ACCOUNTABILITY COUNSEL
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June 26, 2009

Via Electronic Mail

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Re: Comments on the Inter-American Development Bank Proposed Independent Consultation and Investigation Mechanism

Dear Ms. Betancourt:

I am pleased to have the opportunity to submit the following comments on the April 29, 2009 Inter-American Development Bank ("IDB") Proposed Independent Consultation and Investigation Mechanism Paper ("ICIM Draft") for your consideration. I submit these comments based on over a decade of experience with the international financial institution ("IFI") accountability mechanisms, as well as based on my recent experience with the review of the EBRD's accountability mechanism. I submit these comments in my capacity as Director of Accountability Counsel; not as representative of any other institution or organization.

I. General Comments

I commend the IDB for re-opening the review of the Independent Investigation Mechanism ("IIM") and for the comment period offered on the ICIM Draft. Accountability mechanisms are an important element of the credibility and legitimacy of IFIs – particularly where they serve as the primary complaint system for people harmed by the institution's operations. They are also a valuable tool for the institutions' leaders because they provide a vehicle for bringing instances of policy non-compliance to the bank's attention.

Because the IDB was one of the early adopters of an accountability mechanism, there has been significant evolution in the design and implementation of accountability mechanism policies at the IFIs since the IIM's creation in 1994, just after the 1993 creation of the World Bank Inspection Panel. It is hoped that these advances will inform the current ICIM Draft and the consultation process as a whole.

This review of the IDB's accountability system comes at a crucial time for the IDB. While the IDB continues with significant lending volume in the region, it's mechanism has not reflected what is required of it given the IDB's impact in terms of the need to provide a

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mechanism based on principles of independence, transparency, fairness, professionalism, accessibility and effectiveness. Because the IIM has lacked many of these principles, distrust of the IIM in the IDB's countries of operations among a number of civil society groups is one contributing factor to the very few cases brought to the IIM, in addition to other factors such as lack of awareness of its existence.[1]

This revision of the IDB's accountability mechanism is thus an opportunity to design a system that reflects these core principles, while taking advantage of 'state of the art' accountability mechanism design features that have been developing over the past 14 years. For example, the value of "consultation" (also called ombudsman, problem-solving or dispute resolution) functions has been demonstrated since 1994 with the subsequent creation of the accountability mechanisms for the IFC/ MIGA, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development and, most recently, the European Investment Bank. Not only attention to design of consultation functions, but design generally at each of these mechanisms, may provide useful input to the IDB's review of the IIM.[2]

In general, the ICIM draft is an important advancement toward the IDB's accountability. However, a number of changes would further improve the current draft and move the IDB's mechanism closer to meeting the principles of independence, transparency, fairness, professionalism, accessibility and effectiveness.

First, the proposed sequencing of the mechanism – requiring the consultation phase to run its course before initiation of a compliance review – may minimize the role of compliance review and make it a less available tool for communities and the IDB's Board. Rather than sequencing these functions, a better approach may be to accept requests, determine eligibility for one, both or neither function, and then to proceed on a case-by-base basis. At times, an eligible complaint would go straight for processing under the compliance function. Where both functions are appropriate, in certain cases a compliance review may be undertaken simultaneous to a consultation, whereas in other cases, it may make sense to sequence the functions. However, requiring each requester to exhaust the consultation process before compliance issues are addressed may delay the process and thereby hamper effectiveness of the mechanism.

Second, in terms of the mechanism's independence, a preferable structure would be to house the ICIM in an independent office that is not part of the Bank Secretariat which serves senior staff. This creates at least potential for conflict-of-interest from the outset and undermines the credibility of the mechanism. Independence would also be better ensured if the Executive Secretary reported to the Board, not the President, and was selected in a transparent manner with input from civil society and Panel members.

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[1] These observations are based on my own personal experience speaking with a number of would-be users of the IIM who chose not to engage with the IIM because of conflict-of-interest built into the IIM's design and other perceived deficiencies in its operations.

[2] These comments are limited to specific and technical points as they relate to the current ICIM Draft. It is hoped that a separate, in-depth study that makes use of the innovations and experiences of other IFIs forms part of the review process.

Third, a positive aspect of the ICIM Draft is the opportunity for requesters to comment on the Panel's draft compliance report. While this is an important element, the missing aspect of this provision is the drafting of an action plan (either by the Panel or Management) to address non-compliance. Requesters should be able to comment on both the draft report and the corresponding action plan. This change would make the exercise more useful and would obviate the need for the Board or President to be drafting action plans – a task not suited to these bodies.

Fourth, the ICIM Draft is unclear regarding registration versus eligibility criteria. In addition, as detailed below, some of these criteria amount to inappropriate barriers to access of the mechanism.

Finally, regarding the tone of the current ICIM Draft, after the glossary of terms, it may be useful from the perspective of potential users of this mechanism to first detail the registration criteria (now para. 40, which itself requires elaboration and clarification as to which requests will be "registered") and then the steps of the Consultation Phase (now starting at para. 42) and the Compliance Review Phase (now starting at para. 62) in such as a way to (1) describe how a complaint may be brought, then (2) which claims are excluded, and finally (3) how the mechanism is to be administered. Beginning with exclusions may set an overall tone that the mechanism seeks to keep requesters out, rather than seeking inclusion, which has the impact of making the mechanism appear less accessible than it might otherwise.

The following comments relate to specific paragraphs of the Proposed ICIM Draft.

II. Specific Comments

Para. 2. Policy-based and emergency loans may cause significant adverse impact to communities and should therefore be included in the definition of Bank-financed Operation. Furthermore, because the date of the signing of the mandate letter and the assignment of the project number are technical stages in a project that may be difficult if not impossible for affected communities to determine, measures should be described regarding how this information will be communicated to potential requesters (*e.g.*, explicit posting of these stages on the IDB website for each initiative).

Paras. 27. and 28. It is unclear why the ICIM Office is to be housed in the Office of the Secretary. Because one of the core functions of the Office of the Secretary is to provide "services" to "senior management" of IDB (who may be involved in decisions leading to complaints filed with the mechanism),[3] this compromises the independence of the mechanism as well as the perceived independence of the mechanism. A preferable structure would be for the Executive Secretary to be housed in a dedicated ICIM office that reports directly to the IDB Board.

[3] *See* http://www.iadb.org/aboutus/departments/home.cfm?dept_id=SEC.

The Executive Secretary of the ICIM should be appointed by the Board, not the President, and the appointment should take place only after a transparent selection process that includes a nomination committee with external representative(s), including members of civil society and Panel members.

These paragraphs are confusing because while 28 is titled "Reporting responsibilities" it does not state to whom the Office of the ICIM reports.[4] As mentioned above, the ICIM Office should report to the IDB Board in order improve the mechanism's independence from Bank management. This is particularly important give the Executive Secretary's substantive role (see paras. 29(a) and 52) in assessment, and generally due to the need for independence in the day-to-day administration of the mechanism.

Para. 29(d). A more optimal role for the Executive Secretary might be to offer general trainings on problem-solving for IDB management, but not case-specific "advice". If advice is offered for a specific case that is not under review by the Mechanism, this could very well lead to problem-solving advice on a case that does or should come under such review. The principle of independence would be better served here if a separate unit of the IDB provided project-specific problem-solving advice to management so that the ICIM's integrity in the process could be preserved for its role in problem-solving when a complaint triggers its response.

Para. 29(g). The language here would be more effective if "developing means to promote" were deleted and replaced with "promoting" to more directly ensure access to and knowledge of the Mechanism.

Para. 30. I commend the Panel's reporting to the Board with regard to its Compliance Review Phase activities. This is crucial to the Mechanism's independence and credibility.

Para. 31. While up to seven Panel members might eventually be required, it is preferable to initially appoint only three Panel members as a regular practice and only increase the number if those three Panel members are occupied with ICIM activities on a full-time basis. This would benefit the Mechanism by ensuring that the Panel members have the ability to draw on repeated experience from the performance of their duties. It would also increase the likelihood that the Panel members would be able to share information with one another, potentially increasing the professionalism of the Mechanism.

Para. 33. While the 2-year pre-employment ban is important, a 2-year post-employment ban is insufficient to support the Mechanism's independence. A permanent post-employment ban would ensure greater independence as well as perceived independence.

Para. 37. Removal by the Board should be permitted only "for cause" to ensure greater independence of Panel members.

[4] Also, please note that the term Office of the Independent Consultation and Review Mechanism in para. 27 is an inconsistent title with the ICIM used elsewhere in the document.

Para. 39. This paragraph should be deleted because it is self-evident (if intended to be read, as I read it, as subordinate to other paragraphs in the Draft document) and could conflict with the role of the Terms of Reference described in para. 67.

Para. 40. As mentioned above, the criteria for registration should be included in this paragraph, as should the timing of how soon after an event it will be posted (optimally, as soon as possible).

Para. 41(a). In some cases, it may be important for the ICIM to have the power to assist in resolution of a dispute where the IDB has financed an operation and the operation has caused harm, even if the IDB may not be directly responsible for causing the harm. If, for example, the harm has created a problem that puts the IDB's investment at risk, allowing the ICIM a role in dispute-resolution may serve the institution as well as communities in which the IDB operates.

Para. 41(g). With this language, it will be important for the IDB to publicize clearly when Project Completion Report's are completed with access to this information available to potential requesters. Preferably, however, the ICIM would be extended to requests brought at least until full repayment of IDB funds or, if that is an inappropriate measure, until the IDB no longer maintains a financial interest in the operation or initiative.

Para. 41(j). This paragraph should be amended to exclude requests where Compliance Review is the appropriate function. It should also be amended to clarify that requests that raise issues "under arbitral or judicial review by national, supranational or similar bodies" are merely reviewed as one factor for eligibility to determine whether such issues are brought by substantially the same parties such that decision by another body, where that body is legitimate, could undermine the IDB ICIM's role.

Para. 42. Based on the reasoning regarding paragraph 41(a), above, this might be too narrow a purpose for the Consultation Phase. A more effective construction would be where a Bank-supported operation has caused, or it is reasonably believed that it will cause, harm.

Para. 44. An exception should be made here to allow the Executive Secretary to waive this requirement where such efforts to contact Management are alleged to threaten harm to the would-be requesters. The act of complaining to Management could cause retribution that would deter follow-up through the filing of a complaint.

Para. 45. It is not clear whether this paragraph's requirements form registration criteria or eligibility criteria. In addition, it should be clarified which of these elements are mandatory and which discretionary. Also, for example, requiring that the requester state the "alleged act or omission of the Bank in contravention of its Operational Policies" is not realistic where such an act or omission may be known only to the Bank and, even then, maybe be known only after an investigation. If included at all, it should be clear that this information is to be included only if possible on a discretionary -- not mandatory -- basis.

Para. 46. This paragraph is unclear and raises the question whether, when both functions are requested, this provision states that the processing of the entire complaint must conclude

under the Consultation Phase before even determining eligibility for a Compliance Review. If so, there is a risk that complaints that raise serious and urgent compliance issues will languish while a perhaps long and protracted Consultation process ensues. The ICIM must be able to ensure that complaints that raise compliance issues are dealt with in a timely and professional manner.

Para. 50. This paragraph should be broken into two, one on registration, as titled, and a second on eligibility, which is also included in this paragraph. It is not clear what the criteria are for registration, and whether they are separate from the criteria for eligibility. If they are virtually the same, the word eligibility should be removed to clarify this and the provision should discuss criteria required for registration.

Paras. 51, 52 and 53. These provisions should clarify whether the Assessment applies to requests for Consultation and Compliance Review or only one of the functions. It is perhaps implicit that Assessment applies to the Consultation phase, but this should be made explicit.

Para. 52. Any assessment seeking to clarify issues raised in the request and the views of the stakeholders must, not may, minimally involve interviewing the requesters, preferably in person through a site visit.

Para. 53. As discussed above, waiting for completion of an assessment may not be appropriate if there is a clear compliance issue alleged in need of immediate attention.

Para. 54. This 120-day period would be more appropriate if the functions of the mechanism were not sequenced (and it may be more effective were they not sequenced). Given the sequencing, 120 days may be too long in many cases and may remove the opportunity to identify continuing compliance issues that could be addressed through a Compliance Review.

Para. 55. As discussed above, if sequenced, it is important that the Consultation Phase not be entirely open-ended such that a compliance issue becomes moot by the time the Consultation Phase is terminated. Furthermore, this paragraph does not make clear who will be conducting this phase – will it be the Executive Secretary or a third party?

Para. 58. This provision should be eliminated as there should be no need for advance written consent to conduct a site visit. There is a risk that this provision will be used as a tool to stall or prevent the mechanism's work.

Para. 61. This monitoring provision is an important tool, but the provision should include a regular basis for reporting, biannually for example.

Para. 63. The Compliance Review tool should not be permitted only after a Consultation, but rather, it should be a directly accessible tool for requesters. As has been seen in other sequenced mechanisms, this approach may delay or even prevent Compliance Review. Should it remain sequenced, requesters should not be required to re-submit their complaint for Compliance Review if the Executive Secretary determines there is or may be a compliance issue. Please see general comments above regarding how this feature could be redrafted.

Para. 64. As mentioned above, requesters should not have to submit complaints twice in order to have a Compliance Review initiated if there is a compliance issue raised (in substance or in name).

Para. 67. While it may be appropriate for the Chairperson to accept comments from Management regarding their views of the complaint, it is not appropriate for Management to be *consulted* regarding the TORs. How to conduct a Compliance Review should be in the sole discretion of the mechanism.

Para. 68. Requiring approval of the Board or President for a Compliance Review lessens the independence of the Compliance Review Panel. As is the case with the EBRD Project Complaint Mechanism Policy, better practice is to empower a Compliance Review automatically if the eligibility criteria have been met. It is therefore recommended that paragraph 68 be deleted.

Para. 72. As with paragraph 58, this provision should be eliminated as there should be no need for advance written consent to conduct a site visit. There is a risk that this provision will be used as a tool to stall or prevent the mechanism's work.

Para. 77. Allowing requesters to comment on the Panel draft report is a positive feature of the draft. However, it is essential that the requesters are given not only draft findings upon which to comment, but draft recommendations addressing the non-compliance as well. Either the Panel or Management should draft an action plan that is discussed with the requesters through an opportunity to comment.

Para. 79. As noted above, the Report that is submitted to the Board or President should include an action plan that has been commented on by the requesters so that the Board or President's decision consists of accepting or rejecting the Report with recommendations. Requiring the Board to "instruct Management regarding any subsequent actions" is not realistic, would cut the requesters out of this process, could lead to failure to implement changes after a finding of non-compliance, and is too cumbersome a requirement for the Board/ President considering the work involved in drafting, refining and agreeing on an action plan.

Para. 81. Monitoring is an important part of the panel process and should be mandatory following approval of action plans created to remedy non-compliance with Bank policy. Therefore, it is important that monitoring be automatically undertaken and not left to the Board's request.

Para. 86. This paragraph is confusing and could be interpreted as allowing the Executive Secretary, Office Staff and Panel to have a substantive role with regard to IIC- and MIF-funded projects that are operational in nature, not in line with the other consultation or compliance functions of the mechanism. This should be clarified and the paragraph removed if possible.

I appreciate the opportunity to comment on the ICIM Draft and again commend the IDB for undertaking revision of the IIM. I look forward to continuing engagement with the IDB on this important policy revision.

Sincerely,

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