



**OYU TOLGOI**

REQUEST NUMBER: 2013/01 (a)

**COMPLIANCE REVIEW REPORT – February 2017**

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

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

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### How to submit a complaint to the PCM

Complaints about the environmental and social performance of the EBRD can be submitted by email, telephone or in writing at the above address, or via the online form at:

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

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*NOTE: Unless otherwise defined, capitalised terms used in this Compliance Review Report refer to terms as defined in the PCM Rules of Procedure.*

## **EXECUTIVE SUMMARY**

The present Complaint alleges non-compliance on the part of EBRD with a number of performance requirements arising under the 2008 Environmental and Social Policy (ESP), due to an alleged failure on the part of the Bank to ensure the identification and avoidance or mitigation of a range of adverse impacts upon herders' health, livelihoods and cultural heritage resulting from a proliferation of roads, road traffic and road-related dust associated with the Oyu Tolgoi Project.

Having examined the Project Environmental and Social Impact Assessment (ESIA) in detail, along with a wide range of supporting documents, the Compliance Review Expert has concluded that EBRD was compliant with the ESP PR 1 and related performance requirements. Specifically, the Compliance Review Expert has found that the ESIA was adequate in terms of the timing of its completion and disclosure, its designation of the Project area of influence, the arrangements set out therein for stakeholder identification and consultation, the manner in which it addressed road-related dust impacts, its mitigation of potential road safety impacts and the manner in which it identifies and addresses the needs of vulnerable people.

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

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

## INTRODUCTION

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

1. On 26 February 2013, EBRD approved financing of the Oyu Tolgoi copper and gold mine project (OT), providing a loan of up to US\$400 million, together with further financing of up to US\$1 billion, to be syndicated to international commercial banks. The loans are part of a larger financing package that includes an assortment of international financial institutions and commercial banks. Oyu Tolgoi is a Category A Project, which defines the EBRD requirements under the 2008 Environmental and Social Policy (ESP) and sets the standard by which the appraisal is assessed. OT is a joint venture between Turquoise Hill Resources (66 per cent) and Erdenes Oyu Tolgoi (34 per cent), a company wholly owned by the Government of Mongolia. Rio Tinto (RT) is a major shareholder in Turquoise Hill Resources and since 2010 is formally managing the Project on behalf of all shareholders.
2. On 2 July 2013, fourteen Mongolian herders from Javkhlant bagh submitted a Complaint dated 1 July 2013, to the European Bank for Reconstruction and Development (EBRD) Project Complaint Mechanism (PCM), regarding the Oyu Tolgoi Project (as well as the Ukhaa Khudag (UHG) coal mine, operated by Energy Resources and financed by EBRD). Two Mongolian civil society organizations (CSOs), OT Watch and Shuteen Gaviluut, joined as Co-Complainants. On 6 September 2013 via electronic mail, PCM received related Complaints (dated 5 August 2013) from five herders residing in Manlai soum, and four individual herders from Javkhlant bagh (one dated 28 July 2013 and three dated 9 August 2013). On 1 April 2014, OT Watch submitted a letter to the PCM that supplements the previous complaints and provides additional information related to the request for a Compliance Review. As requested by the Complainants, these submissions were assessed for eligibility collectively, according to the 2009 PCM Rules of Procedure (RP). The Complaint alleges risks and impacts from both projects on herders' livelihoods, health and cultural heritage due to a proliferation of roads, road traffic and road-related dust, primarily due to the extensive network of paved and unpaved roads being utilised by the Project. The Complainants requested a Problem-solving Initiative (PSI) and a Compliance Review (CR) for each Project.
3. The Eligibility Assessment Report (EAR) was published on 22 December 2014 and found that the Complaint satisfied the PCM criteria for a Compliance Review and, consistent with the 2009 PCM Rules of Procedure, included Terms of Reference (ToRs) for two separate Compliance Reviews. On 26 January 2015 PCM Expert Prof Owen McIntyre was appointed as the Compliance Review Expert for the Compliance Review concerning the Oyu Tolgoi Project.

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<sup>1</sup> A more detailed account of the respective positions of the Relevant Parties is provided in the Eligibility Assessment Report: Project Complaints Mechanism, Eligibility Assessment Report – Request No. 2013/01, *Energy Resources Phase II & Oyu Tolgoi* (22 December 2014), at 11-36, available at <http://www.ebrd.com/cs/Satellite?c=Content&cid=1395241816445&d=&pagename=EBRD%2FContent%2FDownloadDocument>

## Positions of Relevant Parties<sup>2</sup>

### Complainants

4. The Complainants allege adverse impacts and increased risks of such impacts from the Project on herders' health, livelihoods and cultural heritage, principally due to the proliferation of roads, road traffic and road-related dust arising from the extensive network of paved and unpaved roads utilised by the Project. Specifically, the Complainants allege that the environmental and social appraisal conducted under EBRD's 2008 Environmental and Social Policy (ESP) failed adequately to evaluate the full set of Project impacts on local herders from road transportation or to develop appropriate avoidance and mitigation measures in accordance with EBRD policy. In addition, they claim that herders were not adequately compensated for economic displacement resulting from road-related impacts and that inadequate consultation took place to enable local herder communities to participate fully in the environmental and social appraisal and management of the Project.

### EBRD

5. EBRD maintains that the Project was adequately appraised to meet the requirements of the 2008 ESP, resulting in the preparation of a comprehensive and thorough Environmental and Social Impact Assessment (ESIA) that addressed all of the issues raised in the Complaint and set out appropriate measures for the avoidance and mitigation of the impacts and risks alleged. Management points out that EBRD in collaboration with other financial institutions has expended very considerable time and resources in carefully reviewing the Project documentation in order to ensure that the ESIA presents a detailed and complete analysis of a comprehensive range of potential impacts and mitigation measures for all phases of the Project.

### Client

6. While acknowledging that its activities, including road transportation, have the potential to impact the local community significantly, the Client claims that many of the failures alleged in the Complaint are either outdated or unsupported, or fail to recognise mitigation measures effectively implemented or compensation delivered to affected herders. More specifically, the Client claims that 'OT's share of dust generation, road use and pasture disturbance has been moderate, mitigated, and fully compensated and, further, is declining relative to other road users'.<sup>3</sup>

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<sup>2</sup> A more detailed account of the respective positions of the Relevant Parties is provided in the Eligibility Assessment Report: Project Complaints Mechanism, Eligibility Assessment Report – Request No. 2013/01, Energy Resources Phase II & Oyu Tolgoi (22 December 2014), at 11-36, available at <http://www.ebrd.com/cs/Satellite?c=Content&cid=1395241816445&d=&pagename=EBRD%2FContent%2FDownloadDocument>

<sup>3</sup> OT Comments, at 7. See Eligibility Assessment Report, at 31.

## Steps Taken in Conducting Compliance Review

7. The Compliance Review Expert has conducted a detailed investigation of the environmental and social appraisal and management processes conducted in respect of the Oyu Tolgoi Project, as well as an examination of the Bank's role in overseeing these processes in order to ensure their compliance with the requirements of the 2008 ESP. He has also investigated the factual circumstances on the ground in relation to the failings alleged in the Complaint. In addition to detailed examination of the Project documentation and various correspondence, communications and background documents relating to environmental and social appraisal and management, the Compliance Review Expert has conducted numerous meetings with the Relevant Parties, including:
- A meeting with EBRD Environment and Sustainability Department (ESD) at EBRD Headquarters on 3 March 2015;
  - A meeting with representatives of the Complainants at EBRD Headquarters on 17 April 2015;
  - A meeting with ESD at EBRD Headquarters on 21 August 2015;
  - A meeting with ESD at EBRD Headquarters on 4 February 2016.

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

Further, the Compliance Review Expert, accompanied by the PCM Officer, conducted a site visit to the South Gobi region of Mongolia on 1- 8 August 2015 to meet with Complainants and other affected local herders, and with representatives of the Client both in Khanbogd *Soum* and Ulaan Baatar. Meetings included:

- Meeting with Complainants in Khanbogd *soum* on 3 August 2015;
- Meeting with OT Community Relations Manager on 5 August 2015;
- Meeting with OT Management in Ulan Baatar on 7 August 2015.

At the meeting with Complainants on 3 August 2015, the Compliance Review Expert had the opportunity to hear, first-hand, the personal experiences of five individual herders adversely impacted by the OT Project. Along with the Compliance Review Expert's own site-visit observations, this testimony has been fully taken into account in reaching conclusions regarding the Bank's compliance with the relevant requirements of the ESP. However, such observations and testimony could not be considered determinative of the matter due, *inter alia*, to the inconclusiveness of personal observations, inconsistency regarding the nature and severity of impacts reported,<sup>4</sup> uncertainty as to which impacts might be attributable to the Client,<sup>5</sup> confusion as to

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<sup>4</sup> For example, testimony received from Complainants regarding the continuing impacts of OT's use of the paved OT-GS coal export road vary very considerably.

<sup>5</sup> Problems of attributability arise, for example, regarding Project impacts on well recharge, the source(s) of informal road use, the source(s) of litter at herder wells, etc. For example, EBRD points to very detailed investigations of Project impacts on groundwater, while OT alleges that herders commonly use light vehicles to herd animals.

which issues were raised in the original Complaint,<sup>6</sup> and lack of clarity regarding herders' use and experience of the Project grievance mechanism.

Pursuant to paragraph 42 of the 2014 PCM Rules of Procedure, a comprehensive draft version of the present Compliance Review Report (CRR) was shared with the Bank and with the Complainants in early April 2016, with a view to receiving the Parties' comments and observations. Comments were received from the Bank on 14 April 2016 and from the Complainants on 16 August 2016.

In addition, in a telephone call on 4 November 2016 the Complainants requested that the Compliance Review Expert delay completion of the CRR until publication of the findings of an ongoing independent fact-finding study designed

'to map independently and objectively the changes over the last decade in livelihood and socio-economic conditions of Khanbogd soum herder households [and] to determine which changes were caused by or attributable to Oyu Tolgoi (OT) company operations.'<sup>7</sup>

The Complainants were concerned that there should be an opportunity for this in-depth study to inform the outcome of the present Compliance Review. The findings and recommendations of this study were published on 12 January 2016.<sup>8</sup>

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<sup>6</sup> For example, despite testimony and further correspondence received from the Complainants, the original Complaint had not alleged a failure to assess the cumulative impacts of the OT Project with the Energy Resources (ER) Project and other mining projects in the South Gobi. (However, the Compliance Review Expert did take some account of consideration of cumulative impacts in reviewing the assessment of impacts under PR 1 of the ESP). Similarly, it does not allege any inadequacy in the project grievance mechanism. (However, the adequacy of the grievance mechanism is considered in the context of the alleged failure to consult and inform affected persons). Para. 8 of the Eligibility Assessment Report makes it quite clear that

'The Compliance Review shall confine itself to the Compliance Review issues raised in the present Complaint. It shall not go beyond the parameters of the Complaint to address other issues.'

See also, EAR ToRs, para. 13, at 99.

<sup>7</sup> Tripartite Council of Khanbogd soum, Umnugovi aimag, Cover Letter to Final Report of MDT and IEP (12 January 2017).

<sup>8</sup> *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding: Summary of the Experts' Reports* (JSL Consulting Ltd., Oxford, January 2017).



## RELEVANT EBRD POLICY OBLIGATIONS

### Applicable EBRD Policy

8. As the Complaint relates to a Project approved for financing by the EBRD Board of Directors on 26<sup>th</sup> February 2013, the relevant and applicable EBRD policy is the 2008 Environmental and Social Policy,<sup>9</sup> which was adopted in May 2008 and entered into force six months later in November 2008,<sup>10</sup> until it was replaced by the 2014 Environmental and Social Policy, which was adopted in May 2014 and entered into force in November 2014.<sup>11</sup>

### Implications of Relevant Policy Provisions

9. This Complaint is essentially concerned with a range of alleged adverse impacts of roads used in the construction and operation of the Oyu Tolgoi Project on the health and livelihoods of local herders. The original Complaint<sup>12</sup> simply refers to the fact that a number of mining companies, including the Client, have engaged in 'building roads of various types through the pastures of Khanbog soum to the mine sites and their facilities such as airports, power plants, water storage and treatment units, waste storage and construction material mines', as well as roads on which they 'transport products and goods from Ulaanbaatar to the mines and from the mine to the Chinese Border', all of which 'cut through and fragment pastures of nomadic pastoralists ...[and] ... raise huge amounts of dust ... causing severe health damage to the nomads living along these roads and their animals'. The supplemental Complaint<sup>13</sup> prepared with support from Accountability Counsel in turn explains that '[t]he Oyu Tolgoi mining operation relies on, or impacts, a multitude of roads, which include roads resulting specifically from its operation, as well as existing roads', before specifying in detail the roads in question and categorising the adverse impacts allegedly caused to the Complainants under three distinct headings:
  1. Health and safety impacts;
  2. Livelihood and economic impacts; and
  3. Impacts on indigenous tradition and culture.
10. The Supplemental Complaint then proceeds to set out in detail the specific provisions of the EBRD's 2008 Environmental and Social Policy (ESP) which the Complainants allege have been violated by failures on the part of the Bank. The ESP provisions allegedly violated include:
  1. PR 1.4, due to an alleged failure to assess impacts from roads at the early stages of project development;
  2. PR 4.7, due to an alleged failure to ensure the implementation of adequate health and safety measures;

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<sup>9</sup> See EAR, para. 112.

<sup>10</sup> In accordance with para. 49 of the 2008 ESP.

<sup>11</sup> In accordance with para. 52 of the 2014 ESP.

<sup>12</sup> Dated 1 July 2013, hereinafter Original Complaint.

<sup>13</sup> Dated 1 April 2014, hereinafter Supplemental Complaint.

3. PR 5.7, 5.11 and 5.39, due to an alleged failure to ensure the implementation of adequate measures to prevent, mitigate and compensate for the physical and economic displacement of complainants;
  4. PR 10.17 and 4.8, due to an alleged failure to consult and inform affected persons; and
  5. PR 7.10, 7.31 and 7.33, as well as PR 8.12 and 8.15, due to an alleged failure to ensure the implementation of adequate measures to preserve the Complainants' traditional nomadic pastoralist lifestyle.
11. In an attempt to rationalise the grounds of non-compliance put forward in the Supplemental Complaint, the Eligibility Assessment Report reorders,<sup>14</sup> in the light of further communication with the Complainants, the alleged violations of the ESP performance requirements in the following terms:
1. Issues related to PR 1: Environmental and Social Appraisal and Management, including alleged failures regarding:
    - a. Road impacts on pastures and access to water resources;
    - b. Dust/particulate impacts on herder health, safety and ecology;
    - c. Impacts on animal health from dust, noise and pasture fragmentation;
    - d. Increased competition over scarce resources; and
    - e. Employment.
  2. Issues related to PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement, comprising issues related to Livelihood and Economic Impacts, Compensation and Mitigation Measures, including alleged failures regarding:
    - a. Alternative project design to avoid or minimise physical and/or economic displacement;
    - b. Inadequate compensation framework; and
    - c. Updated compensation framework.
  3. Issues related to PR 7: Indigenous Peoples;
  4. Issues related to PR 8: Cultural Heritage; and
  5. Issues related to PR 10: Information Disclosure and Stakeholder Engagement, including alleged failures regarding:
    - a. Meaningful consultation and information disclosure; and
    - b. Ensuring an adequate grievance mechanism.

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

12. Despite the quite expansive understanding set out in the EAR of the ESP provisions potentially violated by the issues raised in the present Complaint, it occurs to the Compliance Review Expert that a significant majority of the alleged grounds of non-compliance can be addressed by means of an examination of the Bank's compliance with the requirements of PR 1 on *Environmental and Social Appraisal and Management*. Quite apart from the practical necessity, having regard to the inevitable restraints facing the PCM relating to time, resources and logistics, to rationalise the

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<sup>14</sup> See EAR (Oyu Tolgoi), paras. 29-59, at 13-22, available at <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>

Compliance Review process for such a wide-ranging and multi-faceted Complaint in order to focus on the key areas of alleged Bank failure, PR 1 is clearly intended to comprise a cross-cutting obligation, stipulating ‘a dynamic, continuous process, initiated and supported by management’,<sup>15</sup> which ‘outlines the client’s responsibilities in the process of appraising, managing and monitoring environmental and social issues associated with projects proposed for EBRD financing’.<sup>16</sup> It is worth remembering that PR 1.5 provides that

‘Through appraisal activities such as ... environmental and social impact assessment, the client will consider in an integrated manner the potential environmental and social issues and impacts associated with the proposed project. The information gained will inform the EBRD’s own due diligence related to the client and project and will help to *identify the applicable PRs* and the appropriate measures to better manage risk and develop opportunities, *in accordance with the applicable PRs*’

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

13. For example, the central concerns of the Complainants regarding the loss and fragmentation of pastureland due to the use of roads associated with the Project, including off-road driving on unauthorised roads, the separation of pastures from wells and other water sources and the resulting disruption of established grazing patterns, the contamination of water supplies, and the hazards presented by unfenced and/or un-rehabilitated quarries, ought all to have been adequately addressed under the ESIA and appropriate measures identified under the ESAP to which it gave rise. This is also true of the alleged impacts of dust from road traffic on human and animal health and safety, which the Complainants maintain is leading to a deterioration of herders’ traditional livelihood and lifestyle. While PR 3<sup>17</sup> and PR 4<sup>18</sup> are centrally relevant to determination of the standards of protection that project-affected persons can reasonably expect, the ESIA conducted under PR 1 is intended to identify potential adverse impacts upon such standards and the appropriate measures for their avoidance or mitigation.

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<sup>15</sup> PR 1.1.

<sup>16</sup> PR 1.3.

<sup>17</sup> According to PR 3.3, a key objective of PR 3: *Pollution Prevention and Abatement* is ‘to avoid or, where avoidance is not possible, minimise adverse impacts on human health and the environment by avoiding or minimising pollution directly arising from projects’.

<sup>18</sup> PR 4.1 expressly recognises that

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

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

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

14. Therefore, it is necessary in the course of this Compliance Review process to determine whether the ESIA carried out in respect of the Oyu Tolgoi Project, as well as the ESAP to which it gave rise, was adequate in order to assess and address the alleged impacts highlighted in the present Complaint. This involves, examination of the appropriateness of the ESIA in terms of, *inter alia*, the area of influence identified for the Project,<sup>19</sup> the range of potential environmental and social impacts analysed for all relevant stages of the project cycle,<sup>20</sup> the nature and intensity of the due diligence studies undertaken,<sup>21</sup> and the suitability of measures identified as necessary to avoid, minimise or mitigate adverse impacts.<sup>22</sup> In addition, it is necessary to determine whether the Bank has overseen the development and implementation of an adequate ESAP containing ‘a programme of mitigation and performance improvement measures and actions that address the identified social and environmental issues, impacts and opportunities’.<sup>23</sup> It is also necessary to determine whether adequate procedures have been established to monitor and measure compliance with the environmental and social safeguards set out in the ESAP and the relevant ESP PRs.<sup>24</sup> Finally, it is necessary to establish whether the process of conducting the ESIA and of developing and implementing the ESAP met the information disclosure and stakeholder engagement requirements arising under PR 10.<sup>25</sup>

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

15. Even in the case of issues related to PR 5 of the ESP concerning *Land Acquisition, Involuntary Resettlement and Economic Displacement*, the EAR expressly acknowledges that ‘[t]hese also relate to the claim of inadequate social and environmental assessment under PR 1’.<sup>26</sup> This is borne out by an examination of the individual issues raised. For example, the Complaint alleges that ‘the company has failed to appropriately consider alternative road placement or design features to avoid economic displacement and has failed to adequately compensate those experiencing economic or physical displacement due to project-related roads’ before contending that ‘neither the ESIA nor OMPs (Operational Management Plans) consider measures to minimize the construction of roads’.<sup>27</sup> Further, it is argued in relation to the alleged

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<sup>19</sup> PR 1.6.

<sup>20</sup> PR 1.7.

<sup>21</sup> PR 1.8 provides that

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

<sup>22</sup> PR 1.9.

<sup>23</sup> See PR 1.14, which also sets down a hierarchy of such measures and actions:

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

PR 1.15 generally provides that

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

<sup>24</sup> PR 1.20 – PR 1.24.

<sup>25</sup> PR 1.9. See also PR 1.24 regarding the requirement to ensure that

‘Stakeholder engagement during project implementation, including external reporting on progress with implementing the ESAP, will be undertaken in accordance with PR 10.’

<sup>26</sup> EAR, para. 40.

<sup>27</sup> Supplemental Complaint, at 9.

failure to build wildlife passages in the Oyu Tolgoi – Gashuun Sukhait paved road and flood culverts in roads more generally, that

‘These are feasible alternative project designs that could have mitigated the impacts of pasture fragmentation and other road-related problems on the complainants’ livelihoods. Oyu Tolgoi’s failure to consider these alternatives is a violation of PR 5.11.’<sup>28</sup>

Though PR 5.11 expressly refers to this requirement,<sup>29</sup> consideration of alternative project designs would ordinarily be understood to fall within the requirements of ‘Environmental and Social Appraisal and Management’ arising under PR 1. Similarly, in relation to ‘the roads and quarries which physically occupy land that herders used to use, [and which] have physically displaced herders from traditional pastures’, the Complainants contend that ‘Oyu Tolgoi’s ESIA, however, only identified one road, the Oyu Tolgoi – Gashuun road, as a project component relevant to an “impact zone” (i.e. that will result in physical or economic displacement meriting compensation or mitigation)’.<sup>30</sup> This suggests the centrally critical role of the ESIA process conducted under PR 1 for the effective realisation of the safeguards intended under PR 5, and the central relevance of PR 5 in informing the scope of the ESIA and the nature of the impacts to be identified and addressed thereunder. This is similarly true of the alleged failure to mitigate pasture fragmentation and to allow for the free flow of local rivers and streams.<sup>31</sup>

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

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

17. Of course, PR 5 also stipulates certain requirements which cannot be addressed under the framework of PR 1, including the establishment of a grievance mechanism,<sup>32</sup> the development of a Resettlement Action Plan (RAP)<sup>33</sup> and the development of a Livelihood Restoration Framework (LRF).<sup>34</sup> Though the Complainants have only raised concerns indirectly in the Complaint about the effective operation of the grievance mechanism operated by Oyu Tolgoi,<sup>35</sup> this issue was also raised as an alleged ground of non-compliance during the site visit by the Compliance Review Expert. Therefore, it is

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<sup>28</sup> *Ibid.*

<sup>29</sup> PR 5.11 provides that

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

<sup>30</sup> Supplemental Complaint, at 10.

<sup>31</sup> Supplemental Complaint, at 9.

<sup>32</sup> PR 5.13.

<sup>33</sup> PR 5.15.

<sup>34</sup> PR 5.24.

<sup>35</sup> Supplemental Complaint, at 10, notes that

‘while Oyu Tolgoi staff would write down their concerns during interactions, there was never further feedback.’

necessary in the course of this Compliance Review process to examine whether the Bank has taken reasonable measures to ensure the establishment of a grievance mechanism that is adequate ‘to receive and address in a timely fashion specific concerns about compensation and relocation that are raised by displaced persons and/or members of host communities’.<sup>36</sup> However, this issue can best be determined as part of the examination of compliance with PR 10.<sup>37</sup>

18. The Complaint also expressly alleges non-compliance with the requirement under PR 5.39 to ‘[p]romptly compensate economically displaced persons for loss of assets or access to assets at full replacement cost’,<sup>38</sup> which requires an examination of the adequacy of the RAP.<sup>39</sup> More specifically, the Complaint claims that, ‘in violation of PR 5.39, Oyu Tolgoi’s compensation and resettlement scheme does not include compensation for loss of livestock from impacts associated with project-related roads’.<sup>40</sup> Of course, such examination is closely linked to the examination required as part of this Compliance Review process of the adequacy of the ESIA, which is expected to identify all project-related impacts including physical or economic displacement.
19. Therefore, it is necessary to examine the ESIA, and the ESAP to which it gave rise, to determine whether the likely impacts of project-related roads related to economic displacement and involuntary resettlement were adequately assessed and addressed. In addition, it is necessary to determine the adequacy of the compensation arrangements provided for in the RAP.

#### PR 7: Indigenous Peoples

20. The position regarding the applicability of PR 7 of the ESP on *Indigenous Peoples* is rather less clear. The Complainants contend that ‘despite the herders’ distinct nomadic pastoralist identity, neither Oyu Tolgoi nor the EBRD undertook any analysis to determine whether the nomadic herders should be recognized as indigenous peoples under PR 7’ and, thus, that they ‘failed to afford the herders the protections provided for by PR 7’, including such requirements as

‘that free, prior and informed consent is obtained, that the indigenous peoples are given an opportunity for informed participation, that efforts are made to avoid or at least minimize the size of the indigenous land to be used and that indigenous peoples are provided with compensation, whether in cash, land or in kind, as well as culturally appropriate development opportunities.’<sup>41</sup>

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<sup>36</sup> PR 5.13.

<sup>37</sup> PR 10.24 – PR 10.25 set out in detail the nature of the requirement for the client to establish an effective grievance mechanism. See further below.

<sup>38</sup> Supplemental Complaint, at 9-10.

<sup>39</sup> On this interpretation of alleged non-compliance with PR 5, see further EAR, at 17, para. 40.

<sup>40</sup> Supplemental Complaint, at 10.

<sup>41</sup> Supplemental Complaint, at 11, where the Complainants refer to the additional safeguards provided under PR 7.31 and 7.33.

In terms of the particular details of the alleged non-compliance, the Complainants argue that ‘Oyu Tolgoi failed to fulfil these requirements in relation to the project and, more specifically, the project-related roads’.<sup>42</sup>

21. As regards the difficult question of whether the herders of the South Gobi fall within the definition of “Indigenous Peoples” provided in the ESP,<sup>43</sup> the Complainants point out that they ‘self-identify as traditional, nomadic pastoralists with an ancient culture’, and that ‘they maintain an intimate attachment to distinct ancestral territories in and surrounding the project area’ which ‘is displayed in a seasonal and cyclical migration from one traditional location to the next’ and ‘by the sacred status of various sites’.<sup>44</sup> In addition, they note that the herders ‘descend from, and are themselves, nomadic pastoralists who have pursued traditional, non-wage subsistence strategies for centuries’ and ‘are separated from mainstream culture by distinct cultural and economic customs, namely a nomadic lifestyle rooted in a natural-resource based livelihood that is tied to the geographic area they inhabit’.<sup>45</sup> Finally, the Complainants argue that the herders possess a ‘particularized dialect’ involving ‘use of words and phrases not heard in the mainstream Mongolian language [which] distinguishes them from the rest of the country’.<sup>46</sup>
22. However, while these characteristics correspond closely with those listed in the ESP as relevant for the identification of “Indigenous Peoples”,<sup>47</sup> it should be noted that, under the particular formulation of the definition provided in the ESP, such relevance only becomes pertinent once the project-affected persons in question have been established to be ‘a social and cultural minority group, distinct from dominant groups within national societies’.<sup>48</sup> It is questionable whether herders could be considered such a ‘minority group’ within Mongolia, and especially in the South Gobi region, and thus as “Indigenous Peoples” for the purposes of PR 7.<sup>49</sup> For example, UN figures from 2013 suggest that approximately 40 percent of all Mongolians are currently involved in

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<sup>42</sup> Supplemental Complaint, at 12.

<sup>43</sup> PR 7.10.

<sup>44</sup> Supplemental Complaint, at 11.

<sup>45</sup> Supplemental Complaint, at 11.

<sup>46</sup> Supplemental Complaint, at 11.

<sup>47</sup> PR 7.10.

<sup>48</sup> PR 7.10 provides in full:

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

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

<sup>49</sup> Ethnic groups traditionally recognised as “Indigenous Peoples” in Mongolia include, for example, the Durbet, Bayad, Buryat and Dariganga Mongols, as well as Tuvinians, Urianhais, Hotons, Duhkas or Evenk, or the Oirats of Western Mongolia: <http://minorityrights.org/country/mongolia/>

herding for their primary livelihood.<sup>50</sup> Moreover, Mongolia's traditional pastoralist lifestyle based upon nomadic livestock herding continues to provide the predominant cultural identity nationally.<sup>51</sup> Indeed, the Pastureland and Livelihood Improvement Strategy prepared as part of the Project's overall environmental and social appraisal highlights the continuing importance of the livestock sector, and thus the social prevalence of herding as a lifestyle in the impacted *soums*.<sup>52</sup> This situation appears to be at odds with the spirit and intent of PR 7, which recognises 'Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies', though it also recognises that they 'are often among the most marginalised and vulnerable segments of the population'.<sup>53</sup> This statement suggests that "Indigenous Peoples" are afforded special protection on account of their inherent vulnerability due to their minority status, their cultural distinctiveness from dominant groups, and their resulting marginalisation within national society. This is a widely held view among mining concerns. For example, the latest practice guidelines issued by the International Council on Mining and Metals, a mining industry body, explains that 'Indigenous Peoples have historically been disadvantaged, discriminated against and dispossessed of their land, and continue to be disadvantaged relative to most other sections of society'.<sup>54</sup>

The position in international law would appear to support the requirement that, in order to comprise "Indigenous Peoples", a group should comprise a minority or distinct group which has been colonised or otherwise subjugated and which faces the risk of discrimination at the hands of a dominant majority.<sup>55</sup> For example, the 1989 International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples,<sup>56</sup> the leading international treaty instrument on the rights of indigenous peoples, defines such groups having regard to their being either:

(i) 'tribal peoples in independent countries whose social, cultural and economic conditions *distinguish them from other sections of the national community*, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'<sup>57</sup> or

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<sup>50</sup> UN Stats., *2013 World Statistics Pocketbook Country Profile: Mongolia*(2013), available at: <http://unstats.un.org/unsd/pocketbook/PDF/2013/Mongolia.pdf>

<sup>51</sup> See, for example, Asia-Pacific Network for Global Climate Change, *Can Traditional Livelihoods and Mining Co-exist in a Changing Climate: Strengthening Public-Private Partnerships in Mongolia to Reduce Risk and Address Loss and Damage* (Final Report, 2014), at 8, available at: <http://www.apn-gcr.org/resources/items/show/1938>

<sup>52</sup> The Pastureland and Livelihood Improvement Strategy explains, at 27, para. Annex A, that 'Agricultural sector plays important role for nation's economy, 40% of the workforce is directly dependent on the sector. As for OT mine impacted *soums* Bayan Ovoo, Manlai and Khanbogd, livestock sector is the single largest contributor to the economic output with production of 94%, 96% and 94% respectively. (Recent SIA report).'

<sup>53</sup> PR 7.2.

<sup>54</sup> International Council on Mining & Metals (ICMM), *Good Practice Guide – Indigenous Peoples and Mining* (2<sup>nd</sup> ed., 2015), at 10.

<sup>55</sup> It should be noted, however, that PR 7.9 takes the position adopted by the UN-system, *i.e.* that 'There is no universally accepted definition of "Indigenous Peoples".'

<sup>56</sup> Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169)

<sup>57</sup> Article 1(a) (emphasis added). It should be noted that a 'tribe' usually refers to a group that is distinct from and not integrated into mainstream national society. See, for example, S. Corry, *Tribal Peoples for Tomorrow's World* (Freeman Press, 2011).



(ii) native to a country at ‘the time of *conquest or colonisation* or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions’.<sup>58</sup>

In addition, ILO Convention 169 also identifies as one of the key principles guiding the application of the Convention that indigenous peoples ‘shall enjoy the full measure of human rights and fundamental freedoms *without hindrance or discrimination*’,<sup>59</sup> which suggests strongly that they would normally comprise an oppressed or disadvantaged minority. Similarly, the United Nations (UN) Declaration on the Rights of Indigenous Peoples,<sup>60</sup> adopted by the UN General Assembly in 2007, notably avoids the inclusion of any definition of “Indigenous Peoples”,<sup>61</sup> but instead stresses the right to be free from discrimination.<sup>62</sup>

23. Given the general lack of clarity surrounding the definition and scope of “Indigenous Peoples”,<sup>63</sup> and the resulting uncertainty over whether Mongolian herders might be covered by PR 7, it would be inappropriate, on the facts of the present Complaint, for the Compliance Review Expert to consider the alleged ‘[f]ailure to properly identify nomadic herders as indigenous peoples’ for the purposes of establishing non-compliance on the part of the Bank. This issue was addressed in the ESIA from the outset, where it was concluded in Section A in relation to EBRD Performance Requirement 7 on Indigenous Peoples that

‘There are no indigenous peoples associated with this Project. Herder communities are part of the mainstream of Mongolian society from an ethnic and cultural perspective. Herder communities are treated as a “vulnerable group” within the ESIA given the pressures being placed on their traditional lifestyle by economic development and social changes.’<sup>64</sup>

Though PR 7.8 expressly provides that ‘[t]he applicability of this PR will be determined by the Bank during the environmental and social appraisal process according to the criteria outlined’, the ESIA Gap Analysis had little difficulty in establishing that

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<sup>58</sup> Article 1(b) (emphasis added).

<sup>59</sup> Article 3(1), (emphasis added).

<sup>60</sup> Available at: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>61</sup> The UN Permanent Forum on Indigenous Issues explains that ‘[c]onsidering the diversity of indigenous peoples, an official definition of “indigenous” has not been adopted by any UN-system body’. See UNPFII Fact Sheet: *Indigenous Peoples, Indigenous Voices*, available at: [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf)

<sup>62</sup> See Article 2 which provides:

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

See also Preamble, para. 4.

<sup>63</sup> For example, a recent guidance document prepared by the World Bank Inspection Panel notes that ‘Panel cases have shown that the classification of groups as Indigenous Peoples is a complex process’ and, further, that ‘[i]t is often difficult to ascertain whether a certain group possesses the distinguishing characteristics under the policy’. See World Bank Inspection Panel, *Indigenous Peoples* (Emerging Lessons Series No. 2, October 2016) at 5-6.

<sup>64</sup> Chapter A2: Policy and Legal Framework, at 27, para. 2.8.2. See also in relation to IFC Performance Standard 7, Chapter A2: Policy and Legal Framework, at 23, para. 2.8.1.

'[b]ased on the IFC and EBRD definitions, there are no Indigenous Peoples in the Project Area. Pastoralists and nomadic herders within the Project Impact Area will be considered as a "vulnerable group" for the purposes of the ESIA.'<sup>65</sup>

On this basis, the Compliance Review Expert has determined that it was not necessary in this instance to retain an Indigenous Peoples expert as suggested by the Eligibility Assessment Report and requested in subsequent comments received from the Complainants.<sup>66</sup>

24. In such circumstances, the Bank must be permitted some margin of discretion in deciding whether to apply PR 7. However, this does not mean that the standards of protection provided under PR 7 are irrelevant. The defining objective of PR 7 is to address the particular and special vulnerability of certain communities due to the nature of their 'natural resource-based livelihoods'.<sup>67</sup> Therefore, regardless of whether or not the Mongolian herders affected by the present project formally qualify as "Indigenous Peoples" for the purposes of PR 7, the safeguard standards set out therein ought to inform the nature and scope of the ESIA required under PR 1, and any further protection provided under other relevant and applicable PRs,<sup>68</sup> to the extent that the herders share any of the characteristics and vulnerabilities commonly associated with "Indigenous Peoples". To deny non-qualifying herders all such protection would involve the interpretation and application of the ESP in an arbitrary and inequitable manner. For example, the safeguards set out in PR 8 regarding the conservation and protection of cultural heritage should apply having particular regard to the special nomadic pastoralist identity of the herders, regardless of whether or not they qualify as "Indigenous Peoples".<sup>69</sup> It should be noted that, when faced with difficult determinations of the indigeneness of project-affected persons, it has often been the practice of the World Bank to apply a "functional equivalent" methodology and, though the Inspection Panel has expressed concerns about such an approach, its application

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<sup>65</sup> Citrus, *Oyu Tolgoi Project ESIA Gap Analysis* (30 March 2010), at 18, para. 6.2.1.

<sup>66</sup> See EAR ToRs, para. 15(f) and Complainants' Comments on the Draft Compliance Review Report (6 August 2016), at 19. It should be noted that para. 15 of the ToRs contained in the EAR suggests steps that the Compliance Review Expert "may" take in the conduct of the Compliance Review. The Complainants point out, at 30, that para. 28(b) of the 2009 PCM RPs provides that

'The terms of reference for a Compliance Review will identify the type of expertise required to carry out the review, as well as the scope and time frame for the review.'

However, this provision should be read in conjunction with the broad freedom of action granted to the Compliance Review Expert in the conduct of the Compliance Review, under PCM RP para. 37, for example. The fact that it was never intended to restrict the freedom of action of the Compliance Review Expert on the basis of the cursory, *prima facie* examination of the facts of the Complaint conducted by the Eligibility Assessor is borne out by paras. 13 and 14 of the ToRs, contained in the EAR, at 99.

<sup>67</sup> PR 7.3. See also PR 7.2 which notes that such groups

'are particularly vulnerable if their lands and resources are transformed, encroached upon by those who are not members of their communities, or significantly degraded.'

<sup>68</sup> Indeed, PR 7.8 expressly advises that

'Implementation of the actions necessary to meet these requirements is to be managed in accordance with this PR, and PRs 1, 5, 8 and 10 as appropriate.'

<sup>69</sup> This is the case even though conservation of cultural heritage under the ESP is closely linked to the protection afforded to "Indigenous Peoples". For example, PR 8.3 includes among the relevant national laws that might apply to cultural heritage 'laws relating to the protection of Indigenous Peoples', while PR 8.8 includes within the scope of application of PR 8 projects that 'may have an adverse impact on the culture, knowledge and practices of Indigenous Peoples'.

in the current Complaint would not give rise to the potential instances of non-compliance which have been associated with a functional equivalent approach.<sup>70</sup>

25. Indeed, rigorous application of the safeguards afforded to herders under the ESP, in light of the inherent vulnerability to project impacts of a nomadic pastoralist community, should mean that the vexed question of their qualification as “Indigenous Peoples” less central to the effective protection of their interests. The requirement under PRs 7.31 and 7.33 that free, prior and informed consent (FPIC) is obtained in the case of Indigenous Peoples<sup>71</sup> is commonly understood to mean that there should be ‘no coercion, intimidation or manipulation’ of indigenous communities and that Client engagement with such communities should involve significantly enhanced consultation and participation.<sup>72</sup> It is instructive in this regard that the World Bank Inspection Panel’s recent guidance on Indigenous Peoples extols ‘Free, Prior and Informed Consultations’, as

‘An effective and extended consultation process provides Indigenous peoples with opportunities to actively participate in decision making for projects that may impact them negatively or positively, and to have their views reflected in project design and implementation arrangements.’<sup>73</sup>

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

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

‘Where stakeholder groups were identified as disadvantaged or vulnerable during the appraisal process, the ESAP will include differentiated measures so that adverse impacts do not fall disproportionately on them, and they are not disadvantaged in sharing any development benefits and opportunities resulting from the project.’<sup>74</sup>

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<sup>70</sup> World Bank Inspection Panel, *Indigenous Peoples* (Emerging Lessons Series No. 2, October 2016) at 6. As regards potential pitfalls, this guidance document outlines, at 8, that:

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

<sup>71</sup> Emphasised in Supplemental Complaint, at 11.

<sup>72</sup> Department of Economic and Social Affairs of the United Nations, *Resource Kit on Indigenous Peoples’ Issues* (United Nations, New York, 2008), at 18, available at:

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

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

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

<sup>73</sup> World Bank Inspection Panel, *Indigenous Peoples* (Emerging Lessons Series No. 2, October 2016) at 7-8.

<sup>74</sup> PR 1.14 elsewhere provides that

27. Therefore, it is necessary to examine the adequacy of the ESIA, and of the ESAP to which it gave rise, to determine whether the measures intended to assess and address the potential impacts of project-related roads took appropriate account of the particular vulnerability of herders and their natural resource-based lifestyle and livelihood.

#### PR 8: Cultural Heritage

28. There can be no doubt that the traditional knowledge, skills and practices of nomadic pastoralism practised by the herders of the South Gobi qualify as cultural heritage under PR 8 of the ESP.<sup>75</sup> For the purposes of PR 8, “cultural heritage” is defined as ‘a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions’.<sup>76</sup> Of greater relevance to the present Complaint, one category, “intangible cultural heritage”, is understood to mean

‘the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage and which are transmitted from generation to generation.’<sup>77</sup>

29. Helpfully, PR 8 makes it quite clear that the safeguards contained therein are to be given effect by means of environmental and social appraisal under PR 1 and consultation with affected communities under PR 10. Though the present Project could not easily be regarded as falling within any of the three specific categories enumerated under PR 8.8, PR 8.9 goes on to provide that

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

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

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

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<sup>75</sup> compensation for ... impacts on Indigenous Peoples will be carried out in accordance with PR 7’. See also, PR 10.9 regarding the requirement to identify such disadvantaged or vulnerable individuals or groups.

<sup>76</sup> See Supplemental Complaint, at 12; EAR, at 19-20, paras. 46-49; and OT ESIA, Chapter 11: Cultural Heritage, at 9-10.

<sup>77</sup> PR 8.7.

<sup>77</sup> PR 8.7.

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

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

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

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

30. It is therefore necessary to examine whether the potential impacts of the Oyu Tolgoi Project on the cultural heritage of herders were adequately assessed and addressed in the environmental and social appraisal process conducted in accordance with PR 1 and whether adequate consultation took place with the affected communities regarding the outcomes of that process related to cultural heritage. In addition, it is necessary to determine whether PR 8.18 was applicable having regard to the facts of the present Project and, if so, whether good faith negotiations were successfully concluded with the informed participation of the affected communities.

#### PR 10: Information Disclosure and Stakeholder Engagement

31. The Complainants list a range of alleged failures regarding PR 10: *Information Disclosure and Stakeholder Engagement*, which they claim amount to breach of PR 10.17 and PR 4.8.<sup>78</sup> Specifically, they claim that ‘Oyu Tolgoi routinely failed to consult herders about the siting of its transport routes, or about appropriate measures to mitigate impacts of these routes, prior to constructing new roads or using the existing ones’.<sup>79</sup> They further claim that the client does not appear to have ‘made any attempt to consult herders regarding the many roads not identified as impact zones’.<sup>80</sup>

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<sup>78</sup> Supplemental Complaint, at 10. PR 4.8, which relates to *Community Health, Safety and Security*, sets out the requirement for the client

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

<sup>79</sup> Supplemental Complaint, at 10. It is further noted by the Complainants, *ibid.*, that

‘the ESIA does not refer to consultations in relation to other project-related roads.’

<sup>80</sup> Supplemental Complaint, at 10. However, this alleged instance of non-compliance can be more appropriately examined under PR 1.6, relating to the requirement that

‘Environmental and social impacts and issues will be appraised in the context of the project’s *area of influence*’ (emphasis added).

Regarding the Oyu Tolgoi – Gashuun Sukhait road, which was included within the area of influence and addressed by the ESIA, the Complainants contend that

‘while Oyu Tolgoi claims to have “extensively consulted” with herders along the Oyu-Tolgoi Gashuun road about dust and other road impacts, there is no evidence that these consultations occurred prior to the use of the road or involved questions such as whether the company should take protective measures prior to using the road.’<sup>81</sup>

Finally, they suggest that the client failed to establish a grievance mechanism that promptly and effectively addressed their concerns, noting that ‘while Oyu Tolgoi staff would write down their concerns during interactions, there was never further feedback’.<sup>82</sup>

32. It is quite clear from the text of PR 10 that ‘the process of stakeholder engagement is an essential component of the appraisal, management and monitoring of environmental and social issues’ and thus, that PR 10 ‘should be read in conjunction with PR 1.’<sup>83</sup> Indeed, stressing the close functional linkages between PRs 1 and 10, PR 10.5 explains that ‘the relevant requirements of this PR will be addressed as part of the client’s overall environmental and social appraisal process, Environmental and Social Action Plan (ESAP) and/or Management System (outlined in PR 1)’. Highlighting the integrated nature of the various PRs in the ESP, PR 10.19 provides that, ‘[i]n the case of projects involving involuntary resettlement, affecting Indigenous Peoples or cultural heritage, the client will also apply the special requirements of PR 5, PR 7 and PR 8’ in the conduct of its stakeholder engagement activities.
33. Generally, for Category A projects PR 10 requires a community engagement process comprising ‘a formalised and participatory assessment process’ and ‘organised and iterative consultation’,<sup>84</sup> and including the provision of ongoing information ‘commensurate to the nature of the project and its associated environmental and social impacts’,<sup>85</sup> as well as an effective grievance mechanism.<sup>86</sup> Such engagement practices must be adequate ‘to receive feedback on the effectiveness of the implementation of the mitigation measures in the ESAP as well as the affected communities’ ongoing interests and concerns about the project’.<sup>87</sup> Once again, ‘[v]ulnerable people may need special attention and could require resources to understand the impacts and to allow meaningful input’.<sup>88</sup> In case of any doubt regarding the supervisory nature of the Bank’s obligations under PR 10, PR 10.7 explains that ‘[a]s part of its own due diligence, the Bank will assess the level of information disclosure and consultation conducted by the client against the requirements of this PR and may require additional engagement.’

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<sup>81</sup> Supplemental Complaint, at 10.

<sup>82</sup> Supplemental Complaint, at 10. See also, EAR, at 21, paras. 53-57, which suggests that, though the Complainants were aware of the formal grievance mechanism established by the client, they found it to be generally unresponsive and ineffective.

<sup>83</sup> PR 10.4.

<sup>84</sup> PR 10.17.

<sup>85</sup> PR 10.21.

<sup>86</sup> PR 10.24 – PR 10.25.

<sup>87</sup> PR 10.21.

<sup>88</sup> PR 10.17.

34. As regards the specific steps stipulated under PR 10, the client is first of all required to identify stakeholders including, as a priority, ‘the various individuals or groups who ... are affected or likely to be affected (directly or indirectly) by the project (“affected parties”)’.<sup>89</sup> More particularly, as part of this stakeholder identification process the client is subject to the express requirement to ‘identify individuals and groups that may be differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status’, and to identify the nature and extent of such potential impacts.<sup>90</sup> For Category A projects, the client must

‘engage in a scoping process with identified stakeholders to ensure identification of all key issues to be investigated as part of the Environmental and Social Impact Assessment (ESIA) process ... [which] ... will also facilitate development of a Stakeholder Engagement Plan for the project.’<sup>91</sup>

The Stakeholder Engagement Plan (SEP) is intended to set out in detail the arrangements for effective communication with identified stakeholders throughout project preparation and implementation, including those for the establishment and operation of a suitable grievance mechanism.<sup>92</sup> PR 10.11 once again stipulates special consideration of vulnerable groups in the SEP by specifically providing that

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

35. Secondly, regarding information disclosure, PR 10 requires that the client discloses to stakeholders a comprehensive range of information concerning environmental and social risks and impacts associated with the project ‘in a manner that is accessible and culturally appropriate, taking into account any vulnerable people’.<sup>93</sup> For a Category A project this involves disclosure of the ESAP to the affected parties.<sup>94</sup>
36. Thirdly, PR 10 requires the client to engage in meaningful consultation with stakeholders ‘in a manner that provides the affected parties with opportunities to express their views on project risks, impacts and mitigation measures, and allows the client to consider and respond to them’.<sup>95</sup> The consultation process must be inclusive and culturally appropriate and tailored to ‘the needs of any disadvantaged or vulnerable groups’.<sup>96</sup> Such consultation should begin early in the assessment process and

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<sup>89</sup> PR 10.8.

<sup>90</sup> PR 10.9.

<sup>91</sup> PR 10.10.

<sup>92</sup> PR 10.11.

<sup>93</sup> PR 10.12 and PR 10.13.

<sup>94</sup> PR 10.14.

<sup>95</sup> PR 10.15.

<sup>96</sup> PR 10.16.

continue 'on an ongoing basis as the nature of issues, impacts and opportunities evolves'.<sup>97</sup> Ongoing consultation involves providing identified affected communities

'with periodic reports on progress with implementation of the ESAP, on issues that involve ongoing risk to or impacts on them, and on any issue that the consultation process or grievance mechanism has identified as of concern to those communities. These reports will be in a format accessible to the affected communities.'<sup>98</sup>

37. Finally, in order to be aware of and able to respond to stakeholders' concerns related to the project, 'the client will establish a grievance mechanism, process or procedure to receive and facilitate resolution of stakeholders' concerns and grievances about the client's environmental and social performance'.<sup>99</sup> This grievance mechanism 'should address concerns promptly and effectively, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, at no cost and without retribution'.<sup>100</sup> Where PR 5 and PR 7 are applicable, as is arguably the case in relation to the present Complaint, the Client must 'ensure that there is an independent, objective appeal mechanism'.<sup>101</sup>

38. Therefore, it is necessary in the course of the present Compliance Review process to determine whether the stakeholder identification process correctly identified all affected parties, as well as the nature and extent of the potential adverse impacts from road use associated with the OT Project. It is also necessary to examine whether adequate information regarding the adverse impacts of project road use was disclosed to the affected parties in an appropriate manner. This Compliance Review process must also examine whether adequate consultation took place with the affected parties, including ongoing reporting and consultation regarding road use and the associated impacts. Finally, it is necessary to examine whether the project grievance mechanism has operated effectively in addressing the concerns of affected parties. In examining each of the compliance issues above, it is necessary to consider whether due account was taken of the special vulnerability of herders as affected parties.

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<sup>97</sup> PR 10.15.

<sup>98</sup> PR 10.22.

<sup>99</sup> PR 10.24.

<sup>100</sup> PR 10.25.

<sup>101</sup> PR 10.25.



## ANALYSIS OF COMPLIANCE ISSUES

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

39. It is quite clear from an inspection of the project documentation for Oyu Tolgoi that the project underwent very extensive project appraisal as required under ESP PR 1.9 for projects categorised by EBRD as “A”. Essentially, the ESIA<sup>102</sup> for the project consists of four sections:

- a. Section A on Introduction and Background, including Chapter A4 on Project Description, Chapter A5 on Alternatives Analysis and Chapter A6 on Community Consultation;
- b. Section B on Baseline Assessment, including Chapter B3 on Air Quality, Chapter B4 on Noise, Chapter B6 on Water Resources, Chapter B9 on Employment and Livelihoods, Chapter B10 on Land Use, Chapter B11 on Transport and Infrastructure, Chapter B12 on Cultural Heritage and Chapter B13 on Community Health, Safety and Security;
- c. Section C on Impact Assessment, including Chapter C10 on Land Use and Displacement, Chapter C11 on Cultural Heritage and Chapter C12 on Community Health, Safety and Security; and
- d. A comprehensive set of 19 Operational Management Plans (OMPs), including an Environmental and Social Action Plan and an Environmental and Social Management Plan, as well as a range of issue-specific management plans, such as the Noise and Vibration Management Plan, the Transport Management Plan, and the Community Health, Safety and Security Management Plan.

A number of supplemental studies have also been prepared and published, notably including one related to the Oyu Tolgoi to Gashuun Sukhait Road.<sup>103</sup>

40. In addition, consistent with PR 1.9,<sup>104</sup> the ESIA/OMPs include several plans designed specifically to address the requirements of PRs 5, 7, 8 and 10, namely the Resettlement Action Plan, the Cultural Heritage Management Plan and the Stakeholder Engagement Plan.
41. Further, in order to ensure that the OT Project meets all of the commitments set out in the ESIA, a process has been established for the conduct of regular ESIA Audits by independent experts selected by the project lenders. These audits occur up to three times per year and measure progress against the ESIA commitments.<sup>105</sup>

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<sup>102</sup> Dated 31<sup>st</sup> July, 2012, available at: <http://ot.mn/environmental-social-impact-assessment/>

<sup>103</sup> Oyu Tolgoi ESIA: Supplementary Memorandum Oyu Tolgoi to Gashuun Sukhait Road (1 September 2012), available at [http://ot.mn/media/ot/content/page\\_content/commitments/ESIA/1\\_ESIA/Supplemental\\_Information/ESIA\\_Supplemental\\_OT\\_GS\\_Road\\_Zone\\_EN.pdf](http://ot.mn/media/ot/content/page_content/commitments/ESIA/1_ESIA/Supplemental_Information/ESIA_Supplemental_OT_GS_Road_Zone_EN.pdf)

<sup>104</sup> PR 1.9 stipulates, *inter alia*, that

‘The Environmental Impact Assessment (EIA) / Social Impact Assessment (SIA) shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws. ... Projects involving involuntary resettlement or impacts on Indigenous Peoples or cultural heritage will require an assessment in accordance with PRs 5, 7 and 8 respectively, in addition to any other environmental or social due diligence studies that may be required.’

<sup>105</sup> For the ESIA Audit Reports from April 2013 – April 2015, see <http://ot.mn/esia-audit-reports/>

42. The general *Project Description* included in Section A of the ESIA does not provide a great deal of detail on project-related roads under the heading ‘Off-Site Project Infrastructure’, merely providing a brief mention of the Oyu Tolgoi – Gashuun Sukhait road which ‘is used by Oyu Tolgoi for access to the border crossing and for access to Khanbogd soum centre and beyond’ and a commitment that ‘Oyu Tolgoi also undertakes regular maintenance of the existing earth road from the Mine Licence Area to Khanbogd’.<sup>106</sup> It also explains briefly that ‘[f]uel and supplies will also be transported to the project site by road from Ulaanbaatar during the construction and operational phases’.<sup>107</sup> While the *Project Description* provides assurances that all Internal Access Roads (i.e. internal to the Project site) ‘will be constructed to the Mongolian National Standard, applicable international standards and AASHTO Standards’,<sup>108</sup> and that the Water Borefield Access Track ‘will be constructed to Mongolian Standards in accordance with a Resolution issued by the Mongolian Department of Roads in 2002’,<sup>109</sup> it makes it clear that further detail will be provided elsewhere on the Regional Roads used by project-related traffic.<sup>110</sup> Indeed, as regards the Oyu Tolgoi – Gashuun Sukhait road, the *Project Description* elsewhere summarises the analysis of alternatives conducted during project appraisal as well the construction standards and the operational load parameters for the new paved road and the arrangements for drainage and flood protection and for animal and herder crossings.<sup>111</sup>
43. It is quite clear from the analysis of various alternatives for road transport included in the ESIA that the Client was fully aware of the potential for environmental and social impacts of the kind alleged in the present Complaint. For example, regarding the impacts on nomadic herder families of one optional route for the Oyu Tolgoi to Gashuun-Sukhait export road, the ESIA highlights, *inter alia*, the potential for some risk and disruption to the livelihood of these families by:
- Increased dust and noise from vehicle traffic for camps located adjacent to the road;
  - Impacts on shallow herder wells from water resources used for road construction;
  - Loss of stock from road kill and the potential for road accidents associated with increased traffic’.<sup>112</sup>

However, Chapter A5 also sets out in detail a suite of proposed mitigation measures, including, *inter alia*:

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<sup>106</sup> Chapter A4: Project Description, at 61, para. 4.12.1.

<sup>107</sup> Chapter A4: Project Description, at 61, para. 4.12.1.

<sup>108</sup> Chapter A4: Project Description, at 61, para. 4.11.6. AASHTO refers to the American Association of State Highway Transportation Officials ([www.transportation.org](http://www.transportation.org)).

<sup>109</sup> Chapter A4: Project Description, at 61, para. 4.12.2.

<sup>110</sup> Specifically, in Chapter D11: Transport Management Plan.

<sup>111</sup> Chapter A4: Project Description, at 65-68, para. 4.14.1. For example, it explains that cross drainage will comprise 8 different sizes of square and round pipe culverts at 129 locations, and that animal and herder crossing points have been identified in conjunction with herders and built into the road layout. The various alternative options considered for the export of copper concentrate to China are set out in Chapter A5: Alternatives Analysis, at 37-46, paras. 5.10.1 – 5.10.2.

<sup>112</sup> Chapter A5: Alternatives Analysis, at 44, para. 5.10.2.

- maintenance of a minimum separation distance of 500m between the road alignment and herder camps or community facilities;
- application of appropriate safety standards for all vehicles and transport operations, including appropriate driver training and competency tests;
- appropriate dust suppression for unsealed roads, prior to the progressive sealing of the road;
- consulting and liaising with local families using nearby pastures in order to minimise the risk of stock loss from vehicle accidents through an assessment of well locations and grazing patterns.<sup>113</sup>

The ESIA also notes that '[a] survey completed in 2006 along the proposed road corridor identified no significant archaeological sites'.<sup>114</sup>

### *Timing of the ESIA*

44. In alleging failure to comply with the requirement under PR 1.4 that 'potential environmental or social risks and impacts ... should be assessed in the early stages of project development, and managed on an ongoing basis', the Complainants point out that

'the Oyu Tolgoi ESIA was not completed until July 31, 2012. At that time, the construction phase was over 94% complete: mine exploration had begun in 1997, the investment agreement between Oyu Tolgoi and the Mongolian government was signed in 2009, and construction on the project began in 2009.'<sup>115</sup>

The Complaint proceeds to set out the relevant implications of this alleged failure for the present Complaint:

'The tardiness of the comprehensive ESIA meant that Oyu Tolgoi created and heavily used roads prior to identifying the actual and potential environmental and social risks and impacts. This left no opportunity for preventive or mitigation measures commensurate with the nature of these risks and impacts.'<sup>116</sup>

45. However, it is quite clear from the EBRD Project Summary Document (PSD) for the Oyu Tolgoi Project that implementation of the Project was under way prior to EBRD involvement, with EBRD Environment and Sustainability Department (ESD) staff taking part in a comprehensive environmental and social appraisal of the project since 2010, even though the Project was not approved for financing by the Board of EBRD until 26 February 2013.<sup>117</sup> By the time the ESIA was ready for public disclosure ESD staff had:

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<sup>113</sup> Chapter A5: Alternatives Analysis, at 44-45, para. 5.10.2.

<sup>114</sup> Chapter A5: Alternatives Analysis, at 45, para. 5.10.2.

<sup>115</sup> Supplemental Complaint, at 7.

<sup>116</sup> Supplemental Complaint, at 7.

<sup>117</sup> See generally, Oyu Tolgoi PSD (disclosed 5 September 2012), available at: <http://www.ebrd.com/work-with-us/projects/psd/oyu-tolgoi.html> and Oyu Tolgoi Eligibility Assessment Report, available at <http://www.ebrd.com/cs/Satellite?c=Content&cid=1395241816445&d=&pagename=EBRD%2FContent%2FDownloadDocument>

- Concluded seven separate site inspections to make first-hand observations of site conditions and company practices;
- Conducted numerous interviews with local officials and herders located in the vicinity of the site;
- Reviewed numerous reports and documents on background environmental and social conditions; and
- Conducted several successive reviews of the draft ESIA.

Generally, though the ESIA was released until rather late in the process of approval of the Project, it is clear the issues identified therein were being addressed by the Bank during the time that constructions operations were ongoing before disclosure of the ESIA.<sup>118</sup>

46. Though under Mongolian legislative requirements, several Detailed Environmental Impact Assessments (DEIAs) – each covering different elements of the project - had been prepared, submitted to the national regulatory authorities for approval and permitting, and formed part of the project disclosure and consultation procedures dating back to 2004, EBRD required a comprehensive ESIA integrating all relevant project elements. In order to identify gaps regarding the environmental assessment conducted to date and the environmental and social requirements of lenders, a consultant was engaged to conduct an ESIA gap analysis in 2010.<sup>119</sup> In collaboration with the other lenders making up the Project Lender Group, an Independent Environmental and Social Consultant (IESC) was appointed to commence work in August 2010 on assessing the consolidated international-standard ESIA and ESMPs being prepared to support financing of the Project. The IESC conducted four site visits in June 2011, December 2011, June 2012 and September 2012 in order to observe on-site operations relative to risks, international practices and compliance relative to the commitments of the ESIA.
47. To provide an indication of the level of lender scrutiny applied to the evolving draft ESIA, a set of consolidated comments compiled by the IESC and the Lender Group on the draft ESIA and submitted on 12 July 2011 sets out no fewer than 80 substantive comments and proposed amendments,<sup>120</sup> including the following selected issues of relevance to the present Complaint:
- A query as to ‘why some of the local roads that will be used for the most part for project-related traffic (such as airport to OT MLA and KB Soum Centre to OT MLA) are not considered to be part of the Project’ (Comment No. 3);
  - A query as to why the ESIA ‘does not appear to analyse the option of a shared alignment with the coal road ... as ... one option by which additive impacts may have been mitigated’ (Comment No. 20);

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<sup>118</sup> Meeting with EBRD ESD, EBRD HQ, London, 3 March 2015.

<sup>119</sup> Citrus, *Oyu Tolgoi Project ESIA Gap Analysis* (30 March 2010).

<sup>120</sup> Letter from ERM (IESC) to Hatch Corporate Finance, dated 12 July 2011 (Attachment 1: Substantive Comments). For a set of comments arising from an earlier ‘Red Flag’ review of the draft ESIA, see Letter from the Lender Group to Hatch Corporate Finance, dated 20 January 2011 (Re: Oyu Tolgoi Mine Project – January 3 Draft ESIA – Request for Preliminary ‘Red Flag’ Review).

- A request to '[d]escribe how social aspects were taken into consideration in the selection of the water supply pipeline and road alignments' (Comment No. 21);
- A query regarding use of inconsistent data in affected household mapping, as '[t]his is critically important in terms of stakeholder consultation and engagement sufficiency' (Comment No. 22);
- A query regarding the low number of herder households initially identified as having been economically displaced by the MLA (Comment No. 23);
- Detailed queries regarding identification of, consultation with and differentiated assistance measures for vulnerable people in Khanbogd soum (Comment Nos. 24 and 25);
- Detailed queries regarding the nature and extent of stakeholder mapping and stakeholder consultation in respect of resettled and economically displaced stakeholders (Comment Nos. 26 and 27);
- A request to 'discuss the importance of the pastoral way of life in terms of national cultural identity' (Comment No. 32);
- Concern over confusion between tangible and intangible cultural heritage (Comment No. 45);
- A request to 'provide information regarding current levels of traffic on the routes that OT is already using (*i.e.* to KB, DZ, etc.)' (Comment No. 52);
- A query regarding 'whether the OT export road is purely greenfield, following existing designated or undesignated routes or a combination' (Comment No. 80).

48. Therefore, having regard to the requirements of PR 1.4 invoked by the Complainants, it appears that the potential environmental and social risks and impacts were assessed, in a manner generally consistent with PR 1, at the earliest possible stage of project development after EBRD became involved. The appraisal process leading to the development of the comprehensive ESIA would appear to meet the general requirements of PR 1.5 regarding environmental and social appraisal,<sup>121</sup> as well as the more specific requirements regarding ESIA of Category A projects set out under PR 1.9.<sup>122</sup> One might also argue that, due to the timing of EBRD's involvement in the Project, the Bank has focused more on the requirement under PR 1.4 that risks and impacts should be 'managed on an ongoing basis'. It must be remembered that PR 1.1 describes a 'successful and efficient environmental and social management system' as 'a dynamic, continuous process'. At any rate, one could not agree that '[t]he tardiness of the comprehensive ESIA ... left no opportunity for preventive or mitigation measures commensurate with the nature of these risks or impacts'.<sup>123</sup>

### *Project Area of Influence*

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<sup>121</sup> PR 1.5 requires that

'the client will consider in an integrated manner the potential environmental and social issues and impacts associated with the proposed project. The information gained will inform the EBRD's own due diligence related to the client and project and will help to identify the applicable PRs and the appropriate measures to better manage risk and develop opportunities, in accordance with the applicable PRs.'

<sup>122</sup> PR 1.9 stipulates that Category A projects

'will require a comprehensive environmental and/or social impact assessment, to identify and assess the potential future environmental and social impacts associated with the proposed project, identify potential improvement opportunities, and recommend any measures needed to avoid, or where avoidance is not possible, minimise and mitigate adverse impacts.'

<sup>123</sup> Supplemental Complaint, at 7.

49. Chapter A6, which introduces the *Community Consultation* activities for the project, outlines the broadly participative process by which Oyu Tolgoi determined the project's 'area of influence' and identified the project stakeholders. The area of influence is determined to include the 'Direct Area of Influence', including 'physical infrastructure, facilities and associated works, (such as the mine site, temporary airport, Gunii Hooloi water supply borefield, transport and power route to the border and their surrounds) and the nearest settlement (Khanbogd *soum* centre)', and the 'Indirect Area of Influence', including 'all other *soums* affected by influx, together with areas involved in or affected by the supply of goods and services to the Project, the implementation of social and community support projects, infrastructure improvements and changes to communal utilities and associated services (e.g. waste infrastructure and water supply)'.<sup>124</sup> The Direct Area of Influence was therefore deemed to include: Khanbogd *soum*, Khanbogd *soum* centre, the Mine Licence Area, Gunii Hoolai aquifer and water supply pipeline, the temporary airport, the permanent airport, and the Oyu Tolgoi to Gashuun Sukhait road and infrastructure/power corridor. The Indirect Area of Influence in turn is understood expansively to cover: Manlai, Bayan-Ovoo, Dalanzadgad and Tsogttsettii *soums*.
50. The ESIA baseline assessment took care to examine the background social and economic situation of the communities likely to be affected by the Project. In particular, the Client commissioned a detailed study by the Centre for Policy Research and the Population Training and Research Centre, which was published in 2009.<sup>125</sup> As part of this study, a household survey was undertaken in which 1,323 households (10 per cent of the total number of households in the *aimag*) were sampled, using a detailed questionnaire containing 417 questions.<sup>126</sup> In addition, five focus group discussions were held in each *soum* with around 10 people in each, and interviews were conducted with a range of stakeholders, officials and other individuals in order to clarify issues and verify data. Therefore, the ESIA was based on a reasonably comprehensive set of baseline data on a wide range of social, economic and environmental issues.
51. As regards the assessment of impacts associated with land use and displacement, the ESIA notes that the Client 'carried out detailed assessments of land use, pastureland quality and water availability and use throughout Khanbogd *soum*' permitting it 'to identify and map a series of different "impact zones"' which 'have now been agreed by community consensus and have been used to determine community and household-level entitlements for livelihood restoration and other assistance'.<sup>127</sup> In identifying such impact zones for economic displacement, the Client engaged in regular consultation with herders in Khanbogd *soum* in a manner that attempted to take due account of the informal system employed by herders for managing and controlling pastures and herders' traditional grazing rights and use of winter shelter sites. Since 2007 the Client has also 'undertaken a series of studies and consultation rounds to clarify the situation

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<sup>124</sup> Chapter A6: Community Consultation, at 6, para. 6.4.2.

<sup>125</sup> Centre for Policy Research / Population Training and Research Centre, *The Oyu Tolgoi Project Social, Economic and Environmental Subset* (Ulaanbaatar, 2009).

<sup>126</sup> Chapter B1: Introduction, at 5, para. 1.2.2.

<sup>127</sup> Chapter C10: Land Use and Displacement, at 6, para. 10.3.3. The assessments in question are described in detail in Chapter B6: Water Resources Baseline and Chapter B10: Land Use Baseline.

with regards to pasture use and to understand better the interactions between herder communities and the Project'.<sup>128</sup> Demonstrating some sensitivity to the inherent vulnerability of herders and their traditional way of life, the ESIA acknowledges the complexity of identifying and minimising economic displacement impacts, explaining that

'Results from these investigations and consultation identified that there is considerable variation between herder households in terms of their migration patterns, herd size and overall standard of living. It also highlighted that there are no clear boundaries for summer and autumn grazing areas, and that these vary from year to year, and from household to household, making it difficult to be firm about where infrastructure can best be placed to minimise inconvenience and disruption to herding practices.'<sup>129</sup>

Thus, negotiations on the "impact zones" for economic displacement continued with the Compensation Working Group and affected herder households from early May to mid-October 2011.<sup>130</sup>

52. However, the agreed impact zones appear to focus almost exclusively on the Mine Licence Area, the Airport Sites, the Oyu Tolgoi to Gashuun Sukhait Road Corridor, the Water Pipeline Phases I and II and the Transmission Line.<sup>131</sup> The only impact zones identified which are directly related to road impacts include:

- 'All herder households with winter shelters within 500m either side of the Oyu Tolgoi to Gashuun Road' (Impact Zone C1), due to division of pastures;
- 'All herder households with winter shelters within 500m – 6.5km either side of the Oyu Tolgoi to Gashuun Sukhait Road' (Impact Zone C2), due to disruption of herding practices; and
- 'All seasonal herder households with traditional grazing use rights in Khanbogd *soum*' (Impact Zone E1), due to communal grazing land loss.

In addition, the ESIA recognised cumulative impacts (Impact Zone F1) and disruption to herding practices (Impact Zone F2) in respect of the owners of non-resident winter shelters *within the impact zones already agreed* in connection with other impacts. It also took account of *additional impacts in all impact zones upon households already enumerated in other impact categories*, including where a 'road will restrict access to wells for some herders'.<sup>132</sup> Thus, Section C of the ESIA dealing with 'impact assessment'

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<sup>128</sup> Chapter C10: Land Use and Displacement, at 8, para. 10.3.3. These included:

- Initial herder land use and water studies;
- Pastureland mapping and assessment;
- Detailed consultation with all potentially affected herder households;
- Survey of potentially affected herder households; and
- Establishment of the Compensation Working Group.

<sup>129</sup> Chapter C10: Land Use and Displacement, at 8, para. 10.3.3.

<sup>130</sup> Chapter C10: Land Use and Displacement, at 9, para. 10.3.3.

<sup>131</sup> See Chapter C10: Land Use and Displacement, at 10-12, Table 10.2.

<sup>132</sup> Chapter C10: Land Use and Displacement, at 11-12, Table 10.2 (emphasis added).

appears not to address specifically the many other road impacts associated with the Project.<sup>133</sup>

53. This conclusion is borne out by the detailed description of the impacts resulting in economic displacement. The ESIA identifies a total of 22 herder households impacted by loss of summer pastures due to land acquisition for the airport sites (Impact Zone B),<sup>134</sup> and a total of four herder households impacted by division of permanent pastures (Impact Zones C & D) due to having winter shelters within 500m either side of the Oyu Tolgoi to Gashuun Sukhait road (Impact Category C1) and a total of 11 herder households similarly impacted by the Water Pipeline phases I and II and the Transmission Line (Impact Category D1).<sup>135</sup> Among the mitigation measures identified to address these impacts, the ESIA states that:

‘Rehabilitation of all temporarily disturbed land will be actively implemented as soon as is practical, and Oyu Tolgoi will work with local herders to implement rehabilitation works and involve them in monitoring the progress of reinstatement of pastures; compensation procedures will be applied where satisfactory reinstatement of pastures is delayed or unsatisfactory’.<sup>136</sup>

It would appear that any other roads, quarries and associated sites located outside of the above impact zones would not benefit from similar measures, especially in light of the (possibly unrealistic) commitment expressed in the ESIA that ‘[d]isturbance of sites outside Project areas will be strictly prohibited’.<sup>137</sup> Similarly, as regards disruption to herding practices, a more widespread category of impact leading to economic displacement,<sup>138</sup> the ESIA only considered impacts affecting 14 herder households having winter shelters within 500m – 6.5km of the Oyu Tolgoi to Gashuun Sukhait road (Impact Category C2) and a further 22 herder households with unoccupied winter shelters within the “impact zones” already identified for the Project (Impact Category F).<sup>139</sup> Likewise, as regards adverse impacts due to water access restrictions or loss, the ESIA only considers four herder households whose wells were located either near the Oyu Tolgoi to Gashuun Sukhait road, near the Gunii Hooloi Borefield Pipeline, or on the boundary of the Mine Licence Area.<sup>140</sup>

54. The final category of impact causing economic displacement, communal grazing land loss, is understood potentially to affect herders over a much more extensive area (Impact Zone E), with the Client recognising that ‘all seasonal herders in the *soum* could

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<sup>133</sup> For example, the Supplemental Complaint refers, at 8, to ‘the estimated 70 roads leading to Oyu Tolgoi’s quarries and water bore holes, the 56 roads leading to its water stations and the numerous roads leading to its worker camps, river diversions and electricity transmission lines’.

<sup>134</sup> Chapter C10: Land Use and Displacement, at 21-23, para. 10.3.7.

<sup>135</sup> Chapter C10: Land Use and Displacement, at 23-25, para. 10.3.7.

<sup>136</sup> Chapter C10: Land Use and Displacement, at 25, para. 10.3.7.

<sup>137</sup> Chapter C10: Land Use and Displacement, at 25, para. 10.3.7.

<sup>138</sup> See Chapter C10: Land Use and Displacement, at 25-26, para. 10.3.9., which explains that

‘During consultation, Oyu Tolgoi identified that herder households residing further away from Project facilities could also be impacted by potential disruption to their herding practices. Households not near to Project facilities are still likely to be affected by some construction activities, e.g. pre-stripping of topsoil and road use are likely to mobilize large quantities of dust particles which may have negative impacts on pastures, livestock and households’ (emphasis added).

<sup>139</sup> Chapter C10: Land Use and Displacement, at 25-26, para. 10.3.9.

<sup>140</sup> Chapter C10: Land Use and Displacement, at 27, para. 10.3.10.



potentially be affected by a reduction of grazing land – this is a communal or shared loss'.<sup>141</sup> By October 2011, the Client had identified through extensive consultation a total of 399 potentially affected herder households in Khanbogd *soum*. As this impact involves a “communal loss”, it gives rise to “community compensation”, regardless of compensation otherwise payable to families or households, comprising the pasture management and livestock husbandry improvement measures set out in the Sustainable Pastureland Management Programme. This impact does not address the problem of Project-related road use, except as regards the rehabilitation as pastureland of temporary roads, lay down areas, quarries and borrow pits. In relation to such rehabilitation, the ESIA provides assurance that

Temporary land disturbance areas will also be rehabilitated after construction ends, so that land can be returned to its pre-Project usage capability, as quickly as possible. Rehabilitation works will include best international practice for grading, topsoil restoration, and revegetation with suitable species.<sup>142</sup>

Therefore, the problem of economic displacement due to dust arising from Project-related road use was not considered within the scope of this impact.

55. Having regard to the central ESP requirement set down in PR 1.6 that '[e]nvironmental and social impacts and issues will be appraised in the context of the project's area of influence', which may include, as appropriate, '[a]reas and communities potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location', the delimitation of the area of influence under the ESIA appears unduly restrictive. This issue is alluded to on several occasions in the Complaint. For example, the Complainants allege that 'Oyu Tolgoi's due diligence documents and management plans do not begin to address the full scope of the problem. The ESIA specifies mitigation measures for only 3 roads'.<sup>143</sup> Further, in relation to the requirements of PR 5, the Complaint contends that

'Oyu Tolgoi's ESIA, however, only identified one road, the Oyu Tolgoi – Gashuun Sukhait road, as a project component relevant to an “impact zone” (i.e. that will result in physical or economic displacement meriting compensation or mitigation). Accordingly, and in violation of PR 5.7, persons physically or economically displaced by other roads relied on or impacted by Oyu Tolgoi have not been eligible for the company's compensation and resettlement package.'<sup>144</sup>

Any failure correctly to identify the Project's area of influence strongly suggests non-compliance on the part of the Bank with the ESP, as PR 1.6 expressly provides that 'the EBRD and the client will agree on the area of influence for each project'. Thus, the Bank clearly plays a role in overseeing identification of the area of influence.

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<sup>141</sup> See Chapter C10: Land Use and Displacement, at 28-29, para. 10.3.11.

<sup>142</sup> Chapter C10: Land Use and Displacement, at 29, para. 10.3.11.

<sup>143</sup> Supplemental Complaint, at 8.

<sup>144</sup> Supplemental Complaint, at 10. Citing PR 5.7, the Complaint further points out, at 9, that 'PR 5 on land acquisition involuntary resettlement and economic displacement applies to all project-related physical or economic displacement',

Further still, it contends, at 10, that

'Additionally, in violation of PR 5.39, Oyu Tolgoi's compensation and resettlement scheme does not include compensation for loss of livestock from impacts associated with project-related roads.'

56. However, when it comes to the identification of stakeholders and affected people and the determination of adequate mitigation measures and suitable compensation for affected persons, the Operational Management Plans set out under the Environmental and Social Action Plan would appear to take a much more pragmatic and expansive view of the area of influence. This might reflect adaptive management of environmental and social impacts on the part of the Client and a management of change process governing the management and reporting of unfolding environmental and social impacts, as envisaged under the Bank's ESP.<sup>145</sup>
57. For example, the Stakeholder Engagement Plan (SEP), defines the "Project Area of Influence" expansively to include

the immediate or Direct Area of Influence (i.e. footprint of physical infrastructure, facilities and associated works, ... etc), as well as the Indirect Area of Influence resulting from influx, the supply of goods and services to the Project, implementation of social and community support projects, infrastructure improvements and potential impacts on communal utilities and associated services (e.g. waste infrastructure and water supply).'<sup>146</sup>

It goes on to explain that, in addition to the entire area of Khanbogd *soum*, much of which falls within the Direct Area of Influence, the Indirect Area of Influence also includes Manlai, Bayan-Ovoo and Dalanzadgad *soums*. Indeed, the SEP goes even further, stating that

'It is likely that the Project's Indirect Area of Influence could extend beyond these local and regional boundaries, particularly in terms of anticipated in-migration to Omnogovi aimag together with indirect employment and business opportunities. For this reason, other soums such as Tsogttsetsii have been included in some consultation activities as appropriate.'

58. Similarly, the Transport Construction Management Plan, which seeks 'to control and minimise potential negative impacts within the Project's area of influence that are associated with Project vehicle ... movements', includes within its scope '[i]mport and export of equipment and materials to/from the site' and '[t]ransport of personnel from/to the Project area by road', and identifies among the relevant potential impacts:
- Increased risk of collisions with other vehicles or pedestrians resulting in injury or death;
  - Dust generation (with knock-on health safety and ecological impacts);
  - Increased risk of collision with fauna and herd animals;
  - Deterioration of local roads resulting from heavy equipment usage and high levels of vehicular traffic; and

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<sup>145</sup> On the requirements of the ESAP, PR 1.15 of the 2008 ESP provides:

'Recognizing the dynamic nature of the project development and implementation process, the ESAP will be responsive to changes in project circumstances, unforeseen events, and the results of monitoring. For Category A projects the Bank may agree with the client during appraisal a management of change process to govern the way in which proposed project changes or unforeseen *circumstances are managed and reported.*'

<sup>146</sup> Stakeholder Engagement Plan, at 12, para. 5.1.

- o Physical barriers to migratory animals.<sup>147</sup>

The inclusion of all vehicle transport and such potential impacts, which might occur across a very wide area, suggests an expansive understanding of the area of influence, at least as regards impacts related to construction traffic.

59. It is in the latest iteration of the Resettlement Action Plan (RAP),<sup>148</sup> however, that this altered understanding of the area of influence is expressed most clearly. While noting the Client's earlier focus on households directly affected by physical relocation from the Mine Licence Area and by loss of grazing due to construction and the siting of ancillary Project-related infrastructure, the latest RAP explains that

‘The current RAP sets up for transition to where secondary impacts are recognised and where livelihood and other support and monitoring for all Khanbogd Soum resident herders is the focus. In part this “widening out” of engagement and contributions reflects the original commitment by OT to support all Khanbogd Soum herders through a sustainable pastureland management programme, and concerns expressed by soum authorities that the resettlement compensation programme resulted in tension in the community, driven by divisiveness between households that received support and those that did not. This is also reflected in complaints and requests from non-resettled herder households to be recorded as “impacted households”. The appropriate response from OT is to place more emphasis on steady-state community-wide engagement and contributions.<sup>149</sup>

Thus, the Client appears to have adopted an adaptive approach to environmental and social appraisal and management, which has responded to structured feedback received from a range of stakeholders, including complaints and requests from herder households who believe themselves to have been economically displaced as a result of project-related impacts.

60. In addition, the Pastureland and Livelihood Improvement Strategy adopted under the RAP, which seeks to mitigate a broad range of economic displacement impacts associated with the Project, including to the problem of ‘overall reduction of pastureland quantity and quality from dust’,<sup>150</sup> declares that it applies across all four soums impacted by the Project even though it expressly refers to ‘the Project’s area of influence’.<sup>151</sup> This once again strongly suggests that the area of influence is understood expansively in order to capture all project-related impacts.
61. It is important to note that, as a member of the Lender Group which engaged the Independent Environmental and Social Consultant (IESC) to assist in its detailed scrutiny of the development of the ESIA, EBRD has been actively involved in oversight of the Client’s identification of economically displaced persons. For example, the July 2011

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<sup>147</sup> Chapter D11: Transport Construction Management Plan, at 2-3, 11.3-11.4.

<sup>148</sup> Dated September 2015.

<sup>149</sup> Resettlement Action Plan, at 16, section 4.

<sup>150</sup> Pastureland and Livelihood Improvement Strategy, at 7, para. 2.1.5.

<sup>151</sup> Khanbogd, Bayan Ovoo, Manlai and Dalanzadgad soums. See Pastureland and Livelihood Improvement Strategy, at 5, para. 2.1.3.

consolidated ERM (IESC) and Lender comments on the draft ESIA expressed concern that '[t]he project description still needs to be made consistent with the rest of the document and the realities of current project activities'<sup>152</sup> before raising more specific concerns regarding the nature and extent of stakeholder mapping and stakeholder consultation in respect of resettled and economically displaced stakeholders,<sup>153</sup> and regarding the low number of herder households initially identified as having been economically displaced by the MLA due to loss of grazing land.<sup>154</sup>

62. Therefore, the Compliance Review Expert does not accept the Complainants' contention that 'Oyu Tolgoi has failed to properly identify complainants who have been physically or economically displaced', and that 'in violation of PR 5.7, persons physically or economically displaced by other roads relied on or impacted by Oyu Tolgoi have not been eligible for the company's compensation and resettlement package'.<sup>155</sup> While Chapter C10: Land Use and Displacement of the ESIA might appear to describe the Project's area of influence rather restrictively, it becomes apparent from an examination of the ESMP/OMPs that the Client has employed a quite expansive approach in determining appropriate mitigation and compensation. It would also appear that the Client has adopted an adaptive and progressive approach to the concept, demonstrating an ability to react to feedback from stakeholders and, in particular, complaints and requests from potentially impacted herders.
63. This conclusion is broadly in line with the findings of the recent independent fact-finding study of socio-economic impacts attributable to the OT Project conducted on behalf of the Office of the Compliance Advisor Ombudsman (CAO) of the World Bank Group, which concludes that '[t]he studies, impact assessments and the resettlement action plan that provided the basis for 2011 compensation were largely suitable and adequate'.<sup>156</sup> While the study also highlights weaknesses 'in the identification of impact zones that meant that some affected herders were not identified', it does not suggest that this shortcoming would amount to an instance of non-compliance. The study instead recommends that it should be addressed by means of the establishment of 'a Compensation Claims Committee (CCC) to opine on claims to be retrospectively included'.<sup>157</sup> It is worth noting in this regard that recent guidance on the practice of involuntary resettlement prepared by the World Bank Inspection Panel acknowledges the inherent difficulty in correctly determining such a project's impact area.<sup>158</sup>

### *Stakeholder Identification and Consultation*

64. As regards the identification of Project stakeholders, an extensive series of stakeholder mapping exercises has been implemented, including a comprehensive workshop in 2008, community visioning exercises conducted with Khanbogd, Manlai, Bayan-Ovoo

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<sup>152</sup> Letter from ERM (IESC) to Hatch Corporate Finance, dated 12 July 2011.

<sup>153</sup> Attachment 1: Substantive Comments - Comment Nos. 26 and 27.

<sup>154</sup> Attachment 1: Substantive Comments - Comment No. 23.

<sup>155</sup> Supplemental Complaint, at 10.

<sup>156</sup> *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding: Summary of the Experts' Reports* (JSL Consulting Ltd., Oxford, January 2017), at 11.

<sup>157</sup> *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding: Summary of the Experts' Reports* (JSL Consulting Ltd., Oxford, January 2017), at 13.

<sup>158</sup> World Bank Inspection Panel, *Involuntary Resettlement* (Emerging Lessons Series No. 1, April 2016), at 5.

and Dalanzadgad *soums* in 2010, development of a database of socio-economic information and a comprehensive assessment of the types of impacts experienced by affected parties, development of a live stakeholder database, and maintenance of a 'Community Diary' to record every interaction with stakeholders.<sup>159</sup> These stakeholder mapping exercises led to the identification of two principal categories of stakeholders: 'Affected Parties' and 'Other Interested Parties'. Among the 'Affected Parties',<sup>160</sup> are included herders who have been physically displaced from their properties and '[h]erders who have been economically displaced through the loss of access to wells, physical disturbance from air or noise emissions and/or reduced access to summer grazing land or winter camps'.<sup>161</sup> Chapter A6 proceeds to provide a detailed account of the project-affected herder population and concludes that a total of 16 families/61 people have already been physically resettled, while a total of 84 families / 325 people would be economically displaced.<sup>162</sup>

65. Chapter A6 recounts an extensive programme of consultation with potentially affected herder families going back to 2003. Starting with an initial census of 15 herder families (comprising 91 people), in April and May 2003 the former Ivanhoe Mines Mongolia Inc. (IMMI) conducted in-depth interviews with local authorities and herder households. This consultation took place in the context of implementation of the *Herder Relocation Plan*, adopted in April 2003 in accordance with World Bank Operational Directive 4.30 on Involuntary Resettlement, which was regarded as indicative of good international practice, and led to the conclusion of tripartite agreements by September 2004 between each physically displaced household, the Khanbogd *soum* and IMMI.<sup>163</sup> Oyu Tolgoi conducted follow-up consultation with all resettled households (and local authorities) between 2005 and 2010.<sup>164</sup>
66. Regarding consultation with economically displaced herders, Chapter A6 explains that the Socio-Economic Impact Assessment completed in 2009<sup>165</sup> 'identified that additional herders could potentially be economically displaced by the Project (i.e. through the loss of access to camps or grazing land or reduced access to water supplies)', leading Oyu Tolgoi to conduct further consultation with such potentially affected herders.<sup>166</sup> This consultation led to 'detailed negotiations with herders directly affected by Project

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<sup>159</sup> Chapter A6: Community Consultation, at 6-7, para. 6.5.1. See further, Chapter C10: Land Use and Displacement Impacts, available at:

[http://ot.mn/media/ot/content/page\\_content/commitments/ESIA/1\\_ESIA/Impact\\_Assessment/ESIA\\_OT\\_C10\\_Land\\_EN.pdf](http://ot.mn/media/ot/content/page_content/commitments/ESIA/1_ESIA/Impact_Assessment/ESIA_OT_C10_Land_EN.pdf)

<sup>160</sup> Which the ESIA defines, at Chapter A6: Community Consultation, at 7, para. 6.5.2, as

'people/entities directly affected by the project and/or have been identified as most *vulnerable* to change and who need to be engaged in identifying impacts and their significance, as well as in decision-making on mitigation and management measures'.

<sup>161</sup> Chapter A6: Community Consultation, at 7, para. 6.5.2. Further detailed descriptions of these stakeholder groups are provided in the Socio-Economic Impact Assessment (SIA) for the Project: Centre for Policy Research & Population Training and Research Centre, *Oyu Tolgoi Socio-Economic Impact Assessment, Final Report* (Ulaanbaatar, September 2009).

<sup>162</sup> Chapter A6: Community Consultation, at 7-8, para. 6.5.3. Table 6.1, at 8-9 details the number of herder households physically displaced and economically displaced by each project component or activity.

<sup>163</sup> Chapter A6: Community Consultation, at 15-16, para. 6.6.1. Unfortunately, the formal records of this early consultation were not retained by Oyu Tolgoi.

<sup>164</sup> Chapter A6: Community Consultation, at 17, para. 6.6.2.

<sup>165</sup> Centre for Policy Research & Population Training and Research Centre, *Oyu Tolgoi Socio-Economic Impact Assessment, Final Report* (Ulaanbaatar, September 2009).

<sup>166</sup> Chapter A6: Community Consultation, at 17, para. 6.6.3.

activities' in order 'to develop mitigation strategies jointly with the affected population and to agree on suitable compensation measures' in respect of the following adverse impacts:

- Reduced access to summer grazing;
- Disruption to herders and herding practices during construction (and operations) for herders with winter shelters and pastures; and
- Disruption to herders and herding practices through secondary impacts (physical risks to wells, separation from wells, dust and noise nuisance).<sup>167</sup>

67. The ESIA provides details of 28 consultative meetings which took place between June 2010 and June 2011, including a number of citizen *baghs*, covering a wide range of issues and concerns, including road routing, signage and animal crossing points as well as water and dust impacts associated with road use, pastureland management, and livelihood support and compensation.<sup>168</sup> It also summarises the specific issues raised by economically displaced herders and the actions taken in response to such concerns.<sup>169</sup> For example, in response to herders' concerns regarding the loss of access to summer pastures, Oyu Tolgoi implemented the *Sustainable Pasture Management Programme*, which was developed in cooperation with the Mongolian Society for Rangeland Management (MSRM) and contained compensation packages for affected herders. Implementation of the Programme involved the establishment of 14 Pasture User Groups in Khanbogd *soum*, which by October 2011 represented almost 400 herder households. Similarly, in response to concerns about degrading pastures and problems in maintaining herders' livelihoods and incomes, the Client implemented the *Herder Livelihood Improvement Programme*. In response to concerns about increasing dust emissions due to the operation of project-related roads, the Client implemented the *Atmospheric Emissions Management Plan*, setting out Oyu Tolgoi's commitment to the control of dust arising from the movement of goods and vehicles. In response to the herders' concern to receive more updates and information about the Project, a Compensation Working Group was established in early 2011 with herders affected by economic displacement, a Community Relations Officer (CRO) was assigned to every household identified as affected (c. 12 households per CRO), and Local Advisory Groups (LAGs) made up of local authorities and community members were established for each *soum* in 2010 in order 'to facilitate local engagement on important topics and issues and to promote regular interaction on local level'.
68. Of course, all of the above is in addition to early consultation which took place under the initial (national) EIA process, consisting of a range of meetings with local and regional government and NGO representatives and a series of well attended public meetings taking place between March and November 2003.<sup>170</sup> At these meetings a number of issues relevant to the current Complaint were raised and the Client's actions and responses discussed, including impacts on livestock herding resources and related mitigation and compensation measures, impacts to intangible heritage and lifestyle,

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<sup>167</sup> Chapter A6: Community Consultation, at 18, para. 6.6.3.

<sup>168</sup> Chapter A6: Community Consultation, at 18-20, Table 6.6.

<sup>169</sup> Chapter A6: Community Consultation, at 20-21, Table 6.7.

<sup>170</sup> For further details, see Chapter A6: Community Consultation, at 21- 26, paras. 6.7.1 – 6.7.2.

and the need for targeted and inclusive consultation and grievance mechanisms.<sup>171</sup> In addition, the Client implemented specific consultation measures in respect of particular components or aspects of the Project, including on the Oyu Tolgoi to Gashuun Sukhait Road/Infrastructure Corridor (2003-2010),<sup>172</sup> on the new airport (2005-2006), on pastureland impacts (2009-2010)<sup>173</sup> and on water use (2007-2008).<sup>174</sup>

69. Extensive consultation arrangements were also employed in the course of the original SIA conducted between 2008 and 2009.<sup>175</sup> These included focus group discussions involving 141 individuals from the five *soums*, 29 *soum* officials and 32 other individuals. Interviewees were carefully selected to ensure that vulnerable people were included.<sup>176</sup> In addition, several workshops and meetings were held between April and June 2009 involving a broad range of stakeholders, including herder households. The issues raised during the consultation activities described above included the health and safety hazards presented by road transport, reduced pasture due to land-take and fragmentation by roads, dust and noise impacts, possible impacts on herder wells, and possible impacts on cultural heritage and the traditional nomadic herding lifestyle. Detailed commitments were entered into by the Client in respect of each of these anticipated impacts.<sup>177</sup>
70. The ESIA also details the increased level of community consultation which has taken place since construction activities commenced in late 2009. Consultation events have included: Oyu Tolgoi Project Open Days held in all target *soums*; project updates provided to local herders at each quarterly *bagh* meeting in Khanbogd *soum*; the public launches of several project-related programmes; ongoing interaction with Community Relations Officers through the branch offices and regular visits to communities and households; and regular NGO and media site tours and presentations.<sup>178</sup> These activities are in line with the Client's commitments under the SEP and an indicative list

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<sup>171</sup> See Tables 6.10 and 6.11.

<sup>172</sup> A public meeting at the Javklant *bagh* centre in 2003-4, and engineering study in 2007 and further consultation conducted between 2007 and 2010 led to the identification of appropriate locations for animal crossings, traffic advisory signs and other traffic-calming measures. See Chapter A6: Community Consultation, at 26, para. 6.7.3.

<sup>173</sup> Involving a series of additional pastureland mapping and consultation activities from May 2009 – mid-2010, as well as small-scale pastureland assessments within Javkhlant, Gaviluud and Bayan *baghs* involving 80 herder families identified as particularly vulnerable to change. This exercise enabled the Client to develop plans to identify economically displaced herder families and to continue consultation on pastureland loss and related impacts and on compensation and livelihood restoration measures. The information gathered on affected households was incorporated into the original Socio-Economic Impact Assessment (SIA) completed in late 2009. See Chapter A6: Community Consultation, at 27-28, para. 6.7.6.

<sup>174</sup> As part of which the Client, together with the Centre for Policy Research (CPR), conducted a comprehensive *Water Perception Study* in mid-2007, under which

'A total of 280 herder households within the [Khanbogd] *soum* were interviewed, 58 of them through semi-structured interviews, the others with the provision of short questionnaires. In addition 51 people were involved in focus group discussions (FGDs) based upon four groupings: Governor's office and representatives, water users, private sector people and budgetary bodies.'

Oyu Tolgoi also conducted a *Herder Lifestyle and Water Use Study* between July and September 2008, in which a total of 21 herder families from Bayan *bagh* were consulted at the household level. See Chapter A6: Community Consultation, at 28, para. 6.7.7

<sup>175</sup> Centre for Policy Research & Population Training and Research Centre, *Oyu Tolgoi Socio-Economic Impact Assessment, Final Report* (Ulaanbaatar, September 2009).

<sup>176</sup> See Chapter A6: Community Consultation, at 29-33, para. 6.7.8

<sup>177</sup> See Chapter A6: Community Consultation, at 31-33, Table 6.15.

<sup>178</sup> Chapter A6: Community Consultation, at 29-33, para. 6.8.1.

of consultation events, including dates, number of persons in attendance and main topics discussed, is provided in Table 6.16 of Chapter A6.

71. Regarding the extent of community consultation generally, the ESIA confidently notes, *inter alia*, as examples of ‘key indicators of support for the Oyu Tolgoi Project’, that
- Herder households economically displaced as a result of pastureland loss have formed a compensation working group and participated in designing a *Herder Livelihood Improvement Programme*.
  - The consultation process has been accessible to vulnerable groups including herders. All herder households in Khanbogd *soum* have been visited by Oyu Tolgoi at least once and affected herders households are all involved in regular consultation with the Company.
  - A total of 399 households have joined 14 Pasture Management groups established by the Mongolian Society for Range Management as part of the Oyu Tolgoi sponsored Sustainable Pastureland Programme in Khanbogd *soum*.
  - Local communities have been actively participating in the design and implementation of a number of key programmes including the Cultural Heritage Programme, the Community Health, Safety and Security Programme, and the Participatory Environmental Monitoring Programme.<sup>179</sup>

This suggests that extensive structured consultation has been taking place between the Client, affected herders and the broader community.

72. In terms of practical implementation of the above commitments, several of the Operational Management Plans comprising the Environmental and Social Action Plan include express requirements for conducting routine stakeholder consultation, and for taking account of relevant feedback and complaints, on a wide range of matters. For example, as part of the process of route selection, the Transport Construction Management Plan requires that

‘Oyu Tolgoi will ensure that consultation is undertaken with local communities, police, military and emergency services along transportation routes used routinely by Oyu Tolgoi. Oyu Tolgoi will provide local community representatives and government authorities with a summary of driving practices adopted by Oyu Tolgoi.’<sup>180</sup>

In line with a number of other OMPs,<sup>181</sup> the Transport Construction Management Plan sets out detailed arrangements for monitoring these commitments and, in particular, for

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<sup>179</sup> Chapter A6: Community Consultation, at 40-41, Table 6.18.

<sup>180</sup> Chapter D11: Transport Construction and Management Plan, at 6, Table 11.1. It similarly requires that such public consultation and disclosure activities include emergency response plans and procedures applicable to transport, identify appropriate animal crossings, and minimise the risk of stock loss from vehicle accidents.

<sup>181</sup> See, for example, Transport Management Plan, at 10, Table 3, regarding herder crossings and, at 16, Table 4, regarding complaints from local communities; Community Health, Safety and Security Management Plan, at 17, Table 2, regarding the Road Safety Awareness Programme and, at 24, Table 4, regarding complaints from local communities. Similarly, the establishment under the Pastureland and Livelihood Improvement Strategy of 14 Pasture User Groups in Khanbogd *soum* as the key Strategy stakeholders typifies the broad consultative and inclusive processes employed. See Pastureland and Livelihood Improvement Strategy, at 13, para. 4.5.



responding to complaints received via the Project's grievance mechanism. It notably provides that

'During the construction phase, Oyu Tolgoi will undertake an ongoing review of activities that contribute to significant dust generation and maintain an ongoing dialogue with local herders and local communities along principal transportation routes.<sup>182</sup> If complaints are received by local herders, Oyu Tolgoi is committed to work with specific herders to develop monitoring and appropriate mitigation measures.'<sup>183</sup>

73. More specifically, the Stakeholder Engagement Plan, which defines the Project commitments and operational procedures in respect of stakeholder engagement, explains that '[s]ince 2003, OT has actively sought to build strategic institutional and individual working relationships with communities and stakeholders who have interests in and/or who are directly or indirectly impacted by the Project'. At the top of the list of such communities and stakeholders are 'herders who have been economically displaced through the loss of access to wells, disturbance from air or noise emissions and/or reduced access to summer grazing land or winter camps due to actual or proposed Project developments'.<sup>184</sup> The Stakeholder Engagement Plan lists among the key engagement and disclosure methods employed in respect of physically and economically displaced people:

'Compensation Working Group, Pasture User Groups, Pasture User NGO, household visits / consultation, *bagh* meetings, surveys, focus groups and workshops, other local working groups, local disclosure materials (e.g. newsletter, brochures, etc.)'.<sup>185</sup>

In respect of the communities of the four impacted *soums*, it lists

'Local Advisory Groups, surveys, focus groups and workshops, OT branch offices / open houses, Open Days, other local working groups'

In addition to a detailed information Disclosure Process,<sup>186</sup> the Stakeholder Engagement Plan sets out a comprehensive Complaints, Disputes and Grievance Procedure,<sup>187</sup> along with clear instructions for complainants. A highly detailed Stakeholder Engagement Action Plan sets out the precise steps to be undertaken by the Client in connection with each type of engagement task including, notably, implementation of the Participatory Environmental Monitoring (PEM) Programme with local herder households.<sup>188</sup> Detailed monitoring measures are stipulated for community

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<sup>182</sup> Note, for example, the development of the Sustainable Pastureland Management Programme (SPMP), and its subsequent replacement with the Herder Livelihood Support Programme (HLSP), both of which have sought to counteract 'the cumulative effects of pasture degradation due to increased public vehicle traffic and dust'. See Resettlement Action Plan, at 27-31, Section 7. See further, para. 109, *infra*.

<sup>183</sup> Chapter D11: Transport Construction and Management Plan, at 11, Table 11.1.

<sup>184</sup> Stakeholder Engagement Plan, at 16-17, para. 5.3.

<sup>185</sup> Stakeholder Engagement Plan, at 19, Table 3.

<sup>186</sup> Stakeholder Engagement Plan, at 23, Figure 2.

<sup>187</sup> Stakeholder Engagement Plan, at 24, Figure 3.

<sup>188</sup> Stakeholder Engagement Plan, at 28-35, Table 5. The Participatory Environmental Monitoring Programme is designed to

'Implement dust, pastureland management and water monitoring programmes with households'.

engagement activities including, most notably, the requirement that 'OT will review Community Complaints and Grievance Log / Database'.<sup>189</sup>

74. In addition to exercising oversight over the Client's public consultation activities,<sup>190</sup> it is clear that EBRD engaged in its own public consultation activities and actively participated in those of the Client. For example, ESD site visits to OT included the following meetings with herders and other stakeholders:
- September 2010: one meeting in Khanbogd *Soum* Centre with local representatives from Government, schools, entrepreneurs and herders; ESD visited five herder families in their homes; four of which had been affected by the physical resettlement carried out in 2005;
  - June 2011: a meeting with OT Watch in Ulaan Baatar; ESD visited a number of herder families on a site visit to Energy Resources, at least one of which had also been impacted by OT's activities;
  - September 2012: ESD attended some of OT's public consultation activities in Ulaan Baatar and in Khanbogd *Soum* Centre with presentations / open houses at the information centre; ESD met with two RAP households;
  - September 2015: meetings with local government, tri-partite council (Gobi Soil founder and elected herder group representative), two new herder cooperatives and other local businesses, and two herder households categorised by OT as vulnerable.<sup>191</sup>

In addition, the Compliance Review Expert has established that ESD routinely reviewed the Grievance Log / Database and followed-up on selected complaints to ensure that the issues raised had been resolved satisfactorily.<sup>192</sup>

75. All the above efforts on the part of the Client and EBRD would appear to contradict the Complainants' various contentions that 'Oyu Tolgoi routinely failed to consult herders about the siting of its transport routes, or about measures to mitigate impacts of these routes, prior to constructing new roads or using existing ones', that 'it is unclear whether Oyu Tolgoi made any attempt to consult herders regarding the many roads not identified as impact zones', and that 'the ESIA does not refer to consultations in relation to other project-related roads'.<sup>193</sup> Take, for example, the consultative events outlined above held between April and June 2009 concerning such impacts of road use as health and safety hazards, reduced pasture due to land-take and fragmentation, dust and noise, possible impacts on herder wells, and possible impacts on intangible cultural heritage,<sup>194</sup> or those held between June 2010 and June 2011 concerning road routing, signage and animal crossing points and dust impacts, as well as pastureland management, livelihood support and compensation.<sup>195</sup>

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<sup>189</sup>Stakeholder Engagement Plan, at 38, Table 7.

<sup>190</sup> See, for example, Letter from ERM (IESC) to Hatch Corporate Finance, dated 12 July 2011, Attachment 1: Substantive Comments – Comment Nos. 22 and 26.

<sup>191</sup> Detailed information contained in e-mail from ESD to PCM Officer, dated 4 January 2016.

<sup>192</sup> The records of such follow-up activities have been provided by ESD and are on file with the Compliance Review Expert.

<sup>193</sup> Supplemental Complaint, at 10.

<sup>194</sup> Detailed in Chapter A6: Community Consultation, at 31-33, Table 6.15.

<sup>195</sup> Detailed in Chapter A6: Community Consultation, at 18-20, Table 6.6.

### Road-Related Dust Impacts

76. As regards the assessment of baseline conditions within the area affected by the Project, the ESIA details the 2009 Dust Monitoring Survey, which involved five dust monitoring points located in the vicinity of the Project site in order to get [baseline] information on dust sources such as traffic, batch plant operations and construction activities'.<sup>196</sup> This survey allowed the ESIA baseline assessment to conclude that 'local influences such as existing road traffic have influenced dust ... [which is] ... clearly visible along many of the unsealed roads and tracks in the Project Area of Influence'.<sup>197</sup> It also found that dust conditions in the Project area 'have been heavily influenced by climatic conditions - higher dust concentrations and deposition rates have been observed during high wind events and during times when vegetation is sparse', particularly March, April and May. Therefore, the Client was fully aware of the risks posed by increased dust from heavy traffic related to Project construction and operation, which led to the development of the dust monitoring programme described in Chapter D2: *Atmospheric Emissions Management Plan* of the ESIA.<sup>198</sup>
77. The ESIA baseline assessment further considered Project-related traffic on the Khanbogd to Dalanzadgad road, the Khanbogd to Oyu Tolgoi road, the Oyu Tolgoi to Gashuun Sukhait road, the Tavan Tolgoi to Gashuun Sukhait road and the Khanbogd to Manlai (then Choir and Ulaanbaatar) road.<sup>199</sup> It notes that 'Oyu Tolgoi commissioned a traffic census in 2011 to assess traffic loadings to the mine site and on roads used by the Project in Khanbogd *soum*', which showed an average of 157 vehicles arriving at and leaving the Oyu Tolgoi gate daily in March 2011, including workers' buses, construction supply trucks, fuel supply trucks, catering supply trucks and assorted light vehicles.<sup>200</sup> The census also recorded the number of vehicles using each of the roads listed above and found, for example, that 200 Oyu Tolgoi and contractor vehicles (140 heavy vehicles and 60 light vehicles) used to the unpaved Oyu Tolgoi to Khanbogd-Manlai road in one 24 hour period, while 143 other vehicles (38 heavy vehicles and 105 light vehicles) used the road during the same period.<sup>201</sup> Thus, the preparation of the ESIA involved meticulous efforts to understand the nature and extent of road use associated with the Project, and to generate data which could assist in design and implementation of measures to mitigate resulting impacts.
78. As regards Section C of the ESIA on *Impact Assessment*, which specifically identifies the various environmental and social impacts associated with the Project, as well as the efforts employed to avoid and mitigate such impacts, it appears that the problem of road-related dust was anticipated but was not regarded as presenting a very serious risk. For example, though it assesses likely impacts of dust from mining activities,<sup>202</sup> as well as dust generation from the tailings storage facility,<sup>203</sup> the chapter on *Climate and*

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<sup>196</sup> Chapter B3: Air Quality, at 9, para. 3.9.1.

<sup>197</sup> Chapter B3: Air Quality, at 13, para. 3.11. It also notes that

'Dust is also very apparent along the existing coal transport route to the Chinese border (see *Figure 3.8*).

<sup>198</sup> Chapter B3: Air Quality, at 14, para. 3.11.

<sup>199</sup> Chapter B11: Transport and Infrastructure, at 18-19, Table 11.7.

<sup>200</sup> Chapter B11: Transport and Infrastructure, at 19, Table 11.8.

<sup>201</sup> Chapter B11: Transport and Infrastructure, at 20, Table 11.12, which records traffic on 31 March 2011.

<sup>202</sup> Chapter C2: Climate and Air Quality, at 12, para. 2.4.9.

<sup>203</sup> Chapter C2: Climate and Air Quality, at 12, para. 2.4.10.

*Air Quality* concluded that '[s]ignificant dust generating activities outside of the Mine Licence Area are not anticipated during Project operations'.<sup>204</sup> Similarly, it characterised as "negligible" the residual significance (after the implementation of the relevant recommended design and mitigation measures) of both '[d]eterioration of ambient air quality resulting from mobile and stationary equipment' and '[d]eterioration of ambient air quality resulting from concentrate, materials and personnel road transportation'.<sup>205</sup> However, the specific dust-related design and mitigation measures identified and recommended in respect of both categories of impact seem highly appropriate, including:

- Speed limitation of 80 km/h in all areas and as low as 10 km/h in sensitive receptor locations (e.g. camps) including tracking of vehicle speeds on GPS system.
- Provision of compacted granular wearing course on all graded roads.
- Provision of wet dust suppression and/or dust palliatives in sensitive receptor locations.
- Restriction on vehicular usage in off-road areas and informal tracks, including tracking of vehicles on GPS system.<sup>206</sup>

79. As regards dust impacts more specifically, the assessment of community health, safety and security impacts (ESIA Chapter C12) expressly acknowledges that respiratory diseases were among the most prevalent illnesses in Khanbogd *soum* in 2007 and that 'additional construction works and traffic in Khanbogd could exacerbate existing respiratory illnesses or create new conditions'.<sup>207</sup> It further recognises that '[h]erders are particularly affected by dust from unpaved roads and explained during consultation with Oyu Tolgoi that they needed to move livestock in response to road building and dust'. The ESIA concluded that dust from construction activities sites, including the Mine Licence Area, airport sites and Gunii Hooloi pipeline will be temporary and will be 'managed through watering and other engineering controls on site', as well as through herders being notified of construction activities in new areas 'so that they can avoid dust and noise impacts wherever possible while construction activities are being conducted'.<sup>208</sup> Similarly, while the ESIA conceded that '[c]onstruction and use of the unsealed Oyu Tolgoi to Gashuun Sukhait road prior to surfacing has contributed to the existing dust levels in Khanbogd', it insisted that 'this road is being upgraded in 2011/12 and any additional dust impacts will be temporary'.<sup>209</sup> It also points out that '[h]erders along the Oyu Tolgoi road to the border have been extensively consulted about dust and other road impacts and are being supported to be able to maintain their livelihoods and avoid dust and noise impacts during construction.'

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<sup>204</sup> Chapter C2: Climate and Air Quality, at 12, para. 2.4.6.

<sup>205</sup> Chapter C2: Climate and Air Quality, at 16-18, Table 2.6.

<sup>206</sup> Chapter C2: Climate and Air Quality, at 16-18, Table 2.6.

<sup>207</sup> Chapter C12: Community Health, Safety and Security, at 14, para. 12.3.7.

<sup>208</sup> Chapter C12: Community Health, Safety and Security, at 14, para. 12.3.7.

<sup>209</sup> Chapter C12: Community Health, Safety and Security, at 14, para. 12.3.7. As regards the Clients awareness of the seriousness of such temporary dust impacts, it is interesting that the ESAI should record that

'In Khanbogd *soum*, the coal transportation route was a source of considerable dust until it was upgraded in 2011, and resulted in complaints from herders.'

80. However, the ESIA appears to discount the Project's potential for giving rise to dust problems due to the use of other, non-paved roads. First, it appears to suggest that dust problems in Khanbogd *soum* are largely due to the use of other, "non-Oyu Tolgoi" roads by other road users, stating that

'The construction and operation of Oyu Tolgoi roads in addition to other roads within the south Gobi is a potential source of cumulative dust ... [and] ... The use of unpaved multiple tracks (by other users) is also a source of dust in Khanbogd.'<sup>210</sup>

While the ESIA acknowledges that Oyu Tolgoi vehicles use other, unpaved roads, it insists that their impact in terms of dust is minimal. For example, it concluded that

'Use and operation of the unsealed power line service road and the Gunii Hooloi pipeline service road that will be built as part of the Project will be a source of minor ongoing dust generation, but as vehicles will be limited to 1-2 per day, additional dust levels are expected to be low.'<sup>211</sup>

Similarly, regarding the Project's main supply route, the ESIA explains (somewhat inadequately perhaps)

'The existing road to UB [Ulaan Bataar] via Mandalgovi, which will be used for logistics and supplies, will also be a source of dust during construction and operations, although this impact will be mitigated through good traffic management measures. The volume of non-Project traffic on this route is limited and therefore there will be a limited cumulative impact which will be most pronounced through communities such as Manlai. Enforcing appropriate speed limits through these communities and on the route will serve to mitigate this impact.'<sup>212</sup>

The above reference to cumulative impact appears once again to suggest that non-Project traffic is a significant source of dust, despite the commitment in the discussion of mitigation measures in the ESIA that 'Oyu Tolgoi will also contribute to the maintenance of other roads that are heavily used by the Project such as the Oyu Tolgoi to Khanbogd road'.<sup>213</sup>

81. Generally, the ESIA characterises the expected impact from road-related dust as "moderate adverse", due to the existing high incidence of respiratory disease, but suggests that it will decrease to 'minor adverse or better as borrow pits are rehabilitated, the *Oyu Tolgoi to Gashuun Sakhait* road is sealed and construction activities are completed.'<sup>214</sup> While tacitly acknowledging that several unpaved roads, including the Oyu Tolgoi to Khanbogd road and the Oyu Tolgoi to Ulaan Bataar (via Mandalgovi) road, will continue to be heavily used by the Project during operations

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<sup>210</sup> Chapter C12: Community Health, Safety and Security, at 14, para. 12.3.7.

<sup>211</sup> Chapter C12: Community Health, Safety and Security, at 14, para. 12.3.7.

<sup>212</sup> Chapter C12: Community Health, Safety and Security, at 15, para. 12.3.7.

<sup>213</sup> Chapter C12: Community Health, Safety and Security, at 15, para. 12.3.7.

<sup>214</sup> Chapter C12: Community Health, Safety and Security, at 15, para. 12.3.7.

resulting in the generation of dust, the ESIA explains that '[s]pecific dust control mitigation measures are set out in Chapter D2: Atmospheric Emissions Management Plan'. Thus it is necessary to examine the Atmospheric Emissions Management Plan<sup>215</sup> in detail.

The Atmospheric Emissions Management Plan identifies as an "Emission of Primary Concern", wheel generated dust from operational vehicles on and off site,<sup>216</sup> before proceeding to describe in detail the controls in place to minimise road-related dust generation,<sup>217</sup> as well as the specific company departments responsible for their implementation and the means of verifying such implementation.<sup>218</sup> The Atmospheric Emissions Management Plan, which is to 'be reviewed at least every two years or more frequently when operational or environmental conditions so dictate', also sets out detailed 'monitoring measures to be implemented during the operations phase to assess compliance with Project Standards'.<sup>219</sup> The key dust-related monitoring activities include 'visual observation of significant dust, supplemented with direct readings of dust concentrations' and monitoring using "Dust Trak" equipment (53 points) and dust fall measuring cylinders (21 points).<sup>220</sup> It is interesting to note, in the context of the current Complaint, that one of three key performance indicators for assessing the Project's performance with regard to dust and air emissions is that of the 'number of reported air quality related community complaints per year'.<sup>221</sup> In addition, the Atmospheric Emissions Management Plan sets out detailed requirements for the training of employees, for internal and external audit of conformance with the Plan, and for the maintenance of records of audits, inspections and incidents.<sup>222</sup>

82. As an example of the technical dust monitoring routinely conducted by the Client, one report on dust monitoring in December 2013 and October 2014 along the Oyu Tolgoi – Manlai road generally concludes that 'there is no impact of the project operation' as

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<sup>215</sup> The *Atmospheric Emissions Management Plan* is a component of the *Project Environmental and Social Management Plan* and consists of five inter-related constituent documents, notably including in relation to dust the *Atmospheric Emissions Management Plan* and the *Air Quality Monitoring Plan*.

<sup>216</sup> Atmospheric Emissions Management Plan, at 13, Table 3, available at [http://ot.mn/media/ot/content/page\\_content/commitments/ESIA/2\\_Operation\\_Management\\_Plans/3\\_Atmospheric\\_Emissions\\_Management\\_Plan/ESIA\\_OT\\_OMP\\_Atmospheric\\_Emissions\\_Management\\_Plan\\_EN.pdf](http://ot.mn/media/ot/content/page_content/commitments/ESIA/2_Operation_Management_Plans/3_Atmospheric_Emissions_Management_Plan/ESIA_OT_OMP_Atmospheric_Emissions_Management_Plan_EN.pdf)

<sup>217</sup> Atmospheric Emissions Management Plan, at 17, Table 3, which reads: 'Implement appropriate control measures for activities, locations and sites where potential for dust generation is significant (for example, soil stockpiles), on highly trafficked roads and especially for activities near sensitive receptors. The Transport Management Plan (OT-10-C3-PLN-0001-E) and the Land Use Management Plan (OT-10-E9-PLN-0001-E) will also provide procedures to control off-road vehicle access outside of the Mine Lease Area. The Land Disturbance Permit Procedure (OT-10-E9-PRC-0003-E) includes the identification of sensitive receptors and is used to control dust generation rising from specified activities (e.g. borrow pits/quarry activities) that involve land disturbance.'

<sup>218</sup> Including the GPS vehicle tracking system, Air Quality Monitoring Audits and community complaints.

<sup>219</sup> Atmospheric Emissions Management Plan, at 19, para. 6.1 and 7.1.

<sup>220</sup> Atmospheric Emissions Management Plan, at 20, para. 7.3 and at 21, Table 7. Further technical details are provided in the Air Quality Monitoring Plan, available at [http://ot.mn/media/ot/content/page\\_content/commitments/ESIA/2\\_Operation\\_Management\\_Plans/3\\_Atmospheric\\_Emissions\\_Management\\_Plan/Atmospheric\\_emission\\_MP/ESIA\\_OT\\_OMP\\_Air\\_Quality\\_Monitoring\\_Plan\\_EN.pdf](http://ot.mn/media/ot/content/page_content/commitments/ESIA/2_Operation_Management_Plans/3_Atmospheric_Emissions_Management_Plan/Atmospheric_emission_MP/ESIA_OT_OMP_Air_Quality_Monitoring_Plan_EN.pdf)

For example, in relation to the requirement that dust deposition gauges be used to monitor impacts from temporary roads, the Air Quality Monitoring Plan explains, at 14, Table 0.5, that

'Dust deposition gauges may be added to and removed from the existing network as required for measurement of dust fall due to road construction, infrastructure construction, unsealed roads or quarries.'

<sup>221</sup> Atmospheric Emissions Management Plan, at 19-20, Table 6.

<sup>222</sup> Atmospheric Emissions Management Plan, at 23-24, paras. 8-9. For example, the Plan requires that 'All employees of OT and Contractors to OT responsible for dust control activities shall be provided with toolbox training that outlines the mitigation measures identified in Table 5.'

'both PM2.5 and PM10 concentration in ambient air along the OT-ML road were below the project standard acceptable', though on one occasion during measurement airborne dust did exceed the project standard due to the passing of a convoy of 12 trucks.<sup>223</sup> For this particular monitoring exercise, dust monitoring was conducted at two separate monitoring points using Dusttrak DRX 8533 aerosol real time monitors on 14 December 2013 and 12 October 2014.

83. In addition to the Atmospheric Emissions Management Plan, the Operation Management Plans prepared for the Project include the Transport Construction Management Plan, the Transport Management Plan, the Community Health, Safety & Security Management Plan and the Pastureland and Livelihood Improvement Strategy. The Transport Construction Management Plan, which seeks to control and minimise potential negative impacts associated with Project vehicle movements, includes within its scope '[i]mport and export of equipment and materials to/from the site' and '[t]ransport of personnel from/to the Project area by road', and identifies among the relevant potential impacts:
- Dust generation (with knock-on health safety and ecological impacts); and
  - Deterioration of local roads resulting from heavy equipment usage and high levels of vehicular traffic.<sup>224</sup>

A range of specific mitigation measures and management controls are included in the Plan to help avoid and mitigate dust impacts from road use during construction, including:

- The use of only pre-designated roads for all transportation, which will have been surveyed and approved by Oyu Tolgoi, with vehicles supervised by means of the GPS traffic management system;
- Selection of road alignments for any new roads which will avoid indicator species, herder camps and river beds;
- Detailed measures to minimise dust from truck cargoes, including the prevention of overloading, the sweeping of truck sides and rails to remove spilled material, and speed restrictions of max. 80km/h and as low as 10km/h, which will be policed using GPS tracking devices on all Oyu Tolgoi and dedicated contractors' trucks;
- Ongoing review of activities contributing to significant dust generation and maintenance of an ongoing dialogue with local herders and communities , including procedures for responding to any complaints from herders regarding dust nuisance in a consultative and appropriate manner.<sup>225</sup>

Regarding monitoring of compliance with the Transport Construction Management Plan, the Client has committed to the carrying out of visual inspections every three months or in the event of a complaint 'of dust levels along the haulage routes and in particular at sensitive locations e.g. residential areas' and also 'to engage [on an ongoing basis] with

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<sup>223</sup> Oyu Tolgoi, *Report for Dust and Noise Monitoring along the Pyu Tolgoi – Manlai Road*, (2014).

<sup>224</sup> Chapter D11: Transport Construction Management Plan, at 2-3, 11.3-11.4.

<sup>225</sup> Chapter D11: Transport Construction Management Plan, at 6-11, Table 11.1.

affected communities along haulage routes to establish the extent of impact caused by Project traffic'.<sup>226</sup>

84. Similarly, the Transport Management Plan, which outlines the management procedures applying to road transport related to Project operations, including a commitment to the effect that '[d]ust management strategies will be developed and implemented if potential problems are identified through participatory dust monitoring programmes, or if considered necessary by OT Environment Department'.<sup>227</sup> It further directs that '[g]raded roads will be constructed to include a granular wearing course or other suitable material' and stipulates measures to deter and prevent off-road driving.<sup>228</sup> For the purposes of monitoring dust impacts, this Plan also commits to '[v]isual inspection by the OT Environment Department of dust levels along the haulage routes and in particular at sensitive locations ... [f]ollowing road construction and/or upgrading and in the event of a complaint'.<sup>229</sup> Once again, it pledges to 'continue to engage with local communities along haulage routes to establish the extent of impact caused by Project traffic'.
85. More generally, the Community Health, Safety and Security Management Plan acknowledges the risk to health posed by dust<sup>230</sup> and includes as a key objective to 'mitigate impacts of road and other transport movements on the community that are a direct result of transporting Project personnel and materials'.<sup>231</sup> In order to minimise communities' exposure to Project hazards, the Management Plan stipulates that

'Community relations staff will continue to provide regular updates to herders and other residents about potential Project hazards and changes to Project activities that may have community safety impacts ... [and] ... Activities conducted off-site will assess community risk exposure and efforts will be made to avoid or mitigate community risk where possible.'<sup>232</sup>

It further stipulates that the Client would 'monitor key health indicators, including for herders' and 'undertake a research study on herder health in 2013 and develop and implement a health monitoring system for herders in selected *soums*'.<sup>233</sup> The Management Plan is to be reviewed annually taking account of key performance

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<sup>226</sup> Chapter D11: Transport Construction Management Plan, at 19, Table 11.2.

<sup>227</sup> See Transport Management Plan, at 10-12, Table 3.

<sup>228</sup> One management control provides that Oyu Tolgoi will:

- (i) Develop and distribute communication materials on the impacts of off-road driving and its implications for livelihoods and wildlife conservation as part of an information and education campaign linked to ongoing stakeholder engagement efforts; and
- (ii) Incorporate requirements related to off-road driving into its contractor management program and induction training for all new staff and contractors.

<sup>229</sup> See Transport Management Plan, at 17-18, Table 5.

<sup>230</sup> For example, the Plan includes among the relevant and applicable national legal standards the Law on Sanitation (2998), which covers, *inter alia*, the 'control of air quality including dust', and acknowledges the relevance of PR 4 of the EBRD ESP, which seeks 'to avoid or minimise adverse impacts due to Project activities on air, soil, water, vegetation and fauna and other natural resources in use by the affected communities'. See Community Health, Safety and Security Management Plan, at 7, para. 4.1 and at 10, para. 4.4.

<sup>231</sup> Community Health, Safety and Security Management Plan, at 14, para. 5.2.

<sup>232</sup> Community Health, Safety and Security Management Plan, at 17, Table 2.

<sup>233</sup> Community Health, Safety and Security Management Plan, at 19, Table 2.



indicators including the number of relevant complaints received from local communities as recorded in the grievance management system.<sup>234</sup>

86. Even the Pastureland and Livelihood Improvement Strategy, which applies across the four soums impacted by the Project and is intended to form a key element in arrangements ‘to compensate seasonal herders in Khanbogd soum’,<sup>235</sup> expressly includes among the impacts considered ‘overall reduction of pastureland quantity and quality from dust’.<sup>236</sup> Also, in terms of supporting improvements to herding management and animal health, the Strategy notes that ‘[l]ocal private veterinary units identified several underlying problems for livestock ill-health ... [including] ... increased dust from new roads’,<sup>237</sup> while setting out a wide range of measures intended to improve animal health and prevent or mitigate pastureland degradation.
87. In addition, it is clear that the Bank sought to exercise oversight over the Client’s efforts to avoid and mitigate the adverse impacts of road-related dust. For example, during the ESD site visit in September 2013 ESD staff investigated dust impacts on winter shelters located 1km from the dirt export road, which remained in use until the paved road was commissioned in October 2013, as well as road dust impacts upon Bazar and Lhasuren winter shelters.<sup>238</sup> ESD concluded that

‘It was considered highly unlikely (based on the visual observations made during this trip of the amount of dust generated on this road from concentrate export trucks) that under current conditions, or even worst anticipated conditions, that dust from the OT export road could cause dust problems at these winter shelters, and of course certainly not once the paved road was commissioned. During our time, the dust generated from the trucks was not significant, and visible dispersion was less than a couple hundred meters total.’<sup>239</sup>

Indeed, pending the commissioning of the paved road, ESD held several face-to-face meetings with Oyu Tolgoi staff to discuss the content of the ESIA, which involved ESD making several dust-related demands of the Client, including the use of convoys (of up to seven trucks) for export of all concentrate in order to reduce impacts on herders by ensuring long periods of time with no traffic and no dust, and the inclusion of a transportation management plan with speed restrictions specifically aimed at promoting overall road safety and reducing the amount of dust generated.<sup>240</sup> Similarly, during the IESC site visit in April 2014, ESD staff took part in discussions on and inspection of dust management controls on the road network used by Oyu Tolgoi.<sup>241</sup> During the same site visit ESD also held a meeting with the veterinarian who performed the assessment of

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<sup>234</sup> Community Health, Safety and Security Management Plan, at 24, Table 4.

<sup>235</sup> Khanbogd, Bayan Ovoo, Manlai and Dalanzadgad soums. See Pastureland and Livelihood Improvement Strategy, at 5, para. 2.1.3.

<sup>236</sup> Pastureland and Livelihood Improvement Strategy, at 7, para. 2.1.5.

<sup>237</sup> Pastureland and Livelihood Improvement Strategy, at 19, Table 5.4.

<sup>238</sup> Back-to-Office Report, dated September 2013, at 16.

<sup>239</sup> Detailed information contained in e-mail from ESD to PCM Officer, dated 4 January 2016.

<sup>240</sup> Detailed information contained in e-mail from ESD to PCM Officer, dated 4 January 2016.

<sup>241</sup> Back-to-Office Report, dated 28 May 2014, which records, at 3, that

‘Dust management on roads was directly observed during the site visit – including water trucks, route grading and black-topping of major routes.’

health impacts on animals due to dust.<sup>242</sup> ESD also examined the veterinarian's report, which concluded that, although dust can aggravate certain respiratory diseases, dust from roads is not the cause of black lungs in animals.<sup>243</sup>

88. Therefore, it is not possible to conclude that EBRD failed, in contravention of either PR 1 or PR 4, to ensure that reasonable and appropriate avoidance or mitigation measures were identified and implemented in order to protect herders from the adverse impacts of dust associated with Project road transport.

### Road Safety Impacts

89. The ESIA assessment of baseline conditions examined the incidence of traffic accidents and found that up to the end of July 2012 there had been 'no traffic accidents involving Oyu Tolgoi vehicles which have affected people, livestock or wildlife'.<sup>244</sup>
90. In the context of the assessment of community health, safety and security impacts, the ESIA recognises the increase in road traffic which will occur due to the Project, the fact that the majority of roads within the *soum* are earth roads or graded roads and are unlikely to be upgraded significantly, and the resulting risk of an increase in traffic accidents, 'particularly where roads pass close to herder camps or *ger* settlements'.<sup>245</sup> The ESIA sets out a comprehensive list of mitigation measures, including:
- Upgrading of the Oyu Tolgoi to Gashuun Sukhait road;
  - Maintenance of other roads that are heavily used by the Project, such as the Oyu Tolgoi to Khanbogd road;
  - Extensive consultation with herder households to identify safe crossing points for herders and animals and other appropriate safety features (at least on the Oyu Tolgoi to Gashuun Sukhait road);
  - Construction of appropriate road junctions at the intersections of *soum* roads with the Oyu Tolgoi to Gashuun Sukhait road;
  - Determination and enforcement of appropriate speed limits for Oyu Tolgoi and contractor vehicles;
  - Comprehensive community road safety awareness campaign;
  - Capacity-building to applicable service providers to support traffic safety and emergency response;
  - First Aid and Safety training for local residents; and
  - Development of Community Emergency Response Plans.<sup>246</sup>

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<sup>242</sup> Detailed information contained in e-mail from ESD to PCM Officer, dated 4 January 2016.

<sup>243</sup> *Executive Summary on Health Assessment of Livestock in Affected and Non-Affected Zones of Oyu Tolgoi Mining Site in Khanbogd Soum of Omnugobi Aimag*, 15 February 2015, copy on file with Compliance Review Expert.

<sup>244</sup> Chapter B11: Transport and Infrastructure, at 20, para. 11.5.1.

<sup>245</sup> See Chapter C12: Community Health, Safety and Security, at 2-3, para. 12.3.2.

<sup>246</sup> See Chapter C12: Community Health, Safety and Security, at 4-5, para. 12.3.2. It is interesting to point out in relation to the upgrading of the Oyu Tolgoi to Gashuun Sukhait road that the ESIA notes, *ibid.*, at 3, that

'A second positive effect will be the reduction in dust generation associated with the use of a single, sealed road rather than multiple unsealed tracks. This benefit will only be realised once the Oyu Tolgoi to Gashuun Sukhait road is surfaced. A general increase in dust can be expected during the construction phase.'

Regarding the increase in road traffic, the ESIA also acknowledges, *ibid.*, that

'Traffic on local roads (i.e. earth roads) will also increase as a result of population influx and commercial activity associated with the Project.'

In addition, the Client has provided assurances that transportation of materials and concentrate will be scheduled for daytime hours whenever possible, primarily in the interest of road safety.<sup>247</sup>

91. The Transport Construction Management Plan was centrally concerned with road safety issues arising during the construction phase. This Plan sought to control and minimise potential negative impacts associated with Project vehicle movements during construction operations, including ‘[i]mport and export of equipment and materials to/from the site’ and ‘[t]ransport of personnel from/to the Project area by road’, and identified among the relevant potential impacts:
- Increased risk of collisions with other vehicles or pedestrians resulting in injury or death;
  - Increased risk of collision with fauna and herd animals; and
  - Deterioration of local roads resulting from heavy equipment usage and high levels of vehicular traffic.<sup>248</sup>

The Plan included a wide range of mitigation measures and management controls applying to Oyu Tolgoi and contractors’ vehicles and intended to maximise road safety involving, *inter alia*, use of approved pre-designated routes, establishment of appropriate emergency response plans and procedures, reporting and recording of domestic livestock fatalities, controls on speeding and off-road driving with monitoring by means of a GPS traffic management system, identification and signage of herder and animal crossings and construction of appropriate road junctions, appropriate training of Project drivers and driver competence assessment, limits on trip duration and enforced rest periods, regular maintenance of vehicles and use of reversing alarms and other safety devices, route surveys and active identification of accident black spots, and a range of specifically tailored education activities, demonstrations and other events to raise awareness of road traffic.<sup>249</sup> The Plan also set out detailed monitoring measures involving regular audits, inspections<sup>250</sup> and tracking the number of transport-related complaints recorded in the grievance database.<sup>251</sup>

92. Similarly, the Transport Management Plan stipulates a detailed list of management controls to address road safety impacts arising during Project operations, including use of designated roads, road signage, detailed rules and standards for drivers on speeding, driver training, use of Journey Management Plans, development of emergency response plans, and implementation with local communities of a road safety and traffic awareness programme.<sup>252</sup> The Plan includes detailed monitoring actions, including analysis of reported road traffic accidents and transport-related complaints from local

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The above statements confirm that the Client was well aware of the potential problem of dust from the Oyu Tolgoi to Gashuun Sukhait road until completion of its upgrade to a sealed road, as well as the ongoing problem of dust resulting from increased traffic on local earth roads.

<sup>247</sup> See Chapter C12: Community Health, Safety and Security, at 3, para. 12.3.2.

<sup>248</sup> Chapter D11: Transport Construction Management Plan, at 2-3, 11.3-11.4.

<sup>249</sup> Chapter D11: Transport Construction Management Plan, at 6-17, Table 11.1.

<sup>250</sup> Chapter D11: Transport Construction Management Plan, at 19, Table 11.2.

<sup>251</sup> Chapter D11: Transport Construction Management Plan, at 20, Table 11.3.

<sup>252</sup> Transport Management Plan, at 10-13, Table 3.

communities and provides for an annual internal audit of conformance.<sup>253</sup> The Plan is to be reviewed every two years and may be updated on an “as required” basis.<sup>254</sup>

93. Road safety is an absolutely central concern of the Community Health, Safety and Security Management Plan, which lists among ‘[t]he most significant negative risks identified’ in respect of community health and safety

‘increased injury, disability and death from traffic accidents, as a consequence of increasing heavy vehicle numbers (including trucks, cars and motor bikes), poor roads, lack of diversion of heavy traffic from settled areas, unaware pedestrians, lack of traffic enforcement or vehicle inspection and unskilled, drunk or exhausted drivers’.<sup>255</sup>

Consequently, one of its key objectives is to ‘mitigate impacts of road and other transport movements on the community that are a direct result of transporting project personnel and materials’.<sup>256</sup> The Plan proceeds to list first among the relevant management controls, the Client’s commitment to ‘[c]ontinue to implement the Road Safety Awareness Programme in local communities and along principal transport routes in consultation with key local stakeholders’ and, further, that ‘[c]ommunity relations staff will continue to provide regular updates to herders and other residents about potential Project hazards and changes to Project activities that may have community safety impacts’.<sup>257</sup> In addition, it stipulates, *inter alia*, the promotion of road safety among the community, including the design, printing and dissemination of a rural road safety training module, annual first aid training for herders and traffic police, and the annual supply of first aid kit content.<sup>258</sup> Once again, the monitoring actions stipulated in the Plan include analysis of reported road traffic accidents and transport-related complaints from local communities.<sup>259</sup>

94. Bank management has taken an active interest in road safety issues as part of the Bank’s oversight of the environmental and social standards applied by the Client. For example, during their September 2013 site visit, ESD staff drove down the export road to the Chinese border for the specific purpose of inspecting the 21 crossing points, making specific stops at two Animal Crossing (AC) points (AC 6 and AC 11), where they were satisfied that the signage and the gradual slope from the road to the natural ground were as requested by local herders.<sup>260</sup> In addition, on several occasions ESD demanded at face-to-face meetings with the Client the inclusion of a transport management plan with specific speed restrictions aimed at promoting overall road safety.<sup>261</sup>

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<sup>253</sup> Transport Management Plan, at 15-16, Table 4 and 19, para. 9.1.

<sup>254</sup> Transport Management Plan, at 15, para. 6.1.

<sup>255</sup> Community Health, Safety and Security Management Plan, at 13, para.5.1.

<sup>256</sup> Community Health, Safety and Security Management Plan, at 14, para.5.2. The Plan expressly acknowledges, at 10, para. 4.4, that one of the key requirements of EBRD Performance Requirement 4 obliges Oyu Tolgoi ‘to seek to prevent the occurrence of incidents and accidents associated with the operation of vehicles on public roads’.

<sup>257</sup> Community Health, Safety and Security Management Plan, at 17, Table 2.

<sup>258</sup> Community Health, Safety and Security Management Plan, at 22-23, Table 3.

<sup>259</sup> Community Health, Safety and Security Management Plan, at 24, Table 4.

<sup>260</sup> Back-to-Office Report, dated September 2013, at 14-15.

<sup>261</sup> Detailed information contained in e-mail from ESD to PCM Officer, dated 4 January 2016.

95. Therefore, it is not possible to conclude that Bank management failed, in contravention of either PR 1 or PR 4.7, to ensure that adequate road safety measures were identified and implemented in order to protect herders and their livestock from accidents with Project road transport.<sup>262</sup>

### *Impacts on Vulnerable People*

96. As noted above, the Compliance Review Expert takes the view that PR 7 on Indigenous Peoples does not apply to impacted herders except to the extent that it helps to inform the standard of protection that this community should enjoy due to the vulnerability of the traditional herder lifestyle to economic development and social change.<sup>263</sup> Therefore, it is necessary to determine the adequacy of the protection afforded to such vulnerable people in the course of the Project's environmental and social appraisal.
97. The ESIA purports to define vulnerable people in line with the International Finance Corporation's 2007 Performance Standards on Social and Environmental Sustainability:

'Vulnerable people are people who by virtue of gender, ethnicity, age, physical or mental disability, economic disadvantage, or social status, may be more adversely affected by the Project than others and who may be limited in their ability to claim or take advantage of the development benefits or opportunities.<sup>264</sup>

This definition ought to be sufficiently expansive to include vulnerable groups of herders who have been indirectly impacted by the Project due to economic displacement. However, Chapter A6 of the ESIA goes on to explain that '[t]he identification of vulnerable people in Khanbogd *soum* is completed through a workshop with local government and community leaders (usually held each year)' and using the rather narrower vulnerability criteria set out under the 2005 Mongolian Law on Social Welfare.<sup>265</sup> On this basis, the Labour and Social Welfare Office has identified 55 households as vulnerable within the total population of Khanbogd *soum*, of which a total of 14 households, or 74 people, have been identified as vulnerable within the directly affected herder group.<sup>266</sup> Though the Client commits to providing assistance to such vulnerable persons in a variety of ways,<sup>267</sup> through a specific budget that was

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<sup>262</sup> As alleged in Supplemental Complaint, at 8.

<sup>263</sup> *Supra*, paras. 24 to 28.

<sup>264</sup> Chapter A6: Community Consultation, at 14, para.6.5.5 (emphasis added).

<sup>265</sup> See further, Chapter A6: Community Consultation, at 14-15, para.6.5.5. The 2005 Mongolian Law on Social Welfare defines vulnerable people as

'people who are in need of support and assistance of social welfare cover, old people in need of regular care, children in harsh conditions, disabled citizens, citizens (ages 18-24), orphan children under the age of 18, mothers who have many children and single mothers / fathers.'

The Labour and Social Welfare Office appears to have inferred from this definition five key criteria for vulnerability, *i.e.*

- a) Single-headed (single parent family);
- b) Family member requiring full-time carer (including the elderly, those in ill-health and the disabled);
- c) Family with many children;
- d) Unemployed; and
- e) Low income per person (total income divided by family members).

<sup>266</sup> See further, the baseline study outlined in Chapter B6: Employment and Livelihoods, at 26, para. 9.7.

<sup>267</sup> For example, Chapter A6: Community Consultation explains, at 15, para. 6.5.5, that

'The Project has provided *gers* to poor families in Khanbogd, Bayan Ovoo, Manlai, Nomgon, Tsogttsetsii and Dalanzadgad *soums*, donated vitamins and school supplies to disadvantaged children in Nailakh and collaborated with the Dalanzadgad police on a child abuse prevention programme. All Oyu Tolgoi programmes

allocated for this purpose, it is not apparent from Chapter A6 of the ESIA that any assistance would be available to vulnerable herders indirectly impacted by the Project.

98. Such a restrictive approach would appear to have been adopted in the identification of vulnerable people in the impact assessment itself, which reports that ‘four households have been identified as vulnerable people by Oyu Tolgoi’ on account of these households having abandoned their winter shelters ‘due to adverse impacts from the coal transportation route traffic and the unplanned and largely unmanaged expansion of *Tsagann Khad*, the truck stop near the China border post’<sup>268</sup> (Impact category F1),<sup>269</sup> which cannot be directly attributed to Oyu Tolgoi Project activities. Chapter C10 goes on to explain that, in addition to education assistance for children and short-term training to be provided generally in respect of ‘minor to moderate disruption to herding practices during construction activities’,

‘Oyu Tolgoi also intends to provide special assistance to the vulnerable households identified as having abandoned their winter shelters near *Tsagann Khad*. These households will be provided with livelihood improvement measures tailored to their needs.’<sup>270</sup>

99. However, it becomes clear on closer scrutiny that the impact assessment takes an expansive and inclusive approach to vulnerability in respect of communal grazing land loss in Impact Zone E, which covers ‘[a]ll seasonal herder households with traditional grazing rights in *Khanbogd soum*’.<sup>271</sup> The ESIA demonstrates a keen awareness of the inherent vulnerability of the herder livelihood by acknowledging, for example, that

‘Whilst there is an abundance of grazing land in the region, it varies in quality and accessibility during different seasons and over different years. Herders affected by loss of pasture may be able to find new grazing areas, however, the vital condition of pastoralism is open grazing over vast pasture areas. Any reduction in the size of pastureland and forage resources associated with mine development will lead to the re-distribution of existing grazing resources among current users, thus increasing pressure on grazing land (and water resources) and exacerbating the potential for conflict.’<sup>272</sup>

Taking account of the limited water resources in the area and of 2010 research conducted by the Mongolian Society for Range Management, the ESIA concludes that ‘a loss of 20,000 ha of land to mining-related uses (conservative figure) would equate to a 2.6% reduction of the total pasture with water supply in the *soum*’.<sup>273</sup> Once again displaying a sensitivity to the vulnerability of herder livelihoods and of traditional livestock herding as a community activity, the ESIA explains that

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have a mandate to address and include vulnerable people (e.g. the *Local Business Economic Development (LBED) Programme*; Oyu Tolgoi have made a provisional budget of US\$50,000 available for 2012 ...’.

<sup>268</sup> Chapter C10: Land Use and Displacement, at 26, para. 10.3.9.

<sup>269</sup> According to Chapter C10: Land Use and Displacement, at 11, Table 10.2, Impact Zone F1 covers ‘Oyu Tolgoi to Gashuun Sukhait Impact Zone in vicinity of *Tsagann Khad*’.

<sup>270</sup> Chapter C10: Land Use and Displacement, at 26, para. 10.3.9.

<sup>271</sup> Chapter C10: Land Use and Displacement, at 11, Table 10.2.

<sup>272</sup> Chapter C10: Land Use and Displacement, at 28, para. 10.3.11 (emphasis added). See further, the Resettlement Action Plan, at 18-19, Table 7.

<sup>273</sup> Chapter C10: Land Use and Displacement, at 28, para. 10.3.11.

‘Community compensation is intended to offset the permanent loss of pastureland, deemed to be a community resource, regardless of compensation to families or households and livelihood restoration initiatives. Community compensation will be exclusively in-kind, in the form of permanent pasture management and improvement measures such as well rehabilitation, animal dips, veterinary services, and so on.’<sup>274</sup>

All herders in the *soum* are eligible to participate in the Sustainable Pastureland Management Programme through which these measures are to be implemented.

100. The Resettlement Action Plan (RAP) provides more detail regarding OT’s approach to assisting vulnerable people and explains that the Client will continue to ‘case-manage registered vulnerable herder households that were resettled and displaced by OT’.<sup>275</sup> Such case management will involve:

- Annually checking and updating the *soum* register of vulnerable people;
- Undertaking family visits to confirm family circumstances;
- Identifying extended family members in the *soum* who can help the family;
- Organising meetings with such extended family members, vulnerable family members and *soum* Social Welfare Officer to explore greater use of existing assistance; and
- Identifying specific assistance that OT can direct towards specific vulnerable family members.<sup>276</sup>

Specific assistance measures will include:

- Inclusion of vulnerable households in regular consultation activities;
- Assistance in understanding any residual compensation entitlements and general assistance measures (with the help of extended family members);
- Assistance to obtain training and to access employment opportunities, directly or indirectly with OT, contractors or suppliers, and generally;
- Assistance to ensure that opportunities for government assistance are well understood; and
- Counselling and support in matters such as family, health, money management, and livelihood restoration.

The Client has developed a Vulnerable Households Assistance Plan,<sup>277</sup> which designates a specially allocated budget of MNT 15,000,000 for 2015 for assistance to vulnerable persons and has been approved by the Governor of Khanbogd *Soum*. This document sets out detailed plans and time-lines for:

- Compiling a database of vulnerable households;
- Involving vulnerable households in capacity-building programmes;
- Improving access to information;

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<sup>274</sup> Chapter C10: Land Use and Displacement, at 28, para. 10.3.11.

<sup>275</sup> Resettlement Action Plan, at 37, section 9. The RAP notes that the *soum* authorities, in cooperation with who OT provides such assistance, use the term “development needed households”, rather than “vulnerable”.

<sup>276</sup> Resettlement Action Plan, at 37-38, section 9.

<sup>277</sup> Contained in Resettlement Action Plan, Annex IX, at 86-88.

- Supporting projects to increase household income; and
- Providing donations and other support.

More generally, in identifying affected households the Resettlement Action Plan acknowledges that ‘OT impacts on households vary greatly, depending on *location, vocation and household resilience*’, thereby once again showing an implicit sensitivity to the potential vulnerability and particular needs of certain herder households.<sup>278</sup>

101. As regards efforts to ensure meaningful and effective engagement with vulnerable people, the Stakeholder Engagement Plan (SEP) again defines vulnerable people sufficiently expansively, in line with the International Finance Corporation’s 2007 Performance Standards on Social and Environmental Sustainability. The SEP expressly stipulates, in addition to the specific tailored arrangements (such as Pasture User Groups) designed to enhance communication with herder households, measures aimed at reaching vulnerable people within affected herder groups and in each of the four impacted *soums*. Generally, the Client is committed to taking steps to ‘[i]dentify support that may be required to ensure vulnerable people can access Project benefits’, including to

- Consult with vulnerable people and *soum* authorities to update identification of vulnerable people and their needs.
- Establish vulnerable people programme, involving *soum* governors and Labour & Social Welfare Office.<sup>279</sup>

Special engagement and disclosure methods aimed specifically at economically displaced vulnerable groups include ‘household visits, individual meetings, focus groups and workshops, local disclosure materials’.<sup>280</sup>

102. Generally, the Operational Management Plans which comprise the Environmental and Social Action Plan, appear tacitly to seek to take account of the inherent vulnerability of the herders’ way of life. For example, in relation to road safety impacts, the Transport Construction Management Plan recognises different levels of susceptibility by providing that ‘[t]he traffic awareness programme will be tailored to meet the needs of the different communities/settlements affected along the transport route’.<sup>281</sup> Similarly, regarding risks to the health of herders in particular, the Community Health, Safety and Security Management Plan explains that ‘OT will undertake a research study on herder health in 2013 and develop and implement a health monitoring system for herders in selected *soums*’.<sup>282</sup> Appearing to acknowledge the economic vulnerability of the local herder community, albeit at differing levels among herders households, the Pastureland and Livelihood Improvement Strategy notes that

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<sup>278</sup> Resettlement Action Plan, at 16, section 4.

<sup>279</sup> Stakeholder Engagement Plan, at 31, Table 5. It might also be regarded as indicative of the Client’s sensitivity to potentially vulnerable groups that the SEP includes express commitments, at 34-35, Table 5, to take steps to ensure that women among the affected communities are adequately represented.

<sup>280</sup> Stakeholder Engagement Plan, at 19, Table 3.

<sup>281</sup> Chapter D11: Transport Construction Management Plan, at 15, Table 11.1. It provides, at 11, Table 11.1, in relation to the division by roads of grazing land and migration routes, that

‘Oyu Tolgoi will continue to consult with local communities to understand how they may be affected and develop appropriate mitigation strategies to reduce effects from construction (including road use).’

<sup>282</sup> Community Health, Safety and Security Management Plan, at 19, Table 2.



'Variation between herder households is considerable in terms of migration patterns, herd size, family size and overall standard of living. The vast majority of herder households are engaged in herding activities at or below subsistence levels.'<sup>283</sup>

103. In addition, EBRD appears to have been actively engaged in its supervisory role in relation to the protection of vulnerable people during the appraisal process. For example, in the July 2011 consolidated ERM (IESC) and Lender Group comments on the draft ESIA, a number of queries and comments are raised regarding the identification and protection of vulnerable persons.<sup>284</sup> Indeed, one such comment stipulated unequivocally that the:

'ESIA needs to:

1. Demonstrate that consultation has been undertaken in a fashion that considers vulnerable people;
2. Propose and implement differentiated measures so that adverse impacts do not fall disproportionately on them and they are not disadvantaged in sharing development benefits and opportunities;
3. Identify whether any of these vulnerable individuals have been or will be economically or physically [impacted];
4. Provide resettlement assistance to vulnerable people, as necessary.'<sup>285</sup>

104. Such differentiated measures for vulnerable people would appear to indicate full compliance with the spirit and intent of the relevant requirements of EBRD's 2008 ESP, which stipulates in PR 1.14 that

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

In support of this finding, the recent independent socio-economic study conducted on behalf of the IFC-CAO was able to conclude that '[s]ince 2011 OT has addressed questions of differential impacts on vulnerable people and the steps taken to address vulnerability are appropriate.'<sup>286</sup>

### *Cumulative Impacts*

105. Though the issue of assessment of the cumulative impacts of the OT Project in combination with the Energy Resources (ER) Project and other mining projects in the South Gobi is not raised in the Complaint,<sup>287</sup> the Client insists that such cumulative

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<sup>283</sup> Pastureland and Livelihood Improvement Strategy, at 6, para. 2.1.5.

<sup>284</sup> Letter from ERM (IESC) to Hatch Corporate Finance, dated 12 July 2011, Attachment 1 – Substantive Comments, Comment Nos. 24 and 25.

<sup>285</sup> Letter from ERM (IESC) to Hatch Corporate Finance, dated 12 July 2011, Attachment 1 – Substantive Comments, Comment No. 24.

<sup>286</sup> *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding: Summary of the Experts' Reports* (JSL Consulting Ltd., Oxford, January 2017), at 12.

<sup>287</sup> Though the issue of cumulative assessment is raised subsequently by the Complainants, see Complainants' Comments on OT Draft Compliance Review Report (16 August 2016), at 30-31.

impacts are a central concern in its ongoing efforts to minimise and manage road-related impacts.<sup>288</sup>

### *Conclusion Regarding the In/adequacy of the ESIA*

106. Taking account of the findings set out above, it is not possible to conclude that the ESIA for the OT Project has been inadequate along the lines alleged in the Complaint to a material degree amounting to non-compliance on the part of EBRD with the relevant requirements arising under the 2008 Environmental and Social Policy. Therefore, the Compliance Review Expert finds the Bank compliant with PR 1.

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

107. Regarding the alleged failure of the Project, contrary to PR 5.7 and 5.39, to ensure adequate measures to compensate for physical and economic displacement due to project-related roads,<sup>289</sup> it is necessary first of all to examine the relevant provisions in the ESIA and ESAP. The ESIA baseline study paid careful attention to the socio-economic conditions in Khanbogd *soum* and in Omnogovi *aimag* more generally, including the situation regarding employment, livelihoods and economic vulnerability among the herder community;<sup>290</sup> and to land-use practices and livestock resources among the herder community.<sup>291</sup>

108. The impact assessment section of the ESIA goes into considerable detail in order to identify the full range of impacts resulting in economic displacement. In addition to the Client's efforts to avoid and minimise displacement,<sup>292</sup> including investigation of a range of routes for the Oyu Tolgoi - Gashuun Sukhait road and measures to eliminate off-road driving in order to minimise disturbance to pastureland and herders, the ESIA details mitigation and compensatory measures in respect of economic displacement due to loss of summer pastures (Impact Zone B),<sup>293</sup> division of permanent pastures (Impact Zones C and D),<sup>294</sup> disruption to herding practices (Impact Zones C, D and F),<sup>295</sup> water access restrictions or loss<sup>296</sup> and communal grazing land loss (Impact Zone E).<sup>297</sup> Therefore, it is clear that issues relating to pasture fragmentation and to reduced access to water resources were identified and addressed under the ESIA.<sup>298</sup> Typical mitigation / compensation measures proposed included employment opportunities with Oyu Tolgoi, education assistance, local business and economic development, vocational and other training, assistance to establish new and/or improved livelihoods, the Sustainable Pastureland Management Programme, and land rehabilitation.

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<sup>288</sup> Meeting with OT Community Relations Manager, Khanbogd *soum*, 5 August 2016.

<sup>289</sup> Supplemental Complaint, at 9.

<sup>290</sup> Chapter B9: Employment and Livelihoods, at 9, para. 9.4.4, at 12, paras. 9.5.3 and 9.5.4, at 20, para. 9.6.4 and at 26, para. 9.6.11.

<sup>291</sup> See, in particular, Chapter B10: Land Use, at 14-16, paras. 10.6.3, 10.6.4 and 10.6.5.

<sup>292</sup> Chapter C10: Land Use and Displacement, at 16-17, para. 10.3.5.

<sup>293</sup> Chapter C10: Land Use and Displacement, at 21-23, para. 10.3.7.

<sup>294</sup> Chapter C10: Land Use and Displacement, at 23-25, para. 10.3.8.

<sup>295</sup> Chapter C10: Land Use and Displacement, at 25-26, para. 10.3.9.

<sup>296</sup> Chapter C10: Land Use and Displacement, at 27, para. 10.3.10.

<sup>297</sup> Chapter C10: Land Use and Displacement, at 28-29, para 10.3.11.

<sup>298</sup> This is at odds with the Complainants' concerns that pasture fragmentation issues and access to water issues are not addressed in the present Compliance Review, see Complainants' Comments on OT Draft Compliance Review Report (16 August 2016), at 11-13 and 15-17.

109. The Resettlement Action Plan (RAP) provides very considerable detail regarding ongoing assistance to economically displaced households, reporting that by 2015 '[m]any have received all their entitlements, while others continue to receive specific components, or in the case of education support are waiting for children to reach secondary school age or enrol in tertiary institutions'.<sup>299</sup> The latest iteration of the RAP reports that 89 beneficiaries from economically displaced households have been provided employment by OT, that 50 have received education assistance for school children, that 98 have received pastureland management assistance payments, that 26 have received tertiary education scholarships, and that 20 have received short-term training.<sup>300</sup> In each case such assistance represents 100 percent of eligible households. In addition, 89 households have also received additional livelihood support comprising involvement in other livelihood improvement and community development activities initiated by OT. The 2014 Affected Household Survey conducted by OT indicated a very high degree of satisfaction among such households that they have received their compensation entitlements in full, though it also found that 'several herders expressed dissatisfaction with the compensation package in general terms'.<sup>301</sup> Quantitative performance indicators of affected household circumstances show considerable improvements across a range of metrics including, in particular, un/employment, children at school, total head of livestock, and aggregate annual income.<sup>302</sup>

110. The RAP also points out that '[a]s well as household specific entitlements, all households are eligible to access herder support programmes offered by OT to all herders in Khanbogd Soum as part of its secondary impact compensation and general benefits programme'.<sup>303</sup> Indeed, among such "secondary effects", the RAP expressly lists 'the cumulative effects of pasture degradation due to increased public vehicle traffic and dust'.<sup>304</sup> Providing evidence of OT's continuing active engagement with herder households economically displaced by such secondary impacts, the RAP outlines the Herder Livelihood Support Programme (HLSP), which has replaced the Sustainable Pastureland Management Programme (SPMP), reflecting a recognition that 'the programme is focused on herder livelihoods rather than strictly pastureland sustainability'. The HLSP comprises a range of activities, including:

- Pasture monitoring;
- Development of herder cooperatives;
- Herder water well rehabilitation;
- Study on herd animal health;
- Provision of supplementary Spring fodder;
- Development of a Grazing Protocol;
- Appointment of a full-time Pastureland Management Programme Officer;
- Development of a Herder Livelihood Improvement Programme;
- Provision of job-readiness training; and

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<sup>299</sup> Resettlement Action Plan (September 2015), at 23, Section 6.

<sup>300</sup> Resettlement Action Plan, at 23-24, Table 9.

<sup>301</sup> Resettlement Action Plan, at 25, Section 6.

<sup>302</sup> Resettlement Action Plan, at 26, Table 10. See further, RAP Appendices V and VI, at 69-81.

<sup>303</sup> Resettlement Action Plan, at 23, Section 6.

<sup>304</sup> Resettlement Action Plan, at 27, Section 7.

- Support to local business and economic diversification.<sup>305</sup>

In response to OT's 2015 household survey a majority expressed general satisfaction, though many respondents were not fully satisfied with the unsatisfactory performance of the Cooperative programme which, according to the RAP is only recently established.<sup>306</sup>

111. In relation to the question of compliance with PR 5, the establishment and functioning of the Compensation Working Group (CWG) is of particular significance. The CWG comprises representatives of the relevant *bagh* and *soum* authorities, of Oyu Tolgoi's community team and of affected herder households, the latter including both men and women and herders of different ages and socio-economic status. The CWG was established in March 2011 with a mandate to define economic displacement impacts and agree the impact zones for each project facility, to negotiate compensation and livelihood support measures, and to mediate disputes related to eligibility and entitlements or the implementation process.<sup>307</sup> It met on a total of five separate occasions between May and October 2011, when it played a key role in developing the 'entitlement matrix' for the economically displaced households. During the Economic Displacement Compensation process, the CWG held a total of 9 meetings at which all decisions regarding the compensation package, including those addressing complaints, were endorsed by the CWG. Though it does not any longer have set meeting dates, the CWG remains in existence and can reconvene as required in response to any grievances or concerns raised by herder households who have received compensation or in response to future voluntary resettlement or economic displacement associated with the Project's activities.
112. As regards EBRD monitoring of the arrangements put in place under the Project for the compensation of economically displaced herders, it is evident that Bank management took a keen interest in the work of the CWG. For example, in a communication made in response to a query from an EBRD Board Member during the disclosure period, EBRD noted that

'During the recent lenders' visit, a meeting with the Governor of Javkhant *bagh* confirmed that this group [CWG] was instrumental in facilitating the negotiation process and mediating any disputes related to eligibility and entitlements. At the working group's request, a lawyer was hired for legal advice, resulting in the widening of the impact corridor along the ore transport route to China from 5km to 6.5km on either side of the road. With the assistance of this lawyer, the CWG also succeeded in significantly increasing the MNT 10m (USD 7,000) compensation grant, which was based on a 3-year average of herder households' incomes to MNT 20m (and a 50% top-up for some families considered to be more heavily impacted due to their proximity to project assets).<sup>308</sup>

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<sup>305</sup> Resettlement Action Plan, at 27-31, Section 7.

<sup>306</sup> Resettlement Action Plan, at 31, Section 7.

<sup>307</sup> See Resettlement Action Plan (2013-09-12), at 80, Table19: Roles and Responsibilities for the OT Resettlement Action Plan.

<sup>308</sup> EBRD Response to a Director's Office (January 2013).

The same communication explains that '[i]t is our understanding that as of 18 October 2012, all but one compensation agreement had been signed'. Once again, this demonstrates Bank management's interest in the work of the CWG in facilitating adequate and satisfactory compensation packages in respect of economic displacement.

113. Similarly, it is quite clear that EBRD has been very actively engaged with OT regarding the continuing evolution and development of the RAP, and the protection to affected persons set out therein. This is evidenced, for example, in the Bank's response to a request from OT in May 2015 regarding a proposed RAP update involving removal of Category E Impacts (Summer Grazing in Khanbogd *Soum*) from the entitlement matrix on the grounds that all affected parties had agreed to use instead the Cooperation Agreement and the CAO Process.<sup>309</sup> The EBRD-ESD response stated:

'While we recognise that the approach and measures to mitigating these pressures on land resources for the benefit of all herders in the *soum* may be defined in and guided by other documents, tools and decision bodies, such as the Cooperation Agreement and Tripartite Council, and agree that these do not need to be fully articulated and repeated in the RAP, this does not in our view justify the removal of a category of impacted people from the entitlement matrix in the RAP altogether. For the lenders, it is important that the E category be re-affirmed in the revised RAP and thus remains a part of the commitments of OT to adequate impact mitigation notwithstanding the outcomes, successes or failures of those other mechanisms in place that are not entirely under the control of the Project.'<sup>310</sup>

Following the Bank's objection to this Notice of Change, OT developed a new and improved RAP which fully reinstated this category of affected herder household (Category E).

114. The recent socio-economic study conducted by independent experts on behalf of the IFC-CAO with a view to facilitating resolution of complaints made to CAO by Khanbogd *soum* herders in respect of the impacts of the OT Project has concluded that '[t]he studies, impact assessments and the resettlement action plan that provided the basis for 2011 compensation were largely suitable and adequate', that 'OT has adequately compensated for most of the negative impacts on pasture that can be attributed to OT', and that 'the compensation to herders included a mix of elements supportive of continued herding and compensation in the form of employment and education support for herders' children', which the experts consider 'a valid approach'.<sup>311</sup>

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<sup>309</sup> E-mail correspondence from OT to EBRD-ESD dated 26 May 2015 and dated 9 June 2015.

<sup>310</sup> E-mail correspondence from EBRD-ESD to OT dated 18 June 2015, emphasis added.

<sup>311</sup> *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding: Summary of the Experts' Reports* (JSL Consulting Ltd., Oxford, January 2017), at 11-12. While the study identified certain weaknesses in terms of the identification of some herders as impacted and the sustainability of elements of the compensation package, it merely recommends establishment of a Compensation Claims Committee (CCC) to address further claims arising due to such weaknesses. Also, while the independent experts take the view that the 2011 Compensation process, though much improved, was not compliant (with IFC requirements), they appear to do so solely 'because it lacked an explicit and trackable Livelihood Restoration Plan and included inappropriate confidentiality conditions'. On the facts of the present case, the Compliance Review Expert does not consider that either of these weaknesses amounts to non-compliance having regard to the requirements of PR 5 of EBRD's 2008 ESP.

115. On the basis of the facts as set out above, therefore, the Compliance Review Expert finds the Bank compliant with PR 5 of the 2008 Environmental and Social Policy.

#### PR 8: Cultural Heritage

116. As regards the Project's alleged '[i]nadequate measures to preserve the complainants' traditional nomadic pastoralist lifestyle',<sup>312</sup> it is important to note that a distinct chapter in the impact assessment section of the ESIA 'describes how the project has sought to eliminate, minimise, mitigate, offset or compensate for impacts on both tangible and intangible cultural heritage'.<sup>313</sup> In relation to potential impacts on intangible cultural heritage represented by 'the herders' nomadic pastoralism',<sup>314</sup> the impact assessment was conducted with a broad spatial scope, examining 'impacts on intangible heritage at the *soum* and the wider *aimag* level'.<sup>315</sup> A comprehensive account of key aspects of local intangible cultural heritage is provided in the ESIA baseline assessment, which identifies oral and traditional literature, Morin Khuur music, Khöömei singing, Urtiin Duu singing, national costumes, the Nadaam festival and spiritual practices.<sup>316</sup> A wide range of potential impacts to tangible heritage were considered, including:

- Disruption to historic rituals at the local worship sites (*ovoos* and *stupas*), as well as potential breach of norms, taboos and customs connected with these ceremonial rituals and locations;
- Changes to religious composition of the Project Area and related spiritual regimen;
- Cultural differentiation, i.e. spread of foreign / modern cultures, conventions and values that do not always take into consideration or may contravene the existing authentic indigenous frameworks, including those that have been maintained by the herder communities over centuries;
- Loss of traditional crafts, customs, folklore, songs, etc.;
- Emergence of language 'impurities', i.e. increasing introduction and assimilation of foreign words in the Mongolian language;
- The weakened sense of community identity and belonging due to the gradual dilution of underlying community benchmarks and paradigms; and the loss of traditional livelihoods associated with the transition to wage-based employment.<sup>317</sup>

Community concerns regarding these potential impacts were identified on the basis of detailed studies commissioned by Oyu Tolgoi,<sup>318</sup> which informed the development of Phase I of the Project's Cultural Heritage Programme (CHP).

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<sup>312</sup> Supplemental Complaint, at 12.

<sup>313</sup> Chapter C11: Cultural Heritage, at 2, para. 11.1.

<sup>314</sup> Supplemental Complaint, at 12.

<sup>315</sup> Chapter C11: Cultural Heritage, at 2, para. 11.2.1.

<sup>316</sup> Chapter B12: Cultural Heritage, at 9, para. 12.5.3.

<sup>317</sup> Chapter C11: Cultural Heritage, at 9, para. 11.3.6.

<sup>318</sup> In particular, Centre for Policy Research / Population Training and Research Centre, *Oyu Tolgoi Project Social, Economic and Environmental Subset* (2009); Centre for Policy Research / Population Training and Research Centre, *Oyu Tolgoi Project Socio-Economic Impact Assessment* (September 2009). See further, Chapter C11: Cultural Heritage, at 9-10, para. 11.3.6.

117. In order to mitigate adverse impacts on cultural heritage, the Client has developed the CHP in conjunction with the Mongolian International Heritage Team (MIHT), which includes compilation of lists of traditional sacred places in Omnogovi *aimag* and traditional cultural sites<sup>319</sup> in the Oyu Tolgoi Project Area, as well as the recording of myths, taboos and rituals associated with these places.<sup>320</sup> The ESIA explains that '[c]onsultations and stakeholder meetings have been the integral elements of the Cultural Heritage Programme', leading to the establishment of a Cultural Heritage Advisory Board to support the CHP, comprising '15 members of the local community, interested parties, archaeological organisations and representatives of Oyu Tolgoi'.<sup>321</sup> Phase I of the CHP has also involved studies in a variety of traditional practices identified as culturally significant in the baseline study conducted for the ESIA.<sup>322</sup> These include the practices of silver-smithing, black-smithing, felt carpet-making, crafting of nomadic accessories (saddle blankets, bridles and traps), animal branding, building a *ger*, as well as studies of religious practices, the custom of lineage names and kinship relations, and the practice of traditional *urtiin duu* ballads and games. In addition, Oyu Tolgoi supports the *nadaam* festival, the upgrading and repair of local museums, and the restoration of Demchig Monastery. Oyu Tolgoi is also committed to facilitating the observance of cultural traditions at work for the benefit of nomadic herders engaged in waged employment. Generally, the ESIA explains that

'Restoration and research activities undertaken within the CHP promote better conditions for preservation and protection of intangible cultural heritage resources and lead to the improved knowledge and understanding of various local customs and crafts in the Project Area and in Omnogovi *aimag*.'

118. A certain degree of sensitivity to cultural heritage issues and impacts is also implicit elsewhere in the Project's environmental and social appraisal. For example, the ESIA chapter on impact assessment in respect of land use and displacement refers, in respect of herder households who have abandoned winter shelters near Tsagann Khad, to the requirement to provide such households 'with livelihood improvement measures tailored to their needs'.<sup>323</sup> Similarly, in relation to loss of communal grazing land, the ESIA is primarily concerned with identifying mitigation measures which can effectively safeguard the herders' way of life. For example, it explains that

'The Sustainable Pastureland Management Programme has been designed to preserve or improve the normal state of pastures, develop the livestock husbandry sector in a stable manner, reduce pasture deterioration and implement measures to help herders to use and protect the pastures within the Khanbogd *soum*.'<sup>324</sup>

119. The Cultural Heritage Management Plan details the ongoing measures being taken by the Client for the protection of cultural heritage and immediately acknowledges that

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<sup>319</sup> Compiled on the basis of an ethnographic study conducted by the Institute of History, and including areas of landscape and natural features, such as mountains and springs, that have spiritual or sacred value, as well as cairns, *ovoos*, and cemeteries.

<sup>320</sup> Chapter C11: Cultural Heritage, at 11, para. 11.3.6.

<sup>321</sup> Chapter C11: Cultural Heritage, at 11, para. 11.3.6.

<sup>322</sup> Chapter B12: Cultural Heritage, at 28-29, para. 12.7.12.

<sup>323</sup> Chapter C10: Land Use and Displacement, at 26, para. 10.3.9.

<sup>324</sup> Chapter C10: Land Use and Displacement, at 28-29, para. 10.3.11.

'There are very important cultural heritage values associated with traditional Mongolian life and nomadic herding including song, music, crafts, language, spiritual beliefs, oral history and traditional Mongolian script across the South Gobi'.<sup>325</sup>

It reports that implementation of the CHP is now 'based upon the establishment of a new Gobi Cultural Heritage Studies Centre (GCHSC), as part of the Mongolian Academy of Sciences (MAS)', which 'will collaborate with the *aimag* and *soums*, OT and other stakeholders to develop and implement the framework and programmes that will ensure long term cultural heritage protection'.<sup>326</sup> Measures prescribed in the Cultural Heritage Management Plan which are of relevance to intangible cultural heritage include:

- Implementation of the CHP in partnership with the MIHT, national and local government, local organisations, and other stakeholders, in particular the public programmes;
- Provision of cultural awareness training to OT employees and contractors;
- Identification and protection of traditional sacred places and associated cultural traditions / norms of behaviour as part of OT CHP;
- Stakeholder Engagement Plan to include procedure to consult with herders, local community and stakeholders, etc.
- Support for Nadaam Festival (to continue annually) and support for other *soum* cultural events in the Direct Impact Zone and Indirect Impact Zone;
- Financial support for the heritage museum extension in Khanbogd;
- Establishment of the Gobi Cultural Heritage Studies Centre by the Mongolian Academy of Sciences;
- Capacity development training for employees of the *soum* cultural centre and museum;
- Implementation of annual public educational programmes on cultural heritage.

The Cultural Heritage Management Plan also sets out mechanisms for its review and revision, and well as clear milestones for implementation and detailed arrangements for monitoring and auditing.

120. In terms of the protection of intangible cultural heritage, the ESIA and ESAP for the Project would certainly appear to meet the requirements of PR 8, which aims to set

'a framework for clients to protect cultural heritage through the avoidance, and where avoidance is not feasible, the reduction and mitigation of any potential adverse impacts by EBRD-funded activities, in an appropriate and proportionate manner.'<sup>327</sup>

In addition, the recent independent fact-finding study conducted on behalf of the IFC-CAO has generally concluded that '[s]ince 2011 OT appears to have identified tangible and intangible cultural heritage impacts, and the need to manage these in a sensitive

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<sup>325</sup> Cultural Heritage Management Plan, at 5-6, para. 2.1.

<sup>326</sup> Cultural Heritage Management Plan, at 13, para. 4.6.

<sup>327</sup> ESP PR 8.5.



and collaborative way, appropriately'.<sup>328</sup> Therefore, the Compliance Review Expert finds the Bank compliant with PR 8.

#### PR 10: Information Disclosure and Stakeholder Engagement

121. The Project Stakeholder Engagement Plan (SEP) expressly acknowledges the information disclosure and stakeholder engagement requirements set out under ESP PR 10 and provides assurance that 'OT has adopted good international industry practice and recognised international standards as embodied in ... EBRD applicable requirements outlined above'.<sup>329</sup> Further, the SEP identifies a set of guiding objectives for stakeholder engagement during implementation of the Project which correspond quite closely with those inherent to PR 10, including to:

- o Outline the applicable standards with regards to effective stakeholder engagement;
- o Identify stakeholders and their interests and/or issues of concern;
- o Define the consultation methods and requirements for stakeholder engagement;
- o Present a specific Action Plan for stakeholder engagement going forwards;
- o Provide a Complaints, Disputes and Grievance Procedure for local communities; and
- o Define monitoring and reporting procedures.<sup>330</sup>

122. Quite apart from the specific stakeholder consultation activities identified above regarding determination of compliance with PR 1,<sup>331</sup> it is clear that the Client has adopted an inclusive approach to stakeholder engagement in relation to economic displacement. For example, though the SEP identifies the Project's "indirect area of influence" as including Manlai, Bayan-Ovoo and Dalanzadgad, it also acknowledges that '[i]t is likely that the Project's Indirect Area of Influence could extend beyond these local and regional boundaries ... For this reason, other *soums* such as Tsogttsetsii have been included in some consultation activities as appropriate.'<sup>332</sup>

123. While this compliance review process has determined that the Project arrangements were adequate in terms of stakeholder identification, the identification of potential adverse impacts from Project-related road use, and information disclosure and stakeholder consultation in respect of such impacts,<sup>333</sup> it remains to be determined whether the Client established 'a grievance mechanism, process or procedure to receive and facilitate resolution of stakeholders' concerns and grievances about the client's environmental and social performance'.<sup>334</sup> Though the Complainants do not

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<sup>328</sup> *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding: Summary of the Experts' Reports* (JSL Consulting Ltd., Oxford, January 2017), at 12.

<sup>329</sup> Stakeholder Engagement Plan (September 2013), at 11, para. 4.4.

<sup>330</sup> Stakeholder Engagement Plan, at 5, para. 2.1. See the requirements of PR 10 identified as relevant to the present Compliance Review, *supra*, para. 39.

<sup>331</sup> *Supra*, paras. 63 to 74.

<sup>332</sup> Stakeholder Engagement Plan, at 12, para. 5.1.

<sup>333</sup> *Supra*, paras. 63 to 74.

<sup>334</sup> *Per* PRs 10.24 and 10.25. See, *supra*, paras. 38 and 39.

explicitly allege non-compliance in respect of the Project grievance mechanism, they do claim, as regards the alleged '[f]ailure to consult and inform affected persons', that

'Herders have reported that they were very rarely given advance notice of important aspects of the Oyu Tolgoi project and its potential impacts, and that while Oyu Tolgoi staff would write down their concerns during interactions, there was never further feedback.'<sup>335</sup>

124. The SEP explains that '[a] comprehensive Community Complaints, Disputes and Grievances Procedure for the Project has been in place since March 2011',<sup>336</sup> which classifies such complaints, disputes or grievances into a range of categories, including:

- Culturally significant, religious or heritage sites;
- Resettlement / economic displacement;
- Human Rights;
- Staff / contractor / supplier behaviour;
- Environmental;<sup>337</sup>
- Community health and safety; etc.

Specialist materials have been prepared to publicise and explain the Community Complaints Procedure, which involves a reasonably straight-forward process, including clear timelines and a one-page Complaints and Feedback Form.<sup>338</sup> If the complainant is not satisfied with the outcomes of the complaint resolution process, the operation of the process will be reinvestigated and reviewed and, if it remains unresolved, it will be escalated and referred to a range of follow-up steps, including negotiations, high-level official dispute resolution, third-party mediation, arbitration or court proceedings.<sup>339</sup> Responsibility for implementation of the Procedure falls upon the relevant Social Performance Officer at OT, with the Governance and Compliance Manager of OT's Social Performance Department having overall responsibility.<sup>340</sup> Social Performance Officials are to receive appropriate training on the Procedure, the prompt resolution of complaints is to be monitored regularly and systematically, and '[g]eneral updates on community complaints and feedback shall be prepared monthly and communicated to the local residents through a local newspaper'.<sup>341</sup> The Community Complaints, Disputes and Grievances Procedure is designed to be as accessible as possible to affected

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<sup>335</sup> Supplemental Complaint, at 10.

<sup>336</sup> Stakeholder Engagement Plan, at 25, para. 5.8.

<sup>337</sup> The Community Complaints and Feedback Management Procedure (Version 3, June 2014), at 10, Section 3, elaborates on 'Environmental' complaints to explain that these involve 'dust, noise, chemical spill, flora and fauna destruction / extinction and impact on water source'. Similarly, a new category of 'Security' complaints might involve 'physical, mental or material damage to entity or citizen, accidents, livestock fatality, crash, inappropriate treatment'.  
<sup>338</sup> The original Procedure set out a six-step process: 1. Receive Complaint; 2. Preliminary Assessment; 3. Respond to Complaint; 4. Investigate and Resolve; 5. Close-out; and 6. Follow-up. (See Stakeholder Engagement Plan, at 26-27, para. 5.8.). However, after a review of the Procedure initiated in 2013, it was simplified to a five-step process: 1. Receive Complaint; 2. Preliminary Assessment; 3. Investigate and Resolve; 4. Respond to Complainant(s) and Close-out; and 5. Follow-up. (See Community Complaints and Feedback Management Procedure, at 6-9, Section 2 and at 18, Appendix 2).

<sup>339</sup> Community Complaints and Feedback Management Procedure, at 9. This commitment would appear to be at odds with the finding of the recent independent fact-finding study conducted on behalf of IFC-CAO that 'the grievance mechanism, revised in 2015, lacks recourse to an independent mechanism'. See *Multi-Disciplinary Team and Independent Expert Panel Joint Fact Finding: Summary of the Experts' Reports* (JSL Consulting Ltd., Oxford, January 2017), at 12.

<sup>340</sup> Community Complaints and Feedback Management Procedure, at 5, para. 1.3.

<sup>341</sup> Community Complaints and Feedback Management Procedure, at 12-13, paras. 5.2, 6.1 and 6.2.

herders, with several pathways for making complaints, including by means of a written request or by means of an elected member of the herder community.<sup>342</sup> A detailed Grievance Log was maintained which kept a record of each complaint and of the measures taken by the Client to investigate, resolve or otherwise follow-up on each complaint. Thus, the Client maintains a statistical record of Project grievances and their resolution. The Grievance Log was routinely reviewed by EBRD and was used to inform the agenda for EBRD audit visits.<sup>343</sup>

125. EBRD appears to have made all reasonable efforts to oversee the implementation and operation of the Community Complaints, Disputes and Grievances Procedure. For example, during site visits EBRD-ESD staff routinely reviewed the OT Complaints/ Grievance Log and followed-up on selected complaints to ensure that issues raised by locals were dealt with effectively.<sup>344</sup> It is apparent from the Back-to-Office Reports provided to the Compliance Review Expert that, when ESD staff encountered affected herders during site visits, they were generally able to ascertain satisfactorily that these herders had a good relationship with OT personnel and that they knew how to contact them should an issue arise.
126. Therefore, the Compliance Review Expert finds the Bank compliant with PR 10 of the 2008 Environmental and Social Policy.

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<sup>342</sup> Meeting with OT Community Relations Manager, Khanbogd soum, 5 August 2015.

<sup>343</sup> Conference call with EBRD ESD, 4 December 2015.

<sup>344</sup> ESD staff have provided the Compliance Review Expert with full details of complainants with whom they followed-up on complaints during the course of this site visit, including one herder who had claimed compensation for a sheep drowned in a flooded footings excavation and one herder household who had complained about the impacts of dust from roads on their winter shelter (names withheld to protect the privacy of the complainants). In the former case full and satisfactory compensation was paid, while in the latter case ESD staff 'could not envision a scenario that this shelter could be impacted by dust generated from either road, even in the most severe and windy conditions'.

## **Conclusion**

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