of up to EUR 65 million for the Boskov Most Hydro Power Project (EBRD Operation ID 41979), in the FYR Macedonia. The overall financing cost is EUR 84 million excluding any contingencies, but including an EUR 19 million equity stake by AD Elektrani na Makedonija (ELEM), a 100% state-owned electric power utility in FYR Macedonia responsible for mining and power generation. The Project entails construction of a 70MW power plant located near the town of Debar in western FYR Macedonia. The Project is intended to utilise the full hydro potential of the tributaries that combine to make up the Mala Reka River and will include a 34 metre-high dam and storage reservoir covering a surface area of 22 hectares near the village of Tresonce and located in the Mavrovo National Park. Annual generation is forecast to be around 118 GWh. The Mala Reka River forms the south western boundary of the Mavrovo National Park and most of the Project area (approximately 80%) will be located within the Park. The Project had been categorised “A” in accordance with the Bank’s 2008 Environment and Social Policy (ESP).
2. On 7th November 2011, the EBRD Project Complaint Mechanism (PCM) Officer received a Complaint regarding the Boskov Most Project, which is included as Annex 1 to this report. The Complaint was made by Ms Ana Colovic Lesoska of Eko-svest (the “Complainant”) and, in accordance with PCM RP 10 was registered by the PCM Officer on 14th November 2011. In accordance with PCM RP 12, the PCM Officer informed all interested parties of the registration of the Complaint and subsequently designated one of the PCM Experts, Mr Graham Cleverly, to assist in the Eligibility Assessment of the Complaint. A further Complaint regarding the Boskov Most Hydro Power Project was subsequently received from the same Complainant on 30th December 2011. It was registered on 10th January 2012 and is included as Annex 2 to this report. Details of both registrations were posted on the online PCM Register of Complaints and can be viewed at <http://www.ebrd.com/pages/project/pcm/register.shtml>. The Complainant seeks a Compliance Review of the Project under the PCM.

Summary of the Positions of the Relevant Parties

3. There are three Relevant Parties whose positions have been examined during the Compliance Review process: the Complainant, the Bank and the Client.
4. The position of the **Complainant** as presented in the Complaints can be summarised as follows:
 - a) The original Complaint alleges the **inadequacy of the appraisal of environmental risks in the ESIA** in breach of PR 1.5 and PR 3.16. It claims that it fails to properly assess the impacts of the Project on mammals, birds

and landscapes and that it does not provide a proper analysis of the cumulative impacts to the climate or a proper analysis of alternatives. The Complaint also alleges that the ESIA failed to include important lists of species, such as those of mammals and birds found in the Project area.

- b) The original Complaint further alleges that the **biodiversity assessment conducted in accordance with PR 6.6 is incomplete** by virtue of missing data. The Complaint contends that this is demonstrated by the requirement in the ESIA for detailed bio-monitoring of large mammals and of existing flora in the Project area, to be undertaken before construction starts.
 - c) The original Complaint alleges that **the Project will result in destruction of natural and critical habitats**, that the benefits of the Project have not been shown to outweigh the costs, that alternatives including wind, solar and sustainable biomass have not been properly assessed and the area for the project could be considered a “critical habitat” by virtue of the proven presence of the Balkan lynx in the Project area, which according to Macedonian scientists is a critically endangered species.
 - d) The original Complaint further alleges that **a Strategic Environmental Assessment (SEA) has not been prepared for the relevant strategy on renewable energy** as is required under National FYR Macedonian law, and that a new law proclaiming Mavrovo as a new National Park to be adopted shortly will require a Management Plan under FYR Macedonian law which will also require an SEA. Thus, the Complaint alleges that the Client (ELEM) is in breach of the requirements on legal permitting as set out in PR 6.15 of the ESP and cannot therefore follow the required mitigation hierarchy.
 - e) The additional Complaint alleges that, as no decision has been issued to date by the Ministry of Environment and Spatial Planning (MoEPP) for the Boskov Most Project, **the Environmental Impact Assessment (EIA) process for the Project is incomplete and national requirements in this respect have not been met.**
5. The **Bank’s Response** to the original and additional Complaints can be summarised as follows:
- a) Regarding **the alleged incomplete ESIA**, the Bank separately addresses each of the alleged shortcomings in its response as follows:
 - Mammals: The experts who prepared the ESIA conducted a desktop evaluation of the scientific literature and cooperated closely with experts concurrently conducting a study of lynx and other mammals in the Mavrovo National Park to conclude that there was no need to describe lynx and other mammals in great detail in the ESIA, since there would be only limited impact on these mammals.
 - Birds: The findings of the ESIA are based on authoritative studies undertaken between 2004 and 2010, which noted only three of the 77 species listed as being of Conservation Value were likely to be present in the Project area, and conclude that only temporary impacts could be expected from the construction phase, as during operation of the Project

the new open water habitat would attract different species of birds without driving away any existing species.

Landscape: The descriptions of current landscape conditions and potential changes are considered more than adequate.

Cumulative impact on climate: The relatively small changes in greenhouse gas emissions arising from the Project would not significantly affect global climate change but the Project would contribute to reducing FYR Macedonian greenhouse gas (GHG) emissions in line with the National Energy Strategy.

Analysis of alternatives: Alternatives should be both “meaningful and realistic” and the Government of FYR Macedonia has previously determined hydropower development as the most feasible option for renewable energy. Therefore, the ESIA only examined options for hydropower development at the Boskov Most site, though the “do nothing” or “zero” option was included in the options considered.

List of mammals and birds: The lists of mammals and birds referred to in the ESIA were omitted in error from the draft ESIA Appendices used for public review and comment due to a word processing error. These lists were provided to the Complainant before the end of the disclosure period and added to the ESIA on the ELEM website.

- b) Regarding the **alleged incomplete biodiversity assessment**, the Bank cites the relevant requirements of PR 6 and confirms that the ESIA was mainly a desktop analysis of terrestrial biodiversity data together with an aquatic biology field study exercise, which reached well-supported conclusions based on the most recent data, including ongoing studies in the Mavrovo National Park. The Bank contends that the requirement for a biodiversity monitoring programme is standard Bank practice and should not be considered as evidence of a weak baseline characterisation.
- c) Regarding the **alleged risk of destruction of habitat without adequate justification**, the Bank confirms that the Project area is without question a protected area but cannot be considered either “natural habitat” or “critical habitat”. It points out that most of the Project area has been modified over centuries by human activities and that the relevant data indicate relatively light use of the Project area by sensitive species. The Bank’s response also confirms that the area affected by the Project is a tiny fraction of the lynx’s range and should not be considered of particular value in the lynx’s daily and seasonal movements given its light usage.
- d) Regarding the **alleged failure to conduct a Strategic Environmental Assessment**, the Bank refers to the Ministry of Environment and Physical Planning (MoEPP) Opinion dated 17th March 2010, which confirms that a Strategic Environmental Assessment of a higher-level planning document, the *Energy Strategy of FYR Macedonia until 2030*, has been undertaken which includes a strategic analysis of the Bostov Most Project as one of six proposed new hydro power projects within the Strategy time horizon. The MoEPP opinion concludes that the higher level *Energy Strategy* includes the information required for the lower level *Renewable Energy Strategy* and the

Bank acknowledges, therefore, that the requirements regarding SEA have been met.

- e) Regarding the allegation in the additional Complaint that **the environmental impact assessment process is not yet completed**, the Bank argues that neither of the PRs referred to in the additional Complaint requires all permits, authorisations and decisions to be made prior to EBRD Board approval. The Bank further points out that permitting process may take place in parallel to the Bank's due diligence process and that there may be several different stages to the permitting process. The Bank also suggests that the issue of whether a Project should proceed to Board consideration where local permitting had not been completed would best be clarified at the policy level since the current ESP does not deal with this timing issue in relation to Board approval.
6. The position of the **Client** (ELEM) is broadly similar in substance to the Bank's response and can be summarised as follows:
 - a. Regarding the allegedly **incomplete ESIA**, ELEM maintains that the ESIA was undertaken by the leading EIA specialist in FYR Macedonia, supported by internationally recognised EIA experts. ELEM reports that the environmental team had taken advice from the Mavrovo National Park experts and the Italian-led team which undertook the re-valorisation of the Park, and concluded that the lynx's prey and thus its natural habitat were usually located in high mountain areas *i.e.* not the valley and forest areas impacted by the Project. On this basis, the alleged threat to the lynx's habitat had been largely "scoped out" of the ESIA. ELEM also points out that the Project area is not a strictly protected zone but is designated as one to be open for sustainable use, and that the potential effects on the area will be very limited and will mainly be temporary.
 - b. Regarding the allegation of **incomplete biodiversity assessment**, ELEM maintains that the use of the Project site by the Balkan lynx and other large mammals was considered by expert biologists who concluded that the largest area of the Project, the future reservoir, is mainly pastureland and unlikely to be used much by the main prey species and, therefore, by the lynx. ELEM maintains that the conclusions of the biodiversity assessment are well supported by the most recent data and by extensive discussions with the Management Team of the Mavrovo National Park.
 - c. Regarding the alleged **risk of destruction of habitat** without adequate justification, ELEM maintains that the justification for the Project is set out clearly in the ESIA and in the recently published *National Energy Strategy (to 2030)* and the *Renewable Energy Strategy*. ELEM acknowledges that the Project area is located in a protected area but points out that the Project area is neither composed of significant areas of "natural habitat" or "critical habitat". Other comments by ELEM on this component of the Complaint repeat more or less verbatim the position of the Bank.
 - d. Regarding the alleged failure to conduct a **Strategic Environmental Assessment**, ELEM maintains that the *Energy Strategy of FYR Macedonia to 2030*, including its associated SEA Report, includes the Boskov Most Project

as one of six new hydro-energy projects within the Strategy time horizon, and that the SEA Report includes a strategic analysis and environmental assessment of planned projects including the Boskov Most Project. In relation to the alleged need for an SEA for the Mavrovo National Park, ELEM points out that SEAs for other National Parks in FYR Macedonia with National Park Management Plans have not been prepared. The company acknowledges that an SEA for Mavrovo National Park Management Plan will eventually be needed, but explains that this is still subject to a decision of MoEPP.

- e. Regarding the allegation set out in the additional Complaint that **the environmental impact assessment process is not complete**, and thus that national requirements in this respect have not been met, ELEM confirms that the MOEPP has recently set up the Review Commission and has begun its review of the ESIA.

Steps Taken to Conduct the Compliance Review

7. Having regard to the Terms of Reference for this Compliance Review prepared by the Eligibility Assessors and included in the Eligibility Assessment Report, the Compliance Review Expert conducted a thorough review of all relevant Project documentation and of relevant internal and external Bank correspondence. Key Project documentation examined includes the Project Summary Document (8 November 2011) and the Environmental and Social Impact Assessment (July 2011), including the Non-Technical Summary, Stakeholder Engagement Plan, and Environmental and Social Action Plan. Documentation specifically related to the present Complaint examined includes both Complaints received from the Complainant and the respective Responses received from the Relevant Parties.
8. The Compliance Review Expert did not find it necessary to hold meetings with the relevant Bank staff during the course of this Compliance Review as the Eligibility Assessors had conducted in-depth meetings concerning the present Complaints in February 2012 in order to clarify outstanding issues. Neither was it necessary to conduct a site visit as the Eligibility Assessment Expert had undertaken productive fact-finding meetings in Skopje with both the Client and the Complainant in February 2012. The findings of these meetings were very well documented. The Compliance Review Expert is of the opinion that he has had access to sufficient information to consider the Bank's alleged non-compliance with the requirements of the 2008 Environmental and Social Policy (ESP) as regards the present Project.
9. It should be noted generally in relation to the conduct of this Compliance Review that the Compliance Review Expert has adopted as rigorous a standard of review as possible in seeking to identify instances of non-compliance with the ESP. However, it is also important that the Compliance Review process should take a common sense approach to the interpretation and application of the ESP, where appropriate, in order to ensure outcomes that serve to further the objectives and principles set out therein. In carrying out the present Compliance Review,

therefore, the Compliance Review Expert, while subjecting the Bank's conduct of the stipulated environmental appraisal processes to a rigorous examination for the purpose of identifying any actions or omissions which objectively would amount to 'non-compliance with a Relevant EBRD Policy',¹ has also found it pertinent to have regard to the key objectives and principles of the Bank's 2008 Environmental and Social Policy.

II. EBRD Policy Obligations

10. This Compliance Review requires an examination of each of the core questions of compliance raised in the Complaint in order to assess whether the Bank has complied fully with all of the requirements arising under the EBRD's 2008 Environmental and Social Policy (ESP). Therefore, it is first of all necessary to identify and clarify each individual element of alleged non-compliance contained in the Complaint and to link each element to the corresponding requirement or requirements in the ESP. This is particularly important for the clarity and coherence of the current Compliance Review process as the present Complaint includes a number of inter-related and potentially over-lapping grounds of alleged non-compliance. In addition, in preparing a complex and multi-faceted Complaint, there is always the possibility that the Complainant might inadvertently fail to invoke the most directly relevant and appropriate performance requirement under the ESP. At this point in the Compliance Review process, it is also helpful to outline the practical implications of each requirement of the ESP which corresponds with each of the alleged grounds of non-compliance set out in the Complaint.

Inadequacy of ESIA

11. In contending that the Environmental and Social Impact Assessment (ESIA) prepared for the Boskov Most HPP Project is incomplete, the Complaint alleges breach of two key Performance Requirements of the EBRD's 2008 Environmental and Social Policy (ESP), PR 1.5 and PR 3.16.²
12. PR 1.5 sets down the general requirements for the environmental and social appraisal of projects but the Complaint expressly refers to the specific requirement that

'The appraisal process will be based on recent information, including an accurate description and delineation of the client's business or the project, and social and environmental baseline data at an appropriate level of detail.'

While PR 1.5 does not elaborate on what might amount to 'an appropriate level of detail' in respect of 'environmental baseline data', PR 1.8 generally provides that

¹ PCM Rules of Procedure, para. 36.

² The Original Complaint (7 November 2011), mistakenly refers to PR 3.6 but quotes from PR 3.16, at 4. that the Complaint meant to invoke PR 3.16 was conformed in meetings with the Eligibility Assessor, see *Eligibility Assessment Report*, at 4.

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

As the Complaint specifically alleges that the Report produced as a result of the ESIA process ‘is missing important lists of species such as the list of mammals and list of birds found in the project area’, it will be necessary to examine whether the overall ESIA process adequately evaluated and presented the potential impacts arising in respect of mammals and birds. At a very general level, the Complaint alleges that the ESIA failed to properly assess the impact on landscapes, but this point is not further developed in any detail, making it somewhat difficult to examine in the context of a Compliance Review.

13. However, the clear focus, in this particular aspect of this alleged ground of non-compliance, on the evaluation and presentation of the potential impacts of the Project on mammals and birds, strongly suggests that it ought to be included within the examination of the adequacy of the biodiversity assessment conducted under PR 6.6, which is also required as a key component of this Compliance Review process³. In fact, in a leading case on the adequacy of an “appropriate assessment” for the purposes of Article 6(3) of the EU Habitats Directive, which corresponds with the requirement for a biodiversity assessment in respect of a protected area under PR 6, the European Court of Justice placed considerable emphasis on the fact that the assessment in question ‘does not contain an exhaustive list of the wild birds present in the area’ for which the SPA [Special Protection Area] at issue had been designated.⁴ Somewhat confusingly, under EU law an “appropriate assessment” for the purposes of Article 6(3) of the Habitats Directive may form part of an assessment for the purposes of the EIA or SEA Directives, though it must be clearly distinguishable or reported separately.⁵ Thus, this issue of the inclusion of baseline data on species of mammals and birds, as raised in the present Complaint, involves a central question relating to the adequacy of the biodiversity assessment and better fits within that component of this Compliance Review. Therefore, this examination of the biodiversity assessment will also ask whether it adequately considered and presented the potential impacts arising in respect of mammals and birds, having regard to recent and accurate baseline information.

³ See *infra*.

⁴ Case C-304/05, *Commission v. Italy*, Judgment, 20 September 2007, para. 66.

⁵ According to official EU Commission Guidance on the implementation of the Habitats Directive:

‘Where projects or plans are subject to the EIA or SEA directives, the Article 6 assessments may form part of these assessments. However, *the assessments required by Article 6 should be clearly distinguishable and identified within an environmental statement or reported separately.*

See, European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 12 (original emphasis).

14. PR 3, on the other hand, is specifically concerned with pollution prevention and abatement and PR 3.16 requires that the pollution impacts of the Project on existing ambient conditions ought to be addressed as part of the Bank's due diligence. The Complaint expressly refers to the requirement that the client should

‘consider a number of factors, including the finite assimilative capacity of the environment, ... existing ambient conditions, the project's proximity to ecologically sensitive or protected areas, and the potential for cumulative impacts with uncertain and irreversible consequences’.

Though this provision is concerned specifically with the prevention and abatement of *pollution*, which is not necessarily the principal concern of the Complainant with regard to the present Project, the Complaint cites it, (perhaps mistakenly), in connection with the contention that the ESIA ‘did not provide a proper analysis of the cumulative impacts to the climate, and it did not provide proper analysis of the alternatives’. However, the dual requirement for consideration of cumulative impacts and of alternatives to the proposed Project as key elements of the ESIA process are expressly included under PR 1 of the ESP. PR 1.6(v) includes within the Project's area of influence for the purpose of appraisal of environmental and social impacts

‘Areas and communities potentially impacted by: cumulative impacts from further planned development of the project or other sources of similar impacts in the geographical area, any existing project or condition, and any other project-related developments that can realistically be expected at the time due diligence is undertaken.’

Likewise, regarding the assessment required for Category “A” Projects in particular, of which the Boskov Most Project is one, PR 1.9 stipulates that

‘This assessment will include an examination of technically and financially feasible alternatives to the source of such impacts [the proposed Project], and documentation of the rationale for selecting the particular course of action proposed.’

The other elements of this alleged ground of non-compliance flowing from the Complainant's erroneous reliance upon PR 3.16, *i.e.* ‘the finite assimilative capacity of the environment’, the ‘existing ambient conditions’, and ‘the project's proximity to ecologically sensitive or protected areas’, are either irrelevant as regards the type of impacts expected from developments such as the present Project or are addressed elsewhere in this Compliance Review.⁶

15. Therefore, a key task of this Compliance Review process is to examine whether the ESIA process adequately considered and presented the cumulative impacts potentially arising in respect of the Project, especially ‘cumulative impacts to the climate’, as well as the availability of feasible alternatives. It is also necessary to examine the extent to which the ESIA addresses potential impacts on landscapes.

⁶ Concerns regarding ‘the project's proximity to ecologically sensitive or protected areas’ ought to be addressed within the biodiversity assessment conducted under PR 6.6 and, thus, to be captured within the examination of the adequacy of that biodiversity assessment which is a central component of this Compliance Review exercise.

16. Of course, any finding by the Compliance Review Expert that the ESIA process generally, or any element of that process such as a biodiversity assessment required under PR 6, was inadequate would also automatically infer a breach of PR 10.18, which unequivocally requires that disclosure on Category A projects ‘must include a full EIA/SIA report in accordance with the Bank’s requirements’. However, having regard to the need to ensure the best possible environmental outcomes in the case of the present Complaint, the Compliance Review Expert considers it appropriate to focus on the question of compliance with the substantive requirements to carry out an adequate ESIA and/or biodiversity assessment, rather than on compliance with the secondary procedural requirements regarding adequate disclosure.

Incomplete Biodiversity Assessment

17. The Complaint alleges that the biodiversity assessment conducted in respect of the Project by the Client as part of the ESIA was incomplete and thus in breach of several provisions of the 2008 ESP including, in particular, PR 6.6, which provides in part:

‘Through the environmental and appraisal process, the client will identify and characterise the potential impacts on biodiversity likely to be caused by the project. The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders.’

In support of this contention, the Complainant relies upon the fact that the Environmental and Social Action Plan (ESAP), developed on the basis of the results of the ESIA process, ‘stipulates that before construction there should be: “a detailed bio-monitoring conducted in all 4 seasons” and “installment of camera-traps” in order to identify presence of large mammals’. The Complaint further points out that

‘[f]or the flora, again, lack of data is identified by the Environmental and Social Action Plan and so “bio-monitoring” and “a preparation of a Study for monitoring of existing flora in the project area” are preconditions for the construction works’.

Thus, the Complainant is arguing that such biodiversity assessment as has been conducted is, almost by definition, inconclusive and incomplete and not ‘sufficient to fully characterise the risks and impacts, consistent with a precautionary approach’.

18. It is quite clear that, where protected areas may be affected, the biodiversity assessment required under PR 6.6 ought to correspond closely to the “appropriate assessment” required under Article 6(3) of the EU Habitats Directive⁷ in terms of

⁷ Article 6(3) of the Habitats Directive provides:

‘Any plan or project ... likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in

its thoroughness, conclusiveness and its significance for the ultimate decision on whether or not to approve a Project. In this regard, it is significant that PR 6.2 provides that

‘In pursuing these aims, [*i.e.* the protection and conservation of the biodiversity in the context of projects in which it invests⁸] the Bank is guided by and supports the implementation of ... relevant EU Directives.’

The same provision then expressly refers to the 1992 EU Habitats Directive⁹ and the 1979 Wild Birds Directive,¹⁰ both of which rely on an “appropriate assessment” under Article 6(3) of the Habitats Directive as the principal means of ensuring that proposed development plans or projects will not adversely affect the integrity of sites designated for protection under either Directive. This understanding of the safeguards required under EBRD policies for the purposes of biodiversity conservation, and of the corresponding relevance of the rigorous “appropriate assessment” process stipulated under Article 6(3), can be traced back to Paragraphs 6 and 21 of the EBRD 2003 Environment Policy,¹¹ which the EBRD Project Complaint Mechanism had found to impose a requirement similar to Article 6(3) in respect of assessment of the biodiversity impact of Projects proposed for Bank funding.¹²

19. Though the role of the Bank in approving a project for EBRD financing ought not to be confused with the role of a “competent national authority”, as understood under the EU Habitats Directive, in permitting a Project in accordance with the requirements of national law and EU law, it is possible in respect of protected areas to identify an obligation imposed upon the Bank by PR 6.6 which corresponds to that imposed upon a competent national authority under Article 6(3), which provides that

‘In the light of the conclusions of the assessment of the implications for the site ... the competent national authority shall agree to the plan or

view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.’

⁸ 2008 ESP, PR 6.1

⁹ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, 21 May 1992, (as amended).

¹⁰ Council Directive 79/409/EEC on the conservation of wild birds, 2 April 1979, (as amended).

¹¹ Paragraph 6 of the 2003 Environment Policy provides 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.’

Paragraph 21 of the 2003 Environment Policy provides that:

‘the EBRD will 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.’

¹² See, PCM, *Compliance Review Report: D1 Motorway, Phase 1, Slovak Republic*, Request No. 2010/01, paras. 8-10 and 12, available at <http://www.ebrd.com/pages/project/pcm/register.shtml>

project only after having ascertained that it will not adversely affect the integrity of the [protected] site concerned¹³

Thus, the biodiversity assessment necessitated by PR 6.6 should conclusively ascertain that the Project as proposed will not adversely affect the integrity of the protected site in question taking account, where appropriate, of additional measures identified in the biodiversity assessment to avoid or mitigate any adverse ecological effects. Alternatively, it may be possible in exceptional cases, and in a manner which corresponds with Article 6(4) of the Habitats Directive,¹⁴ for the Bank to approve a Project, which a completed biodiversity assessment has determined will adversely affect the integrity of a protected site, where that Project is deemed necessary ‘for imperative reasons of overriding public interest’.¹⁵

20. While the Bank cannot be equated with a national “competent authority” under the Habitats Directive, which will have responsibility for deciding whether to authorise projects under national planning and/or environmental laws, the environmental protection standards applicable to the Bank’s decision whether to approve a project for financing ought to correspond in substance with the standards applied by national competent authorities under the EU Habitats Directive. No other conclusion would be consistent with the general EBRD commitment to promote EU environmental standards¹⁶ or the specific stipulation that the Bank will be guided by relevant EU Directives, such as the Habitats Directive¹⁷ ‘in the protection and conservation of biodiversity in the context of projects in which it invests’.¹⁸ Similarly, no other conclusion would be consistent with the overall approach to the integration of environmental and social considerations into the project cycle as set out under the 2008 ESP:

‘All EBRD-financed projects undergo environmental and social appraisal [informed and guided in this case by the EU Habitats Directive] both *to*

¹³ Emphasis added.

¹⁴ Article 6(4) of the Habitats Directive provides:

‘If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.’

¹⁵ Indeed, a corresponding exception to the general obligation not to proceed with a Project that would adversely affect the integrity of a protected site would appear to have been included by PR 6.12 of the ESP, which provides in relation to “natural habitats” that

‘there must be no significant degradation or conversion of the habitat ... unless:

- there are no technically and economically feasible alternatives
- the overall benefits of the project outweigh the costs, including those to the environment and biodiversity’.

On the practical application of Article 6(4) of the EU Habitats Directive, see generally D. McGillivray, ‘Compensating Biodiversity Loss: The EU Commission’s Approach to Compensation under Article 6 of the Habitats Directive’, (2012) 24:3 *Journal of Environmental Law* 417-450.

¹⁶ 2008 ESP, Para. 3.

¹⁷ 2008 ESP, PR 6.2.

¹⁸ 2008 ESP PR 6.1.

help the EBRD decide if an activity should be financed and, if so, the way in which environmental and social issues should be addressed in planning, financing, and implementation.’¹⁹

In addition, it is helpful to recall the wording used in the preceding 2003 EBRD Environmental Policy, which stated unequivocally that

‘The EBRD requires that projects that it finances meet good international environmental practice. Therefore, the *EBRD will require that projects be structured so as to meet: ... (ii) EU environmental standards, insofar as these can be applied to specific projects.*’²⁰

Clearly, a provision such as the requirement for “appropriate assessment” under Article 6(3) of the EU Habitats Directive epitomises one which can be so applied. It also seems highly unlikely that EBRD environmental safeguard standards have regressed with the adoption of the 2008 Environmental and Social Policy.

21. Acknowledging the relevance of the Article 6(3) “appropriate assessment” process for the biodiversity assessment required under PR 6 has numerous advantages. For example, as pointed out in the *D1 Motorway Compliance Review Report*,

‘Considerable [official] technical guidance exists to assist national authorities in ensuring correct implementation of the Article 6(3) appropriate assessment, setting out the specific steps and tests that need to be applied in sequential order.’²¹

Indeed, PR 6.6 itself expressly refers to an indicative selection of such guidelines.²² In addition, the European Court of Justice has provided some judicial clarification as to the standards required for an adequate “appropriate assessment” under Article 6(3), which must inform any determination by the PCM as to the adequacy of a biodiversity assessment under PR 6.6. Of particular relevance to the present Complaint is the Court’s reasoning in arriving at a 2007 finding that successive reports relating to the ecological impacts of a proposed project on a protected site in Italy

¹⁹ 2008 ESP, Para. 14 (emphasis added).

²⁰ 2003 EBRD Environment Policy, Para. 21, at 9 (emphasis added). Available at: http://www.ebrd.com/downloads/about/policies/environmental_policy/2003-07-01_Environmental_Policy-English_publication.pdf

²¹ *D1 Motorway Compliance Review Report*, para. 9, at 5. See European Commission, *Managing Natura 2000 Sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, (Luxembourg, 2000); European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002). In addition, many EU Member States have produced detailed guidance for their national competent authorities, e.g. Irish Department of Environment, Heritage and Local Government, *Appropriate Assessment of Plans and Projects in Ireland: Guidance for Planning Authorities* (Dublin, 10 December 2009).

²² In advising that ‘clients should refer to best practice guidelines on integrating biodiversity into impact assessments’ PR 6.6. includes a footnote 2 which explains that

- ‘Best practice guidelines on integrating biodiversity into impact assessment include:
- *Voluntary Guidelines on Biodiversity-inclusive Environmental Impact Assessment* (Contained in the CBD Decision VIII/28 from COP8 in 2006).
 - *Biodiversity in Impact Assessment* (IAIA Special Publication Series No. 3).
 - Various products of *The Energy and Biodiversity Initiative*.

‘have gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA [Special Protection Area designated under the 1979 Wild Birds Directive] concerned.’²³

22. Therefore, a central concern of this Compliance Review process is to examine whether the biodiversity assessment conducted in respect of the Boskov Most Project is adequate, having particular regard to whether its findings are sufficiently complete, definitive and conclusive to enable a valid decision to be reached on the effects of the Project on the protected areas in question.

Destruction of Habitat without Adequate Justification

23. The Complaint further alleges that the Project has been approved in breach of PR 6.12, PR 6.13 and 14 and, in the context of a lack of Strategic Environmental Assessment, PR 6.15. PR 6.12 relates to the conservation of “natural habitats”, ‘where the biological communities are formed largely by native plant and animal species, and where human activity has not essentially modified the area’s primary ecological functions’. PR 6.13 and PR 6.14 relate to the conservation of “critical habitats”, ‘whether natural or modified’, which are identified by virtue of a list of features indicating their high value to biodiversity and to the functioning of important ecosystems. PR 6.15 relates to the conservation of areas ‘designated by government agencies as protected for a variety of purposes’. Somewhat confusingly, in each case the 2008 ESP requires that such habitats or areas must not be degraded or converted, except in certain prescribed circumstances or subject to certain prescribed conditions.²⁴ In addition to the very real danger of

²³ Case C-304/05, *Commission v. Italy*, Judgment, 20 September 2007, para. 69.

²⁴ PR 6.12 provides that

- ‘there must be no significant degradation or conversion of the [natural] habitat to the extent that
- (i) the ecological integrity and functioning of the ecosystem is compromised or
 - (ii) the habitat is depleted to the extent that it could no longer support viable populations of its native species, unless:
 - there are no technically and economically feasible alternatives
 - the overall benefits of the project outweigh the costs, including those to the environment and biodiversity
 - appropriate mitigation measures are put in place to ensure no net loss and preferably a net gain of biodiversity value in the habitat concerned, or, where appropriate, a habitat of greater conservation value.’

PR 6.14 provides that

- ‘Critical habitats must not be converted or degraded ... unless the following conditions are met:
- Compliance with any due process required under international obligations or domestic law that is a prerequisite to a country granting approval for project activities in or adjacent to a critical habitat has been complied with.
 - There are no measureable adverse impacts, or likelihood of such, on the critical habitat which could impair its ability to function in the way(s) outlined
 - Taking a precautionary perspective, the project is not anticipated to lead to a reduction in the population of any endangered or critically endangered species or a loss in area of the habitat concerned such that the persistence of a viable and representative host ecosystem be compromised.

confusion due to overlap between these categories of habitats and areas, it is quite clear that the protection afforded under each provision requires an in-depth biodiversity assessment, as these provisions focus, for example, on the *identification* of ‘appropriate mitigation measures’²⁵ following the mitigation hierarchy,²⁶ *findings* of ‘no measurable adverse impacts or likelihood of such’,²⁷ or *findings* of no likelihood of ‘a reduction in the population of any endangered or critically endangered species or a loss in area of the habitat concerned’.²⁸

24. Indeed, the final sentence of PR 6.6 itself suggests that the protection intended under at least certain of these provisions is to be achieved primarily by means of a biodiversity assessment required under PR 6.6, by stipulating that ‘[w]hen the requirements of paragraphs 13, 14 and 15 apply, the client will retain qualified and experienced external experts to assist *in conducting the appraisal*.’ This suggests that the true significance of PRs 6.13, 6.14 and 6.15 is that they require a rather more rigorous biodiversity assessment conducted according to the highest standards of technical expertise. As PR 6.12 is similarly concerned with preventing significant degradation or conversion of the habitat, it is safe to assume that it likewise requires a rigorous biodiversity assessment of the impacts of a proposed Project. Further, the references in the latter provisions of PR 6 to the taking of a precautionary perspective,²⁹ to consultation with local communities and stakeholders,³⁰ and to the overall benefits of the project outweighing the costs to the environment and biodiversity,³¹ correspond notably with the nature of the biodiversity assessment required under PR 6.6³² and guided by the standards and practices established under Article 6(3) of the Habitats Directive.³³

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- Notwithstanding the above, all other impacts are mitigated in accordance with the mitigation hierarchy.’

In relation to “protected and designated areas”, PR 6.15 provides that

‘In addition to the applicable requirements of paragraph 14, the client will:

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

²⁵ PR 6.12. See also, PR 6.14, *ibid*.

²⁶ PR 6.14 and PR 6.15.

²⁷ PR 6.13.

²⁸ PR 6.13.

²⁹ PR 6.14.

³⁰ PR 6.15.

³¹ PR 6.12.

³² Note the stipulation under PR 6.6 that

‘The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders.’

³³ The stipulation under PR 6.12 that natural habitats may exceptionally undergo significant degradation or conversion where ‘the overall benefits of the project outweigh the costs, including those to the environment

25. Therefore, examination of this alleged ground of non-compliance can be undertaken alongside the examination of the adequacy of the PR 6.6 biodiversity assessment to determine whether its findings are sufficiently complete, definitive and conclusive. Once it is established which, if any, of the categories of habitat or area listed under PR 6.12 to PR 6.15 the Mavrovo National Park should fall under, it will be possible to determine whether or not the biodiversity assessment has adequately addressed the circumstances and conditions applicable to the Boskov Most Project.

Lack of Strategic Environmental Assessment

26. The Complaint alleges that the Boskov Most Project arises under the Macedonian Government's 2010 'Strategy for renewable use of energy resources 'til 2020' which, it claims, was not subjected to a process of strategic environmental assessment (SEA) as required 'by national law and EU *acquis communautaire*'. Thus, apparently categorizing the Mavrovo National Park as a "protected and designated area" for the purposes of PR 6, the Complaint alleges breach of PR 6.15, which stipulates that such areas 'must not be converted or downgraded' unless certain conditions are met³⁴ and only where the Client can 'demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable'. Of course, even if the Mavrovo National Park ought more appropriately to be categorized as a "critical habitat" under PR 6.13, similar requirements arise by virtue of PR 6.14.³⁵

27. Clearly, an applicable and legally-binding obligation to carry out SEA of a national strategy would amount to a requirement of 'due process leading to such permission' for the purposes of PR 6.15, or to 'due process required ... under domestic law' for the purposes of PR 6.14. Indeed, a recent judgment of the EU Court of Justice has found, in respect of an action programme for nitrate vulnerable zones adopted in accordance with Article 5 of the Nitrates Directive,³⁶ which had not undergone an SEA, that every organ of the State concerned should take 'measures ... that are appropriate for preventing such a plan or programme, *including projects to be realized under that programme*, from being implemented

and biodiversity' corresponds closely to the exception permitted in respect of 'imperative reasons of overriding public interest, including those of a social or economic nature' under Article 6(4) of the Habitats Directive.

³⁴ PR 6.14, which applies to areas designated under PR 6.15 in addition to "critical habitats" identified under PR 6.13.

³⁵ PR 6.14 also requires, *inter alia*, that

'Consequently, in areas of critical habitat, the client will not implement any project activities unless the following conditions are met:

- Compliance with any due process required under international obligations or domestic law that is a prerequisite to a country granting approval for project activities in or adjacent to a critical habitat has been complied with.'

³⁶ Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, 12 December 1991.

in the absence of an environmental assessment'.³⁷ This certainly suggests that the Court views the requirement for SEA as a key environmental due process obligation, breach of which may provide grounds for preventing individual projects associated with that plan or programme. This position strongly infers, by analogy, that any failure on the part of the Bank to take reasonable steps to ensure that the Client could demonstrate that the Project was fully compliant with such due diligence requirements would amount to non-compliance with PR 6.15 or PR 6.14.

28. Therefore, this element of the Compliance Review process will need to examine whether the Boskov Most Project can be regarded as having arisen under the 2010 Renewable Energy Strategy, whether an SEA was required in respect of the Strategy, and whether the Strategy was actually subjected to such an SEA process.

Incomplete Environmental Impact Assessment

29. An additional Complaint received from the Complainant on 30th December 2011, which she requests to be treated as an addendum to the original Complaint, alleges one further ground of non-compliance on the part of the Bank. It points out that to date 'no decision by the Ministry of Environment and Physical Planning has been issued to approve the Environmental Impact Assessment Study for the Boskov Most HPP project', as required under the Macedonian Law on Environment. The additional Complaint explains that this national approval process involves consultation with the public, creates an opportunity for complaints to be submitted, and might even result in changes to the study or in the approval decision being overturned. The Complainant claims, therefore, that by failing to wait for the completion of the national environmental impact assessment (EIA) process before approving the Project, the Bank has acted in breach of its duty to assess compliance with applicable national legal requirements, as set out in PR 1.9 and PR 10.7.³⁸

30. Therefore, a key task of this Compliance Review Process is to examine whether the Bank's decision to approve the Boskov Most Project and to sign the loan agreement was premature in light of the alleged incomplete national EIA approval process, amounting to a breach of PR 1.9 and/or PR 10.7.

³⁷ Case C-41/11, *Inter-Environnement Wallonie ASBL, Terre Wallonne ASBL v. Région Wallone*, Judgment, 28 February 2012, at p. 6 (emphasis added).

³⁸ PR 1.9 requires that

'The Environmental Impact Assessment (EIA) / Social Impact Assessment (SIA) shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws'.

PR 10.7 in turn provides unequivocally that

'The requirements of national law with respect to public information and consultation, including those laws implementing host country obligations under international law, must always be met.'

III. Analysis

Inadequacy of ESIA

31. As the adequacy of baseline data on species of mammals and birds included in the ESIA will be addressed in the next section of this Compliance Review Report, the analysis will concentrate here on the extent to which the ESIA assessed cumulative impacts, especially cumulative impacts to the climate, the availability of feasible alternatives to the present Boskov Most Project, and impacts on landscapes.

32. Regarding the alleged failure of the ESIA to address the ‘cumulative impacts to the climate’, the Bank’s Response points out that

‘the ESIA describes potential effects on global and local climates due to construction ... [and] ... concludes that the relatively small (in global terms) changes in greenhouse gas emissions would have no significant effect on global climate change but would contribute to reducing Macedonian emissions overall in line with the national strategy.’³⁹

An examination of the ESIA reveals that, as regards construction, sources of greenhouse gas emissions (GHGs) would include diesel-fuelled vehicles, equipment for clearing vegetation, subsequent burning or decay of such vegetation, emissions during manufacture of construction materials, and transport of materials and waste. However, the ESIA concludes that these impacts are not predicted to be significant, but rather ‘will be local, direct, short-term (in time duration) and small (regarding the significance)’.⁴⁰ As regards the Project’s operation, the ESIA focuses on GHG emissions, particularly of methane, due to decomposition of organic material when land is flooded to create the reservoir.⁴¹ It uses the IPCC’s 2006 standard methodology for estimating GHG emissions from dam activity and inundation but stresses that it is planned to remove as much vegetation as possible prior to inundation, which will very significantly reduce such emissions.⁴² Generally, the ESIA emphasizes that the impacts of the Project for climate change mitigation are positive ‘due to the reduction of GHG on the national level’.⁴³ In addition, a set of mitigation measures are set out in respect of GHG emissions from the reservoir, including:

- Preparation and implementation of Vegetation Clearance Management Plan.
- Preparation and implementation of Pollution, Prevention and Abatement Management Plan.
- Monitoring of standard climate/meteorological data.

³⁹ *Bank Response*, 15 December 2011, at 4.

⁴⁰ *Environmental and Social Impact Assessment*, at 143-144.

⁴¹ *Ibid.*, at 144-146.

⁴² *Ibid.*, at 145.

⁴³ *Ibid.*, at 146. For example, the ESIA points out, at 144, that

‘According to the development scenarios for the Macedonian power system defined in the Second national communication on climate change from 2008 year is estimated that if HPP Boskov Most will be built emission of GHG will be reduced for 0.2022 MT/year (per option), cumulative 0.3551 MT/year or 1.97% (percentage of baseline emissions in 2010).

- Cleaning up the vegetation on the bottom and around accumulation.⁴⁴ Therefore, the Complainant's assertion that the ESIA 'failed to properly assess ... the cumulative impacts to the climate' of the Project appears misplaced.

33. As regards the charge in the Complaint that the ESIA 'did not provide proper analysis of the alternatives', the Bank's Response points out 'in section 4.3, various alternatives for the Boskov Most HPP, including the "do nothing" alternative, which was simply no hydropower development; and various technical options that had been considered in previous analyses (reservoir versus no reservoir; dam and reservoir site location; dam height and configuration; location of water tunnel; and various headrace and penstock configurations)'.

However, in the English language translation of the ESIA in the possession of the Compliance Review Expert,⁴⁵ the various alternatives are set out and assessed in Section 4.2, which goes into quite considerable detail and depth of analysis.⁴⁶ In addition, the "do nothing" option is examined in Section 4.2, but is quickly discounted because

'it would cause a serious problem in the planned state energy balance and energy sector development, problem in the state obligations to fulfill the requirements for the RES [renewable energy sources] into the final energy production as well as expected larger emissions of GHG (due to utilization of other energy sources that cause higher emissions of CO₂). Consequently, the 'do nothing' will contribute to ... the higher impact to the environment through effects of climate change.'⁴⁷

This conclusion follows an analysis of the quantity of carbon dioxide emissions expected throughout the life-cycle of different renewable energy sources.⁴⁸

Therefore, even if the ESIA has continued to develop and has undergone several iterations, it is clear that feasible alternatives have been analysed in some detail.

34. As regards cumulative impacts more generally, the ESIA describes existing⁴⁹ and planned hydropower projects⁵⁰ in the vicinity of the Boskov Most Project and analyses the cumulative effects in terms of the construction and operation phases, as appropriate, concluding that the cumulative impacts will not be significant.⁵¹ Therefore, it would not be accurate to conclude that the general cumulative

⁴⁴ *Environmental and Social Impact Assessment, Part II*, at 2.

⁴⁵ ELEM informed the Eligibility Assessor at a meeting in Skopje on 8 February 2011 that the full ESIA is only available in Macedonian, although some key sections have been translated into English, see *Eligibility Assessment Report*, para. 16(a), at 9. The version of the ESIA in the possession of the Compliance Review Expert is the electronic version provided to the Eligibility Assessor following a meeting with Bank staff on 14 February 2011.

⁴⁶ *Environmental and Social Impact Assessment*, at 39-46.

⁴⁷ *Ibid.*, at 39. Indeed, this conclusion further contradicts the contention in the Complaint that the ESIA 'did not provide a proper analysis of the cumulative impacts to the climate'.

⁴⁸ *Ibid.*, at 38.

⁴⁹ HPP Vrben, HPP Vrutok, HPP Raven, HPP Spilje and HPP Globocica.

⁵⁰ HPP Lukovo Pole, HPP Crn Kamen and SHPPs Galicnik 1, 2 and 3.

⁵¹ See *Environmental and Social Impact Assessment*, at 187-189.

impacts have not been addressed – if indeed this is what the Complainant intended.

35. Although the Complaint does not provide any detail on the alleged deficiencies in the ESIA as regards its assessment of the impacts on landscape, the ESIA does provide a description and characterization of the essential features of the landscape to be potentially affected by the Project. It characterizes the landscape values in terms, *inter alia*, of “visual aspects”, “experiences”, “natural areas” and “areas with great significance” and lists examples of key features under such values.⁵² It also provides a visualization of the area affected by the Project in Annex 1 to the ESIA Report. Landscape issues are also addressed in Section 5.14 of the ESIA on ‘Natural Heritage’, which records, for example, that:

‘One of the most impressive parts of the Mavrovo national park is the striking gorges of the river Radika. On the mountain slopes there are several villages with original and specific architecture, Rostuse, Jance, Gari, Selce and many others.’⁵³

As regards the visual impacts of the Project on the landscape, the ESIA analyses the effects on “permanent viewers” and “transient viewers” from both the construction and operation phases.⁵⁴ Impacts during construction will arise from construction zones, construction camps, resource extraction sites, and storage areas for construction materials and prefabricated pipeline segments, which will be temporarily visible but subject to restoration and re-vegetation as required under Macedonian construction legislation.⁵⁵ The analysis of visual impacts of the dam and associated infrastructure on permanent viewers concludes that impact should not be significant ‘due to the low number of houses from where views of one or more elements of the project site would be possible’.⁵⁶ Mitigation measures identified as appropriate include:

- a campaign of informing local inhabitants, the public and tourists;
- the preparation and implementation of a Landscape Master Plan for the inundation area,
- the preparation and implementation of a Landscape Design and Management Plan for the design and construction of the dam wall, associated embankments, spillway, siphons, aqua-duct, other infrastructure, and night lighting;
- the implementation of a Revegetation / Rehabilitation Plan.⁵⁷

Therefore, it cannot be concluded that the ESIA failed to assess the issue of visual impacts upon the landscape.

⁵² *Environmental and Social Impact Assessment*, at 76-77.

⁵³ *Ibid.*, at 108.

⁵⁴ *Ibid.*, at 176-183.

⁵⁵ *Ibid.*, at 177.

⁵⁶ *Ibid.*, at 179.

⁵⁷ *Environmental and Social Impact Assessment, Part II*, at 12.

Incomplete Biodiversity Assessment

36. As regards the adequacy of the biodiversity assessment that has been undertaken as part of the ESIA exercise, it is important to examine whether the biodiversity assessment is generally ‘sufficient to fully characterise the risks and impacts’, as required under PR 6.6, and whether its findings are sufficiently complete, definitive and conclusive to enable a valid decision to be taken on the effects of the Project on the protected area or species in question, as required in the case of an Article 6(3) appropriate assessment. A detailed examination of the ESIA reveals that its characterisation of the baseline conditions as regards biodiversity⁵⁸ and of the risk and impacts to biodiversity⁵⁹ is reasonably comprehensive. For example, it notes that over 450 species of flora have been registered in the area of interest, including a number of rare and important species for Macedonia, but that this includes only one species listed in Annex IV of the EU Habitats Directive and four species included in the 1997 IUCN Red List.⁶⁰

37. Regarding mammals specifically, the ESIA lists 31 species in the Mavrovo National Park, including brown bear, lynx, chamois, red deer and roe deer.⁶¹ It notes that the otter is considered “threatened” and the Balkan lynx “critically endangered”.⁶² As regards impacts on mammals, the ESIA notes disturbance will be caused due to:

- fragmentation due to the building of roads;
- noise due to excavation, mining and movement of heavy earth vehicles;
- reduction of habitats due to the clearing of construction sites; and
- possible illegal hunting in the project area during the construction phase.⁶³

It acknowledges that the Project will alter the movement of large carnivores, including the Balkan lynx, wolf, fox and bear populations, and the otter population, as well as almost all of the amphibians.⁶⁴ The ESIA merely states that ‘[a]dditional measures will be prescribed to provide smooth movement of animals in the region’, though no details are included on such measures.⁶⁵ Neither are detailed measures to this effect set out in the Environmental and Social Action Plan (ESAP). The ESIA also concedes that ‘[t]he reservoir, siphons and other facilities will be new barriers which have to be overcome’ as will roads and increased human accessibility, but it concludes that such interference will be ‘small’ in terms of its significance.⁶⁶ Regarding related impacts on the aquatic ecosystems, it similarly concludes that

⁵⁸ *Environmental and Social Impact Assessment, Part I*, at 90-106.

⁵⁹ *Ibid.*, at 167-176.

⁶⁰ *Ibid.*, at 90. It appears that these 450 species are included in an Appendix to the ESIA but Appendix 3, which appears to include a list of species of flora, has not been translated into English in the version of the ESIA available to the Compliance Review Expert.

⁶¹ *Ibid.*, at 101.

⁶² *Ibid.*

⁶³ *Ibid.*, at 168.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at 174.

⁶⁶ *Ibid.*, at 174.

‘The small mammals, living by the river (especially in the Mala Reka catchment area) are motile. So their population will not be adversely affected by the construction and operation activities. Insignificant changes in the population of small mammals (rodents) will not impact feeding chain (prey for carnivores).’⁶⁷

38. The ESIA identifies a range of appropriate mitigation measures to be implemented in respect of terrestrial fauna during both the construction and operation phases of the Project. Such mitigation measures include
- the performance of comprehensive bio-monitoring and the installation of large mammal photo-traps to inform the Construction Management Plan;
 - the introduction of various measures for the care of injured fauna;
 - the progressive rehabilitation of the pipeline easements in order to minimize fragmentation and maintain movement corridors for mammals (along with the ongoing monitoring of movements of lynx and other large carnivores);
 - the implementation of compensation measures to offset habitat loss;
 - the introduction of controls on road lighting and other outdoor lighting;
 - the introduction and effective enforcement of very strong hunting controls; and
 - the implementation of a Noise and Vibration Management Plan.⁶⁸

Therefore, the biodiversity assessment can generally be regarded as being quite comprehensive and rigorous in its treatment of the potential impacts of the Project on large mammals, though the ESAP contains very little detail on the actions required to operationalise the mitigation measures proposed above.⁶⁹

39. Similarly, regarding the impacts on birds, the ESIA recognizes that the Project area hosts some 77 bird species and concedes that there will be some interference during construction, but also points out that it is neither a significant bird sanctuary nor a significant bird corridor,⁷⁰ and anticipates that ‘[a]fter finishing the construction activities the birds will come back in the vicinity of the project area’, especially as

‘The reservoir banks will have wet environment throughout the year, which can lead to proliferation of vegetation e.g., grass, etc along the reservoir banks. Such conditions are generally ideal for various kinds of birds, especially, water birds.’⁷¹

For these reasons, few mitigation measures are identified in respect of the Project’s impacts on birds, except that, in the preparation of the Construction Management Plan, ‘[n]esting and birding [breeding?] periods should be taken into consideration’.⁷²

⁶⁷ *Ibid.*, at 169.

⁶⁸ *Environmental and Social Impact Assessment, Part II*, at 9.

⁶⁹ The version of the ESAP in the possession of the Compliance Review Expert is the electronic version provided to the Eligibility Assessor following a meeting with Bank staff on 14 February 2011.

⁷⁰ *Environmental and Social Impact Assessment, Part I*, at 168-169.

⁷¹ *Ibid.*, at 174

⁷² *Environmental and Social Impact Assessment, Part II*, at 8.

40. As regards the specific allegation in the Complaint that the requirement for ongoing bio-monitoring of large mammals and flora amounts to a breach of PR 6.6 requiring that ‘[t]he extent of due diligence should be sufficient to fully characterize the risks and impacts’, the Bank quite reasonably points out that ‘It is standard practice for the Bank to require clients to monitor key resources as well as actual impacts. Monitoring sensitive species, for example, will help verify the accuracy of the conclusions in the ESIA of limited impacts, and if necessary will identify impacts that justify adjustments to the actions required to avoid or reduce impacts.’⁷³
41. Further, pointing out that ‘[e]cosystems, such as those represented in the area of the Boskov Most HPP, are not static but rather are changing in response to, among many other factors, the change in human pressures’, the Bank insists that ‘The requirement for a robust biodiversity monitoring program should thus not be considered as evidence of a weak baseline characterization. Rather, it should give confidence that changes in biodiversity, whether due to the project or otherwise, can be detected early and addressed as needed to protect the resources of the Park.’⁷⁴
- In principle, such an adaptive “ecosystems approach” would be in keeping with, and arguably required by, the “precautionary approach” stipulated in PR 6.6, and this understanding of the role and utility of ongoing monitoring is entirely consistent with guidance issued by the EU Commission on practical implementation of Article 6(3) of the EU Habitats Directive. For example, 2001 Commission guidance advises, in respect of the identification of mitigation measures, which constitutes “Step Four” of the Article 6(3) “appropriate assessment” process, that
- To assess mitigation measures, the following tasks must be completed:
 - provide evidence of how the measures will be monitored, and, should mitigation failure be identified, how that failure will be rectified.’⁷⁵
42. However, the section of the ESIA Report on mitigation measures does in fact suggest that the ongoing bio-monitoring now required under the ESAP is intended to remedy just such ‘a weak baseline characterization’, as alleged in the Complaint. For example, it refers to ‘[m]issing of reliable data’ and proposes that ‘comprehensive bio-monitoring on terrestrial fauna should be performed in the Project area in four seasons, before the construction activity will start’.⁷⁶ Similarly, in recommending that photo-traps be installed in the vicinity of the Elen Skok Bridge and the location of the main siphon and aqua-duct, the ESIA explains that this will serve ‘to monitor the frequency of crossing by the large

⁷³ *Bank Response*, 15 December 2011, at 5.

⁷⁴ *Ibid.*

⁷⁵ European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 30.

⁷⁶ *Environmental and Social Impact Assessment, Part II*, at 8.

mammals and their presence in the Project area'.⁷⁷ In relation to habitat fragmentation, the ESIA recommends, as a mitigation measure, that

‘Monitoring of moving the lynx and other large carnivores and ungulates should be performed in preconstruction phase, the frequency of crosses and usually use paths to be identified. The Construction Management Plan will take into account the possible impacts to the large mammals and if it is necessary (on the base of the monitoring results) to design the paths / routes for these animals.’⁷⁸

These statements imply that the Client does not possess a clear picture of large fauna movements within the Project area throughout the year. Indeed, in relation to “residual impacts”, the ESIA states quite candidly, ‘[i]f the bio-monitoring will not be performed before starting of activities the missing of reliable data will lead to residual impact’.⁷⁹ Thus, while the mere inclusion of ongoing bio-monitoring requirements does not necessarily indicate an inadequate biodiversity assessment, the present ESIA would appear to include a biodiversity assessment which lacks key baseline data on the presence and movement in the Project area of large mammals, including the “critically endangered” Balkan lynx, necessary for meaningful assessment of biodiversity impacts.

43. Similarly, as regards impacts on flora, the section of the ESIA on mitigation measures states that ‘[d]ue to the missing of continuous reliable (seasonal) data for the present flora habitats and species, there is a need for providing bio-monitoring in the borders of Project area, prior the construction activities will start’.⁸⁰ Once again, it notes that ‘[i]f the bio-monitoring will not be performed before starting of activities the missing of reliable data will lead to residual impact’.⁸¹ Further, one mitigation measure recommends that
- ‘[a] qualified botanist will be on-site prior to any vegetation clearing works within remnant vegetation communities to inspect the area for significant flora. If any species of conservation significance are confirmed as present, suitable management measures will be implemented, such as development of translocation programs and associated management plans.’⁸²

Though it is important to have regard to the fact that this might amount to standard operating procedure, one might have expected that a thorough survey for species of flora of conservation significance would have already been conducted in those areas to be cleared for construction and inundation. Once again, inclusion of such requirements suggests that the biodiversity assessment lacks the key baseline data required to permit a meaningful assessment of likely impacts, and their characterization as “mitigation measures” seems inappropriate.

⁷⁷ *Ibid.*, at 9.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at 7.

⁸¹ *Ibid.*, at 8.

⁸² *Ibid.*, at 7-8.

44. In explaining this determination, it is useful to point out that official guidance on the application of Article 6(3) of the EU Habitats Directive requires, as “Step One” of the assessment, that certain information is required, including:

- The conservation objectives of the site and the factors that contribute to the conservation value of the site;
- The existing baseline condition of the site;
- The key attributes of any [protected] habitats or species on the site;
- The dynamics of the habitats, species and their ecology;
- The seasonal influences on the key [protected] habitats or species on the site.⁸³

This seminal guidance document further provides that ‘[w]here there are gaps in information, it will normally be necessary to supplement existing data with further survey fieldwork’,⁸⁴ and it provides a technical annex detailing how such baseline studies ought to be conducted, including specific guidance on surveying plants and habitats, birds and mammals.⁸⁵ While the biodiversity assessment conducted in respect of the Boskov Most Project quite understandably relies very largely on desktop analysis of data from existing and ongoing studies of the biodiversity resources of the Mavrovo National Park and on consultation with the Mavrovo National Park Administration,⁸⁶ it is clear that some further fieldwork of direct and immediate relevance to the likely biodiversity impacts directly attributable to the Project should have been conducted.⁸⁷

45. It is helpful here to consider the recent interpretive statements of the Advocate General of the Court of Justice of the EU regarding the precise normative implications of Article 6(3) of the Habitats Directive. She states unequivocally that

‘the assessment must be undertaken having rigorous regard to the precautionary principle. That principle applies where there is uncertainty as to the existence or extent of risks. The competent national authorities may grant authorisation to a plan or project *only if they are convinced that it will not*

⁸³ European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 25-26. See also, European Commission, *Managing Natura 2000 Sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, (Luxembourg, 2000), at 36.

⁸⁴ *Ibid.*, at 25.

⁸⁵ *Ibid.*, at 53 *et seq.* This Annex to the Guidance advises, at 57, that ‘A comprehensive floral and/or faunal census will be needed ... when a desk study indicates that the development may have a significant impact on an area recognized as having high nature-conservation interest or within the boundaries of a site known to contain significant species, populations or communities.’

⁸⁶ In fact, the 2002 EU Commission Guidance, *ibid.*, includes among “key information sources”, at 27: ‘Relevant nature conservation agencies and other bodies ... and any existing ecological survey material that may be available from landowners, site managers or nature conservation bodies’.

⁸⁷ See *Bank Response*, 15 December 2011, which points out, at 4, that ‘the ESIA included a mainly desktop analysis of terrestrial biodiversity data (there were aquatic biology field studies undertaken) and reached well-supported conclusions based on the most recent data, including ongoing studies in the Park.’

*adversely affect the integrity of the site concerned. If doubt remains as to the absence of adverse effects, they must refuse authorization.’*⁸⁸

46. If one accepts that, where protected areas are concerned, the obligations imposed by PR 6.6 are analogous to those imposed under Article 6(3) of the EU Habitats Directive, it appears that the bio-monitoring requirements described in the ESIA as “mitigation measures” and outlined in Paragraphs 40 and 41 above, cannot be considered acceptable. The EU Commission guidance on the application of Article 6(3) of the EU Habitats Directive lists the identification and assessment of “mitigation measures” as Step Four of the “Appropriate Assessment” process, following compilation of the “information required” (Step One), “impact prediction” (Step Two), and determination of ‘whether there will be adverse effects on the integrity of the site as defined by the “conservation objectives” and status of the site’ (Step Three).⁸⁹ Indeed, the Guidance makes it quite clear that ‘[m]itigation measures need to be assessed against the adverse effects the project or plan is likely to cause’.⁹⁰ Therefore, such adverse effects must be fully identified and understood in advance of the identification of mitigation measures, rather than by means of their operation.

47. Another, though possibly related, difficulty with the present biodiversity assessment arises from the fact that it is incorporated into and indistinguishable from the ESIA. Despite the fact that PR 6.6 of the 2008 ESP provides that ‘the potential impacts on biodiversity likely to be caused by the project’ shall be identified and characterised ‘[t]hrough the environmental and appraisal process’, the detailed requirement for a biodiversity assessment is set out in a quite separate and distinct PR from the general requirement for environmental and social appraisal under PR 1. However, in the present case, the characterization of biodiversity resources⁹¹ and the assessment of impacts upon biodiversity⁹² merely form minor sub-sections of a much wider-ranging ESIA Report. Having regard to the analogous requirements in respect of Article 6(3) of the EU Habitats Directive, the 2002 Commission Guidance advises that

‘Where projects or plans are subject to the EIA or SEA directives, the Article 6 assessments may form part of these assessments. However, *the assessments required by Article 6 should be clearly distinguishable and identified within an environmental statement or reported separately.*’⁹³

⁸⁸ Case C-258/11 *Sweetman v. An Bord Pleanála*, Opinion of Advocate General Sharpston, 22 November 2012, at para. 51 (original emphasis).

⁸⁹ European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 25-29.

⁹⁰ *Ibid.*, at 30.

⁹¹ *Environmental and Social Assessment, Part I*, Section 5.13, at 90 *et seq.*

⁹² *Ibid.*, Section 7.7, at 167 *et seq.*

⁹³ European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 12 (original emphasis).

This requirement that the Article 6(3) appropriate assessment of biodiversity impacts should be clearly distinguishable reflects the fact that there is a key difference between the Article 6(3) and the EIA and SEA assessment processes required under EU law. The Article 6(3) “appropriate assessment” is determinative of the relevant decision-maker’s formal authority to approve the project or plan in question, whereas the EIA and SEA processes are merely intended to inform the wider decision-making process and do not dictate any particular outcome. Article 6(3) unequivocally provides that ‘the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned’. Therefore, while Article 6(3) imposes specific substantive obligations arising from the outcome of the appropriate assessment, neither the EIA nor SEA Directives require that any specific action be taken as a result of the outcome of the EIA or SEA processes. Consequently, the two types of assessment processes cannot be equated or conflated for the purposes of discharging obligations under EU law and the European Court of Justice (ECJ), recognizing this lack of legal symmetry, has stated that ‘[a]ccordingly, assessments carried out pursuant to Directive 85/337 [on EIA] or Directive 2001/42 [on SEA] cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive’.⁹⁴

The likelihood that the substantive standard of biodiversity protection afforded under PR 6.6 corresponds with that required under Article 6(3) of the Habitats Directive increases considerably in the case of “natural habitats”, “critical habitats” or “protected and designated areas” as identified under ESP PR 6.12, PR 6.13 and PR 6.15 respectively. The language employed in each provision to frame the obligation to ensure that there is no (or no significant) degradation or conversion of the habitat in question reflects the requirement in Article 6(3) to ensure that a plan or project ‘will not adversely affect the integrity of the site concerned’. For example, PR 6.12, on “natural habitats”, requires that the ‘the ecological integrity and functioning of the ecosystem’ should not be compromised, while PR 6.14, applicable to both “critical habitats” and “protected and designated areas”, requires that ‘[t]here are no measurable adverse impacts, or likelihood of such, on the critical habitat which could impair its ability to function’. Indeed, a recent Advocate General’s Opinion delivered in the EU Court of Justice shines considerable light on the precise meaning of the phrase “adverse effect on the integrity of the site”, as employed in Article 6(3) of the Habitats Directive, stating that ‘the notion of “integrity” must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned’.⁹⁵

⁹⁴ Case C-418/04 *Commission v. Ireland*, Judgment, 13 December 2007, at para. 231. See further, G. Simons, ‘Habitats Directive and Appropriate Assessment’, (2010) 17/1 *Irish Planning and Environmental Law Journal* 4, at 8.

⁹⁵ Case C-258/11 *Sweetman v. An Bord Pleanála*, Opinion of Advocate General Sharpston, 22 November 2012, at para. 54.

Regarding the status of the Project site for the purposes of PR 6, it would not appear to be a “natural habitat”, due to its modification by human activity,⁹⁶ nor would it appear to be “critical habitat”, due to its very light use by lynx and the Project’s small footprint.⁹⁷ However, it is certainly a “protected and designated area” within the meaning of PR 6.15,⁹⁸ which means that it is subject to the protection afforded under PR 6.14 and some additional requirements regarding consultation with stakeholders, the satisfaction of legal requirements of due diligence and, where appropriate, additional measures for the promotion and enhancement of the conservation values of the protected area.⁹⁹

Therefore, the requirement that the biodiversity assessment should be complete, definitive and conclusive, similar to an “appropriate assessment” under Article 6(3) of the Habitats Directive and, ideally, clearly distinguished from the general environmental assessment required for the ESIA, is all the more forcefully established under PR 6 in the case of a “protected and designated area”, such as the Mavrovo National Park. As determined above,¹⁰⁰ the biodiversity assessment included in the ESIA for the Boskov Most Project lacks certain key baseline data and conclusions on the presence and movement in the Project area of large mammals, including the “critically endangered” Balkan lynx, to permit it to be considered complete, definitive and conclusive. Therefore, it amounts to a breach of PR 6.14 as it fails to establish definitively that ‘[t]aking a precautionary perspective, the project is not anticipated to lead to a reduction in the population of any endangered or critically endangered species’. This determination relates to the conclusiveness of the biodiversity assessment’s findings and is not altered by the fact that the ‘conservation aims of the protected area’ are reasonably modest.¹⁰¹

⁹⁶ See *Bank Response*, 15 December 2011, at 5-6.

⁹⁷ *Ibid.*, at 6.

⁹⁸ For example, the *Bank Response, ibid.*, at 5, notes that

‘The project area is without question in a protected area, as is emphasized throughout the ESIA. However, it could not be considered as either natural habitat or critical habitat.’

The *Environmental and Social Impact Assessment, Part I* states, at 107, that

‘Mavrovo National Park was designated as a National Park with the Law passed on March 3rd 1952, on account of “the historical and scientific significance of the forests and wooded areas around the plain of Mavrovo, the specific landscape and the natural beauty of the region, the diverse flora and fauna and ethnological characteristics”. It is the largest of all three national parks in the Republic of Macedonia. It is one of the oldest, richest in biodiversity and most valuable protected areas in the country. Furthermore, the National Park is an Emerald site, Important Plant Area (IPA), Important Bird Area (IBA), and part of it will be proposed as Natura 2000 site in future.’

The ESIA further notes, at 108, that the area in which the Boskov Most facilities will be situated, is protected ‘under the Law on Nature Protection (“Official Gazette of RM” no. 67/04, 14/06, 84/07, 35/10 and 47/11)’.

⁹⁹ PR 6.15.

¹⁰⁰ *Supra*, paras. 40 and 41.

¹⁰¹ For example, the *Environmental and Social Impact Assessment, Part I*, at 108, notes

‘The expert team involved in the preparation of the EIA Study for HPP “Boskov Most” has studied these documents, and according to their recommendations, all facilities of HPP will be located in the area of sustainable utilization. This kind of protected area, under the Law on Nature

Regarding the missing lists of species of mammals and birds referred to in the Complaint, the Bank Response informs us that '[t]hese two lists and associated source citations were inadvertently omitted from the draft ESIA that was disclosed for public review and comment (due to a word processing error)'.¹⁰² Taking into account the fact that such an error is entirely plausible in the compilation of such a multi-faceted, complex and wide-ranging document as the present ESIA, and the Bank's assurances that '[t]he lists were provided to the Complainant before the end of the disclosure period and added to the ESIA on the ELEM website as well',¹⁰³ it would not be appropriate to find that the omission of these lists would, *per se*, constitute a breach of PR 1.5 or of PR 6.6. In fact, as regards the above determination that the biodiversity assessment was not complete, definitive and conclusive, the problem is not with the omission of lists of species compiled on the basis of desktop analysis of data from existing and ongoing studies of the biodiversity resources of the Mavrovo National Park, but on the lack of additional fieldwork of direct and immediate relevance to the likely biodiversity impacts of the Project.

Therefore, the Compliance Review Expert has determined that the Bank has failed to ensure the carrying out of an adequate biodiversity assessment amounting to non-compliance with the requirements of PR 6.6, PR 6.14 and PR 6.15.¹⁰⁴

Lack of Strategic Environmental Assessment

As regards the contention in the Complaint that the Boskov Most Project has arisen under the *2010 Renewable Energy Strategy*, for which a Strategic Environmental Assessment (SEA) is required, but has not been conducted, the Bank points out emphatically that a SEA has been carried out in respect of a higher-level policy document, the *Energy Strategy of FYR Macedonia until 2030*, which includes the Boskov Most Project as one of six new hydropower projects within the *Strategy* time horizon.¹⁰⁵ An *Opinion* issued by the Macedonian Minister of Environment and Physical Planning, appears to confirm that the Boskov Most Project may be understood as having arisen under the higher-level *Strategy*, and that the SEA carried out in respect of this *Strategy* suffices for the purposes of the requirements of Macedonian national law.¹⁰⁶ Therefore, there was no need to conduct an additional SEA in respect of the subordinate *2010 Renewable Energy Strategy*, and no breach of PR 6.15

Protection ("Official Gazette of RM" no. 67/04, 14/06, 84/07, 35/10 and 47/11) does not possess high values for conservation, and it is area where building of infrastructure facilities is permitted.'

¹⁰² *Bank Response*, 15 December 2011, at 4.

¹⁰³ *Ibid.* However, the ESIA (final amended version) is no longer available on the ELEM website. See <http://www.elem.com.mk/en/environment/menu2/ecology-report>

¹⁰⁴ Of course, as noted above, *supra*, para. 16, such a finding automatically implies non-compliance with the public disclosure requirements for Category A projects set down under PR 10.18.

¹⁰⁵ *Bank Response*, 15 December 2011, at 6.

¹⁰⁶ Minister of Environment and Physical Planning, *Response to Requirement for Opinion*, 17 March 2010.

Similarly, it does not appear that any proposal for a Management Plan for the Mavrovo National Park has yet been prepared, and so a requirement to conduct SEA of such a Plan could not be included among the due process requirements of PR 6.15. Therefore, the Compliance Review Expert declines to make a finding of non-compliance in respect of this alleged breach of PR 6.15.

Incomplete Environmental Impact Assessment Process

48. As regards the contention, set down in the Additional Complaint,¹⁰⁷ that the Bank should have waited for the completion of the national environmental impact assessment (EIA) process before approving the Project, the Bank points out that neither PR 1.9 nor PR 10.7 ‘require that all permits, authorizations and decisions be made prior to EBRD Board approval’ and, further, that ‘[p]ermitting is often a parallel process to the EBRD due diligence process’ and that ‘different stages of permitting are experienced’.¹⁰⁸ It argues that the decision to approve the Project for financing effectively means that such financing remains ‘subject to the terms and undertakings contained in the loan agreement [including] those in the ESAP, which in this case includes the commitment to comply with all relevant local requirements. If additional requirements are made by the Ministry [on final approval of the EIA], then there is a provision in the legal documents that the Environmental and Social Action Plan can be amended in response to changes, as agreed between the Bank and the borrower.’¹⁰⁹

The Bank also points out that PR 10.7 on stakeholder engagement does not set down precise requirements regarding the timing of public information disclosure and consultation and provides assurances that further consultations will be conducted, as needed, as the Project proceeds and the ESAP evolves.¹¹⁰

49. While ‘the commitment to comply with all relevant local requirements’ is not set out in the ESAP quite as unequivocally as is suggested by the Bank’s response,¹¹¹ it appears reasonable to rely on that commitment to make whatever changes might be necessary as, otherwise, the Project could not proceed except in flagrant breach of Macedonian law. It appears that MOEPP has established the Commission to review the Project EIA in early 2012¹¹² and it is assumed that MOEPP or the Commission would require additional assurances where necessary and would specify a regime of monitoring and reporting for the Project. Also, as both the ESAP and the Stakeholder Engagement Plan (SEP) envisage ongoing communication with stakeholders during construction and operation of the

¹⁰⁷ *Additional Complaint*, 30 December 2011.

¹⁰⁸ *Bank Response to Additional Complaint*, 31 January 2012, at 1.

¹⁰⁹ *Ibid.*, at 2-3.

¹¹⁰ *Ibid.*, at 2.

¹¹¹ The ESAP merely states, at 2, that

‘[t]he ESIA was prepared to meet the requirements of FYR Macedonian law’, [and that] ‘this ESAP may be revised from time to time during project performance. No changes will allow violations of FYR Macedonian law’.

¹¹² See *Eligibility Assessment Report*, at para. 16(f).

Project,¹¹³ it is clear that the procedures in place can easily facilitate any additional stakeholder consultation made necessary by MOEPP's decision of the EIA.

50. Therefore, the Compliance Review Expert declines to make a finding of non-compliance in respect of the alleged breach of PR 1.9 and PR 10.7.

¹¹³ For example, ESAP Action 10.2 provides for the Client to 'Report on a regular basis to the impacted communities about progress in the implementation of the measures in this ESAP ... Semi-annually during construction and annually during operation.' Similarly, Section 5.2 of the Stakeholder Engagement Plan reassures that the 'Stakeholder Communication Activities' comprise 'an ongoing process of communication with stakeholders'.

IV. Recommendations

51. Where, as in the present Complaint, the Compliance Review Expert concludes that the Bank was in non-compliance with relevant EBRD Policy (ESP), PCM RP 40 requires inclusion in the draft Compliance Review Report of recommendations to:

- address the findings of non-compliance at the level of EBRD systems or procedures to avoid a recurrence of such or similar occurrences; and/or
- address the findings of non-compliance in the scope or implementation of the Project taking account of prior commitments by the Bank or the Client in relation to the Project; and
- monitor and report on the implementation of any recommended changes.

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

- Development of detailed guidance on the minimum requirements for the preparation of biodiversity assessments for projects likely to have a significant effect on natural, critical or protected habitats, providing, *inter alia*:
 - o Best practice regarding the setting out of conclusive and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed Project on the integrity of the site concerned.¹¹⁴
 - o Best practice regarding the preparation and reporting of a biodiversity assessment separately from the general ESIA or in a manner clearly identified and distinguishable within the ESIA.¹¹⁵
 - o Practical guidance on the scope of the very limited flexibility as regards the exhaustiveness of such a biodiversity assessment likely to be acceptable for the approval of a Project under the so-called “D1 exception”.
 - o Where the so-called “D1 exception” is employed, fully transparent procedures for decision-making on disbursement of funds subject to subsequent satisfaction of contractual conditions relating to further biodiversity assessment.
 - o Practical guidance on the use of the exception, outlined under PR 6.12 and corresponding with Article 6(4) of the EU Habitats Directive, permitting approval, for imperative reasons of overriding public

¹¹⁴ See European Commission, *Managing Natura 2000 Sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, (Luxembourg, 2000); European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002). See further, Case C-127/02 *Waddenzee*, Judgment, 7 September 2004; Case C-226/08 *Stadt Papenburg*, Judgment, 14 January 2010; Case C-302/05 *Commission v. Italy*, Judgment, 20 September 2007, para 69; Case 239/04 *Commission v. Portugal*, paras. 22-23.

¹¹⁵ See European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002), at 12.

importance, of a Project which a biodiversity assessment has determined to be unavoidably likely to adversely impact the ecological integrity of the site concerned.¹¹⁶

B. Recommendations to address the findings of non-compliance in the scope or implementation of the Project

- Though the Compliance Review Expert has concluded that the Bank was not in full compliance with the ESP as regards the assessment of the biodiversity impacts of the present Project, it is only necessary in the present case to recommend that the mitigation measures identified in the ESAP, and any further measures arising under the due process of national law, are rigorously implemented. The reasonably comprehensive desk-based studies undertaken and the complete suite of mitigation measures stipulated ought to be sufficient to ensure the effective application of the requisite standards of protection of biodiversity resources in the present case.
- In ensuring implementation of the mitigation measures stipulated in the ESAP, the Bank should have regard to the outcome of the ongoing revalorization of the Mavrovo National Park by the Ministry of Environment and Physical Planning and any new or additional management goals established thereby.

C. Monitor and report on the implementation of any recommended changes

The Compliance Review Expert recommends that implementation of the various recommendations proposed above are monitored by Bank officials and that a report be prepared upon completion of these tasks and agreed with relevant Bank officials and the PCM Officer.

¹¹⁶ See D. McGillivray, 'Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Article 6 of the Habitats Directive', (2012) 24:3 *Journal of Environmental Law* 417-450.