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Via Electronic Mail

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

Dear Xiaoqin Fan and Working Group Members:

Accountability Counsel is pleased to submit the following comments concerning the joint Board-Management review that the Asian Development Bank (ADB) is undertaking of its Accountability Mechanism Policy.

Accountability Counsel is a San Francisco-based organization that works around the world to support communities using accountability mechanisms to uphold environmental and human rights. Among our clients are oil-affected indigenous villages in the Peruvian Amazon, subsistence farmers in Papua New Guinea, and dam-affected communities in Mexico. We also work at the policy level to ensure that accountability systems are robust, fair and effective. We therefore take great interest in the review of the ADB Accountability Mechanism Policy, because a stronger mechanism will better serve project-affected communities and facilitate the resolution of any potential disputes.

We commend the ADB for offering the opportunity to comment publicly on the Accountability Mechanism Policy. As you are aware, accountability mechanisms are essential to the credibility and legitimacy of international financial institutions (“IFIs”)—particularly where they serve as the primary only complaint system available for people harmed by the institution’s operations.

The following comments are based on the assumption that the ADB’s Accountability Mechanism should follow best practice principles of independence, transparency, fairness,

professionalism, accessibility and effectiveness. The comments below are based on our extensive experience regarding the design, implementation and practice of IFI accountability mechanisms.¹

I. Comments

We would like to endorse the comments on the NGO Forum on ADB submitted on September 15, 2010. In our comments below we emphasize some of their most salient comments while addressing additional points of concern as well.

1. ADB should increase promotion of the Accountability Mechanism and outreach to potentially affected communities.

In order to continue an active outreach program the ADB Accountability Mechanism should be provided sufficient resources to enhance the outreach that is conducted and improve outreach materials so that they increase accessibility.

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

We recommend that the ADB actively distribute simple, pictorial-based, local-language, user-friendly descriptions of the mechanism, and simplified copies of the ADB operating policies and procedures to all communities that could be impacted by ADB-assisted projects.

We also recommend that information about the Accountability Mechanism be included in all project documents—including executive summaries—that are distributed during preliminary stages, such as consultations.

2. *Any individual* who is, or is likely to be, adversely affected by an ADB-assisted project should be able to file a complaint.

Currently, a complaint can be filed by any group of two or more people. However, an individual is entitled to bring a complaint on behalf of him or herself in a number of accountability mechanisms in other development banks, including the Compliance Advisor/Ombudsman of the World Bank Group, the Project Compliance Mechanism of the European Bank for Reconstruction and Development, and the Complaints Mechanism of the

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

European Investment Bank.²

We recommend that in order to facilitate access to the Accountability Mechanism, the ADB should amend its rules to allow complaints from *any individual* who is, or is likely to be, adversely affected by an ADB-assisted project.

3. Complainants should be able to choose to start with the consultation phase, the compliance review phase, or to proceed with both functions simultaneously.

Currently, the Accountability Mechanism requires all complainants to first file complaints with the Special Project Facilitator (SPF) in the consultation stage. A complaint may move to the compliance review stage only: (1) after a finding of ineligibility by the SPF, (2) despite eligibility but where there is disagreement with the SPF's pre-consultation assessment, or (3) where there are "serious concerns on compliance issues."³

In the absence of further guidance on what would constitute a "serious concern" and elaboration on how the Accountability Mechanism decides if the complainants' concerns are serious enough, this standard does not do enough to guarantee access to the compliance review phase.

Consistent with other accountability mechanisms, we recommend that the Accountability Mechanism allow complainants to choose the function they believe would be most effective, including proceeding with both functions simultaneously.⁴

4. The ADB Accountability Mechanism's dual reporting structure is unnecessarily complicated and time consuming and therefore should be simplified and streamlined.

Currently, under the Accountability Mechanism Policy, the SPF reports to the President of the ADB under its management structure, while the Compliance Review Panel (CRP) reports to the ADB Board through the Office of the Compliance Review Panel (OCRP) or the Board Compliance Review Committee (BCRC).

² See Accountability Counsel, *Accountability Resource Guide* (2010), available at http://www.accountabilitycounsel.org/Accountability_Counsel/AC_Acc_Resource_Guide_files/AC%20ARG%20Version%206.1.pdf. Individuals are eligible to file complaints in other IFI accountability mechanisms as well, including the Compliance Officer of Export Development Canada, the Office of Accountability for the U.S. Overseas Private Investment Corporation, and the National Contact Points for the OECD Guidelines. *Id.*

³ ADB, *Proposal for a New ADB Accountability Mechanism: A Two-Step Approach of Consultation and Compliance Review*, pg. 28, para. 117 (2003), available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/ADB_accountability_mechanism.pdf.

⁴ Other development bank accountability mechanisms, including the Project Compliance Mechanism of the European Bank for Reconstruction and Development, and the Complaints Mechanism of the European Investment Bank, allow both functions to proceed simultaneously. See Accountability Counsel, *Accountability Resource Guide* (2010), available at http://www.accountabilitycounsel.org/Accountability_Counsel/AC_Acc_Resource_Guide_files/AC%20ARG%20Version%206.1.pdf.

The current reporting structure unnecessarily delays both the consultation and the compliance review phases. In order to expedite the process so it is more effective and time efficient, we recommend that the reporting structure be simplified and streamlined.

5. After serving their terms, Special Project Facilitators should be barred from future employment with the ADB.

Currently, the SPF must not have worked for any operational department of the ADB for five years prior to his or her appointment, however, there is no restriction on future employment within the ADB.

In order to assure independence of the mechanism, we recommend that after serving as a SPF a person should be barred from all future employment at the ADB. We believe this would improve independence of the mechanism by avoiding any actual or perceived conflict of interest issues related to an SPF's future employment. We also note that this is the same post-employment ban that applies to the mechanism's Compliance Review Panel members.

6. There should be a policy provision for removal of the Special Project Facilitator.

Currently there is no policy provision for removal of the SPF. The absence of a provision creates an actual and perceived threat to the independence of the SPF because it may be possible to fire the SPF arbitrarily.

We recommend that the ADB adopt the same removal policy for the SPF as it has currently for the Compliance Review Panel members: that the SPF be removed only by a majority vote of the Board for cause.

7. Site visits during the investigation phase should not be left to agreement of others.

Currently, the ADB Accountability Mechanism Policy states that "any site visit carried out in CRP's investigation will take place only if the country concerned and the [private project sponsor (PPS)] concerned as applicable have no objection, and the prior consent of the country concerned and the PPS concerned as applicable have been obtained by CRP."⁵

The Compliance Review Panel's investigation should be an opportunity for all Claimants to voice their concerns about alleged violations of ADB's policies, and for the CRP to conduct a full investigation. In order for the investigation process to be meaningful for the claimants who filed the complaint, there must be an opportunity for all claimants to be heard during the investigation and for the CRP to visit the site in person.

⁵ ADB, *Proposal for a New ADB Accountability Mechanism: A Two-Step Approach of Consultation and Compliance Review*, pg. 29, para. 123 (2003), available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/ADB_accountability_mechanism.pdf.

To the extent the country concerned and the PPS have agreed to ADB financing for a project, they should be deemed to have consented to a site visit by the CRP during an investigation.

8. The issuance of a Project Completion Report should not prevent the filing of a complaint.

Currently claimants may not bring a complaint against a project if the Project Completion Report has already been issued.

As the NGO Forum on ADB noted in their comments, frequently projects—especially those that have effects on the environment or involved resettlement plans—could lead to long-term, serious, adverse impacts that become apparent only after a Project Completion Report is issued.

We suggest that the time frame is extended, for example, to as long as the loan is in repayment by the borrower.

9. Complaints should be allowed in the local language of any eligible claimant.

Currently, the ADB allows for complaints to be submitted in any of the official or national languages of ADB's developing member countries. Excluding local, native and indigenous languages limits access to the Accountability Mechanism and disproportionately affects vulnerable communities, such as indigenous groups and women.

We recommend that the ADB change the language requirements to allow complaints in the local, native or indigenous language of any potential claimant.

10. The Claimants should not have to specify the desired outcome or remedies in the complaint or in the request for compliance review.

Currently claimants are asked to include they desired outcomes or remedies that believe should be provided through the ADB Accountability mechanism process. However, claimants should not have the burden of specifying which remedies are desired as they may not be aware of all the remedies available to them.

We recommend that the ADB remove this requirement from its criteria for complaints. If it is included, it should be discretionary, not mandatory.

11. While an investigation is pending, the ADB should suspend disbursement of project funding alleged to cause harm.

In order to prevent further harm to project-affected communities, while an investigation in pending, disbursed funds should never be used to finance projects elements that are alleged to be causing harm.

If project funding is disbursed, it should only be done to correct known existing policy violations that require time-sensitive resolutions (e.g. to translate project documents into local languages, or to conduct environmental base-line studies so that environmental assessment reports will be meaningful).

12. There should be a procedure whereby claimants can amend a complaint, include new violations, or provide additional information as it becomes available.

Claimants should not be expected to know all ADB policies and procedures when they file an initial complaint. It is even more difficult for claimants to predict how violations of these policies could lead to future harms. Therefore, it is unreasonable to expect the initial complaint to be comprehensive.

We suggest that there be a procedure added whereby claimants, already engaged in the Accountability Mechanism process, could amend their complaint to include new claims or information as they are brought to light.

A new procedure to amend complaints is particularly important if the Accountability Mechanism would like to make the process accessible to individuals without the resources to conduct studies or broad surveys.

13. Consultation phase reports should all be made public and posted to the Accountability Mechanism website.

Currently none of the SPF's reports during the consultation phase are made public.

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

We appreciate the opportunity to comment on the review of the ADB Accountability Mechanism and we look forward to providing additional and more detailed comments on the draft working group review report that will be released in the near future. We look forward continuing engagement with the ADB on this important endeavor and invite members of the joint Board-Management working group to contact us with any questions.

Sincerely,



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