

## ACCOUNTABILITY COUNSEL

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May 28, 2011

*Via Electronic Mail*

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**Re: Comments on the April 2011 Asian Development Bank Accountability Mechanism Policy Review Working Paper**

Dear Xiaoqin Fan and Working Group Members:

Accountability Counsel is writing in response to the invitation to comment on the Asian Development Bank (“ADB”) April 2011 Working Paper on the Accountability Mechanism Policy Review (“Working Paper”).

Before providing our substantive comments, we feel compelled to note our concern about the speed with which the ADB released its Working Paper, just a few days after civil society comments were submitted. Even if the timing was related to an impending annual meeting, releasing a Working Paper with insufficient time to conduct a thorough review of submitted comments does a disservice to the ADB and undermines trust in the consultation process. We appreciated the opportunity to speak with Mr. Rajat Nag about our concerns with the process on May 17, 2011 and appreciate that this additional comment period is intended to ensure that comments are fully taken into account. As we stated in that meeting, there are a number of other organizations and civil society representatives around the world who would have liked to participate in the conversation with Mr. Nag. In the future, we hope that constructive meetings like this will be planned with more than 24 hours notice and in writing, not by phone invitation. These issues aside, we are pleased to provide the ADB with additional comments, given the need to address further issues.

On March 31, 2011, Accountability Counsel, along with thirteen civil society representatives, proposed changes to the Accountability Mechanism in twelve distinct areas. The Working Paper adopted a number of these proposed changes in whole or in part, including: (1) allowing complainants to choose to enter the compliance review function or the problem solving function first and to exit the problem solving function at any time; (2) the adoption of a Complaint Receiving Officer (“CRO”) who will forward complaints to either the Special Project Facilitator (“SPF”) or Compliance Review Panel (“CRP”) according to the complainant’s preference; (3) allowing complainants to file a complaint with the CRO without specifying the

desired outcome or remedy; (4) clarifying the cut-off date for filing a complaint to one year after the loan closing date;<sup>1</sup> (5) adopting language that relieves complainants from the burden of providing written comments on the OSPF review and assessment; (6) improving awareness of the Accountability Mechanism through targeted outreach efforts and adopting term adjustments that clarify the roles of the problem solving and compliance review functions; and (7) the inclusion of a provision that the SPF and CRP should track all processed complaints to enhance learning.

Despite these positive changes, some important comments were not addressed, creating concern that the Accountability Mechanism remains weak on certain issues. These deficiencies are as follows:

### **1. The need to improve independence**

The proposed rules fail to take sufficient steps to improve the independence of the Accountability Mechanism. Independence is a key element required for project-affected people to trust an accountability mechanism and for it to credibly act without conflict-of-interest. As noted in our initial comments, Accountability Counsel requests that the following provisions be adopted to improve independence:

- Civil society representatives should be part of the committee, along with the Board Compliance Review Committee (“BCRC”), who select the Special Project Facilitator (“SPF”) and Compliance Review Panel (“CRP”) members on the approval of the Board. Inclusion of outside voices in the selection process will increase credibility of and trust in the mechanism.
- After serving their terms, SPFs should be barred from future employment with the ADB. Currently, the SPF must not have worked for any operational department of the ADB for five years prior to his or her appointment, however, there is no restriction on future employment within the ADB.<sup>2</sup> In order to ensure independence of the mechanism and to avoid the perception of a conflict by project-affected people, we recommend that a person should be barred from all future employment at the ADB after serving as an SPF. We believe this would improve independence of the mechanism by avoiding any actual or perceived conflict of interest issues related to an SPF’s future employment. We also note that this is the same post-employment ban that applies to the mechanism’s CRP members. Such a requirement also applies to World Bank Inspection Panel members and is considered best practice.
- There should be a policy provision for removal of the SPF. Currently, there is no such provision. The absence of a provision creates an actual and perceived threat to the independence of the SPF because it may be possible to fire the SPF arbitrarily. We recommend that the ADB adopt the same removal policy for the SPF as it has currently for CRP members: that the SPF be removed only by a majority vote of the

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<sup>1</sup> Please see our comment below regarding the need to further extend the cut-off date.

<sup>2</sup> ADB Working Paper, ¶ 124.

Board for cause.<sup>3</sup> The World Bank Inspection Panel has adopted a similar provision for its Panel members, and such an approach is considered best practice among ADB's peer institutions.

- In order to ensure that the SPF is independent, the SPF should report to the Board, not the President. Furthermore, the role of ADB Management and Staff should be clarified so it is clear that the Management and Staff do not have a role in making decisions regarding eligibility, regarding how a problem-solving initiative is managed, or improper involvement in or interference with monitoring.
- The mechanism policy should clarify that all hiring of staff and consultants/experts for OSPF or OCRP must be done with the approval of the SPF or Chair, CRP, respectively. Allowing the mechanism to determine who its staff members are will enhance professionalism of the mechanism. Final decisions should not be left to the Budget, Personnel, Management Systems Department.<sup>4</sup>
- CRP staff should not be considered regular ADB staff.<sup>5</sup> The credibility and independence of the ADB Accountability Mechanism hinges on having an independent compliance review function. Failure to protect the compliance review function from explicit conflicts-of-interest undermines the mechanism. We recommend that all CRP staff have a mandatory post-employment ban that prohibits actual or potential conflict-of-interest. In addition, any staff working for the CRP that have worked for the ADB previously should be required to wait 2 years before engagement with the CRP. Even then, staff should disclose and recues themselves from work related to any matters on which they worked in their employment with the ADB previous to joining the CRP.
- CRP should be fully and independently able to determine its own investigative methods. Currently, the Accountability Mechanism requires Board authorization of the CRP's compliance review terms of reference, including the methodology.<sup>6</sup> In order to preserve mechanism's independence and credibility, the CRP's methodology should be determined exclusively by the CRP and given to the Board for information only.
- CRP's annual work plan should not be subject to Board endorsement or President oversight.<sup>7</sup> CRP should have complete and independent authority to determine its working operations.

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<sup>3</sup> ADB Working Paper, ¶ 127.

<sup>4</sup> ADB Working Paper, ¶¶123 and 131.

<sup>5</sup> ADB Working Paper, ¶132.

<sup>6</sup> ADB Working Paper, ¶ 185.

<sup>7</sup> ADB Working Paper, ¶133.

- CRP’s budget should be completely independent from the President. Presidential oversight of CRP’s financial resources could lead to undue influence on the mechanism. As such, we recommend that the phrase “in consultation with the President” be removed from Working Paper ¶133.

## **2. The need to incorporate a mandatory site visit provision into loan agreements**

Under the proposed rules, CRP site visits will be carried out in partnership with the borrowing countries without recourse to provisions in the loan agreement.<sup>8</sup> The proposed rules rely on ADB Management and staff to “facilitate a borrowing country’s concurrence for site visits.”<sup>9</sup> Accountability Counsel feels, however, that this approach will not adequately protect project-affected people.

Instead, Accountability Counsel recommends that ADB loan agreements with borrowers require compliance with CRP site visit requests. The CRP’s investigation should be an opportunity for all complainants to voice their concerns regarding alleged violations of ADB’s policies, and for the CRP to conduct a full investigation. In order for the investigation process to be meaningful, there must be an opportunity for complainants to be heard during the investigation and for the CRP to visit the site in person.

Moreover, Accountability Counsel feels that to the extent the country concerned and the Private Project Sponsor have agreed to ADB financing for a project, they should be deemed to have consented to a site visit by the CRP during an investigation. Such an approach does not infringe upon national sovereignty and should be viewed as a logical extension of the developing member country’s (“DMC”) acceptance of financing. Indeed, DMCs currently accept project financing with full knowledge of ADB’s policies and project requirements.

## **3. The need to make consultation reports publicly available**

The proposed rules failed to adopt Accountability Counsel’s requested transparency-promoting provisions. Accountability Counsel recommends that the SPF adopt policies that ensure that they publicly post all processed complaints and resulting reports required in each step of the consultation phase. Most importantly, Accountability Counsel requests that the eligibility determination and the final report that concludes the problem solving function be made available on the ADB website in every case.

## **4. The need to expand standing to file a complaint**

Under the proposed rules, complaints may only be filed by a “group of two or more people ... who are directly, materially, and adversely affected” by a project or by a representative on behalf of the group.<sup>10</sup> Only in cases of compliance review may a complaint be

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<sup>8</sup> ADB Working Paper, ¶ 96.

<sup>9</sup> ADB Working Paper, ¶ 96.

<sup>10</sup> ADB Working Paper, ¶ 149.

filed by an individual, and then only “by any one or more ADB Board members.”<sup>11</sup> The proposed rules also disallow the filing of anonymous complaints.<sup>12</sup>

Accountability Counsel recommends that these provisions be changed to allow any individual who is, or is likely to be, adversely affected by an ADB-assisted project to file a complaint for problem solving or compliance. Accountability Counsel notes that other development bank accountability mechanisms allow an individual to file a complaint on behalf of him or herself, including the Compliance Advisor/Ombudsman of the World Bank Group, the Project Compliance Mechanism of the European Bank for Reconstruction and Development, and the Complaints Mechanism of the European Investment Bank.<sup>13</sup>

Moreover, Accountability Counsel recommends that the ADB permit a representative to file a request on behalf of project affected people without clearly identifying the affected people on whose behalf it is made. Allowing anonymous requests through a representative in countries where directly affected individuals have a reasonable fear of persecution in making a claim will better promote accountability.

#### **5. The need to extend the mechanism to indirect, cumulative, and non-material harm**

Currently, the ADB Accountability Mechanism only provides access to people affected by “direct and material harm.” Limiting relief to such harm is problematic because it is subjective and can be used to exclude people adversely affected by ADB’s operations. Accountability Counsel notes that ADB’s benchmarking in the Working Paper is mistaken about the extent to which its peer institutions require “direct” harm in order to access their respective accountability mechanisms. In addition to EIB and IFC, as indicated in ADB’s benchmarking, EBRD does not limit eligibility for use of its accountability mechanism to cases of direct harm. Furthermore, OPIC does not require direct harm for compliance review eligibility. That half of the institutions benchmarked by ADB have eliminated direct harm requirements indicates that it is both feasible and increasingly in line with best practice to do so. Thus, Accountability Counsel recommends that the ADB Accountability Mechanism should follow these institutions’ lead and allow access to people who are affected by indirect, cumulative, and non-material harm.

#### **6. The need to remove the barrier to entry in the Para 153 (ii) exclusion**

Under the proposed rules, complainants requesting problem solving or compliance review must demonstrate they have made “good faith efforts to address [the matters] with the operations department concerned and with the project-specific grievance mechanism concerned.”<sup>14</sup> Because project-specific grievance mechanisms are not always established and

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<sup>11</sup> ADB Working Paper, ¶ 150.

<sup>12</sup> ADB Working Paper, ¶ 158.

<sup>13</sup> Individuals are also eligible to file complaints with the Compliance Officer of Export Development Canada, the Office of Accountability for the U.S. Overseas Private Investment Corporation, and the National Contact Points for the OECD Guidelines. See EBRD Rules of Procedure, available at <http://www.ebrd.com/downloads/integrity/pcmrules.pdf>.

<sup>14</sup> ADB Working Paper, ¶¶ 153(ii) and 154.

sometimes are themselves the subject of a complaint, their use must not be tied to eligibility. Furthermore, complainants may experience intimidation or oppression by project operators, making resort to a project level grievance mechanism impossible. In addition, many complainants may not be able to easily identify the relevant ADB operations department. Since this provision presents a barrier to access to the mechanism, Accountability Counsel recommends that the good faith requirement be a discretionary, not mandatory eligibility requirement.

#### **7. The need to allow complaints to be filed in local, native or indigenous languages**

The proposed rules only allow complaints to be submitted in English or “in any of the official or national languages of ADB’s DMCs.”<sup>15</sup> Accountability Counsel feels that excluding local, native and indigenous languages limits access to the Accountability Mechanism and disproportionately affects vulnerable communities, such as indigenous groups and women. Allowing complaints to be submitted in local, native and indigenous languages would better protect these populations. If the ADB determines that allowing submissions in local languages is prohibitively expensive, the policy should be explicit about the cost determination, given the resulting exclusion of many people from the ability to meaningfully participate in the Accountability Mechanism.

#### **8. The need to allow simultaneous problem solving and compliance review**

For complainants seeking both problem solving and compliance review immediately, the Accountability Mechanism should allow simultaneous processes. The strength of the ADB Accountability Mechanism is that it can handle both functions independently. As the OSPF and OCRP are separate, each with their own staff, the mechanism is equipped to handle SPF and CRP at the same time without the risk of biasing each other. Complainants should not be required to delay compliance review for an indefinite period of time as problem solving takes place. Moreover, the Board should not be deprived of urgent information regarding the ADB’s non-compliance with its own procedures simply because complainants seek problem solving as well. Hence, we recommend simultaneous reviews where requested.

#### **9. The need to implement a longer cut-off date**

Accountability Counsel commends the Accountability Mechanism Policy Review Board for clarifying the cut-off date for filing a complaint to one year after the loan closing date, which represents an advance in the policy. However, Accountability Counsel supports its partners in the NGO Forum on ADB, who have years of experience working with affected people in ADB’s operating regions, in the determination that a cut-off date of 10 years after the PCR is necessary in order to account for long-term health and environmental impacts. We therefore urge the next iteration of the Working Paper to adopt a longer cut-off date.

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<sup>15</sup> ADB Working Paper, ¶ 158.

## **10. The need to allow complainants to amend a complaint**

To further promote effectiveness of the mechanism, Accountability Counsel feels there should be a procedure whereby complainants can amend a complaint, include new violations, or provide additional information as it becomes available. Complainants may have difficulty fully understanding all ADB policies and procedures when they file an initial complaint, and it may be a challenge for them to predict how violations could lead to future harm. Accountability Counsel, therefore, recommends that a new procedure to amend complaints be included in the proposed rules.

## **11. The need for Management recommendations to be made in consultation with complainants**

While the draft Accountability Mechanism policy provides for complainant consultation for CRP findings, it currently does not require such consultations for Management recommendations.<sup>16</sup> Recommendations may be the source of real changes resulting from a compliance review. As those changes directly impact the affected people, complainants should be involved in the process of shaping recommendations. To exclude complainants from this stage risks undermining the credibility, fairness, transparency and effectiveness of the compliance review. Moreover, the CRP's monitoring of remedial actions will be more effective if complainants have working knowledge of the recommendations and can adequately inform the CRP if those recommendations are being implemented. Thus, Accountability Counsel recommends that the Accountability Mechanism incorporate a mandatory complainant consultation during Management's formation of recommendations.

## **12. The need to extend the Accountability Mechanism to financial intermediary projects**

Currently, the Accountability Mechanism does not clearly define the role of the Accountability Mechanism with respect to financial intermediary projects. Such a gap may undermine the ability of affected people to address legitimate grievances related to ADB-funded projects. As such, Accountability Counsel recommends that the Accountability Mechanism unambiguously include projects undertaken by financial intermediaries and co-financiers. Moreover, we agree with the comments of NGO Forum on ADB that the Accountability Mechanism should follow the Safeguard Policy Statement and apply "to all ADB-financed and/or ADB-administered sovereign and non-sovereign projects and their components, regardless of the source of financing, including investment projects funded by a loan; and/or a grant; and/or other means, such as equity and/or guarantees."<sup>17</sup>

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<sup>16</sup> ADB Working Paper, ¶ 192.

<sup>17</sup> ADB Safeguard Policy Statement, p. 15 ¶ 48.

### 13. The need to retain institutional knowledge

In order to enhance professionalism and effectiveness, the Accountability Mechanism must retain some level of institutional knowledge, despite non-renewable terms of CRP members. Accordingly, Accountability Counsel recommends that the five-year non-renewable terms of each member of the panel should be staggered such that at any given time, there is at least one panel member who has worked at OCRP for at least one year.

We appreciate the opportunity to further comment on the ADB Accountability Mechanism Policy Review Working Paper and we look forward to continuing to engage with the ADB on this important process. We invite members of the joint Board-Management working group to contact us with any further questions.

Sincerely,



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cc: Berne Declaration, Switzerland;  
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Center for International Environmental Law, USA;  
La Centre national de coopération au développement (CNCD-11.11.11), Belgium;  
Crude Accountability, USA;  
Forest Peoples Programme, UK;  
Friends of the Earth, USA;  
International Accountability Project, USA;  
International Rivers, USA;  
Jennifer Franco, Independent Researcher, The Netherlands;  
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Ulu Foundation, USA