

January 29, 2003

**Joint Comments on the
EBRD's Proposed Independent Recourse Mechanism**

**Submitted by
Bank Information Center,
Center for International Environmental Law,
CEE Bankwatch Network**

We the undersigned organizations are submitting the following joint comments on the European Bank for Reconstruction and Development's (EBRD's) proposed Independent Recourse Mechanism (IRM). We appreciate the opportunity to provide these comments and welcome the EBRD's decision to join the other multilateral development banks (MDBs) in establishing an accountability mechanism that enables project-affected people to raise their concerns with EBRD-financed projects. In our view, any mechanism established by the EBRD must meet the following general principles:

- (1) It must be independent of EBRD operational staff and management;
- (2) It must operate transparently, with direct access to the public and public release of its reports;
- (3) It must be citizen-driven--affected communities must be able to access the mechanism to assert their rights and interests; and
- (4) It must be capable of fairly handling the environmental and social claims of affected people in the context of EBRD operations.

Given these broad principles and based on our experience at the World Bank Group and the other regional banks, we have serious concerns with the EBRD's proposed IRM. We believe that the weaknesses in the proposed IRM undermine the independence, credibility and effectiveness of the IRM for the affected people it is meant to serve. If the basic flaws are not addressed, EBRD will almost certainly be faced with controversies and problems in the future, and ultimately the IRM will not succeed as an accountability mechanism.

This has been the experience of the other regional development banks that have established similarly flawed mechanisms. Indeed the Asian Development Bank (AsDB) is in the process of revising its mechanism because the existing roster-based system was neither independent nor effective. The InterAmerican Development Bank (IDB) is currently facing similar problems, and its process is under heavy criticism for lacking transparency, taking too long, and being unresponsive to the claimants. We believe that EBRD's proposed mechanism is heading down the same path. By addressing the concerns raised below, the EBRD can avoid the mistakes made by these other institutions and launch an effective accountability mechanism. Given the complexity and number of changes required to the proposed IRM, we recommend that an additional consultation be conducted to better define the fundamental role and requirements of the IRM.

We have provided both general and specific comments below.

General Comments.

1. **The IRM's jurisdictional scope is too narrow.** The EBRD's proposal limits the IRM to a review of only the "environmental impacts of projects which are addressed or covered by EBRD policies and procedures." This is an unnecessary and unwise limitation, as social impacts can be just as critical to the EBRD's development mandate and should be covered by the IRM. None of the other accountability mechanisms (at the World Bank Group, the InterAmerican Development Bank and the Asian Development Bank) are limited to environmental impacts or to environmental policies. *The IRM's scope should be expanded to cover all of the policies and procedures of the EBRD and other applicable international norms in light of the EBRD's mandate to promote sustainable development.*

2. **Reliance on the Chief Compliance Officer (CCO) to co-ordinate the IRM and to screen the incoming claims reduces the independence of the IRM and may raise the appearance of conflicts of interest.** The current responsibilities, reporting requirements and selection process for the CCO is not entirely clear to those of us outside of the EBRD. As we understand it, the CCO is the primary ethics officer for the EBRD, responsible for evaluating and reviewing the policies, procedures and operations of Bank staff that could raise conflicts of interest. To ensure independence in its IRM role, the CCO must not have any operational or managerial responsibility for ensuring compliance with EBRD policies and procedures. If, for example, the CCO is ever in a position to review or approve the compliance of a project, then the CCO would have a conflict of interest handling a subsequent complaint that alleges a violation of an EBRD policy (in other words, a complaint alleging that the CCO or their office has failed to ensure compliance).

Moreover, the two roles are very different and probably should not be mixed. The CCO's role as an ethics officer is necessarily at times more like the role of a policeman—raising ethics-related issues to enforce clear rules regarding staff activities. That person will not be in a good position to oversee a problem-solving process involving the same staff and external issues. The CCO is concerned with internal decision making, operations and governance, and probably will not have the requisite understanding or experience with environmental or social issues to be able to carry out the IRM role effectively. In its IRM role, the CCO should be reporting directly to the Board of Directors. The Board of Directors should also therefore have a role in selecting the CCO. At the World Bank, the Inspection Panel reports only to the Board, giving it the greatest amount of independence from day-to-day operations of the Bank. The IFC/MIGA Compliance Advisor/Ombudsman reports to the World Bank President, although in our view this structure is not sufficiently independent. *We recommend that there be a separate Panel established and that both the CCO and Panel members be selected by, and report directly to, the Board of Directors.*

3. **The IRM grants too much discretion to the CCO to limit or reject complaints.** One of the standards for evaluating the effectiveness and responsiveness of a proposed accountability mechanism is whether affected communities are able to get their complaints before an independent body for adjudicating their rights and interests under the EBRD's policies and other applicable standards. In the proposed draft, the affected communities do not control this decision, as the CCO decides in its own discretion whether to refer a complaint for Compliance Review. *This process should be changed to allow affected communities to determine whether to seek a compliance review.*

Similarly, the CCO has far too much discretion to accept or decline a complaint and to refer a complaint for Compliance Review. As a result, whether the process works well will depend too heavily on the specific personality and concern of the CCO. The process will not be predictable for potential claimants and other outside parties. ***Steps should be taken including eliminating paragraph 10, to reduce the discretion of the CCO.***

4. The IRM's reliance on a roster of experts will not work. A roster has been used for the accountability mechanisms at both the AsDB and the IDB. It has not worked well in either case. In fact, the AsDB is likely to move away from the use of a roster as part of its current revisions to its inspection function. As the experience of the AsDB and IDB illustrate, roster members (1) will not be as knowledgeable about the EBRD, (2) will not be able to place their work in the EBRD context, (3) will not be as accountable for their findings and recommendations, and (4) will frequently not be available as needed. The only advantage of using a roster is that it appears to be cheaper than having a World Bank-style permanent panel. In practice, however, the transaction costs of using a roster may make it as expensive as a permanent, part-time panel.

We recommend selecting a Compliance Review Panel of three people (as with the World Bank Inspection Panel), who would work part-time as needed, and who would be available to conduct other activities necessary to make an accountability mechanism effective. These activities include for example: (1) writing the procedures for the IRM; (2) meeting with NGOs, affected communities, EBRD staff, executive directors and other stakeholders to explain the Panel's function and to understand the evolving context of the EBRD; (3) issuing an annual report; and (4) meeting with the accountability mechanisms of the other MDBs.

We also do not believe a formal roster is necessary for the problem-solving role of the IRM. The CCO should be allowed to develop relationships over time with consultants, but those consultants can be selected to meet the specific needs of each case. This practice would be consistent with the IFC/MIGA's Compliance Advisor and Ombudsman office, which does not rely on a pre-selected roster of experts but rather identifies the best advisors and consultants available for the specific task at hand in any given case. The Ombudsman's office remains accountable for the work and effectiveness of the consultants.

5. The proposed IRM does not ensure adequate transparency or information disclosure. The current procedures lack any clear benchmarks or standards to ensure sufficient transparency and information disclosure. ***As noted below in the specific comments, all assessments, reports and recommendations should be made available to the claimant and to the public.***

Specific Comments. The following comments are organized according to the sections and paragraph numbers in the proposed draft mechanism.

Paras. 2 and 28. As noted above, there is no compelling reason to limit the IRM to environmental impacts. The social and economic impacts of projects can also have important development impacts for affected communities and also deserve to be part of any consultation process for the project. The Bank's institutional interest in compliance is no greater for environmental policies than for other policies.

The proposed limitation makes no sense in either the problem-solving phase or the compliance phase of the IRM. With respect to the problem-solving phase, the IRM (like the IFC's Ombudsman) should not be

circumscribed by any underlying policy violation, as the focus should be on solving problems, not apportioning blame for noncompliance. The whole advantage of the problem-solving phase is to take a broad, comprehensive and flexible approach to identifying and resolving issues of concern to the affected communities, regardless of whether these issues are reflected in EBRD policies. With respect to compliance review (as with the World Bank Inspection Panel), affected communities and the Bank both have an interest in all policies being followed—not just environmental policies.

Para. 4, 3rd Bullet. As noted above, we are not very clear on the CCO's current responsibilities, the qualifications for being the CCO, and to whom the CCO reports. We believe that to ensure independence, if the CCO is to be vested with responsibility for the IRM, then the CCO should report to, and be selected by, the Board of Directors. We also believe that the CCO should be prohibited from working for the Bank again (as would the roster members under the proposal). Further, if as we understand it, the CCO is also the officer in charge of investigating corruption then it may not be appropriate for the problem-solving role. Investigating corruption and fraud is more of a policing function than is the function of the IRM. Moreover, as noted above, the CCO is designed now to be the primary ethics officer for the EBRD, and would not necessarily have the knowledge or skill set necessary to coordinate an IRM function aimed at environmental and social issues.

Para. 4, 4th Bullet. As noted above, reliance on a roster system is a mistake. Based on the experience at other Banks, a roster will serve neither the EBRD nor the affected communities well. In addition to the points raised above, the quality of roster members will not be high, as few people will want to give up all future opportunities to work for the Bank, only to be listed on a roster where they may never get called to serve. ***Instead of a roster, a three- to five-member panel should be established, with at least three members being responsible for the evaluation of each case.*** Panel members can still be paid on an as needed basis, but narrowing the number of people identified as the Panel will help ensure that members: (1) are available more often and can build their schedule around expected responsibilities to the Panel; (2) have a stronger interest in the success of the Panel; and (3) over time, will develop expertise and institutional memory regarding their activities with the IRM. The Panel members will ultimately be more accountable to the success of the Panel mechanism in the specific context of the Bank. They will actually be more responsive to the Bank's concerns and culture, building a more stable and productive relationship between Bank management and the Panel. Such a Panel would also provide an opportunity for affected communities to discuss the inspection process and potential claims informally before filing them.

We would also delete the penultimate sentence in this paragraph: "Where an expert has acted as an assessor, he or she cannot then sit as an expert in respect of any such complaint." We do not believe that determining the eligibility of a complaint would preclude an expert from subsequently investigating the claim on the merits. On the contrary, we think it is more cost-effective and efficient to allow the expert Panel member who has begun learning about the complaint in the eligibility phase to continue on in the substantive part of the process. ***In fact, the entire Panel (or at least three members of it) should be involved in the determination of eligibility, perhaps based on a more detailed review and site visit conducted by one of the Panel members.*** This process has worked well at the World Bank, where all Panel members review and participate in all Panel decisions and reports.

Para. 5. As suggested by this provision, maintaining confidentiality of claimants is critical. ***As a result, the words "use all reasonable efforts to" should be deleted in the third sentence of this paragraph. That sentence should read: "The IRM will maintain the identity of claimants confidential when***

requested.” At a minimum, this means that the CCO must keep the names of claimants confidential from other EBRD staff; this in turn requires separate office space that can be locked (as is the case with both the World Bank Inspection Panel and the IFC/MIGA Compliance Advisor/Ombudsman).

The last sentence of Paragraph 5 should also be modified. Obviously, mediation and some other problem-solving techniques are not possible where the claimants insist on being kept anonymous, but this is not the case with compliance review investigations. The World Bank Inspection Panel has handled several cases with confidential claimants and they have never had any problems carrying out an investigation. *We would therefore delete the words “an investigation, and/or” in the last sentence of paragraph 5.*

Para. 8. *We believe that a claim should be considered eligible, once it is likely that the project will be submitted to the Bank for financial support and there is already evidence of harm or policy violations. In addition, the second sentence in paragraph 8 should be deleted.* The CCO should not retain discretion to determine whether a claim is “premature” if the Bank has already indicated that it is likely to finance the project. In cases relating to projects that are still being prepared for the Bank’s review, the CCO should accept the claim as eligible and then, if necessary, find that it is premature to impose any specific remedy or conduct any dispute resolution process (because the CCO finds that it is likely that EBRD staff will address the problem in the continued preparation and review of the project).

Para. 9. The listed factors for determining eligibility are appropriate, but should be the only factors for determining eligibility. The CCO should have no further discretion. *Thus, this paragraph should begin as follows: “Upon receipt of a complaint, the CCO will determine if it is an eligible complaint based on the following factors: ...”* This will increase predictability, consistency and certainty in the process.

Para. 10. *This provision should be entirely deleted.* It gives far too much discretion to the CCO. Rather, eligibility should be automatic if the technical aspects of the claimants standing and grievance under paragraph 9 have been met. The criteria in paragraph 10 lets the CCO pick and choose among claims and would allow discretion to avoid unpleasant or controversial claims. Over time, this discretion may be exercised differently with cases that are similar—which in turn may lead to unpredictability, uncertainty and frustration with the process. This has been the experience at the other institutions. The World Bank Inspection Panel has a clear set of technical criteria for eligibility, which is more predictable and clearer than the more discretionary set of criteria employed by the IFC ombudsman. The experience with the IFC’s ombudsman office thus far has left many observers in civil society uncertain about how their complaints will be evaluated.

Para. 11-12. The CCO’s recommendations and findings during this assessment stage, including any assessor’s report to the CCO, should be made available to the claimant and to the public *before* the President or Board makes its decision.

Para. 12. According to this process, the complainant may not receive any word from the CCO for 30 days after filing a complaint. This is too long. The resolution creating the IRM should require that the CCO acknowledge receipt of a complaint within five days, and also register a complaint on a public registry so that everyone knows a complaint has been received. This is essentially the same process as occurs with both the World Bank Inspection Panel and the IFC Compliance Advisor/Ombudsman. We also believe that if the eligibility phase is narrowed to a technical review of eligibility (as we suggest), then eligibility could easily be determined in less time—perhaps 15 days.

Para 13. The requirement that the Board or President authorize the hiring of an expert should be eliminated. Involving the Board/President at this point greatly reduces the independence and effectiveness of the IRM, because it will (1) unnecessarily politicize the process, (2) interfere with the objective and professional nature of the IRM, (3) allow for manipulation of the process by the Board/President, and (4) lengthen the process unnecessarily. The CCO should be able to implement its recommendation directly. This is the case with the IFC's Compliance Advisor/Ombudsman.

By contrast, the World Bank Inspection Panel process formerly allowed the Board to approve all proposed inspections. This caused significant controversies and problems. During the 'second review' of the Panel in 1999, the Board of Directors essentially removed itself from the process by agreeing that all recommendations for an inspection would be approved on a "no objection" basis. This has streamlined and depoliticized the Panel process. Learn from the World Bank's experience and allow the IRM to operate more independently.

Para. 14. This is an excellent provision and an advance over the practice at other accountability mechanisms. ***The IRM's recommendation should also be made public and be sent to the Board at the same time it is provided to the President.*** Moreover, to ensure that this provision can be implemented in the future, we recommend that the EBRD's basic financial agreements include a provision in the future that explicitly lists such a finding as a reason that the EBRD can suspend further work or disbursements. In this way, the EBRD's rights and interests will not be superceded by future contracts.

Para. 15. ***We recommend that all claims have recourse to the Board.*** The Board has an interest in policy compliance at all stages of project preparation and implementation. Moreover, we do not agree with the statements in this paragraph that the President is sufficiently far removed from the project-development to be "credibly independent". Particularly because projects that are the subject of complaints are typically very controversial, senior management may have already been involved in allowing the projects to move forward during the pre-approval phase. The experience at the other financial institutions (particularly the Asian and InterAmerican Development Banks where the President is involved in the first phase of the inspection function) has not been positive. Recourse to the President's office has not been as credible, because the President typically must delegate the issue to other management who may be conflicted or have the appearance of a conflict of interest.

In this regard, we also disagree with the last sentence. Engaging the Board earlier in problem projects will not prejudice the Board's decision on a project; it will *inform* the Board and let the Board have more full and informed discussion with both the staff and their home offices. We believe this sentence reflects the staff's desire to maintain the Board's distance, when in fact they should be more engaged on controversial projects.

This paragraph appears to assume that only Problem-solving exercises will be appropriate for claims brought during the Pre-Board Phase of the project. Many procedural elements of the EBRD policies are applicable before Board approval and it may be necessary and advisable to review compliance before the Board approves a project. ***Thus, as in paragraph 19 (addressing claims brought to the post-Board phase) the rules should be clarified to allow the CCO to recommend either a Problem-solving exercise or a Compliance Review for projects in the pre-Board phase.***

Para. 15 and 16. The CCO's final Reports should be made available to the claimant, the borrowing government or project sponsor, and the public at the same time as the Board or President and before any final decision is made.

Para. 20. We find it hard to understand what compelling reasons will exist to deny public access to most reports. If there are particular parts that need to be redacted, this could be done. *Whenever the report, or any part of a report, is withheld, the Board should identify the parts withheld and explain the reasons why those parts were withheld.*

Para 21, 2nd bullet. The second bullet point should be reworded, because it currently suggests that any claim that aims to impede a project should be barred. There may in fact be legitimate reasons for affected communities to seek to stop or slow a project. We agree that complaints that primarily seek competitive advantage by business competitors should be rejected. Some complaints by affected communities may seek delays in the project (e.g., to address concerns of the community), but are unrelated to competitive advantage and should be allowed. **Thus, we would reword the bullet point in the following way: "Complaints whose primary purpose is to seek competitive advantage through the disclosure of information or through impeding or delaying the project".**

Para. 21, 6th bullet. In the sixth bullet point, complaints are rejected if another accountability mechanism is addressing the same issue. Although processes have to be worked out for the efficient operation of multiple accountability mechanisms on the same project, the EBRD's institutional interest in compliance remains the same regardless of whether another institution or accountability mechanism is involved. Similarly, affected communities will remain interested in ensuring compliance with EBRD's policies (and that they received all the rights and interests to which they are entitled under those policies). For this reason, the IRM should at least retain jurisdiction to determine compliance. We would delete this bullet point; if necessary a provision could be added that the CCO is directed to cooperate with other accountability mechanisms that may be reviewing the same or related projects.

Para. 23. This paragraph should be eliminated. None of the accountability mechanisms at the other financial institutions preclude recommendations that include compensation. The IRM should have the full range of potential remedies available to them in making a recommendation, including in extraordinary cases making recommendations that claimants receive compensation. In some instances, compensation may be the only recourse available. The IFC's Compliance Advisor/Ombudsman has recommended compensation in at least one case, although compensation may ultimately come from the project sponsor rather than the financial institution. Moreover, because the IRM's recommendations do not bind anyone and would not be legally enforceable, there is no reason to curb the potential for creative and effective resolutions.

Para. 25. We would delete the second sentence in this paragraph: "The focus of Problem-solving is to move forward and not look backward." Although this sentence is true, it suggests that the focus of the Investigation and compliance review is not forward-looking. The compliance review can and should result in remedial recommendations (see para. 19) and thus it, too, is forward looking.

Para. 27. This provision on monitoring is a critical improvement over other existing accountability mechanisms, and we commend the EBRD for including it. Monitoring can be made more effective, however, by (1) releasing the monitoring reports to the public, (2) instructing the IRM to check in with

the claimants as part of the monitoring, and (3) requiring the CCO to review any information received from the public as a part of monitoring the implementation of decisions made.

Para. 29. *As suggested by our general comments above, we believe the IRM should cover all the EBRD's policies and procedures.* The compliance review panel can be relied on to identify which policies and procedures are mandatory in a particular context. There is no valid reason to narrow the policies eligible for inspection in advance.

Para. 30. For reasons noted in our general comments, we would not limit the IRM to environmental impacts. *We would thus delete the word "environmental" from this paragraph.*

Para. 31. *Consistent with our general comments and the comments relating to Paragraph 29, we would delete this paragraph.* We believe the IRM should cover all the EBRD's policies and procedures. The compliance review panel can be relied on to identify which policies and procedures are mandatory in a particular context. There is no valid reason to narrow the policies eligible for inspection in advance.

Para. 32. To ensure that the panel operates independently from Bank management, the General Counsel should not be responsible for providing the IRM with legal advice relating to the Bank's policies and procedures. Gaining an independent interpretation of those policies and procedures and how they are implemented is precisely the role of the independent IRM panels. The General Counsel of course is the only entity that can provide opinions about the Bank's legal rights and responsibilities, for example under loan agreements or the Articles of Agreement. In those instances, it may be appropriate for the IRM panels to ask for advice from the General Counsel. This is consistent with the role that the World Bank General Counsel plays vis-à-vis the World Bank Inspection Panel. *We would thus substitute the following paragraph (taken from paragraph 15 of the resolution creating the World Bank Panel) for paragraph 32: "The Panel shall seek the advice of the Bank's General Counsel on matters related to the Bank's rights and obligations with respect to the request under consideration."*

Para. 34. *The IRM's annual report should include more than just a description of its activities.* The annual report should also be used to make more general recommendations for the EBRD, based on the experience and lessons learned from the IRM's activities. In this way, the IRM will be more usefully integrated into the EBRD's operations in preventing problems from recurring in the future.

Please direct any response to these comments to David Hunter, dhunter@ciel.org, Karen Decker, kdecker@bicusa.org, and Peter Hlobil, petr.hlobil@ecn.cz.