

COMPLAINT: AGROINVESTBANK EQUITY INVESTMENT

REQUEST NUMBER: 2018/02

ELIGIBILITY ASSESSMENT REPORT – June 2018

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

For more information about PCM, contact us or visit www.ebrd.com.

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

How to submit a Complaint to the PCM

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


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

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Unless otherwise indicated, capitalised terms used in this report are those set out in the Definitions and Abbreviations incorporated within the PCM Rules of Procedure 2014.

EXECUTIVE SUMMARY

The Project Complaint Mechanism (PCM) received a Complaint in relation to the EBRD Agroinvestbank Equity Investment Project in Tajikistan. The Complaint was submitted by counsel based in London, who is authorised to represent an individual owner of a commercial entity registered in Hong Kong. This owner is in dispute with another commercial entity, registered in Tajikistan. In the context of a commercial transaction between these two entities, Agroinvestbank was involved as a guarantor. The Complainant alleges Project noncompliance with the Bank's 2008 Environmental and Social Policy concerning EBRD's commitments to promote private entrepreneurship, sound banking, sustainable business practices and corporate responsibility, among others. Further, the Complainant alleges EBRD noncompliance with its Public Information Policy, related to insufficient disclosure of project-related information.

In the Complaint, the Complainant requested that the PCM facilitate Problem-solving and if not successful, conduct a Compliance Review.

The PCM Eligibility Assessors find that the Complaint does not satisfy the eligibility criteria as set out in the PCM Rules of Procedure for a Problem-solving Initiative or for a Compliance Review.

I. BACKGROUND

1. The PCM received a Complaint regarding the EBRD's Agroinvestbank Equity Investment Project (the Project) in Tajikistan.¹ The Complaint was submitted by counsel based in London, who is authorised to represent an individual owner of a commercial entity (incorporated in Hong Kong). This owner is in dispute with another commercial entity, registered in Tajikistan. In the context of a commercial transaction between these two entities, Agroinvestbank was involved as a guarantor. The Complaint alleges EBRD noncompliance in relation to its 2008 Environmental and Social Policy as well as its Public Information Policy.
2. In the Complaint, the Complainant requested that the PCM undertake a Problem-solving Initiative, and if not successful, a Compliance Review. The Complaint was registered by the PCM Officer on 15 March 2018 in accordance with paragraphs 11-13 of the PCM Rules of Procedure (RPs), and was subsequently published in the PCM Register pursuant to paragraph 20 of the PCM RPs. On 29 March 2018 Mr Neil Popovic was appointed as Eligibility Assessor to conduct the Eligibility Assessment jointly with the PCM Officer, in accordance with paragraph 22 of the PCM RPs.
3. According to the EBRD Project summary document, "[t]he EBRD is considering acquiring a 25% + 1 share of the ordinary voting shares of Agroinvestbank through acquisition of newly issued shares via capital increase. The proposed transaction will strengthen the capital base and support the growth and development of one of the largest and most successful banks in Tajikistan."
4. The Project was approved by the EBRD Board of Directors on 25 March 2009 and is categorised "FI" [Financial Intermediaries].²

II. STEPS TAKEN IN THE ELIGIBILITY ASSESSMENT

5. The Eligibility Assessors have undertaken a general examination of the Complaint as well as additional information provided by the Complainant, Client and the EBRD Management, to determine if the eligibility criteria as set out in the PCM RPs for a Problem-solving Initiative and/or a Compliance Review are met.
6. A site visit was not considered necessary for the purposes of this Eligibility Assessment as the Assessors deemed it sufficient and appropriate to determine eligibility through a document-based review together with discussions and written communication with the Relevant Parties.
7. The PCM engaged in a number of meetings and phone calls with the Complainant's representative since first receiving their communication on 31 January 2018.

III. SUMMARY OF THE RELEVANT PARTIES' VIEWS

1. Complainant

8. The Complainant, Mr Alois Schonberger (an Austrian national), is the owner of a Super Perfect Investments Limited (Super Perfect). The Complaint was submitted to the PCM by his authorised representative, Suttons Solicitors, a legal consulting firm based in London UK.

¹ Complaint Number 2018/02, available at <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html> and annexed to this report.

² Project Summary Document for the Agroinvestbank Equity Investment, available at: <http://www.ebrd.com/work-with-us/projects/psd/agroinvestbank-equity-investment.html>

9. The Complaint describes the alleged harm caused by the EBRD Project: “Mr Schonberger and the shareholders and employees of Super Perfect have suffered a significant financial loss, because [...] the EBRD has failed to ensure that Agroinvestbank of Tajikistan conducts itself in an acceptable and appropriate manner.”³
10. The Complainant asserts that on 11 February 2013 Super Perfect entered into a contract with a Tajik company, Levakan-M for the purchase of cotton and paid the Tajik company the amount due. Agroinvestbank provided a guarantee for the said contract in respect of Tajik company to fulfil its contractual obligations and deliver the cotton to Super Perfect.
11. The Complaint explains that Agroinvestbank was chosen as guarantor for this commercial transaction given that it was the second largest bank in Tajikistan and also because the EBRD was an active board member of Agroinvestbank at the time of the transaction, this giving to the Complainant a certain level of comfort.
12. According to the Complaint, the Tajik company did not respect the contractual obligations and failed to deliver the cotton or return the money paid by Super Perfect.
13. In his Complaint, the Complainant states that Super Perfect called the bank guarantee, but Agroinvestbank refused to pay the amounts due.
14. The Complaint also explains that in November 2014 arbitration proceedings commenced in Geneva, Switzerland and apparently the arbitration resulted in an award in favour of Super Perfect, but to date the sum was not paid by Agroinvestbank.⁴
15. The Complainant’s desired outcome from a PCM process is stated in the Complaint as follows:

*[...] [T]he suspension or conditioning of all loans to Tajikistan until the sums owing have been paid over in accordance with Article 8 of the Agreement Establishing the EBRD. Such a request is reasonable in all the circumstances and in accordance with the principles of public international law which principles bind the EBRD.*⁵

2. Bank Management

16. EBRD Management submitted to the PCM its written response to the Complaint on 1 May 2018.
17. In its response, Management states that EBRD acquired 25%+1 shares in Agroinvestbank in October 2009, following the signing of the shareholders agreement with the largest individual shareholders of the EBRD on 12 August 2009.
18. EBRD Management explains that towards the end of 2010 its Client, Agroinvestbank, began to experience financial difficulties as a result of growing non-performing loans and in response to that, the EBRD undertook efforts to provide crisis management support to Agroinvestbank.
19. The response explains that the EBRD’s direct involvement in Agroinvestbank diminished in mid-2012. From that time on the EBRD has been monitoring the activity of its Client based on limited financial reports and meetings with the management of Agroinvestbank. All the given circumstances presented limited opportunities for the EBRD to influence the governance of the Agroinvestbank.

³ Complaint.

⁴ *Ibid.*

⁵ *Ibid.*

20. Management also explains that during this period of time, EBRD has been in continuous dialogue with the Government of Tajikistan and international development finance institutions present in Tajikistan with the view to developing measures to strengthen the financial sector in the country.
21. In response to the Complaint, the EBRD Management deems that it complied with the requirements to carry out adequate due diligence of the Project and to monitor the Client's environmental and social commitments arising under the relevant provisions of the Environmental and Social Policy. Management further deems that no environmental or social harm has been claimed by the Complainant as caused by the Project.
22. In response to the allegations of non-compliance concerning disclosure of project-related information, Management considers that the EBRD has acted in accordance with its Public Information Policy.⁶

3. Client

23. Agroinvestbank is the second largest commercial bank in Tajikistan, focused on providing financial services to micro-, small- and medium-sized enterprises and to the agricultural sector.⁷
24. The Client submitted its written response to the PCM in relation to the Complaint on 17 May 2018.
25. In its response to the Complaint, the Client explains that Agroinvestbank has never recognized itself as part of the presented dispute, and sees it as an economic dispute between the two said private companies. The Client also asserts that there is no act of reconciliation for the previous contracts signed between the two private companies.
26. In addition, the Client's response states that the Swiss arbitration had no relevant competence to pronounce a decision under the dispute, since Agroinvestbank has sufficient evidence to prove that the SWIFT bank guarantee was not properly issued and is not recorded in the Agroinvestbank system; therefore, they consider it invalid.⁸

IV. DETERMINATION OF ELIGIBILITY

27. The Eligibility Assessors have examined the Complaint to determine whether the relevant eligibility criteria are met under paragraphs 24-28 of the PCM RPs, and considered the response of EBRD Management and the Client to the Complaint in accordance with paragraph 29 of the PCM RPs. PCM has also received additional information from the Complainant as well as Bank staff (in particular, the Banking and Environment & Sustainability Departments) since the Complaint was filed.
28. Pursuant to paragraph 24 of the PCM RPs, the Eligibility Assessors do not judge the merits of the allegations in the Complaint and do not make a judgement regarding the truthfulness or correctness of the Complaint in making their determination on eligibility.
29. The Eligibility Assessors have determined that the criteria outlined in paragraph 25 of the PCM RPs have been met:

⁶ Bank Management response, dated 1 May 2018, annexed to this report.

⁷ Project summary document available at: <http://www.ebrd.com/work-with-us/projects/psd/agroinvestbank-equity-investment.html>.

⁸ Client response, dated 17 May 2018, annexed to this report.

- The Complainant has indicated in his Complaint that he requests that the PCM undertake a Problem-solving Initiative and if not successful, a Compliance Review.
- The Complainant has indicated the outcomes he seeks as a result of use of the PCM process:

[...] [T]he suspension or conditioning of all loans to Tajikistan until the sums owing have been paid over in accordance with Article 8 of the Agreement Establishing the EBRD. Such a request is reasonable in all the circumstances and in accordance with the principles of public international law which principles bind the EBRD.⁹

- The Complainant has submitted correspondence exchanged with the Client and the Bank relating to his Complaint.
 - The Complainant has provided details of the Relevant EBRD Policy at issue in the Complaint, namely the Bank's 2008 Environmental and Social Policy concerning EBRD's commitments to promote private entrepreneurship, sound banking, sustainable business practices and corporate responsibility. In addition, the Complainant alleges EBRD noncompliance with its Public Information Policy, related to insufficient disclosure of project-related information.
30. Pursuant to paragraph 28 of the PCM RPs, the Eligibility Assessors do not consider that the Complaint was filed fraudulently or for a frivolous or malicious purpose, or that its primary purpose is to seek competitive advantage through the disclosure of information or through delaying the Project.

1. Determination of Eligibility for a Problem-solving Initiative

31. According to paragraph 24 (a) i) of the PCM RPs, to be held eligible for a Problem-solving Initiative, the Complaint must be filed by an individual or individuals located in an impacted area, or who has or have an economic interest including social and cultural interests, in an impacted area. The Complaint is submitted by an individual, who alleges harm to his privately-owned legal entity. The Eligibility Assessors consider this requirement to be satisfied.
32. Further, according to paragraph 24 (a) ii) of the PCM RPs, the Complaint must raise issues covered by a Relevant Policy of the EBRD.
33. The Complaint asserts that the concerns of the Complainant are contemplated by the 2008 Environmental and Social Policy, specifically introductory provisions of the Policy and specific provisions in Performance Requirement 9, Financial Intermediaries. The Eligibility Assessors consider that the allegations raised in the Complaint relating to the financial loss experienced by the Complainant are not explicitly connected with the environmental and social safeguards articulated in the Policy.
34. First, with limited exceptions not applicable here, the Eligibility Assessors consider that the introductory provisions of the Policy do not impose specific compliance obligations on the Bank, but rather provide context and interpretive guidance for the Performance Requirements set forth elsewhere in the Policy. The Performance Requirements, in turn, address environmental and social issues, including Environmental and Social Appraisal and Management (PR 1), Labour and Working Conditions (PR 2), Pollution Prevention and

⁹ Complaint.

Abatement (PR 3), Community Health, Safety and Security (PR 4), Land Acquisition, Involuntary Resettlement and Economic Displacement (PR 5), Biodiversity Conservation and Sustainable Management of Living Natural Resources (PR 6), Indigenous Peoples (PR 7), Cultural Heritage (PR 8), Financial Intermediaries (PR 9), and Information Disclosure and Stakeholder Engagement (PR 10). The Performance Requirements do not address commercial disputes between the Bank's clients and their customers, nor do they address compliance with the Agreement Establishing the EBRD.

35. As noted, the Complaint alleges noncompliance with Performance Requirement 9, specifically paragraphs 2, 9 and 24. Paragraph 2 provides that the EBRD has “an interest in assessing and monitoring whether the environmental and social risks associated with the FI’s business activities are adequately addressed by the FI.” As Complainant notes, the “exact modalities” of EBRD oversight will depend on a number of factors, including “the business environment in the country”, but that does not mean the oversight goes beyond environmental and social risks. Other kinds of risks, while they may be significant and/or important, are not within the purview of the Policy.
36. Along the same lines, paragraph 9 of Performance Requirement 9 requires the FI to “adopt and implement environmental and social due diligence procedures...commensurate with the level of environmental and social risks associated with its business activities and type of project with the EBRD.” As with paragraph 2, paragraph 9 applies to the environmental and social risks covered by the Policy; it does not expand the scope of the Policy to include other kinds of risks.
37. Finally, paragraph 24 of Performance Requirement 9 provides for the Bank to encourage FIs to “follow best practices in sustainability management”, including that FIs should consider “joining appropriate existing international initiatives that promote best practices in the financial sector such as the Equator Principles (EPs), the United Nations Environment Programme Finance Initiative (UNEP FI), and the Principles for Responsible Investment (PRI).” Again, paragraph 9 relates to the management of environmental and social risks of the sort addressed in other PRs; it does not expand the Policy to cover other types of risks.
38. The Complaint further alleges Project noncompliance with the EBRD’s Public Information Policy; in particular, the Complaint refers to insufficient Project-related information in the public domain.
39. The Eligibility Assessors have taken note of the Complainant’s letter to EBRD, dated December 2017, requesting specific information concerning the Project. The Assessors have also taken note of the January 2018 letter of appeal to the EBRD Secretary General regarding the alleged lack of disclosure. The Assessors have considered the response of the Secretary General, who determined that the Bank’s earlier decision not to disclose the information was consistent with the requirements of the Public Information Policy, in particular as such information is considered confidential.
40. In the circumstances of the numerous exchanges between the Bank and the Complainant regarding information disclosure, the Eligibility Assessors consider they have a limited role in questioning the determinations made regarding confidentiality, both in the Complainant’s initial request for information and in the context of the appeal to the Secretary General.
41. The Eligibility Assessors note that the EBRD’s Public Information Policy provides the Bank “will not disclose” certain categories of information, including:

Financial, business or proprietary information received by the Bank in the analysis or negotiation of any investment authorised under Article 11 of the Agreement Establishing the Bank, any treasury operation or any donor funded or technical assistance project, unless permission is given by the entity or entities concerned to release this information.

Public Information Policy, § E.1.8. Category 1.8 includes

any information received from any private or state owned enterprise or other sub-sovereign entity or their representatives or any external consultant(s) in the analysis of any project considered or financed by the Bank or in the negotiation of any investment, loan or other operation. Likewise, the Bank does not disclose legal documentation, including all contractual documentation relating to a project, operation or technical assistance project, or correspondence pertaining to Bank-financed projects (whether financed by donors in whole or in part), including documents or information relating to negotiations between the Bank and its clients, donors, co-financiers and other contractual counter-parties relating to a project.

42. The PCM Problem-solving function has the objective of restoring a dialogue between a Complainant and a Client to resolve the issues underlying a Complaint without attributing blame or fault. In the present case, the Eligibility Assessors have considered whether the PCM's involvement may assist in resolving the present dispute, or is likely to have a positive result taking into account previous or ongoing efforts to resolve the issues.
43. The Eligibility Assessors have considered the fact that the Complainant initiated arbitration proceedings against Agroinvestbank in Switzerland for failure to recognise the bank's guarantee. The PCM understands that there was a decision issued by that tribunal in that regard, and that Agroinvestbank is currently contesting that decision.
44. To be found eligible for a Problem-solving Initiative, each party should indicate their willingness to engage in a dialogue process facilitated by the PCM. To date, the Client has not indicated a willingness to engage in a Problem-solving Initiative to discuss the matters outlined in the Complaint with the Complainant.
45. Based on the above considerations, the Eligibility Assessors do not consider there to be a satisfactory link between the alleged harm and a Relevant EBRD Policy. Further, they conclude that a PCM-facilitated Problem-solving Initiative is unlikely to assist in resolving the dispute or have a positive result. Accordingly, the Assessors consider the Complaint ineligible for a Problem-solving Initiative.

2. Determination of Eligibility for a Compliance Review

46. According to paragraph 24 (b) of the PCM RPs, to be held eligible for a Compliance Review, the Complaint must be filed within 24 months after the date on which the Bank ceased to participate in the Project. The Eligibility Assessors consider that this condition is met, as the EBRD Project is still active.
47. Further, the Eligibility Assessors must consider paragraph 27 of the PCM RPs, which provides:

Where the Complaint raises issues appropriate for a Compliance Review, the Eligibility Assessors will, in their determination of eligibility, also consider whether the Complaint relates to: (a) actions or inactions that are the responsibility of the Bank; (b) more than a minor technical violation of a Relevant EBRD Policy unless such technical violation is alleged to have caused harm; (c) a failure of the Bank to monitor Client commitments pursuant to a Relevant EBRD Policy.

48. The Eligibility Assessors note that the Complaint is underlined by the dispute between two commercial entities, with Agroinvestbank acting as a guarantor in a commercial transaction between the two. In these circumstances, it is difficult to ascertain how the Bank's responsibilities under the Environmental and Social Policy in regards to the transaction bear on the outcome of the transaction for the Complainant.
49. Concerning the second condition, as discussed above, the Eligibility Assessors do not consider there to be a sufficient nexus between the harm alleged and a Relevant EBRD Policy.
50. Finally, and noting the lack of connection with the Environmental and Social Policy, it cannot be the case that the failure to monitor Client environmental and social commitments would in any way have prevented or impacted the financial loss experienced by the Complainant.
51. In relation to the allegations of the Bank's noncompliance with the Public Information Policy, as described above, the Eligibility Assessors do not consider it their role to question the determinations made by Bank staff and the EBRD Secretary General.
52. In consideration of the above findings, the Eligibility Assessors conclude that the Complaint is ineligible for a Compliance Review under the PCM RPs.

V. CONCLUSION

53. On the basis of the information set out above, the Eligibility Assessors have found that the Complaint does not meet the eligibility criteria set out in the PCM RPs for a Problem-solving Initiative or a Compliance Review.

ANNEXES

Annex 1: Complaint

Annex 2: Bank Management Response

Annex 3: Client Response

Annex 1: Complaint

SUTTONS

SOLICITORS

STEPHEN D. SUTTON

Assistant Solicitors:

ISABEL M. WILLIAMS
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OUR REF 5/EKB/S088
YOUR REF

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International: [REDACTED]

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31st January 2018

[REDACTED]
PCM Officer
Project Complaint Mechanism
EBRD
One Exchange Square
London, EC2A 2JN

BY EMAIL AND BY POST

pcm@ebrd.com

Dear [REDACTED],

OUR CLIENT: MR ALOIS SCHONBERGER

RE: PROJECT NO. 39390 / AGROINVESTBANK TAJIKISTAN

We wish to submit a Complaint regarding the EBRD's equity investment in Agroinvestbank ("AIB") (Project No 39390) ("the Project") on behalf of our client Mr Alois Schonberger (an Austrian national). Mr Schonberger is the owner of a company called Super Perfect Investments Limited ("Super Perfect"). We are Mr Schonberger's authorised representative. Please see the enclosed letter dated 31st January 2018 ("**Enclosure 1**") from Mr Schonberger confirming our appointment as his representative.

As a direct result of AIB's conduct Mr Schonberger and the shareholders and employees of Super Perfect have suffered a significant financial loss, details of which are set out below in paragraph 1. The EBRD has failed to ensure that AIB conducts itself in an acceptable and appropriate manner.

According to the limited information available on the EBRD's website the EBRD's equity investment in AIB (Project No 39390) was intended to ***"strengthen the capital base and support the growth and development of one of the largest and most successful banks in Tajikistan"***. The Project was expected to have high transition impact and was also intended to enhance AIB's reputation and the aim was to

"Provide guidance, institution building and set the standards of practice for local banks through improved corporate governance and business conduct".

The Project document ("Enclosure 2") goes on to state

"Agroinvestbank has been a recipient of Technical Cooperation under the Tajik Micro and Small Enterprise and Financing Facility...It is envisaged that the equity investment will be supported by comprehensive Technical Cooperation in the amount of USD 1.5 million for Institutional Building. The Technical Cooperation assignment will focus on corporate governance, strategic review and organisational restructuring, business development, HR (including gender equality), operations review and risk management; the main objective being the development of Agroinvestbank into a modern, efficient bank."

It is understood that technical cooperation was provided by the EBRD (pursuant to the Project) to, inter alia, improve corporate governance at AIB.

The PCM is requested to initiate a Problem Solving Initiative to assist in the settlement of the outstanding dispute (described in detail below in paragraph 1) between AIB and Super Perfect as it is mandated to do by the PCM Rules of Procedure. If a Problem Solving Initiative will not be successful, the PCM is requested to conduct a Compliance Review to determine whether or not the EBRD has complied with the relevant EBRD policies in respect of its equity investment in AIB.

1. Background

Super Perfect Investments Limited (a company incorporated in Hong Kong) entered into a contract with [REDACTED] (a Tajik company) for the purchase of [REDACTED] of cotton on 11th February 2013 and paid [REDACTED]. The said contract was brokered by the [REDACTED] following meetings with him on 6th December 2012 and 6th February 2013 in Tajikistan. At the suggestion of [REDACTED] the contract provided that a bank owned by the

Government of Tajikistan, Agroinvestbank would guarantee up to [REDACTED] in respect of [REDACTED] contractual obligations to deliver the cotton. [REDACTED] advised that AIB would be an excellent choice as guarantor given that it is the second largest bank in Tajikistan. He also advised that the EBRD was an active board member of AIB and a 25% shareholder in AIB. It was only due to the fact that the EBRD was actively involved in running AIB that Super Perfect agreed to proceed with the transaction. [REDACTED] breached its contractual obligations and failed to deliver the cotton or return the money paid.

The bank guarantees were called but AIB has steadfastly refused to pay the amounts due under the aforementioned guarantees. Arbitration proceedings were commenced on 6th November 2014 in Geneva, Switzerland pursuant to the arbitration clause in the bank guarantees. AIB initially refused to participate in those proceedings. On 17th July 2017 the Swiss Arbitration Tribunal issued the enclosed award ("**Enclosure 3**") in favour of Super Perfect. As at 31st January 2018 the sum of [REDACTED] is outstanding. AIB has failed to pay either all or any part of the sum due to Super Perfect notwithstanding that the enclosed formal request for payment dated 20th July 2017 has been made ("**Enclosure 4**").

[REDACTED] [REDACTED]. The actions of [REDACTED] are to be attributed to the Government of Tajikistan (see Articles 5 and 8 of the Articles on Responsibility of States for International Wrongful Acts).

2. The EBRD's Country Strategy for Tajikistan

The EBRD's Country Strategy for Tajikistan emphasises, inter alia, the need to expand private enterprise in Tajikistan and also to improve the business environment in that country. In addition, there are numerous references in the Country Strategy to the objective of developing agribusiness. Cotton is the largest single export from Tajikistan. The overarching objective referred to in the Country Strategy is to improve corporate governance in that country.

3. Super Perfect's attempts to resolve these issues with AIB

Before approaching the EBRD our client has made several attempts to solve these issues by liaising with [REDACTED] and AIB. Those efforts were rebuffed and, as a result, arbitration proceedings were initiated in Switzerland.

Please see the enclosed letters addressed to AIB dated 8th July 2015 and 24th November 2017 ("Enclosure 5") along with the abovementioned letter requesting payment dated 20th July 2017 ("Enclosure 4"). We also refer to the Swiss arbitration proceedings. The documents are voluminous and can be supplied on request. No substantive response has been received to the attached letters from AIB nor has any payment been made.

4. Violation of the EBRD's Environmental and Social Policy

██████████ brokered the deal with Super Perfect ██████████
██████████ We attempted to bring the issues referred to above on numerous occasions to the EBRD's attention given its equity investment in AIB and the Technical Cooperation it is providing to, inter alia, improve corporate governance at AIB. In particular we note the provisions of the Environmental and Social Policy (May 2008) ("the Policy") where it is stated that:

- According to paragraph A1 the purpose of the Policy is to "promote private entrepreneurship" pursuant to the Agreement Establishing the EBRD (see Article 2.1 (vii));
- It is also emphasised in paragraph A1 how important the need for "sound banking" is;
- The EBRD commits at paragraph B3 of the aforementioned Policy to ensure that the projects it finances are "*in compliance with applicable regulatory requirements and good international practice*";
- Paragraph B7 of the aforementioned Policy commits the EBRD to projects being run bearing in mind "*the principles of corporate transparency [and] accountability*" and yet it has refused to disclose any information or documentation regarding its equity investment in AIB other than the enclosed three-page Project Summary document dated 20th February 2009 ("Enclosure 2");
- At paragraph B9 of the aforementioned Policy the EBRD commits to "*actively seek, through its investments, to contribute to the effective implementation of relevant principles and rules of international law related to corporate responsibility*". Specific reference is made to the OECD Guidelines for Multinational Enterprises (see paragraph 6 below);

- At paragraph B9 it is also stated that *"the EBRD will not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to...human rights"*.
- At Paragraph B11 of the aforementioned Policy the EBRD commits to *"promoting sustainable business practices and corporate responsibility"* through its technical cooperation activities;
- The EBRD requires companies such as AIB to adhere to the OECD Guidelines for Multinational Enterprises which Guidelines are intended to promote responsible business practices (see further paragraph 6 below);
- The EBRD's policy regarding corporate governance and banks states

"..good corporate governance at banks is particularly important because they are the most significant (and in some cases only) providers of credit and difficulties in their operations could disrupt the entire economy. In turn, this circumstance puts banks in a unique position to influence governance practices of, their corporate borrowers, thereby reducing risk in their own operations and becoming promoters of better corporate governance practices for all other companies."

- At paragraph C3 of the Policy the EBRD is required to monitor the performance of projects. The purpose of monitoring is to (a), inter alia, *"ensure that the applicable standards...are being substantially met"* and (b) *"...to keep track of the ongoing...social impacts associated with investments..."*.
- At paragraph C14 it is stipulated that all EBRD financed projects are to be subject to an appraisal to determine if financing should be provided to a particular project. In particular the EBRD's project appraisal is to include *"the assessment of financial and reputational risks"*. C14 goes on to state that *"the appraisal will ascertain whether activities to be supported by EBRD finance are capable of being implemented in accordance with this Policy."*

- At C15 it is stated that the EBRD's appraisal will include consideration of "*the capacity and commitment of the client to address [social impacts] and issues in accordance with this Policy*".
- At C24 the EBRD is mandated to "*conduct due diligence on the FI and its portfolio to assess (i) the FI's existing environmental and social policies and procedures vis-à-vis the bank's PR9 and its capacity to implement them and (ii) environmental and social issues associated with FI's existing and likely future portfolio*".
- Paragraph C35 states that monitoring "*is carried out by both the client and the [EBRD]. The extent of the monitoring will be commensurate with the project's issues, impacts and compliance requirements, and with the ability of the client...to adequately monitor and manage these issues and impacts*". C35 goes on to provide that the EBRD is to implement a monitoring programme in conjunction with the client.
- At C37 it is stated that the EBRD is able to take any action it deems appropriate if the client fails to comply with its commitments.

It is evident that numerous provisions of the EBRD's Environmental and Social Policy have been breached by AIB including, in particular, those cited above. The EBRD continues to have an equity investment in AIB and yet notwithstanding the matters that have been brought to the EBRD's attention by this firm on behalf of Mr Schonberger no efforts appear to have been made to either investigate AIB's conduct or indeed sanction AIB for its somewhat unhelpful approach to "sound banking" as extolled in paragraph A1 of the Policy. There has also been a failure on the part of the EBRD to properly monitor the actions of its joint venture partner, AIB.

Elsewhere on the EBRD's website reference is made to the EBRD helping its clients to "*improve corporate governance by supporting efficient operations, better risk management, and increase the accountability and transparency*". Regrettably this does not appear to have happened in respect of Project 39390.

Not only is it apparent that the EBRD has failed to comply with each and every one of the aforementioned policies there has also been a lack of disclosure, inadequate consultation, appraisal and monitoring of Project Number 39390.

5. Performance Requirement Number 9 ("PR 9")

The obligations of AIB are dealt with, inter alia, by reference to PR 9 which governs the responsibility of financial intermediaries. Paragraph 2 of PR 9 requires the EBRD to assess and monitor whether the *"social risks associated with the FI's business activities are adequately addressed by the FI"*. The modalities of the EBRD oversight is according to PR 9 dependent, inter alia, on the *"business environment of the country"*. It would no doubt have been clear to the EBRD that the business environment in Tajikistan and in particular within AIB was both precarious and unconventional at the time the equity investment was made. The EBRD was therefore on notice that an enhanced oversight role should have been adopted by the EBRD in relation to this project. The enclosed extract from the IMF's Financial System Stability Assessment dated 15th May 2015 ("Enclosure 6") evidences the difficulties that the EBRD were facing when investing in AIB.

Paragraph 9 of PR 9 requires the FI to *"adopt and implement...social due diligence and monitoring procedures...commensurate with...[the] social risks associated with its business activities. These Procedures will be agreed with the EBRD"*.

Paragraph 24 of PR 9 requires AIB to *"follow best practices in sustainability management in their entire lending and investment operations"*. PR 9 also encourages Financial Intermediaries to join existing international initiatives that promote best practices in the financial sector including the Equator Principles and the Principles for Responsible Investment ("PRI"). The Equator Principles comprises an agreement to assess and manage environmental and social risks applying internationally accepted standards and international laws and regulations. Environmental and social risks include human rights issues. The PRI comprises 6 principles based on a notion that environmental, social and governance issues can affect the performance of investment portfolios.

It is apparent that neither the EBRD or AIB have complied with either the Equator Principles, the Principles for Responsible Investment or indeed many of the provisions of PR9 of the Policy insofar as Project Number 39390 is concerned.

6. OECD Guidelines for Multinational Enterprises ("the Guidelines")

These Guidelines are incorporated in the EBRD's Environmental and Social policy (May 2008) and constitute principles and standards for responsible business conduct. The Preface to the Guidelines states that the aim of the Guidelines

"is to encourage positive contributions that multinational enterprises can make to make economic, environmental, social progress...".

The Guidelines establish principles covering a broad range of issues in business ethics. The Guidelines were designed to prevent misunderstanding and build an atmosphere of confidence and predictability between business, labour, government and society as a whole.

The Guidelines incorporate the OECD Declaration on International Investment and Multinational Enterprises ("the Declaration"). The Declaration promotes a balanced approach for governments' treatment of foreign direct investment.

The Guidelines recommend disclosure on all material matters regarding enterprise such as its performance and ownership. They are also intended to combat bribery and passive and active corruption. For the avoidance of any doubt it is not the intention of the Complainant to raise allegations of fraud or corruption in this Complaint.

As is set out in this Complaint at paragraph 8 below these issues have been raised with the EBRD on numerous occasions but the EBRD has refused to investigate matters or enter into any substantive correspondence with this firm or our client. In short the EBRD has "pulled down the shutters" and refused to enter in to a dialogue with either Mr Schonberger, Super Perfect or this firm. It has also refused to disclose any information or documentation regarding its investment in AIB.

What does the EBRD's commitment to comply with the OECD Guidelines for Multinational Enterprises really mean? In what way has the EBRD implemented those commitments insofar as AIB is concerned given AIB's refusal to honour both the bank guarantees and the subsequent arbitration Award issued more than 7 months ago by the Swiss Arbitration Tribunal?

7. [REDACTED]

There is also the somewhat uncomfortable issue of [REDACTED] involvement in brokering the initial contract whilst [REDACTED], and, of course [REDACTED] [REDACTED] he is the individual at AIB that directed AIB to renege on its obligations vis-à-vis both the bank guarantees and the Swiss arbitration award.

All of these factors point to [REDACTED] clear conflict of interest. Notwithstanding the serious issues that have been raised in this Complaint and in our previous correspondence the EBRD has taken no steps that we are aware of to investigate and deal with these issues even though there is a requirement on the EBRD's part and on the part of AIB (not to mention the Government of Tajikistan) to comply with OECD Guidelines and the EBRD's own Policy.

8. The Agreement Establishing the EBRD

Whilst we are aware of the fact that somewhat oddly the remit of the PCM does not extend to a review of whether the EBRD and AIB have complied with the Agreement Establishing the EBRD nevertheless we refer to Article 2 of the Agreement Establishing the EBRD.

Article 2 (i) states

"To promote, through private and other interested investors, the establishment, improvement and expansion of productive, competitive and private sector activity, in particular small and medium sized enterprises."

(ii)

"To mobilise domestic and foreign capital and experienced management to the end described in (i)"

Article 8 is also relevant where it is stated

"In cases where a member might be implementing policies which are inconsistent with Article 1 of this Agreement, or in exceptional circumstances, the Board of Directors shall consider whether access by a member to Bank resources should be suspended or otherwise modified and may make recommendations accordingly for the Board of Governors."

It is submitted that the aforementioned Articles when read in conjunction with the factual matrix set out above require the Board to either suspend further loans to Tajikistan or at the very least condition those loans in order to ensure that the EBRD is not in breach of the Agreement Establishing the EBRD and / or generally accepted principles of public international law which principles bind the EBRD (see in particular paragraph B9 of the Policy).

9. Efforts to communicate Mr Schonberger's concerns to the EBRD

Rigorous efforts have been made to engage in a dialogue with the EBRD regarding the abovementioned issues. The EBRD's reaction to our approach has been both unprofessional and discourteous. The EBRD was unwilling to meet with representatives of Mr Schonberger for over a year. Mr Sutton also offered to travel to Kiev to meet with the EBRD representative responsible for Project Number 39390, but that offer was rejected. We enclose a copy of the following communications evidencing our attempts to engage in a dialogue with the EBRD:-

1. Email exchanges between Suttons Solicitors and [REDACTED] and [REDACTED] of the EBRD between September and October 2016 ("Enclosure 7");
2. Telephone attendance notes recording Mr Sutton's attendance on [REDACTED] on 5th October 2016 and 31st August 2017 ("Enclosure 8");
3. Email exchanges between Suttons Solicitors and [REDACTED] and [REDACTED] the EBRD between August 2017 and October 2017 ("Enclosure 9");
4. Attendance note of meeting with [REDACTED] and [REDACTED] in London on 19th October 2017 ("Enclosure 10");

10. The EBRD's Public Information Policy

Mr Schonberger lacks information about the Project, information about how to communicate with those at the EBRD responsible for the Project and general information about the implementation of the Project. We enclose a copy of the following correspondence:-

1. Our letters dated 5th and 8th December 2017 addressed to the office of the Secretary General ("Enclosure 11");
2. The Secretary General's email dated 20th December 2017 ("Enclosure 12");
3. Our response dated 23rd January 2018 ("Enclosure 13").

The EBRD has refused to supply any documents or further information in respect of its equity investment in AIB notwithstanding its commitment to transparency and accountability and the principles enshrined in the OECD Guidelines referred to at paragraph 6 above.

Surprisingly the EBRD has not only refused to supply any information in respect of its investment (and directorship) in AIB it has also refused to respond to perfectly straightforward generic questions such as "what is a social risk" (paragraph 2 of PR 9) and or "what is a social business practice" (paragraph 3 of PR 9). We also enquired whether the equity investment in Project Number 39390 is to be characterised as "project finance" but the EBRD declined to answer this perfectly reasonable enquiry.

There is a presumption on the part of the EBRD that information requested is to be made available. The PIP policy states that the mandate of the EBRD (Article 1) is transparency and accountability. These principles are fundamental to fulfilling the EBRD's mandate and strengthening public trust in the EBRD. We are of the opinion that the EBRD is in breach of its Public Information Policy.

In addition, Article E 1.8 of the PIP states that if information that is considered confidential by the EBRD is requested then that information will not be supplied unless permission is given by the entity concerned, in this case AIB. Has such an approach been made by the EBRD to AIB and if so what was AIB's response? If no approach was made, we would like to know why, and we would respectfully request that AIB be approached for permission to disclose the information and documentation requested.

11. Result Mr Schonberger hopes to achieve by submitting this complaint to the PCM

Given the events that have transpired during the course of the past two years our client requires the suspension or conditioning of all loans to Tajikistan until the sums owing have been paid over in accordance with Article 8 of the Agreement Establishing the EBRD. Such a request is reasonable in all the circumstances and in accordance with the principles of public international law which principles bind the EBRD.

In this regard we refer to the enclosed World Bank Operational Policy 7.40 ("Enclosure 14") which deals with disputes over defaults on external debt, expropriation and breach of contract. It is stated therein that

"When there are disputes over expropriations that, in the opinion of the Bank, the member country is not making reasonable efforts to settle and that are substantially harming the country's international credit standing, the Bank considers whether to continue making new loans or guarantees to the member country. Further the Bank

may decide not to appraise proposed projects / programs in such a country unless it has good grounds for believing that the obstacles to lending will soon be removed."

It is unclear whether the EBRD has a policy on expropriation although it implicitly does as it is bound by the principles of public international law pursuant to the Agreement Establishing the EBRD. Public international law provides that property expropriated from foreign nationals should be compensated "promptly, adequately and effectively" (the so called Hull Rule).

12. The responsibilities of the EBRD as a shareholder in AIB

The directors of a company are responsible for acting in the best interests of a company for the benefit of shareholders. Shareholders in turn empower directors to lead the company in a fiduciary capacity whilst maintaining a degree of decision making and control. The EBRD had a 25% plus 1 shareholding in AIB (subsequently diluted). Clearly the overriding purpose of that equity investment was to ensure that AIB adopted good governance practices. We understand that the EBRD was also represented at Board level when the guarantees presently under discussion were issued by AIB. The EBRD's ownership of shares in AIB carries with it certain responsibilities over and above those responsibilities that the EBRD already has in its unique capacity as a development bank. Institutional shareholders such as the EBRD play a significant role in the corporate governance of companies that it invests in. The EBRD's significant equity investment in AIB carries with it the power to implement good corporate governance. The EBRD as an institutional shareholder has a responsibility to exercise its ownership rights and play a role in ensuring good corporate governance. This it has conspicuously failed to do, at least in the present circumstances.

13. Conclusion

It is clear from publicly available documents and information that the EBRD was on notice that AIB was a problematic bank (see, for example, the IMF's Financial System Stability Assessment dated 15th May 2015, Enclosure 6). It is also apparent from the only information that is available on the EBRD's website that the *raison d'être* for the EBRD entering into an equity investment in AIB was to assist a troubled bank. It is readily apparent that the EBRD did not properly appraise or monitor the performance of this project as is required by paragraph C3 of the Policy.

The EBRD states that it *"will not knowingly finance, directly or indirectly, projects involving the following (a) the production of or trade in any activity deemed illegal under host country*

*(that is national) laws or regulations or international conventions and agreements*¹. The EBRD should not have financed this Project (or at the very least should have taken remedial action once the issues referred to above came to light) because the actions of its equity investment partner AIB violate the basic principles of public international law and are prohibited by the contents of Appendix 2, paragraph A.

The EBRD has actively (or possibly passively) condoned inappropriate courses of action taken by AIB. The EBRD has assumed the duty of ensuring the compliance of AIB with the EBRD's Environmental and Social Policy.

14. Desired Outcomes

The Complainant hereby requests that the EBRD Project Complaint Mechanism experts perform both a Compliance Review in respect of the relevant EBRD policies, namely the Environmental and Social Policy and the Public Information Policy as well as a Problem Solving Initiative. We request that the Problem Solving Initiative be carried out initially followed by a Compliance Review in the event that the Problem Solving Initiative does not resolve the issues complained of in this Complaint.

In order to ensure the possibility of future foreign investment in Tajikistan we also expect the project sponsor (AIB) to pay the monies it owes [REDACTED] promptly as is required by public international law.

Please do not hesitate to contact Stephen Sutton or Emilie Bladon of this firm should you require any further information or documentation.

We look forward to hearing from you.

Yours faithfully

SUTTONS SOLICITORS

cc. [REDACTED]
President of the EBRD

¹ EBRD Social and Environmental Policy, Appendix 2

cc. [REDACTED]
EBRD Austrian Executive Director

cc. [REDACTED]
Chair of the EBRD Audit Committee

cc. [REDACTED]
Vice Chair of the EBRD Audit Committee

cc. [REDACTED]
EBRD Audit Committee

cc. [REDACTED]
EBRD Audit Committee

cc. [REDACTED]
EBRD Audit Committee

cc. [REDACTED]
EBRD Audit Committee

cc. [REDACTED]
EBRD Alternate Director for USA

cc. Bankwatch

Annex 2: Bank Management Response

1. Project background and chronology

EBRD acquired 25%+1 shares in Agroinvestbank (“AIB”) in October 2009 (the “Project”), following signing of the shareholders agreement with the largest individual shareholders of the bank on 12 August 2009. The Project was approved by the Board of Directors of EBRD on 24 March 2009¹⁰, following four years of cooperation of AIB with EBRD under the EBRD’s Trade Facilitation and small business financing¹¹ programmes. AIB at that time was a leading privately owned bank with over 1,200 individual shareholders, the six largest shareholders held 79% of the total shares of the bank.

The Project was approved in compliance with all relevant EBRD policies and procedures and was consistent with the EBRD’s country strategy for Tajikistan and priorities for the country. The purpose of the Project was to support AIB’s growth and development through strengthening of the AIB’s equity base and facilitating business operations. EBRD invested USD 11.5 million equivalent in Tajik Somoni and arranged USD 1.5 million in technical cooperation funds to finance AIB’s Institution Building Programme (“IBP”), which was designed to strengthen the key operational areas of the bank, including corporate governance. EBRD also appointed two non-executive directors (“NEDs”) to the Board of Directors of AIB in December 2009.

AIB began to experience financial difficulties as a result of growing non-performing loans towards end of 2010. Subsequently the IBP implementation was halted and the consultants were requested to provide crisis management support to the newly established Crisis Committee in AIB, which consisted of bank management and members of the Board of Directors, including the EBRD’s NEDs.

Simultaneously, EBRD engaged in a dialogue with the Government of Tajikistan (“GoT”) (primarily via the National Bank of Tajikistan), and with the IMF and the World Bank, with the view to develop a comprehensive solution for AIB. In April 2012, the GoT decided to support AIB by taking a majority stake in the bank and providing liquidity support. In June 2012 the GoT acquired 52% equity stake in AIB, appointed nominees to the Board of Directors and the management team and replaced the CEO. EBRD agreed to have its participation in AIB diluted to 12% and decided to withdraw its NEDs, who were unable to influence decisions at the AIB’s Board.

EBRD’s direct involvement with AIB substantially diminished following dilution of the EBRD’s shareholding stake and withdrawal of the NEDs in mid-2012. EBRD monitored the activity of AIB based on limited financial reports and meetings with the frequently changing management team of the bank. As a result of change of control and governance in AIB, as well as dilution of the EBRD’s share stake, EBRD has not been able to influence governance in AIB. Therefore EBRD has prioritised its efforts on building a dialogue with the GoT to develop a sustainable solution for AIB for the benefit of the entire financial sector of the country. AIB has been one of the key regular topics of discussion with the GoT for the past several years, including during a number of meetings between senior officials of EBRD and Tajikistan.

Since 2016, EBRD has worked closely with the GoT and the IMF and the World Bank on developing a comprehensive solution to troubled systemic banks in the country, which included

¹⁰ <http://www.ebrd.com/work-with-us/projects/psd/agroinvestbank-equity-investment.html>

¹¹ Tajikistan Micro and Small Enterprise Financing Facility

AIB. For the past two years EBRD commissioned consultants who carried out independent assessments of the affected banks and developed recommendations for the GoT on possible resolution options for the affected banks.

Resolving AIB remains one of the priorities for the country. AIB holds a significant share of sector's deposits, including savings and current accounts of thousands of individuals. In December 2016, the GoT injected additional TJS 1.1 billion into AIB to support liquidity and pay out clients of the bank.

EBRD will continue to cooperate with the GoT and the international development finance institutions in Tajikistan with the view to develop measures to strengthen the financial sector of the country.

2. Management Response

2.1 Compliance with Environmental and Social Policy

The environmental and social issues relating to the Project are guided by the EBRD Environmental and Social Policy 2008 (“ESP”) and in particular Performance Requirement 9 (“PR 9”)¹². The complaint alleges, in Section 4, that the EBRD is in breach of the ESP and PR 9. In particular, the complaint alleges that EBRD breached provisions addressing the following:

Allegations unrelated to environmental and social matters

- (i) Promotion of private entrepreneurship, which relates to EBRD mandate (ESP, paragraph 1);
- (ii) Principle of sound banking, which relates to EBRD general principles of financing (ESP, paragraph 1); and
- (iii) Principles of corporate transparency, which are enshrined in other specific requirements as provided for in footnote 6 of the ESP (ESP, paragraph 7).

Allegations related to environmental and social matters

- (i) EBRD will seek to ensure, through its environmental and social appraisal and monitoring processes, that projects it finances are compliant with applicable regulatory requirements and good international practice (ESP, paragraph 3);
- (ii) EBRD will seek to contribute to the effective implementation of relevant principles and rules of international law related to environment, labour, corporate responsibility and public access to environmental information (ESP, paragraphs 9 and 11);
- (iii) EBRD will not knowingly finance projects that would contravene country obligations under relevant international treaties related to environmental protection, human rights and sustainable development, as identified during project appraisal (ESP, paragraph 9);
- (iv) Monitoring obligations in relation to projects financed by EBRD (ESP, paragraph 34) related to environmental and social performance of projects;
- (v) Appraisal including the capacity and commitment of the client to address environmental and social impacts (ESP, paragraphs 14, 15, 24 and PR9 paragraph 9); and
- (vi) EBRD encourages financial institutions it finances to follow best practices in sustainability management.

¹² http://www.ebrd.com/downloads/about/policies/environmental_policy/2008-05-14,_Environmental_and_Social_Policy-Publication.pdf.

Management deems that EBRD complied with the requirements to carry out adequate due diligence of the Project and to monitor the Client's environmental and social commitments arising under the relevant provisions under the ESP and PR9. Management further deems that that no environmental or social harm has been claimed by the Complainant or caused by the Project.

Terms used in the ESP and in PR9 are interpreted bearing in mind the objectives and scope of the ESP and PR 9. For the purposes of the ESP, "social risks" refer to risks to project-affected-people (community and workers) resulting from the business activity to be supported and the way in which their working conditions, socio-economic status, vulnerability, cultural identity, health and safety may be affected.

For the purposes of the ESP, corporate responsibility should be interpreted as environmental and social responsibility by businesses to those groups and individuals that they can affect. As referred to in footnote 6 of the ESP, EBRD has other specific requirements related to good corporate governance, *inter alia*, money laundering, bribery and corruption not addressed under the ESP.

2.2 Compliance with Public Information Policy

The complaint alleges, in Section 10, that the EBRD is in breach of the EBRD's Public Information Policy. In particular, the complaint alleges that the EBRD has refused to:

- (i) supply information in respect of its investment in AIB, Project No. 39390; and
- (ii) respond to certain generic questions relating to the EBRD's Environmental and Social Policy.

Finally, the complaint requests EBRD to approach AIB and seek permission from AIB to disclose the information and documentation requested by the complainant (the "**Requested Information**").

The Management is of view that the EBRD has been in compliance with its Public Information Policy in relation to the Project and the complaint.

Pursuant to Part F, section 12 of the EBRD's Public Information Policy as approved by the Board of Directors on 7 May 2014 (the "**2014 PIP**"): *"The applicable version of the Public Information Policy that is subject to the PCM regarding EBRD disclosure of project information is the policy version that was in force at the time the project was approved by the EBRD Board of Directors or relevant approval body"*.

The Project was approved by the Board of Directors in 2009, therefore Public Information Policy approved by the Board of Director on 12 May 2008 (the "**2008 PIP**") would apply to the Project.

The Management believes that the EBRD has complied with both the 2014 PIP and the 2008 PIP and that, to the extent that the EBRD has not supplied the Requested Information to the complainant, such refusal was also in full compliance with the policy as explained below.

Information requested by the complainant

The complainant submitted two separate requests relating to the Project, pursuant to the letters dated 5 December 2017 and 8 December 2017. Below are extracts from the relevant letters

with Requested Information (items 1-4 were requested under the letter dated 5 December 2017 and items 5-10 were requested under the letter dated 8 December 2017):

1. *Documents relating to the “Technical Cooperation” program that is referred to in the project document;*
2. *The agreement signed by the EBRD and AIB, including a copy of the shareholders’ agreement;*
3. *Any correspondence exchanged between the EBRD and AIB concerning the equity investment;*
4. *Any correspondence exchanged between the EBRD and AIB concerning our client’s dispute with AIB;*
5. *Please could you provide me with a copy of the EBRD’s Corporate Governance Policy in respect of its equity investment in Agroinvestbank (“AIB”) in Tajikistan along with the procedures that the Bank has in place for deciding on the use of its voting rights in AIB;*
6. *I understand that the 2008 Environmental and Social Policy applied to Project No 39390. As this is an equity investment PR 9 is the relevant Performance Requirement. In PR 9 subparagraph 2 reference is made to “environmental and social risks”. Please could you clarify what may constitute a “social risk”;*
7. *Similarly in paragraph 3 of PR 9 reference is made to “social business practices”. Please could you clarify your understanding of a “social business practice”;*
8. *Paragraph 16 of PR 9 refers to “project finance”. Is the equity investment in Project No 39390 to be characterised as “project finance” thereby triggering the provision of paragraph 16 of PR 9 which in turn triggers PR 1 to 8 and 10;*
9. *Please could you clarify whether paragraph 17 of PR 9 applies. In other words has the EBRD set additional “social requirements” in respect of this equity investment; and*
10. *How does a potential Complainant ascertain whether paragraph 17 of PR 9 applies? In other words has the EBRD set additional ‘social requirements’ in respect of this equity investment?*

Responses by EBRD and the Secretary General

EBRD responded to the complainant with regard to the Requested Information on 20 December 2017 pursuant to the 2014 PIP (see attached EBRD’s response).

On 23 January 2017, the Secretary General of EBRD received an appeal from the complainant relating to the EBRD’s refusal to provide the Requested Information pursuant to the 2014 PIP.

The Secretary General responded to such appeal on 16 February 2018 pursuant to the 2014 PIP (see attached the Secretary General’s response).

Both EBRD's response dated 20 December 2017 and, in greater detail, the Secretary General's response dated 16 February 2018, set out the reasons as to why EBRD could not disclose most of the Requested Information.

Reasons for non-disclosure pursuant to policy

EBRD is committed to openness, transparency and accountability and seeks to disclose to the public relevant information about EBRD's strategies, policies and operations. However, Management notes that, as set out in both the 2014 PIP and 2008 PIP under Part C (Basic Principles), *"[a]s a financial institution, with a majority of its operations in the private sector, the Bank must maintain the confidence and trust of its clients and co-financiers"*.

Part E (Information Considered Confidential), section 1 of the 2014 PIP provides *"The Bank is committed to openness and transparency as a basic principle of its engagement with public stakeholders. Nevertheless, there are some instances where full disclosure is not possible. Specifically, the Bank will not disclose..."* information considered confidential as set out in Part E of the 2014 PIP. Part E of the 2008 PIP contained an equivalent provision which states: *"[n]otwithstanding any other provision of this Policy, the Bank will not disclose..."* information considered confidential as set out in Part E of the 2008 PIP.

Pursuant to Part E, section 1.6 of both the 2014 PIP and 2008 PIP, EBRD is not required to disclose *"Information in the Bank's possession which was not created by the Bank and is identified by its originator as being sensitive and confidential, or when the originator legitimately has requested that its release be restricted"*.

Pursuant to Part E, section 1.8 of both the 2014 PIP and 2008 PIP, EBRD is not required to disclose *"Financial, business or proprietary information received by the Bank in the analysis or negotiation of any investment authorised under Article 11 of the Agreement Establishing the Bank, any treasury operation or any donor funded or technical assistance project, unless permission is given by the entity or entities concerned to release this information"*.

The explanatory text under Part E, section 1.8 of both the 2014 PIP and 2008 PIP states that, sections *"...1.6,... and 1.8 apply to any information received from any private...enterprise[...]or their representatives or any external consultants in the analysis of any project considered or financed by the Bank or in the negotiation of any investment, loan or other operation. [...]The Bank does not disclose legal documentation, including all contractual documentation relating to a project, operation or technical assistance project or correspondence pertaining to Bank-financed projects..."*

Management notes that the Requested Information in items 1 to 5 as listed above is confidential information which was not created by EBRD (and thus EBRD is not required to disclose such information pursuant to Part E, section 1.6 noted above) or is information which has been prepared in the analysis of an investment authorised under Article 11 of the Agreement Establishing EBRD (and thus EBRD is not required to disclose such information pursuant to Part E, section 1.8 noted above).

Relating to part of the Requested Information as noted in item 1 above, specifically the procurement of technical cooperation ("TC") relating to the Project, Management notes that EBRD does not maintain an on-line archive of expired procurement notices. However, attached to the Secretary General's response dated 16 February 2018, the Secretary General provided the procurement notice for the invitations for expression of interest that was published on the

EBRD's website from 9 – 29 July 2009 inclusive relating to *“Support with Implementation of Institution Building Programme”* in connection with the Project.

Management further notes that other information relating to the procurement process for any TC relating to the Project is confidential as set out in Part E, section 1.7 of both the 2014 PIP and 2008 PIP. Specifically, this section sets out that EBRD will not disclose, *“information related to procurement processes, including pre-qualification, information submitted by prospective bidders, tenders, proposals...or records of the deliberative processes”*.

As well as applying Part E, sections 1.6, 1.7 and 1.8 as noted above, Management also considers that the Requested Information noted in items 1 to 5 above is confidential pursuant to Part E, section 1.1 of both the 2014 PIP and 2008 PIP. Specifically, such information is either intended for internal purposes only or classified under EBRD's internal classification regime. Consequently, and in accordance with policy, EBRD is not required to publicly disclose such Requested Information, regardless of any third party permission to disclosure. Management also notes that EBRD does not have an obligation, pursuant to the 2014 PIP, pursuant to the 2008 PIP or otherwise, to request AIB's permission to disclose any of the Requested Information.

With regard to provision of the Requested Information under items 6-10 above relating to certain more generic questions on the ESP, please refer to the Secretary General's response to the complainant dated 16 February 2018. Specifically:

(i) On item 6, the Secretary General clarified in that response what constitutes a *“social risk”* as follows: *“Social risks refer to risks to project-affected-people (community and workers) resulting from the business activity to be supported and the way in which their working conditions, socio-economic status, vulnerability, cultural identity, health and safety may be affected.”*

(ii) Item 7 was not specifically addressed in EBRD's responses to the complainant, as *“social business practices”* was taken out of the context of the PR9. PR9 refers to *“good environmental and social business practices”*, which relate to environmental and social risks.

(iii) On item 8, the Secretary General confirmed that the Project is not characterised as *“project finance”* as set out in the full explanation in footnote 1 to paragraph 16 of PR 9 of the ESP;

(iv) On items 9 and 10, the Secretary General confirmed that the EBRD did not set additional social requirements for the Project.

2.3 Compliance with the Relevant Policies

As stated in the Project Complaint Mechanism Rules of Procedure, in order to be admissible a complaint must relate *“to actions and inactions that are the responsibility of the Bank”* and a *“Relevant EBRD Policy”*, namely, the Environmental and Social Policy and Performance Requirements, project-specific provisions of the Public Information Policy.

The Project complied with all relevant internal policies at the time of approval in 2009. EBRD considered the equity investment in AIB after four years of excellent cooperation under the EBRD's Trade Finance facility and small business financing programme, when AIB received and fully repaid a senior loan.

Prior to the investment, EBRD carried out in-depth due diligence, including external assessment of the corporate governance in AIB, which confirmed acceptable profile of the bank at that time.

During the investment period, the Project was regularly monitored and EBRD maintained close involvement with the bank until mid-2012, when the GoT became a shareholder. Since then EBRD has been unable to participate in the governance of AIB due to the aforementioned circumstances. EBRD continued to monitor the Project, relying on limited information furnished by the management of AIB. Simultaneously, EBRD refocused its efforts on building a dialogue with the GoT to find a solution for AIB.

2.4 Communication with the complainant

EBRD has responded to all communication from the complainant. In addition to the EBRD's official response letters dated 6 December 2017, 20 December 2017 and 16 February 2018, the Project Team responded to complainant's earlier requests to meet and discuss the case; and shared relevant information, within the boundaries of the confidentiality undertakings. The Project Team explained the situation to the complainant, including reasons why EBRD was unable to act as a broker between the complainant and AIB.

Annex 3: Client Response

ҶАМЪИЯТИ САҲҲОМИИ КУШОДАИ
“АГРОИНВЕСТБОНК”

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“17” May 2018. № 10-1-06-341

Ба №

RE: PCM Complaint: Agroinvestbank Equity Investment

DATE: May 16, 2018.

No.: N/A

Attention to: Ms. Erica Bach
PCM Officer
Project Complaint Mechanism
EBRD
One Exchange Square
London, EC2A 2JN

Dear Ms. Bach,

In respect to your e-mail dated March 22, 2018, regarding the Complaint from Suttons Solicitors (on behalf of Mr. Alois Schonberger), we would like to inform on the following.

1. Agroinvestbank OJSC never recognized itself as a part of the dispute. In the recall to the claim, Agroinvestbank clearly indicated the economic dispute between Super Perfect Investment Limited and Levakan-M Limited Liability Company. It should be noted that there is no act of reconciliation between Super Perfect Investment Limited and Levakan-M Limited Liability Company for the previous contracts and it is strange to found that Super Perfect unilaterally calculated the amount of the debt.
2. Agroinvestbank was forced to respond to the claim of Super Perfect Investment Limited and subsequent arbitration has recognized this fact as a formal basis and proof of recognition of the debt and the recognition Agroinvestbank dispute, as well as recognition of the competence of the Swiss tribunal. Agroinvestbank believes that provide sufficient evidence of invalidity of the guarantee SWIFT (the text of which an arbitration clause shall be appointed Swiss arbitration) and accordingly arbitrator had no jurisdiction to hear the dispute between Agroinvestbank and the Company Super Perfect, but the arbitrator Mr. Alexander von Ziegler persistently ignored all the evidence and ruled which goes beyond his competence.
3. Super Perfect Company, using various mechanisms of influence, including international arbitration and abuse of law (the legislation of the Swiss

Confederation), through frank blackmail and fraud, tries to seize an impressive amount of about 20 million US dollars from state-owned Agroinvestbank.

4. Agroinvestbank considers these actions of the Super Perfect Company and its local counterparts (including Sipehr Trading CJSC and its head), as well as former employees of the Bank, conspiring to withdraw funds from the Bank.
5. Agroinvestbank reserves the right to take all necessary legal and other actions necessary to protect the business reputation and financial and economic security of the Bank.
6. Agroinvestbank hereby informs you that the Bank has applied to national and international law enforcement agencies in order to give a legal assessment of Super Perfect's actions and its authorized persons, as well as to the actions of the above-mentioned local partners of Super Perfect Company and former employees of Agroinvestbank.
7. Agroinvestbank also appealed to the relevant competent authorities of the Swiss Confederation with a view to giving a legal assessment of the actions of the Arbitrator Mr. Alexander Von Ziegler and checking his impartiality in the course of the arbitration hearings. Agroinvestbank considers the arbitration decision biased, biased and one-sided.
8. Agroinvestbank believes that the so-called "independent" arbitrator, who initially groundlessly accepted the dispute beyond his competence, having all the evidence of the non-participation of Agroinvestbank in the episode of fraud, took a non-judgmental decision to involve Agroinvestbank in a dispute between the two companies – Super Perfect and Levakan-M. Agroinvestbank believes that the Arbitrator decided in advance without considering all the circumstances of the case to involve the Bank as the Respondent, while neither Agroinvestbank nor Levakan-M LLC recognized the amount of the debt specified in the claim of the Super Perfect Company. However, contrary to common sense and possibly from selfish interests, using as an influence tool the norms of the legislation of the Swiss Confederation, the Arbitrator together with the Super Perfect Company decided to force Agroinvestbank to enter into the dispute or third parties by any "ways" and "instrument". Agroinvestbank, being a bank with absolute state participation, deems it inadmissible to abuse the right of the most authoritative institution of the Swiss legal system - arbitration and asks the document to be considered as a statement to the Swiss law enforcement authorities to verify the activities of the Arbitrator Mr. Alexander Von Ziegler.

9. During the arbitration process, Agroinvestbank attracted Mr. Fritz Thomas Klein, an ex-representative of the Swiss Confederation in the Board of the SWIFT system, as a SWIFT expert. Agroinvestbank believes that the guarantee of SWIFT referred to by Super Perfect was not properly issued and is therefore not considered valid. This position of Agroinvestbank is also confirmed by the expert conclusion of Mr. Klein (attached).
10. Agroinvestbank also sends this documents to the following institutes and authorities:
- Euro Commission;
 - European Investment Bank;
 - World Bank;
 - International Finance Corporation;
 - Hong Cong Tax Ministry;
 - Liverpool Cotton Exchange;
 - World Trade Organization;
 - UBS Bank (Austria);
 - UBS Bank (Switzerland);
 - Interpol National Bureau in Tajikistan;
 - Geneva Prosecutor Office.
11. Below Agroinvestbank presents to your attention a brief overview of the dispute and the Bank's position on this dispute. In addition to the following, Agroinvestbank also sends to your attention its legal position based on the law of the Swiss Confederation and international commercial law.

Chairman of the Bank



Murodali Alimardon

CC: Sir Suma Chakrabarti, President of the EBRD
Mr. Johannes Seiringer, EBRD Austrian Executive Director
Mr. Douglas Nevison, Chair of the EBRD Audit Committee
Mr. Andris Vilks, Vice Chair of the EBRD Audit Committee
Mr. David Avarello, EBRD Audit Committee
Ms. Wioletta Barwicka-Lofthouse, EBRD Audit Committee
Mr. Filippo Giansante, EBRD Audit Committee
Mr. Denis Morozov, EBRD Audit Committee
Mr. Brian McCauley, EBRD Alternate Director for the USA
Bankwatch

INTRODUCTION

On July 17, 2017, the Arbitrator of the Geneva Arbitration Court, Dr. Alexander Von Ziegler, rendered a decision on recognition of the claim of Super Perfect Investment Limited to OJSC "Agroinvestbank" of the Republic of Tajikistan one year after the end of the court hearing.

In accordance with the legislation of the Swiss Confederation, OJSC "Agroinvestbank" appealed this decision to the Supreme Federal Court of Switzerland.

The main purpose of this complaint is:

- 1) Cancellation of the unlawful decision of the sole arbitrator.
- 2) By virtue of Article 190 (1) of PILA, we ask you to consider our application as soon as possible and to take our decision in an expedited order.

1. On 6 November 2014, the Super Perfect filed a purported Notice of Arbitration (the Notice) under the Swiss Rules of International Arbitration of 1 June 2012 (the Swiss Rules). On 10 December 2014, Agroinvestbank OJSC submitted its Answer to the purported Notice of Arbitration in question (the Answer). On 1 June 2015, Super Perfect submitted its Statement of Claim (the SoC). By letter of 1 August 2015, the Agroinvestbank OJSC confirmed its objections to the jurisdiction of the honorable Tribunal.
2. The Claimant avers that the Respondent has issued a number of bank guarantees which, individually or in combination, guarantee the contractual obligations of Levakan-M-M Company (Levakan-M) before the Claimant in a total amount of USD 11,000,000. The Respondent is alleged to have failed to honor its undertakings under the alleged bank guarantee/guarantees and so the Claimant says, is liable in a liquidated sum and/or for damages amounting to USD 1,740,779.70.
3. With all respect to the Super Perfect Company, its assertions are unfounded and outrageous. Agroinvestbank demonstrated that there are no contractual grounds for these proceedings because the Agroinvestbank has never entered into a written agreement to arbitrate with the Super Perfect Company. Agroinvestbank also showed that the

guarantees presented by Super Perfect Company before the Tribunal have never been issued by the Agroinvestbank, and are necessarily legally void. How Super Perfect Company came to claim upon guarantees of so dubious nature, unissued and unauthorized, will be one of the principal issues for the Tribunal to resolve.

FACTS

I. PARTIES

A. Claimant

4. Super Perfect Investments Ltd (SP), the Claimant in the arbitration, is a trading company registered in Hong Kong with an operating office in Poland. Besides the CEO, Mr. Schonberger, his wife and Mrs. Grudzinska, Purchase Manager, we are told that SP has two more employees. None of these people appear to live in Hong Kong. This is an offshore shell company.
5. We are further told that SP is controlled by Cottonex Anstalt, a company registered in Liechtenstein, which owns 100 percent of SP's shares. Moreover, we are informed that the CEO of the Claimant, Mr. Schonberger, is President of Cottonex Anstalt. Cottonex Anstalt in its turn appears to be a shell company.

B. Agroinvestbank OJSC

6. Agroinvestbank is one of the leading state-owned banks in the Republic of Tajikistan. Agroinvestbank OJSC was established in 1992, it has 59 branches across the country.

II. CHRONOLOGY OF EVENTS

7. In December 2012, the Agroinvestbank was informed that its client, a Tajik trading company Levakan-M, was negotiating a supply contract with a foreign trading company. The management of Levakan-M requested preliminary information regarding the procedure of issuance of bank guarantees by Agroinvestbank, as apparently they were considering different options of securing their obligations under potential contracts.

8. The representatives of Agroinvestbank attended a meeting between the management of Levakan-M and representatives of Super Perfect Company in order to obtain sufficient information regarding the transaction. Such information was necessary to assess the transaction and associated risks in order to provide the preliminary information requested by Levakan-M.
9. At this meeting, the representatives of Agroinvestbank explained to the procedure of the internal approval and issuance of bank guarantees in compliance with the law of the Republic of Tajikistan and the bylaws of Agroinvestbank. Agroinvestbank also confirmed that in accordance with the Charter of Agroinvestbank OJSC, the Chairman of the Bank is the only person who is entitled to represent the Bank in any transactions without a specific authorization or a Power of Attorney. The Respondent also confirmed that it would consider a request for issuance of a bank guarantee from its client Levakan-M, as it issuance of bank guarantees to the clients with good standing was a general practice of the bank. However, the representatives of Agroinvestbank emphasized that the issuance of the bank guarantee will be subject to the internal assessment and approval in compliance with the financial regulations of the Republic of Tajikistan and bylaws of the bank.
10. The Claimant asserts that it signed the Contract No MC-009/2013 on 11 February 2013, in which Levakan-M undertook to supply 20,000 metric tons of cotton.
11. We are told that Agroinvestbank received a copy of the Contract No MC-009/2013 and allegedly issued a bank guarantee for USD 11,000,000 on 22 February 2013, which was then returned to the Respondent due to formal mistakes and typos; and allegedly reissued by the Respondent on 28 February 2013.
12. In March 2013, the Super Perfect Company and Levakan-M executed two contracts: Contract 009/2013 for the supply of 11,000 metric tons and Contract 012/2013 for the supply of 9,000 metric tons. Super Perfect Company says that the parties to the contracts decided to backdate the contracts for financial reasons at the request of the Super Perfect. Both contracts allegedly provided for the issuance of bank guarantees by Agroinvestbank for the amount of USD 6,000,000 and USD 5,000,000 respectively.

13. We are told that as a result of these "split" of the initial contract, the Super Perfect Company and Levakan-M requested the Agroinvestbank to cancel the alleged bank guarantee for USD 11,000,000 and to issue two separate bank guarantees for each of the two separate contracts.
14. Agroinvestbank initiated the internal procedure for issuance of the guarantees. Levakan-M and the Super Perfect Company presented two templates for the attention of the Agroinvestbank, and the form and wording of the templates were analyzed by the competent departments of Agroinvestbank.
15. One of the templates was in a format of a SWIFT message addressed to BNP Paribas (France) and the second was requested to be issued in hard copy on the Agroinvestbank's official letterhead. Further, during the hearing, Agroinvestbank provided a Sole Arbitrator with the Expert Report of the former Switzerland representative in the SWIFT Mr. Fritz Thomas Klein (Attached No1).
16. On 5 April 2013, the Purchase Manager of the Claimant, Mrs. Grudzinska visited the office of Agroinvestbank in Dushanbe. She asserts that the purpose of her visit was to "*obtain issuing of further guarantees from*" the Agroinvestbank.
17. We are told that during her visit Mrs. Grudzinska received an e-mail from Mr. Nabiev Sherafgan, the Deputy Head of the Department for Investment Projects, with what in the opinion of the Super Perfect Company was a duly issued SWIFT guarantee for USD 6,000,000. The document that was allegedly sent as an attachment to the E-mail (attached) appears to be a draft message in SWIFT MT 760 Format. The same document was allegedly handed by Mr. Nabiev to Mrs. Grudzinska in hard copy at her request. Super Perfect Company also says that the document was immediately forwarded to the Company's CEO.
18. We are told that on the same, in the evening, Mrs. Grudzinska allegedly received a hard copy of another bank guarantee for USD 5,000,000 and returned the bank guarantee for USD 11,000,000 allegedly issued by the Agroinvestbank in February.
19. Super Perfect Company asserts that the two guarantees were issued by Agroinvestbank under the supply contracts and secured the obligations

of Levakan-M towards the Claimant in the total amount of USD 11,000,000.

III. CONTRACTS

A. Contract for USD 11,000,000

20. Super Perfect Company asserts that it entered into a contract with a Tajik counterparty, Levakan-M, whereby Super Perfect Company undertook to buy 20,000 metric tons of cotton. We are told that the Supply Contract No. MC-009/2013 was signed on 11 February 2013 (the Contract for USD 11,000,000) and provided for the issuance of a bank guarantee for USD 11,000,000 by the Agroinvestbank. Levakan-M in its turn undertook to provide a bank guarantee issued by Agroinvestbank to secure “*fulfillment of its obligations to supply the Cotton under ... the Contract*”.

21. Article 8 of the Contract, we are told, provides for the advance payment in the amount of USD 5,000,000 to be made on the following terms:

- *3'500'000 US Dollars within 5 banking days from the date of receipt of valid Guarantee approved by Purchaser in accordance with article 9 of the Contract;*
- *1'500'000 US Dollars – until 20.03.2013, after receipt by Purchaser of valid Guarantee in accordance with article 9 of the Contract.*

22. The Contract for USD 11,000,000 is governed by English law and provides for settlement of all disputes by bylaws and rules of International Cotton Association, Liverpool, England.

B. Backdated Contracts

23. We are told that in March 2013, Super Perfect Company had financial problems with its bank and therefore suggested to Levakan-M that it execute two separate supply contracts to replace the Contract for USD 11,000,000. Thereafter, we are told, Levakan-M and the Super Perfect Company signed two separate contracts and backdated those contracts with the date 11 February 2013. In other words, the Super Perfect Company admits in its own pleading to fraudulent backdating.

24. The Supply Contract No MC-009/2013 backdated to 11 February 2013 (the Contract for USD 6,000,000), appears to have provided for the sale of 11,000 metric tons of cotton and for the issuance of a bank guarantee for USD 6,000,000 on conditions similar to the conditions of the Contract for USD 11,000,000. This Contract, at least upon its face, also provides for an advance payment of USD 5,000,000 but does not condition the advance payment upon receipt of a bank guarantee, instead simply setting a timeframe for payment as “*within March 2013*”.
25. The Contract for USD 6,000,000 has apparently been amended four times on the basis of its Annex 2 dated 29 March 2013, Annex 3 dated 09 April 2013, Annex 4 dated 23 April 2013, and Annex 5 dated 20 August 2013. The Annexes have never been communicated to Agroinvestbank and Agroinvestbank was not aware of the changes and amendments introduced to the Contract for USD 6,000,000.
26. The Supply Contract No MC-012/2013 backdated 11 February 2013 (the Contract for USD 5,000,000) purportedly provides for the sale of 9,000 metric tons of cotton and for the issuance of a bank guarantee for USD 5,000,000.
27. This contract apparently contained the wording similar to the Contract for USD 11,000,000 and the Contract for USD 6,000,000, save for Article 8 which, instead of providing for an advance payment, entitles the Purchaser to fix the final price beginning August 2013.
28. Annex 2 dated 05 September 2013, Annex 3 dated 26 September 2013, and Annex 4 dated 11 October 2013 introduced certain changes and amendments to the Contract for USD 5,000,000. The Annexes have never been communicated to Agroinvestbank and Agroinvestbank was not aware of these alterations.
29. It is important for the Tribunal to observe the foregoing assertions are not admitted in any way by Agroinvestbank. Agroinvestbank’s case is that Super Perfect Company alleges to have engaged in a series of contracts with a third party, which Agroinvestbank guaranteed. The facts and details of those contracts are for Super Perfect Company to prove.

IV. GUARANTEES

A. Guarantee 08/2013 dated 22 February 2013

30. Super Perfect Company avers that when it entered into the Contract for USD 11,000,000 with Levakan-M, the latter filed a request to Agroinvestbank for the issuance of a guarantee for the amount of the Contract, in favor of Super Perfect Company. Super Perfect Company further avers that the Agroinvestbank granted the request, and Guarantee No 08/2013 was issued on 22 February 2013. The Guarantee, so it is said, was issued on the official letterhead of Agroinvestbank No 0000802 and bears the Agroinvestbank's seal and a signature next to the wording "Chairman of the SOLIEV A."

31. The text of Guarantee No 08/2013 dated 22 February 2013 that we have been shown refers to the alleged Contract for USD 11,000,000. The Guarantee states that it is subject to the Uniform Rules for Demand Guarantees, ICC Publication No.758, revision 2010 (ICC URDG). It also states that it *"was issued in compliance with the Civil Code of Switzerland"* and *"governed by Swiss laws"*. Importantly and perplexingly, the Guarantee does not specify the procedure for dispute resolution.

32. The text of Guarantee No 08/2013 dated 22 February 2013 for USD 11,000,000, provided by Super Perfect Company, appears to have contained typos and formal mistakes, and we are told that Super Perfect Company returned the original to Agroinvestbank and requested to reissue the Guarantee.

B. Guarantee 08/2013 dated 28 February 2013

33. We are further told that at the request of Super Perfect Company and for the reasons described above, the Agroinvestbank replaced Guarantee 08/2013 dated 22 February 2013 by issuing the Guarantee 08/2013 dated 28 February 2013. Save for a number of technical corrections, the text of the Guarantee dated 28 February 2013 appears identical to the one of the Guarantee dated 22 February 2013 described in para 13-16 above.

34. It further appears to be part of Super Perfect Company's case that Guarantee 08/2013, dated 28 February 2013, was issued on Agroinvestbank's official letterhead No 0000804. Again it bears the seal

of Agroinvestbank and a signature next to the wording "Chairman of the SOLIEV A."

35. It is Super Perfect Company's case that the hard copy original of the Guarantee 08/2013 dated 28 February 2013 was returned by Super Perfect Company to Agroinvestbank on 5 April 2013.

C. SWIFT Guarantee 08/2013 dated 28 February 2013

36. Super Perfect Company says that when it and Levakan-M agreed to replace the Contract for USD 11,000,000 by two separate contracts, Levakan-M asked for two separate bank guarantees to be issued by Agroinvestbank.
37. The Agroinvestbank accepts that it initiated the internal procedure for issuance of the guarantees as per request of Levakan-M. Agroinvestbank received two templates from Super Perfect Company. One of the templates was for a guarantee for USD 6,000,000 and was in form of a SWIFT message.
38. Mr. Nabiev, Deputy Head of the Department of Investment Projects of the Respondent, accepts that he sent an email to Super Perfect Company Mrs. Grudzinska with the attached document that contained a draft SWIFT message and handed her a hard copy of the draft. But Agroinvestbank says that this was a draft. It was never an agreed document and it was never transmitted in the manner usual and conventional for SWIFTS, and Super Perfect Company has not furnished any proof to the contrary. This indicates that Agroinvestbank never intended it to be legally binding.
39. Super Perfect Company asserts that this document constitutes a duly issued bank guarantee, and in its submissions refers to the document as a question as "SWIFT Guarantee". Agroinvestbank says that this is manifestly false. Its case is that Super Perfect Company is guilty of fraud, passing off a draft guarantee as a genuine one notwithstanding the absence of evidence that the SWIFT was duly transmitted.

40. Notwithstanding, in what follows Super Perfect Company will refer to the document - whose status is essentially contested between the parties - as the "SWIFT Guarantee" purely for ease of reference.

41. The SWIFT Guarantee contains an arbitration clause, on the basis of which these arbitral proceedings have been initiated and in respect of which it is averred that the honorable Tribunal has jurisdiction. The SWIFT Guarantee states that it was "*issued in compliance with the Civil Code of Switzerland*" and that it is "*governed by the Swiss laws*". It also determines that the URDG shall apply.

D. Guarantee 09/2013 dated 05 April 2013

42. The Guarantee 09/2013 was allegedly issued by Agroinvestbank on 5 April 2013 with reference to the Contract MC-12/2013 for USD 5,000,000. It was printed on Agroinvestbank's official letterhead No 0000805. It bears the seal of Agroinvestbank and a signature next to the wording "*Chairman of the SOLIEV A.*":

V. DEMANDS UNDER THE GUARANTEES

43. Following the alleged failure by Levakan-M to fulfill its obligations under the Backdated Contracts, Super Perfect Company asserts that it sent a demand under the alleged SWIFT Guarantee and the Guarantee 09/2013 to Agroinvestbank by a SWIFT message on 24 February 2014, demanding payment for USD 11,000,000 in total.

44. Agroinvestbank accepts that in its answer sent by a SWIFT message on 25 February 2014, it informed Super Perfect Company that the SWIFT Guarantee and the Guarantee 09/2013 dated 5 April 2013 did not exist in the bank's system and had never issued by Agroinvestbank. Accordingly, Agroinvestbank refused to proceed with Super Perfect Company instructions.