

February 12, 2009

The EBRD's Project Complaint Mechanism Draft Rules of Procedure

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The European Bank for Reconstruction and Development (EBRD) is carrying out a Review of its Independent Recourse Mechanism (IRM). As an outcome of this Review, it is expected that the EBRD will establish a Project Complaint Mechanism (PCM) that would amend or replace its existing IRM. Civil Society Organizations (CSOs) have requested an evaluation of the EBRD's plans to establish the PCM that analyzes objectively the proposed PCM's internal and external usefulness, effectiveness and credibility. As needed, this evaluation will also compare objectively the robustness of certain aspects of the proposed PCM with accountability mechanisms (ACMs) of other International Financial Institutions (IFIs).

This note responds to the request of CSOs and presents a preliminary analysis of the proposed PCM in accordance with objective criteria which include its: (a) independence; (b) method of operation; (c) standing in terms of who can submit complaints and the nature of complaints that can be considered; (d) involvement during different phases of a project cycle; (e) applicable policy framework; and (f) accessibility to interested parties. This note evaluates the proposed PCM on the basis of the criteria described above. It is based upon a desk review of the proposed PCM's Rules of Procedures (RP), and short interviews with Ms. Natalie Bridgeman, IRM Review Consultant and Prof. Edith Brown Weiss, who acted as senior adviser at the initial stages of the EBRD's Review, and interviews with EBRD staff and Executive Directors that took place in London on January 20, 2009 in the context of consultations organized by the EBRD.

Overall, the EBRD is to be congratulated for a productive review process of its IRM. Aside from questions about the PCM Officer's independence and its ranking within EBRD, there are a number of positive developments in the draft review that would greatly improve the EBRD's accountability mechanism and build on positive aspects of the current IRM. Indeed, the proposal to establish the PCM constitutes a significant improvement over the exiting IRM mechanism. The comments and observations presented in this evaluation are intended to make a constructive contribution to the EBRD's review process.

Independence of the Accountability Mechanism

The foundation of an ACM's internal and external usefulness, effectiveness and credibility lies in its independence from the people (and organizations) that may present a complaint, on the

one hand, and from the institution and its staff against which such complaints are presented, on the other. Any tilt to the side of either the people or the institution could seriously compromise an ACM's independence. The process for selection and appointment of its members and staff, their terms and conditions of employment, including provisions for employment before and after serving an ACM, the reporting relationships within the institution, and its budgetary allocation and processes, all have an important impact on an ACM's independence. These factors, both as they impact an ACM, as well as the particulars of the proposed PCM, are described in detail below.

Selection and Appointment Terms of Members and Staff and Provisions for Employment Before and After Appointment.

The rules and procedures of most ACMs provide a carefully crafted set of rules to ensure that their members and, in some cases, supporting staff have not only a suitable professional, academic and personal background but also have an actual and perceived independence from the institution under which they are established.

In the case of the proposed PCM, the RP provide that *“up to ten (10) PCM Experts will be nominated by a committee and appointed by the Board on the recommendation of the President. The nomination committee, to be established by the President and to include members both internal and external to the Bank, will solicit nominations for the position of PCM Expert through a public and transparent process per the Bank's procurement rules applicable to consultants”* (emphasis added). The RP do not provide any further guidance as to who and how the “internal” and “external” nomination committee members would be selected, and whether Members of the Board of Executive Directors may or would be included in the nomination committee. The same applies to representatives of relevant CSOs.

On the positive side, RP 48 includes customary provisions about the independence of the candidates regarding prior employment, i.e. *“the experts will not have worked for the Bank (either as a staff member, Bank official, Director, Alternate Director, Director's Adviser or consultant) for at least two (2) years prior to being hired as a PCM Expert (with the exception of having served on the Roster of Experts to the Bank's IRM)”*, and future employment, i.e. *“the PCM Expert, upon completion of his or her term of service, will not be entitled to work for the Bank (either as a staff member, Bank official, Director, Alternate Director, Director's Adviser or consultant) at any point in the future.”* (emphasis added)

Furthermore, RP 47 refers to the candidates' qualifications and experience as follows *“The committee will narrow the list of nominees based on the candidate's experience, particularly in economic, legal, social, environmental, and related fields; proven ability to interpret and apply rules and resolve disputes thoroughly and fairly; demonstrated integrity and independence; ability to interact effectively with Relevant Parties and civil society; and experience with operations of the Bank or similar institutions”*. By and large, these provisions are similar to those of other ACMs and constitute an acceptable practice provided the membership of the “nomination committee” represents adequately all stakeholders.

The selection of the PCM Officer would follow similar rules and procedures with a few significant differences, as follows: a) the designation of the nomination committee and the

appointment of the PCM Officer would be the responsibility of the President and there seems to be no noteworthy role for Board Members (RP 54); b) the PCM Officer would serve as full-time employee of the Bank on a five (5) year, renewable contract (RP 55); and, c) in spite of having a role and responsibilities far superior to those of the PCM Experts, “*the PCM Officer, upon completion of his or her term of service, will not be entitled to work for the Bank (either as a staff member, Bank official, Director, Alternate Director, Director’s Adviser or consultant) for at least the three (3) years immediately following*” (RP55) (emphasis added). These provisions could be construed to cast doubts about the full independence of the PCM Officer, since he/she could be eligible for subsequent employment in the institution.

Reporting Authority

For a number of legal, administrative and practical reasons, as a rule, the ACMs of the major IFIs have been established as internal administrative units that respond to the institutions’ highest authorities, i.e., the Board of Executive Directors and/or its President. This reporting arrangement not only ensures a substantial degree of independence for the ACM but also permits the high level authorities of the IFIs to become aware of problems and perceptions of people that feel actually or potentially affected by projects or programs which they finance.

Despite the many powers and responsibilities vested in the PCM Officer (described below), he/she would not report directly to the Board of Executive Directors and/or EBRD’s President¹, but to the EBRD’s Chief Compliance Officer (CCO), an apparently independent official in EBRD’s management structure that provides “advice and assistance to all Bank departments” in assessing, inter alia, “reputational risks relating to proposed, as well as on-going, Bank transactions”.² Experience shows that a significant number of ACM-related complaints do or may involve reputational risks and, therefore, this subordination of the PCM Officer to the CCO could raise questions of his/her independence from Management.

RP 45 reads as follows: “*Role of the EBRD Chief Compliance Officer (“CCO”). The CCO, the head of the Office in which the PCM is located, is responsible for ensuring that the PCM Officer carries out the PCM functions and administrative responsibilities according to these Rules of Procedures*”. As discussed later, the CCO has also an essential role in determining the PCM’s budget.

¹ The African Development Bank’s ACM has functions very similar to those of the proposed PCM. Their ACM Mechanism comprises the Compliance Review and Mediation Unit (CRMU) and the Roster of Experts. The CRMU is headed by a Director assisted by a Principal Compliance Officer and secretarial services. The Director reports administratively to the President and functionally to the Board of Directors for projects approved by the Board and to the President for projects not yet approved by the Board. See: http://www.afdb.org/portal/page?_pageid=473,5848220&_dad=portal&_schema=PORTAL

² According to EBRD’s website the CCO is the Head of the Compliance Office, which “is responsible for ensuring that the highest standards of integrity are applied throughout all activities of the EBRD. The Compliance Office, which is also the anti-money laundering office of the Bank, provides a range of advice and assistance to all Bank departments in assessing and evaluating integrity and reputational risks relating to proposed, as well as on-going, Bank transactions” (emphasis added) See: <http://www.ebrd.com/about/structure/profiles/quinones.htm>

Organizational Standing

An ACM's standing within an organization, i.e., its relative position in the hierarchy of an institution is closely related to its independence. When the Inspection Panel of the World Bank was established, the Panel members insisted that for the Panel to be effective and have adequate access to Senior Management and Board Members, its Chairperson should have the rank of at least equivalent to that of a Vice President. The idea of a lower ranking individual having authority to request information or interviewing, in appropriate conditions, members of Management, often of higher rank, was considered not viable operationally. Management concurred with this position and the Chairperson of the World Bank's Inspection Panel is functionally regarded as a Vice President. Most IFIs accord similar ranking or standing to the heads of their ACMs.

As proposed, the PCM Officer would be only a member of the staff of the CCO, who may be powerless, in practical terms, when dealing with senior management. In fact, the RP would lower the ranking of the EBRD's existing Accountability Officer.

The most appropriate solution would be to assign a senior position to the PCM Officer heading a separate department or unit. If the establishment of such a unit or department were not feasible to the EBRD, then, as a second best solution, the CCO should retain its independent accountability role and take full responsibility for the PCM function, assisted by the PCM Officer. The question remains whether the CCO should retain its role as adviser to all EBRD departments on matters relating to reputational risks.

Operational Independence

Aside from its standing within the institution, the location of an ACM is fundamental to ensure its independence. Most, if not all, ACMs have their own secure suite of offices and exclusive secretarial support, not only to demonstrate their independence but, more importantly, to preserve the confidentiality and integrity of the ACM process. This is for the benefit of complainants, who may have requested that their names and other data remain confidential. It is also for the benefit of the institution and staff, since in the course of their work all ACMs have access to classified documents and records that may include, among many others, staff depositions, minutes of meetings and all kinds of reports. Experience with the operations of existing ACMs has shown that, to ensure the integrity of the ACM process, all of this information must be available to, and handled and processed exclusively by, members of the ACM.³

³ A good example of the care and concern with which ACMs handle information available to them is provided by the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC) and the Multilateral Insurance Agency (MIGA) who has established for each of the CAO's roles (i.e. compliance, advisor and ombudsman) totally segregated filing systems, manned independently by different staff. See: <http://www.cao-ombudsman.org/html-english/about.htm>

As previously mentioned, the subordination of the PCM Officer to the CCO could create perceived and actual questions about his/her independence. The question is, then, who would assess the performance of the PCM Officer. To preserve an independent process, the PCM's performance could be assessed by the President or by a committee of the EBRD's Board with overall responsibility for the proposed PCM's oversight. This reporting system seems to be already suggested in RP 53, but could be made more explicit.

Finally, the RP General Provisions stipulate that on legal matters, "*The General Counsel will, upon request, provide all legal information and advice needed regarding the Bank's policies and procedures and the Bank's rights and obligations regarding the Project at issue in a Complaint*". The independence of the proposed PCM from the Legal Department is ensured by the proviso that the General Counsel will provide information and advice only upon request.

Budget

To be effective and fully independent an ACM must be provided with budgetary resources that are not only sufficient to carry out its activities but that are also managed independently from the institution's management or other units. An ACM needs not only resources but also the necessary autonomy to apply them –subject to all applicable fiduciary obligations – without the approval or guidance of other institutional units. This is in fact an essential measure to ensure that an ACM has the required independence and the ability to perform its mandate in a timely and effective manner.

RP 65 provides that "*the Bank will provide budgetary resources to the PCM sufficient to allow all of the activities permitted by these Rules to be carried out*". The same RP, however, stipulates that the PCM budget is not prepared and submitted by the PCM Officer but by the CCO, who "*will prepare an annual budget indicating the level of resources required for the forecasted activities of the PCM for the coming year*". The text of the RP is not clear as to whether the CCO has the final authority to approve the proposed PCM's budget, but it is clear that the PCM's activities may be limited to those forecasted by the CCO. In our view, to preserve its independence the PCM Officer should prepare and submit its budget for approval to EBRD's President or Board of Executive Directors.

Unfortunately, the PCM Officer's reporting relationship, office location and lack of dedicated staff, and the budgetary process cast significant doubts about the prospects for the proposed PCM's actual and/or perceived independence.

Operations of the ACM

An ACM's operations provide a good glimpse of the roles of the different actors in an ACM process, and how they shape the credibility and perceived independence and effectiveness of the mechanism. In this context, the roles assigned to the administrators of an ACM, as compared to those of the independent members who are appointed for relatively short periods and can claim that they are more independent from the institution, may provide a significant indicator of the perceived, relative independence of an ACM and its expected efficiency and

credibility. Experience has shown that the greater the number of responsibilities assigned to an ACM's independent members, the greater its credibility.

As proposed in the RP, the PCM process assigns an extraordinary number of functions, powers and responsibilities to the PCM Officer, as opposed to its independent members (i.e., the proposed PCM Experts). Among many other tasks, the PCM Officer would be expected to decide whether or not to register a complaint. The PCM Officer would also be expected to select from a roster the PCM Experts that would be in charge of reviewing the eligibility of a complaint and its final disposition in the case of a compliance review. The PCM Officer and the PCM Experts would have the same level of authority, and together, as "Eligibility Assessors", would be expected to decide whether a complaint is eligible and, if so, the procedures that are to be followed (RPs 17-28). In the case of a Problem-Solving Initiative, the PCM Officer alone may become a "Problem-Solving Expert", whereby the whole process would, by and large, be his/her responsibility.

Furthermore, if there were to be a "Compliance Review" the PCM Officer "*will appoint a PCM Expert*"⁴ to conduct the Compliance Review, and later, depending on the results of the Review, he/she would close the Complaint File or issue the "Compliance Review Report". The PCM Officer would also be expected to be in charge of monitoring compliance with the outcomes of all complaints that he/she had previously processed.

In view of the above, the actual and perceived independence of the PCM Officer, who would not only have a significant influence on the processing and outcome of complaints - but would also be the person to whom complainants would entrust their identities when they feared persecution - could be compromised by a number of issues, including the authorities to which he/she would report, the budgetary independence with which he/she would operate and, to a lesser extent, its selection procedures and appointment terms and conditions.

The independence of the PCM Experts under the RP appears similar to that of the members of other ACMs. However, taking into account the experience with the existing IRM, as described in the IRM's 2007 Annual Report, the selection of PCM Experts as "Eligibility Assessors" and "Problem-Solving Experts" should be regulated and not left at the entire discretion of the PCM Officer, otherwise there would be no guarantees for PCM Experts that they would have a fair chance to be appointed as such. Another way of enhancing the standing of the PCM Experts, and, at the same time, improving the PCM Officer's perceived independence, would be to amend RP 17⁵ to provide that if there were no consensus among the Eligibility Assessors, the opinion of the PCM Expert would prevail, subject to the President's or Board's approval, as the case may be.

⁴ RP 47 provides that "up to ten (10) PCM Experts" will be appointed. The RP, however, provides no guidance or rules on how the PCM Officer will appoint PCM Experts as Eligibility Assessors or Problem-Solving Experts. This is quite relevant since the IRM's 2007 Annual Report shows that only a single expert was contracted on all cases before the IRM that year, acting in either capacity.

⁵ RP 17 provides that "The Eligibility Assessors will determine, by consensus, whether the Complaint is eligible for a Problem-solving Initiative, a Compliance Review, for both, or for neither."

In addition, to be able to attract highly qualified and independent experts that would increase the credibility of the ACM there is also a need to make the PCM Experts' position more attractive, since their chances of participating in one or more complaints during the life of their appointment seems remote, especially considering the number of cases currently handled by the existing IRM and the number of experts in the roster (up to 10). This would be especially relevant since, in addition, the Experts would be subject to a lifetime prohibition to work subsequently for the EBRD in any capacity.

The procedures of the African Development Bank's ACM have addressed at least partially the above concerns by: a) reducing the number of experts (only 3); b) appointing one expert as Chairperson of the Roster of Experts with certain decision making responsibilities; c) paying an annual retainer to the experts, to ensure their availability at all times; and d) providing and financing "training sessions" for experts at least once a year. The proposed PCM would only provide the last of these as a means of making experts' positions more attractive.

In short, leaving aside the well-known integrity and professional reputation of the incumbent CCO (who may change), the PCM as presently proposed would not be a unit completely independent from the EBRD's management structure. This is true especially since the performance of the PCM Officer would be supervised by an EBRD official that, just as importantly, would have the power to determine the PCM's operating budget which is a crucial element of bureaucratic control over what is to be an independent mechanism.⁶ The PCM Officer, who would not only have a significant influence on the processing and outcome of complaints and who would be the person to whom complainants would entrust their identities when they fear persecution, could, as the proposed PCM is to be structured, be affected by a number of issues related to the authority to which he/she would report, operational and budgetary independence and, to a lesser extent, the selection procedures and appointment terms and conditions. In this regard, the proposed arrangements for the EBRD's PCM are not consistent with those of other ACMs and would likely be detrimental to the PCM's standing and credibility.

Access to Institution's Staff and Records

Experience with other ACMs demonstrates that in order to be able to carry out their duties and responsibilities effectively, it is essential that the experts and officer of an ACM have full access to all staff, documents and other records that they, in their sole judgment, regard as relevant for the processing of the complaint in question.

In RP 60, therefore, clarifications are needed so that "the PCM Officer's and Expert's access to and use of information will include access to records and staff that they regard as relevant to the complaint in question, but that the public disclosure of such information will be subject to

⁶ RP 45, although this paragraph indicates that the CCO will be in charge of "ensuring that the PCM Officer carries out the PCM functions and administrative responsibilities", it is silent on how the performance the PCM will be evaluated, and also on who and how could initiate his/her removal pursuant to RP 55.

the Bank's Public Information Policy, and any other applicable requirements to maintain sensitive information confidential.

Selection of Experts

As stated above, the proposed PCM would have a Roster of up to ten Experts who would be selected on an ad-hoc basis to deal with eligibility matters or to conduct an investigation.

The election of PCM Experts as Eligibility Assessors or Problem-Solving Experts should be regulated (rotation) and not left to the sole discretion of the PCM Officer. RP 28 (b) contemplates that the Eligibility Assessors would identify the PCM Expert that would conduct the Compliance Review. This conflicts with RP 35 and RP 53 that state that the PCM Officer would appoint a PCM Expert to act as the Compliance Review Expert to conduct the Compliance Review. Clarification is needed on who does what and whether the RP makes a distinction between selection of the Experts and their formal appointment or employment.

Other Procedural Issues⁷

There are several other issues regarding provisions of the RP that would govern the operation of the EBRD's proposed PCM, especially taking into account the experience and operation of the ACMs of other IFIs. These are presented below.

Unlike the Compliance Mechanism Policy of the European Investment Bank (EIB) that allows individuals to submit complaints of "maladministration"⁸, the proposed PCM would follow a traditional approach requiring that a complaint can only be filed by at least two individuals. In practice, however, sometimes a single individual in a community has the access and the knowledge needed to approach an ACM with the tacit support of others. Although the ACMs of some other IFIs such as the World Bank also require filing by two or more individuals, the justification for not granting individuals the right to submit complaints to an ACM is not obvious.

Paragraph 1 of the RP would preclude CSOs from requesting a Problem-Solving process. In reality, a number of social or political factors could make the possibility of individuals seeking a Problem-Solving Initiative on their own very difficult. Representation by CSOs could facilitate this possibility and make any negotiation or conciliation efforts more fair and

⁷ Some of the RP definitions should be reviewed to make the PCM more relevant and accessible to affected people. For example,; "*Project*": this concept should be amended so that all activities financed by EBRD, unless specifically exempted by the Board of Directors, are subject to the PCM purview; and "*Relevant EBRD Policy*" should be amended to include all EBRD policies related to lending and other financial operations.

⁸ Maladministration occurs when a member of the EIB Group fails to act in accordance with applicable European or local legislation or EIB policies. See: <http://www.eib.org/about/documents/complaints-mechanism-policy.htm>

balanced. CSOs should also be allowed to seek a Problem-Solving Initiative, especially in cases of perceived difficulties or risks to individuals for pursuing this option.

Where to submit a complaint? RP 8 should include an email address so that the proposed PCM could receive complaints via email and begin addressing them as soon as possible. While it may be important that a signed version of the complaint follow via fax or mail, many steps in the process would then take place while waiting for a signature to arrive, including verification of five of the six registration criteria in RP 10.

As to the registration process in RP 10, it is unclear what is meant in RP 10 (e) by requiring that an organization “affix its seal”. Not only is it unclear what “seal” an organization would affix (not only to organizations with few resources in the Region, but to any organization), but it is not a necessary alternative to the signature of the complaining party or its authorized representative. It is suggested that the portion of RP 10 (e) following the semicolon be deleted.

In RP 11, it is important that the first sentence clarify and expand on “*Where the PCM Officer decides not to register a Complaint because of a failure to meet the registration criteria*” so that decisions not to register a Complaint are not seen as arbitrary.

In RP 18, the rules are not clear on how a complaining party would be able to determine whether a complaint is eligible for a Problem-Solving Initiative. If there is a requirement that the complaining party submit the complaint only after the relevant project’s approval by the “*Bank’s Technical Cooperation Committee or has passed Final Review by the Bank’s Operations Committee*”, it is essential that complaining parties be instructed where they may find the documents notifying them about a project’s status. If such information is not publicly and widely available, this requirement should be reconsidered and should perhaps be incorporated as a discretionary factor used in determining eligibility (related to the EBRD’s leverage), not as a technical requirement.

In RP 19, complaints requesting a Compliance Review would be eligible only if the project in question had “*been approved for financing by the Board or by the Bank committee which has been delegated authority to give final approval to the Bank financing such Project*”. As the lessons of fourteen years of practice with the World Bank’s Inspection Panel have shown, it is often too late for an institution to play a meaningful and constructive role in ameliorating or preventing harm when a project is already in final approval stages. While end points for eligibility are essential to ensure that the EBRD continues to have leverage over a project, a barrier to entry that requires parties with complaints to wait for a project to be ripe before they may submit their complaint to the PCM would hinder both the complaining party’s ability to bring timely attention to the problem and the EBRD’s ability to address the issue in a prompt manner.

In RP 22 the provision that “*the Eligibility Assessors will consider whether the Complainant has raised the issues in the Complaint with the Client’s dispute resolution or grievance mechanism, or with the complaint or accountability mechanism of a parallel co-financing institution, or before a court, arbitration tribunal or other dispute resolution mechanism and, if so, the Eligibility Assessors will consider the status of those efforts*” seems to ignore the fact

that a complaint refers to lack of compliance with relevant EBRD policies, which may be different to other ACM's policies or applicable legislation, and that it would be the interest of the institution to ascertain whether its own policies and procedures have been complied with and the eventual consequences of non-compliance, if any. Also, this RP may give the impression that EBRD regards its policy provisions as secondary to those of other institutions.

RP 23 should additionally include a sub-paragraph "c" that would provide that issues appropriate for a Compliance Review include situations where the EBRD has "*failed to follow-up on a Client's contractual obligations with respect to the EBRD's Relevant Policies*".⁹, EBRD's Environmental and Social Policy (2008) includes specific monitoring obligations for staff¹⁰ but it does not seem to include reference to the EBRD's duties to follow up on a Client's contractual obligations.

RP 24 (e), requiring that a Complaint should not relate "*to the adequacy or suitability of EBRD policies*", is vague and should be clarified because, for example, instances of harm in spite of full compliance with Relevant Policies' provisions could indicate the need to revise or update such policies.

RP 24 (f) should be amended to state that a Complaint would be ineligible if it relates to matters in regards to which a complaint has already been processed by the PCM, not the by "*the Bank*". Since RP 18 (c) requires a good faith effort to address the issues in the complaint, "*including with the Bank*", any "*processing*" of a complaint by EBRD's Management or staff should not preclude people from complaining to the PCM.

RP 27 appears to depart from existing policies that allow the Complainants an opportunity to comment before a Complaint that were to be found ineligible is closed.

In RP 34, the agreements that were to result from Problem-Solving Initiatives should be monitored and reported in accordance with terms similar to those provided by RP 44 for actions approved by the Board or the President to address findings of non-compliance.

RP 56 entitles the PCM Officer "*to obtain additional expertise if necessary for the successful performance of the PCM duties and responsibilities*". In our view, the PCM Expert involved in the processing of a complaint should have a say in the preparation of the Terms of Reference (TORs) and selection of the expert consultants. It is fair and practical to subject the selection and TORs of the expert consultants to the relevant PCM Expert for approval.

RP 69, as in the case of other ACMs, the Board of Executive Directors should be in charge of the Reviews of the PCM as provided for in this RP.

⁹ The Board Resolution that established the World Bank's Inspection Panel provides, for example, that violations of policies and procedures include "*situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures*". (Para. 12 of the Board Resolution)

¹⁰ Para 34 of EBRD's Environmental and Social Policy (2008) provides that monitoring is required "*to ensure that the applicable standards and various environmental and social components included in legal agreements, such as the implementation of an ESAP, are being substantially met*".