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Via Electronic Mail

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Re: Comments on the Asian Development Bank Accountability Mechanism Policy Review

Dear Xiaoqin Fan and Working Group Members:

Accountability Counsel and the thirteen undersigned civil society representatives, are pleased to submit the following comments concerning the joint Board-Management review that the Asian Development Bank (“ADB”) is undertaking of its Accountability Mechanism Policy. These comments specifically address the February 2011 Consultation Paper titled *Further Strengthening the Accountability Mechanism* (“Draft Policy”) and build on our comments of November 30, 2010. We commend the ADB for offering the opportunity to comment publicly on the AM Draft Policy.

Accountability Counsel works to support communities around the world using accountability mechanisms to uphold environmental and human rights. We also work at the policy level to ensure that accountability systems are robust, fair and effective. We therefore take great interest in the review of the ADB Accountability Mechanism Policy, because a stronger mechanism will better serve the project-affected communities with whom we work and will improve the ADB’s operations.

In general, the Accountability Mechanism Draft Policy is an important advancement toward the ADB’s accountability. There are, however, a number of changes that would further improve the current Draft and move the ADB’s mechanism closer to meeting the principles of independence, transparency, fairness, professionalism, accessibility and effectiveness. The

comments below are based on our extensive experience regarding the design, implementation and use of international financial institution (“IFI”) accountability mechanisms.¹

Improving Independence

Independence is a key element required for affected people to trust an accountability mechanism. In order for the Draft Policy to improve the Accountability Mechanism’s independence, we recommend the following:

- Civil society representatives should be part of the committee, along with the Board Compliance Review Committee (“BCRC”), who select the Special Project Facilitator (“SPF”) and Compliance Review Panel (“CRP”) members on the approval of the Board. Inclusion of outside voices in the selection process will increase credibility of and trust in the mechanism.
- After serving their terms, SPFs should be barred from future employment with the ADB. Currently, the SPF must not have worked for any operational department of the ADB for five years prior to his or her appointment, however, there is no restriction on future employment within the ADB. In order to ensure independence of the mechanism, and to avoid the perception of a conflict by project-affected people, we recommend that after serving as a SPF a person should be barred from all future employment at the ADB. We believe this would improve independence of the mechanism by avoiding any actual or perceived conflict of interest issues related to an SPF’s future employment. We also note that this is the same post-employment ban that applies to the mechanism’s CRP members. Such a requirement also applies to World Bank Inspection Panel members and is considered best practice.
- There should be a policy provision for removal of the SPF. Currently, there is no such provision. The absence of a provision creates an actual and perceived threat to the independence of the SPF because it may be possible to fire the SPF arbitrarily. We recommend that the ADB adopt the same removal policy for the SPF as it has currently for CRP members: that the SPF be removed only by a majority vote of the Board for cause. The World Bank Inspection Panel has adopted a similar provision for its Panel members, and such an approach is considered best practice among ADB’s peer institutions.
- In order to ensure that the SPF is independent, the SPF should report to the Board, not the President. Furthermore, in paragraph 146 describing the proposed new mechanism, the role of ADB Management and Staff should be clarified so that “provid[ing] assistance to [the Office of the SPF] on problem solving” cannot be

¹ Accountability Counsel’s Executive Director, Natalie Bridgeman Fields, was the consultant hired by the EBRD to review and revise their accountability mechanism in 2008-2009, and has been involved over the last decade with the design, implementation and/or functioning of each of the IFI accountability mechanisms as a consultant, lawyer for complainants and policy advocate.

interpreted as the Management and Staff having a role in making decisions regarding eligibility, regarding how a problem-solving initiative is managed, or improper involvement in or interference with monitoring.

Direct Access to Compliance Review

We agree with the assessment contained in paragraph 87 that the Accountability Mechanism should provide project-affected people with direct access to the compliance review phase and that requesters should be able to decide whether they would like to start the compliance review function or the consultation/problem-solving function first. We further agree that requesters should be able to exit the problem-solving function at any time, even if this results in the consultation being terminated after the ADB and/or the Developing Member Country (“DMC”) has incurred costs. We disagree, however, with the recommendation that a compliance review should be stopped once in progress. If a compliance review is requested and is found eligible, it should be followed through until its completion.

To strengthen this approach, we recommend that ADB develop a detailed information packet to assist requesters in deciding which function to enter first – either the problem-solving/consultation function or the compliance review function. We also recommend that ADB follow the lead of other accountability mechanisms in allowing requesters to proceed with both functions simultaneously.²

Single Point of Entry

We commend ADB’s recognition that coordinating actions between the SFP and the CRP is confusing and agree with the assessment in paragraph 89 that the process should be simplified through the addition of a Complaint Receiving Officer (“CRO”). Currently, however, paragraph 89 ambiguously proposes that the CRO “will forward requests to SPF, CRP, and the operations department ... according to the preferences of the requesters and nature of the problem.”

We recommend clarifying the CRO’s role to explicitly state that he or she will forward a request to either the SPF or the CRP according to the requester’s preference. It should further be clarified that the CRO will only forward a request to the SPF or the CRP based upon the nature of the problem (in his or her discretion) if the requester does not specify a preference and needs assistance and upon consultation with the requester.

Specifying Remedies in a Request

We recommend that ADB change paragraph 155 so requesters are not required to specify the desired outcome or remedy in a request to the CRO but that inclusion of this information be discretionary. Requesters should not have the burden of specifying which remedies are desired as

² Other development bank accountability mechanisms, including the Project Compliance Mechanism of the European Bank for Reconstruction and Development, and the Complaints Mechanism of the European Investment Bank, allow both functions to proceed simultaneously. *See* EBRD Rules of Procedure, available at <http://www.ebrd.com/downloads/integrity/pcmrules.pdf>.

they may not be aware of all the remedies available to them. We recommend that ADB remove this requirement from its criteria for requests in conformance with World Bank Inspection Panel and Compliance Advisor/Ombudsman guidelines and best practice standards among the accountability mechanisms.

Clarifying the Cut-Off Date

We agree with the assessment in paragraph 91 that the existing “approach in determining the cut-off date based on the [Project Completion Report] lacks clarity and certainty,” and we support the proposed change to extend the cut-off date to one year after the loan closing date. Many projects—especially those that have effects on the environment or involved resettlement plans—could lead to long-term, serious, adverse impacts that become apparent only after a Project Completion Report is issued. As ADB has acknowledged, this change is necessary to promote clarity and to ensure fairness within the Accountability Mechanism.

Site Visits

We recommend that the Accountability Mechanism adopt a mandatory site visit provision into loan agreements as explained in Option II, paragraphs 94-95. The CRP’s investigation should be an opportunity for all requesters to voice their concerns regarding alleged violations of ADB’s policies, and for the CRP to conduct a full investigation. In order for the investigation process to be meaningful for all of the filing requesters, there must be an opportunity for them to be heard during the investigation and for the CRP to visit the site in person.

To the extent the country concerned and the Private Project Sponsor have agreed to ADB financing for a project, they should be deemed to have consented to a site visit by the CRP during an investigation. Such an approach does not infringe upon national sovereignty, as expressed in paragraph 94, but should be viewed as a logical extension of the DMC’s acceptance of financing. Indeed, DMCs currently accept project financing with full knowledge of ADB’s policies and project requirements. Such a provision is currently part of the guidelines of the Compliance Advisor/Ombudsman of the World Bank Group and is considered best practice among ADB’s peer institutions.

Streamlining the Accountability Mechanism

We agree with the assessment in paragraph 105 that the Accountability Mechanism should be streamlined so its process are “simplified and clarified.” We specifically note that the Accountability Mechanism’s dual reporting structure is unnecessarily complicated and time consuming and therefore should be streamlined.

Currently, under the Accountability Mechanism Policy, the SPF reports to the President of the ADB under its management structure, while the CRP reports to the ADB Board through the Office of the Compliance Review Panel (“OCRCP”) or the Board Compliance Review Committee (“BCRC”). Paragraph 90 also proposes to place the newly developed CRO within OCRCP to provide it with a higher degree of independence. The current and proposed reporting

structure unnecessarily delays both the consultation and the compliance review phases. All existing offices and any newly proposed offices should be Board-reporting so as to ensure independence. It should be clear in the policy that management has no influence over the decisions of the CRO, SPF or CRP.

In addition to reporting, paragraph 105 proposes to reduce the burden on requesters by relieving them of the responsibility of providing “written comments on the OSPF review and assessment reports” by allowing this feedback through such means as “meetings, discussions, and telephone calls” instead. Paragraph 106 further proposes to reduce duplication by fully sharing information and analysis between the OSPF and the CRP. We agree with these recommendations and urge ADB to consider new ways in which to further simplify and streamline Accountability Mechanism processes.

Improving Awareness and Enhancing Learning

We commend ADB on recognizing the need to improve awareness of the Accountability Mechanism, as outlined in paragraph 110, and support ADB’s proposed activities: first, to improve ADB staff awareness; second, to undertake targeted outreach for government project teams; and third, to undertake targeted outreach efforts in DMCs, involving “local communities, governments, and NGOs.”

We also support the proposed term adjustments outlined in paragraph 111. Renaming the “consultation phase” to the “problem solving function” clarifies its intended purpose to outsiders, and replacing the term “phase” with “function” highlights the new relationship between consultation and compliance review (i.e., that requesters can now choose to enter either the consultation function or the compliance review function first).

We recommend ADB further strengthen these enhanced awareness strategies by further improving the information available to local communities that could be affected by ADB-assisted projects. The Bank should distribute information about its policies and procedures as well as information about the Accountability Mechanism and the request process in all areas where Bank-assisted projects are proposed. These materials should be distributed in full and summarized forms, with efforts to provide translations in local languages and to make the format as user-friendly as possible.

We recommend that ADB actively distribute simple, pictorial-based, local-language, user-friendly descriptions of the mechanism, and simplified copies of the ADB operating policies and procedures to all communities that could be impacted by ADB-assisted projects. We also recommend that information about the Accountability Mechanism be included in all project documents—including executive summaries—that are distributed during preliminary stages, such as consultations.

Consultation Phase Reports

We agree with the assessment in paragraph 112 that the SPF and CRP should track all processed requests to enhance learning. In order to promote transparency, we recommend that

the Accountability Mechanism publicly release the reports required in each step of the consultation phase. Most importantly, the eligibility determination and the final report that concludes the consultation phase should both be made available on the website in every case.

Standing to File a Request

Paragraphs 147 and 148 outline the ways in which a request for consultation/problem solving and the compliance review function may be filed. In sum, they only allow requests to be filed by a “group of two or more people ... who are directly, materially, and adversely affected” or by a representative on behalf of the group. Only in cases of compliance review may a request be filed by an individual, and then only “by any one or more ADB Board members.” We recommend this provision be changed to allow any individual who is, or is likely to be, adversely affected by an ADB-assisted project to file a request for consultation/ problem solving or compliance.

A number of other development bank accountability mechanisms already allow an individual to bring a complaint on behalf of him or herself, including the Compliance Advisor/Ombudsman of the World Bank Group, the Project Compliance Mechanism of the European Bank for Reconstruction and Development, and the Complaints Mechanism of the European Investment Bank.³

Moreover, we recommend that ADB permit a representative to file a request on behalf of project affected people without “clearly identify[ing] the projected affected people on whose behalf it is made,” as required in paragraph 147. Allowing anonymous requests through a representative in countries where directly affected individuals have a reasonable fear of persecution in making a claim will better promote accountability. To protect the mechanism from illegitimate claims, the ADB may require anonymous requests to be supported by evidence demonstrating the reasonableness of the requester’s fear of persecution.

Language of Requests

Paragraph 154 allows requests to be submitted in English or “in any of the official or national languages of ADB’s DMCs.” Excluding local, native and indigenous languages limits access to the Accountability Mechanism and disproportionately affects vulnerable communities, such as indigenous groups and women. We recommend that ADB change the language requirements to allow complaints in the local, native or indigenous language of any potential claimant. Allowing local language requests is considered best practice by ADB’s peer institutions and has been adopted by the World Bank Inspection Panel and Compliance Advisor/Ombudsman.

³ Individuals are also eligible to file complaints with the Compliance Officer of Export Development Canada, the Office of Accountability for the U.S. Overseas Private Investment Corporation, and the National Contact Points for the OECD Guidelines. *Id.*

Effectiveness

Last, to further effectiveness of the mechanism, there should be a procedure whereby requesters can amend a request, include new violations, or provide additional information as it becomes available. Requesters should not be expected to know all ADB policies and procedures when they file an initial request. It is even more difficult for requesters to predict how violations of these policies could lead to future harm. Therefore, it is unreasonable to expect the initial request to be comprehensive. A new procedure to amend requests is particularly important if the Accountability Mechanism would like to make the process accessible to individuals without the resources to conduct studies or broad surveys.

We appreciate the opportunity to comment on the review of the ADB Accountability Mechanism, and we look forward continuing engagement with the ADB on this important endeavor. We invite members of the joint Board-Management working group to contact us with any questions.

Sincerely,



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