



## **Comments on the draft Rules of Procedure for the Project Complaint Mechanism at the European Bank for Reconstruction and Development**

**13 February 2009**

The International Accountability Project (IAP) would like to thank the European Bank of Reconstruction and Development (EBRD) for this opportunity to comment upon the Draft Rules of Procedure (RP) for the Project Complaint Mechanism (PCM). While the majority of our commentary will focus upon areas of concern, please note that we welcome the progressive steps taken within this draft. In particular, providing civil society organizations with independent standing to file a complaint is truly a laudable measure that will increase transparency and accountability across all projects and member states. For this and the other progressive changes, we thank the drafting committee.

However, we are concerned about a number of other provisions in this draft and with the process of the review going forward. In that regard, please accept the following comments and recommendations in order to help ensure that the PCM can provide the most accessible and meaningful accountability for project affected persons.

### **Comments and Recommendations**

- 1. Consultation process:** For meaningful and informed consultation, it is vital that there is two-way exchange of information between the Bank and relevant stakeholders. This includes disclosing draft documentation an adequate amount of time prior to any submission/response deadlines to allow for thoughtful and informed input from external stakeholders. It also requires providing feedback to stakeholders on whether or how their comments were incorporated into the next draft document. This feedback-loop helps ensure that comments have been properly understood and allows stakeholders an opportunity to clarify any of their input. Furthermore, feedback from the Bank on comments-received fosters good-will between the institution and external actors to continue a dialogue and encourage participation in consultation processes in the future.

Unfortunately, the RP consultation document notes that a “summary of public comments and staff responses” will only be disclosed “following approval of the RP.” While we commend the Bank for disclosing responses to comments received, for the reasons listed above, it is crucial that this disclosure takes place before the RP is finalized. Such a practice is not unprecedented. In 2005, the World Bank piloted this approach by disclosing “operational policy reviews simultaneously with their distribution to the Executive Directors for an informal Board discussion.”<sup>1</sup> Furthermore, the Global Transparency Initiative (GTI), a civil society movement promoting openness at international financial institutions, promotes disclosure of iterative draft policy documents including circulation of the final draft document to the public for review, as one of the key principles in GTI’s widely agreed-upon set of best practices.

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<sup>1</sup> World Bank. *World Bank Disclosure Policy: Additional Issues Follow-up Consolidated Report (Revised)*. February 14, 2005, paragraph 10.

*Recommendation:* The Bank should: (a) Disclose a summary of public comments and staff responses, including explanations on whether and how input is incorporated in the next draft document, prior to Board discussion of the final draft RP. (b) Disclose the final draft RP at the same time that it is circulated to the Board for discussion.

- 2. Independence of the PCM:** The PCM plays a vital role in ensuring the accountability and credibility of the EBRD. Given the complex nature of development projects, multiple feedback mechanisms are needed in order to ensure that project objectives are being met while maintaining implementation of important sustainability policies. The EBRD's evaluation units play a role in this regard, but the PCM is the only mechanism that allows affected individuals and civil society organizations to trigger a review or mediation process around the on-the-ground impacts of Bank operations.

In order for such a mechanism to succeed, independence from Bank Management is absolutely critical. This principle is recognized by the almost every other Multilateral Development Bank (MDB) with an accountability mechanism similar to the PCM. One of the best examples of this is the Compliance Review Panel (CRP) of the Asian Development Bank (ADB) which "is an independent forum established by ADB's Board of Directors" and "reports directly to the Board on all activities".<sup>2</sup> Other examples include the World Bank's Inspection Panel and the Compliance Advisor Ombudsman (CAO) at the International Finance Corporation (IFC) which report directly to the Bank's President. The CAO makes a point on independence in their operational procedures: "The CAO reports directly to the President of the World Bank Group and is not part of the line management structure of either IFC or MIGA."<sup>3</sup>

Despite these well founded examples at sister institutions, the draft Rules of Procedures for the PCM state that the EBRD's mechanism will be located under the office of the Chief Compliance Officer (OCCO), with the PCM Officer reporting to the CCO. This establishes a supervision structure within Management and compromises the independence of the mechanism.

*Recommendation:* The EBRD should build on best practice at sister institutions and should establish the PCM as an independent body from Management which reports directly to the Bank's Board of Directors.

- 3. Clarity regarding what should be included in project complaints:** As currently written, the draft Rules of Procedures can be very confusing for users outside of the Bank's structures—specifically, project affected individuals and civil society organizations. A key example of this is how the Procedures describe what needs to be included in a project Complaint. The section under sub-heading "How to submit a complaint" (page 3) lists a number of criteria for a complaint to be registered. However, it is not until several pages later, following sections such as "Where to submit a complaint" and "Actions subsequent to registration" that the draft RP describes *other* criteria for the Complaint to be eligible. It is not clear from the Procedures that *both* information necessary for the complaint to be registered *and* information to determine eligibility must be included in any initial request to the mechanism.

Furthermore, there is no section in the draft RP which summarizes what a user can expect in terms of steps in the process and timeline for the entire process.

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<sup>2</sup> Asian Development Bank. Compliance Review Panel. *Operating Procedures*. June 2004, paragraphs 1 & 6.

<sup>3</sup> International Finance Corporation. Compliance Advisor Ombudsman. *Operational Guidelines*. July 2007, page 6.

*Recommendation:* Add a section before paragraph 10 indicating that a complete complaint will include: (a) all criteria necessary for registering the complaint, (b) a statement as to whether the Complainant is requesting a problem-solving initiative, compliance audit or both, and (c) all criteria necessary for proving eligibility either for a problem-solving initiative, compliance review or both. Add a section in the RP that summarizes the steps in and timeline of the complaint process.

- 4. *Equality of arms for Complainant to information developed throughout the course of the complaint process:*** We are very concerned that the Complainant does not have the same right to information and to formal input in the complaint process as Bank Management. This is clear in at least two instances.

First, following submission of the complaint, Bank Management has an opportunity to comment to the PCM on the project and for that input to be considered when the PCM is determining eligibility. (Paragraph 15) However, while Management is privy to the documentation submitted by the Complainant, Management's input (Management's Response) is not, in turn, disclosed to the Complainant. This grants Management an advantage to discouraging legitimate complaints by pointing out minor flaws in the application that could otherwise be addressed if the Complainant were given the opportunity to respond. Further, it also grants Management the opportunity to present controversial evidence/claims without permitting the Complainant a procedural check. However, it is also necessary to avoid an endless cycle of claim and counterclaim. Therefore, the Claimant's counter at this stage should be substantively limited to issues directly addressed in Managements response.

Second, in the case of a compliance review, following completion of the draft Compliance Review Report, the PCM will send the draft report "to Bank Management to allow it to respond" in a Management Action Plan. (Paragraph 41) However, the Complainant is not given the same right to respond to the draft Compliance Review nor is Management required to consult with the Claimant and affected community in development of the Action Plan. At the ADB CRP, both the Claimant and Bank Management are able to comment on a draft compliance review report and these comments, from both parties, are attached to the report when it is sent to the Board of Directors for discussion.<sup>4</sup> Such a provision helps ensure that the claim is not prejudiced against the Claimant.

*Recommendations:* Paragraph 4 should be amended to: (a) include the disclosure of Management's Response to the Complainant upon submission of the Response to the PCM and, (b) allow the Complainant up to 15 days to comment on Management's Response, if needed. (Management is provided 15 days following claim registration to submit comments to the PCM. Project Complaints should be provided the same amount of time. Furthermore, since the PCM is allowed up to 40 days to determine eligibility, there is ample time for both parties to submit comments. )

Paragraph 41 should be amended or a new paragraph in that section added to formally seek input from the project Complainant on the draft Compliance Review Report, in an equal manner allowed to Management.

- 5. *Effect of a complaint on the bank project cycle:*** We welcome the provision in the draft Procedures that allow a Problem-Solving Initiative to be initiated if the Bank has provided "a clear indication that it is interested in financing the Project." (Paragraph 18(a)(i)) Such a provision is vital to ensuring that potential policy violations or project risks are mitigated early in the project cycle, before final decisions on the project have been made. However, we are concerned that after a complaint is

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<sup>4</sup> Asian Development Bank. *Review of the Inspection Function: Establishment of a New Accountability Mechanism*. May 2003, Article 124.

registered and determined eligible, the project could continue to the Bank's Board of Directors for approval while a Problem-Solving initiative is ongoing. This would likely be damaging to the PCM process initiative and would result in the Board discussing and possibly approving a project without full information. The Board should not make a decision on a project if there is an ongoing process at the PCM when additional, potentially critical, information will be available to the Board only upon the completed PCM report.

While paragraph 30 gives discretion to the PCM Officer to make a "recommendation to suspend further Bank processing of, or, if possible, disbursement in regards to, the Project", there should be an automatic trigger for postponement of the Board review date of a project in the event of an ongoing PCM process.

*Recommendation:* Paragraph 30 should be amended to state that for instances where a PCM process is initiated before Board approval, the Board meeting on the project should not take place until after the PCM process is concluded.

6. **Who may file a complaint:** While we would like to congratulate the EBRD on allowing organizational standing in filing a compliance review, we are concerned that civil society organizations do not have the same right to file for a Problem-solving Initiative. It is likely that in some cases, there may be a risk to individuals raising environmental and social concerns around a project and organizational involvement would be necessary. Furthermore, it may be difficult in some contexts, especially in countries where civil society organizations suffer persecution, for the organization to "provide documentation to establish that they are registered as a NGO in a member country of the Bank." (Paragraph 2) If a civil society organization is able demonstrate that it is acting in good faith, this should be adequate to submit a complaint to the mechanism.

*Recommendations:* Paragraph 1 should be amended to include standing for civil society organizations to request a Problem-solving Initiative. Paragraph 2 should be amended to remove the provision requiring organizations to "provide documentation to establish that they are registered as a NGO in a member country of the Bank."

7. **Defining a "Project":** The EBRD is proposing to adopt a relatively restrictive definition of projects eligible for review by the PCM. The draft RP defines a "project" as an investment actively but precludes "technical assistance projects or other activities that are funded exclusively by cooperation funds administered by the Bank." (page 2) However, technical assistance (TA) projects can have significant ramifications for citizens in EBRD countries due to the social, environmental and economic impacts of the projects resulting from the policies or procedures developed under the TA program. The PCM should have the mandate to accept complaints on all EBRD activities. This is vital to ensuring the highest standard of accountability for the institution.

*Recommendation:* Amend the definition of a "Project" to include all activities financed by the EBRD.

8. **Defining "Relevant EBRD Policy":** The draft RP also proposes a restrictive definition of a "Relevant EBRD Policy." It states that applicable policies include the 1996, 2003, and 2008 Environmental and Social policies and procedures along with the project-specific provisions of the Public Information Policy. This provision deviates greatly from current best practices at other institutions. For example, the operational procedures for the IFC's CAO state that: "The [compliance] audit criteria include IFC/MIGA policies, performance standards, guidelines, procedures and requirements whose violation

might lead to adverse social or environmental consequences.”<sup>5</sup> Furthermore, neither the ADB CRP nor World Bank Inspection Panel is restricted to reviewing only the institution’s environmental and social policies.

If the EBRD delineates some policies as subject to compliance and others as not, it is creating a bifurcated situation where genuine harm caused by possible violations of certain policies will not be subject for review or recourse.

*Recommendation:* Amend the definition of “Relevant EBRD Policy” to include all EBRD policies, performance standards, guidelines, procedures and requirements whose violation might lead to adverse social or environmental consequences.

### **Additional comments on specific paragraphs**

*Paragraph 8:* An email address should be included in the PCM contact information.

*Paragraph 11:* In this paragraph, the draft RP states that where the PCM Officer decides not to register a Complaint, it will inform the Complainant of the decision and “the reason for the decision.” However, this paragraph does not specify on which criteria a decision not to register a complaint will be based. The language in this paragraph should be amended to specify that a PCM decision not to register a complaint is based on the criteria in paragraph 10.

*Paragraph 17:* The draft RP implies that project Complainants can state their preference for a problem-solving initiative or a compliance review. Under the section “Who may submit a complaint,” the draft RP states that individuals may “submit a Complaint seeking a Problem-solving Initiative” and individuals or organizations may “submit a Complaint seeking a Compliance Review.” (Paragraphs 1 & 2) However, paragraph 17 states that “Eligibility Assessors will determine, by consensus, whether the Complaint is eligible for a Problem-solving Initiative, a Compliance Review, for both, or for neither.” This paragraph should be amended to ensure that the preference stated by the Complainants in their request is duly considered when Eligibility Assessors are determining the claim’s eligibility for either a Problem-solving Initiative, Compliance Review or both.

### **Conclusion**

Thank you, again, for this opportunity to submit comments on the draft Rules of Procedure for the Project Complaint Mechanism at the European Bank for Reconstruction and Development. We look forward to your response to our recommendations. Any future correspondence may be directed to: Jennifer Kalafut, Co-Director, jen@accountabilityproject.org.

In coalition with grassroots and international partners, the International Accountability Project advocates for accountability and transparency in international development finance, and we support communities in the Global South in their pursuit of justice for the social and environmental impacts of development-induced displacement and resettlement (DIDR).

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<sup>5</sup> International Finance Corporation. Compliance Advisor Ombudsman. *Operational Guidelines*. April 2007, Page 21.