

October 8, 2014

Via Electronic Mail

Compliance Review and Mediation Unit
African Development Bank

Re: Response to Proposed Amendments to the IRM Operating Rules and Procedures

Dear CRMU Team,

We greatly appreciate the opportunities for public input into the current review of the IRM Operating Rules and Procedures (“IRM Procedures”), as well as your office’s willingness to engage with civil society groups. In particular, we appreciate the opportunity to review and provide input on the Proposed Amendments to the Operating Rules and Procedures (“Proposed Amendments”), which we understand was provided in response to civil society groups conveying interest in commenting on a draft.

We note with appreciation that the Proposed Amendments incorporate a few specific recommendations from public comments. Nonetheless, a number of important recommendations submitted during the public comment period were not incorporated and the Proposed Amendments do not go far enough to address our underlying concerns.

At minimum the following changes, explained in detail below, should be made before the Operating Rules and Procedures are adopted:

- The requirement to provide supporting documentation should be eliminated;
- Requesters should be allowed to raise human rights issues other than violations of social and economic rights;
- Selection of the CRMU and IRM Experts should be done by a nomination committee composed of internal and external stakeholders;
- The spot-check function should be eliminated and the IRM should instead be empowered to initiate compliance reviews independently;
- Post-employment bans should be extended for the CRMU Director, CRMU Staff, and Roster of Experts;
- Requesters should have the power to decide whether to initiate problem-solving or compliance review functions, or both, and in which order; and
- Monitoring activities after a problem-solving exercise must include direct consultation with requesters.

The Proposed Amendments Fail to Incorporate Many Recommendations Critical To the IRM’s Accessibility, Independence and Overall Effectiveness

Accessibility

Many of our comments focused on significant barriers to access for project-affected people, as evidenced by the IRM’s persistently low number of complaints. Accessibility is critical to the IRM’s ability to serve as a useful and effective tool for the AfDB and communities to resolve project-related concerns. One of our overarching messages is that the current IRM Procedures are too complex and convoluted and may deter potential requesters who wish to access the mechanism. Addressing these concerns would have required significant changes to the eligibility requirements and exclusions, as well as modifications to the overall structure of the IRM Procedures to make them easier to understand. Yet, the Proposed Amendments are primarily minor modifications, with only a few significant substantive changes. Because the mechanism is not functioning at its full capacity under the IRM Procedures, the present review is an important opportunity to address broad procedural setbacks and undertake a thorough re-organization of the IRM Procedures to make them more user-friendly and easily comprehensible.

The Proposed Amendments should be rewritten to address the broad problems that currently inhibit the accessibility and effectiveness of the mechanism. In particular, public comments urged the IRM to eliminate the requirement that extensive supporting documentation be submitted with a complaint, including all correspondence with the Bank, notes from meetings with the Bank and a map showing the location of the affected parties or area. Requiring additional documentation beyond a basic explanation of the issues and events giving rise to the complaint presents an undue burden for requesters who may have limited resources, yet the Proposed Amendments only provide slight alterations to these documentation requirements.¹ The Proposed Amendments continue to require that an explanation be submitted if any of the requested documentation cannot be provided and note that the CRMU Director may decline to register a complaint until “sufficient documentation and information is provided.”² We urge the CRMU to address the underlying need for less burdensome documentation requirements by clearly stating that the inclusion of supporting documentation is merely optional.

Further, the Proposed Amendments do not address the recommendation that the language barring complaints related to human rights violations, other than violations of social and economic rights,³ be removed. Complaints often touch upon a variety of rights violations and this should not preclude their eligibility. We urge the Board of Directors to reconsider its resolution and remove this language from the IRM Procedures to ensure that valid complaints involving a variety of human rights violations will not be improperly excluded from the IRM process.

¹ See Proposed Amendments to the Rules and Procedures, para. 15(a) – (d), AFR. DEV. BANK (Sept. 2014), available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/2nd_Review_of_the_IRM_Proposed_Amendments_to_the_Rules_and_Procedures_-_ENG.pdf.

² *Id.* at para. 16 and 22.

³ *Id.* at para. 2(xii).

Independence and Conflicts of Interest

Independence is essential to ensuring that the IRM maintains credibility and can effectively carry out its duties. Our comments on the IRM Procedures specified several key revisions that are necessary to ensure that the mechanism's independence is not compromised. However, concerns regarding the IRM's ability to effectively carry out its duties independently from Bank Management persist.

For example, under the Proposed Amendments, the President will continue to appoint the CRMU Director, and the IRM Experts and Chairperson of the Roster of Experts will be appointed by the Boards on the recommendation of the President. Civil society groups recommended that the CRMU Director and IRM Experts be selected by a nomination committee of internal and external stakeholders, in order to engender trust in the IRM and discourage undue influence, and that the Chairperson be nominated by the other Experts.

The Consultant argues that experience to date has not revealed any problems with the current appointment procedures. However, in drafting and revising institutional procedures it is important to be forward-looking and craft checks and procedural safeguards that protect against potential future abuse. Our recommendation aims not only to protect against actual bias or improper influence in the future selection of CRMU personnel, but also to guard against any perception of bias by the public and promote a high degree of confidence in the mechanism by potential users.

Despite strong objections from civil society, the Proposed Amendments include a new spot check function, under which the CRMU will work with Bank Management to select two or more high-risk projects per year and evaluate their compliance with African Development Bank (the "Bank") policies.⁴ CRMU participation in reviewing a project and certifying its compliance through spot checks would create a serious conflict of interest if a community-driven complaint were later brought to the IRM regarding the same project. We strongly recommend that the spot check function be eliminated. The goals of promoting Bank compliance in high-risk project contexts could instead be met by housing a compliance spot check function within another Bank office, or the IRM could be empowered to initiate complaints and trigger formal project compliance investigations on its own authority, similar to the power held by the International Finance Corporation's Compliance Advisor Ombudsman ("CAO"). Please see the attached annex for suggested language to provide IRM Experts with authority to initiate a compliance review.

Additionally, the Proposed Amendments should be revised to promote the independence of the mechanism through firm employment policies. Public comments recommended extending the CRMU Director's three-year post-employment ban from working at the Bank Group to a lifetime ban, in line with the policies at peer institutions applied to the CAO Vice President and Inspection Panel Members. Public comments further recommended instituting a post-employment ban for CRMU staff and extending the current two-year post-employment ban for the Roster of Experts to a lifelong ban, to ensure that these IRM personnel are free to carry out their roles independent of any influence from other Bank organs. As the Proposed Amendments

⁴ *Id.* at Sec. VII BB (b).

reflect no changes to any of these provisions, we strongly urge the CRMU to adopt these changes through further revisions.

Equity and Effectiveness

Our comments also detailed important procedural changes to promote greater equity and effectiveness in the IRM process. An equitable process, including equitable opportunities for requester participation and decision-making, is fundamental to the credibility and legitimacy of the mechanism.

The Proposed Amendments do not address the recommendation that Requesters be given the power to decide whether to initiate problem solving or compliance review functions, or both, and in which order. Instead, the Proposed Amendments contain the same vague language that is present in the current IRM Procedures. This language allows the CRMU Director to determine which function to initiate through an unclear process that gives only “due consideration” to the preference of the requesters. This provision should be revised to place decision-making power with the requesters, simplifying the process of determining which function to initiate and when. Please see the attached annex for suggested language.

Further, the Proposed Amendments should be revised to include clear and specific procedures for the CRMU’s monitoring of solutions agreed to during a problem-solving exercise. Public comments suggested that monitoring reports should be created at least bi-annually for each case; draft reports should be sent to Bank Management, requesters and other relevant parties for comment; and once all implementation issues are resolved, the CRMU should release a conclusion report explaining its rationale for concluding monitoring. If these suggestions will not be adopted, at minimum the IRM Procedures should explicitly require the CRMU to consult directly with requesters during the monitoring phase to determine whether Bank Management has performed its commitments. Please see the attached annex for suggested language.

The Nineteen-Day Period for Receiving Concerns About the Proposed Amendments Is Insufficient

Full public engagement and input into the IRM procedural review process requires that the public be provided a formal opportunity to comment on the Proposed Amendments. While the public was provided a formal opportunity to comment on the Consultant’s Second Review Report of the Independent Review Mechanism, we note that that document did not contain a complete elaboration of all revisions that are being recommended in the Proposed Amendments. As even slight changes in language can have important implications for the functioning and effectiveness of the mechanism, we urge the CRMU to update its procedural review process in the future to provide a full public comment period on a draft version of the new procedures before they are finalized. This should include prior notice, an adequate timeframe for accepting comments, and a clear process by which public input will be considered and potentially incorporated in the final version of the new procedures. The nineteen-day, informal process for commenting on the Proposed Amendments granted in this case is not an adequate public consultation process.

Thank you again for this opportunity to provide input on the Proposed Amendments. We recognize the enormous potential of the IRM as a mechanism to promote accountability, resolve community concerns and increase the Bank's development effectiveness, and we look forward to future opportunities to work together to advance these goals.

Please do not hesitate to contact us if you have any questions or would like to discuss these matters further.

Sincerely,

Accountability Counsel, USA

African Law Foundation (AFRILAW), Nigeria

Association pour l'Intégration et le Développement Durable au Burundi, Burundi

Both ENDS, The Netherlands

Buliisa Initiative for Rural Development Organisation (BIRUDO), Uganda

CEFoRD-Yei, Republic of South Sudan

Center for International Environmental Law (CIEL), USA

Center for Research on Multinational Corporations (SOMO), The Netherlands

Centre for Applied Legal Studies (CALS), South Africa

Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

Centro terra Viva-Estudios e Advocacia Ambiental, Mozambique

Cercle pour la Défense de l'Environnement (CEDEN), Democratic Republic of Congo

Citizens for Justice (CFJ), Malawi

Civil Society Coalition on African Development Bank (35 member NGOs)

Committee for Peace and Development Advocacy (COPDA), Liberia

Community Empowerment for Rehabilitation and Development

Community Enhancement and Environmental Awareness foundation (CEEAF), Nigeria

Community Policing Partners for Justice, Security and Democratic Reforms (COMPPART), Nigeria

Community Resource and Development Center of Narok, Kenya

Conseil Régional des Organisations Non Gouvernementales de Développement (CRONGD), Democratic Republic of Congo

Foundation for the Conservation of the Earth (FOCONE), Nigeria

Foundation for Environmental Rights, Advocacy & Development (FENRAD), Nigeria

Fondation pour le Développement du Sahel (FDS), Mali

Friends With Environment in Development (FED), Uganda

Friends of Lake Turkana, Kenya

Global Network for Good Governance (GNGG), Cameroon

Groupe de Travail Climat REDD (GTCR), Democratic Republic of Congo

Habi Center for Environmental Rights, Egypt

Human Rights Council, Ethiopia

Inclusive Development International, USA

Indigenous Livelihoods Enhancement Partners (ILEPA), Kenya

Institut de Recherche et Promotion des Alternatives en Développement (IRPAD), Mali

Jamaa Ressource Initiatives, Kenya

JUSTICIA Asbl, Democratic Republic of Congo

LITE-Africa, Nigeria

Natural Justice, South Africa

Peace Point Action (PPA), Nigeria

Réseau Camerounais des Organisations des Droits de l'Homme (RECODH), Cameroon

Secours Net, Mauritanie

Sengwar Indigenous Peoples Programme, Kenya

Support Initiative for Sustainable Development (SISDEV), Nigeria

Wacam, Ghana

Women Environment and Development Network (WEDEN), Nigeria

Annex: Proposed Textual Changes

VII BB: ADVISORY FUNCTION

b) ~~Spot Check Advisory~~ Self-Initiated Compliance Reviews by IRM Experts

The ~~Spot check advisory~~ Self-Initiated Compliance reviews of project compliance will be undertaken following the procedure below:

- i. A request from the Director or IRM Experts based on project-specific or systemic concerns resulting from CRMU problem-solving and compliance casework; or
- ii. A request from the President or senior management of the Bank or Fund.
- ~~i. At the beginning of each calendar year, CRMU shall, in consultation with the Bank Management, select at least two (2) high risk (environmentally and socially unsustainable) projects for which the Review Panel will conduct spot checks to evaluate the Bank Group's compliance with its policies and procedures.~~
- iii. Once the request has been received ~~projects have been selected~~, CRMU will submit the names of the projects to the Boards for approval on a no-objection basis, for allowing the IRM Experts to conduct an advisory compliance review of each the project. Information submitted to the Board shall include simplified Terms of Reference for the Review Panel, a time frame of not more than twelve (12) months, and the estimated budget for the advisory compliance review concerned.

a. Registration

20. (b) After receiving the Management response to the Request, the Director ~~within 5 days, with due consideration of the preference of the Requestors, make a determination on whether the Request should~~ ascertain from the requesters whether they wish for the complaint to be: (i) handled through a problem-solving exercise; and/or (ii) considered further for recommendation for a compliance review. Where appropriate, at the request of the Requestors, problem-solving and compliance review processes may be undertaken concurrently.

(c) Once this determination is made, the Director shall promptly notify ~~the Requestors,~~ the Boards and the President of the Requestors' proposed remedial course of action ~~and the reasons thereof.~~

Successful Problem-solving Exercise

40. The CRMU will monitor the implementation of the solution agreed upon in a problem-solving exercise. Monitoring shall include direct consultations with the Requestors and other relevant stakeholders. Where the project forming the subject matter of the Request has not yet been presented to the Boards for their approval, the Director shall submit the monitoring report to the President and, as and when the project is submitted for Board approval, to the Boards. Any report to the President shall be immediately copied to the Boards.