

August 29, 2014

Via Electronic Mail

Compliance Review and Mediation Unit
African Development Bank
Email: IRMReview2014@afdb.org and irm2review@gmail.com

**Re: Comments on the Second Review Report of the Independent Review
Mechanism of the African Development Bank**

Dear CRMU and Mr. Ayensu:

We, the undersigned, are writing in response to the invitation to submit comments on the Second Review Report of the Independent Review Mechanism (“IRM”) of the African Development Bank (“AfDB” or the “Bank”). We represent organizations from around the world that work with people and communities impacted by AfDB-financed projects. We have assisted communities in submitting complaints to the Bank’s peer international financial institutions (“IFIs”) and thus offer insight into the workings of independent accountability mechanisms (“IAMs”). We hope that these comments provide useful suggestions for improvements of the IRM.

We commend the AfDB for providing this opportunity for the public to comment on the current IRM Operating Rules and Procedures (“IRM Procedures”). However, holding a single public comment period prior to the release of new draft Procedures is inadequate to allow the intended users of the mechanism, including project-affected people and the civil society organizations that assist them, a real opportunity to provide input into planned changes to the mechanism’s policy and functioning. Further, neglecting to provide an opportunity for public comment on a new draft of the IRM Procedures before they are finalized represents a departure from best practice at other IAMs.¹ We strongly urge that a draft version of the new IRM Procedures be released for public comment before they are finalized and that the Bank take into account all comments received on the draft Procedures when creating the final version.

Our comments address the following subjects: I. Access to Remedy; II. Accessibility; III. Independence; IV. Equity and Effectiveness; V. Transparency; and VI. AfDB-wide Recommendations.

¹ All recent IAM policy reviews have followed the practice of providing an opportunity for public comment on a draft version of their new procedures before finalizing the procedures. These institutions include the International Finance Corporation’s (“IFC”) Compliance Advisor Ombudsman (“CAO”); the World Bank Group’s Inspection Panel; the Asian Development Bank’s (“ADB”) Accountability Mechanism (“AM”); the European Bank for Reconstruction Development’s (“EBRD”) Project Complaint Mechanism (“PCM”); the Overseas Private Investment Corporation’s (“OPIC”) Office of Accountability (“OA”); and the Inter-American Development Bank’s (“IDB”) Independent Consultation and Investigation Mechanism (“ICIM”) (policy review ongoing).

I. The IRM Mandate Should Focus on Providing Access to Effective Remedy

The member states of the AfDB have an international obligation under the UN Guiding Principles on Business and Human Rights (“Guiding Principles”) to ensure that the IRM provides access to effective remedy. In 2011, the UN Human Rights Council unanimously adopted the Guiding Principles, which delineate the obligation of states to provide access to effective remedy for business-related human rights abuses.² This obligation extends to situations in which states “participate in [international financial] institutions.”³ As a significant number of the adverse impacts of AfDB-financed projects may be identified under the rubric of “business-related human rights abuses,” AfDB member states must ensure that the IRM provides effective access to remedy to project-affected people. We urge the AfDB to consider these obligations in the current review of the IRM Procedures.

Effective remedy may take many forms,⁴ but in the context of the IRM should encompass at least the following elements: (1) transparency about and public acknowledgment of responsibility for harm done or foreseeable harm; (2) provision of appropriate redress to complainants; (3) implementation of measures to prevent further harm; and (4) meaningful institutional learning and change to prevent the same situation from happening in the future. While the current IRM Procedures encompass each of these principles to some degree, we see significant room for improvement to ensure that the IRM is able to provide effective access to remedy for project-affected people. Our recommendations also aim to help the mechanism better fulfill its mandate and to assist the Bank in promoting sustainable development outcomes.

II. Accessibility

Since commencing operations in 2006, the IRM has received just 16 requests and has registered only 9.⁵ We note that while the mechanism’s peer IAMs are often challenged by an abundance of requests filed,⁶ the IRM is working far below its capacity and allotted budget.⁷ We are concerned that the low level of requests reflects the persistence of barriers preventing project-affected people from accessing the mechanism. Beyond the barriers to access found in specific provisions of the IRM Procedures and discussed in detail below, the complex and convoluted

² See Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, ¶ 25, UN HUMAN RIGHTS COUNCIL A/HRC/17/31 (2011) [hereinafter “Guiding Principles”]. (“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”).

³ *Id.* at ¶10 Commentary.

⁴ See *id.* at ¶ 25 Commentary.

⁵ See Second Review of the Independent Review Mechanism (IRM) of the African Development Bank Group, 15-16, AFR. DEV. BANK (June 10, 2014) [hereinafter “Second Review”].

⁶ In 2013, the EBRD PCM received 22 letters or complaints; the ADB AM received 23 complaints; and the IDB’s ICIM received 23 complaints. See Project Complaint Mechanism Annual Report 2013, 4, EBRD (2014); Improving Outcomes: Accountability Mechanism Annual Report 2013, 1, ADB (2014); ICIM online case registry, available at: <http://www.iadb.org/en/mici/registry-of-request,1805.html>. By comparison, the IRM received no new complaints in 2013 and it received only 4 in 2012. See Second Review at 15-16.

⁷ The mechanism’s most recent annual report indicates that the IRM spent barely half of its budget in 2012. See The Independent Review Mechanism Annual Report 2012, 18, AFR. DEV. BANK (Apr. 11, 2014) [hereinafter “IRM Annual Report”].

nature of the IRM Procedures themselves may deter potential requesters who do not fully understand the role and functioning of the IRM. We urge the Bank to consider re-drafting the IRM Procedures to make them more streamlined, user-friendly, and easily comprehensible.⁸

It is with these concerns in mind that we make the following recommendations, which seek to remove unnecessary barriers to access from the IRM Procedures.

A. Complex and Burdensome Eligibility Requirements Unnecessarily Restrict Access to the Mechanism

We commend the current IRM for including several important provisions in its Procedures that promote access to the mechanism. For example, the Procedures allow the CRMU to advise potential requesters on how to prepare and submit a request.⁹ Additionally, the Procedures allow requesters to submit additional information to the CRMU Director, at his or her request, if the original documentation submitted was insufficient.¹⁰

However, the eligibility requirements and exclusions in the current IRM Procedures remain numerous and unduly restrictive. These restrictions place a heavy burden on project-affected people seeking to access the mechanism and add unnecessary complexity to the process. We thus recommend that the AfDB make the following revisions, which aim to simplify the mechanism's eligibility requirements and promote greater access to the IRM.

1. The IRM Should Not Be Prevented from Accepting Requests Pertaining to Human Rights Violations

With the adoption of the AfDB Integrated Safeguards System in December 2013, an amendment was made to the current IRM Procedures, adding an additional limitation to the mechanism's scope. The amendment, which states that the CRMU is not authorized to receive "complaints regarding human rights violations, other than those of social and economic rights involving any action or omission on the part of the Bank Group entity,"¹¹ was added outside of any formal review or public consultation process.

We agree with the Consultant that the IRM's mandate clearly applies to human rights violations more broadly, including violations that are not those of social and economic rights.¹² Complaints brought before the IRM often touch upon a variety of rights violations and this should not preclude their eligibility.

Additionally, this limitation is in tension with the Guiding Principles, which hold AfDB member states responsible for protecting internationally recognized human rights, encompassing, at a minimum, those rights expressed in the International Bill of Human Rights and those principles outlined in the International Labour Organization's Declaration on Fundamental

⁸ The CAO Operational Guidelines serve as a useful model of a clearer and more accessible IAM policy document.

⁹ IRM Operating Rules and Procedures, ¶17(e), AFR. DEV. BANK (June 16, 2010) [hereinafter "IRM Procedures"].

¹⁰ *Id.* at ¶22-24.

¹¹ Resolution N° B/BD/2013/20 - F/BD/2013/08, ¶1(xi) and ¶2(xii), AFR. DEV. BANK (Dec. 17, 2013).

¹² See Second Review at 22 and 23.

Principles and Rights at Work.¹³ These documents incorporate not only social and economic rights, but also civil and political rights. The AfDB member states have an obligation under the Guiding Principles to ensure that these rights are upheld and to ensure that the IRM can provide access to effective remedy for any rights violations.

We strongly recommend that this restrictive language be removed from the IRM Procedures to ensure that its services apply to all human rights violations, as envisioned in the IRM's mandate. Should this restriction remain in the IRM Procedures, we urge the IRM and the Bank to interpret the provision narrowly to ensure that requests that are otherwise eligible are not dismissed merely because they touch upon a variety of human rights violations.

2. The IRM Should Not Preclude Requests that Raise Issues Under Judicial Review

The current IRM Procedures state that the CRMU is not authorized to receive requests related to “matters before other judicial review or similar bodies.”¹⁴ Additionally, in determining whether a problem-solving exercise should be undertaken, the current IRM Procedures require the CRMU Director to consider “whether the problem-solving exercise may duplicate, or interfere with, or may be impeded by, any other process pending before a court, arbitration tribunal or review body ... in respect of the same matter or a matter closely related to the Request.”¹⁵

These provisions unnecessarily restrict access to the mechanism. As currently written, the provision barring all requests related to matters before judicial review is vague and exceedingly broad, and thus may preclude IRM involvement even if a request has only tenuous connections to another proceeding, and even if there is no indication that the IRM process may impact another proceeding or vice versa. The provision requiring the Director to weigh the effects that a problem-solving process may have on other proceedings is difficult to understand, appears duplicative of the first provision and has the potential to exclude cases from problem-solving due to proceedings that have no bearing on the specific concerns to be discussed during the problem-solving exercise.

Additionally, these provisions ignore the fact that the IRM process may offer services and provide remedies that are not available in parallel proceedings. Moreover, the IRM process serves different functions and may concern different parties than a judicial review or other proceeding. For example, the IRM is the only body that can directly address the AfDB's violations of its own policies and procedures. As such, the compliance review function of the IRM is the only opportunity for requesters to hold the Bank accountable to its own policies. Furthermore, the compliance review reports issued by the mechanism are uniquely able to provide feedback to the Bank to help the institution correct policy violations, apply lessons learned to future projects and achieve sustainable development outcomes. No other forum would provide the AfDB with the same type of feedback.

¹³ Guiding Principles at ¶12.

¹⁴ IRM Procedures at ¶2(iv).

¹⁵ *Id.* at ¶34(f).

Thus, in keeping with the best practices of high-functioning IAMs,¹⁶ we recommend that these provisions be eliminated. Alternatively, the provisions should be revised to exclude consideration of parallel proceeding for compliance review and to allow consideration of parallel proceedings in problem-solving only when the same parties raising exactly the same issues are seeking identical remedies in another forum where all parties are actively addressing the issues.

3. Requesters Should Not Be Required to Cite Specific Acts, Omissions or Policy Violations On the Part of the Bank

The provision under the current IRM Procedures requiring requests to include “where possible, a description of how [an] act or omission on the part of the Bank Group has led or may lead to a violation of the specific provision”¹⁷ imposes an undue burden on requesters. In many cases, it is impossible for requesters to know what actions the Bank has taken or not taken with regard to a given project. Such information is often not made publicly available, or at minimum is difficult to find. Even with the clause indicating that requesters need only provide this information “where possible,” we fear that this provision may reduce access to the mechanism and deter project-affected people from filing a request if they do not have this information. Thus, we agree with the recommendation of the independent consultant (the “Consultant”) that this provision be removed.¹⁸

The current IRM Procedures also require requests to include, “where possible, an explanation of how Bank Group policies, procedures or contractual documents were seriously violated.”¹⁹ This provision, too, is unnecessarily burdensome. Many people affected by Bank-financed projects do not have the resources to access and fully understand Bank policies. Though we appreciate that the provision only requires such an explanation “where possible,” we are concerned that in practice it may serve to restrict access to the mechanism. Moreover, we are concerned that the reference to procedures that were “seriously” violated is too vague and subjective to provide a workable eligibility standard. We therefore recommend that this provision be removed, or that, at a minimum, IRM Procedures be revised to expressly state that requests may be eligible without alleging a specific policy breach.²⁰

4. Requesters Should Not Be Required to Produce Burdensome Documentation

The current IRM Procedures instruct requesters to attach extensive supporting documentation to their request, including “all correspondence with Bank Group staff; notes of meetings with Bank Group staff; a map or diagram, if relevant, showing the location of affected parties or area affected by the project.”²¹ The IRM Procedures further require requesters to

¹⁶ The CAO, for example, does not bar requests on the basis of parallel proceedings, nor are parallel proceedings considered in the dispute resolution process.

¹⁷ IRM Procedures at ¶5(d).

¹⁸ See Second Review at 28.

¹⁹ IRM Procedures at ¶5(c).

²⁰ The CAO offers a model for such a provision. See CAO Operational Guidelines at § 2.1 (“There is no requirement for a complainant to specify particular policies, guidelines, or procedures.”).

²¹ IRM Procedures at ¶14.

submit an explanation regarding any information that cannot be provided.²² These requirements place a heavy burden on requesters, who may not have the resources to produce such information. We recommend that this provision be revised to state that providing supporting documentation is optional and that requests will not be rejected for failure to submit documentation.²³ We further recommend that the Bank remove the requirement that requesters submit an explanation regarding any missing documentation.

5. The IRM Should Be Made More Accessible to Requesters Fearing Retaliation or Intimidation

The current IRM Procedures require that requesters attempt to resolve their complaints with Bank Management prior to submitting a request to the IRM.²⁴ Requiring all requesters to raise their concerns with Bank Management fails to protect requesters who may have a reasonable fear that doing so would result in retaliation or intimidation. Requesters who reasonably fear that contacting Bank Management could lead to retaliation or intimidation should be permitted to waive this requirement.

The Consultant also recommends a new requirement that requesters make good faith efforts to resolve their concerns through project-level and local grievance mechanisms prior to submitting a request to the IRM.²⁵ We strongly disagree with this recommendation. Requiring requesters to first attempt to address their concerns through a local or project-level grievance mechanism presents an additional barrier to accessing the IRM mechanism, which already suffers from too many complex and burdensome barriers to access. While local and project-level grievance mechanisms may be a useful tool for some requesters, they are not able to provide the same services as the IRM, nor can they produce meaningful lessons learned for the Bank, which is one of the IRM's key functions. Moreover, local or project-level grievance mechanisms are often poorly implemented or not fully functional and local people may therefore be unaware of such mechanisms or unable to rely on them as a source of recourse.

We therefore recommend that the Bank not adopt the Consultant's recommendation to add this additional, unnecessary and burdensome eligibility requirement. However, should this recommendation be adopted, we urge the Bank to waive this requirement where requesters have a reasonable fear that raising a complaint through a local or project-level grievance mechanism would lead to retaliation or intimidation.

²² *Id.* at ¶15.

²³ This is similar to the CAO's approach, which is to include a list of information that "complainant may wish to provide." CAO Operational Guidelines at § 2.1.4.

²⁴ See IRM Procedures at ¶1 and ¶5(e).

²⁵ Second Review at 27.

6. The IRM Must Guarantee Requesters' Confidentiality

We commend the current IRM Procedures for requiring that the IRM make “all reasonable efforts” to respect the confidentiality of requesters and other interested parties, where requests for confidentiality are made.²⁶ We take issue, however, with the provision allowing the CRMU Director to determine “whether such confidentiality is warranted.”²⁷ Leaving the confidentiality of requesters to the discretion of the Director may compromise requesters’ safety in situations in which the Director makes an erroneous determination. Additionally, the provision decreases the mechanism’s accessibility, as potential requesters with serious concerns for their safety may be deterred from even submitting a request for fear that the Director may determine that confidentiality is not warranted. We recommend that the provision be revised to require that requests for confidentiality be respected unconditionally, except in situations in which the review process cannot proceed with the requested confidentiality. In these situations, we support the process described in the current IRM Procedures, whereby the Director will notify the requesters and determine terms for proceeding in consultation with the requesters.²⁸

7. The IRM Should Extend the Cut-Off Date for Filing Requests

The current IRM Procedures restrict the CRMU from accepting requests “filed more than 12 months after the physical completion of the project concerned or more than 12 months after the final disbursement under the loan or grant agreement or the date of cancellation of the undisbursed amount.”²⁹ However, people suffering harm caused by Bank-financed projects may not learn that the Bank is involved and that it is possible to file a request until long after project completion or final Bank disbursements. Additionally, some projects result in long-term adverse impacts that only become apparent years after their completion. Requests should not be precluded by the delayed onset of harm. In such cases, a 12-month cut-off date is inappropriate. We therefore recommend that the CRMU accept requests filed up to five years after the Bank’s relationship with the project ends.³⁰ This would benefit the AfDB by allowing it to extract important lessons from Bank-funded projects that result in serious, long-term harm, even after a Bank loan has been repaid.

8. The IRM Should Not Restrict Requests Regarding Private Sector Projects

²⁶ *Id.* at ¶8.

²⁷ *Id.*

²⁸ *Id.*

²⁹ IRM Procedures at ¶2(viii).

³⁰ Some accountability mechanisms do not have fixed cut-off dates. For example, the EBRD PCM has no cut-off period for accepting complaints for compliance review. *See* Project Complaint Mechanism: Rules of Procedure, ¶19(a), EBRD (May 7, 2014) [hereinafter “PCM Rules of Procedure”]. The CAO accepts complaints about any project the IFC or MIGA is participating in or actively considering without defining any set cut-off date. *See* CAO Operational Guidelines at § 2.2.1. The EIB Complaints Mechanism takes another approach, allowing complaints to be submitted to its mechanism up to one year following the date upon which the facts underpinning the allegation could be reasonably known by the complainant. *See* Complaints Mechanism Principles, Terms of Reference and Rules of Procedure, ¶5.1, EIB (Oct. 31, 2012) [hereinafter “Complaints Mechanism Principles”].

The current IRM Procedures heavily restrict requests pertaining to private sector and non-sovereign guaranteed projects, accepting only those that concern the Bank’s compliance with certain social and environmental policies. Specifically, the CRMU is only authorized to review such requests if they contain allegations of noncompliance with the Bank’s agricultural, education, health, gender, good governance or environmental policies.³¹ It is unclear why the IRM cannot review requests alleging violations of any of the Bank’s safeguards policies, as the AfDB’s Integrated Safeguards System applies to both public and private projects.³² This exclusion runs contrary to the best practices of the IRM’s peer institutions and unnecessarily narrows the scope of the mechanism.³³ We recommend that the IRM accept requests regarding private sector projects according to the same terms that apply to public sector projects.

9. The IRM Should Consider Harm for Which the AfDB Is Not Directly Responsible

The current IRM Procedures state that the CRMU is not authorized to receive requests pertaining to “actions that are the responsibility of other parties ... and which do not involve any action or omission on the part of the Bank Group.”³⁴ We urge the Bank to reconsider this exclusion. Eliminating this exclusion would align IRM Procedures with the Guiding Principles, which hold project financiers responsible for preventing and mitigating adverse impacts of projects to which they are directly linked, regardless of whether they themselves have caused or contributed to such impacts.³⁵ Moreover, accepting requests pertaining to all harm caused by AfDB-financed projects, even those for which the Bank is not directly responsible, can benefit both requesters and Bank Management. For example, if the harm has led to a situation that puts the Bank’s investment at risk, allowing the IRM to accept a request may serve the Bank, as well as project affected people, by leading to a mutually beneficial agreement or Action Plan that allows the project to proceed without causing serious harm.

We therefore recommend that this provision be eliminated. Should the provision remain, we support the Consultant’s recommendation to add the word “sole” to the provision, thus only limiting requests pertaining to actions that are the *sole* responsibility of other parties.³⁶

10. The IRM Should Remove Restrictive Conditions for Non-Local Representation

The current IRM Procedures require requesters wishing to rely on non-local representation to submit “clear evidence that there is no adequate or appropriate representation in

³¹ See IRM Procedures at ¶2(xi).

³² Integrated Safeguards System: Policy Statement and Operational Safeguards, 8, AFR. DEV. BANK (Dec. 2013).

³³ The EBRD’s PCM, the IDB’s ICIM and the ADB’s AM all treat private and public sector projects equally in this respect. For example, see Policy Establishing the Independent Consultation and Investigation Mechanism at ¶2, INTER-AM. DEV. BANK (Feb. 2010) [hereinafter “Policy Establishing ICIM”] (The mechanism accepts complaints about any “Bank-Financed Operation,” which “[c]overs all Bank investment or other financing activities, whether with or without sovereign guarantee (public or private sector).”). See also PCM Rules of Procedure at 3 (making no distinction between public and private projects); Accountability Mechanism Policy, 3, ADB (2012).

³⁴ IRM Procedures at ¶2(i).

³⁵ Guiding Principles at ¶13(b).

³⁶ Second Review at 28.

the country or countries where the project is located.”³⁷ This requirement places an unnecessary restriction on requesters’ ability to make their own choices about who represents them and creates an additional eligibility hurdle for communities who may already be working with non-local partners and wish to use those trusted partners as their representatives in the IRM process. We therefore recommend that the provision be removed.

11. Individual Requesters Should Be Permitted to Submit Requests

The current IRM Procedures authorize the CRMU to accept requests submitted by “two or more persons who share a common interest.”³⁸ This requirement is unnecessarily restrictive and has already precluded one request from registration.³⁹ We recommend that the language be changed to “one or more persons” to enable an affected individual to submit a request.⁴⁰

12. The IRM Should Allow Oral and Telephonic Submission of Complaints

We commend the current IRM Procedures for directing that submission requirements for requests be interpreted flexibly, with consideration given to the means available to communities affected by projects.⁴¹ However, the Procedures still require requests to be submitted in writing.⁴² We recommend that oral or telephonic submissions be accepted where requesters have no other means of submitting complaints.

B. Translation Practices Must Be Improved

We commend the current IRM Procedures for allowing the CRMU to accept requests submitted in local languages if requesters are unable to obtain a translation in one of the Bank’s official languages (English or French).⁴³ We also appreciate that the current IRM Procedures require the CRMU to attempt to respond to requests in the language of submission.⁴⁴ However, where this is not “practicable,” the current Procedures permit the CRMU to respond in the official language “with which the Requestors are most comfortable.”⁴⁵ We are concerned that this provision may pose an absolute barrier to accessibility for requesters who do not speak the official languages of the Bank. We therefore recommend that the Bank require all communications to be translated into a language that the requesters understand, even if they do

³⁷ IRM Procedures at ¶13.

³⁸ IRM Procedures at ¶I(b).

³⁹ See Second Review at 27.

⁴⁰ The EBRD PCM and the IFC CAO both accept complaints submitted by individual requesters. See PCM Rules of Procedure at ¶1; CAO Operational Guidelines at § 2.1.2.

⁴¹ IRM Procedures at ¶6.

⁴² *Id.* at ¶7.

⁴³ *Id.* at ¶9.

⁴⁴ *Id.* at ¶10.

⁴⁵ *Id.*

not understand English or French.⁴⁶

C. The AfDB and the IRM Should Continue to Expand Outreach Efforts Both Internally and Externally

We commend the IRM for adopting outreach as part of its mandate and agree with the Consultant's recommendations for more proactive outreach efforts, both internally and externally. We agree that internal outreach can serve to build a more constructive relationship between the IRM and Bank Management,⁴⁷ while recognizing the importance of maintaining the mechanism's independence from Bank Management in any and all communications between the two. Expanding internal outreach will facilitate institutional learning, enabling the Bank to integrate lessons from the IRM's experience into future projects and promote more sustainable development outcomes.

We also support the Consultant's recommendations for increased external outreach, particularly to communities affected by Bank projects, and the use of "innovative means of communication" to engage communities.⁴⁸ Additionally, we urge the Bank to broadly distribute information about its policies and procedures, as well as information about the IRM, in a timely and effective manner 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 the Bank actively disseminate simple, pictorial-based, user-friendly, local-language descriptions of the IRM, as well as simplified copies of the operating policies and procedures of both the Bank and the IRM, to all communities that may be impacted by Bank-financed projects. Such materials should also be made available on the IRM's website.

III. Independence

The IRM's independence from Bank Management is critical to ensuring the mechanism's ability to effectively carry out its duties to the fullest extent. Procedures ensuring strict independence also strengthen the mechanism's external credibility and are thus central to its success. We therefore make the following recommendations, which seek to promote the mechanism's ability to function independently and free of outside influence.

A. Any Advisory Function, if Established, Must Not Compromise the Mechanism's Independence

Potential advisory and project facilitation roles for the CRMU are among the primary issues under consideration in the second review process.⁴⁹ On this matter, the Consultant

⁴⁶ Adopting this recommendation would bring the Bank in line with the Guiding Principles, which state that non-judicial grievance mechanisms such as the IRM must "provide adequate assistance" to those who face accessibility barriers such as language. See Guiding Principles at ¶31(b).

⁴⁷ See Second Review at 20.

⁴⁸ *Id.* at 63.

⁴⁹ See Review of the Independent Review Mechanism (IRM) of the African Development Bank Group: Terms of Reference at 2, AFR. DEV. BANK (Aug. 2013).

recommends that the CRMU take on an advisory function to be triggered either upon the receipt of a request for an advice or technical opinion from the President or the Boards of Directors (“Boards”) or upon the submission of a proposal for such an advisory service to the President or Boards.⁵⁰

Should such an advisory function be adopted, its scope must be clearly defined in the IRM Procedures, and the mechanism’s independence must be preserved.⁵¹ We agree with the Consultant’s recommendation that the scope of any advisory function should be limited to providing advice and opinions on non-project related systemic issues or non-operational programs. The CRMU should not provide advice or opinions on specific projects, thereby ensuring that the CRMU’s independence and impartiality is preserved should those projects ever form the basis of a complaint. We affirm the Consultant’s recommendation that the CRMU Director submit reports on any advice or technical opinions provided to the President or Boards,⁵² and we additionally recommend that these reports be made publicly available.

B. Independence Must Be Ensured Throughout the Compliance Review Process

Under the current IRM Procedures, the CRMU Director and Roster of Experts’ (the “Roster”) recommendation to initiate compliance review is subject to the approval of the President or the Boards.⁵³ This provision adds an additional and unnecessary step to the process that undermines the IRM’s independence and efficiency. Once the CRMU and Roster have reviewed a request and Bank Management’s response, they have sufficient information to decide whether the case merits a full compliance investigation and should be granted the independent authority to make this decision. We therefore recommend that IRM Procedures be revised to allow the CRMU Director and Roster of Experts to initiate a compliance review without President or Board approval.⁵⁴

The current IRM Procedures also undercut the independence of the compliance review process by allowing Bank Management to accept or reject the findings and recommendations of the Roster’s Compliance Review Report in its Response and Action Plan to the Report.⁵⁵ Providing Management with the option of rejecting the findings of a compliance review compromises the IRM’s independence and undermines the mechanism’s mandate, weakening the Roster’s ability to foster institutional learning and promote sustainable development outcomes. Thus, we recommend that the provision allowing Management to reject the Report’s findings be eliminated. In its response to the Roster’s recommendations, we recommend that Management be required to respond to each recommendation made in the Compliance Review Report and provide clear justifications if any recommendations are rejected.

⁵⁰ See Second Review at 26 and 27.

⁵¹ We suggest that the Bank refer to the CAO Operational Guidelines for guidance on how to structure an advisory function while preserving the independence of the mechanism. See CAO Operational Guidelines at §5.

⁵² See Second Review at 27.

⁵³ See IRM Procedures at ¶43 and ¶44.

⁵⁴ The IFC CAO, EBRD PCM, and IDB ICIM have the authority to initiate compliance reviews without requiring Board approval. See CAO Operational Guidelines at § 4.2; PCM Rules of Procedure at ¶17, ¶26, and ¶35; and Policy Establishing ICIM at ¶39.

⁵⁵ See IRM Procedures at ¶58.

C. IRM Staff Should Not Be Permitted to Seek Expertise Internally

When the CRMU and the Roster of Experts require additional expertise to assist in their work, the current IRM Procedures require that they first check to see whether such expertise is available within the Bank. If expertise cannot be made available internally due to a conflict of interest or the appearance of one, only then may expertise be sought externally.⁵⁶ We agree with the Consultant that this provision undermines the IRM's independence and that the use of any Bank staff expertise on the part of the IRM should be viewed as a conflict of interest.⁵⁷ Thus, we affirm his recommendation that the IRM be required to seek expertise outside of the Bank.

D. IRM Staff Should Not Be Permitted to Seek Advice from AfDB General Counsel Regarding the Bank's Rights and Obligations

The IRM Procedures state that the Bank's General Counsel shall provide legal information and advice as requested by the IRM, including information regarding "the Bank Group's rights and obligations in respect of the Bank Group-financed project to which a Request relates."⁵⁸ Accepting advice from the AfDB's own General Counsel regarding the Bank's obligations in a particular project context presents a serious conflict of interest. The General Counsel's office often provides advice to Bank Management regarding its legal obligations during a project's design and implementation and may therefore have preconceived opinions about Bank Management's actions in a particular case. We recommend that the IRM be prohibited from relying on legal advice and information from the General Counsel's office. The Roster of Experts should be independently capable of determining and providing advice on the Bank's legal obligations.

E. CRMU Engagement with the Boards and Management Should Be Undertaken Transparently

In his report, the Consultant recommends that the CRMU interact with the Boards more frequently and proactively; he maintains that such engagement will hold Management accountable to Bank policies and make the AfDB more responsive to the needs of people affected by Bank projects.⁵⁹ The Consultant also recommends that a more structured relationship be fostered between the CRMU and Management, through which the CRMU would help Management better adhere to its own policies.⁶⁰ Should the Consultant's recommendations for increased CRMU engagement with the Boards and Management be adopted, we underscore the importance of his statement that the mechanism's independence must be maintained.⁶¹ The CRMU should not advise or provide opinions to Bank Management on specific projects and documents pertaining to any formal meetings with the Boards or Bank Management should be disclosed publicly.

⁵⁶ *See id.* at ¶75(b).

⁵⁷ *See* Second Review at 25.

⁵⁸ IRM Procedures at ¶77.

⁵⁹ *See id.* at 12.

⁶⁰ *See id.* at 13.

⁶¹ *See id.*

F. Compliance Spot Checks, if Adopted, Should Not Involve the CRMU

The Consultant additionally recommends that each year the CRMU, in consultation with Management, select one to two socially and environmentally high-risk Bank projects on which to conduct compliance review spot checks.⁶² We strongly agree with the Consultant's finding that there is a need to foster a more constructive relationship between the CRMU and Management, and we support the idea of creating additional checks on the Bank's compliance with its own policies. However, involving the CRMU in project-specific spot checks may result in conflicts of interest should the selected projects ever be subject to subsequent IRM processes.⁶³ Thus, in order to maintain the mechanism's independence and accessibility, we recommend that CRMU-led spot checks not be adopted. If the Bank has a strong interest in adopting compliance spot checks, we recommend that another Bank office undertake them instead of the CRMU.⁶⁴

G. CRMU Staffing Issues Undermine the Mechanism's Independence

1. The IRM Must Institute a "For cause" Provision Regarding the Dismissal of the CRMU Director

We commend the current IRM Procedures for retaining a "for cause" provision with regard to the removal of Roster experts.⁶⁵ However, we note that the procedures guiding the removal of the CRMU Director lack a "for cause" provision. To help preserve the independence of the CRMU Director and prevent the Director's arbitrary dismissal or dismissal without justification, we recommend that a provision be added specifying that the Director may only be removed for cause.⁶⁶

2. The IRM Should Expand Post-employment Bans for the CRMU Director, Support Staff and the Roster of Experts

While the original IRM Procedures imposed a lifelong post-employment ban for the CRMU Director,⁶⁷ the current IRM Procedures provide a mere three-year ban.⁶⁸ We are concerned that this abbreviated post-employment ban compromises the independence of the

⁶² See Second Review at 13.

⁶³ The CAO does not advise the IFC/MIGA on specific projects for this reason. See CAO Operational Guidelines at § 5.1.2.

⁶⁴ Please also see our recommendation in section IV.B below that the CRMU be authorized to proactively initiate compliance reviews without needing to first receive a request from affected people. This would accomplish many of the same goals of the Consultant's spot check idea, including increasing the mechanism's ability to effectively carry out its mandate, while still maintaining its independence from Bank Management.

⁶⁵ The current provision states "the Boards may remove Experts from the Roster at any time for cause." See IRM Procedures at ¶73.

⁶⁶ The PCM Officer can only be removed from his or her post for cause, with the approval of the EBRD President. See PCM Rules of Procedure at ¶58.

⁶⁷ See IRM Operating Rules and Procedures at ¶60, AFR. DEV. BANK (2008).

⁶⁸ See IRM Procedures at ¶61.

IRM, and we recommend that the IRM Procedures restore the Director’s lifelong post-employment ban.⁶⁹

Additionally, under the current IRM Procedures, there is no post-employment ban for CRMU staff.⁷⁰ Although the IRM Procedures lack clarity on what authorities CRMU staff exercise, the CRMU Director “may delegate his or her authority to members of staff in his or her office” in his or her absence.⁷¹ The CRMU support staff may wield significant influence over key decisions in the IRM process and neglecting to impose a post-employment ban for CRMU staff thus compromises the independence of the mechanism. We therefore urge the Bank to implement a post-employment ban for CRMU staff, in addition to the Director.⁷²

Finally, the current IRM Procedures provide a post-employment ban for the Roster of Experts that lasts only two years. Given the important role that the Experts play in the compliance review process, a two-year post-employment ban is insufficient to ensure that they are free to carry out their role independent of any influence from other Bank organs. We recommend that a lifelong post-employment ban be instituted for the Roster of Experts.⁷³ If this is not possible, we recommend at minimum that the post-employment ban be increased to five years.⁷⁴

IV. Equity and Effectiveness

The IRM can only be effective insofar as the people it serves trust the mechanism and find it credible. The IRM’s commitment to equity should also warrant the Bank’s consideration. Requesters often initiate the IRM process in a position of disadvantage, with far fewer resources than those at the disposal of other stakeholders. If requesters feel further disempowered through the IRM process, the mechanism’s success is compromised. In order to ensure that the IRM is a tool that is both fair and effective, the IRM Procedures must proactively redress these imbalances.⁷⁵ We therefore make the following recommendations, which seek to promote the principles of equity and effectiveness in the IRM process.

A. The IRM Should Be More Equitable to Requesters

The IRM process should be requester-driven, to honor community self-determination and place requesters on a level playing field with Bank actors. With this in mind, we make the following recommendations.

⁶⁹ The CAO Vice President receives a lifelong ban from employment at any World Bank Group entity. *See* CAO Operational Guidelines at § 1.3. Members of the World Bank Inspection Panel are likewise subject to a permanent post-employment ban from working for the World Bank Group. *See* IBRD Resolution No. 93-10, IDA Resolution No. 93-6, ¶10, IBRD and IDA (Sept. 22, 1993).

⁷⁰ *See* IRM Procedures at ¶67.

⁷¹ *See id.* at ¶17.

⁷² CAO staff and specialists receive a two-year post employment ban. *See* CAO Operational Guidelines at § 1.3.

⁷³ The PCM institutes a permanent post-employment ban for its experts. *See* PCM Rules of Procedure at ¶51.

⁷⁴ The ICIM institutes a five-year post-employment ban for experts serving on its independent panel. *See* Policy Establishing ICIM at ¶80.

⁷⁵ We note that the principle of equity is also recognized under the Guiding Principles as critical to the efficacy of non-judicial grievance mechanisms. *See* Guiding Principles at ¶31(d).

1. Requesters Should Be Able to Select Which Function to Initiate

We commend the current IRM Procedures for requiring that the CRMU Director give “due consideration to the preference of the Requestors” in his or her determination of which IRM function to pursue.⁷⁶ However, “due consideration” suggests that the mechanism may, in some instances, assign a case to one function despite the requesters’ stated desire to access the other function. To ensure that the IRM provides services that are responsive to the needs of affected people, and to honor community self-determination, the IRM Procedures should be revised to give requesters the power to decide which function(s) to initiate, and in which order. Where appropriate, the policy should allow for parallel problem-solving and compliance review processes.⁷⁷ These amendments would build greater flexibility into the system and allow the sequencing of IRM functions to be determined on a case-by-case basis. The revised Procedures would ensure that one function does not restrict access to another, making the mechanism not only more equitable, but also more effective and efficient.

2. Requesters Should Be Permitted to Submit Formal Comments at Key Points in the IRM Process

The current IRM Procedures provide insufficient opportunities for requesters to submit comments and participate in the process. Providing additional opportunities for requesters to express their opinions will make the IRM process not only more equitable, but also more effective. Compliance review and problem-solving exercises are often characterized by complex circumstances and facts and carry a high potential for miscommunication. There is always a risk that important facts and issues may be overlooked, or that needs and concerns may be misunderstood. Thus, providing checks on accuracy throughout the process is critical, particularly as the IRM has no appeal system. Inviting requesters’ comments and participation at key stages will keep the IRM, and ultimately the Bank, better informed and will make the process more transparent and responsive. Finally, such provisions would ensure that the Bank is held accountable for the fair conduct of grievance processes, a key criterion for the effectiveness of non-judicial grievance mechanisms identified in the Guiding Principles.⁷⁸

Specifically, we recommend that the requesters be allowed to submit comments on a draft Problem-Solving Report and that these comments be considered in finalizing the Problem-Solving Report and any recommendations for remedial action. Additionally, requesters should be invited to participate in the development of an Action Plan at the final stages of the compliance review process, as this document is intended to address the concerns raised in the request and requesters are therefore well positioned to provide input.⁷⁹ If they are not granted participation in the development of the Action Plan, we recommend that, at a minimum, both the requesters and the Roster of Experts be provided the opportunity to submit written comments on

⁷⁶ See *id.* at ¶20.

⁷⁷ The EIB follows this practice. See Complaints Mechanism Principles at ¶7.6 – 7.11.

⁷⁸ See Guiding Principles at ¶31(a).

⁷⁹ Under the current IRM Procedures, Management is required to prepare a Response and Action Plan within 90 days after the Compliance Review Report is sent to the President and Boards, with no participation from the requesters. See IRM Procedures at ¶57(a).

the Action Plan after it is drafted, and that Management be required to consider their comments and amend the Action Plan accordingly. Further, the IRM Procedures should allow requesters to participate in the joint presentation of the Compliance Review Report and Action Plan to the Boards.⁸⁰

B. The IRM Should Be Given the Authority to Initiate Compliance Reviews

We agree with the Consultant that there is a need for the CRMU to take a more proactive approach to fulfilling its mandate.⁸¹ The mechanism currently suffers from a low rate of requests and is operating well under its allotted budget.⁸² In order to play a more effective role in enhancing the quality of Bank project delivery, we recommend that the IRM be granted the authority to initiate compliance reviews on its own initiative based on project-specific or systemic concerns related to the Bank's compliance with its own policies.⁸³ This would enable the mechanism to play a more effective role in enhancing the Bank's project implementation.

C. The CRMU Should Be Able to Recommend the Suspension of Further Work or Disbursement on the Basis of Credible Allegations of Harm

We commend the IRM for allowing the CRMU Director or the Roster of Experts to recommend the suspension of further work or disbursement on a project, should they be "of the opinion that serious, irreparable harm shall be caused" if the project continues.⁸⁴ This provision recognizes that allowing projects that threaten imminent harm to proceed before the IRM process has been exhausted undermines the effectiveness of the mechanism. However, the provision is unduly restrictive and does not provide any indication as to whether such recommendations by the Director or the Roster will be followed. We therefore recommend that the language of this provision be revised to allow the CRMU to recommend the suspension of further work or disbursement on a project wherever credible allegations of serious, irreparable harm have been made. Further, we urge the Bank to adopt these recommendations on a no-objection basis.

D. The Parties to a Problem-Solving Exercise Should Decide Whether to Terminate the Exercise

We object to the provision allowing the CRMU Director to unilaterally decide that problem-solving efforts have been unsuccessful and end the problem-solving exercise, without the consent of the parties.⁸⁵ A problem-solving exercise should always be voluntary and subject to the consent of both parties. Where both parties to the dispute wish to continue the problem-solving process despite common setbacks, the Director should defer to the decision of the parties

⁸⁰ Under the current IRM Procedures, the CRMU and Management present these documents jointly to the Boards, without the participation of the requesters. See IRM Procedures at ¶57(b).

⁸¹ See Second Review at 20.

⁸² See IRM Annual Report at 18.

⁸³ The CAO Operational Guidelines grant the power to initiate compliance reviews to the CAO VP. See CAO Operational Guidelines at § 4.2.1.

⁸⁴ See IRM Procedures at ¶18.

⁸⁵ Under the current IRM Procedures, the Director may declare a problem-solving exercise unsuccessful and end it *either* after three months from the commencement of the exercise *or* by common consent of the parties (emphasis added). See IRM Procedures at ¶41.

that the exercise is still useful. He or she should assist the process by doing as much as possible to establish trust and promote a successful outcome.

We recommend that a provision be added to the IRM Procedures explicitly stating that the problem-solving exercise will only be undertaken voluntarily. Additionally, we recommend that the provision allowing the CRMU Director to unilaterally end a problem-solving process be revised to require the consent of the parties prior to termination. At a minimum, if the Director maintains the authority to unilaterally end a problem-solving exercise, he or she should be required to provide 60 days' notice of the intention to terminate to the parties, in order to provide the parties an opportunity to salvage the problem-solving exercise and prove that it has not been "unsuccessful," if they so choose.

E. The Implementation of Problem-solving Agreements Should Be Subject to Strict Monitoring

We commend the IRM for requiring the CRMU to monitor the implementation of any solutions agreed to during a problem-solving exercise.⁸⁶ However, the current provision lacks sufficient guidance. Continued monitoring by the CRMU holds parties accountable for their commitments during problem-solving and ultimately enhances the mechanism's effectiveness and its ability to provide real solutions for affected people.

We recommend that the IRM Procedures be revised to include clear monitoring procedures. Specifically, we recommend that the CRMU be required to create monitoring reports at least biannually. Draft reports should be sent first to Bank Management, requesters and other relevant parties, who should be given the opportunity to submit comments. The CRMU should then revise the report, incorporating any relevant comments, before submitting a final version to the AfDB President and Boards.⁸⁷ When the CRMU Director determines that all implementation issues have been resolved, the CRMU should release a conclusion report explaining its rationale for concluding monitoring.⁸⁸

F. The IRM Should Not Increase the Timeframe for Release of the Problem-Solving Report Without Reasonable Justification

The Consultant recommends that the allotted time period for the Director to prepare a Problem-Solving Report be doubled from thirty days to sixty days.⁸⁹ As the Consultant provides no explanation as to why this extended time period is necessary, and as we have heard from users of the mechanism that they are already unhappy with the long wait times and delays throughout the IRM process, we disagree with this recommendation. Absent some reasonable and identifiable justification for extending timelines, we urge the mechanism to maintain and adhere to those timelines laid out in the current IRM Policy.

⁸⁶ See IRM Procedures at ¶40.

⁸⁷ The EBRD PCM follows this practice, including requiring biannual monitoring reports and sending draft versions to all relevant parties for comment. See PCM Rules of Procedure at ¶39.

⁸⁸ This is the practice of the CAO. See CAO Operational Guidelines at § 3.2.4.

⁸⁹ See Second Review at 29-32 (Consultant's revision of ¶38 of the current IRM Procedures).

V. Transparency

A transparent process is essential to demonstrate the legitimacy of the mechanism and maintain the trust of potential requesters, thereby encouraging the use of the IRM as a forum to address relevant project-related concerns. We commend the mechanism for its efforts to make case documents available on its online registry, yet we note that there is still room for improvement regarding the transparency of some aspects of its services. We offer the following recommendations to address these transparency gaps.

A. All Requests Should Be Promptly Recorded in the Online Case Registry

Under the current IRM Procedures, requests undergo an intake process prior to eligibility determination, during which the CRMU conducts a preliminary review of the request and determines whether it contains a *bona fide* allegation of harm caused by a Bank-financed project. At this stage, the CRMU may decide to register the request, to request additional information, or to reject the request.⁹⁰ Because the IRM makes information publicly available only for those Requests that are registered, this practice lacks transparency.

Moreover, we are concerned that the CRMU may be inappropriately rejecting requests at this intake stage. The Consultant's audit reveals that the IRM has received sixteen requests to date, of which seven were not registered. Of the unregistered requests, five were not registered because, in the determination of the CRMU, they were "successfully handled" by national or regional AfDB field offices.⁹¹ If such requests had been "successfully handled" by Bank Management before the request was filed, however, it is unclear why requesters would have undertaken the effort required to file a request with the IRM. If "successfully handled" instead means that the IRM provided an opportunity for Bank Management to attempt to address requesters' concerns outside of the IRM process and *after* they had sent a request to the mechanism, then this may indicate that a non-transparent process is taking place outside of the IRM, in contravention of the current IRM Procedures. The limited information provided by the Consultant is insufficient to determine whether this is the case, which only underlines the need for greater transparency regarding all requests sent to the mechanism. Additionally, it is not apparent which Bank-financed projects these five requests pertained to or how they were handled internally.

Given the lack of transparency surrounding the CRMU's decisions not to register these requests, we have no way of knowing whether the CRMU's decisions regarding these cases were justified. Additionally, because there is no information available about these cases, future requesters cannot learn from them and avoid having their requests rejected for similar reasons. To ensure greater transparency, we recommend that all requests and corresponding decisions made by the CRMU be promptly recorded in the online case registry, including any requests rejected at the intake stage.

⁹⁰ IRM Procedures at ¶19.

⁹¹ Second Review at 16.

B. The CRMU Should Make All Information Regarding Deadline Extensions Publicly Available, Including Justifications and Updated Timeframes

We commend the IRM for specifying clear deadlines for each stage of its process. However, the Procedures also allow the CRMU Director to extend any specified time period for “as long as is strictly necessary.”⁹² We recommend that the CRMU be required not only to notify requesters and all interested persons of any extensions granted, as the current Procedures provide,⁹³ but also to provide an exact timeframe and clear justification for any such extensions and to make this information publicly available.

VI. Bank-wide Recommendations

In his report, the Consultant makes three broad recommendations to Bank Management pertaining to issues of consultation, resettlement and child labor. While not directly related to the IRM Procedures, these issues are of the utmost importance to the successful operations of the Bank and the achievement of effective development outcomes. We therefore comment on each in turn.

A. Bank Management Should Make Meaningful Consultation a Priority

The Consultant notes that consultation has been an issue in all eight of the major cases that the IRM has registered. In our experience working with people and communities impacted by IFI-financed projects, we have noticed a similar trend. We strongly affirm the Consultant’s recommendation that Bank Management make a greater effort to consult with communities affected by Bank-financed projects and engage them in meaningful dialogue.⁹⁴

B. Bank Management Should Adhere to the Involuntary Resettlement Policy

We affirm the Consultant’s recommendation that Bank Management make a greater effort to adhere to the Bank’s Involuntary Resettlement Policy and ensure that income and livelihood restorations are considered in the preparation of resettlement packages.⁹⁵

C. Bank Management and the IRM Should Protect Against Harmful Child Labor Practices

We affirm the Consultant’s recommendations that all Bank projects be required to undergo mandatory screening against child labor and that the IRM clearly define what are

⁹² IRM Procedures at ¶30.

⁹³ *See id.*

⁹⁴ *See* Second Review at 18.

⁹⁵ *See id.* at 18 and 19.

considered harmful practices with regard to child labor. On the latter issue, the IRM may wish to refer to Operational Safeguard 5 under the Bank’s new Integrated Safeguards System.⁹⁶

VII. Conclusion

We urge the Bank to amend the IRM Procedures to address the issues raised above, which we believe are critical to the mechanism’s ability to fulfill its mandate and ensure sustainable development outcomes. We thank you for taking the time to consider our comments, as well as others submitted during this review process. Please do not hesitate to contact us if you have any questions or would like to discuss these matters further.

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⁹⁶ Operational Safeguard 5 defines child labor as the employment of children “in any manner that is economically exploitative, or is likely to be hazardous or to interfere with the child’s education or to be harmful to the child’s health or physical, mental, spiritual, moral, or social development as stipulated in national laws in compliance with the provisions of ILO Convention C138 and C182.” See African Development Bank Group’s Integrated Safeguards System: Policy Statement and Operational Safeguards, AFR. DEV. BANK, 50 (Dec. 2013).

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