



27 March 2017

To: Sir Suma Chakrabarti  
President, European Bank for Reconstruction and Development  
One Exchange Square  
London EC2A 2JN  
United Kingdom

To: Board of Directors  
European Bank for Reconstruction and Development  
One Exchange Square  
London EC2A 2JN  
United Kingdom

**Re: Project Complaint Mechanism Compliance Review Reports for the Oyu Tolgoi and Energy Resources Phase II Projects**

Dear President Chakrabarti and Members of the Board of Directors:

As part of our continued dialogue regarding changes needed to ensure that the EBRD's Project Complaint Mechanism (PCM) is independent, effective and efficient, we write to highlight concerns about the approach taken in the PCM's Compliance Review Reports for the Oyu Tolgoi and Energy Resources Phase II Projects. In particular, we wish to draw your attention to several ways in which the approach taken in these compliance investigations is out of line with best practice for compliance reviews across independent accountability mechanisms, raising key questions about the effectiveness and validity of the PCM's compliance review function.<sup>1</sup>

The Oyu Tolgoi and Energy Resources cases are based on a complaint filed in 2013 by semi-nomadic herders in Mongolia's Gobi Desert to raise concerns about cumulative impacts from an expanding network of mining roads, quarries, and other linear mining infrastructure arising from both projects. Nearly four years after the original complaint was filed, these projects continue to harm herders by fragmenting pastures, impeding access to water and creating health and safety hazards.

The PCM Compliance Review Expert's approach in these cases was one that entirely failed to grapple with the serious harm reported by complainants. A single example illustrates this well: during an August 2015 site visit concerning both cases, the Expert heard a herder tearfully tell the story of her only child drowning in an unreclaimed quarry that had been used by the Energy Resources Project. The quarry remains unreclaimed to this day and continues to present a risk of further accidents. Despite the tragic nature of this incident, the Report fails to so much as acknowledge this testimony or mention that this type of harm is a concern to complainants.

---

<sup>1</sup> Complainants and their advisors also submitted detailed critiques of both draft Compliance Review Reports. As the final reports are not significantly different from the drafts, we attach those comments in full for your review.

The Expert omitted herder testimonials from both Reports, explaining in the Oyu Tolgoi Report that they “could not be considered determinative” because such statements were inconclusive, inconsistent or unclear.<sup>2</sup> Putting aside the dubious nature of such a broad generalization, these reservations do not justify omitting the complainants’ viewpoint entirely from the Reports, an approach that is grossly out of line with that used by other accountability offices at peer institutions. In fact, both the Asian Development Bank’s Compliance Review Panel (CRP) and the World Bank’s Inspection Panel have treated similar scenarios in a markedly different way.

In a case concerning a railroad improvement project, the CRP discussed in detail the story of two children who drowned in a pond that formed in a project-related excavation site. The CRP presented the known facts of the incident, as well as facts in dispute, and then used the example to draw relevant findings about the project’s failings.<sup>3</sup> The compliance report explained that the CRP’s “conclusions are drawn from the wealth of information and insights it received and from its own observations and assessments in the field.”<sup>4</sup>

Similarly, in a recent case about a road development project, the Inspection Panel explained in detail the information and testimonies provided by complainants during a compliance review site visit, including the story of a boy who drowned in an unreclaimed excavation pit. The compliance report discussed the Panel’s impressions of how this and similar tragedies, and the company’s response to them, affected the community and contributed to feelings of resentment and distrust.<sup>5</sup>

In contrast, stories of specific project impacts and their repercussions for local communities are entirely excluded from the Oyu Tolgoi and Energy Resources Compliance Review Reports. In addition to the example above, the Reports omit the story of Ts. Badarchuluun, a herder whose husband and brother both died in a road accident involving a mining truck, leaving her and her remaining children impoverished. Similarly absent are the many herder testimonials about ongoing pasture fragmentation impacts from Oyu Tolgoi and Energy Resources roads, which have threatened the sustainability of traditional herding practices in the area and led to conflicts between herders for use of pasture and water.<sup>6</sup>

---

<sup>2</sup> Project Complaint Mechanism, European Bank for Reconstruction and Development, *Compliance Review Report, Oyu Tolgoi, Request Number: 2013/01(a)* (Feb. 2017) at para. 7, available at: <http://bit.ly/2mVdCMk>. The Energy Resources Compliance Report does not address why such statements were omitted.

<sup>3</sup> Compliance Review Panel, Asian Development Bank, *Final Report on Compliance Review Panel Request No. 2012/2 on the Greater Mekong Subregion: Rehabilitation of the Railway Project in the Kingdom of Cambodia (Asian Development Bank Loan 2288 and Asian Development Bank Loan 2602/Grant 0187 [Supplementary])* (14 Jan. 2014) at para. 107-113, available at: <http://bit.ly/2nVVJPC>.

<sup>4</sup> *Id.* at para. 13.

<sup>5</sup> Inspection Panel, The World Bank, *Republic of Uganda Transport Sector Development Project – Additional Financing (P121097) Investigation Report* (4 Aug. 2016) at para. 113-14, available at: <http://bit.ly/2nHY2IC>.

<sup>6</sup> Herder testimonials regarding the impacts of Oyu Tolgoi roads are substantiated by a recent independent report produced through an ongoing dispute resolution process facilitated by the Office of the Compliance Advisor Ombudsman (CAO) of the World Bank Group. See JSL Consulting Ltd., *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding, Impacts of Oyu Tolgoi on Herder Livelihoods and Local/Regional Water Sources* (Jan. 2017) at MDT Component 2: Analysis of changes over the past decade to herder assets and livelihoods, para. 5.2, available at: <http://bit.ly/2mVf95k>.

The Reports instead focus on a narrow review of project documents to determine whether social and environmental assessments identified relevant issues and developed mitigation measures. Without also including information and evidence from project-affected people, the resulting Reports cannot provide a complete, accurate view of project impacts or of the adequacy and effectiveness of mitigation measures.

This approach creates an inequitable process for complainants. It also does a disservice to the Board of Directors, who receive compliance reports that lack a complete recitation of evidence on project implementation and impacts on the ground. As a result of this approach, the Oyu Tolgoi and Energy Resources Compliance Review Reports do not provide an adequate basis for the Board to assess whether mitigation measures have been properly implemented or whether Projects have successfully avoided harming local communities.

Moreover, we have reason to believe that the approach taken to the Oyu Tolgoi and Energy Resources compliance reviews is not an isolated or case-specific instance.<sup>7</sup> Over time, allowing such an approach to continue will undermine the utility and legitimacy of the PCM and prevent the Bank from effectively learning lessons from poorly implemented projects in order to make more sustainable investments in the future.

As previously noted, in order to ensure a strong and effective accountability framework at the Bank, we recommend:

- An early revision of the PCM Rules of Procedure, to address this and other issues borne out by recent case experiences;
- Development and adoption by the PCM of its own guidelines for handling complaints in order to improve internal consistency and ensure conformance with best practices for independent accountability mechanisms;
- The creation of a senior management position for the PCM Director, similar to that of the Vice President of the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC), which will give the PCM greater legitimacy among its users, more resources to provide remedy and identify problematic projects and direct access to EBRD's decision-makers;
- The immediate removal of the PCM from the Office of the Chief Compliance Officer and Risk Department to create a direct and independent reporting line to the Board;
- Quarterly reporting by the PCM Officer directly to the Audit Committee.<sup>8</sup> The briefing should include, for example, the status of its case docket, implementation of management action plans, emerging trends, budget and financial information, etc.; and

---

<sup>7</sup> The PCM relies on an independent Roster of Experts to conduct compliance reviews and leaves each Expert significant discretion to conduct reviews as they see fit. Without additional guidance or procedural checks, this model has led to inconsistencies in the investigation and review process used in each compliance review.

<sup>8</sup> We note with concern recent information indicating that the previously scheduled presentation of the PCM's 2016 Annual Report to the Audit Committee was rescheduled.

- The immediate establishment of a stakeholder advisory group, similar to that of the IFC's CAO, with appropriate budget allocations.

We look forward to continued dialogue regarding these matters.

Sincerely,

Caitlin Daniel, Accountability Counsel

Fidanka Bacheva-McGrath, CEE Bankwatch Network

Sukhgerel Dugersuren, OT Watch

Kristen Genovese, SOMO