

May 29, 2013

Via Electronic Mail

Ms. Anoush Begoyan
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**Re: Comments on the European Bank for Reconstruction and Development
Review of the Project Complaint Mechanism**

Dear Ms. Begoyan:

We, the undersigned non-governmental organizations, are writing in response to the invitation to submit comments for the 2013 review of the European Bank for Reconstruction and Development's ("EBRD" or "Bank") Project Complaint Mechanism ("PCM" or "Mechanism").

We commend the EBRD for providing the opportunity for stakeholder input into the review of the PCM's Rules of Procedure ("Rules"). 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 Bank's leadership, because they provide a vehicle for bringing instances of policy non-compliance to their attention and can enable problem-solving of issues that generate risk for the Bank. The following comments are based on the assumption that the EBRD's PCM should follow best practice principles of independence, transparency, fairness, professionalism, accessibility, and effectiveness.

We look forward to providing additional and more detailed comments on the PCM Rules of Procedure in future stages of the review.

I. General Comments

The 2009 PCM Rules of Procedure represented an important advancement toward accountability in EBRD's lending and operations. However, after three years of practice, it is clear that a number of changes would improve the current PCM and move the EBRD's mechanism closer to meeting the principles of independence, transparency, fairness, professionalism, accessibility, and effectiveness.

First, the Mechanism has been slow to process complaints, presenting problems for

complainants who suffer ongoing or imminent harm from Bank-funded projects.¹ It is worth understanding whether this timeliness problem stems from internal staffing or resource constraints.

Second, requiring EBRD approval of a project as a precursor to complaint eligibility,² prevents the PCM from accepting complaints for Compliance Review (“CR”) that allege noncompliance in project preparation stages. Rather than establishing eligibility criteria that limit complainants’ ability to raise issues of noncompliance with the Bank, the Rules of Procedure should encourage the submission of complaints for CR as early as possible, to prevent the worsening of compliance problems. Complainants suffering serious or imminent harm should not be required to wait for the Mechanism’s current eligibility criteria to be triggered before they may file a complaint.

Finally, in terms of the Mechanism’s independence, a preferable structure would be to house the PCM in an independent office that is not part of the Office of the Chief Compliance Officer (“OCCO”). The fact that OCCO advises senior Bank Management and reports to the President creates at least potential conflicts-of-interest from the outset and undermines the credibility of the Mechanism. Restructuring the PCM to be an independent, free-standing, Board-reporting office would better ensure the Mechanism’s independence from Bank Management. Additionally, the PCM Officer should be appointed by a committee of the Board, and the appointment should take place through a public, transparent selection process that includes a nomination committee composed of at least one member of civil society.

The following comments relate to specific paragraphs of the PCM Rules of Procedure, both in terms of suggestions regarding improvement of their drafting and concerns related to their implementation by the PCM.

II. Specific Comments

Definitions. The definition of “Project” is too narrow to capture many conflicts that should be within the scope of the PCM. Projects that the EBRD has been considering for years where there are acute social and environmental conflicts should be eligible for Problem-solving Initiatives (“PSI”) and CR and thus included in the Project definition.³ The definition of Project

¹ For example, in the EPS Kolubara case, although the PCM rules require appointment of an eligibility assessor within 5 business days of registration of the complaint (PCM Rule Para. 17), the eligibility expert was appointed a full 51 business days after registration. See PCM Register, available at: http://www.ebrd.com/downloads/integrity/EPS_Kolubara_register_31.08.2012.pdf.

² See PCM Rules, Para. 19(a).

³ The undersigned organization Accountability Counsel notes that the Oyu Tolgoi Mine provides an example of why the limitation of this definition potentially undermines the effectiveness of the PCM. The Mongolian herders affected by this project and NGOs began raising concerns about social and environmental impacts of the OT Mine well before the disclosure of the Project Summary Document (“PSD”) in September 2012. The EBRD’s PSD states that “The Environment and Social Department (ESD) at the EBRD has been involved in a comprehensive environmental and social appraisal of the [OT Mine] project since early 2010.” See EBRD OT Mine PSD, available at: <http://www.ebrd.com/english/pages/project/psd/2012/41158.shtml>. When EBRD staff are

also appears to conflict with the eligibility parameters for EBRD projects, which may be broader than the definition of “Project”. We recommend that the definition of Project be deleted from the policy and that a more straightforward eligibility ‘starting line’ be adopted. We propose the World Bank Group’s Compliance Advisor Ombudsman (“CAO”) approach, where complaints are eligible regarding the “planning, implementation or impact” of a project, without limiting the project definition.⁴

The definition of “Relevant EBRD Policy” is also too limited in that it only includes “project specific provisions of the EBRD Public Information Policy [PIP].” All Relevant EBRD Policy should include all sections of the PIP, whether project specific or not. Institutional information, such as Board minutes and committee membership, and strategic information, whether at the regional or sectoral level, are crucial to understanding projects, and implementation of these portions of the PIP should therefore be included in the definition of EBRD Policy for the purposes of the PCM.

Para. 1. Organizations, as well as individuals, should be able to bring a request for a PSI if the organization has a legitimate interest in the impacted area. This would serve principles of fairness and accessibility, particularly in cases where an individual may find it too difficult or unsafe to bring a complaint on their own.

Paras. 10. and 11. The goal of registration criteria is to provide the most basic threshold of information that a complaint to the PCM requires. The registration criteria should therefore exclude 10(e) to make clear that *registration* does not rely, even discretionarily, on stating a policy violation. Paragraph 10(e) is also duplicative of 20(d), which, appropriately, is a discretionary piece of information that should, but is not required to, be added to eligible complaints.

We also note our concern with the PCM’s *application* of the current registration criteria in at least one case,⁵ and request that an evaluation of how and whether the current PCM Policy is being implemented be included in the review. Our concern stems from the appearance of

comprehensively involved in evaluating a project, complaints about the project should be able to reach the PCM. If the PCM had been an available tool prior to the release of the PSD, a PSI could have assisted in constructively addressing the herders’ significant livelihood concerns prior to evolving the project design and the Board approval. Instead, the herders’ acute concerns continue along with active harm from the Project.

⁴ See CAO 2013 Operational Guidelines at 8, available at: http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines_2013.pdf.

⁵ On at least one occasion, the PCM failed to register a complaint without due cause, although that complaint was later registered showing a possible re-filing of the complaint. The notice that registration was denied included an *eligibility* determination in violation of current PCM rules. See Exhibit 1, Letter from PCM Officer to Mr. Ivan M. Petrovic, June 22, 2012, denying registration without referencing failure to include any stated registration criteria, but stating that because the PCM Officer believed the *scope* of the project at issue did not touch the alleged harm, the complaint could not be registered. The complainants identified themselves and referenced an EBRD Project, meeting the current PCM definition. Per the PCM Rules, whether or not that project impacted the complainants as alleged is not an appropriate issue to determine at the registration stage.

confusion between the purpose and function of registration versus eligibility stages. While we happen to be aware of one particular failure to register a complaint, it begs the question of how many other complaints were filed with the PCM that also should have been registered but were not. The PCM's 2012 Annual Report states that "[i]n 2012 the PCM received 14 ineligible complaints that were reviewed and either forwarded to other bodies within the Bank for further review or closed. Most of these related to procurement issues." The Annual Report appears to be discussing complaints that, while "reviewed", were never registered – there are no examples of registered but ineligible complaints on the PCM's Registration page. If those 14 complaints had the name and contact information of a complainant and alluded to an EBRD project, they should have been registered and, if related to procurement, promptly declared ineligible. Automatic and mandatory registration of complaints aids the Mechanism's transparency and credibility; the ability of the public to see what is *not* eligible may be equally important as being able to follow eligible cases. Without registration and a formal determination of ineligibility, there is no transparency with which to evaluate whether the PCM is operating according to its rules.

Para. 16. To promote the independence of this Mechanism, this paragraph should be amended to make cooperation with the accountability mechanisms of co-financing institutions voluntary, not mandatory. Other decision-making and dispute-resolution bodies make judgments based on their own institutional standards and norms. EBRD social, environmental, and transparency policies create unique obligations, so the PCM has a duty to *independently* ensure that EBRD policies are followed and that dispute resolution is available where Bank-financed projects have caused harm. As such, it is inappropriate for the PCM to defer to the decisions of other IFIs' accountability mechanisms *in lieu of* conducting its own PSI or CR. We therefore recommend adding the word "may" in front of "cooperate" in this paragraph.

Para. 18(a). For the reason stated above, this provision should be widened to allow organizations to bring a complaint for a PSI.

Para 18(b). As discussed above, the window for submitting a complaint for a PSI is too narrow due to the use of the defined word "Project" in this paragraph. As stated above, we urge the PCM to adopt more general language allowing complaints regarding projects in planning, implementation or impact stages.

Para. 19(a). As mentioned above, this provision should be amended to broaden the beginning of eligibility for a CR complaint.

Para. 21(b) and 24(f). Based on the reasoning articulated in connection with paragraph 16, above, the existence of ongoing proceedings or decisions by co-financing accountability mechanisms or other decision-making bodies should not be a factor used to determine a complaint's eligibility for PSI or CR. Proceedings or decisions by co-financing institutions' accountability mechanisms have no bearing on the eligibility of a complaint brought to the PCM, and, to maintain independence and professionalism, should thus be a discretionary factor regarding how a process is managed that is only taken into account once an eligibility determination has been made.

Para. 22. In determining whether the complainant made a good faith effort to address the

issues in the complaint, only those efforts directed toward the Bank and/or the client should be considered. Because the other functions mentioned, such as accountability mechanisms of parallel co-financing institutions, courts, and arbitration tribunals, are different from the PCM in their purpose, jurisdiction, and parties governed, they do not offer compliance review regarding the EBRD as CR does and may not offer the chance at problem solving either. Any overlap with any other mechanism on the problem solving side should be taken into account only once a complaint is deemed eligible, and then only to help shape the scope of a PSI. To promote fairness, an additional exception should also be made here to allow the Eligibility Assessors to waive the requirement in paragraph 18(d) in cases where a complainant's efforts to contact Bank Management could lead to harm or reprisal for the complainants.

Para. 27. This paragraph should include a timeline for the Eligibility Assessors' reconsideration of a complaint in cases where the Board or President rejects the Eligibility Assessment Report's (EAR) recommendation that a complaint be closed. Additionally, where the Eligibility Assessors conclude that a complaint is ineligible, the EAR should be sent to the complainant with a 10-day opportunity for the complainant to comment on the Assessors' determination of ineligibility. The complainant's comments should then be attached to the EAR that is sent to the Board or President for approval. Providing the complainant with an opportunity to comment on the EAR increases transparency and helps to maintain the inherent value of encouraging as much dialogue as possible between the Bank and the affected parties.

Para. 28. We recommend deleting "where possible" from this paragraph. The selection of a Problem-solving Expert, in particular, should be the result of consultation with the parties to ensure the trust and buy-in that will likely be required.

Para. 31. In order to increase efficiency and independence, this paragraph should be amended to allow the PCM Officer to independently determine whether to initiate a PSI. This would streamline the PSI process and enable the PCM to make timely commitments to complainants. This proposed amendment would also expedite the disclosure of the Eligibility Assessment Report, as the public release and posting of this documentation on the PCM website would no longer be delayed by the 10-day period reserved for the President's decision.

Para. 32. This paragraph should be amended to include a 30-day time limit for the Problem-solving Expert's issuance of a Problem-solving Completion Report following completion of the PSI process.

Para. 33. Complainants should be given the opportunity to comment on the Problem-solving Completion Report ahead of its circulation to the President and the Board.

Para. 34. We commend the EBRD for including a provision on the post-decision monitoring of agreements reached during the PSI process. The biannual preparation of PSI Monitoring Reports, along with the opportunity for comment by the relevant parties, demonstrates the Bank's commitment to ensuring that the Mechanism is as effective as possible.

Para. 38. This paragraph should be amended to include a 30-day time limit for the CR Expert's preparation of the CR Report.

Para. 39. To promote transparency and encourage perceptions that the Mechanism is fair and effective, the complainant should be afforded an opportunity to comment on CR Reports that conclude that the Bank was in compliance with EBRD policy. The complainant's comments should then be included with the CR Report that is circulated to the President or the Board, and published on the PCM website. These changes would appropriately enable the complainant to respond to a finding of compliance before the complaint file is closed. This paragraph should also include a timeline for when the CR Report will be publicly released and posted on the PCM website.

Para. 40. Where the CR Expert concludes that the Bank was not in compliance with EBRD policy, the complainant should be afforded the opportunity to comment on the draft CR Report, allowing Management to respond to any complainant concerns that were not included in the Report.

Para. 45. As discussed above, the PCM should be housed in an independent, free-standing, Board-reporting office. Because the Chief Compliance Officer may have a role in addressing problems with the same projects that then come to the PCM in a complaint, the current structure creates the potential for conflicts-of-interest. This proposed revised structure encourages the independence and professionalism of the Mechanism.

Para. 47. While up to ten PCM Experts might eventually be required, it is preferable to appoint three PCM Experts full-time as a regular practice and only increase the number if those three Experts are occupied with PCM activities on a full-time basis. This would benefit the Mechanism by ensuring that PCM Experts have the ability to draw on repeated experience from the performance of their duties. It would also increase the likelihood that the PCM Experts would be able to share information with one another, potentially increasing the professionalism and consistency of the Mechanism.

Para. 54. This paragraph should be amended to state that nominations will be solicited through a "public and transparent" process.

Para. 55. While the two-year pre-employment ban is important, a three-year post-employment ban is insufficient to support the Mechanism's independence. A permanent post-employment ban for PCM Officers would ensure greater independence.

Para. 57. We urge the PCM to continue making efforts to improve its accessibility and visibility among NGOs and directly affected groups.⁶ The review of the PCM should evaluate whether the PCM's trainings of EBRD staff can parlay into the EBRD providing information about the PCM for directly affected people during meetings with the EBRD wherever and whenever the EBRD goes; the PCM should report on those important efforts. Finally, we note our concern that the Annual Report phrases the PCM's accessibility as only for those who

⁶ Per the 2012 PCM Annual Report, while holding workshops for 50 civil society representatives and participating in the EBRD Annual Meeting is commendable (Annual Report at 17-18), it will not ensure that information about the PCM reaches those who need it most.

wish to use the mechanism as “a last resort” (Annual Report at 18). The eligibility criteria and language about good faith efforts are important, but advertising the PCM as a mechanism only of last resort may not send the message that the PCM is welcoming of complaints from affected people.

Para. 65. To promote principles of effectiveness and professionalism, the PCM budget should be prepared by the PCM Officer. Given his or her direct involvement in and oversight of the day-to-day activities of the PCM, the PCM Officer has the best understanding of the budgetary resources required to support the Mechanism’s activities. As an additional matter, we recommend that the EBRD create a revolving fund that is available to the PCM and supplements its normal operating budget. A revolving fund has worked well for other IFI accountability mechanisms, as it serves to ensure the availability of operating funds.

Para. 66. To promote the accessibility of the Mechanism, PCM reports must be made available in the languages of the region. Especially where complainants themselves do not speak English, it is necessary that these documents be translated into the complainants’ preferred language.

We appreciate the opportunity to comment on the PCM Rules of Procedure. We look forward to continuing engagement with the EBRD on this important policy review.

Sincerely,

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