

24 February 2015

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

**Re: Request to Direct the PCM to reconsider the Eligibility Assessment Report for
Complaints regarding DIF LYDIAN (AMULSAR GOLD MINE)**

Dear President Chakrabarti and EBRD Directors:

Although we have not been directly involved in the complaints filed with the Project Complaint Mechanism (PCM) regarding EBRD's investment in Lydian International, we feel compelled to express our concern regarding the eligibility decision in the case, which we believe is inconsistent with the PCM's Rules of Procedures (RoP) and demonstrates a worrying disconnect with complainants. More specifically, the PCM relied on an improper argument on the merits to find that the complaints were not eligible for a compliance review. To avoid a miscarriage of justice and a bad precedent for future cases, we would urge the EBRD President and Board to direct that the PCM re-open the complaint and reconsider its decision.

I. Eligibility Assessment Criteria

We understand that the PCM is currently trying to redefine the purpose and format of the Eligibility Assessment to prevent duplicating either the Registration or Compliance Review phase of the process. We were assured that in redefining the approach, the PCM would not "cut corners" in order to speed up the process. Unfortunately, it appears that the PCM's new approach to the Eligibility Assessment phase risks setting a dangerous trend, as demonstrated in the Lydian International complaints.

The PCM's new RoP came into force on November 7, 2014, and should be applied to all complaints registered on or after that date. As the second complaint regarding EBRD's investment in Lydian International was registered on November 7, 2014, one, if not both, of the complaints should be handled using the RoP currently in force.

Paragraph 24 of the RoP state that the Eligibility Assessment is "a preliminary process," in which the "Eligibility Assessors do not judge the merits of the allegations in the Complaint and do not make a judgment regarding the truthfulness or correctness of the Complaint."

Instead, the Eligibility Assessment should determine whether the criteria in Paragraphs 25-28 have been met. For a Problem-Solving Initiative (PSI) that requires that the complainants are located in the impacted area and have raised issues covered by an EBRD Policy.¹ The Eligibility Assessors will then determine whether a PSI would assist in resolving the dispute.² To be eligible for a Compliance Review (CR), the complaint must be filed within 24 months after the date on which the Bank ceased to participate in the Project and must relate to a Relevant EBRD Policy.³ Further, the Eligibility Assessors must determine that the complaint relates to actions or inactions that are the responsibility of the Bank, more than a minor technical violation of a Relevant EBRD Policy, or a failure of the Bank to monitor Client commitments pursuant to a Relevant EBRD Policy.⁴

¹ RoP, para. 24(a).

² RoP, para. 26.

³ RoP, para. 24(b).

⁴ RoP, para. 27.

The complaints here relate to the environmental and social impacts of Lydian International's proposed gold mining activities at Amulsar in Armenia. As described in the Eligibility Assessment Report (EAR), both complaints raise concerns about the adequacy of the environmental and social assessment of the project, which would relate to, *inter alia*, the Bank's failure to ensure the implementation of Performance Requirement 1.

It appears to be undisputed that EBRD is still invested in Lydian. If the EBRD were not invested in Lydian, then the complaints would not have been registered. Paragraph 12 of the RoP states that in order for a complaint to be registered, it must "relate to a Project where the Bank has provided and not—and not withdrawn—a clear indication that it is interested in financing the Project," in the case of PSI, or "relate to a Project that has either been approved for financing by the Board or by the body which has been delegated authority to give approval to the financing of such a Project," in the case of CR. The PCM already decided that the complaints relate to an EBRD project when it registered them.

II. Defining the Scope of the Project to Avoid a Full Assessment

So the dispute is not whether EBRD is invested in Lydian but rather how to define the scope of that project. The EAR determines that Project EBRD is financing is only the exploration phase of Lydian's mine. Because the complainants are concerned with the environmental and social impacts of the eventual mine and not the impacts of the exploration phase, the PCM finds that the complaint does not relate to the Project and, therefore, is ineligible. This argument is flawed for the reasons set forth below.

Defining a project's boundaries, scope, and impacts are some of the most commonly contested issues in complaints to the mechanisms associated with development finance institutions (DFIs).⁵ In the environmental assessment laws of some jurisdictions, this issue is known as segmentation, the division of a project into its component parts in order to limit the extent of the assessment.⁶ That same concern can be found regarding projects financed by DFIs, which, at times, improperly define the scope of projects in order to avoid responsibility for the full range of environmental and social impacts. *The critical question in the complaints here is not whether complaint relates to an EBRD-financed project, but whether the EBRD has properly defined the scope of that project.* That the complainants did not explicitly argue this in their complaint should not prevent the PCM from recognizing it. Complainants should not be required to make sophisticated legal arguments or obtain legal counsel in order to file a complaint to a non-judicial grievance mechanism (NJGM).

III. Determining the Proper Scope of the Project Requires an Investigation on the Merits of the Allegations

⁵ A. Jerve, Chairperson, World Bank Inspection Panel, "Defining the boundaries of a project: Where does Bank accountability stop? Lessons from Panel cases and beyond," Presentation at World Bank Spring Meetings (Apr. 18, 2013), available at:

webapps.worldbank.org/apps/ip/Documents/IPN_SpringMeetingsAreaofInfluence_session_Apr2013.pdf.

⁶ M. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, from *The Treatise on New York Environmental Law*, Section 5.07, Copyright 1992 and *The Treatise on New York Environmental Law*, 1995 Supplement, published by the New York State Bar Association, One Elk Street, Albany, New York 12207, available at www.sprlaw.com/pdf/spr_nepa_eli_05.pdf ("Another important aspect of the scope of the federal action to be assessed is the issue of 'segmentation' -- the division of a project, program or decision into component parts or temporal 'phases.' Segmentation was frequently employed in the context of federal highway funding, where the [federal highway administration] would release funds for a small segment of a federal highway and consider only that segment, rather than the entire highway, in determining the need for an EIS. Such divisions of an action have, for the most part, been disallowed by the federal courts, both in highway and other contexts as well... Where an action, or part of an action, is hypothetical, or where future stages of a project are indefinite, [the environmental assessment law] does not apply. Sierra Club I, however, makes it very clear that the federal courts will view with skepticism attempts to characterize planned and definite future stages of an action as 'indefinite' in an effort to avoid a determination of significance and the consequential obligation to prepare an EIS.").

There are very good arguments in favor of complainants' interpretation. In a similar case, the International Finance Corporation's Compliance Advisor Ombudsman⁷ found that the categorization of an investment in a proposed mine, and, consequently, the scope of the environmental and social assessment, should be determined based on the magnitude of the impacts of the proposed mine and the likelihood that the mine would move into development, combined with the potential impacts of the pre-development stage.⁸ The need to assess the potential impacts of the eventual mine is particularly important when the Bank takes an equity investment in a project. Money is fungible. When a company receives funds for one activity, it can devote or re-direct its own funding to another activity. Thus a subscription agreement limiting the use of EBRD's investment to one set of activities is not dispositive of whether the additional investment has allowed the company to undertake activities that it would otherwise not have been able to conduct, with corresponding impacts.

But regardless of whether you agree or disagree with that argument, it is undeniably an argument on the merits. And the PCM's RoP prevent the Eligibility Assessors from making decisions on the merits of the allegations in the complaint. A full compliance review would be needed in order to come to a decision about whether EBRD properly defined the scope of the project in this case. Thus, it was inappropriate to make that decision as part of an Eligibility Assessment, and thereby find the complaints ineligible. As the EAR does not include any other information that would demonstrate that the complaint has not met the CR requirements in Paragraphs 25-28, the complaints, at a minimum, should have been found eligible for a compliance review.

IV. Burden on the EBRD and the PCM to Understand Complainants

In addition to the improper decision on eligibility, the Amulsar EAR also displays a worrying disconnect from complainants. Complainants to non-judicial grievance mechanisms, like the PCM, by design will generally be local community members, not lawyers. The burden is on DFIs and their mechanisms to understand their concerns. In that vein, the EAR repeatedly mentions disapprovingly that the complainants have failed to clearly state which function they are seeking from the PCM. However, Paragraph 18 of the RoP state that after registration, the PCM will verify with the complainants whether they are seeking PSI, CR, or both. If it is unclear to the PCM which function the complainants are seeking, that is the PCM's failure, not the complainants'. Similarly, for those who are intimately familiar with DFIs and their policies, it would seem implausible that the project affected zone would include the host country's entire territory as claimed by complainants, but taking issue with that argument misses the larger point that the complainants are concerned with the appropriate definition of the project's boundaries. Again the burden is on the PCM to understand the complainants' concerns, not take them to task for the deficiencies in their legal analysis.

The number of complaints submitted by local communities to the PCM without legal assistance from international NGOs is small. This fact suggests that, in spite of the various attempts to enable access to justice and redress for project-impacted communities, the PCM is still not accessible to these communities. The EAR in the Lydian case is not the first time that the PCM has rejected a complaint from a community at the EA phase. The PCM determined that a complaint from the Vreoci village regarding the Kolubara lignite mine in Serbia was ineligible, basing its analysis on a flawed interpretation of the scope of the project. Following that decision, several more complaints on the EPS/Kolubara projects were filed, which have lingered without conclusion for years. One flawed assessment is now followed by another and raises our concerns about the extent to which the PCM is providing redress for local communities impacted by the EBRD's investments.

⁷ The CAO has also received complaints regarding the IFC's investment in Lydian International. More information is available at: www.cao-ombudsman.org/cases/case_detail.aspx?id=221 and www.cao-ombudsman.org/cases/case_detail.aspx?id=222.

⁸ CAO, Investigation of IFC Investment in Minera Quellaveco SA, Peru (Aug. 29, 2014), available at: www.cao-ombudsman.org/cases/document-links/documents/CAOInvestigation-IFCInvestmentinQuellaveco_08-29-14.pdf.

In conclusion, we urge the EBRD President and Board of Directors to reject the Amulsar Eligibility Assessment and to direct that the PCM re-open the complaint and reconsider its decision. Furthermore, we call on you to monitor the implementation of the new RoPs—particularly observance of deadlines for all open and future cases—in order to ensure both accountability of the institution and adequate redress for stakeholders adversely impacted by the Bank's projects.

We await your replies and remain available for your questions.

Sincere regards,



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Cc: Anoush Begoyan- Schliesing, PCM Officer