



## **BirdLife International/RSPB comments EBRD Project Complaint Mechanism: Rules of Procedure**

**13 February 2009**

### BirdLife International/RSPB: Background and Objectives

BirdLife International is a global Partnership of NGOs that strives to conserve birds, their habitats and global biodiversity, working with people towards sustainability in the use of natural resources. BirdLife Partners operate in over 100 countries, with a combined membership of 10 million supporters worldwide. Partners collaborate on regional work programmes in every continent, and are represented by a democratic Global Council. A Secretariat facilitates the work of the Partnership worldwide, with a global office in Cambridge, UK and European Secretariat in Brussels. All the Partnership's work is built on robust science. We provide authoritative information on the status and conservation of birds, and are the IUCN Red List Authority. See <http://www.birdlife.org/worldwide/index.html> for further information.

The Royal Society for the Protection of Birds (RSPB) is the UK Partner of BirdLife and has over one million members. As well as working in the UK, we provide support to BirdLife Partners in a number of European, Asian and African countries. The RSPB is the largest conservation NGO in Europe. For further information, see <http://www.rspb.org.uk/international/>.

BirdLife has Partners in 17 of the EBRD's Countries of Operation<sup>1</sup>, and the Brussels Secretariat has an active working relationship with the European Commission, and many other European institutions.

BirdLife International is a member of IUCN and also works closely with the Multilateral Environmental Agreements, notably with the Convention on Biological Diversity, for which BirdLife is a focal point to the Clearing House Mechanism. See <http://www.cbd.int/chm/thematic.shtml>.

One of the key programmes within the BirdLife Partnership concerns critical sites for conservation - Important Bird Areas (IBAs) - a global effort against agreed criteria to identify, catalogue, and monitor sites that hold globally significant biodiversity. Data on Red List species and IBAs form the core data contribution to safeguard policies.

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<sup>1</sup> Armenia, Azerbaijan, Belarus, Bulgaria, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Poland, Romania, Russia, Slovak Republic, Slovenia, Turkey and Ukraine.

BirdLife has worked with the World Bank, IFC, IBD, ADB, and EBRD. BirdLife Partners also have considerable experience in casework at species and site level where conflict between conservation and development occurs. By working closely with funding bodies, and providing information, BirdLife aims to forestall crises at the earliest possible stages of project development. However, where conflicts cannot be resolved BirdLife will use all available mechanisms, including complaints.

#### Revision of Project Complaint Mechanism welcomed

BirdLife and the RSPB welcome the opportunity to comment on the proposals to revise the EBRD's Project Complaint Mechanism (PCM). Our key comments are set out below and more detailed comments in the attached Annex.

#### Key comments

##### **Who may submit a complaint**

We strongly welcome the proposed change to enable NGOs to submit complaints seeking Compliance Reviews. However, we do not understand the rationale for having different 'standing' requirements for Problem-solving Initiatives and Compliance Reviews. We believe that it is everyone's interest that problems are resolved wherever possible and hence we believe that the eligibility for Problem-solving Initiatives should also be extended to include NGOs.

Further, we believe that the requirement that Complainants seeking a Problem-Solving Initiative be from an 'Impacted Area' is overly restrictive, as Complainants may have a legitimate interest in an Impacted Area without physically being based within this area, which will be the case with most of the IBAs, for example. While not living in the Impacted Area individuals may use it for recreation; or, building on our comments above, an NGO whose office is outside an Impacted Area may have a legitimate interest in the Impacted Area because it contains a protected nature area and the *raison d'être* of the NGO is to work on nature conservation issues.

##### **Impacted Area**

For the avoidance of doubt, we would like to see the definition of Impacted Area explicitly refer to the geographical area affected or likely to be affected by both the direct and indirect effects of a Project, during all phases of its life.

##### **Project scope**

For the avoidance of doubt we believe that it should be made clear in the definition of 'Project' that this refers to the whole of a project and is not restricted to the specific parts or components which the Bank is funding/considering funding. Otherwise, the focus of the PCM could be the individual components of a project, rather than the project as a whole, and lead to serious under estimation of the problems associated with the project. For example under estimation of potential impacts due to consideration of associated powerlines and sub-stations separately from the turbine component of wind farms, or short sections of road in isolation from the planned

upgrade of a whole transport corridor – a situation commonly referred to as ‘project splitting’ or ‘salami-slicing’.

### **Information about project cycle**

The criteria for determining eligibility of complaints cross refer to stages in the Banks project cycle eg approval of projects by Bank Committees, 12 months from the final disbursement of funds or 12 months from the cancellation of the amount not disbursed. In order for these eligibility criteria relating to time periods to be workable, it is essential that the Bank provides more transparent information about the stages of the project cycle for a particular project, eg the date of physical completion, as a matter of course. Otherwise, it can be difficult and time consuming for stakeholders to discover this information.

### **Relevant EBRD Policy**

The scope of the EBRD policies that form the basis for a Compliance Review is very narrow. Indeed this seems even more restricted than the 2004 Rules given that there is no equivalent of old Rule 24, which also enabled examination of potential violations of other EBRD policies/procedures if a Compliance Review was triggered on a ‘Relevant EBRD Policy’. In our opinion, the PCM should be able to review compliance with all EBRD policies which are relevant to lending operations.

### **Implementation of the PCM**

For the revised PCM to operate effectively, it is essential that the budget be sufficient and for a more proactive approach to training and outreach to be adopted than that currently envisaged in the draft Rules.

We also think it will be vitally important for the Bank to produce clear guidance to support the implementation of the Rules eg to provide advice on the methods/timescales likely to be mentioned in terms of reference and the interpretation of key phases such as ‘frivolous or malicious’ or ‘for cause’.

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Detailed comments

| <b>Paragraph of Rules</b>  | <b>Comment</b>   |
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| Definitions – Impacted Area  | It needs to be clear that this includes the area affected/likely to be affected by both direct and indirect impacts  |
| Definitions – ‘Relevant EBRD Policy’   | Is the reference to the 1996 Environmental Policy and Procedures still relevant?   |
| Rule 1 – Distinction between submitting a complaint for a Problem Solving Initiative (PSI) & a Compliance Review | It is welcome that NGOs can now apply for a Compliance Review, but we believe that NGOs should also be able to submit applications for PSIs  |
| Rule 5 - Authorised Representative   | <ul style="list-style-type: none"> <li>• What constitutes - ‘written proof of authority’ to act? This will need to be explained in guidance.</li> <li>• The final sentence refers to the ability of the PCM to communicate with Complainant directly even when an Authorised Representative has been appointed. However it is not clear what situation this is intended to cover ie why it will be necessary if there is an Authorised Representative</li> </ul> |
| Rule 8 – Submission of complaints  | This should also mention the option of submitting complaints by email – as is the case in the current rules – see current Rule 5   |
| Rule 10(e) - Seal  | Do all relevant organisations have a seal, or will this be overly restrictive?   |
| Rule 18 (a) – Determining eligibility of Complaints  | How do people know when a project has been physically completed, the final disbursement made or cancelled? There is a need for the Bank to make this information available as a matter of course.  |
| Rule 21 (b) Eligibility for a PSI  | Guidance will need to be provided on the meaning of ‘may assist in resolving the dispute, or is likely to have a positive result’. It is essential that this is not interpreted too restrictively  |
| Rule 24 (a)- frivolous or malicious purpose  | These terms will need to be explained in guidance (as was the case for the 2004 Rules).  |
| Rule 24 (d) – Policies which can not trigger a Complaint   | <p>This is potentially very broad. In our opinion, all policies that relate to the Bank’s lending operations should fall within the remit of a complaint.</p> <p>In particular, the draft rules seems to have no equivalent of current Rule 24 which also enables examination of potential violations of other EBRD policies/procedures if a Compliance Review is</p>  |

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|  | triggered on a 'Relevant EBRD Policy'   |
| Rule 28 Terms of reference                                       | Information needs to be provided about what methods and time frames can be expected – eg in guidance on the Rules   |
| Rule 30 – Bank right to suspend/cancel its interest in a Project | Clarification is needed on what this means in practice ie in what circumstances the Bank will not be able to suspend/cancel its interest  |
| Rule 33 – Circulation of Problem-solving Completion Report       | This should be circulated immediately – as per the circulation of the Compliance Report in Rule 43.   |
| Rule 34 - Monitoring   | How is 'Where required' to be interpreted? There should be a presumption that the PCM Officer will monitor implementation of all agreements.  |
| Rule 35 – PCM Expert   | If both a PSI and Compliance Review are being carried out, do the PCM Experts have to be different or could they be the same person?  |
| Rule 39 – Public release of Compliance Review Report             | State deadline for publication not just 'Thereafter'  |
| Rule 47 – Nomination of PCM Experts                              | What will be the split of internal/external members on the committee? Eg need for half and half?  |
| Rule 48 – PCM Experts  | <ul style="list-style-type: none"> <li>• 'Experts may be removed by the Board for cause' – meaning of 'for cause'</li> <li>• B) Clarify what 'course of action to be undertaken' might involve in guidance, eg appointing a new expert.</li> </ul>  |
| Rule 51 – Impartiality of PCM Experts                            | <ul style="list-style-type: none"> <li>• Is it clear what 'same privileges and immunities, relevant Code of Conduct provisions, conflict of interest rules and confidentiality provisions as experts performing missions for the Bank' involves?</li> <li>• 'Personal interest or significant involvement in any capacity' – clarify how this should be interpreted.</li> </ul> |
| Rule 54 – Appointment of PCM Officer                             | As per out comment on Rule 47, what will be the split of internal/external members on the committee?  |
| Rule 55 – removal of PCM Officer                                 | Meaning of 'for cause' – as per Rule 48 above   |
| Rule 56 Additional Expertise                                     | PCM Officer budget needs to be sufficient to enable appointment of expertise  |
| Rule 57 – Outreach and training                                  | Provision of training 'as required' – it is essential that there is a stronger positive obligation to carry out training and the budget to support this   |
| Rule 61 – Related to Complaints                                  | How is 'pending the results of the review of the first Complaint received' to be interpreted? Does this mean until completion of the first Eligibility Assessment Report, the Compliance Review report,   |

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|                            | the Problem-solving Completion Report? This provision must not be used as a mechanism for stalling substantive complaints    |
| Rule 63 – Annual Report    | What is the timescale for public release? ‘Thereafter’ is a bit vague  |
| Rule 65 - Budget           | There needs to be some flexibility in case the number of cases is not as ‘forecasted’  |
| Rule 70 – Entry into Force | This is a bit vague for people trying to use the system – it would be better to specify a specific date.                     |
| Guidance                   | Guidance will be needed to support the rules with explanations, flowchart summaries etc – as was produced for the 2004 Rules |