

**EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT**

**PROJECT COMPLAINT MECHANISM**

**ELIGIBILITY ASSESSMENT REPORT**

**COMPLAINT: TBILISI RAILWAY BYPASS 1**

**REQUEST NUMBER: 2011/01**

## **Executive Summary**

The Eligibility Assessors have had little difficulty in determining that the present Complaint clearly satisfies the eligibility criteria for a Compliance Review as set out under the Project Complaint Mechanism (PCM) Rules of Procedure (RPs). At the general level, it is clear that the Complaint concerns a Project that has been approved for financing by the Bank and actions or inactions that are the responsibility of the Bank, that it describes the harm likely to be caused, the PCM function requested and the outcomes sought, and that the Complainant enjoys standing to complain either in his capacity as an individual or as a representative of Association Green Alternative, Georgia. In addition, at the more specific level, it is quite clear that each of the individual instances of non-compliance alleged in the Complaint, with the notable exception of the claim relating to the questionable economic viability of the Project, satisfies the relevant and applicable specific eligibility criteria listed under the PCM RPs. For example, each discrete allegation of non-compliance provides details of the Relevant EBRD Policy at issue.

The Eligibility Assessors further recommend that the Compliance Review envisaged under this Eligibility Assessment should be extended also to address the closely connected elements of Compliance Review requested under two related Complaints concerning the Tbilisi Railway Bypass Project. As these Compliance Review aspects correspond closely with, though they do not overlap precisely with, the aspects of Compliance Review requested under the present Complaint, it makes sense in terms of procedural efficiency and consistency of outcomes for the PCM to address all of these Compliance Review issues by means of a single Compliance Review process.

This Eligibility Assessment includes detailed Terms of Reference for the envisaged Compliance Review, setting out the key compliance questions to be addressed, the key Relevant EBRD Policies at issue, and the essential steps to be taken in the conduct of the Compliance Review, as well as its scope and time-frame.

## **Project Complaint Mechanism**

### **Eligibility Assessment Report**

#### **Complaint: Tbilisi Railway Bypass 1 Inadequate appraisal of environmental and social risks**

## **Introduction**

### Factual Background

1. On 28 February, 2011 a Complaint was submitted in respect of the Tbilisi Railway Bypass Project (Georgia) to the Project Complaint Mechanism (PCM) of EBRD by Mr. David Chipashvili, International Financial Institutions Monitoring Programs Coordinator with Association Green Alternative, Georgia. On 14 March, 2011 the Complaint was registered by the PCM Officer according to PCM RP 10, notification of registration was sent to the Complainant and the Relevant Parties pursuant to PCM RP 12, and the Complaint was posted on the PCM website and noted on the web-based PCM Register according to PCM RP 13. On 21 March, 2011 PCM Expert Dr. Owen McIntyre was appointed as an Eligibility Assessor to conduct an Eligibility Assessment of the Complaint jointly with the PCM Officer, in accordance with PCM RP 17.
2. The Project in question consists of a senior loan of up to €100 million (equivalent in Swiss francs) to Georgian Railway LLC for the construction of a new section of railway line intended to bypass the central area of the city of Tbilisi. The Project's aim is to improve the efficiency and safety of rail operations within the city of Tbilisi enabling relocation and consolidation of the existing rail facilities located in the centre of the urban area and to permit the redevelopment of the lands made available by this relocation of the rail facilities and their reintegration as part of the city.<sup>1</sup> The Complaint alleges inadequate appraisal of environmental and social risks and resulting inclusion of inadequate mitigation measures in the Environmental and Social Impact Assessment (ESIA) and Environmental and Social Action Plan (ESAP) prepared for the Project, as well as in the Project's Environmental Permit, and a number of further procedural inadequacies.

### Steps Taken in the Eligibility Assessment

3. The Eligibility Assessors have undertaken a general examination of the Complaint to determine whether it satisfies the generally applicable eligibility criteria. For example, they have investigated whether the Complaint relates to 'actions or inactions that are the responsibility of the Bank', as required under paragraph 23a of Project Complaint Mechanism Rules of Procedure (PCM RP 23a). In addition, the Eligibility Assessors have examined each individual element of the Complaint

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<sup>1</sup> See Overview of the Tbilisi Railway Bypass Project on the EBRD website at:  
<http://www.ebrd.com/pages/project/psd/2009/40173.shtml>

in detail in order to ascertain that the Complaint satisfies the key relevant and applicable eligibility requirements of PCM RP 19, 20, 23 and 24. They have also taken account of the responses received from EBRD<sup>2</sup> and from the Client to this particular Complaint<sup>3</sup> and, to a lesser extent, the responses received from the Client to two related Complaints,<sup>4</sup> as well as the report of the compliance audit of the Resettlement Action Plan completed in May 2011.<sup>5</sup> The Eligibility Assessors have also checked the online availability of the online documents cited in Annex 1 of the Complaint as ‘correspondence, notes, or other materials related to communications with the Bank or other Relevant Parties’ for the purposes of PCM RP 20c.

#### Positions of the Relevant Parties

4. The Complainant contends that the appraisal of the environmental and social risks inherent to the Project was inadequate in a number of respects, which has resulted in the inclusion of several inadequate mitigation measures in the Environmental and Social Impact Assessment (ESIA) and Environmental and Social Action Plan (ESAP) prepared for the Project, as well as in the Project’s Environmental Permit issued by the Georgian authorities. The Complainant also alleges a number of further procedural inadequacies, including a failure adequately to consider feasible alternatives to the present Project and deficiencies regarding the conduct of meaningful consultation and public participation.<sup>6</sup>
5. EBRD concedes, common to large infrastructure projects, that it may not have been possible when the ESIA was developed and published in 2009 to develop all mitigation measures and associated management plans to a sufficient level of detail, but takes the position that ‘for an infrastructure project of this magnitude, it is a normal process that technical design proceeds in successive refinements from concept to detailed design.’<sup>7</sup> It points out that the ESIA has succeeded in identifying several key impacts that had not sufficiently been taken into account in the initial concept design, and that both the EBRD and the Georgian regulatory authorities have imposed clear requirements upon Georgian Railway to develop ‘more comprehensive and detailed mitigation measures to address, amongst others, noise, water protection, community safety and emergency response’, which the Client is now in the process of developing.<sup>8</sup> In addition, the EBRD points out that ‘[a] number of detailed environmental action plans, such as waste management or quarrying, depend on the actual construction work plan that can

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<sup>2</sup> Bank Response to EBRD Project Complaint Mechanism, issued to PCM Officer 6 May 2011.

<sup>3</sup> Georgian Railway Response to Complaint of Association Green Alternative, received 4 April 2011.

<sup>4</sup> Georgian Railway Response to Complaint of Mr. Asatiani, received 4 April 2011; Georgian Railway Response to Complaint of Avchala Population, received 4 April 2011.

<sup>5</sup> Intersocial Consulting, *Resettlement Action Plan Compliance Audit Report – Tbilisi Railway Bypass* (18 May, 2011).

<sup>6</sup> See generally, Request No. 2011/01, Tbilisi Railway Bypass 1, hereinafter Association Green Alternative Complaint, 28 February 2011 (annexed to this Eligibility Assessment Report as Annex I).

<sup>7</sup> Bank Response to EBRD Project Complaint Mechanism, issued to PCM Officer 6 May 2011, at 1.

<sup>8</sup> *Ibid.*, at 2.

only be finalised by the construction contractor once the contractor has been selected.’<sup>9</sup> In either case, the obligation to develop and comply with mitigation measures and environmental action plans will be monitored by the EBRD.

6. The Bank further points out that ‘[t]he resettlement and compensation process carried out by Georgian Railway has recently (March 2011) been subjected to an independent audit<sup>10</sup> commissioned by the EBRD as part of routine monitoring requirements’.<sup>11</sup> It also contends that, where non-resettled residents along the railway route

‘demonstrate that they are directly affected by the construction or operations of the Project, then Georgian Railway has to reach an agreement with them on either mitigation or compensation in compliance with Georgian law and the EBRD Environmental and Social Policy requirements’.<sup>12</sup>

Further, the implementation of such requirements by Georgian Railway will be monitored by the EBRD ‘through the review of monitoring reports submitted by Georgian Railway to the EBRD and periodic monitoring visits by the EBRD staff and representatives or independent monitoring consultants’.<sup>13</sup>

7. The Client, Georgian Railway, contends that the consultants engaged in the development of the ESIA, and in the identification of the social impacts and mitigation measures contained therein, acted fully in line with the relevant and applicable Georgian law, the Performance Requirements of the EBRD’s 2008 ESP and related guidance, relevant international conventions ratified by Georgia, EU law on EIA, and various relevant International Finance Corporation (IFC) guidelines. Georgian Railway concedes, however, that

‘Tbilisi Railway Bypass project ESIA has been developed according to the concept project since the main project was not developed. Thus to assess the existing Social and Environmental problems and to develop suitable mitigating measures were not possible for the given stage’.<sup>14</sup>

Nevertheless, it stresses that the ongoing project elaboration is done according to the requirements of the FIDIC Red Book<sup>15</sup> and that the project design is in full compliance with the Project ESAP and the Report on Ecological Expertise issued by the Ministry of Environment and Natural Resources of Georgia.<sup>16</sup>

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<sup>9</sup> *Ibid.*

<sup>10</sup> Intersocial Consulting, *Resettlement Action Plan Compliance Audit Report – Tbilisi Railway Bypass* (18 May, 2011).

<sup>11</sup> Bank Response to EBRD Project Complaint Mechanism, issued to PCM Officer 6 May 2011, at 2.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Georgian Railway Response to Complaint of Association Green Alternative, received 4 April 2011, at 1.

<sup>15</sup> Fédération Internationale Des Ingénieurs-Conseils, *Conditions of Contract for Construction*, (FIDIC, 1999), which might be regarded as representing international best practice in respect of some aspects of the Project relevant to the present Complaint.

<sup>16</sup> Georgian Railway Response to Complaint of Association Green Alternative, received 4 April 2011, at 1-2.

8. Regarding the safety concerns expressed in the Complaint, Georgian Railway concedes that because ‘the ESIA has been elaborated on the basis of the Initial Design of the Project ... it was not feasible to determine each and every aspect of the Project in full’, but points out that  
‘its contractor in environmental issues GAMMA LLC ensures elaboration of respective manuals for the GR as well as the Construction Contractor, providing all technical standards that should be obeyed by all parties involved in the elaboration of the detail design and assists the GR in fulfillment of the conditions precedents defined by the Ecological Expertise of the Ministry of Environment and Natural Resources.’<sup>17</sup>
9. Regarding cumulative impacts the Client argues that negative impacts on population health will be minimal as there will be little increase in railway traffic intensity and effective mitigation measures in place relating to noise levels and oil vapours.<sup>18</sup> It contends that the issue of compensation for depreciation of property values fall under Section 3 of the Civil Code of Georgia and within the exclusive jurisdiction of the Georgian courts, but that it intends to investigate this issue with the technical assistance of the LEPL Levan Samkharauli Forensics Bureau.<sup>19</sup>
10. Regarding the Resettlement Action Plan, Georgian Railway claims that its contractor, Geographic LLC, is authorized to make compensation offers containing all key information on the process of resettlement and, further, has been instructed to provide all property owners with a full and detailed explanation of the legal procedures applicable in the case of a failure to achieve agreement.<sup>20</sup> In addition, special post boxes for receiving claims and complaints have been established in local authority offices and the Georgian Railway head office, as well as a resettlement ‘hot line’. Georgian Railway also contends that, in order to achieve amicably agreed outcomes, its current arrangements go significantly further than strictly required under Article 21 of the Constitution of Georgia and under Georgian law on expropriation.
11. Georgian Railway outlines a number of technical and engineering solutions to address the possible impacts on the drinking water supply and central water pipeline of Tbilisi,<sup>21</sup> and explains that a Waste Management Plan for the railway construction phase has now been prepared and submitted to the Georgian Ministry of Environment and Natural Resources.<sup>22</sup> In addition, it predicts that the proposed new railway facilities ‘will significantly reduce [road traffic] transit intensity in the city’ and points out that air quality distribution modeling and quantitative assessment will be carried out according to national law and international standards for emissions and that the Georgian Ministry of

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<sup>17</sup> *Ibid.*, at 2.

<sup>18</sup> *Ibid.*, at 2-3.

<sup>19</sup> *Ibid.*, at 3.

<sup>20</sup> *Ibid.*, at 3-4.

<sup>21</sup> *Ibid.*, at 4-5.

<sup>22</sup> *Ibid.*, at 5

Environment and Natural Resources has agreed emission limits to apply to construction camps required for the Project.<sup>23</sup> The Client concedes that the volume of aggregate materials required can only be determined once the main Project has been developed, but provides assurances that such materials will only be sourced from quarries licensed by the Georgian Ministry of Economical and Sustainable Development.<sup>24</sup>

12. In relation to the consideration of alternatives, the Client provides details of the three routes examined as well as the key criteria for route selection and argues that the option of bypassing the Avchala settlements by means of a tunnel was unacceptable from the technical point of view, rather than solely for reasons of cost.<sup>25</sup> Regarding protected areas, Georgian Railway concedes that the railway buffer zone is located within the area of the Tbilisi National Park but claims to have submitted proposals to the Georgian Ministry of Environment and Natural Resources for compensating for the damage to be caused to the National Park. Further, the Client notes that the

‘Ministry of Environmental protection and Natural Resources of Georgia is considering the exclusion of the given area from the National Park. The amendments to be made to the relevant laws have been developed in order to determine a new area for the National park which will replace the excluded one.’<sup>26</sup>

13. Generally, regarding the violations of national legislation alleged in the Complaint, the Client points out that it has already satisfied the conditions precedent defined under the State Ecological Expertise issued by the Ministry of Environment and Natural Resources on 22 April 2010, and that details of the measures taken to fulfill these conditions have now been submitted to the Ministry for review and approval.<sup>27</sup>

## **Determination of Eligibility**

### **PCM Function Requested**

14. Pursuant to paragraphs 17 and 20a of the Project Complaint Mechanism Rules of Procedure (PCM RP 17 and RP 20a), the Eligibility Assessors must, in making their determination on the eligibility of a Complaint, take into account the PCM function requested by the Complainant, who has clearly and unambiguously asked the PCM

‘to undertake a compliance review of the project and to verify, whether the project ESIA correctly assesses environmental and social risks and whether the proposed mitigation measures prevent effectively possible environmental

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<sup>23</sup> *Ibid.*, at 6.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, at 6-7.

<sup>26</sup> *Ibid.*, at 6.

<sup>27</sup> *Ibid.*, at 7-8.

and social damage along the proposed railway route. Additionally, we ask the Project Complaint Mechanism to examine several procedural issues outlined in the complaint.<sup>28</sup>

15. Also, it is worth noting that the present Complainant is simultaneously engaged in two other Complaints seeking Problem-solving Initiatives taken against the same Project in conjunction with a number of individuals located in and having an economic interest in the Impacted Area, in accordance with PCM RP 1.<sup>29</sup> Accordingly, it is implicitly suggested that the present Complaint can only be concerned with a Compliance Review and its eligibility must, therefore, be determined against the requirements of PCM RP 19, 20, 23 and 24. As suggested in the above extract,<sup>30</sup> the Complaint itself categorises the essential issues of non-compliance alleged in the Complaint under three headings:
- a. Assessment and mitigation of social impacts;
  - b. Assessment and mitigation of environmental impacts; and
  - c. Procedural issues of concern.

#### Standing to Complain

16. The issue of Mr. Chipashvili's standing to make the present Complaint, whether in his capacity as an individual or as a representative of Association Green Alternative, Georgia, doesn't arise as the Complaint clearly requests a Compliance Review and paragraph 2 of the Project Complaint Mechanism Rules of Procedure (PCM RP 2) provides that
- ‘One or more individual(s) or Organisation(s) may submit a Complaint seeking a Compliance Review.’
- Thus, Mr. Chipashvili clearly enjoys standing to make a Complaint whether acting in either capacity.

#### General Eligibility Criteria

17. In determining the eligibility of the present Complaint, it is necessary to assess whether the Complaint satisfies a number of the relevant and applicable eligibility requirements of PCM RP 19, 20, 23 and 24 by means of an examination of each of the alleged instances of non-compliance as they are listed in the Complaint

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<sup>28</sup> See Association Green Alternative Complaint, at 2. Indeed, the subject heading on the letter of complaint identifies it as a ‘Complaint on Tbilisi Railway Bypass Project (Georgia) seeking project compliance review’, see Association Green Alternative Complaint, at 1.

<sup>29</sup> Request No. 2011/02, Tbilisi Railway Bypass 2 and Request No. 2011/03, Tbilisi Railway Bypass 3. See PCM Register at <http://www.ebrd.com/pages/project/pcm/register.shtml> In addition, a fourth Complaint involving the same Project, Request No. 2011/4, Tbilisi Railway Bypass 4, has been received from an unrelated individual and registered on the PCM Register, *ibid*. Both the Tbilisi Railway Bypass 2 and Tbilisi Railway Bypass 3 Complaints also contain subsidiary requests for Compliance Review in respect of discrete aspects of the Project and it is proposed in the present Eligibility Assessment Report to have these closely connected Compliance Review elements addressed by the same Compliance Review process recommended herein.

<sup>30</sup> Para. 14, *supra*.

under the headings set out in paragraph 15 above. However, there are also several generally applicable eligibility criteria listed in the PCM RPs against which the eligibility of the Complaint for a Compliance Review can be determined in broad terms. For example, the project was approved by the Board of the EBRD on 9 March, 2010<sup>31</sup> and the loan agreement was signed on 17 March, 2010.<sup>32</sup> Therefore, there can be no doubt that the present Complaint satisfies PCM RP 19a., requiring that it must

‘relate to a Project that has either been approved for financing by the Board or by the Bank committee which has been delegated authority to give final approval to the Bank financing of such Project’.

18. Similarly, as regards to the requirement under PCM RP 19b, that the Complaint must ‘describe the harm caused, or likely to be caused, by the Project’, the Complaint expresses general concern that the alleged shortcomings in terms of the assessment and mitigation of the Project’s impacts will

‘undermine the overall project goals and may cause irreversible negative environmental and social impacts including negative impacts on the local population, the Tbilisi reservoir, the quality of railway services, etc.’.<sup>33</sup>

Each of these particular points of concern is further developed in respect of each of the alleged instances of non-compliance, as listed under the three headings set out above.<sup>34</sup>

19. PCM RP 20a advises that the Complaint should, if possible, include ‘an indication of which PCM function the Complainant expects the PCM to use to address the issues raised in the Complaint’. As outlined in paragraph 15 above, the Complaint clearly and unambiguously requests the PCM to undertake a Compliance Review of the Project.

20. PCM RP 20b suggests that, for the purposes of eligibility, a Complaint ‘should also include, if possible ... an indication of the outcome(s) sought as a result of use of the PCM process’, and the present Complaint expresses the Complainant’s desired outcomes at both a general and a more specific level:

‘We hope that this complaint will help to address the issues of our concern on this particular project in a satisfactory way. Overall, we also hope that our effort will contribute to improvements in the quality of project assessment at the Bank. In particular we are concerned that many of the mitigation measures have not been examined in detail until a very late stage, and that several extra action plans should now be produced.’<sup>35</sup>

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<sup>31</sup> See Overview of the Tbilisi Railway Bypass Project on the EBRD website at: <http://www.ebrd.com/pages/project/psd/2009/40173.shtml>

<sup>32</sup> The date for the signature of the loan agreement between EBRD and Georgian Railway LLC is provided in Association Green Alternative Complaint, at 1.

<sup>33</sup> See Association Green Alternative Complaint, at 1-2.

<sup>34</sup> See para. 15, *supra*.

<sup>35</sup> Association Green Alternative Complaint, at 2.

Further, the Complaint concludes by explaining that

‘we expect that our concerns will result in improvements in the routing and the Environmental and Social Action Plan and translate into improvements of the project implementation’.<sup>36</sup>

21. PCM RP 20c further provides that an eligible Complaint should, if possible, include ‘copies of all correspondence, notes, or other materials related to communications with the Bank or other Relevant Parties’ and the Complaint includes an Annex 1 providing a comprehensive list of all such communications. For convenient access, Annex 1 divides these documents, numbering 21 in total, into those in English and those in Georgian, while also providing, where possible, a weblink to each document, thereby facilitating on-line access. Where on-line access to such communications is not available, Annex 1 provides sufficient detail, (including dates, subject-matter, identification of relevant officials, *etc.*), to ensure that they can be obtained and verified. As noted in paragraph 3 above, the Eligibility Assessors have checked and confirmed the availability of the online documents cited in Annex 1 of the Complaint.

22. Specifically in relation to a Complaint which raises issues appropriate for a Compliance Review, PCM RP 23 requires the Eligibility Assessors to consider, *inter alia*, whether the Complaint relates to ‘actions or inactions that are the responsibility of the Bank’.<sup>37</sup> The present Complaint principally concerns what the Complainant considers to be

‘inadequate appraisal of environmental and social risks and inadequate mitigation measures in the final version of the project’s Environmental and Social Impact Assessment (ESIA) and Environmental and Social Action Plan, as well as the project’s Environmental Permit’.<sup>38</sup>

While the requirements set out in the Environmental Permit issued by the Georgian authorities would clearly be beyond scope of the Bank’s responsibility, the EBRD Environmental and Social Policy (ESP) makes it quite clear that the project appraisal process, of which the Environmental and Social Impact Assessment (ESIA) and the Environmental and Social Action Plan (ESAP) are integral elements,<sup>39</sup> is squarely within the Bank’s area of responsibility.<sup>40</sup> In

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<sup>36</sup> *Ibid.*, at 10.

<sup>37</sup> PCM RP 23a.

<sup>38</sup> See Association Green Alternative Complaint, at 1.

<sup>39</sup> See EBRD, *Environmental and Social Policy* (May 2008), para. 15, at 8, which provides that:

‘EBRD’s environmental and social appraisal includes consideration of three key elements:  
(i) the environmental and social impacts and issues associated with the proposed project;  
(ii) the capacity and commitment of the client to address these impacts and issues in accordance with this Policy; and  
(iii) the role of third parties in achieving compliance with this Policy.’

<sup>40</sup> See, for example, EBRD, *Environmental and Social Policy* (May 2008), para. 14, at 5, which states that ‘All EBRD-financed projects undergo environmental and social appraisal both *to help the EBRD decide if an activity should be financed and, if so, the way in which environmental and social issues should be addressed* ... It is the responsibility of the client to ensure that the required due diligence studies, information disclosure and stakeholder engagement are carried out in

elaborating on the EBRD's commitment 'to ensure through its environmental and social appraisal and monitoring processes that the projects it finances ... are socially and environmentally sustainable', the ESP states unequivocally that the Bank's role is, *inter alia*:

- (i) to review the clients' assessment;
- (ii) to assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimize, mitigate or offset, or compensate for adverse social and environmental impacts consistent with the PRs;<sup>41</sup>

Further, Performance Requirement 1 on Environmental and Social Appraisal and Management (PR 1) of the EBRD ESP states that

'The information gained [through appraisal activities such as environmental and social impact assessment] *will inform the EBRD's own due diligence related to the client and project*'.<sup>42</sup>

23. PR 1 further provides that the EBRD and the client are to agree on 'the area of influence for each project'<sup>43</sup> and on 'the nature of due diligence studies required',<sup>44</sup> while the client will inform the EBRD of how the costs associated with the actions to be taken under the ESAP will be met.<sup>45</sup> The Bank 'may agree with the client during appraisal a management of change process' for Category A projects<sup>46</sup> and any corrective and preventive actions identified as necessary by virtue of the required 'procedures to monitor and measure compliance with the environmental and social provisions of the legal agreements including effective implementation of the ESAP and the PRs ... will be submitted to the Bank for approval'.<sup>47</sup> Further, '[a]s part of their regular reporting to the Bank, clients will provide the EBRD with updates on their progress in implementing their ESAP'.<sup>48</sup> All of the above provisions make it quite clear that the Bank is required to play a central supervisory role and, thus, that the inadequacies alleged in the present Complaint in terms of the appraisal and mitigation of environmental and social risks associated with the Project involve 'actions or inactions that are the responsibility of the Bank',<sup>49</sup> according to the EBRD Environmental and Social Policy.

24. In addition, the Complaint alleges certain deficiencies in terms of meaningful consultation and public participation in violation of Performance Requirement 10 on Information Disclosure and Stakeholder Engagement (PR 10). Significantly,

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accordance with PRs 1 through 10, *and submitted to the EBRD for review as part of its own appraisal.*' (Emphasis added).

<sup>41</sup> EBRD, *Environmental and Social Policy* (May 2008), para. 3, at 3.

<sup>42</sup> EBRD, *Environmental and Social Policy* (May 2008), PR 1: Environmental and Social Appraisal and Management, para. 5, at 15. (Emphasis added).

<sup>43</sup> PR 1, para. 6, at 16-17.

<sup>44</sup> PR 1, para. 8, at 17.

<sup>45</sup> PR 1, para. 15, at 19.

<sup>46</sup> PR 1, para. 15, at 19.

<sup>47</sup> PR 1, paras. 20-21, at 20-21.

<sup>48</sup> PR 1, para. 24, at 21.

<sup>49</sup> PCM RP 23a.

in light of the above conclusions about the Bank's responsibility for environmental and social appraisal, PR 10 links stakeholder engagement intrinsically to appraisal by explaining that

'The process of stakeholder engagement is an essential component of the appraisal, management and monitoring of environmental and social issues associated with the client's investments. Therefore, this performance requirement should be read in conjunction with PR 1.'<sup>50</sup>

PR 10 then goes on to outline the nature of the Bank's involvement in the process of information disclosure and stakeholder engagement, as well as the role of that process in the Bank's own due diligence. For example, PR 10 explains that

*'The Bank will agree with the client how 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).'

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Similarly, in relation to the development of the stakeholder engagement plan, PR 10 requires that

'The client will inform the EBRD how communication with the identified stakeholders will be handled throughout project preparation and implementation' [and, further, that] 'Clients should also inform the EBRD of any information provided or consultation activities conducted prior to approaching the EBRD for financing.'<sup>52</sup>

In relation to what form the required 'meaningful consultation' should take, PR 10 typically provides that

'The need for and nature of any specific consultation will be agreed with the EBRD ...'.<sup>53</sup>

25. As regards the significance of the client's information disclosure and stakeholder engagement activities for the EBRD's own commitments under the ESP, it is telling that PR 10 should expressly note that

*'As 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.'*<sup>54</sup>

Therefore, there can be no doubt that, under the terms of the EBRD's ESP, the Bank plays an important supervisory role in respect of the Client's information disclosure and stakeholder engagement activities, thereby bringing such activities within the scope of the Bank's responsibility for the purposes of PCM RP 23a. Indeed, the EBRD ESP elsewhere describes PR 10 as setting out

*'the Bank's requirements for clients to identify stakeholders potentially affected by their projects, disclose sufficient information about issues and*

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<sup>50</sup> EBRD, *Environmental and Social Policy* (May 2008), PR 10: Information Disclosure and Stakeholder Engagement, para. 4, at 68.

<sup>51</sup> PR 10, para. 5, at 68. (Emphasis added).

<sup>52</sup> PR 10, para. 11, at 70.

<sup>53</sup> PR 10, para. 15, at 71.

<sup>54</sup> PR 10, para. 7, at 68. (Emphasis added).

impacts arising from the projects and consult with stakeholders in a meaningful and culturally appropriate manner’<sup>55</sup>

and proceeds to explain that

‘The documentation submitted to the EBRD’s Board of Directors for approval of an operation will include a description of the client’s stakeholder engagement programme, comments and opinions about the client’s practices or the potential impact of the project expressed by stakeholders, and the way these issues are being or will be addressed by clients in accordance with PR 10.’<sup>56</sup>

The above paragraphs clearly illustrate that the Client’s compliance with the requirements for information disclosure and stakeholder engagement set down under the Bank’s ESP is a matter of central concern for Bank management.

26. Though, as noted above, the adequacy of national rules applicable to the Project, or of legal requirements arising thereunder, such as the conditions set out under the Environmental Permit issued by the Georgian authorities, are clearly beyond the scope of the Bank’s responsibility, it is equally clear that any alleged violation of national laws does come within the scope of the Bank’s responsibility for the purposes of PCM RP 23a. For example, in setting out the EBRD’s environmental and social commitment in general terms, the ESP states that

‘The EBRD will seek to ensure through its environmental and social appraisal and monitoring processes that the projects it finances ... are designed and operated *in compliance with applicable regulatory requirements* and good international practice.’<sup>57</sup>

More specifically, Performance Requirement 1 on Environmental and Social Appraisal and Management stipulates that

‘The appraisal should also identify applicable laws and regulations of the jurisdictions in which the project operates that pertain to environmental and social matters’.<sup>58</sup>

The Complaint alleges that one of the obligatory conditions contained in the conclusion of the State Ecological Expertise process, namely the submission to the Ministry of Environment and Natural Resources of regular progress reports on the provisions of Chapter III of that conclusion by Georgian Railway LLC, has not been complied with in violation of the applicable Georgian legislation. Therefore, this element of alleged non-compliance also satisfies PCM RP 23a, in that it ‘relates to ... actions or inactions that are the responsibility of the Bank’.

27. In turn, PCM RP 23b requires that, in determining eligibility, the Eligibility Assessors also consider whether

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<sup>55</sup> EBRD, *Environmental and Social Policy* (May 2008), para. 25, at 6. (Emphasis added).

<sup>56</sup> EBRD, *Environmental and Social Policy* (May 2008), para. 26, at 6.

<sup>57</sup> EBRD, *Environmental and Social Policy* (May 2008), para. 3, at 2.

<sup>58</sup> EBRD, *Environmental and Social Policy* (May 2008), PR 1: Environmental and Social Appraisal and Management, para. 5, at 15

‘the Complaint relates to ... more than a minor technical violation of a Relevant EBRD Policy unless such technical violation is alleged to have caused harm’.

In other words, it remains open to the Eligibility Assessors to decline to find a Complaint eligible where the non-compliance alleged, though relating to a Relevant EBRD Policy, involves a very minimal (*de minimus*) infraction, made in good faith (*bona fides*), which has not resulted and is unlikely to result in any appreciable harm. The present Complaint could not fall within this *de minimus* exception as it alleges serious breach of a wide range of provisions of the EBRD’s 2008 ESP<sup>59</sup> and raises the possibility of serious environmental and social injury resulting from the Project as currently proposed.<sup>60</sup>

28. PCM RP 23c is not relevant to the present Complaint as it is nowhere alleged that the Bank has failed to monitor Client commitments pursuant to a Relevant EBRD Policy. It is, anyway, highly unlikely that such an allegation would be appropriate at such an early stage in the implementation of the Project.

29. Finally, PCM RP 24 sets out a list of factors, any of which if found to apply, would render a Complaint ineligible. However, there is nothing to suggest that the present Complaint ‘was filed fraudulently or for a frivolous or malicious purpose’,<sup>61</sup> nor that ‘its primary purpose is to seek competitive advantage through the disclosure of information or through delaying the Project’.<sup>62</sup> Nowhere does the Complaint raise allegations of fraud, relate to procurement matters,<sup>63</sup> relate to ‘Article 1 of the Agreement Establishing the Bank, the Portfolio Ratio Policy or any other specified policy’,<sup>64</sup> or relate to ‘the adequacy or suitability of EBRD policies’.<sup>65</sup> Though there is nothing to suggest that the issues of non-compliance alleged in the present Complaint have been dealt with by the accountability mechanism of any parallel co-financing institution, such a review by another accountability mechanism would not anyway disqualify a Complaint seeking a Compliance Review from being processed by the PCM.<sup>66</sup> Also, the fact that the present Complainant is simultaneously engaged in two other Complaints seeking Problem-solving Initiatives relating to the same Project<sup>67</sup> does not in any way affect the eligibility of the present Complaint seeking a Compliance Review.

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<sup>59</sup> Including ESP, para. 3; PR 1, para. 6; PR 1, para. 9; PR 3, paras. 11 and 12; PR 4, paras. 7 and 16; PR 5, para. 20; PR 6, paras. 14 and 15; and PR 10, paras. 10 and 15.

<sup>60</sup> See, for example, the Complainant’s concerns regarding potential impacts on the drinking water supply of Tbilisi, Association Green Alternative Complaint, 28 February 2011, at 4-6.

<sup>61</sup> PCM RP 24a. Indeed, the correspondence listed under Annex 1 to the Complaint shows that the Complainant had expressed related misgivings about the Project to the EBRD as early as 30 October 2009, thus demonstrating the Complainant’s *bona fide* concern.

<sup>62</sup> PCM RP 24b.

<sup>63</sup> PCM RP 24c.

<sup>64</sup> PCM RP 24d.

<sup>65</sup> PCM RP 24e.

<sup>66</sup> See PCM RP 24f.

<sup>67</sup> *Supra*, n. 29.

### Specific Eligibility Criteria

30. As noted in paragraph 17 above, it is also necessary to examine each of the individual instances of alleged non-compliance listed in the Complaint under the headings identified in paragraph 15 above, for the purposes of ascertaining that each satisfies those more specific eligibility criteria set down in the PCM Rules of Procedure which apply to discrete allegations of non-compliance. Such criteria include PCM RP 19b, which dictates that ‘the Complaint *must* ... describe the harm caused, or likely to be caused, by the Project’, and PCM RPs 20b and 20d, which respectively provide that ‘the Complaint *should also include, if possible* ...an indication of the outcome(s) sought as a result of use of the PCM process’ and ‘*if applicable*, details of the Relevant EBRD Policy at issue in the Complaint’.<sup>68</sup> Clearly, the former requirement is mandatory while the latter two are somewhat less imperative.

### *Assessment and Mitigation of Social Impacts*

31. The first specific issue raised in the Complaint under this heading is that of the inadequacy of the safety measures proposed in the ESIA in order to safeguard the population living along the railway route in the case of accidents. The Complaint expresses the view that the measures required under the ESIA ‘are very vague and cannot be considered adequate’ and also notes that, while the permit issued by the Ministry for Environment and Natural Resources includes a requirement for Georgian Railway to provide a plan of additional measures in this regard, no plan has been submitted despite the fact that the preparation works for construction have commenced.<sup>69</sup> The Complaint suggests that

‘Not only does this omission fully undermine the main reason for the project (the safety of Tbilisi’s population) but it also fails to comply with PR 1 (point 9) on the Environmental and Social Appraisal of the EBRD’s Environmental and Social Policy.’

It further contends that

‘the underestimation of safety issues together with the underestimated effects of the project on drinking water and the impact of quarrying on the health of the communities ... violate PR 4 (point 7) on Community Health, Safety and Security.’

Therefore, this aspect of the Complaint clearly satisfies the requirements of PCM RP 19b, on the harm likely to be caused, and PCM RP 20d, on the Relevant EBRD Policies at issue.

32. The second issue raised under this heading is that of the ESIA’s inadequacy in identifying and assessing the cumulative impacts of the proposed and existing railway routes on the living conditions of the Avchala population and, consequently, in terms of property depreciation, which the Complaint alleges to be a violation of PR 1, para. 9. The cumulative impacts foreseen include the

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<sup>68</sup> Emphasis added.

<sup>69</sup> See Association Green Alternative Complaint, 28 February 2011, at 2-3.

‘[s]mell of the transported oil and oil products [which] will make it impossible for local population to live along the new route’.<sup>70</sup> Therefore, this aspect of the Complaint clearly satisfies the requirements of PCM RP 19b, on the harm likely to be caused, and PCM RP 20d, on the Relevant EBRD Policy at issue.

33. The third issue raised under this heading concerns the alleged unavailability of the Resettlement Action Plan, or of any summary thereof, despite the fact that the compensation process has commenced in respect of some persons affected by the Project. The Complaint alleges that ‘the local people of Avchala, Patara Lilo and Didi Lilo districts do not have any official information regarding displacement and compensation issues’ and, accordingly, that this constitutes ‘a violation of PR 5 (20) on Land Acquisition, Involuntary Resettlement and Economic Displacement of the EBRD Environmental and Social Policy’.<sup>71</sup> Therefore, once again, this aspect of the Complaint clearly satisfies the requirements of PCM RP 19b, on the harm likely to be caused, the PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policy at issue.

#### *Assessment and Mitigation of Environmental Impacts*

34. The first two related issues raised under this heading concern the risk of adverse impacts for the drinking water supply of Tbilisi and on the central water pipeline for Tbilisi.<sup>72</sup> The Complaint alleges that the ESIA fails to include adequate safeguard measures necessary to avoid contamination of the Tbilisi Reservoir and that it does not describe the implications of the new railway route for the central water pipeline over which it is to be located, on both counts violating PR 1, para. 9 on Environmental and Social Appraisal. In addition, the Complaint advises that ‘additional studies need to be carried out to find a safer alternative’. Therefore, these aspects of the Complaint clearly satisfy the requirements of PCM RP 19b, on the harm likely to be caused, PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policy at issue.
35. The next issue raised under this heading concerns the allegedly inadequate manner in which waste management is addressed in both the ESIA and the ESAP (and the Environmental Permit issued by the Ministry of Environment and Natural Resources), which require development of waste management plans for the construction, operation and demolition stages of the Project.<sup>73</sup> The Complainant contends that ‘no such plan has yet been prepared, while the preparation works have already begun’, which constitutes a violation of PR 3, para. 12. It claims that this shortcoming is all the more serious as Georgian Railway plans to study and ultimately remediate historical pollution (by virtue of past railway operations) of the lands to be made available for redevelopment by the relocation of railway facilities. Therefore, this aspect of the Complaint clearly

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<sup>70</sup> *Ibid.*, at 3.

<sup>71</sup> *Ibid.*, at 3-4.

<sup>72</sup> *Ibid.*, at 4-6.

<sup>73</sup> *Ibid.*, at 6.

satisfies the requirements of PCM RP 19b, on the harm likely to be caused, PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policy at issue.

36. The Complaint also contends that the ESIA fails to address the road transport and pollution implications of splitting the Tbilisi railway system in two parts and moving key rail freight facilities far from the city centre, in violation of PR 1, para. 6(v) of the EBRD's 2008 ESP.<sup>74</sup> Related to this issue is the allegation that the ESIA does not include details on the location of construction corridors and power supply units, which is in direct contravention of PR 1, para. 6(i) and, further, makes it difficult for people to understand their rights under PR 5 on Land Acquisition, Involuntary Resettlement and Economic Displacement. Also related is the contention that the ESIA does not include air quality modeling for the entire route of the proposed railway line and so fails to assess the effects of air pollution on a number of populated areas, in contravention of PR 3, para. 11 on Pollution Prevention and Abatement. Therefore, these aspects of the Complaint also satisfy the requirements of PCM RP 19b, on the harm likely to be caused, PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policies at issue.
37. Next, the Complaint alleges that the ESIA does not include any calculation of the quantity of aggregate materials required by the Project nor any description of the 'serious risks to the environment and local communities' of quarrying these materials, in breach of PR 1, para. 6 on Environmental and Social Appraisal and PR 4, paras. 7 and 16 on Community Health, Safety and Security.<sup>75</sup> Therefore, this aspect of the Complaint clearly satisfies the requirements of PCM RP 19b, on the harm likely to be caused, and PCM RP 20d, on the Relevant EBRD Policies at issue.
38. Finally under this heading, the Complaint claims that the fact that the proposed railway route encroaches upon the area designated under the Tbilisi National Park, and the fact that there would appear to be no legal basis for permitting this encroachment under national legislation,<sup>76</sup> constitutes non-compliance with PR 6, paras. 14 and 15 of the ESP on Biodiversity Conservation and Sustainable Management of Living Natural Resources.<sup>77</sup> In addition, the Complainant contends that the Project's interference with the Tbilisi National Park conflicts with the 'precautionary approach' as set out under PR 6, paras. 1 and 6. The Complaint alleges that the 'specific Mitigation Action Plan for the National Park to be agreed upon between the Ministry of Environment and Georgian Railway ... has not been made, even though the preparatory works for the project have started'. Therefore, this aspect of the Complaint clearly satisfies the requirements

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<sup>74</sup> *Ibid.*, at 6-7.

<sup>75</sup> *Ibid.*, at 7.

<sup>76</sup> Decree No. 10/61, 13 September 2000.

<sup>77</sup> See Association Green Alternative Complaint, 28 February 2011, at 7-8.

of PCM RP 19b, on the harm likely to be caused, PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policies at issue.

### *Procedural Issues of Concern*

39. The first issue raised by the Complainant under this heading concerns the alleged failure of the ESIA to include an examination of all technically and financially feasible alternatives to the proposed rail route.<sup>78</sup> The Complaint proceeds to outline an alternative route suggested by people from Avchala during the public hearing ‘with a shorter tunnel that would bypass Avchala’, and which might do more to ‘fulfill the main aim of the project – to transfer the transit of hazardous freight out of populated areas’. The Complainant believes that this and other potentially feasible alternatives had not been given ‘adequate treatment’, in breach of PR 1, para. 9. Therefore, this aspect of the Complaint would appear to satisfy the eligibility requirements of PCM RP 19b, on the harm likely to be caused, PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policies at issue.
40. The second issue raised by the Complaint under this heading concerns the alleged failure by the Client to conduct meaningful consultation and public participation, due mainly to the alleged exclusion of the local population from the scoping process for the Project, in contravention of PR 10, paras. 10 and 15 on Information Disclosure and Stakeholder Engagement. The Complainant also alleges deficiencies in the conduct of the public hearings on the draft ESIA Report, in contravention of the requirement for ‘meaningful consultation’ under PR 10, para. 15. Therefore, once again, this aspect of the Complaint would appear to satisfy the requirements of PCM RP 19b, on the harm likely to be caused, PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policies at issue.
41. The Final issue raised by the Complaint under this heading concerns the alleged violation of national law, by virtue of the apparent failure of Georgian Railway to provide progress reports to the Ministry of Environment and Natural Resources as required under Chapter III of the Conclusion of the State Ecological Expertise process.<sup>79</sup> As outlined above,<sup>80</sup> while the adequacy of national rules or legal requirements are beyond the scope of the Bank’s responsibility, any alleged violation of national legal requirements falls squarely within the Bank’s area of responsibility,<sup>81</sup> and thus within the scope of a Compliance Review.<sup>82</sup> This aspect of Complaint would, therefore, similarly appear to satisfy, at least by implication, the requirements of PCM RP 19b, on the harm likely to be caused,

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<sup>78</sup> *Ibid.*, at 8-9.

<sup>79</sup> *Ibid.*, at 9-10.

<sup>80</sup> *Supra*, para. 26.

<sup>81</sup> See EBRD, *Environmental and Social Policy* (May 2008), para. 3, at 2 and PR 1, para. 5, at 15.

<sup>82</sup> PCM RP 23a.

PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policies at issue.

42. It should be noted that an additional aspect of the Complaint listed under this heading, concerning the economic viability of the Project, does not come within the scope of the Bank's responsibility and, consequently, fails to satisfy the requirement under PCM RP 23a that the Complaint should relate to 'actions or inactions that are the responsibility of the Bank'. Indeed, this fact is acknowledged by the Complainant who professes himself 'aware that this is not the subject of the EBRD's Environmental and Social Policy' and explains that it has been added merely 'to give additional background information about our concerns with the project and the EBRD's involvement in it'.<sup>83</sup> In addition, this element of the Complaint completely fails to satisfy the more specific requirements of PCM RP 19b, on the harm likely to be caused, PCM RP 20b, on the outcomes sought, and PCM RP 20d, on the Relevant EBRD Policies at issue.

## Conclusion

43. On the basis of the findings set out above, it is abundantly clear that the present Complaint satisfies all of the generally relevant and applicable eligibility criteria set out under PCM RPs 17, 19, 20, 23 and 24 and is, therefore, determined by the Eligibility Assessors to be **eligible** for a **Compliance Review**.
44. In addition, each individual instance of non-compliance alleged under the Complaint, with the notable exception of the claim relating to economic viability, satisfies fully the more specific eligibility requirements set out under PCM RPs 19b, 20b and 20d and each must, therefore, be examined in the course of the Compliance Review.
45. In addition, the Compliance Review envisaged under the present Eligibility Assessment will also address the closely connected elements of Compliance Review requested under two related Complaints concerning the Tbilisi Railway Bypass Project.<sup>84</sup> In the case of the Tbilisi Railway Bypass 2 Complaint, the Complainants have requested a Compliance Review of various aspects of the project, including: the alleged underestimation of safety issues in the ESIA, in contravention of PR 1, para. 9 and PR 4, para. 7; the alleged failure of the ESIA to address the likely deterioration of living standards of the local population and risks to the central water pipeline, in contravention of PR 1, para. 9; the alleged inadequacy of public consultation under PR 10, paras. 10 and 15; and the failure of the ESIA to examine the problem of depreciation of property values, in contravention of PR 1, para. 9. In the Tbilisi Railway Bypass 3 Complaint, the Complainant has requested a Compliance Review in respect of economic displacement, in contravention of PR 5, paras. 31 and 32. As these Compliance

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<sup>83</sup> See Association Green Alternative Complaint, 28 February 2011, at 10.

<sup>84</sup> Request No. 2011/02, Tbilisi Railway Bypass 2 and Request No. 2011/03, Tbilisi Railway Bypass 3. See PCM Register at <http://www.ebrd.com/pages/project/pcm/register.shtml>

Review aspects correspond closely with, though they do not overlap precisely with, the aspects of Compliance Review requested under the present Complaint, it makes sense in terms of procedural efficiency and consistency of outcomes for the PCM to address all of these Compliance Review issues by means of a single Compliance Review process.

## Request No. 2011/01 - Tbilisi Railway Bypass 1

### Terms of Reference for the Compliance Review

1. In accordance with PCM, RP 35, the PCM Officer appoints PCM Expert **Mr. Graham Cleverly** as the Compliance Review Expert for this Compliance Review.
2. The Compliance Review Expert shall conduct the Compliance Review in a neutral, independent and impartial manner and will be guided by principles of objectivity and fairness giving consideration to, *inter alia*, the rights and obligations of the Relevant Parties, the general circumstances surrounding the Complaint and due respect for EBRD staff.

### Scope

3. These Terms of Reference apply to any inquiry, action or review process undertaken as part of the Compliance Review, with a view to determining, as per PCM RP 36 if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has resulted in non-compliance with a relevant EBRD Policy, in this case the EBRD's 2008 Environmental and Social Policy and, if in the affirmative, to recommend remedial changes in accordance with PCM RP 40.
4. In conducting the Compliance Review, the Compliance Review Expert will examine any relevant documents and consult with the Relevant Parties. The Compliance Review Expert may also carry out a site visit, and employ such other methods as the Expert may deem appropriate, as per PCM RP 37.
5. Upon completion of the Compliance Review, the Compliance Review Expert will prepare a Compliance Review Report setting out his findings. The Compliance Review Report will include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review, as per PCM RP 38.
6. Such processes shall be conducted in accordance with these Terms of Reference subject to modifications which the Compliance Review Expert and the PCM Officer may, at any time, expressly agree upon, except modification that may prejudice the interests of any Relevant Party or is inconsistent with accepted review practice.
7. The Compliance Review shall confine itself to the Compliance Review issues raised in the present Complaint<sup>85</sup> and to the Compliance Review issues raised in

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<sup>85</sup> Request No. 2011/01, Tbilisi Railway Bypass 1. See Annex I to this report.

the two related Complaints concerning the present Project.<sup>86</sup> It shall not go beyond the parameters of these three, related Complaints to address other issues.

### **Time Frame**

8. The Compliance Review will commence when the Eligibility Assessment Report containing these Terms of Reference is publicly released and posted on the PCM website.
9. Every effort shall be made to ensure that the Compliance Review is conducted as expeditiously as circumstances permit and it is intended that it shall be concluded within sixty (60) Business Days of its commencement, within which period a draft Compliance Review Report will be prepared and sent to the Bank's Management, pursuant to PCM RP 41. However, this time period may be extended by the PCM Officer for as long as is strictly necessary to ensure full and proper implementation of the Compliance Review. Any such extension shall be promptly notified to all Relevant Parties.

### **Procedure: Identification of Core Compliance Issues**

10. The Compliance Review process will examine the core questions of compliance raised in the Complaint(s) with a view to identifying the central elements of the Compliance Review, including (without limitation):
  - a. Whether there was inadequate appraisal of the safety risks connected with the operation of the proposed railway line and a consequent failure to identify adequate safeguard measures;
  - b. Whether there was inadequate appraisal of the cumulative impacts of the Project in terms of deterioration of the living conditions of the local population and depreciation of property values;
  - c. Whether inadequate information was made available to affected persons regarding displacement and compensation issues;
  - d. Whether inadequate safeguard measures were identified for protection of the Tbilisi Reservoir and the central water pipeline for Tbilisi, thus placing the water supply for Tbilisi at risk.
  - e. Whether inadequate safeguard measures were identified for the avoidance or minimization of waste and/or reduction of its harmfulness;

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<sup>86</sup> Request No. 2011/02, Tbilisi Railway Bypass 2 and Request No. 2011/03, Tbilisi Railway Bypass 3. See para. 45, *supra*.

- f. Whether there was inadequate appraisal of the road traffic and air pollution impacts of both the construction and operation phases of the project;
  - g. Whether there was inadequate appraisal of the environmental and community health impacts of the quarrying activities required to provide the aggregate materials necessary for the Project;
  - h. Whether there was inadequate protection of the Tbilisi National Park, having regard to the requirements of the precautionary approach as set out under the EBRD's 2008 ESP and to the requirements of national law;
  - i. Whether there was inadequate appraisal of technically and financially feasible alternatives to the proposed Project;
  - j. Whether there were inadequate arrangements for consultation and public participation;
  - k. Whether there was non-compliance with the requirements of relevant national legislation; and
  - l. Whether there were inadequate arrangements to ensure the payment of appropriate compensation for land acquisition, involuntary resettlement and economic displacement caused by the Project.
11. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of each of the provisions of the ESP and of the Performance Requirements contained therein, in respect of which non-compliance is alleged in each of the Complaints. Such provisions notably include ESP, para. 3; PR 1, paras. 6(i) and 6(v); PR 1, para. 9; PR 3, paras. 11 and 12; PR 4, paras. 7 and 16; PR 5, paras. 20, 31 and 32; PR 6, paras. 14 and 15; and PR 10, paras. 10 and 15
12. The Compliance Review Expert will also determine the precise scope, in the specific context of the present Project, of any apparent exception to or relaxation of the requirement to conduct a conclusive environmental and social appraisal of a Project setting out final and definitive findings regarding likely impacts and required mitigation measures. For example, Performance Requirement 1 on Environmental and Social Appraisal and Management provides that the Bank 'may agree with the client during appraisal a management of change process' for Category A projects<sup>87</sup> and further recognises that corrective and preventive actions may be identified as necessary by virtue of the required 'procedures to

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<sup>87</sup> PR 1, para. 15, at 19. See, for example, the contention of EBRD Management that that 'for an infrastructure project of this magnitude, it is a normal process that technical design proceeds in successive refinements from concept to detailed design'.

Bank Response to EBRD Project Complaint Mechanism, issued to PCM Officer 6 May 2011, at 1.

monitor and measure compliance with the environmental and social provisions of the legal agreements including effective implementation of the ESAP and the PRs'.<sup>88</sup>

13. Any elements which are beyond the scope of the Compliance Review will be excluded.

#### **Procedure: Conduct of the Review**

14. The Compliance Review Expert may conduct the Compliance Review process in such a manner as he considers appropriate, taking into account the Rules of Procedure of the PCM, the concerns expressed by the Complainant as set out in the Complaint, and the general circumstances of the Complaint. Specifically, the Compliance Review Expert may:
- a. Review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with its 2008 Environment and Social Policy;
  - b. Review all documentation,<sup>89</sup> including internal memos and e-mail exchanges relevant to the Complaint;
  - c. Consult extensively with EBRD staff involved in the Project including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;
  - d. Solicit additional oral or written information from, or hold meetings with, the Complainant and any Relevant Party;
  - e. Conduct a visit to the Project site to ascertain disputed facts accompanied by such officials of the Bank, the Complainant(s) or their representatives or the Client, or other persons, as he may consider necessary and appropriate;
  - f. Request the PCM Officer to retain additional expertise if needed;
  - g. Identify any appropriate remedial changes in accordance with PCM, RP 40, subject to consideration of any restrictions or arrangements already committed to by the Bank or any other Relevant Party in existing Project related agreements;

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<sup>88</sup> PR 1, paras. 20-21, at 20-21.

<sup>89</sup> Including, notably, the Compliance Audit conducted recently in respect of the Resettlement Action Plan. See Intersocial Consulting, *Resettlement Action Plan Compliance Audit Report – Tbilisi Railway Bypass* (18 May, 2011).

- h. Take any other action as may be required to complete the Compliance Review within the required time-frame.

### **Procedure: General**

15. The Compliance Review Expert shall enjoy, subject to the provision of reasonable notice, full and unrestricted access to relevant Bank staff and files, and Bank Staff shall be required to cooperate fully with the Compliance Review Expert in carrying out the Compliance Review.
16. Access to, and use and disclosure of, any information gathered by the Compliance Review Expert during the Compliance Review process shall be subject to the Bank's Public Information Policy and any other applicable requirements to maintain sensitive commercial information confidential. The Compliance Review Expert may not release a document, or information based thereon, which has been provided on a confidential basis without the express written consent of the party who has provided such document.
17. The Compliance Review Expert shall take care to minimise the disruption to the daily operations of all parties involved in the Compliance Review process, including relevant Bank staff.
18. Generally, all Relevant Parties shall cooperate in good faith with the Compliance Review Expert to advance the Compliance Review as expeditiously as possible and, in particular, shall endeavour to comply with requests from the Compliance Review Expert relating to access to sites, submission of written materials, provision of information and attendance at meetings.

### **Compliance Review Report**

19. In accordance with PCM, RP 38, the Compliance Review Report shall include a summary of the facts and of the allegations in the Complaint, and the steps taken to conduct the Compliance Review.
20. The recommendations and findings of the Compliance Review Report shall be based only on the facts relevant to the present Complaint(s) and shall be strictly impartial.
21. Prior to submitting the Compliance Review Report to the Relevant Parties and to the Board in accordance with PCM RP 39, or sending the draft Compliance Review Report to the Bank's Management in accordance with PCM RP 41, the Compliance Review Expert shall ensure that all factual information relating to the Relevant Parties is verified with them.

**Exclusion of Liability**

22. Without prejudice to the privileges and immunities enjoyed by the PCM Experts, the Compliance Review Expert shall not be liable to any party for any act or omission in connection with any Compliance Review activities undertaken pursuant to these Terms of Reference.

## Annex I - Complaint

To:

Ms. Anoush Begoyan

PCM Officer

Project Complaint Mechanism

European Bank for Reconstruction and Development

One Exchange Square

London EC2A2JN

United Kingdom

Fax: +44 20 7338 7633

Email: [pcm@ebrd.com](mailto:pcm@ebrd.com)

From:

Association Green Alternative, Georgia

Subject: Complaint on Tbilisi Railway Bypass Project (Georgia),  
seeking project compliance review

28 February 2011

Dear Ms. Begoyan,

We would like to submit this complaint to the PCM regarding the Tbilisi Railway Bypass Project (approved by the EBRD board on March 9, 2010<sup>90</sup> and signed on March 17, 2010<sup>91</sup>) regarding the inadequate appraisal of environmental and social risks and inadequate mitigation measures in the final version of the project's Environmental and Social Impact Assessment (ESIA) and Environmental and Social Action Plan, as well as the project's Environmental Permit.

The project consists of the construction of a new section of railway that will bypass the central part of Tbilisi and avoid the transit of hazardous freight such as oil and oil products through the middle of the city. While the main goal of the project aimed at improving safety within the city of Tbilisi is welcome, we have been concerned about several assessment and management plan shortcomings that in our view undermine the overall project goals and may cause irreversible negative environmental and social impacts including negative impacts on the local population, the Tbilisi Reservoir, the quality of railway services, etc. The particular points of concern are developed further below.

Taking into account that the planned railway route goes through a densely populated area (the district of Avchala) and the visitors' zone of the Tbilisi National Park and that it passes 900 metres upstream from the Tbilisi Reservoir - one of the major city drinking water supply sources, stringent appraisal of environmental and social impacts ought to have been carried out and effective mitigation measures complying with the EBRD's Environmental and Social Policy ought to be in place. We hope that this complaint will help to address the issues of our concern on this particular project in a satisfactory way. Overall, we also hope that our effort will contribute to improvements in the quality of project assessment at the Bank. In particular we are concerned that

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<sup>90</sup> The EBRD approved 100 million EUR for the project: <http://www.ebrd.com/pages/project/psd/2009/40173.shtml>

<sup>91</sup> Originally together with the EBRD, the European Investment Bank (EIB) also planned to finance the project. On April 13, 2010 the EIB approved 100 million EUR for the project. However, several months later the Association Green Alternative was informed by the EIB that the Bank cancelled its participation in the project following a request by the Georgian Railway Company.

many of the mitigation measures have not been examined in detail until a very late stage, and that several extra action plans should now be produced. Yet the project is approved, the preparation works have started, and we are concerned that if the action plans turn out to be unsatisfactory, it will be harder and harder as the project implementation goes on to ensure that effective action is taken.

We therefore ask the Project Complaint Mechanism to undertake a compliance review of the project and to verify, whether the project ESIA correctly assesses environmental and social risks and whether the proposed mitigation measures prevent effectively possible environmental and social damage along the proposed railway route. Additionally, we ask the Project Complaint Mechanism to examine several procedural issues outlined in the complaint.

We would like to emphasise that we have undertaken dialogue on the project both with the EBRD and the project sponsors in an effort to ensure that our concerns are dealt with. A list of the most relevant communications can be found at the end of this complaint. However these have not provided us with adequate assurances that the project is compliant with the EBRD's Environmental and Social Policy.

#### Assessment and mitigation of social impacts

##### Safety concerns

According to the project ESIA the railway will be constructed through the densely populated Avchala district using 18-20 metre high embankments. However, the final ESIA does not propose adequate safeguard measures for the population living along the route in the case of accidents. The only measures mentioned are:

3. *Investigation of the freight train derailment cases.*
4. *Adequate design solution to reduce the risks and possible impacts; Emergency Response Plan; Provide the relevant staff [staff??] with trainings and equipment. (p.216 ESIA)*

These are very vague and cannot be considered adequate in our opinion. As far as we have been informed, the only other document where legally binding mitigation measures could be present is the permit given by the Ministry of the Environment. The permit does include a requirement for the Railway company to provide a plan of additional measures for the problematic sections of the route, however no deadline is given, and the preparation works for the construction have started, while according to the Ministry of Environment, no plan has been submitted.

Not only does this omission fully undermine the main reason for the project (the safety of Tbilisi's population) but it also fails to comply with PR 1 (point 9) on the Environmental and Social Appraisal of the EBRD's Environmental and Social Policy:

"Greenfield developments, or major expansions of activities, with potentially significant and diverse adverse environmental or social impacts, such as those listed in Appendix 1, 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. This assessment will include an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed."

At the same time, the underestimation of safety issues together with the underestimated effects of the project on drinking water and the impact of the quarrying on the health of the communities described below, violate PR 4 (point 7) on Community Health, Safety and Security:

"The client will identify and evaluate the risks and potential impacts to the health and safety of the affected community during the design, construction, operation, and decommissioning of the project and will establish preventive measures and plans to address them in a manner commensurate with the identified risks and impacts. These measures will favour the prevention or avoidance of risks and impacts over minimization and reduction."

#### Cumulative impacts, deterioration of living conditions and property depreciation

The current railway line passes through the district of Avchala, as will the new one. This will create a situation where some people will be living very near to both the new railway line and an old one which will stay in service for passenger traffic. In addition to the extremely vague accident prevention and response provisions in the ESIA, the project does not address either these cumulative impacts of the proposed and existing railway routes on the living conditions of the Avchala population or property depreciation and compensation measures for the local people caused by construction of the new railway route (Smell of the transported oil and oil products will make it impossible for local population to live along the new route). In some cases the houses are only 10-15 metres away from the proposed new line. This in our view creates non-compliance with the EBRD Environmental and Social Policy in two ways: First, that people whose properties are very near to the new line, but that will not be directly purchased or demolished, do not seem to be being offered compensation for the negative impacts on their properties (see below on Resettlement) and second, that the cumulative impacts of the old rail line plus the new rail line on some of the inhabitants of Avchala were not studied in the ESIA, which did not fully succeed in its aim *“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.”* (PR 1, para 9).

We would like to note that the response of the Georgian Railway Company to our communication which lists only the issues already discussed in Chapter 6.2 of the ESIA, does not provide an adequate answer to the aforementioned concerns of inadequate safeguard measures, deterioration of living conditions and property depreciation issues.

#### Resettlement Action Plan

According to the EBRD Board Document for the project, presumably written around February 2010:

*“The Resettlement Action Plan (RAP) is currently under preparation by an independent consultant, which will address the land acquisition and resettlement issues including a timetable to complete this process. The RAP will be subject to the Bank’s review and approval.”* (p.11)

Alarmingly, however, the compensation process has started and some affected people in the Patara Lilo and Avchala districts have already received compensation for their land and properties, yet neither the Resettlement Action Plan for the project, nor any summary of it, is available to the affected people. We are not even certain that a final version is finished or approved. An EBRD response from 14 December to a request for the disclosure of the RAP stated: *“While we would certainly not object to the final ESAP and RAP being made available to your organisation, this is a decision that needs to be made by Georgian Railway since they are the legal owners of both these documents, and we would therefore encourage you to contact them directly in this respect.”* This appears to imply that the RAP does exist, but we cannot be sure.<sup>92</sup>

In any case, the local people of Avchala, Patara Lilo and Didi Lilo districts do not have any official information regarding displacement and compensation issues. This comes as a violation of PR 5 (20) on Land Acquisition, Involuntary resettlement and Economic displacement of the EBRD Environmental and Social Policy:

*“The client should summarise the information contained in the RAP for public disclosure to ensure that affected people understand the compensation procedures and know what to expect at the various stages of the project (e.g., when an offer will be made to them, how long they will have to respond, grievance procedures, legal procedures to be followed if negotiations fail).”*

<sup>92</sup>

If it has not been finalised and the resettlement/compensation process has started, this would point to a violation of PR 5 (para 15) on Land Acquisition, Involuntary resettlement and Economic displacement of the EBRD Environmental and Social Policy, as there can be no point in having a Resettlement Action Plan which appears only after some of the resettlement and compensation process has taken place:

*“In the case of transactions as described in paragraph 7 that involve physical displacement of people, the client will, based on environmental and social impact assessment, develop a Resettlement Action Plan, that covers at a minimum, applicable requirements of this PR, regardless of the number of people affected.”*

## Assessment and mitigation of environmental impacts

### Impact on Drinking Water Supply

The proposed railway route crosses several gorges and runs 900 metres from the Tbilisi Reservoir, one of the major city drinking water supply sources.

Due to the underground streams that run towards the reservoir, in the event of the spillage of even half a tank of oil, approximately 50 percent of the volume of the Tbilisi reservoir could be contaminated, leaving 25 percent of Tbilisi's residents without drinking water and around 20,000 hectares of agricultural arable land without irrigation<sup>93</sup>.

According to the response of the Georgian Railway Company to our enquiry, in order to protect the Tbilisi Reservoir from contamination the company will undertake additional engineering works for the Kvirikoba Khevi Gorge. This is confirmed by the ESIA, which states that the river will run through a tunnel at the point where the railway crosses it. However, the final ESIA does not describe adequate safeguard measures<sup>94</sup> for around 30 other ravines along the route apart from this one, that would avoid contamination of the Tbilisi Reservoir. Although these are mostly dry there are underground streams relatively near the surface at various points. In the text of the ESIA, the only measures mentioned for other sections apart from the Kvirikoba Khevi Gorge are:

- prevention of leakage of oils or other harmful substances spilled on the surface to the Tbilisi Sea and their collection in reservoirs with the purpose of future cleaning;
  - a concrete ditch can be arranged along this section, in depressions – arrangement of concrete covered reservoirs can be considered.
- prevention of tipping of oil tanks;
- protection of groundwaters from oil pollution.

However these are very vague and it is not clear whether these measures will actually be undertaken, as the ESAP part of the ESIA states only the following unclear measures:

- Proper technical solution for protection of the Kvirikobiskhevi river from the possible spills of hazardous substances;
- Proper technical solution for prevention of leakage of oils or other harmful substances spilled on the surface to the Tbilisi Sea and their collection in reservoirs with the purpose of future cleaning.
- Proper technical solution prevention of tipping of oil tanks.

Moreover, it is also unclear if these measures would be enough for avoiding contamination because there is no written specification in the ESIA describing the width or depth of the ditch along the route in order to fully ensure protection of the Tbilisi Reservoir in case of accidents.

In addition according to an ecological analysis of the Georgian Water and Power company (GWP)<sup>95</sup>, due to the underground streams in this area feeding the Tbilisi Reservoir these potential negative impacts mean that the preferred route does not fulfill requirements for environmental safety, and therefore additional studies need to be carried out to find a safer alternative.

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<sup>93</sup> ESIA of the project; paragraph 6.1.4.1 "Potential Impacts on Surface Water";

<sup>94</sup> ESIA of the project; 6.1.1 Potential Impacts on Surface Water and Groundwater "Tbilisi Sea" Page 126 "Prevention of leakage of oils or other harmful substances spilled on the surface to the Tbilisi Sea and their collection in reservoirs with the purpose of future cleaning"

<sup>95</sup> Technical department of Georgian Water and Power (GWP), Professor Nino Kezevadze;

These issues are also part of an additional action plan to be prepared by the Railway Company as part of its environmental permit. However preparations works for the project have begun and according to the Ministry of the Environment the plan has still not been carried out.

When asked about these issues, EBRD staff seemed confident that the mitigation measures being undertaken would be sufficient, however we do not believe this to be the case. If this is so, this would represent non compliance with the Environmental and Social policy of the EBRD<sup>96</sup>.

#### Impact on the central water pipeline for Tbilisi

The final ESIA of the project does not describe implications of the new railway route on the central water pipeline for Tbilisi which is located directly under the proposed new route of the Railway in Avchala district where Georgian Railway Company plans to construct 18-20 metres high embankments.

According to the local population The pipeline is in very poor condition and from time to time it bursts and as a result floods the nearby houses. If the project is implemented (Construction, Exploitation) it may worsen the condition of the pipeline and cause drastic negative impacts on people who are living along the route. Unfortunately the ESIA has not studied this issue - a violation of PR 1 para. 9 on Environmental and Social Appraisal of the EBRD's Environmental and Social Policy:

*“Greenfield developments, or major expansions of activities, with potentially significant and diverse adverse environmental or social impacts, such as those listed in Appendix 1, 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. This assessment will include an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed.”*

#### Waste Management issues

Waste management is addressed only in a very general manner in the project ESIA and the ESAP at the end of the document includes the development of waste management plans for the construction, operation and demolition stages of the project as action points for the project. The preparation of a waste management plan to be agreed with the Ministry of Environment and Natural Resources was also a condition of the Environmental Permit issued on April 22, 2010 by the Ministry of Environment. However no such plan has yet been prepared, while the preparation works have already begun.

Considering that the plan has not been made in time for the start of works, this appears to be in violation of with PR 3 (12) of EBRD's Environmental and Social Policy which says:

*“The client will avoid or minimise the generation of hazardous and non-hazardous waste materials and reduce its harmfulness as far as practicable. Where waste generation cannot be avoided but has been minimised, the client will reuse, recycle or recover waste, or use it as a source of energy; where waste can not be recovered or reused, the client will treat, destroy, and dispose of it in an environmentally sound manner. If the generated waste is considered hazardous, the client will explore commercially reasonable alternatives for its environmentally sound disposal considering the limitations applicable to its transboundary movement. When waste*

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Paragraph 9 of PR 1 "Environmental and Social Appraisal" of the EBRD's Environmental and Social Policy;

disposal is conducted by third parties, the client will use contractors that are reputable and legitimate enterprises licensed by the relevant regulatory agencies.”

In addition according to the response of the Georgian Railway Company the project will be financed from the EU Neighborhood Investment Facility (NIF) to study historical pollution (depots etc.) caused by the railway operation in order to clean up the freed territories in Tbilisi before their future utilization. While it is highly welcome that a study will be undertaken to calculate the waste quantity from the freed up territories, it is not clear how the clean up plans will be implemented (including financial aspects), and particularly how the hazardous, construction and other types of waste collected at the freed up sites will be treated.

#### Increases in road transport due to the new railway system

The final ESIA does not describe the transport and pollution implications of the splitting the Tbilisi railway system in two parts. After abolishing the Tbilisi Central Freight Station, local freight goods (e.g. construction materials) will be marshaled and distributed around the city by road from the Tbilisi Marshalling Station in Navtlughi, the Tbilisi Junction in Avchala and the Veli Station located outside Tbilisi, far away from the city centre. However the project ESIA does not describe the impacts such as emissions and the overall impact on the traffic caused by alternative freight transport means from these stations to destinations in the centre of Tbilisi, nor does it assess whether these are acceptable, what the alternatives could be, or whether the impacts can be mitigated. In our opinion this represents non-compliance with the EBRD Environmental and Social Policy PR 1 point 6(v):

“6. Environmental and social impacts and issues will be appraised in the context of the project’s area of influence. This area of influence may include one or more of the following, as appropriate:

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

#### Concerns related to so-called yellow lines (construction corridors) and location of energy facilities

Together with the red lines of the project the so-called yellow lines (areas related to construction corridors) and their impacts should also be assessed in the project ESIA. People especially in the Avchala district do not know to what extent their land will be affected by the construction activities, and therefore do not know whether to expect compensation or not.

According to the response of Georgian Railway Company “the issue of location of construction corridors and power supply units will be included in the final ESIA report.” However, the final ESIA report does not include these issues. This makes it difficult for people to understand their rights according to PR 5 on land acquisition, and shows non compliance with PR 1 para. 6 (i) on Environmental and Social Appraisal of the EBRD’s Environmental and Social Policy, which makes it clear that associated facilities such as energy facilities should be assessed as part of the project.

#### Problems related to quarrying of aggregate materials

The ESIA does not include any calculation of the necessary quantity of aggregate materials such as rock and gravel in the project. It also omits to describe the impacts on the environment and community health of quarrying these materials. The Georgian Railway Company’s answer that the “materials freed up after tunneling and excavation will be mostly used for construction” does not exclude environmental risks because the calculation is not done and it is still not known how much material is needed. This creates non-compliance with PR 1 (6) on Environmental and

Social Appraisal and PR 4 points 7 and 16 on Community Health, Safety and Security of the EBRD's Environmental and Social Policy. We would like to underline that the impacts related to the extraction of natural resources pose serious risks to the environment and the local communities, and as such they should be taken into account by the project sponsor.

#### Potential impacts on air quality

According to the project ESIA the air quality modelling was carried out only for the Avchala depot territory and does not cover the whole route, even though there are other populated areas near the route (eg. Gldanula district; Gldani village and Patara lilo). We expect some air pollution both from the contents of the trains (oil and gas); from the use of brakes in sloping sections, which emit some oil and have a strong smell in some cases, and possibly also from the energy facilities, whose location and nature is not clear.

As the pollution has not been adequately modelled, it is not clear to what extent it will be acceptable or what measures need to be adopted for its minimisation, which appears to constitute non-compliance with PR 3 para. 11 on Pollution Prevention and Abatement of the EBRD Environmental and Social Policy:

“The client will avoid the release of pollutants or, when avoidance is not feasible minimize or control their release. This applies to the release of pollutants due to routine, non routine or accidental circumstances with the potential for local regional or transboundary impacts. In addition the client should examine and incorporate in its operations energy efficiency measures and measures to conserve water and other resources consistent with the principles of cleaner production.”

#### Concerns regarding protected areas

The projected railway route will cross the visitors' zone of the Tbilisi National Park. PR 6 para. 15 of the EBRD's Environmental and Social Policy states that:

“Areas may be designated by government agencies as protected for a variety of purposes, including to meet country obligations under international conventions. Within defined criteria, legislation may permit development in or adjacent to protected areas. In addition to the applicable requirements of paragraph 14, the client will:

- demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable, and the client; and that the development follows the mitigation hierarchy (avoid, minimise, mitigate, offset) appropriately; and
- implement additional programmes, as appropriate, to promote and enhance the conservation aims of the protected area.”

According to the national legislation (Decree N 10/61 “Regarding special logging and rules on its implementation”; September 13, 2000), the construction of railways is not on the list of activities permitted in national parks. The Georgian Railway company has argued that on the basis of consultations with the Ministry of Environment the construction of railway is included in the category of road construction. Despite this assurance, there is no legal basis for this arrangement and no relevant documentation has been presented to support it. This creates non-compliance with EBRD's Environmental and Social policy: The construction of the project within the realm of the National Park requires specific legislative changes, which have not taken place, even though the preparation works for the project have started. Even if they had taken place we would see this as a worrying precedent.

Moreover, the project's interference with the National Park poses in our view conflict with the precautionary principle of PR 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources:

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

The EBRD Board document states that: *"Impacts on areas of biodiversity interest or conservation significance are limited, this particular area of the park (categorised as "traditional use") being of lower conservation status and mainly intended for traditional agricultural use and recreational purposes. Specific compensation and/or mitigation measures are required under EBRD PR6. Such measures will be agreed in the form of a specific Mitigation Action Plan for the National Park to be agreed upon between the Ministry of Environment and Georgian Railway. This is covenanted in the ESAP."* Yet as in the case of the other additional action plans mentioned, this has not been made, even though the preparatory works for the project have started.

#### Procedural issues of concern

##### Selection of project alternatives

The EBRD's Environmental and Social Policy (PR 1, para. 9) states that for the ESIA of Category A projects: "This assessment will include an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed."

Yet in this case, the only alternatives examined cannot be regarded as *technically and financially feasible*, and they seem to have been included in the ESIA only to give the appearance of having examined alternatives. In other words, they are 'straw man' alternatives, set up only to be knocked out easily.

According to the project ESIA four alternative routes of the railway had been proposed. Two of these alternative routes had been rejected earlier at the scoping stage. The other two alternatives are virtually identical, the only difference between them being the gradient. This cannot be considered as an alternative route because the gradient for the project had already been chosen at the beginning of the ESIA process. Despite the fact that the alternative routes of the railway were rejected by the project sponsor earlier at the scoping stage these alternative routes appear in the final ESIA without conducting additional studies that would propose suitable alternatives to the preferred option.

In a response to our letter, the Georgian Railways company states that *"all the technically feasible alternatives have been published in the process of discussion. Despite the fact that the tunnel alternative was not the desired one for Georgian Railways for the safety reasons it was still envisaged as an alternative like the other ones. In case the other alternatives had been rejected, the tunnel alternative would have been acceptable. More expensive but technically feasible alternatives were also proposed. In the process of identifying technical alternatives the main reason to choose the 18 pro mil alternative was the number of downsides of the 15 pro mil alternatives"*.

However we believe that other alternatives exist that were not given due consideration. For example during the public hearing people from Avchala suggested a route with a shorter tunnel that would bypass Avchala, but the panel dismissed it immediately. We are not able to assess whether such alternatives are technically and financially feasible, however we do not think they

have been given adequate treatment. The chosen variant has a number of deficiencies and seems to have been chosen on the basis of being 'the best of a bad bunch'. Yet as it does not fulfill the main aim of the project – to transfer the transit of hazardous freight out of populated areas, we believe that it would have been better to make a more quality assessment and end up with a project that fits its purpose.

#### Concerns regarding meaningful consultation and public participation

The project scoping meeting was conducted on July 21, 2009. According to the project ESIA, the affected local population did not participate in the scoping process. The main reason for the absence of the local population cited in the final ESIA report is that “since no decision on the final routing had been made at that stage, it was decided not to contact them and avoid disturbing them”.<sup>97</sup> As a significant part of the 'identified stakeholders' were missing, this violates the PR 10 on Information Disclosure and Stakeholder Engagement of the EBRD Environmental and Social Policy<sup>98</sup>:

“In the case of Category A projects the client will 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”.

In addition, the non-participation of the local population in the scoping process cannot be considered as “meaningful consultation” which is to be ensured by the project sponsor as required by PR 10 point 15 on Information Disclosure and Stakeholder Engagement:

“Meaningful consultation:

- should be based on the disclosure of relevant and adequate information including, where appropriate and relevant, draft documents and plans, prior to decisions being taken when options are still open;
- should begin early in the environmental and social appraisal process;
- will focus on the social and environmental risks and adverse impacts, and the proposed measures and actions to address these;
- will be carried out on an ongoing basis as the nature of issues, impacts and opportunities evolves.”

In addition during the public hearings over the draft ESIA report, the representatives of Georgian Railway company and the project sponsor presented only the central variant of the railway route and its impacts from the draft ESIA document, not even mentioning the existence of other alternative sites and their impacts. The failure to present project alternatives and their pros and cons during the public hearings cannot be considered as good practice of ESIA public hearing meetings.

#### Violation of national legislation

On April 22, 2010 the Ministry of Environment and Natural Resources issued the conclusion of the *State Ecological Expertise* process. According to Chapter III of the State Ecological Expertise conclusion there are several conditions which are obligatory prior to and after the construction and operation of the project.

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<sup>97</sup> ESIA of the project: Chapter 4.1.2, p.65 “Scoping meeting” The first consultation / scoping meeting with all project stakeholders (except the general public) was conducted on July 21, 2009

<sup>98</sup> PR10 EBRD Environmental and Social Policy (2008), “Information Disclosure and Stakeholder Engagement”, Paragraph 10;

We requested the Ministry of Environment and Natural Resources to provide the progress reports on the provisions of Chapter III of the State Ecological Expertise conclusion, however we received an answer from the Ministry that the progress reports had not been provided by the Georgian Railway Company - a violation of the Georgian legislation.

#### Economic viability

Although we are aware that this is not the subject of the EBRD's Environmental and Social Policy, we add this to give additional background information about our concerns with the project and the EBRD's involvement in it, which according to its statute should be based on sound banking principles.

While we agree that it is necessary to develop a railway project that will improve the efficiency and safety of rail freight and passenger operations in the center of Tbilisi neither the ESIA of the project, nor any other publicly available document, proves the economic viability of the project.

In order to cover the loan the Georgian Railway company plans to create a special purpose company and sell the property of the railway along the existing route<sup>99</sup>. The total value of restoration of the freed up territories will be calculated under the NIF grant recently won by the Georgian Railway company. However, the rehabilitation costs of the freed up territories as well as the proposed amounts that might be gained from selling the property are not calculated in the ESIA or other public documents. Moreover, even the most optimistic calculations do not foresee an increase of freight tonnage. Accordingly, the profit of the Georgian Railway company is not expected to increase either.

In September 2010 Georgian Railway company refused a EUR 100 mln loan for the project from the European Investment Bank. Instead, it issued 5 year euro bonds for USD 250 mln with high interest rate (9.875 percent interest rate)<sup>100</sup>. It is not clear how the company will pay these off or why it is in the company's interest to issue bonds that appear to have a higher interest rate than an EIB loan would have. This seems to put the economic viability of the project as well as the company as a whole under question.

#### Desired outcomes

With this complaint, we expect the EBRD Project Compliance Mechanism experts to perform a Compliance Review of the Tbilisi Railway Bypass project, namely to check whether the ESIA documentation complies with the Performance Requirements and general commitments of the EBRD Environmental and Social Policy. At the same time, we expect that our concerns will result in improvements in the routing and the Environmental and Social Action Plan and translate into improvements of the project implementation.

Best regards,

David Chipashvili

International Financial Institutions  
Monitoring Programs Coordinator

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<sup>99</sup> Dimitri Kemoklidze, Head of Strategic Projects and Development of Georgian Railways Ltd. during the Public Consultation meeting regarding the Tbilisi Bypass Project;

<sup>100</sup> [http://www.railway.ge/?web=0&action=page&p\\_id=209&lang=eng](http://www.railway.ge/?web=0&action=page&p_id=209&lang=eng)

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Annex 1:

Overview of the communication with EBRD and other relevant parties

Documents in English:

1. [Letter to EBRD Director for Transport regarding the developments around the Tbilisi Railway Bypass Project and compliance with EBRD Environmental and Social Policy requirements; October 30, 2009. See:](#)  
[http://www.greenalt.org/webmill/data/file/Tbilisi\\_railway\\_Bypass.pdf](http://www.greenalt.org/webmill/data/file/Tbilisi_railway_Bypass.pdf)
2. [Comments of Association Green Alternative and CEE Bankwatch Network on the Tbilisi Railway Bypass Project; December 30, 2009; See:](#)  
[http://www.greenalt.org/webmill/data/file/comments\\_on\\_Tbilisi\\_Railway\\_Bypass\\_Project.pdf](http://www.greenalt.org/webmill/data/file/comments_on_Tbilisi_Railway_Bypass_Project.pdf)
3. Response of EBRD to comments of [Association Green Alternative and CEE Bankwatch Network on Tbilisi Railway Bypass Project; February 3, 2010;](#)
4. [Second comments of Association Green Alternative and CEE Bankwatch Network on the Tbilisi Railway Bypass Project; March 8, 2010; See:](#)  
<http://www.greenalt.org/webmill/data/file/Letter%20re%20Rail%20with%20BWN.pdf>
5. [Tbilisi Railway Bypass project - Issue Paper; May 11, 2010, sent to the EBRD. See:](#)  
[http://www.greenalt.org/webmill/data/file/IP\\_EBRD\\_TbilisiRailway\\_10May2010\\_eng\\_issue\\_paper1.pdf](http://www.greenalt.org/webmill/data/file/IP_EBRD_TbilisiRailway_10May2010_eng_issue_paper1.pdf)
6. E-mail to the EBRD team leader of the project asking for the progress report of the conditions set out in the conclusion of the State Ecological Expertise (Chapter III “Conditions”) issued on April 22, 2010; **August 3, 2010;**
7. Response email from the team leader of the project of the EBRD regarding the progress report; **September 9, 2010;**
8. E-mail to Ms Nino Marshania and Elena Gordeeva, EBRD, requesting the Environmental and Social Action Plan for the project and the dates of public hearings on this document, **09 December 2010** (not online).
9. Response e-mail from Ms Elena Gordeeva, Senior Banker, Transport Team, **14 December 2010**, stating that the Environmental and Social Action Plan consists of the same mitigation measures that are in the Environmental and Social Impact Assessment, plus a generic requirement to comply with all the measures required by Georgian legislation and permits.

## Documents in Georgian

1. Letter to the Georgian Ministry of Environment, asking to participate in the administrative proceedings of the Tbilisi Railway Bypass project; **December 7, 2009**; See: [http://www.greenalt.org/webmill/data/file/railway\\_administrative\\_proceeding\\_07\\_12\\_2009.pdf](http://www.greenalt.org/webmill/data/file/railway_administrative_proceeding_07_12_2009.pdf)
2. [Comments of Association Green Alternative and CEE Bankwatch Network on Tbilisi Railway Bypass Project](#); **December 30, 2009**; See: [http://www.greenalt.org/webmill/data/file/comments\\_Railway\\_latest.pdf](http://www.greenalt.org/webmill/data/file/comments_Railway_latest.pdf)
3. Response of the Ministry of Environment and Natural resources of Georgia regarding participation in administrative proceedings; **January 20, 2010**; See: [http://www.greenalt.org/webmill/data/file/03\\_111.pdf](http://www.greenalt.org/webmill/data/file/03_111.pdf)
4. Response of Georgian Railway Company to comments regarding the Tbilisi Railway Bypass Project; **January 27, 2010**; See: [http://www.greenalt.org/webmill/data/file/03\\_112.pdf](http://www.greenalt.org/webmill/data/file/03_112.pdf)
5. [Second comments of Association Green Alternative and CEE Bankwatch Network on Tbilisi Railway Bypass Project](#); **February 2, 2010**; See: [http://www.greenalt.org/webmill/data/file/railway\\_comment\\_to\\_MoE\\_02\\_02\\_2010.pdf](http://www.greenalt.org/webmill/data/file/railway_comment_to_MoE_02_02_2010.pdf)
6. [Tbilisi Railway Bypass project - Issue Paper](#); **May 11, 2010**; See: [http://www.greenalt.org/webmill/data/file/Tbilisis\\_shemovliti\\_rkinigzis\\_proeqtis\\_analizi1.pdf](http://www.greenalt.org/webmill/data/file/Tbilisis_shemovliti_rkinigzis_proeqtis_analizi1.pdf)
7. Letter to the Ministry of Environment and Natural Resources asking for a progress report of the conditions set out in the conclusion of the State Ecological Expertise (Chapter III “Conditions”) issued on April 22, 2010; **July 7, 2010**;
8. Letter to the Ministry of Economic Development of Georgia (Copy was sent to Georgian Railway Company) regarding the refusal of the EIB loan, approved in April, 13, 2010, asking copies of communication documents of Georgian Railway Company with EIB and reasons why the loan was refused; **October 18, 2010**;
9. Letter to the Ministry of Economic development of Georgia (Copies to Georgian Railway Company; The ministry of Environment and EBRD team leader of the project) asking updated version of the Environmental and Social Action Plan (ESAP) of the project and proposed dates of the public consultations of the ESAP. **October 18, 2010**;
10. Response letter from the Ministry of Environment regarding the October 18, 2010 letter, saying that progress reports were not provided by the Georgian Railway Company to the Ministry; **November 5, 2010**;
11. Response letter from the Ministry of Environment regarding the updated Environmental and Social Action Plan of the project; **November 10, 2010**;

12. Response letter from the Georgian Railway Company regarding the letter of October 18, 2010; **February 10, 2011;**

## **Annex 2 – Bank’s response**

### **Bank Response to EBRD Project Complaint Mechanism**

<b><u>EBRD Project Complaint Mechanism</u></b>	
Project	Tbilisi Railway Bypass Project (OpID: 40173)
Project Team	Operation Leader: Elena Gordeeva Operation Team Members: Nino Marshania OGC: Stephanie Wormser ESD: Frederic Giovannetti (currently a consultant to the Bank), Mikko Venermo, Dariusz Prasek, Alistair Clark
Date of issue to ExCom	28 April 2011
Date of approval by ExCom	5 May 2011
To: PCM Officer	Anoush Begoyan
Date of Issue to PCM Officer	6 May 2011

Thank you for your email dated 11 March 2011, regarding the request for a compliance review and problem-solving initiative of the Tbilisi Railway Bypass Project (the “Project”) under EBRD Project Complaint Mechanism (PCM) by the Association Green Alternative. The three complaints introduced by the Association Green Alternative were officially registered on 14 March 2011. Reference is also made to your email dated 17 March 2011, regarding another complaint in respect of the Tbilisi Railway Bypass Project was officially registered on 24 March 2011. This document is ‘the Bank Response’ to the complaints as outlined in PCM: Rules of Procedure (Clause 15).

There are a number of issues raised in the complaints. ‘The Bank’s Response’ is structured to address each complaint separately.

#### **Complaint: Tbilisi Railways Bypass 1. Request number: 2011/01. By the Association Green Alternative**

As stated by the Complainant, issues raised in the complaint have been discussed between the Complainant, Georgian Railway and EBRD on several occasions starting with the ESIA public consultation exercise from July to December 2009. EBRD has already taken consideration of the Complainant’s views as well as of other views expressed during public consultation in (i) the guidance to the ESIA consultant, and (ii) setting conditions to EBRD financing for the Project. It is worth noting that the Georgian authorities have also taken consideration of these concerns in the environmental permit issued to Georgian Railway. EBRD is monitoring the implementation of the Project by Georgian Railway in compliance with these requirements and conditions, including the regulatory obligations set by the Georgian regulating agencies.

The ESIA was developed and published in 2009 at a stage in the Project development where a concept design was available at a level of detail sufficient to assess key environmental and social impacts. However, for an infrastructure project of this magnitude, it is a normal process that technical design proceeds in successive refinements from concept to detailed design. Amongst other outcomes, the ESIA identified several key impacts that had not sufficiently been taken into account in the initial concept design. As a result of the ESIA both the Georgian regulator and EBRD have imposed onto Georgian Railway the development of more comprehensive and detailed mitigation measures to address, amongst others, noise, water protection, community safety and emergency response. Together with the construction contractor and a specialised environmental consultant hired late 2010 specifically for that purpose, Georgian Railway is now in the process of developing detailed engineering measures ensuring that adequate provisions are in place to mitigate these impacts. The implementation of this obligation is monitored by EBRD and both the design and the construction of these mitigations will be checked by EBRD. Georgian Railway is required to keep local affected communities informed as the project progresses.

For an infrastructure project of this magnitude, the technical development takes several years. A number of detailed environmental action plans, such as waste management or quarrying, depend on the actual construction work plan that can only be finalised by the construction contractor once the contractor has been selected. Not uncommonly, this happens well after the ESIA is developed. The construction contractor is obligated to develop such action plans prior to commencing the work. EBRD is monitoring this process. Therefore, some detailed mitigation plans are still in progress.

The resettlement and compensation process carried out by Georgian Railway has recently (March 2011) been subject to an independent audit commissioned by EBRD as part of routine monitoring requirements. The results of this audit are currently being reviewed by EBRD and Georgian Railway. The substance of the Green Alternative complaint was brought to the auditors' attention by EBRD prior to their site visit. The auditors amongst others assessed the adequacy of public consultation and information disclosure. If the independent audit demonstrates that corrective measures are needed, these will be discussed between EBRD and Georgian Railway in order to define an implementation plan. EBRD will expect Georgian Railway to make such plan public.

If the non resettled residents in Avchala or elsewhere along the railway route demonstrate that they are directly affected by the construction or operations of the Project, then Georgian Railway has to reach an agreement with them on either mitigation or compensation in compliance with Georgian law and EBRD Environmental and Social Policy requirements. The implementation of these requirements by Georgian Railway will be monitored by EBRD through the review of monitoring reports submitted by Georgian Railway to EBRD and

periodic monitoring visits by EBRD staff and representatives or independent monitoring consultants.

Funding from the EU Neighbourhood Investment Facility (NIF) has been obtained for a detailed investigation of the contamination of the land in Tbilisi centre currently used by the railroad. The consultant for this assignment is currently being appointed and the investigation will be conducted in accordance with the Terms of Reference agreed with EBRD. The cost of physical clean-up activities (which activities will only be undertaken once the new route becomes operational and when the redevelopment commences) will be estimated as a result of the aforementioned detailed investigation and an ongoing detailed master planning exercise which is also funded by NIF. Georgian Railway undertook to finance the clean-up activities unless additional grant funding can be obtained.

**Complaint: Tbilisi Railways Bypass 2. Request number: 2011/02. Joint by ten PAPs, via the Association Green Alternative**

As stated by the complainants, issues raised in the complaint have been discussed between the complainants, Georgian Railway and EBRD on several occasions starting with the ESIA public consultation exercise from July to December 2009. Georgian Railway and EBRD have already taken consideration of the views expressed during public consultation in (i) EBRD guidance to the ESIA consultant and (ii) setting conditions to EBRD financing for the Project.

The ESIA was developed and published in 2009 at a stage in the Project development where a concept design was available at a level of detail sufficient to assess key environmental and social impacts. However, for an infrastructure project of this magnitude, it is a normal process that technical design proceeds in successive refinements from concept to detailed design. Amongst other outcomes, the ESIA has identified several key impacts that had not sufficiently been taken into account in the initial concept design. As a result of the ESIA, both the Georgian regulator and EBRD have imposed onto Georgian Railway the development of more comprehensive and detailed mitigations addressing, amongst others, noise, water protection, community safety and emergency response. Together with the construction contractor and a specialised environmental consultant hired late 2010 specifically for that purpose, Georgian Railway is now in the process of developing detailed engineering measures ensuring that adequate provisions are in place to mitigate these impacts. The implementation of this obligation is monitored by EBRD.

If the non resettled residents in Avchala or elsewhere along the railway route demonstrate that they are directly affected by the construction or operations of the Project, then Georgian Railway has to reach an agreement with them on either mitigation or compensation in compliance with Georgian law and EBRD Environmental and Social Policy requirements. The implementation of these

requirements by Georgian Railway will be monitored by EBRD through the review of monitoring reports submitted by Georgian Railways to EBRD and periodic monitoring visits by EBRD staff and representatives or independent monitoring consultants.

**Complaint: Tbilisi Railways Bypass 3. Request number: 2011/03. By Alexandre Asatiani, a PAP, via the Association Green Alternative**

This issue was brought directly by the Complainant to the attention of EBRD in January 2011. EBRD requested the Borrower to investigate the Complainant's claims as soon as it received initial communications from the complainant.

Georgian Railway has made a representation to EBRD that court action in respect of the Complainant's ownership and/or occupancy rights in relation to this land plot has been taken. The Complainant's eligibility for compensation in accordance with EBRD's Environmental and Social Policy either in respect of formal legal ownership rights (PR5, paragraph 31, item (ii)), or in respect of recognised occupancy rights or claims (PR5, paragraph 31, item (iii)) is dependent on the outcome of the court decision. Likewise, Georgian Railway and EBRD's response to the complaint and course of action depend on the court decision.

**Complaint: Tbilisi Railways Bypass 4. Request number: 2011/04. By Nino Saginashvili, a PAP**

The Complainant contacted EBRD by e-mail on 28 February 2011 and lodged the PCM complaint on 16 March 2011, before it had been possible to investigate her initial claim in detail.

If the non resettled residents along the railway route demonstrate that they are directly affected by the construction or operations of the Project, then Georgian Railway has to reach an agreement with them on either mitigation or compensation in compliance with Georgian law and EBRD Environmental and Social Policy requirements. The implementation of these requirements by Georgian Railway will be monitored by EBRD through the review of monitoring reports submitted by Georgian Railway to the Bank and periodic monitoring visits by EBRD staff and representatives or independent monitoring consultants.

### **Annex 3 – Client’s response**

Dear Ms. Anoush Begoyan,

GR has reviewed The complaint on Tbilisi Railway Bypass Project lodged by the international financial institutions monitoring programs coordinator of the green alternative – David Chipashvili and as a response to the complaint GR would like to provide its position and arguments regarding the issues listed as well as allegations made in the document.

#### **Inadequate appraisal of the social impacts and mitigation measures in the ESIA**

First of all it needs to be mentioned that the appraisal of the social impacts and mitigation measures are fully in line with following documents, which has been used by the GDC Solutions, CENN and APLR in the process of elaboration of the comprehensive document – Environmental and Social Impact Assessment:

- The Georgian legislation: Law of Georgia on Protection of Environment (enacted 1996, amended 2000, 2003, 2007) and Law of Georgia on Environmental Impact Permit (adopted October 15, 1996, replaced by the law adopted in 2007);
- Performance Requirements of EBRD’s Environmental and Social Policy (2008);
- EIB’s environmental and social requirements given in their Environmental and Social Practices Handbook (2007);
- International conventions ratified in Georgia, especially the Aarhus Convention;
- European Union Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council directive 97/11/EC (Council of the European Union, 1985; 1997);
- IFC’s General Environment, Health and Safety Guidelines;
- IFC’s Environment, Health and Safety Guidelines, Railways (2007); and
- IFC’s Stakeholder Engagement (2007) manual.

Tbilisi Railway Bypass Project ESIA has been developed according to the concept project since the main project was not developed. Thus to assess existing Social and Environmental problems and to develop suitable mitigating measures were not possible for the given stage.

Railway construction and operation project elaboration is done according to the FIDIC red book requirements, and after the conceptual project is created in

accordance with them. Tender will define the construction contractor who will prepare the detail design.

For the time being the elaboration of the detail design is almost finalized by the construction contractor. The design is in full compliance with Environmental and Social Action Plan (the ESAP) and the report on Ecological expertise issued by the Ministry of Environment and Natural Resources of Georgia and covers:

- Measures to be undertaken according to the engineering-technical decisions to prevent Tbilisi reservoir contamination;
- Engineering-Technical decisions developed for Tbilisi City water supply mainlines and Natakhtari gravity collector;
- Engineering-Technical decisions for noise propagation and minimization during the Railway construction and Operation phases;
- Engineering-Technical decisions for reservoirs and naturally formed ravines to prevent contamination during the Railway Construction and Operation phases.

#### **Safety Concerns:**

Elaboration of the detail design of the railway line construction is not finalized yet. Solutions for arrangement of mound in Avchala district are being developed accordingly. Arrangement of several corridors is foreseen in the design, in order to minimize the impact caused by fragmentation of the residential area. Measures for prevention of emergencies are also included in the design.

GR uses its best endeavors to ensure safety of the population residing nearby. As for the access roads that might be needed for the property owners in order to use their property and have same living conditions, GR undertakes to provide/construct such access roads. As for the allegations as to why such access roads and alternative communication sources were not determined in the ESIA, we would like to point out that the ESIA has been elaborated on the basis of the Initial Design of the Project and it was not feasible to determine each and every aspect of the Project in full. In the process of resettlement and at this initial stage of the project the GR identifies all such issues and on the later stage shall ensure incorporation of respective design solutions in the Project Detail design.

As a response to the reference to the PR 4 (point 7) of the Environmental and Social Policy of EBRD, which envisages clients (GR) obligation to identify and evaluate the risks and potential impact to the health and safety of the affected community during the design, construction, operation and decommissioning of the project, we would like to point out that the GR is not in violation of this obligation. In this regards through its contractor in environmental issues GAMMA LLC ensures elaboration of respective manuals for the GR as well as the Construction Contractor, providing all

technical standards that should be obeyed by all parties involved in the elaboration of the detail design and assists the GR in fulfillment of the conditions precedents defined by the Ecological Expertise of the Ministry of Environment and Natural Resources.

**Cumulative impacts, deterioration of living conditions and property depreciation**

Population of the adjacent area of the Railway Bypass starting section will be impacted from both, old and new railways. The old Railway line is only destined for passengers and the traffic intensity will be very low. Thus, the risk of the negative Impact on population health is minimal. In addition, for the purposes of minimization of environmental and social risks, noise abating screens shall be arranged that will ensure the mitigation of noise level. In addition It is very important to have followed technical requirements of oil products transportation regime, meaning to have wagons valves and tanks taps maintenance and making them hermetic and maintaining them in a clean condition.

The claim regarding depreciation of the property value and the consequent request of respective property owners regarding compensation of the difference between previous and current market values of their property might be considered unfeasible on this stage of the project implementation. The basis for such argument is that Environmental and Social Policy of the EBRD does not specifically consider obligation to the GR to provide compensation for depreciation of the property value. Considering all the above mentioned solving the issue of reimbursements for depreciation of the property value is in the sole discretion of the court. If the property owners have claims because of depreciation they can apply to the court with respective documents (reports on valuation) evidencing that the Project has caused depreciation of their property and request reimbursement of the difference between the pre-project and after-project value of the real estate.

Against this background we would like to point out that Section 3 of the Civil Code of Georgia (Delictual responsibilities) envisages responsibility of providing respective compensation for the damage caused to the property of other person by intentional or unintentional activities. Considering the abovementioned regulation GR undertakes responsibilities to reimburse the property owner for damage caused by the construction works of the Bypass project or further exploitation of the newly constructed railway line. In this regards GR contemplates to apply to the LEPL Levan Samkharauli Forensics Bureau with a request to conduct expertise of the nearby houses and after that periodically observe the property in order to ensure immediate

identification of the damage that might be caused by the construction or exploitation of the railway line.

**Resettlement Action Plan:**

As you are well aware we have contracted Geographic LLC, which is fully authorized to conduct negotiations and insure provision of information on resettlement process to all property owners affected by the Project. The Geographic LLC is provided with Power of Attorney authorizing them to make offers to the property owners, the content of which are always agreed with the GR in advance.

The standard form of offers always contains main information on the process of resettlement, including: information about the deadline for the responses, legal procedures to be followed if negotiations fail, how their compensation were calculated and the breakdown of such calculations.

In addition GR has ensured installation of post boxes in the offices of local self governance and the head office of the Georgian Railway. In addition under the Contract executed between the Geographic and the Georgian Railway LLC, Geographic has established hot line where each and every property owner could call and lodge complaints/claims regarding resettlement. Since the very beginning of the resettlement GR and Geographic hold progress meeting twice a week in order to discuss the complaints received from the property owners (via hot line or otherwise) and come up to the mutually beneficial decision on each problematic issue.

It also needs to be mentioned that according to the article 21 of the constitution of Georgia and the Georgian Law on expropriation the GR was not obliged to submit offers to the property owners and could exercise directly the right of expropriation and provide the offers with the compensation prices defined by the independent valuation bureau only after the granting of the status of Expropriator. Against this right, for the purposes to minimize the expropriation cases GR made decision to try its best to achieve agreement with the property owners and apply to the Ministry of Economy only in the cases when negotiation with the property owners turned out to be unfeasible. As you might be aware, on the basis of decisions of the court GR have been granted with the rights on expropriation on number of properties but even after that GR has provided the property owners' additional offer regarding the double size land plots and/or compensation of the orphaned lands (up to 30% of the total land) left outside the construction buffer.

In addition Geographic LLC have been instructed by the GR to provide all property owners with full and detailed explanation about the legal procedures that would be

exercised in case of failure to achieve the agreement on sale of the land, including information about issuance of the Order of the Minister of Economy and dates of submission of respective application to the court.

#### **Impact on Drinking water supply**

Railway by-pass project considers engineering-technical decisions for Tbilisi and other reservoirs and underground waters prevention from contamination, among them are:

1. In order to prevent Tbilisi reservoir contamination, the following measures will be taken:
  - Designed bridge on Kvirike ravine will be replaced by the earth mound at the Tunnel 5 exit. Both sides of mound crown will be elevated and rail will pass artificial section. This project decision will practically exclude railway cars tipping in Kvirike ravine in case of emergency and accordingly - Tbilisi reservoir contamination possibility will be excluded as well;
  - A hydro-isolation system will be arranged on Railway land subgrade on Tbilisi Sea whole perimeter to prevent ground water contamination, namely: Geomembrane with a sand lining and Geotextile as the top layer will be arranged under the rails superstructure. Arrangement of concrete ditches (height-0.5m. bottom width-0.4m. top width-1.2m.) is planned on both sides of the railway; this solution shall ensure that the rain water is diverted towards the tunnel. These ditches will also transfer liquids spilled in case of emergencies into the tunnel too.
  - A transit collector is designed in the tunnel, which will be used to transit storm water and emergency spilled liquids in ravine at North-Western portal of 5<sup>th</sup> tunnel. Water will be treated before discharging into the ravine, suitable structures will be designed (sedimentary tank and oil arrester);
  - Waters from “Kvirike” station to South-Eastern direction will be transited with same method and will be discharged so called small ravine. Arrangement of collecting reservoirs is foreseen for emergency spilled liquids deterrence.
  - In accordance with above mentioned engineering decisions, approach to the conceptual project has radically changed and Tbilisi water reservoir contamination risk has minimized.
2. Ditches and emergency spilled liquids collecting reservoirs will be arranged for prevention of pollution of other reservoirs and Natural ravines;
3. A hydro-isolation layer (Geomembrane and Geotextile) together with emergency spilled liquids collecting reservoir shall be arranged in order to

prevent ground water contamination at Varketili agriculture and Gldani Big Lake adjacent territory.

#### **Impact on the Central water pipeline for Tbilisi**

In order to minimize the risk of damaging Tbilisi main water pipelines during the railway by-pass construction phase and thus to mitigate the risk of having problems to supply citizens with drinking water the detail design considers the following measures:

- Tbilisi water pipelines in Avchala will be reallocated on a new route in order to mitigate the risk damage and negative social impact on the population. Decision is agreed with the Georgian Water and Power company and for the time being the project is under elaboration;
- Gravity flow pipe constructed in 30<sup>th</sup> will be crossed by the concrete reinforced bridge, that will ensure proper maintenance and operation of the pipe. The same will cross Jinali tunnel in two points of the designed area (Gldani big lake and adjacent Khevdzmari ravine).

#### **Waste Management issues**

Waste Management Plan for Railway Construction phase is prepared and submitted to the Georgian Environment Protection Ministry.

In accordance with plan, household and nonhazardous wastes will be disposed at Tbilisi household and aggregated materials waste polygon according to the contract signed with Sanitation Service while, hazardous wastes will be transferred to contractor having suitable permit.

#### **Increases in road transport due to the new railway system:**

At the moment the goods from the main freight station are being transported to the city suburbs, since most of the basic warehouses and industrial plants are mainly located in suburbs (especially in the Eastern part). In case of Railway new scheme development goods discharging will be possible as in the Western as Eastern stations. Then it will be distributed among recipients from here. It is believed that this decision will significantly reduce transit intensity in the city.

#### **Problems related to quarrying of aggregate materials:**

Volume of the aggregated materials (sand, gravel) could be defined after the main project has been developed. As it was mentioned the main project is in the process of completion and in the nearest future it will be possible to determine the volume of needed aggregated materials.

Aggregated materials will be taken only from the licensed quarries (issued by the Ministry of Economical and Sustainable Development of Georgia); it will reduce Negative Impact from the Social Environmental point of view.

**Potential impacts on air quality:**

According to the National Laws and International standards for Emissions, distribution modeling and quantitative assessment is carried out taking into account the sensitive districts and meteorological conditions.

For the time being Ministry of Environmental protection and Natural Resources of Georgia has agreed construction camps emissions limits during operation phase.

**Concerns regarding protected areas:**

Railway buffer zone is located in the frame of the Tbilisi National Park and it covers 13.2h area.

GR has submitted the relevant documents to the Ministry of Environmental protection and Natural Resources of Georgia for compensating the damage to be made to the National park.

Ministry of Environmental Protection and Natural Resources of Georgia is considering the exclusion of the given area from the National Park. The amendments to be made to the relevant laws have been developed in order to determine a new area for the National park which will replace the excluded one.

**Selection of project alternatives**

There have been several route alternatives under discussion at the initial state of the Project, including: (i) Karsani-Lilo1 route passing through populated area, (ii) Karsani-lilo1 route passing through the populated area to the north, (iii) Zages-Lilo1 route as well as the alternative route proposed during the public consultation meetings according to which the projected railway line would bypass the Avchala settlements.

Criteria for selection of the projected routes were: Length of the alignment, design gradient, traction ratio, radius of curvatures, weight norm of train, effect on the population and environment, cost of the project etc.

On the basis of the abovementioned criterias the GR have selected Zages – lilo1 (iii) route the one that is being implemented for the time being. As for the alternative route bypassing the Avchala settlements via tunnel, it turned out to be unacceptable from the technical point of view and the cost of the project was not the only reason for such rejection.

**Allegations on violation of the national legislation:**

As you are well aware the conclusion of the state Ecological Expertise issued by the Ministry of Environment and Natural Resources defines conditions precedents that should be met prior to as well as in the process of construction works. In this regards we would like to point out those following conditions precedents have been already fulfilled by the GR:

Following conditions defined by the ecological expertise (22 April, 2010) issued by the Ministry of Environmental protection and Natural Resources of Georgia has been fulfilled and is submitted to the ministry for review and approval:

- Additional engineering and technical decisions to prevent the underground and surface water pollution – paragraph 1;
- Engineering and technical decisions to propagate noise and vibration during construction and operation phases – paragraph 4;
- Relevant compensation mechanism has been defined to be made to the National Park due to the possible damage. Has been submitted the information about the plant species and quantify of them to the Protected Areas Department-paragraph 7;
- Has been defined and submitted to the Protected Areas Department the species and quantity of plants to be used and total area of it to make noise propagation screens on the National Park territory – paragraph 8;
- To prevent Tbilisi Water Reservoir and minimize the risk of having problems to supply citizens with drinking water there has been elaborated engineering and technical decisions - paragraph 9 and paragraph 18;
- Air emissions limit development during the railway construction phase – paragraph 14;
- To exclude the area from the state forest fund located on the Tunnel 1 entrance portal – paragraph 10;
- Optimized information about the species falling in the red list in the buffer zone of the rout – paragraph 11;
- Engineering and technical decisions for domestic and wild animals corridors arrangement along the railway rout – paragraph 15;

Below given documents are under elaboration and will be submitted to the MoE of Georgia not later than April 15, 2011:

- Emergency plans- paragraph 16;

- Additional measures for preventing ravines and rivers from water pollution – paragraph 3;
- Additional measures to minimize risk of negative impact on the population health on the Social and Environmental point of view sensitive areas (Avchala, Gldanula).

Considering all the above mentioned allegations on violation of the Georgian legislation should be considered void.

**Economic Viability:**

The issue of economic viability of the project should not be subject for discussion, as it is out of the scope of the EBRD's environmental and Social Policy and was not supposed to be studied in the ESIA.