

DRAFT

Comments on the Proposal for an Independent Recourse Mechanism at the EBRD

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Article 1:

We commend that the purpose of the IRM will be to review complaints/grievances from affected people. We also commend that the Proposal distinguishes the problem-solving and the compliance review roles. However, we note that the problem-solving function is pertinent to *all* concerns, regardless of whether these are considered eligible for a compliance review.

Recommendation: We recommend the establishment of a permanent IRM. For the sake of its independence, this IRM should be authorised to decide whether a complaint is eligible under the IRM policy to be developed.

We advise the addition, after Article 1, of a separate provision to underscore the need for an IRM as a "learning mechanism," which allows Bank staff to draw lessons from grievances expressed by people that ought to be beneficiaries of the Bank's activities.

Recommendation: The addition of a provision that reads "*Another purpose of the IRM is to provide the Bank with an opportunity to learn from its failings, in order to improve its operations and to prevent the negative impacts thereof in the future.*"

Article 2:

According to this article (and other articles), the IRM may only review complaints relating to environmental impacts of projects. This is far too much of a limitation. It is of paramount importance that, for instance, social impacts are also included in the IRM's investigations.

Recommendation: *All* policies approved by the Board of Directors of the EBRD should be applicable for review by the IRM. In each specific case submitted, the IRM needs to decide which policies are relevant.

Article 4:

The President – the chair of both the Bank's Management and its Board - cannot be considered an independent decision maker with respect to complaints about the Bank's operations.

Similarly; since the Board of Directors is the supervising body of the Bank, it cannot act as impartial decision maker with respect to complaints received after Board approval.

Recommendation: All the complaints submitted should be considered for eligibility, and handled by, the IRM, in accordance with policies to be developed for this purpose. For this purpose, the IRM needs to be established as a permanent function (see hereafter). The IRM should submit a recommendation on the issue of eligibility to the Board. The

Board may subsequently decide how to follow-up on such a recommendation.

The term “Chief Compliance Officer” (CCO) suggests a reference to (only) compliance review activities. However, the IRM is foreseen to encompass both problem-solving and compliance review activities.

Recommendation: The IRM should be headed by a chairperson (referred to as, for instance, the Chair), responsible for the IRM’s two main functions.

The proposal to work with a roster of experts reminds of the ADB Inspection Function. However, the ADB experience learns that there are substantial disadvantages to this roster-mechanism. Most importantly, it appeared that the use of a roster of experts prevents the building and safeguarding of institutional experience and knowledge in handling complaints and about the workings of the Bank.

Recommendation: The IRM should be established as a permanent bureau. One of its tasks should focus on problem-solving (“Ombudsman”). Another task should focus on compliance review.

In addition, the IRM should have a separate desk with the responsibility to assess eligibility of complaints. In this function, the IRM should assist complainants in preparing the complaint for eligibility.

Finally, the IRM have an explicit responsibility in *monitoring* the implementation (by the Bank’s Management or any other party) of recommendations adopted by the Board after reviewing of the IRM report.

As suggested above, the IRM should be headed by a chairperson (Chair), who should be responsible for the IRM’s operations and accountable to the Board.

The Chair should have the authority to hire independent external experts for any specialised review activities as it sees fit.

We note that the mentioned qualities for experts participating in the IRM are too limited.

Recommendation: The listed desired qualities of the experts participating in the IRM should be expanded to include: *a proven expertise in conflict mediation; familiarity with social, environmental or cultural practices and conditions relevant to development projects; work experience with civil society and community organisations.*

Article 5:

This article first refers to eligible complainants. However, the provision mostly deals with the issue of confidentiality.

Recommendation: The provision should focus on eligibility of complainants. A separate provision should be added to address the Issue of confidentiality.

Re Confidentiality: We note that in some instances, for instance where local police protection is failing, complainants may be deterred from submitting their concerns to the IRM.

Recommendation: It should be provided that confidentiality is ensured at all times if the Complainant requests so. NGOs or other organizations should be allowed to represent anonymous individuals. The

last part of the provision ("*The IRM will use ... identity confidential.*") should be deleted.

Article 6:

The IRM should commit to respond to the Complainant in the language of the submission.

Recommendation: The last two sentences of the first paragraph should be replaced with "*The IRM will respond in the language of communication indicated by the complainant. The IRM will ensure adequate translation if necessary or desired*".

Recommendation: The text of the second paragraph should be rephrased to refer to not only environmental impacts, but to *all* adverse impacts identified in the complaint.

Recommendation: The third paragraph should clarify that "*steps taken* [by the complainant, vis-à-vis the government, sponsor, and/or the Bank] *to resolve the matter*" are not a condition for eligibility.

Article 7:

Recommendation: Throughout the Proposal, references to the CCO should be replaced with a reference to "*the Chair*" (of the IRM).

Article 8:

Affected parties should be allowed to file a complaint *at any time*. It should be appreciated that a complaint received at an earlier stage (for instance, prior to the Bank's "clear indication" of intent to finance a project) may provide information relevant to the Bank's assessment of the project it considers for financing.

Recommendation: Rephrase the text of this provision to read: "*Parties that are affected, or likely to be affected, by a project that is proposed for financing by the Bank, may file a complaint at any time.*"

Article 9:

It is unclear what is meant with the statement that the determination of eligibility will be based on an assessment whether "(ii) it is not specifically prohibited." Does "it" refer to the received complaint? How can a complaint be "prohibited" (as opposed to ineligible)?

The provision sub (iii) suggests that the determination of eligibility is dependant on the existence of a "prima facie" evidence of adverse effects. However, in particular cases that have *less* obvious adverse effects require careful scrutiny.

The reference sub (iv) to "good faith attempts to resolve the issues" wrongly suggests that Complainants are required, as a condition for eligibility, to make "good faith attempts" to resolve the issues. In this respect we note again that there may be instances in which actual or perceived threats to personal safety hinder the individuals from openly addressing problems.

Recommendation: To address the above concerns, the entire provision (apart from the first sentence) should be deleted.

Article 10:

The considerations whether “(i) the Bank’s resources may be usefully employed in pursuing the complaint; (ii) a positive result is the likely outcome” are unclear.

When does the consideration of a complaint constitute a “useful employment of the Bank’s resources”? For instance: are the Bank’s resources usefully employed if the IRM proceedings results in a suspension of the project to address social or environmental problems? Similarly, would the Bank a suspension of the project, in the interest of the complainant, be considered “a positive result” of the IRM proceedings? Or does “a positive result” relate to the timely termination of the project?

Sub (iii) and in the last sentences, reference is made to (remaining) leverage of the Bank in the project. It should be clear that the IRM relates to an impartial assessment of the issues addressed in the complaint, irrespective of the Bank’s leverage.

Recommendation: The entire provision should be deleted.

A provision should be included, after Article 11, to ensure that all relevant parties will co-operate with the IRM’s investigations (including, for instance, a site-visit)

Recommendation: In a separate Article it should be provided that *“Borrower will co-operate, and use its best efforts to ensure co-operation of third parties, with the IRM investigations. In particular, it should ensure the IRM’s ability to conduct a site visit. For this purpose, the status of IRM mission should not be considered different from any other Bank mission.”*

Article 12:

Recommendation: The second and third paragraph should be rephrased in view of the above recommendation not to work with a roster of experts.

Article 13:

Recommendation: In view of the above comments, this provision should be rephrased to read *“The Chair’s recommendations will be submitted to the President for approval. If the President does not approve these recommendations, he will refer the recommendations for consideration by the Board. The recommendation of the Chair to the President will be posted on the website of the IRM.”*

Article 14:

We agree that the Bank - the most powerful party in the contract - should not suspend disbursement (i.e.: the fulfilment of its contractual obligations) unless there is clear evidence that the other contractual party has seriously violated its obligations. Mere suspicions of such a violation (generally) constitutes insufficient legal grounds to suspend disbursement. In view of these considerations, we agree that the Chair is granted the right to recommend suspension of disbursement, and that the decision to suspend disbursement lays with the President and/or the Board of the Bank.

However, we also note that the Bank cannot never refer to its contractual obligations to justify the continuation of a project that has appeared to have unjustified, disproportionate or inadequately mitigated

damages. In some cases the apparent failure – by the Bank or its contracting party (or parties) - to adequately mitigate the damages ancillary to the project, should constitute a reason for the Bank to suspend or cease the project (and thus to “breach” the contract).

Recommendation: The last sentence should be deleted.

Article 15-20:

We note that the question whether or not a project has been approved by the Board is not relevant for a truly independent IRM. However, the statement (in article 15) that the IRM involves recourse to the President, or that an expert reports to the President / Board (article 17 / 19) suggests otherwise.

In the earlier stages of the process, there may be communication between complainant and President. An appeal to the IRM is a separate option, and should not be addressed to the President, but to the IRM. As recommended above, the IRM Chair should report to the President in all (both pre-board and post-board) cases.

Recommendation: Article 15 - 20 should be deleted or rephrased to address the above concern.

Article 15:

As noted above, the President of the Bank cannot constitute a “credibly independent” recourse in a conflict in which the Bank is a party.

Article 17:

The IRM member appointed with a problem-solving mandate should work exclusively on the matter *to ensure that the problem is adequately addressed*, rather than “to ensure that project time-lines are met.”

Recommendation: Delete the phrase “to ensure that project time-lines are met.”

Article 20:

To protect the credibility and integrity of the IRM mechanism, as well as the Bank itself, the IRM report should *always* be published.

Recommendation: The second and the last sentence should be rephrased to read: “The IRM report will be publicised on the IRM web site.”

Article 21:

The scope of the IRM should not be limited from the outset. The IRM should be allowed to investigate all aspects of the complaint and the project it sees fit. For this purpose it may seek advice from an (independent) legal counsel. The IRM also may decide whether to involve other proper offices of the Bank.

Recommendation: The paragraphs on “procurement matters” and on “matters of fraud or corruption” should be deleted.

Complainants should not be expected to understand the different mandates of the different Bank’s offices.

Recommendation: the provision should explicate the obligation for the IRM or the Bank staff to refer received complaints to the proper office.

Article 22:

We note that the issues raised in this provision have been addresses elsewhere.

Recommendation: This provision should be deleted, or replaced to read: "*The IRM will have the power to recommend the suspension of the Project or disbursements until it is ensured that social, environmental or other damages caused by the project are adequately addressed.*"

Article 23:

The IRM process may lead to the conclusion that complainants have suffered direct and material harm as a consequence of non-compliance with Bank policies. For such instances, the IRM needs to have the authority to recommend full compensation and mitigation measures.

Recommendation: This provision should explicate the IRM's authority and responsibility to review and recommend the payment of financial compensation, or the implementation of other measures to mitigate damages.

Article 24:

Third parties, engaged by the Bank to implement a project, should be contractually obliged to comply with the Bank's policies. Moreover, the IRM's review should also cover the role and performance of such third parties.

As noted above, serious failure by the Bank's contracting parties to fulfil their obligations towards third parties (e.g. to mitigate social or other damages), may in some cases constitute a reason for the Bank to suspend the Project.

Recommendation: This provision needs to clarify the IRM's authority to review third parties' performance as necessary.

Article 25:

As noted above, an important function of the IRM is to enable the Bank to be a learning institution. However this provision suggests a defensive attitude on behalf of the Bank towards the IRM.

Moreover, different from what this article suggests, at times an adequate solution to a problem may require an address of past wrong-doings.

Recommendation: Article 25 should be deleted.

Article 26:

While this provision rightly aims not to raise expectations of complainants, it inadequately refers (in the second sentence) to only one aspect of this matter.

Recommendation: The second and last sentence of this Article need to be removed.

Article 27:

We commend the inclusion of this valuable and important article. No recourse mechanism in other MDBs included this function thus far.

Article 28-31:

The IRM's mandate should include the review of complaints on operational aspect of the Bank's policies and procedures. Any limitation of the IRM's scope will compromise its – and the Bank's – credibility as well as its effectiveness. It should be left to the IRM itself to determine the scope of its scrutiny.

Another dubious distinction in this respect is between mandatory and non-mandatory policy requirements. *All* policy or procedure approved by the Board should be considered mandatory, and therefore subject to IRM review.

Recommendation: All policies and procedures approved by the Board may be subject to IRM review. It is to the discretion of the IRM to include for each case which specific policies and procedures should be included in the review.

Article 32:

The General Counsel will represent the Bank in a complaint procedure. However, the General Counsel should also be available to provide the IRM with legal advice. To ensure that these two roles do not conflict, a "fire-wall" construction needs to be established (to prevent unauthorized or inappropriate access to information relating to either the one or the other function). In addition to this, the IRM also needs to have access to independent legal counsel.

Recommendation: Add the following sentences: *"The IRM and the Bank will ensure that a so-called "fire-wall" mechanism is established to between the General Counsel to the Bank and the General Counsel to the IRM, to adequately distinguish and protect the integrity of the two functions. The IRM also may seek independent legal counsel."*

Article 33:

The guarantee of confidentiality for complainants and any involved third-parties is a responsibility of the IRM – who we propose will receive the complaint. As suggested, confidentiality should be guaranteed at all times if the complainant requests so.

Recommendation: Rephrase the last sentence of this article: *"Secondly, the identity of complainants and any involved third-parties will, upon request of the complainant, be withheld by the IRM".*

We also note that the IRM, in the context of a compliance review, should have (confidential) access to *all* information pertaining to the Bank's operations, including documents of a commercial nature.

Recommendation: Rephrase the second sentence to read: *"The IRM will have access to commercially sensitive business information, however it will ensure that such information will be maintained confidential at all times."*

Article 34:

The IRM needs to be independent, even if it is a facility of the Bank. For this purpose, the IRM should submit its annual report not to the President, but rather to the Board.

Recommendation: Rephrase the second sentence to read: *"The Report will be submitted to the Board. Upon approval of the Board, the annual report will be made available to the public".*

Other:

We note that the policy fails to provide for clear powers for the IRM to enable it to perform its tasks.

Recommendation: Add the following provision: *"The IRM will have (confidential) access to all documents and information, people and places it considers pertinent to its investigations. In this respect, the Bank's staff will cooperate with, and do what is necessary to facilitate, the IRM investigations."*

An additional article is required to ensure that the function of the IRM is fully introduced to all potentially interested parties.

Recommendation: Add an article after Article 34 that reads: *"The IRM and the Bank will actively introduce and publicize the function of the IRM to all the various stakeholders. The IRM will organize regional introduction workshops for this purpose."*