

March 6, 2014

Via Electronic Mail

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Re: Comments on the European Bank for Reconstruction and Development's Draft Revised Project Complaint Mechanism Rules of Procedure 2014

Dear Ms. Begoyan:

We, the undersigned civil society organizations, are writing in response to the invitation to comment on the European Bank for Reconstruction and Development's ("EBRD" or "Bank") Draft Revised Project Complaint Mechanism ("PCM") Rules of Procedure ("Draft RPs").¹

We welcome this opportunity to comment on the Draft RPs prior to its final approval by the Board of Directors. We note and appreciate that the Draft RPs incorporate a number of the comments made in the letter dated May 29, 2013, from Accountability Counsel et al. ("May 29th Letter") during the EBRD's 2013 public consultation on the PCM RPs.

The PCM has demonstrated commendable thoroughness in its work, and has played a critical role in ensuring accountability of the EBRD. The PCM's effectiveness depends on its ability to address complaints in a timely manner, and delays in PCM reviews are a continuing concern. We note that changes to the registration and eligibility criteria in the Draft RPs were made to address concerns over timing.² However, filtering out meritorious complaints with overly narrow registration and eligibility criteria undermines the purpose and effectiveness of the PCM. Instead, more resources should be given to the PCM to allow it to fulfill its mandate.

While a number of proposals made in the May 29th Letter have not been incorporated in the Draft RPs, this comment letter focuses on those provisions that directly affect complainants' access to the PCM. Specifically, our concerns relate to the Draft RPs' registration and eligibility criteria, and provisions regarding complainant participation at various stages of the PCM process.

¹ EBRD, "Project Complaint Mechanism: Draft Rules of Procedure," January 20, 2014, *available at* http://www.ebrd.com/downloads/integrity/Draft_PCM_RPs_2014_clean.pdf ("Draft RPs").

² EBRD, "Revision Of The EBRD Project Complaint Mechanism Rules Of Procedure: Summary Of Key Changes," January 20, 2014, *available at* http://www.ebrd.com/downloads/integrity/Summary_of_changes_web.pdf ("EBRD Summary of Changes").

I. Suspension of Registration Lacks Necessary Safeguards

Where a complaint does not describe the good faith efforts made to address the issues, or an explanation of why such efforts were not possible, paragraph 17 of the Draft RPs provides for the suspension of registration and for the complaint to be forwarded, in consultation with the complainant, to the relevant Bank department to address the issues. However, it does so without any provision for how and when suspension will be lifted. The Draft RPs hence expose complainants to unnecessary delays and potentially deprive them of the prerogative to decide when sufficient good faith efforts have been made.

In order to ensure that complainants are put in the same position as those that had made such efforts prior to submission of the complaint, the following sentence should be added to the end of paragraph 17:

“The suspension will be lifted at the complainants’ request where they have made good faith efforts to address the issues, or reasonably believe that the issues will continue to not be fully addressed notwithstanding any action by Management or Client.”

Further, we are concerned about the removal of the provision for waiver of the requirement to make prior good faith efforts to address the issues if such efforts would be harmful to the complainant or futile.³

While we have been informed that the intention of the provision remains the same, the matter is too important to be left as merely implied. Paragraph 12(c) should be amended as follows:

“...should describe the good faith efforts the Complainant has taken to address the issues in the Complaint, including with the Bank and/or the Client, and a description of the result of those efforts, or an explanation of why such efforts were not possible, as when, for example, the complainant believes that doing so would cause harm or be futile.”

Paragraph 17 should also be amended as follows:

“If the Complainant did not make good faith efforts to address the issues with the Bank and/or the Client and did not provide an explanation of why such efforts were not possible as per paragraph 12(c), the PCM Officer will, in consultation with the Complainant, and having ascertained that doing so would not be futile or potentially cause harm, forward the Complaint to the relevant department in the Bank to address the issues raised without registering the Complaint at that stage.”

³ EBRD, “Project Complaint Mechanism: Rules of Procedure,” 2009, para. 22, *available at* <http://www.ebrd.com/downloads/integrity/pcmrules.pdf> (“2009 Rules of Procedure”).

II. Timing Requirements for Complaints Are Too Narrow

1. *Complaints Should Be Allowed at an Earlier Stage*

For complaints requesting a Problem-solving Initiative (“PSI”) related to projects that the Bank has not yet financed, paragraph 12(a) of the Draft RPs will allow registration only if “the Bank has provided – and not withdrawn – a clear indication that it is interested in financing the Project (such indication would usually be provided if the Project has been approved by the body which has been delegated authority to give approval or has passed Final Review by the Bank’s Operations Committee).” For complaints requesting Compliance Review (“CR”), paragraph 13 of the Draft RPs allows registration only when the project “has either been approved for financing by the Board or by the body which has been delegated authority to give approval to the financing of such Project.”

However, questions of whether the client⁴ and/or Bank are in violation of a Relevant EBRD Policy may arise earlier than the final review or approval.⁵ The EBRD Environmental and Social Policy 2008 (“ESP”) requires the client to assess and manage environmental and social issues related to their projects, including conducting due diligence studies, disclosing information, and engaging stakeholders.⁶ The ESP also requires the Bank to review the client’s appraisal and provide guidance to the client on how the project can meet the Bank’s requirements.⁷ As part of its due diligence, the Bank is required to categorize proposed projects according to environmental and social criteria, and identify appropriate stakeholder engagement and risk management measures.⁸ These requirements often apply prior to the Bank’s final review or approval of the project.

Allowing complaints for both PSI and CR to be brought prior to final review or approval of the project will allow failures by the client and/or Bank to be identified at an early stage, making prompt corrective action possible. This can prevent escalation of conflicts and provide an opportunity for needed environmental or social provisions to be incorporated in project documentation.

The problems faced by the Oyu Tolgoi Mine, referred to in the May 29th Letter, demonstrate the acute harm that could have been prevented or mitigated had the PCM been an available avenue at an earlier stage of project planning. Harm caused by failure to adequately engage, inform, and consult stakeholders is a common allegation made in complaints, indicating the need for complaint registration to begin prior to Bank approval of a project.

⁴ The “Client” is defined in the Rules of Procedure as the “entity or entities that is/are responsible, directly or indirectly, for carrying out and implementing all or part of a Project.”

⁵ A “Relevant EBRD Policy” is defined in the Rules of Procedure as the “2014 Environmental and Social Policy and Performance Requirements, 2008 EBRD Environmental and Social Policy and Performance Requirements, previous EBRD environmental policies, 2014 Public Information Policy and previous Public Information Policies and any Policies approved in the future by the Board of Directors designated to be included in this Definition.”

⁶ EBRD, “Environmental and Social Policy,” 2008, Performance Requirement 1, *available at* <http://www.ebrd.com/downloads/research/policies/2008policy.pdf> (“ESP”).

⁷ ESP, para. 14.

⁸ ESP, paras. 19-23, 25-26.

Notably, the World Bank Compliance Advisor Ombudsman (CAO) and the Asian Development Bank (ADB) Accountability Mechanism allow complaints where the project has only been proposed and is still under consideration.⁹

Accordingly, the provisions should be amended to allow both of the PCM's functions to be available to affected people during project planning phases, prior to approval from the Bank. We propose that the paragraphs 12(b) and 13 both be amended as follows:

“Where the Problem-solving Function or Compliance Review is requested, the Complaint must relate to a Project where the Bank has provided – and not withdrawn – a clear indication that it is interested in financing the Project (such indication would include EBRD due diligence or investigations into a potential project).”

2. *Eligibility for CRs Should Not Be Confined to Bank “Participation”*

According to paragraph 24(b), only projects that the Bank is “participating in” can be found eligible for CR. This phrase is vague, and could be interpreted to exclude proposed projects under consideration and those not yet approved.¹⁰ The reasons why complaints should be allowed at an earlier stage of the project have been addressed in the section above.

The phrase “participating in” could also exclude complaints for CRs brought after the completion of the project,¹¹ which was not the case under the 2009 Rules of Procedure. Compared with the cutoff dates of other international financial institutions' accountability mechanisms, this revision is regressive,¹² but no justification for it was given. It is

⁹ The CAO requires that the project be one in which the bank is “participating in, or is actively considering,” and the ADB requires that the project be an “ADB-assisted project,” which includes proposed projects. See ADB Operations Manual, Section L1/OP, paras. 26 and 30, *available at* <http://www.adb.org/sites/default/files/OML1.pdf> (“ADB L1/OP”); World Bank CAO Operational Guidelines, para. 2.2.1, *available at* http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf (“CAO Guidelines”).

¹⁰ As a comparison, the CAO relies on two different phrases for eligible complaints, “participating in” and “actively considering,” showing that projects the bank is “participating in” could be regarded differently from projects under consideration and not yet approved. CAO Guidelines, para. 2.2.1.

¹¹ Project completion usually coincides with the end of the disbursement phase. EBRD, “Environmental and Social Procedures,” April 2010, para. 9.12, *available at* <http://www.ebrd.com/downloads/about/sustainability/environmental-procedures.pdf> (“E&S Procedures”).

¹² The United States Overseas Private Investment Corporation (OPIC) allows compliance reviews for projects where OPIC maintains a contractual relationship with the project. The European Investment Bank (EIB) does not base the cutoff date on the status of the project, and allows complaints up to one year from the date on which the facts upon which the allegation is grounded could be reasonably known by the complainant, which could occur long after the end of the project. The Inter-American Development Bank (IADB) and the ADB allow complaints up to 24 months after the last disbursement date. See OPIC, “Problem-Solving and Compliance Review Procedures”, 2005, para. 6.2.5, *available at* <http://www.opic.gov/sites/default/files/docs/Admin%20Order%20-%20Office%20of%20Accountability.pdf>; EIB, “Complaints Mechanism Principles, Terms of Reference and Rules of Procedure,” para. 5.1, *available at* http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf (“EIB CM Rules”); IADB, “Policy Establishing the Independent Consultation and Investigation Mechanism,” para. 37(f), *available at* <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37940284> (“IADB MICI Policy”); ADB L1/OP, para. 142(iv).

inconsistent for the Bank to be concerned with preventing a project's adverse environmental and social impacts only during planning and disbursement phase, and then distance itself from project impacts once the funds are paid out. Adverse impacts caused or contributed to by the Bank's acts or omissions in a project may not materialize or become evident until years after a project's completion. These adverse impacts may also be due to flaws in the Bank's own policies, systems, and procedures. Allowing CRs after project completion is an important means by which the Bank can learn lessons to improve its policies, systems, and procedures, and prevent similar problems from arising in future operations.¹³

Allowing complaints after project completion would bring the Draft RPs in line with the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises ("OECD Guidelines"), and the United Nations Guiding Principles on Business and Human Rights ("UNGPs"). In accordance with these standards, a project financier has a responsibility to prevent and mitigate adverse impacts of projects that it supports, regardless of whether it caused or contributed to the impact, and the amount of its leverage.¹⁴ As the Bank ceases proactive or regular monitoring after project completion, allowing complaints after project completion serves as a continuing warning system regarding project performance, and is a means for meeting the responsibilities of a project financier under the OECD Guidelines and UNGPs. Further, it ensures adherence of the client to its contractual environmental and social obligations.

We therefore propose that paragraph 24(b) be amended as follows:

"To be held eligible for a Compliance Review, the Complaint must relate to a Project where the Bank has provided – and not withdrawn – a clear indication that it is interested in financing the Project, or a Project that the Bank has financed."

3. PSIs Should Be Available during the Loan Repayment Period

We commend the EBRD's revision of paragraph 12(b) of the Draft RPs to cover equity investments and to allow PSIs for the period that the Bank is shareholder. However, for projects in which the EBRD has non-equity financial interests, paragraph 12(b) does not allow complaints seeking PSIs to be brought more than 12 months after the last disbursement date of EBRD funds.

This is not on par with the practice of other international financial institutions.¹⁵ The Bank would continue to have leverage during its entire contractual relationship with the client, not only during the loan disbursement period. Moreover, allowing complaints seeking PSIs is in the Bank's financial interest, as it enables the Bank to monitor issues that may affect the client's ability to make loan repayments. The Bank may also have leverage after the end of the contract's term, e.g. due to the client's interest in maintaining

¹³ Draft RPs, para. 44(a), requires the Compliance Review Expert to make recommendations to "address the findings of non-compliance at the level of EBRD systems or procedures in relation to a Relevant EBRD Policy, to avoid a recurrence of such or similar occurrences."

¹⁴ UNGPs, Principle 13, and OECD Guidelines Chapter II, para. 12; OECD Working Party on Responsible Business Conduct, "Note Of The Chair Of The Negotiations On The Revision Of The Guidelines In 2011, Regarding The Terminology On 'Directly Linked,'" February 20, 2014, para. 4 ("The amount of leverage of a company does not affect this responsibility [to prevent and mitigate adverse impacts].")

¹⁵ The IADB and the ADB allow complaints up to 24 months or 2 years after the last disbursement date. See IADB MICI Policy, para. 37(f); ADB L1/OP, para. 142(iv).

a good relationship with the Bank in order to not harm the reputational benefits it is receiving from the Bank's involvement, or to obtain future financing.

Paragraph 12(b) of the Draft RPs should therefore be amended as follows:

“Where the Problem-solving Function is requested, the Complaint ... must relate to a Project where the Bank maintains a financial interest in the Project in which case, the Complaint must be filed within twenty-four (24) months¹⁶ following the last disbursement date of EBRD funds, or during the duration of the Bank's contractual relationship with the project, whichever is the later.”

III. Eligibility Criteria Are Unduly Limiting for Complainants

1. Third Party Control Should Not Determine Eligibility

Paragraph 28(d) of the Draft RPs, which finds complaints alleging issues related to the obligations of third parties or to country obligations ineligible, should be removed. The current phrasing of the paragraph is confusing because it presents a false choice between issues that are either under EBRD/client control or under the control of a third party: it is possible that issues are under joint control, which does not obviate EBRD and client responsibility. Further, it may be premature to determine whether issues “are under the control of the Client or the Bank” at the eligibility stage and certain circumstances may require in-depth consideration through investigation.

Alternatively, the provision should be amended to clearly state that a complaint will be held ineligible on this ground *only* where it does not relate to any alleged act or omission on the part of the EBRD or client.

2. No Relationship to EBRD Policies Should Be Required for PSI

Under paragraph 24(a)(ii) of the Draft RPs, in order to be eligible for a PSI, a complaint must be found to raise issues covered by a Relevant EBRD Policy. However, this requirement is not relevant to the PSI's stated objective of restoring dialogue between the parties. The 2009 Rules of Procedure did not have such a requirement, and no explanation was given for its inclusion now.¹⁷ Notably, other accountability mechanisms of multilateral financial institutions do not require complaints to relate to their policies in order to be eligible for problem-solving or dispute resolution.¹⁸ Paragraph 24(a)(ii) should be removed.

3. Parallel Proceedings Should Not Be a Factor in Determining Eligibility

Paragraph 26(b) of the Draft RPs requires consideration of whether a PSI may duplicate, interfere with, or be impeded by parallel proceedings. While relevant to

¹⁶ A period of 24 months would at least be on par with the practice of the IADB and ADB accountability mechanisms.

¹⁷ EBRD Summary of Changes.

¹⁸ These are the CAO (which requires only that a complaint pertain to the CAO's mandate to address environmental and social impacts of the project) and the ADB Accountability Mechanism (which allows the use of its problem-solving function “regardless of whether ADB operational policies and procedures have been complied with”). CAO Guidelines, para. 2.2.1; ADB L1/OP, para. 29.

determining how the PCM should proceed, parallel proceedings should not be determinative of whether a complaint is eligible. Certain remedies may be unavailable through the parallel proceeding(s), because, for example, they concern different respondents, do not address all the issues that would be covered by the PCM, and have different functions.¹⁹

We further note that several international accountability mechanisms do not limit dispute resolution because of concurrent proceedings before the accountability mechanisms of co-financing institutions.²⁰ In addition, the accountability mechanisms of the ADB and CAO, in their revised operating procedures issued in 2012 and 2013 respectively, do not provide for complaints to be excluded on grounds of parallel proceedings in any form.²¹

The PCM can avoid conflicting findings of fact on issues pending before other review bodies by shaping the scope and tools used by the PSI. For example, where the complaint concerns the same project but different issues not addressed in the parallel proceeding, the PCM can first address the novel issues raised. Where appropriate, the process may be suspended pending resolution of the parallel proceedings,²² in which case the date the complaint was filed should be used in determining whether it meets registration requirements regarding timing.²³ Given that litigants often negotiate with one another independently of concurrent proceedings, there may be cases where a PSI could be undertaken productively alongside a proceeding before another review body. Where the parallel proceeding is before the accountability mechanism of a co-financing institution, the PCM is allowed to cooperate with that mechanism pursuant to paragraph 23 of the Draft RPs.

In summary, impacts of parallel proceedings should be carefully considered in consultation with the complainants, but should not be used as a determining factor in the eligibility assessment.

4. The Eligibility Criterion in Paragraph 26(c) Is Redundant and Should Be Removed

The intended purpose of paragraph 26(c) is unclear. If its purpose is to ascertain the good faith efforts of the complainant to address the issues in the complaint, the Draft RPs already deal with good faith efforts at the registration stage. If its purpose is to avoid

¹⁹ For example, a parallel domestic court proceeding may address only the issue of land acquisition, while the complainant's grievance may relate also to indigenous peoples' rights and cultural heritage issues that may not be addressed by domestic law, or may require remedial action beyond compensation and other remedies available through the courts.

²⁰ These are the CAO, ADB AM, IADB MICI, and European Investment Bank ("EIB"). See ADB L1/OP, paras. 33-35; CAO Guidelines, para. 2.2.1; IADB MICI Policy, paras. 37, 40; and EIB CM Rules, para. 2.

²¹ ADB OP, paras. 33-35; CAO Guidelines, para. 2.2.1.

²² The accountability mechanisms of the Japan International Cooperation Agency (JICA) and the Japan Bank for International Cooperation (JBIC) provide that in situations involving parallel dispute resolution proceedings, a decision to commence their own process may be suspended until the grounds for suspension have ceased to exist, after which a decision to commence the procedures may be made. JBIC Guidelines for Confirmation of Environmental and Social Considerations, 2012, Article IV.3: Summary of Procedures to Submit Objections, available at <http://www.jbic.go.jp/wp-content/uploads/page/2013/08/757/en-disagree-2012.pdf>; JICA Objection Procedures Based on the Guidelines for Environmental and Social Considerations, 2010, Article 10(4)(3), available at http://www.jica.go.jp/english/our_work/social_environmental/guideline/pdf/objection100326.pdf.

²³ Draft RPs, para. 12(b).

potential problems posed by parallel proceedings, paragraph 26(b) of the Draft RPs also addresses this issue, and in that case, we would recommend consolidating paragraphs 26(b) and 26(c) into a single provision, with the concerns outlined above with regard to paragraph 26(b) to be taken into account.

5. Prior Consideration of a Complaint by an Accountability Mechanism of a Co-Financing Institution Should Not Be Determinative of Eligibility

The Draft RPs rightly provide for complaints to be eligible for CR even though they have been reviewed by another accountability mechanism, as the institutions under review in a CR process would be different and apply different standards. The situation relating to complaints seeking PSI is, however, problematic.

By rendering ineligible complaints seeking PSI that have previously been dealt with by an accountability mechanism of a co-financing institution, paragraph 28(c) of the Draft RPs bars complainants from seeking a further opportunity to problem-solve and resolve conflicts. Notably, this differs from other international accountability mechanisms, which allow complaints involving dispute resolution even where there are or were proceedings before accountability mechanisms of co-financing institutions.²⁴ The PCM should be open to the possibility that there are good reasons, beyond new evidence that complainants can produce or circumstances not known earlier, for complainants to make another attempt to problem-solve, especially as it is in the interest of a project for the parties to resolve their conflicts.

Paragraph 28(c) should be amended to require the PCM to seek further clarification from complainants for the reasons for bringing a new request for a PSI, and take such information into consideration only as a factor in determining eligibility, as opposed to a determinative ground for ineligibility.

IV. Management Discretion in Responding to Compliance Findings

Paragraph 45 of the Draft RPs provides EBRD management the opportunity to respond to the finalized Compliance Review Report, and to prepare a Management Action Plan to address findings of non-compliance and recommendations. However, management needs only to respond to and implement those recommendations that it considers “appropriate,” and is not required to provide any reasoning for its deviations from the CR findings and resulting recommendations.

In the interests of transparency, and to make it possible for complainants to adequately respond to the Management Action Plan, Bank management should be required to respond to each recommendation made, and provide justification where recommendations in the Compliance Review Report have not been adopted. A proposed amendment to paragraph 45(a) is set out further below.

²⁴ These are the CAO, the ADB, the IADB, and the EIB. See ADB L1/OP, paras. 33-35; CAO Guidelines, para. 2.2.1; IADB MICI Policy, paras. 37 and 40; EIB CM Rules, para. 2.

V. Lack of Complainant Participation in the PCM Process

The exclusion of, or failure to formalize, opportunities for complainants to comment on findings and decisions affecting them carries the risks of incorrect findings and failure to adequately address the issues raised in the complaint. The risk that facts, issues or arguments may have been overlooked or inadequately considered can arise due to PCM processes' complex facts and circumstances, communication problems due to language and other barriers, and resource constraints. Furthermore, because there is no appeal process, providing checks on accuracy throughout a PCM process is important. Giving complainants the opportunity to comment also increases transparency, and provides complainants the opportunity to express their views in a public forum, similar to the Bank's opportunity to provide a formal response.

1. Complainants Should Be Allowed to Comment on Eligibility Determinations

Allowing complainants the opportunity to comment on a determination of ineligibility is crucial. Given that an ineligibility determination terminates complainants' access to the PCM at an early stage, caution is required during this stage to ensure that meritorious grievances are not denied consideration. The Draft RPs set out a wide range of eligibility criteria that could be contentious,²⁵ and consideration of complainants' perspectives on potentially complex eligibility determinations enables a more thorough decision-making process.

The RPs should include an opportunity for complainants to comment on the draft Eligibility Assessment Report for consideration by the Eligibility Assessors. We propose that paragraph 29 of the Draft RPs be amended as follows:

“In conducting the Eligibility Assessment, the Eligibility Assessors will consider Bank Management response to the Complaint and the Client's response to the Complaint (if applicable), and will also examine key documents and consult with the Relevant Parties. The Eligibility Assessors may also carry out a site visit and employ such other methods as they may deem appropriate. The Eligibility Assessors will prepare a draft Eligibility Assessment Report, allow the Relevant Parties to comment on the draft(s), and take their comments into account in finalizing the report.”

Further, the Draft RPs should be amended to allow complainants to provide formal comment on the Eligibility Assessment Report when their complaint is found ineligible, and for those comments to be made public on the PCM's website. We propose the following amendment to paragraph 31:

“... Once the recommendation is approved, the Eligibility Assessment Report and the decision will be sent for information to the Relevant Parties. The complainants will be given the opportunity to make a formal response to the Eligibility

²⁵ The following considerations, for example, are not at all straightforward: whether or not a Problem-solving Initiative would duplicate, interfere with or be impeded by a parallel proceeding, whether or not a complaint is frivolous or malicious, whether or not complaint's primary purpose is to seek a competitive advantage or delay, whether or not another accountability mechanism has dealt with the subject matter of the complaint with adequate consideration etc. The only straightforward criterion to apply appears to be whether or not a complaint seeking a Problem-solving Initiative was filed by an individual or individuals.

Assessment Report. The Eligibility Assessment Report and the complainants' formal response will be publicly released and posted on the PCM website.”

2. *Complainants Should Be Allowed to Comment on Problem-Solving Completion Reports*

Paragraphs 37 and 38 of the Draft RPs should be revised to allow complainants the opportunity to comment on draft Problem-solving Completion Reports, as well as provide an official response to the final Completion Report that will be made public on the PCM's website.

3. *Complainants Should Be Allowed to Comment on Compliance Review Reports*

According to the EBRD Summary of Changes, the phrase in paragraph 42 of the Draft RPs stating that the relevant parties “will have the opportunity to comment” means that comments will be allowed on the Compliance Review Expert's “initial report and preliminary recommendations.” The actual wording of the provision, however, only indicates that the parties will have the opportunity to provide feedback in some manner. In addition to giving comments during a CR investigation, the RPs should clearly provide parties the opportunity to comment on the draft Compliance Review Report. Paragraph 42 of the Draft RPs should be amended as follows:

“In conducting the Compliance Review, the Compliance Review Expert will examine key documents and consult with the Relevant Parties, who will be allowed to comment. The Compliance Review Expert may also carry out a site visit, and employ such other methods as the Expert may deem appropriate. The Compliance Review Expert will prepare a draft Compliance Review Report, allow the Relevant Parties to comment, and take their comments into account in finalizing the report.”

4. *Complainants Should Be Allowed to Comment on Management Action Plan*

The Management Action Plan is vital to the remedy complainants seek when bringing a complaint for a compliance review, as it describes the concrete actions that will be taken to resolve the harm they have suffered or are at risk of suffering. It is concerning that the opportunity given to complainants to comment on the Management Action Plan in the 2009 Rules of Procedure has now been removed in the Draft RPs. The EBRD Summary of Changes simply states that this was the “result of consultations with internal stakeholders,” but no rationale was given for the change.

This change gives Bank management the power to determine what remedial actions will be effective and sufficient, subject only to the Board or President's views. The provision should be amended to require management to consult with complainants in the creation of the Management Action Plan prior to its submission to the Board or President. We propose the following amendment to paragraph 45(a) of the Draft RPs:

“The PCM Officer will send the Compliance Review Report to the Bank Management to allow it to prepare a Management Action Plan, which will address whether the recommendations contained in the Compliance Review Report are appropriate. Bank Management will consult with the Complainant and take the

Complainant's comments into account in formulating the Management Action Plan. The Management Action Plan will respond to each recommendation made in the Compliance Review Report, and provide justification wherever recommendations in the Compliance Review Report have not been adopted in full. It should include a timetable and estimate of the human and financial resources required to implement those recommendations considered appropriate."

5. *Complainants Should Be Allowed to Issue an Official Response on the Compliance Review Report and the Management Action Plan*

The Draft RPs also give Bank management the opportunity to issue a formal Management Response to findings after the Compliance Review Report is issued. However, under paragraph 45(d) of the Draft RPs, the complainants are only allowed to comment on the recommendations in the Compliance Review Report, and not its findings. Although this involves cases where the report has found non-compliance, complainants may want to raise issues not adequately addressed in the findings, and ultimately relevant to the recommendations. Both management and complainants should be afforded the same opportunity to make a formal comment on the Compliance Review Report and recommendations.

Paragraph 45(d) of the Draft RPs should therefore be amended to allow complainants to issue a response on not only the Compliance Review Report's recommendations, but also findings. In addition, or alternatively, the Draft RPs should allow complainants to be heard in person by the Board.

VI. Greater Transparency Needed in PCM Processes

Paragraph 55 of the Draft RPs unduly restricts the ability of PCM Experts to inform the wider public, including non-complainants who may be affected by the project in question, about the PCM's ongoing processes. Its last sentence should be amended to read:

"Nothing in this paragraph will prevent a PCM Expert from undertaking any type of public consultation, or publicly clarifying the process, when he or she considers it necessary as part of an Eligibility Assessment, Problem-solving Initiative, or Compliance Review."

VII. PCM Should Be Able to Recommend Programmatic Audits

The Draft RPs should include a provision for the PCM to recommend programmatic (i.e. thematic, sector-specific etc.) audits of the EBRD's financing activities. The PCM's experiences in investigating and addressing complaints, and its independence, make it well-positioned to detect potential systemic problems that are contrary to the EBRD's environmental and social commitments.²⁶ A programmatic, rather than project-

²⁶ For example, a complaint brought to the CAO in 2011 concerning a portfolio investment of the India Infrastructure Fund, a project equity fund that the International Finance Corporation held equity in, led to the CAO initiating a compliance audit of the IFC's financial intermediaries investments, resulting in the identification of significant gaps and limitations in approach, methodology and procedures. CAO, Case of Odisha Chas Parivesh Surekhsa Parishad & Delhi Forum, April 15, 2011, *available at* http://www.cao-ombudsman.org/cases/case_detail.aspx?id=165; and CAO, "CAO Audit of a Sample of IFC Investments in

specific, approach is needed to better understand systemic problems and formulate robust recommendations for addressing them. This approach would be consistent with and build on paragraph 44(a) of the Draft RPs, which envisages that the PCM will contribute to the prevention of adverse impacts at a systemic level.²⁷

VIII. Conclusion

While there have been commendable changes in the Draft RPs, revisions are still needed to implement the PCM's commitment to accessibility and participation. We urge the EBRD to revise the Draft RPs to address the above issues prior to their submission to the Board for approval.

Sincerely,

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Third-Party Financial Intermediaries,” October 10, 2012, *available at* http://www.cao-ombudsman.org/newsroom/archive/documents/Audit_Report_C-I-R9-Y10-135.pdf.

²⁷ Draft RPs, para. 44(a), requires the Compliance Review Expert to “address findings of non-compliance at the level of EBRD systems or procedures in relation to a Relevant EBRD Policy, to avoid a recurrence of such or similar occurrences.”

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